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LIVING RIVERS COUNCIL  
6

7  
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 IN AND FOR THE COUNTY OF NAPA

10 LIVING RIVERS COUNCIL, an unincorporated )  
association, )  
11 )  
Petitioner, )  
12 v. )  
13 CITY OF ST. HELENA, CITY OF ST. )  
HELENA CITY COUNCIL, and DOES 1 )  
14 through 10, inclusive, )  
15 Respondents. )  
\_\_\_\_\_ /

Case No. 26-24908

**PETITIONER LIVING RIVERS  
COUNCIL'S OPENING TRIAL BRIEF**

Date: October 14, 2004  
Time: 8:30 a.m.  
Dept: B

Judge: Honorable W. Scott Snowden

1 **I. INTRODUCTION**

2 In this action mandamus action Petitioner Living Rivers Council (hereinafter "Living Rivers")  
3 seeks to set aside the City of St. Helena's<sup>1</sup> February 24, 2004 adoption of Resolution Numbers  
4 2004-15 and 2004-16 by which the City approved the City of St. Helena Comprehensive Flood  
5 Protection Project and certified the Environmental Impact Report ("EIR") prepared pursuant to the  
6 California Environmental Quality Act for the Project. Through its adoption of Resolution No.  
7 2004-16, the City selected the Enhanced Minimum Plan A as the City's Comprehensive Flood  
8 Control Project (hereinafter referred to as the "Project" or the "EMP-A").

9 The Project represents the City's response to the fact that many people in St. Helena,  
10 particularly the people who live in the Vineyard Valley Mobile Home Park in St. Helena, have built  
11 homes in the flood plain of the Napa River. As a result, these homes are threatened with flooding  
12 from time to time when rainfall in the Napa River drainage upstream of St. Helena exceeds the river  
13 channel's capacity to transport the water downstream without overtopping the river's banks.

14 Periodic river flows that overtop the river's bank are part of the natural history of the Napa  
15 River and of virtually all other rivers in the world. In recognition of this fact, in 1998 the people of  
16 Napa County enacted "Measure A," also known as the Napa County Flood Protection Sales Tax  
17 Ordinance. (See AR [sev to cite to measure A in AR].) Measure A imposes a one-half cent sales  
18 tax in Napa County to provide funds for flood protection projects on the Napa River. Measure A,  
19 however, expresses a strong policy of the people of the County to require that all flood protection  
20 projects on the river embody "Living River Principles." Measure A implements this policy by  
21 requiring that in order to receive funds for Measure A sales tax revenue, flood protection projects on  
22 the river must comply with specified "Living River Guidelines."

23 During the administrative process for this Project, Petitioner Living Rivers submitted  
24 extensive comments to the City describing how this Project's design does not comply with Measure  
25 A's Living River Principles. For example, Living Rivers wrote to the City Council that:

26 \_\_\_\_\_

27 <sup>1</sup>Living Rivers has named both the City of St. Helena and the City of St. Helena City Council as Re-  
28 spondents in this action. In this brief, Living Rivers refers to both the City and its City Council collectively  
as the "City".

1 The fundamental problem with the Projects is they do not attempt to resolve the flood  
2 problem by working with the river in a way that simultaneously provides both flood  
3 protection for citizens and restoration of the river ecology, but instead, elevates the  
4 goal of flood protection above all the other living river considerations. In this regard,  
5 the Projects fail to utilize a multi-objective planning process aimed at maintaining a  
6 sustainable and natural river ecosystem while also providing flood protection. . . .  
7 Accordingly, when tough decisions regarding the Project have been encountered, the  
8 City has repeatedly favored flood protection over environmentally superior  
9 alternatives.

6 (AR \_\_\_\_.) Living Rivers summarized Measure A's Living River Principles as follows:.

7 As defined by the Goals and Objectives document, "A 'living' Napa River and its  
8 tributaries is a river system with structure, function, and diversity. It has physical,  
9 chemical, and biological components that function together to produce complex,  
10 diverse communities of people, plants, and animals." (Exhibit 1, page 4.)  
11 Accordingly, a living Napa River: conveys variable flows and restores habitat in the  
12 floodplain; balances sediment input with sediment transport; provides natural fish and  
13 wildlife habitat; maintains high water quality and supply; offers improved recreation  
14 opportunities; maintains its aesthetic qualities; and generally enhances the natural  
15 environment. To accomplish these goals, the Goals and Objectives document  
16 identifies four overarching goals which include: preserve or enhance the habitats,  
17 water quality and natural geomorphic characteristics of the Napa River System;  
18 provide enhancement of the River system to the fullest extent possible, and not  
19 preclude or eliminate future restoration opportunities; and incorporate the  
20 geomorphic, water quality and habitat objectives to the fullest extent possible so that  
21 the intended functions are self-sustaining. . . . The approach of the Goals and  
22 Objectives document is based on the natural processes and characteristics of the Napa  
23 River itself, incorporating the following principles of geomorphology, all of which  
24 allow the river to meander as much as possible by maintaining: the natural slope of  
25 the river; the natural width of the river; the natural width to depth ratio of the river;  
26 the connection of the river to the floodplain; channel features and a continuous fish  
27 and riparian corridor along the river.

18 (AR \_\_\_\_.)

19 The foregoing discussion is provided as background. This case does not directly challenge  
20 the City's intent to apply for Measure A funds to build this Project. That dispute is left for another  
21 day.

22 This case relates to the City's violation of the California Environmental Quality Act  
23 (hereinafter referred to as "CEQA" or the "Act"). The California Supreme Court has repeatedly  
24 emphasized the importance of public participation under CEQA, stating that CEQA should be  
25 "scrupulously followed," so that "the public will know the basis on which its responsible officials  
26 either approve or reject environmentally significant action," and will be able to "respond accordingly  
27 to action with which it disagrees." Thus, "[t]he EIR process protects not only the environment, but  
28 informed self-government." *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1229;

1 *Laurel Heights Improvement Association of San Francisco, Inc. v. Regents of the University of*  
2 *California* (1993) ("*Laurel Heights II*") 6 Cal.4th 1112, 1123; *Citizens of Goleta Valley v. Board of*  
3 *Supervisors* (1990) ("*Goleta Valley II*") 52 Cal.3d 553, 564; *Laurel Heights Improvement Association*  
4 *v. Regents of University of California* (1988) ("*Laurel Heights I*") 47 Cal.3d 376, 392.

5 Here, the City has violated these fundamental policies of CEQA by certifying an EIR that fails  
6 to provide adequate information to the public regarding the Project, the environment in which the  
7 Project is located and its likely environmental effects. In addition, the City has failed to make the  
8 mandatory findings that CEQA requires before approving the Project relating to the mitigation of  
9 significant environmental effects of the Project and the feasibility of project alternatives that would  
10 reduce these significant environmental effects. As a result, the City committed a prejudicial abuse  
11 of discretion and its approval of the Project and certification of the EIR should be set aside.

## 12 II. STATEMENT OF FACTS

13 On February 24, 2004, the City adopted Resolution No. 2004-16, approving the Enhanced  
14 Minimum Plan A ("EMP A") as the City's Comprehensive Flood Control Project. The Project  
15 purports to (i) provide 100-year flood protection to the Vineyard Valley Mobile Home Park  
16 ("VVMHP"), Hunts Grove Apartments, and the City's Wastewater Treatment Plant; (ii) remove those  
17 same areas from the 100-year flood plain; and (iii) construct an all-weather crossing by way of an  
18 extension of Adams Street east over a new causeway and bridge spanning the Napa River to connect  
19 with Silverado Trail. (AR \_\_\_\_.)

20 The Project includes construction of flood plain terraces (terraces A and B); relocation of a  
21 number of homes located in the VVMHP; construction of setback levees and flood walls; clearing  
22 and removal of riparian vegetation on the east bank of the Napa River at its confluence with Sulphur  
23 Creek (referred to as "Element C"); relocation and modification of various utilities including water,  
24 sewer, gas, electrical, telephone and cable television; installation of rock slope protection at the toe  
25 of the slope to stabilize approximately 300 feet of creek bank along Sulphur Creek at its confluence  
26 with the Napa River; construction of the Adams Street levee and extension of Adams Street east so  
27 as to intersect with Silverado Trail over a new causeway and bridge spanning the Napa River;  
28 construction of an extension of Paseo Grande northwest to connect with Adams Street; construction

1 of a public trail through the flood plain terraces extending from the Adams Street Levee to the  
2 confluence of Sulphur Creek with the Napa River; provision of flood protection for the City's  
3 wastewater treatment plant by installing a flood wall and an embankment including a culvert with  
4 a flap gate; institution of an adaptive management, monitoring and maintenance plan; and removal  
5 of the "rock sill" portion of the Pope Street Bridge which currently consists of a concrete apron with  
6 embedded boulders in the bed of the Napa River. (AR \_\_\_\_.)

7 In January 2003, the City released the Draft Environmental Impact Report ("DEIR") for the  
8 Project for public review and comment. After receiving numerous public comments and testimony  
9 regarding the inadequacy of the DEIR, including Living Rivers Council's March 21, 2003 comment  
10 letter, the City's Planning Commission determined that a significant amount of new information  
11 needed to be added to the DEIR and directed City staff to prepare a revised DEIR and to re-circulate  
12 it for additional public review and comment. (AR \_\_\_\_.)

13 The City prepared a Revised Draft Environmental Impact Report ("RDEIR") and released it  
14 for public review and comment on August 1, 2003. The City held public hearings to receive  
15 comments on the RDEIR on August 19, 2003 and again on September 2, 2003, ultimately closing the  
16 written public comment period on September 15, 2003. Those comments included Living Rivers  
17 Council's September 15, 2003 comment letter which raised a number of the RDEIR's factual and legal  
18 inadequacies.

19 The City then prepared a Final Environmental Impact Report ("FEIR") which included the  
20 City's responses to the public comments on the RDEIR and released it to the public on January 6,  
21 2004. The City's Planning Commission held a public hearing on the FEIR and proposed Project on  
22 January 20, 2004 and recommended that the City Council approve the Project and certify the EIR.

23  
24 On February 10, 2004, the City Council held a public hearing to consider the Project and its  
25 EIR during which it voted to conceptually approve the Project and directed City staff to prepare the  
26 necessary findings and resolutions for its consideration and approval at its next regularly scheduled  
27 meeting.

