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November 21, 2014 (Second of Two)

By Email to: kelli.cahill@countyofnapa.org

Ms Kelli Cahill, Project Planner
County of Napa
Planning, Building and Environmental Services Department
Engineering and Conservation Division
1195 Third Street, Suite 210
Napa, CA 94599-3092

Re: Draft EIR for Walt Ranch Erosion Control Plan Application No. P11-00205-ECPA

Dear Ms. Cahill:

This office represents Living Rivers Council (“LRC”) with respect to the Draft EIR for the Walt Ranch Erosion Control Plan Application No. P11-00205-ECPA. LRC objects to County approval of the Project for the reasons described in this letter and my previous letters.

1. The DEIR Fails as an Informational Document with Respect To Project Impacts on Oak Woodlands.

The DEIR’s analysis of impacts on oak woodlands is arbitrary and incoherent.

For example, the DEIR says that the impact on black oak woodlands is “potentially significant” because the Project proposes to harvest 38.3 acres out of 317.51 acres (12%) of black oak woodlands on the property. (DEIR pp. 4.2-87-88.) The DEIR finds that not harvesting 2.5 acres of these 38.3 acres will reduce this impact to “less-than-significant.” (DEIR pp. 4.2-87-88.) But the DEIR provides no factual basis, or really any explanation at all, for the proposition that while harvesting 38.3 acres is significant, harvesting “only” 35.8 acres is less-than-significant. The DEIR provides no threshold of significance that would explain this result.

Indeed, the DEIR provides no information about the specific locations where the 2.5 acres are located that would explain the shift in conclusion from “significant” to “less-than-significant.” In short, the less-than-significant finding is a bald conclusion without any factual support whatsoever. “An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences.” (Guidelines, § 15150.) This DEIR’s treatment of black oak woodlands does not meet this standard.

The same analysis applies with respect to blue oak and valley oak woodlands. For blue oaks, the Project proposes to harvest 6.26 acres (33.86%) of blue oak woodlands on the property. (DEIR pp. 4.2-88.) The DEIR finds that not harvesting 3.6 acres of these 6.26 acres will reduce this impact

to “less-than-significant.” (DEIR pp. 4.2-87-89.) Again, the DEIR provides no explanation for the proposition that while harvesting 6.26 acres is significant, harvesting “only” 2.6 acres is less-than-significant.

For valley oak woodlands, the Project proposes to harvest 6.34 acres (20.58%) out of 317.51 acres of valley oak woodlands on the property. (DEIR pp. 4.2-88.) The DEIR finds that not harvesting 6.3 acres of these 38.3 acres will reduce this impact to “less-than-significant.” (DEIR pp. 4.2-87-88.) Again, the DEIR does not explain why harvesting 38.3 acres is significant, but harvesting “only” 30.8 acres is less-than-significant.

These numbers are presented without context; therefore, they have no meaning.

Finally, the DEIR claims the Project is exempt from the Oak Woodlands Conservation Act. (DEIR, p. 4.2-70.) Even assuming, arguendo, that this is true, the DEIR does not contend, nor could it, that the Project’s impacts on oak woodlands are somehow exempt from the remainder of CEQA.

2. The DEIR Fails as an Informational Document with Respect to Cumulative Impacts.

The DEIR must evaluate the Project’s cumulative impacts.

“Cumulative impacts” refer to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. (a) The individual effects may be changes resulting from a single project or a number of separate projects. (b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

(Guidelines, § 15355.)

a. The DEIR fails to disclose relevant information regarding the environmental setting regarding and fails to use the best available information to assess the Project’s cumulative impacts on biological resources.

The DEIR selects a small geographic area for its assessment of the Project’s cumulative impacts, without any explanation as to why this area is appropriate for purposes of understanding how the effects of the Project may combine with the effects of past, present and future projects to impact biological resources. As a result, the cumulative effect discussion is truncated to the point of irrelevance.

