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May 20, 2013

VIA E-MAIL (MAY 20TH) AND HAND DELIVERY (MAY 21ST)

Napa County Board of Supervisors
County Administration Building
1195 Third Street, Suite 310
Napa, CA 94559
gladys.coil@countyofnapa.org

**Re: May 21, 2013 Board Meeting – Napa Pipe Project: Request for a
Subsequent Environmental Impact Report**

Dear Chairman Wagenknecht and Board Members:

I. Introduction

You have been asked to approve findings under the California Environmental Quality Act (“CEQA”), a Mitigation Monitoring and Reporting Program (“MMRP”), a Water Supply Assessment (“WSA”), and amendments to the County’s General Plan and Zoning Ordinance for the Napa Pipe Project (“Project”). Before you consider these approvals, the Napa Coalition for Responsible Development¹ urges the County to prepare a subsequent Environmental Impact Report (“EIR”) for the Project, so that decisionmakers and the public have the legally required opportunity to review, analyze, and comment on the significant changes that have been made to the Project, as well as the newly identified environmental impacts and the still evolving mitigation measures. Alternatively, the Coalition urges the County not to grant the proposed approvals, and to instead allow the City of Napa to make these decisions at an appropriate future date. Because the Project will now be annexed

¹ The “Coalition” is comprised of Napa County residents including Brett Risley, David Dias, and Daniel Huss, and Sheet Metal Workers Local 104, Plumbers and Steamfitters Local 343, the International Brotherhood of Electrical Workers Local 180, and their members and their families and other individuals that live and/or work in Napa County.

May 20, 2013

Page 2

and developed in the City, the City rather than the County is the appropriate body to grant the required land use approvals and to act as the CEQA lead agency for the revised Project.

Since the publication of the Final EIR for the Project in February 2012, the Project has been in a constant state of flux. The currently proposed Project barely resembles the project analyzed in the 2009 Draft EIR, the 2011 supplemental EIR, or the 2012 Final EIR. The County's claim that reliance on the old EIR is appropriate because the current Project proposes fewer residential units fails to consider the totality of the Project revisions and is inconsistent with CEQA standards. The County's September 2012 addendum to the EIR was not circulated for public review and comment and it did not adequately analyze the significant revisions to the Project. In addition, there have been even more changes to the Project since the addendum was published, and even since the EIR was certified in January 2013.

The public and decisionmakers have been deprived of their right to review and comment on the County's analysis of the impacts that will be caused by the Project *as currently proposed*. Instead, the Board of Supervisors and the public have been bombarded with last-minute changes, new reports and term sheets, pending MOU's and development agreements, and new Project conditions that will clearly change the scope of the Project, its environmental impacts, and its environmental mitigation plan. As discussed in detail below, the Board *cannot* grant the proposed Project-related approvals unless it first complies with the California Environmental Quality Act ("CEQA") by preparing a subsequent EIR.

II. CEQA requires a subsequent EIR if a project or its surrounding circumstances have substantially changed, or if there is significant new information

A. Legal Standard

Under CEQA, a subsequent EIR is required when one or more of the following events occurs: "(a) substantial changes are proposed in the project which will require major revisions of the EIR; (b) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the EIR; (c) new information, which was not known and could not

have been known at the time the EIR was certified as complete, becomes available.”² Not only one, but all three of these conditions are met here.

Here is a summary of the differences between the project analyzed in the Draft and Final EIR (“DEIR” and “FEIR”) and the currently proposed Project:

Changes from the Previous Project to the Proposed Project		
Project Element	Previously Analyzed Project	Currently Proposed Project
Type of Development	“No destination retail, ‘big box’ or large format retail would be allowed.” ³ 2,050 to 2,580 residential units, with affordable housing built by the applicant and integrated into the Project.	Costco retail store will occupy almost 18 acres of the Project site. 700-945 residential units, with affordable housing built and financed by a third party, in separate buildings, during later phases of the Project.
Water Supply	Groundwater, or imported surface water from Tehama County.	Surface water from the City of Napa.
Traffic	Numerous road improvements required to offset significant impacts.	Different road improvements required to offset different significant impacts.
Site Cleanup Plan	Approved cleanup and remediation plan.	Cleanup and remediation plan must be revised to accommodate phased development and the Costco store.
School	School site not located on Project site.	School site located on Project site.

² CEQA, Public Resources Code § 21166.