28 At the City's February 24, 2004 meeting, the City Council adopted Resolution Numbers

1 2004-15 and 2004-16 approving the EMP A as the City of St. Helena Comprehensive Flood  
2 Protection Project and certifying the FEIR. On February 25, 2004, the City filed its Notice of  
3 Determination with the California Office of Planning and Research and the Napa County Clerk.

### 4 III. LEGAL FRAMEWORK

5 CEQA applies to projects carried out by or permitted by all public agencies in California over  
6 which the agency has discretionary authority. Pub. Resources Code, § 21080, subd. (a). CEQA’s  
7 fundamental policy is that all public agencies “shall regulate such activities so that major  
8 consideration is given to preventing environmental damage.” *Laurel Heights, supra*, 47 Cal.3d at  
9 390; Pub. Res. Code § 21000(g). The “primary means” by which the legislative goals of CEQA are  
10 achieved is the preparation of an EIR. *Laurel Heights, supra*, 47 Cal.3d at 392; Pub. Res. Code  
11 §§21080(d), 21100, 21151; 14 Cal. Code Regs. (“CEQA Guidelines”) §15080. In this case the City  
12 determined that an EIR was required to document the County’s compliance with CEQA.

13 The EIR has been described as “an environmental ‘alarm bell’ whose purpose is to alert the  
14 public and its responsible officials to environmental changes before they have reached ecological  
15 points of no return.” *Laurel Heights, supra*, 47 Cal.3d at 392; *County of Inyo v. Yorty* (1973) 32  
16 Cal.App.3d 795, 810. An EIR is intended to serve as “an environmental full disclosure statement.”  
17 *Rural Land Owners Assn. v. City Council of Lodi* (1983) 143 Cal.App.3d 1013, 1020.

18 CEQA is also intended to ensure that decision makers and the public are informed about the  
19 potential, significant environmental effects of a project. CEQA Guidelines § 15002(a)(1). An EIR  
20 must include a description of the physical conditions in the vicinity of the project at the time  
21 environmental analysis commences. CEQA Guidelines § 15125. This environmental setting will  
22 normally constitute the baseline physical conditions by which the lead agency determines whether  
23 an impact is significant. *Id. See also Planning & Conservation League v. Department of Water*  
24 *Resources* (2000) 83 Cal. App. 4th 892, 915-916; *Environmental Planning & Information Council*  
25 *v. County of El Dorado* (1982) 131 Cal. App. 3d 350, 357.

26 Aside from evaluating a proposed project’s environmental impacts, the third principal purpose  
27 of the EIR is to identify mitigation measures and alternatives to the project which may reduce or  
28 avoid the project’s significant adverse impacts, thus accomplishing CEQA’s basic statutory goals.

1 See *Laurel Heights, supra*, 47 Cal.3d at 400-403; *Citizens of Goleta Valley v. Board of Supervisors*  
2 (1990) 52 Cal.3d 553, 564; Pub. Res. Code §§ 21002.1, 21100. This analysis of feasible mitigation  
3 measures and a reasonable range of alternatives is crucial to CEQA's substantive mandate that  
4 significant environmental damage be substantially lessened or avoided where feasible. Pub. Res.  
5 Code §§ 21002, 21081, 21100; CEQA Guidelines § 15002(a)(2) and (3). *Laurel Heights, supra*, at  
6 392, 404-405.

7 CEQA requires government agencies to disclose to the public the reasons why they have  
8 approved a particular project if it will result in significant adverse environmental effects. CEQA  
9 Guidelines § 15002(a)(4). "The EIR process protects not only the environment but also informed  
10 self-government." *Laurel Heights, supra*, at 392. According to the California Supreme Court:

11 An EIR is an "environmental 'alarm bell' whose purpose it is to alert the public and  
12 its responsible officials to environmental changes before they have reached ecological  
13 points of no return." [ ] The EIR is also intended "to demonstrate to an apprehensive  
14 citizenry that the agency has, in fact, analyzed and considered the ecological  
15 implications of its action." [ ] Because the EIR must be certified or rejected by public  
16 officials, it is a document of accountability. If CEQA is scrupulously followed, the  
17 public will know the basis on which its responsible officials either approve or reject  
18 environmentally significant action, and the public, being duly informed, can respond  
19 accordingly to action with which it disagrees. [ ] The EIR process protects not only  
20 the environment but also informed self-government.

21 *Laurel Heights Improvement Assn. of San Francisco, Inc. v. Regents of the University of California*  
22 (1988) 47 Cal.3d 376, 392 ("*Laurel Heights I*").

23 As noted, the three basic requirements of CEQA that the EIR must achieve are (1) to identify  
24 significant environmental effects, including cumulative impacts, of the project; (2) to identify and  
25 discuss a reasonable range of alternatives to the proposed project in sufficient detail to allow the  
26 government decision-maker to make an informed choice among the alternatives; and (3) to implement  
27 all feasible mitigation measures or alternatives that would substantially lessen significant adverse  
28 impacts. Pub. Resources Code, §§ 21002; 21002.1; 21081, subd. (a)(3); Cal. Code Regs., tit. 14, §§  
15091, 15092. If after doing all this, there are still significant adverse effects that cannot be feasibly  
avoided by implementing mitigation measures or alternatives, the agency has a choice to make: either  
deny the project or, if it finds that specific economic or social benefits of the project outweigh the  
environmental harm, the agency can adopt a "statement of overriding considerations" to document

1 this finding and approve the project. Pub. Resources Code, §§ 21002; 21002.1; 21081, subd. (b); Cal.  
2 Code Regs., tit. 14, § 15093.

3 Under CEQA at Pub. Res. Code § 21081, the lead agency must make findings on all of these  
4 issues. In *Topanga Association for a Scenic Community v. County of Los Angeles* the California  
5 Supreme Court discussed the requirements that agency decisions be supported by findings, and that  
6 the findings be supported by the evidence:

7 We further conclude that implicit in section 1094.5 is a requirement that the agency  
8 which renders the challenged decision must set forth findings to bridge the analytic  
9 gap between the raw evidence and ultimate decision or order. . . . By focusing . . .  
10 upon the relationships between evidence and findings and between findings and  
11 ultimate action, the Legislature sought to direct the reviewing court's attention to the  
12 analytic route the administrative agency traveled from evidence to action. In so doing,  
13 we believe that the Legislature must have contemplated that the agency would reveal  
14 this route. Reference, in section 1094.5, to the reviewing court's duty to compare the  
15 evidence and ultimate decision to "*the findings*" (italics added) we believe leaves no  
16 room for the conclusion that the Legislature would have been content to have a  
17 reviewing court speculate as to the administrative agency's basis for decision. . . .  
18 Among other functions, a findings requirement serves to conduce the administrative  
19 body to draw legally relevant sub-conclusions supportive of its ultimate decision; the  
20 intended effect is to facilitate orderly analysis and minimize the likelihood that the  
21 agency will randomly leap from evidence to conclusions. [citations omitted] In  
22 addition, findings enable the reviewing court to trace and examine the agency's mode  
23 of analysis. . . . By setting forth a reasonable requirement for findings and clarifying  
24 the standard of judicial review, we believe we promote the achievement of the  
25 intended scheme of land use control. Vigorous and meaningful judicial review  
26 facilitates, among other factors, the intended division of decision-making labor.

27 *Topanga Association for a Scenic Community v. County of Los Angeles* (1976) 11 Cal.3d 506,  
28 515–517.

29 In *Laurel Heights I*, the Supreme Court applied to a CEQA case the findings requirement as  
30 construed in *Topanga Association*. The Supreme Court held that while the Court's review of the  
31 findings to determine if they are supported by substantial evidence involves some deference to the  
32 agency's discretion, the Court still has to "carefully scrutinize the record," stating:

33 We do not suggest that a reviewing court should refrain from carefully scrutinizing  
34 the record. We have observed in a related context that such detailed review is  
35 necessary in light of the requirement that in reviewing an administrative agency's  
36 determination the court "must scrutinize the record and determine whether substantial  
37 evidence" supports the agency's decision [citing *Topanga Association*]. The often  
38 technical nature of challenges to EIRs also requires particular attention to detail by  
39 a reviewing court. . . . We do not suggest that a court must uncritically rely on every  
40 study or analysis presented by a project proponent in support of its position. A clearly  
41 inadequate or unsupported study is entitled to no judicial deference.

1 *Laurel Heights I, supra*, 47 Cal.3d at 408, 409, fn. 12.

2  
3 **IV. STANDARD OF REVIEW**

4 Because the Project is a self-generated project aimed at improving the public welfare and not  
5 a decision to grant or deny an entitlement, the City’s approval of the Project is a quasi-legislative  
6 decision. Legislative and quasi-legislative actions are political in nature and involve "the exercise of  
7 discretion governed by considerations of the public welfare." *Wilson v. Hidden Valley Municipal*  
8 *Water District* (1968) 256 Cal.App.2d 271, 280. Further, legislative and quasi-legislative actions  
9 tend to be self-generated by agencies and often "declare a public purpose and make provisions for  
10 the ways and means of its accomplishment." *Fishman v. City of Palo Alto* (1979) 86 Cal.App.3d 506,  
11 509.<sup>2</sup>

12 The standard of review of CEQA actions challenging legislative decisions is set forth in Pub.  
13 Res. Code § 21168.5:

14 . . . the inquiry shall extend only to whether there was a prejudicial abuse of  
15 discretion. Abuse of discretion is established if the agency has not proceeded in a  
16 manner required by law or if the determination or decision is not supported by  
substantial evidence.

17 *See, Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 567-568.

18 LRC’s claims in this case fall into two categories. First, the EIR is defective as an  
19 informational document (Argument Sections V.A, B, C, D \_\_\_ ) and the City’s mandatory CEQA  
20 findings are based on erroneous legal standards (Argument Sections V.E \_\_\_). Both types of claims  
21 come within the failure to proceed in the manner required by law prong of the test for abuse of  
22 discretion. *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859,  
23 881-882 (“When the informational requirements of CEQA are not complied with, an agency has

24  
25 <sup>2</sup>In contrast, adjudicatory or quasi-adjudicatory actions are not self-generated by the agency but initiated  
26 by individuals or other parties who approach the agency with questions or conflicts requiring resolution.  
27 Adjudicatory acts apply law that already exists to determine “questions of right or obligation, or of prop-  
28 erty.” *Smith v. Strother* (1885) 68 Cal. 194, 197; *see also City of Rancho Palos Verdes v. City Council*  
(1976) 59 Cal.App.3d 869, 883 (“an adjudicatory act applies law to determine specific rights based upon  
specific facts ascertained from evidence adduced at a hearing.”); *Meridian Ocean Systems, Inc. v. State*  
*Lands Commission* (1990) 222 Cal.App.3d 153167 [check page number]

1 failed to proceed in 'a manner required by law' and has therefore abused its discretion. . . The  
2 Agency's deficient EIR has made meaningful assessment of the potentially significant impacts of its  
3 Project impossible.”); *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001)  
4 87 Cal.App.4th 99, 118.

