SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES



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| CENTER FOR BIOLOGICAL DIVERSITY, ET AL<br>Petitioners | |
| vs | CASE NO. BS131347 |
| CALIFORNIA DEPARTMENT OF FISH AND GAME, ETC.<br>Respondent | |

**COURT'S STATEMENT OF DECISION ON PETITION FOR WRIT OF MANDATE HEARD ON SEPTEMBER 20, 2012**

This case involves Respondent California Department of Fish and Game's ("CDFG") approvals in connection with the Newhall Ranch Specific Plan Project ("Newhall Ranch project"), the largest residential development ever approved in Los Angeles County. The approved Specific Plan site is located in northwestern Los Angeles County and encompasses 11,999 acres.

The 2003 Specific Plan approval by the County contemplated the need for future federal and state permits, agreements and authorizations from federal, state and other agencies.[1] A joint

[1]From 1996 through 1999, Los Angeles County engaged in a planning and environmental review process which ended in the initial approval of the Specific Plan and other approvals. In the certified environmental documents prepared under CEQA, the impacts associated with the Newhall Ranch Specific Plan were assessed. The assessment was conducted at a program level. The County's approvals where then challenged by a number of parties in a consolidated legal action. On August 1, 2000, the trial court issued a writ of mandate and judgment ordering the County to partially set aside the Newhall Ranch Specific Program EIR and project approvals and to conduct additional analyses of certain specific environmental and planning issues. In response to the trial court's decision, the County set aside certain portions of the Newhall Ranch Specific Plan Program EIR and related project approvals and directed County staff to prepare additional environmental analyses as directed by the trial court. Upon the completion of the Newhall Ranch Revised Additional Analysis, on May 23, 2003, the County certified the adequacy of the revised EIR and reinstated the approval of the Newhall Ranch Specific Plan as revised. The County filed a return to the Court in August 2003 and the trial court thereafter discharged the writ. In December 2003, certain parties appealed the trial court's order and on March 29, 2004, the parties reached a settlement and the appeal was dismissed.

The Specific Plan is regulatory in nature and serves as the zoning for Newhall ranch and establishes regulations and standards for the protection of Open Areas adjacent to the development and other related protected uses. In addition, the County imposed a condition the applicant dedicate 1,517 acres of land in the Salt Creek watershed in Ventura County, adjacent to the Specific Plan. The Specific Plan contains the approved land use plan, development regulations, design guidelines and implementation program in the Newhall Ranch planning areas. As revised, the Specific Plan permits up to 20,885 dwelling units (excluding 423 second units). These residences would be built on 2,391 acres. The Specific Plan also permits mixed use development, including about 67 acres of commercial and

EIS/EIR was prepared at the direction of the Corps of Engineers and the CDFG to analyze the direct, indirect, secondary, and cumulative impacts associated with the project-specific infrastructure improvements and maintenance activities in or adjacent to the Santa Clara River and its tributary drainages located within the approved Specific Plan, Entrada and Valencia Commerce Center planning areas.[2] The EIR includes the Draft EIR (April 2009), Final EIR (June 2010) and the Addendum/Additional Information (November 2010).

The project contains two components. The Resource Management and Development Plan ("RMDP" of "Development Plan") is a conservation, mitigation and permitting plan addressing sensitive biological resources within the 11,999 acre Specific Plan area. The San Fernando Valley Spineflower Conservation Plan ("SCP") applies to portions of the RMDP study area and its purpose is to design preserves for the Spineflower, which grows naturally on the applicant's land holdings.

In addition, the state actions requested from CDFG for the RMDP and SCP include the issuance of a long-term Master Stream Bed Alteration Agreement pursuant to Fish and Game Code sections 1602 and 1605, and authorization for Incidental Take Permits ("ITP") for, *inter alia,* San Fernando Valley Spineflowers pursuant to the California Endangered Species Act ("CESA"), Fish & Game Code section 2091 subdivisions (b) and (c).[3]

Petitioners are a group of non-profit organizations. Petitioner Center for Biological Diversity ("CBD") is a non-profit, public interest corporation with over 6000 members and has offices throughout California. The CBD and its members are dedicated to protecting native species and habitats of western North America. Petitioner Friends of the Santa Clara River ("Friends") is a non-profit organization whose members include residents of Santa Clarita. The Friends is dedicated to the preservation and improvement of water quality and biodiversity in the Santa Clara River watershed. Petitioner Santa Clarita Organization for Planning the Environment ("SCOPE") is a non-profit organization, with members who reside in Santa Clarita. SCOPE is concerned with the protection of the environment, ecology and quality of life in the Santa Clarita Valley. Petitioner Wishtoyo Foundation is a non-profit public interest organization from

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249 acres of business park locations. Build-out was projected to occur over approximately twenty years, depending upon economic and market conditions.

Individual Newhall Ranch developments will be developed over time and the applicant is currently processing development applications to implement projects within the Specific Plan. Many of these development projects will require work in or near the Santa Clara River and its tributaries. Accordingly, the applicant requested a Master Streambed Alteration Agreement and Incidental Take Permits from the CDFG. The Newhall Ranch Project incorporated by reference the environmental documents prepared by Los Angeles County for its approval of the Specific Plan.

[2] The U.S. Army Corps of Engineers, Los Angeles District was the lead agency for the preparation of the EIS in accordance with the National Environmental Policy Act ("NEPA"). Because the proposed project involves discharges of fill material into waters of the United States, the Corps was required to ensure that the proposed project was the least damaging practicable alternative ("LEDPA"). (Administrative Record ("AR") or ("DFG") 2640).

[3] The applicant also submitted an application for issuance of an Incidental Take Permit ("ITP") for the western yellow-billed cuckoo, southwestern willow flycatcher and least Bell's vireo.

Ventura County with over 700 members, including members of the Chumash tribe. The Wishtoyo Foundation's mission is to preserve, protect and restore Native American and Chumash culture, including that of their ancestors, and the Tataviam tribe. Through its Ventura Coastkeeper program, the Wishtoyo Foundation seeks to protect, preserve and restore the ecological integrity and water quality of Ventura County's inland and coastal waters and watersheds. Petitioner California Native Plant Society ("CNPS") is a non-profit corporate of nearly 10,000 members and includes, as part of its mission, the preservation of California's botanical heritage.

Respondent CDFG is the department within the government of California charged with the statutory duties under the California Fish and Game Code to manage the state's diverse fish, wildlife and plant resources, and the habitats upon which they depend. CDFG is the lead agency under CEQA for the Project. CDFG is the permitting authority under the California Endangered Species Act and has authority to issue Streambed Alteration Agreements under the Fish and Game Code.

Real Party in Interest, Newhall Land and Farming Company ("Newhall") is the developer identified with the Newhall Ranch project. Newhall is the sole applicant seeking permits, agreements and authorizations in order to implement the development project.

As stated in the relevant EIRs, "[t]he overall purpose/objective of the Project is to implement the approved Newhall Ranch Specific Plan, and thereby help to meet the regional demand for jobs and housing in Los Angeles County; and at the same time, implement the Resource Management and Development Plan to address the long-term management of sensitive biological resources and develop infrastructure needed to implement the approved Specific Plan."

In December 2010, CDFG issued a number of approvals relating to the Newhall Ranch development. These included the Newhall Ranch RMDP and the SCP, a Master Streambed Alteration Agreement, and permits that authorized project applicant Newhall to "take" Spineflowers, a protected species, pursuant to CESA. The RMDP would be relied upon by the developer to obtain federal and state permits to implement infrastructure improvements required to facilitate a build-out of the approved Specific Plan. The Project as revised and approved by CDFG is similar to Alternative 3 in the EIR, with some increased avoidance along the Santa Clara River and additional Spineflower preserve acreage and larger riparian corridors along major tributaries.

The RMDP encompasses the same areas of the Specific Plan site, except that it includes the Sal Creek area in Ventura County, adjacent to the Specific Plan. The Project as finally approved by CDFG is marginally different from the project proposed by the developer. As finally approved, the RMDP consists of development-related infrastructures in the Santa Clara River and tributary drainages located in the RMDP areas, which are needed to implement the approved Specific Plan. These include two bridges and new road crossing culverts, bank stabilization projects along portions of the Santa Clara River and its tributaries, including cement, rock riprap and gunite slope linings. Tributaries of the Santa Clara are also modified, using buried storm drains and re-graded channels.

The final version of the SCP component of the Project is comprised of a conservation and management plan proposed by the applicant as a way in which to "maximize the long-term persistence of core occurrences of Spineflower." The San Fernando Spineflower has been documented across the entire Project area. According to the CDFG, under the approved project, there would be seven Spineflower preserves collectively occupying 226.45 acres. CDFG asserts that its final proposal "protects" 15.40 acres of occupied Spineflower habitat and reduces the area of impacted habit by one and a half acres. As finalized, the ITP allows a taking of over 24% of existing Spineflower acres.

The Specific Plan, Entrada and Valencia Commerce Center ("VCC") development projects facilitated under the CDFG's approved project include 8,355 single family residential houses, 10,972 multi-family homes and 5.41 million square feet of commercial space. This figure is slightly smaller than the proposed development approved under the Specific Plan. In particular, net developable acreage under the final approved Newhall Ranch Project is 2,551 acres – 899 acres less than under Newhall's proposed project. And, the approved project reduces the number of residential units by 1,658 and the commercial space available by 2.9 percent.

The approvals issued with regard to the Newhall Ranch project are not ancillary or tiered aspects of the now almost decade-old Newhall Ranch Specific Plan ("Specific Plan").[4] Rather, they are new independent discretionary decisions authorize a number of significant environmental events, including the modification of the Santa Clara River and its floodplain, the elimination of existing habitats for fish, wildlife, and plants, including the San Fernando Valley Spineflower and the residential development of locations that may contain Native American burial grounds or unique cultural resources. As the Project may produce significant environmental effects, the CDFG prepared an environmental impact report under the California Environmental Quality Act ("CEQA"). Pub. Res. Code § 21080, subd. (d).

Petitioners challenge the legal adequacy of this CEQA process and CDFG's approvals on a number of grounds, including *inter alia*, that the agency abused its discretion both under CEQA and failed to comply with certain other statutory duties under the Fish and Game Code. Respondent generally argues that it has not abused its discretion, that it has complied with its legislative mandates and that the EIR and other approvals are supported by substantial evidence in the record.

At the trial on this matter, and before taking the case under submission, Real Party in Interest Newhall Land Company requested that the Court issue a Statement of Decision. The Court, therefore, issued an Intended Statement of Decision after the hearing and in light of the parties'

[4] The certified environmental documentation for the approved Specific Plan included and anticipated that implementation of the proposed project components would require federal and state permitting and the exercise of additional discretion by other agencies. The County's approvals were challenged in court and in August 2000, the Court issued a writ of mandate and judgment ordering the County to set aside the Newhall Ranch Specific Plan Program EIR and to conduct additional analyses. In response to the writ, the Los Angeles County Board of Supervisors set aside the approval of the entire Specific Plan. In 2003, a revised EIR was certified and additional findings and overriding considerations were made. In August 2003, the County filed a return to the writ and in October 2003 the writ was discharged. In December 2003, certain parties filed an appeal, and on March 29, 2004, a settlement was reached and the appeal dismissed.

briefs, the augmented administrative record and judicially noticed materials.[5] Thereafter, Petitioners were ordered to and did submit a Proposed Statement of Decision and Proposed Judgment, to which Respondent filed objections.

As set forth in this Statement of Decision, the Court rules as follows:

**Statement of Facts**

The Newhall Ranch project covers over 11,999 acres of rugged undeveloped and agricultural land in the northwestern portion of Los Angeles County.[6] The project area is located in a portion of the Santa Clara River Valley within northwestern Los Angeles County, between the City of Santa Clarita to the east and the Los Angeles/Ventura County line to the west. The Los Padres National Forest is located to the North of the Project area, the Angeles National Forest is to the north and east, and the Santa Susana Mountains are to the south.

At the heart of project is the Santa Clara River, which borders the Newhall Ranch area.[7] The Santa Clara River and State Road 126 traverse the northern portion of the Specific Plan site. The River extends five and one-half miles east to west across the Specific Plan site. Throughout its thousands of acres, the project site is crisscrossed by over forty miles of Santa Clara River stream tributaries.

The Santa Clara River is one of the largest rivers in otherwise arid Southern California. The river runs 116 miles from its headwaters on the north slope of the San Gabriel Mountains near

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[5] Petitioners request Judicial Notice of four exhibits. Exhibit B is the municipal storm water permit (MS4) for Ventura County. Exhibit C is a copy of the guidelines to implementation of the Ventura storm water MS4 permit. Exhibit D is the Biological Opinion for the Newhall Resource Management and Development Plan regarding the Unarmored Threespine Stickleback ("UTS"). This document is not adduced to negate the Respondent's claim that the Project will not result in the taking of the UTS. Instead, it is adduced to illuminate what will be required by the proposed mitigation measure that requires supervision by a US Fish and Wildlife Service employee or agent during construction. Petitioners seek judicial notice under Evidence Code sections 452 and 453 and argue that this information is relevant to the action. Respondent opposes this request for judicial notice and argues that this extra-record evidence should not be allowed.

The Court grants the request for judicial notice for Exhibit B and C. The MS4 permit and its implementation were discussed extensively in the administrative proceedings. Ventura County's alternative LID standards were fully considered (although ultimately rejected). The Petitioners comments and briefing repeatedly referenced the Ventura MS4 permit. In fact, a draft of the MS4 permit was cited in Petitioners' original comments to the Draft EIR. Thus, the MS4 permit and its implementation guidelines were before the agency during its review and should have been included in the administrative record. These materials are relevant to the present action.

