

Attachment A
Appeal Packet

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APPEAL PACKET COVER SHEET
(Section 2.88.050 of Napa County Code)

NAPA COUNTY
EXECUTIVE OFFICE

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Deadline for filing with the Clerk of the Board's office: no later than 2 p.m. on the 10th working day after the filing of the Notice of Intent to Appeal. (Napa County Code sec. 2.88.050(A).)

TO BE COMPLETED BY APPELLANT
(Please type or print legibly)

Action Being Appealed: Zaninovich / Rutherford Winery - Adoption of Negative Declaration and approval of use permit exception to the conservation regulations for P23-00145, based on certain findings and approval of use permit major modification for P19-00126, based on certain findings and subject to certain conditions - Planning and Zoning Commission Public Hearing June 21, 2023 - Notice and Procedure did not comply with the law

Permittee Name: Zaninovich / Rutherford Winery CA 94574
State Zip

Permittee Address: 1680 Silverado Trail St. Helena CA 94574
No. Street City State Zip

Project Site Address/Location (if different from Permittee Address):

Assessor's Parcel No.: 030-300-030

Permit Number: P19-00126 - P23-00145

Date of Decision: June 21, 2023

Nature of Permit or Decision: Adoption of Negative Declaration and Approval of use permit exception P23-00145 and Approval of use permit major modification for P19-00126

Appellant's Name: Water Audit California

Appellant's legal status (check one): Individual Corporation/registered nonprofit
 Individual on behalf of unofficial organization (e.g., neighborhood group, special interest group, etc.)
Specify organization name: _____ Fax #: () _____

Telephone #: (530) 575-5335

E-Mail Address: legal@waterauditca.org

Mailing Address: 952 School Street, PMB 316 Napa, CA 94559
City State No Zip Street

Appellant's Qualification as Interested Person: Submitted Comment during hearing on June 21, 2023, no financial interest

project applicant, adjacent property owner, other (describe)

Primary Point(s) of Contact for Appellant: Check here if Appellant is sole point of contact and will be the prehearing conference representative

Contact # 1 Name: William McKinnon, Water Audit California

Telephone # (530) 575-5335 Email: legal@waterauditca.org

Mailing Address: 952 School Street, PMB 316 Napa, CA 94559
No. Street City State Zip

Check here if this contact will be your representative at the prehearing conference

Contact # 2 Name: Valerie Stephan
Telephone # () _____ Email: vstephan@waterauditca.org
Mailing Address: 952 School Street, PMB 316 Napa, CA 94559
No. Street City State Zip

Check here if this contact will be your representative at the prehearing conference

Attach additional sheet(s) for additional contacts if needed.

Reason for Appeal. Be specific – **factual or legal basis for such grounds of appeal must be expressly stated or they are waived.** At a minimum, you must include: (1) identification and description of the specific factual or legal determination(s) made as part of the decision that are the focus of the appeal; and (2) express assertion of all arguments, contentions, and facts that form the grounds for your appeal. If the basis of the appeal will be, in whole or in part, that there was a prejudicial abuse of discretion on the part of the approving authority, or that there was a lack of a fair and impartial hearing, this must be expressly stated. *(attach additional sheets and/or supporting documentation if necessary)*

Please see attached

Are you appealing a decision relating to real property? (check one) Yes No
If Yes, please ensure that you attach the required Ownership Report, including list of owners and Assessor's map page(s) as indicated on the Checklist.

Evidence of payment of required fees (check one): Attached Will be submitted later*

* Pursuant to Napa County Code sec. 2.88.050, evidence of payment **must** be received by the Clerk of the Board no later than the 2 p.m. deadline.



Signature of Appellant

7/18/23

Date

William McKinnon, Attorney
for Water Audit California

Print Name



WATER AUDIT CALIFORNIA

A PUBLIC BENEFIT CORPORATION

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July 18, 2023

Napa County Board of Supervisors
1195 Third Street, Ste. 310
Napa, CA 94559

APPEAL PACKET - ADDITIONAL SHEETS (Appellant Water Audit California)

RE: Appeal of decision made June 21, 2023, Agenda # 7
Adopting a Negative Declaration (ND) for the Rutherford Ranch Winery Major Modification
#P19-00126-MOD and Use Permit Exception to the Conservation Regulations #P23-00145
(Project) pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.

