

TENTATIVE RULINGS

FOR: February 13, 2018

The Court may exercise its discretion to **disregard** a late filed paper in law and motion matters. (Cal. Rules of Court, rule 3.1300(d).)

Unlawful Detainer Cases – Pursuant to the restrictions in Code of Civil Procedure section 1161.2, no tentative rulings are posted for unlawful detainer cases and appearances are required.

Court Reporting Services – The Court does not provide official court reporters in proceedings for which such services are not legally mandated. These proceedings include civil law and motion hearings. If counsel want their civil law and motion hearing reported, they must arrange for a private court reporter to be present. Go to <http://napacountybar.org/court-reporting-services/> for information about local private court reporters. Attorneys or parties must confer with each other to avoid having more than one court reporter present for the same hearing.

Special Note--Because of the court holiday on Monday, the Court is unable to field telephone calls for requests for oral argument. For this reason, appearances will be allowed for the posted court hearings without notifying the Court, provided a party notifies all other parties today (Friday) that the party intends to appear and argue. If notice of intent to appear has not been given to all parties, no oral argument will be permitted and the tentative ruling will become the Court's ruling.

CIVIL LAW & MOTION CALENDAR – Hon. Thomas Warriner, Dept. G (Criminal Courts Bldg.-1111 Third St.)

<u>Living Rivers Council v. County of Napa, et al.</u>	17CV000055
<u>Center for Biological Diversity, et al. v. Napa County, et al.</u>	17CV000060
<u>Circle Oaks County Water District, et al. v. County of Napa, et al.</u>	17CV000063

PETITIONS FOR WRIT OF MANDATE

TENTATIVE RULING:

1. Respondent and Real Party's request to strike each of the petitioner's late-filed statement of issues is denied. Respondent and Real Party did not demonstrate any prejudice as a result of the untimely filing and the Public Resources Code is silent on the remedy for a late-filed statement of issues.
2. The requests for judicial notice filed by Petitioner Living Rivers and Respondent and Real Party are granted. (Evid. Code, § 452(b).)
3. Living Rivers Motion in Limine is denied as the record for these proceedings is limited to the administrative record and evidence before the decision-makers at the time of the decision. (*Western States Petroleum Association v. Superior Court* (1995) 9 Cal.4th 559, 573, fn. 4.)

4. Living Rivers' unopposed motion to augment the record with the PowerPoint slide deck reviewed by the Board of Supervisors is granted.

5. Circle Oaks' Petition for Writ of Mandate is denied. The groundwater analysis in the EIR is adequate and is supported by substantial evidence. To the extent Circle Oaks is challenging the County's reliance on the RCS reports, such a challenge does not support reversal of the County's approval because such a challenge essentially asks this court, impermissibly, to weigh the evidence. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392-393.) The RCS reports constitute substantial evidence in that they provide "enough relevant information and reasonable inferences from this information that a fair argument can be made to support" the County's conclusion. (Guidelines, § 15384, subd. (a).) Moreover, the EIR disclosed the limitations and assumptions in RCS' modeling such that it was sufficient "as an informative document." (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at pp. 392-393.)

The groundwater mitigation measure does not impermissibly defer mitigation. (AR 402, 404.) During and after development, the groundwater will continue to be monitored and if there is problematic drawdown due to the Project, the County must implement recommended measures. (AR 293.) There is substantial evidence in the record that the mitigation requirements are fully enforceable through permit conditions, agreements, or other measures. (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal. App. 4th 1491, 1508.)

The County took into the consideration the impact of additional car and heavy truck traffic on Circle Oaks Drive, as well as the type of road Circle Oaks Drive is and the type and amount of traffic it can handle as designed. (AR 6131-6132 [Initial Study], 5844-5851 [Draft EIR], 5911 [Draft EIR], 1405-1414 [Final EIR], 1477-1478 [Final EIR].) These facts are substantial evidence to support the conclusion that the project would not create a substantial impact in this regard, although the County has put in place mitigation measures for the construction and post-construction phases. (AR 294, 1409-1410.)

Circle Oaks claims that the County indicated that Country Club Drive might be used by Real Party during operation of the project to access Vineyard Block 68, but that the County did not study the use of Country Club Drive. (AR 755-756.) This argument appears to be moot. The County adopted the Reduced Intensity Alternative (AR 7-8), which removed Vineyard Block 68 from the project (AR 1437-1438).

Lastly, Circle Oaks contends that the County failed to respond adequately to Mark Billings' comments regarding road failure on Circle Oaks Drive. (AR 12746-12767.) This argument lacks merit. Not only did the County respond to the comment (AR 897-898), the County apparently took to heart Mr. Billings' comments about construction traffic possibly compromising the structural integrity of the road. This was demonstrated when the County required, as a condition of approval, all construction equipment or vehicles weighing more than 64,000 pounds to avoid using Circle Oaks Drive. (AR 294.)

