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Staff: A. Willis-LB

Staff Report: February 27, 2015

Hearing Date: March 12, 2015

## **STAFF REPORT: RECOMMENDATIONS AND FINDINGS FOR ISSUANCE OF SETTLEMENT AGREEMENT AND SETTLEMENT CEASE AND DESIST AND SETTLEMENT RESTORATION ORDERS**

**Settlement Cease and Desist Order No.:** CCC-15-CD-01

**Settlement Restoration Order No.:** CCC-15-RO-01

**Related Violation File:** V-5-11-005

**Location of Properties:** Properties collectively known as Banning Ranch, located adjacent to the 5100 block of West Coast Highway, unincorporated Orange County, 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.

**Owners of the Properties:** Aera Energy LLC and Cherokee Newport Beach, LLC

**Description of Alleged Violations:** Unpermitted development and development in non-compliance the terms of a previously-issued permit, in the form of: drilling and operation of new wells; removal of major vegetation; grading; installation of pads and wells; construction of structures, roads and pipelines; placement of solid material; discharge or disposal of any dredged material or any liquid waste; removing, mining, or extraction of material; and change in intensity of use of the land.

**Persons Subject to these Orders:**

1. Newport Banning Ranch LLC (“NBR”)<sup>1</sup>
2. Aera Energy LLC
3. Cherokee Newport Beach, LLC

**Substantive File Documents:**

1. Public documents in the Cease and Desist and Restoration Order files No. CCC-15-CD-01 and CCC-15-RO-01 including the records associated with Resolution of Exemption E-7-27-73-144.
2. Exhibits 1 through 11 and Appendix A of this staff report.

**CEQA Status:**

Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308, and 15321).

## **SUMMARY OF STAFF RECOMMENDATION**

The settlement agreement described herein is a result of the efforts of the parties to this settlement agreement to work diligently to find an amicable solution to address and resolve the various issues at the site. Staff appreciates the efforts of NBR to reach this agreement and recommends that the Commission approve of the proposed settlement agreement described in more detail herein.

This matter concerns property in unincorporated Orange County, adjacent to the City of Newport Beach, known as Banning Ranch. Banning Ranch (hereinafter referred to as the “Properties”)(**Exhibit 1**) was used as an oil field for many years prior to the 1970s. After the passage of Proposition 20, the predecessor to the Coastal Act, in 1972, the Banning Ranch oil field operators applied to the predecessor to the Coastal Commission for the applicable area – the South Coast Regional Coastal Zone Conservation Commission (“Regional Commission”) – for an exemption from the new permit requirements of Proposition 20, based on the claim that they had obtained a vested right to continue their operations. The Regional Commission agreed that the operators had obtained a vested right to conduct certain activities, and in 1973, it memorialized that determination via adoption of Resolution of Exemption No. E-7-27-73-144 (the “Resolution”) (**Exhibit 2**). The issues regarding the history of this site and the Commission actions taken are more fully discussed in section V of this report, *infra*.

The activities at the heart of this disagreement involve development located in and adjacent to wetlands and environmentally sensitive habitat areas that Staff believes is both inconsistent with a previously issued coastal development permit (“CDP”) and beyond the scope of the Resolution, and which was undertaken without a CDP. The specific activities that are the subject of these

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<sup>1</sup> Newport Banning Ranch, LLC, manages planning and entitlement of the “Banning Ranch” surface rights for the property owners, Cherokee Newport Beach, LLC and Aera Energy, LLC. Hereinafter, all references to Newport Banning Ranch, LLC, (or “NBR”) are to Newport Banning Ranch, LLC, Cherokee Newport Beach, LLC, and Aera Energy, LLC, jointly, unless specific reference is made to an individual entity.

proceedings include drilling and operation of new wells; removal of major vegetation, in part through the mowing of extensive portions of the site; grading; installation of pads and wells; construction of structures, roads and pipelines; placement of solid material; discharge or disposal of dredged material or liquid waste; removing, mining, or extraction of material; and change in intensity of use of the land (hereinafter referred to collectively as “Subject Activities”) (**Exhibit 3**).

There are a number of entities involved in the Properties. The surface of the Properties is owned by Aera Energy LLC and Cherokee Newport Beach, LLC. According to documents provided to staff by Newport Banning Ranch, LLC, Aera Energy LLC purchased their 50% share of the Properties in 1997 and Cherokee Newport Beach, LLC purchased their half in 2005. Newport Banning Ranch, LLC manages planning and entitlement of the Banning Ranch surface rights for Cherokee Newport Beach, LLC and Aera Energy LLC and asserts that it holds the right to seek entitlements for development of the Properties. The ongoing oil operations on the Properties have been conducted by West Newport Oil Company (“WNOC”), the operator of the oil field, on behalf of various mineral rights owners since 1983. Horizontal Development LLC is the current owner of the mineral rights, which it acquired in 1999.

Over the last few years, disagreements arose between Coastal Commission staff (“Staff”) and NBR regarding the interpretation of the scope and application of the Resolution.<sup>2</sup> The proposed Settlement Agreement provides a mutually-agreeable resolution of that dispute and clarifies obligations for activities at the site going forward, without requiring either party to concede its position<sup>3</sup>. By entering into Settlement Agreement and Settlement Cease and Desist Order No. CCC-15-CD-01 and Settlement Restoration Order No. CCC-15-RO-01, which are attached to this staff report as Appendix A (hereinafter collectively referred to as the “Settlement Agreement”), NBR, although not admitting to any wrongdoing or liability under the Coastal Act, has agreed to remove allegedly unpermitted oil wells; restore many acres affected by the disputed activities and restore additional acres as mitigation; deed restrict 24.6-acres of the Properties for open space and restoration; and limit its future activities, including vegetation removal on the site, insofar as NBR is involved in mowing of the Properties, unless it obtains a permit for additional activities.

This Settlement Agreement is a result of a collaborative effort of NBR and Commission staff to reach a consensual resolution focused on the restoration and protection of coastal resources. Under the proposed Settlement Agreement, NBR will restore, create, and/or enhance native habitat on 18.45 acres of the Properties (See Figure 2 of **Exhibit 9**). In addition to the active restoration that NBR will undertake, pursuant to this Settlement Agreement NBR also agrees not to engage in the large-scale mowing activities previously undertaken by the oilfield operator that spanned much of the upland areas of the Properties that have resulted in impacts to native habitats (**Exhibit 4**).

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<sup>2</sup> The entity that has been operating the oil field, West Newport Oil Company, has also been involved in discussions regarding this issue, and it has taken a similar position to that taken by NBR. Staff attempted to settle with both parties, but Staff has so far been unable to reach resolution with West Newport Oil Company.

<sup>3</sup> The positions of the parties leading up to this Settlement Agreement are briefly summarized in Recital section 2 of the agreement.

Commission staff has worked closely with NBR to reach this agreement to resolve the Commission's claims against NBR for the alleged Coastal Act violations described herein. NBR, through this Settlement Agreement, has agreed to resolve its liability for all Coastal Act violation matters addressed herein, including resolving civil liability under Coastal Act Sections 30820 and 30822. This Settlement Agreement does not resolve the Commission's claims against the oil field operator, WNOC, for the alleged Coastal Act violations described herein. Commission staff has continued working with WNOC in an effort to reach a full resolution, but if those efforts are not fruitful, Staff will have to evaluate future options to address WNOC, including the possibility of scheduling hearings for a Cease and Desist Order and a Restoration Order to address WNOC's liability under the Coastal Act at an upcoming meeting.

On the last day before production of this staff report, negotiations continued with WNOC, and some progress was evident; but as of then, Staff and WNOC had not reached agreement. Due to the late-breaking nature of these negotiations, it was not possible to complete a full review of the staff report to update points that might be outdated. If WNOC and Staff reach an agreement on a proposed settlement of WNOC's liabilities, that agreement will be attached to this staff report as an addendum.

Staff recommends that the Commission issue the Settlement Agreement to address the alleged violations described above. Through the execution of this Settlement Agreement, NBR has agreed to: (1) cease and desist from undertaking any development on the Properties not authorized pursuant to the Coastal Act; (2) cease and desist from maintaining unpermitted development on the Properties; (3) remove certain allegedly unpermitted wells and either apply for after-the-fact authorization or remove other allegedly unpermitted wells, such that all allegedly unpermitted wells located outside of two areas of the site under WNOC's control, i.e. the "Oil Remainder Areas" (See Exhibit 1 of Appendix A), will be removed or addressed in an after-the-fact CDP application(s); (4) restore certain areas impacted by the Subject Activities, and surrounding areas, pursuant to an approved restoration plan; (5) mitigate for impacts to coastal resources; and (6) resolve its liability for civil penalties under Chapter 9 of the Coastal Act by deed restricting for open space and restoration 24.6 acres of the Properties, including the 18.45-acre restoration area described above and an additional 6.15 acres of wetlands.



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Exhibit 6	Map of wells to be removed
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Exhibit 9	Memorandum from Jonna D. Engel, PH.D, Commission staff ecologist
Exhibit 10	USFWS letter dated October 9, 2014
Exhibit 11	West Newport Oil Company letter dated September 27, 2012
Exhibit 12	NBR letter dated April 12, 2014
Exhibit 13	West Newport Oil Company letter dated June 25, 2014

## APPENDIX

Appendix A – Settlement Agreement and Settlement Cease and Desist Order No. CCC-15-CD-01 and Settlement Restoration Order CCC-15-RO-01

## **I. MOTION AND RESOLUTION**

### **Motion 1: Settlement Agreement and Settlement Cease and Desist Order**

*I move that the Commission **issue** Settlement Agreement and Settlement Cease and Desist Order No. CCC-15-CD-01, pursuant to the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in issuance of the Settlement Agreement and Settlement Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

### **Resolution to Issue Settlement Agreement and Settlement Cease and Desist Order:**

*The Commission hereby issues Settlement Agreement and Settlement Cease and Desist Order No. CCC-15-CD-01, as set forth below, and adopts the findings set forth below on grounds that development has occurred without the requisite coastal development permit, in violation of the Coastal Act.*

### **Motion 2: Settlement Restoration Order**

*I move that the Commission issue Settlement Restoration Order No. CCC-15-RO-01, pursuant to the staff recommendation.*

Staff recommends a **YES** vote on the foregoing motion. Passage of this motion will result in issuance of the Settlement Restoration Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

### **Resolution to Issue Settlement Restoration Order:**

*The Commission hereby issues Settlement Restoration Order No. CCC-15-RO-01, as set forth below, and adopts the findings set forth below on the grounds that 1) development has occurred without a coastal development permit, 2) the development is inconsistent with the Coastal Act, and 3) the development is causing continuing resource damage.*

## **II. JURISDICTION**

The Commission has jurisdiction over permit and enforcement matters on the Properties; the Properties are within the Coastal Zone in an area without a certified Local Coastal Program, in unincorporated Orange County, within the City of Newport Beach's sphere of influence. The Commission has approved the City of Newport Beach Land Use Plan ("LUP"); however, the City does not have a certified Local Coastal Program. Thus, although Chapter 3 of the Coastal Act is the standard of review, the City LUP policies may be used for guidance in regards to development and enforcement matters.

### III. COMMISSION'S AUTHORITY

The Commission can issue a Cease and Desist Order under Section 30810 of the Coastal Act in cases where it finds that the activity that is the subject of the order has occurred either without a required CDP or in violation of a previously granted CDP. The Commission can issue a Restoration Order under Section 30811 of the Coastal Act, if it finds that development 1) has occurred without a CDP, 2) is inconsistent with Chapter 3 of the Coastal Act, and 3) is causing continuing resource damage. These criteria are all met in this case, as summarized briefly, below.

As described in more detail in Section V.E of this staff report, the Subject Activities that have occurred on the Properties meet the definition of “development” set forth in Coastal Act Section 30106. Coastal Act Section 30600 states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a CDP. No such permit was issued by the Commission nor has a permit application been submitted for the Subject Activities. NBR contends that the 1973 Resolution of Exemption established that the Subject Activities were exempt from the permit requirement. The Commission agrees that the Resolution could have been more clearly drafted, and as a result, there potentially may be some ambiguity as to the precise contours of its scope. However, the Commission finds that at least some of the Subject Activities (such as the wells drilled as part of an entirely different approach from the one for which the vested right was requested by the Claimant in its application and affirmed by the Regional Commission; the construction of the steam generation plant on the site; and certainly the extensive mowing, which appears to have been divorced from any proximate connection to any wells; and potentially other wells and associated structures as well) were clearly outside the scope of the exemption. As such, the Commission has jurisdiction, and notwithstanding the acknowledgement by all Parties that a disagreement exists with regard to the interpretation of the Resolution, NBR agrees not to contest the legal and factual bases, the terms, or the issuance of the attached Settlement Agreement.

As discussed below, not only do the Subject Activities meet the definition of development, and therefore require but lack a CDP, but the Subject Activities and the ongoing persistence of the effects of the Subject Activities are also inconsistent with the Chapter 3 policies of the Coastal Act, including Sections 30230 (protection of marine resources), 30231 (biological productivity, water quality), 30233 (limit fill of wetlands), 30240 (avoid Environmentally Sensitive Habitat Areas), Section 30244 (protection of archaeological resources), Section 30251 (scenic and visual qualities), Section 30253 (minimization of adverse impacts), and policies within the City's LUP, as fully discussed below.<sup>4</sup>

The Subject Activities have adversely impacted coastal resources. Such impacts meet the definition of damage provided in Section 13190(b) of Title 14 of the California Code of Regulations (“CCR”), which defines “damage” as, “any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by the unpermitted development.” Materials have been placed in wetlands and sensitive habitats as a result of the Subject Activities

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<sup>4</sup> A description of the Chapter 3 policies of the Coastal Act and the City LUP policies that apply to the Properties is provided in Section V of this staff report.

and remain in place; thus, the effects of the Subject Activities persist and are thereby causing continuing resource damage, as defined by Section 13190 of the Commission's regulations. If the Subject Activities, including their effects, including but not limited to materials placed in habitat areas and areas cleared of native vegetation, are allowed to remain unmitigated, their effects will lead to further adverse impacts (including the temporal continuation of the existing impacts) to sensitive habitat. Thus, the continued presence of the Subject Activities, and the results thereof, on the Properties is causing continuing resource damage, as defined in 14 CCR Section 13190.

#### **IV. HEARING PROCEDURES**

The procedures for a hearing on a Cease and Desist Order and Restoration Order are outlined in 14 CCR Section 13185 and 14 CCR Section 13195, respectively.

For a Cease and Desist Order and Restoration Order hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding, including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which time staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in 14 CCR Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Settlement Agreement and Settlement Cease and Desist Order and Settlement Restoration Orders. Passage of the motions below will result in issuance of the Settlement Agreement and Settlement Cease and Desist Order and Settlement Restoration Order.

## V. FINDINGS FOR SETTLEMENT AGREEMENT<sup>5</sup>

### A. BACKGROUND OF THE PROPERTIES

#### Description of Properties

The Subject Activities, described in more detail below, occurred and the results of such activities persist on the Properties, which are collectively known as Banning Ranch. Banning Ranch consists of 505 acres located north/northeast of the Semeniuk Slough and West Coast Highway and east of the Santa Ana River. The Properties are partly developed with an operating oil field. Banning Ranch is located in an area without a certified Local Coastal Program in unincorporated Orange County, and therefore the Commission has sole Coastal Act permitting and enforcement jurisdiction in this area. The property is located within the City of Newport Beach's "sphere of influence"; thus, although Chapter 3 of the Coastal Act is the standard of review, the City Land Use Plan ("LUP") policies may be used for guidance in regards to development and enforcement matters. Section 2.2.4 of the Commission-certified LUP describes the habitats and topography of Banning Ranch as follows: "The property contains a number of sensitive habitat types, including southern coastal bluff scrub, alkali meadow, southern coastal saltmarsh, southern black willow forest, coastal brackish marsh, and vernal pools. The property also contains steep coastal bluffs along the southern and western edges of the mesa. The bluff faces have been eroded in some areas to form a number of gullies and ravines."

#### The Resolution

Although the proposed settlement addresses the site issues and resolves responsibilities for actions on the site, some background regarding the history is useful. The Subject Activities undertaken on the Properties include drilling and operation of new oil production and injection wells subsequent to the issuance of a Resolution of Exemption, issued in response to an Application for Exemption Under Vested Rights in 1973, and without any separate authorization from the Commission. Both the Coastal Act and the act's predecessor, Proposition 20 ("Coastal Initiative"), 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 CDP for that development. (Pub. Res. Code § 30608, under the Coastal Act; former Pub. Res. Code § 27404, under the Coastal Initiative). If a party wishes to rely on an alleged vested right as a basis for an exemption from the permit requirements of the Coastal Act, that party must file a claim and substantiate it in a proceeding before the Commission. (*Id.*, *Halaco Engineering Co. v. South Central Coast Regional Commission* (1986), 42 Cal.3d 52, 63; *LT-WR, L.L.C. v. California Coastal Comm'n* (2007) 152 Cal.App.4th 770, 785.)

In 1973 General Crude Oil and G.E. Kadane & Sons ("Claimants") applied to the South Coast Regional Coastal Zone Conservation Commission ("Regional Commission") for an exemption from permitting requirements, which was seeking an acknowledgment that Claimants had obtained a vested right to certain activities, on the basis that they were 1) ongoing as of enactment of the Coastal Initiative (Nov. 8, 1972) and the effective date of the permitting

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<sup>5</sup> These findings also hereby incorporate by reference the preface of this staff report ("STAFF REPORT: Recommendations and Findings for Consent Cease and Desist and Consent Restoration Orders") in which these findings appear, which section is entitled "Summary of Staff Recommendation."

requirement of the Coastal Initiative (Feb. 1, 1973), 2) activities for which the claimant had performed substantial work and incurred substantial liabilities, and 3) were diligently commenced in good faith reliance on authorizations pre-existing November 8, 1972. The Regional Commission reviewed the application, and issued the Resolution, which stated that the specific development described by the Resolution did not require a CDP provided that no substantial changes be made to that development.

The first eleven sections of the Resolution describe the development for which the claim of vested rights was sought by the Claimant and the information provided by the Claimant to support the claim. Section 12 of the Resolution is the portion of the Resolution that specifically identifies the development activities for which the Regional Commission determined that vested rights exist; Section 12 begins as follows: “*Claim of exemption No. E-7-27-73-144 is hereby granted as to the following development:*” The “following development” is listed in the Resolution as follows:

*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.*

Section 12 of the Resolution specifies that the Regional Commission’s determination of a vested right is limited to: (1) operation and maintenance of 312 existing wells and associated surface facilities; (2) drilling of 28 new oil producing wells specified in the application, and construction of associated surface facilities; (3) “drilling, redrilling, and repairs to” all of the above wells and the facilities associated with the new wells; and (4) abandonment of wells and removal of surface equipment and pipelines. The Resolution defines the “existing” wells that are exempted by the Resolution as “the 312 wells either drilled or in progress as of Nov. 8, 1972.” The 28 additional wells were identified in the Claimant’s “master plan”, which is the term the Claimant used in the application. The locations of the 28 additional wells are identified on maps submitted with the application for the Resolution.

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”).

Commission staff’s position has been that the Resolution is limited to activities associated with the specific 340 Exempt Wells (and associated facilities) identified in the Resolution. NBR’s position has been that the Resolution authorizes the drilling of any number of additional wells beyond the 340 Exempt Wells, provided that no more than 340 wells are in operation at any time. They point out that the recovery process used at the time required the drilling of additional wells. However, even if NBR is correct that the Resolution exempted the drilling of new wells as long as there were never more than 340 in existence at one time (and regardless of whether the 340 that existed at any time included the original 340), the original application indicated that the Claimants were requesting an exemption based on the recovery process in use at that time (and the Regional Commission’s action and deliberations reflected that), and that process has been wound down. Staff has confirmed that at least 153<sup>6</sup> wells in addition to the Exempt Wells were drilled by oilfield operators subsequent to the Resolution, without separate authorization from the Coastal Commission. Because Respondents dispute that the drilling of those wells exceeds the authorization in the Resolution, those additional wells are referred to herein simply as the “Additional Wells.”

#### **B. PERMIT AND ENFORCEMENT HISTORY FOR THE PROPERTIES AND SURROUNDING AREA**

Select permit and enforcement matters pertaining to the Subject Activities and/or Properties are described below.

##### *Coastal Development Permit No. E-85-001*

In 1985, WNOC applied for and obtained CDP No. E-85-001(**Exhibit 5**) to authorize 3 new exploratory wells on the Properties. 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 CDP for additional wells. The Commission noted that further drilling could have potential subsurface and surface impacts on coastal resources and found in relation to additional 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*

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<sup>6</sup> Information provided to staff catalogues the wells drilled on the properties through 2010. Any wells drilled since 2010 would also be considered Additional Wells.

*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 issuance of CDP No. E-85-001, WNOC wrote to staff to acknowledge and agree to Special Condition No. 2 of the CDP. In its April 4, 1986 letter, WNOC 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.”

*CDP No. 5-86-588*

Also in 1986, the Coastal Commission approved CDP No. 5-86-588, which authorized WNOC 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 WNOC. In approving removal of the wetland fill, 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.”

*Consent Cease and Desist and Restoration Orders No. CCC-11-CD-03 and CCC-11-RO-02*

In 2011, the Commission issued Consent Cease and Desist Order No. CCC-11-CD-03 and Consent Restoration Order No. CCC-11-RO-02, addressing unpermitted removal of major vegetation (including vegetation comprising native plant communities and habitat for the federally threatened coastal California gnatcatcher – a bird species) and the results thereof; the unpermitted placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading, in violation of the Coastal Act.

The unpermitted development that was the subject of the above-noted consent orders commenced in 2004 and continued regularly into 2006. It was performed by a contractor undertaking a utility undergrounding in nearby locations off the Properties, utilizing and impacting portions of these Properties.

Pursuant to the terms of the Consent Orders, NBR, the contractor, and the utility agreed to, among other things: 1) remove all unpermitted materials associated with the utility project; 2) restore impacted areas on the Properties by planting coastal sage scrub vegetation native to Orange County that will provide foraging and breeding habitat for the coastal California gnatcatcher; 3) conduct a mitigation project involving revegetation of no less than 2.5 acres with native coastal sage scrub plant species that will provide foraging and breeding habitat for the coastal California gnatcatcher; 4) cease and desist from conducting any further unpermitted



development on the Properties, and 5) resolve their civil liabilities under the Coastal Act for that violation.<sup>7</sup>

*Application for CDP No. 5-13-032*

NBR has submitted an application for a coastal development permit to authorize construction of a mixed use residential project on portions of the Properties. The project work would include grading; clearance of major vegetation; bluff stabilization; fill of wetlands; subdivision of the land; and construction of 1,375 residential units, 75,000 square feet of commercial space, a 75-unit resort inn, and 52 acres of parks. This enforcement action is intended in part to resolve NBR's liability for alleged unpermitted development on the Properties to provide clarity for future permitting actions, in part by providing for active restoration of certain impacted areas and passive restoration of the remainder of the impacted areas through the cessation of activities that disturbed these areas, thus allowing for an accurate analysis of the resources on site, and in part by clarifying that the potential liability for alleged violations has been addressed.

NBR has agreed, by signing this Settlement Agreement, that it shall not use the restoration or mitigation projects described in the Settlement Agreement for the purpose of generating mitigation or restoration credits to satisfy any State or Coastal Commission requirement for restoration or mitigation.

**C. DESCRIPTION OF THE SUBJECT ACTIVITIES**

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 described below has occurred on the Properties without any CDP.

**Disputed Wells and Associated Structures**

The Subject Activities include drilling and operation of new wells subsequent to the issuance of Resolution without authorization from the Commission. Although the Resolution identifies 340 specific wells to which it applies, additional wells ("Additional Wells") were drilled subsequent to the Resolution without further authorization from the Commission. As noted above, Respondents assert that the drilling of those wells was covered by the original Resolution. They contend that the Resolution authorizes the drilling of additional wells, provided that the total number of wells in operation at any one time does not exceed 340.

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

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<sup>7</sup> NBR and the other parties are currently in compliance with the requirements of these prior Consent Orders.

these activities occurred in conjunction with the approximately 153 Additional Wells, the legal status of these activities would be derivative of the status of the wells themselves.

Currently, at least 49 Additional Wells remain active or idled on the Properties, in addition to approximately 40 of the wells that were initially included in the 340 Exempt Wells. Pursuant to this Settlement Agreement, 17 of the Additional Wells will be removed and NBR will remove or apply to retain the 24 remaining Additional Wells that are located outside the Oil Remainder Areas (See **Exhibit 6**). The surface rights of the property are owned jointly by Aera Energy LLC and Cherokee Newport, LLC. According to documents provided to staff by the property owners, Aera Energy purchased their 50% share of the property in 1997 and Cherokee Newport purchased their half in 2005. Liability for Coastal Act violations attaches to the entity that undertook the unpermitted development as well as the owner of the property, and as noted above, enforcement action against the current operator of the oilfield on the Properties, WNOC, is under evaluation. Liability additionally attaches to whosoever owns the property upon which a Coastal Act violation persists. In addition, pursuant to Coastal Act Section 30811, for example, even if the allegedly unpermitted development was undertaken by another party, the Commission may order NBR to restore the property because development occurred without a coastal development.

