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ELECTRONICALLY FILED
Superior Court of California,
County of Orange

10/03/2014 at 03:38:00 PM
Clerk of the Superior Court
By Enrique Veloz, Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF ORANGE, CENTRAL JUSTICE CENTER
11

12 **HORIZONTAL DEVELOPMENT LLC, A**
13 **CALIFORNIA LIMITED LIABILITY COMPANY;**
14 **ARMSTRONG PETROLEUM**
15 **CORPORATION, A CALIFORNIA**
16 **CORPORATION; WEST NEWPORT OIL**
17 **COMPANY, A CALIFORNIA CORPORATION,**

Plaintiff,

v.

18 **CALIFORNIA COASTAL COMMISSION,**
19 **A CALIFORNIA PUBLIC AGENCY, AND DOES**
20 **1-25, INCLUSIVE,**

Defendant.

Case No. 30-2014-00739490-CU-MC-CJC

**REQUEST FOR JUDICIAL NOTICE IN
SUPPORT OF DEMURRER TO
COMPLAINT**

[Filed concurrently with Notice of Demurrer
and Demurrer; Memorandum of Points and
Authorities]

Date: December 19, 2014

Time: 1:30 p.m.

Dept.: C-11

Reserv. no. 72036412

Judge: The Hon. Andrew P. Banks

Action Filed: August 12, 2014

1 Pursuant to Evidence Code sections 452 and 453, defendant California Coastal Commission
2 (the "Commission") requests that the Court take judicial notice of the following documents in
3 support of the Commission's concurrently-filed Demurrer to Plaintiffs' Complaint, for the
4 reasons and based on the authorities below.

5 1. The Commission requests that the Court take judicial notice of its May 18, 2012 letter
6 to West Newport Oil Company and Newport Banning Ranch, LLC (Violation File V-5-11-005), a
7 true and correct copy of which is attached as Exhibit 1.

8 Authority: Evidence Code section 452, subdivision (c) (official acts of state agency);
9 *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352,
10 374, n. 4 (taking judicial notice of hearing transcripts as part of agency's records under
11 section 452(c)); *Friends of Shingle Springs Interchange, Inc. v. County of El Dorado* (2011) 200
12 Cal.App.4th 1470, 1483 (on demurrer, trial court properly took judicial notice of letters from
13 Secretary of State and Franchise Tax Board to plaintiff under section 452(c)); *San Mateo County*
14 *Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 552-53 (trial
15 court properly took judicial notice of letter from Resources Agency to Coastal Commission under
16 section 452(c)); *Fowler v. Howell* (1996) 42 Cal.App.4th 1746, 1749-1750 (on motion for
17 judgment on the pleadings, trial court properly took judicial notice of documents contained in
18 State Personnel Board's records and files under section 452(c).)

19 2. The Commission requests that the Court take judicial notice of its January 31, 2014
20 letter to West Newport Oil Company and Newport Banning Ranch, LLC (Violation File V-5-11-
21 005), a true and correct copy of which is attached as Exhibit 2.

22 Authority: Evidence Code section 452, subdivision (c) (official acts of state agency);
23 *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.*, *supra*; *Friends of*
24 *Shingle Springs Interchange, Inc. v. County of El Dorado*, *supra*; *San Mateo County Coastal*
25 *Landowners' Assn. v. County of San Mateo*, *supra*; *Fowler v. Howell*, *supra*.

26 3. The Commission requests that the Court take judicial notice of its August 19, 2014
27 letter to West Newport Oil Company and Newport Banning Ranch, LLC (Violation File No. V-5-
28 11-005), a true and correct copy of which is attached as Exhibit 3.

1 Authority: Evidence Code section 452, subdivision (c) (official acts of state agency);
2 *Associated Builders and Contractors, Inc. v. San Francisco Airports Com., supra; Friends of*
3 *Shingle Springs Interchange, Inc. v. County of El Dorado, supra; San Mateo County Coastal*
4 *Landowners' Assn. v. County of San Mateo, supra; Fowler v. Howell, supra.*

5 In accord with Evidence Code section 453, judicial notice of these matters is required in
6 that the Commission's request gives plaintiffs sufficient notice of the request to enable them to
7 prepare to meet the request and furnishes the Court with sufficient information to enable it to take
8 judicial notice of these matters.

9 Dated: October 3, 2014

Respectfully Submitted,

KAMALA D. HARRIS
Attorney General of California
CHRISTINA BULL ARNDT
Supervising Deputy Attorney General



ANDREW M. VOGEL
Deputy Attorney General
Attorneys for Defendant
California Coastal Commission

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EXHIBIT 1

CALIFORNIA COASTAL COMMISSION

SOUTH COAST AREA
200 OceanGate, 10th Floor
Long Beach, CA 90802
(562) 590-5071



NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT

May 18, 2012

West Newport Oil Company
Attn: Tom McCloskey
1080 West 17th Street
Costa Mesa, CA 92627

Newport Banning Ranch, LLC
Attn: Michael Mohler
1300 Quail Street, Suite 100
Newport Beach, CA 92660

Violation File Number: V-5-11-005

Property Location: Newport Banning Ranch
Newport Beach, Orange County

Unpermitted Development: Removal of major vegetation

Dear Mr. McCloskey and Mr. Mohler:

Thank you, Mr. McCloskey, for taking time today to discuss mowing that is occurring on Newport Banning Ranch and agreeing to halt the mowing in order to allow all the parties involved an opportunity to discuss the issue. As I noted during our telephone conversation, our staff has confirmed that removal of major vegetation¹ has occurred at Newport Banning Ranch, which is located within the Coastal Zone. Pursuant to Section 30600(a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit, in addition to any other permit required by law. "Development" is defined by Section 30106 as:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto;

¹ Please note that the description herein of the violation at issue is not necessarily a complete list of all development on the subject property that is in violation of the Coastal Act and/or that may be of concern to the Commission. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other development on the subject property as indicative of Commission acceptance of, or acquiescence in, any such development.

construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations.... [emphasis added]

The protections provided by the Coastal Act for "major vegetation" as used in the Coastal Act extend to many different vegetative communities and, under certain circumstances, even to individual plants found in an array of coastal habitats. Vegetation can qualify as "major vegetation" based on its importance to coastal habitats, the presence of sensitive species, or, in the case of rare or endangered vegetation, its limited distribution. Commission staff has reviewed the Draft Environmental Impact Report for the proposed residential and commercial development at Newport Banning Ranch, which describes the vegetation on site that is impacted by the subject mowing. The DEIR identifies a number of sensitive habitats, including habitats for sensitive species, within and adjacent to the mowed areas. The mowing at issue thus involves removal of vegetation that constitutes development under the Coastal Act and, therefore, requires a coastal development permit. Any development activity conducted in the Coastal Zone without a valid coastal development permit, and with limited exceptions not applicable here, constitutes a violation of the Coastal Act.

As noted above, the subject mowing is not exempt from Coastal Act permitting requirements. The DEIR erroneously characterizes the subject mowing as a component of ongoing oil field operations that purportedly began in the 1940s. The DEIR suggests that the existing oil operations, including the mowing, are merely a continuation of those began in the 1940s, and cites authorization for continuation of those oil operations after passage of Proposition 20 under California Coastal Commission South Coast Regional Coastal Zone Conservation Commission Claim for Exemption No. E-7-27-73-144.

To show the locations where these ongoing oilfield operations purportedly occur on the site, the DEIR includes a map of areas subject to ongoing oilfield operations. Commission staff has significant concerns about whether the map accurately depicts the areas subject to oilfield operations. For instance, the map includes areas that the Commission has previously found in a previous action to be Environmentally Sensitive Habitat Areas. Moreover, the subject mowing is impacting vegetation inside and outside of the areas mapped in the DEIR as areas subject to ongoing oilfield operations. Thus, the DEIR acknowledges that, at a minimum, some portions of the mowing are not within the areas subject to ongoing oilfield operation. This activity is therefore non-exempt unpermitted development undertaken in violation of the Coastal Act.

The DEIR appears to also suggest a claim that there is vested right to mow the site. However, there is no established vested right to mow the site, or even an application before the Commission to consider the issue. There is a specific and formal process for establishing a vested right to an activity under the Coastal Act, as set forth in Section 30608 and its implementing regulations. No such application has been filed, and no such vested right has been established, nor does the oilfield operator or property owner assert that it has done such. "A developer who claims exemption from the permit requirement of the [Coastal] act on grounds that he has a vested right to continue his development is required to seek confirmation of his vested right claim ... and may not first assert the claim in defense." Halaco Engineering Co. v. South Central Coast Regional Commission (1986) 42 Cal.3d 52, 63; see also LT-WR (2007) 152 Cal.App.4th 770, 785; Davis v. CCZCC (1976) 57 Cal.App.3d 700.

