

7/6/21

Public

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Siskiyou County Clerk
510 N. Main Street
Yreka, CA 96097

Re: Public Comment on the Adoption of Ordinance
Nos. 2021-07 and 2021-08

Dear Hon. Members of the Siskiyou County Board of Supervisors:

My law firm represents several individuals (the "Ranchers") who own and operate a ranch in Siskiyou County (the "Ellison Ranch"). On May 4, 2021, the Siskiyou County Board of Supervisors (the "Board" or the "County") adopted urgency ordinances 2021-07 and 2021-08.

Urgency Ordinance 2021-07 prohibits the use, or sale for use, of groundwater outside the parcel from which it was extracted without an administrative permit. The urgency ordinance purports to establish a "ministerial" permit subject to fines of up to five thousand dollars (\$5,000) per day. Urgency Ordinance 2021-08 is an outright ban on the use of certain listed roads by water trucks. On the same day, May 4, 2021, a first-reading was conducted of identical ordinances, which seek to make the provisions of both urgency ordinances permanent. A second reading was scheduled for June 1, 2021, and then continued to this hearing, July 6, 2021.

Scan/Email to BOS 7/6/21

The County claims that both ordinances are exempt from review under the California Environmental Quality Act (“CEQA”), Public Resources Code § 21000, *et seq.* under the “Common Sense Exemption,” title 14, section 15061, subdivision (b)(3) of the California Code of Regulations (the “CEQA Guidelines”). The County further claims that the ordinances are exempt under section 15307 and 15308 of the CEQA Guidelines on the grounds that the ordinances serve the purpose of protecting the environment and natural resources.

I write to you today to urge the Board to delay adoption of the ordinances until the proper environmental review can be conducted. As set forth below, the ordinances are not exempt from CEQA review, and further they have the potential to cause significant environmental impacts, necessitating a full Environmental Impact Report (an “EIR”). The Board must not rush to implement ordinances that impose heavy penalties for noncompliance and exact serious tolls on the lives and livelihoods of a significant portion of the community before giving the public the opportunity to be fully informed about the ordinances’ potential impacts.

A. Background Information

1. Siskiyou County

Siskiyou County has a long history of farming, including both crops and livestock farms run, in some cases, by four or five successive generations. The products produced in the region range from nuts and grains to strawberries and Christmas trees. The County also produces in excess of \$20 million in livestock each year, and, in 2019, exceeded \$40 million.¹

Although Siskiyou County has surface water supplies, many landowners, especially farmers and ranchers, rely heavily on groundwater for irrigation, fire protection, and even domestic uses. In addition to agricultural properties, a large number of residences, some originally intended to be vacation properties, depend on groundwater for irrigation, fire protection, and domestic uses. Many of the residences do not have wells, and, thus, must either incur the considerable expense of drilling a private well or have the water transported to them via water trucks. For years, residents unable to have a well drilled on their properties have relied on other private wells selling their water, which is transported to those communities via water trucks and pumped into storage systems for daily use. Without this water, many homes will go without water critical for drinking, domestic uses, maintaining a fire resistant landscape, and actively suppressing fire when threatened.

There are four medium priority basins in the County: Butte, Shasta, and Scott Valleys and the Tulelake Basin. Under the Sustainable Groundwater Management Act (“SGMA”), Water Code § 10720, *et seq.*, the basins must form Groundwater Sustainability Agencies (“GSA”) that will then develop Groundwater Sustainability Plans (“GSP”). The Siskiyou County Flood Control and Water Conservation District (the “District”) is the GSA for three of the basins, and the Board is a member of the GSA for the Tulelake basin. Currently, the

¹ 2019 Crop Report (siskiyou.ca.us)

Tulelake basin has released a public draft of its GSP, and the District has released similar drafts for comment, separated out by basin.

Presumably, the issues outlined above will be addressed in the final iterations of the County's GSPs. GSAs have authority to implement measures for properly allocating groundwater in a sustainable manner. (Water Code § 10725; 10726, subd. (a).) This includes requirements for registration and measurement of groundwater extraction facilities. (Water Code § 10725.6; 10725.8.)

