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Via E-Mail and U.S. Mail

Board of Supervisors
County of Santa Barbara
105 East Anapumu Street
Santa Barbara, CA 93101

Michael C. Ghizzoni
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County of Santa Barbara
105 East Anapamu Street
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Re: The Healthy Air and Water Initiative to Ban Fracking
June 13, 2014 Board Meeting

Dear Honorable Supervisors and Mr. Ghizzoni:

We write on behalf of the Santa Barbara County Water Guardians to respond to two letters to the Board of Supervisors from Californians for a Safe Secure Energy Future ("CSSEF"), an oil industry campaign committee, opposing the above-entitled Initiative. While CSSEF vaguely urges the Board "not [to] go forward with the Initiative," the group has provided no legal basis for this recommendation. When the Board receives the report prepared pursuant to Elections Code section 9111 on June 13, it has a ministerial duty either to adopt the measure outright within 10 days or place it on the November ballot. Elections Code § 9118(c); *Save Stanislaus Area Farm Econ. v. Bd. of Supervisors* (1993) 13 Cal. App. 4th 141 (county board had ministerial duty to place duly certified initiative on ballot). CSSEF asserts that the Board would be required to comply with the California Environmental Quality Act ("CEQA") prior to adopting the measure, but this argument is not supported by current law. Finally, while CSSEF strains to argue that the Initiative would effect an unconstitutional taking, this theory does not withstand scrutiny.

The Board Need Not Comply with CEQA Prior to Adopting the Initiative.

The CSSEF letter dated May 19, 2014 argues that the Board may not adopt the Initiative outright without complying with the California Environmental Quality Act. The group presents this as a settled law, but in fact the question is currently before the California Supreme Court in a case entitled *Tuolomne Jobs & Small Business v. Superior Court*, Supreme Court Case No. S207173. Based on oral argument held last week, it

appears that the Court will hold that elected officials need not comply with CEQA if they choose to adopt an initiative measure outright rather than place it on the ballot. S.F. Daily Journal, "Ordinance May Be Enough to Skip CEQA," May 29, 2014. The Court appeared persuaded that compliance with CEQA would be at odds with Elections Code requirements allowing the legislative body to adopt an initiative within 10 days of the certification of signatures, a time period that would be insufficient for the agency to prepare any CEQA document. *Id.; see also* Elec. Code §§ 9116(c), 9118(c).

At this time, state law does *not* require that the Board comply with CEQA prior to adopting the Initiative outright, and the Board is free to do so within 10 days of receiving the section 9111 report. Elec. Code § 9118(c).

CSSEF has included an attachment to its May 19 letter, in which consultant Eric Lu argues that the Initiative could cause significant environmental impacts, requiring "more through environmental review under CEQA." Attachment B at 1. Because CEQA does not apply to the Board's action to adopt the Initiative outright or place it on the ballot, Mr. Lu's analysis is irrelevant. It is also erroneous, as Mr. Lu bases his conclusion that the Initiative will cause "significant impacts" on the assumption that the Initiative bans all oil and gas production in the County. *See, e.g.,* Attachment B at 1-2 (claiming that "removing a local supply of oil and gas" will result in air quality impacts from transporting these materials from more distant refineries). This assumption is demonstrably false. In fact, the Initiative does not prohibit low-intensity extraction operations, and does not apply to existing operations and facilities, or to offsite structures or infrastructure. Because existing oil and gas supplies would remain in place, Lu's claims are unsupported.

The Initiative Will Not Give Rise To a Taking and the County Will Not Be Liable for Compensation.

CSSEF's letter dated May 20, 2014 contends that the Initiative would raise "serious constitutional questions" as a regulatory taking in violation of the Fifth Amendment. CSSEF misreads the Initiative and its takings savings clause, and conveniently overlooks its vested rights exception. As a result, its arguments amount to baseless scare tactics.

CSSEF appears to agree that regulatory takings are found in only the rarest of cases. Indeed, regulatory takings can occur only where a regulation deprives the property owner of 100% of the economic value of the property, *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, or, in limited cases, where the property is severely diminished in value, *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104,

124. CSSEF relies heavily on *Penn Central*, but in that case, the U.S. Supreme Court held that the land use law at issue was *not* a taking. 438 U.S. at 138.

The Initiative would not effect a compensable taking because it does not deprive landowners of viable economic use of their property. Landowners could continue to extract oil on their property using low-intensity techniques and/or any vested high-intensity technique. In addition, landowners would remain free to devote their land to other allowable and economically profitable uses, such as farming or development.

CSSEF relies on *Braly v. Board of Fire Com'rs of City of Los Angeles* (1958) 157 Cal.App.2d 208 and *Pennsylvania Coal v. Mahon* (1922) 260 U.S. 393, but those cases do not reflect current law. In *Penn Central*, 438 U.S. 104, the United States Supreme Court announced the modern standard for determining whether a regulation effects a taking. The Court rejected any approach that "divide[s] a single parcel into discrete segments and attempt[s] to determine whether the rights in a particular segment have been entirely abrogated." *Id.* at 130. Instead, courts must consider the effect of regulation on the "parcel as a whole." *Id; see also Concrete Pipe & Products of California, Inc. v. Constr. Laborers Pension Trust for S. California* (1993) 508 U.S. 602, 644 ("the relevant question… is whether the property taken is all, or only a portion of, the parcel in question."). This approach was reaffirmed in *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, in which the U.S. Supreme Court found no taking where regulations prevented a mining company from exercising its mineral rights to extract coal.