The Court also grants judicial notice of Exhibit D for the limited purpose of establishing the efficacy of the claim in the mitigation discussions that the Project will be constructed in a manner that avoids the taking of any UTS. What is left open, however, is whether that absence of a "take" is how that word is defined by the U.S. Fish and Wildlife Service or how that word is defined by the California Fish and Game Code.

[6] The boundary of the RMDP component encompassed the previously approved Specific Plan site and the 1,517-acre Salt Creek conservation area adjacent to Newhall Ranch.

[7] The Santa Clara River has been designated as an "Aquatic Resource of National Importance."

Acton to its confluence with the Pacific Ocean near Oxnard and Ventura. The river is one of the largest watersheds on the Southern California cost, draining an area of 1,624 square miles, with elevations from sea level to over 8,800 feet.

The Santa Clara is the largest river system in Southern California that remains in a relatively natural state. Many large coastal southern California Rivers (the Los Angeles, Santa Ana, and San Gabriel rivers) have been confined to concrete channels in their lower reaches to provide flood protection for the surrounding urban areas. This has eliminated riparian vegetation and crippled the fluvial geomorphic processes that maintain a functioning riparian-floodplain ecological system. The Santa Clara River, therefore, is significant in the region because it retains many of the natural attributes that have otherwise been lost.

The Santa Clara River originates in the San Gabriel Mountains and flows in a westerly direction through Ventura County before discharging to the Pacific Ocean, about 84 miles from its origin. Major tributaries in the Santa Clara watershed include Castaic and San Francisquito Creeks in Los Angeles County and Sespe, Piru and Santa Paula Creeks in Ventura County.

The river has some perennial flow in its eastern most stretches in the Angeles National forest, but then flows intermittently westward within Los Angeles County.[8] The braided Santa Clara River main stem consists of sandy and gravelly soils and is highly permeable over much of its length, which results in surface water infiltration into the groundwater basin.

Like other rivers in Southern California, the Santa Clara River has highly variable, flashy flows. Most of the river's flow takes place during the wet season, and major storms account for most of the river's wet season flow. Water flows in the River range between 253,000 acre-feet and 561 acre feet. And, annual peak flow ranges from 68,800 cubic feet per second to 109 cubic feet per second.

The Santa Clara, however, is different from other rivers in the area in other respects. Unlike many of the other rivers in the area, its river bed is not a cement channel. And, although there is a major diversion dam near Santa Paula in Ventura County that impedes fish passage, the Santa Clara River is not impounded by numerous dams.

The Santa Clara and its watershed provide a regionally important north-south connection and the river itself provides an aquatic habitat linkage from the coast and estuary to upstream habitats in the mainstream and its tributaries. For example, the watershed has the potential to support recovery of southern California coast steelhead and provides critical habitat for other rare and endangered species. The watershed also acts as a movement corridor for a number of native species that require access to large areas to survive. Also the Santa Clara River is the habitat for a state and federally protected fish species, the Unarmored Threespine Stickleback.[9]

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[8] Ninety percent of watershed consists of mountainous terrain with steep, rocky ridges and deep canyons. Only ten percent of the watershed consists of narrow alluvial valleys. The project area is within a gently sloping alluvial valley that extends downstream from Castaic Creek to the Los Angeles/Ventura county line.

[9] According to a 1976 study, UTS require a natural stream course, including "clean, free-flowing perennial streams and ponds surrounded by native vegetation."

The Newhall Ranch project property contains a wide variety of landscapes and vegetation types, including mature riparian forests, oak woodlands, sagebrush, grasslands, freshwater wetlands, alkaline marshes, steep hillsides and mountainous terrain covered by chaparral, as well as agricultural lands.

Newhall Ranch is home to a diverse range of wildlife, fish and plants, including endangered species. Recently re-introduced California Condors use the Ranch as habitat, and at least three other birds protected under federal and/or state law -- the Southwestern willow flycatcher, the least Bell's vireo and the yellow-billed cuckoo – nest in the vegetation. Other rare fish and wildlife found on Newhall Ranch or in the downstream reaches of the Santa Clara River include the California red-legged frog, the arroyo toad, the golden eagle and Southern California Steelhead.

Newhall Ranch is also home to one of only two known populations of the San Fernando Spineflower – a low-growing plant that was thought to be extinct until it was re-discovered on the former Ahmanson Ranch property in 1999. The San Fernando Spineflower is listed as an endangered species under the California Endangered Species Act, and is a candidate species for listing under the federal Endangered Species Act. Where, as in the case of the Spineflower, there are only two known areas of occurrence, and there is a relatively small range, any significant change – such as drought or fire – makes it susceptible to extinction.

In addition to its diverse and productive flora and fauna, the Newhall Ranch and its environs were occupied by native tribes, including the Tataviam. These Native Americans people used this area extensively and, as evidenced by recent excavations, villages and burial sites can be found there. According to at least one expert, a village center for the Tataviam was located at the center of the Newhall Ranch project area.

The Newhall Ranch Project – with the long-term Master Streambed Alteration Agreement for proposed construction activities within the Specific Plan Boundary – includes a number of aspects that may result in substantial environmental impacts for the river, its tributaries and streambed and the floodplain generally. For example, the RMDP infrastructure would be placed in the Santa Clara River and major tributaries would be modified, with engineered channels for these drainages. Several minor tributaries would be converted to storm drains which would be buried and development may amplify storm runoff. In addition, as development replaces landscapes with impervious surfaces on formerly undeveloped landscapes, the capacity of the remaining land surface to capture and filter rainfall is reduced. As a larger percentage of rainfall becomes runoff during any given storm, this water reaches stream channels more quickly and at higher velocities. This peak discharge rate, which is higher than before development for the same size rainfall event, scours and alters streambeds, re-shapes stream channels and alters habitat. This process is called referred to as hydro-modification. The Project's significant impact on increased runoff intensities and altered sediment transport is part of the environmental assessment at issue here.

In addition, as currently discussed, the Project includes an Incidental take Permit for construction activities that will impact species during implementation of the Specific Plan. The Specific Plan area is one of the only two places in the world where the San Fernando Spineflower is known to exist. The authorization of a "taking" of this endangered species outside of designated Spineflower preserves is an integral part of Petitioners' challenge to the agency approvals at issue in this litigation.

Petitioners argue that CDFG has failed to comply with this legal mandate in a number of ways. In addition, Petitioners assert that the agency has failed to meet its statutory mandates with regard to CESA. These issues will be discussed in full below.

Petitioner filed the Instant Petition for Writ of Mandate on June 15, 2011.[10]

**Statement of Issues**

Both Respondent and Petitioner have set forth the Statement of CEQA Issues pursuant to the Public Code Section. While both statements are somewhat useful as guides for the topics required to be considered, neither party has really identified with any particularity exactly what issue or contention it wants the Court to decide. For example, while the Petitioner asserts that one issue presented is whether "Respondents adequately consulted with Native American trustee agencies before approving the project," the Court is unable to ascertain whether to treat that as a claim that Respondents failed to proceed in a manner according to law or whether they mean to say that without such consultation, there is no substantial evidence in the record to support the findings that were made regarding cultural impacts of the proposed project. Similarly, the Respondent CDFG's statement of issues asks only whether the agency's actions "abused its discretion" or "complied with the substantive and procedural requirements of CEQA and NEPA." This is hardly a roadmap of the particular arguments asserted in defense of the agency's actions. Given that neither party's statements of issues are particularly helpful, the Court will hopefully identify all of the contentions of both parties and assay to render a complete and thorough decision.[11]

Both sides appear to generally agree, however, that the underlying issue presented in this case is whether the EIR and the environmental review process employed by Respondent in this instance complies with CEQA.

Under the CEQA Guidelines, 14 Cal. Code Regs. § 15000 *et seq.* ("Guidelines"):

> An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a

[10] A number of related cases have also been filed challenging additional permits and approvals related to the Newhall Ranch Specific Plan.

[11] The failure of both parties to provide the Court with a proper and legally required Statement of Issues resulted in a number of issues being included in the Court's initial statement of Decision that neither party believes ought to have been considered. The Court, therefore, had taken these matters out of the final Statement of Decision.

> proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible. Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts. The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.

**Standard of Review**

Two provisions of CEQA govern the standard of review applied in this proceeding. Section 21168 of the Public Resources Code applies where the underlying agency action being challenged was "made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and the discretion in the determination of facts is vested in the public agency. Such actions must be brought as administrative mandamus proceedings under Code of Civ. Proc. Section 1094.5." Friends of the Old Trees v. Dep't of Forestry & Fire Protection, 52 Cal. App. 4th 1383, 1389 (1997). Section 21168.5 governs review of all other agency actions challenged for alleged non-compliance with CEQA. These challenges are filed as ordinary or traditional mandamus actions under Code of Civ. Proc. 1085. Id.

Review under administrative mandamus and review under traditional mandamus share many of the same characteristics. Id. Under either section, the reviewing court shall determine whether the Respondent agency abused its discretion by failing to proceed in a manner required by law, or because its determination or decision is not supported by substantial evidence." Laurel Heights Improvement Association v. Regents of the University of California, 47 Cal. 3d 376, 392 (1988)("Laurel Heights I"); Madrigal v. City of Huntington Beach, 147 Cal. App. 4th 1375, 1381 (2007).

Challenges to an agency's failure to proceed in a manner required by CEQA are subject to a less deferential standard than challenges to an agency's factual conclusions. Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova, 40 Cal. 4th 412, 435 (2007). In reviewing these claims, the Court must "determine *de novo* whether the agency has employed the correct procedures," including ensuring that the EIR is sufficient as an informational document. Id.; Dry Creek Citizens Coalition v. County of Tulare, 70 Cal. App. 4th 20, 26 (1999).

Substantial evidence is defined as "enough relevant evidence and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." 14 CCR § 15384(a). In applying the substantial evidence standard, "the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision." Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 514 (1974).

> A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusions would have been equally or more reasonable. . . . We have neither the resources nor the scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so."

Laurel Heights I, *supra,* 47 Cal. 3d at 393.

But, that is not to say that the mere inclusion of some evidence in the record constitutes a basis for judicial deference.[12] Rather, the law requires that there be "substantial" evidence to support the agency's findings before judicial deference is required. Substantial evidence is not conjecture, nor is it speculation or unsubstantiated opinion or narrative. "Evidence which is clearly erroneous or inaccurate or evidence of social or economic impacts which do not constitute or are not caused by physical impacts" does not constitute substantial evidence. Guidelines § 15384(a). Arguably, where an agency relies on such unscientific or inaccurate or erroneous information, they have failed to proceed in a manner according to law as it no longer serves its purpose as an informative document. See Berkeley Keep Jets Over the Bay Comm. v. Board of Port Comm'rs., 91 Cal. App. 4th 1344, 1355 (2001) (a clearly inadequate or unsupported study is entitled to no judicial deference); Save Our Peninsula Committee, v. Monterey County Bd. of Supervisors, 87 Cal. App. 4th 99, 117-118 (2001).

> The EIR is the heart of the environmental control process. CEQA describes the report's purpose -- to provide the public and governmental decision-makers . . . with detailed information of the project's likely effect on the environment; to describe ways of minimizing significant effects; to point out alternatives to the project. The EIR process facilitates CEQA's policy of supplying citizen input. By depicting the project's unavoidable effects, mitigation measures and alternatives, the report furnishes the decision-maker information enabling it to balance the project's benefit against environmental cost. The report should function as an environmental "alarm bell."

County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 191 (1977).

Persons challenging an EIR bear the burden of proving that it is legally inadequate and that the agency abused its discretion in certifying it. Cherry Valley Pass Acres and Neighbors v. City of Beaumont, 190 Cal. App. 4th 316, 327-28 (2010).

**Analysis**

Trying to arrange and organize the myriad claims and challenges in this lawsuit without the benefit of statements of issues is a difficult task. The Court attempts to do so below.

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[12] At oral argument, Respondent's counsel accepted the Court's hypothetical that *any* document prepared by a person with an advanced degree constitutes substantial evidence. But the law does not allow such a cynical approach. Rather, substantial evidence is not *unsubstantiated* opinion or narrative or evidence that is clearly inaccurate or erroneous. Pub. Res. Code § 21082.2, subdiv. (c). Rather, expert opinion must be supported by "*enough*" relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion. Guidelines § 15384, subds. (a) & (b). Where, as here, there is no information in the record on a number of critical facts upon which the expert opinions rest, then the Court is not picking one supported expert over another. It is simply that there is no substantial evidence in the record upon which certain expert opinions rest. Even if that expert has proffered that opinion and that expert is credentialed. As noted in Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco, 106 Cal. App. 3d 893, 908 (1980), the EIR is not fatally undermined by the direct participation of the developer and his experts in the underlying environmental and other studies. And, CEQA does not prohibit the applicant from providing the data, information and reports required for the preparation of the EIR. CEQA requires "that the agency independently perform its reviewing, analytical and judgment functions and to participate actively and significantly in the preparation and drafting process." Id.

