

MEMORANDUM

DATE: November 10, 2009

TO: Todd Johnson

FROM: C. Wesley Strickland

RE: Estrella River Vineyard Project: On-Site Water Conservation and Agricultural Resource Impacts

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I. BACKGROUND

The San Luis Obispo County (County) Agricultural Commission has suggested that any potential on-site agricultural water conservation measures taken to mitigate for increased agricultural water use by the Estrella River Vineyard project (Project) may be inconsistent with Agriculture Policy 11 and would trigger the need to prepare an environmental impact report (EIR) to determine the effects of such mitigation on local agricultural resources. This memorandum reviews the applicable law and policy, demonstrating that the proposed water conservation measures are consistent with County and State of California laws and regulations and that an EIR would not be required based on such water conservation measures.

II. THE PROJECT DOES NOT CONFLICT WITH THE AGRICULTURAL POLICIES OF THE COUNTY AGRICULTURE AND OPEN SPACE ELEMENT

The County Agriculture Commission has raised a question about whether the County Agriculture and Open Space Element, Agriculture Policy 11 limits the potential for on-site agricultural mitigation for increased water use at the Project. Agricultural Policy 11, relating to agricultural water supplies, is as follows:

- (a) Maintain water resources for production agriculture, both in quality and quantity, so as to prevent the loss of agriculture due to competition for water with urban and suburban development.
- (b) Do not approve proposed general plan amendments or rezoning that result in increased residential density or urban expansion if the subsequent development would adversely affect: (1) water supplies and quantity, or (2) groundwater recharge capability needed for agricultural use.
- (c) Do not approve facilities to move groundwater from areas of overdraft to any other area, as determined by the Resource Management System in the Land Use Element.

The discussion section for this policy explains that the purpose of the policy is to strongly promote agricultural uses, and to prevent surrounding agricultural use displacement when urban

development uses groundwater supplies. The purpose is to “reduce the chances that urban and suburban developments will diminish recharge, deplete agricultural water supplies, degrade water quality, or make those supplies uneconomical for agriculture to use.” Agriculture and Open Space Element, at 2-27.

Other applicable San Luis Obispo County Policies are GM9 of the Conservation Element, and Policy WR 1.6 of the Draft Conservation and Open Space Element. GM9 of the Conservation Element states that priority should be given in meeting the needs of agricultural operations in water resources management: “Agricultural water supplies should be protected from usurpation by incompatible development through land use controls.” Policy WR 1.6 of the Conservation and Open Space Element, relating to agricultural operations, states: “Groundwater management strategies will give priority to agricultural operations. Protect agricultural water supplies from competition by incompatible development through land use controls.”

The Project does not conflict with any of these goals. Rather than displace agriculture, the Project will increase the acreage under cultivation prior to the Project, and will not result in any loss of agriculture due to competition with development. Rather than adversely affecting water supplies, the water conservation measures taken on site will reduce stress on water resources in the area. As shown in the ERV Water Adequacy Assessment for the Project at Pages 11-12, water conservation measures would be appropriate for both the residential and agricultural project components. The estimated project water demand would not exceed existing site water use (pending the actual water conservation savings), and would be significantly less than the potential water use of the site under current land use zoning. The Project does not move groundwater from an area of overdraft to any other area. Additionally, in line with Policy WR 1.6, the Project will not reduce agricultural water supplies, since the Project will not result in a net reduction in water available. In fact, by conserving water on acreage currently planted with vineyards, the Project will be able to increase agricultural acreage using the same amount of water.

The “Hydrology” section of the Draft Conservation and Open Space Element specifically encourages water conservation measures for new development. On Page 2-7, the County states, “Individuals and agencies should also be encouraged to take actions that will enhance this [supply and demand] equation by increasing supplies or reducing demands. This balance between supplies and demands can be strengthened if, through the review of development proposals that have the potential for adversely affecting the water balance, appropriate mitigation measures are established.” The agricultural water conservation element of the Project is in mitigation to preserve the balance between water quantity and demand, and nothing in the aforementioned agricultural preservation and conservation policies conflicts with this goal.