We would like to work with the parties involved to resolve these issues and would like to discuss with you options to do so. As you agreed to do during our telephone conversation, please immediately stop all unpermitted development activity on the subject site and contact me by May 24, 2012 to discuss resolution of this violation.

While we are hopeful that we can resolve this matter amicably, please be advised that the Coastal Act has a number of potential remedies to address violations of the Coastal Act including the following:

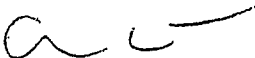
Section 30809 states that if the Executive Director of the Commission determines that any person has undertaken, or is threatening to undertake, any activity that may require a permit from the Coastal Commission without first securing a permit, the Executive Director may issue an order directing that person to cease and desist. Section 30810 states that the Coastal Commission may also issue a cease and desist order. A cease and desist order may be subject to terms and conditions that are necessary to avoid irreparable injury to the area or to ensure compliance with the Coastal Act. A violation of a cease and desist order can result in civil fines of up to \$6,000 for each day in which the violation persists.

Additionally, Sections 30803 and 30805 authorize the Commission to initiate litigation to seek injunctive relief and an award of civil fines in response to any violation of the Coastal Act. Section 30820(a)(1) provides that any person who violates any provision of the Coastal Act may be subject to a penalty amount that shall not exceed \$30,000 and shall not be less than \$500. Section 30820(b) states that, in addition to any other penalties, any person who "knowingly and intentionally" performs or undertakes any development in violation of the Coastal Act can be subject to a civil penalty of not less than \$1,000 nor more than \$15,000 for each day in which the violation persists.

In addition to these other remedies, Section 30812 of the Coastal Act also allows the Executive Director, after providing formal notice and opportunity for a hearing, to record a Notice of Violation of the Coastal Act against the property if this matter is not resolved administratively. We of course would prefer to resolve this matter informally and would like to discuss the options for resolution with you at your earliest convenience by the deadline noted above.

Thank you for your attention to this matter. If you have any questions regarding this letter or the pending enforcement case, please feel free to contact me at (562) 590-5071.

Sincerely,



Andrew Willis
Enforcement Analyst
California Coastal Commission

EXHIBIT 2

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



January 31, 2014

West Newport Oil Company
c/o Tim Paone
Cox Castle Nicholson
19800 MacArthur Blvd., Ste. 500
Irvine, CA 92612

Newport Banning Ranch, LLC
Attn: Michael Mohler
1300 Quail Street, Suite 100
Newport Beach, CA 92660

Violation File Number: V-5-11-005

Property Location: Newport Banning Ranch

Unpermitted Development¹: Drilling and operation of new wells; removal of vegetation; grading; installation of pads and wells; construction of roads and pipelines; placement of solid material; discharge or disposal of dredged material; removing, mining, or extraction of material; and change in intensity of use of the land.

Dear Mr. Paone and Mr. Mohler:

Thank you for your participation in meetings that we've held to discuss the history of oilfield operations at Newport Banning Ranch LLC ("NBRLLC"), currently operated by West Newport Oil ("WNO"), and other activities allegedly related to same. We have found these meeting to be constructive and we appreciate your cooperation. We're encouraged by your commitment to resolve these matters collaboratively and that your preference is, as ours certainly is, to resolve this issue consensually. We greatly appreciate your assistance in working toward achieving a resolution. We are now reviewing the documents submitted in conjunction with Coastal Development Permit application No. 5-13-032 and the associated CEQA process, to start to identify the significant coastal resources that persist on the property despite oilfield activities, with the goal of having a more full set of thoughts about the options and constraints we all are operating under and to propose a consensual mechanism by which WNO and NBRLLC could resolve their individual liabilities for the Coastal Act violations described below.

¹ Please note that the description herein of the violation at issue is not necessarily a complete list of all development on the subject property that is in violation of the Coastal Act and/or that may be of concern to the Commission. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other development on the subject property as indicative of Commission acceptance of, or acquiescence in, any such development.

Given its location and the pattern of development in the region, the site is remarkable in the diversity of habitats and sensitive species that it supports. As we know from recently submitted planning materials, the special status species and habitats that are known to be supported by the site include, but may not be limited to coastal sage scrub and bluff scrub; wetlands; riparian habitat; grasslands, including native grasslands; Southern Tarplant; San Diego Fairy Shrimp; and bird species such as Coastal California Gnatcatcher, Least Bell's Vireo, Belding's Savannah Sparrow, Cooper's Hawk, Sharp Shinned Hawk, Northern Harrier, White-tailed Kite, Osprey, Merlin, Loggerhead Shrike, Horned Lark, Coastal Cactus Wren, Yellow Warbler, and Yellow-breasted Chat.

We look forward to working with all the parties involved to protect the habitats and species that exist on the site and to address collaboratively the impacts to these coastal resources and others that have occurred as a result of unpermitted development activities on the site. We previously raised the issue of unpermitted development activities on the site during our discussions and in correspondence. With this letter, we hope to continue the process of amicably resolving these issues. As we have generally described in previous communications, the unpermitted development related to oilfield operations on the site, described in more detail below, includes development activities that were not authorized or exempted pursuant to E-7-27-27-73-144 ("Exemption"). Any non-exempt development activity (including the development at issue here) conducted in the Coastal Zone without a valid coastal development permit, constitutes a violation of the Coastal Act. The subject unpermitted development activities have incurred into sensitive habitats, impacting coastal resources. Thus they are of significant concern to the Commission.

We would like to work with both NBRLLC and WNO to resolve these issues comprehensively and collaboratively. If the parties are interested in amicably resolving these issues, which is staff's strong preference, we are certainly willing to discuss options that could involve negotiating a settlement agreement in the form of consent cease and desist and restoration orders for Commission approval. Through the consent order process, all of the Commission's claims against the settling parties arising out of the Coastal Act violations at issue, and provided for in the Coastal Act, would be resolved. The consent orders would authorize and order the parties subject to the orders to restore impacted areas of the property to the condition that they would be in if not for unpermitted development activities and mitigate the resource damage caused by the unpermitted activities at a ratio consistent with the resource loss, and would also resolve the issue of monetary penalties provided for in the Coastal Act for violations of the act.

We realize that the parties have not been focused on the enforcement aspect of this matter, and may not have concluded that violations of the Coastal Act have occurred. In this letter, we provide some additional background information related to the matter at hand. It is our hope that through more communication we can agree to a mutually acceptable resolution that allows all parties to move forward. We appreciate your efforts to work with staff towards resolution of this matter and look forward to further cooperation.

The Exemption

Both the Coastal Act and the act's predecessor, the California Coastal Zone Conservation Act of 1972 ("Coastal Initiative"),² provide that a person who has acquired a vested right to undertake development within a permit area is exempted from the need to obtain a coastal development permit for that development. (Section 30608, under the Coastal Act; former Section 27404, under the Coastal Initiative). However, from the beginning, the courts have held that one who claims an exemption from the permitting requirement based on a vested right must substantiate that claim in a proceeding before the Commission.³ (See *State of Calif. v. Superior Court (Veta Co.)* (1974) 12 Cal.3d 237, 249-250; *South Coast Regional Comm'n v. Gordon* (1977) 18 Cal.3d 832, 834, and 837, n.4). The Commission's regulations set forth the steps that must be followed to substantiate a vested right (see California Code of Regulations, Title 14, Division 5.5, Section 13200 *et seq.*) via a "claim of vested right" and hearing.

In 1973 General Crude Oil Company and G.E. Kadane & Sons ("Claimants") applied to the South Coast Regional Coastal Zone Conservation Commission for confirmation of an exemption by reason of a vested right for those activities that were: 1) ongoing as of enactment of the Coastal Initiative (Nov. 8, 1972) and the effective date of the permitting requirement of the Coastal Initiative (Feb. 1, 1973); 2) for which the claimant had incurred substantial liabilities; and 3) were undertaken in good faith reliance on authorizations pre-existing November 8, 1972. The Commission reviewed the application, and issued the Resolution of Exemption ("Resolution"), which stated that the specific development described by the Resolution did not require a coastal development permit "provided that no substantial changes be made" to that development (Resolution § 11, emphasis in original).

