

October 12, 2016

Via Hand Delivery and E-mail

City of Seaside City Council
c/o City Clerk
440 Harcourt Avenue
Seaside, CA 93955
e-mail: CityClerk@ci.seaside.ca.us

Re: Final EIR for Monterey Downs and Monterey Horse Park and Central Coast Cemetery Specific Plan (SCH201291056)

Dear Members of the City Council:

On behalf of LandWatch Monterey County (“LandWatch”) we write regarding the Final Supplemental Environmental Impact Report (“FSEIR”) and the Draft Supplemental Environmental Impact Report (“DSEIR”) (together, the “SEIR”) for the Monterey Downs and Monterey Horse Park and Central Coast Cemetery Specific Plan (“Project”) and regarding the proposed approval of Project entitlements.

The FSEIR fails adequately to address the issues raised by public comments on the DSEIR made by LandWatch and others. In addition, approval of the project entitlements is inconsistent with the Fort Ord Reuse Plan (also known as the Base Reuse plan or “BRP”).

LandWatch reiterates its request that the City revise and recirculate the SEIR to address the defects set out in its comments.

A. Summary of comments

WATER ANALYSIS INADEQUATE: The SEIR fails to meet CEQA’s requirements for an adequate analysis of water supply impacts because it assumes uncritically that there would be no significant impacts to the Salinas Valley Groundwater Basin as long as pumping to support Fort Ord demand does not exceed the 6,600 afy that MCWRA “allocated” to the Army in 1993. Thus, it concludes that there would be no significant impact for Phases 1-3 of the project because water for those phases could be supplied from uncommitted portions of the 6,600 afy allocation. The SEIR does not support this conclusion with any actual analysis of impacts to the basin from increased pumping; it simply assumes that 6,600 afy can be pumped without impact. As the comments below and the attached letter from hydrologist Timothy Parker explains that assumption is completely unfounded:

- 6,600 afy does not represent a baseline or “no new impact” pumping level for Fort Ord. In fact, the SEIR identifies baseline pumping as the currently existing level of pumping – variously reported by the SEIR as from 1,650 afy to 2,311 afy.
- 6,600 afy does not represent a safe yield for Fort Ord pumping. Safe yield cannot be determined for the Fort Ord area by itself because it must be determined for the hydrologically interconnected Salinas Valley Groundwater Basin as a whole. MCWRA’s 2016 State of the Salinas Valley Groundwater Basin report explains that the existing level of groundwater pumping is well beyond the Basin’s safe yield. The California Department of Water Resource’s identification of the Salinas Valley Groundwater Basin as critically overdrafted confirms this. So does Mr. Parker’s attached technical memorandum.
- Contrary to the out-of-date 2010 MCWD Urban Water Management Report relied upon by the SEIR, the Salinas Valley Water Project will not halt seawater intrusion and balance the Basin hydrologically. MCWRA now acknowledges that the existing groundwater management projects, including the Salinas Valley Water project, are insufficient to accomplish this, and that additional groundwater management projects would be needed. These projects are not approved, environmentally reviewed, or funded. The SEIR simply ignores this information, despite Seaside’s obligation under the BRP to cooperate with MCWRA in addressing seawater intrusion and determining the safe yield.
- The SEIR fails to provide a discussion and analysis of actual physical impacts from increased pumping as CEQA requires. The SEIR improperly assumes that as long as a water supply has been allocated on paper, there is no need to discuss the physical impacts from using that supply. The SEIR gets this entirely wrong: as the California Supreme Court has explained, the “ultimate question under CEQA . . . is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project.” *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 434 (emphasis in original).
- The SEIR fails to provide an adequate discussion of cumulative water supply impacts. The DSEIR purports to “tier” from the program EIR for the Base Reuse Plan, but then does not even summarize that document’s conclusion. The Base Reuse plan PEIR concludes that cumulative impacts, viewed at the relevant geographic scale of the Salinas Valley Groundwater Basin, are significant and unavoidable. The Monterey Downs SEIR looks only at Fort Ord demand, improperly conflating its project-specific and cumulative analyses, and then claims that there would be no significant cumulative impact as long as total Fort Ord demand remains within the 6,600 afy allocation. This ostrich-like approach ignores

the fact that there is already a significant cumulative impact and that additional pumping will aggravate overdraft and seawater intrusion.

PARTIAL PROJECT NOT ANALYZED: The SEIR admits that a water supply for Phases 4-6 is uncertain and so proposes simply not building Phases 4-6 as a mitigation measure for water supply impacts. Despite LandWatch's request and CEQA's mandate, the SEIR fails to assess the impact of not building these phases. Not building Phases 4-6 would render the project primarily residential and eliminate most of the commercial and jobs-creating uses. This would render the project inconsistent with Seaside and BRP policies mandating a strong jobs to housing ratio. It would also force residents to travel farther for jobs and shopping, increasing vehicle trips per capita and aggravating GHG impacts, which are based on per capita CO2 emissions. And not building the hotels, commercial space, and racetrack would render the fiscal effects of the project negative.

GHG ANALYSIS INADEQUATE: The FSEIR violates CEQA because it fails to disclose the actual basis of the numerous mitigation credits taken for GHG reduction measures. The DSEIR takes 25 distinct credits for project features to reduce the projected GHG emissions. When LandWatch asked for the specific assumptions that would justify these credits, the FSEIR simply referred LandWatch to documentation that confirms that project-specific assumptions are required, but does not provide those assumptions for this project. Thus, there is no evidence in the record that the claimed GHG reductions are warranted, and the FSEIR violates CEQA because it fails to provide good-faith reasoned responses to comments.

GHG MITIGATION INADEQUATE: The SEIR admits that GHG impacts will remain significant and unavoidable even after implementation of proposed mitigation. CEQA requires that the City adopt all feasible mitigation as long as impacts remain significant. CEQA also requires that the City respond to each mitigation measure proposed by the public and either adopt it or explain why it would not be effective or feasible. The FSEIR fails to respond at all to numerous feasible GHG mitigation proposed by the Monterey Bay Unified Air Pollution Control Agency and by LandWatch. The FSEIR rejects other mitigation, such as mandated solar electrical and water heating systems, without any showing that it is infeasible or ineffective. This violates CEQA.

FSEIR TAKES UNJUSTIFIED VEHICLE TRIP REDUCTION CREDIT AND REFUSES TO EXPLAIN IT: The traffic analysis assumes that 28% of vehicle trips will remain within the project site. Caltrans, TAMC, and LandWatch objected that this so-called "internal capture" rate is unjustified and unjustifiable. The FSEIR claimed that it provided documentation to Caltrans in response to its objection and that Caltrans had made no further objection. Not true. Caltrans has continued to object. Regardless, giving documentation to Caltrans does not answer the objections and questions raised by TAMC and LandWatch. The FSEIR also claims that the trip capture data is in the

DSEIR. This is not true. Indeed, if it were, it would not have been necessary to furnish the information privately to Caltrans.

TRAFFIC ANALYSIS AND MITIGATION IS INADEQUATE: The traffic analysis contains a number of additional flaws.

- The proposed mitigation for special event traffic, events which could occur as frequently as 125 times per year, is a to-be-determined-later “Events Management Plan.” This mitigation is entirely ad hoc with no standards for what level of congestion will be permitted. This violates CEQA’s requirement for specific performance standards when formulation of mitigation is deferred until after project approval.
- As Caltrans objected, the FSEIR fails to apply Caltrans’ level of service standard in its analysis of the significance of impacts, even though it applies the adopted service standards for other jurisdictions (e.g., Marina, the County). Caltrans’ goal is to maintain service at the cusp of LOS C and D. The FSEIR ignores impacts unless service degrades to LOS D, and thus fails to disclose additional significant impacts to Caltrans’ facilities.
- The SEIR admits dozens of significant impacts to roads and intersections that will not be mitigated. LandWatch proposes that impacts to freeway ramps could be addressed with ramp metering and that the project should make fair share payments for this. The FSEIR responds that ramp metering is not planned by Caltrans so is infeasible. This is not true. Caltrans’ current plan for the SR 1 corridor in the project vicinity expressly plans ramp metering. Again, the FSEIR’s comment responses fail to evince good-faith.

NOISE ANALYSIS IS DEEPLY FLAWED: Noise from recreational areas of the project, including the Sports Arena, horse track, swimming center, and other equestrian facilities, noise from project construction, and noise from project traffic will exceed noise standards adopted by the Fort Ord Reuse Plan and the City of Seaside. Despite LandWatch’s objections, the SEIR fails to acknowledge this and to provide a legally adequate noise analysis:

- The SEIR ignores one whole category of noise standards from the Base Reuse Plan, which are specifically intended to protect sensitive uses from loud short-term noise from activities like construction, sports events, and musical concerts. Unlike the 24-hour average noise standards, these so-called “statistical” noise standards regulate peak noise events and cumulative noise for intervals of 1, 5, 15, and 30 minutes in an hour. Without these standards, highly annoying short-term noise would be permitted, such as crowd cheering, PA systems, musical events, and swimming pool timing horns. Seaside has failed to adopt the BRP’s statistical

noise standards even though the BRP mandates that it do so and in fact bars it from approving any projects in Fort Ord until it does so.

- The SEIR's analysis and mitigation of construction noise contains no quantitative analysis to determine if the project would exceed applicable standards, despite express requirements in the Seaside noise ordinance and BRP policies for quantitative assessment. Mitigation does not require the construction noise to meet any noise standard. Noise engineer Derek Watry demonstrates that construction noise would exceed applicable standards and that mitigation to meet applicable standards is infeasible.
- The SEIR's analysis of stationary noise impacts, e.g., noise from recreational facilities, fails to identify a consistent threshold of significance so it is unclear how the SEIR determines significance. Furthermore, the only noise standard mentioned in the proposed mitigation differs from the noise standards discussed in the qualitative assessment of the significance of impacts. And again, the SEIR fails to provide the required quantitative assessment of noise levels with and without mitigation.
- The SEIR fails to assess and mitigate noise impacts to open space users. BRP policies mandate strict standards to protect passively used open space, and information in the FSEIR indicates that this standard is not met. Passive open space use will be directly adjacent to the noisiest portions of the project. Numerous comments have objected to the imposition of the project's noise on this use.
- The traffic noise analysis is flawed because the analysis fails to protect outdoor uses by failing to measure impacts at the property line as required by both the City's noise ordinance and the BRP. Furthermore, the FSEIR refused to provide essential information to understand the traffic noise analysis requested by LandWatch: the identification of the land use and applicable noise standards on the road segments affected by the project. As Mr. Watry explains, for at least one segment, this omission obscures the fact that the project will contribute considerably to a significant cumulative noise impact.

THE PROJECT IS INCONSISTENT WITH THE BASE REUSE PLAN: The project conflicts with numerous noise policies in the BRP. Seaside has failed to adopt required BRP noise standards and has failed to undertake noise analysis required by BRP policies. Project noise will exceed standards in several BRP noise policies. The SEIR admits that the project is inconsistent with BRP water policies requiring additional water supplies and prohibiting approval of a development project without an assured long-term water supply. If water supply limitations result in a predominately residential project and

a failure to build out the commercial and recreational uses, the project will conflict with BRP (and Seaside) policies mandating a balanced jobs/housing ratio.

RELATED ELIMINATION OF RACING RENDERS ANALYSIS INVALID:

The last-minute elimination of horse-racing from the list of allowed uses does not actually ensure that racing will not be permitted by a subsequent interpretation or revision of the specific plan, particularly if regulation of racing is found to be preempted by state law. If Seaside were serious about the racing ban, it could and should make the ban enforceable by identifying it as CEQA mitigation and by banning horseracing by ordinance.

Horseracing is an integral part of the economic justification for the project, representing 40% of the jobs and the primary attraction that would generate hotel taxes, without which the Wildan Report indicates that the project would be a fiscal loss for Seaside. There is no analysis that would suggest that other uses will replace these equestrian jobs and revenues.

And even if Seaside is not concerned about fiscal consequences of the bait-and-switch strategy saddling it with unbalanced residential construction, Seaside is still accountable for the inadequate environmental analysis. Without the commercial and jobs uses assumed in the SEIR, the assumed jobs/housing balance will not materialize. This would result in inconsistencies with Seaside and BRP policies, including policies intended to minimize transportation and air pollution impacts and conserve water supplies to support balanced growth.

For all of these reasons, LandWach urges the Seaside City Council to decline to certify the inadequate SEIR and to decline to approve project entitlements.

Detailed comments are set out below and in the attached letters from hydrologist Timothy Parker and noise engineer Derek Watry.

B. The SEIR fails as an informational document because its discussion of groundwater impacts is incomplete and inadequate.

Because the FSEIR fails to provide adequate responses to the issues LandWatch raised in its DSEIR comments, LandWwatch asked hydrogeologist Timothy Parker to review the SEIR and relevant documentation. Mr. Parker's comments are attached and incorporated by reference in the discussion below.

1. The FSEIR fails to respond adequately to comments objecting to reliance on the 6,600 afy allocation as the basis to find impacts less than significant.

LandWatch objected that the DSEIR improperly concludes that project-specific and cumulative impacts would be less than significant in Phases 1-3 based on the fact that

a portion of the 6,600 afy allocation to Fort Ord from the 1993 annexation agreement remains unallocated and thus available to the Project. Comment PO 208-22.

The SEIR consistently implies or states that impacts would be less than significant as long as the 6,600 afy “allocation” to Fort Ord, or the “sub-allocation” to the City of Seaside and/or the County of Monterey that remains available to the project, is not exceeded. See DSEIR at 4.8-34 to 35 (project-specific groundwater supply impact less than significant through Phase 3 because “Project would only use groundwater that is within MCWD’s existing 6,600 AFY allocation”), 4.8-46 (same for cumulative water quality impact), 4.19-22 to 25 (project specific water supply impact less than significant through phase 3 and “potentially significant” for Phases 4-6), 4.19-32 (“project-related cumulatively considerable water supply impacts” are “significant and unavoidably cumulatively-considerable” for Phases 4-6).¹

Thus, the DSEIR’s clear implication is that as long as total pumping for Fort Ord does not exceed the 6,600 afy allocation, there would be no significant impact.

LandWatch objected that this conclusion is unwarranted because the 6,600 afy does not represent either a baseline usage or a safe yield determination. The FSEIR admits that the 6,600 afy is neither a baseline nor a safe yield. FSEIR, p. 11.4-1027. However, the FSEIR response fails to provide the required good-faith reasoned analysis

¹ DSEIR section 4.19 outlines the allocation of the 6,600 afy to the various jurisdiction within the Ord Community in Table 4.19-2, Groundwater Allocation by Jurisdiction. DSEIR, p. 4.19-4. Section 4.19 then identifies the sub-allocations to projects within the City of Seaside and the County of Monterey in Table 4.19-4, Groundwater Sub-Allocations, concluding that there is 412.9 afy of “City/County Unallocated” water supply. DSEIR, p. 4.19-5. DSEIR section 4.19 explains that the project’s potable demand for Phases 1-4 would be 410.8 afy, which is within the “existing unallocated water supply of 412.9 AFY” and therefore “a less than significant impact concerning potable water demand is concluded for Project Phases I through IV.” DSEIR, p. 4.19-23. Section 4.19 then explains that there is only sufficient “unallocated non-potable water supply” for Phases 1-3 and that therefore a “potentially significant impact is identified for Project Phases IV through VI.” DSEIR, p. 4.19-24. Section 4.19 proposes Mitigation Measure W-1, which would require “proof of an adequate water supply” that ensures “current unused water supply is allocated” before future development is permitted. Section 4.19 then concludes that “given the uncertainties involving the water supply options, sufficient water supplies would not be endured to Phases IV through VI. Therefore impacts concerning water supply availability would remain significant and unavoidable.” DSEIR, p. 4.19-26.

Section 4.19 uses the same arithmetic to conclude that the “project-related cumulatively considerable water supply impacts” are less than significant for phases 1-3 but significant and unavoidable for phases 4-6 due to “the uncertainties involving the water supply options.” DSEIR, p. 4.19-32.

DSEIR section 4.8 references the discussion in section 4.19 and states that impacts from Phases 4-6 would be “potentially significant” because “additional groundwater would be need to be acquired to meet the remainder of the Project’s groundwater demand for Phases IV through VI.” DSEIR, p. 4.8-34. Section 4.8 goes on to explain that because of “uncertainties involving the water supply options, sufficient water supplies would not be ensured to Phases IV through VI. Therefore impacts in this regard would be significant and unavoidable.” DSEIR, pp. 4.8-34 to 4.8-35.

Section 4.8 draws the same conclusions regarding cumulative impacts as section 4.19.

because 1) it mischaracterizes LandWatch's comments and 2) it implies that there is no connection between the 6,600 afy allocation and the remaining unclaimed portions of the sub-allocations to the City and County:

The commenter's following assertions are incorrect: (1) SEIR does not conclude that water supply impacts would be less than significant if total water demand for Project buildout is below 6,600 AFY; and (2) SEIR does not conclude that water supply impacts would be less than significant if total water demand for Phases I-III is below 6,600 AFY. Rather, DSEIR page 4.19-30 states that under the 1993 Agreement, 6,600 AFY of the Salinas Basin groundwater is available for use on Ord Community Service Area lands, not limited only to the Project. As stated in MR 11.3.9 (Water) and Response PO 208-5, DSEIR page 4.19-23 concludes that Phases I-IV would have a less than significant impact concerning potable water demand because the existing unallocated potable water supply of 412.9 AFY (from the 1,722 AFY of groundwater FORA allocated to the City and County) would be sufficient to meet the total potable water demand of approximately 410.8 AFY for these phases combined. Furthermore, as stated in MR 11.3.9 (Water) and Response PO 208-5, DSEIR page 4.19-26 concludes that sufficient water supplies cannot be assured to Phases IV-VI at this time, despite implementation of feasible mitigation (Mitigation Measure W-1); therefore, impacts concerning water supply availability would remain significant and unavoidable. As can be seen from these statements, the above conclusions are not premised on the assumption that the 6,600 AFY allocation from the Agreement either represents the baseline condition or the safe yield from the affected aquifers, on which to base the Project's water supply analysis, as falsely asserted by commenter."

FSEIR p. 11.4-1027, emphasis added.

First, LandWatch did not suggest, as the FSEIR states, that the DSEIR finds impacts less than significant as long as the Project itself does not use 6,600 afy. LandWatch objected that "the DEIR assumes that as long as the Project does not exceed its allocation of a portion of the 6,600 'entitlement' there will be no significant water supply impacts." PO 208-22.

Second, the response simply ignores the fact that the sub-allocations to the City and the County that will not be exceeded until Phase 4 represent portions of the 6,600 afy allocation and that the DSEIR clearly identifies exceeding the 6,600 afy allocation as the basis for a significant impact. For example, in discussing the rationale for its conclusion that project-specific impacts are less than significant through Phase 3 but not after that, the DSEIR explains that "the Ord Community is allocated 6,600 AFY of groundwater" and that "[t]he project would only use groundwater that is within the MCWD's existing allocation." DSEIR, p. 4.8-34; *see* DSEIR, p. 4.9-9 (identifying the 1993 Annexation Agreement as the source of this allocation); 4.19-4 to 5 (explaining that the groundwater allocation by jurisdiction is based on FORA's sub-allocation of the 6,600 afy allocation

to the Ord Community); *see also* FSEIR, p. 11.4-1027 (“sufficient water supplies cannot be assured to Phases IV-VI at this time, despite implementation of feasible mitigation (Mitigation Measure W-1); therefore, impacts concerning water supply availability would remain significant and unavoidable”)

Indeed, if exceeding the 6,600 afy allocation is not the basis on which the SEIR identifies a significant cumulative impact, then the SEIR fails to provide any clear threshold for that conclusion. The FSEIR itself confirms that “groundwater supply is determined by the allocations and sub-allocations shown in DSEIR Tables 4.19-3 and 4.19-4.” FSEIR p. 11.4-1027. These tables clearly indicate that the groundwater supply to the Ord Community is 6,600 afy. DSEIR, p. 4.19-4.

2. The SEIR’s assumption that the project’s Phase 1-3 impact is less than significant because it is within the 6,600 afy allocation is not supported by analysis in the SEIR and is not accurate.

It is clear that the SEIR assumes that 1) there will be no significant cumulative impact from all BRP projects taken together as long as their combined water use is less than 6,600 afy, and 2) the Project itself will not make a considerable contribution to a significant cumulative impact as long as its water use does not exceed the portion of that 6,600 afy that has not been allocated to other projects.

Because the SEIR assumes that there would be no significant cumulative impact (and no considerable contribution to a significant cumulative impact) as long as Fort Ord projects stay within the 6,600 afy entitlement, it fails to consider the possibilities that, even if the 6,600 afy threshold is not crossed, 1) there is already a significant cumulative impact from existing pumping, 2) that increased pumping from all projects including Monterey Downs in the future may result in a significant cumulative impact, and 3) increased pumping for the Monterey Downs project may be a considerable contribution to a significant cumulative impact.

In fact, the SEIR’s conclusions that there is no significant cumulative impact as long as total Fort Ord pumping stays within 6,600 afy and that there is no considerable contribution to such an impact if the project does not exceed its sub-allocation of that 6,600 afy are legally flawed and factually unsupported.

As the California Supreme Court has explained, the “ultimate question under CEQA . . . is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable *impacts* of supplying water to the project.” *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (“*Vineyard*”) (2007) 40 Cal.4th 412, 434 (emphasis in original). The SEIR gets this exactly wrong, focusing on whether there is a water source (i.e., a portion of the 6,600 afy allocation) for the project instead of discussing the impact of using that water source.

