



PC 4/27/17
#9
Charlene Tim <charlene.tim@edcgov.us>
4 pages

Fwd: Public Comment 4/26/17 for PC 4/27/17 Item 9

Anne Novotny <anne.novotny@edcgov.us>
To: Char Tim <charlene.tim@edcgov.us>

Wed, Apr 26, 2017 at 5:03 PM

----- Forwarded message -----

From: **Oak Staff** <oakstaff@californiaoaks.org>
Date: Wed, Apr 26, 2017 at 4:58 PM
Subject: Final Environmental Impact Report, General Plan Biological Resources Policy Update, Oak Resources Management Plan, and Oak Resources Conservation Ordinance
To: "anne.novotny@edcgov.us" <anne.novotny@edcgov.us>
Cc: Janet Cobb <jcobb@californiawildlifefoundation.org>

Dear Anne Novotny,

Please find attached a letter that I am submitting for Janet Cobb.

Best,

Angela Moskow

California Oaks Information Network Manager
California Wildlife Foundation/California Oaks
428 13th Street, Suite 10A
Oakland, CA 94612
www.californiaoaks.org
Office: (510) 763-0282
Mobile: (510) 610-4685

CaliforniaOaksLetter4_26_17EIDorado.pdf
2449K



April 26, 2017.

Anne Novotny, Senior Planner
County of El Dorado
Community Development Agency, Long Range Planning Division
2850 Fairlane Court
Placerville, CA 95667
(Via email: anne.novotny@edcgov.us)

RE: Final Environmental Impact Report, General Plan Biological Resources Policy Update, Oak Resources Management Plan, and Oak Resources Conservation Ordinance

Dear Ms. Novotny:

California Oaks works to conserve oak ecosystems because of their critical role in sequestering carbon, maintaining healthy watersheds, and providing sustainable wildlife habitat. We are concerned, having reviewed the responses to comments that agencies, organizations, and citizens have submitted, that El Dorado County is not interested in protecting the county's primary old growth resources—oaks—and the ecosystem services they provide.

- 1. California Environmental Quality Act (CEQA) applies to oak woodland removal regarding Greenhouse Gas (GHG) omissions.** The provisions of SB 1334 (Kuehl) exempted the conversion of oak woodlands on agricultural lands from the provisions of the legislation. Nonetheless, CEQA requires the analysis and mitigation of greenhouse gas emissions associated with a proposed oak woodland conversion. The County's analysis is therefore deficient in its calculation of disturbed acres. California Oaks also refers the County to a letter submitted by Quercus Group providing further comment on the deficiencies of the County's analysis.
- 2. Oaks on Agricultural Lands:** We were happy to read, on page three of the County's response (2-5) to the letter submitted by Elder Creek Ecological Preserve (8/9/16) that: *...there has only been a .8% reduction in oak woodland coverage in the ORMP study area since 2002.* It is in the interest of the county for oak resources on agricultural lands to remain standing. However, we challenge the presumption in the county's statement (2-5): *there is no substantial evidence in the record that current or forecasted agricultural activities will result in large-scale permanent oak woodland conversion.* The development pressures of the county and the statement (2-7), also in response to the Elder Creek letter point to the potential loss of oak woodlands that is unacceptable: *The commenter is correct in stating that the Agricultural Activities Exemption could allow for up to 132,281 acres of impact that are exempt from mitigation requirements.*

San Luis Obispo County recently adopted protections for oak woodlands on agricultural lands. Those protections, together with the Open Space Element of the General Plan and voluntary Oak

Woodland Management Plan, are giving the county tools for valuing and protecting its natural capital. We recommend that El Dorado County also value and protect its natural resources.

- 3. Consider Quality of Habitat and a Continuum of Protections.** California Department of Fish and Wildlife (CDFW) suggests in their excellent letter (8/22/16) that the county set a goal of no-net-loss of valley oak (*Quercus lobata*) natural communities because of their conservation status. In comments (4-34), County admits: *Although the comment is correct that the impact analysis in the DEIR shows a potential for up to 65% of the County's valley oak woodlands to be impacted . . . the actual amount of impact to valley oak woodlands would be reduced.*” We take no comfort in this assertion and suggest that good governance mandates upholding the public trust through a far higher level of protection for valley oaks.