5 The interpretation and application of CEQA is a question of law for the Court. *Neighbors of*  
6 *Cavitt Ranch v. County of Placer* (2003) 106 Cal App 4th 1092, 1101. The "failure to proceed in  
7 the manner required by law" part of the standard of review test for abuse of discretion does not  
8 involve the judicial deference to agency decision making as does the “substantial evidence” part of  
9 the test for abuse of discretion. *Schoen v. CDF* (1997) 58 Cal. App. 4th 556, 565 (“Since we find the  
10 agency did not act in accordance with the FPA and CEQA, and CDF's actions were prejudicial, we  
11 do not address the issue of substantial evidence.”)

12 Under CEQA, “[a] prejudicial abuse of discretion occurs if the failure to include relevant  
13 information precludes informed decision making and informed public participation, thereby thwarting  
14 the statutory goals of the EIR process.” *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215,  
15 1236-1237. Courts generally “do not judge the wisdom of the agency’s action in approving [a]  
16 [p]roject.” *River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37  
17 Cal.App.4th 154, 168. However, noncompliance with CEQA’s substantive and procedural  
18 requirements constitutes abuse of discretion “regardless of whether a different outcome would have  
19 resulted if the public agency had complied with those provisions.” *Save Our Peninsula Committee*  
20 *v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118.

21 Noncompliance with substantive requirements of CEQA or noncompliance with  
22 information disclosure provisions “which precludes relevant information from being  
23 presented to the public agency ... may constitute prejudicial abuse of discretion  
24 within the meaning of Sections 21168 and 21168.5, regardless of whether a different  
25 outcome would have resulted if the public agency had complied with those  
26 provisions.” [citation omitted] In other words, when an agency fails to proceed as  
27 required by CEQA, harmless error analysis is inapplicable. The failure to comply  
28 with the law subverts the purposes of CEQA if it omits material necessary to informed  
decisionmaking and informed public participation. Case law is clear that, in such  
cases, the error is prejudicial.

*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946 citing *Sierra*  
*Club v. State Bd. of Forestry, supra*, 7 Cal.4th at 1236-1237; *Fall River Wild Trout Foundation v.*

1 *County of Shasta* (1999) 70 Cal.App.4th 482, 491-493; *Kings County Farm Bureau v. City of*  
2 *Hanford* (1990) 221 Cal.App.3d 692, 712 (“*Kings County*”); *East Peninsula Ed. Council, Inc. v. Palos*  
3 *Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 174; *Rural Landowners Assn. v.*  
4 *City Council* (1983) 143 Cal.App.3d 1013, 1021-1023.

5 In short, where an agency’s decisions to certify an EIR and approve a project are not  
6 supported by substantial evidence, or where an agency fails to strictly comply with CEQA’s  
7 procedural and substantive requirements, the agency has prejudicially abused its discretion, and a  
8 reviewing court must order the agency to rescind its action. *San Joaquin Raptor/Wildlife Rescue*  
9 *Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 718 (“*San Joaquin Raptor I*”).

10 Full compliance with the letter of CEQA is essential to the maintenance of its  
11 important public purpose. [citations omitted] Reviewing courts "have a duty to  
12 consider the legal sufficiency of the steps taken by [administrative] agencies  
13 [citation], and we must be satisfied that these agencies have fully complied with the  
14 procedural requirements of CEQA, since only in this way can the important public  
purposes of CEQA be protected from subversion." [citations omitted] At least, when  
these provisions go to the heart of the protective measures imposed by the statute,  
failure to obey them is generally "prejudicial"; to rule otherwise would be to  
undermine the policy in favor of the statute's strict enforcement.

15 *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal. App. 3d 604-622-23.

16 Finally, the guiding principle in the review of projects under CEQA is that CEQA must be  
17 interpreted so as to afford the fullest possible protection to the environment consistent with the  
18 statutory language. *Laurel Heights I, supra*, 47 Cal.3d at 390; *Friends of Mammoth v. Board of*  
19 *Supervisors* (1972) 8 Cal.3d 247, 259.

## 20 V. ARGUMENT

### 21 A. THE EIR FAILS TO CONTAIN AN ADEQUATE PROJECT DESCRIPTION 22 BECAUSE IT ILLEGALLY COMBINES ‘PROJECT’ AND ‘PROGRAM’ LEVEL REVIEW.

23 CEQA mandates that in order to determine the scope of environmental review for a project,  
24 the project description must be accurate. *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d  
25 185, 199. As the *County of Inyo* court noted:

26 A curtailed or distorted project description may stultify the objectives of the [CEQA]  
27 reporting process. Only through an accurate view of the project may affected outsiders  
28 and public decision-makers balance the proposal's benefit against its environmental  
cost, consider mitigation measures, assess the advantage of terminating the proposal  
(i.e. the "no project" alternative) and weigh other alternatives in the balance. An

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accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

*Id.* at 192; *accord Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 738; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 730; *Santiago County Water District v. County of Orange* (1981) 118 Cal.App.3d 818, 830; *see also* Discussion following CEQA Guideline § 15124. The failure to provide an adequate project description is a clear violation of CEQA’s informational requirements and a failure to proceed in the manner required by law. This RDEIR does not provide a legally adequate description of the project.

In this case, the RDEIR offers a confusing mix of both project and program level environmental review, stating that some “aspects of the Proposed Project could be carried out without further environmental review” whereas “[f]or those features addressed at only a program level . . . further environmental review, more focused on site-specific issues, will be necessary after certification of the Final EIR for the Project.” (AR \_\_\_ [RDEIR at ES-1].) The RDEIR does not provide any explanation or rationale for its decision to single out specific project components for an unequal and less than thorough environmental review.

For example, the RDEIR arbitrarily excludes project components relating to the (1) Adams Street extension, causeway, bridge, and intersection with Silverado Trail and (2) the Pope Street Bridge sill removal and stabilization from the “project level” analysis accorded to the rest of the project simply because it has summarily deemed these to be “programmatically” project features. This is especially confusing with regard to the Adams Street extension and bridge components because the RDEIR purports to review a portion of the Adams Street extension (phase 1) completely in this EIR, while leaving the remainder of the Adams Street extension and causeway/bridge construction (phase 2) to be reviewed in more detail at a later date.

The RDEIR offers no factual basis for segmenting the project and piecemealing its CEQA review in this fashion. The RDEIR literally stops its project level analysis of the Adams Street Extension at an arbitrary location on the proposed new levee/road, claiming that while the road extension up to that point is thoroughly reviewed in this RDEIR, the remainder of the road and bridge over the Napa River will be subject to further CEQA review in the future. (AR \_\_\_.)

1 While CEQA provides for and even encourages program EIRs and “tiering” in some  
2 situations, the use of a program EIR for a portion of this particular project violates CEQA. Public  
3 Resources Code §§ 21068.5, 21093 and 21094 govern the use of “tiered” EIRs and express a  
4 legislative intent to free lead agencies from reinventing the wheel each time an EIR is prepared on  
5 one of a series of projects when some of the environmental impacts of those projects could be  
6 analyzed once at the outset.

7 Here, the RDEIR reviews the Adams Street extension and bridge and removal of Pope Street  
8 sill on a programmatic level does not make it easier to review future projects included in a large scale  
9 plan or policy. Instead, it simply defers CEQA review of portions of the Comprehensive Flood  
10 Protection Project to a later date in violation of numerous precedents that prohibit such piecemeal  
11 CEQA review of projects. Pursuant to CEQA Guidelines § 15378(a), a ‘project’ means the whole of  
12 an action that may cause either a direct or reasonably foreseeable indirect physical change in the  
13 environment. Further, “‘Project’ is given a broad interpretation in order to maximize protection of  
14 the environment.” *McQueen v. Board of Directors of the Midpeninsula Regional Open Space District*  
15 (1988) 202 Cal.App.3d 1136, 1143. Accordingly, by failing to analyze the Adams Street extension  
16 and new bridge as well as the removal of the Pope Street sill together with the rest of the project in  
17 the RDEIR, the City improperly split the project into multiple segments in violation of CEQA. *See*  
18 *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172  
19 Cal.App.3d 151, 165-166; *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263,  
20 283-284; *City of Carmel-By-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 241-243;  
21 *Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego* (1992) 10 Cal.App.4th  
22 712, 729-737; *McQueen v. Board of Directors of the Midpeninsula Regional Open Space District*  
23 (1988) 202 Cal.App.3d 1136, 1144; *Laurel Heights Improvement Association v. Regents of the*  
24 *University of California ("Laurel Heights I")* (1988) 47 Cal.3d 376, 395-396; *City of Santee v. County*  
25 *of San Diego* (1989) 214 Cal.App.3d 1438, 1452-1453.

26 The entire proposed Project must be described in the EIR as a complete project description  
27 is necessary to ensure that all of the project's environmental impacts are considered. *City of Santee*  
28 *v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1450. Further, a project description must

1 include all relevant parts of a project, including reasonably foreseeable future expansion or other  
2 activities that are part of the project. *Laurel Heights I, supra*, 47 Cal.3d at 396. The court in *Laurel*  
3 *Heights I* set forth a two-pronged test for determining whether reasonably foreseeable future activities  
4 must be included in an EIR project description:

5 We hold that an EIR must include an analysis of the environmental effects of future  
6 expansion or other action if: (1) it is a reasonably foreseeable consequence of the  
7 initial project; and (2) the future expansion or action will be significant in that it will  
likely change the scope or nature of the initial project or its environmental effects.