1. The Respondent Improperly Rejected Alternatives Analyzed in the EIR.

In the EIR, Respondent identified a number of of-site alternatives and seven on-site alternatives to the Newhall Ranch Project. The first alternative is the No Action/No Project alternative. This is a description of what would occur were the CDFG to decide not to approve the permits and other approvals associated with the proposed Project. Alternative 2 is the applicant's proposed project. This option would allow construction of the proposed RMDP infrastructure and would facilitate development of the Specific Plan and the VCC and a portion of the Entrada planning area. The five other "build" alternatives address a broad range of different configurations of the RMDP infrastructure and Spineflower preserves. These five alternatives oppose a range of proposed permitting activities – ach one of which reduces the RMDP infrastructure and increases the size of the Spineflower preserves.

Petitioners object that the EIR impermissibly "hews" so closely to the Specific Plan – a document created by another agency – that the Respondent has failed to independently perform its reviewing, analytical, and judgment functions.[13] See Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco, 106 Cal. App. 3d 893, 908-910 (1980). For example, the RMDP sought to implement the basic objectives of the basic plan, including a major new community with interrelated villages that allows for residential, commercial and industrial development." Its basic "economic objective" was to provide the developer with "flexibility to respond to changing economic and market conditions over the life of Newhall Ranch" and to provide a tax base. (AR 2433).

Petitioners note that the assertion that a development of this size and scope is required to provide housing for the growing population of Los Angeles is unsupported by substantial evidence as of the date of this EIR.[14] As of 2010, there were 30,000 or more approved but un-built housing units in the Santa Clarita Valley and several thousand graded but vacant lots. (AR 10453).

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[13] Respondent objects that the Petitioners did not make these arguments in their briefs. That claim is simply incorrect. (Opening Brief at 41). As Petitioner's argued, the CDFG failed to focus on alternatives that would significantly avoid impacts to riparian areas and that would increase Spineflower preserves. (Id. at 43). See also Reply Brief at 40-41). As noted, Petitioners complained that Respondent "improperly" relied on "another agency's planning document [the Specific Plan] to determine the feasibility of alternatives." (Id. at 41).

[14] The recent credit crisis led to a "storm" in the housing market that has been described in the record as "unprecedented in our lifetime." (AR 18733) The 2010 Final EIR is inexplicably silent regarding the economic downturn that resulted in significant drops in median value of housing units, median income and per capita income. Instead, the agency adopted the now unrealistic scenarios of 2003 without further analysis as the reason to allow the significant and unavoidable environmental impacts of the proposed Project to be allowed. The current or future need for an additional 2,551 acres of residential space is unsupported by substantial evidence. Equally unsupported by substantial evidence is the claim of unmet demand for an additional 5.41 million square feet of commercial space in this part of the Valley. Census Bureau statistics demonstrates a precipitous decline in economic activity in Los Angeles County. For example, from 2002 to 2009, the total number of business firms in the county fell from by two thirds, as did retail sales. (AR 13528). There is no substantial evidence in the record to support the claim in 2010 that remained unmet demand for commercial and/or retail space provided benefits of the project that outweigh its unavoidable adverse environmental impacts, or that the limited reductions in the size and scope of the project under alternative six are infeasible simply because they do not comport with the 2003 Specific Plan.

Nonetheless, a huge, unmet demand for housing continued to be asserted both as a purpose for the Newhall Ranch Project and in the statement of overriding considerations. Unbelievably, Respondent continues to assert that "the northern Los Angeles County region has experienced *and continues to experience significant growth* and overall regional need for development to accommodate that growth" as late as 2012 when it filed its opposition brief.[15] (Opposition Brief at 3)(emphasis added). And, Petitioners similarly fail to understand what "flexibility" means when looking at basic economic objectives of a project.

Petitioners also assert that there is no substantial evidence to support the Respondent's claim that Alternative 6 would preclude the "development of inter-related villages" that provide a balance of land uses. This alternative reduces only 5.26 percent of the residential units and 3.89 percent of the commercial space compared to the Specific Plan.[16] This amount is so minimal that it can hardly be said to defeat inter-related villages and a balance of land uses. Nor does such a minor reduction in the number of residential units increase costs so significantly as to render this alternative economically infeasible. Moreover, this claimed "inter-related villages" does not have the same meaning as the "balance of land uses" purpose that is part of the basic objectives of the Specific Plan. By adding purposes that are defined so as to make what is practicable appear impracticable, Petitioners assert that the EIR fails to comply with CEQA.

Respondent counters that it did not "hew" to the Specific Plan and that it approved a project with fewer environmental impacts than the one originally proposed. Throughout the relevant environmental approvals and certified reports in this case, CDFG continues to extol its efforts to "reduce" from what was set forth in the 2003 Specific Plan the dire environmental consequences of that Project. For example, CDFG notes that the Approved Project is "different from, and more environmentally sensitive than Newhall's Proposed Project." CDFG proclaims that it managed to reduce the Specific Plan for a 14,000 net developable square acre project by 899 acres. And, CDFG notes that it reduced the number of housing units allowed by 8 percent.

The avoidance of monumental impacts by narrowing ever so slightly the magnitude of a gigantic project, however, is not what the law requires. Nor is it the proper legal measure against which Respondent's efforts should be considered. The legal propriety of environmental review a not a function of the number of pages of paper generated or the length of time that a project has been considered and reviewed.[17] Rather, the law requires not only that public agency decision-makers document and consider the environmental implications of their actions, but also that the refrain

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[15] The Population, Housing and Employment (existing conditions) data in the administrative record is from the Revised Newhall Ranch Specific Plan and was prepared in March 1999. (AR 64616). Employment projections were dated on predictions made in 1987. (AR 64630).

[16] Alternative 6 would increase the size of the proposed Spineflower preserve from 167.6 to 891.2 acres. And, under this alternative, no additional development would be facilitated in the Valencia Commerce Center planning area and certain infrastructure improvements would be reduced. Alternative 6, however, still provides for 20,212 residential dwelling units on the Specific Plan site and Entrada planning area and over 5.7 million square feet of non-residential uses. (AR 6885).

[17] The purpose of CEQA is not to "generate paper" but to compel government at all levels to make decisions with environmental consequences in mind." Bozung v. Local Agency Formation Commission, 13 Cal. 3d 263, 283 (1975).

from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid these effects. Thus, the agency must first identify the significant environmental effects and then mitigate those adverse effects through the imposition of mitigation measures or through the selection of feasible alternatives. And, public agencies must deny approval of a project with significant adverse effects when feasible alternatives or feasible mitigation measures can substantially lessen such effects. When, as in this case, the agency failed to perform an independent analysis and assessment of mitigation measures that could substantially lessen or avoid these effects – electing instead simply to remain wedded to an existing Specific Plan configuration – the agency has failed to conduct the analysis and to proceed in a manner required by law.

2. Respondent's Analysis of Significant Environmental Impacts and the Feasibility of Proposed Mitigation Fail to Comply with CEQA.

Petitioners also assert that in four separate areas, CDFG has abused its discretion by either failing to proceed in a manner required by law or making findings that are not supported by substantial evidence in the record.

The Court will consider these four areas individually.

a. The EIR's Water Quality and Hydro-modification Analysis

Petitioners object that the Respondent abused its discretion in analyzing the significance of the Newhall Ranch Project's impacts on the Santa Clara River and its floodplain. Petitioners challenge this aspect of the EIR on a number of grounds, each of which will be discussed below.

First, Petitioners assert that the analysis upon which the decision-makers relied to conclude that the hydro-modification impacts to the Santa Clara River are less than significant failed to proceed in a manner required by law and/or was not supported by substantial evidence.[18] Specifically, Petitioners assert that the Respondent's finding that stream erosion and stream habitat will not be significantly impacted by the Newhall Ranch Project is based on an incorrect baseline.[19] Petitioners claim that the suspended sediment yield rate used to calculate the pre-project baseline condition is incorrect and, as a result, the EIR underestimates the Project's impact on reducing sediment yield.

As a conceptual matter, the determination of whether impacts are "significant" requires a "baseline" set of environmental conditions against which to compare a project's anticipated

[18] Counsel for Respondent asserted that plaintiffs had failed to exhaust their administrative remedies on all the issues they raised on appeal. The Court concludes that the letters from the California Regional Water Quality Control Board and the Coastal Conservancy raised and presented these issues at the administrative level. (AR 8571, 9202). Therefore, the exhaustion requirement set forth in Cal. Pub. Res. Code section 21177, subdivision (a) has been satisfied.

[19] The EIR includes a stand-alone assessment of the potentially significant hydrology impacts associated with the proposed Project and alternatives, without reliance on the previously certified Newhall Ranch environmental documentation. However, that earlier documentation did identify and analyze existing flood conditions, potential flood impacts and mitigation measures.

impacts. While simple in concept, in practice, the determination of the proper baseline has been confounding and illusive. Adding to the difficulty of setting a proper baseline is the fact that the "environment" changes over time, as does our understanding of environmental conditions. When a project is proposed for the first time, a typical argument focuses on whether the proper baseline consists of current conditions or reasonably foreseeable future conditions that would occur without the project. The general rule, as set forth in the CEQA guidelines, requires that the existing environmental conditions should normally constitute the baseline against which agencies should assess the significance of project impacts.

In the recent past, the supply of sand in the Santa Clara River has been reduced by human activity, including the construction of dams within the watershed and the mining of floodplain sand and gravel. The 2007 Stillwater Study report used sediment data compiled over the 30 years by the Ventura County Watershed Protection District to qualify how sand retained by the dams affects beach formation and maintenance.

Based on the 2007 Stillwater Study, the EIR determined that approximately 15,988 tons per square mile per year of coarse sediment is currently produced in the Santa Clara watershed and roughly 1,171 tons per square mile per year of suspended sediment is produced from the watershed area upstream from the gauge at the LA/Ventura County line – which is where the project is located. In support of that "baseline," Respondent cites the text of the Stillwater Study. In that text, the Stillwater Study notes that roughly 1,171 tons/sq. mi./yr of suspended sediment "originates from the area upstream of the gauge at the Los Angeles/Ventura county line." (AR 101,186). The Newhall Ranch project occurs entirely within Los Angeles County. Thus, the portion of the project that is proposed for development (which is that portion relevant to the issue of the Project's impact on sediment supply) falls within the Upper Santa Clara area.

Accordingly, the EIR contains substantial evidence as to the sedimentation rate selected as baseline for the project. Substantial evidence "shall include facts, reasonable assumptions predicated on facts, and expert opinion supported by facts." Pub. Res. Code § 21082.2, subd. (c). The 2007 Stillwater Study shows that the relevant portions of the Newhall Ranch Project lie within the area upon which this baseline yield rate was supplied. That same study establishes the suspended sediment rate of 1,171 tons per square mile per year in the area upstream of the county line.

As supported by substantial evidence in the record, the baseline selected by Respondent for understanding the hydro-modification effects of the Newhall Ranch Project supports the agency's conclusion that there are no significant effects on sediment yield due to the project.[20] The EIR used the total sediment yield rate to determine the existing sediment supply for the

[20] Petitioners point to a map (figure 4.6) in the Stillwater Study to argue for a different measure of suspended settlement yield in that portion of the Santa Clara River covered by the project. (AR 101187). The Stillwater Study, however, cannot be fairly read to support that contention. While the map shows that some slight portion of the project may be located in the Lower Santa Clara River sub-watershed, the location of the County line on that map allows the Court to conclude that the portion of the project boundary that would be developed is only in land delineated within the Upper Santa Clara sub-watershed – not the Lower Santa Clara River sub-watershed as Petitioners' argue. Thus, Petitioners contention that the EIR "dramatically underestimates the Project's effects in reducing sediment yield form the Project area is not supported by the Stillwater Study.

entire watershed, and the amount of sediment reduction that would result from Project development.[21] The computation of these figures showed that the amount of reduction in sediment attributable to the Project was 0.52% -- below the EIR's significance criterion. (AR 2980-81, 8600, 9203). Thus, there is substantial evidence in the record to support the conclusion that the project will not result in a significant impact on sediment delivery downstream.

Second, Petitioners assert that the EIR's analysis of the impacts of a 100-year flood on the Newhall Ranch project is unsupported by substantial evidence in the record.

In order to avoid flooding impacts along the Santa Clara River, those areas along the river that are proposed for development would be elevated above the 100-year and 50-year capital floodplain, thereby removing development from those flood hazards. The floodplain modification proposed in the Specific Plan included three bridge crossing over the Santa Clara River, bank stabilization along portions of the banks and removal of mostly agricultural acreage from the floodplain by raising the land areas and installing elevated bank protection. It was concluded that the proposed Specific Plan would alter flows in the Santa Clara River, however, the effects would only be expected during infrequent flood events, such as 50-year and 100 year flood events.

In this EIR, the CDFG assessed the river hydrology and flood effects using a 1994 report by the Corps of Engineers.[22] That 1994 report used the 100-year peak flow rate of 60,000 cubic feet per second. (AR 9224). This is the same flow rate that the Federal Emergency Management Agency ("FEMA") used in updating the Santa Clara River Flood Insurance Study. Petitioners contend that this figure was not the most current or updated peak flow rate of 66,000 cubic feet per second, which was promulgated by Ventura County in 2006.

Petitioners' objection on this point is without merit. While there is a study that projects an 11 percent higher stream flow during a 100-year flood event, that fact does not render the earlier data upon which Respondent relied of no value or otherwise not substantial evidence. Where, as here, earlier data is still currently used and adopted, it can constitute substantial evidence. This is not the same situation as there was in Berkeley Keep Jets Over the Bay, *supra*, 91 Cal. App. 4th at 1355. There is no evidence of using misleading information with regard to this figure, as in that case. Rather, what we have is a difference of scientific opinion between two sources of information.[23] A difference of expert opinion – both opinions being supported by substantial evidence – does not a CEQA challenge make.

