

ATTACHMENT F
APPEAL APPLICATION OF BOARD OF ZONING APPEALS' DECISION
(DATED MARCH 29, 2021)



REQUEST FOR APPEAL

APPLICATION INFORMATION

Project Address: 3420 and 3500 North Arroyo Blvd

Case Type (MCUP, TTM, etc.) and Number: Modification to CUP #6222 and FEIR - Arroyo Seco Canyon Project

Hearing Date: March 18, 2021

Appeal Deadline: March 29, 2021

APPELLANT INFORMATION

APPELLANT: Arroyo Seco Foundation et. al.

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APPLICANT (IF DIFFERENT): City of Pasadena Water & Power Department

I hereby appeal the decision of the:

☒ Hearing Officer

☐ Zoning Administrator

☐ Design Commission

☐ Director of Planning and Development

☐ Historic Preservation

☐ Film Liaison

REASON FOR APPEAL

The decision maker failed to comply with the provisions of the Zoning Code, General Plan or other applicable plans in the following manner (use additional sheets if necessary):

The Arroyo Seco Foundation, a 501(c)3 non-profit corporation, together with Pasadena Audubon Society, Hugh Bowles and Ken Kules, file this appeal of the Board of Zoning Appeals Modification to CUP #622 and FEIR and the adoption of the CEQA findings and Mitigation Program for the proposed ASCP. The BZA failed to consider significant gaps and omission of important information regarding hydrology and environmental protections in the FEIR that have deprived regulatory agencies and the public of the opportunity to understand the project and the changes in it. The approvals should be withdrawn. The FEIR should be revised to respond to the concerns raised and recirculated to allow regulatory agencies and the public to comment on it. See also attached statement.

Timothy F. Buck
Signature of Appellant

March 29, 2021
Date

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PLN # _____ CASE # _____ PRJ # _____
DESCRIPTION _____
DATE APPEAL RECEIVED: _____ APPEAL FEES: \$ _____ RECEIVED BY: _____



Reasons for Appeal Regarding BZA and Hearing Officer's Determinations Regarding FEIR and CUP #6222 - Arroyo Seco Canyon Project

The Arroyo Seco Foundation, together with Pasadena Audubon Society, Hugh Bowles, and Ken Kules join in appealing the Board of Zoning Appeal's Modification to Conditional Use Permit #6222 and Hearing Officer Paul Novak's previous Certification of the Final Environmental Impact Report (SCH #2014101022) and the adoption of CEQA Findings and a Mitigation Monitoring and Reporting Program for the proposed Arroyo Seco Canyon Project (the Project).

We believe the Arroyo Seco Canyon Project, as proposed, will have detrimental impacts on the habitat, wildlife and water resources in Hahamongna and the Arroyo Seco.

We urge the City of Pasadena to protect the natural character of our region's greatest environmental treasure by:

1. using a living stream to capture storm flows and protect precious habitat;
2. ensuring an adequate environmental flow for fish and wildlife during the dry season beginning in the late Spring; and
3. committing to a plan to stabilize and replenish the Raymond Groundwater Basin.

Please review the issues we have detailed below that we believe require a recirculation of the EIR.

• Concerns of Responsible Agencies

Public Resources Code section 21080.4(a) clearly requires that information specified by a responsible agency, such as the CA Department of Fish and Wildlife, "shall be included" in the EIR. CDFW provided specific directions to PWP regarding the inadequacy of surveys conducted for fish and species of concern in their comments on the DEIR and the FEIR in the letter of January 6, 2021 that have not been noted or responded to in the FEIR, by the Hearing Officer or by the Board of Zoning Appeals.

It is not sufficient to hold that such directions and requirements will be handled during the permitting process because CEQA requires that responsible agencies should be able to rely on the evidence and measures contained in the FEIR for their regulatory purposes.

• Hydrology Impacts

Evaluation of the ASCP on hydrology and The Raymond Basin requires quantitative analysis of three conditions:

- The amount of “new water” that will be captured by the diversion that would not otherwise have percolated in the stream or behind Devil’s Gate Dam
- The amount of pumping credits that the ASCP will “earn” based on the Raymond Basin Judgment and rules established by the Raymond Basin Management Board
- The efficiency of spreading basins compared to the conservation that naturally occurs in alluvial streamzones like Hahamongna.

If the amount of pumping credits exceeds the “new water” from the ASCP, there would be an adverse impact on the Raymond Basin. The Draft EIR makes no effort to address the first condition and the Final EIR attempts to address it in a vague analysis but does not quantify the amount. No effort is made by the DEIR or FEIR to quantify the pumping credit amount.