8 *Id.* Under this test, environmental review of the Adams Street extension/bridge and removal of the  
9 Pope Street sill must be completed now in the RDEIR and not deferred into the future. These two  
10 project elements are explicitly included in the project description. Thus, not only are they reasonably  
11 foreseeable, they are virtually certain as evidenced by their inclusion in the RDEIR's construction  
12 time line in Year 1 (Remove Pope Street Bridge Sill) as well as in Years 3 & 4 (Adams Street  
13 causeway/bridge) (RDEIR at 2-16), and by virtue of the fact that the City's approval of the Project  
14 specifically includes these two elements as part of the project. (AR \_\_\_\_.)

15 Moreover, by proposing work directly in the Napa River as well as on its banks, both the  
16 Adams Street extension/bridge and removal of the Pope Street Bridge sill have the potential to add  
17 a host of additional impacts to biological resources, water quality, traffic, and aesthetics to name a  
18 few. As such, deferring environmental review of these project features amounts to an improper  
19 segmentation of the project in violation of CEQA.

20 CEQA authorizes the use of a Program EIR and "tiering" in specific situations, none of which  
21 apply here. CEQA Guideline 15168 provides:

22 A program EIR is an EIR which may be prepared on a series of actions that can be  
23 characterized as one large project and are related either: (1) Geographically, (2) A  
24 logical parts in the chain of contemplated actions, (3) In connection with issuance of  
25 rules, regulations, plans, or other general criteria to govern the conduct of a  
continuing program, or (4) As individual activities carried out under the same  
authorizing statutory or regulatory authority and having generally similar  
environmental effects which can be mitigated in similar ways.

26 The project subject to this EIR does not meet any of these criteria. This is not "one large project" in  
27 which various parts are related "geographically." Indeed, it is two, or perhaps three small projects:  
28 first, a flood control project, whose sole purpose is to reduce flooding of the Vineyard Valley Mobile

1 Home Park area; a transportation infrastructure project (the Adams Street causeway and extension  
2 ) whose sole purpose is to provide an all weather river crossing route to St. Helena Hospital (see AR  
3 \_\_ **[findings Resolution]**); and a river restoration project (the Pope St. Sill removal) whose sole  
4 purpose is to restore the natural bed of the Napa River to enhance fish passage (see AR \_\_\_\_\_).

5 A lead agency cannot defer the analysis of impacts from planning, construction or operation  
6 of a project simply by designating the project, or portions of the project, a "program." *Stanislaus*  
7 *Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182. On similar facts, the  
8 Court of Appeal rejected an attempt to by a lead agency to combine program and project level review  
9 in a single EIR. The Court’s decision in the *Stanislaus Natural Heritage Project* discusses the exact  
10 reasons why this EIR’s deferral of environmental review of the Adams Street extension/bridge (phase  
11 2) and the removal of the Pope Street sill violates CEQA in this instance. Just as the City has done  
12 in the RDEIR, the County in the *Stanislaus Natural Heritage Project* case asserted that the EIR was  
13 both a ‘program EIR’ for some aspects of the project and a ‘project-level’ EIR for other aspects. *Id.*  
14 at 202.

15 In that case, the court rejected the County’s argument that it could review certain project  
16 phases and their environmental impacts in the future by observing that in doing so “the County’s  
17 approval of the project under these circumstances [would] defeat[] a fundamental purpose of CEQA:  
18 to ‘inform the public and responsible officials of the environmental consequences of their decisions  
19 before they are made.’” *Id.* at 195 (emphasis added), citing *Laurel Heights Improvement Association*  
20 *v. Regents of University of California* (“*Laurel Heights II*”)(1993) 6 Cal.4th 1112, 1123. Ultimately,  
21 the court held that a “decision to ‘tier’ environmental review does not excuse a governmental entity  
22 from complying with CEQA’s mandate to prepare, or cause to be prepared, an environmental impact  
23 report on any project that may have a significant effect on the environment, with that report to include  
24 a detailed statement setting forth ‘[a]ll significant effects on the environment of the proposed project.’  
25 (Pub. Resources Code, § 21100.)”. *Id.* at 197. Accordingly, the City cannot defer its analysis of the  
26 Adams Street extension and bridge or the removal of the Pope Street sill but is required to analyze  
27 and identify the specific impacts expected to result from their development now, in this EIR. By  
28 deferring environmental assessment to a future date, the RDEIR runs counter to “that policy of CEQA

1 which requires environmental review at the earliest feasible stage in the planning  
2 process....Environmental problems should be considered at a point in the planning process where  
3 “genuine flexibility remains.” *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 307.

4 Without detailed analysis of the entire Adams Street extension and bridge construction, as  
5 well as the removal of the Pope Street bridge sill, both the public and the City’s decision-makers are  
6 deprived of information regarding the totality of the project’s environmental impacts at this most  
7 important stage before committing to a specific course of action. In addition, mitigation measures  
8 and alternatives that may appear adequate now, may turn out to be inadequate or inapplicable to  
9 address the additional impacts of the Adams Street extension/bridge and Pope Street sill removal  
10 when viewed together with the impacts of the ‘whole’ project. Moreover, when the impacts of the  
11 ‘whole’ project are considered together, project alternatives that now seem infeasible or completely  
12 new project alternatives may become feasible or more attractive. While the RDEIR is clear in that  
13 additional environmental review of these programmatic level features will occur in the future, by  
14 deferring the identification of the project’s impacts at this crucial stage, the City is violating one of  
15 CEQA’s fundamental requirements.

16 In its responses to comment in the Final EIR, the City relies on two Court of Appeal decisions  
17 in defense of its use of both program-level EIR and project-level EIR review for different portions  
18 of this Project, namely. For example, the City cites *Neighbors of Cavitt Ranch v. County of Placer*  
19 (2003) 106 Cal App 4th 1092, 1104, and *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.  
20 App. 3d 1011, 1016. These cases, however, do not support the City’s position because they are  
21 completely inapposite. Neither case involved a program EIR at all. Both cases involved one project  
22 level EIR for multiple projects. Thus, they simply do not address the issue raised here, which is that  
23 the City has used the device of program level review of the Pope Street Bridge Sill removal Adams  
24 Street causeway/bridge extension as a fancy way of illegally segmenting the environmental review  
25 of this project. If the City had conducted project level review of these comp[onents], then the cases  
26 it relies on would support the inclusion of all of the components in one EIR. The failed to do so and  
27 that decision is illegal.

28 **B. THE EIR FAILS TO CONTAIN AN ADEQUATE PROJECT DESCRIPTION**

1           **BECAUSE SEVERAL PROJECT COMPONENTS AND MITIGATION MEASURES**  
2           **ARE INDETERMINATE**

3           As stated above, CEQA places great importance on an accurate, stable and finite project  
4 description in order to determine the proper scope of environmental review for a project. *County of*  
5 *Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199. Indeed, in order to be legally sufficient  
6 and to satisfy the informational requirements of CEQA, a complete project description is necessary  
7 to ensure that all of the project's environmental impacts are considered. *Id.* at 192. Here, however,  
8 the EIR fails to adequately describe and analyze a number of the Project components and mitigation  
9 measures resulting in both informational deficiencies and inadequate impact assessments.

10           First, the EIR fails to adequately describe the Project’s planned management and maintenance  
11 of the flood terraces (A and B) intended to ensure the overflow channels perform as designed with  
12 respect to sediment transport, habitat restoration, and flood control functions. While the EIR does  
13 contain an operation and maintenance manual for the Project, or adaptive management plan, it fails  
14 to describe any specific remedial actions or project modifications that may be taken if the flood  
15 terraces fail to meet any of their intended purposes. **[FEIR, attachment 2]** Living Rivers fully  
16 understands that “adaptive” management entails the ongoing monitoring and collection of data to best  
17 direct maintenance actions. The flexibility the City claims it needs to respond to maintenance issues  
18 encountered through monitoring of the flood terraces, however, does not eliminate its duty under  
19 CEQA to adequately describe the project and all its potential impacts.

20           This requirement includes a discussion of impacts that may result from the Project itself, as  
21 well as its mitigation measures. CEQA Guidelines § 15126.4(a)(1)(D); *see also Save Our Peninsula*  
22 *Committee v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 130. Whether the  
23 City views the adaptive management plan as a project element or a mitigation measure, or both, is  
24 unclear since the City relies extensively on the 18 acres of riparian vegetation proposed for the flood  
25 terraces to overcome and reduce the significance of the loss of riparian vegetation and wildlife habitat  
26 caused by other Project elements. Regardless, the EIR fails to discuss the potential for the future  
27 maintenance of the flood terraces to cause its own potentially significant impacts despite admitting  
28 that future maintenance activities like the “removal of sediment or vegetation” from the flood terraces

1 and structural modifications such as “increasing the height of levees or floodwalls” is a distinct  
2 possibility. **[FEIR, attachment 2, pages 3-8]** The EIR’s failure to describe these reasonably  
3 foreseeable future activities and consider their potential secondary impacts violates CEQA. *Laurel*  
4 *Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376,  
5 396; CEQA Guidelines § 15126.4(a)(1)(D).

6 In response, the City is likely to claim that CEQA does not require an agency to foresee the  
7 unforeseeable or to speculate regarding potential impacts as they did in responding to this issue in  
8 the Final EIR. **[FEIR 2-102 through 2-103]** That argument, however, is misplaced here since the  
9 City has already admitted that such maintenance activities are reasonably foreseeable by expressly  
10 mentioning their likelihood in the adaptive management plan.

11 Second, the EIR fails to adequately describe or analyze the reasonably foreseeable changes  
12 to the City’s wastewater treatment plant. While the EIR does include detailed information regarding  
13 the Project’s proposed floodproofing of the existing wastewater treatment plant facilities, it fails to  
14 describe or analyze potential impacts from the anticipated construction of additional water filtration  
15 facilities and operations and administration buildings planned for the site. **[RDEIR, p. 2-13]** In the  
16 Final EIR, the City claims that it need not consider or review the environmental impacts of the future  
17 facilities and buildings planned for the wastewater treatment plant because the Project “does not  
18 create the need for additional buildings.” **[FEIR, p. 2-105]** Whether or not the Project creates the  
19 *need* for the buildings is an irrelevant standard. Pursuant to the holding in *Laurel Heights*, the test  
20 for whether the EIR needs to describe and analyze the environmental impacts of future expansion is  
21 whether that expansion is a reasonably foreseeable consequence of the initial project; and the future  
22 expansion or action will be significant in that it will likely change the scope or nature of the initial  
23 project or its environmental effects. **[cite to page # in LHI]** It is absurd for the City to claim that its  
24 plan to expand the wastewater treatment facilities and buildings is not a consequence of this Project.  
25 Surely, the City would not have decided to utilize this location for important water treatment  
26 operations without the assurance that it would be safe from damaging and potentially polluting  
27 floodwaters. Accordingly, the EIR’s failure to describe and analyze this reasonably foreseeable  
28 expansion of the wastewater treatment plant violates CEQA.

