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December 14, 2004

Hand Delivered

Members of the Board of Supervisors
County of Ventura
800 S. Victoria Avenue
Ventura, CA 93009-1610

Re: Final EIR/EIS for the Matilija Dam Ecosystem Restoration Project
Subj: Failure to Comply with the California Environmental Quality Act

Dear Members of Board of Supervisors:

The Final Environmental Impact Statement/Environmental Impact Report ("EIS/EIR") for the Matilija Dam Ecosystem Restoration Project ("Project") does not comply with the requirements of the California Environmental Quality Act ("CEQA") because it fails to analyze Project impacts or set forth adequate mitigation measures to ameliorate the adverse and significant water supply impacts that will result from the Project. The failure to analyze and mitigate this critically important aspect of the Project has been communicated to the Ventura County Watershed Protection District ("VCWPD") in letters submitted by our office on behalf of Southern California Water Company ("SCWC") on August 25, 2004 and November 12, 2004, by oral comments made to the VCWPD and the Army Corps of Engineers at the hearing on the Draft EIR/EIS on July 28, 2004, and at multiple other meetings with staff of the VCWPD. The Final EIS/EIR's procedural and substantive deficiencies are discussed in further detail below.

I. The Revised Groundwater Section Violates CEQA Both Substantively and Procedurally

A. Procedural Deficiencies

The Revised Groundwater section ("Errata") made available at the eleventh hour does not comply with CEQA. (See Declaration of Robert J. Saperstein ["Saperstein Decl."], attached as Exhibit "A".) Public Resources Code section 21092.1 and CEQA Guidelines section 15088.5 both require recirculation of the EIS/EIR because the Errata adds significant new information about water supply issues after public notice was given of the availability of the draft EIR for public review, but before the EIS/EIR was certified. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1130; Remy et al., *Guide to the*

California Environmental Quality Act p. 301.) Information about and proposed mitigation for project impacts on water supply are significant. (See, e.g., *Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2003) 106 Cal.App.4th 715, 717-718 (“SCOPE”).) If the County certifies the EIS/EIR without recirculation, the public will be improperly deprived of the opportunity to provide meaningful comment regarding this important issue. (*Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 365.) Notwithstanding the Errata’s assertion that its contents are based on comments received after publication of the Final EIS/EIR, the new information must be subjected to the same “critical evaluation that occurs” with a Draft EIS/EIR, and the public must not be denied “an opportunity to test, assess, and evaluate the data” in a meaningful way. (*Sutter Sensible Planning, Inc. v. Bd. of Supervisors* (1981) 122 Cal.App.3d 813, 822.)

The EIR is “the heart of CEQA” whose purpose is to duly inform the public and decisionmakers about environmental changes before project approval, and to insure that an agency “has, in fact, analyzed and considered the ecological implications of its action.” (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392; see also CEQA Guidelines §15201 [public participation is an essential part of the CEQA process].) This purpose, along with CEQA’s purpose of public participation in the process by which a project’s environmental impacts are assessed, has been utterly thwarted by the County’s proposed reliance on the Errata.

B. Substantive Deficiencies

The significance of this procedural error is magnified by the Errata’s substantive deficiencies. The Errata’s analysis of the Project’s impacts on groundwater and water supply, just like the analyses in the Draft and Final EIS/EIR documents, is inaccurate and incomplete. The Army Corps of Engineers received no fewer than 13 comments on this issue alone from concerned residents within the affected areas, environmental organizations, and water agencies. (See generally Final EIS/EIR section 3.) Yet, the Errata’s analysis of the Project’s impacts on groundwater and water supply is inaccurate and incomplete: a) the Errata identifies significant water supply impacts but fails to adequately mitigate them, and b) the Errata fails to adequately analyze and provide any mitigation for further long-term water supply impacts associated with the Project.

1. The Errata Fails to Adequately Mitigate the Water Supply Impacts that it Does Acknowledge

The Errata acknowledges that some water supply (a cumulative total of 2,200 acre feet) will be lost as a result of the project. (See Errata, pp. 2-10 – 2-13.) The Errata impliedly assumes that the loss of this water supply is significant and proposes mitigation. (CEQA Guidelines §15126.4(a)(3) [mitigation measures not required for effects which are not found to be

significant].) However, the proposed mitigation measures to accommodate for this lost supply and therefore the mitigation is inadequate under CEQA.

To be effective, "mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments." (CEQA Guidelines §15126.4(a)(2).) In contrast, proposed Condition A provides only for negotiating with the City of Ventura to provide replacement water, and for exploring undescribed feasible alternatives. This condition constitutes improper deferral of analysis of alternatives and proposed mitigation. (See *Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1396; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 306.)