#### **Additional Oilfield Activities**

In addition to the drilling of the Additional Wells, a number of other activities have occurred on the site subsequent to issuance of the Resolution that appear to exceed the scope of the Resolution. In addition to authorizing the operation and maintenance of the wells existing at the time of the Resolution; and the “drilling, redrilling, and repairs to” all of the authorized wells, the Resolution covers (1) operation and maintenance of surface facilities associated with the existing wells and construction of and repairs to facilities associated with the new Exempt Wells. However, the Resolution does not state that the expansion of existing facilities or the creation of new facilities in addition to those associated with the Exempt Wells is exempt.

In its application for CDP No. 5-13-032, NBR details changes in the oil recovery strategy that have occurred on the site over time subsequent to issuance of the Resolution, which have resulted in installation or expansion of existing structures on the site, grading, placement of materials and/or removal of major vegetation. As noted above, NBR believes that the wells exempted by the Resolution are not limited to the 340 Exempt Wells, and thus, by extension the exemption for new facilities is not limited to facilities associated with the 340 Exempt Wells, but would in fact cover these additional oilfield activities, which 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 volume, its importance to coastal habitats, the presence of sensitive species, or, in the case of rare or endangered vegetation, its limited distribution.

In November 2011, during the process of commenting on the DEIR for the Newport Banning Ranch project, staff reviewed site biological information associated with the CEQA process. Staff also subsequently received and reviewed additional biological information submitted in conjunction Coastal Development Permit application No. 5-13-032. It was evident from this newly submitted information that the site supported a diversity of habitats and sensitive species. The CEQA and CDP application materials demonstrated that 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, and Loggerhead Shrike.

The planning documents and biological surveys of the site describe the vegetation on site and 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 Commission, this activity is problematic from a resource protection perspective, particularly in areas that contain sensitive habitats or are adjacent to such habitats.

NBR has contended that the mowing constituted necessary “maintenance” of the authorized oil facilities. The Commission 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 unpermitted development. Fuel modification has also occurred around Additional Wells, and to the extent those wells were themselves installed in without the necessary authorization under the Coastal Act, the associated vegetation clearance would be unpermitted development as well.

Although the precise scope of the exemption recognized by the Resolution may be ambiguous in some respects, the Commission finds that at least some of the activities described in the

“Additional Wells and Associated Structures,” “Additional 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. NBR has agreed to fully resolve its liability for the Subject Activities, despite disagreeing with staff’s position that Subject Activities constitute violations of the Coastal Act, by undertaking the actions outlined in the attached Settlement Agreement.<sup>8</sup>

#### **D. SETTLEMENT DISCUSSIONS**

In May 2012, Commission staff received reports that vegetation removal in the form of mowing was occurring on the site. Through comparative analysis of historic aerial photographs, and subsequent investigation, Staff confirmed the extent of the mowing that had occurred in past years and confirmed, based upon a review of the biological information available to Staff, that the mowing had resulted in the removal of major vegetation. On May 18, Staff contacted WNOC by telephone and confirmed that mowing was underway on site. Staff expressed their concerns with the mowing and followed up this telephone conversation with a letter, also dated May 18 that stated Staff had confirmed removal of major vegetation had occurred on the Properties, that such removal of vegetation constituted development under the Coastal Act, and that any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit.

The May 18 letter explained that the protections provided by the Coastal Act for “major vegetation,” as that term is used in the Coastal Act, extend to many different vegetative communities. The letter further described some general categories of vegetation that had been impacted on the site by the subject mowing as follows: “

*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.*

The May 18 letter confirmed that WNOC had agreed verbally to stop mowing the site and requested that WNOC contact Staff to discuss resolution of the violation.

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<sup>8</sup> Both NBR and WNOC also contend that, even if there were violation(s) of the Coastal Act, which they dispute, any such violation was not knowing or intentional, whether for purposes of PRC sections 30820(b) or 30822 or otherwise. Whether any party acted knowingly or intentionally is not at issue in the present matter, as neither knowledge nor intent is a necessary criterion for issuance of the proposed orders (see Section V.E.1, below). Accordingly, Commission staff has made no showing regarding knowing or intentional misconduct, and the Commission takes no position on the issue. Nothing in the Commission’s current action or the record for this action should be treated as being probative of whether NBR or WNOC acted knowingly or intentionally.

Over the next few months, Staff, WNOC, and NBR corresponded regarding any proposed future mowing on the site, met in person and discussed the issue by telephone. On August 30, WNOC wrote to Staff explaining its interpretation of the Resolution and how that interpretation would treat the mowing activities as having been authorized by the Resolution, as well as arguing that the practice was “necessary for many reasons, including the protection of both the oil operations and adjacent properties.” Staff responded by writing to WNOC on September 5, 2012, explaining that the extent of the mowing went beyond what Staff considered to be necessary or justified as part of a reasonable nuisance abatement or maintenance program. Staff also explained that the Resolution made no mention of vegetation removal or “fuel abatement.” In an attempt to reach a resolution, Staff proposed a fuel modification approach that was far more limited in extent than the mowing WNOC had undertaken previously. Staff said that this limited approach would be sufficient to address fire safety concerns and avoid impacts to coastal resources to the maximum extent possible. Staff confirmed that the following fuel modification measures would be appropriate until such time as a comprehensive fuel modification program could be developed with the Orange County Fire Authority:

“In order both to provide for fire safety and to maximize protection of the sensitive ecological resources on site, we support immediate measures to reduce vegetation within previously modified areas that are: 1) within 25’ of any active oil well; 2) within the minimum distance necessary to provide physical access to any active, above ground pipeline; or 3) within 100’ of any home (pursuant to the OCFA Vegetation Management Guidelines.”

WNOC confirmed by letter dated September 27, 2012 (**Exhibit 11**), that, although it took a different position with regard to the legality of the mowing, it was agreeing to temporarily limit the extent of fuel modification on the site. NBR and WNOC have represented to staff that this approach has been implemented since 2012. Staff has received no indication that this limited approach is inconsistent with OCFA’s fuel modification regulations.

On February 1<sup>st</sup>, 2013, Staff received an application for a proposed project on the Properties that includes grading; clearance of major vegetation; bluff stabilization; fill of wetlands; subdivision of the land; and construction of 1,375 residential units, 75,000 square feet of commercial space, a 75-unit resort inn, and 52 acres of parks. After reviewing application submittals, Staff raised the issue of the number of wells in a letter to NBR March 1, 2013, noting that Staff had reviewed the Resolution and interpreted it to cover just the 340 Exempt Wells, defined above. Staff thus came to the realization that the disagreement with the Parties regarding the interpretation of the Resolution was not limited to the extent of vegetation removal covered by the Resolution, but also the number of wells exempted by the Resolution, as further discussed in Section V.A. In a follow-up letter dated August 7, 2013, staff explained that drilling of wells in addition to those exempted by the Resolution constituted unpermitted development.

Staff met with WNOC on November 7, 2013 and conveyed to WNOC staff’s position that wells had been drilled on the property in addition to those wells exempted by the Resolution. Staff also conveyed to WNOC an interest in working with them to reach a consensual resolution of this matter.

Staff followed up that meeting and its previous correspondence and communications with WNOC and NBR with a letter dated January 31, 2014 (**Exhibit 7**), which described in detail Staff's position related to the Subject Activities. The letter informed the parties that the Subject Activities constitute "development" as defined in Section 30106 of the Coastal Act, and therefore require a coastal development permit. The letter states further that because no permit has been obtained, the actions constitute unpermitted development, and that for that reason, the Properties have been developed in violation of the Coastal Act. Staff expressed its preference to work with the parties to resolve this matter consensually. Specifically, Staff wrote:

*We would like to work with both NBR LLC 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.*

To that end, subsequent to that January 31<sup>st</sup> letter, Staff met with WNOC and NBR on March 7, 2014, to discuss an amicable resolution of this matter and the consent order process. An exchange of communications<sup>9</sup> followed over the subsequent few months in which WNOC continued to focus on their view of the Resolution, but did offer to apply for coastal development permits for future activities. In a letter dated August 8, 2014, the Commission's Executive Director indicated that Staff was "targeting the October Commission meeting in the City of Newport Beach for scheduling the hearing on the enforcement matter."

On August 12, during the period that NBR was engaged in discussions with the Commission staff, WNOC filed suit against the Commission, seeking declaratory relief to affirm its interpretation of the Resolution and confirm that "[a]ll wells and other development within the Oil Field occurring since 1973 for which a [CDP] has not been sought have been developed in a manner consistent with the vested rights . . . and the Resolution." This litigation is active and pending.

In order to move the discussions Staff had had with the Parties toward a final resolution of the alleged violation, on August 19, 2014, the Executive Director notified NBR and WNOC of his intent to commence proceedings for issuance of Cease and Desist and Restoration Orders to address the Subject Activities. The Notice of Intent letter ("NOI") (**Exhibit 8**) further set forth a suggested framework to legally resolve the violation via "consent orders".

In the NOI, Staff reiterated a strong desire to resolve this matter through a negotiated agreement with both NBR and WNOC. The clear purpose of sending the NOI to the parties was to engage both parties in a mutually acceptable resolution of this matter. As explained in the NOI:

*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*

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<sup>9</sup> For examples of the discussions of these issues, see letters from NBR and WNOC attached as **Exhibits 12 and 13**.

*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.*

The NOI concluded by repeating Staff's preferred resolution of this matter:

***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.*

In accordance with 14 CCR Sections 13181 and 13191, the letter was accompanied by a Statement of Defense ("SOD") form, and established a deadline for its completion and return. Thus, the parties were provided the opportunity to respond to the allegations contained within the Notice of Intent letter, to raise any affirmative defenses that they believed may exonerate them of legal liability for the alleged violations, or to raise other facts that might mitigate their responsibility.

Finally, through the NOI, Staff pointed out to both NBR and WNOC that should they settle the matter, the parties would not need to expend time and resources filing an objection to the assertions made in the NOI in the form of a Statement of Defense.

NBR requested and was granted extensions to the deadlines for submitting a completed Statement of Defense form, and Staff continued discussions with NBR for the purpose of reaching a comprehensive resolution of this matter.

In subsequent meetings and telephone conversations, NBR expressed their interest in agreeing to consent orders that would comprehensively resolve this matter and working towards settlement rather than submitting a SOD. Although they ultimately submitted a SOD during the period of discussions with the Commission staff, after reaching a proposed settlement with the Commission, NBR agreed to withdraw that SOD for purpose of this administrative process. Thus, it does not currently constitute part of the record for these consent proceedings. Staff and NBR have worked collaboratively towards an amicable resolution of the Subject Activities. NBR signed this Settlement Agreement on February 20, 2015. In order to amicably resolve the violations through this Settlement Agreement, NBR agrees not to contest the legal and factual bases for, the terms of, or the issuance of this Settlement Agreement, or to contest issuance of these Consent Orders. Specifically, NBR agrees not to contest the issuance or enforceability of these Consent Orders at a public hearing or any other proceeding, and, along with Staff, supports issuance of these Consent Orders to resolve the matters addressed therein.

## **E. BASIS FOR ISSUANCE OF ORDERS**

The following sections provide the bases for the proposed enforcement actions. The Properties are in an area without a certified Local Coastal Program in unincorporated Orange County, and therefore the Commission has sole Coastal Act permitting and enforcement jurisdiction in this area. However, the property is located within the City of Newport Beach's "sphere of influence," and the City of Newport Beach does have a certified LUP; thus, although Chapter 3 of the Coastal Act is the standard of review, the City's LUP policies provide guidance in regards to development and enforcement matters, and thus, that document is also considered for the purposes of guidance, and relevant portions of the LUP are discussed herein as appropriate.

### **1) STATUTORY PROVISIONS**

#### **(a) Consent Cease and Desist Orders**

The statutory authority for issuance of Cease and Desist Orders is provided in Section 30810 of the Coastal Act, which states, in relevant part:

*(a) 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.*

*(b) The cease and desist order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material...*

#### **(b) Restoration Orders**

The statutory authority for issuance of Restoration Orders is provided in Section 30811 of the Coastal Act, which states, in relevant part:

*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 [a] the development has occurred without a coastal development permit from the commission, local government, or port governing body, [b] the development is inconsistent with this division, and [c] the development is causing continuing resource damage.*

### **2) FACTUAL SUPPORT FOR STATUTORY ELEMENTS**

The following pages set forth the bases for the issuance of the proposed Settlement Agreement and Settlement Cease and Desist and Settlement Restoration Orders by providing substantial evidence that the Subject Activities meet all of the required grounds listed in Coastal Act Sections 30810 and 30811, and as quoted above, for the Commission to issue Settlement Cease and Desist Order and Settlement Restoration Orders.



(a) Development has occurred without a Coastal Development Permit that was Required

Development, as described in Section V.C, above, has occurred on the Properties without a CDP (i.e. the Subject Activities). Section 30600(a) of the Coastal Act states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a coastal development permit. 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 Subject Activities described herein clearly constitute “development” within the meaning of the definition in Coastal Act, and no coastal development permit has been issued to authorize those activities. NBR does not contest those facts. The issue in dispute in this case is whether such a permit was required. Although the activities clearly fall within the scope of section 30600(a)’s requirement, there are exceptions for various types of development that the Coastal Act designates as exempt. As discussed above, NBR contends that the Subject Activities were all within the scope of work that the Resolution declared to be exempt, based on a vested rights theory.

However, as also noted above, in section V.A, many of the Subject Activities appear to be outside the scope of activities that the Resolution declared to be exempt. Moreover, although there may be some ambiguity about the precise scope of activities covered by the Resolution, some of the Subject Activities are *clearly* outside its scope. The clearest examples of this are: (1) wells that were drilled as part of an entirely different approach from the one for which the vested right was affirmed; (2) mowing that occurred in a location indicating that it was not associated with *any* wells, as well as mowing associated with any wells that were outside the scope of the Resolution; and (3) significant expansions of facilities and creations of new facilities to conduct new types of operations, distinct from that which the Resolution found to be exempt.<sup>10</sup> Thus, even if the Resolution were interpreted to allow the drilling of some additional wells, beyond the 340 Exempt Wells, it appears that development, including the three types listed immediately above, has occurred that was beyond the scope of the exemption recognized by the Resolution.

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<sup>10</sup> By highlighting these as the clearest examples, the Commission does not waive its position that other elements of the Subject Activities may also have been outside the scope of the Resolution. However, as is explained below, because the parties have come to agreement on a resolution of this dispute, the Commission finds that it is unnecessary to interpret the Resolution and determine its precise contours, which would only highlight the dispute that it is, by this action, seeking to resolve.

A vested rights exemption issued pursuant to Coastal Initiative Section 27404 (the precursor for what became Section 30608 of the Coastal Act) enables one who (1) obtains all valid governmental approvals for development, (2) diligently commences development in reliance thereon, and (3) 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 in a way that would restrict or prohibit such development if it were proposed anew. A vested right does not allow any other new development to be completed without compliance with existing permitting requirements and other laws. Similarly, both section 27404 and 30608 expressly state that “no substantial change[s] be made in any such development,” except as authorized under those laws.

In addition, under settled vested rights law, courts have held that if there are any doubts regarding the meaning or extent of the Resolution, they should be resolved against the person seeking the exemption. *Cf. Urban Renewal Agency v. California Coastal Zone Conservation Commission* (1975), 15 Cal.3d 577, 588.

Commission staff, WNOC, and NBR have debated the meaning of the Resolution at its margins for some years now. This Commission cannot revisit the 1973 decision of its predecessor agency, but it can rely on the record of the Regional Commission’s action, case law regarding vested rights, and any other probative evidence to interpret any ambiguous provisions of that decision (subject, of course, to judicial review, as are all of this Commission’s decisions). However, in this case, the Commission need not complete a comprehensive analysis of this sort. The parties have come to agreement on a means to move forward that will alleviate the need for this Commission to resolve the precise contours of the Resolution and, thereby, potentially avoid costly and time-consuming litigation. For the reasons indicated above, it appears that, although some of the Subject Activities fall within the Resolution, at least some of the Subject Activities (including those listed above) exceeded the scope of activities that the Resolution could reasonably be interpreted as having found to be exempt. Given this finding, the key criterion in section 30810 and the first element of section 30811 have been satisfied, and this Commission has jurisdiction to issue a Cease and Desist Order. Given that the terms of the proposed orders are acceptable to the parties and, as indicated below, consistent with the sections of the Coastal Act authorizing such orders, and that the orders specify what activities will require further Commission authorization going forward, an exact determination as to which historical activities exceeded the scope of the Resolution and which did not is unnecessary.

(b) The Subject Activities are Inconsistent with a Previously Issue CDP

Additionally, components of the Subject Activities undertaken on the Properties, namely drilling of new wells and placement of associated structures, are in violation of a permit previously issued by the Commission. This development violated Special Condition No. 2 of CDP No. E-85-001. Special Condition No. 2 required a new CDP for any future oil production. In this case, no new CDP was sought or obtained for said development, in non-compliance with Special Condition 2. It has been NBR’s position that Special Condition No.2 requires a new CDP only for wells drilled to a deeper horizon than was tapped by the Exempt Wells. As noted above, the special condition was silent with regard to the depth of the wells that would require a new CDP,

suggesting that any new wells would be subject to that requirement. Despite the expansiveness of the condition on its face, the condition was adopted as quoted above, and the applicant for CDP No. E-85-001, WNOC, did not object to its inclusion in the CDP or its wording. Thus, the Commission finds that the alternative basis for issuance of a cease and desist order in section 30810 is also satisfied here.

(c) The Subject Activities are Inconsistent with the Coastal Act

The second criterion for issuance of a restoration order, pursuant to section 30811, is that the development at issue be inconsistent with the Coastal Act. As described below, the Subject Activities, collectively, are inconsistent with multiple resource protection policies of the Coastal Act, including, but not necessarily limited to, the policies set forth in Sections: 30230 (protection of marine resources), 30231 (protection of biological productivity and water quality), 30233 (limiting fill of wetlands), 30240 (protection of environmentally sensitive habitat areas, or “ESHA”), 30244 (protection of archaeological and paleontological resources), and 30253 (minimization of adverse impacts). Furthermore, the Subject Activities are also inconsistent with similar resource protection policies of the City’s LCP as fully described below.

i. 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 30121 of the Coastal Act states:

*“Wetland” means lands within the coastal zone which may be covered periodically or permanently with shallow water and include saltwater marshes, freshwater marshes, pen or closed brackish water marshes, swamps, mudflats, and fens.*

The Commission has further specified how wetlands are to be identified through regulations and guidance documents. Section 13577(b)(1) of the Commission’s regulations states, in pertinent part:

*Wetlands shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes . . . . For purposes of this section, the upland limit of a wetland shall be defined as:*

- (A) the boundary between land with predominantly hydrophytic cover and land with predominantly mesophytic or xerophytic cover;*
- (B) the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or*
- (C) in the case of wetlands without vegetation or soils, . . .*

Section 30233(a) of the Coastal Act states the limited purposes for which wetlands may be filled (“allowable uses”) and imposes other restrictions on uses of wetlands as well, as follows:

*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.*

Section 30108.2 of the Coastal Act defines “Fill” as:

*"Fill" means earth or any other substance or material, including pilings placed for the purposes of erecting structures thereon, placed in a submerged area.*

The Commission’s staff ecologist, Dr. Jonna Engel, evaluated the Properties and confirmed that some of the areas impacted by the Subject Activities contained wetlands, as that term is defined by Section 30121 of the Coastal Act and the Commission’s regulations, prior to the impacts of the Subject Activities. The Commission concurs with Dr. Engel’s conclusion that at least some of the areas impacted by those Subject Activities that were clearly unauthorized constituted wetlands. The Coastal Commission’s regulations regarding wetlands establish a “one parameter definition,” meaning that they only require evidence of a single parameter to designate an area as a wetland conditions. *See, also, Kirkorowicz v. California Coastal Comm’n* (2000) 83 Cal.App.4<sup>th</sup> 980, 990. Dr. Engel found that at least one parameter is present within certain areas impacted by the Subject Activities. (see memorandum from Jonna D. Engel, PH.D, Commission staff ecologist (**Exhibit 9**)).

The wetlands on site are contiguous with, and part of, a much larger wetland complex at the mouth of the Santa Ana River. The Commission-certified City LUP describes this wetland complex, also referred to as the Semeniuk Slough area, as follows:

*Semeniuk Slough is a remnant channel of the Santa Ana River from the time when the river emptied into Newport Bay; it forms a loop around the Newport Shores residential area in West Newport. The 103-acre Semeniuk Slough Environmental Study Area (ESA) includes the main slough channel immediately north of Newport Shores and the coastal salt marsh habitat to the north, including a narrow sliver of salt marsh habitat in the far north of the ESA, flanked by the Santa Ana River on the west and Banning Ranch on the east. Several smaller interconnected channels and inundated depressions are located throughout the salt marsh habitat.*

*Semeniuk Slough is exposed to limited tidal influence through a tidal culvert connected between the Santa Ana River and the slough. The site contains a healthy stand of sensitive coastal saltwater marsh habitat. The state endangered Belding's savannah sparrow (*Passerculus sandwichensis beldingi*) breeds in nearby wetland habitats including Upper Newport Bay and salt marsh in Huntington Beach but not in Semeniuk Slough. However, small numbers of Belding's savannah sparrows forage in Semeniuk Slough, especially during the winter when breeding birds disperse. A Belding's savannah sparrow was observed within the Semeniuk Slough site on July 10, 2002. The state and federal endangered California least tern (*Sterna albifrons browni*), which has a large nesting colony on the Huntington Beach side of the Santa Ana River mouth, forages occasionally in the slough channels. Western snowy plovers (federal threatened) are observed occasionally in Semeniuk Slough. The California brackish water snail (*Tryonia imitator*), a Federal Species of Concern, has been collected in substantial numbers in the channels of Semeniuk Slough.*

In previous actions, in addition to its actions to certify the LUP, the Commission has found that wetlands exist on former portions of the Properties and that these wetlands are a component of a larger wetland system on adjacent properties. In 1986, the Coastal Commission approved CDP No. 5-86-588, which authorized WNOC 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 WNOC. In approving the CDP, the Commission found that the site, which was, at that time, part of the Properties at issue in these matters, "is part of approximately 200 acres of coastal salt marsh wetlands identified on the USFWS National Wetland Inventory Maps."

In its approval of CDP No. 5-86-588, the Commission recognized that fill of wetlands must be limited to the types of development 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."

The Subject Activities include placement of structures and materials within and adjacent to wetlands. Section 30233 of the Coastal Act allows for development of wetlands only under narrow criteria. In this case, of course, there was no coastal development permit sought or obtained for the development activities at issue. However, even if a coastal development permit from the Coastal Commission had been sought, the Subject Activities that resulted in wetland fill would unlikely be found to be the least environmentally damaging feasible alternative for such

development, and, in those instances where the filled wetland also qualifies as ESHA, certainly would not be considered a resource dependent use, and thus, as described below, would be inconsistent with Section 30240.

## ii. Water Quality and Biological Productivity of Coastal Waters

Certain Subject Activities are inconsistent with Coastal Act Sections 30230 and 30231, which require protection of marine resources and biological productivity and water quality of coastal waters, including from the effects of erosion and run-off.

### Quality of Coastal Waters

Fill placed in and adjacent to wetlands on the Properties inevitably diminishes the water quality of the wetlands by increasing turbidity. Increased sedimentation and turbidity diminish the water quality of wetlands, and as noted above, the function and biological productivity of the wetland, by reducing water clarity, increasing water temperature, and smothering wetland vegetation.

### Biological Productivity of Coastal Waters

Section 30230 of the Coastal Act states:

*Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Section 30231 of the Coastal Act states:

*The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

The Subject Activities performed here involved extensive vegetation removal, exposing bare soil, and thereby increasing the likelihood of erosion; placement and operation of mechanized equipment that can leak fuel or other harmful substances; grading; and importation of construction materials, including dirt and other materials.

The vegetation that existed on the Properties prior to the Subject Activities helped to stabilize the soil, limit runoff and erosion, and facilitated infiltration. The removal of that vegetation can expose the site and surrounding properties and water bodies to the effects of unregulated runoff.

Unmanaged runoff across exposed dirt areas can increase the level of sediment entering water bodies, consequently also increasing the turbidity of receiving waters, which reduces the penetration of sunlight needed by aquatic vegetation that provides food and cover for aquatic species and disrupts the reproductive cycles of aquatic species, leading to adverse changes in reproduction and feeding behavior. These impacts reduce the biological productivity and the quality of coastal waters and reduce optimum populations of marine organisms. Similarly, sediment-laden stormwater runoff can increase sedimentation in coastal waters. Sedimentation of coastal waters impacts fish populations in part by burying aquatic vegetation that provides food and cover for aquatic species.