1 **C. THE CITY VIOLATED CEQA BY FAILING TO ADEQUATELY DESCRIBE,**  
2 **IDENTIFY AND ANALYZE THE PROJECT’S ENVIRONMENTAL SETTING OR**  
3 **‘BASELINE’ CONDITIONS**

4 One of CEQA’s fundamental purposes is to inform decisionmakers and the public alike about  
5 the potential adverse impacts to result from the implementation of the project. CEQA Guidelines §  
6 15002(a)(1). Once an agency decides that CEQA requires them to prepare an EIR for a particular  
7 project, that EIR must include an accurate description of the physical conditions as they exist in the  
8 vicinity of the project at the time the notice of preparation is prepared and published. CEQA  
9 Guidelines § 15125(a). The on-the-ground information gathered as part of the development of the  
10 project’s environmental setting constitutes the baseline physical conditions by which the agency will  
11 determine whether any identified impact is significant. *Id.*

12 An accurate description of the baseline environmental information is crucial to a complete  
13 understanding by both the decisionmaker and the public of how the project will change and impact  
14 existing conditions and resources. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus*  
15 (1994) 27 Cal.App.4th 713, 723. More importantly, when an EIR’s description of the environmental  
16 setting is inadequate, it also renders the EIR’s identification of environmental impacts legally  
17 inadequate and precludes a determination that substantial evidence supports any findings that the  
18 environmental impacts have been mitigated to insignificance. *Id.* at p. 729; *Kings County Farm*  
19 *Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712, 718 (“The misleading nature of the  
20 discussion and the failure to include relevant evidence ... renders the EIR inadequate as an  
21 informational document.”)

22 Early in the environmental review process for this project, both Living Rivers and the  
23 California Department of Fish and Game (“DFG”) criticized the City for failing to gather any real  
24 information regarding the existence of wildlife species and habitat within the project area. **[cite to**  
25 **LRC original comment letter and DFG letter]**. At that point in time, the City had done little to  
26 explore or describe the on-the-ground environmental conditions with regard to wildlife and their  
27 habitat, despite the fact that a number of state and federal protected species and species of concern  
28 were believed and assumed to be present by the City. **[cite to AR, include mention of pond turtle**  
**sighting]**

1           Instead, the City simply researched available species databases and reviewed other  
2 environmental documents to get a general understanding of what species and habitat may exist within  
3 the Project area **[DEIR 4-29]** despite requests from Living Rivers and DFG that the City conduct  
4 surveys to document whether and where protected species actually occur within the Project area.  
5 Living Rivers repeated its request for more detailed information when it commented on the City’s  
6 Revised Draft Environmental Impact Report. It wasn’t until late 2003, after the close of public  
7 comment on the EIR, that the City finally hired a biologist to conduct a survey for state and federally  
8 listed endangered California freshwater shrimp. **[FEIR]** Not surprisingly, that survey not only  
9 documented the existence of viable habitat for the California freshwater shrimp, but found a number  
10 of the species of California freshwater shrimp at various locations along the Napa River in the Project  
11 area.**[FEIR]. [describe legal status of this species]** For other potentially affected threatened and  
12 special status species such as steelhead trout, chinook salmon, and the northwestern pond turtle, the  
13 City has yet to conduct any similar on-the-ground surveys, opting to defer those surveys until just  
14 prior to actual project construction in and near the Napa River.**[FEIR]**.

15           Without a full understanding of what species occur within the project, and where, the EIR  
16 circulated for public review and comment fails as an informational document. As explained by the  
17 Court in San Joaquin Raptor **[full name]**, an adequate description of the environmental setting of the  
18 project is required for the agency and the public to assess and identify the likely significant impacts  
19 of the project on the environment. **[cite to case page number with parenthetical ]**. Similarly, the  
20 CEQA Guidelines make clear that

21           Knowledge of the regional setting is critical to the assessment of environmental  
22 impacts. Special emphasis should be placed on environmental resources that are rare  
23 or unique to that region and would be affected by the project. The EIR must  
24 demonstrate that the significant environmental impacts of the proposed project were  
adequately investigated and discussed and it must permit the significant effects of the  
project to be considered in the full environmental context.

25 CEQA Guidelines § 15125(c). Because the EIR circulated for public review and comment lacks the  
26 eleventh hour discovery that California freshwater shrimp occur in several areas of the Project, and  
27 lacks similar surveys for the other special status species that the City merely assumed to be present  
28 and potentially impacted must also be conducted prior to certification of the EIR and approval of the

1 project. **[describe other species we are talking about here]**

2 **[SEV -Need more context for Bio - 3 and fuller explanation, preferably with excerpts**  
3 **from record that flesh it out.]** Moreover, its ultimate finding that Impact Bio-3 has been mitigated  
4 to avoid significant impacts is unsupported, precluding this Court from confirming that the City’s  
5 finding is legally adequate.

6 **D. THE CITY VIOLATED CEQA BY FAILING TO REVISE OR RECIRCULATE THE**  
7 **EIR BASED ON INFORMATION THAT BECAME AVAILABLE AFTER THE**  
8 **FINAL EIR WAS ISSUED, BUT BEFORE IT WAS CERTIFIED**

8 **[subheading for shrimp]**

9 After the City had received hundreds of comments and hours of public testimony on both  
10 the Draft EIR and the Revised Draft EIR, public comment on the adequacy of the environmental  
11 document for the Project closed on September 15, 2003. **[cite to AR, carol poole letter to me]** Then,  
12 as described above, based on the requests from Living Rivers as well as from DFG, the City hired  
13 a biologist to conduct an on-the-ground survey for California freshwater shrimp habitat and  
14 individual species along both banks of the Napa River throughout the Project area. **[FEIR]** Not only  
15 did the City’s biologist observe that “suitable habitat occurs along the reach of the Napa River that  
16 is located within the flood control project area”, but that “four adults of the CFS were observed in  
17 reaches #7, #9, #12, and #13.” **[FEIR 3-31]**

18 The City’s discovery that these federally endangered species exist in the Project reach is  
19 important because it shows that the species has not yet become extinct in this area. Moreover,  
20 because three of the four reaches where the shrimp were found are in locations where significant  
21 Project construction and maintenance is planned, this new information has great bearing on the  
22 significance of the Project impacts and the adequacy of its mitigation measures. Indeed, reach #7 is  
23 where the Project proposes “Element C”, which entails routine and repeated clearing of dense riparian  
24 vegetation on the east bank of the Napa River directly across and just downstream from the  
25 confluence of Sulphur Creek and the Napa River. Similarly, reach #12 is the exact location where  
26 the Project proposes to construct the “outlet” to flood terrace A by removing 200 feet of existing  
27 riverbank to allow water that enters the flood terrace upstream to return to the mainstem of the Napa  
28 River. Finally, reach #13 is the exact location where the “inlet” to flood terrace A will be constructed

1 by removing 200 feet of existing riverbank to allow rising floodwaters to leave the mainstem until  
2 returning through the outlet planned for reach 12.

3 This new information, which was not known let alone reported to the public until after the  
4 close of public comment period on the EIR, is extremely important as it clarifies a significant  
5 unknown regarding the environmental baseline for the project, which in turn, drives the EIR's  
6 identification of Project impacts and consideration of mitigation measures and Project alternatives.

7 In fact, based on this new information, the City added new mitigation measures in the Final EIR to  
8 address the newfound shrimp and its habitat. [FEIR 3-46 through 3-48] Due to the significance of  
9 this new information, the City was required to recirculate the EIR for additional public comment.  
10

11 “Where new information is added to an EIR between the close of public comment period and  
12 certification, recirculation of the EIR for public comment is required where the new information is  
13 ‘significant’.” *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App. 4th 1134, 1146-1147  
14 citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal. 4th  
15 1112, 1126-1130; Public Resources Code § 21092.1; CEQA Guidelines § 15088.5(a). CEQA defines  
16 “significant new information” as information which discloses one of the following:

17 (1) A new significant environmental impact would result from the project or from a  
18 new mitigation measure proposed to be implemented.

19 (2) A substantial increase in the severity of an environmental impact would result  
20 unless mitigation measures are adopted that reduce the impact to a level of  
21 insignificance.

22 (3) A feasible project alternative or mitigation measure considerably different from  
23 others previously analyzed would clearly lessen the environmental impacts of the  
24 project, but the project's proponents decline to adopt it.

25 (4) The draft EIR was so fundamentally and basically inadequate and conclusory in  
26 nature that meaningful public review and comment were precluded. (*Mountain Lion  
27 Coalition v. Fish and Game Com.* (1989) 214 Cal.App.3d 1043)

28 CEQA Guidelines § 15088.5(1)-(4).

Here, because the Draft EIR was so fundamentally inadequate regarding the baseline  
information relating to the existence of California freshwater shrimp and its habitat in the Project  
area, the new information added after the close of public comment but before the certification of the  
EIR was significant pursuant to CEQA, requiring the City to recirculate the EIR. Prior to the detailed  
survey conducted after the close of public comment, the Draft EIR simply assumed that the California

1 freshwater shrimp were present without knowing if its habitat or actual specimens actually existed  
2 or occurred within the Project reach. As such, the public and resource agencies were uncertain  
3 whether and where the species actually occurred, limiting their comments on the DEIR to criticism  
4 about the lack of surveys and ground-truthed data.

5 The City is likely to argue that this new information is not significant because even before its  
6 introduction, the Draft EIR recognized that the Project had the potential to result in a significant  
7 adverse impact to the shrimp. That argument, however, is unpersuasive for two key reasons. First,  
8 opposed to the Draft EIR's general assumption that the shrimp may exist in the Project area, the  
9 significant new information added to the Final EIR confirmed not only that shrimp and shrimp habitat  
10 existed throughout the Project area, but were specifically located in areas where the Project proposed  
11 drastic and permanent changes, namely the regular clearing of the dense vegetation in reach #7  
12 (Element C of the Project) as well as in the areas where at least 400 feet of riverbank is proposed to  
13 be permanently excavated to allow water ingress and egress to and from flood terrace A. This fact  
14 alone underscores the significance of the new information as it relates to actual project elements and  
15 impacts.