The law governing vested rights limits the scope of development allowed under the exemption to that development that has been properly permitted by the regulatory entities with authority to regulate the exempted development prior to the enactment and/or effective date of new laws and regulations that have altered the legal requirements for the same development. (See, gen., *Avco Community Developers v. CCC* (1976) 17 Cal.3d 785; *McAllister v. CCC* (2008) 169 Cal.App.4th 912.) Further, to establish a vested right, one must have "performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government." (*Avco, supra*, 17 Cal.3d at 791.) Once a vested right is obtained, the exempted development is only that development that has been specified in the terms of the underlying permit. (*Id.*) The scope of the work allowed under the Exemption is thus limited to that allowed under the terms of the permits issued for the oil development from the Division of Oil and Gas ("DOGGR") and other regulatory agencies with authority to regulate oil development at the site prior to November 8, 1972. (See former Pub. Res. Code, section 27404.)

² Like the Coastal Act, the Coastal Initiative was codified in the California Public Resources Code ("PRC"), but in that case at sections 27000 *et seq.* Unless otherwise indicated, all section references herein are to the PRC, and thus to the Coastal Act (if in the 30000s) or the Coastal Initiative (if in the 27000s).

³ The term "Commission" is used herein to refer both to the Coastal Commission and to its predecessor agency, the California Coastal Zone Conservation Commission.

Therefore, the Commission, through the Exemption, delineated the scope of the claimed vested right by evaluating the existence and terms of the permits issued to the claimant. Section 12 of the Exemption identifies the development activities for which the Commission determined vested rights exist. It states:

- 12. Claim of exemption No. E-7-27-73-144 is hereby granted as to the following development: Continued production and operations on the 480 acre "Banning Lease" per the attached items:*
- a. Continued operation and maintenance of existing oil producing and injection wells and associated surface facilities. The "existing" wells to be defined as the 312 wells either drilled or in progress as of Nov. 8, 1972*
 - b. Performing workover or remedial operations on existing wells necessary to maintain or improve their performance.*
 - c. Drilling, redrilling and repairs to existing injection wells.*
 - d. Drilling, redrilling and repairs to existing oil production wells.*
 - e. Based upon the existing plan, the drilling of 28 additional oil producing wells and construction of associated surface facilities.*
 - f. Drilling, redrilling and repairs to the 28 new wells and associated facilities.*
 - g. Abandonment of wells in accordance with requirements and approval of the State Division of Oil and Gas and removal of surface equipment and pipelines per state and local agency requirements.*
 - h. Future exploratory drilling within the lease area is not exempted.*

Item number 12 of the Exemption specifies that the Commission's determination of a vested right is limited to operation of "existing wells" and drilling 28 new wells, as well as repair and maintenance of the wells and associated surface facilities. "Existing wells" is a defined term in the Exemption referring to "the 312 wells" that were in existence or in the process of being drilled in 1972 (hereinafter "Existing Wells"). The application for the Exemption explains that the claimant's master drilling plan called for drilling of an 28 additional wells in 1973 (hereinafter "Planned Wells"), and notes that "This latter group of wells would now be under development but for the passage of Proposition 20." The plans submitted with the application, and included in the Commission's action, depict the locations of the Existing Wells and the Planned Wells.

The Exemption is the final document that determines what is exempt pursuant to the vested right. The Exemption identifies the specific wells in the specific locations that were in place or under construction at the time of the Exemption, i.e. the Existing Wells, and the 28 additional wells that were planned to be completed contemporaneously with the Exemption as depicted in the "existing plan" referenced in the Exemption, i.e. the Planned Wells. The Exemption recognized a vested right for drilling, redrilling and repairs to the Existing Wells and the Planned Wells, together totaling 340 wells (hereinafter "Exempt Wells"). It's important to note that at least 2 of the Existing Wells were not complete but were under construction at the time the Exemption was issued, hence the inclusion of "drilling" in reference to the exempted activities associated with the Existing Wells. The Exemption did not exempt relocation of the Exempt Wells. Rather, it refers to the 'continued operation and maintenance' of the Exempt Wells, and names that as the development that has specifically been exempted. The tables labeled "Banning Lease Well

Totals 1974-2010" in Attachment 7 to Coastal Development Permit application No. 5-13-032 specifically list the Existing Wells in the "Existing 312 Wells" column, and identify the 28 subsequent wells that can be construed as the Planned Wells, which together with the Existing Wells comprise the Exempt Wells.

Although the Claimants might have anticipated, at the time of the Exemption, drilling new wells in addition to the Exempt Wells, additional drilling would require a coastal development permit. This is logical since additional drilling could not have satisfied the criteria, noted above, to be substantiated as a vested activity via the Exemption. Namely, additional wells were not in existence or under development, and thus were not "ongoing" at the time the Coastal Initiative became effective, and also had not received all required authorizations. For these reasons, application of the Exemption is limited to the Exempt Wells. Furthermore, relevant case law supports a narrow interpretation of a vested right. If there are any doubts regarding the meaning or extent of the vested rights exemption, they should be resolved against the person seeking the exemption. *Urban Renewal Agency v. California Coastal Zone Conservation Commission* (1975) 15 Cal.3d 577, 588. A narrow view of vested rights should be adopted to avoid seriously impairing the government's right to control land use policy. *Charles A. Pratt Construction Co. v. California Coastal Commission* (1982) 128 Cal.App.3d 830, 844, (citing, *Avco v. South Coast Regional Commission* (1976) 17 Cal.3d 785, 797). In evaluating a claimed vested right to continue a nonconforming business or activity (i.e., a use that fails to conform to current zoning laws/regulations), courts have stated that it is appropriate to "follow a strict policy against extension or expansion of those uses." *County of San Diego v. McClurken* (1957) 37 Cal.2d 683, 687 (holding that a property owner had obtained a vested right to continue mining operations at a quarry that had been in continuous use for more than 50 years).

It is clear from the Commission's actions subsequent to issuance of the Exemption that the Commission considered additional drilling, including exploratory drilling, to be new development not covered by the Exemption and thus requiring a separate Commission authorization. In 1985, WNO applied for and obtained Coastal Development Permit No. E-85-001 to authorize 3 new exploratory wells; as clearly stated in the Exemption, "Future exploratory drilling within the lease area is not exempted."

WNO has asserted in recent communications with staff WNO's belief that the Exemption allows drilling and operation of any 340 wells on the site, as long as there are no more than 340 wells in production at one time. However, if this were the case, the Commission would not have required a coastal development permit for the 30 production wells that WNO was contemplating constructing subsequent to the 3 exploratory wells authorized by CDP No. E-85-001. In its application, WNO represented to staff that 243 oil wells were in production on site in compliance with the Exemption.

Under WNO's interpretation, no coastal development permit would be required because 30 additional wells would bring the total operating wells to 273, under the purported 340 well limit. However, contrary to WNO's theory, Special Condition No. 2 of CDP No. E-85-001 states:

Limitation to Exploratory Drilling. This permit allows the drilling of up to 3 exploratory wells, no other drilling or commercial or oil production activities are authorized by this permit. Upon

discovery of oil, the applicant shall submit to the Executive Director the results of testing including drill logs and production estimates within 60 days after removal of the well drilling equipment. A separate coastal development permit from the Coastal Commission shall be required for oil production beyond these three wells.

The body of the staff report further describes the requirement to obtain a coastal development permit for additional wells. The Commission found in relation to further drilling that:

The three areas identified for drilling by the applicant are surrounded by existing oil production equipment and minimal grading (max. 1 foot) is proposed. The applicant proposes that up to 10 development wells be approved on each site yielding a total of 30 wells to the deeper horizon. Concerns for subsidence, erosion hazards, and uncertain potential siting of wells on bluffs require that the proposed project be limited to exploration at three well locations. Another coastal permit shall be required for production and the addition of any more wells (beyond the three approved subject to conditions by this permit).

After CDP No. E-85-001 was issued, WNO wrote to staff to acknowledge and agree to Special Condition No. 2 of the coastal development permit. In its April 4, 1986 letter, WNO, c/o of its authorized representative for the project, agreed that "The applicants shall, upon discovery of oil, submit to the Executive Director the results of testing including drill logs and production estimates which shall be kept confidential by the Commission, with 60 days after removal of drilling equipment. The applicants recognize that a separate coastal development permit shall be required for oil production beyond these three wells."

