Katherine Douglas Public Comment - Law office of Marc Chytilo, APC # 1

LATE DIST

From:	Ana Citrin <Ana@lomcsb.com>
Sent:	Friday, October 6, 2023 11:53 AM
To:	sbcob
Cc:	Robbie Jaffe; Steve Gliessman
Subject:	North Fork Appeal - Comment Letter and Presentation
Attachments:	LOMC North Fork 10-10-23 PPT FINAL.pptx; LOMC to BOS_North Forks Frost Ponds_ 10-6-23_FINAL.pdf

clearly having technical difficulties today! Sorry all

---------- Forwarded message ---------
From: **Ana Citrin** <Ana@lomcsb.com>
Date: Fri, Oct 6, 2023 at 11:51 AM
Subject: Fwd: Draft back
To: <sbcob@countyofsb.org>
Cc: Robbie Jaffe <robbiejaffe@gmail.com>, Steve Gliessman <gliess@ucsc.edu>

Resending with a descriptive subject line

---------- Forwarded message ---------
From: **Ana Citrin** <Ana@lomcsb.com>
Date: Fri, Oct 6, 2023 at 11:49 AM
Subject: Fwd: Draft back
To: <sbcob@countyofsb.org>
Cc: Robbie Jaffe <robbiejaffe@gmail.com>, Steve Gliessman <gliess@ucsc.edu>

Dear Clerk, please accept the attached letter and powerpoint presentation submitted by this office on behalf of Roberta Jaffe and Stephen Gliessman regarding the North Fork Ranch item on the Board's agenda.
With best regards,
Ana
--

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LAW OFFICE OF MARC CHYTILO, APC

ENVIRONMENTAL LAW

October 6, 2023

Santa Barbara County Board of Supervisors *By email*
105 E. Anapamu Street
Santa Barbara, CA 93101

RE: Applicant Appeal of the Planning Commission's Denial of the North Fork Ranch Frost Ponds Project

Dear Chair Williams and Honorable Supervisors,

This office represents Roberta Jaffe and Stephen Gliessman, Cuyama Valley residents and farmers of a 5-acre dry-farming operation called Condor's Hope Ranch. Ms. Jaffe and Mr. Gliessman filed the initial appeal of the Zoning Administrator's approval of the North Fork Ranch Frost Ponds Conditional Use Permit (CUP) (Project) and have been engaged at the County at every step of this Project's review. **We strongly support staff's recommendation to deny the appeal and deny the CUP**, upholding the Planning Commission's carefully considered denial findings. Importantly, the CUP denial findings are specific to the critically overdrafted Cuyama Groundwater Basin and the facts of this particular Project, and accordingly a denial does not set a precedent for other agricultural reservoir projects.

Unlike the overwhelming majority of agricultural projects in the County which require no permits at all or only ministerial permits, the North Fork Frost Ponds Project requires a *discretionary permit* (CUP). The denial findings for this discretionary permit are firmly supported by the County Code and substantial evidence in the record. The County has broad discretion to deny the CUP on one or more grounds, including but not limited to: inadequate water supply, incompatibility with the surrounding area, and non-compliance with Comprehensive Plan requirements including groundwater protection policies and agricultural element policy protecting the long-term viability of agriculture. Due to the severe overdraft within the Cuyama Groundwater Basin (CGB) and the large amount of water this Project would waste – threatening the viability of long-established agricultural operations in Northwestern Cuyama that work hard to conserve limited groundwater supplies - denial findings are readily supported and entirely warranted in this case.

While the County enjoys broad discretion to deny this discretionary project, an approval would require compliance with the California Environmental Quality Act (CEQA). The Project's Environmental Impact Report (EIR) identified significant impacts to groundwater, including evaporative losses from the Project that would substantially exceed the County's 31 AFY threshold. As mitigation, the EIR would require reservoir covers over 15.6-acres of reservoir surface, and drastic restrictions in water use that make the Project's stated objectives impossible to realize. Because of CEQA's requirements, there is no legal option for the Board to approve the Project *and* allow North Fork Vineyard the freedom to use as much groundwater for frost protection as they see fit. Moreover, while a CUP denial applying the specific facts of this case to the LUDC's CUP

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findings would not set a precedent for expanded County review of agricultural operations, an approval is vulnerable to a CEQA challenge which could set such precedent.

I) The Denial Findings Are Legally Robust

The North Fork Frost Ponds Project requires a *discretionary permit* (CUP) due to its large size. Specifically, pursuant to Section 35.21.030 of the County's Land Use and Development Code (LUDC), water storage reservoirs greater than 50,000 square feet (1.15 acres) are a conditionally permitted use in the AG-II zone and require the approval of a discretionary Minor Conditional Use Permit. Water storage reservoirs that are 50,000 square feet/1.15 acres or smaller only require a Land Use Permit (LUP). Here, the proposed reservoirs are 5.0, 5.7, and 4.9 acres each, and together total 15.6 acres – 13.5x larger than what could qualify for a ministerial Land Use Permit under the code. The reservoirs have the capacity to hold 49 acre feet (AF) of water each, which is 1 AF below the 50 AF threshold to be regulated by the Department of Water Resources as a "dam" (*see* Cal. Water Code § 6002).

The Board has broad discretion to deny a discretionary CUP. Substantial evidence must support the denial findings, but "substantial evidence" is interpreted broadly and does not need to be conclusive. Specifically, 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*" and includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (14 CCR §15384 (emphasis added.) 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.) The record before the Board in this case includes robust evidence supporting the Planning Commission's denial findings.

The Appeal lobs several attacks at the evidence supporting specific findings, but those attacks are off-point as explained in the Board Letter. At most the Applicant provides a different opinion, which in no way undermines the sufficiency of the evidence supporting the denial findings. (*See Id.*)

The same legal standards governing the CEQA analysis do not directly apply to the CUP findings as the Applicant suggests throughout their appeal (see e.g. Appeal Letter, pp. 3-4), however the EIR including the technical analysis conducted by the Applicant's consultants (e.g. Cardno Water Budget Technical Memorandum) provides key substantial evidence to support the denial findings.

The denial findings, including Finding 2.1.1, emphasize the facts specific to the CGB and wells on the Project site, supported with technical reports prepared pursuant to the Sustainable

Groundwater Management Act (SGMA) and well hydrographs showing declining well levels on the subject property.

> the project site is located within the Cuyama Valley Groundwater Basin, which is listed as a "high" priority and "critically overdrafted" basin by the California Department of Water Resources (DWR). In addition, monitoring of groundwater levels in the vicinity of the project site show that water levels have dropped 40 feet on average since increased groundwater pumping began in 2016 after the project site vineyard was planted.

The Findings acknowledge that the EIR includes mitigation to limit evaporative losses to 31AFY over a 3-year rolling average (MM-WAT-01) and includes compensatory mitigation to restore protected native grassland habitat that the Project would remove (MM-BIO-02) (see Finding 2.1.2, Board Letter p. 6). For example, Denial Finding 2.1.3 (water supply adequacy) states:

> Although the Project's annual evaporative losses could potentially be reduced to below the adopted significance threshold of 31-acre-feet per year with the adoption of mitigation measures, due to the critical groundwater overdraft conditions affecting the Basin, the Board of Supervisors finds that the Project's loss of up to 31-acre-feet per year to evaporation and use of up to 103-acre-feet per year for frost protection is a long-term water supply impact that will adversely affect the Basin.

With respect to conformity with the Comprehensive Plan, which includes the Finding 2.1.5 provides:

> the scale of the Project and declining water levels in the project area could potentially impact the long-term viability of existing and future agriculture throughout the basin and within the project area. As a result, the proposed Project is not consistent with Agricultural Element Policy 1.B, which requires the use of "sound agricultural practices that promote the long-term viability of agriculture…"

Throughout the County's review of this Project, Cuyama residents and business owners have provided their opinions, based on their personal observations and expertise, as well as well data and other evidence, that the Project threatens the long-term viability of other agricultural operations in the Northwestern CGB. This provides additional substantial evidence in support of Finding 2.1.5.

