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NAPA COUNTY  
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**APPEALS**  
(Chapter 2.88 of Napa County Code)

NAPA CO. CONSERVATION  
DEVELOPMENT & PLANNING DEPT.

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

Appellant's Name: Earth Defense for the Environment Now

Telephone #: 415 777 5600 Fax #: 415 777 9809 E-Mail: \_\_\_\_\_

Mailing Address: 1325 Imola Avenue West PMB 614 Napa CA 94559  
No. Street City State Zip

Status of Appellant's Interest in Property: Interested Person (Napa Code Chapter 2.88 030)  
project applicant, adjacent property owner, other (describe)

Action Being Appealed: Approval of ECP # 99323 & Certification of Final EIR

Permittee Name: Robert Mondavi Properties, Inc

Permittee Address: P.O. Box 106 Oakville, CA 94562

Permit Number: ECP # 99323 Date of Decision: March 29, 2005

Nature of Permit or Decision: Erosion Control Plan for Vineyard Conversion

Reason for Appeal (Be Specific - 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, that there was a lack of a fair and impartial hearing, or that no facts were presented to the approving authority that support the decision, factual or legal basis for such grounds of appeal must be expressly stated or they are waived. (attach additional sheet if necessary): SEE Attached letter from law offices of Thomas N. Lippe.

If the basis of the appeal will be, in whole or in part, that the environmental determination under the California Environmental Quality Act is inadequate, please provide: a detailed statement supported by substantial evidence for each insignificant or less than significant impact identified in the initial study that the appellant contends may be significant, a detailed legal and factual statement indicating why the project is not exempt, and a detailed statement supported by substantial evidence describing why the Negative/Mitigated Negative Declaration or EIR is inadequate. (attach additional sheet if necessary)  
SEE Attached letter from law offices of Thomas N. Lippe

Project Site Address/Location: N/A

Assessor's Parcel No.: 046-400-034

Thomas Lippe 4/15/05 THOMAS LIPPE  
Signature of Appellant Date PRINT NAME

**TO BE COMPLETED BY CLERK OF THE BOARD**

Total Fee: \$ 627<sup>80</sup> Receipt Nos. 845238 Received by: Miller Date: 4-15-05

\* The following information, in addition to the information required by this form also needs to be provided as attachments hereto pursuant to County Code Section 2.88.050 (F-D): Title Insurance Report, Assessor's Map Book Pages, and Appeals Fee

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Law Offices of  
THOMAS N. LIPPE

329 Bryant Street,  
Suite 3D  
San Francisco, California 94107

Telephone: 415-777-5600  
Facsimile: 415-777-9809  
Email: Lippelaw@sonic.net

April 15, 2005

Board of Supervisors  
County of Napa  
Attn: Clerk of the Board of Supervisors  
1195 3rd Street  
Napa, CA 94559

Hillary Gitelman, Director  
Conservation, Planning and Development Department  
County of Napa  
1195 3rd Street, Room 210  
Napa, CA 94559

**RE: Notice of Appeal of Erosion Control Plan #99323 and Certification of the Environmental Impact Report for earthmoving activities associated with the installation of proposed new 88 acre Robert Mondavi Properties Inc. Vineyard Project**

Dear Ms Gitelman and Members of the Board:

This office represents Earth Defense for the Environment Now ("EDEN") with respect to this appeal of the Director's decision to approve Erosion Control Plan #99323 and to certify the Final Environmental Impact Report ("FEIR") for the 88 acre Robert Mondavi Properties Vineyard Project (hereinafter referred to collectively as the "Project").

EDEN is an unincorporated association formed for the purpose of conserving, protecting and defending the earth's deep ecology and biodiversity for a sustainable future and high quality of life for all. EDEN strives to accomplish its mission through education, advocacy and science. From its inception, EDEN has concentrated its efforts on protecting and conserving the ecological health and aesthetic beauty of the Napa River and its tributaries and surrounding area. EDEN and its members are beneficially interested in the ecological values, aesthetic enjoyment and continued productivity of the land and water in the Napa River watershed, and are further committed to protecting and preserving the native salmonid runs that occur in the Napa River and its tributaries.

