

LAW OFFICE OF MARC CHYTILO, APC
A PROFESSIONAL CORPORATION

LATE
DIST

#3

ENVIRONMENTAL LAW



March 6, 2020

Santa Barbara County Board of Supervisors
105 E. Anapamu Street
Santa Barbara, California 93101

By email to sbcob@co.santa-barbara.ca.us

**RE: Santa Rita Valley Ag., Inc. Cannabis Cultivation Project
19APL-000000-00032**

Chair Hart and Honorable Supervisors,

Our offices represent Blair Pence and the Pence Winery, Appellant in this matter. Mr. Pence resides, and the Pence Winery is located, in the Santa Rita Hills AVA at 1909 West Highway 246, approximately 3 miles west of the City of Buellton. The Pence Vineyard and Winery has focused on producing Burgundian-inspired wines and organically farms 38 acres of world-class Pinot Noir, Syrah, Gamay and Chardonnay grapes. The Santa Rita Valley Ag., Inc. Cannabis Cultivation operation is located across Highway 246 and less than ½ mile west of the Pence Winery, and is one of nearly 50 cannabis cultivation and processing operations currently proposed or approved in the Santa Rita Valley between Buellton and Lompoc.

In this appeal, Appellant requests that the Board of Supervisors ensure the impacts of the Santa Rita Valley Ag, Inc. – 19LUP-00000-00351 Cannabis Development Project (“Project” or “Proposed Project”) are thoroughly reviewed. Such review must include environmental review of the Project’s site specific and cumulative impacts pursuant to the California Environmental Quality Act (“CEQA”). Appellant believes that such environmental review, in addition to being required by law, is necessary to ensure that the Project will be compatible with neighboring uses (both agricultural and residential) and mitigate aesthetic and visual, agricultural resources, air quality, and odor impacts of the Project as well as cumulative impacts from multiple outdoor cannabis cultivations permit approvals.

As a preliminary matter, the Applicant should not be allowed to modify the Project Description at the Board level to eliminate conditions imposed by the Planning Commission, without having appealed the Planning Commission’s approval with conditions to the Board. This back-door approach undoes the careful work of your Planning Commission in crafting conditions to reduce the cultivation area to 12.75 acres in the center portion of the lot in order to address the Project’s potentially significant impacts, and should be rejected.

Key Cannabis Issues

This Project sets a precedent countywide, and likely statewide:

Cannabis projects, like this Project, present unique and complex legal and practical issues. This Project is only the second cannabis project in the County that has come before the Board for review, and is the first project on an AG-II zoned parcel. The significance of these two facts cannot be understated in light of a clear trend by the Planning Commission, County staff, and cannabis project applicants to look to prior approved projects for guidance on acceptable scope, standards, and conditions for cannabis projects in Santa Barbara County. It has become common for subsequent projects to refer to prior project approvals to find commonalities to support a similar approval, and recent news media confirms all eyes are on Santa Barbara County. As such, clear precedent will be set with this appeal vis-à-vis future cannabis projects in AG-II zones and beyond. Of note, there are nineteen (19) pending cannabis projects in the Santa Rita Valley area, all of which we anticipate County staff will review in light of the direction you give during this appeal hearing.

The permit is a permanent entitlement that does not run with the operator:

It is also important for the Board to take into consideration that the future cannabis industry will operate differently than is proposed based on today's limited science and basic technologies. New tools will be developed to assess, quantify and resolve the challenges presented by this new industry, and the County needs to protect its ability in the future to revise operational standards to use new technologies and best harmonize the industry with the interests and needs of surrounding and downwind communities. Under the current ordinance, Applicant will claim vested rights to continue the permitted operations, even when better pollution control measures are developed and shown to be feasible, once the science of impact assessment advances and after the County's ordinance is amended. Limiting the term of the Project establishes clear expectations for the Applicant and preserves the County's ability to require more effective control technologies at the permit renewal step, narrowing the Applicant's claim of vested rights.

To address this issue, the Board should limit the Project's permit to a short and specific term, such as 3 years, and require the Applicant renew their permit to address changed circumstances and incorporate new technologies. The renewal process would allow the Applicant would reserve the cultivation acreage they were previously approved for, but have to meet any new requirements, utilize the latest proven technology to control their emissions, and manage their operations to avoid and overcome land use incompatibility problems. At this moment, it is most important that the Project as one of the first generation of cannabis permits be limited in time and require reapplication and renewal within 3 years to ensure the most recent science and best technology is used.

It is a common practice to limit the term of land use permits in California, and to require reapplication and renewal based on future and changed conditions. This proposed limited duration permit and renewal process for commercial cannabis use permits is similar to the

LUDC's requirements for LUPs for Homestays articulated in §35.42.193.E1¹, as well as MCUPs for trailers (§35.42.260.G.3). Additionally, a number of other jurisdictions limit the duration of cannabis permits specifically, including (among others) Los Angeles County (1 year)², Alameda (2 years)³, and include renewal opportunities.

Assertions by Applicant about operations that are not enumerated as a Project condition are not binding or enforceable upon Applicant or future operators:

The Applicant asserts that it will be a responsible operator and must operate in an already heavily regulated industry. While all this could be true, land use permits issued by the County run with the land, not the operator – they are perpetual entitlements. Any promises or assurances made by the Applicant that are not specified in the conditions of approval are unenforceable as to this Applicant and future operators and owners of the parcel. The limitation on permit duration would provide an opportunity to reassess if the permit's conditions are insufficient to avoid impacts to nearby agricultural operations or other nearby land uses. The annual business licensing process does not address this issue, as a business license can be revoked or not renewed, but the site will retain its underlying entitlement for another operator to utilize.

Odor abatement on AG-II parcels:

The migration of odors produced by cannabis operations onto adjacent parcels has created substantial land use conflicts in areas of the County where cannabis is currently grown and

¹ E. Renewal of permit [Homestays].

1. A Land Use Permit issued for a Homestay shall only be valid for one year commencing upon the effective date of the Land Use Permit, except as provided below in Subsection 3.
2. The owner or long-term tenant shall submit an application to renew the Land Use Permit to the Department for review and approval on an annual basis as directed below.
 - a. The renewal application shall be processed pursuant to the requirements set forth in Section 35.82.110 (Land Use Permits).
 - b. The Land Use Permit application for the initial renewal and any subsequent renewal shall be submitted no later than 30 days prior to the expiration of the previous Land Use Permit.
3. If the approval of a Land Use Permit for the renewal of a Land Use Permit for a Homestay has been appealed, then the validity of the Land Use Permit shall be extended until processing of the appeal(s) has been completed.

² LA County Cannabis Ordinance §§ 8.04.1310.D and 8.04.1315, available at https://library.municode.com/ca/los_angeles_county/codes/code_of_ordinances?nodeId=TIT8COPRBUWARE_DIV1PUHELI_CH8.04PUHELI_PT7COCAAC.

³ Alameda County Cannabis Ordinance §§ 6.106.030.c and 6.106.130, available at https://library.municode.com/ca/alameda_county/codes/code_of_ordinances?nodeId=TIT6HESA_CH6.106CACU

processed, including conflicts with residential uses, schools, agriculture, and other businesses including wineries. Presently, most AG-II zoned parcels are exempt from the County's Odor Abatement Plan requirements for cannabis.⁴ At the time of ordinance adoption, this exemption was adopted in AG-II zones because the Board assumed that cannabis would be protected by its Right to Farm Ordinance. Since that time, the County's Right to Farm Ordinance was amended to exclude cannabis and odor management is now feasible and appropriate in AG-II. As such, the Board may use its discretion to require odor abatement mitigation for the Project.

Scope of Board's Discretion and Applicability of CEQA

Land Use Permits can be either "discretionary" or "ministerial" permits. Whether a permit is "discretionary" or "ministerial" has bearing on the Board's authority and discretion to review and condition a project prior to approval or deny a project. The Land Use Permit required for the Project is a discretionary permit which, in this case, gives the Board has broad authority and discretion to review and condition the Project, or deny the Project.

CEQA does not define "discretionary" or "ministerial" permits. The Guidelines, however, define the terms "discretionary project" and "ministerial."

"Discretionary project" means a project that "requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations."⁵ Thus, "where a governmental agency can use its judgment in deciding whether and how to carry out or approve a project," the project is discretionary.⁶

"Ministerial" project means a project that requires "little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely applies the law to the facts as presented but uses no special discretion or judgment in reaching a decision. A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out."⁷

The Guidelines' statement of the principles for determining whether a particular agency action is discretionary or ministerial are supplemented by case law. The often-cited *Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 235 Cal. Rptr. 788 (Westwood) discussed the discretionary-ministerial distinction in detail. (Id. at pp. 264-273.) In *Westwood*, the appellate court concluded that the permit approval process for the 26-floor office

⁴ See §35.42.075.C.6.

⁵ CEQA Guidelines, § 15357.

⁶ *Id.* at § 15002, subd. (i).