6. Center for Biological Diversity's (Center) Petition for Writ of Mandate is denied.

Center's first argument is that the EIR fails because it is piecemealing the project into a vineyard phase with a residential estate phase to follow later. Center teases this from the description of the project location, which reflects that the site contains 35 parcels and that zoning for the site allows one single family dwelling per lot. (AR 1080.) Center also notes that the project includes water and road infrastructure. (AR 5556, 5806, 5894) Residential development, Center states, would change the project's scope and nature by generating more severe environmental impacts.

Although the current zoning could allow for residential development, the record discloses no evidence that Real Party has considered residential development on the site or that a reasonable consequence of vineyard development is residential development. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1450; *Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 651, 657.) Thus, this claim lacks merit.

Next, Center contends that the EIR is fatally deficient for not analyzing the growth-inducing impacts of the project and that the County was required to analyze foreseeable development at or arising from the project, but did not. The record does not belie this assertion (AR 561-563, 1479, 5912-5913.) Thus, this argument fails.

Center also alleges that the EIR does not disclose the groundwater impacts of the project and that the mitigation measures are unenforceable. The baseline and mitigation arguments are the same as those raised by Circle Oaks and they fail for the same reasons. The streamflow argument was also raised by Living Rivers and is not any more successful here.

Center next takes the County to task for allegedly failing to describe adequately the baseline conditions for the red-legged frog. This argument was also raised by Living Rivers and fails for the same reasons. In any event, the surveys were sufficient to allow for informed decision. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 409.)

As Living Rivers did, Center challenges the Integrated Pest Management (IPM) measures as vague and unenforceable. This argument fails here as well, and for the same reasons.

Center's next argument is that the EIR fails to establish that IPM and existing regulations will mitigate impacts to species protected by the Endangered Species Act. This claim lacks merit. The County studied the impact of pesticides and developed a host of measures, including but not limited to compliance with existing law, to mitigate their impact. (AR 319-320, 1230-1233, 1255, 1335-1338, 1340-1345; SAR 68337-68338.)

Center also contends that the "Water Quality Monitoring Plan" represents deferred and ineffective mitigation. (AR 401, 59800-59817.) Not so. This plan was a voluntary action by Real Party and was not required mitigation. (AR 105; *North Coast Rivers Alliance v. Marin Mun. Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 653-654.)

Center next argues that the EIR's water quality buffers are not designed to protect endangered species from chemical runoff and that the EIR's studies undermine its own conclusion regarding buffer width. There was substantial evidence to support the Board's decision. (AR 1230-1233, 1252, 1342; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 407.)

As Living Rivers did, Center argues that the EIR does not analyze or mitigate airborne drift of pesticides. This argument fails for the same reasons that Living Rivers' argument did.

Center further contends that the EIR fails to analyze or mitigate the impacts to Foothill Yellow-legged Frogs arising from vehicle traffic. (AR 1408-12, 7028, 1376, 56914-56915.) This potential impact was studied. (AR 1195, 7033.) There is substantial evidence in the record supporting the conclusion that there will be less than significant impacts given that most of the operational activity at the project will occur outside the frog's breeding season, and that as a result no mitigation is required. (AR 1110, 1195; SAR 66283; Pub. Resources Code, § 21002.1, subd. (b).)

Center alleges that the County repeatedly violated CEQA in its analysis of greenhouse gas (GHG) emissions and the adoption of mitigation measures therefor. Specifically, Center claims that the EIR's calculation of total GHG emissions resulting from the project is incomplete and that the mitigation measures adopted were inadequate.

The County's analysis of GHG emissions is found in the record at pages 1460-1467, and 5895-5902. Substantial evidence supports that the mitigation measures put in place will be adequate. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 407; AR 33-37, 79-80, 683, 1465, 12275-12279; SAR 68299-68304, 68344-68345.)

Center claims that the EIR's alternatives analysis was improperly narrowed based on an unsubstantiated claim of infeasibility. (AR 748-752.) Specifically, Center says, the County should have considered an alternative that consolidated all of the vineyard acres into one large vineyard. (AR 1434-1444, 1981.) There is substantial evidence in the record that consolidated vineyard development is not feasible due to the terrain and other factors at the site. (AR 562-563, 1085, 1090-1092, 1442, 6290; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1509.)

Center's last argument is that the project is inconsistent with the General Plan, specifically CON-18 and CON-53. This argument lacks merit. (AR 16, 12071-12095; Gov. Code, § 65860, subd. (a)(2).)

7. Living Rivers' Petition for Writ of Mandate is denied.

Living Rivers argues that the EIR is informationally deficient regarding watershed resource impacts. The portion of the OB regarding engineered drainage facilities is not a challenge to the EIR per se, but a recitation of Living Rivers' point of view about engineered drainage facilities for hillside vineyard conversions. (OB pp. 10-12.) To the extent that Living Rivers is arguing that their expert's opinion should have held sway that is a dispute among experts and not a valid

challenge to the EIR. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392-393.)

