

CALIFORNIA COASTAL COMMISSION

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RE: **COMMENTS ON DRAFT ENVIRONMENTAL IMPACT REPORT**
SCH# 2009031061
Site: Newport Banning Ranch
Newport Beach, Orange County

DEVELOPMENT
CITY OF NEWPORT BEACH

Dear Mr. Alford,

Thank you for the opportunity to review the Draft Environmental Impact Report for the residential and commercial development at Newport Banning Ranch. According to the Draft EIR, the proposed project includes 1,375 residential dwelling units, 75,000 square feet of commercial space, a 75-room resort inn, approximately 51.4 gross acres for active and passive park uses, and 252.3 gross acres for natural resources protection in the form of open space.

The following comments address, in a preliminary manner, the issue of the proposed project's consistency with the Coastal Act. This letter is an overview of the issues we've identified at this time based on the time available for analysis and the information we've been presented and is not an exhaustive analysis. The comments contained herein are preliminary and those of Coastal Commission staff only and should not be construed as representing the opinion of the Coastal Commission itself.

I. Procedure for Commission Review of the Proposed Development

The DEIR states that the applicant intends to request a 'master coastal development permit' from the Coastal Commission for the proposed development. The DEIR suggests that the Commission would be asked to provide a preliminary review and approval of land uses, with details of some portions of the development, and lesser details for other parts of the development. It also suggests the 'Master CDP' would set up a process for delegating review and approval authority for certain details of the project to the City when the City has no authority for ultimate approval of any part of the project. There is no statutory or regulatory authority for the kind of coastal development permit review process described in the DEIR. Rather, the process the DEIR describes is more akin to requesting approval of a Local Coastal Program, not a coastal development permit. Such request would need to come from the City and not the developer.

Given the scope and complexity of the proposed project, Commission staff would recommend that the project be considered in the context of a Local Coastal Program review, submitted by the City. This would allow for consideration of significant threshold issues at the planning level, such as the kind, location and intensity of development that would be appropriate for the site given the priorities established under the Coastal Act and the constraints present on the site (e.g. biological resources, geologic hazards, etc.). Furthermore, we do not endorse the 'master CDP' process described in the DEIR, and believe it would be unworkable. The CDP process is not appropriate for analyzing conceptual projects; rather it is designed for consideration of specific projects with

known and identifiable impacts. Such impacts couldn't be identified at the conceptual level. Significant additional details regarding the planned development would be needed in order to properly analyze the effects of the development in the context of a CDP application. Those details are not available now and would not normally be available until the planning level issues described above have been resolved, and are better resolved in the LCP context. **Thus, references to a 'master CDP' process should be removed from the DEIR.**

Legal Status of Disturbances on Site

The DEIR characterizes acres of the subject site as disturbed due to ongoing oil field operations that purportedly began in the 1940s. The disturbances include, but may not be limited to, the presence of bare dirt, roads, areas developed with oil field equipment and buildings, and places where vegetation thinning, mowing, and/or clearing have occurred. The DEIR describes removal of oil field equipment and discontinuation of operations within certain areas, and restoration of disturbed areas as one benefit of the proposed development plan. The DEIR suggests that the existing oil operations are merely a continuation of those that began in the 1940s, and cites authorization for continuation of those oil operations after passage of Proposition 20 under California Coastal Commission South Coast Regional Coastal Zone Conservation Commission Claim for Exemption No. E-7-27-73-144. At this time, we have not yet analyzed whether the existing operations are in compliance with the exemption cited. The DEIR should include the details regarding the extent of the exemption authority that Newport Banning Ranch claims exists for its ongoing oil operations.

When a project is submitted to the Commission for authorization, the Commission's analysis of impacts will be based on the legally permitted condition of the site. If there are any unpermitted impacts to native vegetation, wetlands, or other habitat, the impacts of the proposed project will be based on the conditions prior to the unpermitted impacts. Assertions have been made during a public comment period at a Commission meeting that unpermitted resource impacts have occurred on the subject site. Therefore, we recommend that the City and/or applicant thoroughly and precisely document the activities that led to the existing disturbed conditions, and whether those conditions were legally authorized or subject to a vested rights determination.