As Mr. Parker explains, the existence of the 6,600 afy allocation to Fort Ord does not establish that additional pumping within that 6,600 afy would have not significant impact. Mr. Parker demonstrates the following:

- The BRP Program Environmental Impact Report (“PEIR”) did not assume that 6,600 afy could be pumped without impact. That document expressly provided that pumping within this allocation might in fact cause additional seawater intrusion, and it required specific mitigation that was intended to avoid this outcome. This includes the duty to determine safe yield and to accelerate the provision of additional water supply if groundwater pumping were unable to supply 6,600 afy without causing further seawater intrusion. BRP PEIR, pp. 4-49, 4-53 to 4-54.
- In fact, even though the allocated 6,600 afy has not yet been pumped, seawater intrusion has been exacerbated by cumulative pumping since the BRP PEIR was certified (e.g., another 2 miles advance of the seawater intrusion front) and will be exacerbated in the future by any additional pumping, including pumping to support the Project, whether from the 180-foot, 400-foot, or 900-foot aquifers.

Nor does the purported “reliability” of the water supply demonstrate that its use is without significant impacts. Mr. Parker demonstrates the following:

- The fact that the capacity of the Salinas Valley Groundwater Basin (“SVGB”) is large enough to smooth out year-to-year climatic variations does not mean that this pumping does not deplete the aquifer over time. In fact, an ongoing annual average rate of depletion of the Salinas Valley Groundwater Basin since the 1930’s has caused more than 5 miles of seawater intrusion. Thus, the groundwater supply may be “reliable” only in the sense that there would be available water in normal, single, and multiple dry years, the analytic periods required by the Water Code for an urban water management plan. But using that water exacerbates an overdraft condition and exacerbates seawater intrusion.
- The claim in MCWD’s WSA and 2010 UWMP that the Salinas Valley Water Project (“SVWP”) ensures a “reliable supply” in the sense of a “no impact” supply is not accurate. The Salinas Valley Water Project’s 2002 modeling assumptions for cumulative demand have not proved accurate. Demand substantially exceeds the levels at which the Salinas Valley Water Project modeling assumed seawater intrusion would be controlled. The Monterey County Water Resources Agency (“MCWRA”) now admits that the Salinas Valley Water Project will not halt seawater intrusion and that additional projects are needed. The most recent comprehensive report on the state of the Salinas Valley Groundwater Basin indicates that existing pumping from the basin as a whole is not sustainable. The report documents that the safe or sustainable yield of the Pressure Subarea, the subarea from which the project would draw its

water, is only 110,000 to 117,000 afy, but groundwater pumping exceeds this yield by about 12,000 to 19,000 afy.

- The fact that seawater intrusion has not been detected yet in the 900-foot aquifer does not mean that pumping the 900-foot aquifer is without impact. Existing stratigraphy and modeling show that pumping the 900-foot aquifer will induce seawater intrusion in the upper aquifers, i.e, the 180-foot and 400-foot aquifers. And pumping the 900-foot aquifer and may lead to seawater intrusion in the 900-foot aquifer through either of two routes: a direct hydraulic connection with the bay or through inter-aquifer transfer. The SEIR fails to address this, despite LandWatch comments asking for just this information.

3. 6,600 afy does not constitute baseline use.

It is clear that the 6,600 afy allocation does not represent baseline pumping. Thus, the City may not simply assume that pumping within the 6,600 allocation is not a new impact.

First, in response to landWatch's comments, the FSEIR denies that 6,600 afy is intended to represent either a baseline or safe yield. FSEIR, p. p. 11.4-1027.

Second, in response to LandWatch's request that the SEIR actually identify baseline use (PO 208-10, 208-14), the FSEIR references Master Response 11.3.9 and the discussions in the DSEIR sections 4.8 and 4.19. FSEIR, pp. 11.4-1022-1023. The FSEIR's Master Response 11.3.9 identifies baseline conditions for MCWD's Fort Ord area as the 2015 consumption of 1,650 afy (of which total the City was using 505 afy and the County 55 afy). FSEIR, p. 11.3-9. Section 4.19 of the DSEIR reports baseline pumping in the Ord Community Service Area from 2001 to 2010 as 2,311 afy, based on the MCWD Water Supply Assessment. DSEIR, p. 4.19-1 to 4.19-2. (Section 4.8 of the DSEIR reports pumping capacity and planned future pumping, but not baseline pumping. DSEIR, pp. 4.8-8 to 4.8-10, 4.8-33 to 4.8-35.) Regardless whether baseline pumping is assumed to be the 1,650 pumped in 2015 or the 2,311 afy average from 2001 to 2010, it is clear that the baseline is not 6,600 afy.

Third, the average pumping at the time that Fort Ord was in use by the Army was never 6,600 afy. That amount represents a single peak year pumping in 1984. The 1993 Army/MCWRA agreement reports that average pumping from 1988-1992, the period that brackets the 1991 closure decision, was about 5,200 afy. Agreement No. A-06404 between U.S.A. and MCWRA, Sept 21, 1993, ¶ 4c.

Fourth, the BRP PEIR does not identify 6,600 afy as the baseline use. The discussion of water supply in the section captioned "environmental setting" references the Army/MCWRA agreement that "6,600 acre feet per year (afy) of water is available from the Salinas Valley groundwater basin for Former Fort Ord land uses, provided that

such provisions do not aggravate or accelerate the existing seawater intrusion.” BRP PEIR, p. 4-49. However, the discussion in this section does not identify any prior pumping amounts, and a reference to an agreement regarding future pumping does not even purport to identify historic baseline pumping. As Mr. Parker explains, the BRP PEIR provides that mitigation would be required for any pumping that would lead to an increase in seawater intrusion, even if this occurs before the 6,600 afy allocation is pumped. The BRP PEIR’s discussion of the environmental setting with respect to water supplies identifies the 6,600 afy figure as the allocation in the MCWRA/Army agreement, not as baseline use. The discussion expressly provides that this allocation is available only “provided that such provisions do not aggravate or accelerate the existing seawater intrusion.” BRP PEIR, p. 4-49.

Fifth, if the BRP PEIR adopts any baseline figure for Salinas Valley Groundwater Basin pumping on the Former Fort Ord, that figure is not 6,600 afy. The figure may be the 5,100 afy average pumping for the 4 to 5 years immediately prior to 1991, based on the Army’s NEPA documents. In Section 1.2.2, Baseline Determination, the BRP PEIR expressly adopts the Army’s NEPA document baseline: “As with the Army’s FEIS and DSEIS, this EIR determines whether the proposed project may have a significant effect on the environment based on physical conditions that were present at the time the decision became final to close Fort Ord as a military base (September, 1991).” BRP PEIR, p. 1-3. The BRP PEIR states that this approach “complies with Section 21083.8.1 of the Public Resources Code and utilizes the extensive research already conducted for the Army’s NEPA documents, which use the same baseline year.” *Id.* Section 21083.8.1 permits a reuse plan EIR or EIS to rely on conditions at the time of the closure decision as a baseline provided that certain procedures are followed.²

The BRP PEIR then identifies the specific NEPA documents that were used to determine the Environmental Setting for water supply analysis. BRP PEIR, pp. 1-3, 1-10 (Table 1.9-1). These include the Army’s December 1995 Draft SEIS, the Army’s June 1993 Final EIS Volume 1, and the Army’s April 1992 “*Other Physical Attributes Baseline Study of Fort Ord, California.*” These documents identify the baseline water use from the Salinas Valley Groundwater Basin as 5,100 afy, not as 6,600 afy, as follows:

² These procedures include circulation of proposed baseline conditions to affected agencies “prior to circulating a draft EIR” followed by a public hearing at which “the lead agency shall specify whether it will adopt any of the baseline physical conditions for the reuse plan EIR and identify those conditions.” CEQA Guidelines, § 15229(a)(1), (2). Although the BRP PEIR states that it availed itself of the Public Resources Code § 21083.8.1 baseline provisions and that baseline conditions are as of the September 1991 closure decision (BRP PEIR p. 1-3), there is no evidence that FORA actually followed the process required by Public Resources Code § 21083.8.1(c) and CEQA Guidelines § 15229 to identify baseline water use conditions in a document circulated before the PEIR and to state an intent to adopt that as the baseline. See FORA, Resolution 97-6, June 13, 1997 (Certifying BRP PEIR and discussing proceedings and hearings). CEQA does not authorize FORA to rely on the Army’s prior compliance with these procedures, if in fact the Army did comply.

- The 1996 Final SEIS states that “[a]s reported in the final EIS (Volume 1, page 4-56), average water demand on Fort Ord was 5,100 acre-feet (af) during 1986-1989. Water use has declined in recent years with the decrease in the number of personnel living on and occupying the base. Annual water use was 5,634 af in water year 1992, 3,971 af in 1993, and 3,235 af in 1994.”³
- The June 1993 Final EIS states that “[a]nnual water consumption decreased from a high of 6,600 acre-feet in 1984 to an average of 5,100 acre-feet during 1986-1989.”⁴ Table 4.5-2 identifies 5,100 afy as the average pumpage for Fort Ord.⁵
- The April 1992 *Other Physical Attributes Baseline Study of Fort Ord, California*, provides a table of annual pumping, from which it is apparent that average annual pumping from 1986-1989 is 5,083 afy and the average from 1986-1990 is 5,126 afy.⁶ That 1992 report identified declining water use from 1980 to 1990, except for the single year 1984.⁷

In sum, if the Army actually followed the procedures of Public Resources Code § 21083.8.1(c) and CEQA Guidelines § 15229 to adopt a baseline figure and if FORA also complied with those procedures, then the baseline water use was not 6,600 afy but only 5,100 afy. The outlier 6,600 afy figure from 1984 could not have been used as a baseline because it does not represent the “physical conditions that were present at the time the decision became final to close Fort Ord as a military base (September, 1991).” BRP PEIR, p. 1-3; *see* Public Resources Code § 21083.8.1(c).

Sixth, even if FORA or the Army had followed the process required by Public Resources Code § 21083.8.1(c) and CEQA Guidelines § 15229 to identify a baseline condition for water, they were required to “state in writing how the lead agency intends to integrate the baseline for analysis with the reuse planning and environmental review process.” Public Resources Code, § 21083.8.1(c)(C). The BRP PEIR does explain how the 6,600 afy figure is to be integrated into its analysis and mitigation of water supply impacts. BRP PEIR, pp. 4-49, 4-53 to 4-54. And that discussion does not indicate an intent to treat 6,600 afy as a baseline condition within which there is no significant impact, because it requires mitigation even if the 6,600 afy allocation is not pumped in

³ Dept. Of the Army, Final Supplemental EIS Fort Ord Disposal and Reuse, June 1996, p. 4-11, available at http://docs.fortordcleanup.com/ar_pdfs/AR-BW-1538//Section_4.pdf. The quote from the Final SEIS is of the unchanged text of the 1995 Draft SEIS.

⁴ Dept. of the Army, Final EIS, Fort Ord Disposal and Reuse, June 1993, p. 4-57, available at http://docs.fortordcleanup.com/ar_pdfs/AR-BW-1348//Section_4/section_4.5.pdf.

⁵ *Id.* at 4-59.

⁶ US Army Corps of Engineers, *Other Physical Attributes Baseline Study of Fort Ord, California*, April 1992, p. 1-6, available at http://docs.fortordcleanup.com/ar_pdfs/AR-BW-2202//Section_1.pdf.

⁷ *Id.* at 1-6, 1-14.

full. CEQA does not permit the imposition of mitigation unless there are significant impacts. Guidelines, § 15126.4(a)(3). Thus, treating 6,600 afy as a baseline “no impact” level is inconsistent with the fact that BRP PEIR repeatedly states that use of the 6,600 afy allocation is only to be permitted if it does not contribute to seawater intrusion and that mitigation may be required even if water use does not rise to 6,600 afy. *See* BRP PEIR, pp. 4-49, 4-53 to 4-54.

And the Army’s EIS also makes clear that 1) there is no categorical right to pump 6,600 afy, and 2) even the right to pump up to 5,200 afy is subject to a no-harm condition:

MCWRA will not object to Fort Ord/POM Annex withdrawal from the basin of up to 6,600 af/yr, provided that no more than 5,200 af/yr are withdrawn from the 180-foot aquifer and 400-foot aquifer and that such withdrawals do not threaten to aggravate or accelerate the existing seawater intrusion problem.⁸

Seventh, Public Resources Code, § 21083.8.1(c)(A) provides that “[p]rior to the close of the hearing, the lead agency may specify the baseline conditions for the reuse plan environmental impact report prepared, or in the process of being prepared, for the closure of the base. The lead agency may specify particular physical conditions that it will examine in greater detail than were examined in the environmental impact statement.” The BRP FEIR does in fact require further analysis of physical conditions than the analysis provided in the EIR. For example, Program C-3.1 requires determination of the safe yield of the portion of Fort Ord overlying the Salinas Valley Groundwater Basin “to determine available water supplies.” BRP PEIR, p. 4-55. Program C-3.2 require further investigation of seawater intrusion in the context of the Salinas Valley Basin Management Plan and measures to prevent further intrusion. Again, these provisions are simply inconsistent with treating 6,600 afy as a permissible baseline use that would not constitute a significant impact.

4. 6,600 afy is not a safe yield.

Safe yield or sustainable yield is defined as “the amount of groundwater that can be pumped annually on a long-term basis without causing undesirable results.”⁹ The FSEIR admits that 6,600 afy does not represent a safe yield figure for pumping to support Fort Ord reuse. FSEIR, p. 11.4-1027.

⁸ Dept. of the Army, Final Supplemental Environmental Impact Statement Fort Ord Disposal and Reuse, June 1996, p. 4-11, emphasis added, available at http://docs.fortordcleanup.com/ar_pdfs/AR-BW-1538//Section 4.pdf.

⁹ Dept. of the Army, Fort Ord Disposal and Reuse Final EIS, June 1993, p. 4-57, available at http://docs.fortordcleanup.com/ar_pdfs/AR-BW-1348//Section 4/section 4.5.pdf.

The Final EIS for the Fort Ord base closure and reuse also acknowledges that 1) safe yield must be determined for the entire groundwater basin and 2) pumping for Fort Ord already exceeded safe yield as of 1993:

The concept of safe yield is meaningful only when applied to an entire groundwater basin. The amount of yield available to individual users within the basin depends of the amounts and locations of pumping by other users. In the Salinas Valley groundwater basin, present pumping in and near Fort Ord exceeds safe yield in the 180-foot and 400-foot aquifers, as indicated by continuing seawater intrusion and water levels below sea level in those aquifers. This indicates that the yield from the 180-foot and 400-foot aquifers for Fort Ord is less than its present pumpage, assuming that pumping by other users remains unchanged.¹⁰

Base Reuse Plan Hydrology and Water Quality Program C 3-1 requires that Seaside work with MCWRA to determine safe yield to determine available water supplies:

The City shall continue to work with the MCWRA and the MPWMD to estimate the safe yield in the context of the Salinas Valley Basin Management Plan for those portions of the former Fort Ord overlying the Salinas Valley and the Seaside groundwater basins to determine available water supplies.

BRP PEIR, p. 4-55. There is no evidence in the record that Seaside has in fact worked with MCWRA to determine safe yield for the Fort Ord area. LandWatch's DSEIR comments specifically requested a water balance analysis showing sustainable yields for the 180, 400, and 900 foot aquifers, i.e., the amounts that could be pumped without mining or depleting the aquifers. PO 208-10, 208-14. The FSEIR did not provide this information. FSEIR, pp. 11.4-1023, 11.3-7 to 11.3-11.3-17.

Furthermore, as the Final EIS for the Fort Ord base closure and reuse indicates, the concept of safe yield only makes sense for a basin as whole, not just the Fort Ord area. MCWRA's most recent determination of the sustainable or safe yield for the Salinas Valley Groundwater Basin and the Pressure Subarea indicates that pumping has been and remains in excess of safe yield. In particular, the 2016 State of the Salinas Valley Groundwater Basin report indicates that the safe yield of the Pressure Subarea is about 110,000 to 117, 000 afy and that existing pumping already exceeds this yield by about 12,000 to 19,000 afy.¹¹ The safe yield for the Salinas Valley Groundwater Basin as a whole (the four subareas constituting Zone 2C, the assessment area for the Salinas

¹⁰ Dept. of the Army, Fort Ord Disposal and Reuse Final EIS, June 1993, p. 4-57.

¹¹ MCWRA, State of the Salinas Valley Groundwater Basin, 2016, p. 4-25, available at http://www.mcwra.co.monterey.ca.us/hydrogeologic_reports/documents/State_of_the_SRGBasin_Jan16_2015.pdf.

Valley Water Project) is from 499,000 to 506,000 afy, and existing pumping already exceeds this yield by 17,000 to 24,000 afy.¹²

Instead of providing current information about safe yield for the basin, the FSEIR recites the out-of-date claim in the MCWD 2010 UWMP that the Salinas Valley Water Project is expected to balance the basin by resulting in a “net increase in storage of about 6,000 ac-ft annually.” FSEIR, p. 11.4-1025. As Mr. Parker demonstrates, this claim is simply unsupported in light of current information:

- The Salinas Valley Water Project EIR’s modeling analysis claimed only that the Salinas Valley Water Project would balance the basin on the basis of 1995 demand levels, of about 473,000 afy.
- The Salinas Valley Water Project modeling projected that basin-wide demand would decline from 1995 to 2030 from 473,000 afy to 443,000 afy; however demand has averaged over 500,000 afy since 1995.
- MCWRA has acknowledged that the demand assumptions used for the Salinas Valley Water Project modeling did in fact understate basin-wide demand.
- MCWRA now acknowledges that additional future groundwater management projects, in addition to the existing projects such as the Salinas Valley Water Project, are required to mitigate and avoid future seawater intrusion.
- MCWRA’s current analysis, based on 2013 modeling by Geoscience, calls for using 130,000 afy of surface water from the Salinas River to deliver additional water for coastal use, above and beyond the amount that can be provided by the Salinas Valley Water Project, in order to reduce coastal pumping and to establish the necessary groundwater elevations to prevent seawater intrusion.
- There is no certainty that seawater intrusion will be mitigated or avoided because the projects that are required to deliver this additional water are not committed, funded, or environmentally reviewed.

The FSEIR’s continued reliance on the out-of-date claims for the Salinas Valley Water Project made in the MCWD 2010 UWMP are unaccountable in light of the MCWRA’s open and public work on the continuing problem of seawater intrusion since 2010. The City of Seaside is required by BRP Hydrology and Water Quality Policy C-3 to “work with” MCWRA “to estimate the current safe yield” and to “participate in implementing measures to prevent future intrusion.” DSEIR, p. 4.8-20. It is difficult to believe that the City has honored this policy obligation if it remains ignorant of MCWRA’s current analysis of the seawater intrusion problem.

¹² *Id.* at 4-26.

Regardless, the City cannot claim that additional pumping in the Fort Ord area up to 6,600 afy would be without impact on the grounds that 6,600 afy represents a safe yield level for Fort Ord pumping.

5. The SEIR must provide an adequate and independent cumulative analysis of water supply impacts because it may not rely on tiering from the BRP PEIR.

Changed circumstances, new information, and changes in the BRP itself that have occurred since the BRP PEIR require reexamination of the cumulative analysis and preclude tiering. Accordingly, the City is obliged to prepare a new water supply analysis and not to tier from the water supply analysis in the BRP PEIR.

As LandWatch has objected, the SEIR may not tier from the BRP PEIR, at least with respect to the water supply discussion. Public Resources Code § 21094(b) bars tiering if the Project is not consistent with the plan for which the first tier EIR was prepared. The SEIR admits that it is inconsistent with the BRP Hydrology and Water Quality Policies B-1 and B-2, which policies require additional water supplies and prohibit approval of a development project without an assured long-term water supply. DSEIR, p. 4.9-10; FSEIR 14.4-1020.

Public Resources Code § 21094(b) also bars tiering if the project is not consistent with the applicable General Plan. The project is inconsistent with Seaside's General Plan, as is evident from the need for substantial amendments to that General Plan. The FSEIR's argument that the Project would be consistent with the General Plan after amendment would simply read this section of Public Resources Code § 21094(b) out of the statute because the State Planning and Zoning law bars approval of projects that are inconsistent with the General Plan. Furthermore, if the Project is inconsistent with the General Plan, there can be no assurance that its impacts were adequately assessed by the General Plan EIR.

Most problematically, Public Resources Code § 21094(b)(3) bars tiering if a project is subject to Public Resources Code § 21166 and/or CEQA Guidelines § 15162 due to changed circumstances and/or new information. Here, there are changed circumstances and new information that bar reliance on the out-of-date cumulative analysis.

First, seawater intrusion has advanced significantly since the 1997 BRP PEIR, constituting a substantially more severe significant effect than shown in the BRP PEIR. See Guidelines § 15162(a)(3)(B) ("Significant effects previously examined will be substantially more severe than shown in the previous EIR"). Within the meaning of Public Resources Code § 21166(b) and (c) this is a "substantial change[] . . . with respect to the circumstances under which the project is being undertaken" as well as "new information, which was not known and could not have been known" at the time of the BRP PEIR.

Second, the expected basin management plan, the cooperation in mitigation of seawater intrusion and development of new water supply, and the determination of safe yield required by BRP policies, including Hydrology and Water Quality Policies B-1, B-2, and C-3 have not materialized, and this is a substantial change in the BRP project itself. Public Resources Code § 21166(a). Indeed, the FSEIR admits that there have been substantial changes within the meaning of Public Resources Code § 21166. FSEIR at 14.4-1017 (acknowledging that the “various changes in the environmental and/or regulatory setting over the years” requires an SEIR). One of the admitted change in circumstances or changes in the BRP project is the “uncertainty” regarding “previously identified long-term water supply options,” i.e., the options identified by the BRP PEIR as the purported basis for finding impacts less than significant. DSEIR p. 4.8-47. The DSEIR acknowledges that, in light of this uncertainty, it is no longer possible to find, as the BRP PEIR found, that the project’s “adherence to the BRP policies and programs (as outlined below) and additional mitigation measures” would adequately mitigate impacts for all phases of the project.