16 Second, prior to the introduction of the new information regarding the existence of the shrimp  
17 and shrimp habitat, the Draft EIR proposed three general mitigation measures to minimize any  
18 impacts to shrimp or its habitat, wherever they may actually occur.<sup>3</sup> Those measures, however, did  
19 not and could not address the site specific impacts and concerns uncovered by the new information  
20 because they were based on a general, unsupported assumption that the shrimp occurred in the Project  
21 reach somewhere. This is significant because it shows that the previous EIR was completely  
22 inadequate on the issue of the existence of shrimp, the identification of the Project's impact on the  
23 shrimp, the severity of that impact, and on the adequacy of the mitigation of that impact.

24 Accordingly, the new information is significant and CEQA requires the City to recirculate the  
25

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26 <sup>3/</sup> In effort to minimize the impact on the shrimp assumed to be present, the Draft EIR included mitiga-  
27 tion measures Bio-1a, Bio-1e, and Bio-2a. Those measures included requirements to limit construction  
28 crews to the right-of-way- and confinement of disturbance to as small an area as possible; ensure that wild-  
life habitat is not reduced, populations do not drop below self-sustaining levels or eliminated, or reduce the  
number or restrict the range of endangered, rare or threatened species.

1 EIR for additional review and comment by the public and resource agencies. The significant new  
2 information not only reveals that the Draft EIR's treatment of the shrimp was wholly inadequate, but  
3 that because the shrimp and its habitat exist in a number of areas the Project plans to destroy, current  
4 alternatives to the project which avoid these areas need to be reconsidered, and new alternatives may  
5 need to be identified.

6 **[subheading for trial]**

7  
8 Finally, in response to comments from the Living Rivers and the Friends of the Napa River  
9 regarding the DEIR's failure to describe the new trail proposed by the Project along the Napa River,  
10 the City added new information regarding the approximate location, length, width, and composition  
11 of the public trail. **[FEIR 3-4]** However, the City failed to similarly add any discussion of the  
12 potential impacts the development of the trail might have. As stated above, when new information  
13 is added to an EIR after the close of public comment but before certification, and that new  
14 information discloses the potential for a new significant impact, CEQA requires the recirculation of  
15 the EIR for review and comment. Included in the new trail information in the Final EIR is a  
16 commitment to comply with the City's General Plan Policies 6.4.2 and 6.4.3 which allow the  
17 development of a trail system in stream corridors if compatible with riparian vegetation and wildlife  
18 habitat and require the preclusion of public access to habitat areas when public access will  
19 significantly impact the value of the habitat area. On its face, by including these policies in the new  
20 trail information and promising to comply with them in developing the new public trail, the City is  
21 acknowledging that the development of the trail may significantly impact riparian vegetation and  
22 wildlife habitat. Indeed, the development of an impermeable or otherwise compacted trail surface  
23 and introduction of pedestrians and bicyclists into this restoration area may indeed harm sensitive  
24 riparian vegetation or wildlife. This new information and the new impacts that it implicates also  
25 requires the recirculation of the EIR.

26 **E. THE CITY VIOLATED CEQA BY IMPROPERLY DEFERRING THE**  
27 **DEVELOPMENT OF MITIGATION MEASURES IDENTIFIED TO REDUCE THE**  
**PROJECT'S SIGNIFICANT IMPACTS**

28 **[sev to fill in]**

1 **F. THE EIR FAILS TO ASSESS THE SIGNIFICANCE OF THE PROJECT’S GROWTH**  
2 **INDUCING IMPACTS**

3 While the RDEIR does include a brief section entitled "Growth-Inducing Impacts," it fails to  
4 adequately mention, discuss, and analyze the significance of growth inducing impacts resulting from  
5 the Project’s removal of the area of parcels #30 and #31 from the 100 year flood zone and  
6 development of the Adams Street extension and bridge over the Napa River. Amazingly, while the  
7 EIR admits that the project is growth inducing, it fails to address whether that anticipated growth will  
8 result or contribute to any direct or indirect significant impacts. Instead, the EIR simply confirms  
9 that the Project will be growth inducing and ends its discussion, comfortable in the fact it is growth  
10 that the City has anticipated in its General Plan. [RDEIR 4-23 through 4-25] Further, in its  
11 responses to comments, the City goes so far as to claim that it need not consider whether the Project’s  
12 growth inducement is or contributes to a significant impact. [FEIR, p. 2-141]

13 Pursuant to CEQA Guidelines § 15126.2(d), EIR's are required to include a discussion of the  
14 ways in which the proposed project could foster economic or population growth, or the construction  
15 of additional housing, either directly or indirectly, in the surrounding environment. Inherent in this  
16 “discussion” is a consideration whether such growth is or contributes to a significant impact. This  
17 is clear from the heading of the CEQA Guidelines section the requirement falls under –  
18 “Consideration and Discussion of Significant Environmental Impacts”. CEQA Guidelines § 15126.2.  
19 When read in conjunction with one of CEQA’s fundamental goals which is to “prevent significant,  
20 avoidable damage to the environment by requiring changes in projects through the use of alternatives  
21 or mitigation measures”, it is clear that CEQA does not simply require an unthoughtful confirmation  
22 that a Project will indeed be growth inducing, but that agencies consider growth inducing impacts  
23 as part and parcel of the whole project’s potential to significantly and adversely impact the  
24 environment.

25 Under CEQA, a project is generally considered to be growth-inducing if it results in the  
26 extension of urban services or infrastructure into a previously unserved area; the extension of a  
27 transportation corridor into an area that may be subsequently developed; or the removal of a major  
28 obstacle to development and growth.

1           The project's plan to extend Adams Street from its current terminus eastward to the Silverado  
2 Trail, construct a new all-weather access bridge across the Napa River, and provide 100-year flood  
3 protection to parcels #30 and #31 meets all three of the above listed criteria for a growth-inducing  
4 project. First, the City has repeatedly cited the need for this extension and bridge in order to provide  
5 and expand adequate public health and safety services (such as fire and ambulance), thus, without  
6 a doubt, doing so would allow for the extension of urban services (fire, police, ambulance) or  
7 infrastructure (road and bridge) into a previously unserved area.

8           Second, the Adams Street extension and bridge epitomizes the extension of a transportation  
9 corridor as that is its intended purpose. Currently the area of the proposed street extension and bridge  
10 is not developed, and the EIR itself admits that development is likely in the area after the street  
11 extension as part of the relocation of Vineyard Valley residents proposed by the Project, or by future  
12 development proposals on lots #30 and #31. Indeed, the RDEIR states that parcels # 30 and #31  
13 adjacent to the new Adams Street extension and bridge would be key sites for residential  
14 development upon completion of a flood protection project, meaning that the development of that  
15 area is currently hindered by existing flooding hazards and constraints. The RDEIR also states that  
16 the Adams Street extension would serve as a flood proofing measure, thereby removing a major  
17 obstacle to development and growth, thus satisfying the third criteria implicating a growth-inducing  
18 impact.

19           Instead of addressing the admitted growth inducing impacts of the project, the City attempts  
20 to justify its lack of analysis by arguments regarding the project's reliance and consistency with  
21 regulatory standards, namely the General Plan's Growth Management Policies. By doing so, the City  
22 has failed to adequately identify the level of growth inducing impacts from the project by claiming  
23 that each of the identified impacts will be 'less than significant' due the project's adherence to various  
24 regulatory standards. This practice violates CEQA and frustrates its main purpose which is to inform  
25 the public and its responsible officials of the environmental consequences of their decisions before  
26 they are made and reduce or avoid environmental impacts when feasible.

27  
28           Just last year, the Court of Appeal's Third Appellate District overturned a newly enacted

1 CEQA Guideline section which attempted to validate the practice of using regulatory standards to  
2 determine the significance of environmental impacts. *See Communities for a Better Environment v.*  
3 *California Resources Agency* (2002) 103 Cal.App.4th 98. In that case, the Court was troubled by the  
4 fact that by relying on a project's consistency with a regulatory standard to conclude that a particular  
5 environmental effect is not significant, agencies will fail to take the required hard look into the  
6 significance of an impact.

7 With regard to this Project, those fears are personified. By avoiding a true analysis of the  
8 project's Adams Street extension and bridge connection with Silverado Trail, the City fails to make  
9 a true inquiry into the real significance of the project's growth inducing impacts. Instead, the City  
10 concludes that the identified impacts have no potential to be significant simply because the project  
11 is consistent with the General Plan. As expressed in *the Communities for a Better Environment* case,  
12 such a practice runs afoul of CEQA. CEQA requires more than simply adding a section to an EIR  
13 called "growth inducing impacts", it requires agencies to consider a project's capability to induce  
14 growth within its broader duty to identify and mitigate significant adverse impacts to the  
15 environment. Because the City failed to discuss and consider the Project's ability to induce growth  
16 in this manner, it's discussion of the Project's growth inducing impacts is inadequate.

17  
18 **G. THE EIR FAILS TO DISCUSS A REASONABLE RANGE OF PROJECT**  
19 **ALTERNATIVES**

20  
21 **[sev to fill in]**

22  
23 **H. THE EIR FAILS TO LAWFULLY ASSESS THE SIGNIFICANCE OF THE**  
24 **PROJECT'S CUMULATIVE IMPACTS**

25 The cumulative impact analysis bears directly on the scope of potential adverse environmental  
26 impacts, the necessity for mitigation measures, and ultimately the appropriateness of project approval.  
27 *Citizens to Preserve the Ojai v. Board of Supervisors* (1985) 176 Cal.App.3d 421, 431. CEQA  
28 requires that an EIR must discuss a cumulative impact if the project's incremental effect combined

1 with the effects of other projects is “cumulatively considerable.” CEQA Guidelines §15130(a). The  
2 Guidelines define cumulative impacts as “two or more individual effects which, when considered  
3 together, are considerable or which compound or increase other environmental impacts.” CEQA  
4 Guidelines § 15355. Individual effects may be changes resulting from a single project or more than  
5 one project. *Id.* § 15355(a). Finally, a cumulative impact is an impact caused by the combination  
6 of the project reviewed in the EIR together with other projects causing related impacts. *Id.* §  
7 15130(a)(1).