This letter provides the information required by County Code § 2.88.050 for a Notice of Appeal. All correspondence or other communications relating to this appeal should be directed to this office.

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 2

- A. The name and address of the permittee: Robert Mondavi Properties, Inc., P.O. Box 106 Oakville, CA, 94562. The assessor's parcel number for the property subject to the Erosion Control Permit is 046-400-034.
- B. The name and address of the appellant: Earth Defense for the Environment Now, 1325 Imola Avenue West PMB 614, Napa, CA, 94559.
- C. This letter appeals the Napa County Conservation, Development and Planning Director's March 29, 2005 letter<sup>1</sup> and decision to approve Erosion Control Plan #99323 and certify the FEIR for the Robert Mondavi Properties Vineyard Project pursuant to the California Environmental Quality Act ("CEQA"). In addition, to the extent the Director has approved a Groundwater Permit for this project, EDEN appeals that decision as well.
- D. A summary of the facts on which the appeal is based: *See* "Basis for Appeal" set forth below.
- E. The basis for this appeal is in part that the approving authority, the Director of the Napa County Conservation, Development and Planning Department, prejudicially abused her discretion by failing to adopt a legally valid Environmental Impact Report under the California Environmental Quality Act, and that the facts presented to her do not support the decision to approve the Project as described below. *See* "Basis for Appeal" set forth below.
- F. A list, certifying by name, address and assessor's parcel number, of all owners of real property located within three hundred feet of the real property which is the subject of this appeal is attached hereto as Exhibit 10.
- G. Copies of the Assessor's map book pages showing all real property which is the subject of this appeal and all properties used in compiling the adjoining property owners list is attached hereto as Exhibit 10.
- H. The required fee for filing an appeal, established by resolution of the board of supervisors: Pursuant to a telephone conversation with Pamela Miller, Napa County Clerk of the Board, on April 14, 2005, the estimated appeal fee is \$627.80. Ms. Miller informed our office that the County will contact us if additional appeal fees are required above and beyond the \$627.80 estimate.
- I. A detailed statement of the reasons why EDEN believes the Director's certification of the FEIR is inadequate, as well as evidence in support of EDEN's contentions, is included below. *See* "Basis for Appeal."

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<sup>1</sup> As modified by the Director's March 31, 2005 letter to Robert Mondavi Properties, Inc. To clarify that the effective approval date is April 16, 2005, and not April 8, 2005 as reported in the Director's March 29<sup>th</sup> letter.

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 3

### **BASIS FOR APPEAL**

1. The director's decision to approve this project violates the California Environmental Quality Act ("CEQA") in that (1) there is not substantial evidence in this record to support a finding by the County that this Project will not cause or contribute to significant individual and cumulative adverse environmental effects; and (2) the director did not proceed in the manner required by law in certifying the Final Environmental Impact Report ("FEIR") for the Project because the FEIR is not an adequate informational document or in determining the feasibility of project alternatives.
2. With respect to the resources discussed below, the FEIR does not (1) adequately describe the environmental setting of the project in sufficient detail to enable any assessment of the potential significance of adverse effects on; (2) follow the definition of "cumulative impacts," (3) adequately respond to comments submitted on the DEIR; (4) respond at all to certain significant environmental points raised in public comments; or (5) evaluate a reasonable range of project alternatives.

