



WATER AUDIT CALIFORNIA

A PUBLIC BENEFIT CORPORATION

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JAN 27 2020

NAPA COUNTY
EXECUTIVE OFFICE

January 27, 2020

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Alfredo Pedroza, Supervisor, District 4
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David Morrison, Planning, Building and Environmental Services Director
Steven Lederer, Public Works Director
Jeffery Brax, County Counsel

BY HAND DELIVERY

To Those That It May Concern:

Water Audit has not as of this writing received a reply to our letter of January 21, 2020, but we have reviewed the changes in the staff memorandum pertaining to the small winery Ordinance that arose from our communication. Respectfully, staff is in error in regard to the scope of the public trust, the evidence required to show proof of injury to the *res*, and the existing evidence of injury. Although it seems that the County wishes to turn a blind eye to these concerns, we wish the record to be as complete as possible considering the time available.

As a matter of law, the Napa River is a navigable waterway. (*Harbors and Navigation Code §104*) While it is true that impairment of the navigability of waters was historically the foundation of an injury to the public trust, that vision has evolved significantly in the more than a century since first expressed in *Illinois Central Railroad Co. v. Illinois* (1892) 146 U.S. 387 [36 L.Ed. 1018, 13 S.Ct. 110].

As there is inadequate time to draft a proper legal memorandum, and the Board of Supervisors seems set on a rush to judgment, we will limit our immediate comments on the scope of the doctrine to quotations taken from the California Supreme Court decision in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 189 Cal.Rptr. 346; 658 P.2d 709. The *National Audubon Court's* comments alone should be cause enough to cause a pause to allow reconsideration of Board's duty to protect all aspects of the public trust, not merely the navigation of a waterway. If adequate time is made available, Water Audit would be pleased to provide a more comprehensive analysis and report. One may reasonably speculate that Staff may also wish reconsider its equally hurried analysis.

"By the law of nature these things are common to mankind -- the air, running water, the sea and consequently the shores of the sea." (Institutes of Justinian 2.1.1.) From this origin in Roman law, the English common law evolved the concept of the public trust, under which the sovereign owns "all of its navigable waterways and the lands lying beneath them 'as trustee of a public trust for the benefit of the people.'" (*Colberg, Inc. v. State of California ex rel. Dept. Pub. Wks.* (1967) 67 Cal.2d 408, 416 [62 Cal.Rptr. 401, 432 P.2d 3].)

The State of California acquired title as trustee to such lands and waterways upon its admission to the union (*City of Berkeley v. Superior Court* (1980) 26 Cal.3d 515, 521 [162 Cal.Rptr. 327, 606 P.2d 362] and cases there cited); from the earliest days (see *Eldridge v. Cowell* (1854) 4 Cal. 80, 87) its judicial decisions have recognized and enforced the trust obligation.

The objective of the public trust has evolved in tandem with the changing public

perception of the values and uses of waterways. As we observed in *Marks v. Whitney*, supra, 6 Cal.3d 251, "[p]ublic trust easements [were] traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes." (P. 259.) We went on, however, to hold that the traditional triad of uses -- navigation, commerce and fishing -- did not limit the public interest in the trust res.

The principal values plaintiffs seek to protect ... are recreational and ecological -- the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds. Under *Marks v. Whitney*, supra, 6 Cal.3d 251, it is clear that protection of these values is among the purposes of the public trust. In the second decision, *People v. Russ* (1901) 132 Cal. 102 [64 P. 111], the defendant erected dams on sloughs which adjoined a navigable river. Finding the sloughs nonnavigable, the trial court gave judgment for defendant. We reversed, directing the trial court to make a finding as to the effect of the dams on the navigability of the river. "Directly diverting waters in material quantities from a navigable stream may be enjoined as a public nuisance. Neither may the waters of a navigable stream be diverted in substantial quantities by drawing from its tributaries

The principles recognized by those decisions [citations omitted] apply fully to a case in which diversions from a nonnavigable tributary impair the public trust in a downstream river or lake. "If the public trust doctrine applies to constrain fills which destroy navigation and other public trust uses in navigable waters, it should equally apply to constrain the extraction of water that destroys navigation and other public interests. Both actions result in the same damage to the public interest." (*Johnson, Public Trust Protection for Stream Flows and Lake Levels* (1980) 14 U.C. Davis L.Rev. 233, 257-258; see Dunning, *The Significance of California's Public Trust Easement for California Water Rights Law* (1980) 14 U.C. Davis L.Rev. 357, 359-360.)

