

(Distributed during meeting by Cheryl Langley)

6 pages

Public Comment—Biological Resources
Policy Update/ Oak Resources
Management Plan (ORMP)
Cheryl Langley
Planning Commission Meeting
August 24, 2017
File No. 17-0937; Agenda Item #5

Commissioners--

I have reviewed the documents provided under Agenda Item 5 (File # 17-0937; associated file 12-1203) and have the following comments regarding the Planning Commission / County staff recommendations, and other related issues.

Planning Commission Recommendations:

1. Add language to Ordinance Section 130.39.080 (Enforcement) from the ORMP Maintenance and Monitoring Program;
2. Redefine Heritage Oak Tree diameter size to 20 inches (from 36 inches, ORMP Section 6.0, Definitions);
3. Change bi-annual reporting to annual reporting and include expenses and income in Ordinance Section 130.39.090.B (Bi-Annual Reporting – Oak Woodland Conservation Fund Fees);
4. Increase in-lieu fee for Oak Woodland based on acquisition land values in El Dorado County (ORMP, Section 3.0, In-Lieu Fee);
5. Enforcement of mitigation monitoring and reporting needs to be more effectively applied, in light of past performance and (perceived) deficiencies; and
6. Establish long-term funding for Mitigation and Monitoring in perpetuity.

Heritage Oaks (*Planning Commission recommendation #2*)

The Board of Supervisors denied the Planning Commission recommendation to change the definition of Heritage Oak from 36" to 20" diameter at breast height (dbh). I again request heritage tree designation be established at a size no larger than 24", if not for all oaks, for **blue oaks**. Numerous citations from scientific studies have been provided to the Planning Commission and the Board of Supervisors that specify blue oaks grow very slowly, and that growth may even cease after 26".¹ Thus, under the current Heritage Oak size designation of 36", many of these oaks will *never* reach heritage size, despite their extreme age. **Valley oaks** would be another worthy addition—it is an endemic *species of special concern*, and there is relatively little valley oak woodland in the County. Of the approximate 247,000 acres of oak woodland in the County, under 4,000 acres is valley oak woodland.

Also in need of revision is the exclusion of live oak under the Heritage Tree designation:

Heritage Trees: Any live native oak tree of the genus *Quercus* (including blue oak (*Quercus douglasii*), valley oak (*Quercus lobata*), California black oak (*Quercus kelloggii*), interior live oak (*Quercus wislizeni*), canyon live oak (*Quercus chrysolepis*), Oregon oak (*Quercus garryana*), oracle oak (*Quercus x morehus*), or hybrids thereof) with a single main trunk measuring 36 inches dbh or greater, or with a multiple trunk with an aggregate trunk diameter measuring 36 inches or greater.

Excerpt Source: Exhibit A—Errata Summary Table—File # 17-0937; Agenda Item 5; pdf page 14 of 29.

If omitted from Heritage Tree designation, it is likely this is the only County in the State to do so. (Also, the "multiple trunk" aggregate measurement is mostly included to accommodate this species.) Importantly, different species of oak support different wildlife species—including mammals, insects and lichen species. That is, an oak tree is not simply an oak tree—it supports a *community* that is species specific. To exclude or reduce live oak from Heritage Tree protections—and presumably from some replanting programs—is to exclude many associated species as well; it limits woodland and wildlife diversity.

¹ McDonald, 1985; in: Ritter, L.V. Undated. *Blue Oak Woodland*; page 2 of 4. Available at: <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=67340>.

Besides—this is an odd prejudice—a prejudice based on the perception that live oak is a relatively fast growing “weedy” oak species, and therefore not in need of the same protections as other oaks. But relatively “fast” growth is an asset when it comes to woodland replacement. To demonize this attribute may result in mitigation plantings comprised largely of oaks that will take multiple decades to reach the size of those removed.

