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Planning, Building & Environmental Services

1195 Third Street, Suite 210
Napa, CA 94559
www.countyofnapa.org
Main: (707) 253-4417

Brian D. Bordona
Director

MEMORANDUM

To:	Planning Commission	From:	Sean Trippi, Supervising Planner
Date:	November 20, 2024	Re:	Item 7A – E & P Technology Way Use Permit Applications P22-00307 & P22-00308

Attached is additional correspondence from Water Audit California, dated November 19, 2024. You have previously received the attached correspondence via e-mail.

After consultation with the project applicant, staff is recommending continuing the public hearing on this item to a date uncertain to allow staff and the applicant time to address the comments we have received.



WATER AUDIT CALIFORNIA

A PUBLIC BENEFIT CORPORATION

952 SCHOOL STREET #316 NAPA CA 94559
VOICE: (707) 681-5111
EMAIL: GENERAL@WATERAUDITCA.ORG

November 19, 2024

County of Napa
Planning Commission

meetingclerk@countyofnapa.org

RE: Hearing – November 20, 2024

E&P TECHNOLOGY WAY - BUILDING A & B / DENNIS PAULLEY / USE PERMIT APPLICATIONS #P22-00307 and #P22-00308 CEQA Status: Consideration and possible adoption of a Mitigated Negative Declaration.

Water Audit California ("Water Audit") is an advocate for the public trust.

WAC recommends Option 4 to the Commission - Continuance Option, as the Commission may continue an item to a future hearing date at its own discretion.

FINDINGS

Water Audit disagrees with the Findings. The Application submitted omits critical material required in permitting Industrial Zone in Airport Zone. There is no Airport Land Use Commission project determination. A Variance Application for Building A setback is not in agenda packet, County Electronic Document Retrieval, or County Parcel Report.

FINDINGS at pdf page 18:

"10. Analysis consistent w IP/AC...The proposed use complies with applicable provisions of the Napa County Code and is consistent with the policies and standards of the Napa County General Plan and the Napa Valley Business Park Specific Plan. Analysis: Compliance with the Zoning Ordinance The proposed use is consistent with the Industrial Park: Airport Compatibility Combination (IP:AC) zoning district regulations, as conditioned, including setbacks, excepted as noted below, landscaping, building height, parking requirements, lot coverage and floor area ratio."

FINDINGS at pdf page 19: "VARIATION TO DEVELOPMENT STANDARDS reduce 40ft bldg setback to 31ft Bldg A... VARIATION TO DEVELOPMENT STANDARDS The Commission has reviewed the use permit variation request to development standards to reduce the 40-foot average building setback to 31-feet for Building A from the south property line in accordance with the requirements of Napa County Code Section 18.40.250, and makes the following findings:"

FINDINGS at pdf page 19:

"14. consistent w airport... The proposed modifications are consistent with applicable airport safety regulations. Analysis: The proposed modification pertains to reducing average building setback requirements that do not directly affect airport safety."

CONDITIONS OF APPROVAL ("COA") BUILDING A AND B

There are two Conditions of Approvals sought, one for Building A and one for Building B. This is very confusing. There is no wastewater connection frac-out plan under Sheehy Creek. COAs continue to assign Responsible agency to PBES to every BIO Mitigation Measure. No letters appended to COAs from CDFW, Caltrans, CalFire, CDFW, US Army Corp. The November 15, 2024 CDFW letter posted on State Clearing House is not in the packet before Commission. That CDFW letter recommended language has not been incorporated in COAs. (see CDFW Letter below.)

CDFW letter at page 6: ADD THE BELOW LANGUAGE TO THE EXISTING MM BIO-6.