Appellant Name and Contact Information:

Water Audit California
952 School Street, PMB 316
Napa, California 94559
legal@waterauditca.org
530-575-5335

A. The Parties

Water Audit California, ("Water Audit") a California public benefit corporation, is an advocate for the public trust.

Water Audit is informed and believes that the Applicant, Rutherford Ranch Winery is a California stock corporation, on occasion doing business as "Round Hill winery," ("Applicant") is the owner and operator of a bottling plant located at 1680 Silverado Trail in the County of Napa. The "Application" is as captioned above in the Appeal of Decision.

B. Grounds for Appeal

Water Audit hereby appeals the June 21, 2023, decision of the Napa County Planning Commission's adoption of the Negative Declaration ("ND") #P19-00126, and Use Permit Exception to the Conservation Regulations #P23-00145 as captioned above. Water Audit appeals on its own behalf, on behalf of the general public and in the public interest. Water Audit has standing to appeal based on the submission of comment during the June 21, 2023, hearing. (see Napa County Code sec. 2.88.010 (G).)

Water Audit asserts that there was not a fair and impartial hearing in that there was no inquiry into potential injury to the public trust. Critical Findings underlying the ND are not supported by the evidence. There is evidence of existing environmental injury; the projected water demand for the project is greater than the groundwater recharge from the site; and the proposed project will consume more water than the existing facility. Impermissible intrusions into the riparian way have improperly been allowed to persist.

As separate and additional grounds for reversal of the ND, it is submitted that the proposed sole source of potable water has not been approved or reviewed by Napa County Division of Environmental Health or the California Division of Drinking Water. There has not been a full and complete review of the project as required by the California Environmental Quality Act ("CEQA"). Contrary to the Findings the project poses a potential adverse effect on wildlife resources. The adopted Recommended Findings have failed to comply with a term of mitigation required by the California Department of Fish and Wildlife ("CDFW"): "The Project, as proposed, would have an impact on fish and/or wildlife." CDFW concludes: "a Mitigated Negative Declaration is more appropriate for the Project and the below recommended mitigation measures should be implemented." (Agenda PDF 417)

The Planning Commission failed to properly deal with the critical issue of parking. The Napa Department of Public Works has stated that "5. All roadway, access drive and parking area improvements shall be completed **prior to execution** of any new entitlement approved under the Use Permit Modification." (Agenda PDF 70) Public Works continued: "9. The parking areas located within the vineyards to the north and east of the driveway are not considered existing or approved parking areas. Plans shall be submitted for improvements to this area in accordance with condition # 5 above." (Agenda PDF 71)

To the extent that the project seeks to rely upon increasing importation of grapes, it does not comply with the terms of the Winery Definition Ordinance (WDO). The adoption of the WDO in January 1990 allowed a baseline exemption for the Applicant's 144,000-gallon production that had been authorized in 1983, but it does not exempt from compliance the proposed 1,366,000 gallons of additional production.

Through Government Code § 65800 et seq. the Legislature conveyed to the County the authority to adopt regulations and ordinances to promote the general welfare of the State's residents, while providing that the County may exercise the maximum degree of control over zoning matters. Government Code § 65101 states in part: "The legislative body [i.e. the Board of Supervisors] may create one or more planning commissions each of which shall report directly to the legislative body."

The Napa County Planning Commission performs the function of a planning agency. Its five members are each appointed by the supervisor representing one of the County's five districts for a term that expires one month after the appointing supervisor is no longer in office.

Notwithstanding the State's sweeping assignment of powers, the County remains subordinate to the control and direction of the senior levels of government. Napa Ordinances Title 16 and Title 18 were required to conform the County to state law. The state endows the highest priority on fish and wildlife protection and conservation. "The Legislature finds and declares that the protection and conservation of the fish and wildlife resources of the state are of utmost public interest." The County has failed in its trustee duties as enumerated in Public Resource Code 6009.1.

Fish and wildlife are the property of the people and provide a major contribution to the property of the state. Further, the State has allocated trustee powers to the Department of Fish and Wildlife (CDFW) over fish

and wildlife within the State. (*Fish and Game Code § 1600*)

Ordinance § 16.04.040 declares the County's intent to, *inter alia*, control the alteration of stream channels.