2. The Ellison Ranch

The Ellison Ranch is a small, family owned business in Montague, California, located off of Highway A12. The current owners' great grandfather purchased the land comprising the ranch in 1942, with nothing but brush and a single well. The original owner's son, David Ellison, cleared the land, plowed fields for crops, and began purchasing cattle. In 1967, another well was drilled, and more fields were cleared to increase the land's productivity. Throughout the next few decades, the Ellison Ranch improved its irrigation equipment and increased its hay production to feed its growing cattle herd.

Currently, the Ellison Ranch runs 220 head of cattle and grows grass hay, alfalfa hay, and grain hay, which it uses to feed its own cattle and sell to other cattle ranchers in the area. The Ellison Ranch has been in the family for four generations, but, with the dropping price of cattle, and the increasing costs of equipment and other infrastructure needs, recent years have seen shortfalls in income, forcing the ranchers to look for supplemental income opportunities.

The Ellison Ranch has sold surplus groundwater from its wells to make up for those shortfalls and keep David Ellison's dream alive, as well as to continue to provide feed for local ranchers and quality cattle to the market. In 2020, the Ellison Ranch suffered approximately \$60,000 in losses on their cattle business, but were able to overcome those losses with approximately \$70,000 in water sales. The Ellison Ranch has no intention of supporting illegal activity, cannabis or otherwise, but greatly needs the ability to exercise its rights to the water from its wells in order to ensure that its ranch can remain afloat during these times of price volatility.

B. The Ordinances are Individually, and in Tandem, an Effective Ban on the Use of Groundwater in Certain Areas in Siskiyou County

1. Ordinance 2021-07

This ordinance effectively bans the sale of groundwater for use off-parcel in certain areas due to the County's belief that water being sold to users in that area are using it for an unlawful purpose. Under Siskiyou County Code ("SSC") § 3.5-13.104, as amended by the urgency ordinance and added permanently by the corresponding ordinance, the required permit will *only* be granted if the water is put to a lawful use, as determined by the *end user* property's zoning designation and Siskiyou County law.

The Ellison Ranch's customers are water trucks. Water trucks, or "water tenders," carry in excess of 2,500 gallons of water, sometimes up to 5,000 gallons, in a single load. The County has not enacted any ordinance requiring water trucks to disclose their customers to a filling station, and, even if the County did, such an ordinance would be of dubious validity and enforceability. A single truck may have multiple customers, and a single system into which such water is pumped may, in turn, have multiple users. A single water truck may also, and likely will, deliver to different individuals and businesses with each load.

Under the urgency ordinance, the required administrative permit may be denied if a *single* user, unbeknownst to either the Ellison Ranch or, indeed, the water truck driver, puts the water to a non-conforming or illegal use. There is no guidance as to who determines the universe of end users for a given applicant, and whether or how the end user is evaluated to determine whether their ultimate use of the water is non-conforming or illegal. Because of these uncertainties, as the ordinance is currently constituted, it is highly likely that no permits would or could be issued, as there is a possibility that at least some water in each load may go to an unlawful use, regardless of the fact that neither the Ellison Ranch nor the water truck driver filling at the ranch knew or could have known of such use.

2. Ordinance 2021-08

This ordinance further ensures that families without the ability to drill a private well will be unable to irrigate crops or landscaping, and will be significantly hindered in meeting their domestic needs. The ordinance prohibits *any* water truck from operating on certain roads, meant to isolate particular communities, if the truck carries in excess of 100-gallons of water.

Irrigation of one-acre of land with one inch of water requires approximately 27,158 gallons. This unreasonable and arbitrary limitation renders meaningful irrigation of any appreciable area of land impracticable. Further, the United States Geological Survey has estimated the national average for self-supplied domestic water use at approximately seventy-seven (77) gallons per day, per person.² In California, that number rises to eighty-eight (88) gallons per day, per person. Thus, the County's proposed limitations would require families of four living along the prohibited roadways to either hire or personally obtain four (4) truck deliveries *every single day* simply to meet their most basic domestic needs.