Burrowing Owl Habitat Assessment and Surveys: If take of BUOW cannot be avoided, the Project shall consult with CDFW pursuant to CESA and obtain an ITP before Project activities commence. Take is likely to occur, and the Project shall obtain an ITP if: 1) BUOW surveys of the Project site detect BUOW occupancy of burrows or burrow surrogates, or 2) there is sign of BUOW occupancy on the Project site within the past three years and habitat has not had any substantial change that would make it no longer suitable within the past three years. Occupancy means a site that is assumed occupied if at least one BUOW has been observed occupying a burrow or burrow surrogate within the last three years. Occupancy of suitable BUOW habitat may also be indicated by BUOW sign including its molted feathers, cast pellets, prey remains, eggshell fragments, or excrement at or near a burrow entrance or perch site. If BUOW, or their burrows or burrow surrogates, are detected within 500 meters (1,640 feet) of the Project site during BUOW surveys, but not on the Project site, the Project shall consult with CDFW to determine if avoidance is feasible, or an ITP is warranted and shall obtain an ITP if deemed necessary by CDFW.

Timing: Prior to Ground Disturbance and During Project Construction

Responsible Party: Project Applicant

Responsible Agency: CDFW

WATER and SEWER

The Conditions of Approval do not reflect what is currently recorded with the County. Staff claims no record of historical potable water use and no will-serve letter. Not in the agenda packet but found online is the County EDR records with a Well Permit E07- 00683 filed in parcel 057-250-031 (the Well Completion Report is filed in 057-250-030), and, a prior City of American Canyon Will Serve Letter was included with the earlier referenced permit submittal P07-00864 on APN 057-250-030.

Condition of Approval pdf page 75 (emphasis added below):

1.3 - Status of Existing Services

The property is currently vacant. The **City has no record of historical potable water use** at the property. **No prior Will-Serve Letters have been issued by the City.** The property is located within the Napa Sanitation District's (NSD) recycled water service area. Recycled water is available in the area.

INITIAL STUDY

The Initial Study and Mitigated Negative Declaration determination was evaluated by Sean Kennings, LAK Associates LLC, a contract planner (packet pdf 155.) There is no disclosure of a Kennings 'Conflict of Interest Disclosure. The Initial Study mistakenly omits from project review the Responsible Agencies CDFW, USFW and US Army Corp. The November 15, 2024 CDFW letter recommended language requires clarification prior to the finalization of the Initial Study. Without a Notice of Determination from CDFW, the project is not approved, operative, vested, or final.

CDFW letter at page 6 omitted from agenda packet (emphasis added):

"CDFW recommends revising the language on IS/MND Page 2, Section 10 to: "The proposed project has the potential to result in "take" of listed endangered or threatened species, or candidate species for listing, and thus may require a "take permit" from the Department of Fish and Wildlife, the U.S. Fish and Wildlife Service, or the National Marine Fisheries Service.

Timing: Prior to Finalizing IS/MND

Responsible Party: Lead Agency

Responsible Agency: CDFW

CDFW letter at page 5 omitted from agenda packet (emphasis added):

ENVIRONMENTAL DOCUMENT FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of environmental document filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. **Payment of the environmental document filing fee is required in order for the underlying Project approval to be operative, vested, and final.** (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089.)

APPLICATION

Wrong Application. This is not a "Major Modification", it is a Site Development Plan. No deed on any of the three parcels. No notice list to neighbors. No Assessor Parcel Pages. No "grape source" for 057-250-030 winery parcel. No Application for Variance for Building A set-back. Neither Application is signed or date stamped. No Fees. No Airport Land Use Commission determination. No Compatibility Map. Checklist omits Industrial Zone supplemental checklist, CUPA, Business Activities Form, Hazardous Materials Business Plan. No Solid waste & Recycling Storage area location & size included on overall site plan. No referenced P07-00864 or P08-00057 in packet for review. No referenced Conservation Easement 2006-0004963 with Site Map in packet for review. NapaSan requires separate sanitary sewer laterals, but the Applicant does not explain how Sheehy Creek will be impacted.

