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**BOS Meeting Oct.10,2017; Biological Resources Update/ORMP; File #12-1203; Agenda Item 37**

1 message

Cheryl <Cheryl.FMR@comcast.net>

Tue, Oct 10, 2017 at 6:55 AM

To: The BOSTWO <bostwo@edcgov.us>, EDC COB <edc.cob@edcgov.us>, jim.mitrisin@edcgov.us

Supervisors and Jim--

I've attached comments for the Biological Resources Policy Update/Oak Resources Management Plan. While I realize it is likely this issue will be continued to the October 24, 2017, Board meeting, I felt it was important to submit these comments at this time.

Jim--Please add these comments to the administrative record. **Jim--this is a resend.** I believe my last email did not send properly to bostwo, for some reason, so I'm resending (I didn't see a problem with the address). I've resent to you, too, in the event the entire "group" (Board) may not have received it (although I think the remainder of the Board did)--the email delivery failure message was a little ambiguous.

Thank you--  
Cheryl Langley  
Shingle Springs Resident



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Supervisors—

I ask Board members to **not** approve the Biological Resources Policy Update/Oak Woodlands Management Plan (ORMP) without amendment. **Amendment and recirculation of the Environmental Impact Report (EIR) are necessary to establish a viable project.** At a minimum, the following aspects of the project are problematic.

### **Bifurcation of Biological Resources Policy Update/ORMP and the TGPA/ZOU**

First, and most important, this project should *not* have been separated from the Targeted General Plan Amendment/Zoning Ordinance Update (TGPA/ZOU) project. The changes made here—within this project—worsen the impact of the TGPA/ZOU in a manner that was never disclosed in the TGPA/ZOU environmental evaluation. That is, the elimination of the Integrated Natural Resources Management Plan (INRMP), oak retention standards, etc., undermines the viability of the TGPA/ZOU because **it was approved predicated upon the implementation of these mitigating programs/standards/asures.** To eliminate these mitigation elements leaves the TGPA/ZOU in a precarious position.

In addition, the TGPA/ZOU reduced riparian setbacks (from 50'/100' to 25'/50'), but did not evaluate the environmental impact of the change within its Environmental Impact Report (EIR)—*nor was this impact evaluated under this project.* This failure to evaluate the impact of the riparian buffer size reduction in *either* document is a serious omission that can have obvious legal consequences.

### **Flawed Lead Agency Project Alternative Selection**

The most obvious alternative—that of including Option A retention standards *within* this ORMP project—was not evaluated as a project alternative, despite the fact that the public repeatedly requested *inclusion* of Option A. Omission of this project alternative is especially troubling because it is an alternative that would mirror what was once included in the 2004 General Plan, and considered a viable approach to oak management. Because this ORMP contains an in-lieu fee element (in essence an Option B), it would be an “easy fix” to add Option A. The response to comments in the EIR reveals the method used to negate this request; it states, “*Alternative 1 [the No Project alternative] is the Option A alternative.*”<sup>1</sup> But this alternative does not include a viable Option B.

The evaluation of project alternatives is an important matter. In fact, the Supreme Court ruled that considering alternatives is one of *the most important functions* of an EIR. (*Wildilfe Alive v. Chickerlmg* (1976) 18 Cal.3d 190, 197.) Similarly, the court ruling *Citizens of Goleta Valley* made the determination that **evaluation of project alternatives and mitigation measures are “[t]he core of an EIR”** (*Citizens of Goleta Valley v. Board of Supervisors, supra*, 52 Cal.3d at p. 564 (*Goleta Valley*)). **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. (Public Resources Code [PRC], sec. 21002; 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].)

And, importantly, it has been determined **the EIR document must consider alternatives that are feasible.** (*EPIC v. Johnson* (1985) 170 Cal.App.3d 604, 610; *Friends of the Old Trees, supra*, Cal.App.4th 1404.) 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].) The only two alternatives presented in the EIR as possible alternatives—the No Project alternative, and a 30% Retention

<sup>1</sup> Final EIR for the Biological Resources Policy Update and Oak Resources Management Plan, response to comment 8-2; pdf page 399 of 582.

alternative were “non-starters”—that was obvious. And ultimately, the County did deem these alternatives infeasible; it will not spend nearly \$550,000 to keep what is already in place, and the 30% retention standard would be so ridged as to disallow the incorporation of adjustments sensitive to the value/diversity of the oak woodland on construction sites, it had no nexus to biological value. This equates to a failure to seriously consider a *reasonable* range of viable alternatives.

Ultimately, determining if alternatives are suitable involves a three-part test governed by the “*rule of reason*.” (Citizens of Goleta Valley v. Bd. of Supervisors (1990) 52 Cal3d 553, 564, 566 (Goleta II); Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission (1992) 10 Cal.App.4th 908, 919.) (Guideline 15126.6(a),(f).) Factors that may be used to **eliminate alternatives** from detailed consideration are: **(1)** failure to meet most of the basic project objectives, **(2)** infeasibility, or **(3)** inability to avoid significant environmental impacts (PRC, section 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. The exclusion of this **obvious** project alternative from the EIR is problematic for the County.

It seems likely 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, ideally, 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].) And, **an agency cannot find an alternative infeasible simply because the developer does not want to do it.** (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 601.)

As noted earlier, Public Resources Code (PRC) sections 21002, 21081, and Guidelines 15091, 15093 **together forbid approval of a project that will result in significant impacts without first finding that any environmentally superior alternatives are infeasible.** It is clear here the County failed to consider an alternative that *is* environmentally superior, and that inclusion of Option A retention standards would not *substantially impede* the project. An alternative that first required projects to be evaluated in regard to meeting Option A retention standards before defaulting to Option B in-lieu fee mitigation would be environmentally superior, as would the **No Project alternative**, which currently requires evaluation of projects in light of Option A, but subsequently allows “relief” from strict Option A retention standards **if it is determined the project’s value to the community warrants such relief.** It is certain the County has not considered a reasonable range of alternatives, and has not provided sufficient explanation of infeasibility, or other reasoning to support not considering such an alternative. (As stated previously, although the No Project alternative *is* feasible, it is clear this alternative would never be selected, making it for all practical purposes a non-starter.)

**Because the EIR omitted a feasible Option A alternative (that includes Option A within the proposed ORMP framework), it is likely the County has “failed to satisfy the informational purpose of CEQA.”** 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 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].)

### **Unsupported Project Rationale**

While the argument has been made that inclusion of Option A retention standards would mean the project would not meet project objectives,<sup>2</sup> **staff has yet to present a reasonable argument in support of this position.** These are the project objectives as stated in the draft EIR:

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<sup>2</sup> Legistar 12-1203, 24D, Exhibit C, Public Comment Summary; July 18, 2017; pages 7 - 8 of 17.

## 1.2 Goals and Objectives of Plan

The ORMP goals are guided by two General Plan Objectives: Objective 7.4.2 and Objective 7.4.4. General Plan Objective 7.4.2 states: *Identify and Protect Resources*: Identification and protection, where feasible, of critical fish and wildlife habitat including deer winter, summer, and fawning ranges; deer migration routes; stream and river riparian habitat; lake shore habitat; fish spawning areas; wetlands; wildlife corridors; and diverse wildlife habitat.

General Plan Objective 7.4.4 states: *Forest, Oak Woodland, and Tree Resources*: Protect and conserve forest, oak woodland, and tree resources for their wildlife habitat, recreation, water production, domestic livestock grazing, production of a sustainable flow of wood products, and aesthetic values.

Excerpt Source: Biological Resources Policy Update and Oak Resources Management Plan Draft EIR, June, 2016; Appendix C; pdf page 7 of 215.

The objectives seem clear: they emphasize resource protection. Clearly, inclusion of Option A would not thwart Objective 7.4.4—it would support it in a manner not supported otherwise under this project. Nor would inclusion of Option A thwart implementation of the TGPA/ZOU (General Plan) itself. But the final EIR for this project states project “objectives...are to resolve inconsistencies and flaws,”<sup>3</sup> primarily (apparently) “...challenges that the County has encountered in attempting to implement the current Policy 7.4.4.4...” The County argues Policy 7.4.4.4 (Option A, currently absent Option B) is problematic because:

**[It] precludes many projects, particularly commercial and industrial projects, that would otherwise help the County meet other important economic and land use goals. There are significant challenges associated with this option. A great deal of staff time is consumed explaining and implementing 7.4.4.4 Option A. Without Option B mitigation fee program, Policy 7.4.4.4 is difficult to implement consistently and fairly. This option would create difficulties in the development of many land properties. This option is not the most environmentally sensitive approach in the long term, since it treats all oaks as equal, and allows additional fragmentation to occur everywhere in the County.**<sup>4</sup>

AND:

**Adding Option A retention standards to the proposed ORMP was not considered because it would not avoid any of the significant impacts of the proposed project. ... those impacts would remain significant and unavoidable...**<sup>5</sup>

AND:

**[Policy 7.4.4.4]...implementation was stymied ... The County then spent the next six years trying to implement the biological resources policies without success, which brought staff to the realization that another approach was necessary to move forward.**<sup>6</sup>

But these arguments are without merit. Taken individually, here are the arguments.

1. **Option A (minus Option B) “precludes many projects”/would create difficulties for land development.** When the TGPA/ZOU EIR was released, Option A (minus Option B) was the “law of the land.” While the implication is that keeping Option A would preclude specific projects and/or force growth into rural areas,

<sup>3</sup> Final EIR for the Biological Resources Policy Update and Oak Resources Management Plan; response to comment 6-23, pdf page 281 of 582.

<sup>4</sup> Final EIR for the Biological Resources Policy Update and Oak Resources Management Plan; response to comment 6-23, pdf page 281 of 582.

<sup>5</sup> Legistar file # 12-1203; 25A Staff Memo BOS 9-12-17; page 5 of 12.