The FSEIR admits that “MCWD has not implemented their long-term water supplies options to date” but apparently offers the excuse that this is “because the reuse of the former Army base slowed down considerably during the economic downturn beginning in 2008.” FSEIR p. 11.4-1026. This misinterprets the BRP PEIR’s water supply policies and mitigation requirements by implying that there is no obligation to provide any additional supply until 6,600 afy has been allocated to approved development projects. As discussed above and in Mr. Parker’s comments, the BRP PEIR analysis of water supply impacts makes it clear that FORA did not necessarily expect that 6,600 afy could be pumped from the Salinas Valley Groundwater Basin to support uses on Fort Ord without causing further seawater intrusion, and its policies and mitigation do not permit the agencies to delay a solution if seawater intrusion persists. BRP PEIR, pp. 4-49, 4-53 to 4-54. As Mr. Parker demonstrates, seawater intrusion has advanced another two miles since the BRP PEIR was certified.

Case law is clear that additional analysis of water supply impacts is required under section 21166 when new information shows more severe impacts or the planned water sources are not implemented timely:

To the extent that a subsequent subdivision proposal relies on different water sources than were proposed in the specific plan it implements, or the likely availability of the intended water sources has changed between the time of the specific plan and the subdivision application (or more has been learned about the effects of exploiting those sources), changes in the project, the surrounding circumstances or the available information would exist within the meaning of section 21166, requiring additional CEQA analysis under that section . . .

Vineyard, supra, 40 Cal.4th at 438; see also *id.* at 431, n. 7. Here, the new information about the severity of cumulative impacts, changes to circumstances, and to the project

itself with regard to water supply are subject to Public Resources Code § 21166 and/or CEQA Guidelines § 15162 and therefore tiering, at least for the water supply analysis, is not permitted. The SEIR erred by not providing a new analysis of water supply impacts, in particular, a new cumulative analysis.

6. Even if tiering were proper, the City must assess whether the project makes a considerable contribution to a significant cumulative effect.

Finally, even if tiering were permitted, the City must still assess whether the incremental effects of the Project would be considerable when viewed in the context of past, present, and probable future projects.” Guidelines, § 15152(f)(2). We note that the California Supreme Court has clarified that additional review of a subsequent project may be required in a tiering context even where 21166 does not apply:

The standard for determining whether to engage in additional CEQA review for subsequent projects under a tiered EIR is more relaxed than the prohibition against additional review imposed by Public Resources Code section 21166 for project EIR's.” (*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 528, 98 Cal.Rptr.2d 334.) For project EIRs, of course, a subsequent or supplemental impact report is required in the event there are substantial changes to the project or its circumstances, or in the event of material new and previously unavailable information. (*Ibid.*, citing § 21166.) In contrast, when a tiered EIR has been prepared, review of a subsequent project proposal is more searching. If the subsequent project is consistent with the program or plan for which the EIR was certified, then “CEQA requires a lead agency to prepare an initial study to determine if the later project may cause significant environmental effects not examined in the first tier EIR.” (*Ibid.* citing Pub. Resources Code, § 21094, subs. (a), (c).)

Friends of the Coll. of San Mateo Gardens v. San Mateo Cty. Cmty. Coll. Dist. (2016) 207 Cal. Rptr. 3d 314, slip op. at p. 11 (emphasis added).

The determination whether a project’s effects are a considerable contribution to a significant cumulative impact requires an acknowledgement of the existence of that cumulative impact and assessment of its severity 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.” *Communities for a Better Environment v. California Resources Agency* (“*CBE v. CRA*”) (2002) 103 Cal.App.4th 98, 120. Here, as discussed below, the SEIR simply fails to provide this assessment because it fails to provide an adequate cumulative analysis.

7. The SEIR fails to provide an adequate cumulative analysis of water supply impacts because it fails to acknowledge the existence of a significant regional cumulative impact and improperly limits the scope of cumulative analysis to the BRP area.

The DSEIR's cumulative analysis of water supply impacts is inadequate because 1) it is limited to the area subject to the BRP PEIR, i.e., former Fort Ord, and 2) it fails to consider in the first instance whether there is a significant cumulative impact from cumulative regional groundwater pumping. DSEIR 4.8-47, 4.19-30 to 4.19-32. Furthermore, to the extent that the FSEIR implies that cumulative impacts may be ignored because the project's contribution is a relatively small part of basin-wide pumping, the FSEIR is legally and factually in error.

By way of background, cumulative impact analysis requires an agency to make two determinations: (1) whether the impacts of the project in combination with those from other past, present, and future projects are cumulatively significant, and (2) if so, whether the project's own effect is a considerable contribution. Guidelines, § 15130(a); see Kostka and Zischke, Practice Under the California Environmental Quality Act (2nd Ed., 2014 Update), § 13.39. In step one, the agency must determine whether the combined effect of the project and other projects is significant, because those impacts may be "individually minor but collectively significant." *Communities for a Better Environment v. California Resources Agency* ("CBE v. CRA") (2002) 103 Cal.App.4th 98, 119-120. To provide an adequate step one analysis, the agency must

- "define the scope of the area affected by the cumulative effect,"
- explain "the geographic limitation used,"
- identify the past, present, and future projects "producing related or cumulative impacts" or provide projections of the conditions "contributing to the cumulative effect,"
- provide a "summary of the expected environmental effects to be produced by those projects." Guidelines, § 15130(b)(3), (4).

In step two, if there a significant cumulative effect, the agency must determine whether the project's contribution is "considerable," i.e., "whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect." *CBE v. CRA, supra*, 103 CalApp.4th at 119.

- a. The DSEIR errs by purporting to tier from the BRP PEIR but failing to summarize its cumulative groundwater analysis and conclusions.

Notably, the geographic scope of the BRP PEIR's cumulative analysis was regional, including the Salinas Valley Groundwater Basin as a whole, and it found significant unavoidable cumulative impacts. BRP PEIR, p. 5-5. The DSEIR does not acknowledge this; indeed, despite its claim that it tiers from the BRP PEIR, the DSEIR fails even to summarize the regional cumulative analysis from the BRP PEIR. As

discussed above, tiering is not appropriate here. However, if it were proper, then the DSEIR would be inadequate because it fails to summarize the discussion.

- b. The cumulative analysis is inadequate because it fails to justify limiting the geographic scope of analysis to the BRP area.

There is no justification for limiting the geographic scope of the cumulative analysis to the BRP area (former Fort Ord) because the seawater intrusion and aquifer depletion impacts are due to pumping throughout the Salinas Valley Groundwater Basin.

The FSEIR claims that “[t]he geographic scope of the area affected by the Project’s cumulative effect is the former Fort Ord (BRP boundaries).” FEIR 11.4-1024. This is not true. Nor is the FSEIR’s claim true that the area affected by the Project’s impact limited to the MCWD service area. *Id.* As Mr. Parker explains, the area that would be affected by project pumping includes the Pressure Subbasin and the Salinas Valley Groundwater Basin as a whole since these areas are hydraulically interconnected.

More importantly, CEQA does not define the geographic scope of cumulative analysis based on the area affected but based on the location of the cumulative projects that cause effects in the same area that the project causes effects. The Guidelines require identification of projects “producing related or cumulative impacts” or projections of conditions “contributing to the cumulative effect.” Guidelines §15130(b)(1). Case law is clear that it is improper to omit relevant past, present, and future projects that create related impacts. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1213-1214 (failure to consider all relevant projects in its cumulative impact analysis is an “overarching legal flaw”); *Citizens to Preserve the Ojai v. County of Ventura* (1985) 126 Cal.App.3d 421, 430-432 (failure to justify omission of offshore emissions is failure to comply with CEQA’s legal mandates); *San Joaquin Raptor Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 739-741 (omission of other known development projects).

In *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720, 724 the court invalidated an EIR’s cumulative air quality impact analysis not because its conclusions were unsupported by substantial evidence, but because the agency there – as here – had failed to conduct the analysis in the legally required manner by omitting consideration of all “past, present, and reasonably foreseeable probable future projects.” *Id.* at 720, 724. The court rejected the agency’s argument that it must defer to any substantial evidence within an EIR to support to support of the scope of cumulative analysis. *Id.* at 721-724. The court held that when an EIR’s analysis fails to consider required factual information, the error is one of law, not fact, because the exclusion of relevant information improperly burdens the public to provide the relevant analysis. *Id.* at 724.

Again, as Mr. Parker explains, it is indisputable that projects and pumping outside the BRP area affect aquifer depletion and seawater intrusion within the BRP area. For

example, this is acknowledged by the BRP PEIR (at p. 5-5, acknowledging that regional growth could cumulatively affect aquifers and cause further overdraft and seawater intrusion), the MCWD 2010 UWMP (at p. 29, acknowledging that basin-wide pumping causes declining water levels in Pressure Subarea), and the Army's 1993 FEIS (at p. 4-57, acknowledging that the available yield without seawater intrusion depends on the amount of pumping throughout the basin).

Responding to Comment PO 208-16 objecting to the truncated scope of cumulative analysis, the FSEIR asserts that it has simply made the choice to rely on a summary of projections and has chosen the BRP as the source of that summary. FSEIR p. 11.4-1024. However, reliance on a summary of projections in an adopted plan is impermissible if there is evidence that the geographic scope is drawn too narrowly. *Bakersfield Citizens, supra*, 124 Cal.App.4th at 1216-1217.

The FSEIR claims that its response PO 208-5 explains why the geographic scope was limited to the BRP. FSEIR pp. 11.4-1020, response PO 208-4, and p. 11.4-1023, response PO 208-15. However, response 208-5 does not justify the limitation of the geographic scope. That response purports to address objections that the DSEIR inadequately identifies and characterizes the pumping source aquifer(s), fails to identify other wells and cumulative pumping in the 900-foot aquifer, and fails to discuss recharge, saline contamination and sustained yield of the 900-foot aquifer. Response 208-5 makes the following points, which do not even purport to justify the geographic limitation:

- It claims it is speculative to state whether the 180-foot, 400-foot, or the 900-foot aquifer would supply Project water since they are connected hydraulically and the 180-foot and 400-foot aquifers are recharging the 900-foot aquifer. FSEIR 11.4-1020. This claim does not explain why the scope of cumulative analysis is limited to the BRP area.
- It states that the 900-foot aquifer is “in reality a series of aquifers, not all of which are hydraulically connected.” FSEIR p. 11.4-1020. This claim, which on its face contradicts the claim that all of the aquifers are hydraulically connected, does not explain why the scope of cumulative analysis is limited to the BRP area.
- It claims that the deep aquifer (the 900-foot aquifer) is not experiencing seawater intrusion. FSEIR p. 11.4-1021. This claim does not explain why the scope of cumulative analysis is limited to the BRP area.
- It reiterates that the threshold of significance is substantial depletion of groundwater supplies or interference with recharge such that there would be a net deficit in aquifer volume or lowering of groundwater table level. FSEIR p. 11.4-1020. This claim does not explain why the scope of cumulative analysis is limited to the BRP area.

- It states that mitigation will be required, that the impact will be significant and unavoidable for phases 4-6, and that a statement of overriding considerations will be required. FSEIR p. 11.4-1020 to 1021. This claim does not explain why the scope of cumulative analysis is limited to the BRP area.
- It states that the DSEIR relied on the MCWD UWMP, which discussed the Salinas Valley Groundwater Basin. This claim admits that the relevant geographic scope of cumulative analysis should be the Salinas Valley Groundwater Basin.
- It claims that there is adequate pumping capacity, that the project would be required to submit proof of adequate water supply before development is allowed, that the project does not overlay areas subject to seawater intrusion, and that all of this means that it will not cause any increase in seawater intrusion. FSEIR p. 11.4-1021. This claim, which on its face is inconsistent with the well-established fact that all Salinas Valley Groundwater Basin pumping, and especially coastal pumping, is causing an increase in seawater intrusion, does not in any event explain why the scope of cumulative analysis is limited to the BRP area.
- It states that the Project will not interfere with recharge. FSEIR p. 11.4-1021 to 1022. This claim does not explain why the scope of cumulative analysis is limited to the BRP area.
- It states that the Ord area is limited to 6,600 ac from the Salinas Valley Groundwater Basin and that not all of this has been allocated. FSEIR p. 11.4-1022. This claim admits that the relevant geographic scope of cumulative analysis should be the Salinas Valley Groundwater Basin.
- It claims that the DSEIR's analysis is based on the 2010 UWMP and that therefore "the details concerning aquifer operations do not affect the DSEIR's analysis," which is "considered sufficient to allow decision-makers to make an informed decision concerning the project's impacts." FSEIR p. 11.4-22. Again, this claim does not address the relevant geographic scope of cumulative analysis.

In sum, the SEIR is inadequate because it fails to justify the geographic limitation of its cumulative analysis to the BRP area. And the SEIR's cumulative analysis is inadequate because it fails to list projects "producing related or cumulative impacts" or to provide a

summary of projections of conditions “contributing to the cumulative effect.” Guidelines §15130(b)(1).

- c. Failure to consider whether there is a significant cumulative impact from cumulative regional groundwater pumping is legally erroneous; failure to identify such an impact is a critical factual omission.

As noted, cumulative analysis may require two distinct determinations: whether there is a significant cumulative impact from all relevant projects and, if so, whether the project under review makes a considerable contribution to that impact.

Nowhere in a step-one analysis does the DSEIR consider whether, much less acknowledge that, there is a significant cumulative impact caused by groundwater pumping from regional projects or, alternatively, conclude that there is no significant cumulative impact from regional projects. Indeed, the DSEIR erroneously fails to distinguish between the single-step analysis required for a project-specific significance determination and the two-step analysis required for cumulative significance determinations. Instead, the DSEIR offers essentially the same analysis and conclusions for both its project-specific and cumulative analyses of groundwater supply impacts. It finds both the project specific impacts and the cumulative impacts to be less than significant for Phases 1-3, because an unallocated portion of the 6,600 afy allocation is available, and unavoidably significant for Phases 4-6, because additional sources of water are not certain. DSEIR, pp. 4.8-34 to 4.8-35 (project-specific groundwater impact), 4.8-47 to 4.8-48 (cumulative groundwater impact), 4.19-31 to 4.19-32 (project-specific water supply impact), 4.19-24 to 4.19-26 (cumulative water supply impact). The cumulative analysis does not even purport to provide the required two-step analysis that would include a step-one determination whether there is a significant cumulative impact and a step-two determination whether the project makes a considerable contribution to it.

Again, this error reflects the fundamental confusion of the question as to whether there is an available water supply with the question of whether there will be impacts from using that supply.

Here, there is overwhelming evidence that a step-one determination must conclude that there is a significant regional cumulative impact from groundwater pumping by past, present, and reasonably foreseeable future projects, including the Monterey Downs project. The evidence, including Mr. Parker’s comments, shows that

- there has been and still is an ongoing significant cumulative impact to groundwater resources in the form of declining groundwater levels and seawater intrusion due to over-pumping of groundwater;
- this impact is due to basin-wide pumping, not just pumping within the BRP area;
- this impact has not been avoided by existing groundwater management projects;

- there are no committed, funded groundwater management projects that will avoid this impact in the foreseeable future; and
- the impact will be aggravated by increases in pumping to support future development, including projected increases in agricultural pumping and new urban development such as the Monterey Downs project.

Given this evidence, and the complete lack of analysis of relevant cumulative conditions in the Monterey Downs SEIR, the omission of an adequate cumulative analysis is prejudicial to informed decision making and public participation.

Furthermore, the SEIR presents no contrary evidence to support a step-one finding that there is no significant cumulative impact from cumulative groundwater pumping – an issue that the DSEIR simply fails to address. The lack of analysis precludes any step-one conclusion or finding that there is not a significant cumulative impact.

The lack of analysis also precludes any step-two conclusion that project's water demand does not constitute a considerable contribution to a significant cumulative impact. And, as discussed below, any implied approach to a step-two conclusion based on the relatively small percentage of basin pumping undertaken by MCWD or the fact that the pumping may be from the 900-foot aquifer would be based on a legally and factually erroneous approach to cumulative analysis.

- d. Any implication that pumping by MCWD is less than significant, or less than cumulatively considerable would be legally and factually flawed.

Responding to LandWatch's objections to the DSEIR's cumulative analysis, the FSEIR argues that agricultural water use consumes 95% of Salinas Valley Groundwater Basin water and that urban use consumes only 5%, and that the MCWD pumping is only 1% of total Salinas Valley Groundwater Basin pumping, apparently implying some kind of support for the DSEIR's conclusion that cumulative impacts for Phases 1-3 would be less than significant. FSEIR p. 11.4-1024 ("these details provide further clarification of the cumulative impacts associated with groundwater demand and supply . . ."). If the implication of this discussion is that the project does not make a considerable contribution to a significant cumulative impact, it is wrong as a matter of law and fact.

An EIR may not conclude a cumulative impact is insignificant merely because the project's individual contribution to an unacceptable existing condition is, by itself, relatively small. *Los Angeles Unified School Dist. v. City of Los Angeles* ("LAUSD") (1997) 58 Cal.App.4th 1019, 1025-1026; *CBE v. CRA, supra*, 103 Cal.App.4th at 117-118, 121. In *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692,718, the Court rejected the agency's "ratio" theory that found impacts not to be a

considerable contribution merely because they were a relatively small percent of the total impact. *Id.* at 720. Because the relevant question was “whether any additional amount” of incremental impact “should be considered significant in light of the serious nature” of the problem (*id.* at 718), a valid determination whether a project’s contribution is considerable must reflect the severity of the cumulative problem. “[T]he 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. Thus, even an “individually minor” impact may be “cumulatively considerable.” *Id.*; *see also* Guidelines, §§ 15355(b), 15065(a)(3); *LAUSD, supra*, 58 Cal.App.4th at 1024-25.

As Mr. Parker explains, it is irrelevant whether groundwater is used for agriculture or urban uses – it depletes the same basin. And the magnitude of existing pumping by MCWD or others is also irrelevant. What is relevant is whether marginal increases in pumping will be a considerable contribution in light of the severity of the overdraft and seawater intrusion problem. Because seawater intrusion is caused by the problem of overdraft, not by total pumping, the severity of the cumulative problem should be measured in terms of the size of the overdraft or the amount of induced seawater intrusion. Here, the basin as a whole and the Pressure Subarea are in overdraft and, as Mr. Parker explains, any additional pumping will induce seawater intrusion equal to about 75% of the volume pumped. Furthermore, coastal pumping is more problematic than inland pumping. Thus, as Mr. Parker explains, the project’s 250 afy increase in pumping demand should be evaluated in light of the annual Pressure Subarea overdraft of 12,000 to 19,000 afy, not in relation to the 500,000 afy of total pumping in the Salinas Valley Groundwater Basin. Viewed in this light, and viewed in the light of the current recommendations by MCWRA that existing pumping be reduced in the Pressure Subarea, the project’s marginal pumping demand is a considerable contribution.

And, in any event, the Monterey Downs SEIR does not address the legally relevant questions because it fails in the first instance to identify the severity of the cumulative problem and fails in the second instance to consider the project’s impact in light of that severity.

Any implication that the project’s pumping is not a considerable contribution because it is small in comparison to total basin-wide pumping would make the same error as made in *Kings County* by focusing on the ratio of the project’s pumping to the overall aquifer pumping or capacity and using these comparisons to “trivialize the project’s impact” without putting Project demand in the context of the serious nature of the cumulative problem. *Kings County, supra*, 221 Cal.App.3d at 718. An EIR is legally inadequate if it is “focused upon the individual project’s relative effects and omit[s] facts relevant to an analysis of the collective effect.” *Id.* at 721.

Furthermore, it is clear that the FSEIR bases its significance conclusions solely on the availability of water supply, not the effects of using that supply or the relative magnitude of pumping. For example, despite the fact that the demand for Phases 1-3 is

approximately equal to the demand for Phases 4-6, the SEIR finds Phase 1-3 demand to have a less than significant impact and phase 4-6 demand to have an unavoidably significant impact.

Finally, the SEIR cannot be used to argue that project pumping would be less than a considerable contribution to significant groundwater impacts because some portion of that pumping would come from the 900-foot Aquifer, also known as the Deep Aquifer. Mr. Parker demonstrates, based on available stratigraphic analysis and modeling, that increased pumping from the Deep Aquifer will also cause depletion of the 180-Foot and 400-Foot Aquifers because those aquifers are the source of recharge to the Deep Aquifer. Mr. Parker also demonstrates that increased pumping from the Deep Aquifer will aggravate seawater intrusion to the 180-Foot and 400-Foot Aquifers. Increased pumping from the Deep Aquifer may deplete that aquifer and it may also induce seawater intrusion into the Deep Aquifer itself. Because the SEIR declined to discuss the relation of the 180-Foot, 400-Foot, and Deep Aquifers or to provide any assessment of impacts to the three aquifers in response to LandWatch's comments and questions, the SEIR provides no evidence to the contrary.

8. The SEIR's conclusion regarding phases 4-6 are not based on adequate analysis and the SEIR fails to discuss impacts from alternative water supplies.