III. THE AGRICULTURAL WATER CONSERVATION MEASURES DO NOT TRIGGER CEQA THRESHOLDS OF SIGNIFICANCE

A mitigation on site for water conservation purposes does not pass the threshold for a “significant effect” upon the environment in terms of the impacts to agricultural resources in the surrounding area. The California Environmental Quality Act (CEQA) requires public agencies to consider the environmental impacts of proposed projects and to mitigate or avoid significant impacts, if feasible. Pub. Res. Code, § 21002. A public agency must prepare, or cause to be

prepared, and certify the completion of an EIR for any project that it proposes to carry out or approve that may have a significant effect on the environment. *Id.*, §§ 21100(a), 21151(a). “Significant effect on the environment” is defined as “a substantial *adverse* change in the physical conditions which exist in the area affected by the proposed project.” CEQA Guidelines, § 15382 (emphasis added); *Laurel Heights Improvement Assn. v. Regents of University of California*, 6 Cal.4th 1112, 1123-1126 (1993).

To assess the impact of a proposed project on the environment, the lead agency examines the changes to existing environmental conditions that would occur in the affected area if the proposed project were implemented. CEQA Guidelines, § 15126.2(a); *San Joaquin Raptor Rescue Ctr. v. County of Merced*, 149 Cal.App.4th 645 (2007). An agency may find that an environmental impact is less than significant if it concludes that the impact is not a substantial or potentially substantial adverse change to the environment. CEQA Guidelines, § 15382; *National Parks & Conserv. Ass’n v. County of Riverside*, 71 Cal.App.4th 1341, 1359 (1999). The CEQA Guidelines provide that the environmental setting as it exists when the EIR is being prepared should ordinarily be treated as the baseline for gauging the changes to the environment that will be caused by the project. CEQA Guidelines, § 15125(a). In most cases, this means that the EIR will “compare what will happen if the project is built with what will happen if the site is left alone.” *Woodward Park Homeowners Ass’n v. City of Fresno*, 150 Cal.App.4th 683, 707 (2007).

The CEQA Guidelines encourage lead agencies to adopt and publish “thresholds of significance” for use in determining whether environmental impacts are significant. A threshold of significance is defined as “an identifiable quantitative, qualitative or performance level of a particular environmental effect.” CEQA Guidelines, §15064.7(a). Once such thresholds are established, an impact that complies with the applicable threshold will “normally” be found insignificant and an impact that does not comply with the applicable threshold will “normally” be found significant. CEQA Guidelines, §15064.7(a). San Luis Obispo County uses the thresholds for effects upon agricultural resources listed in CEQA Guidelines, Appendix G.

Following the CEQA Guidelines Appendix G, San Luis Obispo County determines that a project would have a significant impact if the project would:

- (1) Convert Prime Farmland, Unique Farmland, or Farmland of Statewide Importance to nonagricultural use;
- (2) Conflict with existing zoning for agricultural use, or a Williamson Act contract;
- and/or (3) Involve other changes in the existing environment which, due to their location or nature, could individually or cumulatively result in loss of Farmland, to non-agricultural use.

The Project here fails to meet any of these thresholds. Here, rather than creating a loss of farmland, the agricultural activities will continue on the property. The Project does not conflict with existing zoning for agricultural use, or a Williamson Act contract. More importantly, the water conservation measures at issue will not result in any loss of farmland to non-agricultural use. Rather, the water conservation measures will help preserve the continued viability of farming in the area by allowing farming to continue sustainably and maximizing water use efficiency.

In *Turlock Irr. Dist. v. Zanker*, 140 Cal.App.4th 1047 (2006), the court held that the exception to CEQA's exemption for existing facilities, where "there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances," did not apply to a water district's implementation of water conservation rules. *Id.*, at 1066-67. There, the court found that water conservation measures would not adversely affect the environment, as they were implemented to make more water available for fire protection. *Id.* Similarly here, an increase in water efficiency for the ongoing agricultural operations at the Project will not qualify as a "significant effect on the environment."