The DEIR makes no effort to quantify or locate wildlife habitat or vegetation community loss and fragmentation, either in the County as a whole, in the limited “cumulative environment” selected

in the DEIR, or on any other geographic scale. As a result, the DEIR fails to assess how this Project threatens to further fragment important wildlife habitat and vegetation communities and to disrupt remaining habitat corridors that connect areas of intact wildlife habitat in this landscape.

A more informative approach is described in “A Modeling and Geospatial Approach to Predicting Effects on Biodiversity Due to Vineyard Expansion in Napa County, A Thesis Presented to the faculty of the Department of Biological Sciences California State University, Sacramento Submitted in partial satisfaction of the requirements for the degree of Master of Science in Biological Sciences (Biological Conservation)” by Eric E. Link.¹ (Reference 21 submitted with my first letter of today’s date.)

Mr. Link used standard data sources to characterize Napa County’s land base on a number of dimensions and values to determine where vineyard development in the County is likely, where wildlife habitat has been fragmented, and to identify critical “wild land corridors” that connect remaining fragments of intact wildlife habitat. (Reference 21, pp, iv-vi.)

The connectivity of wild land corridors and how vineyard development might disrupt them was also analyzed. Application of the predicted vineyard expansion model allowed for the identification of corridors in danger of disruption by detecting patterns in fragmentation of species rich areas due to an increase in vineyard development. Visual analysis of corridor disruption allowed for the prioritization of species rich patches (Bender et al., 1998).

¶ Species rich patches that were found to be highly fragmented were the focus of identifying wildlife corridors between such patches. California Department of Fish and Game (CDFG) developed a dataset called “ACE-II biological richness” for ecologic regions within California. The dataset ordinales species rich areas from 1-5 where five is the most species rich. Six taxonomic groups: birds, fish, amphibians, plants, mammals, and reptiles were evaluated by CDFG for the development of the dataset. Locational information on wetlands, riparian, rare upland natural communities and high value salmonid habitat were also evaluated to determine distribution of species richness and rarity (ACE-II, 2011).

This study combined four GIS spatial datasets from the ACE-II database (Central Coast, Northern Coast, Northern Coast Ranges, and Northern Interior Coast Ranges) in order to obtain a complete species richness dataset for Napa County.

(Reference 21, pp. 30-31.)

The results of Mr. Link’s careful review of the available data are that: “GIS analyses of the

¹Neither Living Rivers Council nor its undersigned counsel have ever retained or spoken to Mr. Link at any time for any purpose.

species richness dataset revealed five areas within the County and are shown in Figure 5" (Reference 21, pp. 31) and:

Five core species rich regions were identified from the ACE-II database as being highly fragmented by vineyard expansion (Figure 6). Analyzing the five regions revealed thirty-nine potential corridors linkages. ... Region 2 had four creeks (Capell Creek, Milliken Creek, Sarco Creek, and White Creek) and five designated linkages as potential wildlife corridors. Capell Creek and Sarco Creek provided connectivity to the most fragmented areas.

In her letter report, Dr. Padgett-Flor shows that the Walt Ranch property is located almost entirely within the fragment of species rich habitat area designated "Region 2" by Link. See Figure 1 on page 18 of Exhibit 16 to my previous letter of today's date. Therefore, this Project directly threatens crucial remaining habitat connecting corridors.

In contrast to Mr. Link's thesis, the DEIR does not quantify or locate wildlife habitat or vegetation community loss and fragmentation, either in the County as a whole, in the limited "cumulative environment" selected in the DEIR, or on any other geographic scale. Therefore, the DEIR fails to lawfully assess how this Project threatens to further fragment important wildlife habitat and vegetation communities and to disrupt remaining habitat corridors that connect areas of intact wildlife habitat in this area.