<sup>6</sup> Legistar file # 12-1203; 25A Staff Memo BOS 9-12-17; page 6 of 12.



Option A was never the “final word” for any given project—developers could always go before the Planning Commission/Director of Planning to be granted relief from strict adherence to Option A retention standards.<sup>7</sup>

In any case—aside from the flexibility to grant relief from Option A adherence—according to the draft EIR for the Biological Resources Policy Update/Oak Resources Management Plan (ORMP), changes made to the 2004 General Plan under the TGPA/ZOU “...primarily increased the number of locations where development of different types would be allowed within the County and increased the potential for higher intensity development to occur.”<sup>8</sup> **This assessment that growth in the County would increase over 2004 General Plan levels was completed with the 2004 General Plan biological policies/oak policies in place (including only Option A); the EIR states emphatically that increased development can and will occur. Option A was figured into this growth calculation;** there could be no “promise” of its demise at the point in time of this analysis. **This negates the notion that Option A stands as an obstacle to growth** and the “goals and objectives” of the General Plan.

*Under the No Project Alternative [adherence to Option A alone], development would need to comply with the existing General Plan policies. **This could alter the location of development but would not be expected to substantially reduce the total amount of development through 2025 and 2035. Therefore...the proposed project...would result in similar levels of development and resultant habitat conversion as described in the 2004 General Plan EIR and the TGPA-ZOU EIR.***<sup>9</sup>

The Biological Resources draft EIR further concludes:

*The development projections used for this EIR analysis reflect both historic and recent development patterns in the County as well as the changes to those patterns anticipated as a result of the General Plan and zoning changes adopted under the TGPA-ZOU. **Those changes primarily increased the number of locations where development of different types would be allowed within the County and increased the potential for higher intensity development to occur.***<sup>10</sup>

Despite the EIR analysis that concludes County growth will increase (under Option A only availability):

*...County staff have observed that a significant number of potential applicants for both ministerial and discretionary projects have chosen not to move forward with new development projects due to issues or concerns directly related to meeting the on-site oak canopy retention and replacement requirements of Option A. ... **Although it is not possible to determine an actual number of potential applicants electing not to proceed with development because detailed results of such informal consultations are not typically documented.***<sup>11</sup>

This anecdotal observation cannot stand as “evidence” upon which an important, rational decision can be rendered. It is not known (or described) if the problem may have resulted from County staff itself being unable (or unwilling) to describe the policy for oak canopy retention, or if staff somehow discouraged applicants from pursuing projects on heavily treed properties, either intentionally or inadvertently. Thus, this rationalization for deriding Option A has no merit—it does not support its exclusion. (The court has found a clearly inadequate or unsupported study will be entitled to no judicial deference; *State Water Resources Control Board Cases* (App. 3 Dist. 2006) 136 Cal.App.4<sup>th</sup> 674.) Conclusory statements unsupported by factual information will not suffice. (Cal. Code. Regs., tit. 14, sec. 15088. See also *Banning Ranch Conservancy v. City of Newport Beach* (2017); *Ballbona Wetlands Trust v. City of Los Angeles* (2011) 201

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<sup>7</sup> El Dorado County. 2007. **(IIG): Interim Interpretive Guidelines for El Dorado County General Plan Policy 7.4.4.4 (Option A)**. Adopted November 9, 2006; amended October 12, 2007; pages 13 & 14 of 18. Available at: [https://www.edcgov.us/Government/Planning/General\\_Plan\\_Oak\\_Woodlands.aspx](https://www.edcgov.us/Government/Planning/General_Plan_Oak_Woodlands.aspx)

<sup>8</sup> Dudek. 2016. *Draft Biological Resources Policy Update and Oak Resources Management Plan EIR*; June 2016; pdf page 43 of 270.

<sup>9</sup> Biological Resources Policy Update and Oak Resources Management Plan Draft EIR, June, 2016; pdf page 220 of 270.

<sup>10</sup> Biological Resources Policy Update and Oak Resources Management Plan Draft EIR, June, 2016; pdf page 43 of 270.

<sup>11</sup> Final Environmental Impact Report for the Biological Resources Policy Update and Oak Resources Management Plan, February, 2017; response to comment 6-23; pdf page 282 of 582.

Cal.App.4<sup>th</sup> 455, 475.) Substantial evidence does not include argument, speculation, unsubstantiated opinion or narrative, clearly incorrect evidence, or social or economic impacts not related to an environmental impact. (Guideline, 15384.)

**2. Inclusion of Option A would be “difficult to implement consistently and fairly.”**

This argument is unsupported by data/fact. There is no evidence to show how or why inclusion/implementation of Option A would be difficult to implement “*consistently and fairly*,” or how this project would correct perceived inequities.

**3. Inclusion of Option A “is not the most environmentally sensitive approach in the long term, since it treats all oaks as equal.”**

This argument is unsupported by data/facts, and is incoherent. It is not known how or why it was determined inclusion of Option A would not be “*the most environmentally sensitive approach in the long term*,” or how “*treating all oaks as equals*” constitutes environmental insensitivity.

**4. Inclusion of Option A “allows additional fragmentation to occur everywhere in the County.”**

The TGPA/ZOU General Plan *itself* directs commercial and industrial growth into the rural areas—far beyond what was allowed under the 2004 General Plan. It is the approval of the TGPA/ZOU General Plan that will drive “*fragmentation to occur everywhere in the County*.” If the Board is earnest in its desire to reduce oak woodland fragmentation, it must change the General Plan/Zoning Ordinance to disallow intensive development in rural areas (ministerial projects), and not approve discretionary projects in those areas. That is, this argument assumes the Planning Commission and Board of Supervisors have *no* authority to direct where growth does or does not occur, when in fact they do.

**5. Adding Option A was not considered because it would not avoid any of the significant project impacts.**

This argument is unsupported by data/facts. It is believed this—once again—is a reference to the argument that fragmentation will occur “*everywhere in the County*” if Option A is retained. This is a flawed argument for the reasons described in 4 above.

**6. Implementation was stymied; the County spent six years trying to implement the biological resources policies without success.**

This is a particularly odd argument in the face of “successful” mitigation presented in the staff memo of July 18, 2017.<sup>12</sup> These examples—intended to provide “proof” that past oak mitigation efforts were successful—means staff has just argued against itself, and past direction *was* good enough to lead to the successful mitigation of oak loss—staff was not “stymied” after all. By presenting what staff determined to be past mitigation successes, staff cannot say the County spent “*...six years trying to implement the policies without success...*” (Although it should be noted these “successes” were based upon Option A retention in two cases, and the planting of 1, 5, and 15 gallon trees—not acorns—in other examples. The single sample that *did* utilize acorns was actually documented as *not successful* in an arborist’s report.)

It is clear project objectives *can* be met with the inclusion of Option A retention standards, and oak retention would most certainly avoid “*significant impacts of the proposed project*,” without jeopardizing County growth. And, because the County claims past mitigation successes, it follows that previous policies must have been “clear.” (County mitigation failures have largely been caused by *lack of enforcement* and the absence of effective mitigation standards—acorn use, for instance—not lack of “clarity.”)

Perhaps most disturbing is the following excerpt from the staff memo of September 12, 2017, which attempts to explain away the need for oak retention standards:

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<sup>12</sup> Legistar File No. 12-1203; 24C; Exhibit B Staff Memo Supp, July 18, 2017; pages 15 – 18.

*...the proposed policies and ORMP would allow 100 percent removal but it is not expected that this would be the norm, or even would occur frequently or commonly. Based on past practices and development patterns in the County, the recognized role that mature vegetation plays in property values, and the incentive-based mitigation ratios in the ORMP, it is expected that some portion of natural landscapes will be retained on many properties.*<sup>13</sup>

**Importantly, this is not planning;** it reveals a lack of will to manage oak resources, and instead rely on *chance* (and minor monetary incentives) to retain this important resource.

### **Feasible Mitigation Proposals Ignored/Rejected**

Clearly this project will have serious impacts on County oak resources. These impacts could be reduced based on *feasible mitigation* that has been repeatedly proposed by the public, but overlooked during plan development. These proposals include, but are not limited to the following.

- Inclusion of **Option A retention standards** as a “first screen” for proposed projects
- **Elimination of acorns** as a woodland/tree replacement option
- Reduction of **Heritage Oak size** from 36” to 24” --if not for all oaks, for blue oaks
- Inclusion of meaningful **performance standards**
- **Appointment of an Oversight Committee** that includes state/federal biologists, arborists and foresters

These proposals represent the bare minimum the County should incorporate into the project; each would lessen the adverse environmental impact of the project. They represent *feasible* mitigation that the County has repeatedly ignored or rejected, minus reasoned analysis. The omission of these elements from the current project proposal exposes the County’s unwillingness to do all it can to protect oak resources and reduce project impacts. Public Resources Code (PRC) section 21002 states “*it is the policy of the state that **public agencies should not approve projects as proposed if there are “...feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects...”*** (Guidelines, 21002.) In fact, the PRC and CEQA Guidelines emphasize **an agency may not approve a project that will result in significant impacts unless it first finds that mitigation measures or alternatives are infeasible.** (PRC, section 21081; Guidelines 15091,15093.)

The courts, too, have weighed in on this and ruled that agencies **cannot approve a project as proposed if feasible mitigation measures are available that can substantially lessen the significant environmental effects.** (*Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4<sup>th</sup> 104, 134; *Sierra Club v. State Board of Forestry* (1994) 7 Cal.4<sup>th</sup> 1215, 1233; *Citizens for Quality Growth v. City of Mount Shasta* (App. 3<sup>rd</sup> Dist. 1988) 198 Cal.App.3d 433, 440-441.)

Clearly, an alternative that *includes* these proposals in the ORMP project framework would “*...substantially lessen...significant environmental effects...*” Without an evaluation of these elements, the County has not done all it reasonably can to limit the environmental impact of this project, and has in so doing sidestepped its obligation under CEQA.