⁷ *Id.* at § 15369.

tower was discretionary and reversed the trial court.⁸ The court determined city employees set, or had the opportunity to set, standards and conditions for various aspects of the proposed building.⁹

In contrast, a permit is ministerial if “[t]he fixed approval standards delineate objective criteria or measures which merely require the agency official to apply the local law ... to the facts as presented in a given ... application. The approval process is one of determining conformity with applicable ordinances and regulations, and the official has no ability to exercise discretion to mitigate environmental impacts.”¹⁰

Here, this Project, like all cannabis projects, requires the exercise of judgment and some level of deliberation among County staff and the Planning Director when the Department decides to approve, disapprove, or require modifications to a particular cannabis project. In adopting the cannabis ordinance, your Board declared its purpose was to establish the “minimum land use requirements” for cannabis cultivation, codifying the County’s discretion to impose additional requirements needed “to protect public health, safety and welfare, enact strong and effective regulatory and enforcement controls, . . . and minimize adverse impacts on people, communities and the environment”. § 35.42.075.A.1. With the Project specifically, the County exercised its discretion to modify the Project prior to approval, although these modifications remain insufficient to mitigate impacts as required by CEQA and protect public health, safety and welfare and the environment.

It is well established that CEQA applies to “discretionary projects”.¹¹ With this in mind, the Board must review this Project as a discretionary permit subject to CEQA regulations and requirements.

CEQA Requires Project Denial

As will be discussed, the Project and surrounding projects will have significant direct and cumulative impacts to aesthetic and visual resources, agricultural resources, land use compatibility and air quality that were not adequately reviewed in the Santa Barbara County’s Programmatic Environmental Impact Report for the Cannabis Land Use Ordinance and Licensing Program (“PEIR”) or by staff prior to approval of the Project. Additional CEQA review of this Project is required. The Board, by law, cannot approve the Project until such CEQA review has been completed if there is *substantial evidence* supporting a *fair argument* that either of the following are true:

⁸ *Westwood, supra*, 191 Cal.App.3d at p. 282.

⁹ *Id.* at p. 274.

¹⁰ *Sierra Club v. Napa County Bd. of Supervisors* (2012) 205 Cal.App.4th 162, 180 [139 Cal. Rptr. 3d 897].

¹¹ See CEQA Guidelines at § 15357.

Substantial changes have occurred which result in: significant effects that were not examined by the PEIR, or the effects examined in the PEIR will be substantially more severe, or mitigation measures previously found not to be feasible would now be feasible.¹²

New information, which was not known and could not have been known at the time the PEIR was certified as complete, is available.¹³

Substantial evidence may take many forms for the purposes of determining whether there is a *fair argument* that either the foregoing are true with regard to a project. The following constitute substantial evidence:

Expert opinion if supported by facts, even if not based on specific observations as to the site under review.¹⁴ Where such expert opinions clash, the County should require preparation of a tiered EIR.¹⁵

Relevant personal observations of area residents on nontechnical subjects.¹⁶

When there is doubt or uncertainty as to whether there is *substantial evidence* supporting a *fair argument*, all doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, **notwithstanding the existence of contrary evidence**. CEQA provides that the Board merely need enough relevant information and reasonable inferences that a *fair argument* can be made to support a conclusion, even though other conclusions might also be reached.¹⁷ Specifically, as explained in more detail below, the Santa Rita Valley Ag Project presents five impacts that require substantive and meaningful review and mitigation:

- (1) the new potentially significant impact of terpene taint on wine grapes grown nearby;
- (2) changes to the County's Right to Farm Ordinance which now make odor mitigation on AG-II zones and this Project feasible;
- (3) the now known significant and more severe impacts of pesticide migration on the future viability of legacy agriculture near the Project;

¹² Cal. Pub. Resources Code at § 21166(b).

¹³ *Id.* at § 21166(c).

¹⁴ *The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928, citing *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1398–1399 & fn. 10).

¹⁵ *Sierra Club v. County of Sonoma*, 6 Cal.App.4th at 1322; *see also Pocket Protectors*, 124 Cal.App.4th at 928, citing Guidelines, § 15064 (g).

¹⁶ *Pocket Protectors*, 124 Cal.App.4th at 928, citing *Ocean View Estates Homeowners Ass'n Inc. v. Montecito Water District* (2004) 116 Cal.App.4th 396, 402.

¹⁷ CEQA Guidelines, § 15384 (a).

- (4) extent and severity of the land use incompatibility with adjacent agriculture; and
- (5) the severity of cumulative impacts of concentration of cannabis projects west of Buellton.

By law, the Board must seek review and resolution of these issues through use of the CEQA review process. It cannot proceed with Project approval in any form without this information in hand to make reasoned and informed decisions, supported by fact and law.

For the reasons explained, Appellant respectfully requests that the Board deny the Project and return it to County staff for appropriate environmental review under CEQA.¹⁸ With such denial, we request the Board provide direction to staff that all cannabis projects require site-specific CEQA review of the three key impacts presented in this appeal.

1. Approval of the Project Violates CEQA

The Program EIR for the County's Cannabis Ordinance (PEIR or Program EIR) was prepared in 2017 and certified February 6, 2018, when the legal cannabis industry was in its infancy, and the range and severity of environmental impacts resulting from commercial cannabis activities was not well understood. Since then, County residents and businesses including Appellants have experienced first-hand just how impactful these operations are, and have testified at numerous public hearings identifying specific and substantial evidence documenting new information of new and substantially more severe impacts than disclosed and analyzed in the PEIR. Despite this, the County has continued to rely on the defective and inadequate "CEQA Checklist" to establish that individual cannabis projects are within the scope of the PEIR and that no additional environmental review is required.

The Board Letter prepared for this appeal asserts that the "PEIR that analyzed the environmental impacts of the Cannabis Program constitutes adequate environmental review for the Santa Rita Valley Ag., Inc. Cannabis Cultivation project." (Board Letter p. 6.) The record however does not support this assertion, due to the existence of new information showing that the Project's impacts will be substantially more severe than shown in the PEIR. Discussed below and in our previously submitted appeal materials, there is substantial evidence supporting a fair argument that the Santa Rita Valley Ag. Project specifically will have one or more impacts that are either new or substantially more severe than those examined in the PEIR, and accordingly, the Board must direct additional environmental review or deny the Project¹⁹.

¹⁸ CEQA Guidelines § 15126.4(a)(1)(D); see generally, *Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986 (new mitigation measures that entail potentially significant impacts should be considered in environmental review document).

¹⁹ CEQA does not apply to projects which a public agency rejects or disapproves. (CEQA Guidelines § 15270 (a).)

Additionally, described at length in our previously submitted appeal materials, the County's process for reviewing subsequent activities in the Cannabis program including the Santa Rita Valley Ag. Project is legally inadequate, and constitutes a pattern and practice of violating CEQA. The Board Letter does not even directly address this claim. We request that the Board direct immediate changes to the County's process for evaluating the environmental impact of commercial cannabis projects to ensure that it complies with CEQA and that the significant impacts of cannabis operations are fully disclosed and mitigated.

a. Additional Environmental Review Is Required

i. Applicable Standard of Review

After a Program EIR has been prepared, subsequent activities in the program like this Project must be examined in light of the PEIR to determine whether additional environmental review is necessary. (CEQA Guidelines²⁰ § 15168 (c).) In order to approve the Project as being within the scope of the project covered by the Program EIR, the County is required to find that pursuant to CEQA Section 15162, no new effects could occur or no new mitigation measures would be required. (Id. subd. (2).) Conversely, if the Project would have effects that were not examined in the Program EIR, a new Initial Study would need to be prepared specifically for this Project, leading to either an EIR or a Negative Declaration. (Id. subd. (3).)

Guidelines § 15162 identifies the circumstances under which subsequent environmental review is required including where "substantial changes occur with respect to the circumstances under which the project is undertaken, which will require major revisions of the previous EIR due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects." (CEQA Guidelines § 15162 (a)(1-2); Pub. Res. Code § 21166 (a-b).) Subsequent environmental review is also required if new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time of the previous EIR was certified (here the Program EIR on February 6, 2018), shows that a) the project will have one or more significant effects not discussed in the previous EIR or negative declaration; b) Significant effects previously examined will be substantially more severe than shown in the previous EIR; c) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or d) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative. (CEQA Guidelines § 15162 (a)(3); Pub. Res. Code § 21166 (c).)

²⁰ 14 CCR 15000 et seq.

An agency's determination regarding whether a subsequent activity is covered by a program EIR is subject to the "fair argument" test which establishes a "low threshold for an agency's determination whether to prepare a new EIR on a later new project which follows certification of a program or plan EIR." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1319.) Specifically, "if there is substantial evidence in the record that the later project may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR, doubts must be resolved in favor of environmental review and the agency must prepare a new tiered EIR, ***notwithstanding the existence of contrary evidence.***" (*Id.* (emphasis added).)

