**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SIXTH APPELLATE DISTRICT**

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| HIGHWAY 68 COALTION, et al.,<br><br>Plaintiffs and Appellants,<br><br>v.<br><br>County of Monterey et al.,<br><br>Defendants and Respondents;<br>_____<br>DOMAIN CORPORATION et al.,<br><br>Real Parties In Interest and Respondents. | **Case No. H045253**<br><br>Appeal from Monterey County Superior Court<br>Cases No. M130660 and M130670, consolidated for trial only<br><br>Hon. Thomas Wills, Judge of the Superior Court |

# APPELLANT LANDWATCH MONTEREY COUNTY'S REPLY BRIEF

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Federal Cases



### California Cases

**Statutes**



**Regulations**



**Treatises**

## TABLE OF ACRONYMS

| | |
|---|---|
| af | acre-feet |
| afy | acre-feet per year |
| AR | Administrative Record |
| CEQA | California Environmental Quality Act |
| CT | Clerk's Transcript |
| DEIR | Draft Environmental Impact Report |
| EIR | Environmental Impact Report |
| FEIR | Final Environmental Impact Report |
| MCWRA | Monterey County Water Resources Agency |
| PRC | Public Resources Code |
| SVIGSM | Salinas Valley Integrated Ground and Surface Water Model |
| SVWP | Salinas Valley Water Project |
| UWMP | Urban Water Management Plan |

## INTRODUCTION

An EIR is an "environmental alarm bell whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Laurel Heights Improvement Assn. v. Regents of University of California* ("*Laurel Heights I*") (1988) 47 Cal.3d 376, 392. Because an EIR "must be certified or rejected by public officials, it is a document of accountability" that "protects not only the environment but also informed self-government." *Id.* The Monterey County Board of Supervisors should not be permitted to evade accountability by certifying an EIR that fails to disclose material information, mandated by CEQA, about the cumulative overdraft and seawater intrusion that is rendering increasing areas of the Salinas Valley Groundwater Basin ("Basin") aquifer unusable.

The 2014 Ferrini EIR relies on the modeling in the 2002 Salinas Valley Water Project ("SVWP") EIR to conclude that the Project's payment of a fair share of the cost of existing groundwater management projects is sufficient mitigation of its contribution to those cumulative impacts. Based on that outdated modeling, the Ferrini EIR claims these projects will balance the Basin and halt seawater intrusion. However, uncontroverted post-EIR admissions show that the cumulative water demand assumptions in the SVWP EIR greatly understate demand and that existing projects are *not* sufficient to alleviate seawater intrusion.

LandWatch alleges that, by failing to disclose readily available current cumulative demand information, and current modeling demonstrating the inefficacy existing groundwater projects, the Ferrini EIR fails to comply with CEQA's informational mandates. In particular, LandWatch claims that the EIR thereby fails to provide legally mandated information, including (1) a projection of cumulative impact sources, (2) an adequate environmental setting description, (3) a roadmap to the earlier SVWP EIR on which it relies, and (4) comment responses that directly address the concerns LandWatch raised in its specific comments challenging reliance on the SVWP and the SVWP EIR.

Contrary to Appellees, these failures to proceed as required by CEQA are *not* "inherently factual" claims about the "type, scope, and amount of analysis to include in EIRs." They are *legal* claims, which this Court can and should evaluate independently and de novo, based on mandates in statute, regulations, and case law. Those mandates, and the legal tests for evaluating the EIR's compliance, are set out and applied in LandWatch's Opening Brief and discussed further below.

However, seeking deferential review, Appellees mischaracterize LandWatch's legal claims as factual claims and then argue that "substantial evidence supports the County's determination as to what and how much information to include in the EIR's cumulative groundwater impact analysis." Opp. at 46. By this evasion, Appellees fail to acknowledge *any* enforceable mandate as to informational adequacy and fail to substantively address LandWatch's claims that the EIR is informationally deficient as a matter of law.

After the EIR was final, County staff admitted that the SVWP EIR does in fact understate demand and that existing groundwater projects are not sufficient to balance the Basin and halt seawater intrusion. This significant new information required that the County recirculate the EIR, because (1) it demonstrated that the public had been denied a meaningful comment opportunity on an EIR now shown to be conclusory and inadequate, and (2) it disclosed new significant impacts. Appellees entirely ignore the first claim and misrepresent the second claim, arguing instead that the belated admissions cure the prejudice from the inadequate EIR. This ignores repeated holdings by the California Supreme Court and lower courts that post-EIR disclosures cannot cure an inadequate EIR.

Finally, Appellees fail to rebut LandWatch's claim that there is no substantial evidence to support the EIR's determination that payment of existing impact fees is adequate mitigation. An EIR may only rely on impact fees as sufficient mitigation when (1) the project is required to pays its fair share of *all* of the mitigation projects needed to alleviate the cumulative impact, and (2) those mitigation projects have been committed and reviewed under CEQA. Here, as the

County admits, existing groundwater projects are not sufficient to alleviate the cumulative impact; and there has been no commitment to, or CEQA review of, needed additional projects.

## ARGUMENT

### I. The EIR is legally inadequate for failure to include information required by CEQA regarding the sources of cumulative groundwater impacts.

#### A. LandWatch's claim that the EIR is legally inadequate is reviewable de novo as a failure to comply with CEQA's informational requirements.

LandWatch objects that, in relying on undisclosed cumulative demand assumptions from the 2002 SVWP EIR to conclude that existing groundwater projects will halt seawater intrusion, the 2014 EIR failed to comply with four *legal* mandates that an EIR provide certain information:

- The EIR fails to identify all sources of "related impacts," either by providing a "list of past, present, and probable future projects producing related or cumulative impacts" or, alternatively, a "summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect." Guidelines, § 15130(b)(1)(A), (B); Public Resources Code ("P.R.C."), § 21083(b)(2).

- The EIR fails to provide a "roadmap" to the earlier EIR on which it relies because it does not provide and explain the SVWP EIR demand assumptions. *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* ("*Vineyard*") (2007) 40 Cal.4th 412, 443.

- The EIR fails to provide an adequate setting description because it does not provide "a sufficient description of the baseline environment to make further analysis possible" and to "permit the significant effects of the project to be considered in the full environmental context." *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 954; Guidelines, § 15125.

- The EIR fails to provide adequate responses to comments because it does not disclose the readily available cumulative demand and supply data specifically requested by comments. P.R.C., § 21091(d); Guidelines, § 15088(c).

To persuade this Court to misapply a deferential substantial evidence standard of review, Appellees mischaracterize LandWatch's *legal* claims that the EIR omits mandated information as "inherently factual" claims about the "type, scope, and amount of analysis to include in EIRs." Opp. at 27. Thus, in addressing LandWatch's claims that the EIR was informationally inadequate as a matter of law, Appellees argue that "substantial evidence supports the County's determination as to what and how much information to include in the EIR's cumulative groundwater analysis." Opp. at 46. Appellees get the standard of review wrong 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." *Communities for a Better Environment v. City of Richmond* ("*CBE v. Richmond*") (2010) 184 Cal.App.4th 70, 82.

Here, the statutes, regulations, and cases cited by LandWatch identify clear *legal* requirements for an informationally adequate EIR. Even the cases cited by Appellees (Opp. at 27, 46) acknowledge that Courts should review claims that an EIR omits legally required informational independently, without deference to the agency. *California Native Plant Society v. City of Santa Cruz* ("*CNPS*") (2009) 177 Cal.App.4th 957, 986 ("An EIR will be found legally inadequate—and subject to independent review for procedural error—where it omits information that is both required by CEQA and necessary to informed discussion"); *Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 950–951 (applying de novo review to the "mode of analysis" of cumulative impacts; observing in dictum that petitioner's objection to level of detail would raise an insufficiency of evidence issue that was not before the court); *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1046–1047 ("A challenger, such as CSTI, asserting

inadequacies in an EIR must show the omitted information 'is both required by CEQA and necessary to informed discussion'").

"Whether an EIR has omitted essential information is a procedural question subject to de novo review." *Banning Ranch Conservancy v. City of Newport Beach* ("*Banning Ranch*") (2017) 2 Cal.5th 918, 935, citing *Vineyard, supra*, 40 Cal.4th at p. 435 and *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236. The cases cited by LandWatch for its claims that the EIR is informationally inadequate expressly apply an independent de novo standard of review.

First, cases finding non-compliance with the Guidelines, § 15130(b)(1) requirement to disclose relevant cumulative sources or provide a summary of projections are decided as a matter of law, not fact. *Citizens To Preserve the Ojai v. County of Ventura* ("*Ojai*") (1985) 176 Cal.App.3d 421, 428-429 holds that the Court "does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document" and then holds that its cumulative analysis "must *at minimum* include certain elements," including the cumulative impact sources information required by § 15130(b). (emphasis added.)

*Bakersfield Citizens for Local Control v. City of Bakersfield* ("*Bakersfield*") (2004) 124 Cal.App.4th 1184, 1213, 1218 identifies case law and Guidelines,§ 15130(b)(1) as authority for the Court to hold a cumulative analysis is under-inclusive where it omits relevant projects and holds that this omission is an "overarching legal flaw."

*Friends of the Eel River v. Sonoma County Water Agency* ("*Friends of the Eel*") (2003) 108 Cal.App.4th 859, 868–869, 872 holds that failure to include available information about cumulative impact sources mandated by § 15130(b)(1) "makes the EIR an inadequate informational document."

*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* ("*San Joaquin Raptor*") (1994) 27 Cal.App.4th 713, 740-741 holds that the "FEIR does not comply with CEQA because it fails to contain a list of 'past, present and reasonably anticipated future projects,' or a summary of projections contained in

an adopted general plan for a summary of cumulative development as is required by State CEQA Guidelines section 15130" and thus "the cumulative discussion is inadequate as a matter of law."