Overall, there is an abundance of substantial evidence supporting the denial findings, and the Applicant has not presented any argument that undermines the Board's broad discretion to deny the Project based on the record before it.

II) Approval of the Project would Violate CEQA

Denial of the North Fork Frost Ponds Final EIR is exempt from CEQA, so if the Board follows staff's recommendation, these issues do not come into play. However an approval must comply with all applicable CEQA's requirements, so if the Board is considering approving the Project, it's important to understand the numerous CEQA defects that have been raised below.

The County Planning Commission did not certify the Final EIR, and for reasons discussed below, the Final EIR does not comply with CEQA's requirements in numerous respects. In particular, the EIR's narrow focus on only evaporative losses in analyzing the Project's impacts on the critically overdrafted CGB is not supported by either CEQA or by the County's environmental thresholds and guidelines.

Even with only evaporative losses counted, the EIR nonetheless discloses that the Project's impacts to groundwater are significant, and requires extraordinarily restrictive mitigation to keep evaporative losses below the County's 31AFY threshold (over a 3-year rolling average). This mitigation would be required with a two-reservoir alternative as well (*see* FEIR p. 6-9). **With required mitigation, the Project would not have enough water to achieve the Project's objective of protecting grapevines from frost damage, as only 38% of early budding and mid-season budding vines could be protected in a light frost year, 17% of the vines in an average year, and 0.06% of the vineyard in a heavy frost year.** Moreover, with required mitigation, approval of the Project would raise all the same concerns about interfering with agriculture, while also exposing the County to legal vulnerabilities that do not exist with a CUP denial.

1. Overly Narrow Analysis of Impacts to Groundwater

For the Cuyama Groundwater Basin, the County's adopted CEQA threshold provides that a significant impact occurs if a project uses more than 31 AFY of groundwater. The County's threshold applies basin-wide and does not distinguish between the different subbasins. (County CEQA Thresholds and Guidelines Manual, Groundwater Thresholds, p. 89, Tables 1 and 2.)

In the case of the North Fork Project, *just evaporative losses* from the frost protection system exceeds the County's 31 AFY threshold in every frost scenario evaluated. The technical memorandum prepared by Cardno to evaluate evaporation losses explains as follows:

> Cardno's independent technical analysis of water use associated with the operation of the proposed frost pond reservoirs and frost protection system found the average annual net evaporative losses for all three proposed reservoirs and soil evaporation to be approximately 61.45 AFY. **In a light frost year, the total groundwater losses were calculated to be 35 AFY, a normal frost year was calculated at 61 AFY, and a heavy frost year was calculated at 272 AFY.** Using these calculations the net evaporative losses from the

> reservoirs and frost protection groundwater use exceeds the threshold of 31 AFY and the project would result in a significant groundwater use impact.

(FEIR Appendix E, Cardno Water Budget Technical Memorandum, p. 22 (emphasis added).)

To mitigate the identified significant impacts WAT-01 and WAT-02 from evaporative losses, the FEIR relies on reservoir covers over *15.6-acres of reservoir surface*, and drastic restrictions in water use that make the Project's stated objectives difficult or impossible to realize (MM WAT-01; see section 7, below.)

However, even assuming that MM WAT-01 (Evaporative Loss Reduction Plan) is effective and enforceable at limiting evaporative losses to 31AFY, it does not reduce the Project's groundwater impacts below significant levels.

First, evaporative losses will likely be much higher than Cardno estimates. Cardno's analysis of evaporative losses at the North Fork Vineyard drastically underrates these losses as it is 1.) based on a far fewer number of hours of operation of the frost sprinklers than industry standard, and 2.) erroneously dismisses the evaporative losses from the sprinklers themselves, based on the claim that losses are negligible based on temperature. Previous analysis provided to the County Planning Commission discussed the established industry practice of starting frost protection well ahead of an anticipated drop below 32 degrees F, therefore utilizing an order of magnitude as much water than Cardno's analysis provided for. As such, **given industry standard operation of a frost protection sprinkler system, the chosen year to represent a light year (2015) would lose 194.4 AF to evaporation, an average year (2017) would lose 102.56 AFY, and a heavy frost year (2009) would lose 563.87 AFY to evaporation.**

Moreover, discussed below, there are additional impacts beyond evaporative losses that are significant pursuant to the County's CEQA thresholds and authoritative CEQA case law. The EIR's focus on only evaporative losses however is not supported by CEQA. Rather, CEQA's mandate that EIR's evaluate "the whole of the Project" compels a much broader analysis of Project water use beyond evaporative losses (see section 3, below).

2. With Required Mitigation, Groundwater Pumping Still Exceeds the County's Threshold

With implementation of MM-WAT-01, the Project would use 103 AFY, over three times the County's 31 AFY threshold. This alone triggers a significant unmitigated impact to the critically overdrafted Cuyama Groundwater Basin.

The EIR claims that the County's 31 AFY threshold does not apply to water used to irrigate crops so only evaporative losses were analyzed. (FEIR p. 3-37.) Specifically, the FEIR states:

> *Table 2-1 indicates that agricultural operations conducted on properties with agricultural zoning are an allowed use and no land use entitlements are required for such uses. The existing North Fork Ranch vineyard operations are located on property with agricultural zoning (AG-II-100). Thus, vineyard operations and irrigation water used do not require any County discretionary land use entitlements, and water impounded in proposed reservoirs used to support (i.e., used for crop irrigation and frost protection) the existing vineyards would not be subject to the water use threshold of significance established for the Cuyama Valley Groundwater Basin.*

(Id.) This claim is directly at odds with the core CEQA principle that the EIR must analyze the impacts of "the whole of the project", and with CEQA requirements governing the evaluation of water use impacts (discussed further in section 3, below.)

The County's Thresholds and Guidelines Manual does not restrict application of the 31 AFY threshold to non-irrigation uses. (See pp. 97-135.) Indeed, the FEIR's approach of measuring only the Project's evaporative losses against the 31 AFY threshold of significance is directly at odds with the County's CEQA Thresholds and Guidelines Manual which specifies that the Project's net consumptive use is measured against the threshold. (Id., p. 107 ("A project's net new consumptive use is the figure which is compared to the Threshold of Significance to determine level of impact on groundwater resources. This figure represents the gross demand (i.e. water duty factor demand) adjusted for return flows to the groundwater basin, loss of natural recharge due to construction of impervious surfaces, increased recharge due to irrigated area or recharge basins and historic use on the site.) The County's Groundwater Thresholds further explain:

> In an overdrafted basin, projected net new consumptive water use of a project which exceeds the calculated threshold for that particular basin is deemed a significantly adverse environmental impact. This determination during the initial study would require the preparation of an Environmental Impact Report. If the estimated water use remains above the Threshold of Significance in the final analysis, the impact of the project on water resources, would, as stated above, be considered significant (Class I) and the project would require a finding of Overriding Considerations by the Decision-makers for approval.

(County CEQA Thresholds and Guidelines Manual, p. 93 (emphasis added).) This approach was even confirmed in published caselaw. Specifically, in Save Cuyama Valley v. Cty. of Santa Barbara (2013) 213 Cal. App. 4th 1059, 1066, the court applied the 31 AFY threshold as follows:

> To evaluate whether the mine's water consumption is significant within the meaning of CEQA, the Report uses the threshold of significance formally adopted by the County in its Environmental Thresholds and Guidelines Manual (Manual). Although the most recent update to the groundwater thresholds was in August 1992, the County confirmed the continued validity of those thresholds with agency staff and by evaluating more recent studies. The Manual defines significance by referring to how a project's water usage would

> affect the water supply of the alluvial aquifer underlying the entire 1,140-square-mile Cuyama River watershed. Because that watershed is in a state of "overdraft" (that is, more water is used than is naturally replenished), the Manual defines a project as "significant" if its net consumption exceeds 31 acre-feet per year (afy). The Report calculates the Diamond Rock mine's net consumption to be 28.12 afy, and accordingly classifies its impact as not significant.