The County’s response (4-26) to the CDFW letter regarding a suggested no-net-loss standard for oak woodlands illuminates the central problem with the planning process...*the Draft EIR considered an alternative that would require a no-net-loss standard for oak woodland, and found that the alternative would not be feasible because it would constrain development to the extent that it would prevent the County from fully implementing the General Plan.* The General Plan needs to be rewritten to align with a no-net-loss of the county’s primary old growth resource. Further evidence of the fallacy of advancing climate change and other environmental goals in the current iteration of the General Plan is reflected in the County’s statement: *The DEIR also noted that a no-net-loss policy could increase air pollution and greenhouse gas emissions by pushing development into the rural areas of the county, requiring residents to drive longer distances.* (4-26)

We would also like to address the assumption that mitigation far from an area of impact is adequate. The response to the letter (8/15/16) sent on behalf of Center for Sierra Nevada Conservation, California Native Plant Society (El Dorado Chapter), and Maidu Sierra Club states (4-4): *It is not necessary for mitigation to occur close to the area of impact. It is preferable to have conservation occur in areas that are not subject to threats of habitat fragmentation and associated edge effects.* While we applaud the County’s efforts to reduce habitat fragmentation we offer the caution that natural capital has a profound influence on many aspects the quality of life of its human and natural communities. A more nuanced approach is advisable. Other provisions to consider, which would also advance a continuum of protections, are:

Prohibit oak removal in areas designated as critical habitat, except for limited removal in order to ensure woodland health.

Provide a greater level of oak protections in areas that are important wildlife corridors, habitat for rare or native species richness (including valley oaks), irreplaceability, or sensitive habitat.

Prioritize habitat connectivity.

Prioritize the creation of open space for recreation and habitat: Open space has proven to be a tremendous asset in counties experiencing population growth. Examples of open space protections that include oak woodlands and oak forested lands can be found in the Sonoma County Agricultural Preservation and Open Space District (www.sonomaopenspace.org/) and the East Bay Regional Park District (<http://www.ebparks.org/>).

We also urge El Dorado County to look to other counties for ideas on revenue sources to sustain the natural environment. An example can be found in Contra Costa County, which levies a

Transfer Fee on sales of real property to raise funds for the county's purchase of natural habitat to meet its Natural Conservation Communities Plan (NCCP) commitments.

Require more stringent protections on lands under conservation easements. Conservation easements should protect oak woodland and oak-forested lands and their critical wildlife and other conservation functions.

4. **Environmental hazards:** Senate Bill 379 (Jackson), chaptered in 2015, mandates counties too *include a set of adaptation and resilience goals, policies, and objectives* in hazard mitigation and climate adaptation plans. Section (4) (VII) (C) of the legislation states that guidelines shall include: *(i) Feasible methods to avoid or minimize climate change impacts associated with new uses of land.* Later in this section the legislation states: *(v) Where feasible, the plan shall use existing natural features and ecosystem processes...to increase resiliency to climate change, manage environmental hazards, or both.* The legislation is reflective of a growing understanding of the importance of natural landscapes in maintaining climate stability.

El Dorado County has irreplaceable natural resources that offer climate resilience alongside a vital function in sustaining natural, agricultural, and other built landscapes. Oak woodlands produce abundant leaf litter that enriches soil and improves its water-retention capacity. Oak root systems and above-ground woody material—snags, stumps, and downed branches—further stabilize soil, preventing erosion, replenishing groundwater, and maintaining cool creek and stream temperatures vital to aquatic organisms.

Oaks play a central role in other ecological processes as well. The authors of the Oak Woodlands chapter (Davis, Frank et al.) in *Ecosystems of California* describe oaks as a **foundation species**, using Ellison et al.'s definition of such a species as "...one that 'controls population and community dynamics and modulates ecosystem processes,' whose loss 'acutely and chronically impacts fluxes of energy and nutrients, hydrology, food webs, and biodiversity.'"