*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 72 holds that cumulative impact analyses "are legally defective" because they omit foreseeable future highrise projects where it was reasonable and practical to include them.

*Kings County Farm Bureau v. City of Hanford* ("*Kings County*") (1990) 221 Cal.App.3d 692, 722–723 expressly rejects the substantial evidence standard of review for claims that the cumulative analysis was under-inclusive with respect to the mandates of § 15130(b)(1) and declines to defer to the agency's factual determination that the cumulative project information was adequate. Instead, *Kings County* holds that the Court should independently determine whether it was "reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately." *Id.* at 723. This is determined not by deference to what the agency chose to include in the EIR but by the Court's own evaluation of the "disparity between what was considered and what was known." *Id.*

Second, claims that an EIR fails to provide a sufficient "roadmap" to an earlier EIR on which it relied are reviewed de novo because it is a "failure to proceed in the manner provided in CEQA" if the agency "relied on information not actually incorporated or described and referenced in the FEIR." *Vineyard, supra*, 40 Cal.4th at 442-443, *citing* Guidelines, § 15050.

Third, claims that an EIR fails to provide an adequate environmental setting description, as required by Guidelines, § 15125, are reviewed de novo. *Cadiz Land Co., Inc. v. Rail Cycle, L.P.* ("*Cadiz*") (2000) 83 Cal.App.4th 74, 87 ("If the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA"). Thus, *County of Amador, supra,* 76 Cal.App.4th at 954 holds an environmental

setting description is inadequate if it fails to "make further analysis possible," which is a question of "the adequacy of the information contained in the EIR," not a factual question of "conflicting expert opinions."

Fourth, failure to provide adequate comment response as required by Guidelines, § 15088, is reviewable de novo as a failure to comply with CEQA. *California Oak Foundation v. City of Santa Clarita* ("*California Oak*") (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.") In *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 359, the Court reviews case law governing adequate comment responses and then holds "*under the criteria established by the statutory and case law* the County's responses are inadequate to answer the specific concerns voiced in the letter." (Emphasis added.)

In sum, in reviewing LandWatch's four legal claims that the EIR was informationally inadequate for failure to disclose available cumulative supply and demand data, and the need for additional groundwater management projects, this Court can and should undertake de novo review guided by statute, regulations, and case law.

### B. The EIR does in fact rely on the categorical claim that the SVWP will halt seawater intrusion, based on the SVWP EIR's demand assumptions, which were never disclosed, despite LandWatch's request.

Appellees argue that the EIR does not categorically claim that the SVWP will halt seawater intrusion and that, "read in context," one might infer that the SVWP merely has this as its "goal." Opp. at 30-31. Not so.

The DEIR does in fact make the categorical claim that the SVWP "provides for the long-term management and protection of groundwater resources *by stopping seawater intrusion*." AR489 (emphasis added); *see also* AR466, 492. The DEIR asserts that "the SVWP provides the surface water supply necessary to

attain a hydrologically balanced groundwater basin." AR466, 489. Based on this claim, the EIR then concludes that the Project's payment of its fair share assessment for the existing suite of Zone 2C groundwater management projects mitigates its contribution to the cumulative overdraft and seawater intrusion impact. AR492, 4116.

Furthermore, as discussed in section III.A below, the EIR cannot consistently claim that payment of a fair share of the cost of existing groundwater management projects is sufficient mitigation while admitting that the efficacy of those projects is uncertain.

Appellees argue that the EIR does not rely on the SVWP alone, but also on prior projects that comprise the "project suite." Opp. at 31. This is not in dispute. But the EIR claims that the *last* project in that suite, the SVWP, will "attain a hydrologically balanced groundwater basin," based on the analysis in the 2002 SVWP EIR, and, in particular, on its modeling of hydrologic effects using the "Salinas Valley Integrated Ground and Surface Water Model (SVIGSM)." AR466. That modeling *assumes and includes* the entire project suite. AR25213 (SVWP EIR).

The DEIR explains that the SVWP EIR modeling "relied on assumptions about future population growth and water demands in the Salinas Valley." AR466. In DEIR comments, LandWatch objected that, because the modeling in the 2002 SVWP EIR greatly understates the actual post-1995 groundwater demand, "it remains improper for an EIR for a development project to rely uncritically on the SVWP as evidence there will be a sufficient long term water supply without aggravating the existing overdraft and seawater intrusion impacts." AR3555-3556. LandWatch objected that the DEIR fails to (1) identify the Basin groundwater supply sustainable without overdraft or seawater intrusion, (2) provide current and projected future cumulative Basin demand, and (3) compare actual Basin demand to the SVWP EIR demand assumptions on which the DEIR relies. AR3558-3564 (questions 59, 61, 63, 65). LandWatch's comments

specifically asked for these data. AR 3560 (questions 59, 61), 3564 (question 63), 3566-3567 (question 65).

The FEIR fails to disclose the Basin's sustainable supply, future Basin-wide demand, or any comparison of post-1995 demand datum to the SVWP EIR's demand projections. LWOB at 32-34. The only Basin-wide data provided by FEIR was for a single year, and that datum was not used in analysis or compared to the SVWP EIR assumptions the DEIR cites. *Id.* Instead, the FEIR merely claimed the SVWP demand data were "conservative." AR4113; *see* LWOB at 32-34, 38-40.

The County had readily available data demonstrating that the SVWP EIR demand assumptions greatly understate cumulative demand. AR15612-15615 (LandWatch), *compiling* AR16063-16334 (MCWRA pumping data); *see* AR5184-5187 (MCWRA testimony). The County also had readily available updated SVGISM modeling that concludes that existing groundwater management projects will *not* balance the Basin or halt seawater intrusion. AR15616 (LandWatch), *citing* AR16391-16426 (MCWRA, *Protective Elevations to Control Seawater Intrusion in the Salinas Valley*, 2013). The new modeling updates the SVIGSM, the same model cited by the DEIR and used in the SVWP EIR. AR 466 (DEIR), 16405 (*Protective Elevations*), 25299 (SVWP EIR). The new modeling concludes that additional projects supplying at least 48,000 afy of groundwater recharge, in addition to the 12,000 afy of recharge from the SVWP, are required to control seawater intrusion. AR16406.

### C. The EIR fails to comply with the legal obligation under Guidelines,§ 15130(b)(1) that a cumulative analysis identify all relevant sources of the cumulative impact.

#### 1. Guidelines, § 15130(b)(1); Public Resources Code, § 21083(b); and case law mandate provision of all relevant sources of cumulative water demand.

CEQA requires that the CEQA Guidelines "shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a "significant effect on the environment," which includes the situation in which

> The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, 'cumulatively considerable' means that the incremental effects of an individual project are considerable when viewed in connection with *the effects of past projects, the effects of other current projects, and the effects of probable future projects*.

P.R.C., § 21083(b) (emphasis added). Implementing this directive, the CEQA Guidelines provide that certain specified "elements are *necessary to an adequate discussion* of significant cumulative impacts." Guidelines, § 15130(b)(1) through (b)(5) (emphasis added). One of these necessary elements is an identification of the sources of cumulative effects, which must be provided as either:

> " (A) a list of past, present, and probable future projects producing related or cumulative impacts . . ., or (B) a summary of projections contained in an adopted general plan or related planning document, or in a prior environmental document which has been adopted or certified, which described or evaluated regional or areawide conditions contributing to the cumulative impact."

Guidelines, § 15130(b)(1). Thus, both statute and regulation mandate identification of all sources of the cumulative effect at issue.

Cases discussing Guidelines, § 15130(b) and P.R.C., § 21083(b) hold that the list of projects or summary of projections is *mandatory*. *See, e.g., Ojai, supra,* 176 Cal.App.3d at 429 (cumulative analysis "must at minimum include certain elements" including the elements mandated by 15130(b)(1); *Bakersfield, supra,*

124 Cal.App.4th at 1218 ("*Following and applying these authorities*, we likewise conclude that the EIR's are inadequate because they did not analyze the cumulative environmental impacts of other past, present and reasonably foreseeable retail projects in the market areas served by the proposed shopping centers," (emphasis added).) *Friends of the Eel* holds:

> The Guidelines *require* the Agency to consider 'past, present, and probable future projects producing related or cumulative impacts . . ..' (Guidelines, § 15130, subd. (b)(1)(A).) The Agency must interpret this requirement in such a way as to "afford the fullest possible protection of the environment." [citations].

108 Cal.App.4th at 868 (emphasis added). Thus, omission of foreseeable future water demand in modeling cumulative water supply impacts "makes the EIR an inadequate informational document." *Id.* at 871-872.

CEQA provides a clear test a Court should apply to determine if omission of cumulative impact sources renders an EIR legally inadequate:

> The primary determination is whether it was reasonable and practical to include the projects and whether, without their inclusion, the severity and significance of the cumulative impacts were reflected adequately. [citation] "The disparity between what was considered and what was known is the basis upon which we find an abuse of discretion."

*Kings County, supra,* 221 Cal.App.3d at 723, *quoting San Franciscans for Reasonable Growth, supra,* 151 Cal.App.3d at 77, *cited with approval by Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection* ("*EPIC*") (2008) 44 Cal.4th 459, 525; *see also Friends of the Eel, supra* 108 Cal.App.4th at 868–86 (same test); *Bakersfield, supra,* 124 Cal.App.4th at 1215 (same test).

Because the agency in *Friends of the Eel* knew of the foreseeable additional water demand, it was "reasonable and practical" to include that information and it was error to omit it. *Id.* at 869-871. *Kings County* holds omission of cumulative air quality impact sources outside the County rendered the EIR inadequate because

the agency knew from comments that this information was considered important and the omitted information was readily available; "[t]hus, the EIR could reasonably and practically have included such projects in its analysis." *Id.* at 723.