Request:

- **Establish Heritage Oak tree size as no larger than 24”**, if not for all oaks, for blue oaks and valley oaks.
- **Reinstate live oaks under the Heritage Tree definition.**

In-Lieu Fee Adjustments (*Planning Commission recommendation #4*)

I concur with the Planning Commission’s request for in-lieu fee adjustments based on El Dorado County land acquisition values.

Request:

- Repeat the request to the Board of Supervisors to implement this Planning Commission recommendation.

Enforcement of Mitigation Monitoring and Reporting (*Planning Commission recommendation #5*)

The Planning Commission requested more effective enforcement of oak mitigation efforts in light of past failures. While this recommendation seems to be supported by County staff in concept, it is not clear what mechanisms have been instituted to change the trajectory of mitigation efforts. For instance, in the past it has been suggested a PAWTAC-like committee² be used to oversee mitigation efforts and in-lieu fee use. However, as one Supervisor commented privately, because such groups are often overwhelmed by debate and conflict, such a committee is unlikely to be effective.

While this may be the case in some instances, it need not be the case in *all* instances. Perhaps the **El Dorado County Fish and Game Commission** could serve in the capacity of overseeing mitigation proposals, mitigation implementation and efficacy, and oversight of in-lieu fee use.³ This is an established commission with expertise—and with contacts within the research community; this would enable it to do an effective job. While this commission may require additional resources to take on additional tasks, the expertise necessary to accomplish the goal is present, and the benefits of mitigation oversight would be worth the cost.

Besides, the document *Draft Oak Resources Management Plan Background and Support Information*⁴ specifies **“the major components of the administration program will include ... One or more entities approved by the Board of Supervisors to assist in the management, maintenance, monitoring or restoration of oak woodlands...”**

Request:

- **Reconvene a PAWTAC-like committee, or utilize the El Dorado Fish and Game Commission;** task the commission with oversight of oak mitigation proposals, mitigation implementation and efficacy, and oversight of in-lieu fee use.

Long-Term Funding for Mitigation and Monitoring (*Planning Commission recommendation #6*)

I concur with the Planning Commission’s request for long-term funding in perpetuity.

Request:

- Repeat the request to the Board of Supervisors to implement this Planning Commission recommendation.

² PAWTAC: Plant and Wildlife Advisory Committee.

³ The current EDC Fish and Game Commission is comprised of the following individuals: Larry Nelson and Grady Garlough (at large); Dennis Byrne (District I); Mike Denega (District II); Kurt Mikkola (District III); Pat Weddle (District IV); Victor Babbitt (District V). See information on the Commission at: <https://www.edcgov.us/Government/FishGame>.

⁴ Draft Environmental Impact Report for the Biological Resources Policy Update and Oak Resources Management Plan Appendix C, *Proposed Oak Resources Management Plan (ORMP)*, Appendix A (“Background and Support Information”), page A-40. (Appendix A of Appendix C)

Other Project Related Issues

Acorn Mitigation

While Dudek supports the use of acorns for mitigation plantings under specific circumstances, there is ample evidence that **acorn planting is simply not efficacious**. I have submitted numerous comments on the issue to both the Planning Commission and the Board of Supervisors based on research and observations made by multiple researchers—including the researcher Dudek cites as providing evidence acorns can work; Dudek simply ignores the caveats.

In support of acorn use, the final EIR (FEIR) described jurisdictions that allow acorn planting. But this information was not accurate:

2) The FEIR does not provide the information needed for the Board to make a fully informed decision, and in some cases intentionally misleads us. Without listing all instances, here are a few examples:

a. In answer to 'what jurisdictions allow acorn planting for mitigation?', FEIR Response 6-55 falsely claims

"Jurisdictions that allow acorn planting or have approved oak woodland mitigation plans that include acorn planting include, but are not limited to, Sacramento County (whose General Plan Conservation Element also calls for amending the Tree Preservation Ordinance to allow for acorn planting), Nevada County, Placer County, Santa Barbara County, and Sonoma County."

