

CALIFORNIA ENVIRONMENTAL LAW PROJECT
A Non-Profit Legal Corporation



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Via Electronic Mail and Facsimile
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Louis Fuentes, Chairman
Imperial County Board of Supervisors
Superior Court County of Imperial
940 Main Street, Suite 209
El Centro, CA 92243-2842

Re: Wind Zero Project (Hearing – September 28, 2010)

Dear Chairman Fuentes and Members of the Imperial County Board of Supervisors:

I am writing to you on behalf of the Sierra Club Desert Committee. Comments dated August 11, 2010 have previously been submitted to the Board on behalf of the Club that address a variety of issues, including groundwater impacts. I have been requested to address only those aspects of the project that concern its groundwater and water supply impacts.

I. The Mitigation Monitoring, and Reporting Plan provides Monitoring and Reporting But No Mitigation and Fails to Meet CEQA Requirements.

Condition MM 4.7.7d requires the applicant to “install the means of assessing the potential impact of groundwater production at the Project site” prior to recordation of the final map for Phase I. (emphasis added). Three monitoring wells are required “to assess the potential of hydraulic influences outside of the immediate area of production.” Distances are prescribed for the location of the monitoring wells.

Under condition MM 4.7.7e the Project is required to implement a groundwater monitoring program which includes installation of pressure transducers to record with precision water level data. The developer is required to produce a monthly report to the Planning Department “to provide a means of assessing the potential of the additional demand exacerbating [sic] the rate of groundwater level decline described in earlier reports.”

Condition MM 4.7.7f requires implementation for a groundwater sampling program “to collect water quality data form the production well and outlying monitoring wells.”

Condition MM 4.7.7g is set out in full:

“The proposed project shall enter into a six-year groundwater management plan/agreement with the Imperial County Planning and Development Department to

ascertain the potential impact the production of groundwater for the proposed project is having on the described overdrafted basin. The groundwater management plan/agreement shall focus on site specific impacts and though the use of the data collected onsite will establish the specific area of hydraulic influence, potential for degradation of water quality in the immediate vicinity, and potential mitigation influences, [sic].

If it is determined by the third party consultant (not having prior experience or financial interests in the determination of any findings regarding the groundwater resources in the basin) that Phase I and Phase II water consumption (33.3-acre feet per year) have caused further overdraft in the basin, the project will not be permitted to develop Phase III without securing alternative water supply sources. Phase III (project buildout) will be limited to a total of 65 acre-feet per year. If it is determined the alternative water supply sources are necessary, these alternative water supply sources will be subject to a separate environmental analysis.”
(Emphasis added).

In the likely event that production from the Project wells has caused “further overdraft” within the six year agreement period, the Project developer must obtain an alternative water supply in order to proceed with Phase III. There is no discussion in the FEIR concerning where that alternative water supply will come from and the environmental effects of obtaining it. Nor is there any prescribed mitigation for adverse impacts to nearby wells with respect to drawdown, increased expenses associated with water production for overlying nearby users, or with decline in water quality that may make water non-potable. The Mitigation, Monitoring, and Reporting Plan is only a Monitoring and Reporting Plan; it is not a mitigation plan providing any remediation of damage to nearby wells caused by the Project’s pumping.

II. The FEIR Fails to Address Long Term Water Supply Impacts of the Project.

In *Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova*, 40 Cal.4th 412 (2007), the California Supreme Court held that an EIR must clearly explain how the project’s long-term water needs might be met, what the impacts would be from exploiting various supply sources, and how those impacts would be mitigated. *Vineyard* involved an EIR for a long-range plan for 22,500 homes on 6,000 acres. The anticipated water supply for planned development had several components, including use of groundwater for near-term development and new surface water supplies coupled with a conjunctive use program that would provide water for the longer term. The EIR explained that other development projects would compete for these water supplies, and mitigation was adopted to prohibit specific development entitlements until a secured water source was in place. The trial court and court of appeal both upheld the EIR’s water supply analysis, concluding that the EIR adequately identified and evaluated potential water sources for the development. Reviewing earlier appellate decisions, the Supreme Court in *Vineyard* distilled the following general principles governing an EIR’s analysis of water supply issues:

(1) CEQA’s informational purposes are not satisfied by an EIR that ignores or assumes a solution to the problem of supplying water to proposed development. Decision makers must be supplied sufficient facts to evaluate the pro’s and con’s of supplying the water the project will need.

