

To: The Honorable Board of Supervisors of Ventura County

Regarding: The October 20, 2015 Appeal Hearing of the Planning Director's February 17, 2015 approval of minor modification of CUP 3344 (Case No. PL 13-0150)

The following is a letter brief in support of appellant Citizens for Responsible Oil and Gas (CFROG):

Summary

This appeal concerns whether the Planning Department abused its' discretion in approving the application to modify CUP 3344 (Case No. PL 13-0150) without first preparing a subsequent or supplemental EIR in accordance with California Public Resources Code § 21166, and Guidelines¹ § 15962.

It is submitted that the Planning Department's findings included in the Addendum that there have been no substantial environmental changes or pertinent new information of importance regarding potential environmental impacts from the project since the 1985 EIR is completely unsupported by the evidence.

The CEQA criteria requiring a subsequent or supplemental EIR are found in § 15162 of the Guidelines that states, in pertinent part,

“(a) When an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record, one or more of the following:

¹ CEQA Guidelines (California Code of Regulations, title 14, § 15000 et seq.) must be used by the public agency in implementing the Environmental Quality Act (Public Resources Code) (Cal. Code Regs. Tit. 14, § 15000.)

- (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
- (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or
- (3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
 - (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration...”

1. The recent listing of the Southern California Steelhead as an endangered species coupled with the evidence Southern California Steelhead have been found in the Santa Paula Creek by Drill Site 7 is sufficient proof of the criteria in Guideline § 15162 that require the Planning Department to prepare a subsequent or supplemental EIR

Where, as here, there has been a new listing of an endangered species since the preparation of the EIR, and there is substantial evidence that the species has been found near the project, those circumstances are in themselves sufficient to require the preparation of a supplemental EIR. (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 76 Cal.Rptr.3d 428 (*Moss*) [holding a subsequent or supplemental EIR was required for the recently listed coastal cutthroat trout where the record contained evidence of its presence near the project site, but not for coho salmon, because while newly listed as endangered there was no evidence that coho had been found near the project.].)

Moss therefore holds that the new listing of an endangered species coupled with evidence of its’ presence near the project is *prima facie* proof of the CEQA conditions that necessarily require the preparation of a subsequent or supplemental EIR. i.e. “substantial changes in the circumstances...” or “new information of substantial importance...” *That is, evidence that a recently listed endangered species is found near the project is enough to require a supplemental EIR; further evidence of the project’s potential impact on the species is not required.* (*Moss v. County of Humboldt, supra*, 162 Cal.App.4th 1041.)

Nevertheless, there is more than enough evidence here of the project’s potential impact on endangered Southern California Steelhead.

The evidence of “new information of substantial importance”² which was not known and could not have been known with the exercise of reasonable diligence at the time the Board of Supervisors certified the previous EIR” (§ 15162(a)(3)(A)) includes the following:

1. The Southern California Steelhead was listed as a federally endangered species in 2006;
2. Southern California Steelhead have been found by the California

Department of Fish and Wildlife (CDFW) in the Santa Paula Creek near

² “ ‘Substantial evidence’ under CEQA ‘includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact.’ (§ 21080, subd. (e)(1).” (*Moss v. County. of Humboldt* (2008)162 Cal. App. 4th 1041, 1060.)

Drill Site 7. CDFW regularly performs surveys for steelhead and reds in this part of Santa Paula Creek. On September 4, 2014 and September 11, 2014, one hundred and twelve steelhead were rescued by CDFW from pools located west of Thomas Aquinas College and Downstream of Drill Site 7. Blue Tomorrow and Dr. Newton will be presenting this information to the County Board of Supervisors at the hearing on October 20, 2015, along with other data of steelhead observations near Drill Site 7 made by CDFW;

3. Santa Paula Creek (at Drill Site 7) was listed in the Federal Register as critical habitat for Southern California Steelhead in 2005;
4. Drill Site 7 is currently in violation of the County ordinance minimum set back distances enacted to protect Santa Paula Creek from pollution and other environmental degradation;
5. The proposed project otherwise has the potential to further endanger Southern California Steelhead and its' critical habitat in Santa Paula Creek.

II. The environmental impact of Drill Site 7's encroachment into Santa Paula Creek has not been previously considered

As discussed above, the evidence that the recently listed Southern California Steelhead is present in the Santa Paula Creek itself independently

satisfies the CEQA criteria requiring the Planning Department prepare a subsequent or supplemental EIR.