As discussed above, the Subject Activities also included fill of wetlands. Any fill or alteration of wetland hydrology reduces a wetland's ability to function, and consequently, its biological productivity. Water is the main requirement for a functional wetland. If water is drained, displaced or removed, or isn't present in the wetland for as long, then wetland function will be degraded. Therefore, wetland function would be degraded by actions that disrupt water supply through direct fill of a wetland. Degradation of function will preclude the wetland plants that grow in a functional wetland from growing and thriving and thus the degraded wetland will not provide the same habitat functions, water filtration, percolation, and stormwater runoff storage function. The Subject Activities at issue that resulted in fill of wetlands disrupted water supply through direct fill from grading and placement of dirt and other materials. Consequently, the Subject Activities degraded the function of wetlands on the Properties.

In summary, the Subject Activities have significantly impeded the water quality, functioning, and biological productivity of wetlands and other coastal waters on and off the Properties, in part due to removal of native vegetation that provides habitat to wildlife, which in turn will affect adjacent wetlands and wetland habitat. Further, the interim loss of habitat value and wetland hydrology will have a significant impact that will continue to be experienced until the impacts of the Subject Activities are remedied. Due to its deleterious effect on wetland habitat and function on and off the Properties, the Subject Activities do not maintain, much less restore, the biological productivity and water quality of wetlands necessary to maintain the optimum populations of marine organisms and is not compatible with the continuance of the wetlands and wetland habitat located on and off the Properties.

For these reasons, the Subject Activities are inconsistent with Coastal Act Sections 30230 and 30231.

### iii. Environmentally Sensitive Habitat Areas

Certain Subject Activities are inconsistent with Coastal Act Section 30240, which requires protection of all ESHA within the Coastal Zone subject to the Coastal Act. Environmentally sensitive habitat areas are 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.*

Commission Ecologist Dr. Jonna Engel conducted a site-specific analysis to assess the likely status, prior to the Subject Activities, of the biological resources in areas impacted by the Subject Activities that remain disturbed as a result of those activities (hereinafter, “Impacted Areas”). The results of Dr. Engel’s assessment are included in a memo to staff, dated (**Exhibit 9**). According to the memo, some of the vegetative communities immediately adjacent to the Impacted Areas on the Properties consist of various native plant communities and wildlife habitats that the Commission has consistently treated as ESHA. Utilizing vegetative surveys conducted by private biological consultants, including NBR’s biological consultants, in addition to historic aerial and present-day ground-level photographs, Dr. Engel determined that several of the areas impacted by the Subject Activities contained or were immediately adjacent to coastal scrub and/or grassland habitat prior to the development at issue, and those areas therefore met the definition of ESHA under the Coastal Act or were adjacent to areas that met that definition at the time they were affected by the Subject Activities. These areas met the definition of ESHA because they were 1) rare, primarily from habitat loss due to development, and/or 2) provided especially valuable ecosystem services for rare species (e.g. coastal California gnatcatcher, coastal cactus wren, burrowing owl), and 3) were easily degraded and disturbed by human activities and development.

The Commission concurs with Dr. Engel’s general conclusion that at least some of the areas that were affected by those of the Subject Activities that were clearly unauthorized constituted ESHA.

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 Subject Activities at issue, including mowing, grading, and placement of structures and materials, resulted in the disturbance of vegetation in areas of the Properties that constitute ESHA and/or are adjacent to ESHA. In a letter dated October 9, 2014 (**Exhibit 10**) that was sent to NBR LLC and WNOC, as well as Staff, USFWS described the effects of the mowing that has occurred on the Properties. USFWS noted that “Regular disturbance to vegetation from mowing has also increased the extent of invasive and ornamental vegetation and decreased available foraging habitat for the [coastal California] gnatcatcher.” Because the subject development significantly disrupted areas of ESHA on the Properties and was not dependent on the resource (since the development did not have to occur in sensitive habitat to be effective), the subject development was inconsistent with Section 30240 and of the Coastal Act, and this element of section 30811 has been met.

Moreover, the maintenance of elements of the Subject Activities, and results thereof, including drill pads, roads and areas cleared of vegetation, has prevented the recovery of native vegetation



in impacted areas on the Properties. The persistence of the disturbance on the site has degraded the habitat in the areas impacted by the Subject Activities, which may also affect adjacent ESHA, in a way that is not compatible with the continuance of these habitats, in violation of Section 30240(b). Therefore, certain Subject Activities are inconsistent with Section 30240 of the Coastal Act.

In addition, as noted above, the habitat that a functioning wetland provides is a significant coastal resource due in part to the high biological productivity of wetland habitat and the rarity of this habitat and the sensitive species it supports. One of the chief components of wetland habitat is wetland vegetation. Thus, removal of wetland plant species reduces the habitat value of a wetland. Wetland vegetation species native to southern California wetlands were among the vegetation removed here, without a permit and subsequently in violation of the Coastal Act. Also, degradation of function through alteration of wetland hydrology means that the same plants may not grow and habitat value and wildlife use of the wetland could be reduced.

The wetlands on the Properties, which are part of a wetland complex on the surrounding properties, have been historically degraded and fragmented as a result of development in the area. Impacts to wetlands, including those on the Properties, can fragment the wetland complex, causing more extensive damage to the whole complex and the flora and fauna it supports, thus impacting adjacent ESHA and the biological productivity of adjacent wetlands, which is inconsistent with Coastal Act Sections 30240(b).

#### iv. Scenic Public Views and Visual Qualities of Coastal Areas

The Subject Activities are inconsistent with Section 30251 of the Coastal Act, which requires that the scenic and visual qualities of the coast be protected and any permitted development be visually compatible with the surrounding area. Section 30251 of the Coastal Act states:

*The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas...*

At more than 500 acres, Banning Ranch is a large enough area that it creates its own character, rather than being part of a larger area whose character is defined by a mix of open spaces such as the adjacent Semeniuk Slough and the surrounding, urbanized areas. As such, the visual and scenic resources that must be protected in this area include views to and across the few remaining coastal areas that are undeveloped with residences and buildings in heavily urbanized northern Orange County. The Subject Activities at issue were neither sited nor designed to protect views of this coastal area. Instead, the actions degraded a fundamental and defining component of the coastal area's character – the native vegetation - and resulted in the placement of numerous structures and materials on undeveloped land.

Rather than seeking to ensure the Subject Activities were visually compatible with the surrounding area, which consists of native coastal sage scrub, the impacted areas were either

mowed of vegetation or cleared to bare earth and materials or equipment were placed within the bare area. The resulting barren patches of earth, equipment and materials contrast sharply with the scenic and visual character of the undeveloped land. The Subject Activities failed to protect, enhance, or ensure compatibility with the visual quality of the area. Therefore, the Subject Activities are inconsistent with Section 30251 of the Coastal Act.

v. Minimization of Adverse Impacts/Avoiding Alteration of Natural Land Forms

Much of the Subject Activities is inconsistent with Section 30253(b) of the Coastal Act, which requires new development to minimize erosion and associated impacts to the site. Section 30253(b) states:

*New development shall... (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area . . . .*

The Subject Activities removed vegetation from the Properties, including on slopes and above slopes, resulting in barren patches of earth. Vegetation provides soil stabilization by intercepting water before it hits the ground, slowing the water's flow across the ground's surface, and reducing overall surface runoff by facilitation infiltration.

Removal of vegetation increases the risk of erosion. The unpermitted clearing of vegetation from and above slopes on the Properties has eliminated an important natural stabilization mechanism, leaving the Properties exposed and vulnerable to erosion. Furthermore, clearing the impacted areas of the Properties to bare earth without adequate erosion control measures has contributed to wind and water-related erosion across the subject properties. The Subject Activities have created and contributed significantly to erosion. For this reason, the unpermitted activities are inconsistent with Section 30253(b) of the Coastal Act.

For these reasons, the Subject Activities are inconsistent with Coastal Act Sections 30230, 30231, 30240 and 30253(b) of the Coastal Act, satisfying the second criterion for issuance of a Restoration Order. Mitigation is necessary in this case, due to the fact even with proper restoration of the wetlands and habitat on site, the interim loss of ecosystem value and water quality functioning will have a significant impact that will be experienced into the future.

(d) Subject Activities are Causing Continuing Resource Damage

The final factor in section 30811 is that the development at issue be causing continuing resource damage. The phrase "continuing resource damage" is defined in 14 CCR Section 13190. 14 CCR Section 13190(a) defines the term "resource" as it is used in Section 30811 of the Coastal Act as follows:

*'Resource' means any resource that is afforded protection under the policies of Chapter 3 of the Coastal Act, including but not limited to public access, marine and other aquatic resources, environmentally sensitive wildlife habitat, and the visual quality of coastal areas.*

The term “damage” in the context of Restoration Order proceedings is defined in Section 14 CCR 13190(b) as follows:

*‘Damage’ means any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development.*

The term “continuing” is defined by 14 CCR Section 13190(c) of the Commission’s regulations as follows:

*‘Continuing’, when used to describe ‘resource damage’, means such damage, which continues to occur as of the date of issuance of the Restoration Order.*

The wetlands on the Properties; the native vegetation, in providing water quality protection, erosion control and habitat; the views of undeveloped coastal land; and the physical stability of the site are afforded protection under Coastal Act Sections 32030, 30231, 30233, 30240, 30251, and 30253(b), and are therefore “resources” as defined in Section 13190(a) of the Commission’s regulations. The Subject Activities have removed native vegetation, caused significant disruption to the unique and fragile habitat of a sensitive bird species, exposed the site and surrounding properties and water bodies to the effects of unregulated runoff, and visually harmed a coastal area, thereby causing “damage” to a resource, as defined in Section 13190(b) of the Commission’s regulations. Without restoration, revegetation, and careful monitoring, the foregoing impacts are continuing and will continue to occur, in addition to the temporal loss of habitat and loss of habitat fitness due to removal of native plants and disruption of soil that will continue during restoration and monitoring of the site. The persistence of these impacts constitutes “continuing” resource damage, as defined in Section 13190(c) of the Commission’s regulations.

For the reasons stated above, the Subject Activities are causing continuing resource damage. As a result, the third and final criterion for the Commission’s issuance of the proposed Restoration Order pursuant to Coastal Act Section 30811 is therefore satisfied

(e) Subject Activities are Inconsistent with the Certified Land Use Plan

The Subject Activities at issue in this matter are also inconsistent with numerous policies of the Newport Beach LUP. Until the City obtains certification of its Local Coastal Program (“LCP”), and incorporates the Banning Ranch into the LCP area, the Coastal Act remains the standard of review for permitting and enforcement matters in this area. However, because the City’s LUP has been certified and Banning Ranch is within the City’s sphere of influence, the LUP serves as a valuable guidance document in such matters. The LUP policies with which the Subject Activities at issue are inconsistent include, but may not be limited to ESHA and wetlands policies.<sup>11</sup> In summary, as described above, the Subject Activities at issue in this matter are

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<sup>11</sup> LUP Section 4.1.1 includes some of the relevant habitat protection policies.

clearly inconsistent with the Chapter 3 resource protection policies of the Coastal Act, as well as resource protection policies of the LUP.

(f) Settlement Agreement is Consistent with Chapter 3 of the Coastal Act

The Subject Activities impacted ESHA, amongst other coastal resources on the Properties, and disrupted its functionality. The Subject Activities are therefore inconsistent with the resource protection policies of the Coastal Act and City LUP, and the resource damage caused by the Subject Activities will continue unless the Subject Activities cease and the Properties are properly restored. Issuance of the Settlement Agreement is essential to resolving the violations and to ensuring compliance with the Coastal Act.

The Settlement Agreement attached to this staff report is consistent with and, in fact, is designed to further the resource protection policies found in Chapter 3 of the Coastal Act. Failure to restore areas on the Properties impacted by the Subject Activities would lead to the continued loss of ESHA, inconsistent with the resource protection policies of the Coastal Act. The Settlement Agreement requires NBR to, among other things, remove materials placed on the Properties as a result of the Subject Activities, and restore certain areas impacted by Subject Activities, and adjacent, contiguous areas, by planting native plant species appropriate to the site, and undertake habitat mitigation by restoring additional acreage.

The required habitat restoration acreage that NBR will restore pursuant to this Settlement Agreement was strategically concentrated in several large areas, given the unique history, nature and size of the site and the widely scattered pattern of the Subject Activities. Although direct restoration of each individual Impacted Area might seem to be the most straight-forward approach, such an approach would require many separate restoration efforts spread out in a number of smaller patches. The Commission finds the alternative approach adopted here to be more appropriate for this site for two primary reasons. First, because of the disagreements over the interpretation of the Resolution and the consequent potential ambiguity with respect to whether certain individual instances of development were exempt, and because this resolution is the result of a negotiated compromise, the Commission believes that some latitude is appropriate. Secondly, from a resource perspective, this restoration approach provides the best chance that the restoration efforts at this site will be successful in restoring the various habitat types and habitats for the respective rare species. According to the Commission's ecologist, "a key principle of conservation biology is to restore a smaller number of large areas as opposed to a larger number of small areas. This is because fragmented habitats have reduced biological integrity because they are more vulnerable to population size fluctuations (increases and declines), catastrophic events, introduced species, pathogenic outbreaks, and overall loss of genetic diversity." This isn't to say that such scattered areas aren't sensitive and worthy of protection and enhancement, and in fact, pursuant to this Settlement Agreement, these areas will be subject to passive restoration in the sense that NBR has agreed not to engage in the mowing of, or undertake the Subject Activities in, these areas. Although the Impacted Areas are fragmented from each other, they are often separated by existing habitat areas. Thus, restoration in place would result in restoration of habitats adjacent to existing habitat, and therefore, would add to the existing habitat areas on site. However, the small size of the restoration areas and overall scope of this particular restoration effort, if restored in place, would decrease the likelihood, in this case, of

the restoration efforts' success for the reasons noted above. The Commission concurs in and adopts this conclusion. NBR has also agreed to remove, or obtain coastal development permits for, Additional Wells located outside the Oil Remainder Areas. Therefore, the Settlement Agreement is consistent with the Chapter 3 policies of the Coastal Act.

**F. SETTLEMENT AGREEMENT IS CONSISTENT WITH CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

The Commission finds that issuance of these Consent Orders to compel the restoration of the Properties is exempt from any applicable requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 *et seq.*, and will not have significant adverse effects on the environment, within the meaning of CEQA. The Consent Orders are exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines, also in 14 CCR.

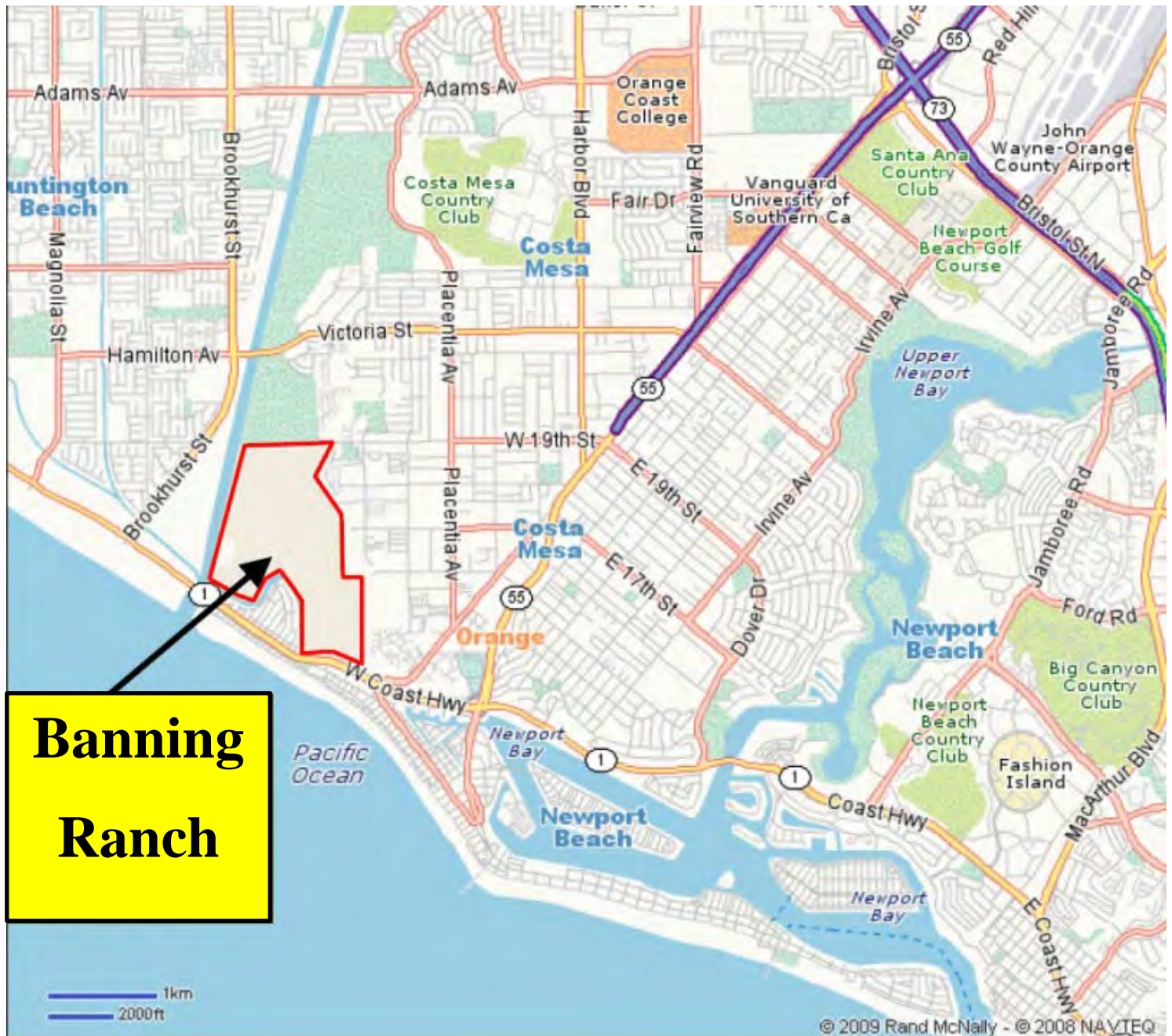
**G. SUMMARY OF FINDINGS OF FACT**

1. The properties that are the subject of these orders (the "Properties") are located adjacent to the 5100 block of West Coast Highway in unincorporated Orange County and are designated by the Orange County Assessor's Office as APNs 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. The Properties are located within the Coastal Zone. There is no certified Local Coastal Program applicable to the Properties.
2. Aera Energy LLC and Cherokee Newport, LLC own the Properties. Newport Banning Ranch, LLC, manages planning and entitlement of the "Banning Ranch" surface rights for the property owners, Cherokee Newport Beach, LLC and Aera Energy, LLC. The ongoing oil operations on the Properties have been conducted by West Newport Oil Company, the operator of the oil field, on behalf of various mineral rights owners since 1983. Horizontal Development LLC is the current owner of the mineral rights, which it acquired in 1999.
3. In 1973, the Commission's predecessor approved Resolution of Exemption No. E-7-27-73-144, acknowledging that certain oil field operations that were ongoing as of the passage of Proposition 20 were exempt due to the operator having secured a vested right to continue those operations.
4. The activities undertaken on the Properties that are the focus of these orders ("Subject Activities") included, but may not have been 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; and change in intensity of use of the land. The activities described immediately above constitute "development" as defined in the Coastal Act, and some significant portion of them was not covered by the exemption provided in 1973 Resolution Exemption No. E-7-27-73-144.

5. Collectively, the Subject Activities are not consistent with multiple resource protection policies contained in Chapter 3 of the Coastal Act, including, but necessarily limited to: Sections 30244 (protection of archaeological and paleontological resources), 30230 (protection of marine resources), 30231 (protection of biological productivity and water quality), 30233 (limit fill of wetlands), 30240 (protection of environmentally sensitive habitat areas, or “ESHA”), and 30253 (minimization of adverse impacts). The Subject Activities are “causing continuing resource damage” within the meaning of Coastal Act Section 30811 and Title 14, California Code of Regulations, Section 13190.
6. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order under these circumstances, when the Commission determines that any person or government agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the Commission without securing a permit or (2) is inconsistent with any permit previously issued by the Commission. Coastal Act Section 30811 authorizes the Commission to issue a restoration order when it finds that development (1) has occurred without a CDP, (2) is inconsistent with the Coastal Act, and (3) is causing continuing resource damages. All of these elements have been met in this case.
7. The work to be performed under this Settlement Agreement, if done in compliance with the Consent Orders and the plans approved therein, will be consistent with Chapter 3 of the Coastal Act.

Staff recommends that the Commission issue Settlement Agreement and Settlement Cease and Desist Order No. CCC-15-CD-01 and Settlement Restoration Order No. CCC-15-RO-01 attached hereto as Appendix A.





## Location of the Properties ("Banning Ranch")

## CALIFORNIA COASTAL ZONE CONSERVATION COMMISSION

SOUTH COAST REGIONAL COMMISSION

666 E. OCEAN BOULEVARD, SUITE 3107

P. O. BOX 1450

LONG BEACH, CALIFORNIA 90801

(213) 436-4201 (714) 846-0648



October 2, 1973

STAFF REPORT *approved*Exemption Number: E-7-27-73-144Name of Applicant: General Crude Oil & G.E. Kadane & SonsDevelopment Location: 6S-10W-20 and 29 bounded by Newport Beach  
(south), Costa Mesa (east) and the Santa Ana River on the west.Development Description: Surface and subsurface oil drilling and  
production on 480 acres (the Banning Lease) consisting of 312  
existing wells and associated surface facilities and 28 additional  
wells to be drilled this year.Commission Resolution:

1. Claimant has received for said development the following governmental permit, or other authorization, on the date indicated.
  - a. State Resources Agency - Div. Oil & Gas Permits - 1944 to present
  - b. Orange County Dept. Bldg. & Safety Permits - 1958 to present
  - c. Orange County APCD Permits - 1958 to present



Following the effective date of said permit, work began on development on 1944 with commencement (date)  
of the following work:

Drilling of 109 wells with construction of surface facilities by 1951

3. Following the effective date of such permit claimant incurred the following liabilities for such development \$ 26,600,000.  
Nov. 8 - 12,500,000  
Feb. 1 - 13,000,000
4. The following portions of the development have been completed on the dates noted:

Nov. 8, 1972 - 295 wells and related facilities

Feb. 1, 1973 - 310 wells and related facilities

5. The following portions of the development were under construction as of November 8, 1972 and February 1, 1973, and were in the stage of development as noted:

November 8, 1972: 17 wells being drilled

February 1, 1973: 2 wells being drilled and @ 18,000,000 barrels of the 42,000,000 barrel goal had been produced.

6. The following portions of the development are remaining to be done:

Drilling 28 new wells and additional drilling, repair and replacement of existing wells such that 340 wells may be in production at any one time.

7. Claimant anticipates to complete the total development on or about 1974.

development described above is a single, interdependent  
cept as demonstrated by the following:

Production since 1944 (secondary recovery since 1958) with  
construction and maintenance of ancillary facilities and  
structures based upon a goal of 42,000,000 barrels

9. That claimant has/~~has not~~ acted in good faith reliance upon  
said permit issued under law pre-existing November 8, 1972,  
is demonstrated by the following:

Since 1943 all operations subject to permits and approvals

10. Wherefore the South Coast Regional Coastal Zone Conservation  
Commission draws the following conclusions:

- a. Claimant has/~~has not~~ completed substantial work on said  
development.
- b. Claimant has/~~has not~~ incurred substantial liabilities  
for such development.
- c. Claimant, in obtaining said permit and in the performing  
said work and in incurring said liabilities has/~~has not~~  
acted in good faith reliance on said permit issued under  
law pre-existing November 8, 1972.

11. Therefore; the South Coast Regional Coastal Zone Conservation  
Commission hereby grants/~~denies~~ the claim for exemption,  
No. E-7-27-73-144, of Said Claimant  
claimant. This exemption shall constitute acknowledgement  
that the exempted development requires no permit from the  
South Coast Regional Coastal Zone Conservation Commission,  
provided that no substantial changes may be made in said  
development except in accordance with the provisions of the  
California Coastal Zone Conservation Act of 1972.

12. Claim of exemption No. E-7-27-73-144 is hereby  
granted/~~denied~~ as to the following development:

Continued production and operations on the 480 acre "Banning  
Lease" per the attached items:

12. Continued

- 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.





See pages 10-11 of this staff report for the definition of "Additional Well." This is one of the wells that will be removed pursuant to the Settlement Agreement.

Photographs of Representative  
Subject Activities (cont. on  
subsequent pages)





Mowing in southern portion of the Properties.