#### **Groundwater Impacts**

3. The factual basis for the groundwater impact portion of this appeal is explained in more detail in the letter from hydrologist Greg Kamman, attached as Exhibit 7, as well as Mr. Kamman's comment letter on the draft EIR (at FEIR, p. 201).<sup>2</sup>
4. The FEIR does not present and utilize relevant information regarding the environmental setting of the project to determine the relationship between groundwater recharge and consumption for this project. The FEIR ignores non-consumptive uses of groundwater, such as stream base flow. (See Kamman Comment letter at FEIR, p. 2-103; Exhibit 7, p. 2.) The FEIR also does not present and use the best available data regarding annual rainfall for this location. (See Kamman Comment letter at FEIR, p. 2-105; Exhibit 7, p. 3.)
5. As a result, the FEIR's conclusion that Project induced impacts on groundwater resources are less than significant is unreliable. The FEIR contends that the groundwater recharge rate for the 160 acre Project location is greater than the total groundwater consumption rate of 66 acre feet per year for the irrigation needs of the proposed 88 acre vineyard. The DEIR estimates the applicant's

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<sup>2</sup>Despite repeated requests for copies of documents relied upon by the County in preparing the EIR see e.g., Exhibit 12 hereto), the County has not provided to EDEN a copy of a report used in the County's groundwater impact analysis - an aquifer pump test completed on the Mondavi parcel well (Well B) by Richard C. Slade & Associates, LLC on March 26-28, 2001, which is referenced in both the DEIR and FEIR. On April 13, 2005, Mary Doyle, the County's planner for this Project informed counsel for EDEN that the County did not have a copy of the March 2001 pump test report by Slade & Associates and had requested it from its hydrological consultant, HSI Hydrologic Systems, and that she would provide a copy as soon as the County received it. Since this information was not made available during the appeal period, EDEN reserves the right to supplement this appeal with additional comments upon receiving the March 2001 pump test report by Slade & Associates.

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 4

fair share as 72 acre feet per year. The FEIR calculates yet another recharge rate/"fair share" for the property of 147 acre feet per year. However, as detailed in Mr. Kamman's comment letter on the DEIR and his letter attached hereto as Exhibit 7, the evidence offered by the EIR in support of this impact analysis is fatally flawed for a number of reasons, especially its reliance on inaccurate rainfall data used to determine the Project site's groundwater recharge rate. When the best available rainfall data is applied, the Project site's groundwater recharge rate is at or well below the anticipated irrigation demand of 66 acre feet per year. Indeed, Mr. Kamman's analysis based on the best rainfall data available indicates that the recharge rate for this property is approximately 43 to 47 acre feet per year. Exh. 7, p. 3. Exhibit 7, pp. 2-4.

6. Employing the County's own impact significance criteria, the Project has the potential to result in a net annual deficit in groundwater volume or a lowering of the groundwater table, and as such, results in a significant adverse impact for which mitigation measures or project alternatives need to be developed and explored. This discrepancy lead Mr. Kamman to conclude that "there is not sufficient rainfall and associated long-term average rainfall recharge to groundwater at the proposed Mondavi vineyard site to sustain the estimated future consumptive water demands without adversely impacting groundwater conditions pursuant to the 'fair share' principle evaluation criteria used in the EIR's groundwater impact analysis." Exhibit 7, p. 2.

7. Further, the FEIR's groundwater impact analysis is also flawed due to its reluctance to acknowledge the Project site's proximity and similarity to the adjacent Lower Milliken-Sarco-Tulucay Creeks (MST) area, which is currently recognized to be in a state of groundwater overdraft. Based in part on Mr. Kamman's analysis of the Project site's proximity and similarity to the groundwater deficient MST area, he concludes that "there is a significant possibility that upon full-proposed development, the five-parcel vineyard development area will also experience groundwater overdraft conditions due to groundwater pumping at a rate in excess of groundwater recharge." Exhibit 7, p. 2.

8. The FEIR also incorrectly determined that the Project induced cumulative impacts on groundwater was not cumulatively considerable based on the contention that the cumulative irrigation volumes of existing and future planned vineyards did not exceed the estimated groundwater replenishment (groundwater recharge due to natural rainfall recharge rate) over the Central and South Creek Watersheds. This analysis and impact determination is inadequate for two primary reasons.

a. First, while the FEIR analyzes potential cumulative groundwater impacts based on local vineyard development projects covering a total of 1068 acres including 557-acres of vineyard, it assumes the affected aquifer underlies only a 637-acre portion of these areas including 408-acres of vineyard development. This discrepancy results from the FEIR's assumption that the affected groundwater is limited to the surface boundaries of the Central and South Creek watersheds, an assumption which is presented without any support whatsoever.