In addition, the alternative water supplies undoubtedly will have environmental impacts that must be analyzed. See CEQA Guidelines §15126.4(a)(1)(D).) Finally, The Errata's imposition of additional conditions does not cure the failure to analyze Project impacts or afford statutorily required time for public comment. This is the case even if the agency's decision on the project and EIR certification would be unchanged. (*Mira Monte*, 165 Cal.App.3d at 364, 365; Pub. Resources Code § 21005(a).)

2. The Errata and EIR/EIS Fail to Provide Any Analysis of Other Significant Project Related Water Supply Impacts

More important is the Errata's and EIR/EIS's failure to analyze and mitigate the long-term water supply available from the sediments ("Sediment Water Supply") trapped within the Matilija Reservoir ("Reservoir") that will be lost as a result of the Project. (See Saperstein Decl. (Exhibit A) and Declaration of Jordan L.N. Kear ("Kear Decl.") attached as Exhibits "B".) This water supply represents a lost long-term annual water supply of 300-1000 acre-feet per year ("AFY"). (See Saperstein and Kear Decls.)

The Errata is unclear but appears to claim that the EIR/EIS did not have to analyze or mitigate for the loss of the Sediment Water Supply because accessing the Sediment Water Supply would: a) not be economically feasible, and b) somehow improperly deprive downstream water users of a water supply to which they are entitled. These claims are inaccurate and are not supported by substantial evidence. (See Saperstein and Kear Decls.) Had the Errata analyzed these issues, as CEQA requires, it would have had to conclude that accessing the Sediment Water Supply is economically feasible¹ and legally proper. (See Saperstein Decl.)

¹ As discussed in Mr. Saperstein's Declaration, the costs of accessing the Sediment Water Supply would likely be no greater than the value of this lost water supply over only a couple of years. (See Saperstein Decl.)

C. The Project's Impact on Water Supplies is Significant

As discussed in our prior letters and in oral comment, the Project threatens the water supply available to Casitas Municipal Water District ("Casitas"), and as a result, the water supply available to SCWC and the other water users within the Ojai Valley (predominantly agricultural users). A study of the Ojai Valley Groundwater Basin ("Basin") by Stall, Garner, & Dunn, Inc., dated December 1992, ("Basin Study," attached as Exhibit "C") estimated local water demands at approximately 10,000 AFY. (See Basin Study, pp. 18, 40.) The Basin Study reported that the local water demands are met roughly equally by Basin groundwater extractions and imported water from Casitas. (Basin Study, p. 40.) The Ojai Basin Groundwater Management Agency's ("OBGMA") 2002-2003 annual report (attached as Exhibit "D") provides water extraction and use data forward to 2002. This data shows average extractions from the Basin between 1994 through 2002 of approximately 5000 AFY (roughly 55% of total demand) and approximately 4000 AFY of imported water from Casitas (roughly 45% of total demand) during the same period. (OBGMA 2002-2003 Annual Report, p. 10.)

The Basin Study predicts that should importation of water from Casitas be reduced as a result of reduced yield from Casitas and increased water supply costs. Groundwater use will increase proportionately. (See Basin Study, p. 44.) A reduction in Casitas deliveries to the Ojai Valley would reduce the Basin replenishment that occurs from the application of these imported water supplies to lands overlying the Basin. Moreover, the Basin is a relatively "shallow" groundwater basin, and is susceptible to dewatering during drought periods. (See Basin Study, p. 17 [discussing dewatering of shallow wells and wells around the Basin's perimeter during the drought period of the late 1940's].)

Accordingly, if imported water is not supplied to the Ojai Valley or is significantly diminished, there is a high probability that a water supply shortage will occur. Diminished imported water supply to the Ojai Valley threatens to cause significant changes to the environment, including loss of irrigated agriculture and other irrigated vegetation, increased fire danger, and even impairment of municipal uses, all of which deleteriously impact the physical environment. A loss of imported water supplies would cause Ojai water consumers, purveyors, and public officials to seek to obtain additional water supplies from currently unidentified alternative sources, which, assuming they are available, would involve significant environmental impacts (e.g., new water storage projects within the Ojai Valley or elsewhere and conveyance pipelines) and higher costs.

Casitas' available water supplies were recently reduced by approximately 3000 AFY² to accommodate necessary bypass flows for passage for the endangered Steelhead Trout. The

² Casitas is limited to 33.3 cubic-feet per second of diversions (maximum of 24,325 AFY) at the Robles Diversion by its State Water Resources Control Board license. (See SWRCB License No. 011834 [application No. A015998].)