On the other side of the coin, a public agency *may* approve a project even if it would cause a significant effect on the environment *if* the agency makes a “*fully informed and publicly disclosed decision that there is no feasible way to lessen or avoid the significant effect.*” (Guidelines 15043; 15091.)

But there has been no supported, reasoned analysis upon which to justify the elimination of proposed mitigation. And, 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.4<sup>th</sup> 1019.) Project mitigation measures must be capable of remedying the impacts,

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<sup>13</sup> Legistar 12-1203, 24D, Exhibit C, Public Comment Summary; July 18, 2017; pages 7 of 17.

and the administrative record must contain substantial evidence supporting the County's view that the measures *will* mitigate the impacts. That is, rejection of mitigation measures must be based upon substantial evidence, supported by data. (*Citizens of Goleta Valley v. Board of Supervisors* (App. 2 Dist 1988) 197 Cal App.3D 1167, 1180-1183.) "Argument, speculation, unsubstantiated opinion, or narrative evidence which is clearly erroneous or inaccurate...does not constitute substantial evidence." (Cal Code Regs, title 14, sec. 15384.) Conclusory statements rejecting mitigation measures are inadequate. (*Preservation Action Council v. City of San Jose* (2006) 121 Cal.App.4<sup>th</sup> 1490.)

### **Project Lacks Meaningful Mitigation Measures/Performance Standards**

County staff justified the development of this project—and the removal of Policy 7.4.4.4 (Option A)—by stating there was a **lack of clarity about how impacts and mitigation are measured**.

Ironically, "*how impacts and mitigation are measured*" is still a problem, left unresolved by this project. Otherwise, the Board would not have made the request for the development of "*mitigation metrics*" at the September 12, 2017, meeting (the meeting at which the project was originally intended to be approved.)

The Board also provided the following general direction listed below\*:

1. **Develop metrics to measure mitigation effectiveness;**

**Excerpt Source:** Legistar file # 12-1203; 25A Staff Memo BOS 9-12-17; page 3 of 12.

The lack of specific, effective mitigation is emphasized in this excerpt. And, while I agree the **development of mitigation metrics (performance standards) is an important step, this is a step that should have been taken well in advance of project approval**. In fact, **it should have served as a basis for mitigation measure development and selection, and metrics should have been presented in the EIR**. This is a red flag that the EIR has failed in its role as a document upon which informed decision making can be accomplished, and failed as a full disclosure document. Board members cannot make reasoned decisions when the information upon which decisions must be made is absent.

In fact, the following excerpt from the final EIR reveals an *unwillingness* to develop performance standards (mitigation metrics) that actually measure mitigation efficacy. It was stated in the final EIR that defining a required amount of tree canopy over time is "*not considered a reliable metric by which mitigation success can be measured*":

The commenter requests that the Final EIR include specific performance standards with regard to oak tree and oak woodland mitigation (e.g., amount of canopy cover expected over a period of time).

The proposed ORMP defines the number and type of trees to be planted. Because tree growth is subject to many diverse conditions, defining a required amount of tree canopy over time was not considered to be a reliable metric by which mitigation success can be measured.

**Excerpt Source:** Final Environmental Impact Report for the Biological Resources Policy Update and Oak Resources Management Plan, February, 2017; pdf page 425 of 582.

Actually, requiring a defined amount of tree canopy over time would be one of the *more reliable* metrics to use to determine mitigation efficacy. This project has provided no more reliable benchmark. Tree *survivability*, is the only criteria established for "success," when survivability may equate to a 5" high blue oak sprouted from an acorn seven years ago. This is not an adequate/acceptable replacement for removed mature trees/woodland; it is not a viable performance standard—in fact, it is not a performance standard at all.

This request by the Board for performance standards is particularly interesting because during the course of EIR circulation, a question was posed by the public that sought to determine if an adequate analysis had been performed to ensure the development of effective mitigation measures via analysis of *past* mitigation efforts undertaken by the



County. The questioner was told *"Evaluating the efficacy of other mitigation efforts by the County is beyond the scope of the proposed project."*<sup>14</sup>

This response is clearly inadequate. Evaluating the efficacy of other mitigation efforts undertaken by the County is relevant, and must be the basis—not an afterthought—for development of performance standards and mitigation designed to meet those standards. This request by the Board reveals **the project is being managed in a manner that invites failure.**

Also unresolved is the "clarity" issue; staff has stated this project is necessary to impart clarity. But if County staff could not implement the last plan, this plan is likely to run into the same problems. **Without clear performance standards (mitigation metrics) there will be uncertainty with regard to individual project mitigation development, implementation, and efficacy assessment.**

### **Misleading/Deceptive/Unsupported Information Presented in the EIR and by Staff**

#### **Acorn Mitigation**

While the consultant supports the use of acorns for mitigation plantings, there is ample research-based 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 the consultant cites as providing evidence acorns can work—the consultant simply ignores the caveats.)

In support of acorn use, the final EIR 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.

When asked to describe **the efficacy of any such program** in these counties, the consultant responded that they **"...confirmed through telephone calls that the counties listed...do not maintain data regarding the success of individual oak woodland mitigation programs conducted in their jurisdictions."**<sup>15</sup>

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

<sup>14</sup> Question from the public: Final EIR for the *Biological Resources Policy Update and Oak Resources Management Plan*, pdf page 322 of 582; response in final EIR: pdf page 425 of 582.

<sup>15</sup> Final EIR, Response 8-47, pdf page 422 of 582.

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 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. (See discussion of the regeneration problem in comments submitted by C. Langley in Legistar file # 12-1203). 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.

In addition, County staff pointed to a site in the El Dorado Hills Specific Plan area that staff stated “proved” oak tree mitigation success based on acorn planting, but an arborist’s report for that plan area revealed oak mitigation failure. 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.

**Oak Woodland**

The monitoring results for the oak woodland monitoring are presented in Table 1.

**Table 1. Oak Woodland Survival Results**

Location	Phase	Monitoring Year	# Live Trees	# Dead Trees	Total Trees Observed	Survival Rate	Area Planted	Live Trees/Acre*	Standard Met
Upper Silva Valley	V	3	116	157	273	42%	3.4 acres	27	No
Lower Silva Valley	V	3	209	103	312	67%	4.4 acres	33	No
Village D	V	3	413	308	721	57%	9.5 acres	13	No

\*This Value Derived As Follows:  
 $(218 \text{ trees planted/acre}) \times (\text{Survival Rate}) / \text{Area Planted} = \text{Estimated Number of Live Trees/Acre}$

**Excerpts Source:** Exhibit E, Serrano Oak Canopy Analysis for EDHSP, pdf page 66 of 70; Attachment 1, page 2 of 2; (Wildlands, Inc. 2002 report: *Serrano El Dorado Development Project Wetland and Oak Woodland Mitigation 2002 Monitoring Report*, February, 2003).

In April 12, 2007, Wildlands, Inc.<sup>16</sup> reported the following (oak woodland evaluation for Serrano Phases 1-6):

**CONCLUSIONS**

Overall, the Phase 4 wetlands are readily achieving their performance standards and no remedial actions are necessary at this time. However, the oak woodlands have failed to meet its success criteria's of 70 trees per acre within an overall 125 acres of oak woodland habitat.

**Excerpt Source:** 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, pdf page 2 of 4, Attachment 2.

**Selection of Information to Produce a Desired Outcome**

It appears the consultant “cherry-picked” information to justify the 36” Heritage Oak size designation. The consultant identified another County that relied on 48”—an even larger basis for Heritage Tree designation—seemingly to “justify” the “more modest” 36” designation. The consultant stated that San Mateo County designates 48” oaks as Heritage

<sup>16</sup> 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, page 2 of 4.

Oaks. However, review of the San Mateo County Ordinance Code reveals that **for the oaks that grow in El Dorado County** (in yellow, below) **the only oak identified as a Heritage Tree at the 48" mark is valley oak—it does not apply to blue oak (30"), black oak (32"), interior live oak (40"), or canyon live oak (40")**. (See Attachment A, San Mateo County Ordinance Code, page 3.)

- (9) Quercus chrysolepis - Canyon Live Oak of more than 40 inches in d.b.h.
- (10) Quercus garryana - All Oregon White Oak trees.
- (11) Quercus kelloggii - Black Oak of more than 32 inches in d.b.h.
- (12) Quercus wislizenii - Interior Live Oak of more than 40 inches in d.b.h.
- (13) Quercus lobata - Valley Oak of more than 48 inches in d.b.h.
- (14) Quercus douglasii - Blue Oak of more than 30 inches in d.b.h.

**Excerpt Source:** County of San Mateo Planning and Building Division, *Regulation of the Removal and Trimming of Heritage Trees on Public and Private Property*; Ordinance No. 2427, April 5, 1977 (Excerpt from the San Mateo County Ordinance Code).

The fact that the consultant presented this information to the Planning Commission and Board of Supervisors without the caveat related to it equates to deception. The Board may have made a different decision, realizing the 36" designation placed El Dorado County's 36" designation firmly among the highest in the state. Presenting the 48" standard—and not qualifying it as limited to a single El Dorado County oak species in a single county—may have made a difference regarding the Board's perception of the gravity of the decision.

### **Inadequate In-Lieu Fees**

The Planning Commission recommended to the Board at their April 27, 2017, meeting to ***"Increase in-lieu fee for oak woodland based on land acquisition values in El Dorado County."*** This recommendation was rejected by County staff, and ultimately by the Board. Subsequently, attorney Michael Graf wrote that the in-lieu fee ***"...bears no relationship to the actual cost of purchasing lands in the Highway 50 corridor,"***<sup>17</sup> --the lands most susceptible to development pressure, and the acquisition of which is necessary to preserve wildlife corridors.

### **Inadequate Responses to Public Comment 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.

<sup>17</sup> Letter from Michael Graf to EDC Community Development Agency, September 11, 2017; Legistar File # 12-1203, page 4 of 8.

