

May 30, 2012

To: Board of Supervisors

From: Alex Paul, Sheridan Properties Applicant Permit DRC2005-00073.

Re: Response To Sierra Club's Nov. 14, 2011 Appeal No. 848 of DRC2005-00073.

**Supplemental Water Fee, Condition 26.**

Although the Initial Study discusses the Santa Maria Groundwater litigation<sup>1</sup>, it does not consider the adjudicated water rights of the Applicant and how they relate to CEQA. When the court adjudicated the basin, and retained jurisdiction, it did so under the authority of Article X, Section 2 of the California State Constitution. The constitutionally mandated actions of the court are not subject to CEQA. The impacts to the adjudicated basin are no longer the purview of CEQA and the vested water right entitlements cannot be conditioned. Three recent court cases dealing with projects in adjudicated basins have clarified this relationship. In *California American Water v. City of Seaside*<sup>2</sup>:

"the court scrutinized "[a]ny attempts by any agency or organization to impose obligations on the use of Basin water rights." More specifically, the court found, although the MPWMD had authority to issue water distribution permits, it "cannot exercise that authority in contravention of the Physical Solution imposed by the Amended Decision for management of the Basin." Accordingly, the court ruled that "the Physical Solution governs the environmental aspects of Seaside Basin [groundwater] usage, and... no [p]arty to this adjudication can require environmental review under [CEQA] with regard to such usage."

The appellate court in *Hillside Memorial Park Mortuary v. Golden State Water Co.*<sup>3</sup> rejected the need for an EIR stating:

"where an existing judgment is in place establishing a physical solution to water rights issues, the public agency has no judgmental controls to exercise. The power to act in these circumstances is reserved to the court... Where a physical solution is in place, a public agency may not order preparation of an EIR under CEQA that conflicts with the court order... To the extent there is a conflict between the statutory provision of CEQA and article X, section 2 of the California Constitution establishing a public policy of fostering the reasonable beneficial use of water, the constitutional provision must prevail."

<sup>1</sup> Page 4-60 of the San Luis Obispo County Planning Staff Report dated November 3, 2011.

<sup>2</sup> *California American Water v. City of Seaside* (2010) 183 Cal. App. 4<sup>th</sup> 471, 480.

<sup>3</sup> *Hillside Memorial Park Mortuary v. Golden State Water Co.* (2011) 199 Cal. App. 4<sup>th</sup> 658.

And in *Cherry Valley Pass Acres and Neighbors v. City of Beaumont*<sup>4</sup> the appellate court found that in the adjudicated basin:

“Sunny-Cal’s 1,484 afa entitlement to Beaumont Basin groundwater was not a hypothetical or allowable condition, but a condition that existed on the ground... The EIR realistically and appropriately relied on Sunny-Cal’s 1,484 afa entitlement as the baseline for evaluating the SCSP’s impacts on water supplies in the Beaumont Basin... the EIR properly concluded, based on substantial evidence, that the [project] would cause no “*additional withdrawals*” of the Basin groundwater beyond existing conditions.”

The Applicant’s adjudicated right to use groundwater, as an overlaying landowner, is spelled out in Paragraph VI(B)(2) of the Stipulation Agreement<sup>5</sup>:

**VI(B)(2)** Overlying Owners that are Stipulating Parties that own land located in the NMMA as of the date of this Stipulation shall have the right to the reasonable and beneficial use of Groundwater on their property within the NMMA without limitation, except in the event the mandatory action trigger point (Severe Water Shortage Conditions) described in Paragraph VI(D)(2) below is reached.

Paragraph VI(D)(2) states that when overdraft is reached *and* the Santa Maria pipeline is completed, water use will be restricted to 110% of historical maximum. It should be noted that the project does not fall into the category of New Industrial Uses under VI(E). It is also important to note that the court specifically ordered the large water purveyors to obtain supplemental water, not the overlaying landowners.

The separate question, devoid of any CEQA impacts, is whether the project is subject to a supplemental water fee by County Ordinance as stated in Condition 25. County Ordinance No. 3090<sup>6</sup> only applies to General Plan Amendments and Subdivisions outside the Coastal Zone. The project does not fall into any of these three categories. In addition, a fee has not been established in compliance with procedures of AB1600, the Mitigation Fee Act<sup>7</sup>. Paying an in-lieu fee to NCSO as suggested in Condition 26 fails any measure of proportional benefit because there are no plans to deliver supplemental water outside the Assessment District, where the project is. This is clearly stated in the Assessment Engineer’s Report<sup>8</sup> for the Supplemental Water Project. In the review of general and special benefits the Report concludes:

“General benefit to the public at large, if any, of lessening the threat of seawater intrusion into the fresh water supply or special benefit to properties not covered by Ordinance No. 3090, has been quantified to be much less than the contribution provided by the State Department of Water

<sup>4</sup> *Cherry Valley Pass Acres and Neighbors v. City of Beaumont*(2010) 190 Cal. App. 4<sup>th</sup> 316.