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 5

b. Second, regardless of the validity of this assumption, the FEIR ignores the conclusions of a report it otherwise relies on (2002 Lamphier-Gregory Mitigated Negative Declaration for the Suscol Springs North Project) which concluded that “groundwater levels in the vicinity of the Mondavi vineyard would decline between 2.2 and 2.4-feet per year under proposed vineyard and possible future vineyard development conditions.” Exhibit 7, p. 8. Ultimately, the FEIR’s failure to reconcile its contradictory cumulative groundwater impact analysis with that from the more comprehensive water budget prepared as part of the 2002 Lamphier-Gregory Mitigated Negative Declaration for the adjacent Suscol Springs North Project seriously undermines its conclusion. These facts lead Mr. Kamman to conclude “the EIR provides an incomplete evaluation of the cumulative effects of groundwater pumping on the underlying aquifer system.” Exhibit 7, p. 2.

9. There is not substantial evidence in this record to support a finding by the Board required by the County Groundwater Ordinance at County Code § 13.15.070.C. The DEIR indicates that the project applicant must obtain a groundwater permit pursuant to this ordinance. DEIR, p. 4-28. The ordinance requires the submission of detailed information regarding use of groundwater and impacts on the aquifer and provides that:

the director shall only approve a groundwater permit after making any necessary environmental determination and concluding, based on substantial evidence in the record, that the new water system, improvement or addition would not significantly affect the impacted groundwater basin in Napa County. In making this determination, the director shall consider, but is not limited to, the following factors: impact on the affected groundwater table; adverse effects on the reasonable and beneficial uses of groundwater; interference with surface water flows; implementation of Best Management Practices; or other adverse changes to the physical environment. County Code § 13.15.070.C. (Emphasis added.)

10. Mr. Kamman’s comment letter on the DEIR and his letter attached hereto as Exhibit 7 detail the many types of information regarding the existing environment that are missing from this EIR. Under CEQA, an accurate description of the environmental setting is required to provide a baseline against which to judge the significance of the project’s effects. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 723. The lack of such information renders any attempt to identify the significant environmental effects of the project legally inadequate. *Id.* at p. 729; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712, 718. The FEIR does not comply with the County’s duty to use its “best efforts to find out and disclose all [it] reasonably can.” *San Franciscans for Reasonable Growth, Inc. (SFRGI) v. City and County of San Francisco*, (1984) 151 Cal. App. 3d 61, 74.

11. The FEIR’s groundwater assessment bases its conclusion of no significant impact on the fact that the project will use less water than the applicants’ “fair share.” The referenced “fair share” is illusory due to the lack of information needed to determine what the applicant’s fair share is. In

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 6

general, the County's fair share doctrine is based on so-called "thresholds" set forth in the County's "Water Availability Analysis: Policy Report" dated August of 2003, a copy of which is attached as Exhibit 1. This document describes the procedure for obtaining a groundwater permit and establishes "thresholds" for use of groundwater in each basin. If a new water use is below this threshold, the County assumes that the use will not have a significant adverse effect on the aquifer.

12. In the "groundwater deficient areas," i.e., the Milliken-Sarco-Tulocay ("MST") groundwater basin, the threshold is deemed to be .3 acre foot per acre per year for each acre of land overlying the aquifer. The threshold is 1.0 acre foot per acre per year for "valley floor" areas and .5 acre foot per acre per year for "hillside" areas.