As discussed, the SEIR errs by concluding without adequate analysis that water supply impacts for Phases 1-3 of the project would be less than significant and would not make a considerable contribution to a significant cumulative impact. The SEIR does acknowledge that supplying water for Phases 4-6 would be a significant unavoidable impact. However, the SEIR bases this conclusion solely on the fact that the Phase 4-6 water supply cannot be made available from the unallocated portion of the 6,600 afy allocation and that additional water supplies are uncertain, not based on any analysis of physical impacts on the environment from the water that is likely to be used by Phases 4-6.

Where a water supply is uncertain, an agency must identify alternative supplies and discuss the environmental impacts of tapping those sources. *Vineyard, supra*, 40 Cal.4th at 430, 431, 434. As LandWatch objected, the SEIR fails to provide any discussion of the environmental impacts of developing and providing alternative water supplies, such as the proposed desalinated or recycled water supplies. For example, the SEIR identifies the Regional Urban Water Augmentation Project ("RUWAP") and desalination as possible future water supply. DSEIR, pp. 4.19-7 to 4.19-9, 4.19-25 to 4.19-26; FSEIR pp. 11.3-13 to 11.3-15. However, despite LandWatch's request for a discussion of the environmental impacts of alternative supplies (PO 208-25), neither the DSEIR nor the FSEIR provide any information about these environmental impacts.

The FSEIR admits that "[s]ome of these water supply options were evaluated in past agency documents, as discussed in the DSEIR Section 4.9 [sic, 4.19], Water." However, nothing in in the discussion of future water supplies in Section 4.19 even

mentions the potential environmental impacts of those water supply projects. DSEIR, pp. 4.19-7 to 4.19-9, 4.19-25 to 4.19-26.

Instead of making good-faith efforts to investigate and provide the available information about the environmental effects of alternative water supplies, the FSEIR states that “[b]ecause it is unknown at this time what those environmental impacts would be, the DSEIR concluded that the impact with the provision of water for phases IV through VI could be significant and unavoidable.” FSEIR, p. 11.4-1028. The contention that the environmental impacts of the RUWAP project “are unknown at this time” is not true. MCWD has certified four separate environmental reviews of the RUWAP project from 2004 to 2016, including the September 2004 Final EIR, the October 2006 Addendum No. 1, the February 2007, Addendum No. 2, and the April 2016 Addendum No. 3.¹³ The SEIR could and should have discussed this available information, which it could have done by tiering and incorporation by reference. Furthermore, an agency may not simply label an impact unavoidably significant in order to dispense with analysis. *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1371.

9. Significant new information since the DSEIR was released requires recirculation.

An agency must recirculate a draft EIR for public comments and responses when there is significant new information after the draft EIR is released but prior to certification. Guidelines, § 15088.5(a). Recirculation of a draft EIR for public comment and response is required where the record shows that a potentially significant impact, or the efficacy of mitigation, was not evaluated in the draft EIR. *Vineyard, supra*, 40 Cal.4th at 447-448 (potential impact to salmon); *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1120 (water supply mitigation). The new information triggering the obligation to recirculate may appear in the FEIR or in post-FEIR material. *Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 95; *Save our Peninsula Committee v. Monterey County Board of Supervisors* (“*Save Our Peninsula*”) (2001) 87 Cal.App.4th 99, 131. The purpose of recirculation is to provide the public the same opportunity to evaluate the new information and the validity of the EIR’s conclusions as it had for information in the draft EIR. *Save Our Peninsula, supra*, 87 Cal.App.4th at 131; *Sutter Sensible Planning v. Board of Supervisors* (1981) 122 Cal.App.3^d 813, 822; *Laurel Heights Improvement Ass’n v. Regents of the Univ. of Cal.* (“*Laurel Heights II*”) (1993) 6 Cal.4th 1112, 1132.

¹³ Marina Coast Water District (“MCWD”), Notice of Determination, Regional Urban Water Augmentation Project, June 2, 2005; MCWD, Notice of Determination, Regional Urban Water Augmentation Project, Addendum No. 1, December 18, 2006; MCWD, Notice of Determination, Regional Urban Water Augmentation Project, Addendum No. 2, Feb. 24, 2009; MCWD, Notice of Determination, Regional Urban Water Augmentation Project, Addendum No. 3, April 19, 2016.

Here, significant new information includes (1) new information showing a new or more severe significant impact resulting from the project (Guidelines, § 15088.5(a)(1), (2); *Laurel Heights II, supra*, 6 Cal.4th at 1130) and (2) new information showing that the draft EIR was “so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded” (CEQA Guidelines, § 15088.5(a)(4); *Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1052).

As discussed by Mr. Parker, the DSEIR relies on the MCWD Water Supply Assessment contention that the groundwater supply is “reliable,” which in turn relies on the contention in the MCWD 2010 UWMP that the Salinas Valley Water Project will result in an average annual basin-wide water surplus of 6,000 acre feet instead of an average annual water deficit.¹⁴ However, the contention that the Salinas Valley Water Project will balance the basin and prevent seawater intrusion is no longer tenable in light of significant new information that does not appear in the draft EIR. In addition to Mr. Parker’s comments this information also includes DWR findings, MCWRA groundwater studies, and MCWRA testimony cited by Mr. Parker, including for example:

- DWR, Critically Overdrafted Basins, January 2016 – identifying the Salinas Valley Groundwater Basin as critically overdrafted and therefore requiring an accelerated Groundwater Sustainability Plan under the Sustainable Groundwater Management Act.
- MCWRA, State of the Salinas River Groundwater Basin, January, 2015 – identifying existing pumping from the Basin as unsustainable and recommending pumping reductions in the Pressure Subarea from which this project proposes to increase pumping.
- MCWRA, Protective Elevations to Control Seawater Intrusion in the Salinas Valley, 2013 – acknowledging the need for additional groundwater management projects to deliver water to replace coastal area pumping.
- Testimony of Robert Johnson, MCWRA, to Monterey County Planning Commission, Oct. 29, 2014 – acknowledging that the demand projections used for the Salinas Valley Water Project understated actual demand, that the Salinas Valley Water project would not be sufficient to halt seawater intrusion, and that additional groundwater management projects are needed.

This information demonstrates, contrary to the out-of-date 2010 UWMP relied upon by the DSEIR, that the Salinas Valley Water Project will not balance the basin hydrologically and will not halt seawater intrusion. Thus, the information demonstrates a new or more severe impact than disclosed by the DSEIR and demonstrates that the

¹⁴ See DSEIR, p. 4.8-34; MCWD, Water Supply Assessment and Written Verification of Supply for Monterey Downs Specific Plan, 2012, pp. 22-23; MCWD, 2010 UWMP, p. 53.

DSEIR was so fundamentally inadequate as to deny the public a meaningful opportunity for comment and response.

10. The SEIR fails to respond adequately to comments regarding water supply issues.

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

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

Problems raised by the public and responsible experts require a good faith reasoned analysis in response. [Citation.] The requirement of a detailed analysis in response ensures that stubborn problems or serious criticism are not “swept under the rug.”

Id. at 723.

As Mr. Parker explains, the FSEIR fails to provide good-faith reasoned analysis in response to LandWatch’s comments and questions regarding pumping from the 180-foot, 400-foot, and 900-foot aquifers under baseline and future conditions. See comment PO 208-5. The FSEIR fails to identify the studies cited by the DSEIR including the “recent stratigraphic analyses” that “have indicated” a hydraulic connection between the 180-foot, 400-foot, and 900-foot aquifers. See comment PO 208-5. The FSEIR fails to respond adequately to LandWatch’s comments asking for an explanation of the DSEIR’s claims regarding the hydraulic connections between the 180-foot, 400-foot, and 900-foot

aquifers. See comment PO 208-6. The FSEIR fails to provide adequate responses to LandWatch's comments asking whether recharge to the 900-foot aquifer from the seawater-intruded 180-foot and 400-foot aquifers could contaminate the 900-foot aquifer, whether increased pumping in the 900-foot aquifer would increase this risk, and how much pumping from the 900-foot aquifer is sustainable. See PO 208-7 through 208-11.

As discussed above, the FSEIR fails to respond adequately to comments objecting to reliance on the 6,600 afy allocation as the basis to find impacts less than significant. See, e.g., comment PO 208-22. The FSEIR also fails to respond adequately to LandWatch's request for a discussion of the environmental impacts of alternative water supplies. See comment PO 208-25.

11. The SEIR fails to provide an adequate discussion of the effect of not building Phases 4-6.

Where mitigation includes the possibility of not building later phases of a project due to lack of water, an agency must discuss "the environmental impacts of curtailing the project before completion." *Vineyard Citizens, supra*, 40 Cal.4th at 444. Here, buildout of only part of the project has the potential to aggravate certain environmental impacts, but the SEIR fails to disclose this.

The FSEIR confirms that phases 1-3 are in fact disproportionately residential compared to full buildout of the project: building only phases 1-3 would yield 47% of the residential plan but only 26% of the jobs-generating commercial uses. FSEIR, p. 11.3-2.

An unbalanced jobs/housing ratio for the project would result in greater per capita impacts from transportation and transportation-related air pollutants and GHG emissions as residents would be required to travel to more distant jobs. It would also frustrate BRP and City policies related to jobs/housing balance and economic development. Evidence for this is as follows:

First, the BRP relies on maintenance of a strong jobs/housing balance to manage travel demand and to minimize transportation-related impacts:

3.5.5 Demand Management

The proposed roadway network addresses many of the key issues raised and much of the increased transportation demand that will result from the reuse of the former Fort Ord. To supplement the roadway improvements, there are a number of strategies that can be pursued to reduce the demand for vehicle trips. Taking steps to reduce the number of vehicle trips can also lead to reduced infrastructure costs. Land use and transportation strategies are incorporated into the Reuse Plan to reduce vehicle demand and encourage walking and bicycle use.

Jobs/Housing Balance

Providing a jobs/housing balance is intended to encourage employers to locate in areas where there are significantly more residents than jobs and to add housing development near employment centers. Efforts to create a jobs/housing balance should ensure that the jobs provided are compatible with the skill-levels and income expectations of nearby residents. Developing jobs and housing in proximity to each other provides an opportunity to reduce the travel demands on key regional facilities by reducing the length of the trip and/or shifting a vehicle trip to an alternative mode. The Reuse Plan seeks to achieve a better job/housing balance within the former Fort Ord. The desired result of this balance is the reduced demand on those regional roadways connecting employees living off-base with employment centers on-base.

BRP, p. 120. The BRP seeks to generate 45,000 to 46,000 jobs and 17,000 dwelling units to ensure that there are 2.67 jobs per household (2.06 counting the student population).

BRP, p. 92. The BRP also counts on mixed use development to reduce transportation demand. BRP, p. 121.

Second, the DSEIR relies on jobs generated by the project and a mix of office, retail, commercial and residential uses from full buildout of the project to project a reduction of trips by 28% compared to development of just residential or just commercial uses. DSEIR, p. 4.16-63. The FSEIR also argues that this 28% “internal capture” is justified based on the fact that the project would include a mix of jobs and housing. FSEIR, p. 11.4-17. This internal capture would significantly reduce per capita transportation and GHG impacts through reduced vehicle trips compared to a primarily residential development project in which residents had to commute longer distances and to travel longer distances to shop. However, the internal capture rate would be reduced if the project did not provide a robust mix of land use types, including commercial, retail, residential, and recreation and/or if it did not provide as many jobs per unit of housing.

Third, the SEIR assesses the significance of the GHG impact based on a per capita basis. DSEIR, p. 4.6-13 to 4.6-14. Mobile source emissions amount to 29,062 tons of the project’s total 49,174 tons of CO₂ – about 59% of the total. If internal capture were reduced because the mix of land uses were not as diverse and the jobs/housing ratio were not as high as assumed, then the per capita vehicle trips would increase (even if total trips did not increase), resulting in higher per capita GHG impacts. The DSEIR already finds GHG impacts to be unavoidably significant because GHG emissions exceed the per capita threshold of significance. An unbalanced jobs/housing ratio resulting from failure to build out Phases 4-6 would further aggravate an already significant GHG impact.

Fourth, the SEIR also identifies an unbalanced jobs/housing ratio as a potential inconsistency with the Seaside General Plan and a source of potential impacts in its analysis of population and housing impacts, impacts that are avoided only because the full project is projected to provide many jobs in proportion to its housing units. DSEIR,

pp. 4.9-20, 4.11-15. Seaside identifies a jobs/housing ratio target of 1.5:1. DSEIR, p. 4.9-20.

Fifth, the BRP also contains goals and policies intended to ensure a strong jobs/housing balance. As noted, the BRP jobs/housing goal is a ratio of 2.67. BRP, p. 92. The BRP's Development and Resource Management Plan ("DRMP") is intended to ensure that development goals are met within resource constraints. The DRMC sets an objective of replacing the 18,000 jobs lost by the base closure by 2015. BRP, p. 199. Critical to meeting that goal are the coordinated Residential Development Program (DRMP § 3.11.5.4(b)) and Industrial and Job Creation Program (DRMC, § 3.11.5.4(c)), which limit residential development until the 18,000 jobs goal is met in order to prevent using up the limited water supply to support unbalanced residential development. BRP, pp. 197-199. A large development project that consumes water supply without doing its fair share to create jobs is inconsistent with the BRP jobs/housing policies.

Because the FSEIR declined to address the issue in response to LandWatch's questions (FSEIR, p. 11.4-1028), we examined the effect of not building the relatively jobs-rich Phases 4-6, which contain the lion's share of the commercial and recreational facilities.

We note that the DSEIR is equivocal as to the actual volumes of jobs and the effect on the jobs/housing ratio. The DSEIR provides two widely varying claims regarding the numbers of jobs, although both claims are advanced to support the contention that buildout of the project would improve Seaside's existing jobs/housing ratio, which is currently housing-rich and jobs-poor. In particular, the DSEIR states the project would create 1,743 new jobs in its analysis of the project's consistency with Seaside General Plan Policy LU 1.2, a policy that requiring the City to encourage development that is job intensive:

As concluded in Section 4.11, *Population and Housing*, the Project would generate approximately 1,743 new jobs, which would beneficially impact the City's jobs-to-housing ratio, increasing it from 0.67 to 0.75. The Project would be in furtherance of the City meeting its jobs/housing ratio of 1.5:1.

DSEIR, p. 4.9-20, emphasis added. However, Section 4.11 actually states that the project would generate 2,758 new jobs:

"Finally, the Project would generate approximately 2,758 new jobs, which would beneficially impact the City's jobs-to-housing ratio, increasing it from 0.67 to 0.83."

DSEIR, p. 4.11-15, emphasis added.

The difference in the DSEIR’s two jobs estimate is equal to the 1,015 projected “equestrian” jobs identified in the fiscal analysis of the project.¹⁵ Of the equestrian jobs, 976 are tied to Phases 4-6 and would not be generated if these Phases were not constructed, especially the Phase 6 Sports Arena and race track which, by itself, is projected to create 950 of the equestrian jobs.¹⁶ Most of the non-equestrian jobs are also tied to Phases 4-6.

In fact, only 620 total jobs, equestrian and non-equestrian, would be generated by phases 1-3; the remaining 1,771 jobs depend on phases 4-6 and would not occur if these phases were not constructed due to a lack of water supply.¹⁷

Phases 1-3 would include 473 dwelling units from RES-1 and 124 dwelling units from RES-2, for a total of 597 dwelling units.¹⁸ Phases 4-6 would include 426 units from RM and 256 units from RES-3, for a total of 683 units.¹⁹ Thus, the jobs/housing ratio for Phases 1-3 would be 620 jobs/597 housing units, a ratio of 1.04. The jobs/housing ratio for Phases 4-6 would be 1771 jobs/ 683 housing units, a ratio of 2.59. At full buildout, the jobs/housing ratio would be 2,391 on-site jobs/1280 housing units, a ratio of 1.87.

	Phases 1-3	Phases 4-6	Full Buildout
On site jobs	620	1,771	2,391
Housing units	597	683	1,280
Jobs/housing ratio	1.04	2.59	1.87

Including the 297 jobs generated by the project’s economic effects in Seaside rather than on the project site itself (*see* Wildan, Table 28) the jobs/housing ratio at buildout would be 2,658 jobs/1280 housing units, a ratio of 2.08. (Modeling for these off-site jobs assumes that they would be driven by overall economic activity attributed to the project, not to specific activities; and therefore these off-site jobs would presumably be spread among the six phases.)

¹⁵ Willdan, Monterey Downs Fiscal and Economic Analysis, Aug. 2015, p. iv.

¹⁶ *Id.* at 17.

¹⁷ *Id.*, Table 8. Table 8 reports only on-site employees. Thus, its 2,391 total jobs do not include the 290 jobs from ongoing operations generated in Seaside that are identified in Table 28. These 290 Table 28 jobs in Seaside plus the 2,391 Table 8 jobs within the project account for 2,681 of the 2,758 total jobs reported by the DSEIR at page 4.11-15. It is unclear what accounts for additional 77 jobs reported by the DSEIR.

¹⁸ MDSP, Figure 8-1 (phasing plan); DSEIR, Table 2-2 (land use summary).

¹⁹ *Id.*

Notably, the BRP sets a goal for the jobs/housing ratio of 2.67, based on 45,000 to 46,000 jobs and 17,000 housing units. BRP, p. 92. Omitting the CSUMB students, the BRP goal is 2.06. Thus, full buildout of the project, including the 950 equestrian jobs created in phase 6 and the off-site jobs created in Seaside, would be required to meet the BRP goal of 2.06 jobs per housing unit.

In sum, if Phases 4-6 were not build due to a lack of water:

- The project would not meet the BRP jobs/housing goal intended to minimize transportation and other impacts because the 1.04:1 jobs/housing ratio for Phases 1-3 is well below the BRP's target jobs/housing ratio of at least 2.06:1.
- The project would not contribute as projected in the DSEIR in meeting Seaside's jobs/housing policies. A project with a jobs/housing ratio below the City's 1.5:1 target, e.g., the 1.04:1 ratio in Phases 1-3, cannot contribute to attainment of the 1.5:1 ratio called for by Seaside General Plan Policy ED-8.1. Approving a project with a jobs/housing ratio below the 1.5:1 target, especially a project that will account for the lion's share of future growth in Seaside, effectively frustrates attainment of that target ratio. The draft general plan consistency findings for the City Council meeting state that the full project would add 1,280 housing units to Seaside's existing 11,335 units and add 2,758 jobs to Seaside's existing 7,790 jobs, thereby improving the jobs/housing ratio from 0.69:1 to 0.84:1. However, if only phases 1-3 are build, the resulting 8,410 jobs and 11,937 housing units would provide a jobs housing ratio of only 0.70. The post-project jobs/housing ratio would be essentially unchanged if only Phases 1-3 were built.
- Permitting top-heavy residential development would also be inconsistent with Seaside General Plan Policy LU-1 to encourage regional commercial and visitor serving use and its Policies ED-1.1 and ED 5.1 to establish a diverse mix of businesses and tax sources, because the city would have consumed a major portion of its water-constrained development capacity without advancing those policies.
- Failure to meet the BRP jobs/housing goal would be inconsistent with the BRP's DRMP § 3.11.5.4(b), (c) provisions to balance residential and job-creating development to ensure that water remains available for job-creating development.
- And failure to fulfill the DSEIR's own assumptions regarding the mix of development types and the jobs/housing ratio would increase the per capita GHG emissions over the level projected by the DSEIR, aggravating an already significant GHG impact.

The SEIR should have provided an analysis of these entirely foreseeable outcomes.

Furthermore, because there are significant unmitigated impacts, CEQA requires that the City adopt a statement of overriding considerations to approve the project. An analysis of the fiscal effect of building only the first three phases is clearly relevant to any findings regarding fiscal and job impacts since fiscal and job benefits are cited as overriding considerations. However, as discussed, the jobs benefits would be greatly reduced if only phases 1-3 were built. And the economic benefits of the project are critically dependent on building Phases 4-6. For example, without the hotel uses in Phase 4 there would be at most half of the projected transient occupancy taxes and the net impact of the project on Seaside's general fund may be negative instead of positive.²⁰

In response to LandWatch's request for an analysis of the effect of building only Phases 1-3, the FSEIR claims that any such analysis would be "speculative" since 1) the project phasing plan is subject to change and 2) the DSEIR conservatively assumes full buildout of all phases. FSEIR, pp. 11.3-1, 11.4-1028. The claim that the phasing plan is subject to change is a red herring. The Specific Plan calls for developing certain specific residential and commercial areas in Phases 1-3. Specific Plan, p. 8-1 and Figure 8.1. This is how the project is described and it is how it should be evaluated in the EIR; otherwise the EIR simply fails to provide an adequate and stable project description as CEQA requires. Guidelines, §15124. Indeed, the EIR's water supply analysis is in fact predicated on the specific phasing plan set out in section 8.2 of the Specific Plan, with demand calculated separately for these phases. Because the DDSEIR treats the phasing plan as adequately settled for some of its analyses, it is unreasonable to characterize the phasing plan as "speculative" when the public asks for additional analysis predicated on that same phasing plan.

The FSEIR's argument that the phasing does not matter because the overall analysis conservatively assumes buildout of all phases simply ignores the question LandWatch posed, which is whether there would be different or more intense impacts in some environmental areas if less than the full project were built. As discussed, a predominately residential project would aggravate the jobs/housing balance and increase the per capita transportation, air pollution, and GHG impacts. These are different and potentially more intense impacts.

The FSEIR states that the city could require changes to the phasing plan if it later concludes that "a different land use mix is required to address environmental issues/constraints including available water supply limits." FSEIR, p. 11.4-1029. If this contention is that the City might later decide to adopt mitigation intended to address impacts from unbalanced development and a poor jobs/housing mix, then it is entirely unsupported by analysis of these impacts in this EIR and constitutes improper deferral of both analysis and mitigation. The FSEIR simply fails to provide any answer to the

²⁰ *Id.*, Table 25.

questions raised by LandWatch as to the effects of not building part of the project due to lack of water.

