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July 17, 2019

Sam Vandewaters
Planner II
Mendocino County Planning and Building Services
120 West Fir Street
Fort Bragg, CA 95437
By email to: vandewaters@mendocinocounty.org

Subject: CEQA Compliance - Minor Subdivision MS 2018-0001 (SCH # 2019069030)
31120 Thomas Lane, Fort Bragg, CA, APN 019-333-18

Dear Mr. Vandewaters:

I represent the Dorothy King Young Chapter of the California Native Plant Society (CNPS) regarding legal compliance relating to Minor Subdivision 2018-0001 at 31120 Thomas Lane, Fort Bragg ("Project").

CNPS is a California 501c(3) non-profit organization with 10,000 members representing 35 Chapters across California and Baja California, Mexico. The mission of CNPS is to protect California's native plant heritage and preserve it for future generations through application of science, research, education, and conservation. The Dorothy King Young (DKY) Chapter of CNPS focuses on protecting native plants and sensitive natural communities within coastal Mendocino County, and on providing education about the science and significance of these species and communities.

I write to comment on Mendocino County's ("County") California Environmental Quality Act (CEQA) compliance for the proposed the Project, specifically the lack of substantial evidence regarding: 1) the Project's direct impacts to and the lack of mitigation measures for rare and sensitive plants; 2) the Project's polluted runoff and potential impacts to wetland and riparian habitat; and 3) the Project's cumulative impacts to rare and sensitive plants and wetlands when combined with past, present and future actions, including land clearing.

As set out below, due to these significant impacts, the County must either revise and recirculate the MND or prepare an Environmental Impact Report ("EIR").

1. The County Must Prepare an EIR if there is a Fair Argument by the Public That There Is a Significant Environmental Impact.

CEQA requires that agencies provide substantial evidence for its conclusions and the County must prepare an EIR if construction of the Project “may have a significant impact on the environment.” (Pub. Res. Code § 21151(a).) There is a “**low threshold**” requirement for initial preparation of an EIR [that] reflects a preference for resolving doubts in favor of full environmental review when the question is whether any such review is warranted.” (*League for Protection of Oakland’s Arch. Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 905. Emphasis added.) The County, therefore, has the responsibility to ensure that there is no fair argument of substantial evidence in the record of significant impacts.

The low threshold triggers an EIR rather than a negative declaration whenever substantial evidence in the record supports a “fair argument” that significant impacts may occur, even if there is also substantial evidence supporting a different conclusion. (*Friends of “B” Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1000-1003; Guidelines § 15064(f)(l).)

2. The Record contains does not Contain Substantial Evidence Regarding the Project’s Direct Impacts to and Lack of Mitigation Measures for Rare and Sensitive Plants.

CEQA requires that an Initial Study and Mitigated Negative Declaration (“MND”) identify, evaluate, and mitigate the possible significant environmental impacts of the proposed Project. (Pub. Res. Code § 21002; Guidelines §§ 15063-15064, 15071.) The lead agency is required to conduct a “thorough investigation” with respect to significant impacts, and its conclusion must be based on substantial evidence. (See Pub. Res. Code §§ 21168, 21168.5, 21082.2; Guidelines § 15064(a).)

CEQA mandates that “if there is disagreement among expert opinion supported by facts over the significance of an effect on the environment, the Lead Agency shall treat the effect as significant and shall prepare an EIR.” (CEQA Guidelines § 15064.) The California Department of Fish and Wildlife (“CDFW”) is the state regulatory authority for wetlands and biological resources; its opinions carry great weight in determining adequacy of CEQA documents.

CDFW opines that the impact analysis regarding biological resources, including rare plants is inadequate, stating that:

The MND's impact analysis determinations are informed only by a cursory biological assessment of conditions at the Project site. Botanical surveys for rare plants and Sensitive Natural Communities (SNC) were not conducted. Only preliminary biological scoping resulting in a "Preliminary Biological Scoping Letter" was conducted, which were not intended to follow standard CDFW botanical survey guidance. (Page 1.)

