

September 22, 2015

7248-25

Mr. Marc Brown
California Regional Water Quality Control Board
Santa Ana Region
3737 Main Street, Suite 500
Riverside, California 92501-3348

***Re: Response to Denial without Prejudice, Newport Banning Ranch
Development Project, RWQCB Project Number 302014-15, CIWQS 809160***

Dear Marc:

Newport Banning Ranch and their consultant team are in receipt of the denial without prejudice notification issued by the Regional Water Quality Control Board (RWQCB) on September 15, 2015 for the Newport Banning Ranch Development project (RWQCB Project Number 302014-15, CIWQS 809160). All members of the project team were surprised to receive this notification considering the fact that we've been working with RWQCB staff in good faith for months to address any outstanding issues with respect to the project and the notification recently provided outlines a series of concerns, data requests, and additional analyses that either has already been recently addressed or provided as part of our August 2014 application.

Further, the information requested in the September 2015 notification conflicts drastically from what we were told was required to advance the permit application toward completion. Mr. George Basye (Newport Banning Ranch) consulted with RWQCB staff back in July 2015 where it was communicated to him that in order to finalize the Section 401 Water Quality Certification for the project RWQCB staff needed to better understand what aquatic resources the U.S. Army Corps of Engineers (USACE) would assert jurisdiction over on-site. It was our understanding that RWQCB staff wished to participate in the wetland delineation confirmation field visit with USACE staff to review the seasonal features and understand the extent of current USACE jurisdiction on the property. Further, it was our understanding that following the site visit, RWQCB staff would be better versed on those resources that would be subject to RWQCB regulation, thereby advancing the permit process to completion. The site visit with USACE staff has been scheduled for October 5, 2015 at 10am. An invitation to participate in this visit was extended to you on September 14, 2015 and we understand you will be participating.

As described herein, and contrary to statements in the denial without prejudice notification, the information provided in the application submittal is more than sufficient to conclusively establish

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the level of impacts to jurisdictional features potentially resulting from the proposed project. Absent any substantive correspondence from RWQCB staff over the last 12 months suggesting the application materials were insufficient to complete staff review for the 401 certification and despite Newport Banning Ranch's numerous attempts to coordinate with staff on this matter, we believe RWQCB staff's issuance of denial without prejudice on these grounds has deprived the applicant reasonable due process for the subject application.

The intent of this letter is to provide a formal written response to each issue/concern identified in the denial without prejudice notification to help guide and facilitate review of the project issues and the resolution of those issues moving forward.

For your convenience, each RWQCB issue has been bracketed on the attached PDF and a response to each bracketed comment is provided by Dudek below on behalf of Newport Banning Ranch and other members of the project consultant team.

A-1 This comment suggests that RWQCB staff requested supplemental information regarding impacts to beneficial uses, in particular the RARE use designation, the protection of those uses, and the identification of appropriate mitigation for impacts to these uses and that the Applicant has failed to adequately address these concerns. Neither Newport Banning Ranch nor the project consultant team has ever received a written request from staff to clarify impacts to beneficial uses and/or to address the efficacy of the habitat mitigation proposal. Since a majority of the project impacts to waters of the U.S. and State are associated with habitat restoration it is unclear what RWQCB staff is requesting. A detailed habitat restoration plan outlining the positive effects of the proposed restoration program was submitted with the original application for Section 401 Water Quality Certification in August 2014. The proposed mitigation program represents a comprehensive program of on-site compensatory mitigation that is designed to fully mitigate all biological impacts associated with the proposed project, and to enhance on-site biological communities in a way that improves the overall ecological function of the site. No adverse immitigable impacts to beneficial uses are anticipated as part of the project.

A-2 Please elaborate on the inconsistencies referenced in the denial without prejudice notification regarding the seasonal features and the impacts to those features. It is true that reports from 2008 would have likely described fewer seasonal features than the more current reports, which include all data from 2000-2012. In fact, the *Jurisdictional Determination of Seasonal Features Report for Newport Banning Ranch*, prepared by Dudek dated May 2013 (revised July 2015), which was provided to RWQCB staff, was

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prepared specifically for the purpose of compiling and summarizing the significant amount of data collected on the site's seasonal features since 2008 in a single report to assist with review of the information and analyzing potential impacts for all seasonal features observed on the property. It is important to emphasize that the changes to the seasonal features report, dated July 2015, were minor and did not include changes to the number of features or any physical characteristic of the features. The property continues to support 49 seasonal features and the impacts to those features we felt should be subject to RWQCB regulation was clearly described in our application for Section 401 Water Quality Certification. In our application, Newport Banning Ranch proposed and continues to maintain the position that the only features subject to RWQCB regulation include VP 1, totaling 0.304 acre (13,262 square feet), and VP 2, totaling 0.021 acre (918 square feet). Both pools support the federally endangered San Diego fairy shrimp and sustain at least three wetland parameters (hydrophytic vegetation, hydric soils and hydrology) and thus meet the definition of a vernal pool. These two pools will be subject to restoration efforts to increase the functions and services of existing pool habitats and establish self-sustaining vernal pools to an extent that would, at a minimum, replace the functions and services temporarily lost by project implementation which would in turn provide higher quality habitat for the San Diego fairy shrimp (*Branchinecta sandiegonensis*).