³ DEIR p. 3-20.

Wetlands	Wetlands avoided and buffered from development.	1.5 acres of wetlands destroyed by new Costco development.
Community Farm	Not proposed.	4-acre community farm.

The CEQA Guidelines describe when changes to a project or its surrounding circumstances are “substantial” enough to require major revisions to a previous EIR through the preparation of a subsequent EIR. Major revisions are required “due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant environmental effects.”⁴ The CEQA Guidelines also explain that there is “new information of substantial importance” requiring the preparation of a subsequent EIR if the new information shows a new or substantially more severe significant effect that was not discussed in the EIR.⁵ In general, the numerous changes to the Project are “sufficiently important to require consideration of their effects in a later EIR.”⁶ The new and increased significant environmental effects associated with the currently proposed Project are highlighted below.

1. The revised Water Supply Assessment must be included in a subsequent EIR, and the significant environmental effects associated with providing City water to the Project site must be disclosed, analyzed, and properly mitigated

The final Water Supply Assessment (“WSA”) for the Project cannot be published as a last-minute stand-alone document, but must be *included in a subsequent EIR*. The Water Code and the CEQA Guidelines specifically require that the County “shall include” the WSA for the Project in the environmental document prepared for the Project under CEQA.⁷ That environmental document can be a subsequent EIR.⁸ The law does not say “a” WSA, it says “the” WSA, which means that the *final* WSA upon which the County will make its findings regarding

⁴ CEQA Guidelines, 14 Cal. Code Regs. §§ 15162(a)(1), (2).

⁵ CEQA Guidelines § 15162(a)(3).

⁶ *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Assn.* (1986) 42 Cal.3d 929, 937.

⁷ Cal. Water Code § 10911(b); CEQA Guidelines § 15155(e); *see also* CEQA, Pub. Resources Code § 21151.9 (specifically requiring compliance with the Water Code provisions).

⁸ *See* CEQA Guidelines § 15155(e) (the WSA can be included “in the EIR, negative declaration, or mitigated negative declaration, *or any supplement thereto*” [emphasis added]).

the adequacy of water supplies for the Project. By including the final WSA in the EIR, the public is afforded a full opportunity to review and comment on the analysis and conclusions contained in the assessment. The process required by the statute is open and transparent, and allows for adequate public scrutiny regarding the critically important topic of the plan for providing public water supplies to the Project.

The County has not followed the WSA statutory requirements for this Project, and it has not abided by the principles of public participation that are set forth in such requirements. The County published a revised WSA on May 14, 2013, more than a year after the public comment period on the EIR, more than four months after the County certified the EIR, and just days before the County will consider the adoption of CEQA findings and the approval of land use plans for the Project. This process violates the requirement that a WSA be included in an environmental document prepared under CEQA.

In addition to the failure to allow for adequate public review and include the WSA in the final CEQA document, the County has failed to comply with the Water Code and CEQA Guidelines requirement to identify any public water system that “may supply water for the project,” and request that the owner and operator of that public water system prepare a WSA for the Project.⁹ In this case, that would certainly include the City of Napa, yet the City was not requested to prepare a WSA.

The revised WSA highlights the substantial Project changes that have occurred, and the substantial changes in surrounding circumstances. After four years, the Project applicant still has no secure water supply. This WSA is the fourth revised WSA for the Project. The first WSA focused on the use of groundwater (an idea subsequently rejected by the County), the second focused on the use of imported surface water transferred from Tehama County (a proposal that received significant criticism and is no longer being pursued by the applicant), the third focused on conjunctive use of groundwater and imported surface water (also disfavored), and the new WSA focuses on the use of City of Napa (“City”) potable water supplies.¹⁰

While all of the previous water supply analyses for the Project, including the County’s September 2012 “addendum” document, found that the Project would

⁹ Water Code §10910; CEQA Guidelines § 15155(b).

¹⁰ May 14, 2013 Revised WSA, p. 1.

require at least 340 acre-feet of potable water, and would put a strain on the City's water supplies, particularly during single dry years, the recent revised WSA concludes that the Project will require only 150 acre-feet of potable water, and concludes that there will be sufficient water to serve the Project for the next 20 years. These changes in the water supply calculations and conclusions require more than six days for review by the public and decisionmakers. The applicant cannot submit a new study at the eleventh hour that reverses prior conclusions regarding the adequacy of water supplies for the Project without an opportunity for full review and consideration by the public and the decision-makers.

