

1 GABRIEL M.B. ROSS (State Bar No. 224528)
JOSEPH D. PETTA (State Bar No. 286665)
2 SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
3 San Francisco, California 94102
Telephone: (415) 552-7272
4 Facsimile: (415) 552-5816
Ross@smwlaw.com
5 Petta@smwlaw.com

6 Attorneys for Greenspot Residents Association and
San Bernardino Valley Audubon Society

7 ARUNA PRABHALA (State Bar No. 278865)
8 CENTER FOR BIOLOGICAL DIVERSITY
1212 Broadway, Ste. 800
9 Oakland, California 94612
Telephone: (510) 844-7115
10 Facsimile: (510) 844-7150
Aprabhala@biologicaldiversity.org

11 Attorney for Center for Biological Diversity

12
13 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
14 **COUNTY OF SAN BERNARDINO, SAN BERNARDINO DISTRICT**
15

16 GREENSPOT RESIDENTS
ASSOCIATION and SAN BERNARDINO
17 VALLEY AUDUBON SOCIETY,

18 Petitioners,

19 v.

20 CITY OF HIGHLAND; CITY OF
HIGHLAND CITY COUNCIL; and DOES
21 1 through 20, inclusive,

22 Respondent.

23 LCD GREENSPOT, LLC; ORANGE
24 COUNTY FLOOD CONTROL
DISTRICT; COUNTY OF ORANGE;
25 ORANGE COUNTY BOARD OF
SUPERVISORS; and DOES 21 through
26 40, inclusive,

27 Real Parties in Interest.
28

Case No. CIVDS 1615280
Related Case No: CIVDS 1615347

PETITIONER'S OPENING BRIEF

Date: April 6, 2018
Time: 10:00 a.m.
Dept.: S23

Assigned for All Purposes to:
Hon. Donald Alvarez, Dept. S23

[Code Civ. Proc. § 1094.5 (alternatively, § 1085), Cal.
Public Resources Code §§ 21000, et seq. (California
Environmental Quality Act)]

Action Filed: September 15, 2016

TABLE OF CONTENTS

	Page
1	
2	
3	TABLE OF CONTENTS 2
4	INTRODUCTION 7
5	FACTUAL AND PROCEDURAL BACKGROUND 8
6	I. Environmental Setting of the Harmony Project 8
7	II. Project Description 9
8	A. The Proposed Development 9
9	B. The Mill Creek Bridge Connecting the Harmony Development with SR-38..... 10
10	III. Environmental Review and Approval of the Harmony Project 11
11	A. The Draft EIR and Public Comment 11
12	B. The Final EIR and Project Approval..... 11
13	ARGUMENT..... 12
14	I. Standard of Review 12
15	II. The EIR Ignored the Mill Creek Bridge, an Integral Part of the Project. 14
16	A. The Project Includes Both the Harmony Specific Plan and the Mill Creek
17	Bridge. 15
18	B. The EIR’s Project Description Was Legally Inadequate and as a Result the
19	EIR Failed to Provide Sufficient Analysis. 21
20	III. The EIR Failed to Fully Disclose and Properly Evaluate the Significance of the
21	Project’s GHG Emissions..... 22
22	A. The EIR Relies on a Legally Invalid Methodology to Conclude the Project
23	Would Comply with AB 32. 23
24	1. The EIR Improperly Compares the Project’s Purported GHG
25	Reductions to the Level of Required Reductions Required Statewide. 25
26	2. The EIR Lacks Substantial Evidence to Find That the Project Would
27	Be Consistent with AB 32 Through Compliance with Regulatory
28	Programs Designed to Achieve Its Goals..... 28
	B. The EIR Fails to Adequately Assess the Project’s Inconsistency with
	California’s Post-2020 Goals for Reducing GHG Emissions. 30
	IV. The EIR Failed to Properly Evaluate the Project’s Inconsistencies with the 2012
	RTP/SCS..... 32

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. The EIR Lacks Substantial Evidence to Find that the Project’s Long-Term GHG Emissions Would Be Consistent with the RTP/SCS. 33

B. The EIR Lacks Substantial Evidence to Conclude that the Project Is Consistent with the RTP/SCS’s Long-Range Vision for Sustainable Growth. 34

V. The EIR Entirely Failed to Disclose, Analyze or Mitigate Flooding Impacts Downstream from the Project Caused by Elevating Portions of the Project Site. 35

CONCLUSION 39

TABLE OF AUTHORITIES

Page(s)

California Cases

Assn. for a Cleaner Environment v. Yosemite Community College Dist.
(2004)
116 Cal.App.4th 629 13

Association of Irrigated Residents v. Kern County
2017 Cal.App. LEXIS 1037 29

Banning Ranch Conservancy v. City of Newport Beach (2012)
211 Cal.App.4th 1209 16, 18, 19, 20

Bozung v. Local Agency Formation Com. (1975)
13 Cal.3d 263 19

Californians for Alternatives to Toxics v. Dept. of Food & Agriculture
(2005)
136 Cal.App.4th 1 37

Center for Biological Diversity v. California Dept. of Fish & Wildlife
(2015)
62 Cal.4th 204 *passim*

Cleveland National Forest Foundation v. San Diego Assn. of Governments
(2017)
3 Cal.5th 497 31, 32

Clover Valley Foundation v. City of Rocklin (2011)
197 Cal.App.4th 200 13, 36

Communities for a Better Environment v. City of Richmond (2010)
184 Cal.App.4th 70 21, 22

County of Inyo v. City of Los Angeles (1977)
71 Cal.App.3d 185 15, 36

Laurel Heights Improvement Assn. v. Regents of Univ. of Cal. (1988)
47 Cal.3d 376 17, 18, 20

1	<i>Madera Oversight Coalition, Inc. v. County of Madera</i> (2011)	
2	199 Cal.App.4th 48	13, 36
3	<i>Neighbors for Smart Rail v. Exposition Metro Line Construction Authority</i>	
4	(2013)	
5	57 Cal.4th 439	13
6	<i>Plan for Arcadia, Inc. v. City Council of Arcadia</i> (1974)	
7	42 Cal.App.3d 712	18, 19
8	<i>RiverWatch v. Olivenhain Municipal Water Dist.</i> (2009)	
9	170 Cal.App.4th 1186	19
10	<i>San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus</i> (1994)	
11	27 Cal.App.4th 713	<i>passim</i>
12	<i>Topanga Assn. for a Scenic Community v. County of Los Angeles</i> (1974)	
13	11 Cal.3d 506	38
14	<i>Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora</i>	
15	(2007)	
16	155 Cal.App.4th 1214	<i>passim</i>
17	<i>Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho</i>	
18	<i>Cordova</i> (2007)	
19	40 Cal.4th 412	12
20	California Statutes	
21	California Code Regulations, Title 14	
22	§ 15002	15, 22
23	§ 15064	23, 28
24	§ 15064.4	22, 23, 32, 33
25	§ 15125	32, 34
26	§ 15165	15
27	§ 15378	12, 15
28	§ 15384	14
29	California Public Resources Code	
30	§§ 21000 et seq.	7
31	§ 21002	15, 22
32	§ 21082.2	27, 37
33	§ 21168.5	12

1 Government Code
2 § 65080..... 32

3 Health & Safety Code
4 §§ 38500 et seq. 14

5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 **INTRODUCTION**

2 The City of Highland’s undeveloped eastern expanse lies at the foot of the San
3 Bernardino Mountains. On the former site of citrus orchards, today a vast open space—portions
4 of which are home to the endangered San Bernardino Kangaroo Rat and other sensitive
5 species—the City has approved a 1,657-acre area for a huge, 3,632-unit mixed-use development,
6 wholly disconnected from the City’s core. This lawsuit challenges the City’s approval of this ill-
7 conceived project, the Harmony Specific Plan.

8 The California Environmental Quality Act, Public Resources Code sections 21000 et seq.
9 (“CEQA”), requires the government and project proponents to fully disclose the scope of their
10 project and its impacts on human health, the environment, and public safety. CEQA requires a
11 specific method of disclosure: tell the public about the existing environmental conditions, tell
12 them how the project will change those conditions, and explain what the agency and the
13 proponent will do to minimize its effects on human health, the environment, and public safety.

14 The environmental impact report (“EIR”) for the Harmony Specific Plan (the “Project”)
15 suffers from two essential defects under CEQA. First, it impermissibly “piecemeals” the
16 analysis of the impacts of the Project: the EIR claims that a bridge over Mill Creek, connecting
17 the southeastern corner of the Harmony Specific Plan to State Route 38, is a separate
18 undertaking outside the Project and beyond the scope of the environmental analysis. This claim
19 is belied by evidence in the record showing that the bridge will exist only to serve the Harmony
20 Specific Plan, that it is anticipated and facilitated by the Specific Plan’s conditions of approval,
21 and that it would begin as soon as the City approves the Specific Plan. The EIR’s second flaw is
22 its failure to take a realistic, supported look at the impacts of the whole Project (including the
23 Mill Creek bridge), particularly its potential to cause flooding hazards for downstream
24 communities and its substantial contribution to California’s greenhouse gas emissions.

25 The Project would place massive, yet unquantified, amounts of fill in the Mill Creek
26 floodplain, very likely changing its capacity and hydrodynamics. But the EIR refuses to take a
27 thorough look at the potential flooding impacts associated with this fill both within and outside
28

1 to the site from the developed portions of the City to the west. AR 16504. Today, access is
2 largely provided by Greenspot Road, a two-lane road with no curb, sidewalks or other roadway
3 improvements. *Id.* Newport Avenue is the only other existing access route. *Id.* It runs through
4 the southern portion of the Harmony Specific Plan site and provides limited access from the City
5 of Redlands and unincorporated San Bernardino County. *Id.*

6 The Project is located in a critical wildlife movement corridor. AR 1605. It is home to
7 and upstream from numerous threatened and endangered wildlife species, including the federally
8 and state-protected Southwestern Willow Flycatcher and Least Bell’s Vireo, San Bernardino
9 Kangaroo Rat, White Tailed Kite, Santa Ana Sucker Fish, and various types of rare Sage Scrub.
10 E.g., AR 16619, 16625, 17236, 29007. In particular, the southeast portion of the site, where the
11 City intends to build the bridge over Mill Creek connecting the Harmony development to SR-38
12 (hereafter, the “Mill Creek Bridge”), intersects with several critical habitat and wildlife
13 corridors. AR 475. These include a Regional Wildlife Movement Corridor designated in the
14 County’s General Plan (AR 29006); sensitive habitat for highly threatened Sage Scrub which
15 supports the federally listed Santa Ana River woolly star and slender-horned spineflower (AR
16 29007); and federally-designated “critical habitat” for the endangered San Bernardino Kangaroo
17 Rat and Santa Ana Sucker Fish (*id.*), among others. *See also* AR 29009, 29011, 40865.