CEQA requirement regarding recirculation of the Draft EIR

The following CEQA language informs decisions regarding adequacy of a **Draft EIR** (emphasis added):

15088.5. RECIRCULATION OF AN EIR PRIOR TO CERTIFICATION

(a) A lead agency is **required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review** under Section 15087 but before certification. As used in this section, the term “information” can include changes in the project or environmental setting as well as additional data or other information. **New information added to an EIR is not “significant” unless the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project** or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project’s proponents have declined to implement. **“Significant new information” requiring recirculation include, for example, a disclosure showing that:**

- (4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.**

In this case, it is clear that sufficient information was not included in either the Draft or Final EIRs to provide for meaningful public review and comment of the impacts on the Raymond Basin. The Draft EIR must be recirculated as required by CEQA Section 15088.5.

- **Failure to address that there will be an adverse and significant impact on the Raymond Basin groundwater.**

Ken Kules’ comments on the FEIR indicate that there could be an adverse impact on Raymond Basin groundwater as a result of ASCP operations. That impact has not been acknowledged or addressed by the Hearing Officer or BZA, and mitigation has not been proposed. The analysis

discussed in Mr. Kules' FEIR comments on pp. 11-13 concludes that the adverse impact is significant and a Finding of Overriding Considerations is required for the ASCP to proceed. The Hearing Officer failed to make a technically-based rational judgment concerning the validity of the City's assertion that Mr. Kules' comment on the FEIR (p.11) is "inaccurate." Without providing substantial reasons, the Hearing Officer accepted the City's dismissal of Mr. Kules' analysis. This, despite Mr. Kules' rigorous granular analysis and modeling of likely conditions.

In addition, the Hearing Officer did not provide substantial justification for accepting the City's disregard for the changed operation of Devil's Gate Dam and reservoir regarding the impact of ponding of water behind the dam during the Spring as required by the settlement of ASF vs. Los Angeles County Flood District, the Hahamongna sediment management program.

- **Failure to Provide for Fish Passage or Adequate Streamflow to Accommodate Potential Fish Populations.**

The FEIR concedes that the project fails to comply with Fish & Game Code sections 5931 and 5937, which require that free passage over or around any dam as well as sufficient streamflow be allowed to pass over, around or through a dam to accommodate "any fish that may be planted or exist below the dam." (FEIR at 2-177.)

The EIR takes the position that compliance with sections 5901 and 5937 is contingent upon the City locating native fish within 1,500 feet upstream to 2,000 feet downstream of the Project Site. (DEIR at ES-18.) The California Department of Fish & Wildlife, however, found that the City's finding is specious and is based upon an inadequate survey that fails to comply with California regulatory requirements (FEIR at 2-23). The Project clearly violates sections 5931 and 5937 which require that passage and streamflow be adequate for any fish, native or otherwise, that may exist downstream of the dam irrespective of whether the City's perfunctory search of them may happen upon one.

The environmental review should consider that the lack of any consideration of seasonal flow availability during dry months and the taking of water that is already limited in dry months by PWP diversions imperils fish at their most vulnerable period.

It is also concerning that the FEIR does not consider that rapidly changing climate conditions are likely to exacerbate the dry conditions for fish and aquatic species.

- **Failure to include information lawfully required Information in the FEIR about the Potential Presence of Fish in the Arroyo and to Support its Finding that No Fish are in the Arroyo with Substantial Evidence**

The Arroyo Seco Foundation and others who commented in the FEIR noted the glaring deficiencies in the FEIR's fish information and interpretation of the California Fish & Game

Code (ASF p9). As the California Department of Fish & Wildlife notes, surveys were only conducted for southern steelhead and rainbow trout and not for any fish populations in general. (FEIR at 2-23.) In addition, California Department of Fish & Wildlife found that the methods utilized to conduct the wildlife surveys were inadequate and that the methods utilized by the City “can miss fish that may be hiding between boulders, below undercut banks, or in shadowed areas of the stream.” (*Id.*) Neither the Hearing Officer nor the BZA, however, noted these comments, or questioned City staff about them, or responded to them in any way.

Failure to conduct adequate surveys for wildlife is more than just an omission of information. It represents a failure to adequately describe an environmental baseline, as well as a failure to supply substantial evidence to support the City’s finding that there are no fish in the Arroyo.

MM Bio-7 has been substantially revised in the FEIR, but the measure misstates CA Fish & Game Code 5932 and 5937, narrows the requirements contained therein, and sets infeasible conditions for a purported future compliance.

Neither the hearing officer or the BZA discussed these concerns in their decisions. Resolution No. 2021-01 says that the evidence considered “included the Final EIR, including the public comments about environmental impacts that were made on the Draft Environmental Impact Report prepared for the Project” but does not cite consideration of comments made on the FEIR or responses to them.

The FEIR Deprived the Public of a Meaningful Opportunity to Comment Upon Changes in the Project, Environmental Setting, Mitigation Measures and Other Critical Data.