Building A and B are NOT Major Modifications. There is no relationship with previous application submitted in 2007 by Rombauer Vineyards for permit P07-00864. That P07-00864 was withdrawn by owner.

Further, the E & P Project Statement claims this "modification" is exempt from submitting a Variance Application for Building A setback. No Variance for any Building setback has been filed then, or now. The E & P claim is also supported by a 2008 Permit P08-00057 applied for by Caymus Vineyards on a different APN. That P08-00057 is APN 057-250-032, and is supported with conditions from Environmental Health Services October 13, 2008 Memo requiring siting the hazardous waste stored and disposed per CA HSC, Hazardous Materials Business Plan, Business Activities Form. That P08-00057 is "Pending as of 2008" and has long since expired (see County Parcel Report.)

Project Statement Building A (emphasis added) pdf 150:

NapaSan Will Serve "11. Each parcel shall be served by a **separate sanitary sewer lateral**"

Project Statement Building A (emphasis added) pdf 193:

"GENERAL PROJECT DESCRIPTION: The property is located on the north side of Technology Way and Morris Court within the Industrial Park Area of the Napa County Airport Business Park. The parcel is undeveloped. **This proposal supplements application P22-00307 to allow for full winery production and wine storage within the proposed 143,325 SF building. The winery uses will include grape crushing,** bulk wine processing and storage, stainless steel tank and barrel storage, bottling, and office space. In addition, approximately 13,000 square feet of covered work area will be located on the north side of the building

Project Statement Building A (emphasis added) pdf 194:

"Site Development: The Napa Valley Business Park Specific Plan includes a requirement for an unnamed setback from Sheehy Creek, which is adjacent to this parcel on the north side. **The necessary setbacks were evaluated and established under a previous application (P08-00557). A Conservation Easement has been recorded to established for habitat conservation (2006-0004963).** First Carbon Solutions has prepared updated Biological Assessment. All recommendations contained in this report are included in the project."

Project Statement Building B pdf 213:

"GENERAL PROJECT DESCRIPTION: The property is located on the north side of Technology Way and Morris Court within the Industrial Park Area of the Napa County Airport Business Park. The parcel is undeveloped. **This proposal supplements application P22-00308 to allow warehouse uses within the proposed 66,915 SF building.** The warehouse use would be consistent with allowable warehouse uses as outlined in Napa County Code (18.40.020)."

STORMWATER

The Stormwater plan claims the bike trail is a sufficient setback designation from Sheehy Creek. and from the proposed construction.

STORMWATER CONTROL PLANS packet pdf 478:

"III.A. OPTIMIZATION OF SITE LAYOUT:

III.A.3 SETBACKS FROM CREEKS, WETLANDS, AND RIPARIAN HABITATS

An existing **bike trail borders the Sheehy Creek, creating a natural setback for proposed construction.** Proposed construction will not encroach within 5 ft of the existing bike trail and the creek to the north.

BIOLOGICAL RESOURCES ASSESSMENT

The Biological assessment maps omit Fagan, Sheehy and Suscol Creeks altogether (see packet pdf 307.) There is no wetlands verification number from US Army Corp. No wetlands delineation worksheets, either wet or dry seasons. All three project parcels are in wetlands (County GIS wetland vegetation layer map Exhibit attached below.)

Biological Resources Study pdf page 21 (emphasis added in bold):

"Biological Report 3.4 Watercourses and Potential Wetlands...Potential wetlands on-site were assessed based on the likelihood to satisfy the three-tier wetland delineation criteria used by the USACE Wetland Delineation Manual (USACE 1987); **however, a protocol-level wetland delineation was not performed.**

GEOLOGICAL

The Geological Study pdf page 491 "C203 Civil Site Plan" omits distances to Sheehy Creek. There are Sanitary Sewer connections crossing Sheehy Creek. At pdf page 497 "C403 Utilities Building A" No distances sited. There is an "existing 20' sanitary sewer to remain" crossing Sheehy Creek to connect with NapaSan pipe. Is NapaSan pipe inside the setback "Habitat Conservation Easement"? At pdf page 493 "C303 Grading & Planning" sites the sewer crossing at Sheehy Creek, with no distance sited.