Project threatens to eliminate several hundred to over a thousand additional AFY per year of water supply available to Casitas. This additional reduction will cause Casitas' deliveries to the Ojai Valley to be less reliable and more expensive as Casitas will need to expend more to substitute for the lost water supply. All of these enumerated circumstances increase the threat to the Ojai Valley's water supply and deleteriously impact the municipal and agricultural users that depend on it. The EIS/EIR fails to address these cumulative impacts as reduced by CEQA. (CEQA Guidelines, § 15130.)

The County's proposed conclusion of no significant impact on water supply must be based on rigorous environmental analysis, which has not occurred here. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712-718.) Neither the Final EIR/EIS, nor the Errata provide any evidence (much less substantial evidence as is required) to support the conclusions that the Project's adverse impact on water supply is not significant, and that the Sediment Water Supply is not an economically feasible water supply available to help satisfy the water supply deficit within the Ventura River Watershed.

For all of the forgoing reasons, the decision on the Project must be deferred until after recirculation of the Errata. Otherwise, the project approval will be a nullity since it will be based on environmental documentation that does not provide the County Board of Supervisors and the public with the information about the project that is required by CEQA. (*See San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722; Pub. Resources Code §§21005(a), 21168.5.)

II. The EIS/EIR Is Defective As A Matter Of Law

A. The Draft EIS/EIR Did Not Adequately Analyze Or Mitigate Project Impacts On Water Supply

The EIS/EIR's assessment of project impacts on water supply has changed with every environmental document prepared. (*Compare* Draft EIS/EIR 5.2-9 et seq. *with* Final EIS/EIR p. 2-10 and Errata p. 2-10 et seq.). An EIR, however, must accurately discuss and analyze project impacts. (*See* Pub. Resources Code §§ 21002, 21002.1(a), 21061.) The Draft EIS/EIR's inaccurate analysis and insufficient mitigation of Project impacts on water supply does not comply with CEQA.

The Draft EIR/EIS failed to adequately analyze and provide legally compliant mitigation measures for the significant water supply loss associated with the Project. The Draft EIR/EIS appears to acknowledge that the lost water supply would be adverse and significant, but is mitigated to a level of less than significant because the lost water supply could be obtained from

other sources.³ In our letter of August 25, 2004 (attached as Exhibit "E") and in our oral comments at the July 28, 2004 hearing, we explained that the Draft EIS/EIR was inadequate because it simply stated that State Water Project ("SWP") water or other alternative supplies available to offset the lost supply, but failed to provide any further analysis of the process for securing the alternative water supply. (Draft EIR/EIS, p. 5.2-10.) Numerous comments on the EIR by other water agencies and environmental organizations also noted the Draft EIS/EIR's deficiency in failing to analyze the Project's impact on water supply. (*See, e.g.*, Final EIS/EIR section 3.)

B. The Final EIS/EIR Also Did Not Address The Loss Of Water Supply

The Final EIR/EIS then completely changed the approach to the water supply issues, suggesting that no analysis or mitigation was necessary, explaining that the lease of the Matilija Project from the County to Casitas will expire prior to the deconstruction activities that may impact the Matilija Dam's water supply, and therefore the EIR/EIS need not address the issue. (Final EIR/EIS, p. 2-10; see Agreement by and between VCFCD and Ventura River Municipal Water District (predecessor to Casitas) dated May 26, 1954, attached as Exhibit "F".) By letter from our office, dated November 12, 2004 (Exhibit "G"), we explained that this change was entirely improper from a CEQA perspective it that it did not address the issue of the elimination of the water supply currently available and needed in the future. That approach also confused the physical impacts of the Project on local water supplies, which must be analyzed and mitigated, with a contractual arrangement that does not affect the physical availability of water from Matilija. Our letter also noted that modifications could be made to the Matilija Reservoir's operation that would make available a long-term water supply in excess of that quantity that County staff had acknowledged.

The Errata then changed the approach yet again, striking the language regarding expiration of the Casitas lease (Exhibit F) and instead alleging that the loss supply was insignificant in quantity, while failing to acknowledge or properly analyze the more substantial and long-term water supply available from the Reservoir's sediment. The Errata's claim that the loss water supply is insignificant is particularly troubling and short sighted. As explained above and in the attached declarations, simple and economically feasible alterations to the operation of the reservoir could make a long-term water supply available to Casitas equal to roughly 5% of its average diversions from the Ventura River and equal to roughly 13% or more of the imported water supply to the Ojai Valley. (See Saperstein Decl.)

Given Casitas' recent losses of water for fish passage, the critical dependency of the Ojai Valley on imported water supplies, and the limited nature of water supplies in California

³ The Final EIR/EIS and the Errata change the document to espouse an opinion that the loss water supply is actually not significant but without any explanation for the change in opinion from the Draft EIR/EIS.

generally, the EIS/EIR's conclusion that the Project's impact on water supply is less than significant is inaccurate and not supported by substantial evidence. (*See generally SCOPE*, 106 Cal.App.4th 715.) This inadequacy renders the analysis of the project impacts on land use, and assessment of its socioeconomic impacts inaccurate as well.