As discussed, *Kings County* specifically *rejects* the claim that "the scope of the analysis is, in essence, a question of fact to be determined by the lead agency" and that the Court "must find the EIR to be adequate if there is any substantial evidence to support the scope chosen by the agency." *Id.* at 722. *Kings County* instead holds that the Court should evaluate abuse of discretion based on the "disparity between what was considered and what was known." *Id.* at 723.

### 2. Omission of cumulative demand data mandated by CEQA was an abuse of discretion.

Here, omission of cumulative demand data was an abuse of discretion because "it was reasonable and practical to include" the information and without it "the severity and significance of the cumulative impacts" were not "reflected adequately." *Kings County, supra,* 221 Cal.App.3d at 723.

It was reasonable and practical to include the demand information sought by comments because it was available on the County's own website. AR15612-15615 (LandWatch), *compiling* AR16063-16334 (MCWRA data). The updated SVIGSM modeling result, directly contradicting the EIR's claim that existing groundwater projects were sufficient to balance the Basin and halt seawater intrusion, was also available on the County's website. AR15616 (LandWatch), *citing* AR16391-16426 (*Protective Elevations*). Given this "disparity between what was considered and what was known," omission of the requested information was an abuse of discretion. *Kings County, supra,* 221 Cal.App.3d at 723. An agency may not uncritically rely on a summary of projections of cumulative sources from an outdated planning document, as the Ferrini EIR does, when available evidence shows that that the projections are underinclusive. *Bakersfield, supra,* 124 Cal.App.4th at 1216-1217.

The EIR's omissions do in fact tend to understate the severity of the cumulative overdraft and seawater intrusion impacts. The SVWP EIR cautioned that pumping in excess of assumed demand levels would exacerbate existing overdraft and seawater intrusion. AR25719. The omitted pumping data from 1995-2013 demonstrate that the SVWP EIR demand assumptions materially understate actual cumulative demand; and the omitted 2013 SVIGSM modeling demonstrates that additional groundwater management projects are required. Indeed, MCWRA's Executive Director eventually admitted as much in post-EIR hearings. AR5164, 5178-5179, 5183-5184, 5187, 5189-5190. Thus, it is clear that the severity and significance of the cumulative impacts" were not "reflected adequately." *Friends of the Eel, supra,* 108 Cal.App.4th at 869; *Kings County, supra,* 221 Cal.App.3d at 722–723.

Although the omitted information reveals a more severe impact, this Court is not required to determine this as a factual matter to find the EIR inadequate. Such a requirement would improperly burden the public and the Court and reward the agency for omitting information:

> Because the record does not provide information regarding similar energy developments in the San Joaquin Valley air basin, the agency could not, nor can we, determine whether such information would have revealed a more severe impact. Accordingly, the EIR is inadequate. To conclude otherwise would place the burden of producing relevant environmental data on the public rather than the agency and would allow the agency to avoid an attack on the adequacy of the information contained in the report simply by excluding such information.

*Kings County, supra,* 221 Cal.App.3d at 724; *see also Bakersfield, supra,* 124 Cal.App.4th at 1218 ("cannot fault" petitioner for lack of evidence of consequence of missing information); *EPIC, supra,* 44 Cal.4th at 488 ("a determination of whether omitted information would have affected an agency's decision . . . is highly speculative, an inquiry that takes the court beyond the realm of its competence.")

Appellees argue that "LandWatch relies principally on *Vineyard*" for its claim that the EIR erred by failing to provide total cumulative supply and demand. Opp. at 47. Not so. LandWatch also cites and relies on Guidelines, § 15130(b) and the other cases interpreting it. LWOB at 29-30, 34-35. However, Appellees attempt to distinguish *Vineyard* as a "project specific" rather than a cumulative case is unavailing. Opp. at 47. *Vineyard* is in fact a cumulative impact case, expressly interpreting Guidelines,§ 15130(b)(1):

> . . . 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].)

*Vineyard, supra,* 40 Cal.4th 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). Thus, contrary to Appellees (Opp. at 50), *Vineyard's* holding that "some discussion of total supply and demand is necessary to evaluate the long-term cumulative impact of development on water supply" is not dictum. *Vineyard, supra,* 40 Cal.4th at 441. Just as the EIR in *Vineyard* failed to present coherent supply and demand data for the Water Agency's Zone 40 (*id.* at 446), the EIR here fails to disclose available supply and demand for MCWRA's Zone 2C.[1]

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[1] Nothing in *Vineyard's* holding limits it to small projects. Indeed, *Vineyard's* "Principles Governing CEQA Analysis of Water Supply" relies on *Santiago County Water District v. County of Orange* ("*Santiago*") (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. *Id.* at 428-429; *see* AR486. (15,000 gpd is 16.8 afy.)

Contrary to Appellees, in objecting to the EIR's failure to disclose cumulative supply and demand information, LandWatch is not "ignoring Vineyard's direction to focus on the impacts of the project." Opp. at 49. In *Vineyard* the fundamental issue was the same as here: failure to clearly disclose the cumulative demand and supply *upon which the assessment of significant cumulative impacts rested*. *Id.* at 438-444. In *Vineyard*, the cumulative impacts at issue were the potential unavailability of long-term water supply and/or the impacts from providing alternative supplies. *Id.* at 442-446. Here, the cumulative impact is the unavailability of a sufficient long-term supply that does not exacerbate seawater intrusion or cause impacts from construction of new groundwater management projects to avoid that outcome.

**3. Despite Appellees claim to the contrary, the EIR was obliged first to evaluate the severity of the cumulative impact by considering the effects from *all* cumulative projects before determining whether the Project's contribution is considerable.**

Appellees seek to minimize the agency's obligation to provide an adequate cumulative analysis by suggesting that the treatises have only "recommended" the two-step analysis in which an agency first determines the severity of the significant cumulative impact from *all* projects and then determines if the project under review makes a considerable contribution. Opp. at 20. In fact, the treatises explain that statute, regulations, and case law mandate that the agency make "two related determinations:"

- "Is the combined impact of the project and other projects significant? 14 Cal Code Regs § 15130(a)(2).
- Is the project's incremental effect cumulatively considerable? 14 Cal Code Regs § 15130(a).

Kostka and Zischke, Practice Under the California Environmental Quality Act (2nd Ed., 2014 Update), § 13.39; *see also* Remy, Thomas, et al., Guide to CEQA (11th Ed., 2007), pp. 474-475; LWOB at 28-29.

Contrary to Appellees, *Rialto Citizens for Resp. Growth v. City of Rialto* ("*Rialto*") (2015) 208 Cal.App.4th 899, 933 does not obviate the need to determine the actual magnitude of the cumulative impact in order to set a threshold for considerable contribution in light of its severity. *See Communities for a Better Environment v. California Resources Agency* ("*CBE v. CRA*") (2002) 103 Cal.App.4th 98, 119-120 ("the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant.") *Rialto* holds only that the agency need not *duplicate* the air district's analysis of cumulative sources and may instead rely on the air district's numeric threshold for "considerable contribution" where the air district, as the agency responsible for attainment of clean air standards, has already done the analysis to determine that threshold. *Rialto, supra,* 208 Cal.App.4th at 933. *Rialto* does not repudiate the requirement that *someone* first needs to determine the actual magnitude of a significant impact and then to set a threshold for considerable contribution in light of the severity of that impact.

However, that two-step determination did not happen here because the EIR's analysis fails to include all cumulative water demand sources and fails to consider the Project's 95 afy contribution to overdraft and seawater intrusion in that cumulative context.

**4. Cases excusing a truncated analysis where the project makes *no* contribution to a significant cumulative effect are inapposite because the Project here makes some contribution.**

Cases cited by Appellees to justify a truncated cumulative analysis are inapposite here because in those cases the project made *no* contribution to a significant cumulative effect. Under § 15130(a)(1) an "EIR should not discuss impacts which do not result in part from the project evaluated in the EIR."

Thus, it neither surprising nor relevant that *City of Long Beach v. Los Angeles Unified School District* (2009) 176 Cal.App.4th 889, 909 justifies a

truncated cumulative analysis because the project *reduces* emissions and thus "*would not contribute*" to the cumulative impact. (emphasis added.)

Appellees repeatedly cite *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal. App. 4th 316, 346–47 and *Watsonville Pilots Ass'n v. City of Watsonville* (2010) 183 Cal. App. 4th 1059, 1094 to claim that an agency is not required to disclose groundwater conditions or identify a solution to the groundwater problem. Opp. at 32-34, 49, 51, 54. However, in both cases the agency and the Court found that the project *would not contribute at all* to the cumulative problem. *Cherry Valley* holds that the EIR was not required to address the extent of the cumulative basin overdraft because the EIR found that the project would have *no* impact, properly finding that the project "would cause no '*additional withdrawals*' of Beaumont Basin groundwater beyond existing conditions." 190 Cal. App. 4th at 346–47 (italics in original). Similarly, *Watsonville Pilots* holds that the EIR was not required to address the overdraft problem because the project would have *no* impact:

> The FEIR concludes that the impact of the new development contemplated by the 2030 General Plan will be offset by decreased water usage associated with the conversion of farmland and the City's water conservation measures. Thus, the overdraft problem will remain but *will not be exacerbated by the proposed project*.

183 Cal.App.4th at 1094 (emphasis added).

By contrast, the Ferrini Project will indisputably increase groundwater pumping by 95 afy. AR486. As argued, this 95 afy is a considerable contribution to the 2,000 afy overdraft that currently drives seawater intrusion in the Pressure subarea. LWOB at 50-51.