Please note that if the City and/or applicant will be claiming a 'vested right' to conditions on the subject property arising from ongoing oil field operations and/or vegetation thinning, mowing, and/or clearing, a claim of vested rights must be made to the Commission. The procedural framework for Commission consideration of a claim of vested rights is found in Sections 13200 through 13208 of Title 14 of the California Code of Regulations. These regulations require that the individual(s) or organization(s) asserting the vested right, make a formal 'claim' with the Commission, that staff prepare a written recommendation for the Commission and that the Commission determine, after a public hearing, whether to acknowledge the claim. If the Commission finds that the claimant has a vested right for a specific development, the claimant is exempt from CDP requirements to complete that specific development only. Any substantial changes to the development subject to the vested rights determination after the effective date of Prop 20 will require a CDP. If the Commission finds that the claimant does not have a vested right for the particular development, then the development is not exempt from CDP requirements.

II. City of Newport Beach Coastal Land Use Plan

The City's 2005 Coastal Land Use Plan also contains a variety of other policies aimed at the protection of coastal resources, including but not limited to public access; protection, enhancement and provision of lower cost visitor serving and recreational development; water quality protection and enhancement; visual resources; avoidance of geologic hazards; and the protection of archeological resources, among others. The Chapter 3 policies of the Coastal Act will remain the

standard of review for any coastal development permit until the City (or County) has a fully certified Local Coastal Program, although, the Coastal Land Use Plan will provide strong guidance. **The EIR should analyze the consistency of the proposed development with applicable policies in the certified Coastal Land Use Plan and Chapter 3 policies of the Coastal Act and identify and address impacts accordingly.**

III. Biological Resources

A. Relevant Statutes:

Coastal Act Section 30240 states (emphasis added):

*(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.*

Section 30240 of the Coastal Act requires the protection of ESHA from significant disruption of habitat values, and further specifies that only uses dependent on those resources shall be allowed in those areas. Also, development adjacent to ESHA shall be sited and designed to prevent impacts which would significantly degrade those areas and be compatible with the continuance of the habitat.

A key point is that Section 30240 requires that development **avoid** impacts to ESHA. Unlike the requirements for other resource agencies, Section 30240 does not allow for non-resource dependent impacts to an ESHA area, and mitigation for those impacts in other areas. Rather, Section 30240 requires that proposed new development be located outside of ESHA areas. Additionally, Section 30240 requires siting, design, and appropriate buffers to ensure that development adjacent to ESHA does not result in impacts to ESHA.

Buffers are important for preserving the integrity and natural function of environmentally sensitive habitats. The purpose of a buffer is to create a zone where there will be little or no human activity, to “cushion” species and habitats from disturbance, and to allow native species to go about their “business as usual”. Buffer areas are essential open space between development and ESHA. The existence of open space ensures that development will not significantly degrade ESHA. Critical to buffer function is the fact that a buffer area is not itself a part of the ESHA, but a “barrier” or “screen” that protects the habitat area from adverse environmental impacts. Habitat buffers provide many functions, including keeping human disturbances such as noise, night lighting, and domestic animals, at a distance; Reducing the hazards of herbicides, pesticides and other pollutants, And preventing or reducing shading and reducing the effects of landscaping activities. Buffers also protect against invasive plant and animal species that are often associated with humans and development.

Coastal Act Section 30107.5 defines Environmentally Sensitive Areas as:

"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.

Plants and animals and habitats that meet the rarity criterion under this definition may include rare plant communities identified by the California Department of Fish and Game (CDFG), federal and state listed species, California Native Plant Society "1B" and "2" plant species, California species of special concern, and habitats that support the type of species listed above. A habitat could also be designated as ESHA due to its special nature or role in an ecosystem, such as if it provides an important function in a local ecosystem, or regional significance.