The FEIR makes numerous changes to the EIR including modifying “areas of known controversy,” project objectives, new and previously undisclosed biological impacts to special status species, as well as new mitigation measures that could have undisclosed environmental impacts by themselves. (FEIR 3-1 – 3-12). In addition, the FEIR modified the environmental setting, noting previously undisclosed information concerning cultural resources on the Project Site.

Of special significance is that the FEIR added a whole new area of controversy as to whether “percolation rates in the spreading basins are poor.” The efficacy and efficiency of spreading basins as a means of recharging groundwater resources goes to the core project objectives, and the FEIR must be recirculated with information as to the City’s analysis regarding the percolation rates in spreading basins.

The FEIR fails to note recent sightings of a family of the endangered Least Bell's vireo in the downstream area that will be impacted by increased diversions. The FEIR does not note the presence of an entirely new sensitive status species, mountain lion, which demonstrates that the FEIR omitted crucial information that was required to be included in the Draft EIR regarding the environmental baseline. In another development, eDNA results in 2019 discovered the presence of the California Newt, another species of special not found in the EIR survey. These findings also require recirculation due to modifications in the environmental setting. (FEIR 3-2 – 3-3.)

The FEIR also adds additional mitigation activities that require environmental analysis. MM-BIO-4 mentions the establishment of white alder-California sycamore woodland in Area 1 without describing or analyzing the activities necessary to establish this particular habitat, activities that could have significant environmental impacts. MM-BIO-6 mentions the establishment of jurisdictional waters within Area 1, additional activities that could have significant environmental impacts that are not described in the current FEIR.

The only remedy for these failures is recirculation of the EIR with regard to these issues.

Mr. Kules raised the point with regard to CEQA Section 15088.5 requirements in his comments on the FEIR that *"the California Environmental Quality Act (CEQA) requires that the EIR be recirculated to provide opportunity to disclose the impacts."*

Section 21092.1 of the California Public Resources Code requires that "[w]hen significant new information is added to an environmental impact report after notice has been given pursuant to Section 21092 ... but prior to certification, the public agency shall give notice again pursuant to Section 21092, and consult again pursuant to Sections 21104 and 21153 before certifying the environmental impact report" in order to give the public a chance to review and comment upon the information. (CEQA Guidelines § 15088.5.)

Significant new information includes "changes in the project or environmental setting as well as additional data or other information" that "deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative)." (CEQA Guidelines § 15088.5(a).) Examples of significant new information requiring recirculation include "new significant environmental impacts from the project or from a new mitigation measure," "substantial increase in the severity of an environmental impact," "feasible project alternative or mitigation measure considerably different from others previously analyzed," as well as when "the draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." (*Id.*)

An agency has an obligation to recirculate an environmental impact report for public notice and comment due to “significant new information” regardless of whether the agency opts to include it in a project’s environmental impact report. (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 95 [finding that in light of a new expert report disclosing potentially significant impacts to groundwater supply “the EIR should have been revised and recirculated for purposes of informing the public and governmental agencies of the volume of groundwater at risk and to allow the public and governmental agencies to respond to such information.”].) If significant new information was brought to the attention of an agency prior to certification, an agency is required to revise and recirculate that information as part of the environmental impact report.

The Hearing Officer's failure to discuss the issues raised here and BZA’s subsequent action have resulted in a CEQA administrative record that is sorely lacking, and an EIR that must be recirculated.

Denial of Administrative Due Process

At the hearing before the Board of Zoning Appeals, Assistant City Attorney Teresa Fuentes interceded improperly after the public hearing was closed to misstate CEQA requirements in a “successful” effort to bend the decision of Board. We appellants were not given the right to respond to her interpretation of CEQA and her misstatements as to whether we had offered alternatives for consideration. In that hearing, we were also denied other measures that were accorded to PWP, such as the opportunity to present slides illustrating our concerns and to respond and rebut statements at some length. It should also be noted that planning staff openly admitted that PWP had played a major in shaping and writing their staff report because of the “complexity of the issues.” We appellants were given no such privilege regarding the development of a staff report that should have been an objective review of our concerns.

The inherent inequity of the process illustrates the one-sided, defensive nature of the FEIR review and the clear denial of due process to concerned citizens.

Conclusion

These significant gaps in the FEIR and the omission of important information have deprived the public of a meaningful opportunity to understand and comment upon the impacts of the Project and the changes in it. The Hearing Officer’s determination and the findings of the BZA should be withdrawn. The EIR should be revised to respond to these concerns and other pertinent considerations and recirculated to allow agencies and the public to comment on the Projects and its impacts in a fair and science-based process.

References:

- Arroyo Seco Foundation Comments on ASCP FEIR
- Comments of Ken Kules on ASCP FEIR