**5. "Brief description" cases do not excuse compliance with § 15130(b)(1)**.

Citing Guidelines,§ 15130(a), Appellees claim that the EIR need only "briefly describe its basis" for its cumulative conclusions, implying that this

excuses disclosure of cumulative sources under § 15130(b)(1). Opp. at 12, 28 46, 59. Not so.

Section 15130(a) applies in three situations:

- When there *is no* significant cumulative impact from all cumulative projects in combination. § 15130(a)(2) ("When the combined cumulative impact associated with the project's incremental effect and the effects of other projects is not significant, the EIR shall briefly indicate why the cumulative impact is not significant.")

- When the project at issue itself makes *no* contribution to the significant cumulative impact. § 15130(a)(1) ("An EIR should not discuss impacts which do not result in part from the project evaluated in the EIR.")

- When the project's contribution is determined to be less than considerable because it "is required to implement or fund its fair share of a mitigation measure or measures designed to alleviate the cumulative impact." § 15130(a)(3). In that event, the "lead agency shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable." *Id.*

Section 15130(a)(2) and its "briefly indicate" language do not apply here because there is *already* a significant cumulative impact from existing overdraft and seawater intrusion. *See* AR480 (EIR defining water quality degradation, aquifer depletion, and lowering groundwater levels, as significant impacts). Indeed, the EIR's cumulative analysis is specifically concerned with the efficacy of groundwater management projects intended to mitigate this significant cumulative impact. AR491-492, 4116.

Section 15130(a)(1) does not apply here because the Project's 95 afy water demand makes *some* contribution and the EIR was therefore obliged to determine whether the Project contribution is considerable.

Section 15130(a)(3), allowing the agency to determine that a project does not make a considerable contribution if it funds "its fair share of a measure designed to alleviate the cumulative impact," might apply. But this requires more than a "brief explanation;" it requires "facts and analysis supporting its conclusion

that the contribution will be rendered less than cumulatively considerable." *Id.* The relevant facts and analysis would be evidence that existing or committed groundwater projects will in fact balance the Basin and halt seawater intrusion, which requires disclosure and discussion of the relation of cumulative demand to the supply that can be pumped without impact. The introductory paragraph to § 15130(a), providing generally that an EIR "shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable" cannot excuse the *specific* requirement for "facts and analysis" in § 15130(a)(3).

Furthermore, cases are clear that the "briefly describe" and "briefly indicate" language in § 15130(a) and (a)(2) does not excuse compliance with the independent obligation to disclose all cumulative impact sources in § 15130**(b)(1)**. In *Ojai*, the EIR contained a "brief discussion" of the cumulative impact that relied on an inventory of cumulative sources and modeling of cumulative impacts from another plan document, just as the Ferrini EIR does. *Ojai, supra,* 176 Cal.App.3d at 426-427. The EIR concluded that there would be no significant cumulative impact from the project's emissions, "either by themselves or in concert with emissions from other sources." *Id.* at 427. Even though the *Ojai* court observes that an EIR need only "briefly indicate the reasons for determining that the effect is not significant and therefore not discussing it in detail" (*id.* at 429), the Court still found that the EIR was inadequate for omitting relevant cumulative sources and for failing to justify the limited scope of cumulative analysis under Guidelines,§ 15130(b). *Id.* at 430-431.

Thus, Courts require compliance with § 15130(b)(1) even where the agency determines that there is no significant cumulative impact or that the project would not make a considerable contribution to such an impact. *See, e.g., Friends of the Eel, supra,* 108 Cal.App.4th at 871–872 (agency found no cumulative water supply shortage). In *Kings County* the agency found that, although the cumulative ozone problem was significant, the project contribution was not considerable. 221 Cal.App.3d at 719. The Court nonetheless held that the EIR was inadequate

because it failed to disclose all cumulative sources and, without that information, there was no basis to determine the significance of the project's incremental contribution. *Id.* at 723-724.

An accurate accounting of all sources contributing to the severity of the cumulative impact is essential because the determination whether a project's contribution is "considerable" must be made in the "context of the existing cumulative effect;" and "the greater the existing environmental problems are, the lower the threshold should be for treating a project's contribution to cumulative impacts as significant." *CBE v. CRA, supra*, 103 Cal.App.4th at 119-120. Thus, to excuse the § 15130(b)(1) obligation to disclose cumulative impact sources whenever an agency determines that a project's non-zero contribution to a significant cumulative effect is not "considerable" would vitiate the EIR as a disclosure document. It would improperly "place the burden of producing relevant environmental data on the public rather than the agency and would allow the agency to avoid an attack on the adequacy of the information contained in the report simply by excluding such information." *Kings County, supra*, 221 Cal.App.3d at 724; *see also Bakersfield, supra,* 124 Cal.App.4th at 1218 (same).

Appellees "brief description" cases are inapposite. *City of Long Beach*, consistent with § 15130(a)(1), excuses a brief description because the project *reduces* emissions and thus "*would not contribute*" to air pollution. 176 Cal.App.4th at 909 (emphasis added). The observation in *San Francisco Baykeeper, Inc. v. California State Lands Comm'n* (2015) 242 Cal.App.4th 202, 222-224 that § 15130 requires only a brief explanation was at most dictum: the Court upheld the EIR expressly because it "provided *more than a brief explanation* for its conclusions regarding the project's incremental contribution to the cumulative impact," including quantifying the project's contribution through supplemental modeling in response to comments and through analysis of "pertinent studies regarding sediment transport." *Id*. at 220-224 (emphasis added).

Here, the FEIR did not disclose the *existence* of, much less discuss, the new 2013 modeling that was directly responsive to LandWatch's comments.

**6. Discussion of the cumulative *impact* and possible *mitigation* is not a substitute for identification of cumulative impact *sources*.**

Appellees argue that the County complied with § 15130(b) because the EIR "disclosed the severity and likelihood of the cumulative water supply impacts" by discussing (i) the state of seawater intrusion, (ii) MCWRA's efforts to address it, and (iii) the SVWP EIR's modeling. Opp. at 49. However, as noted, § 15130(b)(1) through (b)(5) identify *several* distinct "elements [that] are necessary to an adequate discussion of significant cumulative impacts."

Discussing MCWRA's efforts to address seawater intrusion fulfills at most the § 15130(b)(**5**) requirement to identify "reasonable, feasible options for mitigating or avoiding the project's contribution to any significant cumulative effects." Discussing the state of seawater intrusion and its modeling fulfills at most the § 15130(b)(**4**) requirement for a "summary of the expected environmental *effects* to be produced by those projects." (Emphasis added.)

However, § 15130(b)(**1**) *also* requires that the EIR must identify the *sources* of cumulative effects, either through a list of "projects producing related or cumulative impacts" or a "*summary of projections* . . . that describes or evaluates *conditions contributing to* the cumulative effect." (Emphasis added.) Here, by ignoring the mandate of § 15130(b)(1), the EIR fails to disclose the sources of cumulative effects or the material fact that these sources greatly exceed the sources assumed in the SVWP EIR modeling.

**D. The EIR fails to comply with the legal obligation to provide a "roadmap" to the demand information in the SVWP EIR on which it relies.**

In *Vineyard*, as here, the EIR relied on an EIR for a water project without summarizing the referenced information and describing the relation to the project

EIR, i.e., without providing a "road map to the information it intends to convey." *Vineyard, supra*, 40 Cal.4th at 443. Here, as in *Vineyard*, the EIR relies on water demand assumptions in a prior EIR without providing "a consistent and coherent description of the demand for new water" or the available supply (*id.* at 439); without making "sufficiently clear [the project EIR's] relationship with" the prior EIR (*id.* at 443); without providing an "explanation of the differences among these figures" (*id.* at 440); and without making it possible to "derive the missing quantitative analysis" (*id.* at 441). Here, as in *Vineyard,* because the EIR "relied on information not actually incorporated or described and referenced in the FEIR, it failed to proceed in the manner provided in CEQA." *Id.* at 442. In particular, in support of its conclusion that "the SVWP provides the surface water supply necessary to attain a hydrologically balanced groundwater basin in the Salinas Valley," the Ferrini EIR expressly cites, but fails to provide, summarize, or explain, the SVWP EIR's "assumptions about future population growth and water demand in the Salinas Valley." AR466.

Appellees argue that the EIR's discussion of the SVWP EIR was sufficient because the EIR described the SVWP itself and its relevance to the Project and explained the nature of the SVWP EIR computer model. Opp. at 58-59, *citing* AR466, 4115-4116. But this discussion is inadequate because it neither provides nor summarizes the projections of cumulative water demand nor incorporates the SVWP EIR by reference. *Vineyard, supra,* 40 Cal.4th at 443. Critically, the EIR fails to explain differences in the 2002 SVWP EIR demand assumptions and current assumptions, despite LandWatch's comments seeking just this information.[2] *Id.* at 440 ("An explanation of the differences among these figures . . . did not appear in the FEIR"); *see* AR3555-3564 (comments 57, 59, 61, 63, 65).

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[2] Contrary to Appellees (Opp. at 59), LandWatch exhausted its claim that the County failed to incorporate the SVWP EIR by objecting to reliance on the SVWP EIR assumptions and asking that the EIR state those assumptions and reconcile them with current assumptions. AR3555-3564 (comments 57, 59, 61, 63, 65).

Contrary to Appellees (Opp. at 59-60), merely referencing six pages of the SVWP EIR that discuss the SVIGSM model does not meet the requirements for incorporation by reference under Guidelines, § 15150. *Vineyard* requires that the referenced information be summarized so as to "adequately inform the public and decision makers." *Vineyard, supra,* 40 Cal.4th at 442-443. Furthermore, those six pages do *not* present the missing information, i.e., the SVWP EIR's demand assumptions. AR494 (DEIR) *citing* AR26063-26069 (SVWP EIR, pp. 2-42 to 2-48, discussing modeling but not presenting demand assumptions). *Vineyard* requires "explicit reference . . . to the particular portions incorporated." *Id.* at 443.