Furthermore, unless related to an adverse effect on the physical environment, an inconsistency between a project and an applicable plan cannot be a "significant effect" in itself. An EIR is only required for a project that conflicts with a land use policy that was adopted for the purpose of avoiding or mitigating an environmental effect. *The Pocket Protectors v. City of Sacramento*, 124 Cal.App.4th 903, 929 (2004). When a project does not conflict with a land use policy, then an EIR is not required unless the conflict translates into a separate potentially significant physical impact, aside from the mere conflict with a plan policy itself. *Id.*

IV. CALIFORNIA AND COUNTY LEAD AGENCIES DO NOT CONSIDER AGRICULTURAL WATER CONSERVATION MEASURES TO BE "SIGNIFICANT EFFECTS"

The potential effects of agricultural water conservation have been studied by lead agencies across the state. These studies have consistently made findings of "no significant impact" to agricultural resources resulting from on-site water conservation. There is no reason the mitigation measures here should be analyzed differently.

Changes in water use from agricultural use to industrial or residential use do not in themselves act as a detriment to agricultural resources. On June 12, 2009, the Mojave Water Agency released a Negative Declaration for a water transfer from Dudley Ridge Water District, involving an agricultural water to urban water transfer. Using the same Appendix G checklist used by the County of San Luis Obispo to determine significant effects to agricultural resources, the study noted that nearly all of the land within the Dudley Ridge Water District is designated by the California Department of Conservation as Farmland of Statewide Importance. *See Dudley Ridge Water District Water Transfer Project Neg. Dec., State Clearinghouse No. 2009061046*, at 17 (June 2009). The study determined that because Dudley Ridge Water District intended to keep the land for agricultural use, the proposed project would not conflict with existing zoning for agricultural uses. Even further, the study found that the water transfer would result in water used solely for agriculture to be converted to agricultural, commercial, industrial, and residential land uses. *Id.* Since the transfer would by more efficiency guarantee a source of water in the future, the study found no significant effects to agricultural resources. *Id.*

On May 7, 2009, San Luis Obispo County released a mitigated Negative Declaration for the Staniec Land Use Ordinance Amendment, ED08-203. In finding that the subdivision project for residential use's impact on agricultural resources would not create a significant effect on the environment, the County specifically reviewed the project in light of Agricultural Policy 11. The County found that because the net change in water use would be "negligible," the baseline conditions would not change. Furthermore, "to avoid any potential inconsistency with Agriculture Policy 11, the vacant lot created by the future subdivision of the Staniec property

shall be served by its own on-site well.” *Id.*, at 24. Similarly here, the on-site water conservation mitigation will avoid potential inconsistency with Agriculture Policy 11, since the Project’s conservation measures allow the continuance of farming without drawing off additional off-site water supplies dedicated to agricultural lands. Because the County should remain consistent in how it interprets its own guiding thresholds of significance, it should find that no significant impacts on agricultural resources would result from the proposed water conservation measures for the Project.

V. PUBLIC POLICY SUPPORTS IMPLEMENTATION OF WATER CONSERVATION MEASURES WITHOUT TRIGGERING ADDITIONAL ENVIRONMENTAL ANALYSIS FOR MITIGATION MEASURES

Moreover, public policy supports water conservation to increase the efficiency of agricultural operations in the region and sustain water resources. *See, e.g.*, Water Code §§ 10801(e), 10802 (“(a) The conservation of water shall be pursued actively to protect both the people of the state and their water resources. (b) The conservation of agricultural water supplies shall be an important criterion in public decisions on water.”); Pacific Institute, Heather Cooley, Juliet Christian-Smith, and Peter H. Gleick, *Sustaining California Agriculture in an Uncertain Future* (July, 2009). Water Year 2009 is the third consecutive dry year for the state. Water Year 2007/08 resulted in 63 percent of average annual precipitation across the state, and Water Year 2008/09 resulted in 72 percent of average annual precipitation. By the end of August 2009, statewide precipitation stood at 78 percent of average for this water year. Department of Water Resources, *California’s Drought Update* (Sep. 30, 2009). In the face of such short- and longer-term water supply pressures, the State and County’s policy is to promote water conservation for agriculture as well as urban water use.

A. Agricultural Water Efficiency

On November 4, 2009 the California Legislature passed and on November 10, 2009 (the date of this memorandum) the Governor signed into law Senate Bill No. 7, which mandates extensive water conservation across the state in both the urban and agricultural sectors. The Legislature made an official finding that “[t]he conservation of agricultural water supplies is of great statewide importance.” Water Code § 10801(d).