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[21] The EIR calculated the total amount of existing watershed-wide sediment by multiplying the total watershed size (1,624 sq. mi.) by the combined sediment yield rate (17,158 tons/sq. mi./year), which equals 27.86 million tons per year. (AR 8599-600).

[22] The 1994 Corps' Study, entitled Santa Clara River Adopted Discharge Frequency Values" is based upon a frequency analysis of stream flow data along the Santa Clara River. Six of the seven recurrence intervals were obtained from the 1994 study; the seventh -- the Los Angeles County capital flood -- is obtained from the previously published rates from the Department of Public Works.

[23] Nor did the EIR "mostly ignore" the question as to the use of 60,000 cfs as the 100-year flood flow rate. The EIR evaluated that information and rejected the claim that the Project's channel design did not have sufficient freeboard to allow for an 11% increase in the peak flow rate. There is typically in excess of five feet of freeboard from the

Third, Petitioners complain that the Project did not consider the implementation of certain proposed development standards for Ventura County as a measure by which to mitigate the impacts associated with the post-development increase in storm water run-off. Petitioners argue that the Low Impact Development ("LID") performance standards set forth in the Ventura County Municipal Stormwater Permit are the best management practices for the capture, treatment and release of storm water runoff. The Ventura MS4 permit requires that, unless technically infeasible, the Effective Impervious Area of the total Project area must be less than five percent. This level is achieved by rendering at least 95 % of impervious surfaces "ineffective" by retaining the storm runoff volume onsite using varied methodologies. In addition, the Ventura MS4 permit requires hydromodification control criteria specific to each tributary and drainage affected by the Project.

Rather than consider Ventura County's LID performance standards and ascertain whether these measures were feasible alternatives to the mitigation strategies set forth in the EIR, the Respondent instead used the technical capability screening criteria established by the Los Angeles Department of Power and Water's LID Manual at the Specific Plan scale. (AR 8034). Respondent contends that it was not required to adopt the Ventura County LID standards because the Project lies within LA County, not Ventura.

The Court agrees. While there may be alternative mitigation strategies available under Ventura County LID standards, a mitigation strategy predicated on LA County regulations must stand if it supports the conclusion that the Projects stormwater/water quality impacts have been mitigated to less than significant. While CEQA requires a consideration and evaluation of "specific suggestions" for mitigating a significant environmental impact unless the suggested mitigation is facially unfeasible, that "consideration" occurred in this case. Los Angeles Unified School District v. City of Los Angeles, 58 Cal. App. 4th 1019, 1029 (1997). There is substantial evidence in the record that the Horner suggestion was reviewed and assessed. (AR 8035). Whether experts agree as to what practicable mitigation measures are possible is not the issue. The issue is whether there is substantial evidence in the record to support CDFG's conclusion that stormwater discharges/water quality impacts have been mitigated to less than significant levels.

Fourth, Petitioners object to the EIR's analysis of the Project's cumulative impact on water quality. Petitioners assert that the EIR was required to consider the cumulative impact of the increase in dissolved copper discharged into the Santa Clara River as a result of the Newhall Ranch project on steelhead salmon breeding grounds downstream.[24]

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100-year water surface elevation to the top of the proposed bank protection. Using 66,000 cfs would increase surface water elevation by only 0.8 feet. Thus, the engineered channels will convey the 100-year flood events and the Project will not create a flooding hazard. And, as CDFG used a valid measure for the 100-year flow, the EIR similarly contains substantial evidence upon which it evaluated the impacts on velocity, scour, incision, sediment loading and fluvial geomorphology downstream in Ventura County of such an event.

[24] While Respondent asserts that the Petitioners did not raise or brief the issue of copper impacts on steelhead smolt below the Dry Gap in the lower reaches of the Santa Clara River, this contention is without merit. As noted in Petitioner's opening brief, Ventura Coastkeeper provided CDFG with substantial evidence documenting steelhead smolt in the Santa Clara River Estuary and other "below the dry gap" locations and complained that estuarine

The EIR acknowledges that the Project's storm water discharges into the Santa Clara River will increase to 8.4 -9.3 micrograms per liter the concentration of dissolved copper during storm events. Trace metals are commonly found in storm water. Many of the artificial surfaces of the urban environment contain metals, which enter storm water as these surfaces corrode or decay. Metals, such as copper, are of concern because they can be toxic to aquatic organism. This concentration level causes juvenile salmonids to lose their smell, to reduce their swimming speed and to lose their ability to locate spawning grounds, to reproduce and to avoid prey. (AR 122904, 122918, 122935).

The southern steelhead was listed as federally endangered in 1997 and within the Santa Clara watershed, the River and its tributaries from Piru Creek below Santa Felicia Dam to the River's confluence with the Pacific Ocean has been designated as critical habitat. And, a recovery team has been formed and is currently working on a draft Recovery Plan for the southern steelhead. The Southern Steelhead has specific habitat requirements for each life history stage (egg, fry, juvenile, smolt and adult).

There is no substantial evidence in the record of any historical presence of southern steelhead in the Project area nor are the existing conditions along the Santa Clara River in the project area suitable as habitat for southern steelhead. Thus, it is unremarkable that the EIR concludes that the increase in dissolved copper during storm events will have no significant impact on southern steelhead, as there are none in the area of the river above the Dry Gap. The Dry Gap is a part of the Santa Clara River – approximately 3.5 miles downstream of the Los Angeles County/Ventura County line – where the River is dry most of the year and water is present only when rainfall events create storm water runoff in the River. This Dry Gap extends downstream of the Piru Creek confluence with the Santa Clara and the lower limit of the Piru groundwater basin,[25] between the communities of Piru and Fillmore.

The EIR acknowledges, however, that the Project has the potential to affect southern steelhead individuals and habitat downstream of the Project area. "However," the study notes, "due to the approximately five mile distance from documented occurrences of southern steelhead at Piru Creek and the intervening Dry Gap, these potential secondary effects would be substantially attenuated before they could affect any downstream habitat and individuals." (AR 7481). Thus, the EIR concludes that the proposed project is not expected to have any significant secondary cumulative impacts.

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rearing habitats below the dry gap could be adversely affected by discharges of dissolved copper from the development above that gap during storm events. (Opening Brief at 15-17). Thus, while the Petitioner's omitted this discussion from the proposed statement of decision, the Court declines that suggestion. The Respondent had notice and an opportunity to oppose this contention that the EIR's failed to consider this significant environmental impact.

[25] The Piru groundwater basin underlines the dry gap. On the upstream side of the eastern limit of this groundwater basin, the alluvial fill is thin and the underlying bedrock lies at a shallow depth. As a result, the water table is shallow, and little or no leakage occurs from the river to the underlying shallow groundwater. On the downstream side of this boundary, the alluvium is thicker and the underlying bedrock is much deeper. Thus, the water table is deeper and sediment can rapidly infiltrate the entire flow of the river – thus the presence of the "Dry Gap."

Petitioners challenge that assumption. While in ordinary circumstances, the "Dry Gap" is dry, there is no substantial evidence in the record to suggest that the Gap inhibits or prevents the discharge of concentrated dissolved copper into the lower reaches of the Santa Clara River during storm events. As has been amply documented, the flashy flows of the Santa Clara have breached the Dry Gap, taking storm run off along with its sub-lethal levels of dissolved copper into the lower reaches of the Santa Clara River where Southern Steelhead smolt are found. (AR 10936-37). The EIR fails to consider, much less evaluate, whether the dissolved copper discharged from the Project Area (which is four times over the steelhead smolt sub-toxicity levels) over the Dry Gap and into the lower reaches of the Santa Clara would adversely affect restored habitat for endangered steelhead smolt.

The Respondent's response that a storm large enough to breach the Dry Gap would dilute the dissolved copper to levels safe for Steelhead smolt is unsupported by any substantial evidence in the record.[26] (AR 19811-19). And, while it may be intuitive that any discharges that would pass over the Dry Gap during high flows would comprise only a very small portion of the average flow of the river, there is no substantial evidence to support the conclusion that the dissolved copper discharges in these events would not have a significant impact on steelhead smolt.

And, by ignoring the Ventura Coastkeeper's request for such an analysis to develop substantial evidence of that claim, the EIR fails to meet the legal requirements of being an informational document.[27] Laurel Heights II, *supra*, 6 Cal. 4th at 1124. While an agency is not required to evaluate every impact study suggested by interested groups, they are required to assess whether the Proposed Project's run-off will result in a substantial environmental impact by destroying an adjacent and environmentally sensitive downstream habitat that years of recovery efforts have established for the endangered Southern Steelhead. The EIR must address foreseeable significant environmental impacts created by the Project supported by fair argument. See Laurel Heights II, *supra,* 6 Cal. 4th at 1124. Compare CFG 12075-76, 12080-81, 11121, 11161, 4230-46, 7479-81, 122906-15, 123745-47. In this case, assessing the impact of project-related dissolved coppers into a restored Steelhead habitat downstream when storm surges breach the dry gap is reasonably feasible to study. (AR 10821). The failure to do so renders the EIR inadequate as an informational document.

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[26]In modeling exercises, the concentration of dissolved copper was predicted to increase proposed conditions when compared to existing conditions. (AR 19819, 19843). That the post-Project dissolved copper concentrations will comply with local applicable regulatory standards, however, is not substantial evidence to support the finding that the project's impacts will have a less than significant effect on endangered Steelhead habitat and smolt. See Communities for a Better Environment v. California Resources Agency, 103 Cal. App. 4th 98, 113-14 (2002). Nor is it any answer to simply conclude that so long as the newly created discharges are within the range of already existing concentrations of dissolved copper there can be no substantial effects. (AR 12076). These existing "ranges" are known to cause sub-lethal effects in the smolt (AR 11251-55, 11263-11317).

[27] Newhall contends that CDFG was not required to respond to Ventura Coastkeeper's "late" comments and, therefore, no matter how legally deficient the Final EIR, it doesn't violate CEQA. (Newhall Opposition at 24). While the cases do suggest that late comments may not obligate a response, once the agency "picks up the cudgel" and provides responses, CEQA once again requires that the document be adequate as a matter of law. (AR 12075-95).

b. The CDFG's Analysis of Mitigation Measures for the Endangered San Fernando Spineflower Is Legally Impermissible and the Agency's Proposed Mitigation Measures Are Unsupported by Substantial Evidence as Adequate Mitigation.

One of the most significant environmental impacts of the Newhall Ranch Project is the elimination of almost one quarter of one of the two remaining habitats of the San Fernando Valley Spineflower in the world.[28] The Spineflower Conservation Plan ("SCP"), a separate component of the Project analysis, was prepared to support mitigate measures relied upon in the Newhall Ranch Project EIR and to "facilitate the conservation of San Fernando Valley Spineflower on all of Newhall's land holdings that contain Spineflower populations. (DFG 57, 83-84, 3619).

The SCP provides for the establishment of seven preserves representing five of the six general locations in which naturally occurring Spineflower exists; the sixth location (on the site of the Valencia Commerce Center) would be entirely destroyed to allow development at that site. (DFG 860, 862). Thus, despite its "conservation" title, the SCP allows Newhall to obtain a permit from the CDFG under Fish and Game section 2081(b) to "take" or destroy spineflowers outside of these disparate established preserves. (DFG 791, 12). In connection with the issuance of the permit to take, CDFG concluded that the SCP would result in the loss of approximately 24% of the area occupied by the San Fernando Valley Spineflower. (DFG 238-40, 860-906).

The SCP provides for the establishment of seven "preserves" -- small parcels of land separated from one another by intervening development -- to offset this loss of natural habitat. (AR 862). These mitigation efforts are proposed as a way in which the San Fernando Valley Spineflower can be maintained or increased within the preserves and the native species within spineflower preserves can be maintained or enhanced. (AR 797-804). A number of subsidiary objectives are also included in the SCP, including limitations of access, installation of fencing and signage and ecological restoration within preserve areas and general management measures to respond to wildfires and mudslides within preserve areas. (AR 924-26, 931-34).

Petitioners object that there is a complete absence of substantial evidence in the record to support the viability of these preserves as mitigation measures.[29] Without any basis upon which to

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[28] Newhall included existing conservation easements within the Spineflower preserves. These easements were established to mitigate *past* Newhall activities that affected Spineflower. (DFG 118215). While the coordinated management of easements as part of the plan may provide some additional conservation benefit, that is not how the EIR and SCP considered these areas. Rather, they were counted toward the newly-conserved Spineflower range as if they were new dedications. (DFG 229). This discounting of the existing easements altered the calculation of the percentage of Spineflower acres that will be "taken" under the permit. Thus, the approved Project will "take" considerably more than 24% of the acreage occupied by Spineflower outside of existing conservation easements. This is erroneous as there is no substantial evidence to justify the use of mitigation for past impacts to mitigate the new impacts of the Project.

[29] Respondent objects to the Proposed Statement of Decision and claims that Petitioners did not raise nor argue that the administrative record failed to include substantial evidence concerning propagation, pollination and germination of the San Fernando Spineflower was not argued. The Respondent then inserts an improper footnote to add additional briefing in support of its contention that it would have cited more evidence in the record. The Court, therefore, strikes the additional evidence cited in footnote 2 of Respondent's opposition as beyond the scope of the Court's order – which was to provide objections to the Petitioners' Proposed Statement of Decision.

conclude that the Spineflower will grow and prosper in these isolated "parcels" – the Respondent's conclusion that the Newhall Ranch Project significant impacts on the endangered San Fernando Spineflower can be fully mitigated is unsupported by substantial evidence. The Spineflower has only recently been re-discovered. There is little known about it, including the conditions under which it grows and propagates. There is little known or understood about various threats to Spineflower survival, including pests and other invasive diseases.