### E. The EIR fails to comply with the legal obligation to provide an adequate description of the environmental setting, which here includes existing water demand.

"If the description of the environmental setting of the project site and surrounding area is inaccurate, incomplete or misleading, the EIR does not comply with CEQA." *Cadiz, supra,* 83 Cal.App.4th at 87 (failure to quantify aquifer volume). Appellees argue that the EIR adequately discloses the environmental setting because it "describes groundwater conditions both locally and regionally." Opp. at 57. Appellees argue that there is no authority for requiring "an EIR to provide total cumulative water supply and demand data as part of an EIR's discussion of environmental setting."[3] Opp. at 5. Appellees are wrong here.

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And LandWatch's briefing below objected to the failure to provide a road map to the SVWP EIR assumptions, citing *Vineyard, supra,* 40 Cal.4th at 439-443. CT II:398:11-22.

[3] Contrary to Appellees (Opp. at 55), LandWatch argued below that the EIR fails to disclose baseline demand. CT II:396:6-10, 397:21-22, 398:25-27, 407:27-408:3, 409:8-17; CT IV:837:17-21

The case law cited above requires disclosure of both future and *existing* cumulative impact sources in cumulative analysis. *See, e.g., Kings County, supra*, 221 Cal.App.3d at 723-724 (failing to provide and consider available "baseline emissions inventory data"); *Ojai, supra*, 176 Cal.App.3d at 427, 430-431 (failing to consider all existing sources from available "emissions inventory"). Thus, *Friends of the Eel, supra*, 108 Cal.App.4th at 869, 875 rejects the agency's claim that its "abbreviated description of historical levels of diversion from the Eel River sufficiently describes the Project's environmental setting" as required by Guidelines,§ 15125, holding that this "incomplete description of the Project's environmental setting fails to set the stage for a discussion of the cumulative impact."

As discussed in section I.G below, the existing demand data belatedly provided in the FEIR was inadequate. The sole datum for existing Basin-wide demand was not the data actually *used* in the EIR's analysis; and the other data, also not used in any analysis, was only for *portions* of the Basin-wide demand.

### F. The EIR fails to comply with the legal obligation to provide good faith, reasoned response to comments seeking water demand information.

CEQA mandates that an FEIR provide reasoned, good faith comment responses. P.R.C., § 21091(d)(2)(b); Guidelines, § 15088. Where comments seek omitted facts or analysis essential to an EIR's water supply conclusions, the failure to correct those omissions through comment responses "renders the EIR defective as an informational document." *California Oak, supra*, 133 Cal.App.4th at 1244. Review of a claim that "an EIR has omitted essential information is a procedural question subject to de novo review." *Banning Ranch, supra*, 2 Cal.5th at 935. This Court should therefore be guided by case law as to the adequacy of responses. *See, e.g., Cleary, supra*, 118 Cal.App.3d at 359 ("under the criteria established by the statutory and case law the County's responses are inadequate to answer the specific concerns voiced in the letter.")

Specific questions require specific answers. In *Cleary*, responses were inadequate because they were "nonspecific and general" and they failed to provide the "specific factual information" requested or to address the "specific concerns" raised. *Id.* at 358-359. Here the EIR fails to meet *Cleary's* requirements.

LandWatch's comments were specific. First, LandWatch detailed the reasons that the demand assumptions in the 2002 SVWP EIR were understated and, thus, it is improper to rely on the SVWP. AR3555-3556 (comment 36-57); *see also* AR3558-3560 (comment 36-61 – explaining SVWP EIR understatement of *existing* demand), AR3562-3563 (comment 36-63 – explaining SVWP EIR understatement of *future* demand). Second, LandWatch requested a statement of the Basin pumping sustainable without overdraft and seawater intrusion. AR3558 (comment 36-59). Third, LandWatch requested that the EIR provide current and projected Basin-wide demand data and compare this data to the demand assumptions in the SVWP EIR. AR3558, 3560, 3564, 3566-3567 (comments 36-61, 36-63, 36-65).

The FEIR responses were nonspecific and general, evading the clear and specific concerns LandWatch raised. The FEIR does not provide *any* information about sustainable supply. The FEIR provides existing Basin-wide demand for only a single year (AR4114), but it does not provide any basin-wide projections of *future* demand, despite LandWatch's request and the mandate of § 15130(b)(1) and P.R.C. § 21083(b)(2). The FEIR's future demand projections are limited to the Cal-Water service area, omitting the vast majority of cumulative demand, which is from agriculture and urban demand met by other suppliers. AR4122. As discussed in section I.G. below, provision of demand data only for parts of the Basin or data that was not actually used in the EIR's analysis does not suffice.

Critically, the FEIR entirely failed to provide the requested comparison of the SVWP EIR Basin-wide demand assumptions to the actual demand, other than the misleading and conclusory claim that the SVWP demand assumptions are

"conservative."[4] AR4113. The responses are inadequate because they fail to address "objections raised in the comments . . . in detail giving reasons why specific comments and suggestions were not accepted;" fail to provide "good faith, reasoned analysis in response;" and amount to "conclusory statements unsupported by factual information." CEQA Guidelines, § 15088(c); *see Cleary, supra*, 118 Cal.App.3d at 357-359.

Appellees attempt to distinguish *California Oak, supra,* 133 Cal.App.4th at 1236 and *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* ("*SCOPE*") (2003) 106 Cal.App.4th 715, 722-723 as cases involving the uncertainty of water supply, whereas here, they claim, there is no uncertainty as to the Project's water supply. Opp. at 71. This facile distinction will not do. There was clearly uncertainty about the the water supply *sustainable without causing continuing overdraft and seawater intrusion impacts,* which is precisely the issue LandWatch's comments raised.

And the *principle* for which both cases stand is that an agency must actually respond to comments that raise specific concerns with specific answers. For example, in *California Oak,* comment responses were inadequate because the FEIR did not "directly address" the issues raised by comments, which were specific reasons why the assumed water entitlement may not be available. *California Oak, supra,* 133 Cal.App.4th at 1236. Similarly, the Ferrini EIR is inadequate because it is "completely devoid of any direct discussion" of the specific issue LandWatch raised (*id.* at 1237): whether a comparison of the SVWP EIR demand assumptions to actual Basin demand since 1995, and to current projections of future Basin demand, would disclose that the SVWP EIR understates demand, precluding continuing reliance on its analysis.

Appellees argue that the County's responses were adequate because, they claim, "the County did not rely solely on the SVWP EIR" (Opp. at 69) and there

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[4] Section I.H.2 below explains why this claim is misleading.

was substantial evidence for the County's conclusions (Opp. at 71). However, the Ferrini EIR repeatedly cites and relies on the accuracy of the SVWP EIR's modeling of the efficacy of the existing groundwater projects. AR466, 492, 4115-4116. Furthermore, *California Oak* rejects the relevance of the claim that there was *other* substantial evidence of the sufficiency of the water supply, because that evidence "does not address the point in dispute" raised in comments. *Id.* at 1240. Indeed, "[t]he 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 70, 82.

Contrary to Appellees, the questions LandWatch raised were not "outside the scope of the EIR" or only "tangentially relevant." Opp. at 67-68. As argued, the demand information was mandated in CEQA's requirements for an adequate cumulative analysis and setting description and by *Vineyard's* requirement for a roadmap to a prior EIR relied upon for cumulative water supply and demand assumptions. Where comments challenge the sufficiency of an EIR's disclosure of cumulative impact sources, an FEIR must respond. *Bakersfield, supra*, 124 Cal.App.4th at 1218 ("Neither EIR meaningfully addressed comments stating that the two shopping centers will have cumulative adverse impacts. As a result, the cumulative impacts analyses in both EIR's are underinclusive and misleading"); *Friends of the Eel, supra*, 108 Cal.App.4th at 878, 881 ("Agency's responses to comments violate CEQA insofar as these comments raise issues we have identified as inadequately addressed in the EIR.")

Contrary to Appellees, provision of the requested information was not "unduly onerous." Opp. at 68. As noted, the demand information sought by comments was *available on the County's own website*. AR15612-15615 (LandWatch), *compiling* AR16063-16334 (MCWRA pumping data 1995-2013). The 2013 updated SVIGSM modeling result, contradicting the EIR's claim that existing groundwater projects were sufficient to balance the Basin and halt

seawater intrusion, was also *available on the County's own website* prior to the release of the 2014 FEIR. AR15616 (LandWatch), *citing* AR16391-16426 (*Protective Elevations*).

### G. Provision of *partial* demand data for some urban uses within the Basin is insufficient because the EIR does not define or justify such a limited scope of cumulative analysis, and it does not *use* these partial data in the analysis on which it relies.

Contrary to Appellees (Opp. at 51, 56), the demand data for *urban* uses for *portions* of the Basin is not sufficient because *total* Basin demand causes overdraft and seawater intrusion. AR26056-26057 (SVWP EIR: "pumping in each area affects seawater intrusion because each subarea draws water from the same Basin.") LandWatch's comments sought the readily available Basin-wide demand information because *that* data determines the continuing reasonableness of the SVWP EIR demand projections. *Vineyard* holds that an EIR must address *relevant* circumstances. *Vineyard, supra,* 40 Cal.4th 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").

The DEIR reports only the existing demand, for urban uses, from a small portion of the 180/400-Foot Aquifer, i.e., the current pumping from the two Cal-Water wells that would serve the Project. AR460. The FEIR reports the projected 2040 demand from the Cal-Water Urban Water Management Plan ("UWMP") that covers Cal-Water's "small isolated systems" scattered in various subareas throughout the Basin. AR4122, AR29289; *see* AR29316-29319. Even though agriculture accounts for 90% of Basin demand (AR4114, 15235-15236), the UWMP omits agricultural use because Cal-Water does not serve agricultural users. AR29304-29306 (UWMP); 4122 (FEIR).

