



March 19, 2012

Planning Commission
County of Santa Barbara
123 E. Anapamu St.
Santa Barbara, CA 93101

RE: Appeal of E&B Natural Resources 3D Seismic Data Acquisition (11LUP-00000-00343)

Dear Chairman Cooney and Commissioners:

On March 9, 2012, the County of Santa Barbara Planning and Development Department ("County") approved a Land Use Permit ("LUP") to E&B Natural Resources to conduct intensive oil and gas exploration using seismic testing across more than 23 miles of the Cuyama Valley in Santa Barbara County. The project area is located adjacent to the Carrizo Plain National Monument, and within close proximity to the Los Padres National Forest.

If approved, the LUP would authorize motorized buggies or tractor-mounted drills to bury explosive charges at approximately 3,443 locations throughout the project area. A helicopter, four-wheel drive trucks, and all-terrain vehicles would be used to transport the recording equipment to and from staging areas. The explosive charges (eleven-pound sticks of dynamite, the equivalent of one grenade) would then be detonated underground at depths of up to forty feet, data would be recorded, and the information would then be used to determine the amount and extent of oil and gas deposits in the area.

The project area contains habitat for at least 16 special-status plant species and 14 special-status wildlife species, including several species of plants and animals protected under the state and federal Endangered Species Act. While we appreciate the efforts that have been taken to focus this project on lands subject to active agricultural operations, we have concerns that the project may significantly impact a number of special-status species in the area. Because of these impacts, we are also concerned that the County exempted this LUP from environmental review under the California Environmental Quality Act ("CEQA").

We hereby file this appeal of the above-referenced LUP for the specific reasons outlined below.

1. The County Improperly Excluded the Project From Environmental Review Under CEQA

On March 9, 2012, the County issued a Notice of Exemption for this project, determining it to be exempt from environmental review under CEQA. Specifically, the County invoked the categorical exclusion for information gathering contained in CEQA Guidelines 15036, which “consists of basic data collection, research, experimental management, and resource evaluation activities which do not result in a serious or major disturbance to an environmental resource. These may be strictly for information gathering purposes, or as part of a study leading to an action which a public agency has not yet approved, adopted, or funded.”

This categorical exclusion is not applicable to the project at hand. For projects such as this one, where mitigation measures are imposed to reduce the potential for significant impacts to the environment, the County must first prepare a Mitigated Negative Declaration or an Environmental Impact Report. The Biological Assessment (“BA”) for this project outlines several potentially significant impacts to protected species, including:

Implementation of the proposed project could potentially result in significant impacts on individual San Joaquin kit fox if they are in the project area during implementation of the project. Impacts could occur during ground crew activities associated with surveying of source and receiver points, installation and retrieval of geophysical equipment, and drilling and detonation activities. Impacts to these species would occur primarily through the crushing of individual of these species by equipment and vehicle traffic along source and receiver lines. Additionally, these species utilize burrows, and crushing or destruction of these burrows during project activities could also lead to mortality of this species in the project area.

BA at 35 (emphasis added).

In an effort to mitigate these impacts, the County included several permit conditions addressing the San Joaquin kit fox and some (but not all) of the other special-status species that occur in the project area. While these permit conditions are a good first step towards mitigating the environmental impacts of this project, several courts have struck down this approach because it violates CEQA. “An agency should decide whether a project is eligible for a categorical exemption as part of its preliminary review of the project (Guidelines, §§ 15060 & 15061), not in the second phase when mitigation measures are evaluated.” *Azusa Land Reclamation Company v. Main San Gabriel Basin Watermaster* (2d Dist. 1997) 52 Cal. App. 4th 1165, 1199-1200. Thus, even if a project appears to fit within a categorical exemption, environmental review will be required if that project – without mitigation – could have a significant impact on the environment. See CEQA Guidelines § 15300.2(c) (“[a]

categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances”). In other words, if a project is subject to the “significant effect” exception, then the agency “cannot escape the law by taking a minor step in mitigation and then find [itself] exempt from the exception to the exemption.” *Azusa* at 1200 (quoting *Lewis v. Seventeenth District Agricultural Association* (3d Dist. 1985) 165 Cal.App.3d 823, 830. In short, the agency cannot mitigate its way around the exception. *See also Salmon Protection and Watershed Network v. County of Marin* (1st Dist. 2004) 125 Cal.App.4th 1098, 1102, 1107 (“[m]itigation measures may support a negative declaration but not a categorical exemption”). Instead, if the agency proposed to incorporate mitigation measures into the project, the agency must do so pursuant to the procedures set forth in the Guidelines sections governing mitigated negative declarations or EIRs. *Asusa* at 1200-1201; *Lewis* at 830; *SPAWN* at 1102, 1107.