18 **II. Project Description**

19 **A. The Proposed Development**

20 The Project is a master-planned, mixed-used residential and commercial development
21 which would place 3,632 residences at the outskirts of the City. AR 16513, 16772. Residential
22 uses would cover roughly 658 acres of the site, providing attached and detached housing types.
23 AR 16513. Approximately 5.7 acres of the site is planned for “neighborhood commercial”
24 development providing “retail goods and services.” *Id.* Certain residential-designated areas are
25 also designated with a Neighborhood Commercial “overlay” that provides the opportunity to
26 develop as either commercial or mixed-use. *Id.* An estimated 830 acres, or approximately 50
27 percent of the site, is planned for parks, recreation (e.g., sports fields) or other open space. *Id.*

28 The Project lies within a flood plain, a significant portion of which is categorized by the

1 Federal Emergency Management Agency (“FEMA”) as “Zone A” (within the 100-year flood
2 plain).¹ AR 16859. Roughly 68 acres of the Project site lie within a 100-year floodplain. AR
3 16877; *see also* AR 16859. The site also receives stormwater runoff from the San Bernardino
4 Mountain foothills to the north and northeast. AR 16522. This runoff travels through the Project
5 site on its way to the Santa Ana River to the west of the site, or to Mill Creek directly to the
6 south. *Id.*

7 **B. The Mill Creek Bridge Connecting the Harmony Development with SR-38**

8 The Mill Creek Bridge would connect the Harmony development to SR-38, running east-
9 to-west directly on the other side of Mill Creek (AR 29009-10 (map of development and
10 bridge); *see generally* AR 29006-13 (FEIR Appendix P.4, describing Mill Creek Bridge)). A
11 bridge in this location would require a “Section 404” dredge-and-fill permit from the United
12 States Army Corps of Engineers and “take permits” under the federal Endangered Species Act.
13 AR 29007, 40865-67.

14 In August 2011 the City Engineer explained that the development would need access to
15 State Route 38 (“SR-38”) via a bridge over Mill Creek at the southeast corner of the site.
16 AR 39360, 39370-71. Around the same time City staff noted, on the basis of a Habitat
17 Assessment for the site, that the bridge would cause the Project’s “biggest impact.” AR 39458
18 (City notes on Sept. 2011 Habitat Assessment); *see also* AR 39693 (expressing concern about
19 scrutiny on environmental review).

20 The bridge was not mentioned in the July 2012 Notice of Preparation for the EIR AR
21 2237-46. But minutes from a December 2014 Planning Commission Study Session indicate that
22 “the City does desire to have such a bridge constructed across Mill Creek [A bridge] would
23 optimize circulation within the project and traffic traveling between Highland and
24 Redlands/Yucaipa/Mentone. The City intends to begin design of this bridge immediately

25 _____
26 ¹ “The 100-year floodplain is an area of land subject to potential inundation by a storm that has a
27 one percent probability of occurring in any given year. According to the City General Plan,
28 portions of the western boundary of the Project site are within the limits of a 500-year flood
boundary and portions of the southern boundary are within the limits of a 100-year flood
boundary.” AR 16859.

1 following approval of the Harmony Specific Plan.” AR 44435; *see also* AR 44486, 45114. The
2 EIR explained that the Harmony Specific Plan’s circulation plan would “allow for” a bridge
3 over Mill Creek (AR 16515), thereby providing an “exit point” (AR 29006) from the Harmony
4 development to SR-38.

5 **III. Environmental Review and Approval of the Harmony Project**

6 **A. The Draft EIR and Public Comment**

7 The City completed the Draft EIR (“DEIR”) in March 2014 and circulated it for public
8 comment. AR 37567. Members of the public, as well as government agencies, submitted
9 comments pointing out the serious deficiencies in the DEIR. AR 15583-85; 15592-16183. Many
10 commenters, including Petitioners San Bernardino Valley Audubon (“Audubon”) and the Center
11 for Biological Diversity (the “Center”), explained the Project would significantly worsen air
12 quality, traffic, public health and hydrologic conditions, and that it would have severe impacts
13 on endangered and threatened biological resources, and on the region’s ability to meet its
14 climate change goals. *See, e.g.*, AR 15682-86, 15848-60, 15914-40. Commenters also noted that
15 the DEIR failed to adequately disclose, analyze, or mitigate the Project’s significant climate
16 change impacts; failed to establish an accurate baseline for determining such impacts; and failed
17 to adequately analyze a reasonable range of alternatives that would substantially lessen the
18 Project’s significant environmental effects. AR 15914-40.

19 In August 2014, the City released revised portions of the EIR’s air quality, traffic and
20 biological resources analysis in a Revised DEIR (“RDEIR”). AR 37585. While the RDEIR
21 addressed some concerns raised in comments on the DEIR, many issues remained inadequately
22 analyzed and mitigated, and the Project as described continued to pose significant environmental
23 impacts. *See* AR 16283-91. In an October 2014 letter, Audubon and the Center commented that
24 the RDEIR continued to violate CEQA. *Id.*

25 **B. The Final EIR and Project Approval**

26 The City released the FEIR, including its responses to public comment, in February 2016.
27 AR 15509 et seq. The City’s failure to disclose or analyze the Project’s impacts persisted in the
28 FEIR. In a June 2016 letter, Petitioner Greenspot Residents Association (“Greenspot”) explained

1 the ongoing deficiencies of the document. AR 37721-38134. Greenspot’s comments
2 incorporated a memorandum by Bruce Abelli-Amen (*see* AR 37751-57 (hereafter, the “Baseline
3 Report”)), a hydrologist with Baseline Environmental Consulting, who reviewed the FEIR’s
4 hydrology analysis and the accompanying Hydrology and Sedimentation Technical Study
5 (Appendix I.1 to the FEIR, AR 21614-22404).

6 In June 2016, the City held a public hearing to determine whether to certify the FEIR and
7 approve the Project. AR 37611-12. Greenspot and other concerned members of the public
8 attended the hearing and opposed the Planning Commission’s recommendation of project
9 approval. *See, e.g.*, AR 36909-911. At a continued hearing on August 23, 2016, the City
10 certified the FEIR and approved the Project. AR 11-13, 328-30. This Petition followed.

11 ARGUMENT

12 The City’s EIR failed to comply with CEQA because it (1) failed to acknowledge that the
13 Mill Creek Bridge is part of the Project, and therefore to disclose the environmental impacts of
14 the “whole of [the] action” (CEQA Guidelines, Cal. Code Regs., tit. 14 (“Guidelines”),
15 § 15378(a)); (2) relied on invalid methodologies for determining the significance of the Project’s
16 greenhouse gas (“GHG”) emissions, and therefore lacked substantial evidence for its conclusion
17 that GHG impacts would be less than significant; (3) concluded, without substantial evidence,
18 that the Project would be consistent with the Southern California Association of Governments’
19 2012 Regional Transportation Plan/Sustainable Communities Strategy while failing to disclose
20 that the Project would undermine this plan’s core objective to prioritize compact, transit-
21 oriented development; and (4) failed to provide any evidence that the Project would not
22 significantly increase flood impacts at the Project site or downstream, due to the necessary
23 placement of massive amounts of fill to raise certain areas above the 100-year floodplain.

24 I. Standard of Review

25 When reviewing an agency’s compliance with CEQA, the court determines whether there
26 has been a prejudicial abuse of discretion. Abuse of discretion is established if the agency did
27 not proceed in the manner required by law or its decisions were not supported by substantial
28 evidence. Pub. Resources Code § 21168.5; *Vineyard Area Citizens for Responsible Growth, Inc.*

1 *v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427. These dual standards of review apply to
2 the different claims in this case.

3 Two claims of legal error are subject to independent review by this Court. First, when an
4 EIR fails to analyze the “whole of an action” under CEQA, the EIR is inadequate as a matter of
5 law. *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155
6 Cal.App.4th 1214, 1224 (“*Tuolumne*”). Courts do “not apply the substantial evidence test to the
7 agency’s determination or otherwise defer” in making this determination. *Id.*; *see also Assn. for*
8 *a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 637.
9 This standard applies to Petitioners’ claim that the EIR improperly “piecemealed” the Harmony
10 Specific Plan from the reasonably foreseeable construction of the Mill Creek Bridge. The Court
11 must decide whether the bridge and the rest of the Project “were all part of a single, coordinated
12 endeavor,” based on an independent review of the evidence in the record. *Id.* at 639.

13 Second, when an EIR omits required information that relates to a project’s potentially
14 significant environmental impacts, the EIR is inadequate as a matter of law. Petitioners must
15 demonstrate that the EIR did not contain the information required by law, and that the omission
16 “precluded informed decisionmaking by the lead agency or informed participation by the
17 public.” *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 76-
18 77, disapproved of on other grounds by *Neighbors for Smart Rail v. Exposition Metro Line*
19 *Construction Authority* (2013) 57 Cal.4th 439, 451. This standard applies to Petitioners’ claim
20 that the EIR failed entirely to disclose or evaluate whether the Project would significantly
21 increase flood impacts downstream from the Project site, a claim of legal error. *Id.*; *Clover*
22 *Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 211 (“*Clover Valley*”) (courts
23 “scrupulously enforc[e] all legislatively mandated CEQA requirements”) (citation omitted).