If the proposed General Plan Biological Resources Policy Update, Oak Resources Management Plan, and Oak Resources Conservation Ordinance were promulgated those natural functions discussed above would be dismantled and the County would fail to uphold the public trust.

Sincerely,



Janet Cobb
Executive Officer
California Oaks

4/27/2017

Edcgov.us Mail - Oak Resources Management Plan--File # 12-1203; Agenda Item # 9



PC 4/27/17
#9
Charlene Tim <charlene.tim@edcgov.us>
5 pages

Oak Resources Management Plan--File # 12-1203; Agenda Item # 9

Cheryl <Cheryl.FMR@comcast.net>

Thu, Apr 27, 2017 at 6:40 AM

To: gary.miller@edcgov.us, brian.shinault@edcgov.us, james.williams@edcgov.us, jeff.haberman@edcgov.us, jeff.hansen@edcgov.us, charlene.tim@edcgov.us

Commissioners & Char—

I've attached comments for the April 27, 2017 Planning Commission meeting. These comments pertain to the Biological Policy Update/Oak Woodlands Management Plan (ORMP), (File # 12-1203; agenda item #9).

These comments discuss CEQA/ORMP issues.

Char—please include these comments in the administrative record.

Thank you again—

Cheryl Langley

Shingle Springs resident

 CEQA_ORMP_FNL.pdf
315K

CEQA/ORMP Issues

Public Comment—Biological Resources
Policy Update/ Oak Resources
Management Plan (ORMP)
Cheryl Langley
Planning Commission Meeting
April 27, 2017
File No. 12-1203
Agenda Item #9

Commissioners—

My prior comments sent to each of you for this meeting included requests for project amendments that would reduce the impacts of the Oak Resources Management Plan (ORMP). Clearly this project will have serious impacts on our oak resources. These impacts could be reduced based on *feasible mitigation* that has been repeatedly proposed by the public, but overlooked during plan development.

Lead Agency Project Alternative Selection

It is not known why the most obvious alternative—that of including Option A retention standards *within* this ORMP project—was not evaluated as a project alternative. The public repeatedly requested inclusion of Option A.

Omission of this project alternative is especially troubling because it is an alternative that mirrors what was once included in the 2004 General Plan, and was considered a viable approach to oak management until Option B (the in-lieu fee option) was rescinded. Because this ORMP contains an in-lieu fee element (in essence an Option B), it would be an “easy fix” to add Option A to the ORMP project plan to make a viable alternative. And, to those interested in retaining County oak resources, such an alternative would be more acceptable than the ORMP as currently proposed; and with the inclusion of the in-lieu fee program (an Option B equivalent), this alternative would likely satisfy the development community as well.

The evaluation of project alternatives is an important matter. In the court ruling *Citizens of Goleta Valley*, it was determined evaluation of project alternatives and mitigation measures is “[t]he core of an EIR” (*Citizens of Goleta Valley v. Board of Supervisors, supra*, 52 Cal.3d at p. 564 (*Goleta Valley*)). And, while CEQA does not require the project proponent to evaluate *all* possible project alternatives, it does require a focus on alternatives that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen significant effects of the project, even if these alternative would impeded to some degree the attainment of the project objectives, or would be more costly. (Pub. Resources Code, sec 21002 & 15126.6[b]&[c]; CEQA Guidelines, sec. 15126, subd. (d); *Citizens for Quality Growth v. City of Mount Shasta* (3d Dist. 1988) 198 Cal.App.3d 433, 443-445 [243 Cal.Rptr. 727]; *Kings County Farm Bureau, supra*, 221 Cal.App.3d at p. 733.)

Factors that may be used to eliminate alternatives from detailed consideration in an EIR are: **(1)** failure to meet most of the basic project objectives, **(2)** infeasibility, or **(3)** inability to avoid significant environmental impacts (PRC, 15126.6[c]). None of these factors apply to a project alternative that includes Option A and an in-lieu fee option that equates to an Option B. So why wasn’t this obvious project alternative included in the EIR?