Although the City of Newport Beach Coastal LUP (CLUP) does not currently apply to the subject site, it contains numerous policies for coastal resource protection that should be referenced with regard to this site. As the most proximate and relevant discussion of habitat areas in and around the City, **a discussion of the policies of the Coastal Land Use Plan for the City of Newport Beach should be included within the EIR.** The buffer area/setbacks identified in the CLUP should be viewed as minimums; larger buffers/setbacks may be deemed appropriate at the subject site if necessary to protect biological resources. The City of Newport Beach Coastal Land Use Plan (CLUP) provides criteria for determining what constitutes ESHA in the Natural Resources section, including the following:

In determining whether a habitat area meets the statutory definition of ESHA contained in Section 30107.5 of the Coastal Act and should be designated as an ESHA, the following attributes need to be taken into consideration:

- *The presence of natural communities that have been identified as rare by the California Department of Fish and Game.*
- *The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.*
- *The presence or potential presence of plant or animal species that are not listed under State or Federal law, but for which there is other compelling evidence of rarity, such as designation as a 1B or 2 species by the California Native Plant Society.*
- *The presence of coastal streams.*
- *The degree of habitat integrity and connectivity to other natural areas.*

The LUP goes on to discuss particular species and habitats of importance within the City, and also states the following:

Where the habitats discussed above occur in the City of Newport Beach the presumption is that they are ESHA and the burden of proof is on the property owner or project proponent to demonstrate that that presumption is rebutted by site-specific evidence.

In summary, there is a significant amount of guidance available in both the Coastal Act and the Land Use Plan for the City. The policies therein stress the preservation of existing ESHA areas, and avoidance of ESHA.

B. Determination of ESHA

The figures shown in the DEIR only include one year of survey data. In review of previous projects on or near the Newport Banning Ranch property (Cease and Desist Order CCC-11-CD-03, Consent and Restoration Order CCC-11-RO-02, and Coastal Development Permit 5-10-168), the Commission staff has reviewed a continuous survey record of gnatcatcher usage from 1992 to 2009. However, only a single year of data is shown for the usage of sensitive species of the property, and of this year of data, only a single point is shown to indicate usage. A single year of data is not sufficient to draw conclusions regarding the usage of habitat on the subject site by sensitive species, as some sensitive species, such as Burrowing Owls, may be absent one winter and present the next. Furthermore, surveyors do not always detect rare species they are searching for, even when individuals are present. Finally, a point does not indicate the range of habitat that was observed by the surveyor, and does not indicate the entirety of the habitat which should be protected. For these reasons, **the EIR should be updated to reflect all known survey data regarding all sensitive species on the site, and the maps should be updated to indicate the extent of usage.**

An ESHA designation is based on site specific circumstances, and, except for the portion of the site that is part of the Sunset Ridge Park project that was heard at the Commission's November 2011 hearing, the Commission staff has not yet performed a formal ESHA delineation for the site. However, the site is known to support significant numbers of sensitive species, and there are likely significant areas of ESHA on the site. ESHA determinations are based on site specific circumstances, which the Commission has not had the ability to review in full. However, generally, habitat which supports sensitive species would be considered ESHA. Other examples of potential ESHA include rare community types, such as Coastal Bluff Scrub, and non-native or degraded habitat that supports special status species.

As listed above, Coastal Act Section 30240 requires that development **avoid** impacts to ESHA. Therefore, it is important that the EIR process incorporate a determination of probable ESHA areas and their required buffers before land use areas and development footprints are established. **We suggest that ESHA and wetland delineations and recommended buffers be reviewed by Coastal Commission staff biologists before the EIR is finalized.**

C. Compatibility with ESHA policies

In regards to Coastal Act Section 30240, The DEIR states:

The Project is consistent with this section. Section 4.6.4 of this DEIR has identified and mapped the vegetation types and special status species occurrences known to occur within the Project Site. The Project and associated mitigation measures avoid, minimize, and compensate for the placement of development within these areas to prevent a substantial degradation of these areas or significantly disrupt habitat values. The determination of what areas would be regulated as ESHA would be made by the Coastal Commission as part of the CDP process for the Project.

Based on a preliminary analysis by the Commission to date of the provided information, the development proposed in the EIR does not appear to be compatible with Coastal Act Section 30240.