Proposed amendments to the ordinance, from the version codified as urgency ordinance 2021-08, purport to provide exceptions to the prohibition. However, Section 3-4.1504 of the Siskiyou County Code provides unfettered discretion to require trucks to provide all delivery information, which may change over time and with each fill-up, and to deny such permits without any explanation to the applicant. As a result, areas deemed unfavorable to the County will still likely be completely deprived of groundwater deliveries of sufficient frequency and quantity to irrigate crops and meet all domestic needs.

² Estimated Use of Water in the United States in 2015 (usgs.gov)

D. The Ordinances are Not Exempt Under Either the Common Sense Exemption or Any Categorical Exemption

1. The Common Sense Exemption

Section 15061, subdivision (b)(3), of the CEQA Guidelines exempts a “project” from CEQA review “[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment.” The common sense exemption is “reserved for those ‘obviously exempt’ projects, ‘where its absolute and precise language clearly applies.’” (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117 [quoting *Myers v. Bd. of Supervisors* (1976) 58 Cal.App.3d 413, 425].) If legitimate, reasonable questions can be raised about whether the project might have a significant impact, the agency cannot find with certainty the project is exempt. (*Id.*, at 117–18.)

Here, it is clear that the resulting lack of water in communities dependent upon water deliveries throughout Siskiyou County have the potential to result in significant environmental impacts. As set forth in more detail below, the ordinances are an effective ban on the use of groundwater deliveries in certain communities. This effective ban will almost certainly cause impacts to the environment, including to agriculture and forestry resources, geology and soils, hydrology and water quality, population and housing, public services, transportation, and wildfires. Because there are legitimate, reasonable questions as to the whether such impacts will occur, and the extent to which those nearly certain to occur will affect the environment, the project cannot be exempt under the common sense exemption.

2. The Class 8 Categorical Exemption

The Class 8 Categorical Exemption states:

Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.

(CEQA Guidelines § 15308.) An agency invoking the Class 8 exception bears the burden of demonstrating with substantial evidence that the project in question constitutes an action to assure the maintenance, restoration, or enhancement of the environment. (See *Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 710-11 [citing *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1102].)

At the May 24, 2021 Board meeting, when the urgency ordinances identical to the proposed ordinances were adopted, the conversation about the adoption of the urgency ordinance surrounded illegal cannabis grows.³ Indeed, the Agenda Worksheets provided for *both*

ordinances in the Agenda for the July 6, 2021 Board meeting mention cannabis specifically, but, notably, omit any mention of the environment.

At the May 24, 2021 meeting, Supervisor Haupt suggested potentially requiring a list of parcels to which water would be delivered pursuant to permits issues under Ordinance 2021-07. This was undoubtedly aimed at ensuring water did not go to cannabis grow operations. The County Sheriff spoke at the hearing on the urgency ordinance, about cannabis, *not* the environment. The District Attorney likewise expressed support, based on concerns about the proliferation of illegal cannabis grows. Based on the discussion of both citizens and County government officials, it is clear that the intent of the proposed ordinances is not “to assure the maintenance, restoration, enhancement, or protection of the environment” as required by Section 15308 of the CEQA Guidelines.

In any event, another exception to the Class 8 Exemption is applicable here. Section 15300.2(c) prohibits the County from relying upon a Class 8 exemption “where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” Indeed, courts have repeatedly declined to allow agencies to rely upon a Class 8 Exemption for projects with putative environmental benefits where the evidence shows a potentially significant impact could result. (See *Dunn-Edwards Corp. v. Bay Area Air Quality Mgmt. Dist.* (1992) 9 Cal.App.4th 644 [finding agency could not rely on Class 8 exemption for action tightening standards for volatile organic carbon (VOC) architectural coatings where industry groups provided evidence VOCs would increase due to the need for increased coatings of paint], *disapproved on other grounds by Western States Petroleum Ass’n v. Superior Court* (1995) 9 Cal.4th 559; see also *Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694 [invalidating ordinance designed to protect heritage trees where aspects of ordinance could result in greater impacts to tree resources].) Thus, even if the County could assert the Class 8 Exemption facially applies to the proposed ordinances, the clear potential for significant environmental impacts renders the exemption inapplicable here.