Because the MND and BA omitted complete technical and/or scientific description and assessment of the rare plants and riparian area on the subject property, the MND is legally inadequate. Therefore, the MND must be revised and recirculated or an EIR must be prepared because the MND has not adequately explained why direct and cumulative adverse effects to wildlife or biological resources would not occur. See *San Bernardino Valley Audubon Soc'y v. Met. Water Dist.* (1999) 71 Cal. App. 4th 383, 389.

The CDFW letter also identifies several feasible and appropriate mitigation measures that were not considered and/or adopted by the County. CDFW writes:

CDFW's March 25 letter (Attachment 1) includes substantial evidence why 50-foot buffers are typically not effective at minimizing impacts from adjacent development and why minimum buffers of 100 feet or wider were recommended by CDFW for this Project.

Since the MND's basis for impact assessment of biological impacts is not based on adequate evidence, the MND does not – and cannot - identify adequate mitigation measures which would otherwise enable the County to satisfy CEQA with a mitigated negative declaration. Pub. Res. Code § 21080(c)(2); CEQA Guidelines §15070(b). Such measures could properly include limitations on the scope of operation or intensity of use (*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal. App. 3d 130). The County, however, did not consider, much less adopt such measures.

3. The MND Fails to Consider the Project's polluted runoff and potential impacts to wetland and riparian habitat.

CEQA requires that there be a description of the specific location and extent of riparian habitat and "investigate" the possibility of wetlands, riparian habitat and sensitive species. *San Joaquin Raptor/Wildlife Rescue Ctr. v. County of Stanislaus* (1994) 27 Cal. App. 4th 713. The MND, however, fails this test as it does not accurately describe, much less investigate, the existing biological, hydrogeological and groundwater conditions.

As set out in DFW's letter of July 8, 2019 letter from Curt Babcock to Sam Vandewaters, the project biological assessment (BA) by Wynn Coastal Planning of September 10, 2018 is inadequate; stormwater and polluted runoff impacts are not adequately assessed; and feasible mitigation measures have been identified and not been adopted will cause

significant impacts. The MND states that “The subject parcel is host to several wetlands as identified in the Wetland Delineation Report (Wynn Coastal Planning, 2019),” (MND, Page 3.) Yet CDFW concludes that: “The MND does not adequately analyze stormwater, altered hydrology, and disturbance impacts to onsite and adjacent wetland and SNC habitats.” (Page 1.)

Thus, the MND does not comply with CEQA because it does not provide substantial evidence that the project will not cause significant environmental impacts to wetland and riparian areas due to habitat destruction, polluted runoff and any groundwater recharge impacts.

For instance, CDFW letter states on page 3 that:

The MND does not analyze the Project's altered hydrology and water quality impacts to onsite and directly adjacent offsite SNCs and wetlands. CDFW's March 25 letter (Attachment 1, page 3, and Recommendation (a)), describes a sphagnum fen and intact MCW adjacent to this Project, and provides substantial evidence of known stormwater and nutrient impacts to these habitat types from adjacent development runoff.

Further, despite not providing sediment and erosion analysis and mitigation to riparian resources, the MND concludes that there will be no impacts to the riparian area (MND, p.8) due to project's grading, reduction of impermeable surfaces and encroachment into buffer zones recommended (as stated by CDFW). However, the MND included no local characterization of erosion or runoff conditions or impacts and the MND lacks evidence to conclude that there will be no significant impacts to the riparian area. As such, the MND cannot identify adequate mitigation measures which would allow the County to satisfy CEQA with an MND. (Pub. Res. Code § 21080(c)(2); Guidelines § 15070(b)).

The MND states that a condition has been included to require the Developer to adhere to agency regulations. First, such a condition does not alleviate the County from identifying impacts.