The proposed project includes a four lane arterial from West Coast Highway to access the subject site. Coastal Commission Staff recently analyzed the habitat resources present in the footprint of the proposed road in processing the Coastal Development Permit for Sunset Ridge Park by the

City of Newport Beach (Please see the Staff Report and attached exhibits for Coastal Development Permit 5-10-168 available on the Commission's web site at <http://documents.coastal.ca.gov/reports/2011/11/W16a-11-2011.pdf>). Staff has determined that a four lane arterial road in the proposed location would result in significant, unavoidable impacts to ESHA. Therefore, staff has determined that the proposed arterial road would be inconsistent with the Coastal Act. **Therefore, the EIR should more fully consider alternative intensities of development on the site and alternative means to access the property, and should not rely on access from West Coast Highway, as such access would likely be found to be inconsistent with the Coastal Act.**

The proposed project involves extensive grading and the placement of structures within and adjacent to sensitive habitats and species (as presently mapped in the DEIR). Once more fully mapped as recommended herein, the quantity of sensitive habitat areas may be even more extensive. In any event, it is clear that the proposed development would result in the elimination of habitat supporting sensitive species. The special status species and habitats that are known to be supported by the site and which are possibly impacted by the proposed development footprint include the San Diego fairy shrimp, Coastal California Gnatcatcher, wetlands, riparian habitat, Southern tarplant, least Bell's vireo, Belding's savannah sparrow, Cooper's hawk, sharp shinned hawk, Northern harrier, white-tailed kite, osprey, merlin, California gull, loggerhead shrike, California horned lark, coastal cactus wren, yellow warbler, and yellow-breasted chat. Exhibits 4.6-6a and 4.6-6b of the EIR show that development is planned in areas that support sensitive species, and would fragment and isolate habitat areas located on the site. Both the direct elimination of habitat supporting sensitive species and the fragmentation of habitat on the site would have significant deleterious impacts and would be inconsistent with Coastal Act Section 30240.

The proposed project shows significant elimination of non-native grassland. In the past, the Coastal Commission has identified areas of nonnative grassland as ESHA because of their value as foraging habitat for raptors. The Commission has in the past considered habitat that supports burrowing owls ESHA. The Burrowing Owl, a California Species of Special Concern, is extremely rare in Orange County due to large-scale development of nearly all the county's suitable grasslands, especially near the coast. **The EIR should evaluate whether the proposed development will result in sufficient foraging habitat for raptor species.**

As stated above, Section 30240 requires that development avoid impacts to ESHA. Although it may be allowable by the requirements of other resource agencies, non-resource dependent impacts to ESHA and mitigation in other areas to offset those impacts, is nevertheless inconsistent with Section 30240. **Thus, the EIR should evaluate alternatives that result in avoidance of these impacts.**

D. Other Impacts

Bird Strikes: From a review of the Draft EIR, it is unclear whether transparent or reflective screenwalls will be used in the design of the building or the surroundings. Glass walls are known to have adverse impacts upon a variety of bird species. Birds are known to strike glass walls causing their death or stunning them which expose them to predation. Some authors report that such birds strikes cause between 100 million to 1 billion bird deaths per year in North America alone. Birds strike the glass because they either don't see the glass, or there is some type of reflection in the glass which attracts them (such as the reflection of bushes or trees that the bird might use for habitat).

There are a variety of methods available to address bird strikes against glass. For instance, glass can be frosted or etched in a manner that renders the glass more visible and less reflective. In the case of fences or walls, alternative materials can be used, such as wood, stone, or metal (although this approach isn't usually palatable when there is a desire to see through the wall). Use of frosted or etched glass, wood, stone or metal material is preferable to other types of treatments such as appliqués because of the lower maintenance and less frequent replacement that is required.

A more recent development is the creation of bird-safe building standards. Multiple cities around the country have created bird safe building guidelines. Recently, the Commission approved Local Coastal Program Amendment 1-10 for the City of Long Beach, which incorporated guidelines for bird safe buildings. Given the sensitive nature of habitat in the area and the bird species present, future planning documents for the site should incorporate bird safe building standards.