CEQA requires consideration of both alternatives and mitigation measures to lessen significant impacts. (Pub. Resources Code §§21002, 21002.1(a), 21100(b)(3) and (4).) Where a project will have a significant impact, the EIR must contain alternatives that will achieve project objectives but also will reduce or eliminate significant impacts [CEQA Guidelines §15126.6(a)]. Likewise, it must also propose mitigation measures that could minimize those impacts. (CEQA Guidelines §§15126.4(a)(1); 15126.6(b), (c).) "What is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned." (*Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco* (1980) 106 Cal.App.3d 893, 910.)

Here, neither the alternatives, nor the mitigation complies with CEQA. None of the alternatives, including the one selected, Alternative 4.b., include amelioration of the loss of water supply.⁴ The no project alternative is specifically rendered insufficient by EIR/EIS's failure analyze the water supply impacts discussed above. (*See Saperstein Decl.* [discussing the economic and legal feasibility of accessing the Sediment Water Supply]; *County of Amador v. El Dorado County* (1999) 76 Cal.App.4th 931, 952 (An EIR that does not utilize a correct baseline or that contains unsupported assumptions does not comply with CEQA); CEQA Guidelines §15125(a) The absence of this critical information precludes informed decision-making and impedes the statutory goals of CEQA. (*Dry Creek Citizens v. County of Tulare* (1999) 70 Cal.App.4th 20, 25-26.). This failure to provide analysis of project impact on resources renders an EIR defective. (*See, e.g., San Joaquin Raptor*, 27 Cal.App.4th at 728.)

Likewise, the EIS/EIR's proposed mitigation monitoring program contains no mitigation concerning water supply. As set forth in section I above, the Errata contains proposed mitigation that does not comply with CEQA. The EIS/EIR's failure to fulfill requirements for alternatives and mitigation is also fatal to CEQA compliance.

C. The County's Responses to Comments on The Water Supply Issue Are Also Inadequate As A Matter Of Law

CEQA requires that the lead agency provide a written response to comments on the EIR by providing a good faith, reasoned analysis of the environmental issues raised that are at

⁴ Moreover, the selection of Alternative 4.b. was predicated on balancing the ratio of the Project's costs with its benefits. By failing to include assessment of the cost of mitigating replacement of the lost water supply caused by project implementation, the selection of this alternative is improper as it is not based on complete, much less substantial, evidence.

variance with its position. (See Pub. Resources Code §21091(d); CEQA Guidelines §15088(b); *Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, 862; *Gallegos v. State Bd. of Forestry* (1978) 76 Cal.App.3d 945, 954.) The responses to comments do not comport with these requirements. The responses inaccurately contend that even under the no project alternative, no water would be available after the year 2020, and state that the project “proposes to replace the water supply loss resulting from the dam’s removal prior to its obsolescence date.” (Final EIS/EIR p. 4-12. However, neither the Final EIS/EIR, nor the Errata include such mitigation, (See section II.A. above), and the Final EIS/EIR acknowledges that no plan or budget currently exists for such mitigation. (See, e.g., Final EIS/EIR at 4-39.) Accordingly, the responses are inadequate as a matter of law.

III. Conclusion

SCWC has repeatedly stated its support for the goals of the Project. But it cannot support EIS/EIR certification or Project approval based on the defective environmental documentation currently presented for the Board’s consideration. As an accommodation to the Project, we proposed a substituted procedure whereby the County would agree to work with SCWC and the other Ojai Valley Stakeholders to identify the full scope of water supply impacts and identify and secure forms of mitigation in a timely fashion, while not forcing the necessity of a lawsuit challenging the adequacy of the EIR/EIS. (See proposed Term Sheet for County Matilija Agreement with Ojai Stakeholder, attached as Exhibit “H”.) The VRCS staff flatly refused to engage in such approach.

As a result, should the Board certify the EIS/EIR today, we will be left with no option but to file a lawsuit concerning the lack of CEQA compliance or simply face the consequences resulting from the lost water supply. Accordingly, we request that the Board of Supervisors (“Board”) decline to approve the Final EIR/EIS at today’s hearing. Instead, we ask that the Board instruct the VCWPD staff to either: a) approve the Project and the Term Sheet and finalize an agreement based upon it, or b) comply with CEQA by recirculating for public comment the Revised Groundwater Section in connection with an amended Final EIR/EIS that accurately analyzes the no project alternative and other Project impacts, and provides specific and enforceable mitigation for the loss of water supply caused by the Project.

Sincerely,



Russell McGlothlin
For HATCH & PARENT
A Law Corporation

Members of the Board of Supervisors
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