A 'riparian way' is proximate to the stream flowing through the subject property. Ordinance § 16.04.010 states a County finding that riparian vegetation "is a valuable natural resource ... [many] wildlife species, particularly birds, live only in riparian cover."

Ordinance § 16.04.050 lists five County riparian objectives:

- **Preserving fish and game habitats;**
- **Preventing or reducing erosion;**
- **Maintaining cool water temperature;**
- **Preventing or reducing siltation;**
- **Promoting wise uses and conservation of woodland and wildlife resources of the county.**

Ordinance § 16.04.060 provides that the methods "of preserving riparian cover include regulating by permit all development activities within riparian zones."

Ordinance § 16.04.750 (B) prohibits any facility or structure within ten feet from the top of a stream bank.

Ordinance § 16.04.770 states: "No structure or facility shall be constructed, located, extended, converted *or altered* without full compliance with the provision of this chapter ... "

Ordinance § 18.108.050 states that that no permit shall be issued "for uses, buildings or purposes which would be in conflict with the provisions of this title." In further emphasis of the preeminence of the subject chapter.

Ordinance § 16.04.780 states in relevant part:

Neither the issuance of a permit nor compliance with the conditions thereof ... shall act to relieve any person from any responsibility otherwise imposed by law. ... A permit issued pursuant to this chapter shall not relieve the permittee of the responsibility of securing and complying with all other permit requirements and procedures which may be required by any other rule or regulation.

Ordinance § 18.108.050 sets forth categorial exemptions to the chapter. Review of the provisions disclose that none apply to the instant matter.

Ordinance § 18.108.040 sets forth the requirements in order to qualify for a Conservation Regulations Exception that would allow a discretionary exception to environmental compliance. It provides that "the encroachment, if any, is the minimum necessary to implement the project."

There are three exemptions to the rule that would permit the approval of a use permit. None avail the Applicant. The first exemption, Ordinance § 18.108.050, is factually inapplicable. The Application did not concern land clearing, fire safety, or any other of the designated exceptions set forth in that provision.

Second, the Applicant is ineligible for an exemption because its proposal does not contain the necessary precondition of maintaining legal setbacks from the stream bank. See Ordinance § 16.04.750 (B) and Ordinance § 18.108.025 (B)(3). The Planning Commission is without authority to grant an exemption if the applicant does not meet that fundamental requirement. Other provisions of building and zoning it may waive, but this minimum protection of environmental interests is mandatory.

Ordinance § 18.108.025(E) is unavailing because it requires “appropriate permits from other state, federal and local use permit requirements,” and that the director determine “that the least damaging alternative has been selected as part of an approved project.” There is no state or federal permit, or evidence that the encroaching buildings are the least damaging alternative.

Ordinance § 18.112.160 provides for mandatory abatement in situations where an encroachment has occurred:

Any building set up, erected, built, moved or maintained, and any use of property contrary to the provisions of this title, shall be and the same is hereby declared to be unlawful and a public nuisance and the county may immediately commence action or actions, proceeding or proceedings, for the abatement, removal and enjoinder thereof in the manner provided by law, and shall take such other steps and shall apply to such court or courts as may have jurisdiction to grant such relief as will abate and remove such building or use and restrain and enjoin any persons, firm or corporation from setting up, erecting, building, moving or maintaining any such building or using any property contrary to provisions of this title.

Ordinance § 18.144.030 provides it “*shall* be the duty of the director, and other county officials herein or otherwise charged by law with the enforcement of this title, to enforce this title and all of its provisions.” (Emphasis added)

Amongst the most venerable of California’s laws are the Maxims of Equity, otherwise known as the Maxims of Jurisprudence. Intended to integrate the concept of “what is fair and just” with statutory law, the Maxims import moral values into “legal” decisions. The Maxims include “He who seeks equity must do equity.” Applied herein, it is submitted that the Maxims mean that if the Applicant wishes to receive relief from the legal constraints that prohibit its conduct, it must be completely and unreservedly truthful to this Commission. As is detailed below, the Applicant has repeatedly failed this test.