[T]he dominant theme is the state's sovereign power and duty to exercise continued supervision over the trust. One consequence, of importance to this and many other cases, is that parties acquiring rights in trust property generally hold those rights subject to the trust and can assert no vested right to use those rights in a manner harmful to the trust.

Boone v. Kingsbury (1928) 206 Cal. 148 [273 P. 797], presents another aspect of this matter. The Legislature authorized the Surveyor-General to lease trust lands for oil drilling. Applying the principles of *Illinois Central*, the court upheld that statute on the ground that the derricks would not substantially interfere with the trust. [7] Any licenses granted by the statute, moreover, remained subject to the trust: "The state may at any time remove [the] structures ..., even though they have been erected with its license or consent, if it subsequently determines them to be preposterous or finds that they substantially interfere with navigation or commerce."

Thus, the public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

Staff's assertion that Water Audit has failed to show impairment is rendered irrelevant by the County's own records. Again, given the short time available, we will limit our comments quotations drawn exclusively from the Napa County Groundwater Sustainability Annual [sic] Report -- Water Year 2018.

Among other things, the Report addresses the methodology used by the County to determine the water use impact of new wineries and vineyards. This calculation appears to mirror those used by the Center for Biological Diversity, and the relationship between groundwater extraction and surface water depletion. We have quoted only portions of the most significant findings: (1) there is a proven relationship between surface waters and groundwaters in the Napa Valley; and (2) groundwater extraction exacerbates the drying of surface water flows. As it is common knowledge that fish cannot live without water, the environmental consequences of drying surface waters are self-evident.

Water use by wineries in the Subbasin was updated for water year 2018 using the same estimation method developed for the Basin Analysis Report, which estimates water use based on the details of approved winery permits in the Subbasin (outside of municipal boundaries). The water year 2018 estimate is updated to reflect wineries permits, including new permits and modifications of existing permits, approved in 2018 (Figure 6-4). In 2018 Napa County approved three new permits for wineries, one of which is located in the Napa Valley Subbasin. Also, in 2018, Napa County approved 10 discretionary permits for modifications to previously permitted wineries, three of which are located in the Napa Valley Subbasin.

As in the Basin Analysis Report, the estimates of winery water use assume that all use is supplied by groundwater and that all wineries are

operating at their full, permitted capacity. Overall, 95% of water use in unincorporated areas of the Subbasin, excluding water used for crop production, is estimated to have been supplied by groundwater in water year 2018 (Table 6-5). The remaining amounts are estimated to have been supplied by diversions of surface water from within the Subbasin.

Water supplies available to agricultural land uses (specifically for crop production, rather than related activities such as winery operations; which are discussed in Section 6.1.3 below) in the Subbasin include groundwater pumped from the Subbasin, recycled water, surface water diverted from the Napa River system within the Subbasin, and to a lesser extent surface water diverted outside the Subbasin from the adjacent watershed into Lake Hennessey. Diversions of surface water from the Subbasin watersheds are a minor source of supply to agriculture within the Subbasin ...

