

November 12, 2024

**Via Email**

San Luis Obispo Local Agency Formation  
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*Re: Dana Reserve Annexation*

Honorable Commissioners:

this office represents the Nipomo Action Committee (“NAC”), on whose behalf I submit these comments regarding the proposed annexation of the Dana Reserve (“Project” or “Dana Reserve”) to the Nipomo Community Services District (“NCSD” or “the District”). NAC is opposed to the proposed annexation and urges you to deny it because Dana Reserve is located outside the District’s service area. The supplemental water transfer that the NCSD has identified as the water supply for this project was specifically earmarked for infill development by NCSD’s existing customers and landowners within the NCSD’s current boundaries and therefore cannot be used for a project outside of the NCSD’s boundaries.

Moreover, contrary to NCSD’s contention and past commitments, there is no substantial evidence to show NCSD’s current supplies, including supplemental water from Santa Maria, is sufficient to support existing residents **and** all potential infill development within the District if the 500 AFY supplemental water is dedicated to Dana Reserve.

Finally, because of the recent discovery of a new and highly threatened species of Manzanita in Nipomo, LAFCO must undertake supplemental environmental review before it can consider approving the annexation.



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## **A. Background**

All new residential development in Nipomo must rely on the 500 Acre-foot-per year (AFY) (Phase II) water transfer from Santa Maria. As NCSD argued in its September 18, 2024 letter<sup>1</sup> to LAFCO, this 500 AFY was unambiguously reserved by NCSD itself to serve infill development within NCSD's jurisdictional boundaries and existing customers. The proposed annexation proposal abandons this commitment and instead, promotes sprawl development within the Sphere of Influence. The proposed annexation, therefore, is legally infeasible and contrary to LAFCO and NCSD's own established policies favoring infill development.

Despite the NCSD's extensive comments, the Staff Report completely ignores the issue and fails to explain why it is appropriate for LAFCO to approve the proposed annexation despite the legal cloud over NCSD's ability to lawfully supply water to this project.

## **B. Because the 500 AFY Phase II water transfer from Santa Maria to NCSD is earmarked exclusively for infill development, the NCSD does not have the legal ability to supply water to the Project.**

In its September 18, 2024 comment, NAC painstakingly demonstrated that the 500 AFY water transfer (Phase II) was specifically earmarked for infill development. The evidence cited in the NAC comments include NCSD's environmental impact report (EIR) for the supplemental water project. The NAC letter also pointed out that the August 27, 2024, NCSD Staff Report acknowledged that the supplemental water project EIR explicitly describes the 500 AFY Phase II transfer can be used only for serving projects within the NCSD's existing boundaries and current customers. NAC pointed out that according to the text of the NCSD's 2009 Final EIR, any projects within the NCSD's Sphere of Influence must rely on Phase III water transfer from Santa Maria.

*Phases I and II of the proposed project [i.e. the Santa Maria Supplemental Water Project] will be separately approved and funded by authorization of the NCSD Board of Directors. **Phases I and II totaling 3,000 acre-feet per year will supply water***

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<sup>1</sup> / NAC hereby incorporates its September 18, 2024 letter to LAFCO into the record.

*only to customers within the current NCSD boundaries and other water purveyors in the NMMA. Only in Phase III totaling an additional 3,200 acre-feet per year of supplemental water will be made available to new customers in the 2004 Sphere of Influence Areas that are annexed into the District.*

(2009 Waterline Intertie FEIR, p. III-6. (italics in the original, bold emphasis added.)

Similarly, a 2012 Addendum to the 2009 FEIR similarly confirmed that District's ongoing commitment to restricting the use of the 500 AFY supplemental water: "Phase I and II will supply water only to customers in current NCSD boundaries and other purveyors in the NMMA [namely Woodlands Mutual and Golden State]." (2012 Addendum, p. III-3.)

The prohibition against using Phase I and II water transfers to support projects within the Sphere of Influence is also reflected in the Supplemental Water Management and Groundwater Replenishment Agreement ("SWMGRA"), which is a binding contract signed by the NCSD, Golden State Water Co., Rural Water Company and Woodlands. The SWMGRA specifically prohibits all signatories from using any Phase I and II waters to supply projects outside the parties' existing boundaries: "the Nipomo Supplemental Water delivered to the Parties [which includes the NCSD] pursuant to this Agreement **shall be used exclusively for the benefit of the properties within the existing jurisdictions and service areas of the parties** and in accordance with the Judgment and Stipulation." (*Ibid*, emphasis added.)

