

Attachment K

WAC's Good Cause Request
to Augment the Record



WATER AUDIT CALIFORNIA

A PUBLIC BENEFIT CORPORATION

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Re: Submittal of good cause request and good cause basis for augmenting the record with extrinsic evidence

Appellant Water Audit California ("Water Audit") is appealing the Duckhorn Vineyards Winery - May 3, 2023, decision of the Napa County Planning Commission's to adopt the Mitigated Negative Declaration and Mitigation Monitoring and Reporting Program, and approve Use Permit Major Modification Application P19-00097-MOD. Water Audit is asserting the need for an EIR.

Pursuant to the July 11, 2023, pre-hearing conference instructions, the County Policy Manual, PART I: SECTION 8B, the Napa County Appeal Handbook, and Napa County Code sec. 2.88.090(B), Water Audit California ("Water Audit") submits the following and requests that the Napa County Board of Supervisors augments the record for consideration with this new evidence and testimony of expert witnesses on existing issues not already contained in the record on appeal.

The basis for the request is for the Board of Supervisors to consider evidence of the legality of the Napa County policy of declining to consider the impacts of existing public trust injuries.

Standard for Review

A negative declaration is inadequate and an Environmental Impact Report (EIR) is required when substantial evidence supports a fair argument that a proposed project may have a significant effect on the environment. If the initial study uncovers substantial evidence that any aspect of the project may cause a significant effect on the environment, the agency must prepare a full EIR. (*Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 and *Farmland Prot. Alliance v. Cnty. of Yolo* (2021) 71 Cal.App.5th 300.)

An EIR is required whenever "it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." (*City of Ukiah v. County of Mendocino* (1987) 196 Cal.App.3d 47; See also *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004 and *Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748.) The case of *Visalia Retail, LP v. City of Visalia* ((2018) 20 Cal.App.5th 1) provides additional guidance on the definition of "significant effect on the environment" and the types of evidence that may or may not be considered "substantial evidence" for the purposes of the California Environmental Quality Act (CEQA).

Facts

The proceedings thus far herein have not considered the environmental impact of groundwater extraction utilized by the Duckhorn project. This is because of the Napa County policy to not consider the impact of earlier extraction decisions on the public trust. Respectfully, this is an incorrect statement of the law as it fails to correct the cumulative impact of past decisions. The public trust requires consideration of injury and mitigation when development decisions are being made. Past authorizations are not exempt from review.

CEQA is concerned with significant effects on the environment (§ 21100, subd. (b); See Cal. Code Regs., tit. 14, § 15382.) "The state as sovereign retains continuing supervisory control over its navigable waters." (*Nat'l Audubon Soc'y v. Superior Ct.*, (1983) 33 Cal. 3d 419, 445.) This principle "prevents any party from acquiring a vested right to appropriate water in a manner harmful to the interests protected by the public trust." (*Id.*) Further, "The state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." (*Id.*, at 446.)

County Planning Commission Hearing DUCKHORN Agenda Packet dated April 27, 2023, PDF page 22 (*Staff Report page 12 of 15*) states:

Staff has considered impacts to public trust resources in the event the project wells may be connected to a navigable waterway. Staff determined that **because the project applicant has demonstrated that there will be no net increase in groundwater extraction over existing uses, there are no adverse impacts to trust resources which would result from issuance of this permit.** Applicants

have reasonably demonstrated no net increase of groundwater extraction over existing demand by abandoning an existing single-family residence, reductions in total vineyard irrigated and reuse of process wastewater for vineyard irrigation. **The County has satisfied its duty to consider impacts to trust resources and no further analysis is required.** (Emphasis added.)

In the subject hearing Mr. Hawkes reiterated this policy: “[T]he project demonstrates no net increase in groundwater extraction, so no adverse impacts to trust resources with the Napa River.” (*Transcript of Hearing*, May 3, 2023, page 11:26)

At the subject hearing, counsel for Appellant challenged the assertion that the County did not have a duty to consider the impacts and potential mitigation of existing extractions. “[T]hose waters are public trust waters and there is no such thing as an injury to the public trust that can become grandfathered, that can exist forever. Mistakes happened in the past, but we are obliged to correct them now ...” (*Transcript of Hearing*, May 3, 2023, page 11:26.)

The planning commission chose to ignore Appellant and adopted the reasoning of the Staff Report verbatim.