8 The determination whether a project’s incremental effect combined with the effects of other  
9 projects is “cumulatively considerable” must be based on an accurate assessment of the project’s  
10 incremental effects “viewed in connection with the effects of past projects, the effects of other current  
11 projects, and the effects of probable future projects.” *Id.* § 15065(c).

12 As the court recently stated in *Communities for a Better Environment v. California Resources*  
13 *Agency* (2002) 103 Cal. App. 4th 98, 114:

14 Cumulative impact analysis is necessary because the full environmental impact of a  
15 proposed project cannot be gauged in a vacuum. One of the most important  
16 environmental lessons that has been learned is that environmental damage often  
17 occurs incrementally from a variety of small sources. These sources appear  
insignificant when considered individually, but assume threatening dimensions when  
considered collectively with other sources with which they interact.

18 In this case, the EIR conducted its cumulative impact analysis in a virtual vacuum by failing  
19 to use a reasonable geographic area to analyze the project’s interaction with past, present, and future  
20 projects contributing to increased flooding and sedimentation. The EIR admits that its analysis was  
21 limited to projects in the City by stating that the “cumulative analysis . . . generally includes planned  
22 development in and around St. Helena, and is based on the St. Helena General Plan Land Use  
23 designations, and information from City Planners.” [RDEIR 4-2]. The limited scope of the EIR’s  
24 cumulative impacts analysis is born out by the list of past, present and future projects considered on  
25 pages 4-3 through 4-6 of the RDEIR. Many of those projects are small residential development  
26 projects or other small public works projects with little to no relation to flooding or sedimentation  
27 issues in the Napa River. As for the projects considered outside of St. Helena, most involve projects  
28 well south of St. Helena with no measurable impact on the Napa River or watersheds that drain into

1 the Napa River in and around St. Helena, such as Sulphur and York Creeks.

2 For project's attempting to solve a problem such as flooding and sedimentation, the proper  
3 scope of a cumulative impact analysis requires consideration of projects from throughout the regional  
4 watershed similarly contributing to flooding and sedimentation problems. **[SEV - briefly describe  
5 what the EIR failed to include, such as existing upstream projects]**

6 Dr. Robert Curry, a specialist in fluvial geomorphology, river restoration, and sediment  
7 transport who spent the last 10 plus years on the analysis of cumulative hydrological effects in the  
8 Napa River Watershed, summed up the EIR's deficiency in this regard by stating:

9 [The] Cumulative effects analysis in the draft EIR is mis-focused on local  
10 development and local changes in runoff. The proposed project needs to be evaluated  
11 with other ongoing changes in flood frequency–magnitude–duration in the mainstem  
12 of the Napa River above and below the project site. Particularly important is the  
13 evaluation of the possible impacts of the proposed project on the Pope Street Bridge  
14 concrete sill and the possible impacts should that sill fail or be removed. Without  
15 such an evaluation, it is impossible to place this project in the context that permits an  
16 adequate assessment of its cumulative impacts along with those already affecting the  
17 river (such as dams, land use, timber harvests and conversions, etc).

18 With respect to its impact on vegetation, wildlife and fisheries like the threatened steelhead,  
19 the EIR recognizes that the Project has the potential to affect and impact each. **[RDEIR 4-11]**. In  
20 considering whether the Project's incremental impact on these resources is cumulatively  
21 considerable when considered with past, present and future projects impacting the same resources,  
22 the EIR falls short of CEQA's requirements. Primarily, the failure is directly tied to the EIR's failure  
23 to support the extremely restricted geographic scope of projects it chose to analyze along side the  
24 Project to determine the Project's cumulative impacts. **[This is too abstract - make it more specific  
25 and tied to evidence in the record.]**

26 The appropriate geographic scope of an EIR's cumulative impact analysis is a proper subject  
27 of judicial review. *See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692,  
28 721 (air pollution analysis held inadequate for failure to include entire San Joaquin Valley air basin);  
*Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 430 (EIR failed to  
explain reason for limiting analysis of emissions in assessment of cumulative air quality impacts).  
Here, in violation of CEQA, the EIR does not provide any support for its decision to restrict the  
consideration of the Project's cumulative impacts to such a limited geographical area.

1 In *Kings County*, the Court declined to defer to the agency in deciding the issue of whether  
2 it was "practical and reasonable" to have considered the broader scope of information. *Kings County*  
3 *Farm Bureau, supra*, 221 Cal.App.3d at 723. There, the Court quoted from *San Franciscans for*  
4 *Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal. App. 3d 61, 77, in which  
5 the court ruled that "the disparity between what was considered and what was known is the basis  
6 upon which we find an abuse of discretion." For similar reasons, the disparity between the limited  
7 projects considered in the EIR and the wide ranging projects known to be contributing to the Napa  
8 River's flooding, sedimentation, and steelhead declines, the City abused its discretion in so limiting  
9 its cumulative impacts analysis.

10  
11  
12 **I. THE CITY FAILED TO PROCEED IN THE MANNER REQUIRED BY LAW BY**  
13 **BASING ITS MANDATORY CEQA FINDINGS ON INCORRECT LEGAL**  
**STANDARDS.**

14 As noted above, the EIR prepared by the City for this Project found that the Project would  
15 have unavoidable significant effects on aesthetics, views and traffic. In addition, the EIR discussed  
16 several alternatives that would substantially lessen these effects or reduce them to a level of  
17 insignificance. Therefore, under CEQA, the City was required to make several mandatory findings  
18 regarding the effectiveness and feasibility of mitigation measures and project alternatives that would  
19 "mitigate or avoid" the significant adverse effects. Public Resources Code § 21081 provides:

20 Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall  
21 approve or carry out a project for which an environmental impact report has been  
22 certified which identifies one or more significant effects on the environment that  
23 would occur if the project is approved or carried out unless both of the following  
24 occur:

(a) The public agency makes one or more of the following findings with respect to  
25 each significant effect:

(1) Changes or alterations have been required in, or incorporated into, the project  
26 which mitigate or avoid the significant effects on the environment.

(2) Those changes or alterations are within the responsibility and jurisdiction of  
27 another public agency and have been, or can and should be, adopted by that other  
28 agency.

(3) Specific economic, legal, social, technological, or other considerations, including  
29 considerations for the provision of employment opportunities for highly trained  
30 workers, make infeasible the mitigation measures or alternatives identified in the  
31 environmental impact report.

(b) With respect to significant effects which were subject to a finding under paragraph

1 (3) of subdivision (a), the public agency finds that specific overriding economic,  
2 legal, social, technological, or other benefits of the project outweigh the significant  
effects on the environment.

3 Section 21081 sets out a hierarchy of findings that are interdependent, but distinct. First,  
4 under subdivision (a) the lead agency must, with respect to each significant effect, make at least one  
5 of three findings: (1) that it has been “mitigated or avoided;” (2) that another agency bears  
6 responsibility for mitigating or avoiding the significant impact; or (3) that the mitigation measures  
7 or alternatives that would mitigate or avoid the significant impact are “infeasible.” Impacts that  
8 remain significant after implementation of all feasible mitigation measures under (a)(1) and a finding  
9 that other mitigation measures and alternatives that would mitigate or avoid the significant impact  
10 are often called “unavoidable” significant impacts.

11 Second, under subdivision (b), if there are significant effects remaining even after  
12 implementing all feasible mitigation measures under paragraph (a)(1), and the agency has found that  
13 other mitigation measures or alternatives that would mitigate or avoid the significant impact are  
14 infeasible, then in order to approve the project the agency must find that the benefits of the project  
15 outweigh the harm to the environment. This is often called the “statement of overriding  
16 considerations.”

17 These findings requirements are explained and clarified in more detail in the CEQA  
18 Guidelines, at sections 15091, 15092 and 15093. The “unavoidable” significant effects findings set  
19 forth in subdivision (a) of § 21081 are described in Guideline § 15091. The “statement of overriding  
20 considerations” finding set forth in subdivision (b) of § 21081 is described in Guideline § 15093.  
21 Guideline § 15092 explains the relationship between these two distinct findings. (As subdivision (f)  
22 of § 15091 points out, “A statement made pursuant to Section 15093 [i.e., the statement of overriding  
23 considerations under subdivision (b) of § 21081] does not substitute for the findings required by this  
24 section [i.e., the “unavoidable” significant effects findings under subdivision (a) of § 21081].”)

25 Section 15092 provides that:

- 26 (b) A public agency shall not decide to approve or carry out a project for which an  
EIR was prepared unless either:  
27 (1) The project as approved will not have a significant effect on the environment, or  
(2) The agency has:  
28 (A) Eliminated or substantially lessened all significant effects on the environment

1 where feasible as shown in findings under Section 15091, and  
2 (B) Determined that any remaining significant effects on the environment found to be  
3 unavoidable under Section 15091 are acceptable due to overriding concerns as  
4 described in Section 15093.

5 The City’s findings in this case violate the provisions of CEQA and the CEQA Guidelines  
6 in two ways. First, under any reasonable reading of § 21081 and 15092, the agency must find that  
7 where significant effects remain, the agency must find that any project alternatives that would  
8 substantially lessen such effects are infeasible in order to approve the project, even where those  
9 remaining significant effects have already been substantially lessened by implementing all feasible  
10 mitigation measures. The City rejects this view, and asserts that where significant effects have been  
11 substantially lessened by implementing feasible mitigation measures, even if the effects remain  
12 significant, it has no obligation to find that any project alternatives that would substantially lessen  
13 such effects are infeasible in order to approve the project. (See AR 4724, ¶ H; 4801, first full ¶.) The  
14 City’s finding in this regard is erroneous as a matter of law.

15 Second, despite its position as described in the preceding paragraph, the City purported to  
16 make findings that all project alternatives that would substantially lessen the remaining unavoidable  
17 significant effects of the project are infeasible. The City’s stated reason for doing so was “for  
18 purposes of full disclosure to its constituents.” (See AR 4724, ¶ I.) More important, in doing so, the  
19 City substituted its findings that the benefits of the project outweigh its environmental harm for its  
20 findings that project alternatives are infeasible, in violation of § 21081 and in direct violation of the  
21 directive in subdivision (f) of § 15091 that “A statement made pursuant to Section 15093 does not  
22 substitute for the findings required by this section.”)