Further, pursuant to 2018 CEQA Guidelines Amendments that clarify requirements from CEQA caselaw, an adequate water supply analysis must include the following:

> (1) Sufficient information regarding the project's proposed water demand and proposed water supplies to permit the lead agency to evaluate the pros and cons of supplying the amount of water that the project will need.
> (2) An analysis of the reasonably foreseeable environmental impacts of supplying water throughout all phases of the project.
> (3) An analysis of circumstances affecting the likelihood of the water's availability, as well as the degree of uncertainty involved. Relevant factors may include but are not limited to, drought, salt-water intrusion, regulatory or contractual curtailments, and other reasonably foreseeable demands on the water supply.
> (4) If the Lead Agency cannot determine that a particular water supply will be available, an analysis of alternative sources, including at least in general terms the environmental consequences of using those alternative sources, or alternatives to the project that could be served with available water.

(Matthew Bender, California Environmental Law & Land Use Practice § 22.04 (2022), citing CEQA Guidelines § 15155 (f) (see below discussion of this CEQA guideline section).

The North Fork FEIR's analysis of the Project's water supply, which included essentially no information whatsoever about the Project's water demand, fundamentally fails to comply with CEQA.

3. Limiting the EIR's Analysis to Only Evaporative Losses Violates CEQA

The CEQA Appendix G Thresholds are also not restricted to non-irrigation uses. (See CEQA Guidelines Appendix G, § X (Hydrology and Water Quality)). Rather, CEQA requires that the whole project, including all water the Project will use irrespective of its ultimate destination, be analyzed against baseline water use to determine impact significance. Excluding the Project's water use from consideration because it would not be discretionary if proposed alone is fundamentally contrary to CEQA[1].

[1] The EIR misleadingly suggests that CEQA itself contains an exemption for crop irrigation when

Determining whether a project is "discretionary" or "ministerial" involves only the first step in a three-step process, in which the Lead Agency, during its "preliminary review" of a project, determines whether an agency is contemplating "approval" of a "project," and whether the project is subject to CEQA or is exempt. (California Environmental Law & Land Use Practice § 21.02 (2018)). "Where a project involves an approval that contains elements of both a ministerial action and a discretionary action, the project will be deemed to be discretionary and will be subject to the requirements of CEQA." (CEQA Guidelines § 15268 (d)).

Here, the Project is discretionary because the LUDC specifies that water storage reservoirs greater than 50,000 square feet (1.15 acres) require the approval of a discretionary Minor Conditional Use Permit in the AG-II zone. (LUDC § 35.21.030.) Water storage reservoirs that are 50,000 square feet/1.15 acres or smaller only require a Land Use Permit (LUP). Here, the proposed reservoirs are 5.0, 5.7, and 4.9 acres each, and together total 15.6 acres – 13.5x larger than what could qualify for a ministerial Land Use Permit under the code.

Accordingly the Project proceeds to the second step in the CEQA process, in which the Lead Agency prepares an Initial Study to determine whether the project may have a significant effect on the environment, and then prepares a Negative Declaration if there is no substantial evidence of significant effect (California Environmental Law & Land Use Practice § 21.02 (2018)). The "Project" that proceeds to step 2 is "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" (CEQA Guidelines § 15378 (a) (emphasis added). "Project"[2] refers to the underlying development proposal, not the governmental approval. (Id., subd. (c) and (d "the lead agency shall describe the project as the development proposal for the purpose of environmental analysis")). As lead agency, the County "is responsible for considering all environmental impacts of the project before approving it, a responsible agency has a more specific charge: to consider only those aspects of a project that are subject to the responsible agency's jurisdiction" (Cmtys. for a Better Env't v. City of Richmond (2010) 184 Cal. App. 4th 70, 98)." Accordingly, pursuant to CEQA Guidelines sections 15268 (d) and 15378, and applicable caselaw discussed in our September 7, 2018 letter (see DEIR App. B, Past Proceedings, p. 647) the "Project"

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it does not. In fact, the California Supreme Court recently held that well drilling permits are not necessarily ministerial, and that classifying all well permits as ministerial violates CEQA. (See Protecting Our Water & Environmental Resources v. County of Stanislaus (2020) 10 Cal. 5th 479.)

[2] Whether a particular activity constitutes a CEQA "project" is a question of law; courts do not defer to Lead Agency determinations of whether an activity is a project. (California Environmental Law & Land Use Practice § 21.02 (2018); California Environmental Law & Land Use Practice § 21.05 (2018); Fullerton Joint Union High School Dist. v. State Bd. of Education (1982) 32 Cal.3d 779, 795).

analyzed in the environmental review document cannot be limited to only the discretionary elements of the proposal.

Pursuant to this authority, the Frost Ponds Project includes construction and operation of the reservoirs, including the water actually used for frost protection, and the water used to fill the reservoirs. The EIR should have quantified that water use, compared it against the environmental baseline, and assessed the significance of the increase.

4. The County Failed to Prepare the Water Supply Assessment Required by Law

The Frost Ponds Project is a "water-demand project" as defined in CEQA Guidelines § 15155 and Water Code § 10912 because it "would demand an amount of water *equivalent to, or greater than*, the amount of water required by a 500 dwelling unit project." Accordingly, the County is required to prepare a water supply assessment and include that water supply assessment in the EIR to comply with CEQA Guidelines § 15155 and Water Code § 10910. The WSA must discuss whether the total projected water supplies available during normal single dry, and multiple dry water years during a 20-year projection will meet the projected water demand associated with the proposed project. (1 California Environmental Law & Land Use Practice § 22.04 (2022))

In response to our comment questioning whether a WSA is required, the FEIR calculates that 500 residences would use approximately 260-acre feet per year, but that "with the implementation of proposed mitigation requirements, the proposed Project's water use would be substantially less than water used by 500 residences"[3] Here, the County should have prepared a

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[3] FEIR p. 9-203, response to WSA comment:

> This comment states that the proposed Project's water demands would be equivalent or greater than the amount of water required by 500 dwelling units, therefore, a Water Supply Assessment may be required for the Project. Please note that with the implementation of proposed mitigation measure WAT-01, the proposed Project's water use impacts would be below the impact significance threshold of 31-acre feet per year adopted by the Board of Supervisors for the Cuyama Groundwater Basin.
>
> Residential water demand factors in the County's Environmental Thresholds and Guidelines Manual were used to determine if the proposed Project's water demand would be more than the water requirements of 500 dwelling units. The Manual does not include water use estimates for residential uses in the Cuyama area, therefore, residential water use rates for the Santa Ynez area were used to estimate approximately how much water 500 residences in the Cuyama area would use. Based on water use factors for residence on lots 10,000 to 20,000 square feet in area, a single residence would use approximately 0.52-acre feet per year, and 500 residences would use approximately 260-acre feet per year. Therefore, with

WSA initially because, before mitigation, project water use exceed 260 AFY. This procedural error is significant because the WSA would have provided important information about the project's actual water demand and the ability to extract that much water from the critically overdrafted Cuyama Groundwater Basin.

5. The EIR Failed to Analyze and Mitigate Potentially Significant Impacts to Groundwater Dependent Ecosystems (GDEs)

Discussed above, the FEIR's improper use of thresholds artificially constrained the impact analysis. Even assuming the feasibility MM-WAT-01, the Project results in groundwater extraction above baseline levels that exceed the 31AFY threshold. Moreover, the FEIR failed to analyze the physical environmental impacts associated by groundwater depletion. Not only is this failure legal error on its own, it also impermissibly ignores substantial evidence of these physical environmental effects.

