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January 7, 2015

Via Email

Bob Nunn
Nunn Farms
10500 Brentwood Boulevard
Brentwood, CA 94513

Re: Sunset Exploration, Inc. – Subsurface Lease with Contra Costa County Flood Control and Water Conservation District

Dear Bob:

I hope this letter finds you and your family well, and that you had a warm and gratifying holiday season. I understand that Sunset Exploration, Inc. ("Sunset") has negotiated a three-year Subsurface Oil & Gas Lease ("Lease") with the Contra Costa County Flood Control and Water Conservation District ("District") which would allow Sunset to engage in subsurface drilling activities on the District's land no closer than 500 feet from the surface of the District's land. The actual oil and gas well and related facilities will be placed on Sunset's land (i.e., on land not owned by the District), some distance away, and will be subject to discretionary review and approval (and CEQA compliance) by public agencies other than the District.

I also understand that the hearing on the approval, originally set for December 2, 2014, was continued by the District in response to a letter submitted by Save Mount Diablo delivered that same day, and that Save Mount Diablo submitted a second letter regarding the Lease to the District dated December 19, 2014.

You have requested our evaluation of the District's compliance with the requirements of the California Environmental Quality Act ("CEQA") vis-à-vis the Lease. As part of our analysis, we have reviewed the Lease, Save Mount Diablo's comment letters, and applicable California legal authorities. As explained below, we believe the District's CEQA approach is correct, and that the Lease is exempt from CEQA.

☒ **The "Common Sense" Exemption.**

In its environmental review, the District evaluated the Lease, as well as the existing conditions on the District's property and the property owned by Sunset, and concluded that the Lease is exempt from further CEQA review pursuant to the "common sense exemption" set forth in CEQA Guidelines § 15061(b)(3). We concur with this conclusion, and find the District staff's decision to be supported by substantial evidence in the record.

In brief, CEQA's "common sense exemption" applies to actions that can be seen with certainty to not create significant impacts on the environment. See CEQA Guidelines § 15061(b)(3); *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n,* (2007) 41 Cal.4th 372, 388 (discussing exemption). As the Supreme Court in *Muzzy Ranch* made clear, "whether a project qualifies for the common sense exemption need not necessarily be preceded by detailed or extensive factfinding" but instead "depends on a multitude of factors, including, but not limited to, the nature of the project, the directness or indirectness of the contemplated impact and the ability to forecast the actual effects the project will have on the physical environment." *Id.* (internal quotation marks and citations omitted).

I understand that the Lease only affords Sunset the limited right to conduct subsurface "directional" drilling activities using Sunset's own existing facilities, including a well located exclusively on land owned or otherwise controlled by Sunset. No activities affecting the surface of any of the District's land (nor any land within 500 feet of the surface) is permitted under the Lease. Section 18 of the Lease further provides that additional CEQA review will be performed as required by law if Sunset seeks rights in the future (e.g., if Sunset seeks additional permits, etc.). The Lease is purely a transactional document, and is not a permit or similar authorization by the District for Sunset to actually conduct drilling or any other activities. Section 3 of the Lease makes this clear by stating the Lease "does not grant any privilege or right that is not expressly stated." Additionally, pursuant to the Lease, Sunset's drilling on the District's land – if pursued – would occur more than 500 feet beneath the surface of the District's lands. Such directional drilling would not affect the District's use of the surface of the land as a detention basin or any other use.

Given this evidence, we concur with District staff's conclusion that the Lease will not create any significant environmental impacts.

Although the comment letters submitted by Save Mount Diablo speculates that the Lease could result in environmental impacts such as habitat loss, air quality impacts, and so on, no evidence supporting those conclusions was submitted. There is simply no explanation as to how the Lease's granting to Sunset of limited rights to conduct directional drilling no less than 500 feet below the surface of the District's land could create such enumerated impacts.

Pursuant to Public Resources Code § 21082.2, if no substantial evidence exists that an activity or approval may have a significant impact on the environment, then CEQA does not

apply. That section further provides that neither the "existence of a public controversy" nor "[a]rgument, speculation, unsubstantiated opinion or narrative" are sufficient to show a potentially significant impact. Indeed, Save Mount Diablo's second comment letter dated December 19, 2014, expressly states that they "don't have an opinion about whether this is a good or bad project, *or has significant impacts*." No showing has thus been made that the limited activity authorized by the Lease will result in potentially significant impacts on the environment.

Instead, their concerns appear to have been occasioned by certain language in the Lease itself which Save Mount Diablo wonders whether or not may result in potential environmental impacts. These concerns are misplaced and largely result from taking certain Lease provisions out of context. Each of the specific concerns identified in their December 19, 2014, letter are addressed below in the order in which they appear.

First, Save Mount Diablo's concern about a "pipeline" and potential "surface impacts" results from a misreading of Section 3 of the Lease, which authorizes Sunset to conduct limited subsurface directional drilling only. It is true that the Lease allows the District to request drawings showing the exact location of any pipeline installed on the Leased Land. But the reference to "pipeline" refers to the "casing pipe" installed more than 500 feet below the surface and used for directional drilling. Save Mount Diablo's concern about "surface impacts" arising from some other type of "pipeline" are therefore unfounded.