(2) An adequate environmental impact analysis for a long-range development plan cannot be limited to the water supply for the first stage of development. While CEQA allows an agency to defer analysis of certain details of later phases of long-term projects until those phases are set for approval, CEQA’s demand for meaningful information “is not satisfied by simply stating information will be provided in the future.”

(3) Future water supplies identified and analyzed in an EIR must be reasonably likely to prove available; speculative sources and unrealistic allocations such as “paper water” do not provide an

adequate basis for decision-making under CEQA.

(4) Where a full analysis leaves some uncertainty regarding the availability of anticipated future water sources, CEQA requires some discussion of possible replacement or alternative supply sources, and of the environmental consequences of resorting to those sources.

(5) CEQA's informational requirements may not be met simply by providing that future development will not proceed if the anticipated water supply for a project fails to materialize.

MM 4.7.7.g provides that if Phase I and Phase II water consumption (33.3 afy) "have caused further overdraft in the Basin, the project will not be permitted to develop Phase II without securing alternative water supply sources."

The FEIR contains no discussion of the nature of these alternative water supply sources, where they would be obtained, or the environmental effects of obtaining them in the future. The FEIR does not meet the *Vineyard* standard (The alternative water supply would have to be at least an additional 31 afy per year.)

III. The FEIR and Mitigation, Monitoring and Reporting Plan Fails to Include Feasible Measures to Mitigate Impacts to Users of Groundwater Near to the Project Whose Overlying Beneficial Water Uses May Be Impaired With Respect to Well Production, Water Quality and Expense of Pumping Attributable to Wind Zero's Pumping of Groundwater From the Over-Drafted Sole Source Aquifer.

A. The EIR Does Not Describe Feasible Measures Which Could Minimize Likely to Occur Significant Adverse Impacts of the Project On Nearby Wells. The County Has Failed to Adopt Feasible Measures Which Could Reduce Significant Adverse Impacts of the Project.

The mitigation measures adopted by the County with respect to the Wind Zero project do not minimize significant adverse impacts reasonably expected to be caused by groundwater pumping to fulfill project purposes (64 afy). An EIR must propose and describe mitigation measures to minimize the significant environmental effects identified in the EIR. Pub. Res. Code §§ 21002.1(a), 21100(b)(3), CEQA Guideline § 15126.4. Guideline §15126.4(a) provides that an EIR shall describe feasible measures which could minimize significant adverse impacts. A mitigation measure must be designed to minimize, reduce, or avoid an identified environmental impact or to rectify or compensate for that impact. Guideline§15370.

The proposed project involves pumping up to 64 afy for the three phases of the Project. The FEIR fails to estimate possible declines in nearby wells attributable to project pumping, even through the County has hydrological studies performed in connection with the US Gypsum expansion and modernization project and other information that show that declines in nearby wells in Nomirage and Ocotillo will likely occur. Some wells could go dry, and in all wells so affected costs of pumping will significantly increase. Moreover, as the drawdown increases, water quality is likely to deteriorate. The Findings adopted by this Board in connection with the US Gypsum project acknowledge that:

"As the depth to groundwater decreases, [sic] the saline water that is present at the water table may eventually reach the screened interval of some wells. Several wells have relatively short screened intervals so that the saline water present at the water table could affect the quality of the water in certain wells."

The FEIR acknowledges the Basin is in overdraft, and according to the US Gypsum FEIR, will decline approximately 500 AF/year, given the anticipated (cumulative) groundwater withdrawals. (This figure is calculated based on a disputed estimate of inflow (recharge) into the Basin of 1077 AF/yr.) The USG FEIR states: "The condition of overdraft is characterized in the basin by substantial groundwater declines over the past 30 years and by the water balance studies, all of which indicate a negative change in storage." US Gypsum FEIR at 4.0-55.

Water levels in the Ocotillo/Nomirage area have steadily declined over the last 30 years. Specifically, the US Gypsum DEIR (p. 3.3-49) states:

"The hydrographs for all of the wells shown in Figure 3.3-9 [Ocotillo/Nomirage Area Hydrograph] indicate that the static (non-pumping) water levels in the Ocotillo/Nomirage area have steadily declined over the last 30 years. The total decline is about five to six feet, for an average rate of water level decline of one foot every five years. The hydrographs for several of the wells, but most notably 16S/9E-36D2, indicate that the decline has been very consistent over this time period. This is somewhat surprising because the rate of rainfall in the basin from 1976 to 1993 was generally above average (see Fig. 3.3-2) and the rate of water production from the basin 1979 to 1996 decreased by almost 45 percent (see Fig. 3.3-8)." (USG DEIR 3.3-49.)

