



September 5, 2013

VIA EMAIL AND US MAIL
City Council, City of Whittier
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Subject: The Settlement Agreement by and between MRCA and the City of Whittier, Matrix Oil Company and Clayton Williams (*MRCA v. City of Whittier* et al. LASC Case # BS 136211)

Dear Whittier Council Members:

This letter is being submitted on behalf of Whittier Hills Oil Watch (WHOW) to document our concerns regarding the settlement between the City of Whittier (City), Matrix Oil, and the Mountains Recreation and Conservation Authority (MRCA) regarding the litigation involving the City of Whittier's Oil Drilling Project within the Puente Hills Habitat Preserve on land purchased with Proposition A funds. We are concerned that:

1. the Settlement Agreement was approved by both the City and MRCA in closed sessions, without notice or a public hearing;
2. no subsequent Environmental Impact Report (EIR) was prepared to address the potential impacts resulting from the MRCA's consent to release a restriction on the use of the property, which rendered the oil drilling project approved by the City, infeasible;
3. there is no evidence that the MRCA Board considered any EIR for the project or otherwise complied with the California Environmental Quality Act (CEQA) when approving a settlement which was a defacto project approval;
4. and, the settlement agreement grants the MRCA a share of any oil royalties, but the City lacks the power to allocates royalties.

Background

As you are aware, both Chevron and Unocal created deed restrictions on portions of the approximately 1,280 acres of Proposition A land held in public trust by the City of Whittier. Despite both deed restrictions and the Proposition A Agreement wherein the City agreed to preserve the land in perpetuity as open space, the City leased the land to Matrix Oil for a large-scale drilling project.

The City never disclosed the existence of the Chevron or the Unocal Declarations of Restricted Use (Declarations) to the public. They are not discussed in the EIR for the project, and a Chevron Declaration Release is not listed as one of the approvals for which the EIR would be used.¹ The existence of these two Declarations was uncovered by Open Space Legal Defense Fund's (OSLDF's) attorney shortly before October 5, 2011, after the EIR for the project was release for review.

The City repeatedly contended during the remainder of the project review process that the Chevron Declaration merely represented Chevron's reservation of the option to create a conservation easement and that this option had lapsed;² that there was no restriction on the use of the property. However, on June 19, 2012, after having approved the project on November 28, 2011, the City felt compelled to have Chevron agree to an amendment to the Declaration to alter the area covered by the restriction on use. This was done without the approval of MRCA, one of the grantees. The MRCA then sued for violation of the Chevron Declaration.

Judge James Chalfant, in his tentative decision on the Whittier Oil Project ruled that the City, by adopting the Chevron Release without the MRCA's consent, breached the Chevron Declaration. He also found that the Chevron Declaration "created a 600 acre wildlife and open space conservation easement over a portion of the Whittier Oil drilling project area which was required to be "retained forever" in a natural, undeveloped and open space condition, subject to limited permitted uses", none of which would allow for the Matrix Oil Project.³

The Chevron Declaration essentially rendered the Matrix Oil Project approved by the City of Whittier, infeasible, since it precluded construction of between 1-3 acres of the 7 acres pad area, as well as the North Access Road, which was to be the primary site access after Phase 1 of the project.⁴ Judge

¹ See Table 2-15 FEIR page 2-55 to 2-57

² See for example: 11/13/11 City Council Transcript, p 122

³ See Tentative Decision, pages 30-32

⁴ See Trial Transcript, p. 12

Chalfant's tentative ruling constitutes important new information, in the form of a judicial finding that the project approved by the City of Whittier was infeasible at the time it was approved.

On August 15, 2013 the City of Whittier announced that the City, MRCA, Matrix Oil and Clayton Williams had entered into a settlement agreement in which the MRCA agreed to remove the Chevron Declaration restrictions on the project in exchange for attorneys fees and up to \$11.25 million dollars in oil royalties. The settlement announcement followed an August 7, 2013 MRCA Board closed session and August 8th and 13th City Council closed sessions.