"Substantial evidence . . . means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384 (a).) "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Id.* at subd. (b); Pub. Res. Code § 21080 (e)(1).) Expert opinion if supported by facts, even if not based on specific observations as to the site under review, constitutes substantial evidence supporting a fair argument. (*The Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928, citing *Friends of the Old Trees v. Department of Forestry & Fire Protection* (1997) 52 Cal.App.4th 1383, 1398–1399 & fn. 10).) Where such expert opinions clash, the County should require preparation of a tiered EIR. (*Sierra Club v. County of Sonoma*, 6 Cal.App.4th at 1322; *see also Pocket Protectors*, 124 Cal.App.4th at 928, citing Guidelines, § 15064 (g).)

The fact-based opinions of agency staff and decisionmakers, stemming from experience in their respective fields, are also considered substantial evidence for a fair argument. (*Pocket Protectors*, 124 Cal.App.4th at 932; *Stanislaus Audubon Society*, 33 Cal. App. 4th at 155 (probable impacts recognized by the planning department and at least one member of the planning commission, based on professional opinion and consideration of other development projects, constituted substantial evidence supporting a fair argument that the project would have significant growth inducing impacts).) Moreover, "[r]elevant personal observations of area residents on nontechnical subjects may qualify as substantial evidence for a fair argument." (*Pocket Protectors*, 124 Cal.App.4th at 928, citing *Ocean View Estates Homeowners Ass'n Inc. v. Montecito Water District* (2004) 116 Cal.App.4th 396, 402.) Additionally, "[i]f substantial evidence supports a fair argument that the proposed project conflicts with policies [adopted for the purpose of avoiding or mitigating an environmental effect] this constitutes grounds for requiring an EIR." (*Pocket Protectors*, 124 Cal.App.4th at 930; Guidelines, App. G, § IX (b).)

Discussed below, there is substantial evidence – both already in the record, and additional substantial evidence submitted with this letter – that the Project may have significant adverse effects on the environment that were not examined in the prior Program EIR. For this reason, the Board cannot approve this Project without a project-specific environmental impact report (*see Sierra Club v. County of Sonoma*, 6 Cal.App.4th 1307).

ii. New Information on Terpene Taint Triggers Additional Environmental Review

In our appeal, we identified a new potentially significant impact associated with terpenes from cannabis grown in close proximity to wine grapes, such as Appellant's vineyard which is less than ½ mile from the proposed Project. Specifically, air-borne terpenes released by cannabis plants are documented to impact wine quality, potentially causing "taint", in which can render the wine unmarketable. This issue was not examined in the PEIR, and research studying the potential impact is still developing. Discussed below, under these circumstances there is sufficient substantial evidence to support a fair argument that the Project may result in taint to wine grapes grown nearby.

The Board Letter claims "VOCs and terpenes are discussed in the PEIR and were considered as part of the analysis of potential impacts. This is not new information that triggers additional review." (Board Letter, p. 9.) An evaluation of the PEIR however reveals that the issue of terpene taint on wine was not even so much as mentioned, let alone "examined". (CEQA Guidelines § 15168 (c)(3) ("if the Project would have effects that were not examined in the program EIR, a new Initial Study would need to be prepared leading to either an EIR or a Negative Declaration.")) The PEIR's discussion of agricultural impacts including incompatibility of agricultural uses (*see* Impact AG-1, PEIR pp. 3.2-19 -3.2-21) is silent on this issue. Similarly, the PEIR's discussion of cannabis VOCs and terpenes (*see* PEIR Vol. II (Response to Comments), p. 8-8) is silent on potential impacts to the wine industry. Only recently have researchers been able to develop the evidence of terpene taint and the episodes of crop conflicts based on pesticide migration are a recent development.

Significant new information regarding the potential impact of cannabis terpenes on wine grapes has become available. At the time the PEIR was certified, the only publication regarding the issue of terpene tainting wine grapes was a HighTimes article describing statements made by the Lodi Chamber of Commerce CEO at the prior week's meeting of the San Joaquin Board of Supervisors that "[if t]he odor travels, it could permeate grape skins and render the wine deficient, causing it to lose value," as "next-level nonsense".²¹ However, in 2019 Food and Wine magazine reported that an Oregon vineyard has been allowed to move forward with a lawsuit against a nearby marijuana business, claiming their operation caused at least one customer to fear their grapes would have unwanted notes of cannabis. Instead of "smoke taint," call it "smoking taint."²² Since then, there has been considerable development of this issue including with respect to the science behind how cannabis terpenes may impact wine grapes. An October 28, 2019 letter by Dr. Anita Oberholster of the Department of Viticulture and Enology at UC Davis describes how common cannabis terpenes associated with other plants have been demonstrated to affect wine quality, and how existing research can be used to analogize and draw conclusions regarding the potential impacts of cannabis terpenes and essential oils [from

²¹ <https://hightimes.com/news/california-businessman-believes-the-smell-of-marijuana-hurts-wine-grapes/>

²² <https://www.foodandwine.com/wine/wine-grapes-marijuana-odor-lawsuit-oregon>

odor abatement systems] on wine grapes. A December 6, 2019 report by Dr. William Vizuite of Pacific Environmental Analytics, LLC, *Estimated emissions, concentrations, and deposition of monoterpenes from an outdoor Cannabis farm*, evaluated emission rates of cannabis monoterpenes including 1,8-cineole, beta-myrcene, alpha-terpinene, and terpinolene from an outdoor cultivation site, and establishes that the cannabis monoterpenes can potentially reach threshold values for grape taint.

In addition to her October 28, 2019 letter, Dr. Oberholster prepared an additional letter dated March 3, 2020, submitted herewith, in which she opines: “[i]t is and continues to be my opinion that the concentration of proposed and existing cannabis facilities in close proximity to and upwind of winegrape-producing vineyards in the Santa Ynez Valley, have a reasonable potential to alter the terpene composition of grapes grown in adjacent vineyards. Changes in winegrape terpene composition and concentration could potentially change wine characteristics and result in wines considered tainted. If wines are tainted, it will have an adverse effect on the reputation and marketability of these wines and thus the viability of the wine industry in Santa Barbara County.” Dr. Oberholster also disputes Dr. Vizuite’s conclusion that that terpenes from outdoor cannabis cultivation are unlikely to exceed threshold levels for grape taint, asserting the incorrect odor detection thresholds were used. (Id., pp. 4-5.) In addition, there are inaccuracies in the Air Quality Modeling Study utilized in the Vizuite study that further undermines its conclusions and increase the likelihood that terpenes released from cannabis cultivation projects in the Project area will be deposited on nearby wine grapes including at Appellant’s winery.²³

While the evidence of the significance of terpene taint is not yet conclusive, substantial evidence in the record including the fact-based expert opinion of Dr. Oberholster and testing in Santa Barbara County, establish that terpene migration is occurring and that terpenes can cause wine taint, supporting a fair argument that the Project *may* result in terpene taint to nearby wine grapes, leading to a significant incompatibility between these two agricultural land uses. Evidence of this impact is far from speculation, and is being taken seriously by the Agricultural Commissioner, who is currently investigating funding sources for, and researchers who are qualified to conduct, a study if wine grapes can absorb cannabis terpenes. (Board Letter, p. 9.) Further, a letter submitted by the County’s Ag Advisory Committee (AAC) for this appeal urges the Board to continue the appeals the Santa Rita Valley Ag. Project specifically until the Planning Commission and Board resolves amendments to the Cannabis Zoning Ordinance, including amendments intended to address this very issue of potentially significant impacts of terpene taint. These expert opinions constitute substantial evidence supporting a fair argument of a potentially significant impact and thus cross the threshold of mandating additional environmental review for this project.

Research on cannabis generally has been limited in the United States, and the effects of cannabis on adjacent crops, including crops with sensitive characteristics like grapes, has also been limited. (10/28/19 Oberholster Letter, p. 2.) Dr. Oberholster opined that the “lack of

²³ Exhibit 3, Underwood Report for West Coast Farms Cannabis Development (11/4/19)

evidence-based information on the potential impacts of the cannabis industry on established vineyards ***is a risk to the future viability of the grape and wine industry in Santa Barbara County*** and other counties that have or may adopt regulations allowing outdoor cannabis cultivation and/or odor abatement systems that use vaporized essential oils sited near vineyards.” (10/28/19 Oberholster letter, p. 2 (emphasis added).) While the absence of evidence in the record on a particular issue does not automatically give rise to a fair argument that a project may have a significant effect on the environment, “[d]eficiencies in the record may actually enlarge the scope of fair argument by lending a logical plausibility to a wider range of inferences.” (*Sundstrom*, 202 Cal. App. 3d at 311.)

iii. Changed Circumstances Regarding the County’s Right to Farm Policies Trigger Additional Environmental Review

The PEIR’s discussion of any potential impact of VOCs and terpenes from cannabis on AG-II lands reasons that “Agricultural operations are not typically monitored for their odors and are generally protected from odor related and other complaints under the County’s Right to Farm Ordinance” and accordingly that any odor abatement mitigation should *not* apply in the AG-II areas such as this Project site. (*Id.*, pp. 8-9.)