24 Petitioners bring several claims that the City lacked substantial evidence to support the
25 EIR’s conclusions regarding potential environmental impacts. When evaluating findings in an
26 EIR that a project would not result in a significant environmental impact, the court must
27 determine whether there is substantial evidence in the administrative record to support those
28 conclusions. *Newhall Ranch*, 62 Cal.4th at 227. The “analytical gap” left by an EIR’s failure to

1 support its findings through “substantial evidence and reasoned explanation . . . deprive[s an]
2 EIR of its sufficiency as an informative document.” *Id.* (citation and internal quotation marks
3 omitted). “Substantial evidence” means “enough relevant information and reasonable inferences
4 from this information that a fair argument can be made to support a conclusion, even though
5 other conclusions might also be reached.” CEQA Guidelines § 15384(a).

6 The substantial evidence standard applies to Petitioners’ claims that the EIR (1) failed to
7 adequately evaluate the Project’s ability to achieve the GHG reduction goals of Assembly Bill
8 (“AB”) 32, the “California Global Warming Solutions Act of 2006” (Health & Safety Code
9 sections 38500 et seq.); (2) failed to adequately evaluate the Project’s consistency with two
10 Executive Orders setting additional GHG reduction goals; and (3) failed to adequately evaluate
11 whether the Project would conflict with the 2012 Regional Transportation Plan/Sustainable
12 Communities Strategy.

13 **II. The EIR Ignored the Mill Creek Bridge, an Integral Part of the Project.**

14 The Mill Creek Bridge will connect the southeast corner of the Harmony development to
15 SR-38, which runs east-to-west on the other side of Mill Creek (AR 29010; *see generally* AR
16 29006-13).² The bridge will exist solely to serve the Harmony development, primarily the more
17 than 12,000 new residents the Project would locate in this currently vacant area, including the
18 high-density residential use planned near the bridge at the southeast corner of the site. AR
19 16772, 16515; *see also* AR 16276, 16323, 44435 (“A bridge at Fish Hatchery Road would
20 optimize circulation within the project and traffic traveling between Highland [via the Project]
21 and Redlands/Yucaipa/ Mentone.”). The bridge would also bring customers to the Harmony
22 development’s commercial centers, one of which is identified by a zoning “overlay” precisely
23 where the Mill Creek Bridge would connect with the site. AR 16515; *see also* AR 16276, 16323.
24 If not for the Harmony development, a bridge providing access to and from the site would have
25 no purpose.

26 _____
27 ² As used herein, the “Project” means the Harmony Specific Plan and the Mill Creek Bridge,
28 collectively. By contrast, the residential portion of the Project—the only part that the EIR
considered—is referred to as the “Harmony Specific Plan” or the “Harmony development.”

1 CEQA prohibits “segmentation” of a project—the “chopping up [of] proposed projects
2 into bite-size pieces which, when taken individually, may have no significant adverse effect on
3 the environment.” *Tuolumne*, 155 Cal.App.4th at 1223-24 (quoting *Plan for Arcadia, Inc. v. City*
4 *Council of Arcadia* (1974) 42 Cal.App.3d 712, 726); *see also Tuolumne*, 155 Cal.App.4th at
5 1229 (“when one activity is an integral part of another activity, the combined activities are
6 within the scope of the same CEQA project” and must be analyzed together); Guidelines
7 § 15378(a) (“‘Project’ means the whole of an action, which has a potential for resulting in either
8 a direct physical change in the environment, or a reasonably foreseeable indirect physical
9 change in the environment.”).

10 Without a complete project description, an EIR cannot, as a matter of law, adequately
11 evaluate alternatives or mitigation measures to reduce the project’s impacts, as CEQA requires.
12 Pub. Resources Code § 21002; Guidelines § 15002(a)(3); *San Joaquin Raptor/Wildlife Rescue*
13 *Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729-30 (“An accurate project
14 description is necessary for an intelligent evaluation of the potential environmental effects of a
15 proposed activity.”) (quoting *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185,
16 193). Because the EIR’s use of a truncated project description here undercut the City’s ability to
17 adequately analyze and mitigate the environmental impacts of the whole of the project, the City
18 failed to proceed in a manner required by law. *County of Inyo*, 71 Cal.App.3d at 199-200.

19 **A. The Project Includes Both the Harmony Specific Plan and the Mill Creek**
20 **Bridge.**

21 CEQA instructs that “[w]here an individual project is a necessary precedent for action on
22 a larger project . . . an EIR must address itself to the scope of the larger project.” Guidelines
23 § 15165. Thus, in conducting environmental review, CEQA requires an agency to take an
24 expansive view of the project so as to “maximize protection of the environment.” *Tuolumne*, 155
25 Cal.App.4th at 1223.

26 Here, the City failed to comply with this central tenet of CEQA by excising the Mill
27 Creek Bridge from the Project. The City thus defers the evaluation of the bridge’s impacts—as
28 well as the necessity of a “Section 404” dredge-and-fill permit from the United States Army

1 Corps of Engineers, and “take permits” under the federal Endangered Species Act (AR 29007,
2 40865-67)—to an undetermined date in the future. This is exactly what CEQA proscribes.

3 Under well-established case law, this Court must determine as a matter of law the scope
4 of the “project” that the EIR should have evaluated. *See, e.g., Banning Ranch Conservancy v.*
5 *City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1224 (independently reviewing such
6 claim); *Tuolumne*, 155 Cal.App.4th at 1223-24 (same). The court must base its review on the
7 undisputed facts in the record, with no deference accorded to the agency. *Tuolumne*, 155
8 Cal.App.4th at 1223-24.

9 In August 2011, less than a year before the City issued the Notice of Preparation of an
10 EIR for the Harmony Specific Plan, the City Engineer explained to the Mayor, a Planning
11 Commissioner, and executive officers of the Lewis Group, the Project’s developer
12 (“Developer”), that the “long shape” of the development “necessitates” a bridge over Mill Creek
13 connecting the southeast corner of the development area to SR-38. AR 39371. In October 2011,
14 City staff and consultants reviewed Developer’s Habitat Assessment, which covered the entire
15 project site, including riparian areas that would be impacted by the Mill Creek Bridge. AR
16 39458-592 (Sept. 2011 Habitat Assessment); 39692-96 (City’s review memo). A memo among
17 City planning staff contains the handwritten comment that, based on the Assessment’s findings,
18 “[I]t appears the biggest impact will be the construction of a bridge over Mill Creek.” AR
19 39458. The City’s review shared with the Developer explained several deficiencies in the
20 Assessment’s discussion of impacts to sensitive species and habitats, including the lack of “[a]
21 clear conclusion as to whether or not the project will avoid or impact” the federally endangered
22 San Bernardino Kangaroo Rat. AR 39692. The consultant also noted that “[i]t is anticipated that
23 the EIR and supporting technical studies will receive a high level of scrutiny.” AR 39693.

24 The July 2012 Notice of Preparation did not mention the Mill Creek Bridge. AR 2237-47.
25 But discussion of the bridge and its close relationship with the Harmony development did not
26 end. Minutes from a December 2014 Planning Commission Study Session indicated that “the
27 City does desire to have such a bridge constructed across Mill Creek [A bridge] would
28 optimize circulation within the project and traffic traveling between Highland and

1 Redlands/Yucaipa/Mentone. The City intends to begin design of this bridge immediately
2 following approval of the Harmony Specific Plan.” AR 44435; *see also* AR 44486, 45114.

3 The conditions of approval for the Project include a requirement to extend a new, two-
4 lane street with eight-foot shoulders to the new bridge.³ AR 46712, 45906, 614. The Harmony
5 plan itself locates high-density residential use and a commercial “overlay” at the southeast
6 corner of the Harmony site—precisely where the Mill Creek Bridge would provide access to the
7 development for shoppers from neighboring City of Redlands and San Bernardino County. AR
8 16276, 16323. Despite all of this, the EIR maintains that the Mill Creek Bridge is not a part of
9 the Project and the City was thus not obligated to evaluate its impacts. AR 15618.⁴ The evidence
10 clearly demonstrates otherwise: the Mill Creek Bridge is integral to the Harmony development.
11 CEQA thus required the City to analyze it as a part of the Project.

12 The Supreme Court has held that an EIR must include analysis of the environmental
13 effects of any aspect of a proposed project if it is a “reasonably foreseeable consequence” of the
14 rest of the project, and if this aspect will likely change the scope or nature of the overall project
15 or its environmental effects. *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*
16 (1988) 47 Cal.3d 376, 396 (“*Laurel Heights*”). The Mill Creek Bridge plainly meets this
17 standard: it is not only “reasonably foreseeable” (*see, e.g.*, AR 48271), it is explicitly “likely,”
18 according to the City (AR 29006). The bridge is a clear expansion of the Project’s scope, and the
19 Habitat Assessment shows that it would increase environmental impacts. AR 29006, 39458-592,
20 40865-67.

21
22 ³ The condition originally required the Developer to “extend ‘B’ Street [within the Project] *to*
23 *the new bridge* with partial street improvements with a 40’ wide structural section to include two
24 12’ through lanes and two 8’ wide paved shoulders.” AR 45906 (emphasis added). In October
25 2015, City staff reworked this draft condition to delete just the reference to the Mill Creek
26 Bridge, while preserving the requirement that the Developer “extend ‘B’ street to the
southeasterly boundary of the Specific Plan near Fish Hatchery Road with partial street
improvements with a 40’ wide structural section to include two 12’ through lanes and two 8’
paved shoulders.” AR 46712; *see generally* AR 46701-32. The City’s revision cannot hide the
condition’s effect: connecting the development to the bridge.

27 ⁴ In response to public comments, the FEIR included a brief appendix discussing conceptually
28 the proposed bridge and anticipated biological issues it would raise, including the requirement to
obtain a Section 404 dredge-and-fill permit from the United States Army Corps of Engineers
and “take permits” under the federal Endangered Species Act.” AR 29006, 40865-67.

1 Since *Laurel Heights*, courts have construed the “reasonably foreseeable consequences”
2 test to require that an EIR address not only a future expansion of a project, but also related
3 actions. *See, e.g., Banning Ranch*, 211 Cal.App.4th at 1222-23. The *Tuolumne* case shows even
4 more precisely how the Bridge is a part of the Project that EIR should have reviewed. In
5 *Tuolumne*, an EIR considered a new Lowe’s home improvement center but excluded the
6 construction of adjacent roadway improvements, including realignment of a road and installation
7 of a signalized intersection. *Tuolumne*, 155 Cal.App.4th at 1218-20. the Court of Appeal found
8 that the omission rendered the EIR inadequate. *Id.* at 1231. The lead agency in *Tuolumne* argued
9 that it had independent plans for the roadway improvements, as shown in its general plan
10 circulation element, and therefore should be able to conduct separate environmental review for
11 those improvements. *Id.* at 1227-28. The Court of Appeal disagreed, finding that “there is a
12 strong connection between the road realignment and the completion of the proposed home
13 improvement center,” and therefore the two endeavors “are part of a single CEQA project.” *Id.*
14 at 1226.