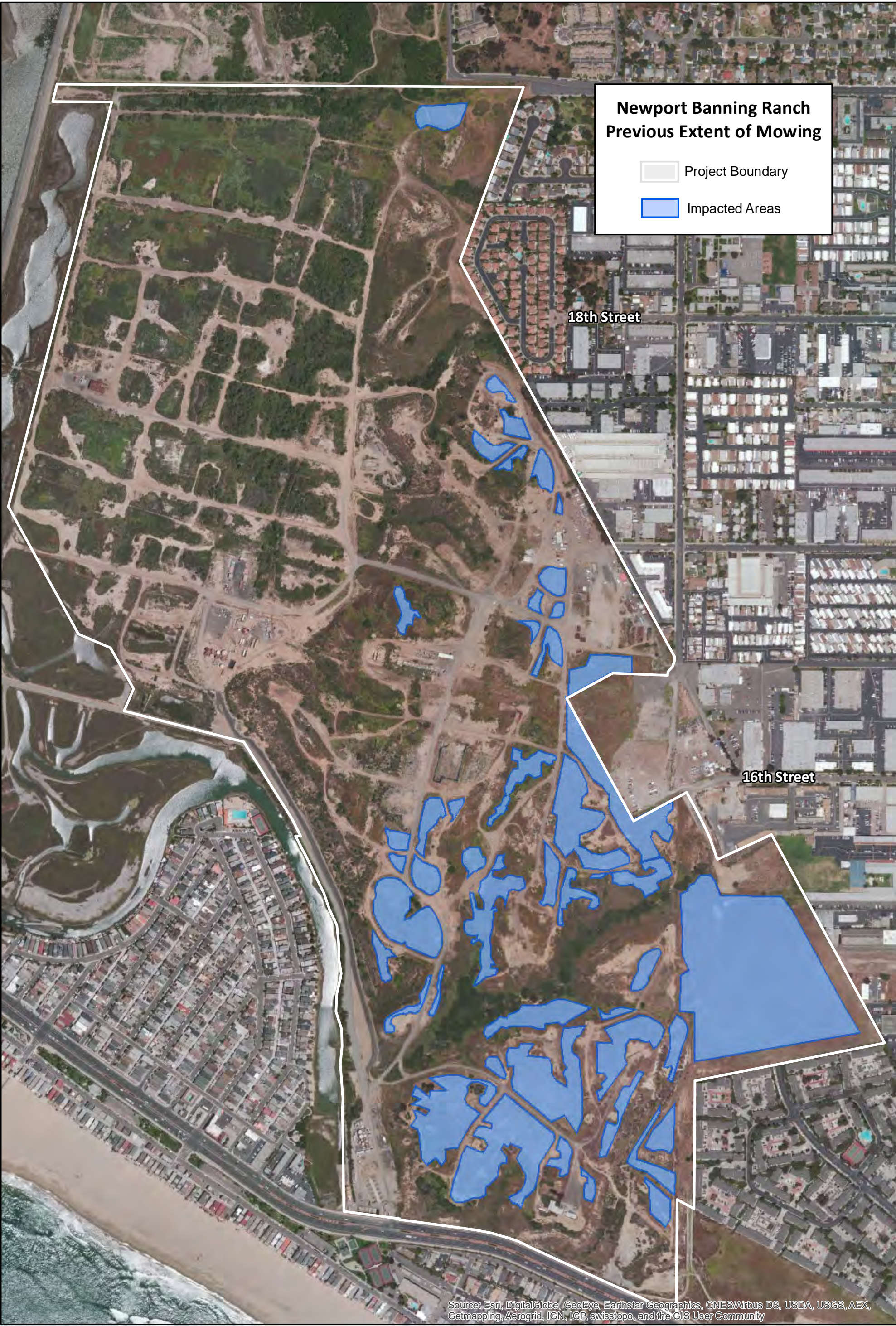
## Photographs of Representative Subject Activities



Mowed areas (indicated by red arrows) adjacent to an arroyo on the Properties. The area on the right is largely within the active Restoration Areas addressed by this Settlement Agreement.

## Photographs of Representative Subject Activities







## CALIFORNIA COASTAL COMMISSION

631 HOWARD STREET, 4TH FLOOR

SAN FRANCISCO, CA 94105

(415) 543-8555

C O A S T A L D E V E L O P M E N T P E R M I T

On May 22, 1985, by a vote of 12 to 0, the California Coastal Commission granted to West Newport Oil Company Permit E-85-1, subject to the conditions set forth below, for development consisting of Preparation of three (3) drill sites for exploration, development and production of up to 30 wells to deeper zones not presently in production; including grading, placement of drilling rigs and pipelines, and more specifically described in the application file in the Commission offices. minor road improv.

The development is located within the coastal zone in Orange County at Banning Tract, lying northerly of West Coast Highway & westerly of Superior Avenue and is subject to the attached Standard and Special Conditions.

After public hearing held on May 22, 1985, the Commission found that, as conditioned, the proposed development is in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976; will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976; if between the sea and the public road nearest the sea, is in conformity with the public access and public recreation policies of Chapter 3 of the California Coastal Act of 1976; and either (1) will not have any significant adverse impact on the environment, or (2) there are no feasible alternatives or feasible mitigation measures available that would substantially lessen any significant adverse impact that the development as approved may have on the environment.

Issued on behalf of the California Coastal Commission  
on September 29, 1986.

PETER DOUGLAS  
Executive Director

By for Nicholas  
Title Supervising Analyst

The undersigned permittee acknowledges receipt of the California Coastal Commission Permit \_\_\_\_\_, and fully understands its contents, including all conditions imposed.

Date

Permittee

CCC-15-CD/RO-01

Exhibit 5

Page 1 of 13

California Coastal Commission  
631 Howard Street, 4th Floor  
San Francisco, California 94105  
(415) 543-8553  
Michael L. Fischer, Executive Director

Filed: 3-22-85  
49th Day: 5-10-85  
180th Day: 9-28-85  
Staff: Devon Bates  
Staff Report: 5-3-85  
Hearing Date & Item: 5/22/85 & Item 13a

REGULAR CALENDAR

STAFF REPORT AND RECOMMENDATION

PROJECT DESCRIPTION

Applicant: West Newport Oil Company (a subsidiary of Armstrong Petroleum Corp.) and Mobil Oil Corporation

Agent: Urban Assist, Inc. - Mitchell Brown

Permit Number: E-85-1

Project Location: Unincorporated land known as the Banning Tract, lying northerly of West Coast Highway and westerly of Superior Avenue, adjacent to the City of Newport Beach, and the mouth of the Santa Ana River in Orange County.

Project Description: Preparation of three (3) drill sites for exploration, development and production of up to 30 wells to deeper zones not presently in production; including grading, placement of drilling rigs and pipelines, and minor road improvements. (see Exhibits 1 & 2)

Substantive File Documents:

1. Coastal Commission Exemption E-7-27-73-144
2. Commission Permit File E-83-6; Ross Petroleum.
3. Archaeological Resources Assessment Conducted for the Banning Property, Cottrell and Jertberg, Archaeological Resource Management Corp. August 1980
4. Archaeological Survey Report: Mobil Oil Land Near Coasta Mesa, by David Van Horn, Ph.D., Archaeological Associates, Ltd. August 1979

STAFF RECOMMENDATION

Staff recommends that the Commission adopt the following resolution:

I. Approval with Conditions

The Commission hereby grants a permit for the proposed development, subject to the conditions below, on the grounds that, as conditioned, the development will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program in conformity with

the provisions of Chapter 3 of the Coastal Act, and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

## II. STANDARD CONDITIONS

1. Notice of Receipt and Acknowledgement. The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If development has not commenced the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Compliance. All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.
4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director of the Commission.
5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.
6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

## III. SPECIAL CONDITIONS

The permit is subject to the following special conditions:

1. Revised Plans. Prior to issuance of the permit the applicant shall submit, subject to the review and approval of the Executive Director, a revised project description to include only the exploration phase of the project and identify one exploratory well site, within each of the three locations (A, B and C) to be confined to the existing graded areas and set back from the bluff edge. The applicant shall provide an aerial photograph of the proposed drill sites and appropriate maps.
2. Limitation to Exploratory Drilling. This permit allows the drilling of up to 3 exploratory wells, no other drilling or commercial 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.

3. Subsidence Monitoring. Following the exploratory phase, and prior to production, the applicant shall develop a monitoring program for potential subsidence as a result of oil and gas extraction, subject to review and approval by the Executive Director. The applicant shall submit to the California Division of Oil and Gas all geologic information obtained from core loggings and the detailed plans to control and monitor potential subsidence. No oil production shall be approved until the Division of Oil and Gas, the County and the Executive Director of the Commission have certified in writing that the subsidence monitoring and control program is adequate to minimize subsidence potential.
4. Oil Spill Contingency Plan. Prior to issuance of permit the applicant shall submit, subject to Executive Director review and approval, an oil spill contingency plan which shall describe emergency plans to contain potential oil spills on the project site. The applicant shall also comply, with all conditions of approval by the Division of Oil and Gas as to the types and amount of blowout preventers, casing requirements, and compliance with DOG requirements for an indemnity bond for well abandonment and site restoration.
5. Liquid Wastes. Prior to issuance of the permit the applicant shall submit, subject to Executive Director review and approval, plans for disposal of any liquid or solid wastes generated by the proposed project, including review and approval of such plans by the County, and the Regional Water Quality Control Board. The plans shall assure that no liquid or solid waste shall be disposed of on the property, other than in temporary impervious containers prior to removal to an approved disposal location. The plans shall prohibit use of unlined sumps on the site for mixing or storage of any fluids, except during emergencies for spill containment. Production water extracted with the oil shall be reinjected in the oil bearing strata.
6. Grading. Prior to the issuance of a permit, the applicant shall submit, subject to review and approval of the Executive Director, a grading plan showing how much soil will be graded from the revised three well sites, where it is to be placed and stabilized such that rainwater runoff would be controlled, and erosion would be minimized.
7. Site Restoration. Within 60 days of the abandonment of use, the applicant shall restore the disturbed site to its previous condition.

#### IV. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

1. Project Description and History. The Banning Lease, otherwise known as the West Newport Oil Field is located landward of Pacific Coast Highway (PCH), west of Newport Boulevard and east of the Santa Ana River Channel. In

unincorporated Orange County, the parcel lies westerly of Superior Avenue and adjacent to the City of Newport Beach. The parcel consists of marshy lowlands and coastal bluffs which run parallel to the river channel and widen to become parallel with the ocean just beyond PCH. The proposed drill sites are all on the bluff, in elevations from 50 to 65 feet above sea level. During World War II, a military defense system was installed along the coast. Remnants of military construction have been exposed on the site as well as the occurrence of archaeological and pre-historic remains.

The field has been in production since 1943 by various operators including Mobil Oil Corporation. The first wells produced 40 barrels per day of 14.5 degree gravity oil. Today, up to 243 wells produce oil from 800 to 2700 feet deep. The oil is extremely heavy and treatment with compressed air, steam and heat is utilized for extraction. The Commission issued an exemption (E-7-27-73-144) to General Crude Oil and G.E. Kadane and Sons for surface and subsurface oil drilling and production of up to 340 wells, however "future exploratory drilling within the lease area [was] not exempted".

The applicant proposes to explore for oil and produce (if oil is found) up to a depth of 8500 feet. Since current oil production extends to 2700 feet in depth, this proposal for deeper wells to a new horizon constitutes exploration and triggers a new coastal permit review. The applicant proposes to conduct activities at three drill sites in three phases: I. exploratory drilling and testing; II. development drilling; and III. production operations. Commencement of exploratory drilling is proposed for mid 1985 continuing through 1986.

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).

2. Public Access. Section 30212(a) of the Coastal Act provides:

Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

The proposed project is landward of the Pacific Coast Highway and the site does not contain ocean fronting property, therefore public access to the shoreline is not available. The Commission finds that the project as proposed does not conflict with Section 30212(a) of the Coastal Act.

3. Environmentally Sensitive Habitats. Section 30231 of the Act states that:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect Riparian habitats, and minimizing alteration of natural streams.

Section 30240(b) states that:

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 such areas, and shall be compatible with the continuance of such habitat areas.

The applicant proposes three sites located on the bluffs overlooking the Santa Ana River mouth and the Pacific Ocean. Each of the sites are adjacent to eroding drainage courses and an intermittent stream which could be affected by the proposed activities.

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. Therefore, the Commission finds that the project as conditioned, is consistent with Section 30231 and 30240(b) of the Coastal Act.

4. Grading. Section 30253(2) of the Act provides that new development shall:

Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.

The applicant proposes up to 30 wells on three previously graded sites where there is no control of water runoff and where erosion problems currently exist. By limiting grading to the area needed for one exploratory well per site, and assessing production and development needs, if and when oil is found, erosion from the three sites can be minimized.

As conditioned, each exploratory well site would be set back from bluff edges so as not to alter natural landforms along bluffs. No new roads would be constructed, grading would be minimized and damage to wetland areas can be prevented. Therefore, as conditioned, the project neither creates nor contributes significantly to erosion, geologic instability or destruction of the site. The Commission finds the project as conditioned, consistent with Section 30253(2).

5. Oil Spills. Section 30232 of the Act states that:

Protection against the spillage of crude oil, gas, petroleum products, or hazardous substances shall be provided in relation to any development or transportation of such materials. Effective containment and cleanup facilities and procedures shall be provided for accidental spills that do occur.

The applicant proposes to explore, develop and produce oil from a horizon that is deeper than existing, exempted development. Much of the surrounding area has been graded and severe erosion problems are apparent. Drainage courses cut into the bluffs and runoff is uncontrolled around the site. Runoff goes into the marshy area below the bluffs and eventually finds its way to the Pacific Ocean through culverts beneath PCH.

As conditioned the project limits the number of wells, provides an oil spill contingency plan, and controls the mixing and disposal of drill muds and cuttings. Therefore the Commission finds the project will protect against the spillage of crude oil and hazardous substances and is therefore consistent with Section 30232 of the Act.

7. Archaeological Resources. Section 30244 of the Act states that:

Where development would adversely impact archaeological or paleontological resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.

Several archaeological and historical surveys have been conducted in the vicinity of the subject property since 1880. Archaeological Associates, Inc. prepared several reports for the property in 1979 and 1980 which identified six areas containing cultural resources with varying degrees of disturbance. Surface reconnaissance and post hole testing was conducted to preserve to the greatest extent possible the remaining important sites. Fences were constructed around identified areas and existing oil field operations generally stay out of these areas.

The three sites proposed for exploration and development have been carefully chosen to avoid these culturally sensitive areas. Therefore, as conditioned to limit grading and control runoff, the project would not adversely impact archaeological resources and is therefore consistent with Section 30244 of the Coastal Act.

8. Visual and Scenic Resources. Section 30251 of the Act states:

The scenic and visual qualities of coastal areas shall be... protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas...

The project as conditioned would add a maximum of three exploratory drilling rigs to a skyline already dominated by 243 oil production rigs, at present. The scenic and visual qualities of the area include the presence of

oil production equipment along Pacific Coast Highway for the Huntington Beach Oil Field. The introduction of these three wells would not detract from the existing visual quality, thus, the Commission finds the project as conditioned, to be consistent with Section 30251.

9. Oil and Gas Development. Section 30262 (a) of the Act states that:

The [oil and gas] development [must be] performed safely and consistent with the geologic conditions of the well site.

The applicant proposes to explore, develop and produce oil, at a deeper horizon than present oil production on site. The requirements for production facilities as a result of new exploratory drilling are not known at this time, therefore the application is necessarily vague. As conditioned to split exploration and production into two distinct phases, each requiring a coastal permit from the Commission, an appropriate design for production facilities may be developed when oil is found to be recoverable from the deeper zones. After testing and exploration, information will be available to determine the equipment necessary for production and plans can be devised for an increased number of wells.

The issue of oil field subsidence is a potential environmental concern given the withdrawal of hydrocarbons from the area. As oil reservoirs are depleted, geologic structures may compact or collapse and ground cracking may result on the surface. The risk of oil spills is increased and roads or surface structures could be damaged. Prior to production of new oil resources, a monitoring program to measure subsidence in several places on site would minimize hazards and guard against construction in light of geologic instability. Mitigation measures can be devised to prevent subsidence, such as reinjection.

As conditioned to separate exploratory and production drilling, a monitoring program and mitigation measures can be developed and the project will not create nor contribute significantly to geologic instability (Section 30253 (2)) and the development can be performed safely and consistent with the geologic conditions of the site (Section 30262 (a)). Therefore, the Commission finds the project as conditioned to be consistent with the Coastal Act.



los angeles county

san bernardino county

riverside county

san diego county

pacific ocean

Site

Newport Beach

Huntington Beach

Costa Mesa

Irvine

Laguna Beach

San Juan Capistrano

San Clemente

REGIONAL LOCATION

EXHIBIT NO. 1

APPLICATION NO.

E-85-1

WEST NEWPORT OIL

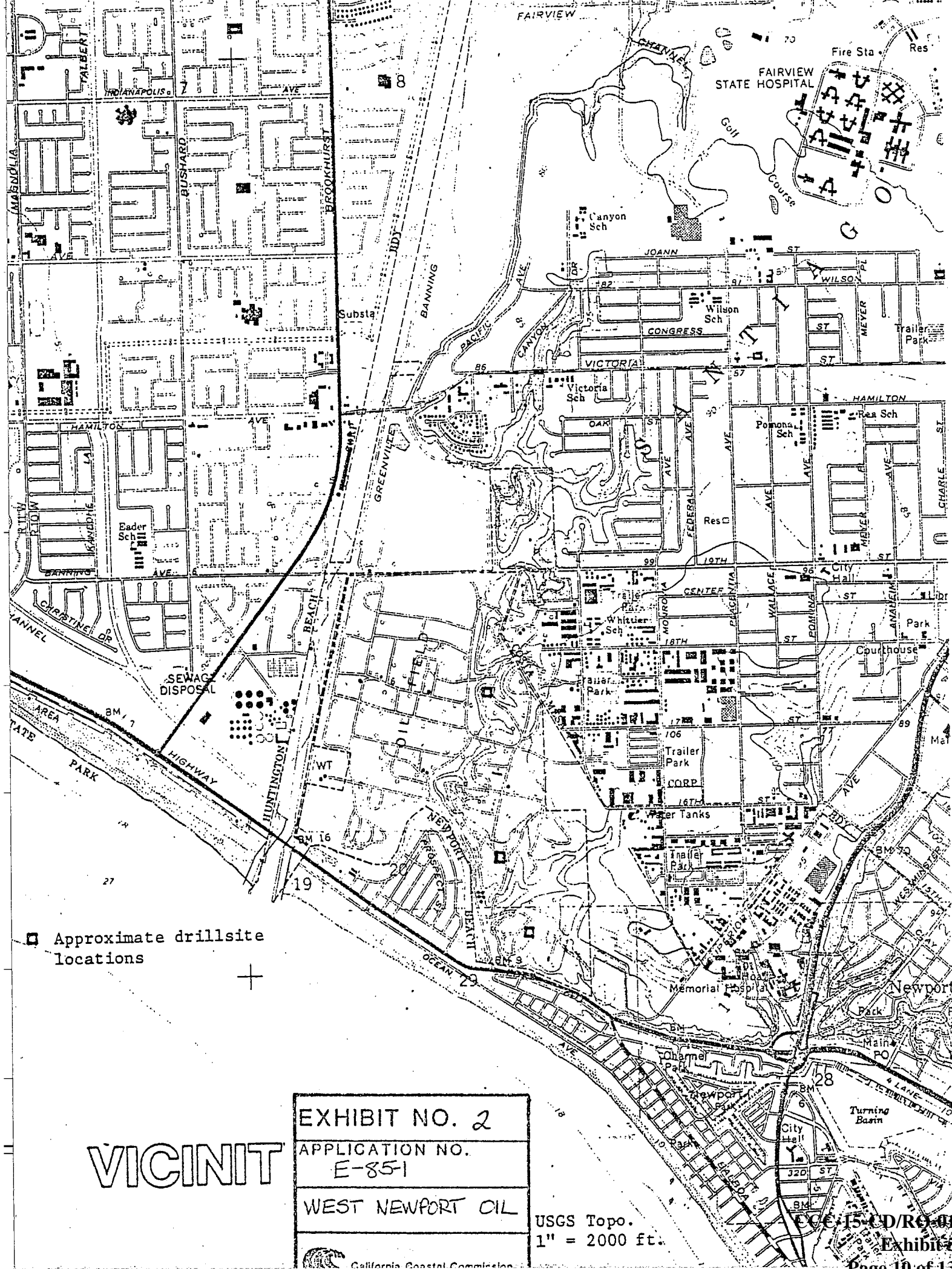


California Coastal Commission

CCC-15-CD/RO-01

Exhibit 5

Page 9 of 13



VICINIT

EXHIBIT NO. 2
APPLICATION NO. E-85-1
WEST NEWPORT OIL

USGS Topo.  
1" = 2000 ft.

ECC-15-CD/RO-01

Exhibit 5



AP 114-170-52 BOUNDARY  
WEST NEWPORT OIL CO.  
NEWPORT-BANNING RCH  
A.B.C. DRILLSITE MAP

EXHIBIT NO. 3  
APPLICATION NO.  
E-85-1  
WEST NEWPORT OIL

CCC-15-CD/RO-01

Exhibit 5

Application No. E-85.1

STANDARD CONDITIONS:

1. Notice of Receipt and Acknowledgement. The permit is not valid and construction shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. Expiration. If construction has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Construction shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. Compliance. All construction must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.
4. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.
5. Inspections. The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.
6. Assignment. The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
7. Terms and Conditions Run with the Land. These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

SPECIAL CONDITIONS:

see attached page 3




III. SPECIAL CONDITIONS

The permit is subject to the following special conditions:

1. Revised Plans. Prior to issuance of the permit the applicant shall submit, subject to the review and approval of the Executive Director, a revised project description to include only the exploration phase of the project and identify one exploratory well site, within each of the three locations (A, B and C) to be confined to the existing graded areas and set back from the bluff edge. The applicant shall provide an aerial photograph of the proposed drill sites and appropriate maps.
2. Limitation to Exploratory Drilling. This permit allows the drilling of up to 3 exploratory wells, no other drilling or commercial 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.
3. Subsidence Monitoring. Following the exploratory phase, and prior to production, the applicant shall develop a monitoring program for potential subsidence as a result of oil and gas extraction, subject to review and approval by the Executive Director. The applicant shall submit to the California Division of Oil and Gas all geologic information obtained from core loggings and the detailed plans to control and monitor potential subsidence. No oil production shall be approved until the Division of Oil and Gas, the County and the Executive Director of the Commission have certified in writing that the subsidence monitoring and control program is adequate to minimize subsidence potential.
4. Oil Spill Contingency Plan. Prior to issuance of permit the applicant shall submit, subject to Executive Director review and approval, an oil spill contingency plan which shall describe emergency plans to contain potential oil spills on the project site. The applicant shall also comply with all conditions of approval by the Division of Oil and Gas as to the types and amount of blowout preventers, casing requirements, and compliance with DOG requirements for an indemnity bond for well abandonment and site restoration.
5. Liquid Wastes. Prior to issuance of the permit the applicant shall submit, subject to Executive Director review and approval, plans for disposal of any liquid or solid wastes generated by the proposed project, including review and approval of such plans by the County, and the Regional Water Quality Control Board. The plans shall assure that no liquid or solid waste shall be disposed of on the property, other than in temporary impervious containers prior to removal to an approved disposal location. The plans shall prohibit use of unlined sumps on the site for mixing or storage of any fluids, except during emergencies for spill containment. Production water extracted with the oil shall be reinjected in the oil bearing strata.
6. Grading. Prior to the issuance of a permit, the applicant shall submit, subject to review and approval of the Executive Director, a grading plan showing how much soil will be graded from the revised three well sites, where it is to be placed and stabilized such that rainwater runoff would be controlled, and erosion would be minimized.
7. Site Restoration. Within 60 days of the abandonment of use, the applicant shall restore the disturbed site to its previous condition.





-  Wells to be removed
-  Wells to be removed or applied for
-  Exempt Wells

Wells within red polygons are not a part of this Settlement Agreement.

**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 Development<sup>1</sup>: 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.

<sup>1</sup> 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"),<sup>2</sup> 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.<sup>3</sup> (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.4<sup>th</sup> 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.)

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<sup>2</sup> 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).

<sup>3</sup> 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

**CALIFORNIA COASTAL COMMISSION**

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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 Development<sup>1</sup>: 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.