Since the EIR’s certification, circumstances changed with respect to the status of cannabis under the County’s Right to Farm Ordinance that render odor abatement mitigation feasible. Specifically, on May 8, 2018, the County Board of Supervisors approved the amendment to the Right to Farm Act to exclude cannabis from its protections. The County’s new position that the Right to Farm Act does not protect AG-II cannabis cultivation from County odor regulations constitutes new information that a mitigation measure previously found not to be feasible would in fact be feasible, and would substantially reduce one or more significant effects of this Project (and the Project proponents have declined to adopt the mitigation measure). Accordingly additional environmental review is required pursuant to CEQA Guidelines § 15162 (a)(3)(c) on this issue alone.

iv. New Information on the Agricultural Impact of Pesticide Migration Triggers Additional Environmental Review

In our appeal we identified a new potentially significant impact to agriculture resulting from the conflict experienced between traditional agriculture and cannabis cultivation with respect to pesticide migration that the PEIR did not examine. Specifically, the PEIR failed to examine how agricultural resources will be impacted by the relationship between low cannabis testing thresholds and inevitable drift, and how drift, volatilization and migration in this area will impact adjacent agricultural land and result in the loss of agricultural land uses from non-viability.²⁴ In addition, because the PEIR does not examine or analyze this impact, it also fails to provide mitigation for the likely loss of agricultural land.²⁵ This fact has been recognized by the

²⁴ See PEIR, pp. 3.2-19-3.2-23.

²⁵ *Id.* at pp. 3.2-24-25.

County, including its Agricultural Commissioner's office. The Agricultural Commissioner's office convened a working group to review and analyze this exact issue and which was unable to develop a solution.²⁶

The Board Letter attempts to rebut this claim on two fronts. First, it asserts that the "use of pesticides and insecticides by non-cannabis cultivation and the accompanying regulatory framework was the same at the time the PEIR was prepared and certified ...[and] is not new information that triggers environmental review." (Board Letter, p. 8.) At the time the PEIR was prepared and certified, the extent of the potential conflict was not understood. The PEIR's agricultural impact analysis barely touches on the issue, stating merely "due to extensive testing requirements for cannabis products, it is a benefit for cannabis cultivators to be located further away from agricultural operations which utilize potentially hazardous pesticides, such as grape and strawberry harvesters." (PEIR p. 3.2-20.) Rather, it is recent reports and publications that have identified this as a significant issue. For example, an article published in *Environmental Health Perspectives* in April 2019 entitled, "*Into the Weeds: Regulating Pesticides in Cannabis*"²⁷ revealed:

Outdoor cannabis crops can become contaminated with pesticides that the growers never actually applied—sometimes at levels high enough to trigger a failed test. Chen of Sonoma Lab Works says that such cross-contamination is not just a theoretical scenario; he's seen it happen to his own customers in California. "Several streams of unintentional contamination that are common to farmers are overspray from neighboring acres due to factors such as wind or recycled water," he says. "When working with such small concentrations, there are dozens of avenues of contamination."

Additionally, since the PEIR's certification, evidence has come forward that pesticide applicators (used for decades and necessary for economically productive avocado production) have refused to apply materials to either conventional or organic avocado crops due to incompatibility with nearby cannabis cultivation operations in Carpinteria.²⁸ In various interviews with Scott Van Der Kar, an avocado grower in the Carpinteria foothills, Mr. Van Der Kar explains that many Oxnard-based pest control companies that treat the avocado crop would no longer spray the insecticides that work best on avocados, for fear of contaminating cannabis crops with the slightest trace of residue and getting sued. One of Mr. Pence's farming neighbors had their pest control applicator threatened by a cannabis grower's lawyer for using materials essential to their

²⁶ See page 36 of Staff Report from October 2, 2019 Planning Commission hearing.

²⁷ *Environmental Health Perspectives* is a monthly journal of environmental health research and news published with support from the National Institute of Environmental Health Sciences, one of the 27 institutes and centers of the National Institutes of Health (NIH).

²⁸ See e.g. Burns, M. May 9, 2019. *Avocado and Cannabis Growers Struggle over Insecticides*. Santa Barbara Independent. Burns, M. Burns, M. May 10, 2019. *The unintended consequences of cannabis: Can avocado and marijuana growers peacefully coexist?* KEYT. May 23, 2019. *Commercial Sprayers Pull Out of Carpinteria Deal with Cannabis Operators*. Noozhawk.

agricultural production,²⁹ actions that have been repeated by cannabis growers in various parts of the County.³⁰ Thresholds for cannabis are as little as one microgram per gram, or 0.1 part per million.³¹

Second, the Board Letter asserts that “the issue of pesticide drift is an important issue, but would not be considered an environmental impact from the project.” (Board Letter, p. 8.) However, under CEQA, a potentially significant impact to the environment occurs where a project may “convert prime farmland, unique farmland, or farmland of statewide importance to non-agricultural use,” “conflict with existing zoning for agricultural use,” or “involve other changes in the existing environment which, due to their location or nature, could individually or cumulatively result in the conversion of farmland to non-agricultural use.”³² Here, substantial evidence supports a fair argument that the occurrence of drift, in conjunction with the prohibition on pesticides or insecticides in cannabis, including most commonly used organically-certified pesticides, will likely result in the conversion of farmland to non-agricultural uses. Paradoxically, these lands rendered unsuitable for agricultural use due to cannabis will also be unsuited for residential uses due to cannabis’ proximity as well.

Well-established farms and vineyards, like Appellants, have always used pesticides and fungicides to control for namely mildew, botrytis, and mealy bugs, all of which can destroy the annual grape crop. These practices are already in place, and have been well before the Project proposed to grow cannabis just 500 feet from Appellants' vineyard. This creates significant impacts, risks and issues for Appellant and other agricultural operations, to the extent it potentially bars Appellant's historic farming practices, and as a result, has the potential to make agricultural uses of the land infeasible.³³ Appellant currently uses at least six materials for its vineyards that are listed as a "Category II Residual Pesticide". Category II pesticides have set thresholds of traceability for inhalable and non-inhalable cannabis goods. Such thresholds are as little as one microgram per gram, or 0.1 part per million.

This issue is exacerbated in the area between Buellton and Lompoc along Highway 246 and near the Project site because of an early morning inversion specific to this area. The inversion was identified in the PEIR, and the air basin where the inversion occurs is further supported by the County Fire Department’s Burn Permit Zone map, which identifies the “Santa Ynez Valley air basin zone” and indicates an air basin overlays the Santa Ynez Valley from Highway 246 just west of the Project, east to Lake Cachuma.³⁴ During an inversion, as the air

²⁹ Letter Amy Steinfeld to Nutrien Ag Solutions, May 28, 2019.

³⁰ Most such reports are not disclosed publicly but known to the County through the Agricultural Commissioner’s office which investigates many of these episodes.

³¹ 16 CFR 42, § 5719, p. 108.

³² CEQA Guidelines, Appendix G, § II.

³³ 16 CFR 42, § 5719, p. 108.

³⁴ See GIS map at <https://sbc-gis.maps.arcgis.com/apps/PublicInformation/index.html?webmap=7d8f1e27f37340248b654363d1569e1f>.

³⁴ See GIS map at <https://sbc-gis.maps.arcgis.com/apps/PublicInformation/index.html?webmap=7d8f1e27f37340248b654363d1569e1f>.

temperature increases above the soil surface and the coldest, densest air is at the surface. Its density steadily decreases with increasing height. The result is a very stable stratification of air that limits vertical air motion. When an applicator introduces spray droplets into very stable air (as during an inversion), the smaller droplets fall slowly and may float along with the air for long distances.³⁵ Temperature inversions are favorable to long distance pesticide migration. With the cool, humid conditions found during a temperature inversion, small droplets can remain suspended above the sprayed area for a long time. Just as morning fog slowly moves into lower elevations, the concentrated cloud of droplets can move down slope with the layer of cool air and cause damage or contamination for miles. Sloped areas are not the only concern during temperature inversions. As winds pick up, suspended droplets can be carried great distances from level application sites as well.³⁶

Due to the inevitable occurrence of drift, the morning inversion, and the immense potential liability and economic damages to conventional agriculture for accidental migration onto nearby cultivated cannabis, farmers and vintners in the vicinity of the Project will be precluded from utilizing pesticides and insecticides essential to their farming and agricultural practices. A number of pesticide applicators have declined to continue to provide services for farmers and vintners located near cannabis cultivation sites for fear of liability. As a result, it will not be viable to maintain any agriculture that utilizes pesticides or insecticides in the vicinity of cannabis operations. Further, there are specific impacts to cannabis cultivation sited near vineyards and tasting rooms, which will also be amplified by air basin inversion. Both vineyards and tasting rooms are treated by the County and related agencies as supportive agricultural uses; such uses are also impacted by the odors from unmitigated cannabis cultivation which interfere with wine tasting and thus threaten the largest source of income for most local vintners.

v. Land Use Incompatibility

According to the Santa Barbara County's Environmental Thresholds and Guidance Manual, and the PEIR, a project may have significant land use and planning impacts if it is incompatible with a surrounding neighborhood.³⁷ CEQA Guidelines Appendix G, § IV (e) ("Would the project ... [c]onflict with any local policies or ordinances"); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903 ("[I]f substantial evidence supports a fair argument that the proposed project conflicts with policies [adopted for the purpose of avoiding or mitigating an environmental effect] this constitutes grounds for requiring an EIR."). Discussed above, the Project is incompatible with surrounding agriculture due to issues with migration and pesticide contamination of cannabis crops, as well as cannabis terpene contamination of wine grapes. Explained above, new information revealed these potentially significant impacts after

³⁵ Thostenson, A, et al. 2017. *Air Temperature Inversions Causes, Characteristics and Potential Effects on Pesticide Spray Drift*. North Dakota State University.