As of 12/13/16 Sac County did NOT allow acorn mitigation planting. Placer county allows acorn planting for restoration, not mitigation, and as of 7/12/16 their Tree Preservation Ordinance called for 15 gal trees as replacement mitigation. Nevada County tree ordinance (section 4.3.15 Trees) calls for "equal or greater mitigation" and does not turn up anything on a search for 'acorn'. Allowing numerous acorns to replace a mature tree is not the norm in other jurisdictions as has been implied.

Excerpt Source: Ellen Van Dyke public comments to the Board; July 18, 2017; file 12-1203, page 1 of 4.

And, when asked to describe **the efficacy of any such program** in these counties, Dudek responded that they **"...confirmed through telephone calls that the counties listed in Comment 6-55 do not maintain data regarding the success of individual oak woodland mitigation programs conducted in their jurisdictions."**⁵

When confronted with examples of El Dorado County oak mitigation sites that had relied on acorn planting and failed, staff attempted to justify oak mitigation failure via the following justification:

Given that the majority of the oak planting effort was not irrigated, the observed survival is not uncharacteristic of other similar natural (i.e., unirrigated) oak woodland restoration projects in the region. These observations suggest that the oak planting sites are approaching their natural capacity for oak trees and further planting may not appreciably increase the overall density of oak trees within the oak planting areas.

Excerpt Source: Legistar File 12-1203, 24C; Exhibit B—Staff Memo; page 15 of 18.

But this description fails to acknowledge that the mitigation site was not maintenance/maintained, and failure ensued. It also ignores the issues that many sites were denuded of oaks for the purpose of cattle grazing long ago, and since that time poor oak regeneration has become a significant problem. That is, the same issues that plague natural regeneration impact acorn planting, yet this is not acknowledged, and mitigation proposals under this project have not been adjusted to take that condition into account.

⁵ Final EIR, Response 8-47, pdf page 422 of 582.

Also significant in terms of assessing acorn planting as a mitigation strategy are the following examples provided by staff. Staff presented what they deemed to be oak mitigation “success stories”:

- Wilson Estates and Cameron Glen: **Both projects were performed under Option A retention standards—their “success” relies on oak retention, not oak replacement.**⁶
- The Department of Transportation (DOT) Green Valley Road Widening project **was performed using 5 – 15 gallon size container plants and included “hand-watering, maintenance, monitoring, and annual reporting for almost 5 years.”**⁷ (This oak mitigation project was performed under contract with Dudek. If Dudek was certain acorns would provide a successful outcome, why plant larger stock?)
- The DOT Weber Creek Project **was performed using 1—5 gallon size saplings, “including regular watering to support healthy growth.”**⁸ Since this project was performed in March/April 2017, it is not known what the success rate of this planting site will be, but obviously acorns were not used.
- Serrano oak mitigation: Because there has been criticism of the oak mitigation efforts in the El Dorado Hills Specific Plan area, County staff cited results of an Army Corps of Engineers (Corps) evaluation of mitigation performed under a Clean Water Act 404 permit issued for the El Dorado Hills Specific Plan. The Corps required 125 acres of oak mitigation. Staff concluded, *“In 2016, the Corps reviewed the planting efforts and performance and did not require further planting/re-planting.”*⁹ This—County staff contends—provides evidence that the oak mitigation effort was a success. But additional documentation differs with this conclusion. A 2002 assessment by *Wildlands, Inc.* of **the Serrano oak woodland mitigation** survival concluded that the Upper Silva Valley, Lower Silva Valley, and Village D **did not meet the standard established for oak survival.**¹⁰

As for other sites, *“As of June 2017, the County is not aware of any tree planting monitoring reports that have been submitted.”*¹¹ **But the County surely must be aware of mitigation that has not been implemented (enforced), and of failed oak mitigation attempts—the public is,** and those sites have been documented in comments submitted to the Planning Commission and the Board of Supervisors. But oak mitigation failure at these sites has not been acknowledged by staff. **If you cannot “see” the problem, you cannot correct it.**

And, significantly, **no adjustment to mitigation approach is presented under this project—in fact, mitigation requirements have been weakened under this plan when compared to those under the 2004 General Plan/Interim Interpretive Guidelines.** And—a fundamental weakness in the existing plans was not corrected—that of allowing the planting of acorns in lieu of larger container specimens.¹²

Request:

- Eliminate acorn planting as a method for oak mitigation.