12. The SEIR relies on inadequate fair share payments to mitigate water supply impacts.

Impact fees are permissible mitigation for cumulative impacts as long as a project pays a fair share of a committed project that has been environmentally reviewed and found adequate. However, a mitigation measure calling for payment of unspecified mitigation fees for project that may not be built is not adequate mitigation. LandWatch requested that the SEIR identify the mitigation projects and fair shares that would be required of the project under mitigation Measure W-3. Comment PO 208-30. The DSEIR and FSEIR refer only to the “appropriate FORA fees, a portion of which is allocated for water supply augmentation improvements.” DSEIR, p. 4.19-28; FSEIR, p. 11.4-1030. Despite LandWatch’s request, the SEIR fails to identify the amount of the fee or the projects for which it will pay.

C. The FSEIR fails to provide good-faith reasoned responses to comments seeking the basis of the DSEIR’s GHG mitigation claims.

As LandWatch objected (comments 208-71 to 208-80), the DSEIR’s analysis of GHG emissions fails to clarify the specific measures for which mitigation credit is taken and fails to specify the assumptions behind that mitigation credit. LandWatch objected that the reductions were taken through the CalEEMod emissions modeling software, but that the DSEIR fails adequately to describe, specify, quantify, or justify each GHG emission reduction feature for which credit was taken. In response, the FSEIR directs the public to pages 38-39 of CalEEMod 2013 User’s Guide and unspecified pages of CAPCOA’s 2010 546-page report, Quantifying Greenhouse Gas Mitigation Measures. Here is the FSEIR’s response:

The GHG emission reduction features used in CalEEMod for the Project are specifically listed in DSEIR Appendix 10.2 for each of the Project operations modeling scenario (pages 234-265 of the PDF), and are based on CAPCOA’s Quantifying Greenhouse Gas Mitigation Measures document (refer to pages 38 and 39 of the CalEEMod User’s Guide Version 2013.2, <http://www.aqmd.gov/docs/default-source/caleemod/usersguide.pdf?sfvrsn=2>). Definitions of the mitigation measures and terms used in CalEEMod (and in quantifying the mitigated Project GHG emissions) can be found at <http://www.capcoa.org/wpcontent/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf>.

CalEEMod conservatively programs the reductions from the CAPCOA research and guidance, and prevents double counting. The CalEEMod outputs for mitigated GHG emissions do not provide a breakdown by specific mitigation measures. Rather, the mitigated emissions outputs are displayed by emission

source (i.e., area, mobile, energy). For example, in the “mobile” category of the modeling outputs, all programmed vehicle trips, VMT and mobile-source GHG emissions reductions from the CAPCOA mitigation measures which are applicable to the Project are clearly listed, and a review of those pages shows that the specific model inputs are the same as those listed in the comment. This methodology discloses the particular GHG emissions reductions claimed for each applicable CAPCOA mitigation measure by emission source, which represents the justification for the modeled reductions which commenter falsely asserts is missing in the DSEIR.

In response to the full paragraph below the bulleted list in this comment, the calculated GHG reduction credits are already built into CalEEMod for each applicable CAPCOA mitigation measure selected. The empirical basis behind the underlying assumptions, parameters or values for these measures and reductions are detailed in the above-referenced CAPCOA document. Therefore, it is inappropriate for this DSEIR to cite such empirical evidence or to “justify” the conclusions already documented in the CAPCOA document that such features “will in fact reduce VMT”, vehicle trips or mobile-source GHG emissions, as incorrectly asserted by commenter. This same logic applies to commenter’s incorrect assertions in the next paragraph regarding non-mobile-source GHG emissions reductions (i.e., area, energy) for each applicable CAPCOA mitigation measure selected.

In conclusion, commenter fails to provide evidence that any applicable CAPCOA mitigation measure to reduce GHG emissions for the Project is missing from the CalEEMod runs in DSEIR Appendix 10.2. Therefore, since the DSEIR clearly discloses this information, recirculation of the document as suggested by commenter is not warranted.

FSEIR, pp. 11.4-1048 to 11.4-1049.

Preliminarily, we note that neither the DSEIR’s discussion of GHG impacts (Section 4.6) nor its Appendix 10.2 analyzing GHG impacts makes any reference whatsoever to the CAPCOA guidance document, Quantifying Greenhouse Gas Mitigation Measures, that the FSEIR identifies for the first time as the source of information justifying the GHG mitigation credits.

The CalEEMod User’s Guide does provide at pages 38-39 that the mitigation is based on mitigation measures specified in the CAPCOA report and that the CalEEMod user is supposed to follow the instructions in the CalEEMod “mitigation module” to enter the various data required by the mitigation measures specified in CAPCOA’s report. However, neither CalEEMod nor the CAPCOA report provide the information LandWatch requested, which is necessarily specific to this project.

Fact Sheets in Chapter 7 of the CAPCOA report identify a number of specific mitigation measures. The CAPCOA Fact Sheets provide formulae for calculating GHG reductions that are dependent on provision of project-specific assumptions and that result in greatly varying ranges of emission reductions depending on those assumptions. For example, CAPCOA indicates that the GHG reduction credit for the measure identified as “increased density” (CAPCOA mitigation measure “LUT-1”) can range from 0.8% to 30% because it depends on three project-specific variables: housing units per acre, jobs per acre, and the selection of one of two different assumptions about the elasticity of VMT with respect to density.

The FSEIR claims that “the emission reduction features used in CalEEMod for the Project are specifically listed in DSEIR Appendix 10.2 for each of the Project operations modeling scenario (pages 234-265 of the PDF).” FSEIR, pp. 11.4-1048. However, the cited pages simply identify the category of emission reduction but fail to set out the critical project-specific assumptions that were used in the analysis. These are the data that LandWatch specifically requested (comment PO 208-79), explaining that the range of effectiveness of the GHG mitigation measures is dependent on accurate assumptions. The CalEEMod user was required to enter these project-specific assumptions, but the CalEEMod output in the DSEIR Appendix 10.2 does not report these assumptions.

MOBILE SOURCE GHG MITIGATION: The table below lists the data required by CAPCOA for the seven mobile source (transportation) mitigation measures that were presumably provided by the air quality analyst pursuant to the data requirements of CalEEMod. See CalEEMod user’s Guide, p. 41. The missing information is the data that LandWatch requested and that the FSEIR simply refused to provide:

Mobile source mitigation feature identified in Appendix 10.2	CAPCOA measure	Project-specific data required by CAPCOA and/or CalEEMod, <u>but not provided in DSEIR or FSEIR despite LandWatch’s request</u>	Project-specific range of effectiveness in reducing GHG emissions
Increase density	LUT-1	-housing units per acre; -jobs per acre; -elasticity of VMT with respect to density Note: two possible elasticity values from the literature are identified.	0.8% to 30%
Increase diversity	LUT-3	-percentage of each land use type in the project (land use types include residential, retail, park, open space, or office)	9% to 30%
Improve walkability design	LUT-8	-intersections per square mile; -elasticity of VMT with respect to percentage of intersections (Note: two possible elasticity approaches from the literature are identified.)	3% to 21.3%
Increase transit accessibility	LUT-5	-distance to transit station in project; -transit mode share for typical ITE development (Note: this project contains numerous ITE categories so it is unclear which “typical mode share” was assumed, or whether a blended mode share was determined)	0.5% to 24.6%
Integrate below market rate housing	LUT-6	-percentage of units in project that are deed-restricted BMR housing	0.04% to 1.2%
Improve pedestrian network	SDT-1	-information regarding extent of pedestrian accommodation	0% to 2%
Expand transit network	TST-3	-percent increase in transit network coverage; -existing transit mode share; -project location: urban center, urban, or suburban	0.1 to 8.2%

As is evident, the range of effectiveness of the above mobile source measures is critically dependent on the specific assumptions describing the project. The public has no way to evaluate the accuracy of the analysis or to challenge the applicability of the assumptions. Contrary to the FSEIR, the citations to the CalEEMod User's Guide and CAPCOA do not provide the information that LandWatch requested, and it is not provided in Section 4.6 or Appendix 10.2 of the DSEIR..

AREA SOURCE GHG MITIGATION: The picture for the five mitigation credits taken for area sources is even more opaque. The DSEIR identifies four categories of credit for use of low VOC paints and another credit for requiring natural gas hearths as measures for which operational emission reduction credits were taken. The FSEIR states that the CalEEMod credits are based on CAPCOA mitigation measures. However, CAPCOA does not mention low VOC paints, and the CalEEMod User's Guide does not identify a CAPCOA mitigation measure related to low VOC paints. Instead CalEEMod identifies a credit based on unspecified SCAQMD (South Coast Air Quality Management District) assumptions and apparently requiring assumptions regarding paint reapplication rates and VOC contents. CalEEMod User's Guide, p. 32. This information is not provided in the DSEIR or FSEIR, despite LandWatch's request.

CalEEMod's discussion of its credit for all natural gas hearths states only that the use of natural gas hearths is "consistent with the mitigation number A-1 in the CAPCOA Quantifying GHG mitigation document."²¹ CalEEMod User's Guide, p. 42. However, Mitigation number A-1 is for prohibition of gas powered landscaping equipment and CAPCOA does not mention a credit for requiring natural gas hearths. CAPCOA, p. 69. There is no apparent connection between CAPCOA's credit for prohibiting gas powered landscaping equipment and CalEEMod's credit for requiring gas-powered hearths. If there is, neither CAPCOA, the CalEEMod User's Guide, nor the SEIR explain that connection.

Furthermore, neither the SEIR nor CalEEMod nor CAPCOA identify the GHG reduction percentage claimed for these low VOC paints and natural gas hearths.

WATER SUPPLY GHG MITIGATION: The DSEIR claims four credits for low flow bathroom faucets, kitchen faucets, toilets, and showers, which CalEEMod indicates are based on CAPCOA measure WUW-1. This measure has a range of effectiveness of 17-31% and requires specification of the percent flow reduction. CalEEMod User's Guide, p. 43; CAPCOA, p. 348. This information is not provided in the DSEIR or FSEIR, despite LandWatch's request.

The DSEIR claims another GHG mitigation credit for reclaimed water use. CalEEMod requires specification of the percent of indoor water use and the percent of

²¹ The CalEEMod User's Guide provides data entry screens to specify hearths and woodstoves and to override regulatory limits on these, but these screens do not appear to relate to emission credits for requiring all natural gas hearths. CalEEMod User's Guide, pp. 31-32.

outdoor water use. CalEEMod User's Guide, p. 43. This information is not provided in the DSEIR or FSEIR. CAPCOA requires specification of reclaimed water use and total non-potable water use and identifies a range of effectiveness of up to 40%. CAPCOA, p. 332. This information is not provided in the DSEIR or FSEIR, despite LandWatch's request.

Furthermore, the actual commitment to use recycled water for the project is unclear because the SEIR acknowledges that provision of recycled water is uncertain. DSEIR, pp. 4.19-26, 4.19-32, 4.19-33. If a credit is taken for recycled water use in the GHG mitigation analysis, the public has no way to understand how much recycled water is assumed to be used, where it is assumed to be used, and the consistency of those assumptions with the discussions of recycled water elsewhere in the SEIR.

SOLID WASTE GHG MITIGATION: The DSEIR claims a credit for solid waste recycling and composting services. CalEEMod does not indicate what data must be supplied, but states that this credit corresponds to CAPCOA's measure SW-1. CalEEMod User's Guide, p. 43. CAPCOA indicates that this measure requires an estimate of the number of residents, building square footage for office and retail uses, visitors to public venues, employees for other commercial buildings, waste disposal methods, and amount of waste diverted to recycling or composting. CAPCOA, p. 393. This information is not provided in the DSEIR or FSEIR, despite LandWatch's request. It is unclear how CalEEMod determines the credit because the CalEEMod User's Guide referenced by the FSEIR as the source of the information LandWatch requested does not in fact explain the basis of the credit.

CONSTRUCTION GHG MITIGATION: The DSEIR Appendix 10.2 claims a mitigation credit for seven construction measures including:

- Use Cleaner Engines for Construction Equipment
- Use DPF for Construction Equipment
- Replace Ground Cover
- Water Exposed Area
- Water Unpaved Roads
- Reduce Vehicle Speed on Unpaved Roads
- Clean Paved Roads

The CalEEMod User's Guide discussion of construction assumptions does not identify the source of these measures and does not illustrate input screens with mitigation options. See CalEEMod User's Guide, pp. 24-27. None of the seven measures listed in Appendix 10.2 appear to correspond to items in CAPCOA's list of five construction mitigation measures, C-1 to C-5. See CAPCOA, pp. 409-432. In short, the FSEIR's contention that all of the GHG mitigation credits "are based on CAPCOA's Quantifying Greenhouse Gas Mitigation Measures document" is apparently not true. FSEIR, p. 11.4-1048. If there is some relation between the CAPCOA construction mitigation measures and the

CalEEMod construction measures for which credit is taken in Appendix 10.2, it remains unclear.

As with the other CAPCOA mitigation measures, the CAPCOA construction mitigation measures have a wide range of effectiveness depending on the specific assumptions provide, e.g., assumptions about specific carbon-based fuels used, about use of electric or hybrid equipment, idling limitations beyond regulatory requirements, the use of a heavy duty off road vehicle plan, and the use of a construction vehicle inventory tracking system. CAPCOA, pp. 409-432. It is clear that the effectiveness of construction GHG mitigation depends on these specific assumptions. However, the SEIR does not provide this information, despite LandWatch's request.

In sum, the SEIR relies on a study of unmitigated and mitigated GHG impacts to assess the extent of the GHG impact. That study uses a software tool, CalEEMod, that requires specific assumptions about what mitigation will actually be undertaken by the Project in 25 specific contexts related to mobile sources, area sources, water, solid waste, and construction. The effectiveness of the GHG mitigation varies widely based on these specific assumptions. Because the assumptions are not in the DSEIR Appendix 10.2, LandWatch requested them. However, the FSEIR simply failed to provide the requested information.

D. The FSEIR fails to respond adequately to comments proposing additional mitigation for GHG impacts.

The DSEIR concludes that, despite the mitigation measures proposed in the DSEIR, GHG impacts will be significant and unavoidable. DSEIR, p. 4.6-22. Accordingly, LandWatch and the Monterey Bay Unified Air Pollution Control District ("MBUAPCD") proposed a number of additional mitigation measures. While the FSEIR does indicate that some of the measures proposed by LandWatch will be implemented as project features or as a result of Title 24 compliance, the FSEIR fails to respond adequately to other proposed mitigation measures. The FSEIR states that the lead agency need only "focus on mitigation measures that are feasible, practical, and effective." FSEIR, p. 11.4-1051. However, the FSEIR does not demonstrate that the proposed measures that it did not discuss are not feasible, practical, and effective.

For each of the following proposed mitigation measures the FSEIR fails to provide any discussion, much less to demonstrate that the proposed measure is not feasible, practical, and effective:

- Use passive solar design and provide shade on at least 30% of onsite impervious surfaces, including parking areas, driveways, walkways, plazas, patios, etc. (excluding roofs).
- Use light colored "cool" roofs with high-albedo materials (reflectance of at least 0.3) for 30% of the Project's non-roof impervious surfaces.

- Use thermal pool covers and efficient pumps and motors for apartments, commercial pools and spa uses.
- Educate residents, customers and tenants on energy efficiency.
- Design outdoor water features for low flow pumps and places where shading can be provided.
- Use low-impact development practices.
- Provide educational information about water conservation.
- Provide educational information about reducing waste and available recycling services.
- Incorporate public transit into the Project design.
- Provide free or low-cost monthly transit passes for students, employees, residents, and customers.²²
- Provide secured bicycle parking for all apartments, flats, and commercial uses.
- Provide a low- or zero-emission trolley at the County Walk.
- Provide convenient locations accessible by public transportation for car sharing and car pools for all events.
- Provide housing units for all track workers within walking distance of work.

- Use alternative-fueled (e.g., bio-diesel, electric) construction vehicles/equipment for at least 15% of the fleet.
- Use local building materials where reasonably available (i.e., within the general Monterey Bay area defined as Monterey County, Santa Cruz County, and San Benito County)
- Recycle at least 50% of construction waste or demolition materials.

- Exceed Title 24 building envelope energy efficiency standards (applicable at the time of the building permit issuance) by 20%.
- Install programmable thermostat timers and smart meters.
- Obtain third-party heating, ventilation, and air conditioning commissioning and verification of energy savings.
- Install green roofs.
- Install tankless water heaters.
- HVAC duct sealing.
- Increase roof/ceiling insulation.
- Install high-efficiency area lighting.
- Maximize interior day light.
- Install rainwater collection systems.
- Restrict the use of water for cleaning outdoor surfaces and prohibit systems that apply water to non-vegetated surfaces.

²² The FSEIR admits that its voluntary approach to transit subsidy is less effective, but does not claim that, or explain why, the more effective mitigation proposed by LandWatch is infeasible.

- Use only electric-powered landscaping equipment (not gas powered).
- Require off-site mitigation including:
 - Paying for energy-efficiency upgrades of existing homes and business.
 - Installing off-site renewable energy.
 - Paying for off-site waste reduction.
 - Off-site mitigation must be maintained in perpetuity to match the length of Project operations to provide ongoing annual emission reductions.
- Carbon Offsets - Purchase offsets from a validated source to offset annual GHG emissions

In addition to ignoring the above proposals, the FSEIR makes no response to MBUAPCD's proposal to require a hotel shuttle to local destinations.

The FSEIR sole response to MBUAPCD's proposal for a three-year funding commitment for a new transit route to serve the Gigling Road transit stop is that the proposal "has been noted." FSEIR, p. 11.4-379. This is not an adequate response. It certainly does not demonstrate that the proposal is not feasible, practical, and effective.

LandWatch and MBUAPCD proposed requiring onsite solar power generation and solar water heating. Responding to MBUAPCD, the FSEIR stated that this mitigation would be "speculative" because the "exact location, size, height, building orientation, etc. of the new buildings on the Project site are unknown at the time." FSEIR, p. 11.4-379. Calling the mitigation "speculative" for this reason is incoherent. In fact, the Specific Plan locates and orients major buildings and lays out illustrative residential lots and building sites in section 2. More fundamentally, the architectural guidelines in section 5 and development guidelines in section 6 of the Specific Plan specify numerous building and site layout features, and could be modified to require accommodation and inclusion of solar electrical and solar water heating panels unless specific, enumerated considerations (e.g., the presence of a heritage tree shading all available roof) made such an accommodation infeasible.

The FSEIR's response improperly assumes that mitigation through solar energy capture must take a back seat to all other considerations and that no mitigation via solar energy can be required for any building unless that mitigation is feasible for all buildings. This misreads CEQA's mitigation requirements because CEQA requires modification of a proposed project in order to address significant environmental impacts unless the mitigation is in fact infeasible or the mitigation is not required to render impacts less than significant:

A public agency should not approve a project as proposed if there are feasible alternatives or mitigation measures available that would substantially lessen any significant effects that the project would have on the environment.

Guidelines, § 15021(a)(2). In determining that mitigation is infeasible, an agency must identify “specific economic, environmental, legal, social, and technological factors.” Guidelines, § 15021(a)(3) (emphasis added). The FSEIR has not done so.

E. The analysis and mitigation of transportation impacts is inadequate.

1. The SEIR fails to provide the analysis of claimed internal trips despite LandWatch’s request for this information.

An EIR “must contain facts and analysis, not just the agency’s bare conclusions or opinions.” *Laurel Heights Improvement Assn. v. Regents of University of California* (“*Laurel Heights I*”) (1988) 47 Cal.3d 376, 404. Even if an agency’s conclusions or opinions are ultimately proven correct, statements unsupported by facts and meaningful analysis are not sufficient: “*the critical point [is] that the public must be equally informed.*” *Id.* (emphasis in original). The requisite facts and analysis supporting an agency’s conclusions must be in an EIR, not scattered elsewhere throughout an administrative record. *Environmental Defense Fund, Inc. v. Coastside County Water Dist.* (1972) 27 Cal.App.3d 695, 706 (“whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report”); *Vineyard, supra*, 40 Cal.4th at 442 (“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”).

As LandWatch objected in its DSEIR comments (PO 208-34), the DSEIR fails to provide the basis for its claim that 28% of vehicle trips would be internal to the project site. Since the 28% reduction in external trips would substantially reduce transportation impacts to facilities outside the project area and would substantially reduce both criteria pollutants (NO_x, PM-10, etc) and GHG emissions, the 28% assumption is a critical parameter. LandWatch asked whether this internal trip rate was based on the standard traffic analysis methodology (ITE’s Trip Generation Handbook) or some other methodology. And LandWatch asked that the City show its work by providing the facts and analysis behind this 28% internal trip rate assumption.

In response, the FSEIR refers LandWatch to its response to PA 3-1, a comment in which Caltrans also objected that the 28% internal trip rate was unsupported by analysis and appears to be inconsistent with the standard ITE methodology. In response to Caltrans, the FSEIR states that “[t]he requested documentation was provided to the commenter shortly after the request was received by the City, and no further comments were received from Caltrans.” But provision of the documentation to Caltrans does not address LandWatch’s concerns. Thus, the response to LandWatch that simply references response PA-3 is entirely inadequate, violating CEQA’s requirement for good-faith reasoned analysis in response to comments. Guidelines, §15088.

And the FSEIR's claim that Caltrans has accepted the internal capture analysis is not true. Caltrans wrote on August 30, 2016 to reiterate its objection to the "exaggerated internal capture rate" and the use of an unjustified method to determine internal capture.