15 The court cited the linkages between the roadway and Lowe’s. Because the Lowe’s
16 center, which was approved before the realignment, was conditioned upon completion of the
17 roadway improvements, the projects were legally linked. *Id.*; *see also Plan for Arcadia*, 42
18 Cal.App.3d at 720, 726 (shopping center and related roadway improvements are “single project”
19 under CEQA). Additionally, the court noted that “the road realignment and the proposed home
20 improvement center are related in: (1) time, (2) physical location and (3) the entity undertaking
21 the action.” 155 Cal.App.4th at 1227.

22 *Tuolumne* is directly on point: here, the Mill Creek Bridge and the rest of the Project are
23 similarly linked. First, the Harmony development is legally linked to the bridge by the City’s
24 condition of approval, requiring the Developer to construct a road right up to where the Bridge
25 will begin. AR 45906, 46712. Second, the projects are related in time: the City intends to launch
26 the bridge immediately upon approval of the Harmony Specific Plan. AR 44435; *see also* AR
27 44486, 45114. Third, the Harmony development and Mill Creek Bridge are physically linked:
28 the Harmony development’s circulation plan allows for a bridge over Mill Creek (AR 16523) to

1 provide an “exit point” (AR 29006) from the Project site to SR-38. AR 29010. The bridge would
2 exist to serve the development’s approximately 12,000 new residents, including the high-density
3 residential and commercial uses planned at the southeast corner of the site. AR 16772, 16515;
4 *see also* AR 16276, 16323. The bridge will exist solely to serve the Harmony development.

5 That the bridge would be proposed by the City in consultation with other local agencies
6 (AR 16523), as opposed to the Harmony Developer, is irrelevant. CEQA precedent clarifies that
7 single projects (requiring environmental review) routinely involve individual components
8 undertaken by separate entities. *See Bozung v. Local Agency Formation Com.*, (1975) 13 Cal.3d
9 263, 283-85, superseded by statute on other grounds (EIR for LAFCO annexation must analyze
10 impacts of development project to be undertaken by developer and approved by city). Cases
11 regularly hold that projects were improperly “piecemealed” even though the two actions under
12 review were to be completed by different entities. *See, e.g., id.*; *Plan for Arcadia*, 42 Cal.App.3d
13 at 720, 726 (parking lot and road widening undertaken by separate entities must be regarded as
14 same project as developer’s shopping center); *RiverWatch v. Olivenhain Municipal Water Dist.*
15 (2009) 170 Cal.App.4th 1186, 1195-96, 1203 (recycled water delivery conducted by different
16 entity must be reviewed as part of developer’s “project”); *San Joaquin Raptor/Wildlife Rescue*,
17 27 Cal.App.4th at 731-32. The logic of *Tuolumne* thus shows that the Harmony EIR should have
18 included the Mill Creek Bridge.

19 *Banning Ranch*, another case applying the “reasonably foreseeable consequence” test,
20 provides a counterexample. There, the court addressed a piecemealing claim involving two
21 actions: (1) approval of a city park, including an access road connecting to a proposed adjacent
22 residential development; and (2) that adjacent development. 211 Cal.App.4th at 1216-17.
23 Petitioners challenged the EIR covering the city park and access road, arguing that it should
24 have included the residential development as well. *Id.* at 1219-20. The court held that while the
25 residential development was reasonably foreseeable and would change the scope of the park
26 project’s environmental effects, it was not the “consequence” of the park project because “the
27 park’s access road is only a baby step toward the [development] project.” *Id.* at 1225. Thus, it
28 would be a “stretch to say the [adjacent development] is a consequence of the access road.” *Id.*

1 at 1226.

2 No such stretch is required here. The facts in this case are the reverse of *Banning Ranch*,
3 and are much closer to the Lowe’s center and road improvements in *Tuolumne*. The Mill Creek
4 Bridge, once built, will exist only to serve the 3,632-unit, 1,657-acre Harmony development.
5 Where the *Banning Ranch* court reasoned that the park access road did not “induce” the adjacent
6 residential development because the development had already been planned (*id.* at 1226), here
7 the Harmony development directly precipitates commencement of the bridge. AR 44435 (bridge
8 design would start immediately after project approval); *see also* AR 44486, 45114. And while
9 the *Banning Ranch* court found the access road would only “relatively modestly” further the
10 development project (211 Cal.App.4th at 1226), here the Harmony development is *the sole*
11 *reason* for the bridge. Because the bridge has no purpose other than to serve the Harmony
12 development, it was a part of the Project and CEQA requires the EIR to consider it. *Laurel*
13 *Heights*, 47 Cal.3d at 396.

14 The EIR misconstrues the meaning of “consequence” when it declares that the Harmony
15 development does not “necessitate” the Mill Creek Bridge in order to mitigate the
16 development’s traffic impacts. AR 17095. The City focusses on mitigation and appears to claim
17 that the bridge would be part of the Project only if the residential project could not exist without
18 it. But that is backwards. Under *Laurel Heights*, the correct question here is whether the bridge
19 would be built but for the Harmony development—not whether the development could exist
20 without the bridge. It does not matter whether the City *could* build the Harmony development
21 without the bridge, but whether it is actually doing so. *Tuolumne*, 155 Cal.App.4th at 1230-31
22 (“[T]he possibility that two acts could be taken independently of each other is not as important
23 as whether they actually will be implemented independently of each other.”). Here, the Harmony
24 development will lead to bridge design and construction. Moreover, unlike in *Banning Ranch*,
25 there is no evidence that the City has any independent plans to construct the bridge. The bridge,
26 therefore, is a reasonably foreseeable consequence of the Harmony development. CEQA
27 required that the EIR fully review the consequences of both developments prior to the City
28 Council’s approval.

1 **B. The EIR’s Project Description Was Legally Inadequate and as a Result the**
2 **EIR Failed to Provide Sufficient Analysis.**

3 Although the bridge is a direct, reasonably foreseeable consequence of the Harmony
4 development, the EIR excludes it from its description of the Project and from its analysis of
5 Project impacts. When an EIR fails to disclose the “true scope” of a project because it
6 “concealed, ignored, excluded, or simply failed to provide pertinent information” regarding the
7 reasonably foreseeable consequences of the project, then the EIR is inadequate as a matter of
8 law. *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-
9 83 (“CBE”) (citation and internal quotation marks omitted); *San Joaquin Raptor*, 27 Cal. App.
10 4th at 729–30 (“truncated project concept” violates CEQA and mandates the conclusion that the
11 lead agency did not proceed in the manner required by law). Furthermore, an inaccurate or
12 incomplete project description renders the analysis of significant environmental impacts
13 inherently unreliable.

14 The EIR’s project description was defective because it not only failed to disclose that
15 Mill Creek Bridge is part of the Project, it expressly denied this fact. AR 16523. The EIR’s
16 failure to adequately describe the Project violated CEQA. *CBE*, 184 Cal.App.4th at 82, 89.
17 Omitting analysis of the impacts from certain Project components grossly underestimated the
18 scope of the Project’s true impacts. The complete Project, with the Bridge, will have greater
19 impacts than the truncated version that the EIR analyzes: its impacts related to climate-
20 disrupting emissions, toxic air contaminant emissions, traffic, flooding, and, especially,
21 biological resources will all be greater. *See, e.g.*, AR 39458-592 (Habitat Assessment showing
22 sensitive communities in area of bridge). By allowing environmental analysis and approval of
23 the Harmony development to proceed without including Mill Creek Bridge in the “whole” of the
24 Project, the City violated one of the most basic precepts of CEQA: that an EIR must analyze and
25 mitigate the “interactive” impacts of connected activities. *Tuolumne*, 155 Cal.App.4th at 1230-
26 31.

27 Furthermore, if an EIR does not “adequately apprise all interested parties of the true
28 scope of the project for intelligent weighing of the environmental consequences of the project,

1 informed decisionmaking cannot occur under CEQA.” *CBE*, 184 Cal.App.4th at 82-83. Even if
2 the Harmony EIR were adequate in all other respects, its use of a “truncated project concept”
3 violates CEQA and mandates the conclusion that the City did not proceed in the manner
4 required by law. *San Joaquin Raptor*, 27 Cal.App.4th at 729-30.

5 An EIR must consider both alternative versions of the project and mitigation measures
6 that could reduce or avoid its adverse impacts. Pub. Resources Code § 21002; Guidelines §
7 15002(a)(3). The feasible alternatives and mitigation measures for just the Harmony Specific
8 Plan would be different from those considered in the context of the complete Project. For
9 example, if the EIR analyzed the entire Project, the City could have coordinated to avoid
10 impacts to sensitive biological resources, such as by relocating the Harmony development’s
11 connection to the bridge. *See Tuolumne*, 155 Cal.App.4th at 1230. Moreover, if two pieces of a
12 project “are analyzed in sequence” rather than together, “the opportunity to implement effective
13 mitigation measures as part of the first matter may be lost.” *Id.* The EIR’s failure to include the
14 Mill Creek Bridge thus fatally distorted its analyses. This flaw, as a matter of law, invalidates
15 the City’s approval of the Project.

16 **III. The EIR Failed to Fully Disclose and Properly Evaluate the Significance of the**
17 **Project’s GHG Emissions.**

18 CEQA requires a lead agency to make a “good-faith effort” to “describe, calculate, or
19 estimate the amount of [GHG] emissions resulting from a project.” CEQA Guidelines
20 § 15064.4(a). After making that effort, the lead agency must assess “the significance of
21 greenhouse gas emissions” and should consider “[t]he extent to which the project may increase
22 or reduce greenhouse gas emissions as compared to the existing environmental setting [and
23 w]hether the project emissions exceed a threshold of significance that the lead agency
24 determines applies to the project.” *See Newhall Ranch*, 62 Cal.4th at 217 (quoting CEQA
25 Guidelines § 15064.4).

