



California Native Plant Society

The mission of the California Native Plant Society is to increase understanding and appreciation of California's native plants and to preserve them in their natural habitat through scientific activities, education, horticulture, and conservation.

City Council
City of Grass Valley
Grass Valley, CA 95959

Dear Mayor Swarthout, Vice Mayor Aguilar, Council Member Arbuckle, Council Member Levine, and Council Member Hodge:

We are writing on behalf of the Redbud Chapter of the California Native Plant Society (CNPS) which serves western Placer and Nevada Counties. CNPS is a non-profit environmental organization founded in 1965 with more than 10,000 members in 35 Chapters across California. 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. CNPS works closely with decision-makers, scientists, and local planners to advocate for well-informed policies, regulations, and land management practices.

The following comments express our concerns regarding the Final Environmental Impact Report submitted for the Dorsey Marketplace Development Project which the Council will consider at its January 28 meeting.

The Final EIR Does Not Meet CEQA Requirements

I. CEQA Requires that the Amended EIR Be Recirculated for Public Comment Before Certification.

CEQA requires that an EIR must be revised and recirculated for public review and comment if "significant new information" is added after the draft EIR is prepared, and before certification of the final EIR (Pub. Res. Code Sect. 21092.1). The purpose of this regulation is to promote *meaningful* public participation in the CEQA process through recirculation of a draft EIR that includes significant new information. CEQA not only favors, but *requires* recirculation where, as here, a draft EIR is substantially revised. Revised documentation with new information added late in the process "does not make up for the lack of analysis in the EIR" – if it has never been subjected to the test of public scrutiny, it must be recirculated.

"If, subsequent to the period of public and interagency review, the lead agency adds 'significant new information' to an EIR, the agency must issue new notice and must 'recirculate' the revised EIR, or portions thereof, for additional commentary and consultation. (Pub. Resources Code, § 21092.1; Guidelines, § 15088.5, subd. (a); Laurel Heights Improvement Assn. v. Regents of University of California, *supra*, 6 Cal.4th 1112....) The revised environmental document must be subjected to the same 'critical

evaluation that occurs in the draft stage,’ so that the public is not denied an ‘opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom.’ (*Sutter Sensible Planning, Inc. v. Board of Supervisors, supra*, 122 Cal. App.3d 813, 822, internal quotation marks omitted.)” *Save our Peninsula Committee*, 87 Cal.App. 4th 99, 130-131. (See *attached pdf of this opinion.*)

Further, the California Supreme Court has held: “Noncompliance with substantive requirements of CEQA or noncompliance with information disclosure provisions ‘which precludes relevant information from being presented to the public agency ... may constitute prejudicial abuse of discretion ... regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.’” (Emphasis in original) *Sierra Club vs. County of Fresno* (2018) 6 Cal. 5th 502, 515. (See *attached pdf of this opinion.*)

The Amended DEIR and Appendix E (the Biological Technical Report, or “BTR”) for the Dorsey Marketplace project contain substantial new information and dozens of changes. In some places, important statements of fact have been reversed. Thus, the Draft EIR and July 2016 BTR both state that the survey was conducted at a time when rare plants would *not* have been evident and identifiable, while the Amended Draft EIR and Final EIR state that a survey was conducted when rare plants *would* have been evident and identifiable (see, e.g., Amended Draft EIR at pages 6-6 and 6-18, and Amended BTR page 23).

In other instances, facts, determinations, analyses, and conclusions have been completely revised, or newly added. See, for example, the Amended DEIR at pages 6-6, 6-7, 6-24, 6-25, and 6-26 which contain large sections of deleted text and newly added factual statements and analysis. In addition, Mitigation Measure 6a has been completely re-written (as has 6b), and 6e has been significantly altered.

It is noteworthy that some of the most glaring changes have not even been marked. An entirely new set of appendices to the BTR has been substituted for the original 2016 versions -- yet there is no statement that the appendices are new, nor any indication of deletions/additions to show that the prior set was removed and a new set added.

