



WATER AUDIT CALIFORNIA

A PUBLIC BENEFIT CORPORATION

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December 2, 2025

RE 7B. E&P TECHNOLOGY WAY - BUILDINGS A & B / DENNIS PAULLEY / USE PERMIT
APPLICATIONS #P22-00307 and #P22-00308

To Napa County Planning Commissioners

Kara Brunzell (District 1),
Walter Brooks (District 2)
Heather Phillips (District 3)
Pete Richmond (District 4)
Megan Dameron (District 5)

Greetings:

INTRODUCTION

If the reader has an extra three minutes of reading time, this tale of two counties is an explanation why one is having great success in repopulating its watercourse with fish, while the other continues to slog through litigation.

The major watercourses in Napa and Solano Counties are roughly equivalent, with the 55 miles of the Napa River supported by a 575 square mile watershed, and the 70 miles of Putah Creek fed by 425 square miles. Both are impaired by major man-made obstructions. Flows in both watercourses vary substantially, with certain reaches of the Napa River, for example adjacent to the City of St. Helena, completely dried by municipal and agricultural diversion for several months a year. Putah Creek remains perpetually wetted, but flows range from peaks of 80,000 cubic feet per second (CFS) down to 5 CFS, the minimum acceptable for the support of healthy salmon. Twenty-five years ago, historically abundant salmon populations in both counties had been reduced to a dozen or so spawning fish a year.

This year Putah Creek is monitoring the return of approximately 2,000 spawning fish. We are unaware of any official measure of the Napa cohort, but a reasonable estimate is about 200 fish, which is a lot better than a dozen counted at the beginning of the century, but hardly anything to brag about.

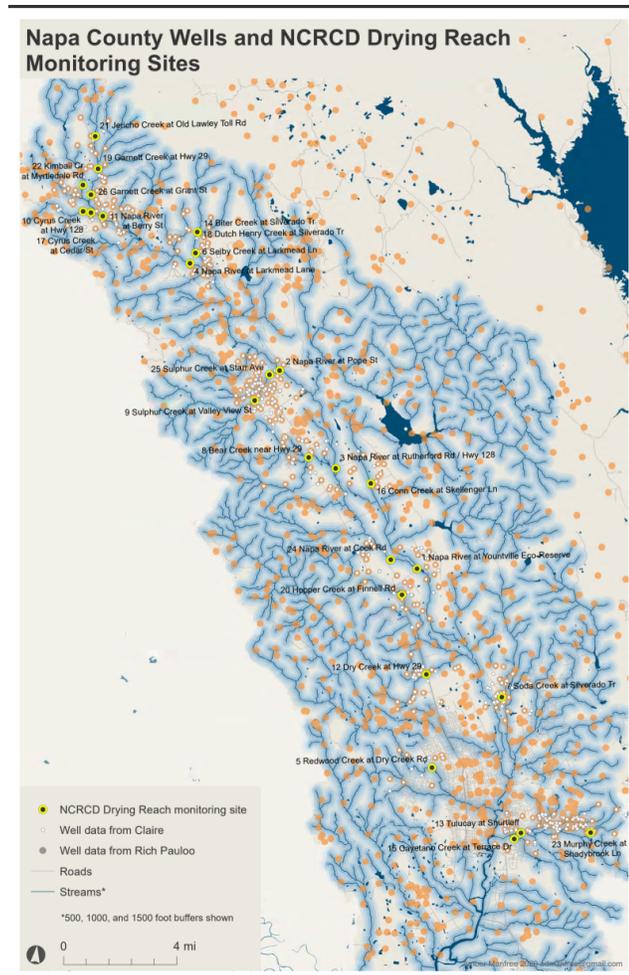
Water Audit has investigated and wish to share our conclusions on the cause of the dramatically different results. In Solana County the government is committed to doing the best they can with what they have and are adaptively adjusting their conduct to succeed. Problems are identified, and over time remediated. In Napa County environmental injury is largely a one-way ratchet, with the best hope being that it won't get much worse. Even volunteer efforts at improvement are intentionally frustrated by the County.