26 Here, the City relied on two thresholds to conclude that the Project’s GHG emissions
27 would be less than significant: (1) whether the Project would “achieve consistency with AB 32’s
28 emission reduction goals,” including compliance with “the applicable regulatory programs

1 designed to achieve AB 32’s goals” (AR 16799), and (2) whether the Project would conflict
2 with the 2012 Regional Transportation Plan/Sustainable Communities Strategy (the
3 “RTP/SCS”) insofar as this plan was adopted for the purpose of reducing GHG emissions in the
4 Southern California Association of Governments (“SCAG”) region (AR 16808).⁵ The EIR
5 determined that the Project’s GHG impacts would be consistent with both AB 32 and the
6 RTP/SCS, and this basis concludes that such impacts would be less than significant. AR 16471,
7 16799, 16808. This conclusion cannot stand.

8 First, the EIR improperly relied on the same defective analysis that the California
9 Supreme Court rejected in 2015 in *Newhall Ranch*: it assumes without the required supporting
10 evidence that the Project is consistent with the statewide GHG reduction goals of AB 32 because
11 the Project makes a reduction in emissions that is slightly larger than the reduction AB 32
12 requires across all industries throughout California. *Newhall Ranch*, 62 Cal.4th at 216, 227.
13 Second, the EIR fails as an informative document by claiming, without evidence, that the
14 Project would not impede the goals of Executive Orders B-30-15 and S-3-05. AR 16802. Third,
15 the EIR fails to use meaningful criteria to evaluate the Project’s consistency with the RTP/SCS,
16 specifically passenger vehicle CO2 emissions reduction goals. AR 36119.

17
18 **A. The EIR Relies on a Legally Invalid Methodology to Conclude the Project
Would Comply with AB 32.**

19 Determining whether or not a project may result in a significant adverse environmental
20 effect is a key task of an EIR. CEQA Guidelines § 15064(a) (determination of significant effects
21 “plays a critical role in the CEQA process”). One of the factors for determining the significance
22 of project GHG impacts in the Guidelines is whether the project “may increase or reduce
23 greenhouse gas emissions as compared to the existing environmental setting.” CEQA Guidelines
24 § 15064.4(b)(1).

25 Four state regulations are central to the GHG analysis in the EIR. The first is AB 32,
26

27 ⁵ This second aspect of the EIR’s GHG analysis is addressed in Part IV, *infra*, along with
28 Petitioners’ other challenges to the EIR’s finding that the Project is consistent with the
RTP/SCS. *See* AR 17213-23.

1 signed into law in 2006, which directed the California Air Resources Board (the “Air Board”) to
2 set a GHG emission limit based on 1990 levels, to be achieved by 2020. AR 16750. In 2011, the
3 Air Board adopted a Scoping Plan for achieving these GHG reductions. AR 16751. The Scoping
4 Plan establishes an overall framework for future measures to reduce GHG emissions for various
5 types of emissions. *Id.* The Air Board determined that achieving 1990 emission levels by 2020
6 would require a 28.5% reduction statewide in current GHG emissions below the levels the state
7 would emit without AB 32’s implementing regulations—the hypothetical “business as usual”
8 (“BAU”) scenario. *Id.*

9 Second and third, AB 32 was bookended by two Executive Orders setting additional
10 statewide GHG emission reduction targets beyond 2020. Executive Order S-3-05 (2005) set a
11 goal of, in pertinent part, reducing GHG emissions to 80 percent below 1990 levels by 2050. AR
12 16749. Executive Order B-30-15 (2015) set an additional, interim goal of reducing GHG
13 emissions to 40 percent below 1990 levels by 2030. *Id.*

14 Fourth, Senate Bill (“SB”) 375 (Chapter 728, Statutes of 2008) provides a process to
15 coordinate land use planning, regional transportation plans, and funding priorities to help the
16 state reach the GHG reduction goals of AB 32. AR 16749-50. SB 375 mandated that each of the
17 state’s regional Metropolitan Planning Organizations, such as SCAG, include in its Regional
18 Transportation Plan a Sustainable Communities Strategy to coordinate regional transportation
19 and land use plans in order to promote compact, transit-oriented communities that will help the
20 state achieve its GHG reduction targets by reducing vehicle miles traveled (“VMT”). AR 16750;
21 *see also* AR 36122-23. “The goals and policies of the RTP/SCS that reduce VMT focus on
22 transportation and land use planning that include building infill projects, locating residents
23 closer to where they work and play and designing communities so there is access to high quality
24 transit service.” AR 16750. SCAG adopted the RTP/SCS in 2012. *Id.* To help achieve SB 375’s
25 goal, and the overarching goal of AB 32, the RTP/SCS sets a standard of reducing per-capita
26 passenger-vehicle CO2 emissions by 9% below 2005 levels by 2020, and by 16% below 2005
27 levels by 2035. AR 36119.

28 Within this regulatory environment, the EIR claims that the approximately 83,000 metric

1 tons of CO2 equivalent (“MTE”) per year, produced in part by the Project’s 3,600-plus homes
2 and 165 million VMT each year (AR 16797-98), would meet each of these standards.
3 AR 16798. Looking to the 28.5% reduction target in the AB 32 Scoping Plan, the EIR concludes
4 that the Project’s GHG emissions would be less than significant because they amount to an
5 approximately 28.66% reduction below the BAU scenario, which it claims is more than AB 32
6 requires. AR 16798-99. However, this approach improperly measures the Project’s purported
7 emissions reduction against the reduction AB 32 requires of the entire state, thus relying on the
8 same defective analysis that the California Supreme Court rejected in 2015 in *Newhall Ranch*
9 (62 Cal.4th at 216, 227-29), as further explained in Part III.A.1 below.

10 *Newhall Ranch* also suggested some hypothetical methodologies that agencies *could*
11 employ to try to establish consistency with AB 32. *Id.* at 228-29 (stating, however, that these
12 approaches would not necessarily satisfy CEQA’s demands as to any particular project). Thus,
13 as an independent basis for determining AB 32 consistency, the EIR attempts to rely on
14 demonstrating compliance with applicable statewide and local regulatory programs designed to
15 achieve AB 32’s goals. *See* AR 16771. Part III.A.2 below explains that the EIR fails to actually
16 establish the Project’s consistency with these regulations (and therefore with AB 32); it instead
17 simply assumes consistency because regulated entities’ compliance with these regulations is
18 required statewide. CEQA prohibits relying on such an assumption to reach a significance
19 conclusion for a particular Project. The EIR thus fails to establish the Project’s consistency with
20 AB 32 by any acceptable method.

21
22 **1. The EIR Improperly Compares the Project’s Purported GHG
Reductions to the Level of Required Reductions Required Statewide.**

23 An EIR may compare a project’s expected GHG emissions to the emissions the project
24 would cause without regulations aimed at meeting the AB 32 goals—the hypothetical BAU
25 scenario discussed earlier. *Newhall Ranch*, 62 Cal.4th at 225. But it may not simply assume that
26 because the Air Board determined that statewide GHG emissions must shrink by 28.5% to meet
27 those goals, any project whose projected GHG emissions are at least 28.5% below the BAU
28 scenario is automatically consistent with AB 32. *Id.* at 216, 227. New housing projects like the

1 one at issue here may need to make deeper reductions below BAU, because existing emissions
2 sources—the installed base of housing and other sources—will not necessarily be able to make
3 the 28.5% reduction. *Id.* at 226.⁶ Thus, *Newhall Ranch* calls on lead agencies for new
4 development projects to demonstrate by substantial evidence that their project’s GHG emissions
5 reduction below BAU is sufficient to actually advance the overall 28.5% statewide reduction. *Id.*
6 at 226-27.

7 The Project’s EIR boldly asserts that it contains the evidence needed to fill this analytical
8 gap. AR 16771. It does not. The EIR asserts that the Air Board subsequently decreased the
9 28.5% statewide reduction target to 16%, and then again in 2014 to 15.3%, in light of the state’s
10 progress toward the AB 32 goal. AR 16752-53, 16771. Thus, the EIR claims, its analysis is
11 “conservative for continuing to use the higher 28.5 percent reduction when there is substantial
12 evidence that statewide emissions have decreased such that the [EIR] could have used lower
13 emission targets as part of its analysis.” *Id.* at 16771. But the EIR must support the analysis it
14 includes, not the analysis it might have included. Because the EIR relies on the 28.5% reduction
15 target to claim consistency with AB 32, later reductions of the target do not save the EIR’s
16 analysis. In any event, comparing a claimed Project-specific GHG emission reduction to a
17 statewide reduction target is precisely the methodology that *Newhall Ranch* discredited. The
18 fault in the EIR’s analysis is not that the Project’s claimed reduction below BAU would fall
19 short of the 28.5% target, but rather that 28.5% is the wrong kind of target for a new
20 development like this one, as *Newhall Ranch* makes clear.

21 The EIR lacks critical facts: if the EIR is going use the statewide reduction as the
22 measure of the Project’s reduction, *Newhall Ranch* requires that it provide substantial evidence
23 that the statewide 28.5% reduction would apply equally to the Project as to *existing* building
24 stock. 62 Cal.4th at 222. The Harmony EIR does not include such evidence. Thus it cannot
25 justify a comparison of the Project’s emission reductions to a statewide reduction target, whether

26 ⁶ Per *Newhall Ranch*, expectations for minimizing emissions from new development, through
27 energy efficiency, renewables, increased density, mixed use and siting close to transit, should be
28 greater than from existing development, where emission reduction opportunities may be more
constrained. See *Newhall Ranch*, 62 Cal.4th at 226.

1 that statewide target is 28.5%, or any other figure. *See* AR 16771. Without this evidence, the
2 EIR’s cannot show that the Project’s GHG emissions are sufficiently reduced from the BAU
3 scenario to advance the statewide goals. And without a showing of that reduction, the record
4 cannot support the EIR’s conclusion that Project-level GHG impacts would be consistent with
5 AB 32 and thus less than significant.