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.** The inadequate response to the issue reveals a serious weakness in the EIR: 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 when 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 project mitigation. The County offers no explanation/correction for its failures—it avoids the topic rather than propose a more effective plan to ensure mitigation efficacy.

### **Past Performance: Enforcement Issues Nullify Mitigation Proposals**

The truth is, past mitigation efforts *have* failed—not because of “lack of clarity,” but largely because mitigation implementation was not enforced. *Enforcement* has been a major problem, coupled with the absence of effective mitigation standards (acorn use, for instance).<sup>18</sup>

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<sup>18</sup> See for example the C. Langley discussion regarding the MaCauley Construction Headquarters project on Greenstone Road submitted for the Planning Commission meeting of April 27, 2017 (included in Legistar).



**Mitigation must not only be planned, it must be effective.** In comments sent to the Planning Commission for the April 27, 2017, meeting, mitigation failures within the County were described. This revealed the County's lack of commitment to making certain mitigation is accomplished. I also brought this issue up in comments submitted 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.<sup>19</sup>*

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 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, 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. Past performance provides evidence the County does not have the resources—or will—to enforce mitigation requirements to ensure their success, and the future of mitigation enforcement is likewise compromised.

This inaction on the part of the County will likely impact the in-lieu fee program as well. 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.4<sup>th</sup> 99.)

<sup>19</sup> Final EIR, response 12-11, page 3-437.



The lack of mitigation efficacy—as represented by past mitigation failures—coupled with the absence of a 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*:<sup>20</sup>

*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 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.*”

### **Adaptive Management and Mitigation Contingency Plans—A Project in Flux**

Documentation for the ORMP (“*background and support information*”<sup>21</sup>) includes the concept of “adaptive management.” Similar language—“contingency plans”—is presented in the draft EIR. Below are excerpts that describe adaptive management and contingency plans.

#### **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 (pdf page 86 of 215).

**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 (pdf page 35 of 215).

<sup>20</sup> Supreme Court of California, *Banning Ranch Conservancy v. City of Newport Beach*, filed March 30, 2017, Orange County; Super. Ct. No. 30-2012-00593557; pdf page 26 of 32

<sup>21</sup> 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.

While these 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.**

Basically, this equates to an unstable project description. It has been found that “An accurate, stable, and finite project description is the sine qua non of an informative and legally sufficient EIR.” (County of Inyo v. City of Los Angeles (3d Dist. 1977) 71 Cal.App.3d 185, 193, [139 Cal.Rptr. 396].) *“Only through an accurate view of the project may affected outsiders and public decision makers balance the proposal’s benefit against its environmental costs, consider mitigation measures, assess the advantage of terminating the proposal (i.e. the ‘no project’ alternative) and weigh other alternatives in the balance.”* (Id at pp. 192-193.) An accurate and complete project description is necessary to fully evaluate the project’s potential environmental impacts. (El Dorado County Taxpayers for Quality Growth v. County of El Dorado (App. 3 Dist. 2004)122 Cal.App.4th 1591.) A description of the project is an indispensable component of a valid environmental impact report under CEQA. (Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer (App. 3 Dist. 2006) 144 Cal.App.4th 890.)

In this instance, the potential for project “flux” via adaptive management and mitigation contingency plans violates CEQA; it casts uncertainty into the mitigation process, and provides zero assurances that mitigation will be performed in the manner described in the ORMP, **or even that the ORMP will be the same project a year from now. It allows revision of both mitigation requirements and the plan itself without the reissuance of an EIR or public input.** It basically nullifies the ORMP and its EIR; it undermines proposed mitigation designed to reduce impacts.

Such project instability and potential for mitigation deferment has been critiqued by the courts. Gentry v. City of Murrleta (1995) 36 Cal.App.4th 1359 found a Negative Declaration defective because it **improperly relied on deferred formulation of specific mitigation measures.** There, the city required the applicant to comply with *any* existing ordinance and allowed the city to require a biological report and compliance with *any* recommendations in the report. The court found this to be insufficient; it was **based on compliance with a report that had not yet been performed.**

### **Unilateral In-Lieu Fee Changes—Eliminating Public Input**

The following excerpt identifies a disturbing trend. Clearly, County staff initially decided to make the change to the in-lieu fee appeals process *without* Board or Planning Commission approval, and minus public input.

Subsequent to the Board hearing on July 18, 2017, staff has added a new section to the proposed Ordinance, Section 130.39.080 (In-Lieu Fee Reductions and Appeals). This section includes procedures for applying for in-lieu fee reductions and/or appeals. The key change is that the decision making body is the Director rather than the Planning Commission or the Board of Supervisors. These procedures are consistent with the Traffic Impact Mitigation Fee appeals process. (See Attachment 25G for the revisions made to the proposed Ordinance shown in Track Changes.)

**Excerpt Source:** Legistar file # 12-1203; 25A Staff Memo BOS 9-12-17; page 2 of 12.

This change is unacceptable; it allows the Planning Director to unilaterally approve reductions in-lieu fee amounts. (This, in conjunction with “adaptive management” throws the EIR out the window.) Under this scenario, the efficacy of in-lieu fee based mitigation can be changed at the will of the Planning Director, minus input from the Board, the Planning Commission, or the public.

This provision must be modified; the Planning Commission, Board of Supervisors, and the public need to be able to weigh in on such matters, in the public forum. Furthermore, regardless of who has a say in this process, this provision

casts uncertainty into the mitigation process by enabling in-lieu fees to be reduced based upon a decision absent accompanying mitigation efficacy evaluation.

### **Burying Pertinent Information in Appendices**

The existence of “adaptive management” as a tool for ORMP revision was buried in an appendix of an appendix to the project EIR. This violates CEQA and the EIR’s role as a full disclosure document. An issue as important as adaptive management should be discussed in full *within the EIR*, not in the appendix of an appendix—presented as an “afterthought,” or as a component so minor it is relegated to an insignificant spot at the back of the plan.

According to *Banning Ranch Conservancy v. City of Newport Beach*:<sup>22</sup>

*The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. “[I]nformation “scattered here and there in EIR appendices,” or a report “buried in an appendix,” is not a substitute for “a good faith reasoned analysis...” (Vineyard, supra, 40 Cal.4th at p. 442.)*

### **Noncompliance with State Law**

The project EIR claims the project is in compliance with state law by “meeting or exceeding requirements”...

#### **12.4 Compliance with PRC 21083.4**

The ORMP, together with applicable General Plan policies, meets or exceeds the requirements of state law PRC 21083.4 relative to conservation of oaks and oak woodlands.

**Excerpt Source:** Appendix A of Appendix C (proposed ORMP) of the Biological Resources Policy Update and Oak Resources Management Plan Draft EIR, June, 2016; pdf page 98 of 215.

...but the **Public Resources Code Section 21083.4** says...

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.

...while the ORMP defines oak trees as “greater than 6 inches dbh.”

**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*), arroyo 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 means the removal of “oaks,” as defined under the PRC, is **not mitigated under this ORMP**. This is a serious deviation from state law, and will require project amendment.

<sup>22</sup> Supreme Court of California, *Banning Ranch Conservancy v. City of Newport Beach*, filed March 30, 2017, Orange County; Super. Ct. No. 30-2012-00593557; pdf page 26 of 32.

### **Wildlife Habitat Fragmentation**

The project requires amendment to ensure wildlife habitat connectivity. The letter from Michael Graf covers this topic in detail. (Letter available in Legistar File No. 12-1203.)

### **Important Biological Corridors**

Important Biological Corridors (IBCs) need to be established based upon a scientific foundation—this is not presently the case.

### **Greenhouse Gas Analysis**

The project requires amendment to ensure the project's greenhouse gas analysis is corrected; *Quercus Group* has submitted letters describing the inadequacies of this analysis in the EIR. (Letters available in Legistar File No. 12-1203; see latest letter dated August 30, 2017, Attachment B)

### **Absence of Adequate Measures to Ensure Accountability**

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."*<sup>23</sup> It is unlikely the Board and public can expect much detail regarding the efficacy of oak mitigation efforts in such a report. This report is not a new tool; it has not been effective in diagnosing and correcting County oak mitigation projects in the past.

### **Closing Public Hearings/Concealing Hearings Under Second Project File w/o Public Notification**

County staff has been asked to not close public hearings for crucial projects—specifically this project and the TGPA/ZOU hearing—but these hearings have been closed prior to project approval. This is unnecessarily restrictive, and sends a message to the public that their input is not welcome. This has a chilling effect on public participation, and may discourage the public from future participation in their County government.

Similarly confounding and inappropriate is the concealing of project-related hearings under separate project files, apparently enabling staff to avoid notification of interested parties of relevant project-related hearings. This project presented the perfect example of this—amendments to the Biological Resources Policy Update/Oak Resources Management Plan (File No. 12-1203) were recently scheduled to be heard before the Planning Commission under File No. 17-0937, minus public notice to those following 12-1203. The explanation from staff for this change defied logic.

### **Conclusion**

I ask Board members to **not** approve the Biological Resources Policy Update/Oak Woodlands Management Plan (ORMP) without amendment. **Amendment and recirculation of the Environmental Impact Report (EIR) are necessary to establish a viable project.** Or, the Board could simply approve the "No Project" alternative and implement the 2004 General Plan biological/oak policies; this would be superior to approval of this project.

### **Experience/Qualifications:**

I am a Senior Environmental Scientist with CalEPA, although I submit comments as a resident, not as a representative of that agency. In the past I worked for the Department of Fish and Game as a Graduate Student Assistant on biological survey projects. I also held a license to sell nursery stock in the County, and have been working to restore oak woodland on my property.

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<sup>23</sup> El Dorado County. 2017. Draft Mitigation Monitoring and Reporting Program, Exhibit C, page 3 of 3.