Depths to groundwater in these wells ranged from 95 feet to 233 feet. Napa County has a network of [ONLY] five sites with dedicated monitoring wells near the Napa River and Dry Creek to enable monitoring of distinct depth intervals within the alluvial deposits of the Napa Valley Subbasin (see Section 4.2). Across four years of monitoring, with highly variable water year types during that time, groundwater levels have remained stable at all five sites demonstrating the relatively full condition of the Subbasin. Data from Sites 1 (Figure 5-15), 3 (Figure 5-17), and 4 (Figure 5-18) show that groundwater levels were above or very near the riverbed at these sites throughout 2018, indicating connectivity between groundwater and the nearby surface water.

Site 2 (Figure 5-16) and Site 5 (Figure 5-19) recorded groundwater levels in the uppermost part of the aquifer system at or above the streambed for a portion of the year in 2018. Groundwater levels in the deeper monitoring well at Site 5 (NapaCounty-223d-swgw5) were recorded to be within two feet of the elevation of the adjacent Napa River streambed in March and April 2018, while water levels in the deeper monitoring well at Site 2 (NapaCounty-217d-swgw2) remained well below the streambed throughout the year. Site 1 is located within the City of Napa and is the farthest downstream along the Napa River (Figure 2-6). The river is perennially wetted and tidally-influenced at this site with a 5-foot to 7-foot tidal range observed during the period of record. Data from Site 1 show that groundwater levels were above the elevation of the riverbed and near to or slightly above the elevation of water in the river channel, indicating a connection between groundwater and surface water.

Data from Sites 3 and 4 along the Napa River showed groundwater elevations reaching 5 to 8 feet above the adjacent streambed in spring 2018, gradually declining over summer to a level equal to the adjacent streambed by late September 2018 (Figure 5-17 and Figure 5-18). This pattern is more similar to groundwater levels observed at these sites in 2015, particularly in the somewhat lower spring groundwater levels relative to 2016 and 2017. The similarity between spring 2015 and spring 2018 conditions is consistent with the reduced precipitation and stormflows in those years relative to 2016 and 2017. However, as noted above, groundwater levels have remained stable across all four years.

At both Site 2 (Figure 5-14) and Site 5 (Figure 5-17) the direction of groundwater flow was predominantly away from the streambed and into the subsurface in 2018, as in the three prior years. At both sites, the streams are mapped by the USGS as intermittent in the reaches adjacent to the monitoring sites (Figure 2-6). The seasonal disconnection between shallow groundwater and the streambed observed at these sites, even after a very wet precipitation year in 2017, indicates that these are perennially losing reaches where surface water infiltrates along the streambed to recharge the alluvial aquifer of the Napa Valley Subbasin.

At Site 2, located along Dry Creek, a pattern similar to Site 5 occurred in 2018, such that unconfined groundwater levels were at or above the streambed during the winter and spring while stormflows provided recharge. Unlike at Site 5, however, the deeper, semi-confined portion of the aquifer system at Site 2 did not see groundwater levels equilibrate with the shallow, unconfined part of the aquifer system between 2015 and 2018. At both Sites 2 and 5, groundwater levels in the shallow, unconfined part of the aquifer system were consistently below the streambed elevation in the summer and part of the fall of 2017, indicating that groundwater was disconnected from the stream, although recharge to the groundwater system likely occurred for a portion of that period while water flowed in the streambed. Site 2 also showed groundwater level differences between the shallow and deep casings of at least 8 feet for most or all of 2018.

Based on the analyses of surface water and groundwater interconnections, measurable objectives and minimum thresholds for streamflow depletion are set at 16 SGMA-related representative wells in the Subbasin (Table

5-2) (LSCE, 2016c). The measurable objectives represent the mean fall groundwater level elevations that occurred historically. The minimum thresholds represent the lowest static groundwater level elevation that has occurred historically in the fall and an elevation below which additional streamflow depletion is likely to occur, i.e., expand the duration of annual no flow days in some reaches of the Napa River. The minimum thresholds also represent the lowest static groundwater elevation to which groundwater levels may reasonably be lowered at the end of a dry season without exacerbating streamflow depletion. These levels are not acceptable on a continuous basis as this would contribute to a worsening of existing conditions. Taken together, the measurable objectives and minimum thresholds represent the fall groundwater elevations within which groundwater elevations are reasonably likely to fluctuate during fall (including fall periods for all water year types) without exacerbating streamflow depletion.