It should also be noted that staff inquired about the status of the Planned Wells during the process of reviewing the application and clearly referred to the Planned Wells as 28 specific wells with specific drilling dates. In a February 5, 1985 letter to WNO to request additional information to complete the application staff wrote: "The 28 wells approved under the exemption were to have been drilled within that year (1973-1974)... What is the status of these 28 wells? We do not have a map of the existing and abandoned wells as was submitted to the County. Please send us an updated version including the assigned number of each well and identify the 28 wells in question." WNO responded that "The status of the existing oil production activities within the West Newport oil field is accurately described in Attachment A included in our permit application." As noted above, WNO had represented in its application that 243 wells were in production on site in compliance with the Exemption.

Finally, the Exemption is silent in regard to the depth of the Exempt Wells. Thus, per WNO's interpretation of the Exemption, they could have drilled additional wells under the Exemption if the number of wells did not exceed 340, including deeper wells. However, as explained above, the Exemption applies only to the Exempt Wells. Thus, although it is true that WNO could have drilled the existing wells deeper, contrary to WNO's interpretation, a coastal development permit was required for the drilling of any new wells in addition to the Exempt Wells, regardless of the well's depth.

Unpermitted Wells and Development

Although the Exemption is expressly limited to the Exempt Wells, staff has confirmed that additional wells were drilled subsequent to the Exemption without authorization from the Coastal Commission. These unpermitted wells are catalogued in Attachment 7 to Coastal Development Permit application No. 5-13-032 in the tables labeled "Banning Lease Well Totals 1974-2010." As noted above, the tables specifically list the "Existing 312 Wells" and identify the Planned Wells. The tables further catalogue 153 additional wells that were drilled subsequent to the Exemption. These wells, and any other wells drilled since 2010, are not covered by the Exemption and they have not been authorized by any coastal development permits.

Pursuant to Section 30600(a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit, in addition to any other permit required by law. "Development" is defined by Section 30106 as:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....

Drilling and operation of new wells, in many cases, includes, but may not be limited to such development activities as removal of vegetation, grading, installation of pads and wells, construction of roads and pipelines, placement of solid material, discharge or disposal of dredged material, removing, mining, or extraction of material, and change in intensity of use of the land. Each of these activities constitutes development under the Coastal Act and, therefore, requires a coastal development permit. Any development activity conducted in the Coastal Zone without a valid coastal development permit that is not otherwise exempt constitutes a violation of the Coastal Act. Where these activities occurred in conjunction with the approximately 153 unauthorized wells, the activities constitute violations of the Coastal Act.

In addition, staff has confirmed that a number of development activities, in addition to drilling of new wells, that are not specified as exempt activities in the Exemption have occurred on the site subsequent to issuance of the Exemption. The Exemption specifies that development is only exempt "provided that no substantial changes may be made in said development" (Resolution § 11, emphasis in original). The Exemption also applies to repair and maintenance of existing surface facilities and construction; repair and maintenance of surface facilities associated with the Planned Wells. However, nowhere does the Exemption state that new facilities in addition to those associated with the Planned Wells are exempt. The application for CDP No. 5-13-032 details changes in the oil recovery strategy that have occurred on the site over time, which have

resulted in installation or expansion of existing structures on the site. These activities are described in the application for CDP No. 5-13-032 and include the following:

1. "Existing steaming and production facilities were expanded and road and pipeline infrastructure installed to accommodate this secondary recovery process."
2. "Facilities and processes were modified to comply with existing, and in anticipation of, changes in regulatory oversight and a new steam generation plant was constructed adjacent to the tank farm facility."
3. "Facilities utilized in the air and steam injection processes were idled, then deconstructed and their sites utilized in the abandonment operations."
4. "A pilot soil bioremediation program was implemented and an impacted soil holding cell constructed."

It is clear from the Commission's permitting history that the Exemption did not exempt additional structures, such as those listed above, and instead a coastal development permit is required for additional structures. In fact, in 1975 soon after issuance of the Exemption, one of the Claimants applied for and obtained CDP No. P-1-29-75-4717 to authorize a new structure on the site. In its application the Claimant described the proposed development as such:

The building is to be an 1800 sq. ft. single story prefabricated steel structure to be utilized for a field office, employees' locker and change room and necessary sanitary facilities... It will replace present portable steel structures which have been used for the same purpose and is part of the support facilities which are necessary to implement the master plan of the oil field operation which was exempted by the South Coast Regional Commission on November 5, 1973.

Notably, the application, particularly the language quoted above, underscores the claimant's understanding that a coastal development permit would be required for structures that, although they might be necessary for implementation of the master drilling plan, were not specified in the master plan and thus were not included in the Exemption. As noted above, the Claimants' application for the Exemption represented that the master plan called for operation of 312 existing wells and drilling and operation of 28 new wells. The Exemption listed these wells and surface facilities associated with these wells (*existing* in relation to the Existing Wells, and *proposed* in relation to the Planned Wells) as development that is exempt from coastal development permit requirements. Thus, to repeat what was described in more detail above, application of the Exemption is limited to these wells and structures, and any new well or structure requires a coastal development permit; as confirmed by permitting history subsequent to issuance of the Exemption.

It is not likely that the Commission would have approved all of the unpermitted additional wells and structures referenced above if WNO or the Claimants had applied to the Commission for authorization because of the inconsistency of the development with the resource protection policies of the Coastal Act, including, but not limited to policies that protect wetlands and environmentally sensitive habitat areas ("ESHA"). It appears from a review of historic and

contemporary aerial photographs, as well as biological surveys, that the unpermitted development at issue resulted in the placement of certain wells and other structures in areas of native habitats, including wetlands and sensitive habitats identified in the planning materials submitted with CDP application No. 5-13-032. The Coastal Act restricts development within wetlands and environmentally sensitive habitat areas to limited circumstances not applicable here.

Wetlands

Because of the historical losses and current rarity of these habitats, and because of their extreme sensitivity to disturbance, wetlands are provided significant protection under the Coastal Act. Section 30233(a) of the Coastal Act states:

The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

- 1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
- 2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
- 3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
- 4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
- 5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
- 6) Restoration purposes.*
- 7) Nature study, aquaculture, or similar resource dependent activities.*

The unpermitted development at issue includes placement of structures within and adjacent to wetlands. Section 30233 of the Coastal Act allows for development of wetlands only under narrow criteria, and when properly authorized in a coastal development permit. Notably, there was no coastal development permit sought or obtained for the development activities at issue. Moreover, even if WNO or the Claimants had applied for a coastal development permit from the Coastal Commission, the unpermitted development that resulted in wetland fill would unlikely be found to be the least environmentally damaging feasible alternative for such development.

WNO is well aware of the presence of extensive wetlands on the site and the provisions of the Coastal Act that limit fill of wetlands. In 1986, the Coastal Commission approved CDP No. 5-86-588, which authorized WNO to remove dredge material that had been placed in a wetland on site by the Orange County Environmental Management Agency pursuant to an agreement with WNO. In approving the Commission found that the site, part of the property at issue in these matters, "is part of approximately 200 acres of coastal salt marsh wetlands identified on the USFWS National Wetland Inventory Maps." The Commission cited the provisions included

above in finding that fill of wetlands must be limited to the types of development types enumerated in Section 30233. The Commission further noted that "Development in coastal wetlands is subject to special scrutiny under the Coastal Act. Wetlands are highly diverse and biologically productive coastal resources. Their variety of vegetation and substrates produce far greater possibilities for marine and terrestrial wildlife feeding, nesting, and spawning than is found in less diverse areas."

ESHA

ESHA is defined in Coastal Act Section 30107.5 as follows:

"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

Section 30240 of the Coastal Act states:

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

The unpermitted development at issue includes development within areas that have been identified as habitat areas that would likely delineate as ESHA. Because the unpermitted development located within ESHA significantly disrupts and is not dependent on the resource (since it is not necessary that the development at issue occur in sensitive habitat to function), the unpermitted development within ESHA is inconsistent with Section 30240(a) of the Coastal Act. In addition, persistence of disturbances on the site has degraded the habitat in the impacted areas, which may affect adjacent native plant communities that constitute ESHA, in a way that is not compatible with the continuance of these habitats, in violation of Section 30240(b).

In contrast to the unpermitted development at issue that was undertaken in wetlands and sensitive habitat areas, the structures and wells approved via CDP No. P-1-29-75-4717 and CDP No. E-85-001 were each proposed to be located in previously graded, disturbed areas, not areas of native habitat. In the application for CDP No. P-1-29-75-4717, in response to question #18 of the application, which asks the applicant to "Describe any proposed changes to the natural or existing land forms, including but not limited to the removal of any vegetation, trees, grading, etc., of 50 cu. yd. of material or more," the applicant responded: "No changes. Project requires very minor grading to level building site located between presently producing oil wells." The application further noted that the proposed structure replaced an existing structure.