The failure to mark these changes disguises the fact that the original appendices were lifted wholesale from a different EIR and were evidently prepared for a totally unrelated project near the California coast. Thus, the plant survey, species of concern list, and photos that were circulated for public review with the Draft EIR *had nothing to do with the Dorsey Marketplace Project*. In addition, the Draft EIR even mis-identified the USGS 7.5 minute quadrangles (see BTR p. 17). Those listed in the DEIR were off by 125 miles or more, and in completely different ecosystems (e.g, San Jose, Mountain View, and Cupertino instead of Grass Valley, Nevada City, and Chicago Park).

The Redbud Chapter submitted comments pointing out blatant errors such as the inclusion of the wrong appendices to the technical report, but these concerns regarding the accuracy, sufficiency, and credibility of the biological studies and reports were peremptorily dismissed and ignored. The response to the comments stated that “The report appendices, which include the site photographs, lists of plants and animals observed at the project site, and the scoping list of special status plants and animals known to occur in the region, were incorrect due to an error made during report production. The correct appendices have been posted to the City’s website and are included with this final EIR.”

In fact, the Amended DEIR and revised BTR were not posted until October, 2019, with the Final EIR. Belatedly making available information about major corrections, additions and revisions to the Draft EIR and associated documents, and without re-circulating the revised EIR for public comment, constitutes “noncompliance with [CEQA’s] information disclosure provisions” in violation of CEQA requirements. Clearly, the Amended DEIR and the BTR both contain “significant” and substantial new information, including statements of fact, analyses, and conclusions directly contradicting the DEIR and BTR. The original DEIR did not mention a biological site survey conducted in July, 2016, *nor was it relied upon in the conclusions drawn in the DEIR* (e.g., see changes in the Amended DEIR at pgs. 6-6 and 6-16). The only mention of a July 2016 survey in the original 2016 BTR was at page 11, Section 4.2.

Instead, the discussion of three special status plant species with potential to occur at the site concludes “No special status plants were observed during the field survey; however, the site survey was conducted at a time when special status plants would not be evident and identifiable.” July 2016 BTR page 23.

The October 2019 Amended DEIR and BTR has been edited to add the July 2016 survey. The analysis was revised to state that the special status plants had not been observed and were unlikely be present at the site since the July survey was conducted at a time when such plants “would be evident and identifiable.” This assertion is diametrically opposed to the original factual statement. Further, as noted below, the Final EIR and Amended DEIR remain insufficient despite this additional survey because there is no showing that ALL potential rare plant species would have been identifiable at the times of the two surveys.

Additional “significant” new information, added without explanation, is the deletion of one of the previously identified special status plants with “moderate potential to occur” and the substitution of another. The information contained in the discussion of this substituted plant, *Mondardella follettii* (Follett’s Monardella), is, of necessity, completely new (Amended BTR at pages 18-19).

Our comments called for amendment and re-circulation of this clearly deficient DEIR and BTR. Major amendments were made, and substantial new information added, to the DEIR and BTR in response to public comments, yet the Amended DEIR and BTR were not recirculated. This is a clear violation of CEQA.

II. CEQA Requires that ALL Potential Rare Plant Species Be Surveyed, and that they be Identifiable During Surveys

Under CEQA protocols, botanical field surveys must be conducted “at the times of year when plants will be both evident and identifiable ... usually during flowering or fruiting.” Botanical field survey visits should be spaced “throughout the growing season to accurately determine what plants exist in the project area (e.g., in early, mid, and late season) to capture the floristic diversity at a level necessary to determine if special status plants are present.” Surveys must be done during periods when each of the potential rare plant species are identifiable. This is typically done by visiting reference sites (see CDFW Survey Guidelines, <https://wildlife.ca.gov/Conservation/Survey-Protocols#377281280-plants>).

The biological surveys done for this project were limited and did not follow CDFW guidelines. As a result, these surveys do not adequately disclose baseline conditions on the site, as is required by CEQA. Instead of showing that ALL of the eleven rare plant species with potential to occur at or near the Dorsey Marketplace site were identifiable during the surveys conducted, the DEIR, Amended DEIR, and

Final EIR each focus on only three species characterized as having a “moderate” potential to occur in the project site. As mentioned above, one of the three original species was deleted in the Amended DEIR and a new species added, without explanation.