In response, the CDFG and Newhall retort that they've "studied" the Spineflower and they are relying on "best evidence" to find that the preservation scheme proposed in this case fully mitigates the loss of existing resources as a result of the project. Cited as "substantial" or "best evidence" are the volumes of observations of the Spineflower conducted by a consultant for the developer. Spineflower populations were mapped annually each spring from 2002 to 2006 using GPS equipment. Existing conditions within and adjacent to Spineflower populations were noted. Spineflower "vigor" was assessed by measuring the diameter of plants. Soils in which Spineflower grow were recorded and slopes were measured.

Despite the myriad of observations and "surveys," there is little useful information regarding Spineflower habitat performed as a result of these "studies."[30] In fact, attempts to correlate these observed conditions in order to understand Spineflower habitat were unavailing.[31] There was no correlation found between ground cover and Spineflower density. There was no relationship between native plant cover and Spineflower density, other than where high shrubs abounded.

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Furthermore, the Petitioners' clearly and unambiguously argued that the Spineflower Conservation Plan mitigation was "based on an incomplete and inadequate understanding of Spineflower ecology." (Opening Brief at 22). "The first and most fundamental deficiency is that not enough is known about the Spineflower to achieve the basic objectives of the SCP or design effective preserves for the conservation and recovery of the species." (Id.) Basic information gaps identified by Petitioners include "understanding the ecological factors influencing the distribution, abundance, and population persistence of the Spineflower in order to inform management and monitoring within the preserves." Within the notion of "population persistence," Petitioners noted a lack of understanding of the spineflower's ability to "germinate and grow." (Id. at 23)

[30] As noted by the agency in 2007, the public needed assurances that the data gathering, analysis and recommendations provided to the Department ... are based upon objective, impartial expertise." (AR 114949, 117949). The Court is not substituting its expertise for that of the respondent, nor is it making a judgment as to the quality of that information. Nor is it simply demanding that a different or another test be preformed. Rather, there is simply no information in the current record on critical questions that are essential to any proposal that includes in its title the "conservation" of the San Fernando Valley Spineflower. While "gaps" in the science may have to await further study, knowing why the plant grows where it does and whether it will survive under the proposed conservation plan is not fairly described as an informational "gap."

[31] As reported in the relevant environmental reports, a habitat suitability index was developed in order to evaluate the entire study area and to identify and design Spineflower preserve areas within the study area. A habitat suitability index was developed using the following datasets: vegetation, soils, geology, elevation, slope and aspect. Each of the six data layers was intersected with the Spineflower occurrence data to determine the number of Spineflower individuals within each individual attribute of each dataset. The results of this study, however, were inconclusive. Either the existing habitat data was not refined enough to inform scientists as to the actual habitat features that the Spineflower is suited to, or these aspects of habitat didn't influence where Spineflower grow. In either event, the applicant and the Respondent failed to produce any data capable of predicting those areas in which the Spineflower would be able to thrive and endure.

Perhaps the problem, as identified in the Dudek 2006 study, was the lack of sufficient data. Nor do these observations *study* seed dispersion and seed banks or others aspect of Spineflower propagation.[32] As one CDFG scientist noted, the current plan had "[i]nadequate provisions for pollinators and seed dispersers." (AR 117027). And, although voluminous, the vast majority of Spineflower "studies" in the record are nothing more than reports based on walking surveys of Spineflower territory – with no analysis of the meaning of the myriad of observations.[33]

The record does include a handful of studies conducted on the Spineflower in the Ahmanson Ranch area.[34] These studies included a soils analysis, an analysis of slope and Spineflower occurrence, and the effect of removing competing vegetation on the size and survivability of Spineflower. These studies, however, did not uncover how the Spineflower is pollinated. Studies conducted in 2002 showed that honeybees were effective pollinators, but that ants may be effective and the Spineflower may be capable of self-pollination. And, nothing is currently known about dispersal of Spineflower seeds. While the appearance of new Spineflower populations at Laskey Mesa suggests the presence of a seed bank, no such research has been performed in the Project area.[35] Seed banks are critical to maintaining genetic diversity among isolated populations. And, key to biodiversity and preserving the Spineflower in the Project area

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[32] Two pollinator studies on the Spineflower were conducted – one at Ahmanson and one at Newhall, but the work undertaken at Newhall was incomplete. (AR 107171). According to one CDFG staff member: "More work was needed at [N]ewhall because it was done in 2004 and the year crapped out. They were not able to do much of the proposed work (ended up with only three small study sites) *and Newhall has not invited them back.*" (AR 117049)(emphasis added). Thus, this information was not unavailable; it was made impossible because the applicant declined to provide the researches with necessary access. For this reason, Respondent's reliance on Environmental Council of Sacramento v. City of Sacramento, 142 Cal. App. 4th 1018, 1082 (2006) is misplaced. This information was not unknowable nor was it unreasonable to expect that it be developed. Nor is this a case in which competing experts disagreed; this is a case in which experts were not afforded access necessary to allow the necessary science to be performed. The applicant's refusal to allow this research to go forward in advance of project approval kept substantial evidence out of this record; not the scientific "knowability" of these facts.

[33] As acknowledged in one such "study," the survey was conducted on foot and took approximately one hour. All species encountered were indentified and recorded. (AR 39444). As another former "consultant" for Newhall admitted to Respondent, the estimates provided in these surveys were "just a guess" and "not scientific." (AR 116694). Not surprisingly, as admitted in the Spineflower Conservation Plan, "[m]any gaps remain in the understanding of the ecology of the Spineflower, making it difficult to prevent its extirpation and to design efficacious monitoring protocols." (AR 800, 116780). While the agency now feels as if it is being "punished" for its candor, quite the contrary is true. The agency is not being "punished" by being required to comply with the law.

[34] From 2000 until 2007, portions of the Specific Plan area were surveyed and populations of Spineflower were detected. (AR 817-820). From these observations, nothing much can be gleaned. For example, in the final Spineflower Conservation Plan, CDFG was still hypothesizing regarding the impact of climactic conditions on the Spineflower. (AR 821). And despite a pre-approval proposal from a third-party independent biologist to conduct a Spineflower habitat study, the applicant rejected a proposal to fund that study – electing instead to include it as part of the post-approval SCP management plan. (AR 122159).

[35] Seed bank is stored seed material and exists in the soil of Newhall's properties. This seed bank will be destroyed or made unavailable as a result of development outside of the Spineflower preserves. (AR 937). There is nothing in the existing EIR to suggest that seed salvage from these areas is necessary, it is only an experimental aspect of the SCP. (AR 935). Newhall has no obligation to preserve seed bank material that will be destroyed with the development of the Newhall Ranch project.

is an understanding of how close together Spineflower populations must exist in order to propagate successfully.

Without empirical evidence upon which to rely, the agency adopted the applicant's proposal to "preserve" Spineflower in discrete preserves located at different locations within the Specific Plan area.[36] The claim that this is a viable mitigation strategy was made despite the fact that certain of the proposed Spineflower preserve areas contain additional habitat not known to be occupied by Spineflower.[37] And, there was no substantial evidence by which to identify suitable habitat for the Spineflower, based on the unsatisfactory results of the habitat suitability index. The HIS "did not produce statistically suitable data. As a result, "an alternative method" of evaluating the applicant's proposed preserve areas was employed.

The "alternative method" employed was to simply draw margins around reported occurrences' of natural Spineflower, call them "preserves" and argue that if the surrounding habitat is suitable, Spineflower expansion can occur.[38] Without any underlying scientific understanding of the Spineflower, the applicant merely protected many of the areas in which Spineflower presently is found and asserted (without any substantial evidence in the record) that these locations provided a supportive habitat that would allow for the "long term persistence of Spineflower within the project study area."[39] (AR 856, 974). And the agency counted on "[f]urther analysis" in order to ascertain "the Spineflower's physical and biological habitat requirements *at a finer scale*."

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[36]In addition to being separated from each other, 48 percent of the preserve acres are within 200 feet of development. (AR 117026, 118200, 120082). Some of the preserves have buffers of 80 to 100 feet. (AR 120082). This proximity to development provides little protection or buffer to the Spineflower and reduces the viability of the preserves and the effectiveness of natural pollinators. Without adequate separation, the Spineflower are vulnerable to Argentine ants, an invasive exotic species. (AR 120083, citing the Suarez study). A 300 foot buffer to protect the Spineflower from Argentine ants and other impacts was recommended by the CDFG's own expert. (AR 116682). Substantial evidence in the record does not support the current design of the Spineflower preserves. As one staff biologist warned, because of lack of connectivity to open space, three of the five preserves offered by the applicant would result in a loss of species and function over time. (AR 117026).

[37] Even if one can assume that the mitigation plan is supported by some substantial scientific evidence and there was a basis to conclude that some preserves would be sufficient to preserve the San Fernando Spineflower in this area, one of the proposed "preservation" areas is subject to ground clearing by its easement owner, Southern California Edison. The 27-acre Entrada Spineflower Preserve has a 175-foot-wide utility easement owned by Southern California Edison. And, although the total size of the easement is relatively small, in support of that easement Edison maintains dirt roads and conducts other maintenance activities that are wholly inconsistent with the preservation of any wildflower. Edison has taken the position that it will not abide any constraints on its activities within their existing easements. (AR 118215). For this reason, CDFG staff members recognized the impossibility of protecting or preserving Spineflower within the Entrada preserve. "And if push comes to shove, those [spineflower] cannot be permanently protected because public utilities can invoke a 1913 exception (give us ten days' notice and scrape them all off without permits or mitigation." (Id.) As noted by the Respondent's own staff, "We probably can never fix the poor connectivity (utility corridor) leading to Entrada – unless Entrada is never built, which seems unlikely." (AR 117086). Despite the complete vulnerability of these Entrada preserve Spineflower, the Respondent counts those acres to support its finding that the Spineflower "taking" was fully mitigated. (AR 931). The inclusion of such an illusory "preserve" is misleading and fails to afford decision-makers with the informational document required by law.

[39] One aspect of the existing Spineflower habitat that was not replicated was the species' current proximity to undeveloped open space. In the final SCP, the agency notes that while efforts will be taken to connect these preserves to open space areas, those "open spaces" include passive and active use parks and trails and, given that

The Court agrees with Petitioner -- the record in this case fails to contain substantial evidence upon which the findings of mitigation through existing Spineflower preserves can rest.[40]

Once a resource – particularly a wildflower as rare and endangered as the San Fernando Valley Spineflower -- is eliminated, the loss of that resource is not truly mitigated simply by the preservation of existing patches in controlled settings. That is particularly true in this case where, even with preservation, there is a substantial net loss of the resource. Only the creation or restoration of new Spineflower land can mitigate for the loss of existing wildflower habitat. And, given the nearly extinct status of the Spineflower, the absence of substantial evidence regarding its ecology and the limited likelihood of developing new habitat in which it would thrive, this option is arguably unavailable in this instance. Compare Mira Mar Mobile Community v. City of Oceanside, 119 Cal. App. 4th 477, (2004)(preservation of new coastal sage scrub may mitigate loss of habitat).

While there are many descriptions, there is no substantial evidence regarding the habitat and propagation of the San Fernando Valley Spineflower in this record. (AR 117049). Thus, there is no substantial evidence in the record to support the respondent's hope that the identified preserves will afford an environment in which the Spineflower will be conserved. CDFG staff biologists complained that the preserves were not being designed using the limited "best evidence" that they had accumulated regarding this rare plant.[41] Rather, staff biologists advised that given the lack of scientific information, the "best we can do with what we have now is argue for inclusion of more undisturbed natural habitats inside the preserves and hopefully the connectivity areas (which remain inadequate), more diversity of species and micro-habitats – this is what will likely provide the best chance for pollinator and possible dispersal agents to access the sites." (AR 117049).

It is no defense for the CDFG to assert that no one knows anything about the Spineflower, so we don't have to do anything more. The department's own staff acknowledged that even the limited and incomplete "best available information" did not support the plan that the agency finally agreed to.[42] CEQA requires a lead agency to use its best efforts to find out and disclose all it

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"[d]evelopment plans are not currently available for open areas," there is no information regarding such uses adjacent to the proposed Spineflower preserves. (AR 860).

[40] For the same reasons that the Respondent has failed to comply with CEQA, the Spineflower Mitigation Plan and Incidental Take Permit ("ITP") do not meet the requirements of CESA. CESA compels applicants to fully mitigate the take of threatened or endangered species. Where, as here, the proposed mitigation measures are unsupported by substantial evidence, they fail to meet the requirement in CESA that they be "roughly proportional in extent to the impact of the authorized taking on the species." Fish & Game Code § 2081(b)(2).

[41] To the extent that there was some effort at obtaining scientific evidence regarding Spineflower by the CDFG staff, it has been largely ignored. For example, CDFG staff (at least in the earliest stages of this analysis) advocated that large buffers of a couple of hundred feet were necessary to protect native Spineflowers from invasions by Argentine ants and other development-related threats. Current buffers set forth in the Final EIR ignore this recommendation. (AR 120087).