Likewise, the Commission found that the development proposed in CDP application No. E-85-001 would not impact coastal resources due in large part to the location of the proposed wells in

areas that "are surrounded by existing oil production and minimal grading (max. 1 foot) is proposed." In finding the development consistent with the Coastal Act policies that protect ESHA on site, the Commission noted that "The proposed project has been conditioned to dispose of solid and liquid wastes offsite, to prohibit use of unlined sumps for mixture or storage of fluids, and to provide an approved oil spill contingency plan thereby preventing impacts to the biological productivity of coastal streams or the Santa Ana River, maintaining human health, and avoiding significant degradation of environmentally sensitive areas." The Commission also found in relation to the proposed siting of the wells that "As conditioned, each exploratory well site would be set back from bluff edges so as not to alter natural landforms along bluffs. No new road would be constructed, grading would be minimized and damage to wetland areas can be prevented."

Removal of Major Vegetation/Mowing

As noted in earlier letters to and discussions with WNO and NBRLLC, extensive removal of major vegetation has occurred on the subject site, purportedly to address fire safety and access concerns, without the necessary coastal development permits. Under the Coastal Act, removal of major vegetation constitutes 'development' and requires authorization from the Coastal Commission, unless otherwise exempt. Vegetation can qualify as 'major vegetation' based on its importance to coastal habitats, the presence of sensitive species, or, in the case of rare or endangered vegetation, its limited distribution. Staff has reviewed planning documents and biological surveys submitted with CDP application No. 5-13-032, which describe the vegetation on site that has been impacted by mowing. The documents identify areas of native plant communities and protected habitats, including habitats for sensitive species, within and adjacent to the mowed areas. The mowing at issue thus involves removal of major vegetation, an activity that constitutes 'development' under the Coastal Act. Such clearance has resulted in alterations to the extent, health, and/or type of vegetation and habitat located on the site. In addition to requiring authorization from the Coastal Commission, this activity could therefore be problematic from a resource protection perspective, particularly in areas that contain sensitive habitats or are adjacent to such habitats.

The Coastal Commission is cognizant of the obligations of property owners to address potential fire hazards on their property. To that end, in letters to WNO and NBRLLC, Commission staff supported appropriate fuel modification activities conducted on the site consistent with Orange County Fire Authority requirements to address legitimate fire safety concerns in a manner that is most protective of sensitive habitat, limited to the minimum amount and least intrusive methods necessary to abate a fire hazard.

However, WNO asserts that vegetation removal is necessary across the site, in some areas hundreds of feet from any active well, pipeline, or flammable structure, in order to preserve future drilling opportunities that WNO claims are covered by the Exemption. Staff disagrees. Vegetation removal at the scale and in the locations that has occurred is not an exempt activity, nor is it supported by the Exemption. The Exemption expressly limits its application to operation and maintenance of the Exempt Wells. Furthermore, such an expansive approach to fuel modification does not constitute a legitimate fire safety practice that limits vegetation removal and uses to the least intrusive methods necessary.

As evidenced by the Commission's permitting and enforcement history for the subject site, staff does not agree with WNO's expansive interpretation of the Exemption and has relayed as much to WNO. Examples of this history are provided above. In another example, with specific regard to vegetation removal, upon learning of vegetation removal on the site, Commission enforcement staff notified WNO, in 1990, that staff had reviewed the Exemption and determined that "There is no mention of permission to clear vegetation or dig ditches in any area of the wetlands." WNO responded that the vegetation removal at issue consisted of prescribed fuel modification around structures. As noted above, staff supports appropriate fuel modification measures and provided a framework for appropriate fuel modification in earlier letters.

As discussed above, staff recognizes the need to abate potential fire hazards on the site. However, it is apparent from aerial photographs that fuel modification undertaken on site far exceeds any standard fuel modification zone, including the requirements of the Orange County Fire Authority and DOGGR. Where this excessive fuel modification has resulted in the unnecessary removal of major vegetation, it constitutes a violation of the Coastal Act. Fuel modification has also occurred around non-exempt wells. Even if such fuel modification were undertaken to address legitimate fire safety concerns, fuel modification activities that are accessory to unpermitted development, i.e. the non-exempt wells, are also violations of the Coastal Act and must also be addressed.

Resolution

As we have stressed to you throughout our discussions, we would like to work with all the parties involved to resolve these issues amicably. You should be aware that liability for Coastal Act violations attaches to both the party who has undertaken unpermitted development and to the owner of property on which a violation has occurred. In *Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal. App.3d 605, 622, interpreting analogous provisions of our sister agency's enabling act, the court held that:

"whether the context be civil or criminal, liability and the duty to take affirmative action [to correct a condition of noncompliance with applicable legal requirements] flow not from the landowner's active responsibility for [that] condition of his land...or his knowledge of or intent to cause such [a condition] but rather, and quite simply, from his very possession and control of the land in question."

The persistence of unpermitted development on NBRLLC property constitutes a continuing violation of the Coastal Act and damage to coastal resources is ongoing. It is NBRLLC's responsibility to obtain a coastal development permit to authorize development on their property or to correct conditions on their property that violate the Coastal Act.

In addition, pursuant to Coastal Act Section 30811, for example, even if unpermitted development was undertaken by another party or NBRLLC was not the property owner at the time unpermitted development was undertaken, the Commission may order NBRLLC to restore the property because development occurred without a coastal development permit, is inconsistent with the Coastal Act, and continues to affect the resources at the site, which NBRLLC now owns.

The authority of the Coastal Commission to order a property owner to restore property ensures that a property owner cannot take benefit from elimination or degradation of coastal resources that has occurred on its property as a result of unpermitted development. Along those same lines, in reviewing applications for proposed development, the Commission typically considers the state of the site as it was prior to the impacts of any unpermitted development in order to determine what the impacts of the proposed project will be. Here, unpermitted development, such as the drilling of additional wells, installation of structures, and extensive vegetation removal, noted above, cannot be used as a basis to justify development in areas where, were it not for the unpermitted development, protected habitats would flourish. If an approach to the contrary were taken, it would essentially result in a windfall for the property owner at the expense of protected coastal resources. Thus, consideration of development proposals must view site conditions as if unpermitted development had not occurred.

As described throughout this letter, CDP application No. 5-13-032 is for proposed development on properties with unresolved Coastal Act violations that affect the baseline condition of said properties (i.e. its condition if not for the unpermitted development). Thus, until such time as we are able to find a clear path to resolution of the subject unpermitted development issues and clearly establish the baseline condition of the subject property, we must consider the application incomplete. Without such information, the Commission cannot make a determination that the proposed development is consistent with the Coastal Act. We believe that the consent cease and desist order process proposed below is the most expeditious way to resolve this matter and establish baseline conditions necessary to move the permitting process forward.

Thus, it is in all parties' interest to resolve the Coastal Act violations described herein amicably and as quickly as possible so that all parties can move forward. One option that you may want to consider is agreeing to consent orders. Consent cease and desist and restoration orders would provide all the parties with an opportunity to have more input into the process and timing of restoration of the property and mitigation of the damages caused by the unpermitted activities described above, and could potentially allow you to negotiate a penalty amount with Commission staff in order to resolve the violation without any further formal legal action. Another advantage to agreeing to a consent order is that it replaces the need for costly and time consuming litigation. Further, in a consent order proceeding, Commission staff will be promoting the agreement between the parties and staff, rather than addressing the violations through a disputed hearing, which could only highlight the violations of the Coastal Act for which the parties are responsible.

Consent orders would provide for a permanent resolution of this matter and restoration of the properties. If you are interested in discussing the possibility of agreeing to consent orders, please contact me by no later than February 14, 2014 to discuss options to resolve this case.

Since these issues have come to light, we have worked steadily toward resolution, but have also proceeded conservatively in order to gather facts and consider the input of all the parties. As you know, since the property is secured for public safety reasons, and also due to the scale and complex nature of the existing development on the site, it has been difficult for staff to verify compliance with the Exemption. Seclusion also has precluded easy access to the site to discover the presence of protected coastal resources on site. On the occasions when staff has been on site,

we have focused on resolving distinct issues on specific portions of the site.

As evidenced by the permitting and enforcement history of the site, it has always been the Commission's intent to require coastal development permits for additional wells and other development not specifically covered by the Exemption. The coastal development permit process is critical to protecting the wetlands and sensitive habitats referenced above, as well as other coastal resources present on the site. It is only through careful analysis, siting, and conditioning of proposed development through the coastal development permitting process that protection of these significant resources can be furthered.