These partial demand data are inadequate. An agency must describe and explain the geographic scope of its cumulative analysis. Guidelines, § 15130(b)(3). Although an agency has discretion to determine the boundaries of its analysis, that boundary must be informed by substantial evidence. *O.W.L. Foundation v. City of Rohnert Park* (2008) 168 Cal.App.4th 568, 594. Here the EIR's cumulative impact analysis, "Impact 3.6-4," purports to cover "the Salinas Valley Groundwater Basin." AR491-492. Nothing in the EIR's discussion of the Basin-wide overdraft causing seawater intrusion even *suggests* that the geographic scope of its analysis is limited, or could meaningfully *be* limited, to the Cal-Water service territory. AR451-468. The EIR's provision of cumulative impact sources 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; *Ojai, supra,* 126 Cal.App.3d at 429-431; *Bakersfield, supra,* 124 Cal.App.4th at 1213-1214.

In addition, the partial demand data in the FEIR are inadequate because they are not the data actually *used* in the DEIR's analysis. An EIR must disclose the environmental setting information actually used in its analysis in order to "permit the significant effects of the project to be considered in the full environmental context." Guidelines, § 15125(c). Thus, an adequate setting description must provide the information that will "make further analysis possible." *County of Amador, supra,* 76 Cal.App.4th at 954 (rejecting mere "presentation of historical observations" because it did not support "an operational analysis").

The *analysis* referenced and relied on by the EIR was the modeling in the 2002 SVWP EIR. [5] AR466. The demand information on which *that* analysis

[5] Contrary to Appellees (Opp. at 69), the analysis of the sufficiency of the existing groundwater projects was not "based on updated and accurate information provided by MCWRA." Indeed the updated information that MCWRA eventually provided, after the EIR, was an admission that the SVWP EIR demand

relied was the SVWP EIR's "Estimated Existing and Future Water Conditions," which projects that total Basin demand would decline from 463,000 afy in 1995 to 443,000 afy in 2030. AR25234 (SVWP EIR Table 1-2). The Ferrini EIR's partial, urban demand data from the Cal-Water UWMP (AR4122) was neither *used* in nor compared to the SVWP EIR analysis. Nor was the existing Basin-wide demand of 500,000 afy, belatedly provided in the FEIR (AR4114), used in or compared to the SVWP EIR. Had the EIR made the comparison, it would have disclosed that the SVWP EIR demand assumptions were not "conservative" but substantially understated.

As in *Friends of the Eel*, *supra*, 108 Cal. App. 4th 874-875, the FEIR's belated provision of incomplete environmental setting information "fails to set the stage for a discussion of the cumulative impact."

### H. Post-EIR disclosures could not legally, and did not factually, avoid prejudice.

Appellees argue that the EIR's failure to disclose the supply and demand information, the inefficacy of the SVWP, and the need for additional groundwater management projects was not prejudicial because this information was disclosed after the EIR was completed. Opp. at 62-64. Appellees are wrong as a matter of law and fact.

#### 1. Post-EIR disclosures cannot cure an inadequate EIR as a matter of law.

The issue here is the adequacy of the EIR, including its disclosure of information required by §§ 15130(b)(1) and 15125, its provision of the road map to referenced documents, and its responses to comments seeking specific

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assumptions were understated (AR5187) and that additional groundwater management projects were required (AR5164, 5178-5179, 5183-5184, 5189-5190).

information. Thus, even if the post-EIR disclosures cited by Appellees included all of the required information that the EIR omits – and they do not – the omissions were prejudicial because the information is *not in the EIR*.

The California Supreme Court has three times 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.

*Laurel Heights I, supra,* 47 Cal.3d at 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.

Omission of required information is prejudicial if it would "substantially impair *the EIR's* informational function." *Banning Ranch, supra,* 2 Cal.5th 918, 942 (emphasis added). Thus, the Supreme Court held that omission of required information from the EIR was prejudicial *even though* that information "can be gleaned from a diligent search of the EIR appendices and other elements of the administrative record." *Id.* at 941. Citing *Vineyard, Banning Ranch* holds that "such a fragmented presentation is inadequate." *Id.*

Lower courts have also repeatedly held that post-EIR testimony and reports cannot cure an informationally inadequate EIR. *San Joaquin Raptor, supra,* 27 Cal.App.4th at 727, holds that post-EIR testimony disclosing the omitted environmental setting information cannot make up for the EIR's omission, because "[w]hatever is required to be considered in an EIR must be in the report itself. Oral reports cannot supply what is lacking." The Court held that the information should have been included in the draft EIR so that the public could

comment and the final EIR respond. *Id.* Furthermore, as discussed in section I.H.2 below, post-EIR testimony did not respond to LandWatch's objections.

In *CBE v. Richmond, supra,* 184 Cal. App. 4th at 87-88 the Court rejected the argument that post-EIR testimony to address the EIR's inadequate description of baseline conditions was sufficient to support an "informed decision to approve the EIR," because this post-EIR testimony "is beside the point:"

> It is the adequacy of the EIR with which we are concerned, not the propriety of the subsequent decision to approve the Project. "[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." [citations] Furthermore, the supplemental information provided by Dr. Sahu during the post-EIR "battle of the experts" is too little, and certainly too late, to satisfy CEQA's requirements. (See *Save Our Peninsula, supra,* 87 Cal.App.4th at p. 124, 104 Cal.Rptr.2d 326 [information about baseline "occurred at the very end of the environmental review process, thus avoiding public scrutiny and precluding the meaningful comparison of preproject and postproject conditions required by CEQA"].)

*Id.* at 88. *CBE v. Richmond* cites *Santiago, supra,* 118 Cal.App.3d at 831, in which the Court rejected post-EIR information regarding available water resources, holding that the issue was the adequacy of the EIR. Here, too, the Court should reject the claim that post-EIR disclosures could cure the Ferrini EIR's inadequate discussion of water supply.

*Sierra Club v. Tahoe Regional Planning Agency* (2013) 916 F.Supp.2d 1098, 1138-1139 rejects consideration of post-EIR analysis offered to support the sufficiency of impact fee mitigation:

> If the EIR-EIS's analysis of the mitigation measure is to be upheld, it must be upheld on the basis articulated in that document," because "[a]dditional documentation in the record . . . 'does not make up for the lack of analysis in the EIR.' [citation]. Agencies thwart the informational purposes of CEQA when they attempt to alter the conclusions in the EIR after its finalization.

Here, too, the Court should reject the post-EIR effort to rehabilitate the EIR's inadequate discussion of impact fee mitigation. And indeed, the post-EIR disclosures demonstrate the *in*adequacy of Zone 2C impact fees, which do not include a fair share of needed future projects. LWOB at 43-44.

Appellees' reliance on *Kings County, supra,* 221 CalApp.3d at 727 is inapposite. *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 quoted with approval by the California Supreme Court. Laurel Heights I, supra,* 47 Cal.3d at 405. To the extent that *Kings County* suggests that defects in an EIR can be cured with post-EIR testimony as a matter of law, it is inconsistent with the cases discussed above.

**2. Post-EIR disclosures did not cure prejudice as a matter of fact.**

Furthermore, unlike in *Kings County,* here the post-FEIR testimony did not disclose essential information, so prejudice could not have been cured as a matter of fact. While finally admitting that additional projects are necessary, the County provided *no* information about their environmental impacts or their uncertainty, which CEQA requires. *Vineyard, supra,* 40 Cal.4th at 432, 434, 439, 446; *see* LWOB at 42. Nor did the County acknowledge that unfunded and uncertain projects do not meet CEQA's mitigation requirements. AR029426; AR029333 (SVWP Phase II not funded); LWOB at 47-48. Although LandWatch objected to these omissions (AR15616-15617), the County made no response. LWOB at 48.

Nor did the County ever provide current demand assumptions. Although MCWRA eventually admitted that the SVW EIR understates demand (AR5187), it provided no comparison to existing and foreseeable future demand.

Appellees *now* cite data culled from post-EIR submissions to argue as a factual matter that the SVWP EIR did *not* understate demand and that its demand assumptions were "conservative" as the FEIR claims. Opp. at 60-61. This

litigation argument, contradicting the post-EIR testimony by MCWRA staff, and based on data outside the EIR, cannot cure the inadequate EIR. *Santiago, supra,* 118 Cal.App.3d at 831 (rejecting effort to "remedy the inadequacies of the EIR by presenting evidence to the trial court."); *Banning Ranch, supra,* 2 Cal.5th at 941 ("fragmented presentation" of data outside EIR inadequate)

Furthermore, Appellees' carefully worded arguments about *partial* demand data ("as to the *Project* or as to *urban users* or as to the *180/400 Foot Aquifer*" – Opp. at 60) are irrelevant because it is *total* Basin cumulative pumping that drives overdraft and seawater intrusion. AR26056-26057 (SVWP EIR). Appellees argue that 2013 demand in one Basin *subarea* was less than the 1995 demand identified in the SVWP EIR, that *urban* demand was less than the SVWP EIR projection; and that demand on the *Project site* will be smaller than assumed. Opp. at 60. The relevant facts for cumulative analysis are that (i) the SVWP EIR projected total Basin demand would decline from 463,000 afy in 1995 to 443,000 afy in 2030 (AR25234); but, (ii) total Basin pumping has in fact averaged 500,989 afy for the 19 years after 1995, substantially greater than the SVWP EIR's projections. AR25234 (SVWP EIR), 15614 (MCWRA data). It is misleading to claim that the SVWP EIR demand assumptions were "conservative" when, as MCWRA acknowledged and LandWatch demonstrated, "the amount of pumping that was assumed in those models was, actually, much lower than the amount of pumping that's being reported." AR5187 (MCWRA staff); *see* AR15612-15615 (LandWatch).