[42] As one CDFG biologist admitted: "Example: around 50 % of the acreage in the applicants' proposed Airport Mesa Preserve (that would be in Mission Village) is either grubbed, terraced or ag fields. Shrubs were scraped off

*reasonably* can. That includes listening to staff concerns and using staff expertise to inform an assessment of the impacts of the proposed project. And, while the law does not require that *every* recommended test be performed, *some* must be. Compare Laurel Heights II, *supra*, 6 Cal. 4th at 1123. For example, a habitat characterization study was requested in 2010, but remained unfunded by the applicant. (DFG 122159). See Laurel Heights I, *supra*, 47 Cal. 3d at 392 (EIR is an "alarm bell whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.")

Nor can it be fairly argued that the Respondent doesn't need to understand propagation and seed dispersion as it is not trying to colonize unoccupied habitat with Spineflower seeds or seedlings.[43] While the existing plants will survive for some period, a mitigation strategy will not preserve the species unless these preserves have been created in a way that allows Spineflowers to propagate. Without knowing what conditions are required for that occurrence – including how isolated preserves can be without eliminating critical biodiversity -- the Respondent is simply taking a shot in the dark and hoping it all works out for the best. (AR 120086). As one of the Respondent's scientist warned in an e-mail -- "Preserves surrounded by development will become zoos and we will watch species blink out and these areas will likely degrade based upon the best available information we have on habitat fragments, isolation, etc."[44] (AR 116673).

The CDFG's boast that the outcome could have been so much worse is not an adequate response to a challenge to the evidentiary sufficiency of the Final SCP. (See CDFG's Opposition at 19)(noting that the final product increased preserves from the amount originally proposed by Newhall Land). Nor is enough to say that a number of small preserves reduces the possibility of a catastrophic event affecting all of the preserves when, as in this case, there is nothing in the

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on the grubbed areas and likely are going to recover very slowly, if ever. The terraced area is likely very ruderal. Ag fields have no habitat [for Spineflower] at all. The relatively natural remaining habitats are fragmented by the existing disturbances and roadway, and not located in the preserve's interior – which is small (habitat more than 300 feet from the edge). So, the effective preserve size for pollinators who likely need more than just spineflower and grasses is quite small. The whole preserve is supposedly 45 acres – interior habitat is more like 8 acres – and almost none of that isn't grubbed or terraced. . . . We've suggested therefore adding more intact habitat in the west – which likely supports pollinators needs -- but even that area would all be downslope of massive development – I do not know how to deal with that – Yet." (AR 117049). Some small measure of these recommendations were taken into account in the final SPC, but the absence of substantial evidence underlying the Spineflower Preserve mitigation strategy was not cured.

[43] While the Court agrees that it is not a scientist, agencies must adduce scientific evidence upon which to base their opinions before such opinions constitute substantial evidence. *Compare* Environmental Council of Sacramento v. City of Sacramento, 142 Cal. App. 4th 1018, 1028, 1042 (2006)(biologist and wildlife specialists submitted substantial evidence to support their conclusion that the issuance of permits would not jeopardize the survival and recovery of either the hawks or the snakes in the Natomas Basin).

[44] As one CDFG biologist noted, "Newhall's eyes are on the prize at all times. Constant strategic thinking. I[n] contrast, we [CDFG] react. Its inherent in our overworked/burnt out/overwhelmed condition. But, I think that WE MUST CLEARLY DECIDE WHAT WE REALLY WANT . . . and then do everything we can to get there." (AR 117023). As that same staff member warned, if [CDFG] takes a short cut at this pivotal time and concurs with the proposed project, (1) the development will be "highly impactive to sensitive resources . . . (2) we will be sued; and (3) we will be in a very weak position to defend our CEQA documents and permits." (AR 117009).

record to support the claim that the current area of Spineflower habitat is more vulnerable than the restrictive acreage under the SCP.

Nor is the promise of future research a sufficient remedy to this problem. Although the ITP requires the applicant to conduct "a breeding and pollination study, as well as a population genetics study, to document the genetic diversity of the Newhall Ranch spineflower population" and to conduct a "habitat characterization study," CEQA does not permit a project's analysis of significant environmental effects to be deferred like this -- after project approval. See Stanislaus Natural Heritage Project v. County of Stanislaus, 48 Cal. App. 4th 182, 206 (1996).[45] While an agency can rely on a mitigation measure that defers some amount of environmental problem solving until after project approval, it cannot do so without first establishing that full mitigation can be achieved in the manner described in the EIR. Riverwatch v. County of San Diego, 76 Cal. App. 4th 1428, 1447 (1999). Without even a rudimentary understanding of the habitat of the Spineflower, its genetic diversity and the manner in which it breeds and pollinates, there is no substantial evidence in the record that full mitigation can be achieved by establishing the proposed seven Spineflower preserves.

Finally, the ongoing monitoring and management plan dos not assure that the Spineflower preserves will thrive. While the EIR calls for "active management activities" if there is a downward population decline in the Preserve areas, there is no scientific basis upon which the agency could assess the ecological factor(s) that are responsible for the decline. And, the promise of a future study by a "qualified botanist/biologist" to complete a study of breeding and pollination biology of the Spineflower – including seed physiology – shows the gross lack of critical information regarding the sustainability of these preserves. Without information as to the basic ways in which these plants germinate, it is folly to assert that the preserves proposed by CDFG will ensure the survival of this endangered species.

As the mitigation strategy proposed for the San Fernando Spineflower is unsupported by any substantial evidence in the record, it fails to comply with CEQA.

c. The EIR's Assessment of the Project's Greenhouse Gas Emissions.

Petitioners also challenge the baseline used in order to analyze the cumulative impact of greenhouse gas ("GHG") emissions associated with the project. Under CEQA, cumulative impacts refer to two or more individual effects which, when considered together, are

[45]CDFG's effort to distinguish Stanislaus from the facts presented here is unavailing. In Stanislaus, the County approved an EIR for a 25 year project when water for the project had not been assured beyond the first five years. It did so even though it did not know the source that would be used in the future or the substantial environmental effects that might be expected when that future water source was identified. In this case there is the same lack of information regarding the critical environmental consequences of a proposal – in this case, a mitigation measure. As in Stanislaus, when an agency approves a project under a cloud of uncertainty, the fundamental purpose of the EIR as an informational document intended to inform the public and responsible officials of the environmental consequences of their decision before they are made is defeated. No one reading the SCP or the EIR in this case can possibly know whether the proposed Project will extinguish one half of the remaining habitat of the endangered Spineflower. Such an EIR fails to protect not only the environment, but also informed self-government. Laurel Heights II, *supra*, 6 Cal. 4th at 1123. While CEQA does not guarantee that the choice here would be to preserve that endangered species, the decision not to do so should be considered before, not after, that decision is made.

considerable or which compound or increase other environmental impacts. The Guidelines define the "cumulative impact from several projects" as the "change in the environment which results from the incremental impact of the project when added to "other closely related past, present, and reasonably foreseeable probable future projects." Guidelines § 15355(b).

The EIR is required to discuss the cumulative impacts of a project when "the project's incremental effect is cumulatively considerable." Guidelines § 15130(a). The discussion should be guided by standards of practicality and reasonableness, but several elements are necessary. These necessary elements include a list of past, present and probable future projects producing related or cumulative impacts, including those projects outside the control of the agency, or a summary of projections contained in an adopted general plan or related planning document which evaluates regional or area-wide conditions contributing to the cumulative impact. "Any such planning document shall be referenced and made available to the public at a location specified by the lead agency." Guidelines § 15130(b)(1)(B).

When looking at greenhouse gas emissions and asking whether the project may result in a significant cumulative contribution to climate change, a lead agency must consider the "extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting." Guidelines § 15064.4(b)(1). This baseline must focus on impacts to the existing environment, not hypothetical situations. County of Amador v. El Dorado County Water Agency, 76 Cal. App. 4th 931, 955 (1999).

> As the Supreme Court has observed, "A long line of Court of Appeal decisions holds, in similar terms, that the impacts of a proposed project are ordinarily to be compared to the actual environmental conditions existing at the time of CEQA analysis, rather than to allowable conditions defined by a plan or regulatory framework."

Communities for a Better Environment v. South Coast Air Quality Management Dist., 48 Cal. 4th 310, 320-321 (2010).

Similarly, the Guidelines direct that the lead agency "normally" use a measure of physical conditions at the time a notice of preparation is published or when the environmental analysis is commenced. Id. at 327. According to CEQA Guidelines § 15125, subdivision (a), "an EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time that the notice of preparation is published . . . ." This environmental setting will "normally constitute the baseline physical conditions by which a Lead Agency determines whether an impact is significant."

In the context of global climate change analysis, lead agencies shall also consider "the extent to which the project may increase or reduce [greenhouse gas] emissions as compared to the *existing* environmental setting." CEQA Guidelines § 15064.4, subdivision (b)(1)(emphasis added). It is only against this baseline that any significant environmental effects can be determined. County of Amador v. El Dorado County Water Agency, 76 Cal. App. 4th 931, 955 (1999).

> "[T]he relevant issue to be addressed in an EIR is not the relative amount of impact resulting from a proposed project when compared to existing environmental problems

caused by past projects, but rather (whether the additional impact associated with the project) should be considered significant in light of the serious nature of existing problems."

City of Long Beach v. Los Angeles Unified School District, 176 Cal. App. 4th 889, 905-906 (2009).

Petitioners assert that the EIR's analytic approach impermissibly ignored the serious nature of existing problems regarding greenhouse gases and, instead, used an unrealistic future hypothetical scenario in making the determination of whether the Project's emissions were significant. (Plaintiffs' Consolidated Reply at 28). This, they contend, is error. See Sunnyvale West Neighborhood Assn. v. City of Sunnyvale, 190 Cal. App. 4th 1379, 1380 (2010).

Respondent challenges that charge and asserts that CEQA does not dictate that all significance determinations be assessed using existing environmental conditions as a baseline. Instead, CDFG asserts that CEQA allows the environmental impacts of a project to be evaluated using realistic measures of environmental effects for a long-term project, even if those estimates are admittedly hypothetical at the present. See Neighbors for Smart Rail v. Exposition Metroline Construction, 205 Cal. App. 4th 552, 570 (2012)(*petition for review granted August 8, 2012).* So long as the "hypothetical" measure is a realistic one, it can constitute substantial evidence of a baseline sufficient to measure the impact of a project over a "no build" alternative.[46] Id. Compare CBE, *supra*, 48 Cal. 4th at 322 (NOx emissions estimates not realistic).

To assess the Petitioners contention requires an understanding of the hypothetical measure used in this case as the baseline for the analysis of the cumulative effect of greenhouse gases associated with this project. In this EIR, CDFG evaluated the potential direct, indirect and secondary global climate change impacts resulting from the Project and proposed alternatives by simply amassing a quantitative emissions category and then considering whether the addition of this proposed Project impedes the achievement of mandates set forth in California's greenhouse gas emissions legislation. So long as the additional greenhouses gasses generated from this Project do not impede compliance with a new regulatory scheme, the impacts are deemed to be not significant.

Whether or not a proper baseline determination has been proffered by the expert is not a question of "substantial evidence." Rather, the question presented here is whether the Respondent's analysis has proceeded in a manner required by law by using a realistic measure of the impact of

[46] As a petition for review has been granted, *Smart Rail* has been de-published and is no longer citable. However, even if it were controlling authority, that case cannot be read as a universal endorsement of the use of an AB 32 hypothetical baseline for an analysis of significant greenhouse gas impacts. The facts presented here are distinguishable from the environmental analysis in that decision. The Project in this case uses a baseline that is distinct from the project future condition used in *Smart Rail.* In that latter decision, the projected conditions relied on traffic improvements that had been committed to and official demographic data. In that case, the reliability of the projections and inevitability of the changes on which those projections were based was considered and found to allow informed decision-making. In this case, however, the projected conditions employed are not supported by substantial evidence. In fact, Respondent bemoans the absence of any such "scientific or regulatory consensus."

the current project on the environment. Thus, the standard of review on the propriety of the baseline methodology employed is *de novo*.

To estimate the greenhouse emissions from the Newhall Ranch project, the CDFG used a number of models and other resources to estimate project-related greenhouse emissions. CDFG then looked at Assembly Bill 32, which mandated that the California Air Resources Board ("CARB") determine the amount of statewide greenhouse gas emissions in 1990, and set the 2020 limit equivalent to that level. In that regard, CARB determined that the 1990 greenhouse has emissions level (and the 2020 cap) was 427 million tons of carbon dioxide. Such a target necessitated a reduction of 174 million tons of carbon dioxide by 2020. Consistent with that goal, CARB estimated that it would be able to achieve this goal through a number of measures, including anti-idling measures and implementation of tail-pipe emissions standards.[47]

At the time of this EIR, CARB had also begun to obtain recommendations regarding the appropriate significance criteria to use in environmental documentation prepared pursuant to CEQA. It had not, however, recommended the use of Assembly Bill 32's goals as a basis upon which to evaluate whether the project had significant climate change impacts.

CDFG's consultant, ENVIRON, identified, quantified and disclosed existing greenhouse gas emissions in the Project area as compared those to projected post-Project emissions. (DFG 7674, 7702, 26377-82). According to the EIR, existing site activities produce 10,272 metric tons of carbon dioxide equivalents per year. (DFG 7705). After this massive new housing project is completed, ENVIRON estimated that the Project that will produce 269,000 metric tons of carbon dioxide equivalents per year. (Id.) Rather than a "no change" situation, the Project under consideration here results in a net increase of approximately 250,000 metric tons of carbon dioxide equivalents per year.[48] (Id.)