Another unexplained discrepancy is the fact that the report only mentions 11 special status plants, while the Amended BTR states that a CNDDDB search indicated that “12 special-status plants have the potential to occur within the Grass Valley USGS 7.5 minute triangle” – what happened to that other plant?

The list of special status plants for the Dorsey Marketplace site included in the FEIR and Amended Biological Technical Report (“BTR”) constituted “new information” that was NOT included in the DEIR and original BTR. Instead, as noted previously, the DEIR and BTR released for public comment listed plants from a completely different and irrelevant study.

Eight of the special status plant species were not identified in the discussion and analysis sections of either the DEIR and BTR or the Amended/Final DEIR and BTR at all; they were only identified and discussed in the revised Appendix C to the BTR – *yet this list was never submitted for public review and comment.*

Only the following conclusory and inaccurate statement addressed the eight special status plants excluded from consideration: “Based on review of the databases and other information sources 11 special-status plant species have the potential to occur on or in the vicinity of the project site. Of these, four were removed from consideration due to lack of suitable habitat within or adjacent to the project area, or the project site is outside of the species known range (Appendix E). Four special-status plant species have low potential to occur on the project site due to lack of appropriate soil substrates or habitats on site (Appendix E).”

Since the eight species removed from consideration were not identified in the text, and the original Appendix C to the BTR included the wrong special status plant list, *there was no opportunity for public review and comment regarding these special status plants.* Indeed, these eight species that were “removed from consideration” were never identified, and no specific information pertaining to these species was disclosed, until the FEIR was completed and ready to be submitted to the Planning Commission. The last-minute inclusion of this NEW information requires that the Amended DEIR/Final EIR be recirculated with an additional public comment period.

In fact, the “removal from consideration” of eight species does not comply with CEQA protocols. As noted above, ALL potential rare plant species must be evident and identifiable during at least one of the surveys. Neither of the two biological surveys was conducted during the correct phenological period for some of the special-status species, as follows:

Calystegia stebbensis (Stebbins’ morning glory). Neither the March or the July survey was appropriately timed to identify Stebbins’ morning glory, one of three special status plants identified as moderately likely to occur at the site. The appropriate phenological stage for detecting this species is May; the surveys were conducted too early (March 4) and too late (July 22) to cover the appropriate phenological timing.

Juncus digitatus (Finger rush). Surveys were NOT conducted during the period when this species is identifiable (April through May, depending on the year). It is not evident during the rest of the year, as it

is an annual species that is completely undetectable when not in flower or fruit, so the determination that no *Juncus* spp. were present is erroneous.

Carex xerophila (Chaparral sedge). The conclusion that there is a low potential for this species to occur is inaccurate. As this species was only recently described, its full range is still being delineated and this site has high habitat suitability, based on comparison with other documented populations.

Further, *Fremontodendron decumbens* (Pinehill flannelbush), which is listed by the Federal Government as “Endangered” and by the State of California as “Rare,” was improperly removed from consideration and described as “not expected to occur” on the grounds that it was “out of range.” The report states that “the site is outside of the species’ known elevation and geographic region.”

This statement is demonstrably false; there are reported populations within ½ mile. Specifically, *F. decumbens* is known from an occurrence approximately 0.5 miles south of the project site in similar habitat. Before the construction of various nearby developments, this known occurrence was likely linked to the Dorsey Marketplace site with continuous habitat, and there is highly suitable habitat for this species at this site. Further, this species is known to grow in dense chaparral communities, which are difficult to survey because they require extensive crawling and bushwhacking. The two single-day surveys were likely insufficient given that this species should be expected to occur, based on the historic habitat continuity and presence of suitable habitat.

The botanical portions of the FEIR are thus insufficient based on CEQA guidelines requiring that survey results conducted pursuant to CEQA protocols must be presented prior to the certification of the EIR; environmental documents should be based on complete, accurate, and current scientific information.