<sup>1</sup> 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, 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.*

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

**CALIFORNIA COASTAL COMMISSION**

SOUTH CENTRAL COAST AREA  
89 SOUTH CALIFORNIA ST., SUITE 200  
VENTURA, CA 93001  
(805) 585-1800

**M E M O R A N D U M**

FROM: Jonna D. Engel, Ph.D.  
Ecologist

TO: Andrew Willis  
Enforcement Supervisor

SUBJECT: Biological Resources of Certain Areas Impacted by Subject Activities on  
Newport Banning Ranch

DATE: February 25, 2015

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**Documents Reviewed:**

- Ortega, B.A. (Dudek). March 7, 2014. 2014 Focused Non-Breeding Season Burrowing Owl Surveys, Newport Banning Ranch Project, Orange County, California. Report addressed to Michael Mohler, Newport Banning Ranch, LLC.
- Dudek. October 24, 2013. Review and Comparison of California Gnatcatcher Surveys Results for the Newport Banning Ranch Property, Orange County, California. Memorandum addressed to Newport Banning Ranch, LLC.
- Vergne, P.J. (Dudek). August 26, 2013. 90-Day Protocol Survey Report for the Federally-Listed Pacific Pocket Mouse on the Newport Banning Ranch, City of Newport Beach and Unincorporated Orange County, Orange County, California. Permit Number *TE-068072-3*. Report addressed to Ms. Susie Tharratt, Recovery Permit Coordinator, Carlsbad Fish and Wildlife Office.
- Compton, D. (Dudek). August 21, 2013. 2013 Focused Least Bell's Vireo Surveys, Newport Banning Ranch Project, Orange County, California. Report addressed to Michael Mohler, Newport Banning Ranch, LLC.
- Ortega, B.A. (Dudek). May 31, 2013. Focused California Gnatcatcher Survey, Newport Banning Ranch Project, Orange County, California. Report addressed to U.S. Fish and Wildlife Service; Attn: Recovery Permit Coordinator.
- Davis, J.H. IV (Dudek). May 2013. Jurisdictional Determination of Seasonal Features for the Newport Banning Ranch. Prepared for Newport Banning Ranch, LLC.



Davis, J.H. IV (Dudek). February 2013. Grassland Assessment and Vegetation Mapping Survey Report for the Newport Banning Ranch. Prepared for Newport Banning Ranch LLC.

Bomkamp, T (Glenn Lukos Associates) and J. H. Davis IV (Dudek). January 29, 2013. Summary of Protocol Surveys for Federally-Listed Vernal Pool Branchiopods Conducted on Newport Banning Ranch, City of Newport Beach and Unincorporated Orange County, California. Report addressed to Christine Medak, U.S. Fish and Wildlife Service.

Johnston, A.M. (BonTerra). June 29, 2011. Supplemental Biological Resource Information for the Sunset Ridge Park Project. Letter to Michael Sinacori, Public Works Department, City of Newport Beach.

Bomkamp, T. (Glenn Lukos Associates). June 14, 2011. Clarification Regarding CAGN Mapping from 2002 Protocol Surveys Conducted by Glenn Lukos Associates for West Newport Oil. Memorandum to Christine Medak, USFWS.

LSA Associates. December 9, 2010. California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site. Memorandum from Art Homrighausen and Richard Erickson, LSA Associates, to Mike Sinacori, City of Newport Beach, Department of Public Works. This memorandum includes LSA's 1991 vegetation map and LSA's annual gnatcatcher survey maps from 1992 through 1996.

Hamilton, Robb (Hamilton Biological). December 10, 2009. Review of Biological Resource Issues, Sunset Ridge Draft EIR. Memorandum from Hamilton Biological to Janet Johnson Brown, City of Newport Beach.

BonTerra Consulting. June 25, 2009. Results of Coastal California Gnatcatcher Surveys for Newport Banning Ranch Project Site, Orange County, California. Letter addressed to Ms. Sandy Marquez, USFWS.

Glenn Lukos Associates. August 2008. The Newport Banning Ranch Biological Technical Report. Report prepared for Mike Mohler, Newport Banning Ranch, LLC.

Glenn Lukos Associates. July 19, 2007. Submittal of 45-Day Report for coastal California gnatcatcher Surveys for the 412.5 Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California. Survey report from Glenn Lukos Associates Biologist Ingrid Chlup to Sandra Marquez, USFWS.

Glenn Lukos Associates. July 25, 2006. Submittal of 45-Day Report for Coastal California Gnatcatcher Presence/Absence Surveys for the 412.5 Newport

Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California. Survey report from Glenn Lukos Associates Biologist Jeff Ahrens to Daniel Marquez, USFWS.

Glenn Lukos Associates. October 14, 2002. Protocol Surveys for the Coastal California Gnatcatcher; West Newport Oil Property, Orange County California. Survey report from Glenn Lukos Associates Biologist Tony Bompkamp to Leonard Anderson, West Newport Oil Property.

Gnatcatcher survey map. 2000. Unknown source (we believe the source is PCR Services).

PCR Services. 1998. Gnatcatcher survey map.

PCR Services. 1997. Gnatcatcher survey map.

LSA. 1996. Spring 1996 California Gnatcatcher Survey. Survey report from LSA Biologist Richard Erickson to Leonard Anderson.

LSA. 1995. Spring 1995 California Gnatcatcher Survey. Survey report from LSA Biologist Richard Erickson to Leonard Anderson.

LSA. 1994. Results of 1994 Gnatcatcher and Wren Surveys. Survey report from LSA Biologists Robb Hamilton and Richard Erickson to Leonard Anderson, West Newport Oil Company.

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I have been asked to review the locations within Newport Banning Ranch where both of the following are true: 1) the Subject Activities, as defined in CCC-15-CD-01/CCC-15-RO-01, have taken place (Figure 1); and 2) as a result of those Subject Activities, the areas remain mapped by Dudek as either "Disturbed" or "Developed" on Figure 5, *Vegetation Communities*, in their February 2013 *Grassland Assessment and Vegetation Mapping Survey Report for the Newport Banning Ranch*<sup>1</sup>, to assess the likely status of the biological resources in these areas prior to these activities. In order to accomplish this I have visited the site numerous times (September 15, 2010, December 15, 2010, June 7, 2011, March 3, 2014, June 10, 2014, June 11, 2014); reviewed the documents listed above (presented in chronological order), including the vegetation, wetland, and

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<sup>1</sup> Figure 5, *Vegetation Communities*, found in Davis, J.H. IV (Dudek). February 2013. *Grassland Assessment and Vegetation Mapping Survey Report for the Newport Banning Ranch*, is still subject to Coastal Commission review and revision.

sensitive species data and maps spanning 1992 to 2014; reviewed peer reviewed literature; and reviewed current and historical aerial photographs.

Several habitat types were disturbed as a result of the Subject Activities including 1) coastal scrub communities that function as habitat for the federally threatened coastal California gnatcatcher (*Polioptila californica californica*), the coastal cactus wren (*Campylorhynchus brunneicapillus sandiegensis*), a California species of special concern, and many other species of plants and animals; 2) areas of extensive wetland vegetation (salt marsh, seasonal ponds, vernal pools); 3) rare vegetative communities including maritime succulent scrub and purple needlegrass grassland; and 4) other habitats such as non-native annual grassland that support burrowing owls and raptor foraging.

### **ESHA Definition**

Section 30107.5 of the Coastal Act defines Environmentally Sensitive Habitat as:

*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.*

Plants and animals and habitats that meet the rarity criterion under this definition may include those identified in the California Department of Fish and Wildlife's (CDFW) Natural Diversity Database (CNDDDB), which includes rare natural communities; plant and animal species identified as rare, threatened or endangered by the state or federal government under the state or federal Endangered Species Act; plants, animals, and plant communities listed by NatureServe as state or global-ranked 1, 2, or 3; plants and animals identified CDFW as Species of Special Concern; and/or California Native Plant Society listed 1B and 2 plant species<sup>2</sup>.

### **Coastal Sage Scrub**

Coastal sage scrub is comprised of dominant species that are semi-woody and low-growing, with shallow, dense roots that enable them to respond quickly to rainfall<sup>3</sup>. The species composition and structure of individual stands of coastal sage scrub depend on moisture conditions that derive from slope, aspect, elevation and soil type. Sawyer et

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<sup>2</sup> The CNDDDB is a state depository of lists of rare natural communities and rare plant and animal species generated by an array of regional, state, national and international sources that are vetted, maintained and continually updated by the Biogeographic Branch of the California Department of Fish and Wildlife (CDFW). In making ESHA determinations, Commission staff generally review a subset of these lists including the list of natural communities identified as rare by CDFW, the State and Federal government lists of rare, threatened or endangered plant and animals species, the natural communities and plant and animal species listed by NatureServe as State or Global-ranked 1, 2, or 3, the plant and animal species listed as California Species of Special Concern, and plant species listed by the California Native Plant Society (CNPS) as 1B or 2.

<sup>3</sup> Holland, R.F. 1986. Preliminary Descriptions of the Terrestrial Natural Communities of California. State of California, The Resources Agency, Department of Fish and Game.

al. (2008) divide coastal scrub communities into alliances including California sunflower (*Encelia californica*), California buckwheat (*Eriogonum fasciculatum*), common deerweed (*Acmispon glaber*) and coast prickly-pear, (*Opuntia littoralis*)<sup>4</sup>. The coastal sage scrub found on Newport Banning Ranch is best characterized as California sunflower shrubland alliance; however, California buckwheat, common deerweed and coast prickly-pear are often co-dominant.

Coastal sage scrub is increasingly rare in the coastal zone; loss of coastal sage scrub habitat in southern California is estimated to be 70 to 90 percent<sup>5,6</sup>. Coastal sage scrub in southern California provides habitat for about 100 rare species, many of which are also endemic to limited geographic regions<sup>7</sup>. Two such species are the coastal California gnatcatcher and the coastal cactus wren. The California gnatcatcher is an obligate, year-round resident of coastal sage scrub communities<sup>8</sup>. Gnatcatchers in southern California preferentially nest and feed in coastal scrub vegetation on mesas and gentle slopes that are characterized by varying abundances of California sagebrush (*Artemisia californica*), California sunflower; and California buckwheat<sup>9</sup>. Gnatcatcher densities in northern San Diego County were found to be highest in areas where California sunflower and California buckwheat were co-dominant with sagebrush<sup>10</sup>. California gnatcatchers are known to occupy (i.e., to breed, nest, and forage) year round various locations of coastal scrub habitat on Newport Banning Ranch. In 2007, the USFWS identified and mapped critical gnatcatcher habitat in southern California<sup>11</sup>. Based on many observations of gnatcatcher use, the USFWS concluded that all of Newport Banning Ranch is occupied by coastal California gnatcatchers. Coastal populations of the cactus wren are also obligate inhabitants of coastal scrub habitats, and they nest almost exclusively in prickly pear and coastal cholla (*Opuntia prolifera*)<sup>12</sup>.

<sup>4</sup> Sawyer, J., T. Keeler-Wolf and J. Evens. 2008. A manual of California vegetation; Second Edition. California Native Plant Society, Sacramento, CA. 1300 pgs.

<sup>5</sup> Westman, W.E. 1981. Diversity relations and succession in Californian coastal sage scrub. Ecology, Vol. 62: 170-184

<sup>6</sup> Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018-AV38, Endangered and threatened wildlife and plants; Revised designation of critical habitat for the Coastal California Gnatcatcher (*Polioptila californica californica*). 50; Federal Register 72:72069. (December 19, 2007).

<sup>7</sup> Westman (1981) op. cit.

<sup>8</sup> Atwood, J.L. and D.R. Bontrager. 2001. California Gnatcatcher (*Polioptila californica*). In The Birds of North America, No. 574 (A. Poole and F. Gill, eds.). The Birds of North America, Inc. Philadelphia, PA.

<sup>9</sup> Ibid.

<sup>10</sup> Weaver, K.L. 1998. Coastal sage scrub variations of San Diego County and their influence on the distribution of the California gnatcatcher. Western Birds, Vol. 29: 392-405.

<sup>11</sup> Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018-AV38, Endangered and threatened wildlife and plants; Revised designation of critical habitat for the Coastal California Gnatcatcher (*Polioptila californica californica*). 50; Federal Register 72:72069. (December 19, 2007).

<sup>12</sup> Rea, A M. and K. Weaver. 1990 The taxonomy, distribution, and status of coastal California Cactus Wrens. Western Birds 21: 81-126.

**Maritime Succulent Scrub**

Maritime succulent scrub, which provides habitat for coastal California gnatcatchers and coastal cactus wren, is identified as a rare plant community in CDFW's CNDDDB.

Maritime succulent scrub is a low growing, open (25% - 75% ground cover) scrub community dominated by drought deciduous, semi-woody shrubs that grow on rocky or sandy soils of coastal headlands and bluffs<sup>13</sup>. This community type has a very limited distribution along the coast between southern California and northern Baja California and on the Channel Islands. Characteristic species include California sunflower, prickly pear, and California box-thorn (*Lycium californicum*)<sup>14</sup>, which is a CNPS list 4.2 species. The maritime succulent scrub intergrades with other scrub community types on Newport Banning Ranch.

**Purple Needlegrass Grassland**

Purple needlegrass (*Nasella pulchra*), the California state grass, is a tuft or bunch grass species once found abundantly throughout California grasslands. Purple needlegrass grasslands have become increasingly rare due to intensive conversion to agricultural land, urban development and invasion of non-native grasses and are now identified as a rare habitat type by the CNDDDB. Patches of purple needlegrass grassland area occur sporadically across Newport Banning Ranch. These grasslands provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species of mammals, birds, and reptiles including burrowing owls, a California Species of Special Concern, and many species of raptors.

**Non-Native Annual Grasslands**

The annual grasslands on Newport Banning Ranch are dominated by a mix of non-native species including ripgut grass (*Bromus diandrus*), foxtail chess (*Bromus madritensis* ssp. *rubens*), black mustard (*Brassica nigra*), and tocalote (*Centaurea melitensis*). Annual grasslands also provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species of mammals, birds, and reptiles including burrowing owls and many species of raptors. A large percentage of the annual grassland areas have been disturbed by regularly mowing on Newport Banning Ranch; in areas where the mowing is discontinued both native shrubs (e.g. deerweed, California sunflower) and grass (purple needlegrass) species begin to establish.

**ESHA Impact Conclusion**

The coastal scrub and grassland habitats on Newport Banning Ranch are 1) rare primarily from habitat loss due to development, and/or 2) provide especially valuable ecosystem services for rare species (e.g. coastal California gnatcatcher, coastal cactus wren, burrowing owl), and 3) are easily degraded and disturbed by human activities and development. Therefore, these areas meet the Coastal Act definition of ESHA and are protected under section 30240 of the Coastal Act. Several of the areas impacted by the

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<sup>13</sup> Sawyer et al. (2008) op. cit.

<sup>14</sup> Ibid.

subject activities contained or were immediately adjacent to coastal scrub and/or grassland habitat prior to the development at issue, and those areas therefore met the definition of ESHA under the Coastal Act or were adjacent to areas that did at the time they were affected by the subject activities.

### **Wetlands**

Newport Banning Ranch supports large areas of salt, brackish, and freshwater marsh on the lower mesa adjacent to the Santa Ana River. Newport Banning Ranch also supports a number of seasonal wetlands including vernal pools. The areas identified as seasonal wetlands do not support vernal pool invertebrate or plant indicator species but do meet one or more of the three wetland parameters required by the Coastal Act to qualify as a Coastal Act wetland; that is they meet the hydrology, hydrophytic vegetation, and/or hydric soils parameter requirements. Vernal pools are discussed immediately below.

### **Vernal Pools**

Newport Banning Ranch supports a large number of vernal pools. Vernal pools are shallow surficial depressions that seasonally fill with water during winter and spring rains and dry up during summer months. Vernal pools are rare and unique habitats that support a number of plant and animal species found only in vernal pools. Plant species indicative of vernal pools, including brass buttons (*Cotula coronopifolia*) and woolly marbles (*Psilocarphus sp.*), occur in several of the vernal pools on Newport Banning Ranch. Fairy shrimp are vernal pool indicator species and there are two species present in the vernal pools on Newport Banning Ranch; the federally endangered San Diego fairy shrimp (*Branchinecta sandiegonensis*) and the versatile fairy shrimp (*Branchinecta lindahli*) which is not a listed species. Vernal pool protocol level surveys to date have documented fairy shrimp in at least 37 vernal pools on Newport Banning Ranch including eight pools occupied by the San Diego fairy shrimp. Fifteen acres on Newport Banning Ranch has been identified by the U.S. Fish and Wildlife Service as San Diego fairy shrimp critical habitat. This area is the only designated critical habitat for this species in Orange County.

Some of the areas impacted by the subject activities contained wetlands or vernal pools. Wetlands and vernal pools are protected under section 30233 of the Coastal Act. In some prior matters, the Commission has considered vernal ponds to be a type of ESHA and has protected them under section 30240 of the Coastal Act. Either way, whether viewed pursuant to section 30233 or 30240, those subject activities that involved placement of materials in wetlands or vernal pools thus resulted in fill or impacts to wetlands.

### **Approach**

Newport Banning Ranch has agreed to mitigate on site for disturbance to the coastal scrub, grassland, and wetland and vernal pool habitat from the subject activities. The required habitat restoration acreage was strategically concentrated in several large



areas versus spread out in a number of smaller patches to have the best chance of successfully restoring the various habitat types and the respective rare species (Figure 2). A key principle of conservation biology is to restore a smaller number of large areas as opposed to a larger number of small areas<sup>15</sup>. This is because fragmented habitats have reduced biological integrity because they are more vulnerable to population size fluctuations (increases and declines), catastrophic events, introduced species, pathogenic outbreaks, and overall loss of genetic diversity.

Wilcove et al. (1986) state that "Habitat fragmentation has been recognized as the leading factor in species loss, on both a local and global level"<sup>16</sup>. Increasing the number of landscape pieces, decreasing interior habitat area, increasing the extent of habitat edges, and increasing habitat isolation all contribute to habitat fragmentation<sup>17</sup>. Animals with relatively large ranges such as birds and many mammals are often the first to be adversely affected by habitat fragmentation<sup>18</sup>. And plant communities and individual plant species have specific threshold habitat size requirements below which the population will not persist through time<sup>19</sup>. Therefore, I find this mitigation proposal (restoring a smaller number of large areas rather than a larger number of small areas) to be the ecologically superior approach with a high likelihood of success.

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<sup>15</sup> Groom, M.J., G.K. Meffe, & R. Carroll. 2006. *Principles of Conservation Biology*. Sinauer Associates, Sunderland, MA. 761 pgs.

<sup>16</sup> Wilcove, D.S., C. H. McLellan, and Dobson, A. P. 1986. *Habitat fragmentation in temperate zones*. In *Conservation Biology: The Science of Scarcity and Diversity*. pp. 237-256. Edited by M. Soulé. Sinauer Associates, Sunderland, MA, USA.

<sup>17</sup> Li, H., J. F. Franklin, Swanson, F. J. and Spies, T.A. 1993. *Developing alternative forest cutting patterns: A simulation approach*. *Landscape Ecology* 8: 63-75.

<sup>18</sup> Beier, P. 1993. *Determining minimum habitat areas and habitat corridors for cougars*. *Conservation Biology* 7:94-108.

<sup>19</sup> Schaffer, M.L. 1981. Minimum Population Sizes for Species Conservation. *BioScience*, Vol. 31, No. 2: 131-134.







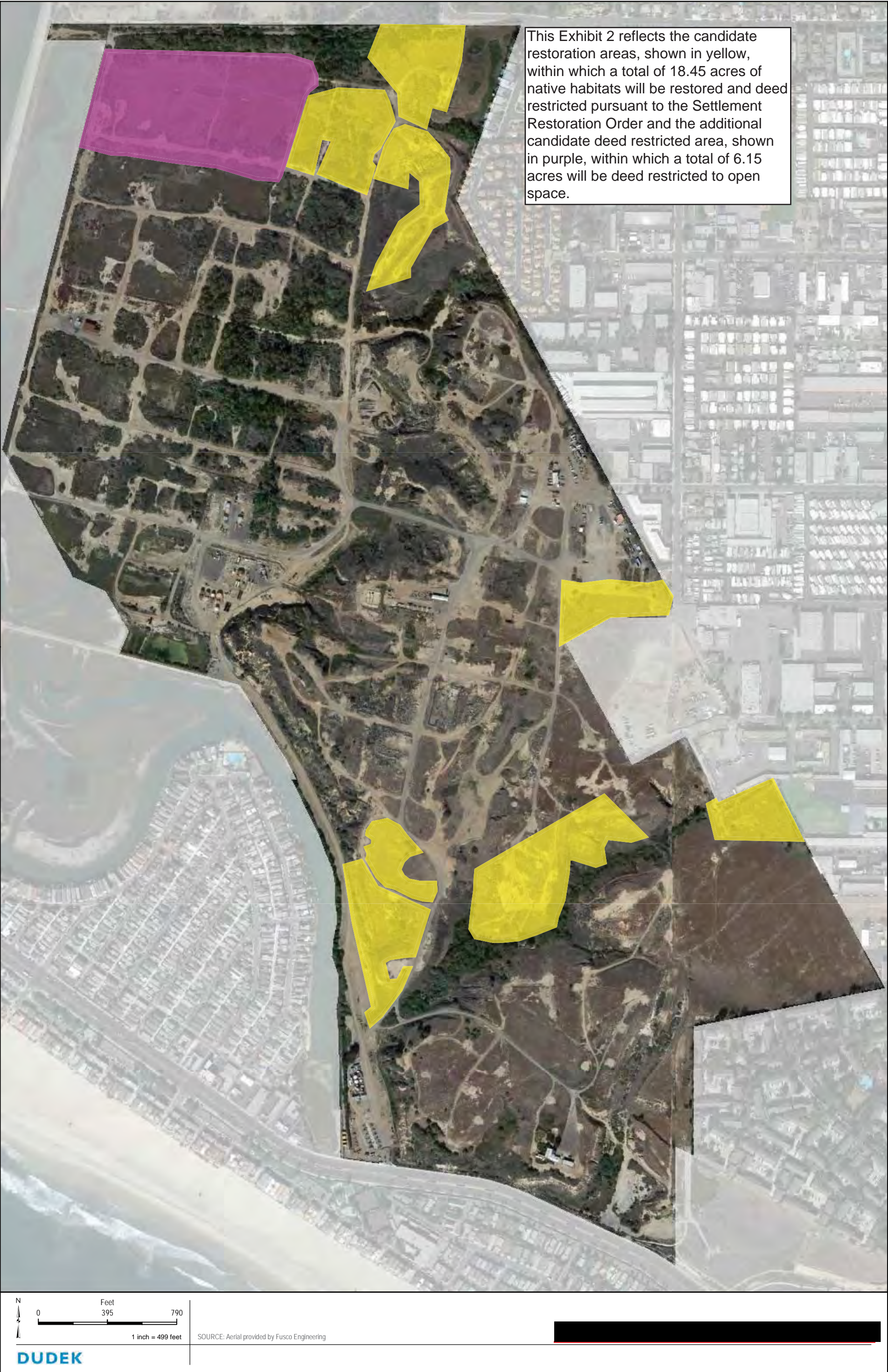


Figure 2: Restoration Areas





# United States Department of the Interior

## FISH AND WILDLIFE SERVICE

Ecological Services  
Carlsbad Fish and Wildlife Office  
2177 Salk Avenue, Suite 250  
Carlsbad, California 92008



In Reply Refer To:  
FWS-OR-09B0158-12TA0393

OCT 09 2014

Michael Mohler  
Newport Banning Ranch, LLC  
1300 Quail Street, Suite 100  
Newport Beach, California 92660

Tom McClosky  
West Newport Oil Company  
1080 West 17th Street  
Costa Mesa, California 92627

Subject: Oil Field Operations and Maintenance, Newport Banning Ranch, City of Newport Beach, California

Dear Mr. Mohler and Mr. McClosky:

By letter received March 11, 2013, you requested that the U.S. Fish and Wildlife Service (Service) review proposed activities related to ongoing oil field operations and maintenance within 385 acres of the Newport Banning Ranch property in the City of Newport Beach, Orange County, California (Enclosed), relative to compliance of those activities with the Endangered Species Act of 1973 (87 Stat. 884, as amended; 16 U.S.C. 1531 *et seq.*) (ESA). Federally listed species known to occur within the property include the threatened coastal California gnatcatcher (*Poliophtila californica californica*, gnatcatcher), endangered San Diego fairy shrimp (*Branchinecta sandiegonensis*, SDFS), and endangered least Bell's vireo (*Vireo bellii pusillus*, vireo).

Section 9 of the ESA and associated regulations prohibit the take<sup>1</sup> of endangered and threatened species without special exemption. The Migratory Bird Treaty Act prohibits killing or injuring adults and destroying active nests. Our review of oilfield operations and maintenance activities on the site indicate that, over time, there appears to have been a reduction in habitat for the gnatcatcher and a reduction in the number of gnatcatcher territories. A total of 20 territories were documented in 1993 when the gnatcatcher was listed whereas only 10 territories were observed in 2013, and 8 territories were observed in 2014. We estimate gnatcatcher breeding habitat

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<sup>1</sup> Take is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, collect, or to attempt to engage in any such conduct. Harm is further defined by the Fish and Wildlife Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavior patterns, including breeding, feeding, or sheltering.

(coastal sage scrub) has declined by 7.31 acres, from 59.41 acres in 1992 to 52.10 acres in 2012<sup>2</sup>. Regular disturbance to vegetation from mowing has also increased the extent of invasive and ornamental vegetation and decreased available foraging habitat for the gnatcatcher.

