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THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF MONTEREY

MONTEREY COURTHOUSE

HIGHWAY 68 COALITION;

Petitioner,

vs.

COUNTY OF MONTEREY; MONTEREY COUNTY BOARD OF SUPERVISORS,

Respondents,

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

Real Parties in Interest.

Case No.: 130660

REPLY BRIEF BY PETITIONER LANDWATCH MONTERY COUNTY

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

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CEQA Guidelines, 14 Cal.Code.Regs

TABLE OF ACRONYMS AND ABBREVIATIONS

afy	acre-feet per year
AR	Administrative Record
CSIP	Castroville Seawater Intrusion Project
DEIR	Draft Environmental Impact Report
EIR	Environmental Impact Report
FEIR	Final Environmental Impact Report
GHG	Greenhouse Gas
LOS	Level of Service
LW Op. Brf.	LandWatch Opening Brief
MCWRA	Monterey County Water Resources Agency
RDEIR	Revised Draft Environmental Impact Report
RDIF	Regional Development Impact Fee
Resp. Opp. to LW	Respondent's Opposition to LandWatch Opening Brief
Resp. Opp. to H68	Respondent's Opposition to Highway 68 Coalition Opening Brief
RP Opp. to H68	Real Parties' Opposition to Highway 68 Coalition Opening Brief
RP Opp. to LW	Real Parties' Opposition to LandWatch Opening Brief
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] or Visually Sensitive [general plan land use designation]

LandWatch submits the following reply to oppositions by Real Parties and Respondent.

STANDARD OF REVIEW

LandWatch identifies the applicable standard of review for each of its claims. LW Op. Brf. at 3-4, 24-26, 26-27, 29-30, 38, 45, 55, 70. Some of LandWatch's claims are subject to a deferential substantial evidence standard of review and LandWatch has acknowledged this, identified the relevant evidence in the EIR, and explained why it is lacking. Contrary to Real Party, LandWatch's other claims – that the County failed to proceed as required by CEQA – are not disguised factual disagreements. LandWatch correctly alleges failures to proceed as required by CEQA by identifying (1) omissions of specific disclosures required by CEQA (e.g., a summary of projections of conditions contributing to cumulative water impacts, an accurate and stable project description, an accurate and stable description of the environmental setting, and adequate comment responses), and (2) other procedural failures under CEQA (e.g., reliance on a "ratio" approach to cumulative analysis, untimely mitigation proposals, reliance on information outside the EIR, and failure to exercise independent judgement). Because these claims that the County failed to proceed as required by CEQA are not factual disputes, they are not subject to deferential substantial evidence review: "the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." C*ommunities for a Better Env't v. City of Richmond* ("*CBE v. Richmond*") (2010) 184 Cal.App.4th 70, 82; *see Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208; LW Op. Brf. at 3. LandWatch presents evidence of factual errors, inconsistencies, and omissions in connection with these claims only to demonstrate error or show prejudice. For example, evidence that groundwater pumping since 1995 greatly exceeds the projections in the SVWP EIR demonstrates prejudice from this EIR's omission of a summary of projections of conditions contributing to cumulative water supply impacts and its failure to respond to comments on this issue. Evidence that an overdraft of only 2,000 afy causes seawater intrusion requiring pumping reductions demonstrates prejudice from the reliance on a legally erroneous "ratio" approach to cumulative analysis that dismisses Project demand as minor.

ARGUMENT

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

A. The EIR is informationally inadequate because it is not sufficient merely to describe the cumulative effect: the Guidelines and case law require identification of the "conditions contributing to the cumulative effect," here, a summary of projections of cumulative water demand.

Real Party argues that the EIR was not required to provide quantitative cumulative water supply and demand information for the Salinas Valley Groundwater Basin, or Zone 2C, or the 180/400-Foot (Pressure) Subbasin. Respondent argues that the EIR uses the "summary of projections method," and, thus, it is sufficient that the EIR "relied on the modeling performed for the SVWP EIR, which showed the rate of seawater intrusion would decline in both the near- and future-term . . .." and that this "provides a more than sufficient summary of the cumulative effect of past, present, and probable future projects." RP Opp. to LW at 22, emphasis added. Not so.

First, an EIR must identify the causes of the cumulative effect, not merely describe that effect. CEQA establishes specific requirements that are "necessary to an adequate discussion of significant cumulative impacts," including the use of one of two methods to identify the causes of the cumulative effect. Guidelines, § 15130(b)(1)(A) and (B). An agency may either list "the projects producing related or cumulative impacts" or it may provide a "summary of projections . . . that describes or evaluates conditions contributing to the cumulative effect." *Id.* Either way, a description of the effect is not enough; the EIR must identify its causes. Indeed, the requirement to discuss the cumulative effect is a distinct additional requirement. *Id.* § 15130(b)(4).

While the EIR described the extent of the seawater intrusion effect, nowhere did it provide or summarize the projections of "contributing conditions" from the SVWP EIR. i.e., the projected cumulative pumping demand.[1] The EIR states that the SVWP EIR "relied on

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[1] Thus, *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 728-729 is directly on point because there too the agency failed to provide "the volume of groundwater used by all such [cumulative] projects." Contrary to Real Party, the EIR's provision of information about the effect of cumulative demand does not distinguish *Kings County*. Nor is *Rialto Citizens for Responsible Growth v. City of Rialto* ("*Rialto Citizens*") (2012) 208 Cal.App. 4th 899, 929-931 on point because LandWatch does not object to the fact that the SVWP EIR

assumptions about future population growth and water demand" (AR000466), but it does not provide these projections, even in response to specific DEIR comments requesting them (AR003558-003567, 003589, 004111-004123). An EIR relying on a prior study must actually summarize and present its critical assumptions. *Vineyard Citizens for Responsible Growth v City of Rancho Cordova* (2007) 40 Cal.4th 412, 439-443.

Second, Real Party's claim that *Vineyard*'s holding does not apply to cumulative analysis is belied by its express references to the requirements for cumulative analysis:

> . . . some discussion of total supply and demand is necessary to evaluate "the long-term cumulative impact of development on water supply." (*Santa Clarita*, *supra*, 106 Cal.App.4th at p. 719, 131 Cal.Rptr.2d 186; see also CEQA Guidelines, Cal.Code Regs., tit. 14, § 15130, subd. (b)(1) (B) [cumulative impact analysis may employ projections in general planning documents].)

Id. at 441, emphasis added. *Vineyard* sets aside a water supply analysis for defects related to its assessment of "*total* long-term water supply and demand in the Water Agency's Zone 40" (*id.* at 439, emphasis in original), which included demand and supply for the project at issue and "competing demands" for "other planned growth" (*id.* at 438-439). In *Vineyard* the fundamental issue was the same: failure to clearly disclose the projections of cumulative water demand and supply upon which the significance assessment rested. *Id.* at 438-444. Here, as in *Vineyard*, the EIR fails to disclose data to meet the obligation to show "at least a rough balance between water supply and demand . . .." *Id.* at 446.

Real Party's effort to limit *Vineyard*'s holding are unavailing. Nowhere does *Vineyard* limit its holding to large projects. Indeed, *Vineyard*'s development of "Principles Governing CEQA Analysis of Water Supply" cites and relies on *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 830-831, in which the 12,000 to 15,000 gallons of water per day at issue was less than this Project's demand of 95 afy.[2] *Id.* at 428-429; *see* AR000486.

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model was computerized but to the failure to provide its projections of the conditions contributing to seawater intrusion. In *Rialto Citizens*, petitioner did not object to the failure to provide model data, and, indeed, relevant traffic volume projections such as intersection turning movements were provided. *Id.*

[2] 15,000 gpd is 5,475,000 gallons per year or 16.8 afy.

Real Party's discussion of "water-demand projects" under SB 610 is a red herring. LandWatch does not argue that SB 610's more exacting water supply disclosure requirements apply.

Third, even if *Vineyard* did not establish the necessity of quantitative supply and demand data in every case, it explains that an EIR must address relevant circumstances. *Id.* at 432 (EIR "must include reasoned analysis of the circumstances affecting the likelihood of the water's availability"), 431 ("informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water"). Here, relevant circumstances include the reasonableness of the SVWP EIR demand projections challenged by LandWatch.

Finally, contrary to Real Party, *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 346-47 does not hold that an agency never needs to provide relevant water demand and supply data, which would fly in the face of *Vineyard* and *Kings County*. *Cherry Pass* holds only that detailed basin information was not required there because, unlike here, the project at issue would have no impact: it "would cause no 'additional withdrawals' of Beaumont Basin groundwater beyond existing conditions."[3] *Id.* at 347.

B. The UWMP's partial, urban-only demand projection is inadequate as a summary of projections because it does not include total demand from the stated geographic scope of the cumulative analysis.

Contrary to Real Party, supply and demand projections belatedly included in the FEIR do not satisfy *Vineyard*'s requirement for "some discussion of total supply and demand" – because the projections are not of total demand for the identified geographic scope of analysis. *Vineyard, supra*, 40 Cal.4th at 441. Provision of urban demand only, and only for a checkerboard of service areas in the Salinas Valley Groundwater Basin, is misleading and irrelevant because it ignores agricultural demand (90% of the total) and demand outside Cal-Water's service areas. LW Op. Brf. at 15-16. The UWMP data is not a projection of demand for the geographic scope

[3] Similarly, *City of Long Beach v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889, 909 justifies a truncated cumulative analysis only because the project reduces emissions and thus "would not contribute" to the cumulative impact. *Id.*, emphasis added.

of cumulative analysis identified in the DEIR, i.e., the Salinas Valley Groundwater Basin, Zone 2C, and the 180/400-Foot Subbasin.[4] *Id.*, *see* AR000492, 000451-000460.

The summary of projections must match the geographic scope. Defining and explaining the geographic scope is required by the same Guidelines section that mandates provision of the summary of projections. Guidelines, § 15130(b). Provision of incomplete demand projections for only a portion of the relevant geographic scope violates CEQA because an agency may not arbitrarily limit that scope. *Kings County*, *supra*, 221 Cal.App.3d at 721-724; *Citizens to Preserve the Ojai v. County of Ventura* (1985) 126 Cal.App.3d 421, 429-431; *Bakersfield Citizens, supra,* 124 Cal.App.4th at 1213-1214. Agency discretion to determine the boundaries of its analysis must be based on substantial evidence. *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 594. Here, none of the evidence explaining the geographic scope of cumulative analysis of sea water intrusion effects (AR000451-000468) even suggests that limiting the analysis to urban demand in the UWMP service area would be justified.