3. The Class 7 Categorical Exemption

Less often specifically invoked, the Class 7 Categorical Exemption is identical to the Class 8 Categorical Exemption except that the regulating activity at issue must be undertaken “to assure the maintenance, restoration, enhancement, or protection of *natural resources*” as opposed to the generalized “environment.” (CEQA Guidelines § 15307 [emphasis added].) The same rules of law apply here, and thus the Class 7 Exemption is inapplicable.

The ordinances are clearly aimed at curtailing the proliferation of illegal cannabis activity, and not at the preservation of natural resources. This is further evidenced by the Board’s amendment of the urgency ordinance meant as the precursor to Ordinance 2021-07 adding exemptions prior to adoption and the proposed amendments to Ordinance 2021-08 allowing unlimited discretion to grant “special exemptions” to the roadway prohibitions. Additionally, multiple Board members expressed support for lowering or even eliminating

³ 1399709.pdf (siskiyou.ca.us)

permitting fees, leaving nearly no barrier to obtainment of the permits required by Ordinance 2021-07 by applicants with the personal approval of the Board.

Again, the potential for environmental impacts as a direct result of the ordinances is clear. Section 15300.2, subdivision (c), places any such action outside of the ambit of the categorical exemptions. The Class 7 Exemption cannot be used to circumvent the required level of CEQA review of the ordinances.

E. The Ordinances, Individually or Together, Have the Potential to Cause Significant Environmental Impacts

The deprivation of much-needed water to the rural residents of Siskiyou County not fortunate enough to have—or be able to afford to drill—a private well will cause significant environmental impacts. An EIR is thus required.

Prior to considering any “project” under CEQA, a lead agency must first determine whether to prepare a Negative Declaration, a Mitigated Negative Declaration, or an EIR for the project. (CEQA Guidelines, § 15063.) The lead agency makes this determination based on what is called the “fair argument” standard. (CEQA Guidelines, § 15064(f)(1).) As explained by the Supreme Court:

[S]ince the preparation of an EIR is the key to environmental protection under CEQA, accomplishment of the high objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact.

(*No Oil, Inc. v. City of Los Angeles* (1975) 13 Cal.3d 68, 75.)

The Supreme Court has explained that even in “close and doubtful cases,” an EIR should *always* be prepared to ensure “the Legislature’s objective of ensuring that environmental protection serve as the guiding criterion in agency decisions.” (*Id.* at 84; see also Pub. Resources Code, § 21101, subd. (d).) Many courts have stated that the “EIR is the heart of CEQA. The report . . . may be viewed as an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes *before* they have reached ecological points of no return.” (*Citizens for Quality Growth v. City of Mount Shasta* (1988) 198 Cal.App.3d 433, 438 [quoting *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810] [emphasis added].)

The CEQA Guidelines set forth the “fair argument” test used to evaluate whether an EIR is required:

If the lead agency finds there is substantial evidence in the record that the project may have a significant effect on the environment, the lead agency shall prepare an EIR. Said another way, if a lead agency is presented with a fair argument that a project may have a significant effect on the

environment, the lead agency *shall prepare an EIR* even though it may also be presented with other substantial evidence that the project will not have a significant effect.

(CEQA Guidelines, § 15064(f)(1); see also Pub. Resources Code, § 21080, subd. (d) [internal citations omitted].)

Moreover, an agency's failure to gather or analyze information on a project's impacts can expand the scope of the fair argument standard necessitating the preparation of an EIR. (See, e.g., *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 ["CEQA places the burden of environmental investigation on government rather than the public," and a lead agency "should not be allowed to hide behind its own failure to gather data."].)

Accordingly, if any commenting party makes a fair argument that the proposed project's environmental impacts "may have a significant effect on the environment," the County *must* prepare an EIR, even if other substantial evidence supports the argument that adverse environmental effects will *not* occur. (CEQA Guidelines, § 15064(g)(1); see also *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316 ["[i]f there is substantial evidence of such an impact, contrary evidence is not adequate to support a decision to dispense with an EIR."].)