Other impacts to features that support San Diego fairy shrimp include permanent impacts to Feature E (0.049 acre), a documented oil production sump, and temporary, restoration-related impacts to VP 3 (0.01 acre) and Features G, H, I, J (totaling 0.199 acre). These features support one parameter (in most cases hydrology) and thus are not considered vernal pools. Temporary impacts to seasonal features and/or vernal pools that support San Diego fairy shrimp will be mitigated at a higher 2:1 ratio. Permanent impacts to seasonal features supporting San Diego fairy shrimp will be mitigated at a higher 4:1 mitigation to impact ratio. The remaining seasonal features consist of road ruts, puddles, and similar features that were formed by previous oil production activities and thus should not be subject to state or federal regulation. The delineation of seasonal features is complete and comprehensive and as such no further delineation of seasonal features is required or proposed to support permit issuance.

As outlined in the Habitat Conservation and Conceptual Mitigation and Monitoring Plan (HCCMP) provided with the original application submittal in August 2014, the proposed vernal pool mitigation will consist of the establishment of 0.846 acres of pool surface area in approximately 6-8 vernal pool features on-site; the enhancement of 0.28 acre in VP1 through the removal non-native vegetation, native vegetation uncharacteristic of

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vernal pools, trash and debris, and sediment; the restoration of seven temporarily impacted seasonal features/vernal pools; and the revegetation of native grassland habitat in the watershed surrounding the established/enhanced/restored pools.

B-1 The project proposes permanent impacts to Feature E, a documented oil production sump, which supports the federally endangered San Diego fairy shrimp. Five other features including VP 3 and Features G, H, I, and J, also support San Diego fairy shrimp and will be temporarily impacted by habitat restoration and remediation work. We are unclear why RWQCB staff is referencing versatile fairy shrimp (*Branchinecta lindahli*) in the September 2015 notification. Versatile fairy shrimp are common invertebrate species and are not afforded protection by state or federal resource agencies. In fact, contrary to the letter, the State does not regulate any fairy shrimp species. Whether or not versatile fairy shrimp were documented during focused vernal pool branchiopod surveys is irrelevant and quite frankly has no bearing on the project impacts or mitigation. For the record, focused surveys for vernal pool branchiopod species were completed by Dudek in 2014/2015 in accordance with the USFWS (1996) *Interim Survey Guidelines to Permittees for Recovery Permits under Section 10(a)(1)(A) of the Endangered Species Act for the Listed Vernal Pool Branchiopods*. At the time, this was the only recommended protocol for these species. San Diego fairy shrimp and versatile fairy shrimp were documented, where observed. Any assertions made by staff that the survey results, impacts, and mitigation are inaccurately presented are false. Please also note for the record that the San Diego fairy shrimp is a federally listed endangered species; it is not State-listed endangered as was stated in the denial without prejudice notification.

B-2 Floral surveys were last conducted at all 49 seasonal features during May and June 2012 by Glenn Lukos Associates (specifically May 1 and/or June 6) during the peak of the flowering season. A variety of hydrophytic vegetation was observed and recorded in order to document the potential for wetland designation. The table below, excerpted from the *Jurisdictional Determination of Seasonal Features Report for Newport Banning Ranch*, prepared by Dudek, dated May 2013 (revised July 2015) includes a comprehensive summary of 32 common plant species observed within the features and their associated wetland indicator status.

Comprehensive List of Hydrophytic Plant Species Observed at Feature Sample Points and Their Indicator Status

Scientific Name	Common Name	Indicator Status
<i>Ambrosia psilostachya</i>	Cuman ragweed	FACU

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Comprehensive List of Hydrophytic Plant Species Observed at Feature Sample Points and Their Indicator Status