IV. Development

A. Public Access

The proposed project includes a 75 room resort. Section 30213 of the Coastal Act provides that lower cost visitor and recreational facilities shall be protected, encouraged and, where feasible, provided. Developments providing public recreational opportunities are preferred. Coastal LUP policy 2.3.3-1 states:

"Lower-cost visitor and recreational facilities, including campgrounds, recreational vehicle parks, hostels, and lower-cost hotels and motels, shall be protected, encouraged and, where feasible, provided. Developments providing public recreational opportunities are preferred. New development that eliminates existing lower-cost accommodations or provides high-cost overnight visitor accommodations or limited use overnight visitor accommodations such as timeshares, fractional ownership and condominium-hotels shall provide lower-cost overnight visitor accommodations commensurate with the impact of the development on lower-cost overnight visitor accommodations in Newport Beach or pay an "in-lieu" fee to the City in an amount to be determined in accordance with law that shall be used by the City to provide lower-cost overnight visitor accommodations."

This language stems from Coastal Act Section 30213 and supports lower-cost visitor accommodations as a priority use in the coastal zone. Therefore, **the EIR should analyze the demand for lower cost overnight visitor accommodations as well as other lower cost public recreational facilities in relation to the existing inventory and range of affordability of such uses in the City of Newport Beach coastal zone.** Based on this analysis, such facilities must be addressed and incorporated into the potential build-out of the subject site.

B. Oil and Gas Consolidation

It is unclear from the DEIR what development would be undertaken as a result of the consolidation of oil operations on the site. Consolidation activities may have impacts on sensitive resources on the site, and should be planned and managed carefully to avoid those impacts. The EIR should also more carefully break down the size of the open space proposed in the development. The consolidated oil and gas operations on the site do not have a timeline on their usage, and including such operations in the open space total may be misleading if the consolidated operations will continue for the foreseeable future.

V. Visual

The DEIR indicates the project being considered may require up to 2,500,000 cubic yards of grading. This suggests the project involves significant landform alteration. Section 30251 of the Coastal Act requires that landform alteration be minimized. **The EIR should be revised to include an analysis of whether there is significant landform alteration on the site.**

VI. Geology

The DEIR indicates that there are three areas in which a fault-setback is required because of the inability to rule out the presence of active faulting at the site. Two of these areas, the north and south segments of the Newport Mesa Fault, are separated but in line. Further, it is logical to conclude that the area between two segments of an active fault in such close proximity is likely active as well. Accordingly, the fault setback zones should be extended to connect the north and south segments of the Newport Mesa fault unless further study conclusively demonstrates that the area of the fault between these segments is not active as defined by the State of California.

Quantitative slope stability analyses should be performed for all cut and fill slopes not only for the existing condition, but more importantly, for the proposed development. Essentially, a geotechnical review of the proposed grading plan should be performed to assure stability and structural integrity and that the development will 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.

VII. Water Quality

- The EIR states that the project will prepare a Water Quality Management Plan (WQMP) following the guidance produced by Orange County dated May 2011. That WQMP will need to be included in the coastal development permit application which is eventually submitted.
- Portions of the water quality basins described in the EIR appear to overlay existing ESHA. In similar projects, the CCC has not found that conversion of existing ESHA into water quality treatment facilities to be consistent with the Coastal Act or Local Coastal Programs.
- The WQMP will need to show that the combination of LID, source control and treatment control BMPs, meeting CASQA design standards, for the site will treat at least the runoff generated by the 85th percentile storm event (3/4 inch, 24-hour storm).
- The WQMP or another document will need to show that the development project will not increase the volume of runoff or peak runoff rate from the development.
- Any Stormwater Pollution Prevention Plan (SWPPP) submitted to the SWRCB will need to be included in the eventual coastal development permit application.
- It is stated that although it will be feasible to apply traditional LID treatments at some locations with no limitation to the volume that is infiltrated, other areas would require sub-drains and impermeable liners to prevent infiltration that would penetrate into groundwater,

or that perforated drainpipe might be used to infiltrate a portion of the runoff to deeper geologic strata in other areas where geotechnical conditions allow.