## II. The County erred by failing to recirculate the EIR after significant new information disclosed that the EIR relies on materially inaccurate water demand assumptions and that additional groundwater projects are necessary.

LandWatch has shown that recirculation was required under *both* Guidelines, §15088.5(a)(**1**) *and* §15088.5(a)(**4**). LWOB at 51-52, 56-57.

However, Appellees simply ignore LandWatch's recirculation claim under §15088.5(a)(**4**). Opp. at 71-73 (addressing only §15088.5(a)(**1**)).

Recirculation was required under §15088.5(a)(**4**) because post-EIR admissions of the invalidity of the SVWP EIR demand assumptions and the inefficacy of the SVWP to halt seawater intrusion disclosed that the EIR "was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." Critically, the public was denied the opportunity for meaningful comment *and response* as to the lack of actual commitment to additional projects and their environmental consequences. LWOB at 51-52.

As argued in section I.H, post-EIR disclosure cannot and did not cure the EIR's failure to respond to comments. The purpose of recirculation is to ensure that comments can be made *and the agency responds*. *See, e.g., San Joaquin Raptor, supra*, 27 Cal.App.4th at 727 ("Comments could have then been made addressing the adequacy of the investigation and responses prepared to these comments. The FEIR would then have provided information sufficient for the Board to intelligently assess the conclusion . . .."). In *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120-134, post-EIR revisions to water demand data and proposed mitigation required recirculation to ensure that information is "presented in the EIR and subjected to the test of public scrutiny" through comment and response. *Save Our Peninsula* repeatedly emphasizes the need for "public comment *and response*." *Id.* at 115, 120, 133 (emphasis added).

Recirculation was independently required under §15088.5(a)(**1**) because the post-EIR information disclosed new significant impacts. Appellees argue that "[t]he *FEIR* merely amplifies and clarifies the information set forth in the DEIR." Opp. at 72 (emphasis added). Appellees thereby fail to respond to the actual basis of LandWatch's §15088.5(a)(1) claim – that significant new information was

disclosed *after the FEIR*, not *in* the FEIR. *See Cadiz, supra,* 83 Cal.App.4th at 95 (recirculation required due to *post-FEIR* information).

That significant *post-FEIR* information shows potential significant impacts not disclosed in the EIR, either in the form of unmitigated seawater intrusion if additional water management projects are not built, or in the form of impacts from their construction if they are built. AR15576, 15616-15617 (citing AR16406), AR16428-016447, AR20362 (citing AR20371-20374). *This evidence is uncontroverted*. Appellees do not even attempt to rebut evidence that there will be continuing seawater intrusion without new projects or other significant impacts from construction of new projects. LWOB at 42. LandWatch has demonstrated that the new information is significant and thus requires recirculation because (i) it shows potential significant impacts, all that is required by *Vineyard, supra*, 40 Cal.4th at 447-448, and (ii) 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.

## III. Substantial evidence does not support the County's determination that the Project's contribution to significant cumulative water supply impacts is not considerable.

In light of the EIR's informational failings, the Court need not reach the distinct question whether the EIR provides substantial evidence to support the County's findings. *CBE v. Richmond, supra,* 184 Cal. App. 4th at 101 (declining to address cumulative analysis and recirculation claims where EIR held informationally inadequate because these claims "may be rendered moot by any subsequent CEQA review.") Furthermore, noncompliance with informational mandates here precludes substantial evidence. *See California Oak, supra*, 133 Cal.App.4th at 1226-1227, 1235-1242; *SCOPE, supra*, 106 Cal.App.4th at 72-724 (approval not supported by "substantial evidence" where EIR failed to provide "sufficient detail"). However, if the Court does reach this question, it should find

that there is no substantial evidence because the EIR fails to present "facts and analysis" to support its conclusions. *Vineyard, supra*, 40 Cal.4th at 442; Guidelines, § 15130(a)(3).

### A. There is no substantial evidence that payment of Zone 2C assessments is adequate mitigation to render the Project's contribution to seawater intrusion less than cumulatively considerable.

An agency may find, based on "facts and analysis," that "a project's contribution to a significant cumulative impact will be rendered 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." Guidelines, § 15130(a)(3). CEQA permits a finding that payment of "fair share" impact fees is sufficient mitigation only if (1) the necessary mitigation program is actually committed and (2) the efficacy of the mitigation program has been evaluated in a CEQA review. LWOB at 43-44. Neither finding can be made here.

First, the necessary mitigation program is not committed because more projects are still required to halt seawater intrusion. AR37 (County's findings: "more are necessary"); AR29425 (MCWRA: "more are necessary"); AR5164, 5178-5179, 5183-5184, 5189-5190 (MCWRA: to stop seawater intrusion, new water management projects would be required that would need to deliver an additional 58,000-60,000 afy of groundwater recharge); AR16406 (*Protective Elevations*: same). These projects are not approved or funded, and there is no certainty that they will be. AR15616-15617 (LandWatch), *citing* AR16427 (SVWP Phase II status); AR29426 (MCWRA: future projects would be implemented only "if accepted by the public," i.e., approved and funded).

Adequate mitigation must be "required in, or incorporated into, the project." P.R.C., § 21081(a)(1); CEQA Guidelines, § 15091(b). Mitigation must be "fully enforceable through permit conditions, agreements, or other measures."

P.R.C., § 21081.6(a),(b). Case law rejects impact fee mitigation where the record demonstrates that the needed mitigation projects have not been approved or the existing impact fee does not include a fair share of *all* needed projects. In *Anderson First Coalition v. City of Anderson* ("*Anderson*") (2005) 130 Cal.App.4th 1173, 1188, mitigation of cumulative impacts was insufficient because, as here, a second phase of a needed mitigation project had not been committed and the agency had not actually updated its impact fee to include a fair share of the needed project. In *Gray, supra,* 167 Cal.App.4th at 1121-1122, mitigation was inadequate because Caltrans' mere "intent to make improvements" without a "definite commitment" was insufficient. In both *Anderson* and *Gray*, even though the agencies had actually determined the equitable fair share formula for future mitigation, the lack of a *committed* project rendered mitigation inadequate. When, as here, neither the mitigation project *no*r the fair share are identified or certain, mitigation is even more speculative and inadequate. *California Clean Energy Committee v. City of Woodland* (2014) 225 Cal.App.4th 173, 197–198.

Second, the efficacy of the necessary mitigation has not been reviewed under CEQA as is required. *CNPS, supra,* 170 Cal.App.4th 957, 1055-1056; *California Clean Energy Committee, supra,* 225 Cal.App.4th at 199; *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1176. Here, there is no evidence of CEQA review of the efficacy and impacts of the needed future projects. The only evidence is to the contrary. *See* AR16427 (SVWP Phase II status: EIR not begun).

Appellees argue that "the rules under CEQA governing mitigation measures do not apply" because "payment of Zone 2C fees is not a mitigation measures [sic], rather, it is a piece of substantial evidence supporting the EIR's impact conclusion." Opp. at 39. Not so. The EIR expressly identifies payment of Zone 2C fees as fair share mitigation. The FEIR states that the Project's payment of Zone 2C fees "funds a proportionate *fair share* toward regional improvements

to help better manage the basin as a whole. *This would be similar to paying toward the Regional Development Impact Fees for roadway improvements mitigation for cumulative traffic impacts*." AR4116 (emphasis added). The DEIR states that the "project applicant contributes financially toward the SVWP and its groundwater management strategies. The project's *impact on the groundwater basin is therefore mitigated by this contribution*." AR492 (emphasis added).

Appellees argue that the EIR does not categorically claim that the SVWP will halt seawater intrusion and that "read in context" one might infer that the SVWP merely has this as its "goal." Opp. at 30-31. However, the DEIR does in fact make the categorical claim that the SVWP "provides for the long-term management and protection of groundwater resources *by stopping seawater intrusion.*" AR489; *see also* AR466, 492. The DEIR asserts that "the SVWP provides the surface water supply necessary to attain a hydrologically balanced groundwater basin." AR466, 489. Furthermore, the EIR cannot consistently claim that payment of a fair share of existing groundwater projects is sufficient mitigation at the same time it admits that the efficacy of those projects is not established.[6]

Appellees argue that this case can be distinguished from *Anderson* because, they claim, the Zone 2C assessment "may be updated as necessary." Opp. at 39. This misreads *Anderson*, in which the deficiencies were that the "mitigation measure is vague regarding 'the program to provide [those] improvements'" *and* that the City had not yet updated its Impact Fee Program to require payment of the Phase 2 cost of the freeway interchange project. *Anderson First Coalition, supra,* 130 Cal.App.4th at 1187-1189; *see also Gray, supra*, 167.Cal.App.4th at 1122 (mitigation inadequate because nothing requires agencies "to actually impose

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[6] Appellees argue that the EIR does not rely on the SVWP alone, but on other prior projects. Opp. at 31. Appellees miss the point. The SVWP is the *last* project to be implemented, but the County still acknowledges that "more are necessary." AR37, 29425.

impact fees;" and the EIR fails to discuss "how or when the possible mitigation fees would be collected or spent" or "the extent to which the mitigation measure would alleviate the traffic impacts.") Here, nothing requires the Project to pay a fair share of the needed future projects, which are neither committed nor included in an impact fee. Where, as here, the impact fee has not even been calculated or mandated, the deficiency is greater. *California Clean Energy Committee, supra,* 225 Cal.App.4th at 197–198.