1. No Public Hearing Prior to Approval of a Settlement Agreement That Was A Project Approval

All discussions of the settlement were held in closed session and the public was not provided with notice or opportunity to comment on the proposed settlement agreement. No public hearing on the settlement agreement was provided by either the City or MRCA despite the fact that the settlement agreement constituted a defacto project approval, since it removed a major impediment to project feasibility.

In the absence of the settlement agreement the project could not go forward. Prior to the settlement agreement, the Matrix Oil project was D.O.A. Essentially but for the settlement agreement, there could be no project.

The settlement agreement is not merely one of several discretionary approvals by responsible agencies – the settlement agreement is a defacto project approval by both the MRCA and the City.

2. No Subsequent EIR Prepared To Address Impacts From Release of Restriction of Use

The settlement agreement constituted as defacto project approval, since it removed an impediment to project feasibility. It is more akin to the grant of a zoning variance or General Plan amendment than to a permit, since like a zoning variance or General Plan amendments it removes a condition that would render the project infeasible.⁵

⁵ Pursuant to Public Resources Code 21080, CEQA requirements "shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from this division."

Prior to this approval of the project, a subsequent EIR was required, since the FEIR for the project failed to identify: the removal of the Chevron Declaration as one of the project approvals; the MRCA as a responsible agency; or, the impacts of a Chevron release. CEQA Guidelines Section 15162(a)(3) requires the preparation of a Subsequent EIR when:

New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the Negative Declaration was adopted, shows any of the following:

(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.

The judicial finding that the City was wrong, and the Chevron Declaration was in full force and effect, thus rendering the project as previously approved infeasible, is new information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the EIR was certified, since the City is on record as saying they didn't believe the Chevron Declaration to be a restriction.

The change in circumstances resulting from the settlement agreement has the potential to result in new or greater impacts than anticipated in the FEIR. The new more severe significant effects include, but are not limited to: additional conflicts with a regulation adopted for purpose of avoiding or mitigation an environmental effect (CEQA Checklist Item X.b) as the project conflicts with the deed restrictions which are akin to a regulation designed to "preserve and protect in perpetuity the natural ecosystems and native habitat values" of the

property.⁶ It also arguably represents a conflict with either a form of local policy or approved habitat conservation plan (per CEQA Checklist Items IV. (e) or (f) that was not identified in the FEIR.

The settlement agreement would also result in the imposition of environmental harm on residents of the City of Whittier, while providing oil revenues to the MRCA to be used for park acquisition and/or maintenance elsewhere in the County. The City of Whittier has a 60% Hispanic population; the fact that this dirty environmental project will be placed on public trust lands in a city with a minority population in excess of 50% violates the intent and purpose of the legislation supporting Environmental Justice. Environmental Justice issues relating to this project must be thoroughly researched and addressed before this project can commence.

These are new impacts that require disclosure and consideration prior to project approval. The City steadfastly argued that there were no deed restrictions; the courts finding that there are is a deed restriction is a substantial change in circumstances triggering the need for subsequent environmental review.

The need for a subsequent EIR is further highlighted by the fact that the settlement agreement alters the City's potential revenue from the project. That revenue was a consideration in the adoption of the Statement of Overriding Considerations. The settlement agreement makes the existing Statement of Overriding Considerations invalid. The settlement is a change in circumstance that affects the economic benefits of the project by reducing potential City royalties by up to \$11.25 million dollars a year, and which was not known at the time the FEIR was certified. If the decision-makers had known that their take would be less, perhaps the benefits would not have outweighed the harm. The need to reconsider the Statement of Overriding Considerations in the face of new impacts and less economic benefit is a further reason why a subsequent EIR needed to be prepared.

⁶ Chevron Declaration, recital C.

3. No Consideration by MRCA Board of Environmental Effects of Settlement Agreement

The only way the previously approved version of the project becomes feasible and physical changes in the environment can occur is if the MRCA removes the deed restrictions. In removing the deed restrictions, the MRCA is in fact the agency approving the project, since the City of Whittier doesn't have the power to make the project feasible.⁷

The MRCA's defacto approval of the project occurred behind closed doors, with no notice or public hearing. In addition, there is no evidence that the MRCA Board even considered the EIR prior to approving the project.