The extent to which LID can be used effectively for this development appears to depend on the infiltration capacity of the soils, the depth to groundwater and geotechnical considerations. LID is a practice where runoff is infiltrated, evaporated or reused close to the source; normally each residence's roof and driveway runoff is infiltrated into the landscape adjacent to these features. There is a qualitative commitment to use LID within the development, but not at all locations within the development due to the above concerns.

It is also not clear whether runoff collected in the sub drains will be routed to a conventional storm drain system or to the proposed water quality basin, or how it will be determined where the collected sub drain water would be routed.

In the final WQMP prepared for the project, the actual area and volume of runoff handled by the LID system and that collected in sub drains, and where it would drain to, will need to be discussed.

- The North Orange County Permit Area has requirements for development that prevents hydromodification as measured for a 2-year return interval storm event. The EIR does not commit to limiting hydromodification effects from the project, but does appear to provide infiltration to the MEP for the project, which is a basic step toward preventing hydromodification. The WQMP that will be prepared for the project should discuss the extent to which LID and other stormwater BMP would be effective in preventing hydromodification, and should demonstrate how closely the hydrograph for a 2-year return interval storm would be matched post development.
- The EIR presents tables of possible site design BMPs and possible non-structural source control BMPs that could be used on the site. Although the lists are exhaustive, it is not clear which of the methods are to be considered for the development. The WQMP should detail which of the BMPs would actually be used and how the decision to use or not use a BMP was made.

VIII. Wetlands

A. Wetland Delineation

The Coastal Commission's regulations (California Code of Regulations Title 14 (14 CCR)) establish a "one parameter definition" that only requires evidence of a single parameter to establish wetland conditions:

Wetland 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, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats. (14 CCR Section 13577)

The Commission's one parameter definition is similar to the USFWS wetlands classification system, which states that wetlands must have **one or more** of the following three attributes:

(1) at least periodically the land supports predominantly hydrophytes; (2) the substrate is predominantly undrained hydric soil; and (3) the substrate is nonsoil and is saturated with water or covered by shallow water at some time during the growing season of each year

For more information on how the Commission delineates wetlands, please see the staff report and video archive of the workshop on wetlands which was held on October 5, 2011.

The wetland delineation shown on figure 4.6-3c does not match the identification of sensitive habitat on figures 4.6-6a and 4.6-6b, which identifies areas that contain the endangered San Diego fairy shrimp. Areas are identified in the EIR as having the endangered San Diego Fairy Shrimp which do not appear on the wetland delineation.

The existence of fairy shrimp in these areas would suggest that the sites support ponding water for a sufficient length of time to support the fairy shrimp. As a result, sites which support fairy shrimp are sites that would also be considered wetlands. Vernal pools may also qualify as wetlands due to the presence of wetland indicator species or hydric soils. Vernal pools also often qualify as ESHA, as vernal pools are rare and valuable habitats in Orange County.

The wetland jurisdiction maps in the DEIR should be updated to reflect this change. Furthermore, the data supporting the wetland delineation should be re-evaluated to ensure that areas which match the CCC wetland definition are properly considered in the EIR.

B. Impacts to Wetlands / Wetland Buffers

Coastal Act Section 30231 states (emphasis added):

*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 waterflow, encouraging waste water reclamation, **maintaining natural vegetation buffer areas** that protect riparian habitats, and **minimizing alteration of natural streams.***

Coastal Act Section 30233 states in part (emphasis added):

*(a) 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....*

*(c) In addition to the other provisions of this section, **diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary....***

The City's Coastal Land Use Plan states:

***4.2.2-3.** Require buffer areas around wetlands of a sufficient size to ensure the biological integrity and preservation of the wetland that they are designed to protect. Wetlands shall have a minimum buffer width of 100 feet wherever possible. Smaller wetland buffers may be allowed only where it can be demonstrated that 1) a 100-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the wetland given the site-specific characteristics of the resource and of the type and intensity of disturbance.*

In summary, wetlands are protected under the Coastal Act and the City of Newport Beach certified Land Use Plan. The development allowed in wetlands is restricted to certain allowable uses, and development adjacent to wetlands must be sited with appropriate buffers to ensure the continuance of the wetland.