13. Since this project is not mapped within the Milliken-Sarco-Tulocay ("MST") groundwater basin, it would ordinarily have a threshold of .5 acre foot per acre per year for each acre of land overlying the aquifer. Since the area of the ownership is 160 acres, this would translate to a "fair share" of 80 acre feet per year. As shown in following paragraphs 13-22, this threshold is not based on empirical information; therefore, it is arbitrary and illusory. The purpose of paragraphs 13 through 22 of this letter is to rebut any suggestion by the applicant that its fair share is 80 acre feet per year based on the County's standardized threshold for hillside areas or that its calculated recharge rate/"fair share" of 72 acre feet per year as estimated in the DEIR is justified because it is below the 80 acre feet per year standardized threshold.

14. With respect to this project, the applicant has taken a step in the right direction by retaining a water resources engineer, Mr. Tom Burke, to attempt to estimate the actual "fair share" of this property based on published precipitation and other data. As Mr. Kamman points out in his comment letters, however, the applicant's analysis does not go far enough to provide a reliable basis for this estimate or for the FEIR's conclusion that the project will not significantly effect groundwater in this area.

15. The County's standardized threshold does not take into account the fact that previous owners may be using more than their "threshold" amount of water. As a result, later owners's use of their "threshold" amount, or any amount of groundwater, may cause significant effects.

16. The County's 2003 Policy report (Exh. 1) explains that the "threshold" number for the Valley Floor Area was "determined in 1991 in the form of a staff report to the Board of Supervisors" and "was established as the expected demand an average vineyard would have." The 1991 staff report to the Board of Supervisors is attached as Exhibit 5. This document notes that no "extensive groundwater studies" have been conducted in many areas of the County, and no groundwater studies at all are mentioned for the Project area here. (Exh. 5, p. 2.)

17. The 1991 staff report also notes for "mountainous areas in volcanic formations" (which may apply here): "While no estimate of annual yield from these areas has been determined, they have been labeled as areas with groundwater problems that should be dealt with cautiously." (Exh. 5, p. 2.) The 1991 staff report assigns a threshold of zero (0) to all "historically poor water areas as

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 7

identified by maps and records on file with the Department of Public Works.” (Exh. 5, p. 6.) No explanation is provided that supports assigning a threshold of zero to the MST groundwater area and not to the area where this Project is located.

18. The 1991 staff report summarizes the findings in the January 1991 Water Resources Study for the Napa County Region (Napa County Flood Control and Water Conservation District), a copy of which is attached as Exhibit 6. This study does not discuss the exact location of this Project, but does discuss the serious groundwater deficiencies of the MST area. (Exh. 6, p. 5-8 to 5-10). As Mr. Kamman shows, the underlying geology of this project, which is directly adjacent to the mapped boundary of the MST study area, is the same Sonoma Volcanics formation underlying the MST study area. Therefore, assuming for purposes of argument that the County’s standardized threshold for the MST area is a reliable indicator of adverse effects, and taking into account the prediction of the Lamphier-Gregory report that vineyard build-out in the “five parcel” area will result in groundwater overdraft, the more appropriate threshold would be the .3 acre foot per acre per year applicable to the “MST” area. This threshold results in a fair share for the applicant’s property of 48 acre feet per year, well below its estimated consumption of 66 acre feet per year. Indeed, Mr. Kamman’s analysis based on the best rainfall data available indicates that the recharge rate for this property is approximately 43 to 47 acre feet per year and the Lamphier -Gregory report concludes that it is 48 acre feet per year. Exh. 7, p. 3.

19. Another pertinent document in the history of the County’s attempts to regulate impacts on groundwater resources is the April 7, 1999 Memorandum from Napa County Planning Department to the Planning Commission regarding a General Plan Amendment relating to groundwater use and the proposed Napa County groundwater ordinance, attached as Exhibit 3. This 1999 staff report states:

“The 1991 study also develops short and long-term projections of water needs among users and regions in Napa County using these figures to balance water needs and supplies for the period 1990 through 2020. The results of this balance reveal substantial long-term inadequacies in supply throughout the county’s subareas, although admittedly at present some areas have a short-term surplus. From this study it is reasonable to conclude that as the county’s water needs increase in the future, increases in agricultural and rural uses are likely to eliminate any existing groundwater surplus. This change from surplus to deficit is likely to be far more pronounced and occur sooner rather than later if increased municipal and industrial demands are also satisfied by using groundwater.