⁶ Legistar File 12-1203; 24C, Exhibit B—Staff Memo; page 16 of 18.

⁷ Legistar File 12-1203; 24C, Exhibit B—Staff Memo; page 17 of 18.

⁸ Legistar File 12-1203; 24C, Exhibit B—Staff Memo; page 17-18 of 18

⁹ County of El Dorado, 24C—Exhibit B; *E. Past Performance of Oak Mitigation Efforts*, page 15 of 18.

¹⁰ Wildlands, Inc. 2002 report: *Serrano El Dorado Development Project Wetland and Oak Woodland Mitigation 2002 Monitoring Report*, February, 2003 AND Letter dated April 12, 2006 to Andrea Brown from Sean Munson, Wildlands, Inc. Subject: *Serrano El Dorado Development Oak Woodland Mitigation Project*. April 12, 2006.

¹¹ Legistar File 12-1203; 24C, Exhibit B—Staff Memo; page 16 of 18.

¹² While there is validity to the issue that acorn planting supports health taproot development—and Dudek cites McCreary to support the contention that acorns will be effective—McCreary also warns of *“a whole host of factors”* that will adversely impact such plantings, especially at remote planting sites, and says an effective strategy is *“...growing oak seedlings in containers and then planting them out.”* Thus, the TreePot 4 is a better [minimum] size for mitigation sites. Acorn viability issues are described in comments provided by C. Langley in Legistar file # 12-1203, *“Public Comment Rcvd 04-19-17 PC 04-27-17”* document titled: *“Request 5: ORMP Project—Request to Eliminate Acorns as Tree Replacement Mitigation.”*

Exemption for Personal Use

The exemption for personal use is not only too “generous,” it invites abuse. For instance, there is no restriction based on parcel zoning; thus, properties including those zoned commercial, industrial and R&D could be stripped of their oak resources over time, without the need to mitigate loss.

J. Exemption for Personal Use. Removal of a native oak tree, other than a Heritage Tree or valley oak tree, when it is cut down on the owner’s property for the owner’s personal use, is exempted from the mitigation requirements included in this Chapter provided that no more than 8 trees are removed from a single parcel per parcel per year or 8 trees per dwelling unit per parcel per year and provided that the total diameter inches at breast height (dbh) of trees removed from a single parcel per year or per dwelling unit per year does not exceed 140 inches.

Excerpt Source: Exhibit A—Errata Summary Table—File # 17-0937; Agenda Item 5; pdf page 22 of 29.

Request:

- Restrict personal use to a more limited number of trees per parcel per year, and limit the zoning designations that allow oak removal under the personal use exemption.

Violation of Public Resources Code

The Oak Ordinance appears to violate Public Resources Code Section 21083.4:

SECTION 1. Section 21083.4 is added to the Public Resources Code, to read:

21083.4. (a) For purposes of this section, "oak" means a native tree species in the genus *Quercus*, not designated as Group A or Group B commercial species pursuant to regulations adopted by the State Board of Forestry and Fire Protection pursuant to Section 4526, and that is 5 inches or more in diameter at breast height.

Individual Native Oak Tree(s): Any live native oak tree of the genus *Quercus* (including blue oak (*Quercus douglasii*), valley oak (*Quercus lobata*), California black oak (*Quercus kelloggii*), interior live oak (*Quercus wislizeni*), canyon live oak (*Quercus chrysolepis*), Oregon oak (*Quercus garryana*), oracle oak (*Quercus x morehus*), or hybrids thereof) with a single main trunk measuring greater than 6 but less than 36 inches dbh, or with a multiple trunk with an aggregate trunk diameter measuring greater than 10 but less than 36 inches dbh, and is not a Heritage Tree.