It appears that development is proposed within wetlands. A comparison of exhibits 4.6-3a, 4.6-6a and 4.6-6b shows that development is being proposed within mapped wetlands at drainage course A, B, and C, that development is proposed within approximately 30 feet of a mapped wetland containing endangered fairy shrimp at wetland point 16, development is proposed in areas which likely qualify as wetlands, as described above, and many of the mapped wetlands are located in close vicinity to areas planned for permanent development.

Therefore, the proposed project does not appear to be consistent with Coastal Act Sections 30231 and 30233 because the proposed project would result in the elimination or degradation of wetlands on the subject site. **The EIR should further evaluate the impacts of the development on wetland resources.** **The EIR should also consider alternatives that avoid wetland impacts and result in the establishment of appropriate habitat buffers between development and wetlands.**

IX. Archeology

Cultural and Paleontological Resources

Section 30244 of the Coastal Act requires the protection of archaeological and paleontological resources and states in part:

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

The Newport Banning Ranch DEIR states that there are 11 archaeological sites on the Project Site. Further, the DEIR states that the archaeological consultant, BonTerra Consulting, performed a walk-over on May 13, 2009 and carried out Phase II text excavation and evaluation of the 11 mapped archaeological sites. Specifically, testing activities included brush clearing, excavation of shovel test pits (STPs), and one square meter units. These activities constitute "development" under the Coastal Act. All development, unless exempt, requires a Coastal Development Permit (CDP). Because the development occurred within a mapped archaeological site, the work would not be exempt. There is no mention of CDPs having been issued for the development. Please provide information regarding any CDP that were obtained for this work.

Inadequate information is provided to determine the adequacy of the testing that was performed to determine the nature, extent and boundaries of existing archaeological sites on the Project Site. In order to provide adequate protection of archaeological resources, a CDP should be obtained to carry out a comprehensive archaeological research plan (ARP) so that archaeological sites are located and can be avoided in the development of the Project Site. The ARP should be carried out in a manner that is most protective of archaeological resources. The ARP should not be designed to recovery archaeological resources but to determine the nature, extent and boundaries of existing archaeological resources. The ARP should also include any subsurface archaeological investigation that was done without a CDP. The Coastal Commission requires that an ARP be subject to peer review by at least three qualified archaeologists and review and comment opportunity be extended to the State Historic Preservation Officer, Native American Heritage Commission (NAHC), and Native Americans with cultural ties to the area, as determined by the NAHC. There is no discussion of peer review or review and comments by the above mentioned parties of the archaeological research testing and implementation plan.

The DEIR states that numerous artifacts and features were found during previous archaeological investigations. However, the disposition of those artifacts and features is not discussed. Further, the DEIR states that no burials were found on the Project Site. However, it is not clear as to whether the archaeological testing was designed to test to the appropriate depth to detect burials.

Finally, the DEIR states that the Project would impact three known archaeological sites that are deemed eligible for listing on the State and National registers of historic places and that activities could also further impact unknown archaeological resources. However, the DEIR concludes that two mitigation measures have been included that will mitigate this impact to a level considered less than significant. As stated, inadequate testing has occurred to date to make such a determination. The mitigation measures (MM 4.13-1 and MM 4.13-2) are inadequate to minimize impacts to cultural resources. The mitigation measures call for the salvaging and cataloguing of archaeological resources as opposed to in-situ preservation of human remains and significant resources as the preferred option. Further, the mitigation measure state that some project grading would be monitored by Native American monitors. All grading activities that have the potential to impact Native American resources should be monitored by Native Americans with cultural ties to the area. The mitigation measures do not provide for maximum protection of archaeological resources and

calls for removal (data recovery) of known archaeological sites in order to make way for Project development as opposed to redesign of the Project in order to protect archaeological resources in place.

For the above site reasons the DEIR is not consistent with Section 30244 of the Coastal Act.

X. Legal Inadequacies in DEIR

2.0 Introduction Section

The introduction fails to inform the public of the extent of the statutory and regulatory standards applicable to this EIR. "An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (Bakersfield Citizens for Local Control v. city of Bakersfield (2004) 124 Cal.App.4th 1184, 1197.) Please include the following statutory and regulatory references and language.