The revised WSA also does not even mention the obvious fact—acknowledged in prior versions of the WSA—that extending City water service to the Project will require the City to make significant infrastructure upgrades, potentially including a new treated water storage facility, a new pump station, and a new or expanded water treatment facility (above and beyond the recent expansion of the Jamieson Canyon water treatment plant).¹¹ The EIR did not analyze the potential environmental effects of these infrastructure upgrades or address necessary mitigation because the City was not expected to supply water for the Project.¹² The revised Project now propose that the City will provide a water supply and water service to the Project. The County has already determined in prior assessments that these infrastructure upgrades would result in “new potentially significant impacts.”¹³ Thus, the record already establishes the trigger for a subsequent EIR. The full effects of supplying the Project with City water supplies must be analyzed in a subsequent EIR that allows for a proper public comment period.

In September 2012, long after publication of the FEIR, the County introduced a new mitigation measure, UTIL-3, in an attempt to address these impacts. Not only is that new mitigation measure included in the currently proposed Mitigation Monitoring and Reporting Program (“MMRP”), but it has been thoroughly revised. It now indicates that an “expanded pipeline south of the site” would need to be constructed as part of the Project. The County's proposed CEQA Findings state that it is not “expected” that the expanded pipeline will have any new significant effects, but nowhere does the County disclose the length or size of the required pipeline, or conduct any analysis of its potential environment impacts.¹⁴ To the contrary, the DEIR contained a detailed analysis of the potential impacts associated

¹¹ DEIR, Appendix I (2009 WSA), pp. 113-117; FEIR, Appendix I (2011 WSA), p. 179.

¹² *Ibid.* p. 14.

¹³ *Ibid.* p. 26.

¹⁴ County's revised Resolution adopting CEQA Findings, p. 36.

with all off-site utility upgrades that may be necessary to serve the previous version of the Project.¹⁵

New mitigation measure UTIL-3 also removes a contingency that the applicant provide on-site water storage, treatment, and pumping facilities if off-site facilities are not feasible, without explaining why this requirement would no longer be appropriate. Finally, it attempts to downplay the potential impacts of certain potentially required City infrastructure upgrades, by asking the applicant to conduct a future study to “confirm” that these upgrades are “no longer needed.”¹⁶ None of these changes have been disclosed to the public, and neither the original nor the currently proposed mitigation measure was analyzed in the EIR.

Because certain associated off-site infrastructure upgrades will be required, and other upgrades may very well be required after further environmental study, a subsequent EIR must analyze their associated environmental effects.¹⁷

2. Traffic impacts, and mitigation measures, have changed substantially

Perhaps nothing illustrates how different the current Project is from the project analyzed in the EIR more clearly than the Project’s associated traffic impacts. The County has admitted that the current Project will have *entirely* different impacts on surrounding roadways. One of these impacts will be a “new, previously unidentified significant impact,” four other impacts will be substantially more severe than those analyzed in the EIR, while other impacts would no longer be significant.¹⁸ Without informing the public, the County’s newly revised MMRP simply deletes at five of the traffic mitigation measures proposed in the FEIR.¹⁹ It

¹⁵ DEIR pp. 4.13-9, 4.13-13 to 4.13-15, 4.13-19 to 4.13-22 (County’s standard of significance is whether a project would “require or result in the construction of new water facilities or expansion of existing facilities, the construction of which could cause significant environmental effects”).

¹⁶ County’s proposed MMRP, p. 26.

¹⁷ *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1221, 1226-1230; *Citizens Ass’n for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 166 (the “danger of filing separate environmental documents for the same project” is that consideration of the full impact on the environment of the two parts of the project may not occur).

¹⁸ County’s EIR Addendum dated September 19, 2012, pp. 11-14, and Attachment 2, Fehr & Peers Memorandum dated September 7, 2012, pp. 3, 11.

¹⁹ *Compare* proposed MMRP, which does not include Mitigation Measures TRA-1a, TRA-2 through TRA-4, and TRA-7, with FEIR pp. 2-7 to 2-11, and pp. 3-45 to 3-48, which show the final proposed Mitigation Measures TRA-1a, TRA-2 through TRA-4, and TRA-7; *see also* County’s revised

also incorporates new traffic mitigation measures that will be required for the proposed Project.²⁰ These are exactly the types of changes that require a subsequent EIR.²¹ The County cannot simply change the terms of its MMRP to reflect the changed impacts and add new mitigation for the currently proposed Project without subjecting these changes to public review in a subsequent EIR.