The proposed mitigation measures provide for monitoring wells and further studies (at least for six years), but provide no relief to neighboring overlying users who may be adversely affected by the groundwater withdrawals for the project. For example, there is no provision requiring the Project proponent to provide for domestic and landscaping needs of overlying users with potable water, when and if water quantity and quality are adversely impacted, until such time as their overlying rights can be fulfilled in perpetuity either by pumping or "substitute" water.

Nor to the extent that increased pumping from Wind Zero wells could degrade water quality in individual wells due to lateral migration of higher-TDS water from other areas of the basin, has there been any attempt to mitigate those effects. Wind Zero is not being required to provide mitigation for overlying users whose water quality has become non-potable and below applicable water quality standards (an effect reasonably likely to occur in light of information presented to (and known) by the County).

The action of the County in approving this Project is tantamount to authorizing Wind Zero to pump up to 63 acre feet of water from the basin and to impair the overlying rights of neighboring landowners to maintain (as an incident of their ownership of lands) full beneficial use of available ground water of sufficient amount and quality (relative to pre-project conditions) to fulfill the purposes of their overlying uses. Under the Mitigation Monitoring and Reporting Program Wind Zero (under its permit) has no obligation whatsoever to mitigate for the continuing effects caused by its groundwater pumping associated with its project. It has an obligation only to report and monitor.¹

¹ The six year groundwater management plan/agreement seems designed to include only data collected onsite rather than any offsite, or down-gradient monitoring. Exhibits 52, 53, and 54 to the Sierra Club CNRCC Desert Committee (Harmon) comments dated August 11, 2010, demonstrate the relevance of such information, which the Conditions do not obligate the applicant to provide.

Exhibit 52 shows locations of wells in relation to location of private property overlying the groundwater basin. Exhibit 53 shows declining static water levels down-gradient from wells pumping the largest amounts of water. The graph depicts a decline in static water level of approximately 60 feet in 6 miles from the Ocotillo Mutual Water Company to the Yuha Estates Subdivision.

B. The County Has No Authority to Authorize Wind Zero to Engage in Ground-Water Pumping in an Overdrafted Sole Source Aquifer That Could Result in Permanent Impairment of the Rights of Overlying Owners of Neighboring Land to Available Groundwater of Sufficient Quality and Amount to Fulfill Overlying Beneficial Uses On Their Property, Or to Burden Them With Increased Costs of Producing Water.

Guideline § 15041 provides that a “lead agency for a project has authority to require feasible changes in any or all activity involved in the project in order to substantiate lessen or avoid significant effects on the environment consistent with applicable constitutional requirements. Guideline § 15126.4(D)(4) provides that mitigation measures must be consistent with all applicable constitutional requirements.

Here the County is in effect authorizing Wind Zero to engage in pumping which, could result, over the time span of the project, in serious impairments (or extinguishment) of the rights of the overlying owners to reasonable beneficial use of the groundwater below their property, including water of sufficient quality to fulfill the overlying land uses, which include drinking water for domestic use. The County is here authorizing Wind Zero to engage in a future physical taking of water in violation of an overlying landowner’s correlative property rights in groundwater, to the extent its pumping decreases the amount of water accessible to the owner of water rights and/or impairs water quality. Washoe County v. U.S. (2003), 319 F3d 1320, 1326. See also International Paper Co. v. U.S. (1931), 282 U.S. 399, 407-408. (taking found where the Secretary of War licensed a private company to withdraw water from the petitioner’s mill to increase power production.) Here the County is conferring a license on Wind Zero, to engage in pumping that could deprive the overlying owners of their senior water rights. (A right to extract groundwater for beneficial use is derived from overlying land ownership. City of Barstow v. Mohave Water Agency (2000), 23 Cal. 4th 1224,1240).

The paramount right of the overlying landowner in the use of so much of the percolating waters as he needs for reasonable beneficial use on his land is entitled to protection against injury by such taking of the water for non-overlying use as will cause him to be deprived of his own lawful use. The owner of land overlying a percolating groundwater supply is entitled to protection against a taking of water that results in such a lowering of the groundwater level in his existing wells as to render his means of diverting the water inadequate. Lodi v. East Bay Municipal Utility District (1936), 7 Cal.2d 316, 335-344.