The 1993 Report confirmed the 1991 Study’s results and projected a growing deficiency in the overall county water supply. The Report identified shortfalls of 10,900 acre feet by the year 2000 which would increase to 18,600 acre feet by 2020 and 23,000 acre feet by 2030.” (Exh. 3, p. 2.)



Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 8

20. The January 19, 1993 Memorandum from Napa County Water Advisory Committee to Napa County Board of Supervisors re Report of the Water Advisory Committee, referenced in the 1999 staff report above and attached hereto as Exhibit 4 notes that "Increased utilization of groundwater as a source of supply can have severe detrimental effects on the rural residential community."

21. In sum, the County's standardized "thresholds" are not based on empirical analysis of actual groundwater supply or availability in the Project area. Thus, the County's threshold for determining the significance of impacts on groundwater resources of this project is arbitrary.

22. It is well settled under CEQA that lead agencies cannot use compliance with another regulatory standard (in this case the County's "thresholds" for groundwater use) as a substitute for a fact based assessment of whether project impacts are significant. *See, Communities For a Better Environment v. California Resources Agency* (2002) 103 Cal. App. 4th 98, 110-114 (Court invalidated CEQA Guideline that would allow agencies to rely on a project's consistency with a regulatory standard to conclude that a particular environmental effect is not significant); *Oro Fino Gold Mining Corporation v. County of El Dorado* (1990) 225 Cal. App. 3d 872, 881-882 (rejects contention that project noise level would be insignificant simply by being consistent with general plan standards for the zone in question).<sup>3</sup>

23. The County is legally prohibited from approving land use permits that are inconsistent with the Napa County General Plan. This project is inconsistent with the General Plan, specifically Open Space and Watershed Policies 1.9 (Water Supply Protection) and 1.10 - Watershed Protection. Policy 1.9 provides: "The County will protect public and private water supply sources from contamination or overdrafts, and encourage groundwater recharge."

### **Geology and Soils Impacts**

24. The factual basis for the geology and soils impact portion of this appeal is explained in more detail in the letter from hydrogeologist and soil scientist Robert Curry, Ph.D., attached as Exhibit 8, as well as Dr. Curry's comment letter on the draft EIR (at FEIR, p. 2-101).

25. While the Draft Environmental Impact Report ("DEIR") recognizes that the Project will result in "an increase in sediment production on the Project site by 23 percent (from 272.7 to 335 tons/year or from 2.75 to 3.38 tons/acre/year) for the portion of the Project site in the Central Creek watershed, and by 75 percent (from 68.7 to 120.1 tons/year or from 1.12 to 1.96 tons/acre/year) for

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<sup>3</sup>See also *City of Antioch v. City Council of the City of Pittsburg* (1986) 187 Cal. App. 3d 1325, 1331-1332 (EIR required for construction of road and sewer lines even though these were shown on city general plan); *Kings County Farm Bureau v. City of Hanford, supra*, 221 Cal. App.3d at 712-718 ("The agency had wrongly assumed that, simply because the smokestack emissions would comply with applicable regulations from other agencies regulating air quality, the overall project would not cause significant effects to air quality.")

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 9

the portion of the Project site in the South Creek watershed” (DEIR, p. 5.6-21), it fails to identify this increased sediment production as a potentially significant impact. Instead, the DEIR found this increased sediment production to be a less than significant impact claiming that all of the project induced sediment will be retained onsite such that the sediment yield (delivery of sediment off of the Project site) would actually be reduced as a result of the Project. On this point, the DEIR states “the reduction in sediment yield (as compared to existing conditions) primarily reflects the trapping capacities of the proposed erosion control measures in combination with the hillside and creek channel (including aggradation basins) sediment retention.” In his comments on the DEIR, Dr. Curry offered expert opinion criticizing the DEIR’s reliance on the effectiveness of the natural sediment trapping features of the aggradation basins, or CAV’s (Colluvial/Alluvial aggradation basins). He also recounted first hand knowledge of recent events wherein he witnessed the failure of the aggradation basins to retain sediment during a rain event in 2002.