3. Site cleanup and remediation

In a letter dated April 29, 2013 to the Project applicant from Keith Robinson, Senior Engineering Geologist with the San Francisco Bay Regional Water Quality Control Board (“Regional Board”), the Regional Board acknowledged that the Remedial Design and Improvement Plan for the Project site has been approved. The letter goes on to state, however, that because the Project has been changed to include a phased development incorporating a new Costco store, the remedial plan must be revised. In particular, the site now proposed for the Costco was supposed to be used for hauling, stockpiling, and biotreatment (“landfarming”) to remediate the contaminated soil on site. With the construction of a Costco in the first phase of the Project, this will no longer be possible, and the cleanup and remediation plan will need to be changed.

Mitigation Measure HAZ-2 requires compliance with the 2010 Remedial Design and Implementation Plan to remediate the contaminated soil on the Project site. That plan will now be revised to allow for Costco construction to occur while the remediation process is taking place, and to address different cleanup actions that will be needed for soils on the proposed 5-acre community farm.²² These changes involve new potentially significant environmental impacts, or at the very least, substantially more severe impacts than were disclosed in the EIR. The proposal to revise the Remedial Design and Implementation Plan sometime in the future constitutes inappropriate “deferred mitigation.” The subsequent EIR must explain how these new remediation challenges will be overcome.

Resolution adopting CEQA Findings and MMRP, pp. 12-13 (overall the County has deleted then previously proposed mitigation measures).

²⁰ *Ibid.*, Mitigation Measure TRA-19.

²¹ Compare *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1079 (subsequent EIR not required where traffic outcomes would be “substantially identical to those of the original EIR, namely, that the project would not result in significant degradation of the surrounding street network”).

²² County’s CEQA Addendum dated September 19, 2012, p.18.

4. New school site

In 2011, the County prepared a supplemental EIR that analyzed the potential environmental effects of a locating a future school on a parcel adjacent to the Project site. The supplemental EIR contained an *88-page analysis* of the potential environmental effects of this proposal.²³ These effects included noise, air pollution, and other impacts that are commonly reviewed when assessing the potential location of a school. Even though the Project revisions now propose that the future school be located on 10-acres within the Project site itself, the County is not conducting any environmental review or assessment of the potential impacts of the new school site. This is despite the fact that the Project applicant and the Napa Valley Unified School District have apparently reached some sort of agreement regarding the construction of a new school at the Project site.²⁴ Moreover, former Mitigation Measure PS-3, which placed conditions on the development of a new school, has been deleted from the MMRP without any explanation.²⁵

There is good reason to conduct further review of the newly proposed school site in a subsequent EIR. For example, the County has stated that this new school site “has been designated as requiring ‘no further action’ to achieve the cleanup levels in use for this project.”²⁶ This kind of conclusory statement completely fails to meet CEQA standards, which contain stringent requirements whenever a school is proposed for construction on a formerly contaminated site.²⁷ A subsequent EIR is required to address this issue.

5. Wetlands

The original project evaluated in the EIR would have avoided existing wetlands and established a substantial buffer zone to protect these sensitive lands. The newly proposed Costco, however, will destroy 1.5 acres of existing wetlands in or adjacent to Bedford Slough, in order to construct a *big box store and a gas station* in these wetlands.²⁸ Under CEQA Guidelines Appendix G, this adverse effect on a

²³ Supplemental DEIR, Chapter 4.3.

²⁴ See video of January 14, 2013 Board of Supervisors meeting (comments by Napa Valley Unified School District representative that the district has reached an “agreement” with the applicant).

²⁵ Compare Supplemental DEIR p. 4.3-2 with currently proposed MMRP.

²⁶ County’s CEQA Addendum dated September 19, 2012, p. 18.

²⁷ CEQA, Pub. Resources Code § 21151.8.