**COUNTY OF SAN MATEO  
PLANNING AND BUILDING DIVISION**  
(Excerpt from the San Mateo County Ordinance Code)

**REGULATION OF THE REMOVAL AND TRIMMING OF HERITAGE TREES  
ON PUBLIC AND PRIVATE PROPERTY**  
(Ordinance No. 2427 - April 5, 1977)

**CHAPTER 1. PURPOSE, FINDINGS, INTENT, AND POLICY**

**SECTION 11,000.** The Board of Supervisors finds and declares that the County of San Mateo is an area of great natural beauty and that its outstanding heritage tree population has been and continued to be an invaluable asset in contributing to the economic, environmental, and aesthetic stability of the County and the welfare of its people and of future generations. The County is a highly desirable residential, business, and recreational area because of its great scenic beauty, its forests, trees and beaches, mountains, proximity to the San Francisco Bay and the Pacific Ocean, its equable climate, its parks and recreational areas, and other natural characteristics. Irresponsible, wanton, and wholesale destruction of heritage trees could, among other things, diminish such beauty, scientific and historical values, adversely affect the environment, reduce property values, detract from scenic highways, and destroy the County's recreational economy.

**SECTION 11,001.** The Board of Supervisors further finds and declares that it has already passed legislation to regulate the commercial harvesting of forest products in this County and that it does not intend by this enactment to affect that ordinance, but that it is the intention of the Board to control and supervise in a reasonable manner the cutting of heritage trees within the unincorporated area of the County as herein prescribed.

**SECTION 11,002.** It is further found and declared that, for the above reasons and in order to protect and preserve heritage trees in San Mateo County on both public and private property and to enhance the environment, the economy, and promote the general welfare and prosperity of the County, while respecting and recognizing individual rights to develop, maintain, and enjoy private property to the fullest possible extent, consistent with the public interest, convenience, and necessity, it is necessary to enact this ordinance and regulate the removal of heritage trees in the unincorporated area of San Mateo County. Designation of a heritage tree does not give or intend to give the public access to, or use or enjoyment of, private property.



## CHAPTER 2. PRESERVATION OF TREES ON PRIVATE PROPERTY

**SECTION 11,050. DEFINITIONS.** For the purposes of this part, the following words shall have the meaning ascribed to them in this section:

- (a) "Person" means individuals, firms, associations and corporations, and agents, employees or representatives thereof.
- (b) "County" means the County of San Mateo acting by and through its authorized representatives.
- (c) "Tree" means a woody plant which has the inherent capacity of producing naturally one main erect axis of at least 12 feet, continuing to grow for a number of years more vigorously than the lateral axes.
- (d) "D.B.H." means diameter outside bark, 4 1/2 feet above average ground level.
- (e) "Basal area" means the cross-sectional area.
- (f) "Exotic Tree" means any tree introduced into areas of the County where such trees are not native as a part of their natural distribution.
- (g) "Heritage Tree" means any of the following:

Class 1 shall include any tree or grove of trees so designated after Board inspection, advertised public hearing and resolution by the Board of Supervisors. The affected property owners shall be given proper written notice between 14 and 30 days prior to inspection and/or hearing by the Board.

Class 2 shall include any of the following trees, healthy and generally free from disease, with diameter equal to or greater than the sizes listed:

- (1) Acer macrophyllum - Bigleaf Maple of more than 36 inches in d.b.h. west of Skyline Boulevard or 28 inches east of Skyline Boulevard.
- (2) Arbutus menziesii - Madrone with a single stem or multiple stems touching each other 4 1/2 feet above the ground of more than 48 inches in d.b.h., or clumps visibly connected above ground with a basal area greater than 20 square feet measured 4 1/2 feet above average ground level.
- (3) Chrysolepis chrysophylla - Golden Chinquapin of more than 20 inches in d.b.h.
- (4) Cupressus abramsiana - All Santa Cruz Cypress trees.
- (5) Fraxinus latifolia - Oregon Ash of more than 12 inches in d.b.h.

- (6) Lithocarpus densiflorus - Tan Oak of more than 48 inches in d.b.h.
  - (7) Pseudotsuga menziesii - Douglas Fir of more than 60 inches in d.b.h. east of Skyline Boulevard and north of Highway 92.
  - (8) Quercus agrifolia - Coast Live Oak of more than 48 inches in d.b.h.
  - (9) Quercus chrysolepis - Canyon Live Oak of more than 40 inches in d.b.h.
  - (10) Quercus garryana - All Oregon White Oak trees.
  - (11) Quercus kelloggii - Black Oak of more than 32 inches in d.b.h.
  - (12) Quercus wislizenii - Interior Live Oak of more than 40 inches in d.b.h.
  - (13) Quercus lobata - Valley Oak of more than 48 inches in d.b.h.
  - (14) Quercus douglasii - Blue Oak of more than 30 inches in d.b.h.
  - (15) Umbellularia californica - California Bay or Laurel with a single stem or multiple stems touching each other 4 1/2 feet above the ground of more than 48 inches in d.b.h., or clumps visibly connected above ground with a basal area of 20 square feet measured 4 1/2 feet above average ground level.
  - (16) Torreya californica - California Nutmeg of more than 30 inches in d.b.h.
  - (17) Sequoia sempervirens - Redwood of more than 84 inches in d.b.h. west of Skyline Boulevard or 72 inches d.b.h. east of Skyline Boulevard.
- (h) "Protected Tree" means a tree specially listed as endangered by either the California Native Plant Society's List as amended or the Federal Register or any tree species designated protected by the Board of Supervisors.
  - (i) "Private Property" means all property not owned by the County of San Mateo or any other public agency.
  - (j) "Public Property" means all property owned by a public entity which is controlled or regulated by San Mateo County.
  - (k) "Trim" means the cutting of or removal of any limbs, branches or roots of trees which will not seriously impair the health of trees.

**SECTION 11.051. PERMIT REQUIRED TO REMOVE, DESTROY, OR TRIM TREES.**

It shall be unlawful for any person to cut down, destroy, move or trim any heritage tree growing on any public or private property within the unincorporated area of San Mateo County without first obtaining a permit from the San Mateo County Planning Department except as herein provided. The Planning Director may require that a permit for trimming

of a heritage tree in an area defined by the General Plan as urbanized be carried out only by a licensed tree surgeon. A minimal charge shall be made for permits required by this ordinance.

Any area to which a valid Timber Harvesting Permit applies is exempt from this Ordinance.

**SECTION 11,052. APPLICATION FOR AND GRANTING OF PERMITS.** Any person desiring to cut down, destroy, move or trim one or more heritage trees on public or private property must apply to the San Mateo County Planning Department for a Heritage Tree Removal/Trimming Permit form provided by the Planning Department. Said application shall identify the species, contain the number, size and location of the trees or trees involved, contain a brief statement of the reason for the requested action, and describe any other pertinent information the Planning Director may require. Within 20 working days of receipt of the application, the Planning Director or his authorized representative shall inspect the premises and trees and shall ascertain which trees may be trimmed, cut down, destroyed, moved, or removed; provided however, the Planning Director may upon receipt of the application and such information, maps, sketches and/or photographs as he deems sufficient, make a determination without an inspection; provided further, failure to act within 20 days shall not be deemed approval. If trimming is to be performed by a licensed tree surgeon, the tree surgeon's inspection and decision may be accepted by the Planning Director for purposes of compliance with this section.

If no action on the approved permit is taken within a period of one year from the date of approval, the permit shall be considered void. The determination of the Planning Director in granting or denying the permit or in affixing conditions shall be based upon the following criteria:

- (a) The general health of the tree;
- (b) The anticipated longevity of the tree;
- (c) Whether the tree is a public nuisance;
- (d) Proximity to existing or proposed structures and interference with utility services;
- (e) The necessity of the required action to construct improvements or otherwise allow economic or other enjoyment of the property;
- (f) The number, species, size and location of existing trees in the area;
- (g) The effect of the requested action in terms of historic values;
- (h) The topography of the land and effect of the requested action on erosion, soil retention, water retention, and diversion or increased flow of surface waters.

The Planning Director may refer the application to another department, committee, or person for report and recommendation.

In granting a Heritage Tree Removal/Trimming Permit, the Planning Director may attach reasonable conditions to insure compliance with the content and purpose of this ordinance, such as, but not limited to, requiring replacement of trees removed with plantings acceptable to the Planning Director. If a permit is denied or conditions attached, the Planning Director shall provide the applicant with a written statement of the reasons for said denial or conditions based upon the above standards.

The Planning Director shall give priority to those applications based upon imminent hazard.

**SECTION 11,053. EMERGENCIES.** If an emergency develops which requires immediate response for the safety of life or property, action may be taken by seeking oral permission of the Planning Director, notwithstanding other provisions contained in this chapter. If the Planning Director is not available and action must be taken, the Planning Director shall be notified within a reasonable time thereafter. Such emergencies shall be exempt from Heritage Tree/Trimming Permit procedures.

**SECTION 11,054. PRESERVATION AND MAINTENANCE OF EXISTING TREES.**

- (1) When proposed structures or developments encroach into the dripline area of any heritage tree, special construction to allow irrigation and aeration of roots, as determined by the Planning Director, may be required with respect to any application for a building permit.
- (2) The existing ground surface within the dripline of the heritage tree shall not be cut, filled, compacted, or paved without having first obtained permission of the Planning Director. Tree wells or other techniques may be used where advisable. Excavation adjacent to such trees, where material damage to the root system will result, shall be allowed only after obtaining a permit as provided under Sections 11,051 and 11,052.
- (3) All applications for building permits, use permits, variances and other applicable permit applications shall be accompanied by a scaled plot plan indicating the location, size and species of heritage trees as defined in this Ordinance, which may be impacted upon by said permit execution.