CEQA emphasizes it is important to include *feasible* alternatives for analysis in an EIR. **Because the EIR for this ORMP project evaluated only two alternatives—both determined to be infeasible¹—and omitted a potentially feasible alternative, it is likely the County has “failed to satisfy the informational purpose of CEQA.”** In *Habitat and Watershed Caretakers v. City of Santa Cruz*, it was found that “[b]y failing to mention, discuss, or analyze any feasible alternatives, the draft EIR and the final EIR failed to satisfy the informational purpose of CEQA...” (*Habitat and Watershed Caretakers v. City of Santa Cruz* (2013) 211 Cal.App.4th 429.) CEQA Guidelines state, “[t]he range of feasible alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making.” (CEQA Guidelines, sec. 15126.6 subd. [f]). Court rulings have emphasized that an EIR is required to “...ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.” (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 197 [132 Cal.Rptr. 377, 553 P.2d 537].) In fact, in *Kings County Farm Bureau v. City of*

¹ El Dorado County. 2017. Draft CEQA Findings of Fact, Exhibit A, page 14 of 50.

Hanford, an inadequate discussion of alternatives in an EIR was determined to be an abuse of discretion. (*Kings County Farm Bureau et al. v. City of Hanford* (5th Dist. 1990) 221 Cal.App.3d 692, 730-737 [270 Cal.Rptr. 650].)

The CEQA procedures themselves “are intended to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects.” (§ 21002; see Guidelines, §§ 15126.4, 15126.6.) A primary purpose of the EIR is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.” (§ 21061; see § 21002.1, subd. [a]).

But no feasible alternatives were presented in this EIR. What is the likelihood that a project alternative that included Option A and Option B was not chosen because—while it had the obvious capability of being a viable project alternative—it was viewed as being more onerous or costly for the development community? After all, inclusion of Option A would require project applicants/County staff to first assess whether the proposed project could be built on a given parcel while meeting oak retention standards. The time and expertise involved in such an evaluation could potentially increase project cost and incrementally delay project buildout. But in the past, when lead agencies have attempted to narrow the range of reasonable alternatives by defining the objectives so narrowly that there are no feasible alternatives to the project that meet its objectives, the courts have not allowed this. (*Rural Land Owners Association v. Lodi City Council* (3d Dist. 1983) 143 Cal.App.3d 1013, 1025-1026 [192 Cal.Rptr. 325].)

Clearly, an alternative that *includes* Option A in the ORMP project framework would “...avoid or substantially lessen...significant effects.” Without an evaluation of this alternative, the County has not done all it reasonably can to limit the environmental impact of this project.

The County’s Mitigation Enforcement Record—Why it Matters

Mitigation must not only be planned, it must be effective. In comments sent to each of you for this April 27th meeting, I described failed mitigation efforts within the County. This revealed the County’s lack of commitment to making sure mitigation is accomplished. I also brought this issue up in comments sent in during development of the project EIR. The response I received in the final EIR was:

The county is allowed a presumption that it will comply with existing laws, including its own policies and ordinances (Erven v. board of Supervisors [1975] 53 Cal.App.3d 1004). There is no reason to believe the county will not enforce its own regulations and standards.²

But there are several examples that cast doubt on the County’s willingness and ability to enforce its “regulations and standards.” And here’s the problem: the County’s inability to ensure effective mitigation “deepens” the environmental impact of development projects beyond what is disclosed in the EIR. That is, impacts are understated, because the mitigation measures proposed have been shown to lack viability. Mitigation has no ability to minimize adverse impacts if the project developer and the County do not follow through on mitigation implementation; under this circumstance, mitigation is for all intents and purposes absent. It is one thing to propose mitigation, it is another to follow through—otherwise proposed mitigation measures are valueless.