Accordingly, we are concerned that the past activities on the site may have resulted in take of gnatcatcher through habitat modification. We would like to resolve these past compliance issues with you. In addition, we would like to discuss the components of the maintenance plan that was prepared, by West Newport Oil Company (WNOC) and Newport Banning Ranch LLC (NBRLLC) in coordination with the Service, to describe ongoing activities and to accomplish the following objectives:

- Restore and maintain vegetation so that the habitat quality for the gnatcatcher is equivalent to or greater than it was in 1993, when the gnatcatcher was federally listed as threatened;
- Maintain habitat quality for the vireo and SDFS; and
- Incorporate measures to avoid impacts to gnatcatcher, vireo, and SDFS.

In summary, we appreciate the efforts of WNOC and NBRLLC to coordinate with our agency to ensure regulatory compliance with the ESA and Migratory Bird Treaty Act. At this time, we recommend that mowing be restricted to those areas with active oil operations or that are necessary to maintain health and human safety. Please contact Assistant Field Supervisor Karen Goebel by telephone or email (760-431-9440, extension 296; Karen\_Goebel@fws.gov) to arrange a meeting to discuss these issues further.

Sincerely,



G. Mendel Stewart  
Field Supervisor

cc:

Resident Agent-in-Charge, USFWS Office of Law Enforcement, Torrance

---

<sup>2</sup> Dudek Associates documented a total of 52.10 acres of scrub (minimum of 30 percent shrub cover) in 2012 and determined there was 58.62 acres of scrub (minimum 25 percent shrub cover) in 1992 based on vegetation mapping completed by LSA. The Carlsbad Fish and Wildlife Office GIS staff reviewed the information and determined that a portion of the 1992 map was not included in Dudek's analysis; therefore, 59.41 acres of scrub was mapped in 1992. Scrub vegetation was reduced by approximately 7.31 acres between 1992 and 2012.



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Irvine, California 92612-2480  
P 949.260.4600 F 949.260.4699

Tim Paone  
949.260.4655  
tpaone@coxcastle.com

September 27, 2012

**VIA ELECTRONIC MAIL**

Andrew Willis  
Enforcement Analyst  
California Coastal Commission  
200 Oceangate, Tenth Floor  
Long Beach, CA 90802

Re: **Vegetation Maintenance at Banning Ranch Oil Field, Newport Beach, Orange County, California**

Dear Mr. Willis:

Cox, Castle & Nicholson LLP is counsel to West Newport Oil Company ("WNO"), the oil operator for the Banning Ranch oil field (the "Oil Field"). Since receiving a Notice of Violation (the "NOV") from the California Coastal Commission (the "Coastal Commission") in May of this year, representatives of WNO and Newport Banning Ranch LLC ("NBRLLC"), the Oil Field landowner, have communicated with staffs of the United States Fish and Wildlife Service ("USFWS") and the Coastal Commission in an effort to address concerns regarding oil operations and related vegetation maintenance activities within the Oil Field. Despite our mutual efforts, we still differ on the appropriate scope of those activities.

WNO has consistently reiterated the need to continue the historic patterns of oil operations, which include vegetation maintenance in the Oil Field. The purpose of this maintenance is to facilitate oil operations by, among other things, protecting Oil Field buildings and structures and surrounding persons and properties from the risk of fire which could result from the oil operations (or otherwise). Those historic patterns were the subject of a 1973 determination by the California Coastal Zone Conservation Commission, the California Coastal Commission's predecessor, that the rights to conduct the oil operations on the Oil Field had vested and were, therefore, exempt from regulation under the California Coastal Zone Conservation Plan (the "Vested Rights Exemption"). The same general pattern of vegetation maintenance related to the oil activities that was occurring at the time of the Vested Rights Exemption has continued for what soon will be the 40 years since that exemption was granted. It is worth noting that the Vested Rights Exemption preceded current fire regulations addressing brush clearance. Obviously, if current health and safety regulations require more clearing than what has historically been performed in the Oil Field, then more clearing would now be required. But if the operational practice which vested with approval of the Vested Rights Exemption is more



protective of the Oil Field and surrounding properties than the new regulations, then the rights which vested included the right to continue the more protective operational practice. That is precisely what has consistently occurred over time.

More recently, without altering or waiving its rights under the Vested Rights Exemption and since receiving the NOV, WNO has voluntarily delayed ongoing vegetation maintenance this summer. Today, however, WNO believes it is necessary to recommence vegetation maintenance activities, as we are well into the fire season. This maintenance is necessary, appropriate, and authorized by the Vested Rights Exemption. We will perform our work in two phases in an effort to allow for further discussion with Commission staff regarding the scope of the Vested Rights Exemption. Those phases are as follows:

**First Phase:** WNO will begin vegetation maintenance activities by performing fuel modification within a 100 foot wide area along the eastern boundary of the Banning Ranch. The enclosed exhibits show the area which will be cleared. To ensure that the work will not impact any sensitive species, NBRLLC's biologists will monitor the work. Weather permitting, we will begin the work on Wednesday, October 3, and expect to complete it by Friday, October 5.

We recognize that this approach differs from your most recent proposal to allow clearing within 100 feet of any "home" (we assume your use of the term "home" was an oversight, since (1) there is a school and other buildings which are adjacent to the Oil Field, (2) there are many structures within the Oil Field itself, (3) the City's regulations do not limit fuel modification to the protection of "homes," and (4) the Orange County Fire Authority's Vegetation Management Technical Design Guideline provides protection to all "structures.") However, absent this practical approach, it would be virtually impossible for the driver of a tractor to follow a dramatically meandering and shifting line to stay precisely 100 feet from each adjacent structure, not to mention the difficulty of starting and stopping the process if there is not an adjacent structure. Our goal, as it always has been, is to be reasonable in protecting surrounding properties and the Oil Field itself.

In addition to the vegetation maintenance along the property line, we will soon be performing vegetation maintenance near well pads, oil and gas lines, utility poles and lines, Oil Field buildings and structures, roads, and existing bare areas, consistent with the Vested Rights Exemption, historical practices, and our discussions with USFWS.

The limited scope of this first phase is not intended to waive any of WNO's rights under the Vested Rights Exemption. It simply means that we will begin our vegetation maintenance in those areas which appear to be less objectionable to Coastal Commission staff and the USFWS. While this limited effort is underway, we are available to work with you with the hope that, before we proceed to the second phase of vegetation maintenance, Commission staff will understand that all proposed vegetation maintenance is within the scope of the Vested Rights Exemption and, therefore, not subject to further regulation under the Coastal Act.

**Second Phase:** Following the first phase of vegetation maintenance, WNO intends to complete its vegetation maintenance activities consistent with historic practices. Maps depicting the vegetation maintenance areas will be provided to you in advance of the work.

Andrew Willis  
September 27, 2012  
Page 3

It is important that we meet soon to share with you information we have assembled which demonstrates the consistent vegetation maintenance practices within the Oil Field for more than sixty years. It remains our goal to resolve the disagreements we have with Coastal Commission staff regarding the scope of the Vested Rights Exemption. Please contact me at your earliest convenience so that we can set a date for a meeting.

Sincerely,



A handwritten signature in black ink, appearing to read 'Tim Paone', with a stylized, sweeping underline.


Tim Paone

Enclosures: Initial Seasonal Vegetation Maintenance Program Implementation Exhibits

65411\4194477v1



 Banning Ranch Oil Field  
 100' Fuel Modification Area

 0 100 200 Feet

**DUDEK**  
7248-01  
SEPTEMBER 2012

SOURCE: ESRI Online BING Satellite  
**Initial Seasonal Vegetation Maintenance Program Implementation - 100' Fuel Modification Area**  
NEWPORT BANNING RANCH

**NORTH VIEW**

**CCC-15-CD/RO-01**





**DUDEK**

7248-01  
SEPTEMBER 2012

SOURCE: ESRI Online BING Basemap

**Initial Seasonal Vegetation Maintenance Program Implementation - 100' Fuel Modification Area**  
**NEWPORT BANNING RANCH**

**SOUTH VIEW**

**CCC-15-CD/RO-01**

**Exhibit 11**  
**Page 5 of 5**

April 12, 2014

Client-Matter: 28934-032

**VIA E-MAIL AND U.S. MAIL**  
**ANDREW.WILLIS@COASTAL.CA.GOV**

Andrew Willis  
California Coastal Commission  
200 Oceangate, 10th floor  
Long Beach, CA 90802

**Re: Follow up to March 7, 2014 Meeting**

Dear Andrew:

On behalf of my client, Newport Banning Ranch LLC ("NBR"), we would like to respond to your letter dated March 21, 2014 in which Commission enforcement staff is requesting data files and information relating to NBR's coastal development permit ("CDP") application. Your letter was a follow up to our March 7, 2014 meeting among representatives of NBR, Coastal Commission staff, and representatives of West Newport Oil Company ("WNOC") to see if we could find a mutually acceptable path to resolving the concerns raised in your January 31, 2014 letter regarding possible unpermitted development at the Newport Banning Ranch property. As discussed at the meeting and as your letter reiterates, it remains our shared goal to work with Commission staff and WNOC to reach an amicable resolution. To that end, when we closed the meeting, we agreed that the next step would be to develop a framework for resolution.

We felt that the meeting gave the parties the opportunity to air a number of issues, and to provide information to Commission staff regarding the history of the oil operations at Banning Ranch, and the current oil production activities. It was our impression that the information provided by WNOC provided relevant background data to address some of Commission staff's questions and that your legal staff committed to revisit some of the allegations raised in the January 31, 2014 letter. For example, WNOC provided an explanation of its 1985 coastal development permit, noting that (i) the CDP application was for the drilling of exploratory wells, and (ii) the speculative thirty wells referenced in that application which could have resulted (but didn't) from the proposed exploratory drilling would have been in a deeper subsurface horizon than what was within the scope of the Exemption. Hopefully, staff now understands why the drilling proposed by the 1985 CDP application was outside the scope of the Exemption and unrelated to drilling and redrilling in those horizons which were covered by the Exemption.

Andrew Willis  
April 12, 2014  
Page 2

We were therefore very surprised to receive your March 21 letter requesting additional information regarding the location of oil wells and oil facilities on behalf of both enforcement and permitting staff instead of providing a framework for resolution as we thought we agreed at our meeting. Although this letter is not a response to permitting staff's Notice of Incomplete Application, I would simply like to reiterate that for its part, NBR has taken every opportunity to provide prompt responses to Commission permitting staff regarding the additional information it has requested. In addition to providing information addressing issues such as habitat, oil field abandonment and remediation, water quality, land planning, and circulation, NBR has also arranged site visits for Commission staff to examine first hand and ground truth the vegetation mapping data that NBR has provided. NBR has also provided information to permitting staff to address is questions regarding current baseline conditions, as well as a detailed habitat management and maintenance plan – all of which would allow Commission permitting staff to move forward with processing NBR's application.

Given the copious amounts of information provided with our application – which we understand has been reviewed by both Commission permitting staff and enforcement staff – you and I discussed using the March 7<sup>th</sup> meeting as an opportunity for Commission enforcement staff to walk NBR through its analysis and, for example, point out to us the structures that it believed were built without permits and/or outside the scope of Exemption E-7-27-73-144 ("Exemption"). We agreed that would be a worthwhile exercise for Commission staff to identify the development that it questioned as being outside of the Exemption, and for WNOC and NBR to understand the basis for the concerns expressed in your January 31, 2014 letter. We had not discussed bringing either data files or digital files to the meeting. (I understand that in an earlier meeting, George Basye discussed with Cassidy Teufel digital files, but once the threat of an enforcement action was received by NBR, Mr. Teufel indicated, in a subsequent phone call, that he understood if NBR chose not to provide any additional information.)

After we reviewed the oil field operations with staff, both WNOC and NBR offered options on how they would propose to resolve the question of the scope of activities covered by the 1973 Exemption. Those options would provide an avenue for addressing both the concerns expressed by Commission enforcement staff, as well as what Commission permitting staff has described as the "threshold" issues to deeming NBR's permit application complete.

We believe that the logical next step following the March 7 meeting would be to begin defining the framework for arriving at an amicable resolution of both the enforcement and permitting matters and that the most productive use of all of our energy and efforts would be to



Andrew Willis  
April 12, 2014  
Page 3

focus on resolution. Jared Ficker has reached out to you to schedule a time where we can meet again to discuss the options for resolving the Exemption issues and potential unpermitted development concerns. We look forward to meeting with you and Commission staff again so that we can continue these discussions.

Very truly yours,

Manatt, Phelps & Phillips, LLP



Susan K. Hori  
Partner

Cc via email:

Michael Mohler  
George Basye  
Jared Ficker  
Tim Paone  
Leonard Anderson  
Lisa Haage  
Sherilyn Sarb  
Alex Helperin  
Allison Detmer

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RECEIVED  
South Coast Region

JUN 27 2014

CALIFORNIA  
COASTAL COMMISSION

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Tim Paone  
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June 25, 2014

Via US Mail and E-mail

Lisa Haage (lhaage@coastal.ca.gov)  
Chief of Enforcement  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, CA 94105

Andrew Willis (awillis@coastal.ca.gov)  
Enforcement Analyst  
California Coastal Commission  
South Coast Area Office  
200 Oceangate, Suite 1000  
Long Beach, CA 90802-4302

Re: Threatened Enforcement Action  
Resolution of Exemption E-77-27-73-144 (October 30, 1973)

Dear Lisa and Andrew:

I am writing on behalf of West Newport Oil Company ("West Newport"), the current oil operator at the West Newport Oil Field (the "Property"). This letter pertains to the scope of Resolution of Exemption E-77-27-73-144 (the "Resolution of Exemption").

Newport Banning Ranch LLC ("NBR") has shared with West Newport recent discussions and correspondence between members of Commission Staff and representatives of NBR pertaining to NBR's appeal of Staff's determination that NBR's development application is incomplete. Let me acknowledge up front that it is possible that something may have been "lost in the translation" with respect to those communications. Nonetheless, we feel the need to clarify West Newport's position with respect to Staff's threatened enforcement action and, in particular, Staff's allegations of unpermitted drilling of wells and unpermitted maintenance on the Property.

A summary of the events of the past two years is as follows:

- Dating back to May of 2012, Staff has made allegations that, during the course of the roughly forty years following the Resolution of Exemption, various violations have occurred on the Property in connection with the oil operations.
- Initially, on May 18, 2012, Staff asserted that violations had occurred with respect to mowing that had occurred on the Property. On August 17, 2012, representatives of West Newport and NBR met with Staff onsite and asked Staff to point to specific areas of the Property where violations had occurred. Despite having sent to West Newport and NBR a document entitled "Notice of Violation," Staff was not able to identify a single location on the Property where a violation had occurred. Rather, Staff stated that it was up to NBR and West Newport to prove that everything that had been done on the Property pursuant to the Resolution of Exemption was legal. Clearly, in the enforcement context in which that demand was made, it was wholly inappropriate.
- Despite Staff's inability to point to a single violation, an agreement was reached with Staff to limit mowing while a resolution to the disagreement over the scope of the Resolution of Exemption was addressed. There has yet to be a resolution.
- On November 7, 2013, Leonard Anderson and I, representing West Newport, traveled to San Francisco to meet with Staff in the hope of having a constructive discussion regarding the scope of the Resolution of Exemption. It was at the very beginning of that meeting that it became apparent that Staff was not interested in West Newport's perspective on the scope of the Resolution of Exemption. Upon being introduced and *before* there had been any substantive discussion, one Staff member stated "I know what you are going to say and you will never convince me." The tone was set.
- Subsequently, in a January 31, 2014, letter, Staff asserted, among other things, that up to 153 wells had been drilled on the Property outside of the scope of the Resolution of Exemption.
- To address the allegations of that letter, on March 7, 2014, representatives of NBR and West Newport met in Long Beach and participated in a meeting/conference call with numerous Staff members to address Staff's violation allegations. During that meeting:
  - West Newport attempted to inform Staff of the reasons why it disagreed with both the legal and factual underpinnings of Staff's violation allegations. Overall, Staff appeared dismissive of and disinterested in any substantive discussion of the scope of the Resolution of Exemption.

Lisa Haage  
Andrew Willis  
June 25, 2014  
Page 3

- Staff's focus appeared to be not on "whether" there was a violation, but rather on questions related to restoration, mitigation, and fines. In fact, when we stated that we wanted to address "whether" there had been a violation, one Staff member stated "I thought we were beyond that." As we adamantly stated at that moment, West Newport has never moved "beyond" the question of whether even a single violation has occurred.
- West Newport stated, in no uncertain terms, that it believes that all drilling operations conducted on the Property since 1973 have been conducted within the scope of the Resolution of Exemption. Our position has not changed. When we left the meeting, we thought our position was understood.

The recent communications between NBR and Staff have left West Newport with the impression that Staff not only remains intransigent in its position with respect to the scope of the Resolution of Exemption, but believes that there is an ongoing process to resolve the alleged violations and the threatened enforcement action. Such a process is not underway and, to our understanding, would be premised upon the existence of violations. West Newport does not accept that premise. West Newport has not wavered at any time from its view that Staff's violation allegations, including those related to the well count, are baseless, both legally and factually.

West Newport is not a party to NBR's permit process and, therefore, not a party to NBR's pending appeal. Nonetheless, for obvious reasons, West Newport has a significant interest in any issues related to the scope of the Resolution of Exemption. We simply wanted to clarify that we remain confident in our reading of the scope of the Resolution of Exemption. Thank you.

Sincerely,



Tim Paone

cc: Alison Dettmer, Deputy Director, Energy, Ocean Resources, and Federal Consistency  
Sherilyn Sarb, Deputy Director, South Coast District Office (Orange County)  
Leonard Anderson, West Newport Oil Company

## SETTLEMENT AGREEMENT AND SETTLEMENT CEASE AND DESIST ORDER AND SETTLEMENT RESTORATION ORDER

This Settlement Agreement and Settlement Cease and Desist Order and Settlement Restoration Order (collectively, the “Settlement Agreement”) is entered into by and between (1) the California Coastal Commission (the “Commission”) and (2) Newport Banning Ranch LLC,<sup>1</sup> Aera Energy LLC, and Cherokee Newport Beach, LLC (collectively, “NBR (individually, a “Party” or, collectively, the “Parties”).

### RECITALS

#### 1.0 BACKGROUND

1.1 In May, 2012, California Coastal Commission (“Commission”) through its staff (“Staff”) notified NBR and West Newport Oil Company (“WNOC”) that Staff believed work had been conducted on the West Newport Oil Field that exceeded the scope of Coastal Exemption E-7-23-73-144 (“1973 Exemption”) without the requisite Coastal Act authorization. The West Newport Oil Field is located at 5100 block of West Coast Highway, within the City of Newport Beach and unincorporated County of Orange (the “Property”) (see **EXHIBIT 1**), the surface of which is owned by Aera Energy LLC and Cherokee Newport Beach, LLC.

1.2 Beginning in May, 2012, Staff, NBR and WNOC exchanged numerous letters regarding Staff’s allegations regarding work on the Property, culminating with Staff’s transmittal of “Notification of Intent to Commence Cease and Desist Order and Restoration Order Proceedings and Notification of Intent to Record a Notice of Violation” letter (“NOI”) to WNOC and NBR on August 19, 2014.

1.3 NBR and WNOC have disputed and continue to dispute the Commission’s allegations set forth in the NOI and prior correspondence and filed Statements of Defense in response to the NOI on November 11, 2014 and September 24, 2014, respectively, in accordance with the deadline set forth by the Commission. Through the execution of this Settlement Agreement, the Commission, and NBR have mutually agreed to resolve with respect to NBR all claims asserted in the NOI, as described herein.<sup>2</sup>

1.4 NBR asserts that it holds the right to seek entitlements for development of the Property.

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<sup>1</sup> Newport Banning Ranch LLC manages planning and entitlement of the “Banning Ranch” surface rights for the owners of the Property (as that term is defined in section 1.1 and 3.1.B) – Cherokee Newport Beach, LLC and Aera Energy LLC. Hereinafter, all references to NBR LLC are to Newport Banning Ranch LLC individually, but references to “NBR” are to Newport Banning Ranch LLC, Cherokee Newport Beach LLC, and Aera Energy, LLC, jointly.

<sup>2</sup> See FN 7.



1.5 The ongoing oil operations are conducted by WNOC, the operator of the oil field, on behalf of the mineral rights owner, Horizontal Development LLC.

**1.6 This Settlement Agreement represents a compromise by the Parties to avoid the cost and uncertainty of administrative proceedings related to the NOI and/or litigation. NBR does not acknowledge any guilt or liability with respect to the allegations of the NOI, and this Settlement Agreement shall not be construed to suggest, imply, or establish any guilt or liability with respect to those allegations. All Parties continue to maintain their respective factual and legal positions as set forth in the NOI (in the case of the Commission) and in its Statement of Defense (in the case of NBR) without any concession to contrary positions taken by other Parties. Nonetheless, to achieve this compromise, NBR has agreed through this Settlement Agreement to withdraw its Statement of Defense for the reasons set forth and pursuant to the terms and conditions set forth in Section 11.0, and resolve the differences regarding the Parties' respective positions regarding the activities described in the NOI.**

## **2.0 NATURE OF ISSUES**

2.1 Commission Staff's Position. Staff notified NBR and WNOC of Staff's position that, based in part upon Staff's interpretation of the 1973 Exemption, certain activities have been conducted on the Property that required authorization pursuant to the Coastal Act, but for which no such authorization was obtained. In summary, the primary activities of concern to Staff include the removal of major vegetation; the placement, construction, or release of the items and materials identified in Section 4.3.B, below; and undertaking of the activities identified in the NOI, including any associated grading and removal of major vegetation.

2.2 NBR's Position. NBR's position is set forth in its Statements of Defense. In summary, NBR believes that:

A. The vested rights acknowledged by the 1973 Exemption specifically included the right to continue (a) the oil operations provided that the maximum number of wells in production at any one time never exceeded the number set forth in the 1973 Exemption (i.e., 340 wells), and (b) maintenance of the Property, including vegetation management and mowing activities, in the same manner in which it had been maintained prior to and at the time of the 1973 Exemption.

B. At all times since 1973, the oil operations, including vegetation management, on the Property have been conducted in a manner consistent with the 1973 Exemption. No more than 340 wells have ever been in active production at one time and the vegetation management has been consistent with the vested pre-1973 practices, although voluntarily reduced in some circumstances to respect environmental concerns.



C. NBR has not knowingly or intentionally performed or undertaken development (as defined by Coastal Act Section 30106) in violation of the Coastal Act.

2.3 Shared Position. All Parties agreed to work collaboratively to facilitate a resolution of these matters. To that end, NBR and Staff have had discussions over the past several months for the purpose of resolving this matter amicably and through this Settlement Agreement.

2.4 Filing Dispute. NBR and Staff's differing interpretations of the 1973 Exemption also contributed to a dispute regarding whether oil field operation information was needed to complete NBR's Coastal Development Permit ("CDP") application No. 5-13-032. Pursuant to the procedures set forth in 14 CCR § 13056, NBR filed, on June 12, 2014, an appeal of the Executive Director's determination that the CDP application was incomplete, raising, among other issues, the question of the scope of the 1973 Exemption. The Commission's Executive Director determined that the application could be filed without the requested oil field operation information and deemed the application "complete" with respect to Staff's information requests related to oil field operation activities, thereby eliminating the need for a dispute hearing before the Commission with respect to the completeness of NBR's CDP application.

2.5. Resolution. All Parties have worked collaboratively to resolve this matter amicably and have mutually agreed to settle their differences through this Settlement Agreement.

## EXHIBITS

The exhibits to this Settlement Agreement are as follows:

SETTLEMENT AGREEMENT EXHIBITS	
Number	Description
1	Property Depiction
2	Identification of Candidate Restoration Areas and Candidate Areas to be Deed Restricted
3	Identification of Wells to be Abandoned
4	Identification of Wells that After-the Fact Permits will be applied for
5	Memorandum of Settlement

### 1.0 SETTLEMENT CEASE AND DESIST ORDER CCC-15-CD-00

Pursuant to its authority under California Public Resources Code ("PRC") Section 30810, the Commission hereby authorizes and orders NBR; and all its successors, assigns, employees, agents, contractors, and any persons or entities acting in concert with any of the foregoing; and notwithstanding the acknowledgement by



all Parties that a disagreement exists as described in Recital 2 above, NBR agrees to:

- A. Cease and desist from engaging in development, as defined in PRC Section 30106, including the Subject Activities, which phrase is defined in Section 3.1.C, below, on the Property, unless authorized pursuant to, or exempt, as specified herein, under, the Coastal Act (PRC Sections 30000-30900), including as authorized by this Settlement Agreement. Pursuant to this provision, and consistent with those practices conducted since May 2012, NBR agrees not to engage in vegetation removal activities, except insofar as it may participate in the future with the limited vegetation removal regimen on the Property<sup>3</sup>, unless authorized pursuant to the Coastal Act.
- B. Remove, subject to the terms and conditions of this Settlement Agreement and pursuant to the Settlement Restoration and Mitigation Plan (hereinafter referred to as the "SRMP") described in Section 4 of this Settlement Agreement, certain physical items and materials placed or allowed to come to rest on the Property as a result of the Subject Activities, as that term is defined in Section 3.1, below, unless authorized by the Commission pursuant to the process described in Section 5, below, and take other actions as set forth in Section 4, below.
- C. As a component of the removal activities described in Section 4.3, below, initiate and complete within the time periods set forth in the Settlement Agreement the abandonment of seventeen (17) oil wells as identified in Exhibit 3 in accordance with the terms and provisions of this Settlement Agreement.
- D. As further described in Section 5.0, NBR shall file for an after-the-fact authorization for well(s) identified on Exhibit 4 or abandon the well(s) pursuant to Section 4.3 (Removal), below.
- E. Relocate, pursuant to the terms of the SRMP described below, the approximate 0.4 acre portion of the debris stockpile to an alternate placement area on the Property.