**SECTION 11,055. BUILDING PERMITS.** When any building permit is applied for pursuant to the San Mateo County Ordinance Code and a proposed structure would require the cutting down, destruction, moving, removal, or trimming of one or more heritage trees, the Building Inspection Section of the Building Construction and General Services Department shall refer the matter to the Planning Director who shall take into consideration the provisions of this Ordinance before signing the building permit.

### **CHAPTER 3. PRESERVATION OF HERITAGE TREES - ENFORCEMENT**

**SECTION 11,100. NOTIFICATION.** Any person who owns or controls a heritage tree shall give 60 days notice to the County of San Mateo of intent to sell lands upon which those trees are growing if such lands are contiguous to an existing County park.

**SECTION 11,101. CUTTING, STRIPPING AND KINDRED ACTIONS FORBIDDEN.** Any person who willfully strips off bark from, trims, cuts burls, branches or leaves from, defaces or gouges any part, or destroys by fire any Heritage Tree located in the unincorporated area of San Mateo County without having first received authority under the provisions of the County Timber Harvesting Ordinance or under provisions of this Part is guilty of a misdemeanor and is punishable by a fine of not less than fifty dollars (\$50.00) nor more than five hundred dollars (\$500.00) or by imprisonment in the County jail for not less than 25 nor more than 150 days, or by both such fine and imprisonment.

### **CHAPTER 4. APPEALS**

**SECTION 11,150. APPEALS.** The applicant, or any other person, who is aggrieved by the issuance or non-issuance of the permit or any conditions thereof may appeal as set forth below. A statement by the appellant shall be required indicating how he is aggrieved or adversely affected by the decision. At the time the appeal is heard, the Planning Commission shall rule upon the appellant's standing as an aggrieved party. If the Planning Commission rules that the appellant is not aggrieved, all further proceedings shall be stayed except that the appellant may appeal the Planning Commission decision on standing to the Board of Supervisors as herein provided.

- (1) Permits considered and acted upon by the Planning Director may be appealed to the Planning Commission by filing a written Protest with the Secretary of the Planning Commission within ten (10) days of issuance or denial of said permit. The Planning Commission shall render a decision on the appeal within fifteen (15) days of public hearing. The Planning Director shall notify the affected parties of said action in writing.
- (2) Permits considered and acted upon by the Planning Commission may be appealed to the Board of Supervisors by filing a written protest with the Secretary of the Planning Commission within (10) days from issuance or denial of said permit. The Board of Supervisors shall hear such appeal within sixty (60) days, and render a decision within fifteen (15) days following such hearing. The decision of the Board of Supervisors shall be final. The action taken by the Board of Supervisors shall be reported to the affected parties in writing.

LLT:kcd - LLTM0739\_WKR.DOC  
(5/8/02)





August 30, 2017

Community Development Agency  
Long Range Planning Division  
2850 Fairlane Court  
Placerville, CA 95667

Re: Biological Resources Policy Update and Oak Resources Management Plan EIR

Board of Supervisors:

The Quercus Group appreciates the opportunity to submit draft Biological Resources Policy Update EIR (Update) comments for Board consideration. We incorporate by reference herein our remarks of March 15, 2017 and July 17, 2017. Unfortunately, the Update remains burdened by logical and legal infirmities.

1. Failure to Avoid or Feasibly Mitigate Wildlife Habitat Fragmentation

The Update acknowledges that, *"In total, under the cumulative scenario 18,642 acres of natural vegetation communities, including 6,848 acres of oak woodland, could be converted to developed uses. When the ORMP exemptions are also considered, a total of 145,552 acres of oak woodland could be lost."*<sup>1</sup> Oak woodlands represent 93 percent of the project area directly or indirectly<sup>2</sup> impacted by 2035. The Oaks 2040 study (Gaman, 2006) noted that "El Dorado County has more oak woodlands at risk than any other county in the state" and projected that "By 2040, 80 percent of El Dorado's oak woodlands may be developed." The Update seems intent on exceeding Gaman's 2040 oak woodland impacts projection.

The Update also states that, *"Of the land that is subject to the County's regulations, there is a total of 200,929 acres of oak woodlands, and of this amount, 95,843 acres (47.7%) of land is characterized in the FRAP data as supporting oak woodland habitat is already developed (CAL FIRE 2015)"* (FEIR, p. 5-15). Clearly significant El Dorado County oak woodlands habitat degradation and fragmentation has already occurred. The Update proposals would shatter the functionality of the remaining wildlife habitat connectivity.

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The Update contends that future *"project-specific environmental review would be required to document any GHG emissions associated with ground disturbing activities and vegetation removal."* Why would future projects measure soil carbon loss emissions when the Update dismisses their significance and apparently is unaware of how to estimate these carbon dioxide effects? Similarly, the Update denies the scientific certainty of a very substantial quantity of vegetation decomposition methane emissions associated with direct impacts to 18,642 natural land acres and foreseeable indirect GHG effects due to potential conversion of another 138,704 acres of oak woodlands (attachment A). Further, the Update contains no measures that compel future natural land conversions to analyze concomitant methane and black carbon emissions consistent with the SB 1383 reduction targets.

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Regarding soil disturbance carbon dioxide emissions, if biogenic<sup>3</sup> soil carbon loss is inconsequential why has state GHG policy stressed for a decade that maintaining soil carbon storage and increasing soil carbon sequestration rates is important? Why is the state funding a Healthy Soils Program<sup>4</sup> to increase soil carbon storage and sequestration rates statewide? Soil carbon science is centered on agriculture because prior to the advent of climate change issues there was no need to focus on ground disturbing activities related to development project soil emissions. Additionally, the more the development soil is moved around or transported the greater the soil microbial breakdown and carbon dioxide emissions. Agriculture does not generally move massive amounts of soil to and fro. Whether the soil carbon loss is caused by agricultural or development practices is immaterial, the carbon dioxide emissions occur.

The point of grading project sites is mainly to get beyond the average one meter soil column for the purpose of foundation and infrastructure stability. Construction projects, including residential development, involve the removal of the soil cover over large continuous areas, down to firm bedrock. On a per acre basis carbon dioxide emissions due to construction grading are much higher than new vineyards emissions over any GHG assessment period. Furthermore, the Update provides no guidance or performance standards for future projects to analyze or feasibly mitigate significant soil carbon loss emissions associated with impacts to potentially 157,346 acres.

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The DEIR states that “*the emissions estimates for the proposed project are all assumed to all be CO<sub>2</sub>*.” More recently, the Update Table 8-6 quantified relative GHG emissions from various wood-burning devices and provided estimates for combustion carbon dioxide/methane emissions but *not* for the associated black carbon and nitrous oxide emissions. Likewise, the Update estimated carbon dioxide and methane emissions from the firewood portion of impacted trees but *not* the residual tree slash decomposition methane emissions or slash open burning methane, nitrous oxide and black carbon emissions from the same trees. Cherry-picking which GHG emissions to measure does not represent a good-faith effort.

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The Update asserts that wood-burning device black carbon emissions are infeasible to measure at the programmatic scale. In fact local air district fine particulate matter (PM<sub>2.5</sub>) data, including specific wood-burning device information, could be used to provide a reasonable assessment of countywide wood-burning PM<sub>2.5</sub> emissions. The wood-burning PM<sub>2.5</sub> weight is then multiplied by the BC/PM<sub>2.5</sub> ratio of 0.05581<sup>5</sup> to determine the black carbon weight, which is then multiplied by CARB’s Short-Lived Carbon Pollutants policy black carbon GWP standard. Not only is estimating black carbon emissions feasible at the programmatic level, it would have been economically feasible under the Update budget of nearly \$550,000.

---

<sup>3</sup> The Bay Area Air Quality Management District has a simple definition for the term biogenic emissions, “derived from living cells.” While biogenic in nature, combustion related fossil fuels, prescribed open burning and wood-burning device emissions are classified as anthropogenic emissions.

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<sup>5</sup> United States Environmental Protection Agency, 2006. SPECIATE 4.0. [http://www.epa.gov/ttn/chief/software/speciate/speciate4/speciate4\\_2006dec.zip](http://www.epa.gov/ttn/chief/software/speciate/speciate4/speciate4_2006dec.zip)

4. Failure to Use the Best Available Global Warming Potential Scientific Values for CEQA Review

The Update used scientifically outdated Intergovernmental Panel on Climate Change (IPCC) global warming potential (GWP) values for the GHG emissions analysis. The appropriate IPCC GWP standards for CEQA review are the 2013 AR5 GWP values, not the Update 2007 AR4 GWP values. This point is particularly germane regarding calculating methane emissions. The Bay Area Air Quality Management District are currently using the 2013 IPCC GWP standards.

The Update issue here is not jurisdictional or approval authority but compliance with the specific language in the AB 32 global warming potential values definition: "*based on the best available science, including from the Intergovernmental Panel on Climate Change.*" Update use of a 10-year old IPCC methane GWP value does not comport with a GHG analysis based on the best, latest or most relevant science.

The use of scientifically outdated information under CEQA may have legal ramifications (See *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1367 ("By using scientifically outdated information derived from the 1991 profile, we conclude the EIR was not a reasoned and good faith effort to inform decisionmakers and the public about the increase in TAC emissions that will occur as a consequence of the Airport expansion.").)

Summary

It appears the Update includes a carbon dioxide emissions-only analysis perspective for the sole purpose of creating a faux plan for the reduction of GHG emissions, while bypassing the CEQA § 15183.5 requirement to fully account for all significant GHG emission sources within the chosen geographical area (attachment B). Future projects would be able to streamline the GHG emissions analysis by tiering to the General Plan and declare that GHG emissions have been sufficiently analyzed. This possible scenario is evidenced by the fact that the Update focuses on project carbon dioxide emissions but offered a variety of justifications for the failure to estimate vegetation decomposition methane and combustion black carbon/nitrous oxide emissions. In fact El Dorado County does not have the prerogative to choose which GHGs to account for and feasibly mitigate. Moreover, the Update fails to describe or demonstrate how non-carbon dioxide greenhouse gas emissions will be reduced consistent with state policy and law by 2030.