Instead, the DEIR uses a thoroughly discredited methodology to conclude the Project's cumulative effects on biological resources are less than significant. For virtually every biological resource consisting of distinct vegetation communities, habitat type, or species of fish and wildlife that the DEIR finds will suffer potentially significant impacts before mitigation (i.e. Impacts 4.2-1, 4.2-2, 4.2-4, 4.2-5, 4.2-6, 4.2-7, 4.2-8, 4.2-9, 4.2-10, 4.2-11, 4.2-13, 4.2-14, 4.2-15, 4.2-16), the DEIR finds that the Project's direct or incremental impacts will be less-than-significant after mitigation. The mitigation measures for these impacts vary somewhat depending on the resource, but they also bear many similarities, e.g., avoidance and preservation of portions of the resources or its habitat, buffer areas, etc. Regardless, all of these mitigation measures allow some level of adverse impact to all of these resources, even if the DEIR claims the level of impact is less-than-significant.

The DEIR's conclusion that the Project's cumulative impacts on all of these resources (i.e., Impacts 4.2-1, 4.2-2, 4.2-4, 4.2-5, 4.2-6, 4.2-7, 4.2-8, 4.2-9, 4.2-10, 4.2-11, 4.2-13, 4.2-14, 4.2-15, 4.2-16) is less-than-significant is based on the explanation that the mitigation measures identified in Chapter 4 to reduce the Project's incremental impacts on each of these resources will ensure that the Project's cumulative impacts on each of these resources will be less-than-significant.

This represents a fundamental legal error in applying the definition of cumulative impacts. The DEIR's approach is similar to the position taken by the Department of Forestry and rejected by the Court of Appeal in *Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604, where the Court stated:

“To address the cumulative effect issue the Department has taken the tact [sic] that if the adverse effects are minimized to the maximum on each individual operation, then the total effect in the surrounding area will also be minimized to an acceptable level.” This statement is at odds with the concept of cumulative effect, which assesses cumulative damage as a whole greater than the sum of its parts.

(*Id.* at pp. 624-25.) Stated another way, “Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.” *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 117 (“*Communities*”). Thus, the DEIR’s assumption that mitigating each of these incremental impacts of the Project to “less-than-significant” somehow avoids significant cumulative impacts on each of these resources is inconsistent with governing case law.

The significance of a cumulative impact depends on the environmental setting in which it occurs, especially including the severity of existing environmental harm. *Communities*, 103 Cal.App.4th at p. 120 “[T]he relevant question”... is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether “any additional amount” of effect should be considered significant in the context of the existing cumulative effect. [footnote omitted] In the end, the greater the existing environmental problems are, the lower the threshold should be for treating a project’s contribution to cumulative impacts as significant. [footnote omitted]”; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-721.)

Instead of correctly applying these principles, this EIR ignores the history of habitat fragmentation surrounding the Walt Ranch so ably documented by Mr. Link.

The DEIR also states that “Although vineyards only provide limited habitat value for wildlife, local regulations ensure that installation of vineyards does not necessarily represent a total loss of habitat for wildlife.” (DEIR p. 6-21.) To the extent the DEIR implies that compliance with Napa County’s regulatory standards will avoid significant impacts, this suggestion is also inconsistent with governing case law. (See, e.g., *Californians for Alternatives to Toxics v. Department of Food & Agriculture* (2005) 136 Cal.App.4th 1, 16 (lead agencies must review the site-specific impacts of pesticide applications under their jurisdiction, because “DPR’s [Department of Pesticide Regulation] registration does not and cannot account for specific uses of pesticides..., such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas targeted for application, and the like”); *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1587-1588 (state agency applying pesticides cannot rely on pesticide registration status to avoid further environmental review under CEQA); *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal.App.3d 872, 881-882 (rejects contention that project noise level would be insignificant simply by being consistent with general plan standards for the zone in question). See also *City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal.App.3d 1325, 1331-1332 (EIR required for construction of road and sewer lines even though these were shown on city general plan); *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712-718 (agency erred by “wrongly assum[ing] that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the

overall project would not cause significant effects to air quality”).)