C. **The FEIR fails to provide adequate responses to comments seeking a comparison of SVWP EIR cumulative demand projections to current projections.**

LandWatch's DEIR comments objected to reliance on the SVWP EIR's demand projections. Thus, LandWatch requested (1) baseline and future projections of cumulative supply and demand for the Salinas Valley Groundwater Basin and (2) a comparison of those data to the SVWP EIR projections. LW Op. Brf. at 23:4-24:14. Even if CEQA did not otherwise require provision of demand and supply data, the County's failure to provide good-faith reasoned response to comments seeking this information violated CEQA.[5] *California Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1244 (failure to provide reasoned analysis in response to comments pointing out uncertainty of water supply "renders the EIR defective as an informational document"); Guidelines, §15088(b).

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[4] Contrary to Real Party, LandWatch does not argue that the EIR failed to identify this relevant scope; LandWatch cites that identification. *See* LW Op. Brf. at 15:8-11.

[5] Real Party argues that the FEIR responded to other comments made by LandWatch, e.g., comments related to General Plan litigation, to inclusion of Project demand in the SVWP EIR assumptions, and to the location of the Project in Zone 2C. But these responses are not at issue.

Real Party's defense of the FEIR's conclusory and inaccurate response – that the SVWP EIR demand projections were "conservative" (AR004113) – is to cite a memo provided by applicant's consultant at the final hearing arguing that the SVWP EIR had conservatively projected urban demand (AR020400). The memo and the FEIR are misleading and unresponsive as to the relevant question of total cumulative demand. As Real Party admits, urban use is only 10% of cumulative demand; MCWRA eventually admitted that the total SVWP EIR demand projections were not conservative because pumping has exceeded its projections (AR005187); and LandWatch demonstrated this with 19 years of pumping data (AR015612-015615).[6]

Real Party argues that LandWatch's criticism of DEIR's reliance on the SVWP was "misplaced" because the FEIR identified additional arguments to support the DEIR's conclusions. Regardless, the FEIR still relies on the SVWP EIR and its unstated demand projections. AR004113. Accordingly, it should have responded to LandWatch by setting out those assumptions and comparing them to current assumptions as requested.

Real Party claims that *California Oak Foundation, supra,* 133 Cal.App.4th at 1244 and *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* ("SCOPE") (2003) 106 Cal.App.4th 715, 722 are distinguishable because there the agencies never owned up to the uncertainties raised by comments. Yet that is precisely what happened here: LandWatch identified an uncertainty, asked for data to resolve it, and the FEIR responded with evasion.[7]

D. The EIR is informationally inadequate because it fails to disclose that the SVWP is insufficient to prevent or adequately mitigate significant cumulative impacts.

Real Party claims that the EIR adequately describes the SVWP "and the potential need for future projects" based on its statement that one or two year of data had not yet confirmed that seawater intrusion would be halted. RP Opp. to LW at 29-30. This is sophistry. First, there was

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[6] Real Party argues erroneously that LandWatch has not challenged the adequacy of Master Response 2. In fact, LandWatch expressly details the irrelevance and insufficiency of the demand data provided through the FEIR's Master Response 2. LW Op. Brf. at 8:11-9:5, 15:21-16:25, 17:12-16, 18:11-13, 19:13.

[7] Adequate comment responses must be in the "text of the EIR" or "its appendices." *California Oak Foundation, supra,* 133 Cal.App.4th at 1240; *see* Guidelines, § 15088(d). As discussed in section I.F below, post-EIR disclosure is insufficient.

no mention of the need for additional projects in the EIR. Second, the EIR categorically states that the SVWP will halt seawater intrusion and will balance the Basin hydrologically:

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

AR000489, emphasis added. The EIR does not discuss the "potential" need for additional groundwater management projects. Even though LandWatch questioned the sufficiency of the SVWP, and even though the County's Water Resources Agency acknowledged the actual need for additional projects in 2013 (AR016406), the 2014 FEIR continued to rely on the sufficiency of the existing "project suite," i.e., the SVWP, CSIP, and the two reservoirs, without mentioning the need for additional projects. AR004113, 004115, 004116.

Vineyard is clear that where there is uncertainty as to the sufficiency of existing water projects to meet demand, an EIR must discuss possible additional water sources, their environmental consequences, and/or the consequences of curtailing development. *Vineyard*, *supra*, 40 Cal.4th at 432, 434, 446. The omission of this discussion, particularly in the face of comments objecting to the insufficiency of existing groundwater management projects, could only reinforce the public perception that existing projects are sufficient and that there was no uncertainty. But additional projects are needed and this critical fact was not disclosed in the EIR. SAR029425-029426, AR005164, 005178-005179, 005183-005190, 000037.

E. The EIR's reliance on the "ratio" approach to find a less than considerable contribution to a significant cumulative impact was legally erroneous, and the analysis was irrelevant and misleading.

Real Party claims that, in dismissing the significance of Project demand by comparing it to total Basin capacity and pumping, the County did not rely on the legally erroneous "ratio" approach rejected by *Kings County*. But that comparison, as a basis to determine significance, is erroneous as a matter of law because it trivializes the Project impact without taking the

cumulative context into account, precisely the error in *Kings County*.[8] *Kings County, supra*, 221 Cal.App. 3d at 718. The error is the failure to recognize that a relatively minor impact may be a considerable contribution where the cumulative condition is severely degraded, and that the threshold for "considerable" must reflect this. *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120. The error is prejudicial because Project demand of 95 afy is a considerable fraction of the 2,000 afy overdraft causing continued seawater intrusion and leading the County's consultants to recommend reduction of pumping in the Pressure Subbarea. AR020362-020363, *citing* AR020371, 020374. Real Party also argues that even if the EIR improperly employs the ratio approach, this was just "one factor," implying reliance on a legally erroneous analysis is acceptable as long as there are some other "factors" in play. But a legally erroneous analysis is irrelevant and misleading and cannot support a significance determination.

F. Disclosure of the need for additional water supply projects after the EIR was complete could not, and did not, avoid prejudice.

Real Party argues that the EIR's failure to disclose the supply and demand information, the inefficacy of the SVWP, and the need for additional water projects was not prejudicial because this information was disclosed after the EIR was completed. But belated information cannot cure an informationally inadequate EIR because it precludes comment and response. *Save Our Peninsula Committee v. Monterey County Board of Supervisors* ("*Save Our Peninsula*") (2001) 87 Cal.App.4th 99, 117-118, 128. Thus, even if there had been an adequate discussion of the inefficacy of the SVWP and other existing groundwater management projects after the FEIR was released, that discussion could not suffice. The California Supreme Court has repeatedly affirmed that information relied on by decision makers must be in the EIR itself:

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

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[8] Real Party's argument that the ratio approach was somehow improved by also expressing the Project demand as a percentage of Basin capacity rather than just a percentage of annual demand simply compounds the error by using an even larger and more irrelevant denominator.

Laurel Heights Improvement Assn. v. Regents of University of California ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 405, quoting *Environmental Defense Fund, Inc. v. Coastside County Water Dist*. (1972) 27 Cal.App.3d 695, 706.

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

Vineyard, supra, 40 Cal.4th at 442. Where the EIR itself does not adequately disclose critical water supply information, it "fails in its function as an informational document," and this cannot be cured by information provided by the public or not in the EIR.[9] *California Oak Foundation, supra,* 133 Cal.App.4th at 1240, *see also SCOPE, supra,* 106 Cal.App.4th at 722-723.

Real Party's reliance on *Kings County, supra*, 221 CalApp.3d at 727 is inapt. *Kings County* dismisses the holding of *Environmental Defense Fund, Inc. supra*, 27 Cal.App.3d at 706 that the essential information must be in the EIR itself, even though this holding was affirmed by the California Supreme Court. *Laurel Heights I, supra*, 47 Cal.3d at 405. And, unlike in *Kings County*, here the post-FEIR hearing testimony did not disclose essential information.[10] First, while finally admitting that additional projects are necessary, the County provided no information about their environmental impacts, which CEQA requires. *Vineyard, supra*, 40 Cal.4th at 432, 434, 446; *see* LW Op. Brf. at 19:1-10. Second, the County did not acknowledge the uncertainty of the additional projects, which are not funded and will be implemented only if

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[9] Evidence cited by Real Party to support its contention that the record adequately discloses the SVWP inefficacy and need for additional projects includes 1) information supplied by LandWatch and 2) testimony at the final hearings on the Project. RP Opp. to LW at 12-15, 31 *citing* documents supplied by LandWatch at AR15573-16728 and AR009301-9304 (*see* AR003772 furnishing this), testimony at AR005149-5194, 5213, 5554-5556, 5576-5578, 4431.

[10] Real Party's other "no prejudice" cases are also inapt. Unlike *Mount Shasta Bioregional Ecology Center v. County of Siskyou* (2012) 210 Cal.App.4th 184, 225-226 and *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 670, 709-710, LandWatch does not rely on a presumption of prejudice. LandWatch demonstrates prejudice. LW Op. Brf. at 17-20. Unlike *San Francisco Baykeeper, Inc. v. California State Lands Comm'n* (2015) 242 Cal.App.4th 202, 230-232, where "the record demonstrates that the issue of coastal erosion was thoroughly explored during the CEQA review process," the record here shows that the need for additional water management projects was not addressed until after the CEQA process, and the impacts and uncertainty of those projects was never addressed.

"accepted by the public," i.e., funded. [11] AR029426; SAR029333 (SVWP Phase II not funded); LW Op. Brf. at 19:11-20:3. *Vineyard* requires that uncertainty of water projects be disclosed. *Vineyard*, *supra*, 40 Cal.4th at 434, 439, 446. Uncertainty is critical here because the EIR relies on payment of water project assessments as mitigation, but mitigation must be certain and "payment of fees must be tied to a functioning mitigation program." *California Native Plant Society v. County of Eldorado* (2009) 170 Cal.App.4th 1026, 1055; Guidelines, § 15026.4(a)(2).