Staff would be happy to meet with you before the date noted above to discuss the steps necessary to resolve the unpermitted development described in this letter and to discuss the necessary scope of that resolution. Our goal is to resolve this situation amicably and as quickly as possible so that all parties can move forward. We greatly appreciate your time and input and look forward to discussing this matter further and working together on a consensual resolution. If you have any questions about this letter or the pending enforcement case, please do not hesitate to contact me as soon as possible at (562) 590-5071.

Sincerely,



Andrew Willis
Enforcement Analyst

cc: Jared Ficker, California Strategies, LLC
Lisa Haage, Chief of Enforcement, CCC
Sherilyn Sarb, Deputy Director, CCC
Allison Dettmer, Deputy Director, CCC
Alex Helperin, Senior Legal Counsel, CCC

EXHIBIT 3

CALIFORNIA COASTAL COMMISSION

45 FREMONT STREET, SUITE 2000
SAN FRANCISCO, CA 94105-2219
VOICE (415) 904-5200
FAX (415) 904-5400
TDD (415) 597-5885



August 19, 2014

VIA REGULAR & CERTIFIED MAIL

West Newport Oil Company
c/o Tim Paone
Cox Castle Nicholson
19800 MacArthur Blvd., Ste. 500
Irvine, CA 92612
(Certified Receipt No. 7013 1090 0000 6246 8636)

Newport Banning Ranch, LLC
Attn: Michael Mohler
1300 Quail Street, Suite 100
Newport Beach, CA 92660
(Certified Receipt No. 7013 1090 0000 6246 8629)

Subject: **Notification of Intent to Commence Cease and Desist
Order and Restoration Order Proceedings and
Notification of Intent to Record a Notice of Violation**

Violation File Number: V-5-11-005

Property Location: Properties collectively known as Newport Banning Ranch,
located adjacent to the 5100 block of West Coast Highway
in unincorporated Orange County; also identified by
Orange County Assessor's Parcel Numbers 114-170-24,
114-170-43, 114-170-49, 114-170-50, 114-170-52, 114-
170-72, 114-170-75, 114-170-77, 114-170-79, 114-170-80,
114-170-83, and 424-041-04.

Unpermitted Development¹: Drilling and operation of new wells; removal of vegetation;
grading; installation of pads and wells; construction of
structures, roads and pipelines; placement of solid material;
discharge or disposal of dredged material; removing,
mining, or extraction of material; and change in intensity of
use of the land.

¹ Please note that the description herein of the alleged violations at issue is not necessarily a complete list of all development on the properties that is in violation of the Coastal Act and/or that may be of concern to the Commission. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other development on the properties as indicative of Commission acceptance of, or acquiescence in, any such development.

Dear Mr. Paone and Mr. Mohler:

California Coastal Commission ("Commission") staff appreciates your efforts to work cooperatively towards resolution of the alleged Coastal Act violations involving the unpermitted development listed above; we hope to continue to collaborate to resolve this matter. We are encouraged by your commitment to resolve this matter collaboratively and that your preference is, as ours certainly is, to resolve this issue consensually. We are willing to consider options that could involve agreeing to a consensual resolution to the alleged Coastal Act violations on the properties, such as consent cease and desist and restoration orders ("consent orders"). To that end, we have met with you on multiple occasions to discuss the consent order process and we are happy to continue to discuss proposed terms for consent orders that we are willing to propose to the Commission.

In order to be able to resolve the alleged violations through formal enforcement actions, legally, we have to initiate the order process by sending you this letter, the purpose of which is to notify you of my intent, as the Executive Director of the Commission, to commence proceedings for issuance of cease and desist and restoration orders to address unpermitted development on the properties.

If adopted by the Commission, consent orders would likely direct you to, among other things: (1) cease and desist from undertaking any further development on the properties unless authorized by a coastal development permit or by other means consistent with the Coastal Act, (2) cease and desist from maintaining any unpermitted development on the properties, (3) restore impacted areas pursuant to an approved restoration plan, (4) mitigate for impacts to coastal resources, (5) take all steps necessary to ensure compliance with the Coastal Act, and (6) resolve your liability for civil penalties under Chapter 9 of the Coastal Act. The consent orders would contain more detailed proposed terms of a consensual resolution of this matter.

Please note that this letter is not intended to supplant the opportunity to resolve this matter consensually, but it is a legally mandated step in the ongoing process that is intended to facilitate the resolution of the issue. The steps of which we are giving you notice herein are designed to resolve the aforementioned alleged Coastal Act violations through formal enforcement actions, and we can utilize these mechanisms whether we come to agreement on a consent process or not; however, as noted above, we would like the focus of our discussions to be resolving this matter consensually.

Unpermitted Development

Based upon the information that staff has reviewed to date, it has become abundantly clear to staff that a number of sensitive and native plant communities and wildlife species thrive on the properties. Accordingly, the potential that development activities on the site, particularly unpermitted development activities, could have impacted and could be continuing to impact sensitive habitats and species, including ecologically significant vegetation, became more salient. We look forward to working with all the parties involved to protect these habitats and species

that exist on the site and to address collaboratively the impacts to these coastal resources and others that have occurred as a result of unpermitted development activities on the site. In reviewing documents submitted in conjunction with Coastal Development Permit application No. 5-13-032 and the associated CEQA process, Commission enforcement staff confirmed that the development listed above and further specified below has occurred on the properties without the permit that we believe was required by the Coastal Act (hereinafter referred to as "unpermitted development").

Unpermitted Wells and Associated Structures

The unpermitted development is largely detailed in Coastal Development Permit application No. 5-13-032 and includes drilling and operation of new wells subsequent to the issuance of Resolution of Exemption No. E-7-27-73-144 ("the Resolution") without authorization from the Commission. Although the Resolution is limited to 340 wells identified in the Resolution, staff has confirmed that additional wells were drilled subsequent to the Resolution without authorization from the Commission. These unpermitted wells are catalogued in Attachment 7 to Coastal Development Permit application No. 5-13-032 in the tables labeled "Banning Lease Well Totals 1974-2010." The tables specifically list the 312 wells that were in existence at the time of the Resolution and identify the 28 wells that were slated to be drilled at that point, totaling 340 (hereinafter, "Exempt Wells"), all of which were covered by the Resolution. The tables further catalogue 153 additional wells that were drilled subsequent to the Resolution (hereinafter, "Additional Wells"). Commission staff believes that these wells, and any other new wells drilled since 2010, are not covered by the Resolution, and they have not been authorized by any coastal development permits, making them violations.

Drilling and operation of new wells, in many cases, includes, but may not be limited to such development activities as removal of vegetation, grading, installation of pads and wells; construction of roads and pipelines, placement of solid material, discharge or disposal of dredged material, removing, mining, or extraction of material, and change in intensity of use of the land. Each of these activities constitutes development under the Coastal Act and, therefore, requires Coastal Act authorization, generally a coastal development permit. Any development activity conducted in the Coastal Zone without a valid coastal development permit or other Coastal Act authorization and that is not otherwise exempt constitutes a violation of the Coastal Act. Where these activities occurred in conjunction with the approximately 153 Additional Wells, Commission staff believes that the activities again constitute violations of the Coastal Act.

Unpermitted Oilfield Activities

In addition, staff has confirmed that a number of development activities that are not specified as exempt activities in the Resolution, in addition to the drilling of the Additional Wells described above, have occurred on the site subsequent to issuance of the Resolution. The Resolution applies to repair and maintenance of existing surface facilities and construction, repair and maintenance of surface facilities associated with the Exempt Wells. However, nowhere does the Resolution state that the expansion of existing facilities or the creation of new facilities in addition to those associated with the Exempt Wells is exempt. The application for CDP No. 5-13-032 details changes in the oil recovery strategy that have occurred on the site over time,

which have resulted in installation or expansion of existing structures on the site, grading, placement of materials and/or removal of major vegetation. These activities are described in the application for CDP No. 5-13-032 and include the following:

1. "Existing steaming and production facilities were expanded and road and pipeline infrastructure installed to accommodate this secondary recovery process."
2. "Facilities and processes were modified to comply with existing, and in anticipation of, changes in regulatory oversight and a new steam generation plant was constructed adjacent to the tank farm facility."
3. "Facilities utilized in the air and steam injection processes were idled, then deconstructed and their sites utilized in the abandonment operations."
4. "A pilot soil bioremediation program was implemented and an impacted soil holding cell constructed."