The Geological Study does not include any LSAA or US Army Corp verification to permit filling in Sheehy Creek, cutting a new channel, and relocating it. No explanation regarding connection to NapaSan pipe. Soils description is same as wetland soil composition. No wetland delineation worksheets, wet or dry seasons, or verification from US Army Corp.

Geological Study pdf page 2 through 4 (emphasis added):

"... We also noted that there is fill on both properties, which is most significant on the easterly portion of the easterly property. The approximate location of the pre-existing trace of Sheehy Creek, which according to Gogle Earth® imagery was moved to its present location within the interval between the summers of 2003 and 2004, crosses the property as shown approximately on Plate 1. The backfill of the pre-existing creek trace is discussed in the next section."

"It should be recognized that eight of the 11 borings drilled on the composite property were located over the pre-existing creek trace in order to assess the quality of the creek backfill. In locating borings over the former creek trace we considered historic aerial photography, and by virtue of the composition of the creek fill materials we engaged, it is apparent that our exploratory location methodology was appropriate. The depths of fill engaged in the creek-specific borings ranged from 5.3 to 19 feet, likely reflecting the locations of our explorations relative to the centerline of the trace; the quality of the creek backfill appears to be good. The immediate surface of the creek backfill soils consists of a foot or less of silt which is typically underlain by a six-to 20-foot-thick dark, high plasticity clay stratum, although the dark heavy clays also appear at the surface locally, and also are interlayered with leaner, lighter-colored silty clays and silty sands locally. **Within areas outside the pre-existing creek trace, it would appear that the native soil profile consists of two to four feet of locally loose but generally medium dense silt at ground surfaces, underlain by comparatively thin strata of dark heavy clay soils, which are locally interrupted by lighter, leaner silty clays and clayey silts. At depths of six to seven feet within the native soils, silty clays of stiff to very stiff consistency were engaged; these soils were found to extend to depths of nearly 20 feet. Below about 20 feet the native soils consist of a complex sequence of silty sand, sandy silt, silty clay, and even fine gravel locally, which appear to**

extend beyond our maximum 50-depth of our exploration; consistencies of the soils in this lowermost interval generally are stiff to hard/dense."

"Free groundwater was encountered in nine of the 11 borings drilled for this study. Measured depths ranged from, as little as eight feet, to 17.5 feet, although no water was engaged in either the 20-foot-deep Boring 3 or the 15-foot-deep Boring 4. **Nearly three feet of artesian pressure was measured in Boring B where the free groundwater is confined by dark heavy clay backfill materials."**

"As indicated above, the plasticity of the uppermost native clays is quite high. These near surface clays are capable of exerting high to very high expansion pressures on slabs, flatwork, pavements and foundations with variations in moisture content. As with other projects in this setting, **soil expansion potential will be addressed by chemical treatment."**

TRAFFIC

The Traffic Study at pdf page 372 "Winery Trip Generation" for Building A is named differently from the Application Project Statement. Dates are not consistent. Worksheets are not consistent. Employees full-time and part-time are not consistent.

GRAPHICS

No USGS with watercourses and distances sited per Checklist Sample. Napa County Land Use Plan map is only a tight-shot with the project parcels. It omits surrounding parcels. Maps have illegible font and numbers. The plan "C402 Utilities Building B" designates an "INTERIM PROPERTY LINE TO BE ELIMINATED." There are No APNs on map. There is no lot line or easement permit number (see pdf page 577.)

PARCEL REPORT

Not in agenda packet and noted on individual Parcel Reports "Not currently updating as of August 2024." No pre-site application on Parcel Report. No lot line adjustment per -031, -032 Bldg B. No 1994 "original" Use Permit application approved. No Variance permit.