³⁶ NC State University NSF Center for Integrated Pest Management. *Pesticide Drift*. <https://pesticidestewardship.org/pesticide-drift>

³⁷ *Santa Barbara County's Environmental Thresholds and Guidance Manual*, p. 118; PEIR, p. 3.9-32.

the PEIR was certified, and accordingly the Board Letter is incorrect that “the 30 day statute of limitations to challenge the adequacy of the PEIR has expired.” (See Board Letter, p. 11.) Just as the County may not override a General Plan policy inconsistency, neither may the County ignore the duty to conduct additional CEQA review when faced with new evidence of project inconsistency with a General Plan policy, such as the conflict with the Agricultural Element’s Policy 1A due to the violation of the integrity of agricultural operations by non-compatible uses.

vi. Cumulative Impacts of Project Clusters

State CEQA Guidelines Section 15130 require that an agency analyze cumulative impacts in an EIR when the resulting impacts are "cumulatively considerable" and, therefore, potentially significant. Cumulative impacts refer to the combined effect of project impacts with the impacts of other past, present, and reasonably foreseeable future projects.³⁸ Generally, projects that are located within geographical proximity to each other (e.g., two or more projects utilizing the same roadways) have the potential to contribute to cumulative impacts to an environmental resource or issue area. The impacts of a project and related projects are considered "cumulatively considerable" when "the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects." (CEQA Guidelines, § 15065(a)(3).)

Currently, there are nineteen (19) pending outdoor cannabis cultivation projects in the Santa Rita Valley area that are pending approval or that have been approved (and appealed), averaging 30 acres each. For context, Sonoma County has capped cannabis cultivation at 1 acre per parcel, with 88 growers currently operating, totaling 88 acres countywide. Note: the first project approved in Sonoma County is for 1 acre and was approved with 133 conditions the operator must follow and they must return to the board after two years to discuss how the smell is impacting neighbors.³⁹ These nineteen projects total 610 acres of outdoor cannabis cultivation, or 39% of Santa Barbara County's 1,575 acres cannabis production cap. This is 55% of the total 1,100 acres of cannabis estimated as needed to supply the entire State of California. The PEIR does not analyze or examine cumulative impact of this proliferation of cannabis cultivation projects in AG-II zones between Buellton and Lompoc along Highway 246, within the Santa Rita Hills American Viticultural Area and a scenic corridor that is considered the gateway to the Valley.

³⁸ CEQA Guidelines, § 15355 state: "'Cumulative impacts' refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (a) The individual effects may be changes resulting from a single project or several separate projects. (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time."

³⁹ See <https://www.pressdemocrat.com/news/9711880-181/sonoma-county-begins-to-process?sba=AAS>.

The Board Letter responds asserting that the “the PEIR acknowledged that cumulative impacts associated with the Cannabis Program would include potential changes to scenic resources and existing visual character and noted that future cannabis cultivation would likely occur along Highway 246.” (Board Letter, p. 11.) However, as discussed at length in our previously submitted appeal materials, the PEIR did not anticipate either the number or size of the potential cultivation operations in this area, or the magnitude of their impact to visual impacts. Moreover, the Board Letter does not even claim that the PEIR identified or examined the potential cumulative impact to agriculture including from pesticide migration or terpene taint associated with this intensity of cannabis cultivation in this important wine producing region. Discussed above, new information revealed substantial evidence of these impacts, and accordingly additional environmental review is required.

b. The Checklist is flawed

The County’s CEQA analysis for cannabis activity permitting relies on and tiers from the PEIR. The PEIR specifically analyzed the effects of the Cannabis Ordinance, but included some potentially applicable project-specific analyses that could be used for later activities authorized by the Project (ordinance) such as site specific individual permits. The PEIR did not address all possible impacts, and the County’s CEQA compliance relies on a subsequent analysis that is flawed due to improper use of the Checklist, new information and changed circumstances entailing new potentially significant impacts. Additional environmental review is necessary before the Board can properly consider the Project.

i. The County’s Checklist Fails to Address Project Impacts as Required by § 15168(c)(4)

The CEQA Guidelines direct that, “[w]here the later activities involve site specific operations, the agency should use a written checklist or similar device **to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered within the scope of the program EIR.**” Guidelines § 15168(c)(4) (emphasis added). CEQA clearly requires that the Checklist focus on the Project’s site and specific activities. The County’s CEQA Checklist fails to achieve this, and thus the reliance on the PEIR and tiering is defective.

The substantive elements of the CEQA Checklist provided by the County is found at § C.1 of the Checklist. This section, and the Checklist as a whole, is focused exclusively on whether specific mitigation measures or requirements of the PEIR are deemed to apply to the Project. This is the incorrect focus, which should be on the Project’s impacts resulting from the site and specific operations. The CEQA Checklist does not demonstrate that County staff engaged in any substantive evaluation of the Project site or activity to determine whether the environmental effects of the Project were actually disclosed and evaluated in the PEIR. It contains no site-specific analysis, no data regarding site activity, and completely ignores many of the impacts associated with the Project that were not analyzed in the PEIR, as discussed elsewhere in this correspondence. This falls short of the requirement that a public agency must

examine the later project in a detailed manner before determining that the later project does not require an EIR,⁴⁰ that an initial study is required, and if not, to disclose data or evidence supporting their findings.⁴¹

For example, regarding Aesthetics and Visual Resources, the Checklist ignores that the site is in a scenic area with open pastoral views across the Santa Ynez River plain, asking only “[i]s the proposed cannabis operation visible from a public viewing location?” The box is checked yes. “If so, does the proposed project include implementation of the required landscape and screening plan?” The box is checked yes and that is the entirety of the Checklist’s treatment is the issue. There is no further evaluation of the site’s aesthetic and visual features, or the impacts of the operations that serves to document “whether the environmental effects of the operation were within the scope of the program EIR.” § 15168(c)(4). The focus exclusively on canned mitigation measures from the PEIR, and not the details about the site and activities for each of the impact categories, undermines the validity of the County’s Checklists.

Further, the CEQA Checklist determinations are not supported by substantial evidence. Under CEQA, an agency’s analysis and determinations must be supported by evidence in the record.⁴² A public agency must prepare a tiered EIR if a project “may arguably have a significant adverse effect on the environment which was not examined in the prior program EIR.”⁴³ This establishes a “low threshold” for when a public agency must prepare a tiered EIR.⁴⁴ Any doubts “must be resolved in favor of environmental review and the agency must prepare a new tiered EIR” even if there is “contrary evidence.”⁴⁵

As discussed below, there are numerous impending impacts associated with the Project that were not examined by the PEIR. For example, the checklist is silent regarding impacts to adjacent agricultural operations. As such, the County’s determination that the Project does not “involve a project site with sensitive or unusual environmental characteristics or require unusual development activities which will result in a significant environmental impact that was not evaluated in the PEIR” is not supported by the evidence.⁴⁶ Under these circumstances, the agency’s analysis is not supported by substantial evidence and, if adopted, would be subject to reversal by a reviewing court.

The CEQA Checklist does not comply with the requirements of CEQA. Consequently, at a minimum, the County must prepare an initial study and follow the conclusions indicated by that study prior to making any final environmental determination of or County approval of the

⁴⁰ *Sierra Club, supra*, 6 Cal.App.4th at 1319.

⁴¹ *Citizens Ass'n for Sensible Dev., supra*, 172 CA3d at 171.

⁴² Cal. Code Civ. Proc. § 1094.5; Cal. Pub. Resources Code, § 21168.

⁴³ *Sierra Club, supra*, 6 Cal.App.4th at 1319 (emphasis added).

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

Project. To do so, please direct this application back to the Planning and Development staff for a proper and comprehensive CEQA environmental determination.