Finally, although LandWatch objected to reliance on unfunded projects without environmental review (AR015616-015617), and provided evidence that these projects would have significant environmental impacts (LW Op. Brf at 19:3), the County made no response to these comments. The mere opportunity to comment without response is insufficient. *Save Our Peninsula*, *supra*, 87 Cal.App.4th at 123 (post-EIR information insufficient because "there was little opportunity for public comment and meaningful response," emphasis added), 131, 133.

G. Recirculation was required under Guidelines, §15088.5(a)(1) and (a)(4).

LandWatch has shown that recirculation was required for two independent reasons. First, significant new information shows potential significant impacts not disclosed in the EIR, either from continuing unmitigated seawater intrusion or from impacts of additional water management projects. Guidelines, §15088.5(a)(1); AR015576, 15616-015617 (*citing* 016406), 016428-016447, 020362 (*citing* 020371-020374). This evidence is uncontroverted.[12] Thus, even on a non-deferential standard of review, LandWatch has demonstrated that the new information that the SVWP is insufficient to halt seawater intrusion is significant because (1) it shows potential significant impacts, all that is required by *Vineyard*, *supra*, 40 Cal.4th at 447-448, and (2) it shows that needed but uncertain mitigation (i.e., additional projects) was not evaluated, all that is required by *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1120.

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[11] In claiming a settlement agreement "requires MCWRA to devise a plan to fund the project," Real Party admits that SVWP Phase II is not funded; and AR016437 does not support the claim that MCWRA is required to devise a funding plan. RP Opp. to LW at 39, fn. 13.

[12] Real Party argues that post-EIR information shows the County intends to solve the seawater intrusion problem but does not rebut or even address evidence of continuing seawater intrusion or impacts from new projects.

Second, the Draft EIR (and Final EIR) were so fundamentally inadequate and conclusory as to preclude meaningful public comment because the inefficacy of the SVWP was not disclosed until the EIR was completed. Guidelines, § 15088.5(a)(4). Real Party simply ignores this second claim.[13] Thus, Real Party fails to acknowledge the application here of the non-deferential standard of review applicable to claims of informational failures. *See, e.g.*, *Bakersfield Citizens*, *supra*, 124 Cal.App.4th at 1207-1208. Nor does Real Party address the fact that, because *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1133 expressly excludes procedural violations, its standard of review discussion (*id.* at 1130) does not apply here. The remedy for informational inadequacies purportedly addressed by post-EIR disclosures is to require recirculation to permit public comments and to require agency responses. *Save Our Peninsula*, *supra*, 87 Cal.App.4th at 131, 133-134. Notably, as discussed, the County made no response to public concerns that arose when it finally admitted the insufficiency of the SVWP (e.g., non-disclosure of the uncertainty of and impacts from additional water projects). Nor was there any response to the objection that new information shows the Project's 95 afy pumping may be a considerable contribution to the 2,000 afy overdraft that continues to drive seawater intrusion. AR015618, *citing* 020362-20363.

H. There is no substantial evidence to support conclusions regarding cumulative water supply impacts.

While the EIR should be set aside based on its informational deficiencies, it should also be set aside because these deficiencies preclude substantial evidence. LW Op. Brf. at 26-27.

The DEIR relies on existing groundwater management projects to conclude that there would be no significant cumulative water supply impact. AR000492. The FEIR offers two additional arguments: that the Project demand is a small percent of Basin capacity and total pumping and that the project is "consistent with" the UWMP. AR004114. None of these three arguments are supported by substantial evidence.

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[13] Indeed *Citizens for a Sustainable Treasure Island v. City & Cty. of San Francisco* (2014) 227 Cal.App.4th 1036, 1063, cited by Real Party also ignores 15088.5(a)(4), inexplicably citing only 15088.5(a)(1)-(3). The case is also inapt because, unlike here, petitioner "does not even attempt to make an argument" that impacts would remain significant. *Id.*

First, the County cannot rely on payment of Zone 2C fees and the "positive influence" of existing groundwater management projects because the record is unambiguous that the existing suite of projects toward which the Project would make a fair share contribution is insufficient to halt seawater intrusion. MCWRA and the findings do not conclude that additional projects "may" be necessary (RP Opp. to LW at 38:28, 30:17) but that they are necessary.[14] AR000037 ("more are necessary"), SAR029425 (same); *see also* AR016406, 005178-005179, 005183-5190. These projects are not approved, funded, or environmentally reviewed, and there is no requirement that this Project pay a fair share of their cost if they are ever approved. LW Op. Brf. at 19:11-20:3. Contrary to Real Party, the mere intention to pursue future projects is not sufficient and, thus, LandWatch has met the only relevant burden because "payment of fees must be tied to a functioning mitigation program."[15] *California Native Plant Society, supra*, 170 Cal.App.4th at 1055; *see also Anderson First Coalition v. City of Anderson* (2005) 130 Cal.Appo.4th 1173, 1188 (intention to update fee program insufficient).

Second, the County cannot rely on "consistency" with the UWMP as substantial evidence that there will be no significant cumulative impacts, because the UWMP demonstrates only sufficiency of pumping capacity, which is not at issue. AR005445, 015608-015611. What is at issue is whether existing projects prevent significant impacts caused by that pumping. On that topic, the UWMP concludes that seawater intrusion will continue due to pumping in the Pressure subarea and that existing projects are an insufficient solution. SAR029332-029333.

Third, the County cannot rely on the relatively small Project water demand as substantial evidence that there will be no significant cumulative impacts. As explained, the ratio of Project

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[14] MCWRA's 2010 support for the DEIR's conclusions predated its 2013 acknowledgment of the need for more projects. AR016406. MCWRA's later opinion on cumulative impacts acknowledged that more projects are necessary. AR029425. MCWRA does not have or offer expertise on the legal issue at hand, the insufficiency of fair share mitigation where necessary mitigation projects are not committed, funded or environmentally reviewed.

[15] *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1092 and *Cherry Valley Pass Acres & Neighbors, supra*, (2010) 190 Cal.App.4th at 346-47 cited by Real Party are inapt because they do not address the insufficiency of impact fee mitigation to prevent cumulative impacts. In both cases, the holding was based on the conclusion that the projects would not increase existing pumping and so had no impact.

demand to basin capacity or total pumping is legally irrelevant and misleading. Contrary to Real Party, *San Francisco Baykeeper, Inc., supra,* 242 Cal.App.4th at 223-224 does not endorse use of a ratio as "one factor" in analysis; to the contrary, it excuses consideration of this "irrelevant' and "misleading" ratio where there was other sufficient evidence to support a determination. As discussed, the County did not address the evidence that the Project's 95 afy demand is a considerable contribution to seawater intrusion in light of the fact that a cumulative overdraft of only 2,000 afy still led the County's consultants to recommend pumping reduction in the Pressure Subbarea.[16] AR020362-020363, *citing* AR020371, 020374.

Real Party argues that the County did not rely exclusively on any of these three arguments. RP Opp. to LW at 33, 41, 42. But three insufficient arguments are still insufficient.

II. There is no substantial evidence that impact fees mitigate 2030 traffic impacts; contrary to Respondent, the EIR did not use travel time to evaluate mitigation.

The EIR found that the Project would make a considerable contribution to a significant cumulative traffic impact at every intersection or segment (every "facility") projected to operate at Level of Service ("LOS") F in 2030, including the SR68 intersections 1, 2, 3, 5, 6, 7, 8, 9, 11, 15, 16, 17, 18, 19; SR68 segments 1-10; and Davis Road intersections 20-21. AR000685-000686, 000686-000687. The EIR and findings determined that these impacts would be mitigated to a less than significant level by payment of impact fees. AR000689, 000010. But impact fees are inadequate mitigation because there is no funded, committed plan to construct the improvements needed to mitigate these facility LOS impacts under 2030 conditions. LW Op. Brf. at 38-42. Respondent does not and cannot dispute that there is no such plan.

Instead, Respondent now argues that the EIR did not use facility LOS criteria to determine the adequacy of mitigation. First, Respondent argues that, even though the EIR uses a threshold based on LOS impacts to each affected intersection and segment to determine whether the Project causes a significant cumulative impact, it uses a different threshold, primarily based on corridor-wide travel time, to determine if mitigation is adequate. Second, Respondent argues

[16] Thus, *Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal. 4th 155, 175 is inapt, because there the Court found "no evidence" that the project impact was potentially significant.

that a last-minute, applicant-supplied traffic study provides substantial evidence that mitigation is adequate because it purports to show that the effect of the Project on corridor travel time is neutral. As explained below, neither claim is true or consistent with CEQA.

A. The EIR repeatedly disavows the use of corridor travel time to determine the significance of impacts or the adequacy of mitigation; the EIR determines significance for each intersection and segment based on Level of Service thresholds; and the EIR provides corridor travel time only as "supplemental information."

It is not true that the EIR relies on corridor travel time to determine if mitigation is adequate. The DEIR and FEIR repeatedly disavow reliance on corridor travel time as the basis for determining significance. First, the DEIR specifically states that, while corridor travel time is considered as additional information, the EIR determines significance with reference to intersection and segment LOS impacts. AR000664 ("conventional thresholds of significance are recognized and used in this report"). The EIR's stated thresholds of significance are based on LOS criteria applied to each affected intersection or segment: "a significant impact is defined to occur under the following scenarios [LOS-based significance thresholds for intersections and for roadway segments]." AR000612-000662.

Second, in comments on the DEIR, LandWatch requested that the County identify the thresholds of significance used in the cumulative analysis, objecting that without this information the public could neither confirm the basis of the significance conclusions nor "determine whether proposed mitigation would be effective." AR003552-003553, emphasis added. In response, the FEIR specifically stated that cumulative analysis uses the same individual facility LOS criteria as the project-specific analysis:

> The significance thresholds for project-specific and cumulative impacts associated with the project are the same, as identified on pages 3.12-27 and -28 of the DEIR. The thresholds are based on changes to level of service, volume-to-capacity ratios, and adding traffic to facilities operating at LOS F.