In fact, contrary to CSSEF's assertions, courts have long rejected claims by property and mineral rights owners that zoning ordinances prohibiting oil and gas drilling effect an as-applied taking of private property. *Friel v. County of Los Angeles* (1959) 172 Cal.App.2d 142, 148, 157; *Beverly Oil Co. v. City of Los Angeles* (1953) 40 Cal.2d 552, 559.

Attempting to shore up its weak takings arguments, CSSEF contends that the Initiative amounts to an "outright ban" on all oil and gas extraction. The measure does nothing of the sort. The Initiative's ban applies only to High-Intensity Petroleum Operations, which are defined to include: (1) Well Stimulation Treatments and/or (2) Secondary and Enhanced Recovery Operations. It does not ban "low intensity" methods, which generally involve drilling wells through which oil or gas flows naturally under its own pressure or through which oil is pumped up to the surface, or other production techniques that may be developed in the future . *See* Initiative § 1.A.1. The Initiative—like

the County's General Plan—recognizes that high-intensity operations pose additional threats to our air and water beyond those posed by low-intensity operations. *Id.*; County of Santa Barbara Comprehensive Plan, Conservation Element (2010) at 241.

Even if the Initiative proposed an outright ban of all oil and gas activities, which it does not, courts have repeatedly upheld the validity of such bans. *See, e.g., Hermosa Beach Stop Oil Coalition v. City of Hermosa* (2001) 86 Cal.App.4th 534, 555 ("Enactment of a city ordinance prohibiting exploration for and production of oil, unless arbitrary, is a valid exercise of the municipal police power.") *Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 27 (upholding local initiative measure banning oil and gas drilling or prospecting and all incidental operations within City limits.) Tellingly, CSSEF cannot cite a single case where such bans led to successful takings claims requiring the local government to pay compensation.

CSSEF takes issue with the Initiative's definition of Secondary and Enhanced Recovery Operations, suggesting that it is overbroad. But the definition is taken directly from the Santa Barbara County Code. Petroleum Code § 25-4. The County Code, like the Initiative, treats Secondary and Enhanced Recovery Operations differently from "Primary" operations—and for good reason. The Code defines "Primary" recovery projects to include any such operation where naturally occurring hydrocarbons are produced by natural flow. Petroleum Code § 25-30. Secondary and Enhanced Recovery Operations, on the other hand, require special notice, periodic inspections, warning signs, and in certain circumstances proof that the activity will not constitute a nuisance. *Id.* §§ 25-8; 25-30. Thus, the Initiative simply follows the County's established practice of distinguishing Secondary and Enhanced Recovery Operations from other "primary" or "low-intensity" techniques.

CSSEF's claim of an "outright ban" is all the more implausible because the Initiative applies prospectively only. *See Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1208 ("legislative provisions are presumed to operate prospectively"). By operation of its vested rights exception, the Initiative does not apply to persons or entities with vested rights to conduct high-intensity petroleum operations. *See* Initiative § 5C. Accordingly, the Initiative prohibits only *new* land uses in support of high-intensity petroleum operations. It allows existing high-intensity petroleum operations to continue. For this reason, CSSEF's reliance on *Trans-Oceanic Oil Corp. v. City of Santa Barbara* is misplaced. The *Trans-Oceanic* court did not question the constitutionality of the City's oil and gas ban because, like this measure, it only operated prospectively and included a vested rights exception. (1948) 85 Cal.App.2d 776, 792. The court simply held the City could not apply the ban

retroactively to revoke a permit for a vested oil and gas operation without due process of law. *Id.* at 796-98.

As a last-ditch effort, CSSEF takes aim at the Initiative's takings savings clause. CSSEF essentially concedes—as it must—that the savings clause precludes any "facial" challenge to the Initiative. *See San Mateo County Coastal Landowners' Ass'n v. County of San Mateo* (1995) 38 Cal.App.4th 523, 547 (recognizing that land use initiative's savings clause gave county flexibility to avoid potentially unconstitutional application of its requirements). CSSEF asserts that the savings clause recognizes that the Initiative is "fraught with constitutional perils." Not so. In fact, land use initiatives commonly, if not always, include such savings clauses, and their use has been endorsed by the courts. *See id.*

Finally, CSSEF complains that the savings clause will be too difficult to administer because there are no "set criteria" to grant the permit/exception. CSSEF underestimates County officials. The "set criteria" are, of course, constitutional regulatory takings law. The Board is well equipped to evaluate any factual claim that the Initiative somehow eliminates a property's economic value and to permit additional land uses as necessary to avoid a taking. Notably, to the extent additional guidance is needed, the Initiative authorizes the County to adopt rules and regulations to implement the measure, including the takings exception. Initiative § 6E. *See County of Nevada v. Macmillen* (1974) 11 Cal.3d 662, 674 (guidelines authorized by legislation could remove any remaining uncertainty).

In sum, CSSEF's attempt to portray the Initiative as a draconian measure designed to halt all oil and gas production in the County, and its misleading discussion of CEQA's role in the process, are unavailing. The group has raised no legal argument to prevent the Board from complying with its duty under the Elections Code to adopt the Initiative outright within 10 days or place it on the November ballot.

Very truly yours,

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Rachel B. Hooper

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