Second, the Lease does not have the potential for cumulative impacts, and Save Mount Diablo appears to misunderstand the "pooling" provision in Section 14 of the Lease. That "pooling" provision only concerns how Sunset's adjacent acreage (and the Leased Land) is treated for purposes of calculating royalties (money). As to the potential for cumulative impacts, any additional land that may be leased by Sunset elsewhere is not affected by the limited scope of the Lease which only authorizes limited subsurface directional drilling rights.

Third, Save Mount Diablo states that Section 21 of the Lease "contemplates that toxics might be released on the County parcel, intentionally or by accident." Not so. That section addresses Environmental Liability, and is a mere boilerplate clause intended to provide the District with the same contractual protections that would exist by operation of law. Section 21(b), cited by Save Mount Diablo, thus provides that "Lessee shall (i) remove from the Leased Land, *if, as and when required by any action or law*, any Hazardous Materials placed or released thereon by the Lessee. . ." This is standard lease language that occurs in virtually all lease agreements involving the use of land, irrespective of the particular details of a given project. Here, the Lease does not authorize any surface activities whatsoever, and so this provision is surplusage in addition to being redundant of applicable law.

Fourth, Section 23 of the Lease, addressing Suspension of Operations, is similar boilerplate and provides the District the right to temporarily suspend Sunset's subsurface directional drilling operations under certain remote circumstances, such as threats to life, health

or property. Again, this provision does not mean that the enumerated circumstances are direct, indirect or reasonably foreseeable impacts of the limited activities authorized by the Lease.

Fifth, Save Mount Diablo states that the Lease "contemplates waste oil or gas," citing Section 23(b) of the Lease. This concern results from a misreading of the provision, which allows Sunset to request that the District agree to a suspension of subsurface drilling under certain circumstances, including "prevent[ing] waste of oil or gas." For example, if Sunset wishes to install more efficient equipment or make equipment repairs on its land, then the Lease authorizes the District to temporarily suspend operations (and thus forego collection of royalties) pending the upgrade or repair.

Sixth, Section 25(a) only obligates Sunset to return the Leased Land in the same condition it was in at the beginning at the Lease and deliver a quitclaim deed. This language does not mean that remediation or subsidence is a reasonably foreseeable impact of the Lease.

Finally, as to Save Mount Diablo's concerns regarding noise impacts, Section 30 only provides that Sunset agrees to keep noise from its operations at a reasonable minimum. Notably, Section 32 of the Lease, Compliance with Laws, requires Sunset to strictly comply with all applicable laws, regulations, and ordinances in conducting its operations under the Lease, such as common law nuisance, and related laws such as General Plan policies, zoning regulations, and the County's own ordinances regulating noise. Requiring Sunset to keep noise to a "reasonable minimum" is redundant of existing and controlling law. Lastly, there are no sensitive receptors near the Leased Land who could be affected by noise in any event. Therefore, there is simply no evidence of reasonably foreseeable noise impacts arising from subsurface drilling more than 500 feet below the surface.

In sum, Save Mount Diablo's articulated concerns result largely from a mischaracterization of certain provisions in the Lease agreement itself. But these concerns, especially in light of Save Mount Diablo's admission that they "don't have an opinion about whether this is a good or bad thing, or has significant impacts," do not meet the test of requiring further environmental review. *See, Muzzy Ranch* 41 Cal.4th at 388 ("whether a project qualifies for the common sense exemption need not necessarily be preceded by detailed or extensive factfinding" but instead "depends on a multitude of factors, including, but not limited to, the nature of the project, the directness or indirectness of the contemplated impact and the ability to forecast the actual effects the project will have on the physical environment." [internal quotation marks and citations omitted]).

⊡ **CEQA's Timing Considerations.**

A related concept is the basic CEQA principle that a balancing must occur as to the appropriate "timing" of the preparation of an environmental document. *See, e.g.,* CEQA Guidelines § 15004(b). As the California Supreme Court decisions in *Laurel Heights Improvement Assn. v. Regents of University of California*, (1988) 47 Cal.3d 376, and *Save Tara*

v. City of West Hollywood, (2008) 45 Cal.4th 116, explain, the timing of CEQA review matters because of the tension between CEQA compliance occurring too early in the process before specific project details can be known, and CEQA compliance occurring too late in the process such that the agency's ability to adopt alternatives would be prejudiced.

With respect to the Lease between the District and Sunset Exploration, the document clearly indicates that no surface rights are granted and that the District is not authorizing Sunset to drill a well at all, let alone in any particular location. We also understand that the parties do not know how or whether Sunset will ultimately ever use the subsurface area beneath the District's property. Further, and perhaps most important, we understand that no disturbance of the surface of the District's land is allowed under the Lease, and that no disturbance of any surface environment is allowed under controlling land use regulations without a discretionary use permit approval from a public agency other than the District, after CEQA review and compliance. Section 18 of the Lease is clear that no work will occur unless and until Sunset secures any and all necessary permits and approvals, including CEQA compliance, and that any such work must be performed in accordance with those approvals. *See*, *Concerned McCloud Citizens v. McCloud Community Services District*, (2007) 147 Cal.App.4th 181.

Accordingly, based on the evidence that has been presented by District staff, including the Lease itself and its express terms and conditions, we concur with District staff that it can be seen with certainty that there is no possibility that the limited three-year subsurface rights encompassed by the Lease could create significant impacts on the environment, and that therefore the "common sense" exemption applies.

Very truly yours,

Michael Patrick Durkee

MPD/tlm

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