At a minimum, the MRCA was acting as a Responsible Agency⁸ in approving the settlement agreement, since it removed an impediment that rendered the project infeasible. The MRCA was thus required to follow the CEQA process for a Responsible Agency prior to approving the Settlement Agreement. As detailed in CEQA Guidelines Section 15096, that process includes among other things:

(a) General. A Responsible Agency complies with CEQA by considering the EIR or Negative Declaration prepared by the Lead Agency and by reaching its own conclusions on whether and how to approve the project involved.

(f) Consider the EIR or Negative Declaration. Prior to reaching a decision on the project, the Responsible Agency must consider the environmental effects of the project as shown in the EIR or Negative Declaration.

(h) Findings. The Responsible Agency shall make the findings required by Section 15091 for each significant effect of the project and shall make the findings in Section 15093 if necessary.

(i) Notice of Determination. The Responsible Agency should file a Notice of Determination in the same manner as a Lead

⁷ The same arguments would apply to any County approval of the project. However, denial of a project is exempt per CEQA Guidelines Section 15061(b)(4). We also note that the County, in two excellent comment letters on the EIR identified a number of defects in the EIR, as well as a substantial understatement of project impacts.

⁸ CEQA Guidelines 15381 states: For the purposes of CEQA, the term "Responsible Agency" includes all public agencies other than the Lead Agency which have discretionary approval power over the project.

Agency under Section 15075 or 15094 except that the Responsible Agency does not need to state that the EIR or Negative Declaration complies with CEQA. The Responsible Agency should state that it considered the EIR or Negative Declaration as prepared by a Lead Agency.

In addition, arguably the MRCA should have taken over as lead agency pursuant to Guidelines 15052(a)(2).

15052. SHIFT IN LEAD AGENCY DESIGNATION

(a) Where a Responsible Agency is called on to grant an approval for a project subject to CEQA for which another public agency was the appropriate Lead Agency, the Responsible Agency shall assume the role of the Lead Agency when any of the following conditions occur:

(2) The Lead Agency prepared environmental documents for the project, but the following conditions occur:

- (A) A subsequent EIR is required pursuant to Section 15162,
- (B) The Lead Agency has granted a final approval for the project, and
- (C) The statute of limitations for challenging the Lead Agency's action under CEQA has expired.

Not only did the MRCA not assume Lead Agency control, there is no evidence that the MRCA conducted environmental review, or considered the existing FEIR prior to approving the settlement. The MRCA has thus failed to comply with CEQA. Similarly, there is also no evidence that the City conducted any subsequent environmental review prior to approving the project.

4. City Lack Capacity to Allocate Any Royalties

As noted in Judge Chalfant's tentative ruling: "Whatever the Project Agreement states, Prop. A requires the greater amount of fair market value, grant amount, or proceeds from the transaction be used for Prop. A purposes. Whittier cannot deposit the revenue into its general fund. Nor could it pay Habitat Authority without District approval." Similarly the City lacks the capacity to decide to give potential royalties to the MRCA without County approval. Since the City lacks the capacity, the settlement agreement should be considered null and void.

We would also note that the settlement agreement's alleged prohibition against fracking is merely a restatement of existing Condition 77, which was

introduced during Planning Commission hearings on the project with Matrix Oil's consent and preferred wording. We would also note that this condition only prohibits high pressure, high volume hydraulic fracturing, which is a special type of fracking sometimes called unconventional fracking or massive fracking.⁹

In Closing

In closing, we would once again ask that the City uphold the promises made to the public, when they were asked to vote for Proposition A, and when the City accepted Proposition A funds for the purchase to the 1,280 acres, and that the City take all actions necessary to ensure that the Whittier Oil Project does not go forward, and that the lands in question remain open space in perpetuity.

Sincerely,

A handwritten signature in black ink, appearing to read "Roy McKee", with a long horizontal flourish extending to the right.

Roy McKee
President, WHOW

cc: SMMC Board of Directors
MRCA Board of Directors
Joseph Edmiston, Executive Director, SMMC and MRCA
Los Angeles County Board of Supervisors
Jeff Collier, City Manager, City of Whittier

⁹ See: <http://www.oilandgasbmps.org/resources/fracing.php>