AR003588, emphasis added. Third, in comments on the RDEIR, LandWatch stated that changes in corridor travel time had not been identified in the DEIR as a threshold of significance (AR003912) and objected that the EIR could not rely on the Wood Rodgers travel time study "to

conclude that project-level or cumulative impacts are adequately mitigated." AR003913, emphasis added. In response, the FEIR stated that "the comment is correct that travel time was not used in the TIA ["Traffic Impact Analysis"] as a significance threshold," that the travel time analysis "is considered supplemental information," and that "the TIA provides the LOS-based analysis to support the alternatives analysis and conclusions of the RDEIR."[17] AR003943, emphasis added. In sum, the EIR specifically assured the public that the EIR's LOS-based significance thresholds are used to assess both the significance of impacts and whether cumulative impacts "are adequately mitigated." This directly contradicts Respondent's claim that the EIR actually used the corridor-wide travel time to determine the adequacy of mitigation.

Fourth, the EIR's detailed analyses of the significance of cumulative impacts, both without mitigation and with mitigation, are based on whether the LOS-based significance criteria are met at each affected facility. The DEIR's Traffic Impact Analysis shows, for each affected facility, the cumulative impact without mitigation and again with mitigation; and both analyses are based on LOS criteria. AR001925-001929 (identifying and discussing App. L and M worksheets showing unmitigated and mitigated LOS conditions for each facility), 002315-002418 (App. L and M). The mitigation in the "with-mitigation" LOS worksheets is the set of improvements needed to attain adequate LOS. AR002467-002470 (summary of recommended improvements), 001925-001928 (same); *see* AR015627 ("mitigated" cumulative conditions assume these improvements are made). These intersection improvements identified as necessary to mitigate cumulative impacts, based on avoiding LOS impacts to each intersection, are listed in the DEIR's cumulative analysis section with the recommendation that the County "work toward listing and programming" them in the future because they "are not included in any fee program."[18] AR000688-000689. In sum, the EIR's actual analyses of unmitigated and mitigated

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[17] Responding to other comments, the FEIR reiterated that "[t]he assessment of impacts is a level of service–based assessment" and " . . .the DEIR studied travel time and corridor delay to inform the assessment of segment operations, but ultimately used traditional level of service (LOS) thresholds to assess impact significance." AR003683, emphasis added.

[18] As LandWatch has explained impact fees are not adequate if needed improvements are not in an adopted, funded program. LW Op. Brf. at 36-42.

cumulative conditions is expressly based on whether each facility attains the LOS identified as acceptable in the DEIR's thresholds of significance, not on corridor travel time.

Fifth, the RDEIR, which proposed traffic mitigation in the form of a new intersection and widening a 1.2 mile section of SR68 (AR002650-002651, 002686-002687), but did not recirculate the traffic analysis, does not suggest that the DEIR's cumulative mitigation measures are thereby obviated: it states that, despite this improvement, "all mitigation measures would still be required," i.e., the mitigation to address LOS impacts to individual facilities. AR002698.

To buttress its litigation claim that the EIR relies on corridor travel time, Respondent argues that the EIR does not treat impacts to each intersection and segment as a separate impact but instead considered only two impacts: the 2030 cumulative "impact" and the 2015 background condition "impact." Respondent's argument is based on the DEIR's use the singular "impact" in its headings for the 2015 and 2030 analyses. However, the EIR typically uses the plural form "impacts" to refer to the separately identified effects at the individual facilities evaluated in both the 2015 and 2030 analyses. AR000671 (State Route 68 Commuter Improvements "would effective mitigate project impacts to [list of intersections and segments]"), 000674-000675 (referencing mitigation of "project impacts to levels of service [at various facilities]"), 000688 (claiming payment of fees "would help offset any cumulative impacts . . ." and referencing "the project's contribution to cumulative impacts"), 001929 ("cumulative impacts"). The findings also identify "impacts" in the plural. AR00010-000011 (referencing "direct project impacts," "potentially significant impacts on cumulative traffic," and "cumulative traffic impacts"). More fundamentally, the EIR's analyses separately assess impacts for each individual intersection and segment.[19] *See, e.g.*, AR000664-000675, 000683-000689.

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[19] Contrary to Respondent, LandWatch exhausted its objection to the County's "grouping" of cumulative impacts and to any reliance on a corridor-wide travel time assessment of cumulative impacts. LandWatch specifically objected to the failure to enumerate adequately each cumulative impact. AR003553. The FEIR responds that "DEIR acknowledges that the project's contribution is applicable to degradation of LOS above LOS F level" and that this contribution occurs at "19 study intersections and 13 roadway segments." AR003588. As discussed above, LandWatch repeatedly objected to use of corridor travel-time to determine adequacy of mitigation, and the FEIR disavows this approach. AR003912-003913, 003943.

If the County's actual intent was to use corridor travel time as a threshold of significance, the EIR fails as a disclosure document because it fails to disclose the analytic route that connects the determination of "potential" significance to the determination of the adequacy of mitigation – particularly since the FEIR expressly disavows use of the travel time metric to determine the adequacy of mitigation. *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).

Finally, even if the EIR had adopted the travel time metric for determining mitigation adequacy, Respondent's litigation theory fails because CEQA does not countenance using one threshold of significance to determine the significance of impacts and a different threshold to determine the adequacy of mitigation.[20] A threshold of significance is a criterion "non-compliance with which" means the effect is significant and "compliance with which" means it is less than significant, e.g., adequately mitigated. Guidelines, § 15064.7(a). Mitigation must address the significant impact that is "identified in the EIR," and "as identified in the EIR." Guidelines, §§ 15126.4(a)(1)(A), 15091(a)(1); *see also* § 15130(a)(3) ("contribution is less than cumulatively considerable if the project is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact," emphasis added). Here, the significant impacts identified in the EIR were impacts to intersection and segment levels of service; and corridor travel time was expressly disavowed as a threshold of significance. Mitigation could only be found adequate if it substantially reduced or avoided the significant impact that was actually identified in the EIR, as identified in the EIR.[21]

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[20] Respondent's authority that an agency has discretion to determine a significance threshold does not hold, or even suggest, that an agency may use the EIR's announced threshold to determine potential significance and some other threshold to determine whether effects remain significant after mitigation. Guidelines, § 15064(d); *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068 (holding threshold was "not ambiguous"); *Rominger, supra,* 229 Cal.App.4th at 716; *San Francisco Baykeeper, Inc., supra,* 242 Cal.App.4th at 227.

[21] Contrary to Respondent, *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-658 is on point because it holds that an EIR must clearly state its significance threshold; in particular, it must do so to inform discussion of proposed mitigation measures.

B. Even if the EIR had used corridor travel time to determine the adequacy of cumulative mitigation, there is no substantial evidence that the mitigation will actually result in "neutral" corridor travel time because (1) the 2012 RDEIR's Wood-Rogers memo shows an increase in travel time, (2) the applicant-supplied 2014 Wood Rogers memo contradicts the assumptions in the RDEIR memo, and (3) both memos omit cumulative traffic and are thus based on an admittedly "misleading and uninformative" existing conditions baseline "that would not serve the public in determining the effects of the project."

Respondent cites the 2012 Wood Rogers study attached to the RDEIR to claim that the Project's improvements and other unrelated improvements will reduce corridor travel time by 2.3 minutes. Resp. Opp. to LW at 16:21-22, *citing* AR012082-012083 (included in RDEIR at AR003290-003291). But Respondent admits in a footnote that staff erred in claiming the claimed 2.3 minute reduction in travel time is attributable to the Project itself. Resp. Opp. to LW at 10; *see* AR005059-005060 (erroneous claim), 004236 (erroneous draft finding). The Planning Commission objected that it was misleading to credit the Project with the benefits of unrelated improvements. AR005124-005125; *see* AR015651-015658. And when pressed, staff admitted that the RDEIR's 2012 Wood Rogers study actually shows that the Project itself, without the unrelated improvements, would result in "about a one-and-a-half-minute increase over current."[22] AR005062, emphasis added; *see* AR003291 (Wood Rogers 2012, Table 3, scenario 2, showing 1.9 minute increase). Thus, the Commission asked for an analysis using the improved future conditions baseline with and without the Project traffic and improvements. AR005124-005125; *see* AR015651-015658.

Staff delegated this to the applicant (AR004181), whose attorney gave Commissioners a Wood Rogers 2014 memo at the next meeting, claiming that this new analysis actually showed a "wash." AR015196-015197, 005207-005209. Respondent relies on the Wood Rogers 2014 memo to claim the Project's effect on corridor travel time is "neutral" and thus it has no significant cumulative impact. Resp. Opp. to LW at 10:2-6, 20:26. The reliance is misplaced.

[22] LandWatch and traffic expert Dan Smith, P.E. also objected that the RDEIR's 2012 Wood Rogers analysis shows that the Project's actual effect is to increase travel time on the corridor – as Wood Rogers admitted. AR015637-015638, 015651-015658, 005062.

First, Wood Rogers 2014 is not in the EIR and, unlike Wood Rogers 2012, presents conclusions with no supporting documentation or analysis. *Compare* AR015196-015197 *to* 003280-003302. Second, Wood Rogers 2014, like Wood Rogers 2012, is based on an existing conditions baseline, not on future cumulative conditions.[23] AR002672 (footnote 8), 003289-003291, 015167; *see* AR003913. The FEIR itself argues that an existing conditions baseline is "misleading and uninformative" because it is "a physically impossible scenario that would not serve the public in determining the effects of the project." AR003943 (FEIR, quoting language from *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 452). For example, the EIR shows that actual traffic conditions in 2030 will include an additional 184,406 daily trips compared to existing conditions in the traffic study area. AR000683-000685. The Wood Rogers memos are not substantial evidence of future cumulative impacts because the EIR itself denies the relevance of an existing conditions baseline.