6 Instead of marshalling the evidence that *Newhall Ranch* requires, the City argues that its
7 reliance on the 28.5% reduction requirement is justified by a report from the Bay Area Air
8 Quality Management District (“Bay Area District”). The Bay Area District set out to develop a
9 Bay Area–specific GHG reduction metric for AB 32 compliance. AR 16771; *see also* AR
10 16805; 36043-44. As part of these efforts, it disaggregated the 28.5% reduction target and
11 determined that the Air Board’s Scoping Plan assumed a 26.2% reduction just for land-use
12 driven emissions statewide. *Id.* The City here takes this to mean that any new land use project
13 must simply make a 26.2% reduction from BAU in order to advance the statewide reduction.
14 Thus, the City claims, by exceeding the overall 28.5% reduction, the Project does more than
15 necessary to achieve consistency with the required reduction for the land-use sector. AR 16771,
16 16805.

17 The Supreme Court, however, has already rejected an identical claim in *Newhall Ranch*,
18 specifically the claim that less reduction (26.2% below BAU) is required from new development
19 than from the state as a whole. There, the California Department of Fish and Wildlife (“DFW”)
20 could not rely on the 26.2% land-use sector reduction because “no expert opinion stat[ed]
21 generally that the Scoping Plan contemplates the same emission reductions from new buildings
22 as from existing ones.” *Newhall Ranch*, 62 Cal.4th at 226. Here, the City’s EIR consultant
23 attempts to rehabilitate the 26.2% reduction by claiming that the Bay Area District “implicit[ly]
24 assert[ed]” that the necessary reductions from new and existing construction would be the same,
25 based on the fact that the District did not distinguish between these two kinds of development in
26 establishing its emissions threshold. AR 36044. Such an implication, if it even exists, is not
27 substantial evidence. Pub. Resources Code § 21082.2(c) (“[a]rgument, speculation,
28 unsubstantiated opinion or narrative, [and] evidence which is clearly inaccurate or erroneous”

1 does not constitute substantial evidence); *see also Newhall Ranch*, 62 Cal.4th at 227.

2 In sum, by finding that the AB 32 GHG emission reduction target would be achieved
3 because Project emissions are purportedly reduced by more than 28.5% below BAU, the EIR’s
4 significance determination does not reflect “careful judgment . . . based to the extent possible on
5 scientific and factual data.” CEQA Guidelines § 15064(b). It is invalid, as is the Project approval
6 adopted in reliance on the EIR.

7 **2. The EIR Lacks Substantial Evidence to Find That the Project Would**
8 **Be Consistent with AB 32 Through Compliance with Regulatory**
9 **Programs Designed to Achieve Its Goals.**

10 The Final EIR, in response to *Newhall Ranch*, incorporated a new, independent method
11 of demonstrating the Project’s consistency with the AB 32’s reduction targets: “a combination
12 of consistency with the quantitative emission reduction targets and compliance with applicable
13 statewide and local regulatory programs designed to reduce GHG emissions consistent with AB
14 32.” AR 16771. The EIR takes this approach from language in *Newhall Ranch*, where the Court
15 “briefly address[es] some of the potential options for . . . lead agencies faced with evaluating the
16 cumulative significance of a proposed land use development’s greenhouse gas emissions,”
17 including “assess[ing] consistency with AB 32’s goal in whole or part by looking to compliance
18 with regulatory programs designed to reduce greenhouse gas emissions from particular
19 activities.” *Newhall Ranch*, 62 Cal.4th at 228-29.

20 The EIR fails to demonstrate compliance with AB 32 using this method. The EIR
21 considers eight categories of GHG emissions: construction; vegetation changes; area sources
22 (e.g., lawn mowers or natural gas fire places); energy use; public lighting; water supply,
23 treatment, and distribution; solid waste; and mobile source emissions (vehicles). AR 16772,
24 16776. It then claims to identify for each the “applicable regulatory measures designed to reduce
25 GHG emissions from particular activities consistent with AB 32,” and to “discuss[] the Project’s
26 compliance with the same.” AR 16777. The EIR neither identifies appropriate regulatory
27 measures nor offers adequate discussion.

28 For example, the EIR’s discussion of relevant measures “designed to achieved AB 32’s
goals” (AR 16779) with regard to construction states:

1 [United States Environmental Protection Agency] and [National Highway Traffic
2 Safety Administration] have adopted standards for CO2 emissions and fuel
3 consumption. . . . [T]his program will reduce GHG emissions and fuel
4 consumption for affected vehicles by 6 percent to 23 percent As the Project
5 must comply with the applicable regulations imposed by law relative to
6 construction emissions sources, the Project is consistent with the applicable
7 regulatory programs designed to achieve AB 32’s goals.

8 AR 16778-79. Neither this discussion—which discloses that these federal programs might
9 reduce GHG emissions from construction vehicles by as little as 6%—nor the EIR’s separate
10 summary of these federal programs (AR 16745-46) even attempts to demonstrate that these
11 programs are intended to meet AB 32’s goals, let alone whether they are capable of doing so.
12 *See Newhall Ranch*, 62 Cal.4th at 229 (recommending demonstration of project’s compliance
13 with “regulations outlined in the Scoping Plan and adopted by the Air Board or other state
14 agencies”).

15 Similarly, for each GHG emission category it identifies, the EIR simply offers a
16 conclusory statement that any applicable regulations designed to achieve AB 32’s goals will
17 ensure that the Project will advance those goals because it “must comply” with them. *See* AR
18 16779 (construction emissions sources), 16783 (area sources), 16784 (public lighting), 16785
19 (energy use), 16790 (water conservation), 16792 (solid waste reduction), 16794 (mobile source
20 emissions). The cited regulations, however, are not always actually applicable. For example, the
21 mobile source regulations cited include AB 1493 (the “Pavley Standard”), requiring the Air
22 Board to adopt regulations to reduce GHG emissions from passenger vehicles; Executive Order
23 S-01-07, requiring a 10 percent or greater reduction by 2020 in the average fuel carbon intensity
24 for transportation fuels; and the statewide cap-and-trade program implementing AB 32.

25 AR 16793-94. None of these actually regulate the construction or operation of a land-use
26 project—there is nothing for the Project to comply with.⁷

27 ⁷ The Court of Appeal’s recent decision in *Association of Irrigated Residents v. Kern County*,
28 2017 Cal.App. LEXIS 1037, is not to the contrary. There, the Court of Appeal held that in the
narrow instance where a refinery project expressly demonstrated compliance with cap-and-trade,
an EIR could rely on such compliance to find the project consistent with AB 32. 2017 Cal.App.
LEXIS 1037, *43, 48. Here the EIR for the Project explicitly *did not* rely on compliance with
(footnote continued on next page)

1 Nonetheless, the EIR claims that because the Project “must comply” with these programs,
2 its reduction in mobile source emissions, the largest share of the Project’s GHG emissions,
3 would be consistent with AB 32. AR 16794. Under *Newhall Ranch*, however, the City may not
4 merely point to these regulations’ existence as evidence that the Project would comply with AB
5 32; indeed, the Court explained that because “transportation emissions are affected by the
6 location and density of residential and commercial development, the Scoping Plan . . . relies
7 instead on *local governments* . . . [to] evaluat[e] a land use project’s impact on greenhouse gas
8 emissions.” 62 Cal.4th at 229 (emphasis added). Although the EIR asserts the Project would
9 comply with the RTP/SCS as a basis for claiming consistency with AB 32 (AR 16794), this
10 claim lacks merit for the reasons described in Part IV, below. The EIR thus fails to demonstrate
11 the Project’s consistency with any mobile source emissions standard that might point to
12 compliance with AB 32.

13 Finally, there is no substantial evidence in the administrative record that, even if the
14 Project *were* to comply with all of the listed regulatory measures, the Project’s GHG emissions
15 could achieve AB 32’s goals. *Newhall Ranch* states that assessing compliance with regulatory
16 programs designed to reduce GHG emissions from particular activities might demonstrate
17 consistency with AB 32’s goal either “in whole or part.” 62 Cal.4th at 228-29. Compliance with
18 these regulations does not by itself show that the Project would comply with AB 32. Without
19 substantial evidence that even full regulatory compliance would equal consistency with AB 32
20 (and evidence that the Project could achieve this), the EIR could not legally conclude the Project
21 in consistent with AB 32 and that its GHG impacts are less than significant.

22 **B. The EIR Fails to Adequately Assess the Project’s Inconsistency with**
23 **California’s Post-2020 Goals for Reducing GHG Emissions.**

24 Despite the fact that the Project will be fully built out “well after 2023 “ (AR 16772), and
25 certainly will continue in operation for many years after that date, the EIR fails to adequately
26

27 (footnote continued from previous page)
28 cap-and-trade (nor could it have) as evidence for the finding that GHG impacts would be less
than significant. AR 16757, 16794.

1 analyze the Project’s GHG impacts in the years following (*id.*). This approach violates CEQA.
2 The EIR purports to assess the Project against Executive Orders S-3-05 and B-30-15, but it fails
3 to meaningfully analyze the Project’s against either directive. AR 16800-02.

4 Instead, the EIR speculates that “[a]dditional GHG-reducing control measures are likely
5 to be introduced and implemented over time” and that “some of these measures are likely to
6 reduce the Project’s GHG emissions.” AR 16800; *see also* AR 16801 (citing sources stating that
7 California is already “well positioned” to continue reducing its emissions in line with the
8 reduction goals set forth in the Executive Orders). Thus, the EIR concludes, the Project “will not
9 impede the achievement” of the Executive Orders and is “not inconsistent” with them.⁸ AR
10 16801-02. Yet, without a comparison of the Project’s numerical annual GHG emissions against
11 the long-term emission reduction goals in Executive Orders S-3-05 and B-30-15, the EIR’s
12 conclusion that the Project is “not inconsistent” with the Executive Orders lacks substantial
13 evidence.

