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MONTEREY COUNTY

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CLERK OF THE BOARD

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6 April 2022

TO: Monterey County Board of Supervisors (ATTN: Mr. Erik Lundquist and Ms. Miranda Taylor)

FROM: The Ag Land Trust

RE: **Proposed Amendment to Monterey Co. Code Chapter 10.72 (Sec. 10.72.030(B)) and Request for the Preparation of a Full and Comprehensive Environmental Impact Report (EIR)** instead of the proposed inadequate negative declaration

By this correspondence, the Ag Land Trust hereby requests the preparation of a comprehensive and complete EIR in full compliance with the requirements of the California Environmental Quality Act (CEQA) and its published guidelines before the above referenced amendment to the Monterey Code is considered. The Ag Land Trust supports the existing ordinance and also supports the development of a publicly owned, regional desalination plant that will make inexpensive water available to farmers, residents, and landowners around Monterey Bay region.

The Trust believes that the proposed negative declaration is legally and materially deficient and inadequate to meet the requirements of CEQA and to properly and fully evaluate the potentially significant adverse environmental impacts that will result from the proposed material modification of the ordinance. The proposed amendment to the ordinance (which is a project as defined by CEQA) has the potential to significantly degrade the environment (increasing overdrafting of groundwater aquifers by private party junior appropriators and adverse impacts on public trust resources); will have a significant adverse impact on long term environmental goals (goal: reversing seawater intrusion in the state designated potable aquifers within the North County Local Coastal Plan, and the goal of limiting discharges into the Monterey Bay National Marine Sanctuary); will have a significant adverse cumulative and long-term effect on the environment; and will adversely affect low income communities by denying those communities access to publicly provided, less expensive water resources.

The failure of the "negative declaration" to properly characterize, and thus fully evaluate and mitigate, the potentially significant adverse impacts of the proposed amendment to the ordinance is reflected in the absence of any meaningful description/discussion of the current environmental conditions and settings within Monterey County coastal zone that will potentially be directly affected by the proposed modifications to the ordinance. Monterey County has a coastline that is over 70 miles long. It extends from the Pajaro River, to Monterey, to Carmel, to Big Sur. That coastline includes thousands of privately

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owned properties that might be used (if the proposed amendment were approved) to exploit seawater or groundwater on the premise that the "private owner" is pursuing a desalination project. Moreover, the existing ordinance has been in effect since 1989. The Monterey County General Plan was adopted (pursuant to an EIR) in 2010, and the population and growth projections (including potential municipal annexations) were specified therein. The proposed ordinance amendment would allow a currently unknown number of desalination project applications resulting in the potential for significant adverse environmental and massive growth inducing impacts without any identification of the adverse impacts on the County, its environmental/marine resources, its communities, its schools, and its citizens, or the identification of required/mandated mitigation measures. Hence, the current proposed amendment's negative declaration violates the clear holdings in *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal. App. 4th 931. A full EIR is required to be prepared and necessary before the proposed amendment may proceed to a hearing.

One of the most fundamental provisions embodied in CEQA and the CEQA guidelines, and affirmed repeatedly by the courts of California, is that an EIR must be prepared at the earliest possible time that a project can be conceptualized and that potentially significant adverse impacts may result. Desalination plants are not new. The ordinance which is being considered for amendment is not new either (it was written by the County Counsel adopted unanimously by the Board of Supervisors who voted for it after multiple public hearings and NO objections from any private parties in 1989). The potentially affected locations of possible private desalination plants along the presently digitally mapped Monterey County coastline are now completely identifiable given the existing certified Local Coastal Plans (and the requirements therein) and the 2010 General Plan. The potential adverse impacts of the proliferation of desalination plants on the cost of housing and population growth induced by high priced water sales, loss of low income housing opportunities and housing stock, conversion of prime farmlands, large scale urban sprawl outside of the Coastal Zone (and increased storm water pollution from urban runoff), adverse impacts on marine and endangered species resources, and unmitigated traffic and school system impacts that may be induced by the potentially huge increases in unplanned "for profit" water sales all necessitate the preparation of a full EIR for the proposed project at the earliest possible time. The County must order the preparation of a full EIR now, instead of a legally deficient negative declaration.

The negative declaration fails to address the significant potential adverse environmental impacts on groundwater resources should private desalination plant be allowed unfettered and without appropriate environmental review and planning in the North County Local Coastal Zone LUP area. The negative declaration fails to identify the undisputed facts that BOTH the Salinas Valley and the Pajaro Valley groundwater aquifers are in a state of overdraft. The consequence of those indisputable facts are that (under long decided California groundwater rights law), there is NO surplus groundwater that is available for any junior appropriators to pump.