The County's CEQA Thresholds and Guidelines Manual, Groundwater Thresholds, provides as follows (on p. 87):

> Effects on Biological Resources
>
> Pumpage of groundwater causes fluctuations over time in the elevation of the groundwater table. Lowering of the water table can effect biological resources on the land surface by reducing access to water by deep-rooted native vegetation or by reducing discharge of groundwater (baseflow) in streambeds. Even if a basin were pumped at a hydrologic "safe yield" rate (longterm water levels remain stable) a drop in water levels during a drought could adversely affect biologic resources.
>
> In nearly all cases, an individual project's effect on biological resources would not have a discernable local effect - the new pumpage would add incrementally to the regional change in water levels. Thus, the thresholds of significance included herein would adequately address this impact. Under certain conditions, however, a local pumping depression could adversely affect a specific habitat area. In this case, the effects would need to be analyzed in the biologic resources section of the project environmental document.

As explained in the Jaffe/Walsh DEIR comments, data collected by the Cuyama Basin GSA since 2015 clearly shows undesirable results of groundwater pumping in the North Fork Vineyard area. DWR's decision letter on the GSP specifically expresses concern about depletion and dewatering "in an area with the highest concentration of potential GDEs in the Cuyama Valley and

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the implementation of proposed mitigation requirements, the proposed Project's water use would be substantially less than water used by 500 residences.

with interconnected surface water" (DWR 2022, p, 10, Jaffe/Walsh Letter Appendix A). The Jaffe/Walsh Letter compiles and analyzes the available data, and concludes the Project, even as mitigated, will contribute to chronic groundwater depletion and severed groundwater-surface water connections. Further, discussed below, Dr. Gliessman's Letter explains the impacts to GDEs that result from excessive water use including in heavy frost years.

6. The EIR's Analysis of Cumulative Groundwater Impacts Is Incomplete

The FEIR states: "In order to consider impacts from development within the Cuyama Valley, this analysis also considers ministerial projects in Santa Barbara County related to existing, planned, and proposed cannabis operations in the Cuyama Valley that could result in related or cumulative impacts. These projects are listed in Table 4.1 and will be considered in this cumulative analysis. Figure 4-1 shows the geographic location of the proposed Project in relation to the projects listed in Table 4.1." (FEIR p. 4-2.) However, the FEIR does not include past projects approved on the project site that contributed most directly to related and cumulative impacts to groundwater in the Northwest Region, namely the approval of well permits by County Environmental Health Services to irrigate the North Fork vineyard. This failure renders the cumulative impact analysis misleading and incomplete.

The Jaffe/Walsh Letter uses existing data and reports to demonstrate that the Project's contribution to already significant cumulative groundwater impacts is cumulatively considerable, even assuming proposed mitigation is effective. Unfortunately the FEIR's analysis included none of this information and is fundamentally flawed as a result. We raised this objection in DEIR comments, and the Response to Comment merely restates that the EIR relies on the 31AFY threshold which is not responsive to our request to include other uses of water on the project site that directly contribute to the current downward trend in well levels in the Project area.

7. Required Mitigation to Reduce Evaporative Losses Is Impractical and Unenforceable

An EIR must identify feasible mitigation measures to mitigate all significant environmental impacts. (CEQA Guidelines § 15126.4.) The ultimate feasibility of mitigation measures is determined by the decision makers when they prepare findings to support a project decision. (Matthew Bender, California Environmental Law & Land Use Practice § 22.04 (2022).)

Mitigation measures must be described with sufficient detail to determine if a mitigation measure would cause significant environmental effects in addition to those caused by the proposed project. (See CEQA Guidelines § 15126.4 (a)(1)(D).) Deferring the formulation of mitigation measures until after project approval is inadequate, unless specific performance standards are identified. (CEQA Guidelines § 15126.4(a)(1)(B), Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 309.) "Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments." (CEQA Guidelines § 15126.4 (a)(2).) "Whether a

measure is effective requires not just quantification, but also an assessment of the likelihood of implementation." (Sierra Club v. Cty. of San Diego (2014) 231 Cal. App. 4th 1152, 1170)

Mitigation measures must be both enforceable and effective at reducing the impact to less than significance. (Gray v. County of Madera (2008) 167 Cal.App.4th 1099, 1115-1116 (deference to finding of mitigation measure effectiveness unjustified when claims of mitigation measure effectiveness defy common sense).) CEQA requires that feasible mitigation measures actually be implemented as a condition of development, and not merely be adopted and then neglected or disregarded. (Anderson First Coalition v. City of Anderson (2005) 130 Cal.App.4th 1173, 1186, citing Federation of Hillside & Canyon Associations v. City of Los Angeles (2000) 83 Cal.App.4th 1252, 1260–1261.)

Condition WAT-01 is defective and inappropriate in several respects. First, the constraints of WAT-01 render the Project partially to completely ineffective in most years. **Under MM-WAT-01, the Project's Frost Protection System Evaporative Loss Reduction Plan, the Project would not have enough water to achieve the Project's objective of protecting grapevines from frost damage. Given this limit, only 38% of early budding and mid-season budding vines could be protected in a light frost year, 17% of the vines in an average year, and 0.06% of the vineyard in a heavy frost year.** When faced with crop-threatening frosts after exhausting the allowable frost protection water use, Condition WAT-01 will either be ignored, or the applicant will have to develop an alternative frost protection system, such as wind machines, and the impacts from reservoir construction and operation will be completely unnecessary. Condition WAT-01 defies common sense as it imposes restrictions that render the Project ineffective at meeting its core objective.

Moreover, Condition WAT-01 improperly allows annual extractions to be averaged over a rolling three years. (See WAT-01 Reporting, allowing the operator to monitor and report frost protection groundwater use using a 3-year rolling average to demonstrate compliance with the 31 AFY CEQA Threshold.) The County's CEQA Thresholds for groundwater use are based on annual extractions, not a three year average of water extractions, and thus Condition WAT-01 is incompetent to ensure the annual 31 AFY threshold is not exceeded in any given year.

While the operator is required to record daily groundwater use for each frost protection event, it must only report the amount to the County only after the frost event for tracking purpose. "The applicant will be responsible for ensuring that the evaporative groundwater loss does not exceed 31 AFY, by ensuring that the frost protection water application is less than 103 AFY." Reporting occurs only after the fact, and after a significant impact has already occurred. As such, WAT-01 does not ensure evaporative loss will be below the threshold in any given year, and imposes restrictions that precludes the effectiveness and reliability of the project, and as such, defy common sense.

8. The FEIR Failed to Analyze a Reasonable Range of Alternatives

A major function of an EIR 'is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.' (Save Round Valley Alliance v. County of Inyo (2007) 157 Cal. App. 4th 1437, 1456). The alternatives analysis is the core of CEQA, and forms the foundation for CEQA's "substantive mandate" which prohibits approval of projects "if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." (Citizens for Goleta Valley, 52 Cal. 3d at 564-565; Pub. Res. Code § 21002.)

Specifically, the CEQA Guidelines provide that "An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines § 15126.6 (a).) "The range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects." (Guidelines § 15126.6 (c).) "Because an EIR must identify ways to mitigate or avoid the significant effects that a project may have on the environment [citation], the discussion of alternatives shall focus on alternatives . . . which are capable of avoiding or substantially lessening any of the significant effects of the project, even if these alternatives would impede to some degree the attainment of the project alternatives, or would be more costly." (Guidelines § 15126.6 (b).) "If an alternative is identified as at least potentially feasible, an in-depth discussion is required." (Save Round Valley All. v. Cty. of Inyo (2007) 157 Cal. App. 4th 1437, 1457.)