Sincerely,



Ron Cowan, Principal

attachments (2)

The author of these comments has over 45 years of training and experience in all aspects of California forestry and 10 years of GHG emissions analysis experience. He also wrote a significant portion of the Oak Woodland Conservation Act (2001), the first draft of legislation chaptered as Public Resources Code § 21083.4, county oak woodland mitigation (2005) and the first approved Napa County vineyard EIR GHG analysis/mitigation measures (2010).

## Attachment A

The Update engages in a concentrated effort to dissemble and diminish the actual vegetation decomposition methane emissions resulting from this countywide project. For example the Update chose the Forest Service COLE model for the forestry analysis and it is only capable of estimating carbon storage and carbon dioxide emissions, not non-carbon dioxide emissions. The Update carbon dioxide-only approach was augmented by extraneous comparative statements like the following paragraph:

*"CH<sub>4</sub> is produced when decomposition of vegetative materials, such as wood pellets and wood chips, occurs in the presence of anaerobic (lacking oxygen) conditions. These conditions are typically found in the middle of large storage piles, such as at biomass to energy facilities. "On the other hand, similar behavior [occurrence of anaerobic conditions] was not observed from garden waste, which contained a lot of lignin. In this case more air could get into the compost and anaerobic conditions cannot occur, because compost is loosely packed" (Jamsen 2015). Thus, it is expected that decomposition of the materials harvested from oak woodlands and used for landscaping applications would not be a source of new CH<sub>4</sub> emissions and that the majority of GHG emissions from decomposition of such material would be in the form of CO<sub>2</sub>."*

This paragraph conflates wood pellets, wood chips, energy facilities, garden waste, lignin and compost for the purpose of making natural lands conversion decomposition methane emissions virtually disappear. Disparate associations are used to make the case that vegetation decomposition aerobic (with oxygen) digestion is dominant in the natural world. In fact anaerobic digestion is prevalent, with aerobic digestion most often associated with man-made wastewater treatment facilities and septic systems. Science depicts a different vegetation decomposition reality than the Update:

- Using the Update IPCC 2007 global warming potential methane value of 25, the scientific consensus is that vegetation decomposition carbon dioxide and methane emission would be roughly equal.<sup>6</sup> Using the IPCC 2013 GWP methane value of 34 almost 60 percent of the decomposition emissions are methane.
- Indeed garden waste contains high levels of lignin causing the rate of microbial breakdown to slow. However, hardwood trees such as oaks (±20 percent) contain much less lignin than garden waste or crops. Further it is vegetation sugars, starches, and cellulose that are the drivers of biogenic methane emissions production, not lignin content.
- The assertion that landscaping wood chips and forest slash debris derived from cutting "new" trees would not be a source of new biogenic methane emissions is illogical.

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<sup>6</sup> "Anaerobic digestion, chemical process in which organic matter is broken down by microorganisms in the absence of oxygen, which results in the generation of carbon dioxide (CO<sub>2</sub>) and methane (CH<sub>4</sub>) .... Sugars, starches, and cellulose produce approximately equal amounts of methane and carbon dioxide." Encyclopædia Britannica (2013). <http://www.britannica.com/EBchecked/topic/22310/anaerobic-digestion>

Phoenix Energy - "As wood starts to decompose it releases roughly equal amounts of methane (CH<sub>4</sub>) and carbon dioxide (CO<sub>2</sub>)." 2012. <http://www.phoenixenergy.net/powerplan/environment>

Macpherson Energy - "Rotting produces a mixture of up to 50 percent CH<sub>4</sub>, while open burning produces 5 to 10 percent CH<sub>4</sub>." 2011. <http://macphersonenergy.com/mt-poso-conversion.html>

- As evidenced previously the production of compost results in very high biogenic methane emissions (3/15/17 comments, Attachment A).
- Rain accelerates wood chips and forest debris methane emissions due to the same chemical processes that occur with controlled landfill open cell methane emissions before the cell is capped and the emissions captured. Up to 50 percent of the cell “latent” methane escapes during the first year when the landfill mass is uncovered and open to rainfall (Themelis and Ulloa, 2007).<sup>7</sup>
- While vegetation compaction accelerates the formation of methane these methane emissions will occur regardless within the Update 20-year time frame and the GHG emissions standard assessment period of 100 years. Methane forms and is dispersed into the atmosphere in a relatively short period, stays in the atmosphere 10-15 years and then degrades to carbon dioxide.

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<sup>7</sup> Climate Action Reserve. 2009. Issue Paper: *Methane Avoidance from Composting*, p. 40.  
<http://www.climateactionreserve.org/how/future-protocol-development/issue-papers/>.



## Attachment B

### 14 CCR § 15183.5

#### § 15183.5. Tiering and Streamlining the Analysis of Greenhouse Gas Emissions.

(a) Lead agencies may analyze and mitigate the significant effects of greenhouse gas emissions at a programmatic level, such as in a general plan, a long range development plan, or a separate plan to reduce greenhouse gas emissions. Later project-specific environmental documents may tier from and/or incorporate by reference that existing programmatic review. Project-specific environmental documents may rely on an EIR containing a programmatic analysis of greenhouse gas emissions as provided in section 15152 (tiering), 15167 (staged EIRs) 15168 (program EIRs), 15175-15179.5 (Master EIRs), 15182 (EIRs Prepared for Specific Plans), and 15183 (EIRs Prepared for General Plans, Community Plans, or Zoning).

(b) Plans for the Reduction of Greenhouse Gas Emissions. Public agencies may choose to analyze and mitigate significant greenhouse gas emissions in a plan for the reduction of greenhouse gas emissions or similar document. A plan to reduce greenhouse gas emissions may be used in a cumulative impacts analysis as set forth below. Pursuant to sections 15064(h)(3) and 15130(d), a lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project complies with the requirements in a previously adopted plan or mitigation program under specified circumstances.

(1) Plan Elements. A plan for the reduction of greenhouse gas emissions should:

(A) Quantify greenhouse gas emissions, both existing and projected over a specified time period, resulting from activities within a defined geographic area;

(B) Establish a level, based on substantial evidence, below which the contribution to greenhouse gas emissions from activities covered by the plan would not be cumulatively considerable;

(C) Identify and analyze the greenhouse gas emissions resulting from specific actions or categories of actions anticipated within the geographic area;

(D) Specify measures or a group of measures, including performance standards, that substantial evidence demonstrates, if implemented on a project-by-project basis, would collectively achieve the specified emissions level;

(E) Establish a mechanism to monitor the plan's progress toward achieving the level and to require amendment if the plan is not achieving specified levels;

(F) Be adopted in a public process following environmental review.

(2) Use with Later Activities. A plan for the reduction of greenhouse gas emissions, once adopted following certification of an EIR or adoption of an environmental document, may be used in the cumulative impacts analysis of later projects. An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project. If there is substantial evidence that the effects of a particular project may be cumulatively considerable notwithstanding the project's compliance with the specified requirements in the plan for the reduction of greenhouse gas emissions, an EIR must be prepared for the project.

(c) Special Situations. As provided in Public Resources Code sections 21155.2 and 21159.28, environmental documents for certain residential and mixed use projects, and transit priority projects, as defined in section 21155, that are consistent with the general use designation, density, building intensity, and applicable policies specified for the project area in an applicable sustainable communities strategy or alternative planning strategy need not analyze global warming impacts resulting from cars and light duty trucks. A lead agency should consider whether such projects may result in greenhouse gas emissions resulting from other sources, however, consistent with these Guidelines.

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Section 65457, Government Code; Sections 21003, 21061, 21068.5, 21081(a)(2), 21081.6, 21083.05, 21083.3, 21093, 21094, 21100, 21151, 21155, 21155.2, 21156, 21157, 21157.1, 21157.5, 21157.6, 21158, 21158.5 and 21159.28, Public Resources Code; California Native Plant Society v. County of El Dorado (2009) 170 Cal.App.4th 1026; and Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099.





Jim Mitrisin <jim.mitrisin@edcgov.us>

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## BOS Meeting/Oct. 10,2017; Biological Resources Policy Update/ORMP; File # 12-1203; Agenda Item 37

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**Cheryl** <Cheryl.FMR@comcast.net>

Tue, Oct 10, 2017 at 7:21 AM

To: The BOSONE <bosone@edcgov.us>, The BOSTWO <bostwo@edcgov.us>, bostthree@edcgov.us, bosfour@edcgov.us, bosfive@edcgov.us, EDC COB <edc.cob@edcgov.us>, jim.mitrisin@edcgov.us

Supervisors and Jim--

I've attached a letter dated August 30, 2017, from *Quercus Group, Forest & Greenhouse Gas Consultants*. This letter describes--among other issues--concerns regarding the greenhouse gas emissions analysis conducted by the consultant for the Biological Resources Policy Update/Oak Resources Management Plan project.

**Jim**--Please add these comments to the administrative record for this project.

Thank You--

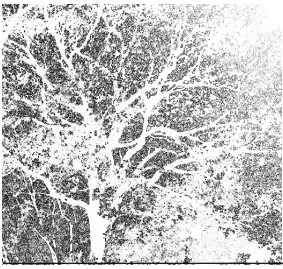
Cheryl Langley  
Shingle Springs Resident



Virus-free. [www.avg.com](http://www.avg.com)

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**Eldo\_Bio\_BOS\_2.pdf**  
342K



August 30, 2017

Community Development Agency  
Long Range Planning Division  
2850 Fairlane Court  
Placerville, CA 95667

Re: Biological Resources Policy Update and Oak Resources Management Plan EIR

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#### 4. Failure to Use the Best Available Global Warming Potential Scientific Values for CEQA Review

The Update used scientifically outdated Intergovernmental Panel on Climate Change (IPCC) global warming potential (GWP) values for the GHG emissions analysis. The appropriate IPCC GWP standards for CEQA review are the 2013 AR5 GWP values, not the Update 2007 AR4 GWP values. This point is particularly germane regarding calculating methane emissions. The Bay Area Air Quality Management District are currently using the 2013 IPCC GWP standards.