But, a magnitude change of this size did not support a finding that the project would have a significant climate change impact. Instead, the agency asked whether this numeric increase would impede the State of California's compliance with AB 32's emissions mandate. If the legislature's mandate could be reached, then it could be concluded that the Project would not significantly affect the environment.[49] This "significance determination" is based on the unsubstantiated assumption that new development that is 29% below "business as usual" (or "BAU") is consistent with California's near-term emissions reduction objectives, and therefore, would not result in a cumulatively considerable environmental impact on global warming.[50]

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[47] Regulatory emphasis on tail-pipe emissions is understandable given the fact that transportation accounts for 40 percent of California's greenhouse gasses.

[48] The estimates provided used by ENVIRON were those associated with Projective Alternative 2. The Project ultimately adopted by CDFG was "more akin" to Alternative 3, but not exactly.

[49] Specifically, ENVIRON took the hypothetical "business as usual (BAU)" emission estimate that was created by the California Air Resources Board (CARB) to measure *statewide* compliance with the legislative goal of AB 32 and applied it to conclude that the Newhall Ranch Project would not create significant environmental impacts from its 20-fold increase in greenhouse gas emissions.

[50] The EIR's claim that AB 32 is a relevant reduction mandate in the CEQA context is based on a quotation that says no such thing. (AR 20340). The quotation states only that new provisions to CEQA ought to be enacted to

It is this second step that Petitioners contend is contrary to the Guidelines and to CEQA. The Court agrees. While lead agencies are generally afforded discretion when determining the significance of impacts, the use of an improper baseline interferes with the EIR's ability to assess the impacts of a proposed project. In cases in which a project is being proposed for undeveloped pieces of property (such as in this case), the baseline has been existing environments, rather than some hypothetical impacted future environment that might occur without the project. See, e.g., Environmental Planning and Information Council v. County of El Dorado, 131 Cal. App. 3d 350, 352 (1982); County of Amador v. El Dorado County Water Agency, 76 Cal. App. 4th 931, 952 (1999).

The question to be answered in an EIR is not whether this project will result in non-compliance with a state-wide legislative objective, but rather whether the project will have adverse environmental effects and whether those impacts can be avoided or substantially lessened by way of feasible mitigation. A baseline analysis of impacts on the existing environment, therefore, is required to inform decision-makers of the magnitude (or significance) of the cumulative environmental impact Newhall Ranch Project on greenhouse gas emissions. Whether such a project would assist or defeat (or, more likely, have no effect on) the state's efforts at reducing these levels is not the proper question.

In contravention of CEQA, the EIR presumes, without any substantial evidence in the record to support the claim, that because the Scoping Plan states that California's overall emissions must be reduced to 29% below "business as usual" to meet legislative targets, that new developments (such as this one) need only reduce greenhouse gasses to 29% below "business as usual" to fully mitigate its impacts under CEQA.[51] In fact, given that opportunities for reducing emissions from the already built environment present greater challenges, there is no legitimate basis upon which to presume that expectations for minimizing emissions from new developments should be greater. In fact, as recognized by the Attorney General, "new development must be more GHG-efficient than this average, given past and current sources of emissions, which are substantially less efficient that this average, will continue to exist and emit." (AR 12225).

As the EIR acknowledges, CARB is already fully engaged in a multi-front effort, including regulation of tail-pipe emissions from the largest single source of greenhouse gases, in order to achieve these 2020 goals. The 29% below "business as usual threshold" adopted by Respondent as a significance threshold will be largely achieved through compliance with existing and anticipated regulatory requirements. Thus, the 31% below "business as usual" conditions promised by this Project – in effect – awards emission reduction 'points" to the applicant for mitigation already required by local or state law. (AR 122807).

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encourage "developers to submit applications and local governments to make land use decisions" that will help the state achieve its climate goals under AB 32 . . . .") Given that the land use decision made by the local government in this instance occurred years before the passage of AB 32, that goal certainly did not inform any aspect of the decision made by Los Angeles County in this case.

[51] As noted in Rialto Citizens for Responsible Growth v. City of Rialto, 208 Cal. App. 4th 899, 939-40 (2012), "Assembly Bill 32 did not provide thresholds or methodologies for analyzing a project's impacts on global climate change.") Nor are there appellate decisions expressly approving the use of AB 32's thresholds to assess environmental significance.

In addition, the "methodology" employed in this case did not even use the entire mandate under CARB's implementation of AB 32 to assess environmental significance. Rather, the agency "cherry picked" CARB's thresholds. There are two different aspects of the CARB greenhouse gas targets in its plan. Not only does CARB propose a 30 percent reduction of the state's BAU's projected emissions in 2020, but it also proposes a ten percent reduction from *actual* 2002-2004 average emissions. Using the "actual" 2002-2004 greenhouse gas level as a "baseline" – which CARB also proposes using as a measure of compliance with AB 32 -- the Project would be environmentally significant as it fails to meet AB 32's requirement of decreasing greenhouse gases from 2002-2004 levels by 10 percent.

Ironically, using a BAU measure of statewide greenhouse emissions to measure CEQA significance will defeat the very goal of AB 32. By partially importing a regulatory measure intended to address a legislative mandate and using it as a measure of significance in an EIR approval process, project planners are making the achievement of AB 32's mandates more difficult. New developments of the type under consideration here must actually reduce greenhouse gas emissions from the business as usual baseline in order to allow "past and current sources of emissions," which are substantially less efficient than this Project pre-development, to continue to exist and emit. (DFG 122806, 121707, 122806-07).

Admittedly, the absence of federal guidance and the paucity of legal decisions on the subject of how to appropriately measure greenhouse gas effects render the task of the lead agency particularly problematic. And, into this uncertainty, the law does afford the agency some reasonable discretion. The agency's discretion, however, is bounded by the underlying rationale of CEQA – to provide decision-makers with a fair and accurate environmental analysis of a proposed project. It is no answer to say, as did CDFG, that our expert provided this analysis and his "expert opinion" constitutes substantial evidence. Here, the agency adopted an expert's opinion predicated on one aspect of CARB's hypothetical baseline without requiring that expert to investigate and verify the assumptions upon which the baseline generated. Where, as here, the expert's analysis of environmental significance is not "adequately supported by facts and analysis contained in the EIR," it is inadequate as a matter of law. Communities for a Better Environment v. City of Richmond, 184 Cal. App. 4th 70, 83 (2010).

As time has progressed, there has emerged greater consensus in the State of California regarding how global climate change should be analyzed and which significance criteria ought to be used.[52] In further proceedings in this case, that growing guidance will assist decision makers in the evaluation of greenhouse gas emissions from this proposed Project.

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[52] Under an analysis by the California Air Pollution Control Officer's Association, the only two standards that they believe to be effective in reducing emissions and highly consistent with AB 32 are a threshold of zero, or a quantitative threshold designed to capture 90 percent or more of likely future discretionary projects. A 40,000 to 50,000 ton project would have low consistency with AB 32. The project in this case would result in well over 300,000 tons of greenhouse gas emissions. (AR 120044).

d. The EIR's Assessment of the Project's Impact on Native American Cultural Resources Is Not Supported by Substantial Evidence.

Cultural resources, both historic and prehistoric, are known to exist on the Project site and in the surrounding areas. Under CEQA, the lead agency must determine if these are either significant resources or a unique archeological resource, and if so, whether impacts to that resource are significant. Under CEQA, a project may have a significant effect on the environment if it may cause a "substantial adverse change in the significance of an historical resource." Under CEQA, an EIR must also evaluate any impacts on unique archeological resources.

The Upper Santa Clara River Valley region, including the present-day site of the Newhall Ranch project, was occupied by an ethnolinguistic group known as the Tataviam. The Tataviam people are thought to have inhabited the upper Santa Clara River drainage from about Piru eastward to just beyond Vasquez Rocks/Agua Dulce, and southward as far as the crests of the San Gabriel and Santa Suzanna Mountains. (DFG 6663). The Tataviam were hunter gatherers with subsistence emphasizing yucca, acorns, juniper berries, sage seeds and islay. They also hunted small game and larger game, such as deer and rabbit.

During the historic period, Tataviam villages existed near modern Piru and San Francisquito, near Newhall, in Elizabeth Lake and Near Castaic Junction. (Id.) A mixed Tataviam/Chumash population lived near modern Rancho Camulos. (Id.)

In general terms, the prehistory of the Upper Santa Clara River appears to parallel that of the Southern California coastal region. The earliest evidence of human habitation dated from about 7,000 years before present.

With regards to the Specific Plan area, the EIR asserts that it "was found to have a very low density of archeological remains." That claim is predicated on a survey conducted in 1993 and 1994 and a search of archival records in 1995.[53] The survey entailed walking over the surface of the land at 15 to 20 meter intervals and looking for archeological "sties or isolates." While occasionally cut banks allowed a sub-surface examination to be made, little information was obtained. A similar survey was re-conducted in 2004. Once again, nothing much was found. That is not surprising given the passage of hundreds of years, the accumulation of soils and sediment, particularly after the San Francisquito Dam disaster in 1928 inundated the valley and its environs, and the use of the land for activities such as grazing.[54]

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[53] That search of records – claimed to be substantial evidence to support the expert's opinion – established that the Tataviam tribe was extinct. Adopting that conclusion, W & S opined that the Tataviam Tribe was extinct. W & S Consultants ("W & S") later apologized in 2007 when it discovered that the Tataviam tribe was not extinct. Obviously, literary searches that are established by their results to be grossly inaccurate do not constitute substantial evidence upon which experts reasonably rely. Not surprisingly, this same consultant found that Chumash people did not occupy the Specific Plan area, despite a 2002 ethnographic history showing intermarriage and co-occupation of this territory by members of the Chumash and Tataviam tribes. (AR 10527). Peer review, without more, does not transform less than substantial evidence into substantial evidence.

[54] The survey did identify *historical* sites on the Specific Plan site and adjacent thereto. On site are historic remains of an 1839 rancho, the Rancho San Francisco, which is listed as a California Historical Landmark. This site is not included in the development plan and the land has been donated to the Archeological Conservancy.

To get below the surface and examine likely locations of archeological remains, the applicant's consultants excavated eight sites in the Specific Plan area in September 2004. With regard to CA-LAN 2233, 13 test pits were excavated. Middle period deposits at that site extended to a depth of 55 inches. (AR 114413). Two sites, CA-LAN-2133 and -2233 were deemed eligible for listing in the National Register of Historic Places as likely to yield information important in prehistory or history.[55] Other excavations were conducted, but these sites were deemed ineligible for NRHP and were not found to constitute unique archeological resources.[56] There was no attempt by the applicant's expert to perform random test pit sampling or to engage in any other inquiry to ascertain the scope or breadth of tribal occupation in the Specific Plan area.

In 1996, Caltrans began a widening project on SR-126, which runs through the Specific Plan area. The road crew discovered a large number of human remains. An independent archeological team from Caltrans commenced excavations of the area. A total of 45 burials were recovered during these excavation sessions. These discoveries triggered a far more extensive excavation of the area previously explored by the applicant's expert.

The investigation undertaken by the Caltrans archeologists uncovered far more extensive complexes at the excavated sites, including both habitation and cemetery areas. As with the records search, it appears that the applicant's expert's archeological excavations were inaccurate, incomplete and partial. The cemetery areas discovered by Caltrans dated back to 2,000 to 1,640 radiocarbon years BP. At the burial sites, Caltrans archeologists unearthed patterned internments that may indicate kin relationships. A limited number of artifacts were located along with the burials, including stone tools, coiled basket remnants, bone tools and shell beads. The data collected suggest that residence at the complex went on for several hundred years. And, DNA analysis supports the conclusion that the occupants were dissimilar to coastal inhabitants. It is assumed that this settlement was occupied by ancestral Tataviam.

And, beneath the cemetery was a second component of even earlier occupation in the Millingstone era. This component was not discovered by the applicant's consultant. The Millingstone component of the site included traditional features of milling pieces and stone implements in addition to bone tools.

As noted by the Caltrans archeologists, this site provided unique and valuable insights into a temporal and functional mode of a prehistoric community in the Santa Clara Valley, an area in which there has been scant knowledge prehistory. The Millingstone component had not previously been encountered in the Santa Clara River valley to date and demonstrated an

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[55] CA LAN 2133 had already been identified during a survey related to a pipeline project. (AR 114408).

[56] While Petitioners have complained that the EIR fails to provide specific information regarding the location of Native American cultural sites, that omission is not the basis upon which the Court finds that the W & S studies fail to provide substantial evidence to support the claim that the Specific Plan area was not densely occupied by native Peoples. While an EIR must disclose "all that it reasonably can," the disclosure of ancient cultural sites is not reasonable. As a general practice, archeological reports are not included in environmental documents because their publication would expose discovered resources from unauthorized exploration or vandalism. Additional access, however, may have been provided upon request by any interested individuals, had it been requested. Nothing more is required under CEQA.

important aspect of a widespread tradition that extended from the coast to the inland valleys. The critical and important discovery of the Millingstone component was missed entirely by the limited test pit excavations conducted by the applicant's consultant. Such incomplete and inadequate archeological evidence does not constitute substantial evidence sufficient to support the findings upon which the decision-makers relied.