The "public trust" is a legal concept that has held for two thousand years that certain natural components are incapable of private ownership and are equally owned and usable by all persons. Waterways and associated fish have long been recognized as being part of the "public trust." In contemporary California this means that all water is owned by the people, and private rights are merely conditional rights of use,

In 1983 the California Supreme Court rendered a decision confirming that California's fishery was part of the public trust. In *National Audubon* the Court held that, notwithstanding its prior decades drainage of Mono Lake, LA Water and Power had a preemptive duty to allow "sufficient" water to remain in the watercourses to maintain fish downstream of diversions in "good condition." When LA Power later objected that it did not know how much water it was required, the Supreme Court responded in *Cal. Trout II*: "release sufficient water into the streams from its dams to reestablish and maintain the fisheries which existed in them prior to its diversion of water."

Subsequently, to escape Water Board deference to this principle when authorizing extraction permits or licenses, water users transitioned to drilling wells proximate to watercourses, thereby *indirectly* drying connected waterways.

Within the last decade, the courts have held that any water extraction that dries a public trust resource *directly or indirectly* is violative of the law. Whether one dries a watercourse by throwing a suction hose into the water column, or by extractions from an adjacent well, both are impermissible injuries to the public trust.



Napa County has chosen to argue the point. In January 2020 when Water Audit objected that well drilling permits had the effect of drying the Napa River, then director of planning David Morrison announced, in the face of directly contradictory evidence, that there was no evidence of the surface water/groundwater connection. The Board of Supervisors regally decided to ignore the facts, and in preemptory fashion Morrison proclaimed that the County had no duty to the streams. After litigation initiated by Water Audit, in January 2024, the County changed its policy to require inquiry into groundwater/surface water interface when increased extractions were associated with new developments. However, ignoring *National Audubon and Cal. Trout II*, Napa County continues to argue that existing injuries are vested, for example with the recent Sattui, Bonny's Winery and Silverado Resort decisions. This policy has, at times, resulted in fantastical representations and shocking omissions to avow "no net increase."

There are two ways to look at this situation: the practical and the legal. The County and the named applicants have chosen to shelter behind legal arguments before considering the real-world impact. Our position is that new rights cannot take advantage of old injuries. We are not alone in that opinion. In a published decision the Court of Appeal has recently supported our position on the continuous accrual doctrine. Just because a problem exists does not mean it must persist, as the Duckhorn settlement proved.

Here's our bottom line: Five years ago, Solano acknowledged that they had problems and Water Audit assisted in their solution. There has been no litigation, and the problems are being resolved, to obvious good effect. Napa has decided to defend the status quo, at considerable litigation expense, and the problems remain.

COMMENT

The E&P Technology project Biological Resources Analysis ("Analysis") is not uploaded to the State Clearing House website. The County's public trust protection appears to be limited to groundwater extraction. The Analysis admits the protocol-level wetland delineation has not been performed. The Geotechnical Investigation does not include a soils report, and the Initial Study/Mitigated Negative Declaration admits no soils report has been considered. Sheehy Creek reach on project parcel is not maintained by the County and found to be in poor condition according to recent media publication. The California Department of Fish Wildlife letter dated November 15, 2024 is not incorporated into the Conditions of Approval, and the Site Plan omits required items.

STATE CLEARING HOUSE

The Biological Resources Analysis is not uploaded to State Clearing House, and the Location Waterways is missing Suscol, Fagan, and Sheehy creeks (<https://ceqanet.lci.ca.gov/2024100855>).
<Exhibit A>

HEARING PACKET OMISSIONS

The U.S. Army Corps of Engineers ("USACE"), US Fish & Wildlife, and surrounding cities were not included in the Notice of Completion (https://files.ceqanet.opr.ca.gov/307554-1/attachment/ejcA6SLB62zjFusupGb3QyV50PSPyJFWQIRiixf1IEfg2yopau4zPsrB_tGXD0DqP5al_DsbgZGmqqb00). <Exhibit B>

The Summary Form for Electronic Document Submittal list of responsible or trustee agencies for the project does not include USACE or U.S. Fish & Wildlife, only California Fish & Wildlife ("CDFW") is listed. County of Napa PBES is the *Lead* Agency. (<https://files.ceqanet.lci.ca.gov/307554-1/attachment/-oeff370w4udRSSdxknoaAfUAbRK9pjFIkbcwYXUEVeQ2A6pDjNj4LPNV2jO1i2VoFHR3yPcwPv2er10>)
<Exhibit C>

PUBLIC TRUST

Natural resources held in trust can include navigable waters, wildlife, or land (https://www.law.cornell.edu/wex/public_trust_doctrine) <Exhibit D>:

“Public trust [doctrine](#) is a legal principle establishing that certain natural and cultural resources are preserved for [public use](#). [Natural resources held in trust can include navigable waters, wildlife, or land](#). The [public](#) is considered the [owner](#) of the resources, and the government protects and maintains these resources for the public's use.”