## **2.0 SETTLEMENT RESTORATION ORDER CCC-15-RO-00**

<sup>3</sup> This limitation applies to any removal of major vegetation beyond the parameters noted below and addressed in this Settlement Agreement. In an October 2, 2012 letter to WNO and NBRLLC, Staff supported a restricted mowing regime and other, limited vegetation management measures, supporting only such measures as were necessary to reduce vegetation within previously modified areas that are: 1) within 25' of any active oil well; 2) within the minimum distance necessary to provide physical access to any active, above ground pipeline; or 3) within 100' of any home or building (pursuant to the Orange County Fire Authority Vegetation Management Guidelines).

Pursuant to its authority under PRC Section 30811, the Commission hereby authorizes and orders NBR, and all its successors, assigns, employees, agents, contractors, and any persons or entities acting in concert with any of the foregoing, and notwithstanding the acknowledgement by all Parties that a disagreement exists as described in Recital 2 above, NBR agrees, to undertake the actions described below, including to remove certain materials, restore areas of the Property, and undertake mitigation efforts, by taking the actions listed in Section 4, below, including implementation of the SRMP as described herein.

### 3.0 **GENERAL PROVISIONS COMMON TO BOTH ORDERS**

#### 3.1 **Definitions**

- A. **Settlement Agreement.** This Settlement Agreement, Settlement Cease and Desist Order CCC-15-CD-00, and Settlement Restoration Order CCC-15-RO-00 are referred to collectively in this document as this Settlement Agreement.
- B. **Property.** The property that is the subject of this Settlement Agreement is located at the 5100 block of West Coast Highway in the City of Newport Beach and unincorporated Orange County, California; is 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; and is referred to in this document collectively as the Property, as shown on Exhibit 1.
- C. **Subject Activities.** This Settlement Agreement addresses activities, structures and materials on the Property that Staff has alleged constitutes development (as defined by Coastal Act Section 30106) for which authorization under the Coastal Act was not received and the Parties dispute. The alleged unpermitted development activities that are the subject of and encompassed<sup>4</sup> by this Settlement Agreement include certain activities that were described in the NOI and are referred to herein as the "Subject Activities."
- D. **Restoration Areas.** The 18.45 acres on the Property within which this Settlement Agreement requires establishment of native habitat through the restoration and mitigation activities described herein, including revegetation with native plant species pursuant to the SRMP or supplemental SRMP, described below. The 18.45 acres will be selected from the areas that remain mapped by Dudek in Figure 5, Vegetation Communities in Dudek's February 2013 Grassland Assessment and

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<sup>4</sup> However see FN 7.



Vegetation Mapping Survey Report for the Newport Banning Ranch as “Disturbed” or “Developed”, within the areas identified in Exhibit 2. NBR will propose specific areas totaling 18.45 acres from within the polygons identified in Exhibit 2, for Staff’s review and approval.

- E. **Exempt Wells.** Exempt Wells are the 312 “existing” wells, as defined in the 1973 Exemption, and the 28 new wells identified in the claimant’s master plan referenced in the 1973 Exemption.
- F. **Wells to be Removed.** Those 17 wells listed on Exhibit 3.
- G. **ATF Wells.** Wells and associated structures for which NBR seeks after-the-fact authorization pursuant to the process described in Section 5, below. Candidate wells for the process described in Section 5 are listed on Exhibit 4.
- H. **Abandon(ment).** To “abandon”, through the process of abandonment, shall mean to undertake and complete operations to abandon wells, in accordance with Code of Regulations Title 14 Division 2 Chapter 4 Subchapter 1 Article 3 and to obtain a Report of Well Plugging and Abandonment from California Division of Oil, Gas & Geothermal Resources (“DOGGR”) (or other forms customarily required by the DOGGR for such work).
- I. **Deed Restricted Areas:** The approximately 24.6 acres of land consisting of the 18.45-acre Restoration Areas and an additional 6.15 acres of land on the Property that are generally contiguous with areas of the Restoration Areas to be deed restricted for open space and restoration and all of which NBR agrees it will not use for future Coastal Act mitigation purposes. Candidate Deed Restricted Areas are depicted on Exhibit 2.

### 3.2 Nature of Settlement Agreement

- A. Through execution of this Settlement Agreement, NBR agrees to comply with the terms and conditions thereof. This Settlement Agreement authorizes and requires (1) removal of certain physical items and materials from the Property, as described in the Settlement Restoration and Mitigation Plan; (2) abandonment of 17 wells depicted in Exhibit 3; (3) relocation of the debris stockpile referred to in 1.0 D, above; and (4) habitat restoration and mitigation activities; and (5) the filing of permit applications for the ATF Wells as described in this document. Nothing in this Settlement Agreement guarantees or conveys any right to development on the Property other than the work expressly authorized by this Settlement Agreement.



- B. **Authority to Conduct Work.** By executing this Settlement Agreement, NBR attests that it has authority to conduct all of the work required of them by this Settlement Agreement and agree to obtain all permissions necessary (access, etc.) to complete the obligations set forth herein. NBR agrees to cause any employees, agents, and contractors, and any persons or entities acting in concert with any of the foregoing, to comply with the terms and conditions of this Settlement Agreement. NBR shall, among other measures, distribute copies of this Settlement Agreement to the aforementioned parties, and incorporate into any contracts with the aforementioned parties a provision which requires compliance with this Settlement Agreement.
- C. **Future Development.** Nothing in this Settlement Agreement precludes NBR at any time in the future from either (i) seeking authorization from the Commission to develop or modify the Property or (ii) performing development which is exempt from the requirements of the Coastal Act. Any development that is not (i) exempt from Coastal Act permitting requirements or (ii) specifically authorized by this Settlement Agreement requires a coastal development permit and will need to comply with all relevant Coastal Act requirements and standards, subject to the following:
1. Each of the Parties acknowledges that the 1973 Exemption remains in effect and that the Parties remain at odds over the interpretation of the scope of the 1973 Exemption. Although NBR continues to contend that all development on the Property prior to the effective date of this Settlement Agreement has been within the scope of the 1973 Exemption, this Settlement Agreement is intended to provide a practical resolution, pursuant to the terms of the Settlement Agreement, of the disagreement between the Parties over the interpretation of the scope of the 1973 Exemption with regard to the Subject Activities and similar such activities that are undertaken in the future, in part by clarifying that future development on the Property will require authorization under the Coastal Act.
  2. In the future, as an accommodation to the Commission and/or to avoid, if possible, the cost and delay of enforcement proceedings or litigation pertaining to the scope of the 1973 Exemption, NBR shall file an application for a coastal development permit for approval of proposed future development on the Property, even where NBR believes the proposed development to be exempt from the Coastal Act.
- D. The Parties are aware that the California courts have confirmed the validity of the Commission's historic approach of treating areas that have been subjected to illegal development as if that development had not



occurred, when assessing the potential impacts of proposed development on that land. By approving this Settlement Agreement, the Commission is resolving contested issues regarding whether and where such development has occurred. Accordingly, as an element of this Settlement Agreement, the Commission and NBR agree that as soon as the Commission approves this Settlement Agreement, the Commission will treat the Deed Restricted Areas identified in Exhibit 2 as if they were 1) vegetated with native plants consistent with surrounding plant communities, and 2) limited to open space and restoration (subject to the contingency described in Section 4.2. G, below), for all purposes, including analysis of project impacts for CDP application No. 5-13-032.

#### 4.0 **SETTLEMENT RESTORATION AND MITIGATION PLAN**

##### 4.1 Terms and Conditions

- A. This Settlement Agreement requires preparation and implementation of a "Settlement Restoration and Mitigation Plan" ("SRMP") to remove certain physical items and materials placed or allowed to come to rest on the Property as described in Section 4.3 below, restore certain areas of the Property, and provide appropriate mitigation for impacts resulting from the Subject Activities by restoring the Restoration Areas.
- B. NBR shall submit the SRMP, as described and required by this Settlement Agreement, for review and approval of the Commission's Executive Director, within 120 days of approval of this Settlement Agreement by the Commission (hereinafter the "Approval Date"), unless the Executive Director extends the deadline.
- C. The SRMP shall be prepared and implemented consistent with this Settlement Agreement.

##### 4.2 General Provisions

- A. The SRMP shall describe the measures that NBR proposes to use to implement the activities described in Section 4.3.B, below; to restore the topography of the Property; to restore and to mitigate for habitat impacts resulting from the Subject Activities by revegetating the Restoration Areas; and to monitor to ensure the SRMP is successfully implemented.
- B. The SRMP shall contain all the following phases of restoration, as defined hereinafter: (1) Removal; (2) Restorative Grading; (3) Erosion Control; (4) Revegetation; and (5) Monitoring.

- C. The SRMP, and any reports prepared pursuant to the SRMP or this Settlement Agreement, shall be prepared by a qualified restoration ecologist(s), resource specialist(s), and/or engineer(s) (“Specialist(s)”), as appropriate for each component of the SRMP. Prior to preparation of the SRMP, NBR shall submit, for the Executive Director’s review and approval, the qualifications of the proposed Specialist(s), including a description of the Specialist’s educational background, training, and experience related to the preparation and implementation of the SRMP described herein. If the Executive Director determines that the qualifications of the Specialist are not adequate to conduct the required restoration work, he/she shall notify NBR and, within 10 days of such notification, NBR shall submit a different Specialist(s) for the Executive Director’s review and approval.
- D. The SRMP shall include an exhibit depicting the boundaries of the Restoration Areas as identified in Exhibit 2. The SRMP will be implemented, and the restoration will occur, on the Restoration Areas. The SRMP shall also state that, prior to the initiation of any restoration or removal activities, the boundaries of the Restoration Area shall be physically delineated in the field, using temporary measures such as fencing stakes, colored flags, or colored tape. The SRMP shall state further that all delineation materials shall be removed when no longer needed, and verification of such removal shall be provided in the annual monitoring report corresponding to the reporting period during which the removal occurred.
- E. The SRMP shall include a schedule/timeline of activities, the procedures to be used, and identification of the parties who will be conducting the restoration activities. The schedule/timeline of activities in the SRMP shall be in accordance with the deadlines included in this Settlement Agreement.
  - 1. Removal of vegetation approved pursuant to this Settlement Agreement (i.e. removal of non-native vegetation) shall take place outside the bird breeding season (February 15 through August 31), unless recommended by the monitoring biologist and approved by the Executive Director. Prior to and during removal of vegetation, a qualified monitoring biologist shall locate any individual protected bird species within the areas subject to the SRMP and direct vegetation removal to begin in an area away from the protected bird species. In addition, the biologist shall walk ahead of vegetation removal equipment to flush any protected bird species towards areas of habitat that will be avoided.



- F. The SRMP shall describe in detail all equipment to be used. Mechanized equipment may be needed, but measures shall be taken to ensure resources protected under the Coastal Act will not be impacted, including but not limited to: geological stability, integrity of landforms, freedom from erosion, and the existing native vegetation.
1. If use of mechanized equipment must be conducted during the bird breeding season, and is authorized pursuant to this Settlement Agreement, a biological monitor will conduct a survey to determine the presence of any nesting behaviors, nest building, egg incubation, or brood rearing activities within a minimum of 150' of proposed work limits. If nesting protected bird species are detected within 100' of proposed mechanized equipment use areas, nest monitoring will be initiated and use of mechanized equipment within 100' of active nests will be postponed until either: 1) the nest(s) are determined to be inactive by the biological monitor, or 2) as otherwise directed by the Executive Director in consultation with the biological monitor. During the breeding season, reasonable attempts shall be made to shield nesting sites of protected bird species from the sight and sound of restoration activities that do not involve the use of mechanized equipment and that are taking place within 50', and from the use of any mechanized equipment associated with this project or any other Commission-authorized project, which are taking place at least 100' away.
  2. If use of mechanized equipment is proposed, the SRMP shall include limitations on the hours of operations for all equipment and a contingency plan that addresses: 1) impacts from equipment use, including disturbance of areas where revegetation and/or mitigation will occur and the responses thereto; 2) potential spills of fuel or other hazardous releases that may result from the use of mechanized equipment and the responses thereto; and 3) potential water quality impacts.
  3. The SRMP shall designate areas for staging of any construction equipment and materials, including receptacles and temporary stockpiles of graded materials. All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil.
  4. No machinery or equipment shall be maintained or fueled in areas where releases of hazardous materials may enter sensitive habitat, receiving waters, or a storm drain.



5. No demolition or construction materials, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wind or runoff erosion and dispersion.
- G. If, within 24 months of approval of this Settlement Agreement, the Commission approves a permit for development in precisely the same location as any of the locations where this Settlement Agreement requires restoration or restorative mitigation activities, in lieu of the specific restoration and mitigation required herein within the areas in which development is approved, NBR (1) shall submit a supplemental SRMP for review and approval of the Commission's Executive Director, within 90 days of Commission approval of development on the Property, that provides for restoration of habitat areas either on-site or off-site, or a combination, of habitat value at least equal to that which would be inconsistent with the approved development, and (2) shall implement such supplemental SRMP pursuant to its terms and the terms of this Settlement Agreement within 12 months of approval of the supplemental SRMP and prior to commencing that development.
- H. The areas subject to restoration and mitigation activities shall not be disturbed by activities related to this Settlement Agreement or any development undertaken on the Property, except as provided in Section 4.2.G., above. Any disturbance to the restoration or mitigation areas that occurs in non-compliance with this Settlement Agreement shall be addressed in the appropriate annual report and shall be remedied by NBR pursuant to the procedure described in Section 4.9, below.
- I. NBR will not use the restoration or mitigation projects described in this Settlement Agreement for the purpose of generating mitigation or restoration credits to satisfy any State or Coastal Commission requirement for restoration or mitigation. In addition, NBR shall disclose to any federal agency the existence of this Settlement Agreement.
- J. The SRMP shall identify which other agency approvals (e.g., DOGGR) are required to implement the Plan. The Plan shall be provided to those agencies for approval prior to submittal for the review and approval of the Executive Director.

#### 4.3 Removal

- A. NBR shall describe in detail all measures to be used for the removal and disposal of certain physical items and materials placed or allowed to come to rest on the Property.

- B. The SRMP shall include a site plan showing the location and identity of those physical items and materials resulting from the Subject Activities to be addressed pursuant to this Settlement Agreement. NBR shall be responsible for removal of the items listed below. All structural objects to be removed shall be either removed from the Property or relocated to the area of the Property approved by the Executive Director as an element of the SRMP, and the debris pile shall be moved to an area of the Property approved by the Executive Director as an element of the SRMP. Physical items and materials to be addressed pursuant to this provision of the Settlement Agreement include:
1. All surface structures and equipment associated with the Wells to be Removed listed in Exhibit 3 (abandoned to DOGGR requirements).
  2. Abandonment of the 17 wells listed on Exhibit 3 to DOGGR standards.
  3. The portion of the 0.4 ac debris stockpile discussed in Section 1.0 above that is located within areas currently mapped by Dudek as “Disturbed” or “Developed”;
  4. All surface structures and equipment associated with oil facilities within the Restoration Areas, including, but not limited to derricks, pads, pipelines, utility poles and lines.
- C. The SRMP shall include a plan to abandon the wells depicted on Exhibit 3 consistent with California Code of Regulations Title 14 Division 2 Chapter 4 Subchapter 1 Article 3.
- D. If applicable, the SRMP shall identify the location of the site(s) for the disposal of all materials removed from their locations pursuant to this Settlement Agreement and all waste generated during restoration activities pursuant to this Settlement Agreement. Although not anticipated, if a disposal site is off site and is located in the Coastal Zone and is not an existing sanitary landfill, a coastal development permit is required for such disposal, unless authorized by this Settlement Agreement. Hazardous waste, if encountered, must be disposed of at a suitable licensed disposal facility.
- E. The SRMP shall indicate that removal activities shall not disturb areas outside of the areas from which materials are removed pursuant to this Settlement Agreement (hereinafter, “Removal Areas”).



1. Measures shall be included for restoring any areas beyond the Removal Areas which are disturbed by removal activities. These measures shall include restoration of the areas from which the items or materials resulting from the Subject Activities were removed and any areas disturbed by those removal activities.
- F. The SRMP shall require NBR to initiate removal of the physical items and materials placed or allowed to come to rest on the Property as a result of the Subject Activities to be addressed by this Settlement Agreement and initiate abandonment of the 17 oil wells depicted in Exhibit 3, within 36 months from approval of the SRMP by the Executive Director and that such removal shall proceed in accordance with the terms of the approved SRMP and this Settlement Agreement. The Executive Director may extend the deadline for submittals upon a written request and a showing of good cause, pursuant to Section 16.0 of this Settlement Agreement. "Good cause" for extension of deadlines may include allowing for adequate time, if the Executive Director agrees the additional time is required, to obtain any necessary approvals to authorize these removal activities.
- G. Within 90 days from initiation of removing items or materials resulting from the Subject Activities, the removal activities, except for abandonment of the Wells to Be Removed, shall be completed. All removal activities shall be completed prior to initiation of the revegetation activities described in Section 4.7, below.
- H. Once abandonment of the Wells to Be Removed has commenced pursuant to Section 4.3 G above, it will be continuously pursued to completion.
- I. Within 60 days of the completion of the removal of all physical items and materials resulting from the Subject Activities from the Property NBR shall submit evidence for the Executive Director's review and approval, in the form of a narrative report with supporting photographs, showing that the removal has been completed pursuant to the approved SRMP.

#### 4.4 Restorative Grading

- A. If the Specialist(s) identified in the SRMP determines that alteration to the topography is necessary to ensure a successful restoration of the Restoration Areas, the SRMP shall identify the limits of any proposed grading in the Restoration Areas.
- B. If alterations to the topography are necessary, the SRMP shall include sections showing original and finished grades and a quantitative breakdown of grading amounts (cut/fill), drawn to scale with contours that illustrate, as accurately as possible, the proposed topography.

- C. The goal of restorative grading is to ensure the success of restoration of the Restoration Areas and to restore the areas to their prior condition, while minimizing the size of the area and the intensity of the impacts associated with any proposed restorative grading.
- D. The SRMP shall include a plan to remove fill if removal of fill is necessary to restore the topography of the Restoration Areas.
- E. Other than the Restoration Areas, the areas of the site and surrounding areas that are currently undisturbed shall not be disturbed by activities required by this Settlement Agreement, unless such activities include the removal of non-native or invasive plant species, and/or the planting of native plant species within the Property.
- F. NBR shall commence restoration of the topography of the Property by implementing restorative grading immediately following completion of the removal activities described in Section 4.3 above, excepting completion of abandonment of the Wells to be Removed. NBR shall complete topographic restoration of the Property within 90 days of commencing restorative grading. All removal activities shall be completed prior to initiation of the revegetation activities described in Section 4.6, below.

#### 4.5 Erosion Control

- A. The SRMP shall identify and delineate, on a site or grading plan, the type and location of all erosion control measures to be installed on the Property to address ground disturbance during and after any removal or restoration activities occurring on the Property, including during the establishment of the vegetation planted pursuant to Section 4.6 of this Settlement Agreement.
- B. The SRMP shall specify the methods to be used during and after restoration to stabilize the soil and make it capable of supporting native vegetation. Any soil stabilizers identified for erosion control shall be compatible with native plant recruitment and establishment. Such methods shall not include the placement of retaining walls or other permanent structures, grout, geogrid or similar materials.
- C. To the extent possible, all temporary erosion control measures shall be comprised of bio-degradable materials and shall be removed or eliminated from the Property by NBR once native vegetation is established in the Restoration Areas. Verification of such removal shall be provided in the



annual monitoring report for the reporting period during which the removal occurred.

- D. All erosion control measures shall be fully functional on the Property prior to, or concurrent with, the initial removal and restoration activities required by this Settlement Agreement and shall be maintained at all times of the year throughout the removal and restoration process, until the Restoration Areas have been revegetated, to minimize erosion across the site and sedimentation of streams, tributaries, drains, and/or culverts.
- E. The SRMP shall indicate that NBR shall commence implementation of any necessary erosion control measures prior to commencement of restorative grading, pursuant to Section 4.4 of the SRMP. In those areas where erosion control measures may be immediately necessary, NBR shall install said measures in a timely manner to as to avoid resource impacts.

#### 4.6 Revegetation

- A. The SRMP shall explicitly describe the restoration goals and objectives for revegetation. Based on these goals, the SRMP shall identify, describe, and provide a rationale for the species that are to be planted, the size and number of container plants, and the rate and method of seed application.
- B. The SRMP shall demonstrate that the Restoration Areas will be restored using plant species indigenous to, and appropriate for the Restoration Areas.
- C. The SRMP shall identify the natural habitat type that will serve as the model for the restoration and shall describe the desired relative abundance of particular species in each vegetation layer.
  - 1. The SRMP shall indicate that plant propagules and seeds must come from local, native stock in coastal Orange County.
  - 2. If plants, cuttings, or seed are obtained from a nursery, the nursery must certify that they are of local origin and are not cultivars. The SRMP shall provide specifications for preparation of nursery stock. Technical details of planting methods (e.g. spacing, mycorrhizal inoculation, etc.) shall be included.
- D. The SRMP shall contain narrative reports and photographic evidence of vegetation, if any, in the Restoration Areas prior to any of the Subject Activities having been undertaken and the current state of the Restoration Areas.

- E. The SRMP shall include a map showing the type, size, and location of all plant materials that will be planted in the Restoration Areas; the location of all non-native plants to be removed from the Restoration Areas; the topography of all other landscape features on the Property; and the location of photographs of the Restoration Areas that will provide reliable photographic evidence for annual monitoring reports, as described in Section 4.7 of this Settlement Agreement.
- F. If the Specialist(s) determines, in consultation with the Executive Director, that removal of impacted soil within the Restoration Areas is necessary to ensure successful revegetation of the Restoration Areas, the SRMP shall include a soil remediation plan.
- G. The SRMP shall contain a detailed description of the methods that shall be utilized to revegetate the Restoration Areas to achieve conditions similar to undisturbed native habitat adjacent to the Restoration Areas. The SRMP shall demonstrate that these methods will result in vegetation with a similar plant density, total cover, and species composition as that typical of undisturbed native habitat adjacent to the Restoration Areas.
- H. The SRMP shall include a schedule for installation of plants and removal of non-native plants. NBR shall not employ non-native plant species, which could supplant native plant species in the Restoration Areas.
  - 1. If the planting schedule requires planting to occur at a certain time of year beyond deadlines set forth herein, the Executive Director may, at the written request of NBR, extend the deadlines as set forth in Section 16.0 of this Settlement Agreement in order to achieve optimal growth of the vegetation.
  - 2. The SRMP shall demonstrate that all non-native vegetation within the Restoration Areas will be eradicated prior to any removal, restorative grading, and revegetation activities on the Property. In addition, the SRMP shall specify that non-native vegetation removal shall occur year round, including on a monthly basis during the rainy season (approximately November through April) for the duration of the restoration project, as defined in Section 4 of this Settlement Agreement.
- I. The SRMP shall include a detailed explanation of the performance standards that will be utilized to determine the success of revegetation. The explanation shall be described in sufficient detail to enable an independent specialist to duplicate it.



1. The performance standards shall identify that 'x' native species appropriate to the habitat should be present, each with at least 'y' percent cover or with a density of at least 'z' individuals per square meter.
  2. This section shall include a detailed description of reference site(s) including rationale for selection, location, species composition, and history of disturbance from fuel modification activities, fire, etc. So as to provide the most appropriate models for the different types of habitats to be restored within the Restoration Areas, the reference site(s) shall be located as close as possible to the Restoration Areas, shall be similar in all relevant respects to the target habitats in the Restoration Areas, and shall provide the standard for measuring success of the restoration under this Settlement Agreement.
- J. The SRMP shall describe the proposed use of artificial inputs, such as irrigation, fertilizer or herbicides, including the full range of amounts of the inputs that may be utilized. The minimum amount necessary to support the establishment of the plantings for successful restoration shall be utilized. No permanent irrigation system is allowed in the Restoration Areas. Temporary above ground irrigation to provide for the establishment of plantings is allowed for a maximum of three years or until the revegetation has become established, whichever comes first.
1. NBR must ensure that if temporary, above-ground irrigation is utilized, all of the system's lines and connections are operated, maintained, and monitored to avoid line breaks, leaks, or any other incident that could cause the release of water, unless specifically intended for appropriate irrigation of the Restoration Areas.
  2. If, after the three year time limit, the vegetation planted pursuant to the SRMP has not become established, similar to the extent that exists on the reference sites, the Executive Director may, upon receipt of a written request from NBR, allow for the continued use of the temporary irrigation system. The written request shall outline the need for and duration of the proposed extension.
- K. The Revegetation Plan shall specify that NBR shall commence implementation of the Revegetation Plan in the Restoration Areas immediately following completion of restorative grading, if any, or if no restorative grading is necessary pursuant to Section 4.4, above, immediately following completion of the removal activities described in Section 4.3, above, excepting abandonment of the Wells to be Removed. The Executive Director may extend the deadline for submittals upon a



written request and a showing of good cause, pursuant to Section 16.0 of this Settlement Agreement. Undertaking soil remediation necessary to ensure successful revegetation, if any is necessary, may require approval from DOGGR and/or other agencies. "Good cause" for extension of deadlines may include allowing for adequate time to obtain any necessary approvals to authorize soil remediation activities.