Removal of Major Vegetation/Mowing

Extensive removal of major vegetation has occurred on the properties, purportedly to address fire safety and pipeline access concerns, without the necessary coastal development permits. Under the Coastal Act, removal of major vegetation constitutes 'development' and requires authorization, unless otherwise exempt. Vegetation can qualify as 'major vegetation' based on, among other things, its importance to coastal habitats, the presence of sensitive species, or, in the case of rare or endangered vegetation, its limited distribution. Staff has reviewed planning documents and biological surveys of the site, which describe the vegetation on site that has been impacted by mowing. The documents identify areas of native plant communities and protected habitats, including habitats for sensitive species, within and adjacent to the mowed areas. The mowing at issue thus involves removal of major vegetation, an activity that constitutes 'development' under the Coastal Act. Such clearance has resulted in alterations to the extent, health, and/or type of vegetation and habitat located on the site. In addition to requiring authorization from the Coastal Commission, this activity could therefore be problematic from a resource protection perspective, particularly in areas that contain sensitive habitats or are adjacent to such habitats.

Staff recognizes the need to abate potential fire hazards on the site. However, it is apparent from aerial photographs that fuel modification undertaken on site far exceeds any standard fuel modification zone, including the requirements of the Orange County Fire Authority and Division of Oil and Gas ("DOGGR"). Where this excessive fuel modification has resulted in the unnecessary removal of major vegetation, because it occurred without authorization, it constitutes a violation of the Coastal Act. Fuel modification has also occurred around wells that were themselves installed in violation of the Coastal Act, making the associated fuel modification a violation as well. Even if such fuel modification were undertaken to address legitimate fire safety concerns, fuel modification activities that are accessory to unpermitted development, i.e. the Additional Wells, are also violations of the Coastal Act and must also be addressed.

The activities described in the "Unpermitted Wells and Associated Structures," "Unpermitted Oilfield Activities," and "Removal of Major Vegetation/Mowing" sections above are not covered by the Resolution, and they have not been authorized by any coastal development permit, thus these activities constitute violations of the Coastal Act.

We are happy to meet with you to discuss a consensual resolution of this matter, potentially through a settlement agreement in the form of consent orders that would provide a permanent and complete resolution of this matter. This certainly remains Commission staff's preferred approach, and therefore, to that end, I am initiating formal cease and desist and restoration order proceedings in order to ensure protection of the significant coastal resources on the properties.

The Resolution of Exemption

In previous communications you have expressed your belief that the unpermitted development at issue is exempt from Coastal Act permitting requirements because of a vested right to activities identified and confirmed in the Resolution, but as we have explained to you, staff disagrees that the unpermitted development at issue is covered by the Resolution and, instead, a coastal development permit was required for the unpermitted development.

Please see our January 31, 2014 letter to you (attached) for a more in depth explanation of why the Resolution does not apply to the unpermitted development at issue; below, we summarize some aspects of our position. First though, as background, in 1973 General Crude Oil Company and G.E. Kadane & Sons ("Claimants") applied to the South Coast Regional Coastal Zone Conservation Commission for confirmation of an exemption by reason of a vested right for those activities that were: 1) ongoing as of enactment of the Coastal Initiative (Nov. 8, 1972) and the effective date of the permitting requirement of the Coastal Initiative (Feb. 1, 1973); 2) for which the claimant had incurred substantial liabilities; and 3) were undertaken in good faith reliance on authorizations that were secured prior to November 8, 1972. The Commission reviewed the application, and issued the Resolution, which stated that the specific development described by the Resolution did not require a coastal development permit "provided that no substantial changes be made" to that development (Resolution Section 11, emphasis in original).

Section 12 of the Resolution identifies the development activities for which the Commission determined vested rights exist. It states:

12. Claim of exemption No. E-7-27-73-144 is hereby granted as to the following development: Continued production and operations on the 480 acre "Banning Lease" per the attached items:

- a. Continued operation and maintenance of existing oil producing and injection wells and associated surface facilities. The "existing" wells to be defined as the 312 wells either drilled or in progress as of Nov. 8, 1972*
- b. Performing workover or remedial operations on existing wells necessary to maintain or improve their performance.*
- c. Drilling, re-drilling and repairs to existing injection wells.*

- d. Drilling, redrilling and repairs to existing oil production wells.*
- e. Based upon the existing plan, the drilling of 28 additional oil producing wells and construction of associated surface facilities.*
- f. Drilling, redrilling and repairs to the 28 new wells and associated facilities.*
- g. Abandonment of wells in accordance with requirements and approval of the State Division of Oil and Gas and removal of surface equipment and pipelines per state and local agency requirements.*
- h. Future exploratory drilling within the lease area is not exempted.*

Section 12 of the Resolution specifies that the Commission's determination of a vested right is limited to operation of "the" 312 "existing" wells and drilling 28 new wells, as well as repair and maintenance of the wells and associated surface facilities. The Resolution thus identifies the wells that were in place or under construction at the time of the Resolution, i.e. the 312 existing wells, and the 28 additional wells that were planned to be completed contemporaneously with the Resolution, and recognizes a vested right for drilling, redrilling and repairs to the existing wells and the 28 planned wells, together totaling 340 wells (i.e. the Exempt Wells).

Although the Resolution is limited to the wells identified in the Resolution, staff has confirmed that wells in addition to the Exempt Wells were drilled subsequent to the Resolution without authorization from the Coastal Commission, i.e. the Additional Wells. West Newport Oil Company has expressed its opinion, and Newport Banning Ranch LLC has apparently concurred, that the Resolution allows drilling and operation of any 340 wells on the site, regardless of whether the wells were existing at the time of the Resolution or drilled 10, 20 years, or for any period of time, after the Resolution, as long as there are no more than 340 wells in production at one time. However, such a reading of the Resolution does not comport with its plain language or with the vested right doctrine, upon which the Resolution is based.

A vested rights exemption issued pursuant to Coastal Act Section 30608 enables one who obtains all valid governmental approvals for development and performs substantial work and incurs substantial liabilities in good faith reliance on those approvals to complete the development authorized by those approvals, even if the law changes prior to completion. A vested right does not allow any other new development to be completed without compliance with existing laws. You have not provided any evidence of government approvals in place at the time the Coastal Initiative was enacted to construct the unpermitted development. You, therefore, have not met the first test for establishing a vested right with regard to the Additional Wells because the wells had not received all governmental approvals necessary to undertake the development at the time of the Coastal Initiative was enacted, nor had approvals been applied for.

It should also be mentioned here that the question before us is not whether the Additional Wells are part of the oilfield operations; the question is whether the Additional Wells are covered by the Resolution, which they are not. However, although the Additional Wells are not covered by the Resolution, this does not preclude the possibility of drilling additional wells on the properties. The Claimants state in the September 7, 1973 "supplement" to its application that "The operation of the lease, however, will require that many wells now in existence be replaced or redrilled in order to fit into the pattern development required by the master plan throughout the lease." The Commission did not confirm a vested right for the replacement of existing wells,

however, this is not in and of itself fatal to the drilling of additional wells to allow the possibility for flexibility in the oilfield operator's recovery strategy that the Claimants refer to in the supplement. Instead, if the Claimants or their successors had applied for a coastal development permit to authorize the wells prior to drilling the wells, the Commission would have reviewed the wells for consistency with Coastal Act resource protection policies. Although the opportunity to prospectively apply for approval of the Additional Wells has passed for wells that have already been drilled, to resolve this issue via consent orders, consent orders proposed to the Commission could authorize you to apply to the Commission for after-the-fact approval of those Additional Wells that appear likely to be consistent with the resource protection policies of the Coastal Act. And, as our staff has conveyed to the parties during discussions, we are available to discuss the necessary authorizations for any future drilling or associated development that WNO wishes to undertake.

Cease and Desist Order

The Commission's authority to issue cease and desist orders is set forth in Coastal Act Section 30810(a), which begins by stating the following:

If the Commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the Commission without securing the permit or (2) is inconsistent with any permit previously issued by the Commission, the Commission may issue an order directing that person or governmental agency to cease and desist.

As you know, pursuant to Section 30600(a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit, in addition to any other permit required by law, unless the development is otherwise exempt, which is not the case here. Development is broadly defined by the Coastal Act Section 30106, as follows:

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations.... (emphasis added)

The unpermitted development described herein clearly constitutes "development" within the meaning of the definition in Coastal Act, is not otherwise exempt from permitting requirements under the Coastal Act, and therefore is subject to the permit requirement of Coastal Act Section

30600(a). A coastal development permit was not issued by the Commission to authorize the subject unpermitted development.