With this project, the County took an approach that clearly contravenes well-established CEQA caselaw. It incorporated mitigation measures into the LUP to reduce potentially significant environmental impacts, instead of first preparing a mitigated negative declaration or environmental impact report. This violates CEQA, and the County should withdraw its approval of the LUP on this basis alone.

2. There is a Reasonable Possibility That the Project Will Have a Significant Effect on the Environment

Pursuant to CEQA Guidelines § 15300.2(c), “[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances.” For the reasons outlined below, there is a reasonable possibility that the seismic blasting will have a significant effect on the environment:

- a. **Permit conditions allow an unquantified amount of habitat destruction for special-status species.** Condition 15 states that “non-agricultural areas, burrow areas, and large shrubs shall be avoided *to the extent practicable* in an effort to minimize impact to wildlife habitat” and that “vehicular activity shall avoid these areas *to the maximum extent feasible*,” (emphasis added). Under this condition, significant impacts to the habitat of special-status species could occur if it is not “practicable” or “feasible” to avoid them. This is particularly significant, given the large amount of native habitat located within and immediately adjacent to the project area. A significant amount of native habitat occurs within the boundaries of the project area, particularly along drainages and watercourses where agricultural tilling has not occurred. Moreover, portions of the project area encroach into the Cuyama River channel.

- b. **Permit conditions allow unrestricted motorized use across the project area, without surveys, which could result in trampling or crushing of special-status species.** Specifically, the permit states: “Survey work would be accomplished primarily on foot. However, all-terrain vehicles (ATV's) would be used as necessary for accessing portions of the project area, and lightweight four-wheel drive trucks would be used along existing roads.” While the permit restricts the use of trucks to existing roads and trails, the permit does not include any restrictions or conditions on the use of ATVs. This could lead to significant impacts to special-status species, particularly for the blunt-nosed leopard lizard, a federally-threatened species and a California fully-protected species, and other sedentary species that are not able to avoid approaching vehicles. In fact, the 1998 Recovery Plan for the blunt-nosed leopard lizard lists mortality from vehicle-strikes with vehicles and ATVs as one of the species’ primary threats. At a minimum, the permit should contain a condition prohibiting the use of vehicles during the times of year when blunt-nosed leopard lizards are above-ground.
- c. **Significant impacts may result from underground blasting, and these impacts are not evaluated in the BA nor mitigated by any permit conditions.** The BA focuses almost exclusively on the impacts to special-status species from above-ground activities, such as surveying and drilling and the construction of staging areas. However, it does not contain any analysis of the effects of noise and vibration caused by underground blasting – an issue that is critically important to several special-status species that reside in underground dens or burrows, such as San Joaquin kit fox, giant kangaroo rat, and blunt-nosed leopard lizard.
- d. **The BA erroneously assumes that certain special-status species are not found on active agricultural lands.** Specifically, for several species, the BA concludes that “no potential habitat for this species is present within the proposed project site” because “[t]he entire project site is used for the intensive growing of agricultural crops.” For these species, the BA further concludes that they are “expected to be absent from the proposed project site, and no further protocol-level surveys are deemed necessary.” However, several special-status species are known to occur in agricultural fields and along roadsides, particularly the federally-endangered San Joaquin woolly-threads.

Instead, the BA merely lists all 16 plant species that may possibly occupy the project area, and then concludes that “[a]gricultural fields and the ruderal/disturbed vegetative community provide no potential habitat for special status plant species. Therefore, special-status plant species are expected to be absent from the proposed project site, and no further surveys are deemed necessary.” BA at 14. Several of these special-status species are known to occur in agricultural fields and disturbed

areas, and by failing to require surveys, this project could result in significant impacts to protected plant species.

Finally, we also note that the BA did not evaluate the presence/absence of, or impact to, Kern mallow (*Eremalche parryi* subsp. *kernensis*), a federally-endangered plant species known to occur in the area. This could result in significant impacts to this plant, which has been known to occur in agricultural fields and disturbed areas.

For these reasons, we respectfully request that the County not issue the LUP. Instead, the County should withdraw its approval of the LUP and prepare a Mitigated Negative Declaration or Environmental Impact Report to properly evaluate the impacts of this project on special-status plants and wildlife that occur in the area. This environmental review would likely identify additional mitigation measures that could be incorporated into the project to reduce or eliminate environmental impacts. We look forward to working with the County and the applicant to resolve these matters.

Sincerely,

/s/

Jeff Kuyper
Executive Director