WATER BOARDS

Not in agenda packet is Sheehy Creek Stream Maintenance report. The modified channel is mowed to reduce weeds, and it was realigned to accommodate the development of the industrial park. There are no LSAA or US Army Corp verification numbers.

Link here (emphasis added):

https://www.waterboards.ca.gov/sanfranciscobay/board_info/agendas/2019/July/NapaCounty/Attachment_A_Napa_Stream_Maintenance_Manual_Part_1.pdf

At pdf page 177 REACH SETTING:

The District-maintained reach of Sheehy Creek is significantly modified for drainage and flood control. The channel generally has a trapezoidal cross-section, and a planform alignment that appears to have been modified to accommodate the development of the industrial park. The District has planted native trees along the banks, which has substantially enhanced the riparian habitat along the drainage corridor.

MAINTENANCE HISTORY:

In 2010, bank stabilization work was performed at the downstream end of the reach (Photos 3 and 4). **Cattails in the middle of the main channel are mowed on a routine basis.** In 2016, 250 linear feet of cattails were removed.

At pdf page 177 PHYSICAL CONDITIONS:

Active channel: **The channel bed is 20-30 ft wide; the bed is 10-15 ft beneath the top of banks.**

Bed sediments/texture: The bed is composed of sands and fine sediment (Photo 4). Some riprap has been placed in the channel bed at the downstream portion of the reach.

Bank structure: The channel has 10-12 ft high earthen banks; slopes are typically 3:1. Slopes on the right bank in the downstream portion of the reach are considerably steeper (~1:1). Riprap has been placed on the banks on the outer bends of meanders and near the culverts at North Kelly Road and Highway 29.

Water quality: **On September 22, 2010 water in the upstream portion of the reach appeared stagnant and was covered with aquatic vegetation (Photo 1).** In the middle and lower portions of the reach the water was flowing and appeared clear (Photos 2 and 3). The observation of significant streamflow (estimated to be 0.25 to 0.5 cfs) within a drainage of this size in late September suggests the creek receives runoff and/or subsurface flow from agricultural sources or the adjacent golf course. The golf course and adjacent fields are irrigated with recycled water from the Napa County Sanitation District.

Channel processes: The channel is depositional and traps fine sediment delivered from the upper watershed. There is a significant sediment “wedge” that begins at the downstream end of the reach near Highway 29 (Photo 3) and continues upstream.

THE PUBLIC TRUST

The public trust fulfills the basic elements of a trust: intent, purpose, and subject matter. (Estate of Gaines (1940) 15 Cal.2d 255, 266.) It has beneficiaries, the people of the state, and trustees, the agencies of the state entrusted with public trust duties. Fish and wildlife form a critical part of the res of the public trust. In the limited circumstances of the alienation of components of the public trust into private hands, the private party becomes bound with trustee duties pursuant to Public Resources Code § 6009.1.

The essential idea of the public trust doctrine is that the government holds and protects certain natural resources in trust for the public benefit. (See *Illinois Central Railroad v. Illinois* (1892) 146 U.S. 387, 452, 456; *National Audubon Society v. Superior Court (Audubon)* (1983) 33 Cal.3d 419, 441; *Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521.)

Public trust theory has its roots in the Roman and common law (*United States v. 11.037 Acres of Land* (N.D. Cal. 1988) 685 F. Supp. 214, 215) and its principles underlie the entirety of the State of California. Upon its admission to the United States in 1850, California received the title to its tidelands, submerged lands, and lands underlying inland navigable waters as trustee for the benefit of the public. (*People v. California Fish Co. (California Fish)* (1913) 166 Cal. 576, 584; *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 288.) The People of California did not surrender their public trust rights; the state holds land in its sovereign capacity in trust for public purposes. (*California Fish*, *Ibid.*)

The courts have ruled that the public trust doctrine requires the state to administer, as a trustee, all public trust resources for current and future generations, specifically including the public trust in surface waters and the life that inhabits our watercourses. These trust duties preclude the state from alienating those resources into private ownership.