As part of the EIR, the County must fully evaluate that there is no legal "safe haven" for potential desalination project developers in the "fiction" that they might take advantage of "brackish water" that may exist in isolated areas of the County. All of the overdrafted groundwater basins in the lower Salinas Valley and the Pajaro Valley are designated as potable aquifers by both the Central Coast Regional Water Quality Control Board and, by acceptance, the SWRCB in the adopted Basin Plan. Thus, amending the ordinance to allow private parties to build desalination plants directly encourages wrongful takings of potable groundwater resources from senior, overlying water rights holders. The EIR must identify mandatory mitigations that must be imposed on "private parties" seeking to exploit the overdrafted groundwater resources that belong to other innocent landowners. Those mitigations must address the

likely significant adverse impacts on the County's adopted long term environmental goals embodied in the adopted General Plan and the certified Local Coastal Plans. The proposed negative declaration fails to identify these significant adverse impacts, fails to provide mitigation, and fails to protect the existing property rights of adjacent landowners.

Also related to the potential of source water coming from wells, the question regarding "who owns the fresh groundwater in the 180 foot aquifer that extends offshore into Monterey Bay?". This issue must be addressed and mitigations identified in a full EIR before the propose draft ordinance amendment is allowed to proceed to hearing. That question was asked by Coastal Commission staff over a decade ago when the Coastal Commission was asked to approve "onshore" slant wells to exploit that resource. The question was answered by the Ag Land Trust during hearings in 2011.

The answer is that, under California case law which controls the ownership and use of potable (fresh) groundwater rights in our state, each overlying property owner with land that overlies a percolated fresh groundwater aquifer (including the State of California as the "public trust owner" of submerged lands that are overlying the Salinas Valley potable groundwater aquifer that extends into the Monterey Bay National Marine Sanctuary) is entitled only to its correlative share of the safe yield of the fresh groundwater that may be used without causing additional over-draft, adverse effects, waste and/or damage to the potable water resource or to the water rights of the other overlying land owners. (*Katz v. Walkinshaw* (141 Cal. 116); *Pasadena v. Alhambra* (33 Calif.2nd 908), and reaffirmed in the *Barstow v. Mojave Water Agency* case in 2000). The Commission had no right to authorize or allow the intentional contamination and waste of a potable aquifer (particularly one with limited recharge potential) which is also a Public Trust resource (see below), and such an act would be "ultra vires" and illegal.

Wells that are intended to violate these laws and significantly induce saltwater and contamination into a freshwater aquifer (a Public Trust resource) thereby causing contamination, waste, and direct and "wrongful takings" of the private water rights of other overlying land owners and farmers are prohibited. Further, because there are no surplus groundwater rights in the Salinas Valley and Pajaro Valley aquifers, and because the state owns the submerged Public Trust fresh water aquifers, no water is legally available to "private owners". Such a "taking" will constitute a direct and adverse impact and impairment of the public's health and safety by diminishing a potable groundwater aquifer and a Public Trust resource. These issues must be fully reviewed in a full EIR.

Additionally, in an overdrafted potable groundwater basin, no property owner or user of water is entitled to pump or take any such actions as to waste, contaminate, impair, or diminish the quality or quality of the freshwater resource. The overdrafted Salinas Valley fresh water groundwater aquifer that extends under the Monterey Bay National Marine Sanctuary is identified as a potable water resource by the State and is governed the SWRCB Groundwater Non-Degradation Policy, which finds its source in the California Constitution:

CALIFORNIA CONSTITUTION

ARTICLE 10 - WATER

SEC. 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent

of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.

In other words, the state has determined that the subject Salinas Valley potable groundwater aquifer is a protected natural resource. This has been re-enforced by the legislature in the legislation and legislative findings adopted in SGMA. The State (nor a junior appropriator) may not use the fresh groundwater beyond the extent that it has a correlative right that accrues to its public trust lands as against all other overlying landowners that are exercising their rights and using the fresh groundwater for beneficial uses, as mandated and protected in the California Constitution. Further, the 1968 SWRCB Non-Degradation Policy absolutely prohibits the intentional or negligent contamination and/or "waste" of a potable groundwater aquifer by any party. The fact that the Salinas Valley aquifer is a potable supply is definitively established in the Central Coast Regional Water Quality Control Board "Basin Plan" for Central California.