1. The Public Trust.

By simply stating that no impacts exist, Applicant has arbitrarily and wholly failed to discuss the substantial potential off-site public trust impacts of the project.

The subject parcel is served by a well located approximately seven hundred feet from Conn Creek. The close proximity between the point of extraction and the watercourse is not properly represented in the Application. The project is in an area that has been long recognized as a losing reach, i.e. a section of watercourse that tends to lose surface flow to groundwater. A second well is shown, but not discussed in the Application. Conn Creek has a proven population of steelhead, a federally protected fish, but recently has become a drying reach.

Pursuant to Fish & Game Code (FGC), section 5937 the City of Napa bypasses by Conn Dam from 0.4 to 0.5 cubic feet per second (CFS) into Conn Creek for approximately 6 months a year, (approximately 140 to 160 AF per year). This water is dedicated for the purpose of sustaining fish in Conn Creek downstream of the dam to the confluence with the Napa River.

Extraction by the Applicant lowers the groundwater level, contributing to the drying of Conn Creek. To the extent the extractions of the Applicant diminish public trust surface water flows they require the issue of a streambed alteration agreement pursuant to FGC 1602. Staff avoids this consideration altogether by accepting at face value the assertion that the proposed substantial changes in bottling and visitation operations do not change water consumption. Based upon this improbable assertion, staff then concludes that a Tier 3 Water Availability Analysis is unnecessary. Water Audit challenges both the factual and the legal foundations of this proposition.

2. The assertion of no increase in water consumption should be viewed skeptically.

The Application is not based on tangible empirical operating evidence. In the absence of data, the public must wholly rely on the integrity of consultants. However, one need not put one's common sense into storage when considering this Application.

Compare the recent application by Duckhorn Winery at its Agenda Packet pages 390 and 391 with the subject Application at Agenda Packet 246. (See following page.)

The difference in form is obvious on first glance; it is impossible to do a line by line comparison. A cynical person would suggest this is an intentional officiation, as each of these applications is based on similar data. Consistency in form and content would facilitate review.

Nevertheless, it is possible to compare one fundamental metric found in different formats in the two applications: the volume of water alleged to be required for wine production. Duckhorn represented that it takes 2.15 acre-feet (AF) of water per 100,000 gallons of wine production, or 0.0000215 AF (approximately 7 gallons of water per gallon of wine.) This is the industry standard, published and utilized by the County, and in the absence of contradictory empirical information is apparently deemed reasonable.

The Applicant represents that it proposes to extract 4.9 AF from groundwater to produce 1,560,000 gallons of wine, or 0.00000341 AF (approximately 1.1 gallons of water per gallon of wine), utilizing only 15% of the water used by Duckhorn. This is not credible. A decision to accept such a remarkable assertion demands supporting facts and explanation that are not present in the Application.

The redacted area covers the central portion of the document, including several tables and text blocks. The visible portions on either side show financial data and tables with columns for various categories and values.

3. Injuries to the public trust cannot be vested.

In any event, whether the water utilization is greater or not, the County must consider potential injury to the public trust from the activities sought to be authorized by the Application. A common law doctrine, the public trust is continuously evolving to protect the public's use and needs in California's waterways. In *Environmental Law Foundation v. State Water Resources Control Board* (2018) 16 Cal.App.5th 844, 858 (*ELF*) the court held that groundwater extractions that diminish public trust surface water flows can be enjoined as injuries to the public trust.

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* (1983) 33 Cal.3d 419, 441; *Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521.)

Public trust theory has its roots in Roman and common law. (*United States v. 11.037 Acres of Land* (N.D. Cal. 1988) 685 F. Supp. 214, 215.) 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, precluding the state from alienating those resources into private ownership and requiring the state to protect the long-term preservation of those resources for the

public benefit. (*National Audubon, supra.* 33 Cal.3d 419, 440-441; *Surfrider Foundation v. Martins Beach 1, LLC* (2017) 14 Cal.App.5th 238, 249-251.)

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 both beneficiaries, the people of the state, and trustees, the agencies of the state entrusted with public trust duties.

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.