Unfortunately, the North Fork FEIR does not identify a reasonable range of alternatives and improperly rejects alternatives from consideration without adequate explanation (see FEIR pp. 6-3-6-4, summarily rejecting nine separate alternatives). Only the alternatives that require water for frost protection were evaluated in detail (besides the no-project alternative); all alternatives that accomplish frost protection by other means were dismissed. Our DEIR comments were critical of this approach to alternatives, noting that the limited supply of groundwater in the Cuyama Valley and the numerous significant impacts that using groundwater for frost protection will cause necessitated further identification and analysis of frost protection alternatives that do not require water. Unfortunately, the FEIR does not include further identification or analysis of such alternatives, and the Response to Comment did not adequately explain the failure to analyze potentially feasible alternatives.

Meanwhile, on April 12, 2022 a significant frost event occurred in the Cuyama Valley that affected the North Fork Vineyard (as well as Condor's Hope Ranch). Ms. Jaffe and Mr. Gliessman were present throughout the frost event and made the following observations regarding North Fork's frost protection efforts:

> *Just before sunrise on [April 12, 2022], we observed North Fork Vineyard applying different means of frost protection to different sections of their 800+ acre vineyard. The temperature dipped to 28 degrees F just before sunrise, creating hard frost conditions. ...*
>
> *We viewed the following treatments: sections being protected by wind turbines; sections protected by overhead sprinklers; sections that appeared to have no treatment. We then returned a few days later to observe the impact of the frost event on these sections. ...*
>
> *Observations 3 Days later:*
> *Wind turbine section: Sections protected by the wind turbines appeared to have come through with the least damage. Vines along the edges of these sections, at some distance from the turbine itself, were frosted and green growth had died and appeared black. Interior vines in these sections still had green growth showing. Observation: wind turbines appeared to have substantially protected vines in these sections.*
>
> *Overhead sprinkler: Sprinklers appeared to be used in highly vulnerable sections near where the cold air would settle. They were used throughout these sections. And they were not able to protect the vines. Except for vines very close to the sprinklers, all vines showed sever damage and were black in color.*
>
> *No treatment: western most section at Cottonwood Road – late budbreak, but appeared to be burned back. Other sections that were fully leafed out and did not get any treatment were not impacted, either because they are frost resistant varieties, or they are section of the vineyard that are much less prone to frost and don't need protection. These would be places that don't need sprinklers, hence lessening the need for the amount of water they say they need.*

(FEIR PDF p. 349, Jaffe/Gliessman observations from April 12, 2022 frost event).

Ms. Jaffe and Mr. Gliessman, who themselves manage a vineyard in the immediate vicinity of the North Fork vineyard, are bonafide experts whose observations and fact-based opinions constitute substantial evidence for CEQA purposes (see CEQA Guidelines § 15384 (b)).

The FEIR specifically rejects two alternatives[4] that accomplish frost protection with wind machines (see FEIR pp. 6-3-6-4), with no substantial evidence supporting a conclusion that these alternatives are infeasible. Rather the FEIR relies on speculation and the unsupported assertions of

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[4] **Large Wind Machines**: install permanent or portable agricultural wind machines in key locations in the vineyard to mix airflow and limit pooling of colder air in order to avert the need for frost protection. The applicant has conducted trials of these machines within the existing vineyard. Based upon feedback from the applicant, on-site microclimates and topographic barriers prevented

the applicant, which is not substantial evidence of infeasibility (see CEQA Guidelines § 15384 (a)). The new substantial evidence provided by Ms. Jaffe and Mr. Gliessman establish that these alternatives are at least facially feasible and should be analyzed in detail in the EIR. The Applicant's belated attempt to explain that the necessary microclimate for effective frost protection with wind machines is not supported by any actual evidence, and is directly rebutted by the technical analysis prepared by Katherine Anderson submitted with our March 27, 2023 letter to the Planning Commission.

The Response to Comment responding to this evidence states that these alternatives are not feasible because they would conflict with County Agricultural Element Policy I.B which generally supports freedom of choice in agricultural management decisions. (FEIR pp. 9-105-9-106.) A potential conflict with Agricultural Element Policy I.B does not justify the failure to analyze alternatives to this discretionary project that avoid its significant impacts. Moreover, no actual conflict exists. The Response to Comment selectively quotes from the policy in question, omitting the second clause which states "[t]hese rights and freedoms shall be conducted in a manner which is consistent with: … applicable resource protection policies and regulations". Analyzing alternatives that would help achieve consistency with resource protection policies and regulations applicable to the North Fork, including County groundwater protection policies and State and County regulations protecting special status species in no way violates County policy.

9. Unmitigated Significant Impacts Preclude CEQA Findings of Approval

Agencies have a duty under CEQA to avoid or minimize environmental damage whenever feasible to do so, and must give major consideration to preventing environmental damage. (Guidelines § 15021(a).) To approve a project with significant environmental impacts like the Frost Ponds Project, the Board is required to find that "changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effects" (CEQA Guidelines § 15091 (a)(1).)

Discussed above, the Project's impacts from groundwater pumping exceed the County's significance threshold even with mitigation, and mitigation for the Project's evaporative loss

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sufficient airflow mixing for these devices to be effective.

Install Selective Sinks: placing tower-less wind machines in low-lying areas where cold air drains or pools. These machines would break up stratified warm and cold air layers using horizontal propellers that propel cold air upward to mix with warmer air. These units are portable and can be moved to different locations within the vineyard to protect budding vines from frost events. However, the effectiveness of this method cannot be determined with existing information. In order to confirm the effectiveness of this alternative, a detailed study would need to be conducted for the microclimates and growing conditions that exist for each of the vineyard varietal blocks. Therefore, it cannot be determined if this is a feasible alternative to the Project.

impacts defeats the Project's primary objective. Moreover, with a drastically reduced storage capacity need given the water usage restrictions in MM-WAT-01, the Project's impacts to biological resources, cultural resources, flooding, policy inconsistency, and GHG impacts from construction can all be avoided.

III. Conclusion

We respectfully request that the Board follow Staff's recommendation to deny the Applicant's appeal, and deny the North Fork Project.

Sincerely,

LAW OFFICE OF MARC CHYTILO

Ana Citrin
Marc Chytilo
For Appellants Jaffe and Gliessman

NORTH FORK VINEYARD FROST PONDS PROJECT
APPLICANT APPEAL OF PLANNING COMMISSION DENIAL

16CUP-OOOOO-00005
23APL-OOOOO-00023

Santa Barbara County Board of Supervisors

October 10, 2023

Presenters:

Roberta Jaffe and Stephen Gliessman
Cuyama Valley residents and farmers

Ana Citrin, Katherine Anderson, and Marc Chytilo
Law Office of Marc Chytilo, APC

PRESENTATION OVERVIEW:

1. Facts specific to the critically overdrafted Cuyama Groundwater Basin make the North Fork Project different from other agricultural projects.

1. Legal and factual support for proposed Conditional Use Permit denial findings.

1. CEQA defects that would preclude Project approval.

1. Substantial evidence showing evaporation losses are even higher than the EIR projected.

1. Required mitigation restricting water use precludes effective frost protection.

1. Viable alternatives exist to protect the vineyard from frost that reduce water waste and protect valuable biological resources.