Water Audit is required by the law to prospectively assume that the County will comply with the law. Evidence Code section 664 provides in part: "It is presumed that official duty has been regularly performed." The rebuttable presumption under Evidence Code section 664 "effectuates the policy of relieving governmental officials from having to justify their conduct whenever it is called into question." (*Jackson v. City of Los Angeles* (1999) 69 Cal.App.4th 769, 782.) Appellant was entitled to rely upon the County of Napa to properly obey the law, and when it did not, good cause arose to consider extrinsic expert testimony.

California defines rebuttable presumptions as those affecting the burden of producing evidence and those affecting burden of proof. That the presumption is rebuttable means "there is a further burden placed upon the party adversely affected by the burden to go forward with sufficient proof to defeat the presumption. (*People e v. Gallardo* (1994) 22 Cal.App.4th 489, 496," (as cited in *Hamilton v. Gourley* (2002) 103 Cal.App.4th 351, 362.)

Water Audit has consulted with four experts that are each of the opinion that the County of Napa is in error regarding its public trust duties. Accordingly, there is good cause to admit their evidence that:

- (1) The Napa River proximate to the Duckhorn project has diverse and significant public trust components that the County of Napa has continuing trustee duties to protect;
- (2) The County of Napa has a continuing legal duty in planning decisions to review existing groundwater extractions, determine potential injury and

consider best efforts at mitigation;

- (3) That water extractions authorized by Napa County are causing groundwater depletion that is contributing to diminution of public trust flows; and
- (4) The drying of the subject reach of the Napa River is being caused by groundwater extraction, not by climatic or weather change.

Proposed Supplemental Evidence

Attached hereto as Exhibits A to D, are summaries of the anticipated testimony of the proposed supplemental witnesses:

Dr. Karrigan Börk is an acting professor of law at the University of California Davis specializing in environmental law. Dr. Börk's report and curriculum vita are attached hereto as Exhibit A. In synopsis, Dr. Börk opines that subdivisions of the state have a duty to consider the public trust interest when making decisions impacting water that is imbued with the public trust. He asserts that the question of whether groundwater-related decisions must consider the public trust "begins and ends with whether the challenged activity harms a navigable waterway." He opines that the public trust *requires* reconsideration of past or ongoing water use decisions where those decisions were made without any consideration of the impact upon the public trust.

Dr. Peter B. Moyle is a Distinguished Professor Emeritus of the University of California Davis and co-founder of the Center of Watershed Sciences. His report and curriculum vita are attached hereto as Exhibit B. In synopsis, Dr. Moyle opines that for native fishes and other aquatic organisms to thrive in the Napa River, they need a flow regime that contains features of the natural flow. Data from the nearest stream flow gauge on the Napa River at St. Helena show that years with no summer flows have persisted since 2000. Fishes are much reduced from historic abundance, in large part due to degradation of potential habitat (e.g., by dry reaches).

Dr. Graham Fogg is a Professor of Hydrogeology in the Department of Land, Air and Water Resources at UC Davis. Dr. Fogg's report and curriculum vita are attached hereto as Exhibit C. In synopsis, Dr. Fogg opines that the streamflow and groundwater data clearly point to a cause-effect relationship between river flows and groundwater pumping. Further, Dr. Fogg opines that there is inadequate monitoring in Napa County to make a full assessment of potential public trust injuries, but nevertheless he concludes: "I strongly assert that both shallow and deep groundwater pumping in this basin, including pumping from deep, so-called confined aquifer wells, can each significantly affect the river flows."

Dr. Ted Grantham is an Associate Professor at the University of California Berkeley. Dr. Grantham's report and curriculum vita are attached hereto as Exhibit D. In synopsis, Dr. Grantham opines that minimum flows observed in the Napa River near St. Helena show a distinctive decline in the past 20 years. The minimum 7-day flow has consistently been zero since 2006, indicating that the Napa River at the gauge now runs dry every year. Although the Napa River has ceased to flow in the past, these occurrences have been rare and have never occurred in more than two consecutive years prior to 2006. Since 2001, the number of zero days has been increasing at an average rate of 7 days per year. He concludes that water withdrawals at or near the streamflow gauge are dewatering the Napa River. The effects of these withdrawals on dry-season flows are evident around 2000 and appear to be increasing in magnitude since that time. There is a significant, increasing trend in the number of zero-flow days observed in the river.

Good cause

Accordingly, there is good cause to consider extrinsic evidence of the legality and impact of the Napa County policy of declining to consider the impacts of existing public trust injuries during the planning process.

It is anticipated that the testimony of these witnesses will be approximately 5 minutes per person, for a cumulative total of twenty minutes of the thirty minutes allotted for the presentation of Appellant.

Respectfully submitted,



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EXHIBIT A

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EXHIBIT B

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EXHIBIT C

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EXHIBIT D

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