Second, a reviewing court will not defer to the agency's determination that mitigation measures will work when their efficacy is not apparent and there is no evidence in the records showing that the measures will be effective. (*Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 95). Instead, there must be substantial evidence in the record to support the determination. (See *Citizens for Open Gov't v. City of Lodi* (2012) 205 Cal.App.4th 296, 305). There is no evidence in the record, though, because the County did not provide any data or analysis for: 1) how runoff will not

affect wetlands; and 2) how new impervious surfaces will affect groundwater recharge related to wetlands on the site.

Additionally, the MND concludes that such post-MND regulation is adequate for CEQA compliance. CEQA, though, does not allow for such deferral of either the analysis or mitigation of impacts. Pub. Res. Code § 21080(c)(3); *Gentry v. City of Murrieta* (1995) 36 CA4th 1359, 1396.

4. The MND does not Contain Substantial Evidence Regarding Cumulative Impacts, e.g. the Developer's Previous Destruction of Rare Plant Habitat.

CEQA requires that an MND analyze the project's cumulative impacts. (Pub. Res. Code §§ 21080.5(d)(3)(A), 21083(b)(2); see 14 CCR §§ 15065(a)(1), 15063(a)(1). See also, *Citizens Ass'n for Sensible Development v. County of Inyo* (1985) 172 CA 3d 171). The County's failure to assess project's cumulative and secondary impacts renders the MND inadequate.

Cumulative impacts are the incremental effects from multiple projects that combine to affect the environment. "The cumulative impacts from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects." (14 CCR § 15355(b)). Cumulative impacts are "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts ... [they] can result from individually minor but collectively significant projects taking place over a period of time." (14 CCR § 15355(b); *EPIC v. Johnson*, (1985) 170 Cal. App. 3d 604, 625).

The MND states that:

County staff conducted a site visit, along with a number of jurisdictional agencies ... and determined that alterations to the wetlands constituted a violation of Army Corps regulations. However, as noted above, the violation occurs prior to the submittal of the subdivision application, thus these impacts could not be fully incorporated into the environmental review.

This is simply incorrect. First, CEQA does **allow the agency the discretion** to determine the temporal point where the baseline is established even when those previous activities have not been previously authorized. *Fat v. City of Sacramento* (2002) 97 Cal.App.3d 1270, 1277.

As importantly though, the County **does not have the discretion** to exclude such previous project impacts from its cumulative impact analysis. The clearing done by the

Developer was a “past” project which impacts must be combined with the Project’s impacts and be considered *together*, to determine the how both the Project will compound or increase those previous environmental impacts.” (14 CCR § 15355(b); accord, *EPIC*, supra, 170 Cal. App. 3d at p. 625).

There is an enormous amount of evidence in the record on this subject. For instance, CNPS presented relevant aerial photos of the site from the CDFW BIOS viewer, which is available on-line at <https://apps.wildlife.ca.gov/bios/>. The CNPS letter of September 21, 2018 also references the CDFW assessment of the pre-clearing site (prepared by Diana Hickson, Vegetation Ecologist at CDFW.) Past, current, and post clearing and grading project information is also in the record as set out in the Developer’s consultant reports and the September 21, 2018 letter from CDFW. Thus, there is substantial evidence in the record regarding the environmental setting prior to the clearing as opined in CDFW’s letter of September 21, 2019:

The preliminary biological survey report describes adjacent intact sensitive vegetation as what was likely to have occurred on the subject property prior to clearing: Bishop pine forest (G3 S3.2), Mendocino cypress-Bolander pine forest (G2 S2), Mendocino cypress-labrador tea forest (G2 S2).

Thus, based on those cumulative impacts, as stated in the in CNPS’s September 21, 2018 letter, the County can and should consider and adopt ecological restoration mitigation that would achieve vegetation and ecosystem function recovery.

In sum, because the MND does not comply with CEQA, CNPS requests that the County: withdraw the MND, adopt CDFW’s suggestions; revise the direct and cumulative impacts assessment to rare plants and wetlands; and recirculate the MND.

Sincerely,

A handwritten signature in black ink, appearing to read "Edward E. Yates", with a stylized flourish at the end.

Edward E Yates