1. Conclusion: deny the appeal and make findings denying the discretionary CUP.

Condor's Hope Ranch, Northwestern Cuyama Valley

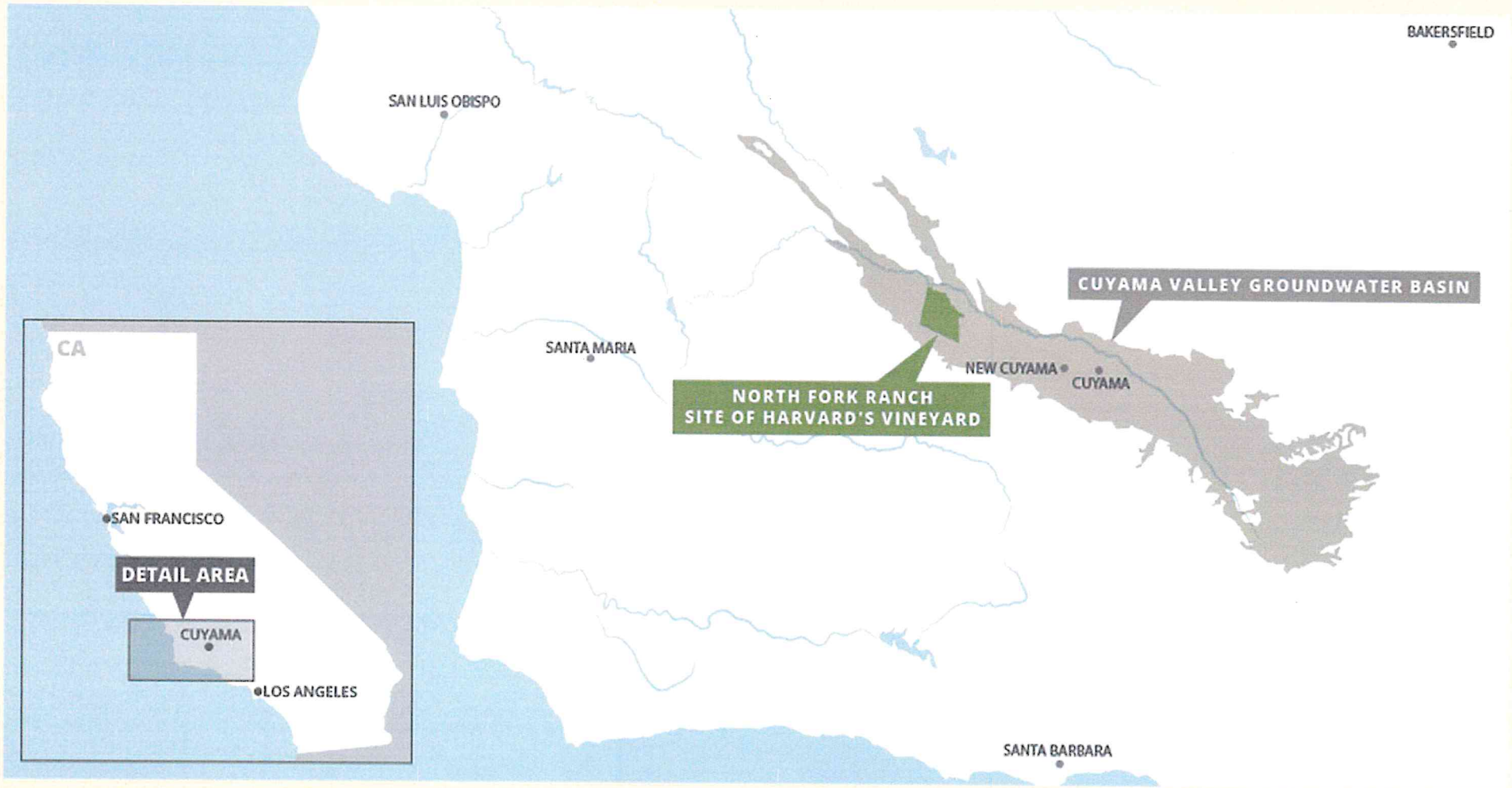


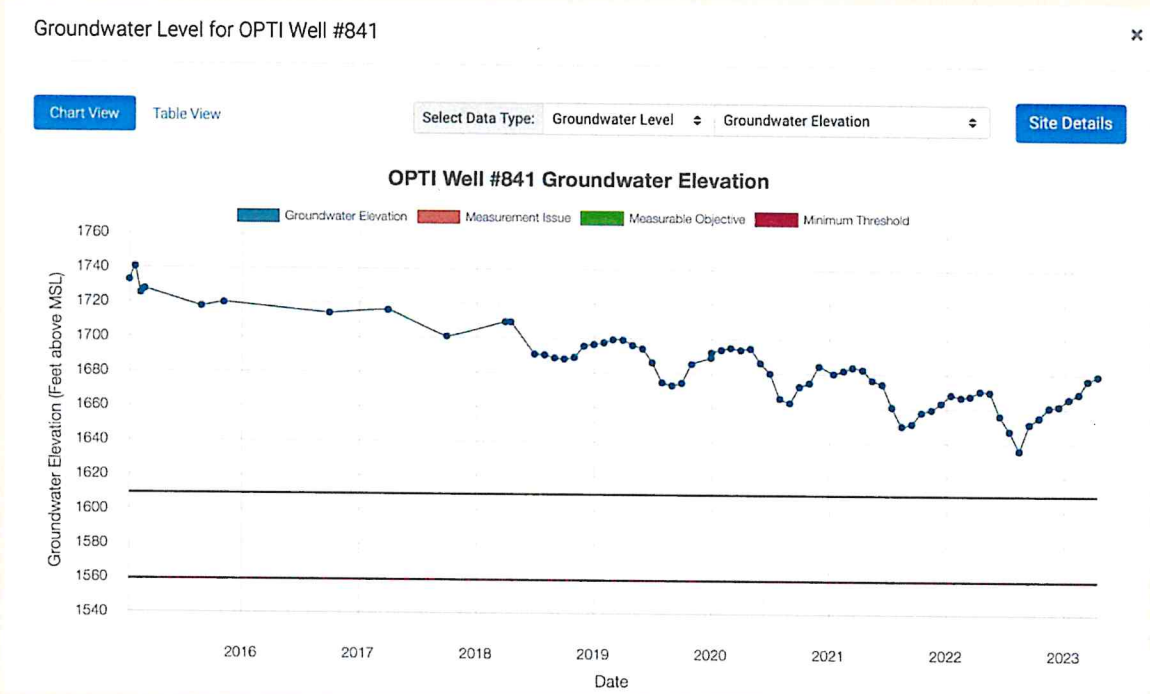
Image credit: Claudia Helmouth, E&E News, 2018

North Fork Vineyard

NORTH FORK VINEYARD MONTORING WELL

- Began pumping 2015
- Decreased 70+ feet in 7 years
- Groundwater level is on a downward slope in what had been a stable region of the Cuyama Basin
- Reservoirs will increase this loss
- Despite extraordinarily heavy rains of 2023, groundwater recovery pattern parallels previous years and elevation will continue to decline

Source: 2023 GSP Annual Report; Woodward and Curran OPTIdata https://opti.woodardcurran.com/cuyama/main.php



The Discretionary Nature of the Project

- Unlike most agricultural projects in the County which require no permits at all or only ministerial permits, the North Fork Frost Ponds Project requires a *discretionary permit.*
  - Water storage reservoirs greater than 50,000 square feet (1.15 acres) are a conditionally permitted use in the AG-II zone and require the approval of a discretionary Minor Conditional Use Permit pursuant to Section 35.21.030 of the County's Land Use and Development Code (LUDC).
  - Water storage reservoirs that are 50,000 square feet/1.15 acres or smaller only require a Land Use Permit (LUP).
- Here, the proposed reservoirs are 5.0, 5.7, and 4.9 acres each, and together total 15.6 acres – 13.5x larger than what could qualify for a ministerial Land Use Permit under the code.

The Denial Findings Are Legally Robust

- The findings for denial of the North Fork Project's discretionary CUP are firmly supported by the County Code and substantial evidence in the record.
- The Board has broad discretion to deny the CUP on one or more grounds, including but not limited to:
    - Inadequate water supply, incompatibility with the surrounding area, and non-compliance with Comprehensive Plan requirements including groundwater protection policies and agricultural element policy protecting the long-term viability of agriculture.
- **Substantial evidence can support opposite conclusions, but courts will defer to the Board**.