#### 4.7 Monitoring

- A. The SRMP shall describe the monitoring and maintenance methodology, including sampling procedures, sampling frequency, and contingency plans to address potential problems with restoration activities or unsuccessful restoration on the Property. The SRMP shall specify that the Specialist shall conduct at least four site visits annually for the duration of the monitoring period set forth in Section 4.7.B of this Settlement Agreement, at intervals specified in the SRMP, for the purposes of inspecting and maintaining, at a minimum, the following: all erosion control measures; non-native species eradication; trash and debris removal; and the health and abundance of existing vegetation and/or vegetation planted pursuant to this Settlement Agreement.
- B. NBR or their successors in interest shall submit, on an annual basis and during the same one-month period of each year (no later than December 31<sup>st</sup> of the first year), for five (5) years from the completion of the revegetation phase of the SRMP, according to the procedure set forth under Section 4.9.C of this Settlement Agreement, a written report, for the review and approval of the Executive Director, prepared by the qualified Specialist, evaluating compliance with the approved SRMP.
  - 1. These reports shall include photographs taken during the periodic site inspections pursuant to Section 4.9.A of this Settlement Agreement, at the same time of year, from the same pre-designated locations (as identified on the map submitted pursuant to Section 4.6.E, above) indicating the progress of recovery in the Restoration Areas.
  - 2. The locations from which the photographs are taken shall not change over the course of the monitoring period unless recommended changes are approved by the Executive Director, pursuant to Section 16.0 of this Settlement Agreement.
- C. If periodic inspections or the monitoring reports indicate that the restoration project or a portion thereof is not in conformance with the SRMP, or this Settlement Agreement, or has failed to meet the goals and/or performance standards specified in the SRMP, NBR shall submit



an addendum to the SRMP ("SRMP Addendum") for review and approval by the Executive Director.

1. The SRMP Addendum shall be prepared by a qualified Specialist, approved by the Executive Director, and shall specify measures to correct those portions of the restoration that have failed or are not in conformance with the original, approved SRMP or this Settlement Agreement. The Executive Director will then determine whether the SRMP Addendum must be processed as a modification of this Settlement Agreement, a new Restoration Order, or a new or amended coastal development permit.
  2. After the SRMP Addendum has been approved, this measures, and any subsequent measures necessary to carry out the original approved SRMP, shall be undertaken by NBR as required by Executive Director until the goals of the original approved SRMP have been met. Following completion of the SRMP Addendum's implementation, the duration of the monitoring period, set forth in Section 4.7.B, above, shall be extended for at least a period of time equal to that during which the project remained out of compliance, but in no case less than two annual reporting periods.
- D. At the end of the five year monitoring period (or other duration, if the monitoring period is extended pursuant to Section 4.7.C, above), NBR shall submit, according to the procedure set forth under Section 4.10.C, below, a final detailed report prepared by a qualified Specialist for the review and approval of the Executive Director.
1. If this final report indicates that the restoration has in part, or in whole, been unsuccessful, based on the requirements of the approved SRMP, NBR shall submit a SRMP Addendum, in accordance with the requirements of Section 4.7.C of the Settlement Agreement, and the monitoring program shall be revised according to the requirements of this Settlement Agreement.

#### 4.8 Implementation and Completion of SRMP

- A. Upon approval of the SRMP (including the Removal, Restorative Grading, Erosion Control, Revegetation, and Monitoring components) by the Executive Director, NBR or their successors in interest shall fully implement each phase of the SRMP consistent with all of its terms and the terms set forth herein. NBR or their successors in interest shall complete all work described in the SRMP in accordance with the deadlines set forth herein.

- B. Within 30 days of the completion of the work described pursuant to each component of the SRMP (Removal, Restorative Grading, Erosion Control, and Revegetation), NBR or their successor in interest shall submit, according to the procedures set forth under Section 4.7, above, a written report, prepared by a qualified Specialist, for the review and approval of the Executive Director, documenting all restoration work performed on the Property pursuant to the SRMP. This report shall include a summary of dates when work was performed and photographs taken from the pre-designated locations (as identified on the map submitted pursuant to Section 4.6.E, above) documenting implementation of the respective components of the SRMP, as well as photographs of the Property before the work commenced and after it was completed.
- C. All plans, reports, photographs and other materials required by this Settlement Agreement shall be sent to:

California Coastal Commission  
Attn: Andrew Willis  
200 OceanGate 10<sup>th</sup> Floor  
Long Beach, CA 90802

With a copy sent to:

California Coastal Commission  
Attn: Chief of Enforcement  
45 Fremont, 20<sup>th</sup> floor  
San Francisco, CA 94105

5.0 AFTER-THE-FACT COASTAL DEVELOPMENT PERMIT FOR  
SELECTED WELLS

A. If NBR desires to retain any of the wells listed on Exhibit 4, NBR shall submit a coastal development permit application to authorize the retention of those wells within 36 months of approval of the SRMP, and not withdraw or impede final Commission action in any way on that application. The Parties agree that NBR may apply for multiple wells via one application and the filing fee will be calculated accordingly. Alternatively, NBR may elect not to apply for an after the-fact authorization for a well identified on Exhibit 5, in which case NBR shall submit a proposed revision to the Removal Plan described in Section 4.3, above, to abandon such well(s) on Exhibit 5, over and above the 17 Wells to be Removed, within the timeframe for implementation of the Removal Plan.



B. NBR shall comply with the terms and conditions of any permit issued pursuant to an application submitted under this section.

C. ATF Wells not Authorized. NBR shall submit, for the review and approval of the Commission's Executive Director, a plan for removal, to DOGGR standards in the same manner as the 17 Wells to be Removed, of any ATF Wells which NBR applies for but that the Commission does not authorize. The plan shall be submitted for any wells that NBR applies for but which the Commission does not authorize within 48 months of approval of the SRMP (NBR shall submit the plan within 90 days of this deadline), and the plan shall be prepared and implemented consistent with the provisions set forth in Section 4 of this Settlement Agreement, with the exception that all removal activities of the areas impacted by the ATF Wells that are not authorized by the Commission pursuant to this process will be commenced by no later than 90 days from approval of the plan required by this section.

#### 6.0 DEED RESTRICTED OPEN SPACE

A. NBR shall submit for the review and approval of the Executive Director within 120 days of the Approval Date of this Settlement Agreement, and revise, if necessary, at the direction of the Executive Director pursuant to Section 7, a deed restriction in a form and content acceptable to the Executive Director to restrict development within the Deed Restricted Areas. Within 30 days of completion of Revegetation pursuant to Section 4.6 of the Settlement Agreement, NBR shall execute and record, a deed restriction in a form acceptable to the Executive Director, over the 24.6 acres of Deed Restricted Areas to limit the uses of these areas to open space and restoration. The recorded deed restriction shall include a formal legal description of the Property and a metes and bounds legal description and graphic depiction, prepared by a licensed surveyor, of the Deed Restricted Areas. The recorded document shall reflect that no development, as defined by Section 30106 of the Coastal Act, including mowing or other vegetation reduction (excepting those activities allowed pursuant to Footnote 3 of this Settlement Agreement), shall occur within the Deed Restricted Areas, except for use of existing roads to access oil field infrastructure, oil field clean-up and restoration activities. The Deed Restriction shall be recorded free of prior liens and encumbrances (other than existing easements for utilities) that the Executive Director determines may affect the effectiveness of the deed restriction and shall run with the land, binding all successors and assigns. It is explicitly agreed that temporary impacts from use of existing roads to access and operate existing oil field infrastructure, as well as, pursuant to any approved CDP, oil abandonment/remediation, grading, and development shall be allowed within the Deed Restricted Areas and lands adjacent to them. The deed restriction shall not be removed or changed without Commission authorization.

B. Within 30 days of recording the Deed Restriction, NBR shall submit a preliminary report reflecting the Deed Restriction recorded against the Property and a certified copy of the recorded Deed Restriction to the Executive Director.

C. If, within 24 months of approval of this Settlement Agreement, the Commission approves a permit for development in the Deed Restricted Areas that is inconsistent with the purpose of the Deed Restriction, and NBR has not yet recorded the Deed Restriction, NBR shall revise the Deed Restricted Areas as delineated in the exhibit, subject to the review and approval of the Executive Director, to remove the area where the Commission has authorized development that is inconsistent with the Deed Restriction and to preserve an area of habitat at least equal in extent to that which would be inconsistent with the approved development, prior to recording the Deed Restriction required by this section 6.

#### 7.0 REVISION OF DELIVERABLES

The Executive Director may require revisions to deliverables under this Settlement Agreement. NBR shall revise any such deliverables consistent with the Executive Director's specifications, and resubmit them for further review and approval by the Executive Director, by the deadline established by the Executive Director. The Executive Director may extend the deadline for submittals upon a written request and a showing of good cause, pursuant to Section 16.0 of this Settlement Agreement.

#### 8.0 RESPONSIBLE PARTIES

Newport Banning Ranch, LLC; Aera Energy LLC; and Cherokee Newport Beach, LLC, collectively, NBR; and all their successors, assigns, employees, agents, contractors, and any persons or entities acting in concert with any of the foregoing, agree to undertake the specific and individual obligations assigned to such party required herein and to be responsible for the specific obligations imposed without individual party designation, and to comply with all the applicable requirements of this Settlement Agreement and therefore shall be subject to the requirements herein.

#### 9.0 NOTICE

Any notice required to be provided by one Party to the other Party shall be sent by First Class U.S. Mail, . Said notice shall be sent to the following individuals:

TO NBR:

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



Newport Banning Ranch LLC  
Attn: George L. Basye  
3031 Saturn Street, Suite 101  
Brea, CA 92821

TO COMMISSION:

California Coastal Commission  
Attn: Andrew Willis  
200 Oceangate, Suite 1000  
Long Beach, CA 90802

WITH A COPY TO:

California Coastal Commission  
Attn: Chief of Enforcement  
45 Fremont, 20<sup>th</sup> floor  
San Francisco, CA 94105

#### 10.0 COMMISSION JURISDICTION

The Commission has jurisdiction over resolution of the alleged Subject Activities pursuant to PRC Sections 30810 and 30811.

#### 11.0 RESOLUTION OF MATTER VIA SETTLEMENT

In light of the intent of the Parties to resolve these matters through settlement, and avoid further litigation, the Parties agree to jointly present this Settlement Agreement to the Coastal Commission for its approval and to inform the Commission that this Settlement Agreement settles all claims<sup>5</sup> – whether contested or uncontested – against NBR and the following predecessors in interest and related ownership entities, specifically Mobil, Shell and ExxonMobil, related to Coastal Act violations presently known or asserted by Staff to have occurred on the Property at any time prior to the Approval Date, and NBR agrees not to contest the legal and factual bases, the terms, or the issuance of this Settlement Agreement at a public hearing. For the limited purpose of the Commission's administrative process (so that Staff is not legally required to prepare a staff report addressing NBR's Statement of Defense), NBR hereby withdraws its Statement of Defense for purposes of the Commission's consideration of this Settlement Agreement<sup>6</sup>

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<sup>5</sup> See FN 7.

<sup>6</sup> In the event a third party challenge is brought against the Commission in connection with the approval of this Settlement Agreement, the Parties agree that the Statement of Defense referenced in Recital Section 1.3 of this Settlement Agreement shall be made a part of and included in the administrative record of proceedings for said third party judicial challenge. In the event the Commission or Staff decides to re-initiate the enforcement proceeding set forth in the NOI, or initiate new enforcement proceedings for

and agrees not to seek a stay pursuant to PRC section 30803(b) or to challenge the issuance and enforceability of this Settlement Agreement in a court of law or equity.

#### 12.0 EFFECTIVE DATE AND TERMS OF THE ORDER

The effective date of this Settlement Agreement is the date this Settlement Agreement is approved by the Commission. This Settlement Agreement shall remain in effect permanently unless and until rescinded in accordance with the standards and procedures set forth in Section 13188(b) and Section 13197 of Title 14 of the California Code of Regulations.

#### 13.0 EFFECT OF LITIGATION

In the event a legal challenge is filed by any party that is not a party to this Settlement Agreement challenging this Settlement Agreement or any final decision by the Commission regarding this Settlement Agreement (collectively, "Challenged Action") for which the Commission, NBR is named as a respondent, defendant or real party in interest, the deadlines set forth in this Settlement Agreement for affirmative obligations to take (as opposed to refrain from) specific actions shall be stayed during the time that a lawsuit seeking to set aside the Challenged Action is pending in a court of competent jurisdiction and until all judicial relief is exhausted if such a deadline is reached while the Challenged Action is pending. NBR shall provide documentation to the Executive Director of the beginning and ending of said litigation.

#### 14.0 FINDINGS

This Settlement Agreement is issued on the basis of the findings adopted by the Commission, as set forth in the document entitled "Staff Report: Recommendations and Findings for Issuance of Settlement Cease and Desist Restoration Orders." No party to this Settlement Agreement is conceding its position regarding the statements set forth in Recital 1.1, 1.2, 1.3, 1.4, 1.5, 2.1, 2.2, 2.3, and 2.4 herein, but NBR agrees that all jurisdictional prerequisites for issuance of this Settlement Agreement have been met. The activities authorized and required in this Settlement Agreement are consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act. The Commission has agreed and has authorized the activities required in this Settlement Agreement as being consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act.

#### 15.0 COMPLIANCE OBLIGATION

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alleged Coastal Act violations that have been asserted by the Commission or Staff prior to the Approval Date, the Parties agree that the Statement of Defense referenced in Recital Section 1.3 of this Settlement Agreement shall be made a part of the administrative record for those proceedings.



- 15.1 Strict compliance with this Settlement Agreement by all parties subject thereto is required. Failure to comply with any term or condition of this Settlement Agreement, including any deadline contained in this Settlement Agreement, unless the Executive Director agrees to an extension under Section 16.0, below, will constitute a violation of this Settlement Agreement and shall result in the non-compliant party to whom these orders are directed being liable for stipulated penalties in the amount of \$500 per day per violation.
- 15.2 The non-compliant party shall pay stipulated penalties pursuant to the provision above regardless of whether the non-compliant party has subsequently complied. If NBR violates this Settlement Agreement, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, including imposition of civil penalties and other remedies pursuant to PRC Sections 30820, 30821.6, and 30822 as a result of the lack of compliance with the Settlement Agreement and for the underlying Coastal Act violations described herein.

#### 16.0 DEADLINES

Prior to the expiration of the deadlines established by this Settlement Agreement, may request from the Executive Director an extension of the deadlines. Such a request shall be made no fewer than 10 days in advance of the deadline and directed to the Executive Director, in care of Enforcement Official, in the Long Beach office of the Commission.

The Executive Director may grant an extension of deadlines upon a showing of good cause, either if the Executive Director determines that the requesting party has diligently worked to comply with their obligations under this Settlement Agreement but cannot meet deadlines due to unforeseen circumstances beyond their control, or if the Executive Director determines that any deadlines should be extended if additional time would benefit the success of the obligations under this Settlement Agreement.

#### 17.0 RECORDATION OF A MEMORANDUM OF SETTLEMENT

The Parties agree to record a Memorandum of Settlement against the real property owned by Cherokee Newport, LLC and Aera Energy LLC. The Memorandum of Settlement shall be in the form attached as Exhibit 7 and shall be recorded within 30 days after execution of the Settlement Agreement by the Commission and NBR. No later than thirty (30) days after the Commission determines that NBR has fully complied with this Settlement Agreement, the Executive Director shall record a notice of rescission of the Memorandum of Settlement.

#### 18.0 SEVERABILITY

Should any provision of this Settlement Agreement be found invalid, void or unenforceable, such illegality or unenforceability shall not invalidate the whole, but this



Settlement Agreement shall be construed as if the provision(s) containing the illegal or unenforceable part were not a part hereof.

#### 19.0 SITE ACCESS

NBR shall provide Staff and any agency having jurisdiction over the work being performed under this Settlement Agreement with access to the Property to inspect the restoration activities and areas potentially affected by the restoration activities at all reasonable times, upon 24 hour notice, when feasible, having been provided to the appropriate NBR representative(s), who shall be designated for this purpose in the SRMP. Nothing in this Settlement Agreement is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Staff may enter and move freely about the portions of the Property on where the Restoration Areas are located, and on adjacent areas of the Property to view the areas where work is being performed pursuant to the requirements of the Settlement Agreement, for purposes including, but not limited to, ensuring compliance with the terms of this Settlement Agreement.

#### 20.0 GOVERNMENT LIABILITIES

Neither the State of California, the Commission, nor its employees shall be liable for injuries or damages to persons or property resulting from acts or omissions by NBR in carrying out activities pursuant to this Settlement Agreement, nor shall the State of California, the Commission or its employees be held as a party to any contract entered into by NBR or its agents in carrying out activities pursuant to this Settlement Agreement.

#### 21.0 SETTLEMENT OF CLAIMS

In light of the intent of the parties to resolve these matters in settlement, including the Commission's monetary claims against NBR, NBR has agreed to record a deed restriction over approximately 24.6 acres of Property to restrict its use to open space purposes and restoration only and which NBR will not use for future Coastal Act mitigation purposes.

The Parties agree that this Settlement Agreement settles all of the Commission's claims of any nature, including civil penalties, fines, or damages, against NBR and the following predecessors in interest and related ownership entities, specifically Mobil, Shell and ExxonMobil, for relief for all alleged violations of the Coastal Act presently known to, or asserted by, the Commission or Staff as having occurred at any time prior to the Approval Date of this Settlement Agreement (specifically including claims for civil penalties, fines, or damages under the Coastal Act, including under Public Resources Code Sections 30805, 30820, and 30822), in which the Commission may name NBR, either by virtue of its ownership of the Property or otherwise, including those violations of the Coastal Act identified herein, with the exception of placement of the well pads associated with wells



other than the Exempt Wells<sup>7</sup>, with the additional exception that, if NBR fails to comply with any term or condition of this Settlement Agreement, the Commission may seek monetary or other claims for both the underlying violations of the Coastal Act and for the violation of this Settlement Agreement.

In addition, this Settlement Agreement does not limit the Commission from taking enforcement action for alleged Coastal Act violations that may occur on the Property after the Approval Date of this Settlement Agreement or that were unknown to Staff at the time of this Settlement Agreement.

Finally, nothing in this Settlement Agreement is intended to limit the Commission from taking enforcement action against other parties for unpermitted development alleged in the NOI.

## 22.0 SUCCESSORS AND ASSIGNS

This Settlement Agreement constitutes a contractual obligation between the Parties and the Commission, and therefore shall remain in effect until all terms are fulfilled, regardless of whether the Parties have a financial interest in the Property. This Settlement Agreement shall also run with the land, binding and inuring to the benefit of NBR and its respective successors in interest, heirs, assigns, and future owners of the Property. NBR agrees that it shall provide notice to all successors, assigns, and potential purchasers of any portion of the Property of any remaining obligations under this Settlement Agreement.

## 23.0 MODIFICATIONS AND AMENDMENTS

Minor, non-substantive modifications to this Settlement Agreement may be made subject to agreement between the Executive Director and NBR. Otherwise, except as provided in Section 13.0, above, this Settlement Agreement may be amended or modified only in accordance with the standards and procedures set forth in Section 13188(b) and Section 13197 of Title 14 of the California Code of Regulations.

## 24.0 GOVERNMENTAL JURISDICTION

This Settlement Agreement shall be interpreted, construed, governed, and enforced under and pursuant to the laws of the State of California.

## 25.0 NO LIMITATION OF AUTHORITY

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<sup>7</sup> Although this Settlement Agreement does not provide for the removal of well pads, it does provide mitigation for impacts that staff alleges have resulted from the well pads and resolves all monetary claims against NBR for the alleged violations described herein, including for the well pads. As a result, the only remaining issue with respect to the well pads is their actual removal. NBR is proposing to remove said well pads as a component of Coastal Development Permit application No. 5-13-032, or alternatively, when the oil field is retired.

February 20, 2015

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Except as expressly provided herein, nothing in this Settlement Agreement shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Settlement Agreement.

## 26.0 INTEGRATION

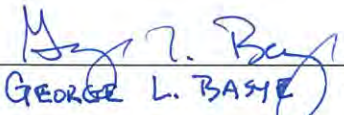
This Settlement Agreement constitutes the entire agreement between the Parties and may not be amended, supplemented, or modified except as provided in this Settlement Agreement.

## 27.0 STIPULATION

NBR and its representatives attest that they have reviewed the terms of this Settlement Agreement and understand that their consent is final and stipulate to its approval by the Commission, provided it is not first modified from its agreed upon form without the written consent of .

IT IS SO STIPULATED AND AGREED:

On behalf of NBR/Aera Energy LLC:

  
\_\_\_\_\_  
GEORGE L. BASYE Manager/Vice President

2/20/15  
\_\_\_\_\_  
Date

On behalf of Cherokee Newport Beach, LLC

\_\_\_\_\_

\_\_\_\_\_  
Date

Executed in  
Commission:

on behalf of the California Coastal

\_\_\_\_\_  
Charles Lester, Executive Director

\_\_\_\_\_  
Date



Except as expressly provided herein, nothing in this Settlement Agreement shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with this Settlement Agreement.

## 26.0 INTEGRATION

This Settlement Agreement constitutes the entire agreement between the Parties and may not be amended, supplemented, or modified except as provided in this Settlement Agreement.

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NBR and its representatives attest that they have reviewed the terms of this Settlement Agreement and understand that their consent is final and stipulate to its approval by the Commission, provided it is not first modified from its agreed upon form without the written consent of .

IT IS SO STIPULATED AND AGREED:

On behalf of NBR/Aera Energy LLC:

\_\_\_\_\_

\_\_\_\_\_  
Date

On behalf of Cherokee Newport Beach, LLC

Brett Batsheld  
Vice President, Secretary/Treasurer

2/20/15  
Date

Executed in  
Commission:

on behalf of the California Coastal

\_\_\_\_\_  
Charles Lester, Executive Director

\_\_\_\_\_  
Date



EXHIBIT 1 – Property and Oil Remainder Areas







This Exhibit 2 reflects the candidate restoration areas, shown in yellow, within which a total of 18.45 acres of native habitats will be restored and deed restricted pursuant to the Settlement Restoration Order and the additional candidate deed restricted area, shown in purple, within which a total of 6.15 acres will be deed restricted to open space.

Exhibit 3

Wells to be Removed

Well Nos. (17):

418

419

280

565

121R2

503

506

507

143R

281

433

440

448

450

466

469

470

Exhibit 4

ATF Wells (Candidate wells for process described in Section 5.0 of Settlement Agreement)

Well Nos. (24):

273

517

47r

204r2

278

575

427

428

530

564

25r2

82r

287

288

325

331

442

443

111r

434

457

480

580

165r



## EXHIBIT 5

Recording Requested By  
And When Recorded Mail To:

\_\_\_\_\_

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(Space Above Line For Recorder's Use Only)

### **MEMORANDUM OF SETTLEMENT AGREEMENT**

This Memorandum of Settlement Agreement (the "Memorandum") is made and entered into as of \_\_\_\_\_, 2015, by and among the California Coastal Commission (the "Commission") and Newport Banning Ranch LLC, Aera Energy LLC, and Cherokee Newport Beach, LLC (collectively, "NBR") (individually, a "Party" or, collectively, the "Parties").

This Memorandum has been executed and delivered by the Parties hereto for the purposes of recording and giving public notice of that certain Settlement Agreement and Settlement Cease and Desist Order and Settlement Restoration Order ("Settlement Agreement") approved by the California Coastal Commission on March \_\_, 2015, and executed by and among the Parties as of \_\_\_\_\_, 2015.

The terms of the Settlement Agreement are incorporated by reference herein as if set out in full in this Memorandum. Reference should be made to the Agreement for the full terms and provisions thereof.

IN WITNESS WHEREOF, the parties have executed this Memorandum as of the date first above written.



**On behalf of NBR:**

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George L. Basye  
Its: Manager

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Date

**On behalf of the California Coastal Commission:**

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Charles Lester  
Its: Executive Director

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Date

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