26. The FEIR failed to respond directly to Dr. Curry’s comments regarding the lack of demonstrated sediment trapping capacity of the aggradation basins. Instead, the FEIR attempted to minimize the role of the aggradation basins in the Project’s erosion control plan by pointing out that the “CAV’s are estimated to store 28.3 tons/year originating from the Robert Mondavi Properties parcel under future conditions, which is a small proportion (6.2 percent) of the estimated total hillslope sediment production.” FEIR, p. 2-70. As explained by Dr. Curry in his letter attached hereto as Exhibit 8, there simply is “no evidence that suggests or demonstrates that these ‘basins’ have any further capacity to trap the excess sediment that is acknowledged to be generated by the proposed vineyard conversion.” Exhibit 8, page 2. In fact, Dr. Curry contends that the basins are now “full”, such that they are no longer topographic basins and sediment is now transported across these features without evidence of further deposition. Accordingly, even if the aggradation basins’ role is relatively small in the Project’s overall erosion control scheme as asserted in the FEIR, the basins’ failure to trap the estimated 28.3 tons/year the FEIR relies on in its analysis would result in a net increase in sediment yield attributable to the Project. Under the EIR’s stated criteria for determining the significance of geologic impacts, such an increase in sediment yield over existing conditions amounts to a significant impact for which additional mitigation measures or project alternatives need be developed and explored.

27. Both the County and Dr. Curry agree that the Project’s erosion control features need to be maintained to ensure their effectiveness. However, neither the DEIR nor the FEIR describe how the erosion control measures will be maintained. The EIR’s failure to describe the necessary maintenance of the erosion control measures violates CEQA in two ways. First, it violates CEQA’s requirement that the EIR include an accurate project description. *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192 (“An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.”). Second, the EIR violates CEQA in that it fails to identify potential impacts which could result from the maintenance activities themselves. CEQA Guideline § 15126.4(a)(1)(D) requires that “if a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed.” For example, Dr. Curry suggests that one possible maintenance activity includes the capture and offsite disposal of accumulated sediment. Such

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 10

maintenance activities could contribute or cause one or more significant effects. Without knowing how the erosion control features are to be maintained in perpetuity, it is impossible to determine whether, and to what extent, maintenance activities will cause impacts of their own.

### **Biological Impacts**

28. The factual basis for the biological impact portion of this appeal is explained in more detail below and in the letter from hydrogeologist and soil scientist Robert Curry, Ph.D., attached as Exhibit 8, and in the letter from wildlife toxicologist Joseph Sullivan, Ph.D., attached as Exhibit 9; as well as Dr. Sullivan's comment letter on the draft EIR (at FEIR, p.2-110).

29. The DEIR failed to identify the Project's potential impact on wildlife and wildlife habitat due to the disruption of mercury contaminated soils despite recognizing that several Project locations "appear[s] to be the remnants of a kiln, or possibly part of a retort used for collecting mercury." DEIR, p. 5.5-6. Based on the DEIR's failure to identify the potential impacts associated with the disruption of highly toxic mercury-laden soils, both EDEN and the Regional Water Quality Control Board objected in comments on the DEIR. In response, the FEIR included soil sampling data which the County contends proves that there is no potential for impacts associated with mercury contaminated soils. EDEN appreciates the County's willingness to conduct the recommended soil sampling, but unfortunately, the sampling was inadequate to support a conclusion of no potential impacts.