Additionally, the very comprehensive Blue Tomorrow report clearly shows Drill Site 7 is in Santa Paula Creek and in violation of Ventura County's local oil and gas set back ordinance, § 8107-5.61. The ordinance and the encroachment's impact upon the steelhead's critical habitat in Santa Paula Creek was not considered in the original EIR and is therefore "new information of substantial importance" triggering the CEQA guideline requirement of a subsequent or supplemental EIR. (*Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 212 Cal.Rptr. 127 (*Mira Monte*).)

The Planning Department's opinion to the contrary is apparently primarily based on an incorrect interpretation of § 8107-5.61.

As will be discussed, Mr. Baca is apparently suggesting that the set-back requirement of § 8107-5.61 applies only to the oil well pumper locations and not the whole of Drill Site 7's permanent facilities. Of course, the interpretation of § 8107-5.61 is a matter of law for this Board to determine.

It is submitted that Mr. Baca's suggested interpretation is unreasonably narrow and inconsistent with the plain language of § 8107-5.61.

Section 8107-5.61 states, in pertinent part, "No well shall be drilled *and no equipment or facilities shall be permanently located within* [the required setback]...These setbacks shall prevail unless the permittee can demonstrate...that

the subject use can be located nearer the stream...*All drill sites*...shall be protected from flooding...”, italics added.

A reasonable interpretation of § 8107-5.61 is that it applies to the whole of an oil drill site. The section’s references to “drill sites”, and “the subject use” in the same context as the oil wells and their related equipment and facilities demonstrates a legislative intent to include all. That’s also common sense. Obviously, the potential for pollution to Santa Paula Creek from the oil production permitted in CUP 3344 includes not only the grasshopper pumpers but the adjunct permanent facilities such as the bermed drill site use area and the permanent drain facilities engineered to drain directly into the creek!

Attached hereto for the Board’s convenience is a copy of Mr. Baca’s hand drawn “profile section” map relied upon by the Planning Department as evidence of compliance with § 8107-5.61. The set-back measurements are actually similar to those in the Blue Tomorrow survey and maps. While the oil wells are shown to exceed a 100’ set back from the Top of Bank, his map also shows that nearly half of Drill Site 7 is encroaching to within about 50’ or less of the Top of Bank mark.

In other words, Mr. Baca’s map in fact confirms that a substantial portion of Drill Site 7 encroaches to within about 50’ of the Top of Bank. However, it is of limited value because it shows only one line of measurement.

The Blue Tomorrow report includes a comprehensive field and map survey of the entire drill site-creek footprint. One of the color aerial maps of the area has

a transparent overlay that is very helpful in visualizing the startling extent of Drill Site 7's encroachment into the set-back zone for Santa Paula Creek.

This evidence is similar to the newly discovered evidence that was held pivotal in *Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal. App. 3d 357, 360-61, 212 Cal. Rptr. 127, 129-30 (*Mira Monte*). In *Mira Monte*, after the EIR had been prepared, it was discovered in a re-survey that a proposed road was going to encroach over a portion of a protected wetland that contained endangered and other protected species.

The planning department there offered up several mitigation conditions to rectify the wetland encroachment. Our local division of the Appellate Court reversed, holding that was error because it denied the public its CEQA right to participate in the review process of the potential impacts from the newly discovered encroachment into the wetland.

Stated differently, once becoming aware there is substantial evidence of one of the triggering criteria in § 15162, the Planning Department *must* prepare a subsequent or supplemental EIR. The Court in *Mira Monte* explained that an attempt to ameliorate the newly discovered impacts with merely an internal review and/or the added conditions of mitigation is unauthorized under CEQA as improperly circumventing the public's right to be informed and participate in the review process. (*Mira Monte Homeowners Assn. v. County of Ventura, supra*, 165 Cal. App. 3d 357, 36365.)

Here, like in *Mira Monte*, the recently discovered evidence of Drill Site 7's encroachment into Santa Paula Creek is "new information of substantial importance" not previously considered in the EIR requiring further environmental review in a subsequent or supplemental EIR. (§ 15162(a)(3)(A).)

As stated by the Court in *Mira Monte*,

"Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal ... and weigh other alternatives in the balance...." (Citation omitted.) [A]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR's bona fide subject." (Citations omitted.)

(*Mira Monte Homeowners Assn. v. County of Ventura*, *supra*, 165 Cal. App. 3d 357, 360-61.)

III. County law otherwise prohibits approval of this project unless and until the unlawful Santa Paula Creek encroachment is abated

As discussed above, the Planning Department abused its' discretion under CEQA in approving a modification to CUP 3344 (Case No. PL 13-0150) by not first preparing a subsequent or supplemental EIR regarding impacts of the project upon the endangered steelhead and its' critical habitat in the Santa Paula Creek.