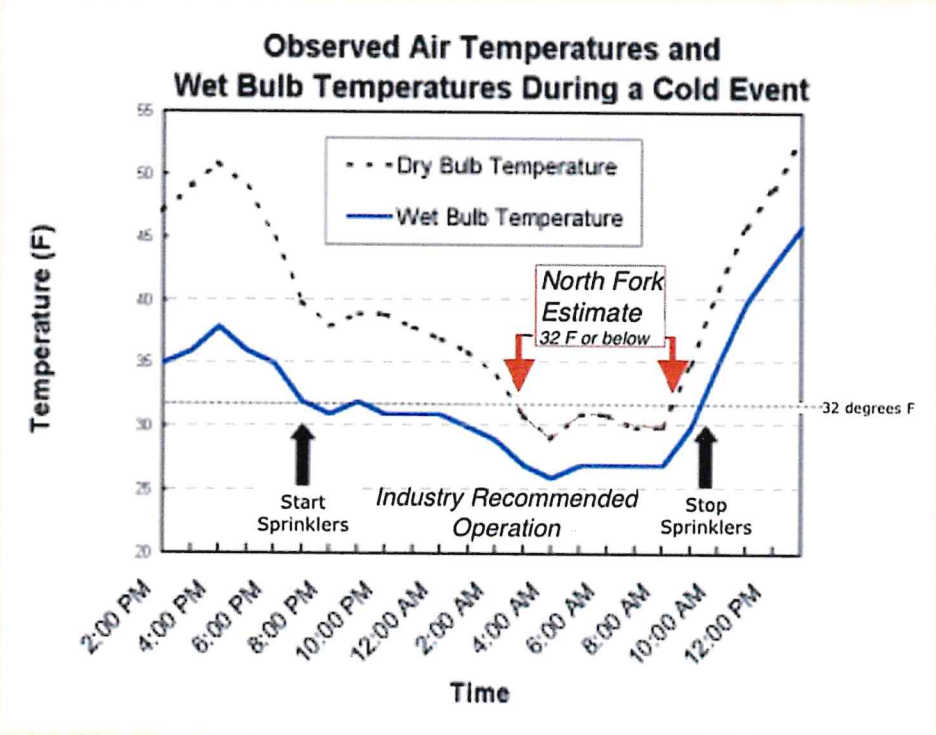
The Denial Findings Are Legally Robust

- The Board Letter confirms that the record contains substantial evidence supporting the denial, including:
  - The severe overdraft within the Cuyama Groundwater Basin (CGB)
  - Declining well levels on the property (see hydrographs)
  - The large amount of water this Project would waste (confirmed by the Applicant's expert)
  - Threats to the viability of long-established agricultural operations in Northwestern Cuyama that work hard to conserve limited groundwater

A CUP Denial Avoids CEQA Pitfalls

- An approval of this discretionary Project requires compliance with CEQA.
- The EIR identified significant impacts to groundwater, including evaporative losses from the Project substantially exceeding the County's 31 AFY threshold.
- Mitigation including reservoir covers over 15.6-acres of reservoir surface, and drastic restrictions in water use are required to reduce evaporative losses to 31AFY (over a 3-year rolling average).
- There is no legal option for the Board to approve the Project *and* allow North Fork Ranch the freedom to use as much groundwater for frost protection as they see fit.
- The record identifies numerous procedural defects in the EIR's analysis of water use impacts that preclude EIR certification.

APPLICANT UNDERESTIMATED AMOUNT OF WATER USED DURING FROST EVENTS



- Number of hours below 32 degrees do not correspond to the number of hours frost sprinklers are activated
- Dew point/wet bulb is more accurate measure of when to start sprinklers
- Longer sprinkler run time means evaporative losses much greater than Applicant projected

Table 2. Comparison between Applicant and industry standard evaporative loss projection

	Light Frost Year (2015)	Average Frost Year (2017)	Heavy Frost Year (2009)
Applicant's Frost Hours (32 F active sprinklers)	2 Hours	32 Hours	101 Hours
Applicant's Evaporative Loss	10.8 AFY	39.6 AFY	249.5 AFY
Industry Standard (Dew Point/Wet Bulb active sprinklers)	**36 Hours**	**83 Hours**	**228 Hours**
Industry Standard Evaporative Loss	194.4 AFY	102.56 AFY	563.87 AFY

Evaporation is calculated by temperature, wind speed, and relative humidity; discrepancies in projected losses reflect this data rather than strictly number of hours

PROJECT DOES NOT HAVE ENOUGH WATER TO ACHIEVE PROJECT OBJECTIVES

- FEIR Frost Protection System Evaporative Loss Reduction Plan (WAT-01) limits the amount of water for frost protection to 103.1 acre-feet per year
- Water available to the project would allow only a fraction of the vineyard to be protected from frost

Table 3. Percentage of early and mid-season vines protected under Frost Protection System Evaporative Loss Reduction Plan, WAT - 01.2

	Light Frost Year (2015)	Average Frost Year (2017)	Heavy Frost Year (2009)
Frost Hours (active sprinklers)	36 Hours	83 Hours	228 Hours
Acres Protected With a Limit of 103.1 AFY (WAT - 01.2)	290.86 Acres	105.18 Acres	45.92 Acres
% of Vines Protected	38%	17%	0.06%

NORTH FORK VINEYARD SECTION TREATED WITH GROUNDWATER SPRINKLERS

Sprinklers during early morning frost event, April 12, 2022

Same section **3 days later**, April 15, 2022

NORTH FORK VINEYARD SECTION TREATED WITH WIND TURBINE FROST PROTECTION

Frost fans during early morning frost event, April 12, 2022

Same section **3 days later**, April 15, 2022

The Reservoirs Are Not Needed for Frost Protection

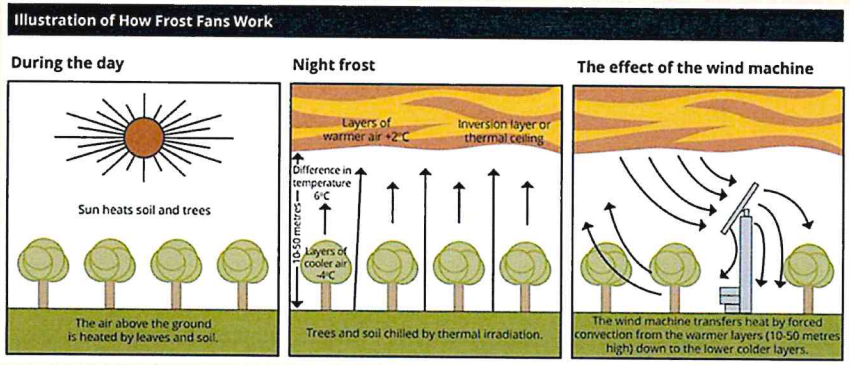
- North Fork vineyard currently has the capacity to use some overhead sprinklers in very frost sensitive areas in combination with wind turbines without needing the reservoirs.

- The results of the April 12, 2022 freeze showed the sprinklers did not appear to be effective in preventing die back while the wind turbines were effective.