We note that the County's practice of CEQA compliance in reliance on the defective and inadequate Checklist process represents a County-wide pattern and practice of evading CEQA for all cannabis entitlements. Project-level environmental review is plainly required by cannabis permits, and your Board should direct staff to employ a complete and adequate initial study process for each application for an entitlement for cannabis cultivation and/or processing activities.

c. Sensitive Receptors

The PEIR also did not identify residential areas and neighborhoods as sensitive receptors and thus did not examine the impact of air pollution from cannabis operations on residents and business that serve the public near Buellton, nearby EDRNs, or along Highway 246. The Project is located across Highway 246 from the North Highway 246 EDRN, approximately 2,000 feet from the West Buellton EDRN and Buellton city limits, and other nearby residences that are no part of a formalized EDRN. The PEIR references visitors to "outdoor facilities" as sensitive "users", but does not assess impacts to such users in the PEIR. The Project is also located just 500 feet from Appellant's vineyard. As explained by Professor Holden and a number of other scientific analyses, the emissions generated by the Project will have a significant impact on human health and safety, which will particularly harm sensitive receptors in residential areas.

The County's cannabis EIR defines sensitive receptors for air pollution impacts as follows:

1.3.2.2 Sensitive Receptors

Individuals with **pre-existing health problems**, those who are **close to the emissions source**, or those who are **exposed to air pollutants for long periods of time** are considered more sensitive to air pollutants than others. Land uses such as **primary and secondary schools**, hospitals, and convalescent homes are considered to be relatively sensitive to poor air quality **because the very young, the old, and the infirm are more susceptible to respiratory infections and other air quality-related health problems** than the general public. **Residential land uses are considered sensitive to poor air quality** because people in residential areas are often at home for extended periods and are therefore subject to extended exposure to the type of air quality present at the residence. **Recreational land** uses offer individuals a location to exercise and are therefore considered moderately sensitive to air pollution. Vigorous exercise places a high demand on the human respiratory function and poor air quality could add potentially detrimental stresses to the respiratory function.

Santa Barbara County Cannabis PEIR, § 3.3.2.2 Sensitive Receptors (emphasis added).

Indeed, one of the stated Project Objectives in the PEIR is to:

“Limit potential for adverse impacts on **children and sensitive populations** by **ensuring compatibility of commercial cannabis activities with surrounding existing land uses**, including **residential neighborhoods, agricultural operations**, youth facilities, recreational amenities, and educational institutions.”

Id., Project Objectives, § 2.3.2.

Santa Barbara County’s CEQA air quality thresholds identify “sensitive receptors” as including children, elderly or acutely ill.” CEQA Thresholds Chapter 5, § B. Courts have found similar definitions. In *Downtown Fresno Coal. V. City of Fresno* (2016) 2016 Cal. App. Unpub. LEXIS 5212, the Fifth Appellate District reviewed a Negative Declaration that assessed the impacts of air pollutants, including odor, on sensitive receptors as follows:

"Those who are sensitive to air pollution include children, the elderly, and persons with preexisting respiratory or cardiovascular illness. A sensitive receptor is considered to be a location where a sensitive individual could remain for 24 hours, such as residences, hospitals, or convalescent facilities. . . . [W]hen assessing the impact of pollutants with [one]-hour and [eight]-hour standards (such as carbon monoxide), commercial and/or industrial facilities would be considered sensitive receptors for those purposes.

Downtown Fresno, Slip. Op. at 39.

In *Downtown Fresno*, the court specifically noted the Negative Declaration’s treatment of odors on sensitive receptors as follows:

"Odors [¶] . . . [¶]

"Two situations create a potential for odor impact. The first occurs when a new odor source is located near an existing sensitive receptor. The second occurs when a new sensitive receptor locates near an existing source of odor. . . . [¶] . . . [¶]

Id., at p. 46-47.

See also *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 332 (““Sensitive receptors” include children.”)

The Board should direct the preparation of a robust and complete air quality impact analysis assessing the likely location of sensitive receptors, including residences and locations where youthful, elderly and persons with compromised respiratory capacity are located and evaluate the Project’s potentially significant impacts upon them.

2. The Ordinance Grants The County Authority to Minimize Adverse Project Impacts and Duty to Protect Public Health, Safety And Welfare

Staff has stated in hearings and in the conditions for this Project that the standards in the County's Cannabis Ordinance constitutes both the minimum and maximum requirements for each project – “Nothing more and nothing less” as declared by Planning and Development Department Director Lisa Plowman to the Planning Commission. This is an incorrect reading of the ordinance and the Board must admonish staff to exercise greater discretion to minimize all negative project impacts and to protect the public's health, safety and welfare.

By its own terms, Section 35.42.075.A.1 of the Land Use and Development Code “establish[es] minimum land use requirements for medicinal and adult use cannabis activities including cultivation.” The section “establishes standards that are designed to protect the public health, safety, and welfare, enact strong and effective regulatory and enforcement controls, as a result of and in compliance with State law, protect neighborhood character, and minimize potential for negative impacts on people, communities, and the environment.” (Emphasis added.)

The ordinance thus establishes that the standards contained therein are the minimum land use requirements, indicating that additional standards, requirements and restrictions may be imposed. The Planning and Development Department's review, and the Planning Director's approval are deeply flawed due to the failure to require even a complete Project Description, as well as by the failure to fully analyze the project and impose sufficient conditions to protect public health, safety and welfare as required by the zoning ordinance. As noted below, even the limited plans and conditions that the Director did approve fall seriously short of what is required.

3. Mandatory Plans Lack Specificity and Fail to Either Meet Minimum Standards or Suffice to Protect Public Health, Safety And Welfare

Each cannabis applicant is required to prepare and submit for Staff's review specific plans to describe elements of the project and address particular impacts. These are described in the Ordinance as “General commercial cannabis activities development standards” and include, *inter alia*, a Fencing and Security Plan, Landscape and Screening Plan, Lighting Plan, Odor Abatement Plan, and Site Transportation Demand Management Plan. Notably, these are the only substantive environmental protection measures associated with the Project.

1. Fencing and Security Plan

a. Adequacy

The ordinance requires a Fencing and Security Plan “demonstrating ample security and screening of the commercial cannabis activity.” 35.42.075.C.2. The ordinance mandates that the Plan include “typical fencing details, including location, fence type, and height.” Fencing “shall be made out of a material that blends into the surrounding terrain, and shall minimize any visual impacts.” Where fencing separates a cultivation area from undeveloped areas with native vegetation, the fencing must use materials that enable wildlife passage. *Id.*, (a-d).

The one-page Santa Rita Valley Ag Fencing Plan, Attachment 11, fails to meet the ordinance requirements in numerous respects. There is no Security element to the Fencing Plan (other than fences) and no “demonstration of ample security” at all. The Project Description includes “2-3 security personnel to monitor the property, . . . 24/7 . . . for approximately two months prior to and during harvest.” No other operational or physical detail is provided to indicate “ample security.” This element of the required Security and Fencing Plan is absent.

The Fencing Plan provides a chain link fence example, but this plainly is not “made of a material that blends into the surrounding terrain.”

b. Fencing Impacts to Wildlife

The project’s Fencing Plan notes that 8’ high chain link fence will surround the proposed cultivation area of 32 acres. Chain link fencing has a mesh diameter of approximately 2”. Such a small opening creates a tight barrier to any larger ground-dwelling species.

The PEIR states “The introduction of barriers to movement of any resident or migratory fish or wildlife species would be considered a significant impact. The deterioration of existing fish or wildlife habitat would be considered a significant impact because obstacles to movement can disrupt population dynamics and gene flow between populations.” (Impact BIO-3. Cannabis activities could have adverse effects on the movement or patterns of any native resident or migratory species. PEIR, 3.4-42, December 2017.) “If fencing is required for outdoor cultivation sites, the applicant shall prepare a Wildlife Movement Plan for all cannabis cultivation sites proposed.” Id.

California Red Legged Frog (CRLF), American Badger, and California Mountain Lion have been identified as being in the range of the proposed project, and potential breeding sites for California Tiger Salamander (CTS) have been identified. See Hunt, 2017.⁴⁷ While amphibians are thought of as an aquatic species, CTS are known to estivate in upland grasslands and pastures and CRLF can travel long distances between breeding sites. (Hunt, 2017). Although CRLF and CTS can both squeeze through a mesh diameter of 2”, disturbances of fence installation and maintenance may disrupt their patterns of movement.

⁴⁷ Hunt, Lawrence J., BIOLOGICAL ASSESSMENT OF PROPOSED COMMONS AT ZACA CREEK PROJECT (APN 137-170-068), 610 McMURRAY ROAD, BUELLTON, SANTA BARBARA COUNTY, CALIFORNIA. Report prepared for Coast Development Partners, LLC., 20 January 2017



Figure 5. Potential CTS breeding sites within a five-mile radius of subject property (ZACR-10, SARO-1, and LOAL-70) and CRLF observations within a three-mile radius of the subject property (Zaca Creek, 2000 and 2007). The broad yellow line marks the presumed southern geographic range limit of CTS in Santa Barbara County (USFWS, 2013). The subject property lies about one air mile south of this line, but range limits for CTS are approximate and based on the latest available field information to date.