The current Staff Report fails to analyze or to otherwise respond to NAC's evidence and arguments concerning the NCSD's legal obligation to restrict the use of the 500 AFY Phase II transfer for infill development. Staff ignores the fact that despite now claiming the 500 AFY Phase II transfer "represented plans and estimates at the time based on water use in the early 2000's, and not a legal restriction," [NCSD Staff Report at p. 7], the NCSD has never taken any formal action to lift the prohibition against the use of Phase II water for Sphere of Influence Projects, or evaluate and analyze its potential environmental impacts.

**C. Staff has failed to analyze whether the NCSD can support all infill development if it commits the bulk of the 500 AFY Phase II transfer to Dana Reserve.**

There is no substantial evidence to support the NCSD's claim that even without the 500 AFY Phase II transfer, the District would have sufficient water supplies to accommodate **all** potential infill growth within its boundaries.

In its September 18, 2024 letter, NAC argued that approving the Dana Reserve annexation application could not be reconciled with LAFCO Policy 2.3.2, which provides that “[p]rior to annexation of territory within an agency’s Sphere of Influence, the Commission encourages development on vacant or underutilized parcels already within the boundaries of a jurisdiction.” NAC also argued that LAFCO must also consider Gov. Code §56668(d), which requires LAFCO to consider the proposed annexation’s anticipated effects on “policies on providing planned, orderly, efficient patters of urban development...”

In support of its argument, NAC pointed out the 2018 Municipal Service Review (“2018 MSR”) acknowledged that the NCSD did not have an adequate water supply to serve the anticipated build-out under the current General Plan and the sphere of influence areas. 2018 MSR, p. 3-46. The 2018 MSR warned that “future annexations should be carefully considered with a focus on the NCSD’s ability to provide reliable, adequate, and sustainable water service.” (*Ibid.*)

The Staff Report uncritically and exclusively relies on the NCSD’s own self-serving assertions in this regard. At the September 19, 2024 hearing, this Commission, however, was so concerned about this issue that it asked NCSD to provide an up-to-date build out inventory as required by Policy 2.3.2. (See, Staff Report Attachment B, page 14.) The Staff Report explains that “NCSD provided a buildout inventory on October 23, 2024, and is included as Attachment S to this staff report.” (*Ibid.*)

A Close review of Attachment S, however, reveals that rather than providing an

updated buildout inventory, the NCSO has merely relied on the same tables and data that is included in its 2021 UWMP. The evidence shows that the data contained in NCSO's buildout inventory is inconsistent with San Luis Obispo County Housing Element and the San Luis Obispo Council of Government's 2019 Regional Housing Needs Allocation Plan (2019 RHNA Plan.)

For example, based on Table-3-3, the NCSO claims "there are a total of 259 parcels, representing 646 gross acres, that are not currently served or are undeveloped within the District's current service area." (Attachment S, at page 1.) This claim, however, cannot be reconciled with the information contained in the SLO County Housing Element Tables 7-5, 7-6 and 7-7, which includes an inventory of parcels in Nipomo that are appropriate for developing moderate, low and very low-income housing. The Housing Element identified these parcels in order to prove the County has enough appropriately designated parcels to meet the County's RHNA obligations. Although these tables reflect only a partial inventory of all buildable parcels in Nipomo, they still show a greater inventory of unbuilt parcels than are listed by NCSO in the 2021 UWMP. While NCSO Table 3-3 show a total of only 14 acres of parcels designated as Residential multi-family and another 60 acres of Residential Single Family, the Housing Element tables identify a total of 26.09 acres of unbuilt Residential Multi-family and a total of 88.43 acres of Single-Family parcels in Nipomo<sup>2</sup>. Accordingly, NCSO appears to underestimate total acreage of unbuilt residential parcels in Nipomo.

Another significant inconsistency exists between the NCSO 2021 UWMP's population growth projections and the estimates provided by the SLOCOG 2019 RHNA Plan. According to the NCSO and the 2021 UWMP (Table 3-1a, Staff Report, Attachment B, page 2) the NCSO's projected 2045 population without Dana Reserve is 16,031. However, according to the 2019 RHNA Plan's projection (Table 11) the

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<sup>2</sup> / A comparison of the Housing Element housing inventory map and the NCSO 2020 District Map shows that the inventory parcels identified in the Housing Element appear to be within the jurisdiction of the NCSO.

buildout population within the Nipomo Urban Reserve Line (URL) without Dana Reserve is 23,462. Although it is possible that some of the population growth within the URL may be outside the NCS D boundaries, this evidence suggests that the NCS D's population growth predictions may be grossly underestimated.