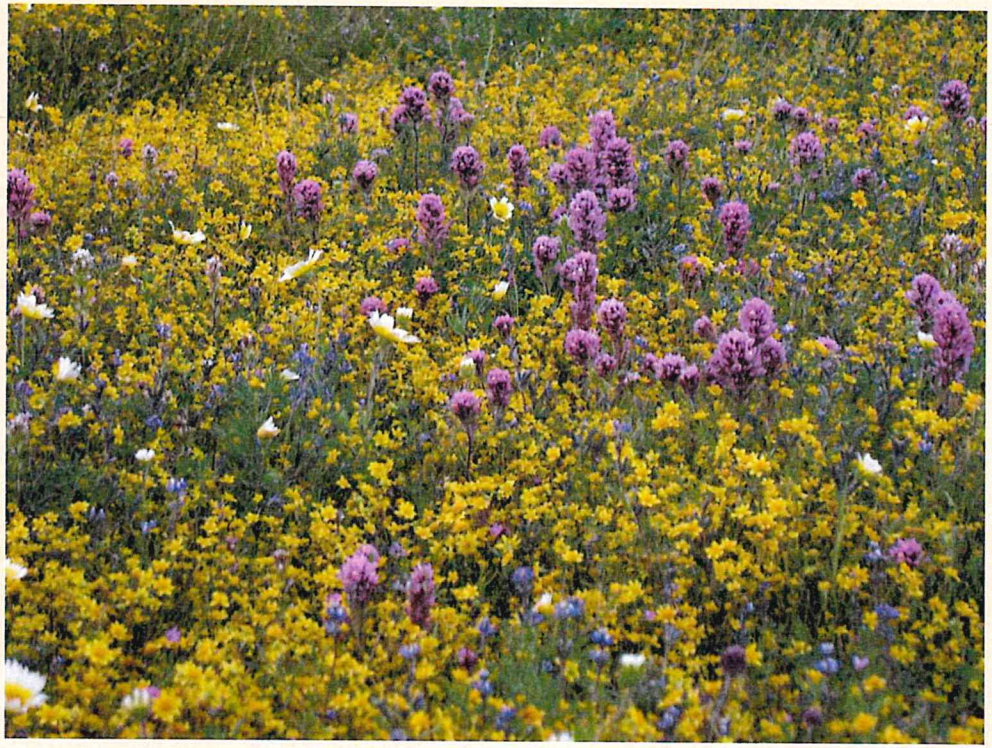
- The EIR clearly states that the amount of water that can be used from the reservoirs must be limited to meet the County's threshold, just measuring for evaporative loss. **This mitigation will not provide sufficient water for the project to prevent frost episodes in a normal nor heavy frost year.**

FROST FANS ARE AN ENVIRONMENTALLY SUPERIOR ALTERNATIVE TO SPRINKLER FROST PROTECTION

- Cuyama's spring frosts are normally inversion layers, the right kind for wind machine protection
- North Fork slopes ideally situated for wind machines and have demonstrated superior protection at the vineyard itself
- Frost fans already in use at other Cuyama vineyards
- Modern wind machines are more efficient and electric models are now common



The 15.6 Acre Project Unnecessarily Impacts Biological Resources



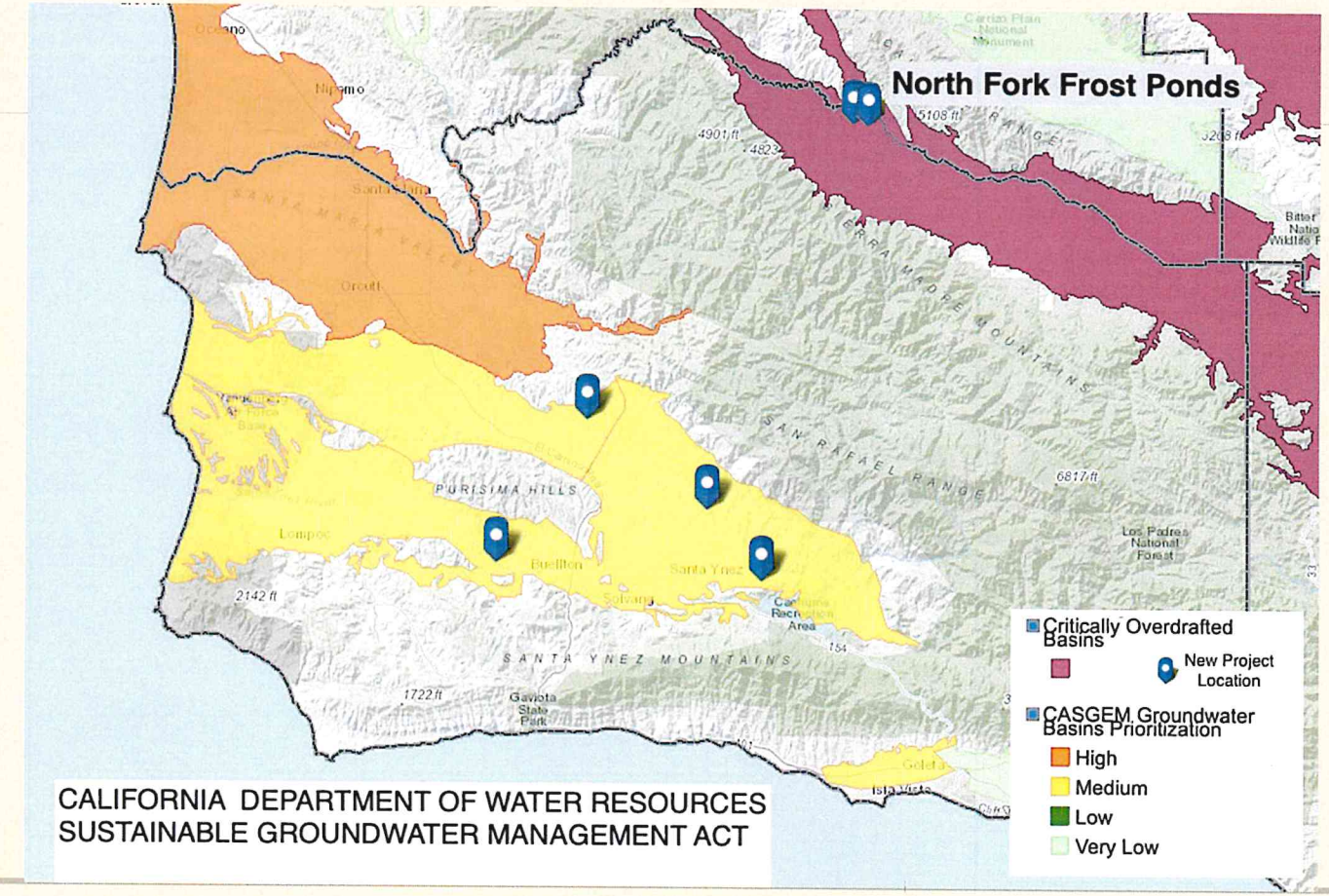
Example of wildflower diversity in normal to wet year, Cottonwood Canyon Road and North Fork Ranch.

Biological resource impacts are not limited to construction of Reservoir 3.

25 threatened plant species have the potential to occur in the Project area, including four that have been collected in the past in the Project's immediate vicinity and another 13 that have been found in nearby Cuyama Valley areas.

The Project impacts wildlife movement, with 17 protected wildlife species known to occur in the Project area.

Other County Agricultural Pond Projects



FINDINGS OF COMPREHENSIVE PLAN INCONSISTENCY

- 2.1.5 The proposed Project will not comply with all applicable requirements of the Comprehensive Plan and LUDC Policy 4, adequate public or private services available to serve the proposed development.
  - Conservation Element Policies 3.5 and 3.6, prevent serious overdraft on a prolonged basis.
  - Agricultural Element Policy 1.B, requiring sound agricultural practices to promote long term viability of agriculture
- 2.1.6 Proposed Project is not compatible with and subordinate to the rural and scenic character of rural areas as designated by the Comprehensive Plan
  - Due to size and number of reservoirs proposed
  - Long term water supply impact will detrimentally affect the future agricultural character of the project area

Request: Approve Staff Recommended Actions

a) Deny the appeal, Case No. 23APL-00000-00023;

b) Make the required findings for denial of the Project, Case No. 16CUP-00000-00005, as specified in Attachment 1 of the Board Letter;

c) Determine that denial of the Project is exempt from CEQA pursuant to CEQA Guidelines Section 15270(a), as specified in Attachment 2 to the Board Letter; and

d) Deny the Project, Case No. 16CUP-00000-00005.