30. Specifically, the FEIR and its soil survey data do not include evidence regarding the sampling protocol used; fail to identify the type of soil sampled and form of mercury identified (elemental or organic); and fail to include sampling from depositional areas such as the aggradation basins which the FEIR claims traps sediment from the Project site. Therefore, the soil survey does not provide substantial evidence in support of the FEIR's conclusion that wildlife are not at risk of mercury contamination due to Project activities. Both Drs. Curry and Sullivan explain the deficiencies of the soil survey as well as why those deficiencies preclude a finding of no potential impact in their letters attached hereto as Exhibits 8 and 9. Until such time that the deficiencies are explained, or additional sampling conducted to address these concerns, the FEIR's conclusion that potential mercury contamination poses no threat will remain unsupported by substantial evidence.

31. The FEIR failed to adequately respond to EDEN's July 2 comment letter which identified potentially significant adverse biological impacts from the use of chemicals such as pesticides and fungicides. In commenting on the DEIR, EDEN submitted two separate comment letters, both dated July 2, 2005. While the second comment letter is included and responded to in the FEIR (pp. 2-62 to 2-90), the first letter, entitled "Comment Letter 1), and any response, is absent from the FEIR.<sup>4</sup>

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<sup>4</sup> A copy of EDEN's July 2, 2004 Comment letter 1 which was omitted from the FEIR is attached hereto as Exhibit 11. Also included in Exhibit 11 (1) is a Proof of Service by hand delivery to Mary Doyle, the County's principal planner for this Project, as well as (2) Ms. Doyle's July 6, 2004 email verifying that the

Attn: Clerk of the Board of Supervisors  
Hillary Gitelman, Director  
April 15, 2005  
Page 11

That letter criticized the DEIR for (1) failing to identify the specific chemicals to be used for this particular Project; as well as (2) failing to identify or analyze the potential significant impacts to biological resources such as threatened steelhead from the use of such chemicals. The FEIR's failure to include and respond to the points raised by this letter violates CEQA Guidelines § 15132, which requires at a minimum (1) comments and recommendations received, either verbatim or in summary; (2) a list of persons, organizations, and public agencies commenting on the draft EIR; and (3) the lead agency's responses to significant environmental points raised in the review and consultation process.

32. In its response to EDEN's second July 2, 2004 comment letter, the FEIR attempts to address this issue by referring to the Project applicant's anticipated use of integrated pest management practices in an effort to minimize the application of toxic chemicals. This response is inadequate and violates CEQA on a number of grounds.

a. First, due to CEQA Guidelines § 15132' requirement that all comments received by included and responded to in the FEIR, the FEIR's terse discussion of anticipated pest management practices falls short of CEQA's explicit requirement.

b. Second, part of EDEN's concern is based on the current lack of information regarding the actual pesticides that may be used. The FEIR's discussion of the applicant's anticipated pest management practices ignores this concern by allowing the Project to be approved prior to the actual development of the anticipated integrated pest management plan. FEIR, p. 2-68 (stating "Thus, part of the Project includes preparation of an Integrated Pest Management Plan by the Pest Control Advisor and Operator. When completed, this plan will specifically identify pesticides and chemicals that may be used on the vineyard, and the appropriate applications for each." Emphasis added).

c. Third, by postponing the development of an Integrated Pest Management Plan until after Project approval, the County has sanctioned a deferred mitigation measure, which is prohibited by CEQA. *Sundstrom v. County of Mendocino* (1988) 202 Cal. App. 3d 296, 306.

d. Finally, by deferring the development of an integrated pest management plan, which is intended to identify the types and amounts of chemicals to be used on the vineyard, the FEIR has failed to provide an adequate project description as well as failed to identify potential significant adverse impacts associated with such chemical use.

33. This violation is especially problematic in light of the fact that the Napa River is home to a number of federally endangered and threatened fish species. Since Napa County adopted its Hillside

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County received Comment letter 1 and its 27 exhibits. For this reason, EDEN did not re-submit the voluminous exhibits to that July 2, 2004 Comment letter 1. EDEN will re-submit them if the County is unable to locate the exhibits in its Project files.