Groundwater extractions are the only trigger for the Public Trust Doctrine:

THE BIOLOGICAL RESOURCES ANALYSIS JURISDICTIONAL WETLAND DELINEATION WAS NOT PERFORMED

Not in the hearing packet but found online, it is USACE that determines Jurisdictional Delineations (<https://www.epa.gov/cwa-404/how-wetlands-are-defined-and-identified-under-cwa-section-404> <Exhibit E>:

“Jurisdictional Delineations are performed on a property in order to delineate which waters are Waters of the U.S. and are therefore subject to CWA 404. Most often, a preliminary jurisdictional delineation is submitted to the Army Corps by the permit applicant, which the Corps then verifies. The applicant can decide whether they would like a final approved delineation or would like to proceed with an application with only a verified preliminary delineation, which makes for a shorter process.” (Environmental Protection Agency “How Wetlands are Defined and Identified under CWA Section 404 _ US EPA”) (emphasis added)

Not in the hearing packet but found online, the USACE questionnaire form considers two communities, wetland and upland to identify a boundary.

(<https://usace.contentdm.oclc.org/utis/getfile/collection/p266001coll1/id/7628>) <Exhibit F>:

“This questionnaire should be completed for each boundary delineation performed. **The assumption is that two communities were evaluated, one wetland** (= "lower community") **and one upland** (= "upper community") so that a boundary between them could be identified. Fill in the blanks or check spaces as appropriate. **Attach copies of the completed field data forms.**” (Wetland Delineation Field Evaluation Questionnaire page 1) (emphasis added)

Not in the hearing packet, the County GIS map Vegetation layer designates approximately 85% of the project parcel area as “wetlands” <Exhibit G> The Biological Resources Analysis (“Analysis”) Exhibits 3 and 4 designate the County GIS wetland as “Upland Annual Grassland” and layer a narrow band of color along Sheehy Creek with legend “Riparian Corridor”. (Analysis “Exhibits 3 and 4” pages 12 and 14) <Exhibit H>

Not in the hearing packet but found online, the USACE website offers a paper to clarify the terminology between Riparian Corridor and Wetland (<https://www.spa.usace.army.mil/Portals/16/docs/civilworks/regulatory/Stream%20Information%20and%20Management/ERDC%20Riparian%20Terminology.pdf>) <Exhibit I>. The Application is not in conformity with these protocols.

The Analysis does not provide supporting field data forms, evaluations, soil samples, or photo documentation Figures. The Army Corps of Engineers has not performed the protocol-level wetland delineation, or “Wetland Delineation Field Evaluation Questionnaire” for any sample site location. The riparian corridor and Sheehy Creek channel are “likely to be jurisdictional wetland” based on the presence of at least one USACE criteria:

“Jurisdictional watercourses on-site were classified according to the three-tier method used by the California Department of Forestry and Fire Protection (CAL FIRE 2017). Based on these criteria there are no jurisdictional watercourses in the project area (Exhibit 3 and Exhibit 4). **There is one Class I jurisdictional watercourse on-site, a perennial reach of Sheehy Creek that was re-routed to its present location between July 2003 and July 2004 based on aerial imagery, as part of development of the rest of the industrial park to the south.** There are no jurisdictional culverts on-site required to reach the project area, and no crossings over Sheehy Creek are included as part of the proposed project (Exhibit 3 and Exhibit 4).

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.** For this BRA, **we identified potential wetlands in Exhibit 3 based on the presence of one of the three USACE criteria**, usually hydrophytic vegetation cover but sometimes soil indicators or hydrology or a combination of these. Based on Exhibit 4). **There is likely to be jurisdictional wetland in the riparian corridor and channel of Sheehy Creek**, however, this area is protected from development and is not included in the project area.” (Analysis pages 21 and 22.) (emphasis added)

Personnel Qualifications do not appear to be wetland technical experts or wetland scientists. (Analysis pages 44 to 50.) We pose a question to the Commission: “Why did FirstCarbon opine there is a wetland on the project parcel, but not seek a jurisdictional wetland delineation?”

STORMWATER CONTROL PLAN DID NOT CONSIDER WETLAND SETBACKS

The Stormwater Control Plan (“Plan”) Table of Contents reveals setbacks from creeks, wetlands and riparian habitats were not considered (Plan page TOC-1.) Water Audit asserts that a USACE Jurisdictional Wetland Delineation is necessary to determine no injury to the public trust and setbacks must be clearly defined.

