

May 12, 2009

Hon. Dianne Jacob
Chairwoman, San Diego County Board of Supervisors
Attn: Clerk of the Board
1600 Pacific Highway, Room 402
San Diego, California 92101

Re: May 13, 2009, Meeting
*Agenda Item #3 - Authorization to Accept \$7 Million In Federal Grants For
Hazardous Fuels Reduction Activities*

Dear Chairwoman Jacob and the Board of Supervisors:

The California Chaparral Institute (Chaparral Institute) objects to the Board of Supervisors (Board)'s proposed finding that the County of San Diego (County)'s vegetation clearing project -- to accept \$7 million of federal grant funds to be "used over multiple years . . . through Fiscal Year 2012 - 2013" to clear vegetation from land in remote areas of San Diego County's rural backcountry -- is exempt from the California Environmental Quality Act, Public Resources Code § 21000, *et seq.* (CEQA) under 14 Cal. Code Reg. (CEQA Guideline) § 15269(c).

The Chaparral Institute requests that the Board direct staff to prepare an Environmental Impact Report (EIR) on the proposed vegetation clearing project. The County has a substantial amount of time to complete CEQA review before the onset of the severe fire season during October before the Board should vote on the project.

First, CEQA and CEQA Guidelines do not support the County's proposed finding that the project is exempt from CEQA.

CEQA Guideline § 15269(c) provides:

"Emergency Projects

The following emergency projects are exempt from the requirements of CEQA.

. . . (c) Specific actions necessary to prevent or mitigate an emergency. *This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term.*" (Italics added.)

CEQA § 21060.3 defines emergency:

"Emergency" means *a sudden, unexpected occurrence*, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, health, property, or essential public services. "Emergency" includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage." (Italics added.)

In this matter, there is no substantial evidence in the administrative record that an emergency or "sudden, unexpected occurrence" exists.

In this matter, the emergency exemption does not apply because the project is long-term, for the funds to be "used over multiple years . . . through Fiscal Year 2012 - 2013."

And, in this matter, the emergency exemption does not apply because the "long-term project" is being "undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short term." The record does not disclose any major fires in San Diego County's backcountry at any time during the period of May through June of any year. Indeed, the proposed exemption admits that the last two major fires that occurred over the last two decades in San Diego County, occurred during October, in 2003 and 2007.

Second, case law does not support the County's proposed finding that the project is exempt from CEQA:

The § 21060.3 definition "limits an emergency to an 'occurrence,' not a condition, and . . . the occurrence must involve a 'clear and imminent danger, demanding immediate action.'" (*Western Mun. Water Dist. v. Superior Court* (1986) 187 Cal.App.3d 1104, 1111-1113.) The Court of Appeal insisted that in order not to "create a hole in CEQA of fathomless depth and spectacular breadth, the concept of "emergency" should be interpreted narrowly. (*Id.*) "Indeed, it is difficult to imagine a large-scale public works project, *such as an extensive deforestation project . . .*, which could not qualify for emergency exemption from an EIR on the grounds that it might ultimately mitigate harms attendant on a major natural disaster. The result could hardly be intended by the careful drafting of the Legislature and is unmistakably opposed to the policy of construing CEQA to afford the maximum possible protection of the environment." (*Id.*) Before upholding the use of the exemption, a reviewing court should apply "close judicial scrutiny of each element of the Legislature's detailed definition of 'emergency.'" (*Id.*)

CEQA's exemption for actions in response to an emergency is extremely narrow, and is limited to immediate action demanded by a sudden occurrence. (*Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1681-1682.)

Third, the treatise writers do not support the County's proposed finding that the project is exempt from CEQA:

The emergency exemption "has therefore been limited in the CEQA Guidelines and in case law to events that involve clear and immediate danger and demand immediate action. It does not extend to correction of a hazardous ongoing condition when immediate action in response to imminent danger from a specific event is not involved, even if corrections might prevent significant harm." (Kostka and Zischke, *Practice Under the California Environmental Quality Act* (2009), § 5.17, p. 213.)

Further, normally an emergency exemption would not apply to activities that merely remedy an ongoing "condition" that is not sudden and unexpected, as opposed to an "occurrence" that is sudden and unexpected." (Bass and Herson, 1-21 *California Environmental Law & Land Use Practice* (2009) § 21.06.)

Fourth, substantial evidence does not support the County's proposed finding that the project is exempt from CEQA:

In this matter, there does not exist any of the substantial expert opinion that each element that an emergency situation exists which requires immediate action that our Court of Appeal found in *Calbeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529, 533-535, 538.

Indeed, there are no facts, reasonable inferences from facts, or expert opinion in the record that an emergency or "sudden, unexpected occurrence" exists.

The Chaparral Institute notes that there are facts, inferences from facts, and substantial expert opinion in the record that implementation of the vegetation clearing project beyond the 100-foot defensible space zone will cause significant environmental impacts. The "Vegetation Management Report" (Report) on the project received by the Board of Supervisors on March 25, 2009, admitted there is limited knowledge about the environmental impacts:

"There is a limited knowledge base on the efficiency, environmental costs, or consequences of large-scale vegetation management actions across the nine priority areas identified . . ."

And the Report admitted that at the two workshops, experts raised concerns that the project may cause significant environmental impacts

"Workshop participants raised concerns about balancing the potential to alter the path of a fire with *the impact of strategic fuel modifications on ecosystem services (erosion control, water quality, hydrology, slope stability) and ecosystem persistence, structure (soil structure, species composition and potential spread of invasive species, species age (size) structure) and function (soil development, nutrient cycling, species succession).*" (Italics added.)

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Numerous experts also submitted comment letters on the Report before the March 25, 2009 hearing, setting forth uncontradicted expert opinion that the County's vegetation clearing project will cause significant environmental impacts.

Finally, the fact that at the March 25, 2009, hearing, the Board directed Staff to complete CEQA review, directly contradicts the new position of the County, that the County's vegetation clearing project is "exempt" from CEQA.

Finally, the Chaparral Institute objects that the Count is improperly "piecemealing" or "segmenting" the environmental review of the County's full vegetation clearing project to nine "high fire risk" areas, that is, to prepare nine "mini-EIRs" for the "vegetative management plan" for each high fire risk area. (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 396; *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283-284; *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.)

Conclusion

The Chaparral Institute requests that the County forthwith prepare an EIR on the County's full vegetation clearing project so that the EIR can be timely completed and the Board can be fully advised of the environmental impacts of the full project before the onset of the height of the fire season during October 2009.

Sincerely

Rory R. Wicks
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