The following chart neatly summarizes the problem. You will observe that the large majority of the testing sites reported show conditions that are described above as being indicative of a flow of surface water to groundwater, thereby diminishing surface flows available and negatively impacting the public trust in fish. This situation is reported to be exacerbated in dry years, when fish are most vulnerable.

Table 5-2 Sustainability Indicators: Groundwater Levels

| Representative Monitoring Sites Well ID | Date Monitored | Measured Minimum 2018 Fall Groundwater Elevation (GWE) (Feet) ¹ | Chronic Lowering of GWLs | | Reduced GW Storage | | Land Subsidence | | Streamflow Depletion | |
|--|----------------|---|--------------------------|----------------------|--------------------|----------------------|-------------------|----------------------|----------------------|----------------------|
| | | | Minimum Threshold | Measurable Objective | Minimum Threshold | Measurable Objective | Minimum Threshold | Measurable Objective | Minimum Threshold | Measurable Objective |
| | | | (Fall GWE, Feet) | (Fall GWE, Feet) | (Fall GWE, Feet) | (Fall GWE, Feet) | (Fall GWE, Feet) | (Fall GWE, Feet) | (Fall GWE, Feet) | (Fall GWE, Feet) |
| 06N04W174001M ¹ | 10/10/2018 | 83 | 17 | 50 | 17 | 50 | 17 | 50 | 17 | 50 |
| 06N04W271002M | 11/2/2018 | 8 | 2 | 12 | 2 | 12 | 2 | 12 | 2 | 12 |
| 07N05W000000M | 11/2/2018 | 112 | 127 | 145 | 127 | 145 | 127 | 145 | 127 | 145 |
| 08N06W000001M | 10/10/2018 | 291 | 269 | 281 | 269 | 281 | 269 | 281 | 269 | 281 |
| NapaCounty_76 | 11/16/2018 | 12 | 30 | 20 | 30 | 20 | 30 | 20 | 30 | 20 |
| NapaCounty_122 | 11/16/2018 | -18 | 45 | -18 | 45 | -20 | 45 | -26 | - | - |
| NapaCounty_128 | 10/17/2018 | 315 | 320 | 318 | 320 | 318 | 320 | 318 | 320 | 315 |
| NapaCounty_131 | 10/20/2018 | 75 | 72 | 76 | 72 | 76 | 72 | 76 | 72 | 76 |
| NapaCounty_135 | 11/16/2018 | 34 | 20 | 60 | 20 | 60 | 20 | 60 | - | - |
| NapaCounty_234a (negat) | 10/25/2018 | 3 | 2 | 4 | 2 | 4 | - | - | 2 | 4 |
| NapaCounty_235a (negat) | 10/25/2018 | 3 | 2 | 4 | 2 | 4 | - | - | 2 | 4 |
| NapaCounty_236a (negat) | 10/25/2018 | 72 | 68 | 76 | 61 | 76 | - | - | 61 | 76 |
| NapaCounty_237a (negat) | 10/25/2018 | 62 | 68 | 76 | 61 | 76 | - | - | 61 | 76 |
| NapaCounty_238a (negat) | 10/25/2018 | 30 | 29 | 32 | 29 | 32 | - | - | 29 | 32 |
| NapaCounty_239a (negat) | 10/25/2018 | 39 | 29 | 32 | 29 | 32 | - | - | 29 | 32 |
| NapaCounty_239b (negat) | 10/25/2018 | 76 | 75 | 77 | 75 | 77 | - | - | 75 | 77 |
| NapaCounty_239c (negat) | 10/25/2018 | 181 | 185 | 190 | 185 | 190 | - | - | 185 | 190 |
| NapaCounty_239d (negat) | 10/25/2018 | 171 | 168 | 175 | 168 | 175 | - | - | 168 | 175 |
| NapaCounty_239e | 11/15/2018 | 65 | 69 | 51 | 69 | 51 | 69 | 51 | - | - |

1. Values below a minimum threshold shown in red.

06N06 - Groundwater Elevation.