Moreover, the mandatory requirements of the California Coastal Act must also be evaluated in a full EIR before allowing the amendment of the ordinance to allow privately owned desalination plants, and the potential adverse impacts must be fully mitigated when addressing these Public Trust resources and groundwater resources. The County has implicitly agreed to enforce the Coastal Act policies by being granted permitting authority through the certified Local Coastal Plans (see below).

(California Public Resources Code Section 30231) requires of the Commission that:

Sec. 30231 - The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Specific and express mandates governing water resources and development in the four Monterey County certified Local Coastal Plans obligate the Board of Supervisors to require compliance with the provisions of Sec. 30231. The certified LCP's mandates embody the requirements of Sec. 30231. The negative declaration does not address these significant environmental issues and impacts.

Finally, in the landmark Public Trust case of National Audubon Society v. Superior Court of Alpine County (1981), the California Supreme Court confirmed as part of its "Public Trust Doctrine" that the State retains continuing supervisory control over the navigable waters of California and the lands beneath them. This prevents any party from acquiring a vested right to appropriate water in a manner harmful to the uses protected by the Public Trust. (California Water Plan Update 2009, Vol. 4, Page 2 (1)). None of these significant adverse potential impacts of the proposed amendment of the ordinance are addressed

in the draft negative declaration. And it is a violation of the CEQA Guidelines to try to excuse the review of these adverse impacts until some later time. They must be addressed in a full EIR now.

The amendment of the ordinance also increases the potential proliferation of discharges of brine waste from privately owned desalination plants. The negative declaration fails to address or identify mitigations for these anticipated adverse impacts. Each and every desalination plant produces a brine waste pollution stream that must be disposed of through either a discharge outfall into the ocean or a discharge into an ground water formation or aquifer. In 1992-93, when the Monterey Bay National Marine Sanctuary was established, a MOA (Memorandum of Agreement) was adopted and executed by all federal, state, and local governmental agencies (including Monterey County through AMBAG), the intent being to limit waste discharges into the waters of the Monterey Bay National Marine Sanctuary. To that end, the California Public Utilities Commission in 2002 (pursuant to California legislative direction) released a report (Plan B) that found that the optimal desalination solution to Monterey County's water need was a single publicly owned regional desalination plant located in Moss Landing with a seawater intake. Those findings have not changed nor has the proposed seawater intake recommendation been denied or abandoned by the Coastal Commission.

The proposed amendment of the ordinance, which would encourage a proliferation of de-sal plants, provides no assurance the County will adhere to its publicly adopted long-term environmental goals of limiting the number of waste discharges into the protected waters of the marine sanctuary. This massive potential change in policy must be fully and publicly vetted in a full and complete EIR so that the potential adverse environmental impacts of the proposed ordinance amendment can be fully disclosed to the public and the citizenry of the Monterey Bay area BEFORE the ordinance is amended.

Finally, a number of communities in Monterey County are communities of color and are clearly publicly identified as "economically disadvantaged". The massive and adverse economic impacts of privately owned water systems in Monterey County are well known. The gouging of innocent ratepayers have led to the highest price potable water bills in the entire country. The negative declaration completely side-steps the necessary review of the significant adverse impacts that the change in the ordinance may have on these disadvantaged communities. AND, in order to protect those disadvantaged communities, mandatory mitigations must be identified in a comprehensive plan (produced from the findings of a full and comprehensive EIR) that can then be uniformly and continuously imposed upon the private parties that may secure the priceless permits to produce desalinated water. These adverse impacts, along with all of the other potential impacts specified in this letter clearly justify the requirement that a full EIR be prepared by the County before any hearing to amend the ordinance may take place.

The Ag Land Trust holds fee ownership and agricultural conservation easements on nearly 47,000 acres of farms and ranch lands in Monterey County and Central California. Herewith attached is a map showing the farms in North Monterey County in which the Trust owns real property interests. The farmlands that we preserve are funded with grants from the State of California expressly to reduce carbon emissions, to preserve the legislatively protected prime and productive farmlands of our state, AND to preserve and protect the water supplies and rights of those lands..

We respectfully request that a full and complete EIR be prepared before the ordinance amendment proceeds. The negative declaration is legally inadequate and will not be sustained before judicial review.

The Ag Land Trust



Marc Del Piero <marc@aglandtrust.org>

(no subject)

1 message

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To: Marc Del Piero <marc@aglandtrust.org>

Mon, Apr 4, 2022 at 9:31 AM



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