III. Mandating Surveys Prior to Construction as Mitigation Does Not Remedy the Flaws in the EIR.

The Amended DEIR and BTR state that “Although special-status plants species were not observed during the site survey, they could become established within the project site in subsequent years if conditions are favorable (climate, rainfall, seed dispersal from other local populations). If construction does not occur within one year of the plant surveys, there is potential that special status plants could become established. ... Direct impacts to special-status plant species could result from project implementation as a result of ground disturbance and vegetation clearing. To reduce potential for impacts, avoidance and minimization measures including preconstruction surveys during the appropriate time of year, are included in Section 6.2.”

As noted above, there are a number of inadequacies in the biological surveys done in March and July, 2016. It has also been 3 ½ years since the last survey, so this mitigation measure has already been triggered. This amounts to a tacit acknowledgement that biological surveys completed in 2016 were insufficient.

Moreover, the response to the Redbud Chapter’s comments on the DEIR explicitly acknowledges that the surveys were inadequate: “... appropriate and industry-standard methods were used to identify the potential presence of special status plants as part of the environmental review. However, due to the amount of time that will pass between these site surveys and project construction, it is necessary for the survey to be repeated.” (Emphasis added.) If it is necessary for the survey to be repeated, then it must be done **before the EIR is certified.**

Using MM 6a to mandate surveys prior to construction is problematic for several reasons. First, such pre-construction botanical surveys will never be made available for public review and comment, and the purpose of requiring biological surveys BEFORE an EIR is certified is defeated. Second, why the rush? If the biological surveys need to be re-done, they should be repeated, a revised DEIR should be prepared with the new findings, and it should then be recirculated for comment.

Further, CEQA guidelines require that survey results be presented prior to the certification of an EIR, not as part of the construction approval process. CEQA Guidelines § 15121(a) provides “An EIR is an informational document which will inform public agency decision-makers and the public generally of the significant environmental effect of a project, identify possible ways to minimize the significant effects, and describe reasonable alternatives to the project.” CEQA Guidelines § 15151 provides “An EIR should be prepared with a sufficient degree of analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences.”

If decision-makers haven’t been provided with adequate information on the project’s impacts, how can they make an informed decision? In *Concerned Citizens of Costa Mesa v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal 3rd 929, 935, the California Supreme Court ruled that “To facilitate CEQA’s informational role, the EIR must contain facts and analysis, not just the agency’s bare conclusions or opinions.” (See attached pdf of this opinion.) In *Sierra Club v. Fresno County* (2018) 6 Cal. 5th 502, 522, the Supreme Court held the EIR was deficient because it “included no facts or analysis to support the inference that the mitigation measures will have a quantifiable ‘substantial’ impact on reducing the adverse effects.” (See attached pdf of this opinion.)

Similarly, there are no facts to support the inference that the mitigation measure of requiring pre-construction surveys will have a substantial impact on reducing the adverse effects of the Dorsey Marketplace project. In addition, there are no specific requirements to ensure that any pre-construction surveys will be adequate. In fact, they are predicted to be unproductive: “it is not expected that a federally or state-listed plant would be observed during these surveys ...”. If these surveys DO find a rare plant, who will be notified? Who will assure the mitigation takes place?

Further, the proposed measures to be implemented if a rare plant is found are inadequate. There is no proposed mitigation ratio for impacts to any rare plant(s) found in the surveys. In addition, the actions that are proposed do not mitigate the potential impacts to less than significant, and cannot be supported by CNPS. Topsoil salvage, seed collection, and the rest are more likely to be harmful to a rare plant population than to mitigate the harm. Mitigation for rare plants must be tailored to individual species and evaluated based on the specific circumstances and level of impact.

Instead, the appropriate step is to conduct proper surveys that actually confirm the absence (or presence) of rare species rather than wait for pre-construction biological surveys and then, if rare plants are found, try to design and implement species and site-appropriate mitigation, all the while delaying construction.

With respect to “take permits,” we note that it is not up to the City of Grass Valley or Nevada County to determine the terms of mitigation (e.g., mitigation ratios) for the take of an endangered species. This would be done in consultation with the CDFW, and there is no guarantee that the CDFW would agree to a mitigation measure based primarily upon a “transplantation” plan.