Finally, Wood Rogers 2014 contradicts the assumptions in Wood Rogers 2012. The 2012 memo assumes that the Project improvements will reduce cut-through traffic in the Toro Estates area (AR003290-003291), which Respondent claims is another benefit. However, Wood Rogers 2014 assumes that the 200 cut-through traffic trips will not be reduced, and the change in its conclusion from a 1.9 minute Project-caused delay to a neutral outcome turns on this single change in the assumptions. AR015196-015197 (in order to assess effect without cut-through traffic elimination, Wood Rogers reran the model "but left the approximately 200 AM peak hour cut through vehicles on Portola Drive and Torrero Drive;" analysis shows no change in travel time "should the cut through traffic remain on Torero Drive. . .").

In sum, Wood Rogers 2104 is not substantial evidence because it is undocumented, it uses an admittedly "misleading and uninformative" baseline, and its assumptions and conclusions directly contradict the study in the EIR and the purported benefit of eliminating cut-through traffic. "Factual inconsistencies and lack of clarity" preclude substantial evidence. *Vineyard*, *supra*, 40 Cal.4th at 439. And, reliance on a last-minute applicant-supplied study is a

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[23] The 2014 memo also simply ignores the Commission's request for an analysis that assumes that the future improvements unrelated to the Project are in place.

failure to proceed as required by CEQA. *Id.* at 442 (reliance on information not incorporated or referenced in EIR is a failure to proceed as required by CEQA); *Save Our Peninsula*, *supra*, 87 Cal.App.4th at 121-122 (delegation of analysis to applicant improper due to vested interest); Guidelines, §§ 15084(e), 15090(a)(3) (independent judgment required).

C. There is no substantial evidence that the project "overmitigates" because it will receive a credit for improvement expenditures in excess of fair share impact fees.

Respondent's repeated claim that the Project "overmitigates" because its improvements would cost more than its fair share impact fee obligation is not true. Respondent's only citations to the record (AR016717, 016710, 004153 – [sic – likely 004513 or 004613]) do not support its claim that its improvements would cost $8 million and its RDIF fair share is approximately $579,000; the citations show only the total cost for the SR68 Commuter Improvements, the per unit RDIF schedule, and that the applicant will widen a 4-lane section of SR68. Regardless, condition of approval 73 expressly provides that the owner/applicant shall receive the benefits of Section 12.90.050 of the Monterey County Code, which provides for reimbursement or credit of "the difference between the cost of constructing all or part of the Regional Transportation Improvement Project and the Regional Impact Fee for the development project." AR000069, 017180. In short, the Project does not "overmitigate" because the owner would recover any funds it advances for improvements in excess of the RDIF fair share fees.

D. Failure to identify cumulative traffic impacts as significant and unavoidable, or to state the basis of its cumulative analysis conclusions clearly, was prejudicial.

LandWatch has shown that the County failed to provide substantial evidence to support a finding that the cumulative traffic impacts identified in the EIR would be mitigated to less than significance. In particular, the EIR admits that the Project will make a considerable contribution to significant impacts as long as it adds traffic to facilities operating at LOS F, and there is no dispute that, due to the lack of funded, committed programs for each needed improvement, some facilities will continue to operate at LOS F under cumulative 2030 conditions. The lack of evidence to support findings of the sufficiency of mitigation via fee payments is prejudicial. *Gray, supra,* 167 Cal.App.4th at 1121-1122, 1129 (failure to show impact fees would actually

mitigate traffic impacts prejudicial; *Kings County, supra*, 221 Cal.App.3d at 712, 728 (failure to show payments for water mitigation would actually produce water is prejudicial). Respondent cannot cure this prejudice by offering a new theory to this Court based on information not in the EIR. *Santiago County Water Dist., supra*, 118 Cal.App.3d at 831 (presenting evidence outside the EIR to trial court cannot cure inadequate disclosures).

Respondent argues that even if the EIR should have found cumulative impacts significant and unavoidable, there was no prejudice because objections by LandWatch, based in part on admissions in the EIR, establish that attaining adequate facility LOS is infeasible and County decision-makers "knew of, and weighed these facts . . .."[24] Resp. Opp. to LW at 26 (citing LandWatch objection at AR000544 and various EIR admissions). However, because the County did not acknowledge that cumulative traffic impacts were significant and unavoidable, it did not weigh those impacts where it matters and CEQA requires: in its statement of overriding considerations. Guidelines, §§15091(a)(3), 15092(b)(1)(B), 15093. The statement of overriding considerations recognizes and weighs only the short-term 2015 impacts as unavoidably significant, leaving the public to believe that the significant intersection and segment impacts identified in the EIR would be solved by 2030. AR000010-000011, 000018-000019.

Furthermore, Respondent fails to acknowledge the prejudice from expressly disavowing use of corridor travel time to determine the adequacy of mitigation and then, at least according to the County's litigation stance, nonetheless using corridor travel time to do just that. The public is entitled to understand not just the facts, but the way the EIR uses these facts, because "an EIR is a document of accountability" that is intended to protect "informed self-government." *Laurel Heights I, supra* 47 Cal.3d at 392. To do this, an EIR must disclose "the basis on which its responsible officials either approve or reject environmentally significant action." *Id.* This includes disclosure of the "analytic route the ... agency traveled from evidence to action." *Id.* at

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[24] An agency may not rely on comments as adequate disclosure; it must supply relevant analysis itself, explaining why those comments are wrong or why there is some other basis for finding impacts less than significant. *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1367; *SCOPE, supra*, 106 Cal.App.4th at 723 ("[i]t is not enough for the EIR simply to contain information submitted by the public and experts").

404. Here, the public repeatedly challenged the lack of evidence that impact fees would mitigate cumulative facility LOS impacts (AR003547-003548, 003553-003554, *see also* 015626-015634) and objected to the use of corridor travel time to determine mitigation adequacy (AR003552-003553, 003912-003913). The only fair response would have been to admit significant unavoidable impacts or to clarify that the significance threshold for cumulative impacts was not based on facility LOS. Instead, the FEIR responded by denying that travel time was a significance criterion and denying unavoidably significant cumulative impacts. AR003588-003589, 003943. Respondent's argument that the EIR adequately disclosed travel time as a threshold of significance for cumulative impacts amounts to saying that the County must have been using some other threshold than the one it expressly announced because, after all, the announced threshold cannot be used to connect the facts and the findings. This is not an adequate disclosure of the route from fact to conclusion. *California Clean Energy Comm., supra*, 225 Cal.App.4th at 205 ("unexplained switch in rationale" impermissible). Misrepresentation of the threshold of significance and reliance on a last-minute, applicant-supplied corridor travel time analysis was also prejudicial because it denied the public, who were concerned about the Project's traffic impacts, the opportunity to challenge that analysis and obtain responses. *Save Our Peninsula, supra*, 87 Cal.App.4th at 117-118, 128, 131, 133.

In sum, because the EIR failed to demonstrate that facility LOS impacts in 2030 would be mitigated or, alternatively, to disclose that it evaluates cumulative impacts based on travel time and that travel time would be neutral, "meaningful assessment of the true scope of numerous potentially serious adverse environmental effects was thwarted," and thus the errors were prejudicial. *Bakersfield Citizens, supra*, 124 Cal.App.4th at 1220-21.

III. There is no substantial evidence that impact fees mitigate 2015 traffic impacts because needed improvements are not funded or scheduled until 2035.

LandWatch challenges lack of substantial evidence that the SR68 Commuter Improvements and the Marina-Salinas Corridor project would mitigate traffic impacts under 2015 background conditions and under 2030 cumulative conditions at segments 8 and 9 and intersections 8, 9, 20, and 21. LW Op. Brf. at 42-44. LandWatch demonstrates that there is no substantial evidence these two projects will be provided timely, and identifies substantial

evidence to the contrary. The EIR admits that both projects are "not funded or scheduled for completion" (AR003587) and unrebutted evidence, including the RTP and an acknowledgement from TAMC's director, shows that they will not be funded or constructed before 2035. AR016577-016578, 05632, 015634, 016728; *see* LW Opening Brief at 43. Respondents ignore this evidence that needed mitigation will not be available for another 20 years – even though the facilities have had unacceptable service since at least 2010 (AR000643-000645).

Instead, Respondent 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. However, *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 there was a "reasonable plan for mitigation" only because (1) "the requirement for improvements to bring the service back to an acceptable level had not yet been triggered," and (2) the time schedule in the improvement program provided that improvements would be constructed when traffic triggered their need. *Id.* at 140-141. Here, there is no similar "reasonable plan" because (1) the improvements are already needed, (2) TAMC acknowledges improvements will not be available when needed.

Cases holding that there is a presumption that agencies will fulfill their plans are simply not apt here – because even if TAMC does fulfill its RTP plan, essential mitigation will be delayed 20 years. Unlike in *Neighbors for Smart Rail, supra,* 57 Cal.4th at 466, LandWatch does not rely on "speculation" that mitigation may not occur; LandWatch shows that the responsible agency does not plan to fund or implement needed mitigation for 20 years. None of Respondent's other cases present a challenge to the certainty of mitigation, particularly not a challenge based on clear and unrebutted evidence that mitigation will be long delayed.[25]

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[25] *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 356-366 holds only that the lead agency's conclusion that it need not impose mitigation fees was legally erroneous, noting in passing that uncertainty of interagency cooperation did not justify the omission. *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1034-1036 is particularly inapt because the holding concerned the reasonableness of baseline condition assumptions about future conditions. The Court found that, while an agency must ensure that mitigation is certain (*id.* at 1035), plaintiffs had improperly

Respondent argues that there is no prejudice from the lack of substantial evidence to support its findings that impacts to these facilities will be mitigated under 2015 background conditions, because the County concluded that "the overall direct impact (Impact 3.12-1) is significant and unavoidable." Resp. Opp. to LW at 29:18-19. As explained above, the EIR and findings reference traffic impacts individually by affected facility and the EIR specifically determined that mitigation would "effectively mitigate impacts [plural] to level of service" on segments 8 and 9 and to intersections 8, 9, 20, and 21 under 2015 conditions, unlike other intersections and segments. AR000674, 000010-000011. Furthermore, an agency is not relieved of its obligation to provide accurate analysis of impacts simply by labeling them significant and unavoidable. *Berkeley Keep Jets Over the Bay Committee, supra,* 91 Cal.App.4th at 1371.