14 The EIR defends its approach by asserting that the Executive Orders propose a goal
15 rather than impose a mandate, and by claiming not to actually rely on its analysis of the Project’s
16 consistency with the Executive Orders in reaching significance conclusions. AR 16800. The
17 Supreme Court, however, has rejected this rationale. *Cleveland National Forest Foundation v.*
18 *San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 515 (State’s long-term GHG reduction
19 goal “expresses the pace and magnitude of reduction efforts that the scientific community
20 believes necessary to stabilize the climate. This scientific information has important value to
21 policymakers and citizens.”) (internal citations omitted). The EIR identified the Executive
22 Orders as part of the regulatory setting and ultimately concluded, without evidence, that the
23 Project “will not impede the[ir] achievement.” AR 16801-02. Affirmative misrepresentation or
24 inaccuracy in an EIR violates CEQA. *See San Joaquin Raptor/Wildlife Rescue*, 27 Cal.App.4th
25 at 729. No evidence supports the conclusion that the Project is consistent with the Executive
26

27 ⁸ The EIR also bases this conclusion in part on the grounds that the Project is consistent with AB
28 32 and the RTP/SCS. Petitioners separately dispute each of these consistency determinations in
Part III.A, above, and Part IV, below.

1 Orders, and thus the invalid determination “deprive[s the] EIR of its sufficiency as an
2 informative document.” *Newhall Ranch*, 62 Cal.4th at 227 (quoting *Laurel Heights*, 47
3 Cal.App.3d at 392); *see also Cleveland National Forest Foundation*, 3 Cal.5th at 515.

4 **IV. The EIR Failed to Properly Evaluate the Project’s Inconsistencies with the 2012**
5 **RTP/SCS.**

6 The 2012 RTP/SCS provides a blueprint for the Southern California region’s
7 transportation network through 2035. AR 16749-50; *see* Gov. Code § 65080(a). The RTP/SCS
8 sets a standard of reducing per-capita passenger-vehicle CO2 emissions by 9% below 2005
9 levels by 2020, and by 16% below 2005 levels by 2035. AR 36119. The EIR attempts to address
10 the Project’s consistency with the RTP/SCS for two independent reasons. First, the EIR adopts
11 consistency with the RTP/SCS as a threshold of significance for evaluating the Project’s GHG
12 impacts. AR 16770, 16805-08; *see* CEQA Guidelines § 15064.4(b)(3). Second, the EIR attempts
13 to analyze the Project’s broader consistency with the RTP/SCS to comply with CEQA
14 Guidelines section 15125(d) (EIR must “discuss any inconsistencies between the proposed
15 project and . . . regional transportation plans”). AR 17213-23. In both respects, the EIR
16 concludes the Project is consistent with the RTP/SCS, but lacks substantial evidence for its
17 conclusions.

18 The Project does not even come close to doing its part to achieve the RTP/SCS’s
19 fundamental goal. The RTP/SCS’s sustainability directives “include[] land use strategies that
20 focus[] new growth and development in existing urbanized areas and opportunity areas
21 such as the high quality transit corridors where transit and infrastructure are already in
22 place.” AR 36122-23. RTP/SCS Goals G2 and G8 call for maximizing mobility and
23 accessibility for people and goods and for encouraging land use and growth patterns that
24 facilitate transit and non-motorized transportation. AR 17217-19. Goal G6 calls for jurisdictions
25 to “[p]rotect the environment and health for our residents by improving air quality and
26 encouraging active transportation.” AR 17218. Yet the Project would be developed far from, and
27 with limited connections to, the City’s core. Moreover, given these limited connections to the
28 rest of the region and lack of meaningful public transit, the Project would encourage reliance on

1 single-passenger vehicles. AR 17217. It would thus directly conflict with all of these RTP/SCS
2 goals.

3
4 **A. The EIR Lacks Substantial Evidence to Find that the Project’s Long-Term
GHG Emissions Would Be Consistent with the RTP/SCS.**

5 CEQA requires the lead agency to determine the extent to which the project complies
6 with regulations adopted to implement a statewide, regional, or local plan to reduce or mitigate
7 GHG emission. Guidelines § 15064.4(b)(3). Here, the City analyzed the Project’s consistency
8 with the RTP/SCS. AR 16805-08. The chief emission-reduction performance target of the
9 RTP/SCS is to decrease per-capita passenger-vehicle CO2 emissions by 9% below 2005 levels
10 by 2020, and by 16% below 2005 levels by 2035. AR 36119.

11 The EIR discloses that the Project will result in a substantial increase in VMT: 165
12 million additional miles traveled per year of operation, compared to existing conditions. AR
13 16797. Thus, associated CO2 emissions will increase when compared with the existing
14 environment. AR 16798. The EIR, however, completely ignores both this increase in VMT and
15 the RTP/SCS’s reduction goals. Instead, it cherry-picks the RTP/SCS to select a different,
16 seemingly irrelevant standard, the Project’s role in allocating projected regional growth within
17 the City’s jurisdiction (AR 16805-06), for measuring consistency with the RTP/SCS. It
18 concludes on this feeble basis that the Project does not conflict with the RTP/SCS’s goals for
19 reducing VMT and associated GHG emissions, providing no actual analysis or relevant evidence
20 related to those key goals. AR 16808. The EIR completely disregards the substance of the
21 RTP/SCS and flouts CEQA’s mandate to analyze consistency with the Plan.

22 In a memorandum to the City addressing Petitioners’ comment on this issue in the FEIR,
23 the City’s consultant claimed that despite the increase in VMT and associated CO2 emissions
24 from current conditions, VMT and emissions will actually be less than under the BAU scenario
25 in 2020. AR 35958 (citing FEIR Table 5.7-J at AR 16798), 16799. But this BAU comparison is
26 only relevant to the question whether the Project would reduce emissions consistent with AB 32.
27 See AR 16798-99 (indicating Project will achieve “consistency with AB 32’s emission reduction
28 goals”). The RTP/SCS sets a different standard: it seeks emission reductions of 9% below 2005

1 levels by 2020, and 16% below 2005 levels by 2035. AR 36119. Because there is no
2 determination or evidence in the EIR that the Project complies with this more specific standard
3 in the RTP/SCS, the finding that the Project is consistent with the RTP/SCS lacked the required
4 support and thus violated CEQA.

5 **B. The EIR Lacks Substantial Evidence to Conclude that the Project Is**
6 **Consistent with the RTP/SCS’s Long-Range Vision for Sustainable Growth.**

7 The Project also conflicts with other core principles of the RTP/SCS, yet the EIR fails to
8 disclose or analyze these conflicts as CEQA requires. Guidelines § 15125(d). The Project will
9 build 3,632 residences on 1,657 acres well beyond the City’s urban core. AR 16513, 16772.
10 Single family and multifamily residences would make up roughly half of the site (658 acres)
11 while a comparatively miniscule 5.7 acres of the site is planned for “neighborhood commercial”
12 development providing “retail goods and services.” AR 16513. The Project site is isolated from
13 existing population and service centers. AR 16509-10. The site’s current connections to the
14 City’s developed center are limited to Greenspot Road, a two-lane road with no curb, sidewalks
15 or other roadway improvements, and Newport Avenue. AR 17217. The only public transit the
16 Project proposes are two bus stops. *Id.*

17 Yet, instead of acknowledging the Project would actually impede the compact, transit-
18 oriented communities that would help reduce VMT (AR 16749-50, 36122-23), the EIR
19 concludes that the Project is consistent with the RTP/SCS (AR 17223). The Project is plainly
20 inconsistent with RTP/SCS Goals G2 and G8, which respectively call for maximizing mobility
21 and accessibility for people and goods and for encouraging land use and growth patterns that
22 facilitate transit and non-motorized transportation. AR 17217-19. Attempting to show
23 consistency, the EIR asserts the Project creates a “safe environment for pedestrian movement
24 and bicycle traffic” and highlights that “[o]ff-street trails connect residential areas to open space
25 and off-site trails and recreational amenities.” AR 17217. The EIR repeatedly touts the Project’s
26 greenway as facilitating alternative transportation and reducing VMT. AR 32, 123, 233 (Specific
27 Plan excerpts); AR 1483, 1487, 1553, 1867 (DEIR excerpts); AR 15958, 16019, 16102 (FEIR
28 excerpts).

1 In reality, the Project’s paths and greenway will function largely as *recreation* facilities,
2 not as a means of getting people to actual destinations: the Project includes only a minimal
3 amount of commercial development that could reduce residents’ shopping trips to outlying
4 destinations. AR 16513. The only mass transit facilities available to residents will be two bus
5 stops for County bus service. AR 56, 16502, 17217. Thus the Project does little to provide
6 mobility and accessibility for residents. While encouraging outdoor recreation is a laudable goal,
7 doing so does not demonstrate consistency with RTP/SCS Goals G2 and G8.

8 The Project is also inconsistent with Goal G6, calling for jurisdictions to “[p]rotect the
9 environment and health of our residents by improving air quality and encouraging active
10 transportation.” AR 17218. Attempting to demonstrate consistency with this provision, the EIR
11 relies again on the fact that the Project includes a “pedestrian friendly environment” and
12 sidewalks. *Id.* These Project elements will undoubtedly provide a pleasant opportunity for
13 residents to recreate on-site, but they do little to address transportation needs to access
14 employment and regional services. SCAG’s definition of “active transportation” means peoples’
15 ability to walk, bicycle, use mass transit or some combination of the three as *transportation* with
16 the effect of reducing VMT, rather than merely *recreation*. AR 36122-23, 36127, 36132. The
17 site’s location and design will ensure that the majority of residents will continue to use
18 automobiles for virtually all of their transportation needs, thus contributing to worsening air
19 quality and public health.

20 The Project does not even come close to achieving the objectives of the RTP/SCS to
21 focus new growth and development in existing urbanized areas and high quality transit corridors
22 where transit and infrastructure are already in place. AR 36122-23. Thus, the EIR’s
23 determination of consistency with the RTP/SCS is without merit.

24 **V. The EIR Entirely Failed to Disclose, Analyze or Mitigate Flooding Impacts**
25 **Downstream from the Project Caused by Elevating Portions of the Project Site.**

26 The Project site’s complex existing hydrological conditions demand careful analysis. The
27 EIR, however, fails to address the Project’s significant hydrological impacts in two ways. First,
28 the EIR contains an incomplete and unstable description of the amount of earthmoving and fill

1 needed raise a portion of the residential and commercial development out of the 100-year
2 floodplain. Second, as a result of this flaw, the EIR fails to consider the on-site and downstream
3 impacts of the massive amount of grading the EIR suggests will be needed at the Project’s
4 southern boundary. When an EIR omits required information that relates to a project’s
5 potentially significant environmental impacts, the EIR is inadequate as a matter of law and the
6 court reviews the agency’s significance determination de novo. *Madera Oversight Coalition*,
7 199 Cal.App.4th at 76-77; *Clover Valley*, 197 Cal.App.4th at 211.