STAFF MEMO DEFENDS WETLAND OMISSION

The Staff Memo (“Memo”) dated November 20 2025 responds only to Water Audit California’s comment dated November 19, 2024. Staff defends the Biological Resources Analysis Consultant conclusions that claim there are no wetland criteria on the project parcel. Neither staff nor consultant have the legal authority to make that determination. The omission of a USACE determination cannot be excused.

“The Biological Resources Assessment prepared by **First Carbon Solutions** assessed the site for potential wetlands. Based on their investigation, the site lacks USACE wetland criteria and concluded that there are no potentially jurisdictional wetlands in the project’s development area.” (Memo dated November 20, 2025, page 4) (emphasis added)

The County Checklist of Required Application Materials (“Checklist”) requires the Special Study “Geological/Geotechnical Hazard Report - Alquist Priolo Act.” However, Staff Planner Mr. Trippi has ticked that box as “N/A” Not Applicable (Checklist pdf pages 7 and 27.)

In comparison, Mr. Trippi as the staff planner for the Planning Commission December 2023 Nova Business Park application *did* require a “Geological Report” in that hearing packet (<https://napa.legistar.com/View.ashx?M=A&ID=1082426&GUID=E9D14924-AB4A-4EFF-9F3A-B11CA56596AE>) <Exhibit P> Mr. Trippi there included the Location Waterways Suscol Creek, Fagan Creek, and Sheehy Creek on the State Clearing House website, but omitted the document from the State Clearing House website <Exhibit Q>

INITIAL STUDY/MITIGATED NEGATIVE DECLARATION ALLOWS FUTURE SOIL REPORT

The Initial Study/Mitigated Negative Declaration (“IS/MND”) claims the report will be required at a future date:

“Based upon the Soil Survey of Napa County, prepared by the United States Department of Agriculture (USDA), the property is composed of Haire loam, 2-9 percent slopes. According to the Napa County GIS Sensitivity Maps (Surficial Deposits layer), the majority of the site is underlain by undifferentiated Holocene alluvium deposits with portions of the site underlain by early or middle Pleistocene fan or terrace deposits. Based on the Napa County Environmental Sensitivity Maps (Liquefaction layer) the project site has very low to high susceptibility for liquefaction. Development will be required to comply with all the latest building standards and codes, including the California Building Code that would reduce any potential impacts to a less than significant level. In addition, **a soils report, prepared by a qualified engineer will be required as part of the building permit submittal. The report will address the soil stability, potential for liquefaction** and will be used to design specific foundation systems and grading methods, which will reduce potential impacts to less than significant.” (E&P IS/MND page 16)

See in comparison, the Planning Commission August 6, 2025, Gateway 24 application that is also within the Napa Valley Business Park Specific Plan and located on south side of Sheehy Creek. That IS/MND did not include the additional language allowing a *future* soils report.

(<https://napa.legistar.com/View.ashx?M=F&ID=14547448&GUID=A76DA758-44BD-4F27-BC90-025554749E27>):

“Based upon the Soil Survey of Napa County, prepared by the United States Department of Agriculture (USDA), the southern portion of the site is composed of soils in the Haire Loam (2-9 percent slopes) series which are characterized by slow or very slow runoff with little or no hazard

of erosion. This nearly level soil type is found mainly on old alluvial fans and basins. Runoff is slow with a slight hazard of erosion. Project approval will require incorporation of best-management practices and will be subject to the Napa County Stormwater Ordinance which addresses sediment and erosion control measures and dust control, as applicable, to ensure that development does not impact adjoining properties, drainages, and roadways.” (Gateway 24 IS/MND page 17)

Why did staff permit E&P a future soil report, and not allow the same for Gateway 24?