Another murky area that warrants further investigation is the question of whether the NCS D's growth predictions are based on unbuilt parcel's existing land use designations and zoning densities, or whether the NCS D's projections take into account the parcels' realistic density potential that can be achieved with general plan amendments and upzoning. The Dana Reserve Project itself is a prime example of a project which whose original land use designation was rural residential with limited density potential, but was subsequently upzoned to allow much denser development. There is no evidence in the record to show the NCS D's population and buildout estimates take into account realistic upzoning potential.

**D. Annexation of the Dana Reserve Project violates LAFCO policies**

As explained above, approving the Dana Reserve annexation would be inconsistent with LAFCO Policy 2.3.2, which requires LAFCO to prioritize infill development on vacant or underutilized parcels instead of annexation.

Annexation of Dana Reserve is also inconsistent with the regional transportation plan and the San Luis Obispo Pollution Control District's Clean Air Plan ("SLOAPCD CAP") because it exacerbates the existing job-housing imbalance in the area and substantially increases the regional Vehicle Miles Travelled (VMT) threshold. No mitigation measures have been identified that would reduce these impacts to below applicable thresholds. (Dana Reserve FEIR at p. 4.3-27.)

Because the Dana Reserve is outside the URL and far away from job centers, the Project significantly increases vehicle miles travelled (VMT) and is therefore inconsistent with several transportation and climate goals and policies.

Finally, annexation would also be inconsistent with LAFCO Policy 2.3.8, which requires the District to show it has the capability of meeting the need for services.

Here, the evidence in the record does not support a finding that the NCSD can lawfully meet the water supply needs of Dana Reserve.

**E. Because of the discovery of a new species of manzanita (*Arctostaphylos*) in Nipomo, as a responsible agency, LAFCO must undertake supplemental environmental review.**

As you likely know, a study submitted to LAFCO by Dr. William Waycott, PhD, California Native Plant Society, describes the discovery of a new species of manzanita (*Arctostaphylos*) in Nipomo. Individual specimens of this unique species have been identified at Dana Reserve. Dr. Waycott has argued forcefully that this species faces an existential threat because of the fragmented nature of its existing habitat. Accordingly, the proposed Dana Reserve Project could potentially jeopardize the continued survival of this species because approximately half of the 700 known specimens are located on the Dana Reserve property.

Under the California Environmental Quality Act (CEQA), a responsible agency such as LAFCO must conduct a supplemental environmental review if new information becomes available that was not known and could not have been known at the time the original Environmental Impact Report (EIR) was certified as complete, and this new information shows that the project could have new or more severe significant effects on the environment (Silverado Modjeska Recreation & Park Dist. v. County of Orange (2011) 197 Cal.App.4th 282, 304).

Specifically, Pub. Res. Code Section 21166 states that no subsequent or supplemental EIR will be required unless one of the following events occurs: (a) substantial changes are proposed in the project which will require major revisions of the EIR, (b) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the EIR, or **(c) new information, which was not known and could not have been known at the time the EIR was certified as complete, becomes available.** (Moss v. County of Humboldt (2008) 162 Cal.App.4th 1041)(emphasis added.)

The discovery of a new rare or potentially endangered species qualifies as "new information" under Section 21166(c), necessitating a supplemental EIR, because this new information indicates that the project will have a new or more severe significant effect on the environment (Silverado Modjeska, supra, 197 Cal.App.4th at 305. "[T]he Guidelines clarify that the new information justifying a subsequent EIR must be 'of substantial importance' and must show that the project will have 'significant effects not discussed in the previous EIR or negative declaration,' that '[s]ignificant effects previously examined will be substantially more severe' than stated in the prior review ...") Moreover, it has been held that recirculation of an uncertified EIR "is 'not required where the new information added to the EIR 'merely clarifies or amplifies [citations] or makes insignificant modifications in [citation] an adequate EIR.'" (Id. at 302.)

In the present case, information about the discovery of an extremely rare species that is facing imminent extinction constitutes extremely significant new information that has not and could not have been previously analyzed in the EIR. LAFCO must carefully consider this new information because the recent discovery of a new species does not merely clarify or amplify information already discussed in the EIR; this new information must be considered in the context of reevaluating the Project's impact on biological resources and consideration of potentially feasible alternatives and mitigation measures.

### **Conclusion**

For all of these reasons, NAC and its hundreds of members urge LAFCO to deny annexation of Dana Reserve. Moreover, even if the Commission is inclined to consider approving the proposed annexation, as a responsible agency, LAFCO must first undertake supplemental environmental review of the new information concerning the discovery of a new, extremely rare and imperiled species of Manzanita.



Sincerely,

*Babak Naficy*

Attorney for Nipomo Action Committee

Attachments:

- A. Excerpts from Housing Element
- B. Excerpts from 2019 SLOCOG RHNA Plan