An overlying owner may institute legal proceedings to safeguard a percolating water supply once a surplus ceases to exist, and may restrain any additional user beyond the point of safe yield. Pasadena v. Alhambra (1949), 33 Cal.2d 908. Where danger from salt water intrusion threatens, overlying owners are entitled to relief for protection to the extent of their rights, and for protection against water uses that would unduly increase their costs or lower the groundwater level beyond the danger point. Allen v. Calif. Water and Telephone Co. (1946), 29 Cal.2d 466.

In Gray v. County of Madera (2008) 167 Cal.App.4th 1099, the DEIR concluded that the quarry project could cause water levels and pumping rates to decline during the operational life of the quarry. The Mitigation for the project required that if, as a result of monitoring, an impact is found, replacement water would be provided. The Court of Appeals found that there was

Exhibit 54 is a graph depicting declining static water levels of about 69 feet, 3 miles from the Miller’s Garage in the west to the Coyote Wells and to 29HI to the East.

See also Sierra Club Exhibit 19 EH Table 10, Water Wells Information, Water Quality, and Groundwater Elevations, Ocotillo/Coyote Wells Groundwater Basin. These exhibits were submitted in connection with August 11, 2010 Sierra Club Comments.

insufficient evidence to support the EIR's conclusion that the proposed mitigation measures were adequate to address the potential and significant impacts of the Project on water resources. In holding that the water replacement mitigation measures were inadequate, the Court noted that the mitigation measure would not "provide neighboring residents with the ability to use water in substantially the same manner they were accustomed to doing if the Project had not existed. The Court concluded:

"Finally, we conclude that Mitigation Measure 3.9-1b improperly defers formulation of specific mitigation strategies. "Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.]" (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1276.) According to Respondents, there is no improper deferral because the County has committed to a mitigation goal of remedying the decline in water levels of private wells and has listed various mitigation alternatives that can address this problem. Respondents contend that CEQA does not require that they specifically detail the mitigation alternatives. (See, e.g., *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029 ["[F]or [the] kinds of impacts for which mitigation is known to be feasible, but where practical considerations prohibit devising such measures early in the planning process (e.g., at the general plan amendment or rezone stage), the agency can commit itself to eventually devising measures that will satisfy [167 Cal.App.4th 1119] specific performance criteria articulated at the time of project approval. Where future action to carry a project forward is contingent on devising means to satisfy such criteria, the agency should be able to rely on its commitment as evidence that significant impacts will in fact be mitigated." [Citations.]".)

While we generally agree that CEQA permits a lead agency to defer specifically detailing mitigation measures as long as the lead agency commits itself to mitigation and to specific performance standards, we conclude that here the County has not committed itself to a specific performance standard. Instead, the County has committed itself to a specific mitigation goal -- the replacement of water lost by neighboring landowners because of mine operations. However, this goal is not a specific performance standard such as the creation of a water supply mechanism that would place neighboring landowners in a situation substantially similar to their situation prior to the decline in the water levels of their private wells because of the mining operations, including allowing the landowners to use water in a substantially similar fashion to how they were previously using water. Moreover, the listed mitigation alternatives must be able to remedy the environmental problem. We have concluded that the listed mitigation alternatives, except for the building of a new water system, cannot remedy the water problems because they would not place neighboring landowners into a situation substantially similar to what the landowners experienced prior to the operation of the mine. And the option to build a water system, which is the only effective mitigation measure that was proposed if it was feasible, was never studied or examined. Thus, the County is improperly deferring the study of whether building such a system is feasible until the significant environmental impact occurs."

(167 Cal.App.4th 1118-1120, emphasis added).

This is not appropriate under CEQA, in light of the FEIR findings: Impact 4.14.1.3 states:

"The proposed project could result in the degradation of groundwater supplies or interfere substantially with groundwater recharge, such that there would be a net deficit in aquifer volume or a lowering of the local groundwater

table level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted. “

Impact 4.7.7 states:

“The proposed project, in combination with existing, approved, proposed an reasonably foreseeable development, would contribute to the cumulative effects [sic] degradation of groundwater quality.”

Impact 4.14.1.4 states:

“The proposed project in combination with other projects in the cumulative study area could contribute incrementally to cumulative impacts to groundwater supply and recharge.”