Additionally, the evidence is unequivocal the Planning Department further abused its' discretion by failing to comply with the Ventura County Non-Coastal Zoning Ordinance (VCNZO) mandatory minimum set-backs for oil development

near Santa Paula Creek. (See *Civil Serv. Assn. v. Redevelopment Agency* (1985) 166 Cal. App. 3d 1222, 1226, 213 Cal. Rptr. 1, 3. [The failure of a local agency to act in accordance with an applicable local ordinance or regulation is subject to challenge in an administrative mandamus proceeding. (Citations)]; Cal. Civ. Proc. Code § 1094.5.)

The applicable provisions of the Ventura County Non-Coastal Zoning Ordinance include the following, in pertinent part:

“Section 8101-4.1 Minimum Requirements

The provisions of this Chapter [VCNZO] shall be held to be *the minimum requirements for the promotion of the public health, safety and general welfare...*

Section 8101-4.5 Misinformation

Information erroneously presented by any official or employee of the County does not negate or diminish the provisions of this Chapter pertaining thereto...

Section 8107-5 Oil and Gas Exploration and Development

...

Section 8107-5.2 Application

Unless otherwise indicated herein, the purposes and *provisions of § 8107-5 et seq. shall be and are hereby automatically imposed on and made a part of any permit for oil or gas exploration and development issued by Ventura County on or after March 24, 1983. Such provisions shall be imposed in the form of permit conditions* when permits are issued for new development or for existing wells/facilities without permits, or *when existing permits are modified at the discretion of the Planning Director, pursuant to § 8111-5.2* (incorrect reference; see § 8111-4.2)...

Section 8107-5.6 Oil Development Standards

The following are *minimum standards and requirements which shall be applied pursuant to § 8107-5.2*. More restrictive requirements may be imposed on a project through the conditions of the permit...

§ 8107-5.6.1 Setbacks

No well shall be drilled and no equipment or facilities shall be permanently located within:...

d. 300 feet from the edge of the existing banks of ‘Red Line’ channels as established by the Ventura County Flood Control District (VC10/16/15), 100 feet

from the existing banks of all other channels appearing on the most current United States Geologic Services (USGS) 2,000' scale topographic map as a blue line. These setbacks shall prevail unless the permittee can demonstrate to the satisfaction of the Public Works Agency that *the subject use* can be safely located nearer the stream or channel in question without posing an undue risk of water pollution, and impairment of flood control interests. In no case shall setbacks from streams or channels be less than 50 feet. *All drill sites* located within the 100-year flood plain shall be protected from flooding in accordance with Flood Control District Requirements...

§ 8111-4.2 Decision Options

The decision-making authority hearing a discretionary matter may approve, deny or modify, wholly or partly, the request being reviewed. The authority may impose such conditions and limitations as it deems necessary to assure that all applicable policies and specific requirements as well as the general purpose and intent of this Chapter and its various Articles [sections] will be carried out, and that the public interest, health, safety, convenience and welfare will be served..."

(VCNZO §§ 8101-4.1, 8101-4.5, 8107-5, 8107-5.2, 8107-5.6, 8107-5.6.1 (d), 8111-4.2 emphasis added.)

Accordingly, the Planning Director's approval of the modification to CUP 3344 (Case No. PL 13-0150) should be set aside because Drill Site 7 violates the above provisions of local law and there was a failure to add a new condition to the CUP requiring the requisite set-back as explicitly required by § 8107-5.2.

IV. Conclusion

Therefore, for the foregoing reasons, it is respectfully submitted that this Honorable Board affirm this appeal and direct the Planning Department to set aside its approval of CUP 3344 (Case No. PL 13-0150) unless and until such time as:

- (1) The applicant abates the unlawful encroachment of Drill Site 7 into Santa Paula Creek; and

(2) The Planning Department prepares for public review a subsequent or supplemental EIR regarding the potential impacts of the project upon the endangered Southern California Steelhead and its critical habitat in Santa Paula Creek.

Dated, October 14, 2015

Respectfully submitted,

Richard E. Holly
Cal Bar #54923
Attorney at Law
State Bar #54923
In support of
Citizens for Responsible Oil and Gas
(CFROG)

VINTAGE, Ferndale Ranch

Profile Section

prepared by B. Baca, CEG 1922

Feb. 2015

B.R.B.

Drill size # 7