Living Rivers contends that salmonoids were excluded from the impact analysis, the County impermissibly only looked for impacts at the project site, the County's studies admit that fine sedimentation upstream from the dams negatively affects the habitat for steelhead and salmon (AR 5797), and that as a result these populations should have been studied.

Living Rivers is incorrect. By recognizing that sediments affect fish habitats, among other things, the County implicitly included the salmonoids in its analysis and focused on minimizing sediment through the erosion control plan to a point where sediments would have a less than significant impact. (AR 1066-1068, 1071-1072, 5703.) Although the County did not create a separate section in the reports for salmonoids, they disclosed and contemplated them in their analysis. (AR 1355-1356, 5703, 5818, 7006.)

Having recognized that sedimentation harms salmonoids and other aquatics (AR 1355, 5797), the County appropriately focused its study and mitigation efforts on reducing sediments that would impact salmonoids. (Pub. Resources Code, § 21005, subd. (b).)

With respect to Living River's argument that the County excluded steelhead above Milliken dam from review, this is not a question of whether the County failed to include it in the review process, but whether it was reasonable to conclude that the steelhead did not need to be studied. This question is a contest between experts. (Compare AR 5608, 7006, with 4043) "[T]he agency's approval of an EIR 'shall be supported by substantial evidence in the record.' (Guidelines, § 15091, subd. (b).) Here, there was enough relevant information about steelhead habitat, the project site, and the surrounding area, as well as reasonable inferences drawn therefrom, that a fair argument could be made that the County did not need to perform an environmental review for steelhead, *i.e.*, that there was "No Potential" for occurrence (AR 7006) in the relevant study area.

Living Rivers next argues that the consultant's report on which the hydrology analysis is based fails to include a letter that was mischaracterized by the County and that the mischaracterization wrongly indicated that soil ripping would make the soil more permeable when such permeability was really only temporary. "To summarize, the EIR adopted a theory that deep ripping permanently increases soil permeability based on a letter from the NRCS that was not included in the EIR and that concedes the change in permeability may be temporary."

Living Rivers' argument is misplaced. First, the description in the Draft EIR was phrased as a possibility, not a certainty. (AR 5796.) In any event, the letter is consistent with the County's characterization of it. (AR 9861-9682.)

Living Rivers further contends that Oster updated his letter in 2016 that resulted in field tests and updated reports and that these updates should have been subject to public comment. In response to the update Oster letter, further soil tests were conducted on one of the vineyards developed in 2006. (AR 55541-55559, SAR 67506.) The report concluded that the ripped soil in the vineyard was classified at soil hydrologic group B. (AR 55541.) As a result, the County's consultant

concluded that “The results of our hydrologic analysis of Block 218 confirm our original statements and conclusions put forth in the EIR. . . . As stated in our memo of July 1, 2016, the ‘revised hydrologic modeling incorporates all mitigations and the results now fully meet the no net increase requirement.’” (SAR 67507.) Thus, the Board of Supervisors’ approval of the EIR was supported by substantial evidence. (Guidelines, § 15091, subd. (b).)

Living Rivers argues that the hydrology impacts are understated because most of the project’s engineered drainage facilities are not included in the analysis. Again, this is a dispute among experts and Living Rivers has not shown that the modeling on which the EIR was based was “clearly inadequate or unsupported” (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 409, fn. 12). Thus, this argument fails.

Next, Living Rivers argues that the EIR is fatally flawed for failing to discuss streamflow depletion due to groundwater pumping. In response to comments during the review process, the County, with assistance from Real Party’s hydrogeology consultant, RCS, stated that Milliken Creek is ephemeral, going dry in the summer and reviving in the fall or winter. (AR 613-614, 1612-1613, 1648.) There was further evidence that the groundwater at Well W-5 is not connected to the creek. (AR 614, 1614.) Living Rivers has not shown that the modeling on which the EIR was based was “clearly inadequate or unsupported” (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 409, fn. 12). Thus, this argument fails.

Living River’s arguments claiming deferral of the development of mitigation measures to reduce groundwater drawdown impacts on nearby wells is similar to the argument raised by Circle Oaks and does not succeed for the same reasons.

Living Rivers argues that the County was required to conduct “protocol-level” surveys for the California Red-Legged Frog rather than simply presuming the presence of the frog in the study area. The County did not err in this regard. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1276-1277.)

The next argument presented by Living Rivers is that the EIR fails to assess the impacts of pesticide drift on endangered, threatened, and rare amphibians and reptiles. Living Rivers is incorrect on the facts. (AR 1070, 1089, 1253, 1255, 1334, 1342-1344).

Living Rivers’ final argument fares no better. It contends that the County unlawfully deferred the development of mitigation measures to reduce significant impacts on endangered, threatened, and rare amphibians and reptiles by allowing for Integrated Pest Management to serve as a mitigation measure without actually specifying what techniques would be used. Here, the facts do not support Living River’s argument. Appendix N to the Draft EIR contains the Integrated Pest Management information and standards. (AR 7036-7038.) Thus, mitigation was not improperly deferred. (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 945.)