And even if Caltrans had been persuaded that 28% was justified, based on privately shared data or analysis, it is not sufficient to tell the public only that there is some expert opinion that supports or acquiesces in an EIR's conclusion. Substantial evidence requires an EIR to present the facts and analysis, not just raw opinion.

The FSEIR claims that "the data supporting this traffic impact analysis, including trip capture rates, is included in DSEIR Appendix 10.8, *Traffic Impact Analysis Data*." FSEIR, p. 11.4-1031. This is not true. Appendix 10.8 contains 723 pages of computer output sheets for the Level of Service Computation Reports for the affected intersections under the no-project, with-project, and with-mitigation scenarios under existing, 2018, and 2035 conditions. Nothing in that output for intersection LOS would enable the public to reconstruct the basis of the 28% internal capture analysis. Indeed, if the 28% internal trip claim could have been validated with reference to the materials in the DSEIR, then Caltrans would not have needed to ask for the analysis and the City would not have needed to supply the "requested documentation" to Caltrans in response to its comment.

The FSEIR's response to Caltrans indicates that the trip distribution patterns were developed through customization of the AMBAG travel demand model. This information is clearly not supplied in Appendix 10.8, which provides no information about the AMBAG model.

The FSEIR claims that the ITE methodology would understate internal capture because it omits "site interaction" for the equestrian facilities, the hotels, the tennis club, warehousing, and cemetery land uses. Site interactions must be determined through empirical analyses of similar mixed-use development projects. Thus, ITE's handbook provides internal capture data for various mixed use combinations based on empirical studies that compare stand-alone development trip rates to mixed use trip rates.²³ Additional empirical studies are available that supplement the ITE data sets and that include site interactions for additional uses such as hotels. For example, a 2014 analysis by the Center for Urban Transportation Research ("CUTR") reports data sets that do include hotel uses.²⁴ But the analysis of capture is based on a number of factors, none of which were revealed to the public here. For example, the CUTR report indicates that site interactions decrease as proximity decreases, so a sprawling 711-acre suburban-style project would have a lower capture rate than a smaller, denser urban mixed-use project,

²³ Institute of Transportation Engineers, *Trip Generation Handbook*, 2nd Ed.

²⁴ Center for Urban Transportation Research, *Trip Internalization in Multi-use Developments*, April 2014, available at http://www.dot.state.fl.us/research-center/Completed_Proj/Summary_PL/FDOT-BDK84-977-10-rpt.pdf.

all other factors being equal.²⁵ CUTR indicates that proximity factors should be used in the analysis for any development bigger than 55 acres.²⁶ However, here the public has no way to evaluate whether or how this was done. What is missing in the Monterey Downs SEIR is any evidence that the internal capture rate is based on empirical data, or, any disclosure of that empirical data.

The FSEIR states that after assigning trips to the roadway network using the AMBAG model “it was determined that approximately 28 percent of the total trips generated by the proposed Specific Plan land uses would travel to another zone within the Specific plan.” FSEIR, p. 11.4-17. However, the SEIR does not explain how “it was determined.” The FSEIR provides no empirical analysis to the public that would support the validity of the internal capture.

2. The SEIR fails to provide adequate performance standards for Mitigation measure TRA-8.

Mitigation Measure TRA-8 provides for an entirely ad hoc response to special event traffic, including events that may attract thousands of vehicles to the Sports Arena. The requirement to prepare an Events Management Plan does not include any performance standard for acceptable levels of congestion. The FSEIR fails to respond adequately to LandWatch’s concern that the measure improperly delegates mitigation to an unelected official without providing a meaningful performance standard. The FSEIR also fails to respond adequately to LandWatch’s concern that the traffic control measures all remain optional under the phrasing of Mitigation Measure TRA-8. DSEIR, p. 4.17-85 (the “measures may include. . .”). There is no assurance that any effective or reasonable traffic control measures will be implemented since there is neither a congestion relief performance standard nor a requirement to use any particular traffic control measure.

The FSEIR claims that an Events Management Plan cannot be prepared in advance, but the DSEIR states that the applicant will in fact be required to prepare an “annual special events traffic and emergency services management plan.” DSEIR, p. 4.17-83. If such a plan can be prepared a year in advance for the 125 or more days of special events, then it is unreasonable to claim that the SEIR could not provide even the sample plan requested by LandWatch.

3. Recirculation is required because the FSEIR identifies a new significant impact at intersection 49, SR-1 NB Ramps at Reservation Road.

The FSEIR acknowledges that impacts to intersection 49, SR-1 NB Ramps at Reservation Road, will remain significant and unmitigated. FSEIR, p. 11.4-1040 to 11.4-1043. This was not disclosed in the DSEIR. The FSEIR’s acknowledgement constitutes

²⁵ *Id.* at 82.

²⁶ *Id.* at 84-85.

significant new information that requires recirculation because it discloses a new significant impact. Guidelines §15088.5(a)(1).

4. The SEIR fails to identify a significant impact at intersection 38, SR 1 SB Ramps at Imjin Parkway.

Recirculation is required because the DSEIR fails to disclose a significant unmitigated impact at intersection 38, SR 1 SB Ramps at Imjin Parkway, under 2018 conditions. The LOS calculations in DSEIR Appendix 10.2 for mitigated conditions under both the existing and 2018 scenarios assume that a signal has been installed at this location pursuant to Mitigation Measure TRA-5. App. 10.2, pdf pages 689, 706. Under existing AM conditions with mitigation, the average delay is 52.6 seconds yielding a LOS D, which the DSEIR treats as a less than significant impact. App. 10.2, pdf page 689; DSEIR, p. 4.17-75 (Table 4.17-14). Under 2018 AM conditions, the average delay is degraded to 62.4 seconds, yielding LOS E. App. 10.2, pdf page 706. Thus, despite the traffic signal mitigation, there would be a significant impact because the LOS E is below the acceptable LOS for Caltrans facilities. Additional mitigation improvements should be proposed for this facility; or, if that is infeasible, the impact should be identified as unavoidable.²⁷

The DSEIR unaccountably and erroneously indicates in Table 4.17-20 that the mitigated AM LOS at intersection 38 would be LOS B, based on an average delay of 14.1 seconds. DSEIR, p. 4.17-93. This is an error because it is unsupported by the technical appendix.

5. The SEIR fails to apply the Caltrans LOS standard for determining significance.

As Caltrans objected, the SEIR fails to acknowledge that Caltrans requires maintenance of a Level of Service at the cusp of LOS C and LOS D on SR1 facilities. Comment PA 3-2. The FSEIR claims that a 2006 planning document would justify this approach, but Caltrans has pointed out that this document does not apply to traffic management or operations.²⁸

The DSEIR states in the section identifying thresholds of significance for each jurisdiction that an impact to a Caltrans facility would be significant if the project would “result in a LOS lower than the transition between LOC C and LOS D” or if the project

²⁷ While the DSEIR identifies the impact under existing conditions as unavoidably significant, it fails to do so under 2018 conditions. DSEIR, pp. 4.17-130 to 4.17-131. Furthermore, the only basis for characterizing the impact as unavoidably significant under existing conditions is the fact that the required mitigation improvements, widening the intersection and installing a traffic signal, are not under the lead agency’s jurisdiction. DSEIR, p. 4.17-84.

²⁸ John Olejnic, Caltrans, to Rick Medina, Seaside, Aug. 30, 2016.

would add a trip to “an existing state highway facility [that] is operating at less than the appropriate target LOS.” DSEIR, pp. 4.17-47 to 4.17-48. The DSEIR identifies the “LOS Std.” for every intersection or ramp, roadway segment, or freeway segment that is under Caltrans jurisdiction as “C/D,” not as “D.” DSEIR, Tables 4.17-13, 4.17-14, 4.17-19, 4.17-21, 4.17-25. Despite stating that the threshold of significance is the C/D transition and designating it in the tables, the DSEIR unaccountably fails to acknowledge impacts are significant where the project causes degradation of service to below the C/D transition or where it adds trips to a facility that operates below the C/D transition. Instead, the DSEIR only treats impacts to Caltrans’ facilities as significant if they operate below LOS D. For example, for existing plus project conditions the DSEIR fails to identify a significant impact despite LOS below the C/D transition at intersection 42 in Table 4.17-13, at intersection 38 in Table 4.17-15, at six SR 1 segments in Table 4.17-16, and at ten ramps in Table 4.17-17. The DSEIR similarly fails to identify significant impacts with reference to the stated LOS C/D threshold of significance under interim 2018 and cumulative conditions.

In sum, the SEIR’s failure to honor Caltrans’ LOS standard in determining significance is unaccountable since 1) it honors and applies the adopted LOS standards of other agencies, including the County of Monterey and the City of Marina, in assessing impacts to their facilities, 2) it expressly identifies the LOS C/D transition as the threshold for significant impacts, and 3) Caltrans has repeatedly and specifically advised Seaside that its standards requires LOS C/D, ever since the scoping meeting for this project.²⁹ The contradiction in the stated significance thresholds and the threshold actually applied and the failure to approach significance determination consistently among the various jurisdictions vitiates substantial evidence for the SEIR’s conclusions. It also demonstrates a results-driven approach to analysis. The SEIR should be revised and recirculated to assess and mitigate impacts with reference to the actual Caltrans standards, as identified in the DSEIR.

6. The FSEIR fails to respond adequately to proposed mitigation in the form of ramp metering.

LandWatch requested that ramp metering be proposed by the SEIR to address significant and unmitigated impacts to freeway ramps. In response, the FSEIR simply refers LandWatch to the discussion in the DSEIR at page 4.17-80, which the FSEIR claims establishes the infeasibility of this mitigation. FSEIR, p. 11.4-1043. However the DSEIR’s discussion states only that ramp metering is not currently planned and is not within the jurisdiction of the lead agency to implement. DSEIR, p. 4.17-80.

In fact, contrary to the DSEIR, ramp metering is part of Caltrans planning for SR 1 segment 14, which includes the portions of SR 1 evaluated in the SEIR. Caltrans’ Transportation Concept Report for State Route 1 in District 5 identifies ramp metering as

²⁹

Id.

an important part of the Intelligent Transportation Systems (“ITS”) strategy to optimize traffic flow that will be managed by Caltrans Traffic Management Center.³⁰ Caltrans specifically identifies ramp metering as part of the measures it plans to implement to maintain acceptable LOS on SR 1 segment 14:

a combination of widening, operational improvements, and enhanced alternatives to travel by single occupant vehicles will be required. ITS elements such as loop detection and ramp metering will be a major component of operational improvements.³¹

Caltrans states that Ramp metering is planned specifically for SR 1 “between SR 68 West and Reservation Road,” which would include all of the ramps evaluated in the SEIR:

Intelligent Transportation Systems (ITS) – ITS will play a critical role in managing operations on State Route 1 in Monterey County. ITS projects have been implemented in the County and additional projects have a high priority. When the Central Coast ITS Strategic Plan is fully implemented, the following elements will be available on Route 1 in Monterey County:

- Smart call boxes from San Luis Obispo/Monterey County line to Monterey/Santa Cruz County line
- Traffic surveillance stations (loop detectors) through Segments 14 (freeway portion) and 15
- CCTV camera installation *and freeway control ramp metering between SR 68 West and Reservation Road . . .*³²

The DSEIR and FSEIR offer no evidence that ramp metering would not be effective at reducing or avoiding impacts, and it is clear that Caltrans believes that ramp metering would be effective at the ramps under review. The DSEIR and FSEIR provide no evidence that Caltrans would not accept fair share payments toward ramp metering and consider implementing ramp metering if it were proposed in the SEIR; and the fact that Caltrans actually plans to implement metering indicates that Caltrans would be receptive.

³⁰ Caltrans, Transportation Concept Report for State Route 1 in District 5, April 2006, p. 10-11, available at http://www.dot.ca.gov/dist05/planning/sys_plan_docs/tcr_factsheet_combo/mon_sr1_tcrfs.pdf. Ramp metering is a “traffic management strategy that utilizes a system of traffic signals on freeway entrance and connector ramps to regulate the volume of traffic entering a freeway corridor. This is to maximize the efficiency of the freeway and thereby minimize the total delay in the transportation corridor.” *Id.*, Appendix A.

³¹ *Id.* at 46, emphasis added

³² *Id.* at 44, underlining in original, italics and bolding added.

CEQA does not permit an agency to dismiss mitigation suggestions from the public without good-faith reasoned analysis. The fact that the mitigation is within another agency's jurisdiction is not a sufficient basis to decline to consider it. CEQA specifically requires an agency to make findings as to whether mitigation is "within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency." Public Resources Code, §21081(a)(2). And indeed the DSEIR proposes numerous other traffic improvements that are not within the jurisdiction of the lead agency (e.g., mitigation Measures TRA-2, 4, 5, 6, and 7).

Seaside may require fair share payments toward effective mitigation measures, including ramp metering, and may even provide that if Caltrans declines to implement the measure the fair share funds can be returned. Seaside may also conclude that the impacts for which these mitigation measures are proposed will remain significant and unavoidable due to its lack of jurisdiction to require implementation. But Seaside cannot simply decline to consider mitigation proposed by the public on the grounds that it lacks legal authority to compel that mitigation be implemented or based on the false claim that this mitigation is not currently planned by Caltrans.

F. The analysis and mitigation of noise impact is inadequate.

LandWatch engaged noise consultant Derek Watry to review the discussion of noise in the DSEIR, LandWatch's comments, and the FSEIR's response. His comments are attached and incorporated by reference.

1. The analysis of noise is inadequate under CEQA because it fails to recognize that non-compliance with statistical noise standards may be a significant impact.

Statistical noise standards ("Ln" standards or "Exceedence Level" standards) are standards for the noise levels that may not be exceeded for various periods of time. See DSEIR, p. 4.10-3, Table 4.10-2, Noise Descriptors. For example, BRP Noise Policies B-1, B-2, B-3, and B-5 apply the statistical noise standards from BRP Table 4.5-3, which is reproduced in the DSEIR as Table 4.10-7. See DSEIR, pp. 4.10-9 (Table 4.10-7) and 4.10-10 (BRP noise policies). Under the BRP's statistical noise standards applicable from 7 am to 10 pm, noise may not ever exceed 65 dBA, may not exceed 60 dBA for more than 1 minute, may not exceed 55 dBA for more than 5 minutes, may not exceed 50 dBA for more than 15 minutes, and may not exceed 45 dBA for more than 30 minutes. e.g., for one minute, five minutes, ten minutes, 15 minutes, or 30 minutes. Permissible noise levels are dBA less from 10 pm to 7am. The BRP applies these statistical noise standards at the property line.

As Mr. Watry explains, BRP Noise Policies and programs expressly require compliance with the BRP statistical noise standards. This SEIR identifies exceeding applicable noise standards as a significant impact. DSEIR, p. 4.10-12. The BRP PEIR specifically identifies the expectation that construction noise and stationary noise, including noise from a proposed amphitheater, would be required to comply with the

BRP's statistical noise standards as a basis to conclude that these noise sources would be less than significant. BRP PEIR, pp. 4-139 to 4-140, 4-146, 4-149.

Statistical noise standards may be applied in addition to and independent of 24-hour average noise standards ("CNEL" or "Ldn" standards). See DSEIR, p. 4.10-3, Table 4.10-2, "Community Noise Equivalent level (CNEL)" noise descriptor. The BRP Noise Policies B-1, B-2, B-3, and B-5 do in fact also and independently apply the 24-hour average CNEL noise standards from BRP Table 4.5-3, which is reproduced in the DSEIR as Table 4.10-6. See DSEIR, pp. 4.10-9 (Table 4.10-6) and 4.10-10 (BRP noise policies).

LandWatch's DSEIR comments objected that the DSEIR fails to apply statistical noise standards from the BRP or from any source to determine the significance of noise impacts. The FSEIR responded that these standards are not relevant. FSEIR, p. 11.4-1053. As Mr. Watry explains, that claim is not true.

Statistical noise standards are in fact highly relevant to determining annoyance from noise, particularly when a noise source is not continuous over a 24-hour period but instead consists of short-term, episodic and/or irregular loud noise such as noise from the recreational events at the project. The rationale for applying statistical noise standards in addition to 24-hour noise standards is that irritation can be caused by short periods of relatively loud noise, even if the average noise level complies with standards for longer periods, e.g., a 24-hour average CNEL standards. The BRP includes both 24-hour standards and statistical noise standards for just this reason.

Mr. Watry explains that stationary noise and construction noise from the Project will exceed the BRP's statistical noise standards and that this will substantially adversely affect sensitive receptors adjacent to the project. For example, maximum noise from cheering crowds at the Sports Arena would exceed the BRP allowable maximum noise level at the Oak Oval. Cheering noise that continues for as little as one minute per hour would exceed the BRP statistical noise limits at the Oak Oval and at the nearest residential receptor. Grandstand noise and the swimming pool timing system noise would exceed the BRP's statistical limit for maximum noise levels. Construction noise would exceed the BRP statistical limits.

The SEIR errs by uncritically relying only on 24-hour noise standards to determine significance despite evidence that episodic loud noise events will in fact result in substantial irritation to noise receptors and without any analysis of the effects of shorter-duration noise events on the ambient conditions.³³ *Berkeley Keep Jets Over the*

³³ Although the DSEIR references the City's 65 dBA maximum noise standard in its discussion of the mitigation of stationary noise impacts (DSEIR, p. 4.10-24), that reference is insufficient because (1) the City's maximum noise standard is not the same as the BRP's statistical noise standards, which include a more restrictive 0-minute (maximum) standard and which include standards for intervals greater than 0 minutes (compare DSEIR Table 4.10-4 to Table 4.10-7), (2) the 65 dBA maximum noise standard was not apparently used to determine the significance of impacts (DSEIR, pp. 4.10-18 to 4.10-24).

Bay Comm. v. Bd. of Port Comm'rs (2001) 91 Cal. App. 4th 1344, 1381–82; *see also Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (“a threshold of significance cannot be applied in such a way that would foreclose consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant”). The SEIR also errs by failing to acknowledge that the project is inconsistent with the BRP policies that mandate compliance with the BRP’s statistical noise standards. Guidelines, §15125(d).

2. Analysis of construction noise is inadequate.

The DSEIR announces that that construction impacts would be significant if any of the standards in the City’s General Plan or noise ordinance or other applicable plans (e.g., the BRP) were exceeded. DSEIR p. 4.10-12. However, the DSEIR provides no actual quantitative assessment of whether construction activities would exceed any of the applicable standards (i.e., the 24-hour average, maximum, or statistical standards promulgated by either the City or the BRP), despite the express requirement in Seaside’s Municipal Code §17.30.060(G)(6) for a quantitative analysis of noise levels post-mitigation. The DSEIR also ignores the effects of construction noise on open space users even though these users are sensitive receptors and will be located immediately adjacent to the project site.

Thus there is no substantial evidence to support a conclusion that construction noise would not exceed applicable standards. However, there is evidence that construction noise would exceed applicable standards.

As Mr. Watry explains, the BRP statistical noise standards are clearly relevant to the significance of construction noise impacts. As explained above, the BRP PEIR specifically referenced the expectation that projects would meet the BRP statistical noise standards as one basis for finding construction noise impact to be less than significant. However the SEIR fails to apply these standards and improperly dismisses their relevance. Mr. Watry demonstrates that construction noise would exceed the BRP statistical noise standards.

Construction noise would also exceed the 65 dBA maximum allowable noise level for residential uses in the City’s noise ordinance.

3. Mitigation of construction noise is inadequate.

CEQA requires that mitigation address the significant impacts identified in the EIR and do so with adequate certainty. Guidelines 15126.4(a)(2) (measures must be “fully enforceable”). A threshold of significance is a criterion “non-compliance with which” means the effect is significant and “compliance with which” means it is less than significant, e.g., adequately mitigated. Guidelines, § 15064.7(a). Mitigation must address the significant impact that is “identified in the EIR,” and “as identified in the EIR.” Guidelines, §§ 15126.4(a)(1)(A), 15091(a)(1). *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655-658 holds that an EIR must clearly state

its significance threshold; in particular, it must do so to inform discussion of proposed mitigation measures.

Here, although the DSEIR identifies the noise standards in the City's General Plan, noise ordinance, and/or the BRP as the significance thresholds, Mitigation NOI-1 for construction noise impacts lacks any performance standard that would ensure that the purported significance thresholds are met. As Mr. Watry explains, the provisions of Mitigation NOI-1 simply do not require that construction noise meet any adopted standards, much less the standards that the DSEIR purport to apply to determine significance of impacts. The actual provisions in NOI-1 – notice, complaint resolution, siting stationary equipment, and limiting work to daylight hours – would not ensure that applicable standards are met.

Furthermore, Mr. Watry explains that it is unlikely that construction noise could meet the adopted standards, particularly the statistical noise standards. The nature of the noise sources, e.g. diesel equipment with elevated exhaust stacks, and the area extent of construction activity renders mitigation by noise barrier infeasible. The SEIR itself provides no evidence that mitigation could feasibly meet adopted standards, despite the Seaside noise ordinance that requires a quantitative demonstration of the efficacy of mitigation. Because mitigation is not demonstrably feasible, its formulation cannot be deferred. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-96. The SEIR must be revised to formulate mitigation that would meet the applicable Seaside and BRP noise standards.

4. The SEIR improperly concludes that impacts are less than significant if mitigation is not feasible.

The FSEIR improperly injects a consideration of feasibility into the determination of significance by implying that construction noise would be less than significant because the proposed mitigation “would minimize construction noise to the maximum extent feasible.” FSEIR, p. 11.4-1056. CEQA neither requires nor allows lead agencies to consider costs or feasibility in determining the significance of impacts. Guidelines, §§15064, 15064.4, 15064.5, 15065, 15126.2, 15130, 15355, 15382. Under CEQA, feasibility considerations arise only in the context of determining if feasible mitigation measure are available after significance is determined (Public Resources Code, §21081(a)(3), Guidelines, §§15091(a)(3), 15364), and the determination of “acceptable” environmental harm arises only in the final step of the CEQA analysis in the context of a statement of overriding considerations. *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 368-369; Public Resources Code, §21081(b).