The beneficiaries of the public trust are the people of California, and it is to them that the trustee owes fiduciary duties. As Napa County is a legal subdivision of the state, it must deal with the trust property for the beneficiary's benefit. No trustee can properly act for only some of the beneficiaries – the trustee must represent them all, taking into account any differing interests of the beneficiaries, or the trustee cannot properly represent any of them. (*Bowles v. Superior Court* (1955) 44 C2d 574.) This principle is in accord with the equal protection provisions of the Fourteenth Amendment to the US Constitution.

An agency of the State "may not approve of destructive activities without giving due regard to the preservation of those [public trust] resources." (*Center for Biological Diversity, Inc. v. FPL Group, Inc. (Bio Diversity)* (2008) 166 Cal.App.4th 1349, 1370, fn. 19, 83 Cal.Rptr.3d 588.)

Agencies of the state must not engage in unlawful conduct. "It is a fundamental principle of our constitutional scheme that government, like the individual, is bound by the law." (*Alderman v. United States* (1968) 394 U.S. 165, 202.) When lawless conduct occurs, the Government may not profit from its fruits. (*Weeks v. United States*, (1914) 232 U.S. 383.) The County's duty is to obey the law, which among other things requires that it not harm public trust resources by its decisions and requires the state to use its best efforts for the long-term preservation of public trust resources for the public benefit. (Audubon, supra, 33 Cal.3d 419, 440-441; *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 249-251; Public Resources Code, § 6009.1.)

Common law imposes public trust considerations upon the County's decisions and actions pertaining to trust assets. (*Bio Diversity*, supra, 166 Cal.App.4th 1349; *Environmental Law Foundation v. State Water Resources Control Board* (ELF) (Cal. Ct. App. 2018) 26 Cal.App.5th 844.) The courts have recognized the State's responsibility to protect public trust uses whenever feasible. (See, e.g., *Audubon*, supra, 33 Cal.3d 419, 435; *California Trout, Inc. v. State Water Resources Control Bd.* (Cal. Trout I) (1989) 207 Cal.App.3d 585, 631; *California Trout, Inc. v. Superior Court* (Cal. Trout II) (1990) 218 Cal.App.3d 187, 289.) Napa County has an affirmative duty to administer the natural resources held by public trust solely in the interest of the people of California.

Napa County must manage its public trust resources so as to derive the maximum benefit for its citizenry. Article X of the California Constitution and the public trust doctrine hold that no water rights in California are truly "vested" in the traditional sense of property rights.

Regardless of the nature of the water right in question, no water user in the State "owns" any water. The owner of "legal title" to all water is the State in its capacity as a trustee for the benefit of the public. There can be no vested rights in water use that harm the public trust. A "water right" grants the holder only the right to use water, an "usufructuary right." All water rights are usufructuary only and confer no right of private ownership in the water or the watercourse, which belongs to the State. (*People v. Shirokow* (1980) 26 Cal.3d 301 at 307.)

Fish & Game Code, section 1600 provides:

The Legislature finds and declares that the protection and conservation of the fish and wildlife resources of this state are of utmost public interest. Fish and wildlife are the property of the people and provide a major contribution to the economy of the state, as well as providing a significant part of the people's food supply; therefore their conservation is a proper responsibility of the state.

The California Department of Fish & Wildlife (CDFW):

... is California's Trustee Agency for the State's fish, wildlife, and plant resources. CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitats necessary for biologically sustainable populations of those species. For the purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources. (<https://wildlife.ca.gov/Conservation/Environmental-Review/CEQA>.)

Respectfully,

A handwritten signature in blue ink, appearing to read 'WM', is positioned above the typed name.

William McKinnon
General Counsel
Water Audit California