IV. Mitigation for Loss of McNab Cypress and Fremont Cottonwood Woodlands Is Inadequate

The Amended DEIR recognizes that there are sensitive natural communities on the site that will be destroyed by the construction: two stands of McNab Cypress (*Hesperocyparis macnabiana*), and a small stand of Fremont cottonwood (*Populus fremontii*) forest. The Amended DIER then proposes MM 6e to mitigate this loss. We have several concerns about this proposed mitigation.

First, the proposed mitigation ratio (1:1) does not appear to compensate for the quality and quantity of lost “sensitive natural communities” and habitat. The loss of these trees, many mature, is not mitigated by 1:1 replacement with 1.5” dbh Fremont Cottonwoods and 5-6’ McNab Cypress

Since there will be on-site replanting, there should be a significantly higher ratio of replacement trees. Alternatively, an effective mitigation may be to purchase an equivalent amount of comparable habitat on private land close to the project. A 1:1 ratio of established, mature trees is a more reasonable ratio.

Second, there is no assurance or evidence that the specified mitigation ratios and measures are sufficient to compensate for the losses and to reduce impacts to less than significant. The language is vague, unspecific, and without defined criteria for measuring whether the mitigations are effective.

Instead, the mitigation is to be accomplished by “a combination of on-site replanting and restoration and off-site restoration sufficient to ensure no net loss of habitat functions or values. On-site planting may include restoration of the disturbed areas of McNab Cypress woodland and cottonwood forest, as well as planting of individual McNab cypress and Fremont cottonwood trees as part of the proposed landscaping plan.”

In fact, these woodlands will not just be “disturbed,” they will be completely demolished and removed. In some places, the elevation is being lowered by removing native soil and substrate to a depth of over 20’. The site is being radically altered for the purpose of constructing buildings, roads, and parking lots, with the result that restoration on that site is impossible. Moreover, planting *individual* trees as part of landscaping in no way replaces either of these sensitive natural *communities*.

In addition, because these are sensitive natural “*communities*,” they are comprised of much more than McNab cypress or Fremont cottonwood trees. Instead, these complex communities include not just their archetypical tree species, but also a complex of other associated native plant species. Removing the entire communities, including the trees and their associated species, cannot be remediated by simply transplanting or re-planting the trees. That is not a remediation; it will not protect, preserve or restore the sensitive natural community that has been destroyed.

No scientific evidence or justification has been presented to justify the proposed mitigation measures or support the contention that they will be successful in mitigating these losses, or that these measures will mitigate the habitat loss to “less than significant.” Further, the EIR does not specify performance measures or monitoring programs that are required to be implemented to ensure the success of MM 6e.

In Mitigation Measure 6e, the FEIR recommends transplanting McNab cypress. To satisfy CEQA, the

efficacy of such a mitigation measure should be described to meet CEQA guidelines with evidence supporting the likelihood of success before the EIR is certified.

V. The Analysis of the Cumulative Effects of this Project is cursory and insufficient

Neither the Amended DEIR or BTR addresses the cumulative effects of this project across the range of the sensitive plant species, and the McNab cypress woodland communities, but instead focuses on the “landlocked” character of the site, especially regarding McNab cypress and Fremont Cottonwood communities on this site, and the fact that there are no directly connected habitats. The Dorsey Marketplace McNab cypress stands are isolated and “landlocked” *precisely because all the nearby McNab cypress were removed to make way for those developments*. These plant communities are sensitive because they are scattered and few in number; the loss of each stand is a loss to the genetic diversity of the species and sensitive communities, and the survival of the whole.

In summary, it is clear that the Final EIR, the Amended DEIR, and the Amended BTR are inadequate and that they violate CEQA because they contain “significant new information” yet have not been recirculated for public comment, and because the botanical surveys and proposed mitigations are deficient.

Sincerely,

Jeanne Wilson, President
Redbud Chapter CNPS

Wendy Boes, Conservation Co-Chair
Redbud Chapter CNPS