The Update issue here is not jurisdictional or approval authority but compliance with the specific language in the AB 32 global warming potential values definition: *“based on the best available science, including from the Intergovernmental Panel on Climate Change.”* Update use of a 10-year old IPCC methane GWP value does not comport with a GHG analysis based on the best, latest or most relevant science.

The use of scientifically outdated information under CEQA may have legal ramifications (See *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1367 (“By using scientifically outdated information derived from the 1991 profile, we conclude the EIR was not a reasoned and good faith effort to inform decisionmakers and the public about the increase in TAC emissions that will occur as a consequence of the Airport expansion.”).)

#### Summary

It appears the Update includes a carbon dioxide emissions-only analysis perspective for the sole purpose of creating a faux plan for the reduction of GHG emissions, while bypassing the CEQA § 15183.5 requirement to fully account for all significant GHG emission sources within the chosen geographical area (attachment B). Future projects would be able to streamline the GHG emissions analysis by tiering to the General Plan and declare that GHG emissions have been sufficiently analyzed. This possible scenario is evidenced by the fact that the Update focuses on project carbon dioxide emissions but offered a variety of justifications for the failure to estimate vegetation decomposition methane and combustion black carbon/nitrous oxide emissions. In fact El Dorado County does not have the prerogative to choose which GHGs to account for and feasibly mitigate. Moreover, the Update fails to describe or demonstrate how non-carbon dioxide greenhouse gas emissions will be reduced consistent with state policy and law by 2030.

Sincerely,



Ron Cowan, Principal

attachments (2)

The author of these comments has over 45 years of training and experience in all aspects of California forestry and 10 years of GHG emissions analysis experience. He also wrote a significant portion of the Oak Woodland Conservation Act (2001), the first draft of legislation chaptered as Public Resources Code § 21083.4, county oak woodland mitigation (2005) and the first approved Napa County vineyard EIR GHG analysis/mitigation measures (2010).

## Attachment A

The Update engages in a concentrated effort to dissemble and diminish the actual vegetation decomposition methane emissions resulting from this countywide project. For example the Update chose the Forest Service COLE model for the forestry analysis and it is only capable of estimating carbon storage and carbon dioxide emissions, not non-carbon dioxide emissions. The Update carbon dioxide-only approach was augmented by extraneous comparative statements like the following paragraph:

*"CH<sub>4</sub> is produced when decomposition of vegetative materials, such as wood pellets and wood chips, occurs in the presence of anaerobic (lacking oxygen) conditions. These conditions are typically found in the middle of large storage piles, such as at biomass to energy facilities. "On the other hand, similar behavior [occurrence of anaerobic conditions] was not observed from garden waste, which contained a lot of lignin. In this case more air could get into the compost and anaerobic conditions cannot occur, because compost is loosely packed" (Jamsen 2015). Thus, it is expected that decomposition of the materials harvested from oak woodlands and used for landscaping applications would not be a source of new CH<sub>4</sub> emissions and that the majority of GHG emissions from decomposition of such material would be in the form of CO<sub>2</sub>."*

This paragraph conflates wood pellets, wood chips, energy facilities, garden waste, lignin and compost for the purpose of making natural lands conversion decomposition methane emissions virtually disappear. Disparate associations are used to make the case that vegetation decomposition aerobic (with oxygen) digestion is dominant in the natural world. In fact anaerobic digestion is prevalent, with aerobic digestion most often associated with man-made wastewater treatment facilities and septic systems. Science depicts a different vegetation decomposition reality than the Update:

- Using the Update IPCC 2007 global warming potential methane value of 25, the scientific consensus is that vegetation decomposition carbon dioxide and methane emission would be roughly equal.<sup>6</sup> Using the IPCC 2013 GWP methane value of 34 almost 60 percent of the decomposition emissions are methane.
- Indeed garden waste contains high levels of lignin causing the rate of microbial breakdown to slow. However, hardwood trees such as oaks (±20 percent) contain much less lignin than garden waste or crops. Further it is vegetation sugars, starches, and cellulose that are the drivers of biogenic methane emissions production, not lignin content.
- The assertion that landscaping wood chips and forest slash debris derived from cutting "new" trees would not be a source of new biogenic methane emissions is illogical.

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<sup>6</sup> "Anaerobic digestion, chemical process in which organic matter is broken down by microorganisms in the absence of oxygen, which results in the generation of carbon dioxide (CO<sub>2</sub>) and methane (CH<sub>4</sub>) .... Sugars, starches, and cellulose produce approximately equal amounts of methane and carbon dioxide." Encyclopædia Britannica (2013). <http://www.britannica.com/EBchecked/topic/22310/anaerobic-digestion>

Phoenix Energy - "As wood starts to decompose it releases roughly equal amounts of methane (CH<sub>4</sub>) and carbon dioxide (CO<sub>2</sub>)." 2012. <http://www.phoenixenergy.net/powerplan/environment>

Macpherson Energy - "Rotting produces a mixture of up to 50 percent CH<sub>4</sub> while open burning produces 5 to 10 percent CH<sub>4</sub>." 2011. <http://macphersonenergy.com/mt-poso-conversion.html>

- As evidenced previously the production of compost results in very high biogenic methane emissions (3/15/17 comments, Attachment A).
- Rain accelerates wood chips and forest debris methane emissions due to the same chemical processes that occur with controlled landfill open cell methane emissions before the cell is capped and the emissions captured. Up to 50 percent of the cell “latent” methane escapes during the first year when the landfill mass is uncovered and open to rainfall (Themelis and Ulloa, 2007).<sup>7</sup>
- While vegetation compaction accelerates the formation of methane these methane emissions will occur regardless within the Update 20-year time frame and the GHG emissions standard assessment period of 100 years. Methane forms and is dispersed into the atmosphere in a relatively short period, stays in the atmosphere 10-15 years and then degrades to carbon dioxide.

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<sup>7</sup> Climate Action Reserve. 2009. Issue Paper: *Methane Avoidance from Composting*, p. 40.  
<http://www.climateactionreserve.org/how/future-protocol-development/issue-papers/>.

## Attachment B

14 CCR § 15183.5

### § 15183.5. Tiering and Streamlining the Analysis of Greenhouse Gas Emissions.

(a) Lead agencies may analyze and mitigate the significant effects of greenhouse gas emissions at a programmatic level, such as in a general plan, a long range development plan, or a separate plan to reduce greenhouse gas emissions. Later project-specific environmental documents may tier from and/or incorporate by reference that existing programmatic review. Project-specific environmental documents may rely on an EIR containing a programmatic analysis of greenhouse gas emissions as provided in section 15152 (tiering), 15167 (staged EIRs) 15168 (program EIRs), 15175-15179.5 (Master EIRs), 15182 (EIRs Prepared for Specific Plans), and 15183 (EIRs Prepared for General Plans, Community Plans, or Zoning).

(b) Plans for the Reduction of Greenhouse Gas Emissions. Public agencies may choose to analyze and mitigate significant greenhouse gas emissions in a plan for the reduction of greenhouse gas emissions or similar document. A plan to reduce greenhouse gas emissions may be used in a cumulative impacts analysis as set forth below. Pursuant to sections 15064(h)(3) and 15130(d), a lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project complies with the requirements in a previously adopted plan or mitigation program under specified circumstances.

(1) Plan Elements. A plan for the reduction of greenhouse gas emissions should:

(A) Quantify greenhouse gas emissions, both existing and projected over a specified time period, resulting from activities within a defined geographic area;

(B) Establish a level, based on substantial evidence, below which the contribution to greenhouse gas emissions from activities covered by the plan would not be cumulatively considerable;

(C) Identify and analyze the greenhouse gas emissions resulting from specific actions or categories of actions anticipated within the geographic area;

(D) Specify measures or a group of measures, including performance standards, that substantial evidence demonstrates, if implemented on a project-by-project basis, would collectively achieve the specified emissions level;

(E) Establish a mechanism to monitor the plan's progress toward achieving the level and to require amendment if the plan is not achieving specified levels;

(F) Be adopted in a public process following environmental review.

(2) Use with Later Activities. A plan for the reduction of greenhouse gas emissions, once adopted following certification of an EIR or adoption of an environmental document, may be used in the cumulative impacts analysis of later projects. An environmental document that relies on a greenhouse gas reduction plan for a cumulative impacts analysis must identify those requirements specified in the plan that apply to the project, and, if those requirements are not otherwise binding and enforceable, incorporate those requirements as mitigation measures applicable to the project. If there is substantial evidence that the effects of a particular project may be cumulatively considerable notwithstanding the project's compliance with the specified requirements in the plan for the reduction of greenhouse gas emissions, an EIR must be prepared for the project.



(c) Special Situations. As provided in Public Resources Code sections 21155.2 and 21159.28, environmental documents for certain residential and mixed use projects, and transit priority projects, as defined in section 21155, that are consistent with the general use designation, density, building intensity, and applicable policies specified for the project area in an applicable sustainable communities strategy or alternative planning strategy need not analyze global warming impacts resulting from cars and light duty trucks. A lead agency should consider whether such projects may result in greenhouse gas emissions resulting from other sources, however, consistent with these Guidelines.

Note: Authority cited: Sections 21083 and 21083.05, Public Resources Code. Reference: Section 65457, Government Code; Sections 21003, 21061, 21068.5, 21081(a)(2), 21081.6, 21083.05, 21083.3, 21093, 21094, 21100, 21151, 21155, 21155.2, 21156, 21157, 21157.1, 21157.5, 21157.6, 21158, 21158.5 and 21159.28, Public Resources Code; California Native Plant Society v. County of El Dorado (2009) 170 Cal.App.4th 1026; and Protect the Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099.