NapaCounty_234a (negat), NapaCounty_235a (negat), NapaCounty_236a (negat), NapaCounty_237a (negat), NapaCounty_238a (negat), NapaCounty_239a (negat), NapaCounty_239b (negat), NapaCounty_239c (negat), and NapaCounty_239d (negat) are all designated as representative wells for the Northeast Napa Management Area as part of the Napa water Subbasin.

Finally, again given the short time for comment on the Staff Report and Ordinance revisions, we note that there has been a significant change in the number of wineries that are anticipated to be impacted by the proposed Ordinance from "several" to 28 locations. By Public Records Request we have sought the identities of this small set. Without engaging in a debate as to whether "28" is greater than "several," we respectfully suggest that CBD's conclusion that the Ordinance applies to all wineries authorized to produce less than 20,000 gallons of wine annually (approximately 219) may be in error, but it will require a court to say so definitively. There is not express statement in the Ordinance that limits the application to the County's proffered number. In fact, the reference to a permissible 10% increase seems to be inherently contradictory, or perhaps a mischaracterization of the existing production of the "28" wineries.

Given the economic consequences, one may reasonably assume that monied interests other than the original 28 will attempt to expand the application of the Ordinance to the larger number. We can imagine equal application of the law arguments that will be advanced in the near future, and Water Audit has already expressed our likely course of action.

What remains unclear to us is the Board's motivation to push this matter through with such haste. Perhaps a savory explanation can be provided, but the unsavory relationship between campaign contributions and this conduct strongly indicates a *quid pro quo*. If this assertion is unfounded, please take a deep breath before jumping off this bridge. If this is a problem that has existed for decades, why must it be decided while the public is considering on both sides of the issue in the pending election? Are your votes being decided by dollars?

Each of you has been invited to a Forum hosted being hosted on February 7, 2020, by Water Audit and two substantial and respected local community organizations. The Forum will address, among other things, the State's expectations regarding the manner of formation of the Groundwater Sustainability Agency, the interface between surface water and groundwater, and the monitoring required to ascertain salient facts using valid science and best practices. The primary purpose of this event is to inform you and the community at large, at our considerable expense, of the reason that this subject is not *de minimus*, but rather a key to your proper performance of your trustee duties and the rehabilitation of Napa River fish.

In short, the Ordinance invites controversy. Once again, we strongly urge you to

reconsider its hasty approval of the Ordinance, and thereby disprove the axiom that "there is never enough time to do something right, but always enough time to do it over." We do not ask that you reject the proposed Ordinance outright, but simply that you not turn intentionally turn a blind eye to the likely environmental and legal consequences of your conduct before making a decision.

Respectfully,

WATER AUDIT CALIFORNIA



Grant Reynolds

Director

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WATER AUDIT CALIFORNIA 952 School Street, #316 Voice: (562) 500-4046
A California Public Benefit Corporation Napa, CA 94559 Email: General@WaterAuditCA.org

1. ☐ At the time of service I was at least 18 years of age and not a party to this action.

2. I served copies of:

a. ☐ summons

b. ☐ complaint

c. ☐ Alternative Dispute Resolution (ADR) package

d. ☐ Civil Case Cover Sheet (served in complex cases only)

e. ☐ cross-complaint

f. ☒ other (specify documents): FOLLOW-UP TO PUBLIC RECORDS ACT REQUEST

3. a. Party served (specify name of party as shown on documents served):
BRAD WAGENKNECHT, SUPERVISOR, DISTRICT 1

b. ☒ Person (other than the party in item 3a) served on behalf of an entity or as an authorized agent (and not a person under item 5b on whom substituted service was made) (specify name and relationship to the party named in item 3a):

4. Address where the party was served:
1195 THIRD STREET, SUITE 310, NAPA, CALIFORNIA

5. I served the party (check proper box)

a. ☒ **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on (date): JAN. 27, 2020 (2) at (time):

b. ☐ **by substituted service.** On (date): at (time): I left the documents listed in item 2 with or in the presence of (name and title or relationship to person indicated in item 3):

(1) ☐ **(business)** a person at least 18 years of age apparently in charge at the office or usual place of business of the person to be served. I informed him or her of the general nature of the papers.