Contrary to Appellees (Opp. at 39), enacting an adequate impact fee for the needed projects is not a matter of simply "updating" Zone 2C assessments. Zone 2C is the benefit assessment zone for just those specific projects described in the SVWP Engineer's Report. AR16341; *see* Cal. Const., art. 13D, § 4(b) (Proposition 218 requires assessment based on the specific project described in an engineer's report). MCWRA admits that additional projects would be built only if "accepted by the public" (AR29426), which requires, first, that the County environmentally review and approve the project and, second, that the public affirm a Proposition 218 vote to fund it, based on an engineer's report creating a *new* assessment. AR16352 (SVWP Engineer's Report); *see also* AR16341, 16341, 16351 (same). A new assessment requires a majority landowner vote on a cost-assessed basis. AR16351; *see* Cal. Const., art. 13D, § 4; *see also* AR16365.

Contrary to Appellees, *Watsonville Pilots*' holding that the EIR at issue did not need to identify a solution to the seawater intrusion problem is irrelevant here. As argued, both the *Watsonville Pilots* and *Cherry Pass* EIRs were fundamentally different than the Ferrini EIR, because both EIRs found that the project at issue would *not increase* groundwater pumping; and, thus, neither EIR relied on impact fee mitigation. *Watsonville Pilots Assn., supra,* 183 Cal.App.4th at 1094; *Cherry Valley, supra,* 190 Cal. App. 4th at 346–47. By contrast, the Ferrini Project would increase net pumping and does rely on impact fee mitigation. AR486, 492, 4116.

Furthermore, LandWatch does not make Appellees' straw man argument that the Ferrini project must *by itself* solve the seawater intrusion problem. Opp. at

14, 32. LandWatch objects only that there is no substantial evidence that the "project is required to implement or fund its *fair share* of a mitigation measure or measures designed to alleviate the cumulative impact." Guidelines, § 15130(a)(3) (emphasis added). The evidence shows that the groundwater projects toward which the Ferrini Project pays a fair share will *not* in fact alleviate the cumulative impact.

Appellees cite MCWRA's 2009 letters relied on by the DEIR to conclude that the SVWP *will* halt seawater intrusion. Opp. at 36, citing AR6024-6026, 6876-6878 (MCWRA: SVWP "*will serve*, together with the existing Castroville Seawater Intrusion Project, *to meet the listed objectives*," which include "*stopping seawater intrusion*," (emphasis added).) But in 2014, *after the Ferrini EIR*, MCWRA did *not* concur with the EIR's conclusion that the SVWP will halt seawater intrusion; MCWRA concluded instead that more groundwater projects are necessary. AR5183-5184, 5189-5190, 29425. Contrary to Appellees (Opp. at 38), MCWRA's failure to object to the *legal* conclusion as to the sufficiency of mitigation under CEQA is not competent or relevant. *See, e.g., Kings County, supra*, 221 Cal.App.3d at 721, 724 (noting CARB's statement that its "concerns about cumulative impacts . . . have been addressed," but holding nonetheless that the scope of cumulative analysis was inadequate to support the determination).

Appellees also cite a belated letter by the applicant's consultant for the proposition that the Project's impact was accounted for in the SVWP EIR. Opp. at 38. Inclusion of Project demand in the assumptions of the 2002 SVWP modeling is irrelevant given that, based on 2013 modeling, MCWRA found that additional mitigation is needed in light of the actual severity of the cumulative problem. AR16406 (*Protective Elevations*); *see* AR5183-5184, 5189-5190 (MCWRA testimony).

Finally, Contrary to Appellees' implication (Opp. at 21, 40), the County did not consider the Sustainable Groundwater Management Act ("SGMA") as evidence that the Project would not make a considerable contribution. SGMA

was passed *after* the EIR was final. AR2704 (FEIR); Water Code §§ 10720 et seq.; *see* 2014 Cal. Legis. Serv. Ch. 346 (S.B. 1168) (WEST). SGMA is not mentioned in the EIR, hearing testimony, staff reports, or the findings. (AR sections B, D, F, G.) As extra-record evidence, SGMA is inadmissible as to the relevant question: whether the County's findings were based on substantial evidence in the record. CCP § 1094(e); *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 265 (administrative mandamus); *see also Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573 (traditional mandamus). An agency cannot cure a defective EIR by presenting new evidence to the Court. *Santiago, supra,* 118 Cal.App.3d at 831. And in any event, SGMA would permit continued seawater intrusion for another two decades. Water Code, § 10727.2(b)(1).

### B. Consistency with UWMP is not substantial evidence that the Project would not make a considerable contribution.

The EIR's claim that the Project is consistent with the UWMP (AR4114, 4122) is at best evidence that there is pumping *capacity*. LWOB at 55-56. Contrary to Appellees, the existence of a water supply is not relevant evidence that *using* that supply would not exacerbate cumulative seawater intrusion impacts. Opp. at 40-43; *see* CT VII: 1526-1527, 1517-1520 (trial Court). The UWMP *admits* that continued pumping "adds to the overdraft . . . which permits the seawater intrusion to continue" and then states that Cal-Water "can not count on the SVWP to provide future demand." AR29333. Appellees argue that the Court should disregard the UWMP's statement because the UWMP is stating that Cal-Water cannot count on the SWWP *Phase II*. Opp. at 42-43. But by acknowledging the *need for* a second phase of the SVWP to halt seawater intrusion, a phase for which "there is no timeline for construction," the UWMP admits the existing groundwater management projects are insufficient. AR29333; *see also* AR16427 (SVWP Phase II status: funding not even committed for EIR).

### C. The EIR's legally invalid and factually irrelevant "ratio" analysis is not substantial evidence.

Appellees argue that the FEIR properly considered the ratio of the Project's annual water demand to total aquifer storage in the Basin and in the Pressure subarea as "one factor" in its significance conclusion. Opp. at 43-45. However, the EIR's ratio comparisons are legally invalid and factually irrelevant.

Appellees insist that the EIR's comparison somehow does not run afoul of *Kings County* because the County considered *two* ratio comparisons, arguing that the EIR "not only *compares the impact of the Project against a much larger cumulative impact* to determine the Project's impact would be small in comparison and therefore not considerable" [but also] "compares the *vast amount of the resource* (water) available (7.24 million acres in the 180/400-Foot aquifer) against the Project's *small demand on that resource* (less than 95 afy)." Opp. at 44 (emphasis added).

However, the first comparison – of the Project's impact to the total impact – is precisely the ratio error condemned by *Kings County*, which holds that such a comparison would "trivialize the project's impact" because, using this ratio approach, "the greater the overall problem, the less significance a project has in a cumulative impact analysis." *Kings County, supra*, 221 Cal.App.3d at 721. Such a comparison is exactly backward, because "the greater the existing environmental problems are, the *lower* the threshold should be for treating a project's contribution to cumulative impacts as significant." *CBE v. CRA, supra*, 103 Cal.App.4th at 120, *citing Kings County* (emphasis added).

The EIR's second comparison, the Project's annual demand vs. the current stock of water, is factually irrelevant. Seawater intrusion is not determined by *stocks* of water in storage but by relative *flows*, i.e., the ongoing excess of aquifer pumping over recharge, which creates an overdraft condition, lowering protective groundwater elevations. AR20369 (*State of the Basin*: relevant analysis is

determining storage changes, not absolute storage); *see* AR24229-25230 (SVWP EIR). The EIR's report of Project demand as a small percent of total aquifer storage is irrelevant.

What the EIR fails to provide is any assessment of the incremental contribution of the Project's ongoing 95 afy demand to the ongoing overdraft that drives seawater intrusion. The most current evidence, presented on the day the Supervisors approved Ferrini, was that the ongoing 2,000 afy overdraft in the Pressure subarea is causing seawater intrusion to persist and that current groundwater pumping "is not sustainable." AR20364, 20371, 20374 (*State of the Basin*). The Project's 95 afy incremental demand, adding almost 5% to the Pressure subarea overdraft, would be a considerable contribution, particularly in light of the recommendation that pumping be *reduced* in the Pressure subarea. *See* AR20362-20363 (LandWatch), *citing* AR20374.

Contrary to Appellees, *San Francisco Baykeeper, 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. *Save the Plastic Bag Coal. v. City of Manhattan Beach* (2011) 52 Cal. 4th 155, 174-175 is also inapposite, because there the issue of *cumulative* impacts had not been discussed by the Court of Appeal and the Supreme Court held only that, unlike here, "no evidence suggests" that the project would contribute to impacts in any significant way.

Subsequently, the Supreme Court has held that the fact that a project's potential contribution to a significant cumulative impact "is likely to be small . . . is not necessarily a basis for concluding that its impact will be insignificant." *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 515 (rejecting agency's "conclusory statement" regarding magnitude of project impact in relation to emission reduction target). Here, the effect of the Project's increased pumping is clearly considerable in light of the

current mitigation recommendation that pumping be reduced in the Pressure Subbarea. AR20374 (*State of the Basin*). There is certainly no substantial evidence to the contrary in the County's ratio analysis.

## INCORPORATION

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

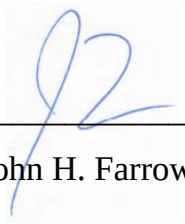
## CONCLUSION

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

Dated: November 11, 2018

Respectfully submitted,

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



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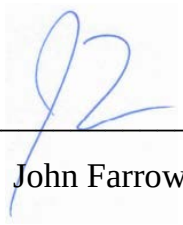
## CERTIFICATION OF LENGTH

I, John Farrow, declare:

In accordance with Rule 8.204(c)(1) of the California Rules of Court, I hereby certify that the length of this brief excluding tables, as calculated by the word processing software with which it was produced, is 13,890 words.

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

Dated: November 11, 2018 By: 

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