Excerpt Source: Exhibit A—Errata Summary Table—File #17-0937; Agenda Item 5, pdf page 14 of 29.

This conflicting language likely means the removal of “oaks,” as defined under the PRC, is not mitigated under this ORMP. This is a violation of State law.

Request:

- Change project language to reflect consistency with State law; define oaks 5 inches dbh as the threshold for mitigation.

Adaptive Management and Contingency Plans

While the terms “adaptive management” and “contingency plans” seem to imply something innocuous and “practical,” in the context of oak tree mitigation efforts this “flexibility” can be misused and misapplied, either intentionally or inadvertently. And, importantly, this language implies the ORMP itself can be changed at any time, for currently unidentified purposes. This in practical terms negates the EIR for this project, because it is not known how mitigation may be applied to any given (or every given) project. Thus, potential adverse impacts cannot be estimated because the mitigation measures are not defined. This lack of definition means mitigation proposed under the project is rendered meaningless.

8.3 Adaptive Management

The success of the ORMP in meeting goals and objectives of the 2004 General Plan will be measured through the Monitoring and Reporting program. The County will implement adaptive management by: 1) revising guidelines for projects as necessary, and 2) revising the ORMP and the mitigation fee. If the Goals of the ORMP are not being met, then the County will review and revise the ORMP as necessary.

Excerpt Source: Draft Environmental Impact Report for the Biological Resources Policy Update and Oak Resources Management Plan; Appendix A of Appendix C, *Proposed Oak Resources Management Plan (ORMP)*, page A-39.

Monitoring Report: A report prepared by a Qualified Professional documenting site observations and replacement planting survival totals for oak resources mitigation efforts. A Final Monitoring Report is one prepared at the end of the 7-year maintenance and monitoring period that summarizes replacement planting survival totals. All Final Monitoring Reports shall contain contingencies or alternatives if the success criteria for replantings, as determined by a Qualified Professional, have not been met at the end of the monitoring term, along with a means to ensure compliance with the replacement planting plan. A copy of the Final Monitoring Report shall be submitted to the County.

Excerpt Source: Draft Environmental Impact Report for the Biological Resources Policy Update and Oak Resources Management Plan, Appendix C, *Proposed Oak Resources Management Plan (ORMP)*, page 30.

Request:

- Restrict the application of “adaptive management” and “contingency plans” to eliminate misapplication. This “flexibility” actually negates the EIR for this project because it is not known how mitigation may be applied to any given (or every given) project; thus potential adverse impacts cannot be estimated because mitigation measures are not defined.

Commissioners—please recommend the following to the Board of Supervisors:

- First and foremost, **do not forward a recommendation of approval to the Board of Supervisors** for this project without amendment.

Include in your request for amendment:

- **Reinstate Option A retention standards.**
- **Establish of Heritage Oak size as no larger than 24”**, if not for all oaks, for blue oaks and valley oaks.
- **Reinstate live oaks under the Heritage Tree definition.**
- **Require in-lieu fee adjustments** be made based on El Dorado County land acquisition values.
- **Convene an oversight committee;** task the committee with oversight of oak mitigation proposals, mitigation implementation and efficacy, and oversight of in-lieu fee use.
- **Establish long-term funding** for mitigation and monitoring in perpetuity.
- **Eliminate acorn planting as a method for oak mitigation.**
- **Restrict personal use to a more limited number of trees per parcel per year, and limit the zoning designations that allow oak removal under the personal use exemption.**
- **Change project language to reflect consistency with State law;** define oaks 5 inches dbh.
- **Restrict the application of “adaptive management” and “contingency plans”** to eliminate misapplication.
- **Revise the Greenhouse Gas analysis to comply with State policy and law.**