IV. The County abused its discretion in finding the Project consistent with the General Plan because it did not make findings for Policies 37.2.1, 39.1.4, and 26.1.4, with which the Project conflicts.

LandWatch has demonstrated that County abused its discretion because (1) the Project conflicts with three 1982 General Plan Policies and (2) the County failed to make findings supported by substantial evidence that bridge the analytic gap from facts to conclusions to show that the Project is consistent with these policies. The second point is critical. Although LandWatch's opening brief demonstrates that the Project conflicts with and frustrates Policies 37.2.1, 39.1.4, and 26.1.4, this Court must review the County's determination of consistency and that determination is not in the record.[26]

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conflated baseline assumptions and mitigation ("those assumptions are not mitigation measures" – *id.* at 1035); and the court held that the actual mitigation was adequately certain. Similarly, *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 337 recognizes the obligation to ensure mitigation while upholding a baseline assumption used in analysis. *Id.* ("Smart Growth may be unhappy with the assumption, but it is not a mitigation measure the County had to ensure would occur"). Finally, *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 407-412 concerns the reasonableness of growth projections used in impact analysis, not the certainty of mitigation.

[26] Respondent argues that LandWatch has waived its General Plan claims by failing to mention that the Project will provide some mitigation. Resp. Opp.to LW at 35-36. Given the County's failure to make any explicit findings in the record, it is pure gall to demand that LandWatch anticipate and rebut the arguments that the County might have made. At any rate, LandWatch did summarize the evidence of mitigation. LW Op. Brf at 35-36, 44-45.

Respondent advances a set of arguments for the first time in this litigation purporting to demonstrate the basis on which the County arguably could have made findings that the Project is consistent with Policies 37.2.1, 39.1.4, and 26.1.4. Resp. Opp. to LW at 36-39. These arguments are fundamentally irrelevant because they are not in the record, and neither Respondent nor the Court may simply "hypothesize new findings." *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840, 849. Bridging the analytic gap requires not just that there be evidence somewhere in the record to support a finding, but that the record identify that "raw evidence" and show how it supports the findings. *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515. *Topanga* and *Sierra Club* require an agency to outline its actual path from evidence to conclusion so parties may determine whether and how to seek judicial review and the court may examine and trace that actual analysis. *Id.* at 516.

Sierra Club v. City of Hayward, supra, 28 Cal.3d 840 is on all fours. Contrary to Respondent, the agency did make findings (*id.* at 846-849), but the court found them to be insufficient because they did not disclose the "pathway from evidence to ultimate conclusion" (*id.* at 859). As here, the inadequate findings in *Sierra Club* were generalized findings that the action was "not inconsistent" with governing requirements (*id.* at 849), not a finding that the action was consistent with the specific requirement at issue. The court held that an "explicit finding" was required because the "scattered and contradictory evidence" was not a sufficient basis to determine whether and how the agency made a "deliberate determination of the issue:"

> Indeed, even the existence of substantial evidence to support a necessary determination would not compel a conclusion that the determination was in fact made. The substantial evidence test compels courts only to sustain existing findings supported by such evidence, not to hypothesize new findings.

Id. at 859, emphasis added. Here, Respondent relies on similar generalized findings that do not address the three specific policies repeatedly put at issue. And here, Respondent picks out raw evidence from the record to support hypothetical findings, even though those findings and their

logic are not in the record. The record contains no evidence that the County ever made a "deliberate determination of the issue," and if so, the specific basis of its findings. [27]

For example, Respondent claims that a reasonable person "could conclude" that the mitigation was "appropriate" within the meaning of Policy 37.2.1 (Resp. Opp. to LW at 37:1), but Respondent does not and cannot point to any evidence that the Board actually did so conclude. In the only portion of the record that even acknowledges LandWatch's General Plan objections, the FEIR admits that the Project will aggravate traffic in excess of "existing thresholds;" admits that some mitigation is provided but other needed mitigation is infeasible; states that the DEIR identifies physical impacts but that there is a "distinction between physical impacts," i.e., the province of CEQA, "and County level of service policies;" and concludes that the County "must make findings regarding general plan consistency" – apparently later, in some other discussion. AR003588. Incredibly, Respondent spins this entirely equivocal response as the consistency finding. Resp. Opp. to LW at 42. Respondent claims that it is sufficient that there is "specific evidence regarding traffic mitigation," even though the County never connected that evidence to a specific conclusion about the General Plan policies at issue.[28] The public, and this Court, are simply left guessing at what does constitute an "appropriate increase in capacity" under Policy 37.2.1 and what level of capacity is "adequate" under Policies 39.1.2 and 26.1.4. Indeed, the conflict between (1) Respondent's argument that the 1982 General Plan does not even establish an acceptable LOS (Resp. Opp. to LW at 37:7-8) and (2) the EIR's plain

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[27] The County's findings of consistency (AR000022-000026, AR000031) do not even mention Policies 37.2.1, 39.1.4, and 26.1.4, even though LandWatch repeatedly objected that the Project conflicts with and frustrates these specific policies. AR003551, 015638-015640, 005444.

[28] Respondents attempt to distinguish *Honey Springs Homeowners Assn. v. Board of Supervisors* (1984) 157 Cal.App.3d 1122, 1151-1152 (rejecting perfunctory finding made "without defining analytical base") is unavailing. Like *Sierra Club*, *Honey Springs* holds that even if there is evidence in the record to support a finding of consistency, the agency must actually make that finding and explain how the evidence supports it to enable judicial review.

Nor can Respondents rely on *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 270 or *Environmental Council v. Board of Supervisors* (1982) 135 Cal.App.3d 428, 438 to argue that the EIR provides a "extended set of findings" that address the general plan policies at issue here. Neither case considers or decides the issue presented here: whether the findings adequately connect the raw evidence to conclusions about the specific policies at issue.

acknowledgment of "that plan's LOS C standard" (AR003586) is testimony to the need for explicit findings to explain how the County would determine consistency.

Finally, Respondent's claim that there was no prejudice even if the County failed to disclose the analytic route or got the decision wrong is remarkable. If the project is not consistent with the General Plan it should not have been approved, period. LW Op. Brf. at 47:17-18. LandWatch's unanswered objections in the administrative proceedings are sufficient to show that a different outcome was probable under Government Code § 65010(b).

Furthermore, the § 65010(b) requirement to show that a different outcome was probable to establish prejudice does not on its face, or in its underlying purpose, apply to failure to meet the substantive requirements of *Topanga*. "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, supra*, 208 Cal.App.4th at 921 (emphasis added). Where § 65010(b) has excused the technical error of failure to make findings, it has 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. Here, by contrast, LandWatch made a specific, detailed, and unanswered showing of inconsistency during the administrative process. AR003551, 015638-015640, 005444. Thus, LandWatch has met any burden to show that a different outcome is probable, because there is no other showing in the record that counters LandWatch; and § 65010(b) cannot require this Court to hypothesize findings. Indeed, where petitioners have demonstrated a failure to meet *Topanga's* substantive requirement to disclose the actual analytic path from evidence to conclusions, coupled with a showing of inconsistency, courts order relief. *Sierra Club v. City of Hayward, supra*, 28 Cal.3d at 864 (mandating agency vacate its action); *Honey Springs Homeowners Assn., supra,* 157 Cal.App.3d at 1151 (same); *Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal.App.3d 825, 838 (reversing denial of mandate seeking vacation of subdivision approval).

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V. The County abused its discretion in the analysis and mitigation of visual impacts because descriptions of the project and its environmental setting were shifting and incomplete; analysis was piecemealed; mitigation was proposed untimely and improperly deferred; and the DEIR does not reflect independent judgment.

A. LandWatch's claims that the County failed to proceed as required by CEQA in its visual analysis and mitigation are not subject to deferential review.

LandWatch identifies eight specific failures to proceed as required by CEQA in the visual impact analysis, attributable to (1) relying on an incomplete and shifting project description and an inaccurate description of the environmental setting; (2) piecemeal CEQA review; (3) failing to propose mitigation timely; (4) deferring formulation of mitigation not known to be feasible; and (5) failing to apply independent judgment in the DEIR. LW Op. Brf. IV.B.2-8 and IV.C. Respondent improperly seeks deferential review by contending irrelevantly that the record contains substantial evidence to support its visual analysis – improperly because "the existence of substantial evidence supporting the agency's ultimate decision on a disputed issue is not relevant when one is assessing a violation of the information disclosure provisions of CEQA." *CBE v. Richmond, supra,* 184 Cal.App.4th at 82; *see Bakersfield Citizens, supra,* 124 Cal. App. 4th at 1208; LW Op. Brf. at 3. LandWatch does discuss evidence, but only to show prejudice and error. For example, evidence that last-minute mitigation was not equivalent to the mitigation proposed in the EIR shows prejudice from erroneously failing to propose mitigation timely. And evidence that deferred mitigation is not known to be feasible shows that its formulation was erroneously deferred. But the legal error and prejudice are not subject to deferential review.

Respondent cites *Western Placer Citizens for an Agr. & Rural Env't v. Cty. of Placer* (2006) 144 Cal.App.4th 890 to argue that CEQA permits any number of post-EIR revisions to the project or mitigation. Not so. *Western Placer* held only that recirculation was not required for one additional mitigation measure to address a previously identified impact, where there was no challenge to the sufficiency of the EIR's analysis and no argument that the new condition conflicted with other mitigation. *Western Placer* does not countenance wholesale post-FEIR revisions to the project description, environmental setting, and mitigation as occurred here, particularly not when those changes are <u>to correct the EIR's informational errors and omissions</u>. Nor does *South County Citizens for Smart Growth, supra,* 221 Cal.App.4th at 329-332

countenance such revisions. In *South County*, unlike here, after the agency selected a new alternative, the public commented and the agency revised the FEIR to respond to comments. *Id.* at 325. Again, the court held only that recirculation was not required under the circumstances.

More problematically, Respondent incorrectly implies that LandWatch's visual analysis claims must meet the test for recirculation at issue in *Western Placer* and *South County Citizens*. Not so. Case law is clear that LandWatch has met its burden by showing (1) that the EIR was informationally inadequate and (2) that these failures precluded informed public participation. *See, e.g., San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655-56, 659 (shifting and inconsistent project description and baseline conditions); *CBE v. Richmond, supra,* 184 Cal.App.4th at 89 (same).