8 The 68 acres of the Project site within the currently mapped 100-year flood zone (AR
9 16877) at the southern edge of the site include proposed residential and commercial overlay
10 uses. The EIR states that “[a]s part of the Project any proposed residential or commercial land
11 use that is within the Zone A flood plain will be required to be graded and elevated so that they
12 are removed from the flood plain.” *Id.*; see also AR 565, 596 (conditions of approval requiring
13 Developer to obtain a FEMA Conditional Letter of Map Revision “acknowledging that the
14 proposed improvements remove the subject area from the flood plain” prior to issuance of
15 grading permit or recordation of tentative tract maps). The Project’s proposed grading plan
16 would raise the elevation of these planning areas by 20 feet. AR 16877, 37755. The EIR also
17 states that “all grading work will be balanced on-site. That is, no import or export of soil is
18 anticipated.” AR 16870. Thus, in order to raise the proposed residential and commercial uses out
19 of the 100-year floodplain, enough soil must be removed from other portions of the Project site
20 to raise the floodplain elevation by 20 feet wherever building will occur.

21 Yet, the EIR makes no attempt to estimate the amount of fill that will need to be moved
22 and placed to achieve this objective. In order for an EIR to adequately evaluate the
23 environmental ramifications of a project, it must first provide a comprehensive description of the
24 project itself. “An accurate, stable and finite project description is the sine qua non of an
25 informative and legally sufficient EIR.” *San Joaquin Raptor/Wildlife Rescue*, 27 Cal.App.4th at
26 730 (quoting *County of Inyo*, 71 Cal.App.3d at 193). As noted in the Baseline Report that
27 Petitioners submitted to the City, the EIR fails to indicate the “precise area of fill placement that
28 would be required to ensure that all ‘residential or commercial uses that lie within the Zone A

1 flood plain will be graded and elevated so that they are removed from the flood plain.” AR
2 37755-56. Thus, the EIR reader can reasonably assume that all 68 acres within the floodplain
3 would be raised by 20 feet. *Id.* This would result in placement of over 2 million cubic yards of
4 fill in the floodplain (*id.*), and removal of an equivalent amount of soil from elsewhere on the
5 site. But the EIR never acknowledges this fact or any other amount of earthmoving required for
6 the Project. It therefore fails even to consider the potential impacts of these measures.

7 Despite this missing information’s import to determining the Project’s onsite and
8 downstream flooding impacts, the EIR finds that “raising the floodplain in the identified
9 residential and commercial land uses would not redirect flood flows.” AR 16877. The EIR
10 asserts without explanation that the floodplain’s location “along the southern boundary of the
11 Project site and on the northerly side of Mill Creek” (*id.*) leads to this conclusion. The Project’s
12 conceptual drainage plan (AR 16865-67), furthermore, does not mention any amount of fill to
13 raise the proposed development out of the floodplain. As the Baseline Report explained, “No
14 analysis in the EIR . . . quantifies the amount of fill that would be placed in the floodplain or
15 describes how [fill in the floodplain] might affect floodplain storage capacity or impact
16 downstream flood-prone areas . . . including Redlands, Mentone, San Bernardino, and Colton.”
17 AR 37756; *see* AR 37728. As a result, “[t]he EIR fails completely to identify this potential
18 impact and since the issue is not even identified, offers no analysis to demonstrate the severity
19 of the impact or needed measures to mitigate it.” AR 37756. The absence of substantial evidence
20 in the administrative record to support the EIR’s determination of no impact violates CEQA.
21 Pub. Resources Code § 21082.2(c); *Newhall Ranch*, 62 Cal.4th at 227; *Californians for*
22 *Alternatives to Toxics v. Dept. of Food & Agriculture* (2005) 136 Cal.App.4th 1, 17
23 (“[C]onclusory statements do not fit the CEQA bill.”). Furthermore, this lack of analysis and
24 mitigation is inconsistent with the City of Highland General Plan Public Health and Safety
25 Element Policy 6.3-3, which states: “Require a drainage study be completed by a qualified
26 engineer prior to all proposed development to certify that the proposed development will be
27 adequately protected and that implementation of the development will not create new
28 downstream flood hazards.” AR 37728.

1 Confronted with the Baseline Report’s explanation of these fundamental CEQA flaws,
2 the City’s hydrology consultant took the unusual approach of attempting to persuade the City’s
3 decisionmakers to ignore the EIR. “[T]he flood plain for Mill Creek does not extend to the areas
4 the project proposes to develop for residential or commercial purposes,” states the consultant’s
5 memorandum to the City, and thus “the project will not deposit fill in the flood plain for
6 purposes of developing the residential and commercial components of the project.” AR 35621
7 (consultant letter, incorrectly dated “5/7/14,” responding to Petitioner Greenspot’s June 27, 2016
8 comments on the FEIR). Therefore, the consultant asserts, “the project will not have a
9 significant adverse impact on the flood capacity of Mill Creek nor will it have significant
10 adverse impacts on downstream properties as the comment letter speculates.” *Id.* A City staff
11 letter accompanying the consultant’s comments likewise states,

12 the extensive analysis included with the FEIR by experts who analyzed the
13 specifics of the Project and its surroundings, demonstrate that the flood plain for
14 Mill Creek does not extend to the areas the Project proposes to develop for
residential or commercial purposes. Thus, the Project will not deposit fill in those
areas.

15 AR 35957. These assertions are precisely contradicted by the EIR itself, which the City certified
16 as accurate. AR 437-38.

17 The City Council relied on the placement of fill to raise these portions of the site out of
18 the 100-year floodplain as a ground for certifying the FEIR and approving the Project. *Id.*
19 Because the EIR failed to disclose the amount of fill that the EIR states would be placed in the
20 floodplain, the City’s finding that the Project’s impacts on flooding on- and off-site would be
21 less than significant (*see* AR 435-36) failed to “bridge the analytical gap between the raw
22 evidence and ultimate decision.” *Topanga Assn. for a Scenic Community v. County of Los*
23 *Angeles* (1974) 11 Cal.3d 506, 515.

24 ///

25 ///

26 ///

27 ///

28 ///

1 **CONCLUSION**

2 For the reasons above, Petitioners respectfully request that this Court issue a judgment
3 granting their petition, and a writ of mandamus directing the City to set aside its Project
4 approvals until it fully complies with CEQA.
5

6 DATED: December 11, 2017

Respectfully submitted,

7 SHUTE, MIHALY & WEINBERGER LLP
8

9
10 By: 
11 _____
12 GABRIEL M.B. ROSS
13 JOSEPH D. PETTA

*Attorneys for Greenspot Residents Association
and San Bernardino Valley Audubon Society*

14
15 DATED: December 11, 2017

Respectfully submitted,

16 CENTER FOR BIOLOGICAL DIVERSITY
17

18
19 By:  GABRIEL ROSS FOR
20 ARUNA PRABHALA

Attorneys for Center for Biological Diversity

1 **PROOF OF SERVICE**

2 ***Greenspot Residents Association, et al. v. City of Highland, et al.***
3 **Case No. CIVDS 1615280**
4 **San Bernardino County Superior Court**

5 At the time of service, I was over 18 years of age and **not a party to this action**. I am
6 employed in the City and County of San Francisco, State of California. My business address is
7 396 Hayes Street, San Francisco, CA 94102.

8 On December 11, 2017, I served true copies of the following document(s) described as:

9 **PETITIONER GREENSPOT RESIDENTS ASSOCIATION AND SAN**
10 **BERNARDINO VALLEY AUDUBON SOCIETY AND CENTER FOR**
11 **BIOLOGICAL DIVERSITY'S OPENING BRIEF**

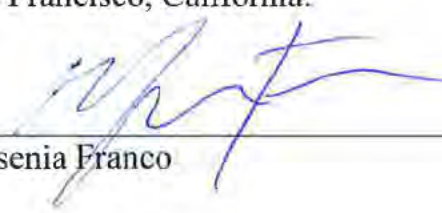
12 on the parties in this action as follows:

13 **SEE ATTACHED SERVICE LIST**

14 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
15 persons at the addresses listed in the Service List and placed the envelope for collection and
16 mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly &
17 Weinberger LLP's practice for collecting and processing correspondence for mailing. On the
18 same day that the correspondence is placed for collection and mailing, it is deposited in the
19 ordinary course of business with the United States Postal Service, in a sealed envelope with
20 postage fully prepaid.

21 I declare under penalty of perjury under the laws of the State of California that the
22 foregoing is true and correct.

23 Executed on December 11, 2017, at San Francisco, California.

24 
25 _____
26 Yesenia Franco
27
28

1 **SERVICE LIST**

2 ***Greenspot Residents Association, et al. v. City of Highland, et al.***
3 **Case No. CIVDS 1615280**
4 **San Bernardino County Superior Court**

5 Ginetta L. Giovinco
6 Stephen D. Lee
7 Richards Watson Gershon
8 355 South Grand Avenue, 40th Floor
9 Los Angeles, CA 90071-3101
10 Telephone: (213) 626-8484
11 Facsimile: (213) 626-0078
12 GGiovinco@rwglaw.com
13 Slee@rwglaw.com

Brian C. Fish
Dentons US LLP
4655 Executive Drive, Suite 700
San Diego, CA 92121-3128
Telephone: (619) 236-1414
Facsimile: (619) 236-1414
Brian.fish@dentons.com

14 ***Attorney for Respondents City of Highland;
15 City of Highland City Council***

***Attorney for Real Parties in Interest LCD
16 Greenspot, LLC; Orange County Flood
17 Control District; County of Orange; Orange
18 County Board of Supervisors***

19 Abigail Smith, Esq.
20 Law Offices of Abigail Smith
21 1455 Frazee Road, Suite 500
22 San Diego, CA 92108
23 Telephone: (951) 506-9925
24 Facsimile: (951) 506-9725
25 abby@socalceqa.com

26 ***Attorney for Co-Petitioner, Sierra Club,
27 Crafton Hills Open Space Conservancy, Tri-
28 County Conservation League, and Friends of
Riverside's Hills***

946134.12