Past performance matters. In the Laurel Heights court ruling, the following was found:

Because an EIR cannot be meaningfully considered in a vacuum devoid of reality, a project proponent's prior environmental record is properly a subject of close consideration in determining the sufficiency of the proponent's promises in an EIR. "In balancing a proponent's prior shortcomings and its promises for future action, a court should consider relevant factors including: the length, number, and severity of **prior environmental errors and the harm caused; whether errors were intentional, negligent, or unavoidable; whether the proponent's environmental record has improved or declined; whether [the responsible**

² Final EIR, response 12-11, page 3-437.

entity] has attempted in good faith to correct prior problems..." (Laurel Heights Improvement Association of San Francisco v. Regents of the University of California (1988) 47 Cal.3d 376, 420 [253 Cal.Rptr. 426.]).

For example, by its own admission, the County acknowledges that enforcement of the personal use exemption provision in the ORMP is not feasible:

The County recognizes that monitoring for compliance with this limit would be infeasible. ~~The County lacks sufficient staff resources to monitor and inspect every parcel in the County to observe whether oak tree removal has occurred, to determine the size of each oak removed under this exemption, and to track such removals annually.~~ However, this limit provides a clear definition for the applicability and limitations of the personal use exemption, thereby providing a mechanism for enforcement of the ORMP penalties and fines for removing oaks without first obtaining an oak tree removal permit if the personal use exemption is relied upon impermissibly. ~~The County would rely on complaints made by County residents to enforce these penalties for violations of the personal use exemption.~~

Excerpt Source: Final EIR, pdf page 30 of 582.

Thus, the impact of the personal use exemption is understated as well. And so it is for mitigation efforts. This begs the question: Does the County have the resources—and will—to enforce mitigation requirements to ensure their success?

The Mitigation Monitoring & Reporting Program associated with this project has committed only to preparing and presenting to the Board of Supervisors an annual report on the implementation status of the General Plan. "*This annual report will include information on the status of the Oak Resources Conservation Ordinance and its implementation.*"³ How much detail regarding the efficacy of oak mitigation efforts can the Board of Supervisors and the public expect in such a report? This report is not a new tool. How effective has it been in diagnosing and correcting the failed oak mitigations of County road projects in the past?

And, importantly, how will this inaction on the part of the County impact the in-lieu fee program? A 2001 court ruling found that a commitment to pay fees without evidence that mitigation will actually occur is inadequate as a mitigation measure. (*Save our Peninsula Committee v. Monterey County Board of Supervisors* (App. 6 Dist. 2001) 87 Cal.App.4th 99.)

This lack of mitigation efficacy—as represented by past mitigation failures—reveals the County's inability, or lack of will, to enforce mitigation violation issues. The absence of response in the EIR to concerns expressed by the public exposes the County's unwillingness to acknowledge and discuss potential unintended adverse environmental consequences, and its unwillingness to propose and develop solutions.

According to *Banning Ranch Conservancy v. City of Newport Beach*:

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. (Laurel Heights I, supra, 47 Cal.3d at pp. 391-392.)" (Vineyard, supra, 40 Cal.4th at p. 449; see Concerned Citizens, supra, 42 Cal.3d at pp. 935-936.)

But what is certain here is that there is not a full understanding of the environmental consequences, because much of the environmental impact of the project lies hidden in the promise of mitigation that will likely not come to fruition. Past performance matters. The public is not assured the environmental consequences of the project have been taken

³ El Dorado County. 2017. Draft Mitigation Monitoring and Reporting Program, Exhibit C, page 3 of 3.

into account to the extent that they are likely to become evident post-project implementation. In this instance, no one—not the Planning Commission, not the Board of Supervisors, nor the public—are privy to “a full understanding of the environmental consequences and...assured those consequences have been taken into account.”


Inadequacy of Responses to Comments in the EIR


This issue of the efficacy of mitigation measures—particularly as it pertains to the past performance of the County in enforcing mitigation requirements—was a topic of inquiry during EIR development. I requested information on the status of County mitigation efforts:

- Include a discussion of mitigation efforts undertaken by the County. Discuss reason(s) for mitigation failures (such as the mitigation plantings adjacent to Serrano Village D2, and along road project sites within the County). If there have been successful mitigation efforts, describe the location of the plantings, the type of oak replanting that took place (i.e., acorns, container plants, etc.—including the size of the container plants), when they were planted, and the current status of the plantings (size, condition, mortality rate, etc.)