Under Appendix G of the CEQA Guidelines, a project will have a significant adverse impact on hydrology and water quality if its implementation results in the following:

“Substantially deplete groundwater supplies or interfere substantially with groundwater recharge so that there would be a net deficit in aquifer volume or a lowering of the local groundwater gable level (e.g., the production rate of pre-existing nearby wells would drop to a level which would not support existing land uses or planned uses for which permits have been granted)...[or] otherwise substantially degrade water quality.”

No specific geo-hydrology study has been prepared for this site despite the fact that the provision of groundwater for multiple lots was unsuccessful at the Graham Well in Nomirage Subdivision. Residents had to invest in private domestic wells for each lot. Preparation and approval of a hydrogeology study to demonstrate that adequate water is available to serve the Project must, under CEQA be done prior to project approval. See Gray v. County of Madera, supra. Without a hydrogeologic study, there is no substantial evidence in the record that the project will not cause further overdraft, contamination, or increased salinity of the groundwater aquifer, or that there will be no effect on well-production in nearby communities.

CUP 08-0031 Condition #8 and related mitigation measures in the FEIR are so vague that they are unenforceable. The conditions do not define terms like: “water quality in the immediate vicinity,” “overdraft in the basin,” and “alternative water supply sources.” Does “immediate vicinity” include impacts off-site on properties not owned by Wind Zero? Moreover, in the proposed findings, the County states; that “the project applicant will be required to enter a groundwater monitoring program to assess the potential impacts of groundwater production at the proposed project site.” (emphasis added). The tract Map conditions provide:

“The proposed project shall enter into a six-year groundwater management plan/agreement with the Imperial County Planning and Development Department to ascertain the potential impact the production of groundwater for the proposed project is having on the described over-drafted basin.

The groundwater management plan/agreement shall focus on site specific impacts and through the use of data collected onsite will establish the specific area of hydraulic influence, potential for degradation of water quality in the immediate vicinity, and potential mitigation influences.” (emphasis added)

There is inconsistency between the language of the Tract Map conditions and the Proposed Findings. The Project Developer could construe the project approval as authorizing only monitoring and reporting impacts at the project site.

Whatever is the case, the Mitigation Monitoring, and Reporting Plan clearly does not meet legal requirements under CEQA, as set forth above.

C. County Has Not Approved Legally Feasible Mitigation Measures Nor Has It Proposed Mitigation Consistent With Its Groundwater Ordinance.

Under Guideline §15040(c) mitigation measures that go beyond the powers conferred by law on lead and responsible agencies are legally infeasible. Kenneth Mebane Ranches v. Superior Court (1992) 10 Cal.App.4th 276, 291. Under Guideline § 15364, “feasible” is defined as being accomplished “in a successful manner within a reasonable period of time, taking into account, economic, environmental, legal, social, and technological factors.” (emphasis added). Agencies have a duty to impose mitigation measures that are feasible.

The EIR fails to describe feasible measures which could minimize significant adverse impacts. Guideline § 15126.4 (a)(i). Therefore the FEIR must be set aside. In its approval of mitigation measures, the County failed to adopt legally feasible measures which could minimize significant adverse impacts. In effect it seems to be deferring the formulation of mitigation measures until the groundwater management plan is formulated. Under *Gray*, this is inappropriate, (“Thus the County is improperly deferring the study of whether building such a [water] system is feasible until the significant environmental impact occurs.” 167 Cal.App.4th at ___.

Finally, the County, in approving the Project, will not be acting consistently with its own groundwater ordinance, and the legal authority it has conferred on itself in its Ordinance, §92204.00 establishes first priority among groundwater use to “overlying domestic uses...legally existing on the effective date of this ordinance or (b) developed thereafter on property zoned R-1 or R-2 on the effective date of this ordinance.” The Ordinance states the “intent of the Board of Supervisors to recognize that such Priority Groundwater Uses have a prior right to groundwater with the County...” The so-called mitigation plan has no meaningful enforceable mitigation conditions and allows Wind Zero to act contrary to its neighbor’s first priority uses.

CONCLUSION

Sierra Club requests the Board to take this matter off tomorrow’s agenda, and to prepare (and circulate) additional, supplemental environmental documentation in connection with Wind Zero.

Sincerely,

CALIFORNIA ENVIRONMENTAL LAW PROJECT

Laurens H. Silver
Counsel for Plaintiff Sierra Club Desert Committee

LHS/ww
cc: Michael Rood, County Counsel
(by email and facsimile)