A public trust trustee "**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.) [Emphasis added]

Common law imposes public trust considerations upon County's decisions and actions. (*Biological 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., *National Audubon, supra.* 33 Cal.3d 419, 435; *California Trout, Inc. v. State Water Resources Control Bd.* (1989) 207 Cal.App.3d 585, 631; *California Trout, Inc. v. Superior Court* (1990) 218 Cal.App.3d 187, 289.) Napa County, under Public Resources Code, section 6009.1, has an affirmative duty to administer the natural resources held by public trust solely in the interest of the people of California.

The public trust doctrine requires the State (i.e. Napa County), as a trustee, to manage its public trust resources (including water) so as to derive the maximum benefit for its citizenry. Even if the water at issue has been put to beneficial use, it can be taken from one user in favor of another need or use. The public trust doctrine therefore means that no water rights in California are truly "vested" in the traditional sense of property rights.

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

The Application asserts that it is impossible to know whether the Applicant's operations have an adverse effect on groundwater levels as there are no monitoring records. That is not a true assertion. The City of Napa has for more than two decades monitored groundwater levels proximate to the Applicant, and that data is readily available on request. If true, this assertion proves only the failure of the County as a trustee to monitor its trust. A trustee who does not know the groundwater levels but authorizes additional extractions is like the trustee of a bank account that writes checks without knowing the bank balance.

Further, even if the assertion of no increase in consumption and the absence of historical data were true, the County's hydrological consultants, Luhdorff & Scalamanini Consulting Engineering offer a flat rate

service through the Planning Department to perform a Tier 3 analysis for no more than \$1,250, with no groundwater monitoring required. Water Audit has concluded that the only reason for not including the Tier 3 analysis is because it would reveal that the Applicant is injuring the public trust. Responsible planning staff should be embarrassed.

4. The Application is incomplete and inadequately supported by fact.

The Exception for Conservation Regulation Application page 5 has no date or permit number. It was signed by the Applicant in 2022, but the County parcel report states the request was applied for in May 2023 and is not identified as a "Con Regs" application. Further, P18-00452 (a very minor modification) is the supporting application for the subject hearing of P19-00126-MOD (a major modification). Technical Information and Reports are reported to have been submitted with P18-00452 but are not available on the public record under either file number.

Agenda PDF 172 represents itself to be a policy memorandum signed by the Director of Planning David Morrison. Both the form and the contents are fraudulent. The 2005 date of the "memorandum" predates Mr. Morrison's employment in 2014 by nearly a decade. Further, the content of the form misrepresents the current standards adopted in 2018, prior to the subject Application.

There is no storm water plan, although photographs submitted with the application show a parking lot immediately adjacent to the drainage flowing into Conn Creek, and show an unpermitted bridge constructed across the watercourse, with the creek flowing under parking structure. (Agenda PDF 250)

Although the County planning process requires designation of environmental risk by state or federal agencies, the Applicant makes no such showing, relying solely on a summary dismissal of the risk in the Kjeldsen biological report. (Agenda PDF 183)

The entirety of Attachment C.1 is in support of the argument that offending improvements should be allowed to remain, alleging that many of the improvements were permitted. No evidence is shown of any such permits. It has been the law in California since 1872 "That which does not appear to exist is to be regarded as if it did not exist." California Civil Code § 353

There is no statement of grape source, although the Applicant was formally asked through its counsel to provide a certified statement and was advised that the use permit would not be granted without both documents being provided.

By reference to the Applicant's website (<https://rutherfordranch.com/round-hill>) it can easily be seen that only a small portion of the Applicant's production is derived from Napa County grapes. The Applicant acknowledges that "Round Hill offers California's most popular varieties sourced from premium Monterey Coast and Central Valley vineyards." One million gallons of juice, the source of two-thirds of the total proposed production, is brought to the site from hundreds of miles away by over two hundred 6,500 tanker trucks. Despite the cache of the St. Helena address, the greatest value of this facility to the Applicant is the copious amounts of free water. Napa County is not so richly endowed with water that consideration must be given to whether this is a good bargain for the public.

The exchange of correspondence between Applicant and staff of the planning department is not fully presented in the agenda packet.

The application for a conservation regulation exception was apparently made long after the program of forgiveness had ended. The Applicant has apparently not corrected issues raised in a code enforcement action that was not disclosed or discussed in the Application.