(From Hunt, 2017, with properties added)

| | | | | | |
|-------------------------------------|-----------------------------------|----------|---|---|---|
| <i>Lepus californicus bennettii</i> | San Diego black-tailed jackrabbit | None/SSC | W of Hwy 101 in vicinity of Parcel 1 | 2013 (Hunt, pers. observ.) | Observed in grassland W of Hwy 101 across from subject property in 2013; may forage on subject property but not resident on-site. Moderate to high potential. |
| <i>Puma concolor</i> | Mountain lion | None/FPF | Lion sightings are routine around the Buellton area | 2012-2013 | One or more individuals may include subject property in home range as foraging habitat. Moderate to high potential. |
| <i>Taxidea taxus</i> | American badger | None/SSC | Several DOR sightings along Hwy 101, N of Buellton in vicinity of subject property DOR Hwy 101, approx. 1 mi S jct Santa Rosa Rd | 1985-2000 (Hunt, pers. observ.) 2013 (Hunt, pers. observ.) | Suitable foraging habitat in grassland and open scrub habitat on subject property; may include site as foraging habitat as part of larger home range in region. Moderate to high potential. |

Under the County cannabis ordinance, impacts to wildlife movement is considered if: “a proposed project separates an agricultural area from undeveloped areas with native vegetation, fencing “shall use materials or devices that are not injurious to wildlife and enable wildlife passage.”

The property proposed for the Santa Rita Valley Ag Project is bordered on the west by undeveloped open oak savannah. Given the proximity of the property to the Santa Ynez riverbed,

it is entirely possible for all of these species to travel through this property, as its use has primarily remained as grazing land as noted in the project description.

Ordinance Appendix J states: “The Applicant shall prepare a Wildlife Movement Plan for all commercial cannabis activities proposed in or near wildlife movement areas...” Both the nearby open oak savannas and riparian margins are especially attractive to wildlife, and use such habitats as corridors of travel.

This project fails to adequately address the impact of the proposed fencing to such species that utilize the nearby undeveloped areas, fracturing the landscape and providing insurmountable barriers to natural movement of wildlife species. A Wildlife Movement Plan is required.

2. Landscaping and Screening Plan

The Landscape and Screening Plan is required to screen the project and structures from publicly-accessible viewing places to the maximum extent feasible, and must reasonably screen all structures and onsite parking from public roads within 5 years. 35.42.075.C.3.

The one page Landscape and Screening Plan fails to provide basic information, including the size of the trees that will be planted. Pictures of mature trees are provided, but the Plan does not indicate that mature boxed trees will be used. The Plan visual renderings fails to include the 8 foot chain link fences, the most visually prominent structural element of the project from the roadway.

3. Lighting Plan

The ordinance requires plans that identify all lighting on the Project site. Attachment 12, a one page plan, depicts where 4 hooded lights would be. The lighting plan fails to identify any other lights on the property, but notes cryptically “The map displays sufficient coverage to illuminate the perimeter of the fence should the Sheriff’s Office require that degree of lighting.” The visual effect of the project, and effectiveness of the landscaping to screen the project’s visibility, depends on whether perimeter lighting is part of the project. The Project Description and the Lighting Plan are incomplete in the absence of the delineation of all exterior project lighting.

4. Odor Abatement Plan

The project includes no Odor Abatement Plan based on the AG-II exemption. Discussed above, given revisions to the County Right to Farm Ordinance, odor abatement mitigation is no longer infeasible on AG-II zoned parcels.

5. Site Transportation Management Plan

Section 35.42.075.D.1.j requires applicants to submit a Site Transportation Demand Management Plan that includes, at a minimum, the “lot locations, total number of employees, hours of operation, lot access and transportation routes, and trip origins and destinations.”

The one page Site Transportation Management Plan (STMP) is incomplete, and includes the following:

Access to 7680 West Highway 246 (APN: 099-230-012) is by means of an encroachment from an unnamed private road at the northwest corner of the property. The unnamed road connects to Highway 246. Both to the east and west the highway passes through Existing (sic) Developed Rural Neighborhood - (EDRN). Access for cultivation activities is available by way of Drum Canyon Road.

According to the applicant’s STDM, they lack legal access to the lot and rely on an “encroachment” on an unnamed private road. The STMP and application includes no ownership information of the unnamed private road nor no evidence of a legal right to use such road. Simply referring to an encroachment – an unlawful intrusion into the rights of the landowners – should be ineffective. The applicant must legally establish its hostile right of access by adverse possession or quiet title, or obtain a legal right of access.

More significantly, the STMP fails to provide critical trip origin and destination information. The original project proposed on-site drying and processing, and was subsequently revised to provide that processing would occur off-site. The STMP is required to identify the trip origins and destinations for all Project trips. This includes vanpool destinations, particularly if a satellite parking area is used.

Additionally, the declaration of access through Drum Canyon Road to clearly avoid depicting access using Highway 246 “through” an EDRN (and thus triggering the requirement that the Project be processed as a CUP) is absurd – that roadway is not maintained through its length, is narrow, steep, lacks adequate site distance and is highly inappropriate for large vehicles.

The STMP references incentives for consultants and contractors to carpool, however these personnel are not mentioned in the Project Description and are in excess of the designated employees. The STMP requires the numbers and functions of consultants and contractors on site to adequately demonstrate ordinance compliance.

The TDM programs are illusory and non-specific, listing only an exemplary incentive – “such as, bonus pay.” Bicycling is encouraged by allowing bikes to be parked behind the fence (WOW!), but the facilities lack showers to make employee bicycling practical. An honest and complete STMP is required.

The Project's addition of traffic to Drum Canyon Road triggers the County CEQA Threshold of adding traffic to a roadway with design features and receives use that would be incompatible with substantial increases in traffic that would become potential safety problems with the addition of project or cumulative traffic. SBC 2008 CEQA Threshold Manual.

While the PEIR generally noted there would be increases of traffic to rural roadways, it acknowledged "it would be too speculative in this programmatic EIR to estimate potential impacts to specific road segments or intersections." PEIR 3.12-28. The project now identifies rural Drum Canyon Road as its access for cultivation activities, per the STMP. Drum Canyon Road is also the access for a number of other proposed and permitted cannabis cultivation operations. A traffic study is appropriate, once the project's trip origins and destinations are identified, considering other cannabis-related use of this roadway. Since the certification of the PEIR, the state has issued guidance pursuant to SB 743 for VMT-based traffic impact assessments. The state has identified a generalized threshold of 110 trips as triggering the VMT Analysis (OPR, Technical Advisory on evaluating transportation impacts in CEQA, 12/2018, page 6). The STMP identifies 53 employees on site during harvest periods, and an unidentified number of consultants and contractors, in addition to an unidentified number of product, supply and equipment trips. Attachment 13. The project will clearly entail in excess of 55 one way trips, or 100 daily trips, and thus should be subjected to a traffic analysis.

Significantly, the primary transportation impact mitigation measure identified in the PEIR, Transportation Impact Fees, was stricken. These changed circumstances necessitate review of the project's traffic impacts.

6. Summary and Conclusion

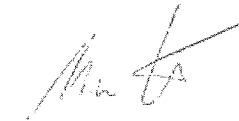
This project has significance throughout AG-II zones and the Santa Ynez Valley region as the first cannabis project approved without odor control that has been closely reviewed. For the appellant Blair Pence and other winemakers in the region, it is less than a quarter mile upwind. After investing millions in dozens of vineyards and wineries, the local wine community, along with many other agriculturalists, face what could be (and is perceived by many in these communities to be) a threat to their existence from two newly discovered issues that were NOT considered in the PEIR or by the Board in adopting the cannabis ordinance – terpene migration tainting wines and legal threats preventing use of even organic pesticides. The Ag Commissioner's unsuccessful invitational workshop process on pesticides demonstrated the difficulty of the latter problem, and its significance to Santa Barbara County's agricultural economy. There is consensus that an independent analysis of the terpene generation issue in Santa Barbara County is needed, but requires funding, cooperation and time. Each qualifies as a legitimate CEQA issue and provide a basis for the Board's denial of the project on CEQA grounds. The cannabis community will be watching the Board's action closely (as is the agricultural community). The Board should use this opportunity to establish that these projects cannot be approved until these issues are addressed, and while the technical studies are being completed and the environmental review process revised, the Board will have an opportunity to revise the ordinance to define more specific standards for siting and operation and enhance the

project review process so each project receives the analysis and process to ensure it is right for the location, for the surrounding community and for the applicant.

For reasons stated herein, and in the materials submitted concurrently with our appeal, approval of the Santa Rita Valley Ag. Project would violate CEQA, and would represent an abdication of the County's responsibility to protect the public health, safety, and welfare. Accordingly we urge the Board to uphold the appeal, and deny the Project.