As presently proposed, CA-LAN -2233 is located in the "Homestead" portion of the Specific Plan site. The tract map proposes that the area be developed as a park, with "burial-in-place treatment of the archeological site. However, this treatment may no longer be feasible in the future. Accordingly, the EIR proposes that a "data recovery project" be implemented at this site in order to "collect and preserve" the scientific information contained therein. (AR 14418, 114431).

As temporal as the "burial in place" mitigation is for CA-LAN 2233, there are no preservation-in-place strategies for CA-LAN -2133.[57] (AR114431). That unique archeological resource is located in a portion of the Specific Plan that has an "Open Area" land use designation, with preliminary development plans indicating that a new road would be constructed in the vicinity of the site. This planned road construction may disturb and damage this resource and would cause substantial adverse changes to the integrity and significance of the resources – thus rendering the "planned avoidance treatment" noted in the EIR as wholly impracticable. Nonetheless, the only mitigation measure required if "preservation in place" of the site is not feasible is to excavate "a statistically valid sample" and to process, analyze and curate recovered artifacts. In addition, if human remains are exhumed, the coroner is called and excavation is postponed until the remains are reburied.

The EIR's proposed mitigation efforts fail to comply with CEQA's preferred method of mitigation and fail to explain why roads or other project improvements cannot be designed so as to not interfere with this unique archeological site or native burial grounds.[58] See, e.g., Madera Oversight Coalition v. County of Madera, 199 Cal. App. 4th 48, 85, 87 (2011); Ballona Wetlands Land Trust v. City of Los Angeles, 201 Cal. App. 4th 455, 469 (2011).

Moreover, the EIR's analysis of mitigation strategies for yet undetected cultural resources is vague and non-specific – due to its assumption that the Specific Plan area is largely devoid of

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[57] While the particular land use decisions regarding these locations will ultimately be refined during the tract map process of the project in the future, that fact does not entitle the Respondent to fail to mitigate presently known significant impacts on cultural resources. The failure to do so in this case constitutes a failure to proceed in a manner required by law.

[58] Petitioners asserted this claim in their opening brief and complained that the EIR failed to identify the basis for selecting a particular mitigation measure and failed to state whether a greater degree of mitigation could be achieved by implementing one method of preservation in place over another. They did not wait until the Reply brief to argue that the EIR violated CEQA's procedural requirements by failing to analyze and select preservation in place mitigation measures for the cultural resources affected by the project. Respondent's sur-rebuttal brief, therefore, was unnecessary. And, it was not necessary to direct the court's attention to the recent decision Neighbors for Smart Rail v. Exposition Metro Line Construction Authority. The Court was already aware of that decision. And, since the date of the sur-reply, that decision has been de-published as a petition for review has been granted by the Supreme Court.

unique cultural resources. Visual surveys of the ground, literary reviews conducted by the applicant's consultant in this case and limited excavations guided not by random selection but instead by expected outcomes do not constitute substantial evidence that this Project area was largely unoccupied.

The Caltrans discovery of extensive and "rich" cultural resources within the confines of the Project area demanded further scientific analysis be performed in order to provide a reasonable and good faith assessment of the archeological character of the Specific Plan area. Rather than engage in that necessary inquiry, the applicant performed yet another pointless (and not surprisingly) inconclusive surface survey. The applicant's failure to engage in sufficient and reasonably diligent examination of the project area results in a record wholly lacking in substantial evidence regarding the baseline of cultural resources likely to be impacted by the Newhall Ranch project and subsequent build-out of the Specific Plan.

Given that there is no substantial evidence upon which to conclude that the Specific Plan area is not one in which there are significant and unique archeological resources present, there is no factual basis upon which to know whether the impact of the Project on these unknown resources can be adequately mitigated using the proposed measures (including monitoring and planned contingencies for unanticipated discoveries). Unless and until there is substantial evidence in the record to support the assertion that the Specific Plan area has a very low density of significant or unique archeological remains, no effective mitigation strategy can be proposed.[59] Moreover, the mitigation measures for those sites known to contain unique resources do not evidence any preference for preserving the artifacts and sites in place. Rather, each of the proposed measures calls for the eventual excavation and recovery of artifacts and human remains.[60]

It is no defense to assert, as does Respondent, that the Tataviam tribe has agreed to support the Project. (AR 47125-47128). While theoretically the Native Americans whose ancestral ties would make them the most likely to oppose an EIR that fails to adduce sufficient substantial evidence in which to make a full and reasoned analysis assessment of the Project's impact on cultural resources, they are not indispensable parties to this challenge. And, Chumash tribal members, whose ancestors may also be buried at sites in the Specific Plan area, have lodged significant objections to the Project.

Nor can a full understanding of the magnitude and quality of the cultural resources lying just beneath the surface of the Specific Plan area be postponed until a later time. (AR 9141). Without a correct baseline of cultural resources at the Project site which is supported by substantial evidence, it cannot be concluded that this proposed project will not have significant

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[59] According to this oral history, the entire Newhall Ranch Project area was occupied by Tataviam and Chumash tribal members. This information was provided on August 3, 2010, during the public comment period on the final EIR. The EIR's response to this information was to stand on the conclusion reached by its own expert based on a conclusion reached before significant new discoveries were made by Caltrans archeologists. Ignoring competent contrary evidence suggesting extensive and long-lasting occupation on Project lands does not constitute "accepted standards of practice."

[60]Petitioners also object that the EIR failed to consider Project's impact on the California Condor and, collaterally, cultural practices involving the Condor. That claim is discussed *infra*.

impacts or that those impacts cannot be avoided or otherwise specifically mitigated.

3. The Respondent Failed to Prevent the Taking of a Fully Protected Fish.

Both as part of its CEQA claim and as a separate claim, Petitioners object that the CDFG approved a project that violates state law prohibitions on the taking of fully protected species.

The Fish and Game Code states that "fully protected fish or parts thereof may not be taken or possessed at any time except under permits authorizing take for necessary scientific research or other circumstances not relevant in this case. Fish & Game Code § 5515(a)(1). Section 86 of the Fish & Game Code defines "take" as hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture or kill."[61]

The Unarmored Threespine Stickleback ("UTS") is a California fully protected species. Therefore, activities resulting in the take of the species are prohibited.[62]

Petitioners allege that the implementation of the Newhall Ranch Plan could adversely affect individual UTS during construction work within the Santa Clara River. A letter from an Emeritus Professor of Biological Sciences at California State Polytechnic University, Dr. Jonathan Baskin, describes this phenomenon and notes that the EIR fails to analyze fully the impact on the Unarmored Threespine Stickleback from the construction that is planned to occur in the Santa Clara River. For example, the proposal to channelize portions of the Santa Clara River, including hard siding and narrowing of the low flow channel of the river (especially at bridges), could lead to significant reduction in the backwater places where the UTS takes refuge during high flow events. Without such refuge, the UTS will no longer be able to survive in certain reaches of the Santa Clara River. While the EIR notes that these impact are less than substantial, even less that substantial events of this kind are impermissible for a fully protected species. Additionally, Petitioners argue that the construction projects contemplated by the Project will result in the "take" of UTS from the water flowing through the construction site. (AR 13645).

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[61] Respondent's contention that this objection is not ripe is without merit. Obviously, the Respondent felt it necessary to issue an Incidental Take permit because the Newhall Ranch project entailed the removal of endangered San Fernando Spineflower. Similarly, if the Project will require (as a mitigation strategy) the capture and relocation of UTS, the permit shall issue, even in advance of the actual implementation of the mitigation plan. The law does not require an endangered species to be unlawfully taken before a claim can be made.

And, while Petitioners may not ordinarily prosecute violations of Fish & Game Code § 5515, a claim for the violation of the public trust or for ordinary mandate requiring the CDFG to perform its statutory duties may be brought by interested members of the public with a beneficial interest in the agency's actions.

Further, the principal issue which is currently ripe for adjudication is whether the proposed mitigation of the Project's impacts on the UTS will result in the taking of a fully protected species without first obtaining a permit. This issue is a well-defined and concrete controversy that goes to the heart of the adequacy of the EIR.

[62] Take, as defined under state law (Fish and Game Code § 86) includes both the killing and capturing of the UTS. As one staff biologist admitted in internal CDFG memos, it would be "difficult" to fully avoid taking the UTS. (AR 117004, 11709).

The record, however, is not barren on the issue of the UTS. With regard to the concern regarding the maintenance of adequate refuge during high flow events, two hydraulics studies were performed to evaluate post-project flows and velocities in 2 year, 5 year, 10 year, 20 year, 50 year and 100 year floods, and a focused ichthyology study to ascertain whether the River's flow regime would result in significant adverse impacts on refugia habitat for the UTS. The hydrology study, by Pacific Advanced Civil Engineering, Inc., concluded that the Project would result in minor localized changes in the flow levels at certain locations in the river, but that these changes were not significant. In addition, freshwater fish specialists, Entrix, took this hydrologic information and determined that the flood control structures and bridges contemplated by the Project would not significantly diminish the amount of usable refugia habitat in the River during storm events – and would in come cases actually increase the amount of such habitat.

As for the inevitability of a "take" of UTS during the construction process, the Respondent agrees that the actual construction work would, if unmitigated, have a significant effect on the UTS. In response, therefore, the EIR recommended a number of mitigation measures, including surveys to identify the presence of UTS and other protected fish, suspending construction is spawn or juvenile fish are present, and providing alternative diversion flows and methods to maintain fish passage for aquatic species and other methods. However, the very "mitigation" methods recommended to be conducted with supervision by a U.S. Fish and Wildlife Service biologist, such as block netting and fish relocation) falls within the meaning of a illegal "taking" under the California Fish and Game Code. Accordingly, while the proposed mitigation strategies designed by Dr. Camm Swift may not occasion a take under federal law, it would cause a taking of the UTS under California law.

Thus, where there is a mitigation proposal that by its very terms constitutes an illegal taking of the UTS under state law, the strategy fails to be a reasonable and realistic alternative. Without the issuance of an ITP, the mitigation measure cannot be implemented. Therefore, there is no substantial evidence to support the mitigation strategy on which Respondent relies to conclude that the construction processes associated with the Project will not result in an illegal taking of the UTS.

4. Project Impacts on the California Condor Have Been Fully Examined.

The Petitioners also object to the adequacy of the Respondent's evaluation of the Project's potential impact on the California condor. The California condor is a California fully protected species. Any activities resulting in the "take" of a Condor, including injury or mortality, are prohibited.

The California condor is found in varying habitat and climate tolerances. Suitable habitat contains adequate food supply, pen areas, and reliable winds and air movement to allow for long duration soaring during forage. Flights over vast areas have been measured over several hundred linear miles of travel each day. Most condors, however, forage within 50 to 70 kilometers of nesting areas, with core foraging areas ranging form 2500 to 2800 square kilometers. California Condors have the largest home range of any terrestrial bird in North America.

California condor populations have precipitously declined sine the early 1900s. An early estimate of population size showed that just over 40 birds remained in the early 1960s and only 30 existed by 1970. The final groups of California condor were removed for captive breeding in 1986-87. Since that time, from January 1992 to the present, California Condors have been re-introduced into suitable habitat near the proposed Landmark Village. These released birds have been observed foraging out onto private land near the Landmark Village area.

The California condor was listed as endangered with critical habitat designated. This critical habitat does not fall within the boundary of the Newhall Ranch Specific area. In fact, the closest known nest to the Landmark Village area is approximately 25 miles. The Landmark Village area has no potential nesting opportunities and, because of limited prey and reduced wind and thermals, that area does not contain the essential elements that define suitable California condor habitat.

While the Condor will fly over the Santa Clarita Valley, they rarely land for roosting and foraging. [63] (AR 4767). And, most of these flights are at fairly high altitudes above the ground when moving between Hopper National Wildlife Refuge and Newhall Ranch and beyond. They are not likely, therefore, to suffer injury or mortality due to construction activities associated with the Project. And, while some secondary impacts (such as the animal's collection of micro-trash) may be foreseeable, those cumulative effects have been accounted for and there is substantial evidence to support the Respondent's claim that they have been effectively mitigated.

Thus, experts concluded, based on scientific observations and analysis, that the Proposed Newhall Ranch project and the Specific Plan build-out would alter the landscape, but would not result in significant impacts to the California condor and its resurging population, nor would it adversely impact critical habitat with mitigation.

While the Petitioners disagree with that opinion, there is substantial evidence in the record to support it. Thus, the Petitioners' claim that Respondent failed to adequately consider the possibility of a 'taking' of the Condor is simply unsupported by the record in this case.

In addition, as there is substantial evidence in the record to support Respondent's conclusion that the California Condor will not be adversely impacted by the Newhall Ranch project or the build-out of the Specific Plan area, the project would not be expected to have any adverse impact on the Chumash's ability to participate in sacred ceremonies featuring the Condor (assuming that the existence of Condor-specific practices were established). In addition, CEQA does not require the Respondent to analyze the cultural and religious impacts on the Chumash associated with the California Condor. See Christward Minstry v. Superior Court, 184 Cal. App. 3d 180, 197 (1986).

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[63] As of 2007, no Condors had recently landed within the Project area. In 2008, a radio-tagged condor was tracked to the Specific Plan area. (AR 118348). In 2009, Condors were observed feeding on a cow carcass at the Newhall Land property. (AR 43785).

**Conclusion**

For the reasons stated above, the Court grants the Writ of Mandate.

The administrative record is ordered returned to the party who lodged it to be preserved without alteration until a final judgment is rendered and to forward it to the Court of Appeal in the event of appeal.

DATED: October 15, 2012

ANN I. JONES, JUDGE OF THE SUPERIOR COURT