2.1

Include entire definition of EIR from Public Resources Code, section 21061 with particular emphasis on the first sentence of this section regarding the meaning of the EIR—" a detailed statement setting forth the matters specified in Sections 21100 and 21100.1..."

2.2

Include all language from Public Resources Code, section 21100 and all language regarding specificity of EIR found in 14 CCR 15146 in this section, "Type of Environmental Impact Report."

3.0 Project Description Section

"An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR; the defined project and not some different project must be the EIR's bona fide subject. CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process" (Burbank-Glendale-Pasadena Airport v. Hensler (1991) 233 Cal.App.3d 577, 592.)

Given the scope of the proposed development project, this chapter does not include specifics about a number of project components. The project proposal resembles more of a subdivision proposal and land use designations for the subdivision rather than a project that presents appropriate plans (architectural, engineering, etc.) for a specific number of residential, commercial, recreational, open space and circulation components. In an application for a coastal development permit, the commission typically requires specific project plans which include details of each component of the proposed project (architectural, engineering, biological, etc) and how each component may or may not impact specific coastal resources present on that component's project site. The present project description does not include the requisite detail to evaluate the scope of the impacts associated with each individual component of the proposed project. Without the

specifics, it would not be possible to determine the extent of a project's impacts on coastal resources. Please revise the project description to include specific details about each component of the project and the requisite technical information about each component.

3.6.4 Land Use Regulations subsection

The DEIR notes that “[d]evelopment of the project would be governed by City regulatory mechanisms including the following:

A. The Newport Banning Ranch Planned Community Development Plan (NBR-PC), which would provide the zoning regulations for the Project site.

B. The Newport Banning Ranch Master Development Plan (Master Development Plan), which would provide a general site development plan for each land use area and would establish design criteria for development of each land use within the Project site.”

The DEIR mischaracterizes these “regulatory mechanisms” in the DEIR. The project applicant cannot rely on any “approval” of these regulatory mechanisms unless the City annexes the project area into its jurisdiction, the City thereafter submits an LCP amendment application to the Commission and the Commission certifies these “regulatory mechanisms” related to the project area. Without adhering to these procedures, the project's approval is subject solely to Chapter 3 policies of the Coastal Act and is entirely within the Coastal Commission's permit-issuing authority. Any alleged “regulatory mechanisms” approved by the City without receiving Coastal Commission certification will not be used as guidance in the Commission's consideration of the proposed project.

4.1 Land Use Section

Section 4-1.6 refers to an exemption issued by South Coast Regional Zone Conservation Commission for oil/gas operations—E-7-27-73-144 (March 24, 1975). Please elaborate on the specific extent of the cited exemption.

4.6 Biological Resources Section

Section 4.6-4, the Biological Resources chapter, alleges to list the permanent and temporary biological impacts of the project but completely fails to provide sufficient detail of the specific project components that cause the alleged impacts. Thus, the chapter does not provide sufficient detail to enable the general public to meaningfully consider the impacts associated with the project. Rather, the DEIR states generally the number of acres that will be impacted from the proposed development. Without specific analysis related to how each component of the proposed project impacts the biological resources, there cannot be a meaningful analysis of cumulative impacts, mitigation measures or feasible alternatives that may enable the applicant to redesign certain components to lessen any impact the project may have on the environment. This level of detail is particularly important for the Commission when it reviews projects to determine the extent of cumulative impacts from a project and its consideration of whether or not the proposal identifies the proper mitigation and/or alternatives for those impacts. Please include more specific detail regarding the site plans for each proposed structure, grading component, or other development, as defined in section 30106 of the Coastal Act, and the expected biological impact from the proposed development.

These are some of our initial concerns; we hope these issues will be addressed in the City's review of the project. Please note, the comments provided herein are preliminary in nature. Additional and more specific comments may be appropriate as the project develops into final form and when it is submitted to the Commission for formal review. We request notification of any future activity associated with this project or related projects. Thank you for the opportunity to comment on this matter.

Sincerely,

John Del Arroz



Coastal Program Analyst

Cc: State Clearinghouse