As the Court of Appeal recently held:

[I]n preparing the EIR, the agency must determine whether any of the possible significant environmental impacts of the project will, in fact, be significant. In this determination, thresholds of significance can once again play a role. As noted above, however, the fact that a particular environmental effect meets a particular threshold cannot be used as an automatic determinant that the effect is or is not significant. To paraphrase our decision in *Communities for a Better Environment*, a threshold of significance cannot be applied in a way that would foreclose the consideration of other substantial evidence tending to show the environmental effect to which the threshold relates might be significant.

(*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109, citing *Communities*, *supra*, 103 Cal.App.4th at p. 114; accord *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322, 342 [“A threshold of significance is not conclusive ... and does not relieve a public agency of the duty to consider the evidence under the fair argument standard.”].)

b. The DEIR’s analysis of cumulative impacts fails to disclose all closely related past, present and reasonably foreseeable future projects.

CEQA Guideline 15130(b) provides:

The following elements are necessary to an adequate discussion of significant cumulative impacts:

(1) Either:

(A) A list of past, present, and probable future projects producing related or cumulative impacts, including, if necessary, those projects outside the control of the agency, or

(B) A summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect. Such plans may include: a general plan, regional transportation plan, or plans for the reduction of greenhouse gas emissions. A summary of projections may also be contained in an adopted or certified prior environmental document for such a plan. Such projections may be supplemented with additional information such as a regional modeling program. Any such document shall be referenced and made available to the public at a location specified by the lead agency.

(2) When utilizing a list, as suggested in paragraph (1) of subdivision (b), factors to consider when determining whether to include a related project should include the nature of each environmental resource being examined, the location of the project and its type. Location may be important, for example, when water quality impacts are at issue since projects outside the watershed would probably not contribute to a

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cumulative effect. Project type may be important, for example, when the impact is specialized, such as a particular air pollutant or mode of traffic.

The DEIR uses the “list of past, present, and probable future projects” method. (DEIR, pp. 6-7, Table 6-1). This list does not include past or present projects on slopes under 5%. (DEIR pp. 6-7, Table 6-1, footnote 1.) The 5% slope threshold is the trigger for a land disturbance project to require an Erosion Control Plan permit from the County.

This list is legally deficient because it is artificially limited to previous “ECP” projects. ECPs are only required for projects that involve land disturbance on slopes over 5%. The County regulatory thresholds for requiring an ECP are not valid thresholds for assuming that projects on slopes below 5% or not involving land disturbance do not have impacts that could combine with this Project’s impacts for purpose of causing cumulative impacts. There may be other projects that are “closely related” in terms of environmental impact but which did not or do not require an ECP. The lead agency must “use its best efforts to find out and disclose all it reasonably can” in a draft EIR. (Guidelines, § 15144; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428.) Therefore, the Draft EIR should be revised to include all past, present, and reasonably foreseeable future projects that may have impacts that could combine with this Project’s impacts.

One example of a reasonably foreseeable future project that the DEIR does not disclose is the recent purchase, by Hall Michigan Investors LLC, of property adjacent to the Walt Ranch. (See November 21, 2014, letter from Chris Malan of Living Rivers Council.) The Hall’s are apparently principals of both Hall Michigan Investors LLC and Hall Brambletree Associates, the applicant for this ECP. (Living Rivers Council’s November 21, 2014, letter.) The Halls are real estate developers. (Living Rivers Council’s November 21, 2014, letter.) In short, the same principals intend to develop homes and vineyards next to Walt Ranch, yet the DEIR fails to disclose this fact. As described in the November 21, 2014, letter from Living Rivers Council, development of this adjacent property, will, at a minimum, cause traffic impacts that combine with this Project’s impacts, and growth inducing impacts. The DEIR must be revised and recirculated to include this reasonably foreseeable future project in its assessment of cumulative impacts.

Thank you for your attention to this.

Very Truly Yours,



Thomas N. Lippe