The FSEIR also improperly injects the issue of feasibility into its determination of the significance of stationary noise impacts. The FSEIR argues that BRP Noise Policy B-1 requires that BRP's 24-hour and statistical noise standards be met only “where feasible and practical.” FSEIR, p. 11.4-1056. The FSEIR then argues that application of the

BRP's "statistical noise Ln standards are not practicable for use in the Project's context." FSEIR, p. 11.4-1056. It would be error to reject use of the BRP's statistical noise standards to determine significance based on a determination that the project cannot feasibly meet those standards.

The FSEIR also improperly injects the issue of infeasibility into the determination of the significance of noise from the City Corporation Yard and fire station. Siren and horn noise from fire trucks (at least 101 dBA Lmax at 50 feet – see DSEIR, p. 4.10-20) would exceed the City's 65 dBA maximum exterior noise standard (DSEIR, Table 4.10-7). Low speed truck maneuvering in the City Corporation Yard would generate 75 dBA Lmax at 50 feet, which would also exceed the City's 65 dBA Lmax standard. DSEIR, p. 4.10-20. The FSEIR argues that "such noise sources are exempt from the City's Noise Ordinance (pursuant to SMC Section 9.12.040) and therefore by extension, CEQA significance thresholds do not apply." FSEIR, p. 11.4-1057, emphasis added. While legal considerations may justify a conclusion that mitigation is legally infeasible (Guidelines, § 15364), the significance of the unmitigated impact cannot be denied on the basis that mitigation is infeasible.

In sum, if the project cannot meet applicable noise standards, the City should identify the impact as significant and unmitigated. CEQA does not permit the City to conclude that noise is less than significant simply because mitigation is infeasible.

5. Analysis of stationary noise impact is inadequate because it fails to employ a consistent threshold of significance, fails to compare projected noise to any of these thresholds, and fails to consider relevant noise events.

There are three fundamental flaws in the SEIR's evaluation of stationary noise sources.

First, the SEIR fails to set out significance thresholds for stationary noise sources coherently. Determining significance of impacts requires "careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data." Guidelines, §15064(b). An EIR must clearly identify and apply standards of significance. *Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 655. As Mr. Watry documents, the DSEIR identifies several completely different thresholds:

- The threshold identification at DSEIR p. 4.10-12 says stationary noise (i.e., noise discussed in Impact Statement 4.10-3) is a significant impact only if the project causes a substantial permanent increase in ambient noise.
- The discussion of threshold of significance at DSEIR p.4.10-13 to 4.10-14 states that stationary noise would be significant if it cause an exceedance

of Seaside's Municipal Code standards at Tables 3-2 and 3-3.³⁴ These tables provide absolute noise standards, not noise standards expressed as an allowable increase. For example, these noise standards permit a maximum exterior noise level of 65 dBA for residential uses and a normally acceptable 24-hour average exterior residential noise level of 55 dB CNEL.

- The discussion of stationary source impacts actually purports to determine significance of noise from residential uses, non-residential mechanical equipment, equestrian event noise, swim center, and swim event center and pool activity based on whether it exceeds the BRP absolute standards of 50 to 55 dBA for residential uses, not, as stated earlier, based on whether it exceeds Seaside's absolute standards. See DSEIR pp. 4.10-19 to 4.10-24. The BRP standard referenced is apparently from DSEIR Table 4.10-6, BRP's land use compatibility matrix, which specifies normally acceptable noise for single family residential use at 50-55 CNEL or Ldn. The confusion as to whether significance is determined by using Seaside's standards or the BRP standards is consequential because those standards differ. For example, the BRP has a 50 CNEL normally acceptable standard for passively used open space but the City has no standard for that use. And the BRP has a less restrictive standard than the City for multi-family residential use.

In short, the SEIR errs because it is impossible for the public to understand what threshold the SEIR applies to determine significance of stationary sources.

Second, the SEIR fails to provide any actual analysis that would support the determination of significance using the 24-hour average thresholds of significance identified as applicable standards. The SEIR identifies various 24-hour noise standards as applicable; however, for a number of critical noise sources (e.g., crowd noise, musical events), the SEIR does not actually determine the 24-hour average noise that the project would produce. For example, there is no analysis of the projected 24-hour average noise produced by events in Planning Areas REC-2, C-1, or REC-1. Instead, the DSEIR's discussion of significance repeatedly and erroneously compares peak or short term noise generated by the project to 24-hours standards.

In fact, the project description is not sufficient to enable the determination of 24-hour average noise impacts. Planning Areas REC-2, C-1, and REC-1 would permit noise from many different sources, such as musical events, equestrian events, swim meets, dog shows, and other sporting events. As Mr. Watry explains, the SEIR lacks an adequate description of the average noise generated by, or the duration of, the events in these areas

³⁴ In the Municipal Code at §17.030.060(E) these are currently identified as Tables 3-3 and 3-4. They are reproduced in the DSEIR as Tables 4.10-4 and 4.10-5.

to support determination of 24-hour average noise levels.³⁵ The FSEIR admits that “the exact activities associated with these potential uses is not known at this time . . .” FSEIR, pp. 11.4-1057 to 11.4-1058. Thus, the EIR is inadequate because it fails to provide a project description that is sufficient to enable analysis of impacts (Guidelines, §15024) and fails to provide an adequate determination of the significance of impacts (Guidelines, §§ 15064, 15126.2). Furthermore, as Mr. Watry explains, the analysis also confusingly compares peak noise levels to noise standards measured by a 24-hour average noise level.

Third, the discussion fails to apply statistical noise standards from the BRP or any standard that would determine significance of annoyance from high volume, transient noise events. Mr. Watry explains that short duration noise, e.g., crowd noise, would in fact exceed the BRP’s statistical noise standards and would be a substantial source of irritation to sensitive receptors, including open space users. Thus, the SEIR errs by uncritically relying only on 24-hour noise standards to determine significance despite evidence that episodic loud noise events will in fact result in substantial irritation to noise receptors and without any analysis of the effects of shorter-duration noise events on the ambient conditions. *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm’rs* (2001) 91 Cal. App. 4th 1344, 1381–82; *see also Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (“a threshold of significance cannot be applied in such a way that would foreclose consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant”).

The SEIR’s errors are prejudicial because the public has no clear picture of the SEIR’s thresholds and no clear description of the project’s actual noise generation and because it is clear that applicable noise standards would be exceeded.

6. Mitigation of stationary noise impacts is inadequate.

CEQA requires an EIR to describe “feasible measures which could minimize significant adverse impacts.” Guidelines, § 15126.4(a)(1). Mitigation must be fully enforceable and certain. Guidelines, § 15126.4(a)(2). Here, the SEIR fails to discuss or propose effective, enforceable mitigation for stationary source noise.

First, the mitigation in NOI-2 calls for meeting “the 65 dBA standard in the Fort Ord Reuse Plan, and Seaside Municipal Code Sections 9.12 (Noise Regulations) and 17.30.060 (Noise Standards).” DSEIR, p. 4.10-24. As Mr. Watry explains, this reference to “the 65 dBA standard” is entirely ambiguous and therefore not enforceable with any certainty. NOI-2 fails to specify whether the standard is a 24-hour average standard (i.e., a CNEL of Ldn metric) or a standard for the maximum noise level in an instant (e.g., the BRP statistical noise standard for zero minutes in Table 4.10-7). If it is a 24-hour CNEL

³⁵ The project description also fails to provide information sufficient to determine noise using statistical noise standards, e.g., to determine if crowd noise would exceed the 1 minute, 5 minute, 15 minute or 30 minute standards.

standard, then NOI-2 fails to explain how it is related to or derived from the actual standards in the Seaside noise regulations and the BRP. These standards include Seaside's "Noise/Land Use Compatibility Matrix" (DSEIR Table 4.10-5), Seaside's "Maximum Interior and Exterior Noise Standards" (DSEIR Table 4.10-4) or BRP's "Land Use Compatibility Criteria for Exterior Community Noise" (DSEIR, Table 4.10-6). NOI-2 implies that the project must meet both Seaside and BRP standards; however, the Seaside and BRP CNEL standards are not uniform with respect to allowable noise levels or even with respect to classification of land uses. It is simply unclear what standard must be met.

Second, the "65 dBA standard" referenced in NOI-2 is not the standard that the DSEIR used to determine the significance of impacts. The entire discussion of the significance of stationary noise was based on a determination whether project noise would exceed the BRP's 24-hour standard of 50-55 CNEL, which was repeatedly referenced in that discussion. DSEIR, pp. 4.10-19 (claiming non-residential stationary noise is "below the BRP's noise standards," referencing Table 4.10-6, and "therefore impacts would be less than significant"), 4.10-21 (referencing BRP's residential noise standard of 50 to 55 dBA in discussing significance of REC-2 Planning Area noise), 4.10-22 (claiming swim center noise is less than significant because it is within "BRP's standard of 50 to 55 dBA (exterior) for residential uses.") Indeed, the BRP's normally acceptable CNEL noise standard was also used to assess the significance of traffic noise impacts. FSEIR, p. 11.4-1054 (referencing the BRP's normally acceptable noise limit for multi-family housing of 60 CNEL). Using a different standard to determine the significance of impacts than is used to determine the efficacy of mitigation violates both common sense and CEQA because mitigation must address the significant impact that is "identified in the EIR," and "as identified in the EIR." Guidelines, §§ 15126.4(a)(1)(A), 15091(a)(1).

Third, NOI-2 fails to specify that compliance is required with BRP's 50 dBA CNEL standard for open space uses, not just its standard for residential uses. See DSEIR, p. 4.10-9 (Table 4.10-6, BRP noise standards). As Mr. Watry explains, compliance may not be possible, especially if the FSEIR is correct that this standard is already exceeded in open space areas.

Fourth, NOI-2 fails to specify that compliance with the mitigation must be determined at the property line, as is required by both the BRP standards and the Seaside Municipal Code. DSEIR, p. 4.10-9; BRP, pp. 411-412; Seaside Municipal Code, § 17.30.060(H).

Fifth, NOI-2 fails to specify that, even if the project meets 24-hour average noise standards, it must also mitigate short-term loud noise events by complying with the BRP's statistical noise standards. See DSEIR, p. 4.10-p. Table 4.10-7.

Sixth, as Mr. Watry explains, effective mitigation is uncertain, e.g., mitigation for crowd noise. Mr. Watry explains that mitigation of via a barrier or berm is not described

and that obtaining the necessary noise attenuation by barrier for the noise sources at REC-2 and C-1 is simply implausible. Indeed, the FSEIR admits that the effectiveness of mitigation is unknown:

The DSEIR identifies Mitigation Measures NOI-2 and NOI-3 that require noise management and attenuation associated with the sports arena and swim center that is proportional to the noise generated at these facilities. As the exact activities associated with these potential uses is not known at this time, it is not possible for the DSEIR to quantify the measurable extent to which implementation of such performance standards would reduce noise events to less than significant levels. The mitigation measures include performance standards to ensure that exceedances of noise standards would not occur. The listed performance standards are comprehensive but are not intended to be exhaustive, nor does CEQA require such standards.

FSEIR, pp. 11.4-1057 to 11.4-1058, emphasis added. Where mitigation is not known to be feasible, CEQA does not permit deferral of its formulation, regardless whether performance standards are proposed. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-96. Accordingly, it is improper to defer the formulation of the Noise Management Plan called for by NOI-2. The Noise Management Program must be specified now and the SEIR must demonstrate that it would be effective with reference to unambiguously identified performance standards.

Furthermore, the FSEIR's statement that post-mitigation noise levels cannot be determined is an admission that the City is failing to comply with the City noise ordinance at SMC § 17.30.060(G)(5), (6) and BRP Noise Policy B-3, both of which mandate that the City identify mitigation and assess post-mitigation noise levels.

Seventh, the mitigation proposed for the swim center under NOI-3 is inadequate because it does not address the admittedly significant impact from the Time System.

7. The analysis and mitigation of impacts to open space use is inadequate.

The BRP FEIR acknowledges that open space, park, and recreation areas are noise-sensitive areas. BRP PEIR, p. 4-132. It is clear that the open space in the project vicinity is in fact extensively used for passive recreation by numerous members of the public, many of whom have objected to the project's impacts, including the noise impacts. See comment letters by Elizabeth Murray, Fort Ord Recreation Trails Friends, Suzanne Worcester, Eric Petersen, Monterey Off-road Cycling Association, Susan Schiavone, Robert McGinley, Cameron Binkley, Tim Townsend, Cosma Bua.

The BRP requires protection of open spaces via a 50 dBA CNEL/Ldn noise standard specifically applicable to passively used open space; via statistical noise standards applicable at the property line of noise-generating uses; and via Policy B-8, barring a 3 dB Ldn/CNEL increase where noise levels are already over the 50 dBA

standard. See DSEIR, pp. 4.10-8 to 4.10-11. Inconsistency with these policies should be identified as a significant environmental impact and as, discussed below, as a reason that the project should not be approved based on inconsistency with the Fort Ord Reuse Act.

First, the proposed mitigation of stationary noise in NOI-2 that identifies only a “65 dBA standard” clearly fails to mandate compliance with the BRP’s 50 dBA CNEL/Ldn open space noise standard.

Second, as Mr. Watry explains, responding to LandWatch’s request for baseline open space noise levels, the FSEIR states that the baseline CNEL noise level for passively used open space is within a decibel of the 52.3 dBA Leq noise level measured at the baseline measurement location #2.³⁶ FSEIR, p. 11.4-1052. Thus, according to the SEIR, the noise level for open space already exceeds the BRP’s 50 Ldn/CNEL standard.³⁷ Thus, BRP Policy B-8 would come into play, and would bar any noise increase over 3 dBA Ldn/CNEL. The SEIR fails to provide any assessment to determine whether project noise would increase noise by 3 dBA at the property line; thus, there is no substantial evidence that the project would comply with BRP Noise Policy B-8. Non-compliance with a policy intended to protect noise-sensitive open space uses would be a significant impact.

Third, the analysis of stationary noise impacts fails to disclose that the project will cause noise in excess of the BRP’s statistical noise standards in the open space areas

³⁶ Baseline information must be presented in the draft EIR, not later in the EIR process. Guidelines, § 15120(c) (draft EIR must contain information required by Guidelines, § 15125); *Save Our Peninsula v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 120-124, 128; *Communities for a Better Env’t v. City of Richmond* (“*CBE v. Richmond*”) (2010) 184 Cal. App. 4th 70, 89. However, here, the DSEIR fails to provide any assessment of the existing noise levels in open space areas that would be affected by the project. This information was not provided until the FSEIR, responding to LandWatch’s objection, claimed that noise levels measured on a roadway at 8th and Gigling was representative of open space noise levels. FSEIR, p. 11.4-1052.

³⁷ There is reason to doubt the FSEIR’s claim that the measurement of noise at location # 2 is in fact typical of open space noise levels. DSEIR Appendix A-7 indicates and demonstrates by photograph that the noise measurement was taken on the shoulder of 8th Avenue over a ten minute period and that the dominant noise source was passing cars. The open space adjacent to REC-2 and REC-1 would not be proximate to existing vehicle traffic.

If the baseline measurement is not accurate, then the SEIR violates CEQA because an EIR must describe the existing environmental setting so that it considers impacts “in the full environmental context.” Guidelines, § 15125(a), (c). An accurate baseline is critical because impact assessment must be based on “changes in the existing physical conditions in the affected area.” Guidelines, § 15126.2(a); *see Neighbors For Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 447; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.

Without accurate baseline noise levels for open space areas, it is impossible to determine whether and to what extent the project would cause noise increases, which may be significant impacts under CEQA. Nor is it possible to determine if the project would be consistent with BRP Noise Policy B-8, which bars a 3 dB increase in noise to open space areas that are already over the normally acceptable level of 50 dBA CNEL. DSEIR, pp. 4.10-9, 4.10-11.

adjacent to REC-2, as Mr. Watry demonstrates. The proposed mitigation in NOI-2 fails to mandate compliance with statistical noise standards.

Fourth, even if the mitigation were revised to require compliance with the BRP's open space noise standards, there is no evidence that mitigation is feasible and substantial evidence to the contrary. Again, the deferral of the formulation of the Noise Management Program called for by NOI-2 in the face of uncertainty violates CEQA.

8. The SEIR fails to identify a substantial increase in traffic noise as a significant impact.

The DSEIR's significance thresholds for both project-specific and cumulative impacts depend on a determination of the project-caused traffic noise increase and a determination whether the resulting combined noise from the Project and other development would exceed noise standards for the receiving property use. In particular, the DSEIR finds project-specific impacts to be significant only if total noise (existing traffic noise plus project traffic noise) exceeds "the applicable exterior standard at a noise sensitive land use" and the Project itself contributes 3 dB to that noise level. DSEIR p. 4.10-13. The DSEIR's two-step cumulative analysis first determines whether all future projects combined with the Monterey Downs project will cause a 3 dB increase and result in a noise level over the applicable standard. If so, the second step determines whether the Monterey Downs project contributes at least 1 dB to the future noise level. DSEIR p. 4.10-13.

Thus, in both analyses, it is necessary to determine whether traffic noise levels at the receiving property will exceed the applicable absolute noise thresholds for the receiving property's land use.

This approach to significance determination is inadequate because it fails to acknowledge that there may be a significant impact due to a substantial noise increase even if the resulting absolute noise does not exceed the applicable standard. An agency may not take refuge in a project's compliance with some regulatory standard when there is evidence that, notwithstanding that compliance, impacts are significant. *Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 ("a threshold of significance cannot be applied in such a way that would foreclose consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant"). The possibility that a noise increase may be significant even if the absolute regulatory standard is not exceeded is expressly recognized in the CEQA Guidelines, quoted by the DSEIR, which identify a significant impact if a project either causes a substantial increase in ambient noise or causes noise in excess of applicable standards. DSEIR, p. 4.10-12. The possibility is also recognized by

BRP Noise Policy B-6, which bars a noise increase over 5 dBA Ldn/CNEL even where noise is within the normally acceptable range.³⁸ DSEIR, p. 4.10-10.

As Mr. Watry explains, and as LandWatch objected in comment PO 208-91, the project will cause a significant impact and a violation of BRP Policy B-6 by increasing noise by more than 5 dBA at 7th Avenue between Gigling and Colonel Durham and at 8th Street between Inter Garrison and 6th. DSEIR, pp. 4.10-25, 4.10-26 to 4.10-27 (Table 4.10-11).

The FSEIR's response to LandWatch's objection is disingenuous. It claims that existing noise barriers would attenuate the traffic noise. FSEIR, p. 11.4-1054. As Mr. Watry explains, the presence of barriers does not affect the analysis: the increase in noise with and without the project would be the same regardless of the presence of barriers.

The FSEIR response is also disingenuous in claiming that interior noise levels would be maintained in residences on these road segments. FSEIR, p. 11.4-1054. The absolute level of interior noise levels is simply not relevant to the issue LandWatch raised, which is the increase in exterior noise levels. Impacts to exterior noise levels are an independent issue, as is evident from the fact that both Seaside and the BRP provide distinct standards for exterior and interior noise levels.

Finally, the FSEIR's observation that noise was modeled at 100 feet from the roadway centerline instead of the property line is also not relevant to this issue. As discussed below, both the Seaside noise ordinance and the BRP mandate noise analysis be at the property line. Regardless, even if it were correct to assess noise impacts at 100 feet instead of at the property line, here the noise increases modeled at 100 feet do exceed 5 dBA CNEL/Ldn in violation of BRP Policy B-6.

9. The SEIR's failures to measure noise impacts at the property line as mandated by the BRP and Seaside noise ordinance results in a failure to disclose a significant impact and a violation of BRP Policy B-6.

The traffic noise analysis assesses noise at 100 feet from the roadway centerline rather than at the property line of the receiving use. Thus, as LandWatch objected (PO 208-106) and Mr. Watry explains, the DSEIR errs by failing to honor the explicit requirements in both the Seaside noise ordinance and the BRP policies that noise be measured and controlled at the property line. SMC, § 17.30.060(E)(1)(a), (H); BRP Noise Policies B-6, B-7, B-8. The express purpose of the requirement to determine impacts at the property line is to protect outdoor uses. SMC, § 17.30.060(F) (obligation

³⁸ The policy bars an increase over 3 dBA Ldn/CNEL if noise is over the normally acceptable range.

to mitigate transportation noise impacts in order to “maintain outdoor and indoor noise levels” in compliance with standards).

As Mr. Watry explains, the error results in a failure to disclose a significant impact. The DSEIR’s criteria for a project-specific impact is a 3 dBA CNEL increase where noise would exceed the applicable standard. On Gigling Road between 6th and 7th Avenues, noise would exceed the 60 dBA CNEL standard at the receiving residential use property line, even though it would not exceed the 60 dBA CNEL at standard at 100 feet from the roadway centerline, and the project would cause more than a 3 dBA CNEL increase. This should be identified as a significant impact. It should also be identified as an inconsistency with BRP Policy B-6, which bars a 3 dBA increase where noise exceeds the BRP’s normally acceptable residential use standard “measured at the property line.” DSEIR, p. 4.10-10.

10. The SEIR is informationally inadequate because it fails to identify land use noise thresholds and applicable standards for roadway segments affected by project; and because of this the SEIR fails to disclose considerable contribution to a significant cumulative impact on 2nd Avenue.