SHEEHY CREEK REACH NOT MAINTAINED BY COUNTY

Sheehy Creek runs through the project parcel. The County argues it has no responsibility to maintain that reconfigured channel:

“The link provided under this comment is to the Napa County Stream Maintenance Manual (Manual) that was prepared for the **Napa County Flood Control and Water Conservation District** in January 2019. The Manual refers to the portion of Sheehy creek from North Kelly Road west to Highway 29 as defined on Pdf page 177 of the report and depicted on the map on pdf page 179. The **portion of Sheehy creek abutting the project site is not included in this Manual.**

The Napa County Flood Control and Water Conservation District (District) has maintenance responsibilities for flood control channels that the District owns in fee title, as well as other channels for which the District has a maintenance agreement or easement. The District is also responsible for operating and maintaining elements of the Flood Protection Project. The location and ownership type for District maintained channels are presented in the Manual. As noted above, **the portion of Sheehy creek abutting the project site is not a District maintained channel.**” (Memo dated November 20 2025, page 5) (emphasis added)

It is within the jurisdiction of the Planning Commission to require the applicant to improve its reach of Sheehy Creek. <https://www.facebook.com/NapaValleyRegister/posts/sheehy-creek-offers-a-rare-slice-of-nature-amid-napa-countys-industrial-growth-a/1199402728874773/> <Exhibit R>:

REVISED CONDITIONS OF APPROVAL

Building A and Building B Conditions of Approval 4.11 COMPLIANCE WITH OTHER DEPARTMENTS AND AGENCIES - OPERATIONAL CONDITIONS, and 6.0 GRADING/DEMOLITION/ENVIRONMENTAL/BUILDING PERMIT/OTHER PERMIT PREREQUISITES do not incorporate by reference and enumeration the California Department of Fish & Wildlife letter dated November 15 2024. The CDFW Letter is not appended to the Conditions.

In comparison, the recent Planning Commission August 21, 2024 Hillwalker Vineyards Winery hearing Revised Recommended Conditions of Approval *did* incorporate its CDFW Letter by reference and enumeration at pages 8 and 9. Staff *did* append the letter with the other agency memoranda at pdf page

32 <https://napa.legistar.com/View.ashx?M=F&ID=13241495&GUID=FD1DB5EE-832E-424D-B8E8-C9CC1ED0AC4E>):

It is evident that the approved Conditions of Approval are inconsistent with one another.

PRELIMINARY MASTER SITE PLAN IS INCOMPLETE

The E&P Site Plan sheet is not in conformance with the Sample Site Plan Revised 2024. The NEW WINERY AND WINE STORAGE FACILITY BUILDING A PRELIMINARY MASTER SITE PLAN A01.0 is an aerial photograph. The licensed architect stamp or signature is omitted. Sheehy Creek and the “likely wetland” riparian corridor are not identified. Sheehy Creek setback is not sited. Building A from Building B distance setback is not sited. There are no topographic contours. The Assessor Parcel Number for the three project parcels are not included in the title block or on the Site Plan. There are no neighboring APNs (Graphics pdf page 6) <Exhibit S>

Not in the hearing packet, but found on County website, the County Sample Site Plan enumerates the required detail of information on the plan (<https://www.napacounty.gov/DocumentCenter/View/20486/Sample-Site-Plan-.pdf>) <ExX COUNTY FORM Sample-Site-Plan-Revised 2024-PDF_202411191159440278 <https://www.napacounty.gov/DocumentCenter/View/20486/Sample-Site-Plan-.pdf>>:

“Aerial photographs will not be accepted as Site Plans

The Site Plan page will be consistent with the size of plans at a minimum of 11 x 17" (with legible, easy to read font). Site Plans will not be accepted unless they are a part of the plans, unless it is directed otherwise. **Plans must contain a Title Page, Site Plan** and project drawings and or details.” (County Sample Site Plan page 1) (emphasis added)

“What to Include on your Site Plan:

A. **Title Block** shall include the following:

- *Parcel number and property address
- *Owner name and address
- *Draftsman (may be yourself), Architect or Engineer and contact information.
- *Date the plans were drawn and/or amended

D. **Setbacks** Provide the setbacks that we need to review your submittal for permit. Setbacks are the distance between existing and proposed property improvements. They are the distance of your project from property lines, septic systems, wells, tanks, structures, dwellings (and in case of generator exhaust, the distance from the nearest opening on the structure closest to the installation). Indicate the distance from the center of road for all improvements.

F. **Identify Natural Features** such as creeks as there are creek setbacks that must be maintained to protect the natural feature from damage and prevent possible flood issues. Identify required creek setback distance pursuant to County Code 18.108.025.” (County Sample Site Plan page 1) (emphasis in original)

PUBLIC COMMENT

Water Audit incorporates herein all public comment in opposition to the E&P Technology project from the previous November 20, 2024, hearing and this hearing December 3, 2025.

Respectfully,

/s/ William McKinnon

William McKinnon
General Counsel