(2) ☐ **(home)** a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party. I informed him or her of the general nature of the papers.

(3) ☐ **(physical address unknown)** a person at least 18 years of age apparently in charge at the usual mailing address of the person to be served, other than a United States Postal Service post office box. I informed him or her of the general nature of the papers.

(4) ☐ I thereafter mailed (by first-class, postage prepaid) copies of the documents to the person to be served at the place where the copies were left (Code Civ. Proc., § 415.20). I mailed the documents on (date): from (city): or ☐ a declaration of mailing is attached.

(5) ☐ I attach a **declaration of diligence** stating actions taken first to attempt personal service.

| | |
|---|--------------|
| PLAINTIFF/PETITIONER: RE: ORDINANCE REGARDING ISSUANCE DEFENDANT/RESPONDENT: OF SMALL WINERY USE PERMITS, ETC. | CASE NUMBER: |
|---|--------------|

5. c. ☐ **by mail and acknowledgment of receipt of service.** I mailed the documents listed in item 2 to the party, to the address shown in item 4, by first-class mail, postage prepaid,
- (1) on (date): _____ (2) from (city): _____
- (3) ☐ with two copies of the *Notice and Acknowledgment of Receipt* and a postage-paid return envelope addressed to me. (*Attach completed Notice and Acknowledgment of Receipt.*) (Code Civ. Proc., § 415.30.)
- (4) ☐ to an address outside California with return receipt requested. (Code Civ. Proc., § 415.40.)
- d. ☐ **by other means** (specify means of service and authorizing code section):

☐ Additional page describing service is attached.

6. The "Notice to the Person Served" (on the summons) was completed as follows:

- a. ☐ as an individual defendant.
- b. ☐ as the person sued under the fictitious name of (specify): _____
- c. ☐ as occupant.
- d. ☐ On behalf of (specify): _____

under the following Code of Civil Procedure section:

- | | |
|--|---|
| <input type="checkbox"/> 416.10 (corporation) <input type="checkbox"/> 416.20 (defunct corporation) <input type="checkbox"/> 416.30 (joint stock company/association) <input type="checkbox"/> 416.40 (association or partnership) <input type="checkbox"/> 416.50 (public entity) | <input type="checkbox"/> 415.95 (business organization, form unknown) <input type="checkbox"/> 416.60 (minor) <input type="checkbox"/> 416.70 (ward or conservatee) <input type="checkbox"/> 416.90 (authorized person) <input type="checkbox"/> 415.46 (occupant) <input type="checkbox"/> other: _____ |
|--|---|

7. **Person who served papers**

- a. Name: LINDA GHIRINGHELLI
- b. Address: 952 SCHOOL STREET, #316, NAPA, CA 94559-2824
- c. Telephone number: _____
- d. **The fee** for service was: \$ _____
- e. I am:

- (1) ☒ not a registered California process server.
- (2) ☐ exempt from registration under Business and Professions Code section 22350(b).
- (3) ☐ a registered California process server:
- (i) ☐ owner ☐ employee ☐ independent contractor.
- (ii) Registration No.: _____
- (iii) County: _____

8. ☒ **I declare** under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

or

9. ☐ **I am a California sheriff or marshal** and I certify that the foregoing is true and correct.

Date: JAN.27, 2020.

LINDA GHIRINGHELLI

(NAME OF PERSON WHO SERVED PAPERS/SHERIFF OR MARSHAL)



(SIGNATURE)