Excerpt Source: Final EIR, pdf page 322 of 582.

The response in the Final EIR was:

8-53  The commenter requests that the Final EIR include a discussion of mitigation efforts undertaken by the County, reasons for mitigation failures, and success of oak replanting.

The EIR evaluates the proposed  project as described in the Project Description (Chapter 3 of the Draft EIR). Evaluating the efficacy of other mitigation efforts undertaken by the County is beyond the scope of the proposed project and is not required by CEQA. Refer to Master Response 4 in Chapter 2 (Master Responses) regarding oak mitigation monitoring.

Excerpt Source: Final EIR, pdf page 425 of 582.

This response is inadequate. Evaluating the efficacy of other mitigation efforts undertaken by the County is relevant, and needs to be discussed. **This response is a hollow attempt to avoid the obvious answer to the question; it fails to acknowledge the real cost of oak removal in the face of a history of failed mitigation attempts.** The inadequate response to the issue reveals a serious weakness in the EIR, because an inadequate response to even one substantive comment can be enough to justify a writ of mandate remanding the decision to the lead agency. (*Gallegos v. California State Board of Forestry* (1978) 76 Cal.App.3d 945, 952-955.)

CEQA Guidelines are specific in regard to what the County’s response must be in regard to conflict between what the County says and what the public observes:

The written response shall describe the disposition of significant environmental issues raised... In particular, the major environmental issues raised when the Lead Agency's position is at variance with recommendations and objections raised in the comments must be addressed in detail giving reasons why specific comments and suggestions were not accepted. There must be good faith, reasoned analysis in response. Conclusory statements unsupported by factual information will not suffice.” (CEQA Guidelines, sec 15088, subd. (c).)

As an example, a California Department of Forestry response to a comment regarding the efficacy of a mitigation measure was inadequate where it contained no analysis of the issues, contained no specific information justifying the rejection of the concern, and referenced a report that was unavailable. (*Environmental Protection Information Center, Inc. v. Johnson* (1985) 170 Cal.App.3d 604.)

The bottom line is this: "*The CEQA process demands that...environmental decisions be made in an accountable arena.*" (*Oro Fino Gold Mining Corporation v. County of El Dorado* (3d Dist. 1990) 225 Cal.App.3d 872, 884-885 [274 Cal.Rptr. 720].) By failing to acknowledge past mitigation failures, the County is turning a blind eye to its mitigation commitments. In so doing, it nullifies to a large degree the stated mitigation in the project. The County offers no explanation/correction for its failures—it avoids the topic rather than propose a more effective plan to ensure mitigation efficacy. Ideally, solutions to failed mitigation efforts should be developed; the County should commit to corrective action.

The Adequacy of Mitigation Measures

According to a recent court ruling, all feasible mitigation must be adopted, and other mitigation properly found infeasible, before an agency can make a statement of overriding considerations. (*Los Angeles Unified School District v. City of Los Angeles* (1997) 58 Cal.App.4th 1019.) And, the mitigation measures listed in the project must be capable of remedying the impacts, and the administrative record must contain substantial evidence supporting the County's view that the measures will mitigate the impacts.

Has the County proven it can responsibly manage mitigation oversight? Has the County adopted all "feasible mitigation"? Mitigation that could reduce pre-project impacts has been proposed by members of the public and ignored.

In closing, I ask the Planning Commission to **not adopt** the ORMP and the accompanying resolution without amendment (and therefore to not adopt actions 1-4). Amendments requested include those described in the comments sent to the Commissioners for this April 27, 2017, meeting, plus a revision/correction of the greenhouse gas (GHG) emissions analysis referenced in the **Quercus Group** letter dated March 15, 2017, and included in the Legistar file for this project.