As LandWatch objected, the traffic noise analysis fails to identify the type of receiving land use (e.g., single family residential, multi-family residential, commercial) at each affected roadway segment, and this matters because the analysis purports to apply a different noise standard based on the type of land use. Comment PO 208-107. Nothing in DSEIR Tables 4.10-11, 4.10-12, or 4.10-13 listing noise levels and determining significance of impacts for various roadway segments identifies the adjacent land uses for these segments or the applicable noise standard. It is thus impossible for the public to see what noise impacts would occur at each type of land use or what noise standard the DSEIR actually applies.

The FSEIR claims that the DSEIR “considers the specific noise standards to each relevant land use” and that “the analysis reviewed the distance of the receivers to the roadway and the location of existing barriers to determine if an impact would actually occur.” FSEIR p. 11.4-1058. If this level of analysis was actually undertaken, it does not appear anywhere in the DSEIR.

For example, the FSEIR claims that the DSEIR applies a 55 dBA standard for single family residential uses and a 60 dBA standard for multi-family residential use. FSEIR p. 11.4-1058 (Response PO 208-108.) However, Tables 4.10-11, 4.10-12, and 4.10-13 do not provide any indication of the actual uses for the affected segments that would allow the public to verify this claim.

The FSEIR failed to provide the requested information even though it claims that this information was developed in the noise analysis. The FSEIR claims that that the

noise analysis “considers the specific noise standards to each relevant land use” and that it “reviewed the distance of the receivers to the roadway and the location of existing barriers to determine if an impact would actually occur.” FSEIR p. 11.4-1058. If the specific land uses and applicable noise standards were in fact determined in the noise analysis, then there was no reason for the FSEIR to have failed to provide this available information in response to LandWatch’s request. Instead of providing the information for each roadway segment, the FSEIR provides only two cursory examples, claiming that residential uses on two segments have barriers; the FSEIR then claims that other sensitive receptors are “generally” located more than 100 feet from the centerline. FSEIR p. 11.4-1054. This is not responsive to the request for specific land uses and applicable standards.³⁹

Mr. Watry explains that there is at least one roadway segment where the SEIR’s lack of care in analysis and its failure to respond to comments with available information is prejudicial, because the SEIR fails to disclose that the project would make a considerable contribution to a significant cumulative impact based on the SEIR’s own criteria. Noise levels on 2nd Avenue between Inter Garrison Road and 8th Street would meet the DSEIR’s criteria for a considerable contribution to a significant cumulative impact because 1) the cumulative noise level would exceed the applicable 60 dBA CNEL standard for multi-family residential use and educational use; 2) the cumulative increase is greater than 3 dBA; and 3) the project adds more than 1 dBA. This is just one example of a prejudicial failure to provide adequate disclosure. Because the SEIR fails to identify receiving land uses and applicable standards for each affected segment, the public cannot determine if there are more.

11. Seaside may not approve the Project because it is inconsistent with Base Reuse Plan noise policies.

Under the Fort Ord Reuse Act, Seaside may not approve a development project that is not consistent with the BRP. Gov. Code, § 67675.8(b)(1). The project is not consistent with BRP noise policies as discussed above and detailed below.

The determinations of consistency with the BRP is not the same determination as the determination of significance under CEQA. Where a plan calls for the use of a particular method of analysis and compliance with particular standards, an agency must actually use the required analysis and standards in determining consistency. *Endangered Habitats League, Inc. v. Cty. of Orange* (2005) 131 Cal. App. 4th 777, 783 (agency may not substitute VC method for determining traffic impacts where plan calls for use of the HCM method). The EIR does not provide this analysis.

³⁹ Furthermore, it appears that the FSEIR may be claiming that applicable noise standards are met because residential structures are “generally” located more than 100 feet from the centerline. As discussed, this would not demonstrate that the exterior standard is met at the property line and that outdoor uses are protected. And even if it were appropriate to evaluate impacts at 100 feet from the centerline, the FSEIR’s assertion that the protected use (presumably the residence itself) is “generally” more than 100 feet from the centerline suggests that either (1) there are exceptions or (2) the analysis did not in fact verify this claim.

- a. The project is inconsistent with BRP noise policies requiring projects to evaluate and to meet *statistical* noise standards; and unless and until Seaside adopts the required BRP Noise Programs it may not approve this project.

The project is inconsistent with the BRP because 1) it does not comply with the BRP's statistical noise standards and 2) the City has failed to adopt those standards.

Mr. Watry has explained that construction noise and stationary noise from the project will violate the statistical noise standards, and that proposed mitigation will not ensure that the project will meet the statistical noise standards. Compliance with these standards is unambiguously required by BRP Noise Policy A-1 and Noise Program A-1.2, which specifically require Seaside to enact the BRP's statistical noise standards (the standards shown in Table 4.5-4) into its noise ordinance and to apply those standards in the Former Fort Ord area.⁴⁰ BRP, pp. 412-413. Seaside has not enacted these standards; the only standards in Seaside's noise ordinance are 24-hour CNEL or Ldn standards. Seaside Municipal Code, § 17.30.060(E), Tables 3-3 and 3-4.

Furthermore, FORA bars approval of development entitlements for this project unless and until Seaside actually adopts the Noise Programs as specified in the BRP, i.e., adopts a noise ordinance that contains the statistical noise standards mandated by the BRP:

No development entitlement shall be approved or conditionally approved within the jurisdiction of any land use agency until the land use agency has taken appropriate action, in the discretion of the land use agency, to adopt the programs specified in the Reuse Plan, the Habitat Management Plan, the Development and Resource Management Plan, the Reuse Plan Environmental Impact Report Mitigation and Monitoring Plan and this Master Resolution applicable to such development entitlement.

Fort Ord Reuse Authority Master Resolution, § 8.02.040.

Contrary to the FSEIR, these standards are clearly relevant to determining significant impacts under CEQA. And, regardless of CEQA's provisions, the Fort Ord Reuse Act makes adoption and application of these standards in the Fort Ord area mandatory as provided by the BRP provisions.

In addition to Noise Policy A-1 and Noise Program A-1.2, Noise Policy B-1 mandates compliance with the statistical noise standards in Table 4.5-4 for existing residences and other existing noise-sensitive uses where feasible and practical. BRP, p. 414. Noise Policy B-2 mandates that new development not adversely affect any existing or proposed uses by complying with the statistical noise standards in Table 4.5-4 for all

⁴⁰ The BRP adopts identical standards and policies for Seaside and the County of Monterey, so the entire project areas is subject to the same requirements. BRP, pp. 413-417.

new development. BRP, p. 414. This means that new development may not adversely affect existing uses and that it may not generate noise levels that would adversely affect other portions of the new development. Noise Policy B-5 requires that if it is not feasible or practical to meet the statistical noise standards, the City must either provide noise barriers for new development or ensure that interior standards are met.

The SEIR has not evaluated impacts in terms of statistical noise standards and has not determined feasibility of compliance with these standards. This violates Noise Policy B-3, which requires analysis of impacts and mitigation with reference to statistical noise standards before accepting development applications as complete. The project is not in compliance with the analysis requirements in Noise Policy B-3, and the City cannot conclude that it is in compliance with Noise Policies B-1 and B-2, until the City completes the required analysis and considers feasible mitigation and alternatives.

- b. Seaside has failed to adopt the BRP's 24-hour noise standards in its noise ordinance as mandated by BRP Noise Policy A-1 and may not approve the project until it has done so.

BRP Noise Policy A-1 and Programs A-1.1 and A-1.2 mandate that Seaside adopt by ordinance and apply the 24-hour noise standards set out in BRP Table 4.5-3. *See* BRP, pp. 411, 413. Seaside has not done so because the 24-hour noise standards in its ordinance differ from the BRP's standards. *Compare* Seaside Municipal Code, §17.30.060(E), Table 3-4 to BRP Table 4.5-3 (or *compare* DSEIR, Table 4.10-5 to Table 4.10-6, which contain these differing noise standards). For example, Seaside's noise ordinance lacks any standard for passively used open space, whereas the BRP provides that at most a 50 dBA noise level is "normally acceptable." Seaside's ordinance provides that 65 dBA is "conditionally acceptable" for single family residential use, whereas the BRP provides that at most 60 dBA is "conditionally acceptable" for that use.

As discussed, the SEIR is unclear as to the noise standards it uses to determine the significance of project noise impacts and to require mitigation under CEQA, referencing both the Seaside General Plan and noise ordinance standards and the BRP noise standards.⁴¹ DSEIR, pp. 4.10-13 to 4.10-14, 4.10-19 to 4.10-24. Thus, it is impossible to determine to what standards the project would be held or even whether proposed mitigation is feasible. Not only does this violate CEQA, but there can be no substantial evidence that the project would be consistent with the BRP Noise Policy A-1 and Program A-1.1, which require application of the BRP noise standards.

Again, FORA bars approval of development entitlements for this project unless and until Seaside actually adopts the Noise Programs as specified in the BRP, i.e., adopts a noise ordinance that contains the 24-hour noise standards mandated by the BRP. Fort Ord Reuse Authority Master Resolution, § 8.02.040.

⁴¹ The Seaside General Plan Noise standards are substantially similar to the standards in its noise ordinance. *See* Seaside 2004 General Plan, p. N-5.

- c. The project is inconsistent with the BRP policies requiring protection of open space uses from noise.

The BRP contains several policies that mandate evaluation of noise impacts to open space uses and compliance with noise standards for open space receptors. BRP Noise Policies A-1, B-1, B-2, and B-5 require compliance with the 24-hour average noise standards for open space specified in BRP Table 4.5-3 (reproduced in DSEIR as Table 4.10-6). See BRP, pp. 411, 413-414.

As discussed, Seaside has failed to comply with BRP Noise Policy A-1 and Programs A-1.1 and A-1.2 mandating inclusion of the BRP's 24-hour noise standards in the Seaside noise ordinance and application of that standard to projects in Fort Ord. As a result, the Seaside noise ordinance omits the BRP's 50 dBA CNEL standard for passively used open space.

Furthermore, as Mr. Watry explains, the SEIR fails to provide an adequate assessment of the project's compliance with BRP open space noise standards by 1) failing to assess compliance with BRP statistical noise standards, 2) failing to determine 24-hour average noise levels at affected open space proximate to the project and failing to assess compliance with the BRP's 50 CNEL normally acceptable noise standard for open space use, and 3) failing to specify that mitigation must meet relevant noise standards for open space, e.g., the BRP 24-hour average and statistical noise standards. The failure of assessment and mitigation is not only a violation of CEQA, but also of BRP Policy B-3, which requires that an acoustical study be submitted prior to accepting a development application as complete that evaluates a project's compliance with Table 4.5-3 and Table 4.5-4 noise standards and proposes necessary mitigation.

Mr. Watry has explained that construction noise and stationary noise from the project will in fact exceed the statistical noise standards in BRP Table 4.5-4, and that there is no assurance that proposed mitigation will ensure that the project will meet these statistical noise standards or even meet applicable 24-hour average standards. In light of the City's failure to evaluate open space noise impacts and the evidence that the project will not meet open space noise standards, there can be no substantial evidence that the project is consistent with BRP Policies A-1, B-1, B-2, and B-5.

Finally, BRP Noise Policy B-8 bars any noise increase of 3 dBA Ldn or more at the property line where ambient noise already exceeds the normally acceptable open space standard of 50 dBA. BRP, p. 415. The FSEIR indicates that open space noise already exceeds that standard, by claiming that monitored noise at Site 2 represents existing ambient open space noise levels. FSEIR, p. 11.4-1052. As Mr. Watry explains, the SEIR fails to make any determination whether noise levels would increase by 3 dBA at open space locations adjacent to the project or to impose mitigation that would ensure compliance. Thus, there can be no substantial evidence that the project complies with BRP Noise Policy B-8.

d. The project is inconsistent with BRP Policy B-6.

BRP Noise Policy B-6 bars a 5 dBA Ldn noise increase to residential uses caused by new development where ambient noise levels for those residential uses are not above the normally acceptable level in BRP Table 4.4-3. BRP, p. 414. BRP Table 4.4-3 provides that the normally acceptable noise level for single family residential uses is 50-55 dBA Ldn and for multi-family residential use it is 50 to 60 Ldn. BRP, p. 411.

Traffic noise from the project will increase noise by more than 5 dBA at a number of locations, even though the SEIR does not conclude that noise will exceed the 60 dBA Ldn standard. For example:

- noise on 7th Avenue between Gigling Road and Colonel Durham Street will increase by 6.3 dBA under existing with project conditions (DSEIR, Table 4.10-11);
- noise on 8th Street between Inter Garison Road and 6th Avenue will increase by 5.1 dBA under existing with project conditions (DSEIR, Table 4.10-11);
- noise on 7th Avenue between Gigling Road and Colonel Durham Street will increase by 6.4 dBA under 2035 with project conditions (DSEIR, Table 4.10-12).

These noise increases violate BRP Policy B-6.

As Mr. Watry explains, the FSEIR's argument that the noise determination in the DSEIR is 100 feet from the roadway and that there are intervening structures is simply irrelevant. BRP Noise Policy B-6 requires measurement at the property line, and if the noise increase exceeds 5 dBA at 100 feet, the increase will exceed 5 dBA at locations closer to the source. Furthermore, the effect of intervening structures on total noise levels would be the same for both pre-and post-project noise, so the increase in noise would still be 5 dBA regardless of intervening structures.

The FSEIR's argument that provision of interior noise mitigation as required by BRP Noise Policy B-5 would somehow ensure compliance with Policy Noise B-6 is also irrelevant. The two BRP policies are distinct and independent requirements, and are intended to attain different standards. Provision of interior noise mitigation would do nothing to ensure that exterior noise standards are met at the property line.

- e. The project is inconsistent with both BRP policies and the Seaside Municipal Code provisions that require noise to be assessed and standards to be met at the property line.

Compliance with exterior noise standards must be determined based on noise levels “measured at the property line of the noise-sensitive land use receiving the noise” under SMC, § 17.30.060(H); *see also* SMC, § 17.30.060E(1)(a) (no use may generate noise in excess of standards “as the noise is measured at the property line of a noise sensitive land use identified in Tables 3-3 and 3-4”). BRP’s statistical noise standards and its 24-hour average noise standards, compliance with which is mandated by BRP Noise Policies A-1, B-1, B-2, B-3, and B-5, are expressly “applicable at the property line.” BRP PEIR, pp. 411-412, Tables 4.5-3 and 4.5-4. BRP Noise Policies B-6, B-7, and B-8, which bar certain noise increases depending on ambient conditions, are all enforceable as “measured at the property line.” BRP, pp. 414-415.

As Mr. Watry explains, the purpose of determining compliance at the property line is in part to protect noise-sensitive outdoor land uses that cannot be protected by building insulation or HVAC systems. Despite this, the SEIR fails to determine traffic noise impacts at the property line of the receiving land uses.

12. The SEIR fails to acknowledge that it would be inconsistent with Municipal Code section 17.30.060(F) to site new noise-sensitive uses where traffic noise causes an exceedance of City standards.

LandWatch objected that the DSEIR fails to acknowledge that Seaside Municipal Code section 17.30.060(F) bars any new noise-sensitive uses in areas where the standards in Table 3-4 (reprinted as DSEIR Table 4.10-5) are or would be exceeded unless mitigation ensures meeting both indoor and outdoor standards, as determined at the property line. Comments PO 208-92, 208-110. Portions of the project would be sited in areas that exceed or will exceed the Table 3-4 standards at the property line. For example, the project would include residential uses on Gigling Road between 8th Avenue and 7th Avenue. DSEIR, Figure 2-16. Traffic noise at 57.9 CNEL at 100 feet from the roadway centerline would exceed the City’s 55 CNEL normally acceptable residential standard on that segment. DSEIR, Table 4.10-12; SMC §17.30.060(E) (Table 3-4). Regardless whether this is deemed a significant impact under CEQA, the City must acknowledge that it is an inconsistency with its noise ordinance.

The FSEIR responds by arguing that the noise levels are determined at 100 feet and that there are intervening barriers and that sensitive uses are “generally” located more than 100 feet from the centerline. FSEIR, p. 11.4-1054. This misreads the ordinance, which clearly states that “exterior noise levels shall be measures at the property line of the noise-sensitive land use receiving the noise” in order to “maintain outdoor and indoor noise levels on the receptor site in compliance with Tables 3-3 and 3-4.” SMC, § 17.30.060(H), (F).

G. The elimination of references to horse racing as an allowed use in the specific plan does not ensure that horse racing will not be permitted.

At the eleventh hour, staff now proposes to eliminate horse-racing as an allowed use from the specific plan. The specific plan would still permit construction of horse-racing facilities, including the track (now termed a “training track”) and the grandstand. Nothing in the proposed conditions of approval would actually ban horse-racing or preclude identifying it as an allowed use in a future interpretation or revision of the specific plan. The applicant would remain free to condition sales of residential properties on acceptance of this potential future use.

The City has prepared an SEIR that assumes that horse-racing would be an allowed use. If horse-racing were identified as an allowed use in a future interpretation or revision of the specific plan, the applicant would likely argue that certification of the SEIR would obviate the need for additional environmental review.

Not only could the City easily identify horse-racing as an allowed use in a future interpretation or revision of the specific plan, regulation of horse-racing could be found to be preempted by statute and state regulation and not subject to a municipal veto. Indeed, a city official has acknowledged as much:

Malin acknowledged, the racing enterprise could be re-inserted into the plan at some point.

“...In both a conceptual and practical sense, horse racing is a legal business. Conceptually, cities can’t generally prohibit legal businesses from operating in a community, particularly those that are as much creatures of state regulation as horse racing is. Conceptually, horse racing could come to almost any city with infrastructure that exists (or may be constructed) to support it. Practically speaking, should the project move forward, it would be very difficult to add horse racing back into the project if homes are sold without that use allowed within the first approvals.

Monterey Bay Partisan, [Seaside officials want to remove horse racing from Monterey Downs venture, at least for now](http://www.montereybaypartisan.com/2016/09/05/seaside-officials-want-to-remove-horse-racing-from-monterey-downs-venture-at-least-for-now), Sept. 5, 2016, available at <http://www.montereybaypartisan.com/2016/09/05/seaside-officials-want-to-remove-horse-racing-from-monterey-downs-venture-at-least-for-now>.

If the City is serious about precluding horse-racing at the site, it should take steps that would inhibit or effectively ban the use. For example, the City could disallow the construction of a “training-track” and grandstand. The City could acknowledge that the horse-racing use would contribute to substantial adverse environmental impacts to traffic and noise and, accordingly, identify a ban on horse-racing as required mitigation. The City could simply ban horse-racing by ordinance.

If the City does not believe it has the authority to ban horse-racing under state law and does not take the other actions that could inhibit horse-racing, then its elimination of references to horse-racing in the specific plan is a hollow and cynical exercise intended to assuage horse-racing opponents without actually addressing their concerns.

H. The elimination of references to horse racing as an allowed use in the specific plan renders the SEIR's project description unstable.

An adequate project description must be stable and accurate in order to support public participation and informed decision making. Guidelines, § 15124; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193, 197-198. An inaccurate project description vitiates the EIR's analysis; that is, a failure of description causes a failure of analysis. *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-397. An inconsistent project description also vitiates adequate analysis. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654-657, 672. A curtailed and shifting project description that precludes informed public participation and decision making is a prejudicial failure to proceed as required by law. *San Joaquin Raptor v. Merced, supra*, 149 Cal.App.4th at 655, 672.

The last-minute elimination of horse-racing from the specific plan renders the project description prejudicially unstable. The analysis of impacts was expressly predicated on the assumption that horse-racing would occur, and, without that use, the SEIR's analyses are no longer justified. For example, as discussed above, 950 of the project's projected 2,391 on-site jobs are identified as equestrian jobs associated with the Phase 6 construction of the horse-racing facilities. There is no analysis that would support a finding that other uses would replace those jobs. Without those jobs, there would only be 1,441 jobs at buildout, resulting in a jobs/housing ratio of 1,441 jobs/1,280 housing units, a ratio of 1.13. SEIR's analyses that are dependent on a strong jobs/housing ratio are invalid. As discussed above, the project would not meet the BRP jobs/housing goal or contribute to meeting the Seaside goal. A reduction in the jobs/housing ratio would result in increased per capita off-site vehicle trips and aggravate the significant per-capita GHG impact.

The elimination of the horse-racing use, if it is in fact eliminated, is significant new information that requires recirculation of a draft EIR to re-assess impacts that are dependent on the DSEIR's assumptions about race track jobs and land uses. Guidelines, § 15088.5(a).

I. The project is inconsistent with the Base Reuse Plan.

Under the Fort Ord Reuse Act, Seaside may not approve a development project that is not consistent with the BRP. Gov. Code, § 67675.8(b)(1). As discussed above, the project is inconsistent with a number BRP noise policies and programs. In addition,

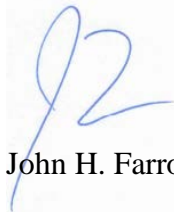
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the SEIR admits that it is inconsistent with the BRP Hydrology and Water Quality Policies B-1 and B-2, which policies require additional water supplies and prohibit approval of a development project without an assured long-term water supply. DSEIR, p. 4.9-10; FSEIR 14.4-1020. As discussed above, approval of the project with mitigation that may compel construction of only Phases 1-3 is inconsistent with BRP policies mandating a balanced jobs/housing ratio, including DRMP § 3.11.5.4(b), (c).

Yours sincerely,

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

A handwritten signature in blue ink, appearing to read 'JH Farrow', is positioned above the printed name.

John H. Farrow

JHF:hs

Cc: Michael Delapa

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