As the activities at issue required a coastal development permit and none was obtained, the criterion of Section 30810(a) for issuance of a cease and desist order has been satisfied. For these reasons, I am issuing this "Notice of Intent" to commence cease and desist order proceedings. The procedures for the issuance of cease and desist orders are described in Sections 13180 through 13188 of the Commission's regulations, which are codified in Title 14 of the California Code of Regulations.

In addition, although it is not a necessary criterion for the Commission's issuance of a cease and desist order, it is worth noting that there are potential conflicts between the substantive protections listed in the Coastal Act for habitat, wetlands and water quality protection and the development activities at issue here. These substantive protections are listed in the next section of this document and described in more detail in our letter to you dated January 31, 2014 (attached).

Restoration Order

Coastal Act Section 30811 authorizes the Commission to order restoration of a site in the following terms:

In addition to any other authority to order restoration, the commission...may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission..., the development is inconsistent with this division, and the development is causing continuing resource damage.

Pursuant to Section 13191 of the Commission's regulations, I have determined that the specified activities meet the criteria of Section 30811 of the Coastal Act, based on the following:

- 1) Unpermitted development has taken place, including, but not limited to, drilling and operation of new wells; removal of vegetation; grading; installation of pads and wells; construction of structures, roads and pipelines; placement of solid material; discharge or disposal of dredged material; removing, mining, or extraction of material; removal of major vegetation; and change in intensity of use of the land.
- 2) This development is inconsistent with resource protection policies of the Coastal Act, including, but not limited to the following:
 - a) 30231 (Biological productivity, water quality)
 - b) 30233 (limit fill of wetlands)
 - c) 30240 (avoid Environmentally Sensitive Habitat Areas)
- 3) Unpermitted materials have been placed in wetlands and sensitive habitats as a result of the unpermitted development at issue and remain in place; thus, unpermitted development persists and is thereby causing continuing resource damage, as defined by Section 13190 of the

Commission's regulations. The impacts from the unpermitted development remain unmitigated; therefore, the damage to resources protected by the Coastal Act is continuing.

For the reasons stated above, I have decided to commence proceedings for the Commission's issuance of a restoration order in order to restore the properties. The procedures for the issuance of restoration orders are described in Sections 13190 through 13197 of the Commission's regulations, which are codified in Title 14 of the California Code of Regulations.

Response Procedure

In accordance with Sections 13181(a) and 13191(a) of the Commission's Regulations, you have the opportunity to respond to Commission staff's allegations as set forth in this notice of intent to commence cease and desist and restoration order proceedings by completing the enclosed Statement of Defense (SOD) form. The SOD form should be returned to the Commission's Long Beach office at 200 OceanGate 10th Floor, Long Beach, 90802, directed to the attention of Andrew Willis, by no later than September 8, 2014.

However, should this matter be resolved via a settlement agreement in consent order(s), a statement of defense form would not be necessary. In any case, and in the interim, staff would be happy to accept any information you wish to share regarding this matter and continue our discussions toward a consensual resolution.

Commission staff intends to schedule the hearings for the cease and desist and restoration orders at the October Commission meeting in the Newport Beach.

Notice of Violation of the Coastal Act

In addition to the remedies proposed above, Section 30812 of the Coastal Act also allows me as the Executive Director to, after providing formal notice and opportunity for a hearing, record a Notice of Violation of the Coastal Act ("NOVA") against the properties if this matter is not resolved administratively.

The Executive Director of the Commission may record a NOVA against the title to the properties pursuant to Section 30812, after providing notice and the opportunity for a hearing. Section 30812 provides, in part:

(a) Whenever the executive director of the commission has determined, based on substantial evidence, that real property has been developed in violation of this division, the executive director may cause a notification of intention to record a notice of violation to be mailed...to the owner of the real property at issue...

(b) ... The notification shall state that if, within 20 days of mailing of the notification, the owner of the real property at issue fails to inform the executive director of the owner's objection to recording the notice of violation, the executive director shall record the notice of violation in the office of each county recorder where all or part of the property is located.

(d) If, after the commission has completed its hearing and the owner has been given the opportunity to present evidence, the commission finds that, based on substantial evidence, a violation has occurred, the executive director shall record the notice of violation...

Should this matter be resolved via a settlement agreement in consent orders, we would request that the property owner(s) agree to our recordation of a NOVA as part of any such settlement, in which case an objection would not be necessary. If we cannot come to an agreement on a resolution of this matter and the property owner chooses instead to object to the recording of a NOVA and wish to present evidence to the Coastal Commission at a public hearing on the issue of whether a violation has occurred, the property owner must specifically object, in writing, within 20 calendar days of the postmarked mailing of this notification. The objection should be sent to Andrew Willis at the Commission's Long Beach office. Please include the evidence you wish to present to the Coastal Commission in your written response and identify any issues you would like us to consider.

If recorded as provided for under Section 30812(b), the NOVA will become part of the chain of title of the properties and will be subject to review by potential buyers. This notice is intended to put other parties on notice of the status of the properties and to avoid unnecessary confusion. The NOVA will be rescinded once the violations are resolved.

Civil Liability/Exemplary Damages

You should be aware that the Coastal Act includes a number of penalty provisions for violations of the Coastal Act. Section 30820(a)(1) provides for civil liability to be imposed on any person who performs or undertakes development without a coastal development permit and/or that is inconsistent with any previously issued coastal development permit in an amount that shall not exceed \$30,000 and shall not be less than \$500 for each instance of development that is in violation of the Coastal Act. Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development without a coastal development permit and/or that is inconsistent with any previously issued coastal development permit when the person intentionally and knowingly performs or undertakes such development, in an amount not less than \$1,000 and not more than \$15,000 per day for each day in which each violation persists. Section 30821.6 provides that a violation of a cease and desist order or a restoration order can result in civil fines of up to \$6,000 for each day in which the violation persists. Section 30822 provides for additional exemplary damages in appropriate cases.

Resolution

We would like to work with you to resolve these issues. As noted above, we encourage you to continue to work with us to resolve this matter via consent orders. Consent cease and desist and restoration orders would provide you with an opportunity to have more input into the process and timing of restoration of the properties and mitigation of the damages caused by the unpermitted development and could potentially allow you to negotiate a penalty amount with the Commission staff in order to resolve the complete violation without any further formal legal action. Consent

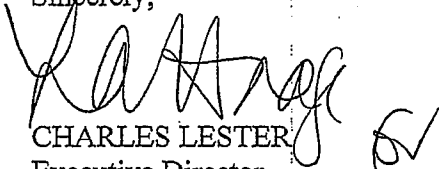
orders would provide for a permanent resolution of this matter so that all parties can move forward.

Another benefit of consent orders that you should consider is that in a consent order proceeding, Commission staff will be promoting the agreement between you and staff, rather than addressing the violations through a disputed hearing.

If you are interested in continuing to pursue consent orders, staff remains available and committed to continuing to discuss options to resolve this case. Again, should we settle this matter, you do not need to expend the time and resources to file the objections mentioned above.

It is staff's goal to resolve the Coastal Act violations described herein amicably and as quickly as possible so that all parties can move forward. If you have any questions about this letter or the pending enforcement case, please do not hesitate to contact Andrew Willis as soon as possible. We greatly appreciate your time and input and look forward to discussing this matter further and working together on a consensual resolution.

Sincerely,



CHARLES LESTER
Executive Director

Encls: Letter dated January 31, 2014
Statement of Defense

cc: Lisa Haage, Chief of Enforcement, CCC
Sherilyn Sarb, Deputy Director, CCC
Allison Dettmer, Deputy Director, CCC
Alex Helperin, Senior Staff Counsel, CCC
Andrew Willis, Enforcement Analyst, CCC

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **Horizontal Development LLC, et al. v. California Coastal Commission**

No.: **30-2014-00739490-CU-MC-CJC**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

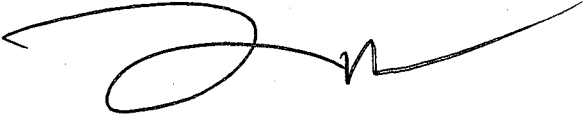
On **October 3, 2014**, I served the attached [**REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF DEMURRER TO COMPLAINT**] by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows: 300 South Spring Street.

Tim Poane, Esq.
COX, CASTLE & NICHOLSON, LLP
19800 MacArthur Boulevard, Suite 500
Irvine, CA 92612-2435

*Attorneys for Plaintiff, Horizontal
Development LLC, et al.*

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **October 3, 2014**, at Los Angeles, California.

Teresa De Paz
Declarant



Signature