<sup>5</sup> Stipulation Agreement June 30, 2005 page 23. *Santa Maria Valley Water Conservation District v. City of Santa Maria, et al.* Case No. 770214

<sup>6</sup> Ordinance No. 3090 codified in San Luis Obispo County Code Title 22.112.020(F)(1).

<sup>7</sup> Government Code §66000 et seq., specifically procedures of section §66013(c) and §66016.

<sup>8</sup> Engineer’s Report for NCSO Assessment District No. 2012-1, March 14, 2012 Wallace Group. Pages 18-19.

Resources grant in the amount of \$2,300,000... The properties within the Assessment District are only parcels that will receive a special benefit from the work of improvements... The improvements are for the use and benefit of the properties within the Assessment District only and will not serve or directly benefit the general public or those parcels not subject to the Assessment.”

#### **Nipomo Mesa Lupine, Conditions 40-46.**

The position of the applicant is that development DRC2005-00073 (the Project) will not jeopardize the continued existence of the Nipomo Mesa lupine, an endangered plant, beyond the jeopardy which already exists. Existing threats to the lupine fall under landowner's rights including: landscaping, erosion and flood control, weed abatement, crop and tree planting and harvesting, raising animals, off-road riding and general enjoyment on relatively small infill parcels. These activities do not require a permit and the removal of endangered plants is allowed by section 1913 of the Fish and Game Code.

Whatever habitat value the subject property had was lost long ago. The property was subdivided in the 1950s into building sites and four residences were built. The greater area where the property lies was subdivided in 1903 for agricultural use and planted with eucalyptus trees for timber. Most of the remaining eucalyptus trees on the property are on a 3 acre parcel surrounding the western lupine buffer. The small, sporadic western population occurred in an area that was graded to form an unpermitted retention basin and flood channel that deposits water, sand, sediment and possibly the lupine seeds themselves from the neighboring property. The larger eastern population is located entirely on a bank that was deeply cut in 1970 to create a permitted industrial building site. The cut removed the dense native brush and exotic grass cover along with the topsoil and left the type of bare sand habitat the plant requires. The plants would not continue to occur in either of these locations if the areas were not disturbed.

Conditions 40-46 on the Project, as well as additional protections requested by the Sierra Club, to protect, maintain and restore the lupine buffer areas apply only to Environmentally Sensitive Habitat Areas, or ESHAs. An ESHA as defined by CEQA is designated as part of the Local Coastal Plan certification process<sup>9</sup>. ESHAs so designated in San Luis Obispo County are mapped as Land Use Element combining designations. The project site is not within or adjacent to any mapped ESHA and therefore none of the provisions of County Codes, Local Coastal Plan Policies<sup>10</sup> or the California Coastal Act to protect ESHAs apply to the project. Further, ESHA protections do not apply unless an area is currently an ESHA<sup>11</sup>.

<sup>9</sup> Pub Res. Section 30107.5, 30502 and 30502.5

<sup>10</sup> San Luis Obispo County Code Title 23.07.160-176 and 23.11.030(Definitions of ESHA, Terrestrial Habitat). County of SLO Coastal Plan Policies, Chapter 6 Environmentally Sensitive Habitats policies 1-3 and Terrestrial Environments policies 29-37.

<sup>11</sup> Sierra Club v. California Coastal Com. (2003) 107 Cal.App.4th 1030, 133 Cal.Rptr.2d 182.

The requirement under CEQA with regard to the Nipomo Mesa lupine is to avoid any significant impacts to the plants caused by the project. The Project will not cause the invasive plants to return to the areas where the lupine appeared as they were already there. What is being asked of the applicant is not habitat restoration, but rather, *habitat creation* by cultivating a deeply cut man made slope and a storm channel.

For the reasons explained above I respectfully ask that the supplemental water fee be removed as a condition of our permit approval and conditions 40-46 be limited to project avoidance of the Nipomo Mesa lupine.

Sincerely,

Alex Paul  
Sheridan Properties  
Applicant  
DRC2005-00073