

Santa Ana Regional Water Quality Control Board

September 15, 2015

Mr. Michael A. Mohler
Newport Banning Ranch, LLC
1300 Quail Street, Suite 100
Newport Beach, CA 92660

mohler@brooks-street.com

DENIAL WITHOUT PREJUDICE OF CLEAN WATER ACT SECTION 401 WATER QUALITY STANDARDS CERTIFICATION FOR NEWPORT BANNING RANCH DEVELOPMENT PROJECT, CITY OF NEWPORT BEACH AND UNINCORPORATED PORTIONS OF ORANGE COUNTY (USACE APPLICATION NO. NOT AVAILABLE) (REGIONAL BOARD PROJECT NO. 302014-15)

Dear Mr. Mohler:

On August 20, 2014, we received from DUDEK, on behalf of Newport Banning Ranch, LLC (Applicant), an application for Clean Water Act Section 401 Water Quality Standards Certification (401 Certification) for a 401 acre project located in the City of Newport Beach and unincorporated Orange County. The proposed project (Project) would include construction of mixed use and 1,375 residential units on 86.1 acres, a resort inn on 11.3 acres, a public park on 26.8 acres of 51.4 acres designated for recreational purposes, and 252.3 acres of open space preserved as natural habitat.

As described in more detail below, we are unable to take action on your application at this time. On February 18, 2015, the Applicant submitted a check for the balance of the 401 filing fee, however, Santa Ana Regional Board staff requested supplemental information necessary to establish that beneficial uses, in particular the RARE¹ use designation, would be adequately protected in the Project area, and that the Project provides the appropriate mitigation to offset any adverse impact to these uses. We have received and reviewed several interpretive analysis studies dated from 2008 to 2015, delineating impacts to jurisdictional waters, namely, to 49 seasonal basins (identified as VP1-TT) located within the proposed Project area. The reports are inconsistent in interpretation and analysis of the number and extent of seasonal basins, indicating that

¹ Rare, Threatened or Endangered Species (**RARE**) waters support the habitats necessary for the survival and successful maintenance of plant or animal species designated under State or federal law as rare, threatened or endangered.

the level of impacts resulting from the currently proposed Project has not been conclusively established. In light of the 365 day statutory deadline for action on a 401 certification application that the US Army Corps of Engineers may deem valid, I am hereby denying the request for certification without prejudice. The denial without prejudice does not preclude future certification of this Project. You may submit a revised application package within one year of this denial. Another application processing fee will not be required with the resubmission.

To reopen the application for 401 Certification, information that responds to the following matters must be provided:

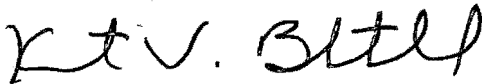
1. Both the California Coastal Commission (CCC) and the U.S. Fish and Wildlife Service (USFWS) continue to indicate to us ongoing concerns regarding the potential impacts of the Project on federal and State listed species, including the San Diego fairy shrimp (*Branchinecta sandiegonensis*) and the versatile fairy shrimp (*Branchinecta lindahli*), and the mitigation proposed to address those impacts. Such impacts have the potential to adversely affect the existing or potential RARE beneficial use of the affected waters.
2. The CCC has also expressed concern to us that the California Coastal Act set high standards on the protection of Environmentally Sensitive Habitat Areas (ESHAs), and the Applicant has not submitted complete information on ESHAs at the Project site, how they would be protected, and not adversely impacted as a result of Project construction. Those ESHAs include the California Department of Fish and Wildlife (CDFW) rare plant communities and/or federal and State listed species and associated habitats. We understand that CDFW staff has stated the same concern about the lack of information. As such, definitive floral studies must be completed during the spring flowering period for annual plants to provide a conclusive characterization and extent of vernal pool habitat, which is an ESHA. Multiple survey sessions should be conducted during the blooming period between March and early June, during years with at least normal rainfall when the vernal pool indicator plants, such as Woolly Marbles (*Psilocarphus brevissimus*) and Brass Button (*Cotula coronopifolia*) are most visible and recognizable.
3. As you know, the Newport Banning Ranch area has been an active oil exploration and development site for several decades, which has modified the natural topography and hydrology. Use of historic Hydrophytic Soil Assessments may not provide accurate descriptions or locations of jurisdictional waters under present conditions. Therefore, they should not be relied upon to describe how the proposed Project will impact jurisdictional waters within the Project area. Regional Board staff must have a recently completed and accurate hydrophytic soil study in order to determine with confidence that the impacts to consider, prior to issuing a 401 Certification for the subject Project.

4. Similarly, historic Hydraulic Studies may not accurately describe how the Project will impact jurisdictional waters within the Project area. Regional Board staff requires a recently completed and accurate Project hydraulic study to assess impacts to consider the issuance of a 401 Certification for the Newport Banning Ranch Project.

CCC staff advised us that they have made recommendations for possible modifications to the Project that would alleviate, at least in part, their concerns with respect to the Project impacts on ESHAs and other environmentally sensitive biological resources. Further, USACE staff has advised us that the Clean Water Act Section 404(b) (1) analysis for the Project has not yet been completed since the area impacted by the Project may be reduced substantially from the area specified in the 404 permit and 401 certification applications. Your revised certification application must be informed by final determinations regarding the Project configuration, including the full extent and level of impacts to water quality and beneficial uses.

Once again, this denial without prejudice does not preclude future certification of this Project. We encourage you to work with CDFW and USFWS in particular to resolve concerns related to Project impacts on biological resources and suitable mitigation. If you have any questions please contact Marc Brown at (951) 321-4584 or marc.brown@waterboards.ca.gov or Wanda Cross at (951) 782-4468 or Wanda.Cross@waterboards.ca.gov.

Sincerely,



Kurt V. Berchtold
Executive Officer
Santa Ana Regional Water Quality Control Board

cc: U.S. Army Corps of Engineers – Crystal Huerta
U.S. Environmental Protection Agency, Supervisor of the Wetlands Regulatory Office – Tim Vendlinski (WTR-8)
State Water Resources Control Board, DWQ - Water Quality Certification Unit
State Water Resources Control Board, OCC – David Rice
California Department of Fish and Wildlife – Joanna Gibson
U.S. Fish and Wildlife Service – Karin Cleary-Rose
Aera Energy - Mr. George Basye (GLBasye@aeraenergy.com)