Respectfully Submitted,

LAW OFFICE OF MARC CHYTILO, APC



Marc Chytilo
Ana Citrin

LAW OFFICE OF COURTNEY TAYLOR, APC



Courtney Taylor

Exhibits:

Exhibit 1: TBS Systems, Report for West Coast Farms Cannabis Development (11/4/19)

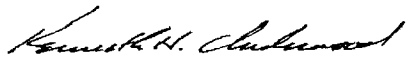
Technical & Business Systems

environmental research associates

25570 Rye Canyon Road Unit J • Valencia, California 91355 • (661)-294-1103 fax (661)-294-0236

Date: 4 November 2019

To: Santa Barbara County Planning Commission

From: Kenneth H. Underwood, Ph.D., C.C.M.
T&B Systems, Valencia CA 

Subject: West Coast Farms Cannabis Development

I have been retained by the Law Offices of Marc Chytilo, APC to provide comments on the meteorological data submitted by SESPE Consulting, Inc. as part of their odor study for West Coast Farms.

I am a Ph.D. meteorologist with a specialty in atmospheric boundary layer dynamics and thermodynamics. I have over 40 years of experience in the commercial, research and academic communities. I have designed commercial instrumentation specifically for the study of atmospheric boundary layer turbulent process including wind profiles. I have provided consulting services to NASA for the characterization of the turbulent boundary layer to quantitatively study the impact of sonic booms in the vicinity of airports. NASA continues to use this instrument network design in their on going sonic boom studies. Currently, I am working with the US EPA to develop quality control methodologies and guidelines for the installation, operation and data collection for laser based ceilometers that are designed to monitor the height of the atmospheric boundary layer. I am also an adjunct instructor at Antelope Valley College for which I developed and teach a junior level course entitled "atmospheric thermodynamics and dynamics" as part of AVC's four year program on aircraft manufacturing technology. I am a member of the American Meteorological Society, a Certified Consulting Meteorologist (#466) and have served on several AMS committees during the past 40 years.

I was provided with a copy of the SESPE memorandum dated 5 August 2019. I was asked to review the "Quantitative analysis of the Surface and Profile Meteorological data obtained from Lakes Environmental" section of the memorandum.

The Lake Environment analysis utilized a data set derived from the following sources:

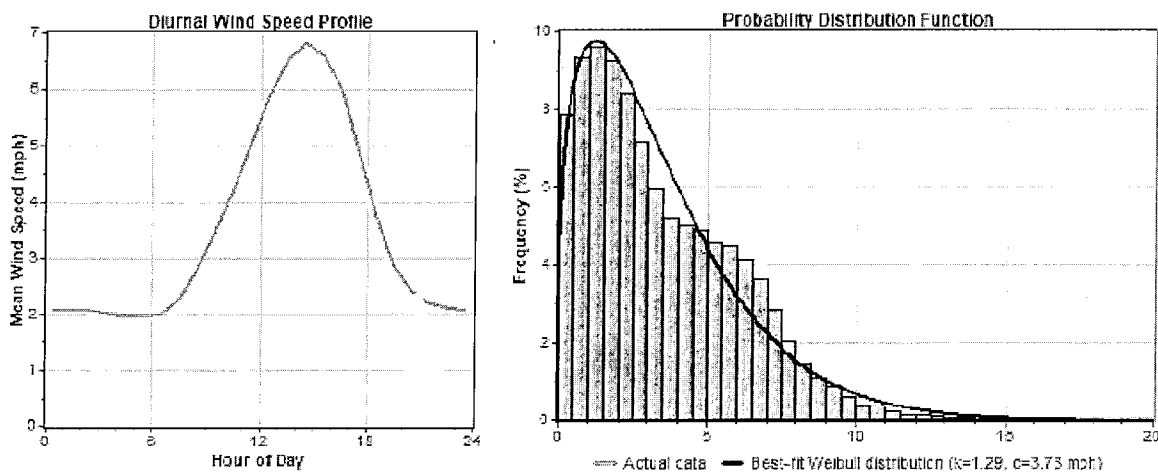
1. ASOS wind data were also obtained from Santa Maria ASOS data;
2. VAFB upper air soundings;
3. USGS Terrain and surface moisture data were used to introduce terrain adjustments for the Buellton, CA area;

These data sets were combined using the Lakes Environmental pre-processor that utilizes EPA guidelines to provide the input data to the AERMOD dispersion model. These data are assumed to be representative of the local Buellton meteorology can be used to drive dispersion modeling efforts.

This AEROMOD model is a stationary Gaussian dispersion model that is most often applied in simple terrain situations but may not be applicable to complex terrain conditions such as those in the Buellton vicinity.

In situations such as this, it is desirable to have data sets more representative of the local meteorology especially since this is a situation where a local source could significantly impact the local community. In cases such as this, the EPA normally requires a monitoring plan according to the Prevention of Significant Deterioration (PSD) for the new source. There is no such requirement in this case but it is still prudent to consider as much as possible the local meteorological conditions.

The proposed source is a surface based area source. As such its impact is intimately related to the local meteorology and in particular the diurnal changes to the meteorological conditions. Data obtained from a vineyard in the Sta Rita Hills in the vicinity of the Pence Vineyard are plotted below:

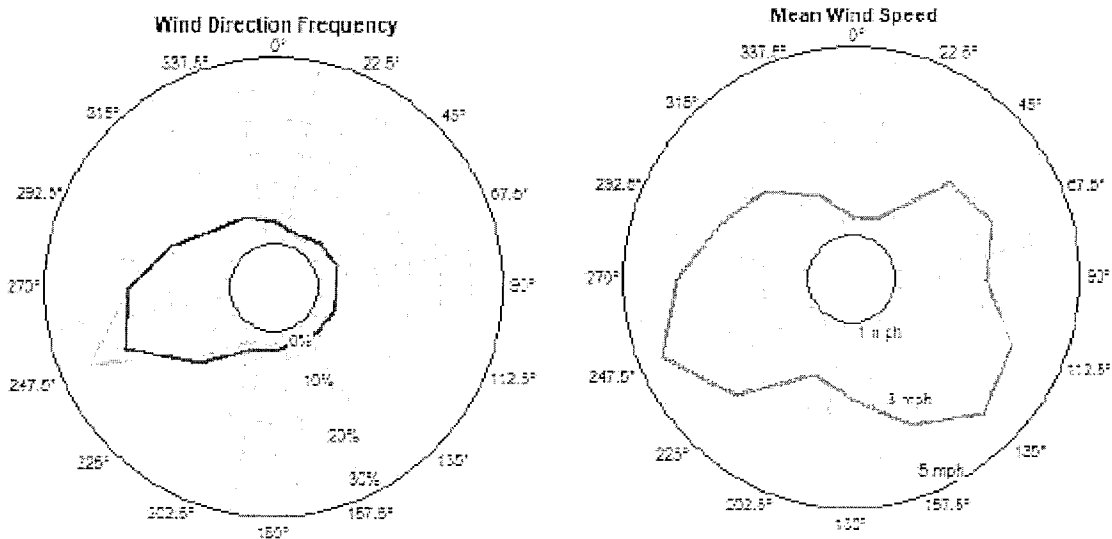


The figure to the left is the average diurnal change to the wind speed plotted as a function of the time of day. The lower wind speeds are in the morning during with the local atmosphere is stable and often disconnect by this stability from the regional and synoptic wind patterns. It is during this time of day that odors fluxed from the proposed acreage will collect around and above the area source. The graph to the right is the frequency distribution of wind speeds over the entire period. It clearly demonstrates that more than 15% of the time, the winds are below 1 mile per hour exceeding the 0.51% calm conditions in the Lakes Environmental report.

It is important to also note that the higher wind speeds later in the morning are the result of solar driven mixing of the upper level winds to the surface through the thermally driven mixing process. Driven by

thermal mixing means that it is quite likely that the accumulated surface odors could be mixed upward and downwind as part of the transition dynamics from a stable atmosphere to the afternoon neutral or unstable atmospheric conditions. This type of process could result in a fumigation condition as it possibly mixes the elevated residual odors downward and could enhancing their impact on the local area.

Another feature of these local data are presented in the following wind roses:



These data are complimentary to the wind data presented earlier. This data was collected at a vineyard in the Santa Rita Hills AVA located on Mail Road, approximately 4 miles WSW of the Pence Vineyard, the wind direction frequency is seen to be a maximum from the WSW direction with an average or mean wind speed of 3 mph about 30% of the time from that same WSE direction.

In support of these observations, I am also including a short power point (pdf) summary of the Santa Ynez ASOS measurements. These measurements which cover the time period of 01 July 1992 to 14 January 2019. The ASOS stations are installed and maintained by the FAA.

In summary,

1. The percentage of calm wind conditions is on the order of at least 20% - 30% for these data sources. Calm winds enable greater concentrations of ground-level odor and terpenes, and so the Applicant's conclusion, based on their assumption of greater winds, is flawed; and
2. The predominant surface level wind directions are WSW at the site near the Pence Vineyard and West with a significant percentage from the WSW direction for the ASOS data set. The

difference in observed wind directions from those assumed by the applicant is significant to the odor and other pollution emitted from the site.

The importance of a local data set for this situation because of the terrain and the potential impact to the local community cannot be overstated.