This site is 17 acres, and under current Water Availability Analysis standards of 0.3 AF per acre of land, the Applicant is entitled to 5.1 AF per year. By applying industry norms to wine production and hospitality estimation of the likely extraction is closer to 55 AF per year. Monitoring is proposed for only one year and reporting only required on demand.

In Attachment F, *Biological Report and Restoration Plan*, at PDF page 225, *Plate 1, Location and Site Map* ("Map") is represented by the Applicant to be "USGS Rutherford Quadrangle." This is a misrepresentation. While the diagram might have some origin history with a USGS map, the Map presented is a distant shadow of the original.

The Map shows a pink dashed line at the base of the slope, identified as the location of the "Project Site" and "Location of Creek." There is no recognized USGS designation for a pink dashed line. The pink dashed line appears to be representing not a creek, but the Applicant's unpermitted redirection of the natural watercourse.

Ordinance § 18.108.030 states in part: "'stream' means any of the following: 1. A watercourse designated by a solid line of dash and three dots symbol on the largest scale of the United States Geological Survey maps most recently published ..." Blue dashed lines on the USGS map that indicate ephemeral streams in the hills between the hills have been carefully overdrawn in a black line, evidently to erase the existence of nature.

Compare to Application Attachment I, Summit Engineering *Wastewater Feasibility Study*, (Agenda PDF page 287), which shows a blue dashed line at a markedly different location from the aforesaid pink dashed line. A blue dotted line is found in the same location as the Summit drawing as in Attachment I in the County GIS publication of the actual USGS map. Web hosted County Community map terrain data indicates two watercourses running through the center of the property that appear to have been filled and redirected, and the original water courses no longer exist.

Concerns for flood plains and wetlands considered in the original use permit have disappeared from consideration. The existing development, which has not been properly documented or approved, has now become the new baseline for this application, thereby building a new entitlement on a faulty foundation.

5. The recommended mitigations of a trustee agency have not been included in the terms of the proposed approval.

In Attachment C, *Previous Project Conditions*, sub-Attachment 1, *Mitigation Measures for Ortman & Rogers Winery*, it is reported that in 1983 the Applicant obtained a use permit from the County of Napa that was foundational to the present operations. Term 17 of the use permit provided that the owner "obtain an approved streambed alteration agreement (Fish and Game Code 1603) from the California Department of Fish and Game."

There is no record of such an agreement being sought or made. The Applicant ignored an express term of mitigation of the use permit, constructed an unlawful drainage, filled other drainages, has occupied riparian way for parking, and has taken commercial advantage of its malfeasance to this date.

The Applicant protests that the previous injuries were caused by prior owners, but the plain fact is that the equity of the shareholders of the Applicant is responsible for the sins of the corporation. A new shareholder at GM or Ford cannot deny responsibility for a factory recall because they were not a shareholder at the time of the manufacturing error. Neither may the current owners of the Applicant deny their responsibility for remediation. "He who takes the benefit must bear the burden." California Civil Code § 3521

Attached as Exhibit N, mistakenly categorized as part of *Public Comments*, CDFW the trustee agency for fish and wildlife makes request for inclusion of mitigation terms. Staff has failed to heed these recommendations. CDFW has requested the removal of all encroachments in the riparian way. Staff does not fully support recognition and approval and continued use of structures in the stream setback. (Agenda PDF 21)

Water Audit notes the presence of piping, both pressure and drainage, in the "creek" drainage.

Water Audit found no State Clearing House listing for this project by searching for the name of project applicant. Department of Drinking Water has no reports for this facility for three of the last five years, and no certification of any report. There has been no comment or waiver of comment from the Regional Water Quality Resource Board, State Water Resources Control Board, there is no hazardous materials management plan, there is no water quality analysis, and there is no Public Works groundwater memorandum. Land use maps are inconsistent with the norm.

C. Conclusion

Water Audit respectfully prays that for the foregoing reasons the decision adopting a Negative Declaration for the Rutherford Ranch Winery Major Modification #P19-00126-MOD and granting a Use Permit Exception to the Conservation Regulations #P23-00145 be reversed, and that Rutherford Winery be instructed to prepare an Environmental Impact Report if it should choose to proceed with the proposed project.

Respectfully,



William McKinnon
General Counsel
Water Audit California