The law requires agricultural water suppliers to implement all cost effective and technically feasible efficient management practices, including on-farm conservation, on or before July 31, 2012. *See* Water Code § 10608.48(c). A list of potential practices is contained in the statute, and authority is granted to the Department of Water Resources to approve additional practices for inclusion in the list. Agricultural water suppliers must prepare and adopt agricultural water management plans by July 31, 2010, describing the efficient management practices to be implemented. *See* Water Code § 10820. Thus, state law will effectively mandate that certain efficient water use practices be adopted for on-farm agricultural operations.

B. State Laws Granting Retained Rights in Conserved Water

It is clear that planning and implementation of water conservation measures may require the expenditure of significant time and financial resources. In light of that reality, California water

laws recognize the value of conservation measures and encourage water conservation by allowing the owner of water rights to transfer the conserved portion to other users. *See, e.g.*, Water Code §§ 109, 1011(b), 1020-1031, 1725 (temporary transfers), 1735 (long-term transfers), 1745.05(a)(1). This allows the user undertaking conservation measures to have a source of income to pay for planning and implementation. In addition, California law protects the water rights of users who implement conservation measures, so that their rights are preserved even following lower usage. *See* Water Code §§ 1005.1, 1011(a), 1012. These provisions allow the water right holder to increase its usage in the future up to the former level of extractions, very much like what is proposed for the Project.

C. County Resources Management System Update

The County influences the use of water for residential and nonresidential purposes by considering the availability of water in the approval of projects and has measures in place to reduce long-term impacts to water supply. In addition to the water supply analysis required for exceptionally large projects by SB 610 and SB 221, the County analyzes long-term water supply as part of the County Resources Management System (RMS).

The RMS utilizes three alert levels called levels of severity to identify differing levels of resource deficiencies. Level I is the first alert level. Level I occurs when sufficient lead time exists either to expand the capacity of the resource, or to decrease the rate at which the resource is being depleted. Level II identifies the crucial point at which some moderation of the rate of resource use must occur to prevent exceeding the resource capacity. When this condition occurs, the rate of resource depletion must be decreased to avoid exceeding the resource capacity. This may be accomplished through conservation or other growth management techniques. The Board of Supervisors may choose to implement development restrictions to increase the lead time for avoiding the deficiency. When the Board of Supervisors finds that a resource deficiency has been corrected, any ordinance that enacted development restrictions should be repealed or allowed to expire. Applications would then be processed and reviewed as normal. Finally, Level III occurs when the demand for the resource equals or exceeds its supply. It is the most critical level of concern. At Level III, there is a deficiency of sufficient magnitude that drastic actions (e.g., growth management, capital improvements) may be needed to protect public health and safety.

According to the most recent Annual Resource Summary Report (2008), the Paso Robles Groundwater Basin is at a Level of Severity I. According to the same report, a Level of Severity II is recommended in San Miguel. A Level of Severity II has also been recommended for the San Miguel CSD for sewage treatment, although the 2008 Annual Report also states that increases in capacity will be planned as building activity dictates. At this time, the levels of severity for San Miguel have not been certified by the Board of Supervisors. When the Board of Supervisors finds that a Level of Severity II exists, it may adopt land use policies that respond to a delay in funding for a necessary project, including imposing stringent water conservation measures within the service area. This structure shows that water conservation serves as a valuable tool in the region, and the proposed Project is not inconsistent with the RMS.

D. San Luis Obispo County Code

The County Code also contains water offset ordinances for new construction. For example, Section 19.07.042 of the County Code requires water conservation technology for all new installations of water fixtures. Under these ordinances, basins like the Nipomo and Los Osos Basin have stricter water conservation requirements. These ordinances demonstrate that the County encourages and requires water conservation and endorses the concept of water offsets. Ordinance No. 3157 § 1, passed August 26, 2008, further evidences the County's importance placed on water conservation. This Ordinance is to reduce the amount of water being used by residential, commercial and other uses located in the Nipomo Mesa Water Conservation Area.

VI. CONCLUSION

Against this strong policy backdrop, it appears clear that County and State policy would support the implementation of water conservation and mitigation measures for the Project without creating a "significant effect" upon the environment such that they would have an adverse effect on agricultural resources, and thus should not be expected to require separate analysis under an EIR.

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