23 **1. The City’s Finding That it Had No Obligation to Find That Project Alternatives  
24 That Would Substantially Lessen Significant Unavoidable Effects Are Infeasible  
25 Is Erroneous as a Matter of Law.**

26 The dispute between Living Rivers and the City on this issue centers on the meaning of the  
27 words “mitigate or avoid” in paragraph (1) of subdivision (a) of section 21081. CEQA Guideline  
28 15091 muddies the water by it substituting the words “eliminated or substantially lessened” in place  
of “mitigate or avoid.” The question posed is whether the degree of “mitigation” of a significant  
impact must be to a level of “insignificance” or merely to a “substantial” degree in order to obviate

1 the agency's obligation to find that alternatives that would substantially lessen the significant impact  
2 are infeasible.

3 The case law, discussed below, is not entirely clear on this issue. The leading treatises are  
4 uncertain. The Continuing Education of the Bar treatise states:

5 An agency's findings on mitigation of significant impacts under Pub Res C  
6 §21081(a)(1) and 14 Cal Code Regs §1509(a)(1) are crucial to the CEQA review  
7 process because the need for a statement of overriding considerations (see §17.22)  
8 hinges on the determination whether significant impacts will be sufficiently mitigated.  
9 It is unclear, however, how much mitigation is enough to avoid the need for a  
10 statement of overriding considerations for an impact. CEQA and the Guidelines use  
11 different terms when referring to mitigation of impacts and do not clearly define the  
12 level to which an impact must be mitigated before a statement of overriding  
13 considerations becomes unnecessary. See Pub Res C §21081; 14 Cal Code Regs  
14 §§15043, 15092-15093. . . . Given the uncertainty about when a statement of  
15 overriding considerations is required, the cautious approach is for agencies to adopt  
16 such a statement unless all impacts have been reduced to a level of insignificance.  
17 See §17.22. Under this approach, the agency should include in its findings for each  
18 impact a determination of whether it will be reduced to insignificance by the adopted  
19 mitigation measures.

20 Kostka & Zischke, Practice Under the California Environmental Quality Act, § 17.16, p. 650, CEB,  
21 2003.

22 Living Rivers contends that the "cautious approach" recommended by the authors of this  
23 treatise represents a binding legal requirement of CEQA: that unless the significant effects are  
24 avoided (or eliminated) entirely or mitigated (or "substantially lessened") to a level of insignificance,  
25 then the agency must make findings that project alternatives are infeasible.

26 The City's relies on several decisions to support its position that it because it found that  
27 mitigation measures had "substantially" lessened significant impacts, albeit not to a level of  
28 insignificance, it was not obligated to find that project alternatives that would further "mitigate or  
29 avoid" remaining significant effects were infeasible, citing *Laurel Hills Homeowners Assn. v. City  
30 Council* (1978) 83 Cal. App. 3d 515, 520-521; *Kings County Farm Bureau v. City of Hanford* (1990)  
31 221 Cal.App.3d 692, 730-731; *Laurel Heights Improvement Assn. of San Francisco, Inc. v. Regents  
32 of the University of California ("Laurel Heights I")* (1988) 47 Cal.3d 376, 400-403. (AR 4801, first  
33 full ¶.) This case law does not support the City's position, however, because these decisions do not  
34 directly address the issues presented here regarding the degree of mitigation that must be achieved

1 before an agency is relieved of the obligation to make findings that project alternatives are infeasible.<sup>4</sup>

2 Indeed, these cases are routinely discussed in the context of whether a finding under  
3 paragraph (1) of § 21081(a) that a significant effect has been “mitigated or avoided” to any degree  
4 relieves the agency the obligation to make findings that project alternatives are infeasible under §  
5 21081(a)(3). See for example, the discussion of this issue in “Guide to the California Environmental  
6 Quality Act 1999” by Remy, Thomas, Moose and Manley (Solano Press 1999) (from bottom of page  
7 328 to top of page 332, attached hereto as Appendix 1). Like the cases it discusses, this treatise also  
8 does not discuss the precise issue of the degree of mitigation that must be achieved before an agency  
9 is relieved of the obligation to make findings that project alternatives are infeasible under §  
10 21081(a)(3).

11 Given this lack of authority on the precise issue, the Court should look to the overall purposes  
12 and structure of CEQA to implement the legislature’s intent. The fundamental policy of the state  
13 embodies in CEQA is to avoid unnecessary environmental damage under CEQA. Thus Pub. Res.  
14 Code § 21002 provides:

15 it is the policy of the state that public agencies should not approve projects as  
16 proposed if there are feasible alternatives or feasible mitigation measures available  
17 which would substantially lessen the significant environmental effects of such  
18 projects.”

19 Pub. Res. Code § 21002.1 provides:

20 (a) The purpose of an environmental impact report is to identify the significant effects  
21 on the environment of a project, to identify alternatives to the project, and to indicate  
22 the manner in which those significant effects can be mitigated or avoided. (b) Each  
23 public agency shall mitigate or avoid the significant effects on the environment of  
24 projects that it carries out or approves whenever it is feasible to do so.

25 The plain intent of these words is to require that agencies reduce significant impacts as long as it is  
26 feasible to do so, regardless or whether they have already achieved some level of mitigation that fails  
27 to reach a level of insignificance (and as long as the reductions are “substantial” rather than the  
28 “nickel and dime” reductions described by the Court of Appeal in *San Franciscans for Reasonable*

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26 <sup>4</sup>To this list can be added the recent decision in *Mira Mar Mobile Community v. City of Oceanside*  
27 (2004) 119 Cal. App. 4th 477, 490 (“Once the City found this adverse impact could be avoided or substan-  
28 tially lessened by mitigation measures, it was not required to make any findings regarding the feasibility of  
proposed alternatives.”)

1 *Growth v. City and County of San Francisco* (1989) 209 Cal. App. 3d 1502, 1519.) This  
2 interpretation is also supported by significant case law, as described in the following excerpt from  
3 the “Guide to the California Environmental Quality Act 1999”:

4 [T]he purpose of the statutory requirement for findings is to ensure that the decision-  
5 making agency actually considers alternatives and mitigation measures.” (*Resource*  
6 *Defense Fund v. Local Agency Formation Commission of Santa Cruz County* (1987)  
7 191 Cal.App.3d 886, 896; see also *Orinda Association v. Board of Supervisors*  
8 (1986) 182 Cal.App.3d 1145, 1169, fn. 13. The findings requirement effectuates  
9 CEQA’s substantive mandate that public agencies refrain from approving projects  
10 with significant environmental impacts when there are “feasible alternatives or  
11 mitigation measures” that can substantially lessen or avoid those impacts. (*Mountain*  
12 *Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134; Public  
13 Resources Code § 21002; CEQA Guidelines §§ 15002(a)(3), 15021(a)(2). Thus, “a  
14 decisionmaking agency is prohibited from approving a project for which significant  
15 environmental effects have been identified unless it makes specific findings about  
16 alternatives and mitigation measures. [Citations.] The requirement ensures there is  
17 evidence of the public agency’s actual consideration of alternatives and mitigation  
18 measures, and reveals to citizens the analytical process by which the public agency  
19 arrived at its decision. [Citations.] Under CEQA, the public agency bears the burden  
20 of affirmatively demonstrating that, notwithstanding a project’s impact on the  
21 environment, the agency’s approval of the proposed project followed meaningful  
22 consideration of alternatives and mitigation measures. [Citation.]” (*Mountain Lion*,  
23 *supra*, 16 Cal.4th at p. 134.)

24 *Id.* at pp. 322-323.

25 In short, the City position on this issue is erroneous as a matter of law.

26 **2. The City Failed to Proceed in the Manner Required by Law in Making Findings  
27 That Project Alternatives Are Infeasible by Conflating and Confusing its  
28 Obligations under Public Resources Code § 21081(a)(3) and 21081(b).**

29 The City’s findings concede that several alternatives discussed in the EIR would substantially  
30 lessen or avoid entirely identified significant impacts on aesthetics, cultural resources or traffic,  
31 including the No Project Alternative (aesthetics, cultural resources and traffic at AR 4804-4805), the  
32 Minimum Plan (aesthetics and traffic at AR 4806-4807), the Vineyard Valley Relocation Plan  
33 (aesthetics, cultural resources and traffic at AR 4808).

34 Thus, as discussed above, the City was required under § 21081(a)(3) that these alternatives  
35 were infeasible prior to approving the project. The term “feasible” is defined in CEQA to mean:  
36 “capable of being accomplished in a successful manner within a reasonable period of time, taking  
37 into account economic, environmental, social, and technological factors.”

38 Here, the City found the No Project Alternative to be infeasible solely because it “would not

1 meet any of the Project objectives.” (AR 4805.) This represents legal error, because whether the No  
2 Project Alternative accomplishes the Project’s objectives has nothing at all to do with whether it is  
3 “capable of being accomplished in a successful manner within a reasonable period of time.” Instead,  
4 whether the No Project Alternative accomplishes the Project’s objectives comes within the question  
5 of whether the overriding social or economic benefits of the project outweigh its environmental harm,  
6 which is a separate finding required under § 21081(b). As the Guidelines point out, the statement of  
7 overriding considerations findings cannot substitute for the findings required under § 21081(a).  
8 Guideline § 15091(f).

9 The City also found the Minimum Plan Alternative to be infeasible based in large part on its  
10 failure to achieve several Project objectives, including equivalent flood protection and an all-weather  
11 river crossing to St. Helena Hospital.” (AR 4807.) Again, these reasons have nothing at all to do  
12 with whether it is “capable of being accomplished in a successful manner within a reasonable period  
13 of time” and this finding represents legal error for the same reasons discussed in the preceding  
14 paragraph.

15 The City also found the Vineyard Valley Relocation Plan Alternative to be infeasible based  
16 in part on it failure to achieve some Project objectives, including an all-weather river crossing to St.  
17 Helena Hospital.” (AR 4808-4809.) Once again, these reasons have nothing to do with whether this  
18 alternative is “capable of being accomplished in a successful manner within a reasonable period of  
19 time.” This finding represents legal error for the same reasons discussed in the preceding paragraph.

20 **VI. CONCLUSION**

21 **[TNL TO FILL IN]**

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24 DATED: July 23, 2004

LAW OFFICES OF THOMAS N. LIPPE

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26 By: \_\_\_\_\_  
27 Thomas N. Lippe

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By: \_\_\_\_\_  
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