²⁸ County’s CEQA Addendum dated September 19, 2012, p. 14; compare newly revised site plan with former proposed site plan in DEIR Figures 3-6 and 4.4-1 (showing existing wetlands and proposed “buffer” zone) and DEIR Section 4.4.

jurisdictional wetland is a new or substantially increased significant environmental impact. The Project applicant has refused to avoid and buffer these wetlands, as was proposed for the initial project. Reliance on mitigation measure BIO-5 is inadequate to reduce this impact to a less-than-significant level, because that measure only applies where wetlands “cannot be avoided,” and here the Project description has been revised to specifically include the destruction of 1.5 acres of wetlands. The addition of the 17.5-acre Costco development on the Project site has introduced new significant impacts that must be addressed by the County in a subsequent EIR.²⁹

In general, the Project changes are so significant that meaningful public review and comment has been precluded. At this point, the County is beyond the requirement for a “supplemental” EIR, which applies when project changes are less significant.³⁰ A subsequent EIR is not only warranted, but required by CEQA.

III. Reservation of rights to raise future objections

It has become increasingly clear that the County, the City, and the Project applicant intend to continue closed-door “negotiations” of important Project changes and mitigation measures without conducting further CEQA review. Footnote 1 of the proposed MMRP states that the recent “changes to Mitigation Measures reflect revisions arising from discussions with the City of Napa and Napa Redevelopment Partners since the Board of Supervisor’s hearing of January 14, 2013,” and that “additional revisions may be considered and adopted concurrent with the project’s development plan, design guidelines, and development agreement.” The City has indicated that there are numerous Project impacts that still need to be addressed, including traffic, water, aesthetics, and park/recreational impacts, and that mitigation for these impacts will be negotiated later, such as during the preparation of a development agreement for the Project.³¹ This backdoor approach to disclosing and mitigating the environmental impacts associated with the Project is a blatant violation of CEQA.

²⁹ *Mira Monte Homeowners Assn. v. Cnty. of Ventura* (1985) 165 Cal.App.3d 357, 364-365 (“The discovery that ‘E’ Street would pave over part of the wetlands was a change in circumstances. It meant that the significant impact upon the wetlands would be more severe than previously recognized by the EIR. . . . [CEQA] Section 21166 and the implementing guidelines dictate that the proper procedure upon discovery of the encroachment should have been further environmental evaluation by way of a subsequent or supplemental report prior to any project approval.”).

³⁰ Even if only “minor additions or changes would be necessary to make the previous EIR adequate,” a supplemental EIR is required. (CEQA Guidelines § 15163.)

³¹ Video of May 7, 2013 City Council meeting, at approximately 1:56:20, 2:07:30.

Moreover, it appears likely that the Project may be changed even further, to include an MOU between the City and County that pertains to site annexation, water supplies, Project mitigation measures, the long-term allocation of affordable housing obligations between the City and County, and various other potential proposals including the school site, a jail, the relocation of an “expo” center, and consolidation of City and County corporation yards.³² Because the County and City have not yet disclosed the full scope of the additional mitigation measures and Project-related actions they intend to pursue, the Coalition reserves the right to continue its call for further CEQA review in the future, as these developments progress.

IV. Conclusion

A subsequent EIR is required before the County can approve the associated land-use changes and adopt the CEQA findings, MMRP, and WSA for the Project. Decisionmakers and the public have a right to review and comment on an EIR that accurately describes the proposed Project, and they have a right to analyze the significant Project changes and related impacts and mitigation measures identified above. Disclosing this information without providing for public review and comment, and revealing much of the information only shortly before granting County approvals for the Project, denies the public an “opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom.”³³ CEQA requires that a subsequent EIR be prepared and circulated for public review.

The applicant has revised its project many times to address the significant environmental challenges associated with building this new community. As a result, it appears that the applicant will now pursue a City annexation process. . There is simply no need for the County to rush to judgment and grant the proposed land use approvals without first conducting the appropriate CEQA review. In fact, given the City’s new role in approving the Project, there is no need for the County to change its General Plan and zoning ordinance at all.

³² See video of May 7, 2013 Board of Supervisors’ meeting, at approximately 55:30; video of May 7, 2013 Napa City Council meeting, at approximately 2:31:00; 2:41:30, 2:42:50.

³³ *Save our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 131.

May 20, 2013
Page 12

Sincerely,

A handwritten signature in black ink that reads "Ellen Trescott". The signature is written in a cursive, flowing style.

Daniel C. Cardozo
Ellen L. Trescott

cc: Planning Director Hillary Gitelman (hillary.gitelman@countyofnapa.org)
Principal Planner Sean Trippi (napapipe@countyofnapa.org)