The adoption of the proposed ordinances has the clear potential to cause a significant effect on the environment, including, but not limited to:

Agricultural and Forestry Resources. Disabling the Ellison Ranch from providing a reliable water supply to neighborhoods like Mount Shasta Vista, who depend on groundwater purchased from private wells, will cause significant impacts to the environment, which may result in the conversion of land suitable for farming to non-agricultural use. Without a reliable water supply, any crops currently irrigated with groundwater purchased from private wells will ultimately fail, and that land will no longer be usable for agricultural purposes. This will both devalue the land and harm Siskiyou County's rural residents who depend on being able to supplement their food supply and income with food grown at home.

Geology and Soils. Disabling large numbers of irrigators in the County from watering their crops will inevitably result in dried and depleted soil. Water is the primary source of movement of nutrients through soil, and helps control the temperature of soil during hotter periods, preserving microbial activity in the soil necessary for the efficient uptake of nutrients by crops of all kinds. This could result in reduced efficiency of later planted crops, as water's role as a solvent for nutrients and microbes as well as its role as transport medium are potentially its most important functions in the soil ecosystem.⁴

Hydrology and Water Quality. The effective banning of the use of groundwater in certain intensely localized areas will likely cause impacts to groundwater recharge in those

⁴ Life in Dry Soils: Effects of Drought on Soil Microbial Communities and Processes (vt.edu)

areas. The aforementioned impacts to soil may also result in impacts to the existing drainage pattern of each site or area affected by the ordinance's new prohibition.

Population and Housing. The ordinance will, unquestionably, force communities to relocate where there is a reliable water supply. This will induce substantial unplanned population growth in nearby areas due to the displacement of hundreds, perhaps thousands of individuals living in communities reliant on ranches like the Ellison Ranch filling water trucks for delivery of their irrigation and domestic water supply. This movement, given the housing availability crisis extant in California, will necessarily result in the construction of replacement housing elsewhere. In fact, even if these populations are able to remain in place, new water infrastructure will need to be constructed. This, itself, could result in an increase in population in those areas, which will undoubtedly have an environmental impact.

Public Services. As stated above, the ordinances will likely result in either a migration of the affected communities or the need for construction of new and additional facilities in those communities. Where the communities are forced to move, their sudden presence in nearby areas will necessitate the expansion or construction of public services for fire protection, police protection, schools, and other such public services. Where the communities are able to construct sufficient infrastructure to remain in place, the newly available infrastructure will encourage growth, and the communities will inevitably be forced to expand and construct public services to accommodate that growth.

Transportation. Pursuant to AB 743, project proponents must analyze the transportation impacts of projects in terms of vehicle miles traveled ("VMT"). The ordinance will certainly increase the vehicle miles traveled, and, thus, greenhouse gas emissions, by members of affected communities. At current, a single water truck may periodically service multiple residences or properties. Without a reliable, bulk source of water delivery, individual residents will now be forced to personally travel farther and more often to obtain water, or to hire more frequent, smaller truck deliveries. As outlined above, the 100-gallon limitation is insufficient to serve the needs of even two (2) individuals' daily domestic needs. The resulting increase in VMT clearly has the potential to cause significant environmental impacts to surrounding communities.

Wildfires. Perhaps most salient, and certainly most urgent, are the ordinances' impacts to wildfire danger. Large portions of Siskiyou County, especially the Mount Shasta area, are located in Very High Fire Hazard Severity Zones ("VHFHSZ").⁵ The inability to water the landscaping surrounding the property, and the resulting complete lack of water to fend off fires while waiting for emergency crews to arrive, will exacerbate the wildfire danger in already extremely at-risk areas. The inability to adequately prepare could result in the uncontrolled spread of fire through affected areas. This danger will likely also necessitate the construction of infrastructure like fuel breaks, which itself will cause environmental impacts that must be reviewed.

⁵ [Fire Hazard Severity Zones Maps \(ca.gov\)](https://www.fire.ca.gov/maps)

F. Conclusion

For each of the foregoing reasons, the County should not adopt Ordinances 2021-07 and 2021-08 at the July 6, 2021 Board meeting. Although my clients wish to prevent the unreasonable limitation on groundwater sales in its entirety, the County should, at least, perform the required Environmental Impact Report to fully evaluate the numerous potentially significant effects of the ordinances, and to fully mitigate each of those negative environmental effects.

Very truly yours,

John P. Kinsey

JPK/jb