Contrary to Respondent, *Save Our Peninsula*, *supra*, 87 Cal.App.4th 99 is on point: the County failed to proceed as required by CEQA by changing the description of the environmental setting (critical viewshed location and policy interpretation) and by adopting new and uncertain mitigation (e.g., berms that conflict with other mitigation; CC&R conditions to replace zoning; post-approval lot relocations; unexplained ridgeline mitigation the EIR found unnecessary).[29] Respondent is incorrect that *Save Our Peninsula* is an outlier; its principles that an EIR is informationally inadequate if it does not set out environmental conditions accurately, that mitigation must be proposed in the EIR, and that informational failures in an EIR are prejudicial when they preclude informed public participation are based on and relied upon in CEQA case law. *See e.g., San Joaquin Raptor Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 727 (baseline information required in EIR, not in public hearing); *CBE v. Richmond, supra,* 184 Cal.App.4th at 83, 88-89, 95 (baseline, project description, and mitigation must be in EIR); *Bakersfield Citizens, supra,* 124 Cal.App.4th at 1220-1221 (informational failures prejudicial); S*ierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236 (same).

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[29] And here, as in *Save our Peninsula*, these changes demonstrated a prejudicially inadequate EIR that denied the public a meaningful opportunity for comment with agency responses. So even if LandWatch were required to meet the test for recirculation to show prejudicial error, it has done so under Guidelines, § 15088.5(a)(4).

Finally, contrary to Respondent, the EIR's informational errors were prejudicial because informed public participation and decision making were precluded by reliance on last-minute and applicant-supplied visual analysis instead of the EIR. LW Op. Brf. at 56-68. For example, although Respondent claims that the off-site improvements were adequately assessed in the EIR (Resp. Opp. to H68 at 43, 46), the evidence it cites related to visual analysis is last-minute, applicant-supplied material that was not in the EIR, not circulated for public review, and in most instances not even presented at hearings. *See, e.g.* AR0015441-AR015501 (applicant's "supplement package"), 005436 (applicant's counsel declining to present visual simulations from AR01729-17030 "in the interest of time"). Similarly, Respondent claims that post-EIR, applicant-supplied simulations of berms is sufficient. Resp. Opp. to H68 at 48. Applicant supplied analysis is inherently suspect due to its vested interest; and last minute submissions are prejudicial because they do not permit informed comment and response. *Save Our Peninsula, supra*, 87 Cal.App.4th at 122, 123, 128, 130, 131, 133-134. Because the changes to the project, the setting description, analytic conclusions, and mitigation proposals vitiate reliance on the analysis and visual simulations in the EIR, they were prejudicial to informed participation.

We address other visual impact issues raised in the Opposition below.

B. The project description is prejudicially inadequate because it permits post-approval lot relocations not subject to CEQA review, public participation, or any further visual analysis.

Respondent's claim that post-approval changes to lot locations are permissible rests on cases excusing project changes either as (1) unforeseeable as part of the project or (2) subject to future CEQA review. *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* (1982) 134 Cal.App.3d 1022, 1029-1030; *Kings County, supra*, 221 Cal.App.3d at 738; *Taxpayers for Accountable School Bond Funding v. San Diego Unif. Sch, Dist.* (2013) 215 Cal.App.4th 1013, 1037-1038. The cases do not apply: post–approval changes to lot layouts in conditions 18, 80, 85, 86, 94, 95, 105, and 106 are entirely foreseeable conditions of the final map approval. AR000050-000091. And that final map approval is a ministerial act not subject to future CEQA. *Youngblood v. Brd. of Supes.* (1978) 22 Cal.3d 644, 648, 656; Guidelines, § 15268(b).

Respondent claims that it is sufficient that the conditions requiring or permitting subsequent lot relocations call for moving the lots to areas previously evaluated or sloped under 30% and not containing sensitive biological resources. This condition is insufficient protection of visual resources because (1) it does not apply to conditions 85, 86, 94, 95, 105, and 106 at all; (2) it allows lots to be relocated to any area under 30% slope regardless of prior evaluation; and (3) it contains no requirement to consider or mitigate visual impacts, much less performance specification for visual impacts.[30] AR000074-000091. Respondent's claim that conditions 18 and 80 are already met by the approved map is belied by the fact that the conditions were nonetheless imposed (AR000071, 000050); and, regardless, the other conditions continue to require or permit lot relocations without consideration of visual impacts or public participation.

C. Post-FEIR changes to lot locations and mitigation due to changes in the critical viewshed map, changes in policy interpretation, and belated discovery of ridgeline impacts violate CEQA's requirement for disclosure in the EIR.

As Respondent admits, numerous post-FEIR changes were made to the description of the project and environmental setting and to conditions of approval to address changes made to the critical viewshed map, changes in the interpretation of Toro Area Plan Policy 40.2.5, and the belated determination that there would be ridgeline development impacts in areas other than Parcel D, contrary to the EIR. These changes violate CEQA's requirements for a stable project description, adequate description of the environmental setting, and timely proposal of mitigation in the EIR. *See* LW Op. Brf. at 56-61.

Certainly, the County may interpret its own critical viewshed map and policy; LandWatch argues only that this environmental setting information must be in the draft EIR, not presented piecemeal through a confused series of map revisions in last-minute staff-reports. And LandWatch objects to failure to follow County subdivision approval custom and requirements, which do in fact mandate flagging and staking projects in areas designated Visually Sensitive in

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[30] And contrary to Respondent, AR002695 does not demonstrate that Alternative 5 complies with cultural resource conditions 105 and 106 because (1) it only provides that impacts would be reduced, by the alternative, stating that mitigation will still be required; and (2) it only addresses impacts from lots, not from the screening berm.

in the Toro Area Plan, regardless of zoning, [31] but only because that led to the failure to disclose and mitigate visual impacts timely or clearly, e.g. ridgeline development. Finally, contrary to Respondent, the belated building site restrictions in condition 18 demonstrate building sites and envelopes are essential information to ridgeline analysis and should have been disclosed.

D. Berm mitigation was proposed untimely and its formulation was improperly deferred because it is not known to be feasible.

Contrary to Respondent, LandWatch does not claim that visual screening berms were not discussed in the EIR or challenge the sufficiency of the secondary impact analysis. LW Op. Brf at 62-65. LandWatch and Caltrans objected that the berms were inadequately specified as mitigation in the DEIR, may be infeasible, and that alternative mitigation should be considered. Instead of providing specifications, the FEIR denies that the berms are mitigation, a preposterous claim to which Respondent clings, even while acknowledging that project features may be mitigation under Guidelines, § 15126.4(a)(1)(A). Even if post-EIR performance standards for the berms were adequate, they should have been provided in the DEIR or in the FEIR in response to comments. Furthermore, deferral, even with performance standards, is not permissible where mitigation is not known to be feasible. *CBE v. Richmond, supra*, 184 Cal.App.4th at 94. Respondent ignores this issue, arguing that deferral is permitted just because there eventually were performance standards. But Caltrans questioned feasibility of an effective berm and requested consideration of alternative mitigation (AR003396); and LandWatch has shown that construction of the lupine field berm may be infeasible because it would conflict with mitigation of cultural resources. LW Op. Brf. at 64. In light of this, and of the obligation to consider alternative mitigation under *Lotus, supra,* 223 Cal.App.4th at 653-658, the County violated CEQA in deferring formulation of mitigation and failing to consider other effective mitigation.

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[31] Respondent's hair-splitting claim that flagging and staking is not required under § 21.46.060 because the Project is not yet zoned VS ignores the independent requirement for flagging and staking under Board Resolution 09-360 for projects in an "area designated as Visually Sensitive ("VS") on an adopted visual sensitivity map (Toro Area Plan [etc.])." AR015710. Reliance on photo-simulation instead of flagging and staking is not permitted in areas designated as visually sensitive on the Toro Area Plan map. AR015714; *see* AR015584.

E. Mitigation was untimely because last minute, non-equivalent CC&R conditions were substituted for the EIR's promised plenary review of visual impacts under three different zoning overlay districts' criteria.

LandWatch has shown that last-minute substitution of a CC&R design review process instead of the plenary review under zoning overlays was untimely mitigation. LW Op. Brf. 65-66. Respondent cannot deny the substitution was untimely, but argues instead that conditions 19 and 83 are equivalent to VS zoning because they call for administering the design criteria "based upon visually sensitive zoning criteria." AR000051, 000072. Not so. "Based upon" does not mean "equivalent to" the VS criteria; criteria could differ and the enumeration of just five conditions may be exhaustive, not illustrative. Furthermore, conditions 19 and 83 simply omit the Design Control and Site Plan Review zoning overlay protections under Monterey County Code Chapters 21.44 and 21.45, which are independent of and in addition to the Visual Sensitivity overlay protections in Chapter 21.46 (*see* AR000249-250, SAR028968-028978), and which the EIR promised as additional critical elements of visual mitigation (AR000257-000260, 000281, 000284). The substituted mitigation is not equivalent.

F. Analysis of visual impacts from off-site improvements was improperly piecemealed because the improvements are required as a Project condition.

The failure to assess visual impacts of offsite traffic improvements (a new intersection and 1.2 miles of freeway to replace a rural, scenic two-lane road) violates CEQA because impacts from required off-site improvements must be assessed. LW. Brf. at 66-67. It is not sufficient to review impacts in a later environmental document. *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1231. Respondent argues that the FEIR found the new entranceway to be a beneficial change compared to the DEIR's proposed entrance facility, but that argument fails because (1) it ignores the visual impacts of the new intersection and new freeway, and (2) there was no comparison to baseline conditions, which Caltrans said would reveal detrimental impacts. AR003775. Finally, informed public participation is precluded by reliance on last-minute, applicant-supplied visual simulations, not circulated to the public for comment and response. *See, e.g.*, AR015461 (applicant-supplied simulation of entranceway in last-minute "supplemental package").

G. The County failed to use independent judgment because it circulated a draft EIR containing an erroneous applicant-supplied mapping of critical viewshed.

Circulation of the DEIR using applicant-supplied mapping of the critical viewshed was a failure to exercise independent judgment, because the map was changed and lots were relocated after the EIR was final. LW Op. Brf. at 67. Respondent claims, based on a footnote in the DEIR, that the maps were prepared by the County's consultant; but the record is clear that they were based on maps provided by the applicant, and that those maps were changed and lots were relocated after the EIR was final. *Compare* AR006245-006249 (applicant supplied maps) to AR004184-004188 (staff report explaining and illustrating map changes) and AR015183-15185 (same). Staff admit that DEIR figure 3.1-1A "comes from information prepared by the applicant" and that the "original large scale drawing" of the critical viewshed area "is not currently available." AR004185. LandWatch does not dispute the County's right to interpret its maps and policies; but LandWatch does object to improper failure to vet the applicant-supplied information before putting it in the draft EIR. Guidelines, § 15084(e).

VI. There is no substantial evidence that visual impacts to Toro Park and Fort Ord National Monument are not significant.

Respondent argues that the County is free to determine that the trails used by thousands of hikers in adjacent public parks are not "common public viewing areas" under County Code § 21.06.195 (SAR028845). Even if the Court accepts this absurd interpretation of a definition that expressly includes public parks, Respondent fails to address two critical points. First, the County may not rely uncritically on a significance threshold that ignores impacts to thousands of trail users, because that "would foreclose consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant." *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109; LW Op. Brf. at 72. Second, the EIR's repeated claims that significant visual impact to these parks is avoided by zoning is absurd if that zoning does not apply to these parks because they are not common public viewing areas. LW Op. Brf. at 71.

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VII. The County failed to proceed as required by CEQA because the FEIR fails to respond to specific mitigation proposals for GHG impacts and the findings fail to explain their infeasibility.

The County failed to proceed as required by CEQA because the FEIR fails to respond to specific mitigation proposals for the significant and unmitigated GHG impact. *Los Angeles Unified School Dist. v. City of Los Angeles* ("*LAUSD*")(1997) 58 Cal.App.4th 1019, 1029. Contrary to Real Party, LandWatch did explain the basis of its proposals: CEQA requires all feasible mitigation for otherwise unmitigated impacts. AR003918-003920. LandWatch was not burdened to demonstrate the ultimate feasibility of each measure or that its proposals were "substantially more effective than" the measures adopted. [32] First, the FEIR must respond if the measure is "facially feasible." *LAUSD*, 58 Cal.App.4th at 1029. The only measure the FEIR claimed infeasible (with no explanation) was recycled water; if the County believed other measures infeasible, the FEIR should have said so. Second, as long as an impact remains significant and unmitigated, as here, feasible mitigation that substantially reduces it must be adopted. P.R.C. § 21002; Guidelines, § 15021. If the County rejected mitigation because it would not "substantially" reduce impacts, the FEIR should have said so. It is irrelevant whether LandWatch's proposals were more effective than the EIR's – although in fact some were.

For example, requiring solar panels that generate 75% of on-site energy, requiring solar-ready roofs, and requiring a 20% improvement over Title 24 energy standards are clearly not insubstantial measures. AR003919 (items l, o, p, q). The FEIR's statement that it is "expected"

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[32] *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 935 is inapt because there the agency had not rejected mitigation proposed by petitioners: "[n]o feasible mitigation measures that would substantially lessen or avoid environmental impacts had been proposed beyond those recommended in the EIR, all of which were adopted." *San Franciscans for Reasonable Growth v. City & Cty. of San Francisco* (2002) 209 Cal. App. 3d 1502, 1515 is inapt because (1) unlike here, the energy impact at issue had already been mitigated, and (2) unlike here, where LandWatch proposed additional mitigation, petitioner argued that the agency should have "independently considered" additional mitigation. *Santa Clarita Org. for Planning the Env't v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1055 is inapt: there the Court excused systematic response to each measure only because petitioners conceded that measures in a generic list may not apply. By contrast, LandWatch requested consideration of each measure it proposed. AR003918-003920.

that "a large percentage" of homes will employ solar panels is not responsive to the proposal to require it. AR003944. The statement that Title 24 applies does not address the proposal to go 20% beyond Title 24. Real Party characterizes LandWatch's proposals as "token" and "nickel and dime" because they "could be applied to any development project." That the proposals are common testifies to their effectiveness and feasibility; it is a reason to accept, not reject them.

Real Party glosses over the FEIR evasions, e.g., pointing to the EIR's discussion of possible future regulation of industrial and automotive air conditioning and arguing that LandWatch failed to demonstrate that its proposed Freon ban for home air conditioning would be substantially better. Similarly, Real Party argues that LandWatch had to show that its proposal for facilities for on-going home recycling would be "substantially more effective" than the EIR's one-time construction waste recycling. The FEIR simply ignores LandWatch's actual proposals. CEQA does not require the public's proposals for additional mitigation for otherwise unmitigated impacts to be "substantially better" than the agency's or allow an agency to ignore public proposals just because the EIR has already picked some low hanging fruit.

Real Party's six page, single spaced attachment purporting to show that the EIR responded to each measure, or that the measure was infeasible, or that it was insubstantial or less effective is not only wrong on the law and the facts as illustrated above, but it is fundamentally irrelevant because it was not in the FEIR. *Flanders Found. v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 615-17 (failure to respond "in detail" to comment proposing alternative to mitigate unavoidably significant impact cannot be corrected in litigation); *Santiago County Water Dist., supra,* 118 Cal.App.3d at 831 (argument to trial court cannot correct EIR omission).

Finally, findings were required if the measures were rejected as infeasible. Nothing in *Village Laguna, supra,* 134 Cal.App.3d at 1026-1027 limits the requirement for infeasibility findings to just those mitigations or alternatives proposed in the EIR.[33] It is error not to make P.R.C. § 21081 findings for mitigation proposed by the public. *Citizens for Quality Growth v. City of Mt. Shasta* (1988) 198 Cal. App. 3d 433, 442, fn. 8 (error for FEIR to disregard and § 21081 findings to ignore public's proposal for wetland compensation). Limiting the § 21081

[33] In any event, LandWatch's proposals were in the EIR at AR003918-003920.

findings requirement to lead agency proposals is inconsistent with the obligation to take comments seriously and with case law that does evaluate the adequacy of such findings rather than simply rejecting the requirement to make them. *See, e.g., Cty. of San Diego v. Grossmont-Cuyamaca Cmty. Coll. Dist.* (2006) 141 Cal.App.4th 86, 93, 108 (evaluating findings of infeasiblity of mitigation proposed by commenting agency); *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal. 3d 553, 569-70, 801 P.2d 1161, 1170-71 (requiring determination of infeasibility of public's alternatives proposals either in EIR or in findings); *City of Del Mar, supra,* 133 Cal. App. 3d at 417 (evaluating findings of infeasibility of public's alternatives).

VIII. There is no substantial evidence that impact fees mitigate park impacts.

As LandWatch explained, there is no substantial evidence that impact fees mitigate impacts to local parks because the relevant evidence – the evidence in the EIR – states that in-lieu fees are not sufficient mitigation and that on-site parkland is required. LW Op. Brf. at 74. Respondent argues that the County Code and state law permit in lieu fees, but that is not at issue. Respondent claims that the Park Department's concern about the unrelated issue of loss of Toro Park land for an access road was resolved, but that is not at issue either. Respondent argues that the last-minute substitution of impact fees for local park dedication represents the County's "evolving" view on mitigation. But the conclusory rationalization in the post-EIR staff report directly contradicts the evidence in the EIR. The EIR finds, based on County Parks Department expertise, that in-lieu fees will not suffice as mitigation and that onsite local parkland dedication is required to mitigate the Project's increased demand for local parkland; and it finds that the separate Project impact on regional parks would be met adequately through its property taxes. AR000576-577, *see* 006038. In a single sentence, the Staff report rationalizes the elimination of local parkland dedication and use of in lieu fees as "deemed to be of greater recreational benefit to the County as a whole because the payment of fees could be used to upgrade recreational facilities within Monterey County." AR004355. The staff report does not explain how the significant impact identified in the EIR, increased demand for local parks, an impact that the EIR determined could not be mitigated by in lieu fees, will be mitigated. Nor does it explain why

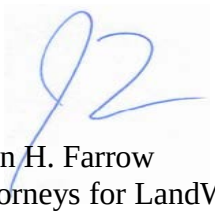
property tax payments are no longer sufficient to address impacts to regional parks.[34] AR004355. These are precisely the "[f]actual inconsistencies and lack of clarity" that preclude substantial evidence. *Vineyard*, *supra*, 40 Cal.4th at 439. The last-minute adoption of a "rationale unsupported by its EIR analysis" also conflicts with the requirement to disclose the path from evidence to action. *California Clean Energy Comm., supra*, 225 Cal.App.4th at 205.

CONCLUSION

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

Dated: March 1, 2016

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



John H. Farrow
Attorneys for LandWatch Monterey County

[34] Respondent argues that the Parks Department would have said so if it objected. But this is not evidence of acquiescence because there is no showing that Parks was even notified of the issue as it had been in 2010. *See* AR005995. Regardless, the contradiction remains.

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 1 Sutter Street, Suite 300, San Francisco, CA 94108. 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 March 1, 2016, 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:

James G Moose Remy, Moose, Manley, LLP 555 Capitol Mall, Ste. 800 Sacramento, CA 95814 jmoose@rmmenvirolaw.com Anthony Lombardo ANTHONY LOMBARDO & ASSOC., INC. 144 Gabilan Street Salinas, CA 93901 tony@alombardolaw.com *Attorneys for Real Parties*	Richard Rosenthal Law Offices of Richard Rosenthal, A Professional Corporation 27880 Dorris Drive, Ste. 110 Carmel Valley, CA 93923 Rrosenthal62@sbcglobal.net Alexander T. Henson Law Offices of Alexander Henson 13766 Center Street, Ste. 27 Carmel Valley, CA 93924 zancan@aol.com *Attorneys for Highway 68 Coalition*
Michael J. Whilden Deputy County Counsel Office of the County Counsel 168 W. Alisal Street, Third Floor Salinas, CA 93901 whildenm@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 March 1, 2016.

John Farrow