Scientific Name	Common Name	Indicator Status
<i>Baccharis salicifolia</i>	Mule fat	FAC
<i>Baccharis salicina</i>	Willow baccharis	FACW
<i>Bassia hyssopifolia</i>	Fivehorn smotherweed	FAC
<i>Bromus hordeaceus</i>	Soft brome	FACU
<i>Conyza canadensis</i>	Canadian horseweed	FACU
<i>Cortaderia selloana</i>	Uruguayan pampas grass	FACU
<i>Cotula coronopifolia</i>	Common brassbuttons	OBL
<i>Cyperus eragrostis</i>	Tall flatsedge	FACW
<i>Deinandra fasciculata</i>	Clustered tarweed	FACU
<i>Distichlis spicata</i>	Saltgrass	FAC
<i>Eleocharis macrostachya</i>	Pale spikerush	OBL
<i>Eleocharis palustris</i>	Common spikerush	OBL
<i>Erodium botrys</i>	Longbeak stork's bill	FACU
<i>Euthamia occidentalis</i>	Western goldentop	FACW
<i>Frankenia salina</i>	Alkali seaheath	FACW
<i>Helminthotheca echioides</i>	Bristly oxtongue	FACU
<i>Heliotropium curassavicum</i>	Salt heliotrope	FACU
<i>Hordeum marinum</i> ssp. <i>gussoneanum</i>	Mediterranean barley	FAC
<i>Hordeum murinum</i> ssp. <i>leporinum</i>	Hare barley	FACU
<i>Lythrum hyssopifolia</i>	Hyssop loosestrife	OBL
<i>Malvella leprosa</i>	Alkali mallow	FACU
<i>Melilotus indicus</i>	Annual yellow sweetclover	FACU
<i>Plantago elongata</i>	Prairie plantain	FACW
<i>Polypogon monspeliensis</i>	Annual rabbitsfoot grass	FACW
<i>Pseudognaphalium luteoalbum</i>	Jersey cudweed	FAC
<i>Psilocarphus brevissimus</i>	Short woollyheads	FACW
<i>Pulicaria paludosa</i>	Spanish false fleabane	FAC
<i>Rumex crispus</i>	Curly dock	FAC
<i>Salsola tragus</i>	Prickly Russian thistle	FACU
<i>Spergularia marina</i>	Salt sandspurry	OBL
<i>Vulpia myuros</i>	Annual fescue	FACU

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It is important to note that while the surveys were conducted during a below normal rainfall year (about 72% of normal), a full suite of vernal pool and other wetland indicator plants were detected on-site including woolly marbles (*Psilocarphus brevissimus*, FACW), tall flatsedge (*Cyperus eragrostis*, FACW), creeping spikerush (*Eleocharis macrostachya*, OBL), pale spikerush (*Eleocharis palustris*, OBL), prairie plantain (*Plantago elongata*, FACW), saltmarsh sand spurrey (*Spergularia marina*, OBL), western goldentop (*Euthamia occidentalis*, FACW), and alkali heath (*Frankenia salina*, FACW). Non-native species considered to be invasive in vernal pools were also found in a variety of features including brass buttons (*Cotula coronopifolia*, OBL), hyssop loosestrife (*Lythrum hyssopifolia*, OBL), and rabbitsfoot grass (*Polypogon monspeliensis*, FACW). It is common practice to perform test surveys at known locations and if species are identified at those locations, then it is determined that surveys at the focal survey location are adequate. In this case, the focal plants were observed on site, thus it is apparent that rainfall on site was sufficient for germination and growth and they would have been detected if present.

The data presented in the *Jurisdictional Determination of Seasonal Features Report for Newport Banning Ranch*, prepared by Dudek, dated May 2013 (revised July 2015) is definitive as not only were woolly marbles and brass buttons detected during the 2012 surveys, an additional nine plants with an indicator status of FACW or OBL and typically associated with vernal pools and/or seasonal wetlands were also detected for a total of 11 species such indicator species. An additional six Facultative (FAC) species were also detected (see Table 4, on pages 27 and 28 of said report). The assertion by staff that adequate surveys were not included and not comprehensive is inaccurate and clearly not based on the information presented in the report, which provides a comprehensive list of definitive data to support the wetland determination.

Further, we are unclear on the purpose of the RWQCB's request for further botanical surveys as we fail to see the relevance of the request as it relates to impacts to RWQCB-regulated impacts to surface waters of the U.S. and State.

B-3 There are a number of assertions in this paragraph that require a response and clarification. First, we concur that the site has been subject to activities typical of oil fields and would in fact note that essentially all of the seasonal features were created by the oil field activities as described on page 33 of *Jurisdictional Determination of Seasonal Features Report for Newport Banning Ranch* (July 2015). Nevertheless, each of the 49 features was evaluated for the presence or absence of a predominance of plants with an indicator status of FAC or wetter; hydric soils and wetland hydrology using the USACE's Arid West Supplement Version 2.0. Table 3, on pages 25 and 26 of the *Jurisdictional Determination of Seasonal Features Report for Newport Banning Ranch*

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(July 2015) provides a detailed summary of the findings for vegetation, soils and hydrology including the specific hydric soil and wetland hydrology indicators.

Second, it is not clear what is meant by “historic Hydrophytic Soil Assessments.” We are not sure what “historic” means in the context of the proposed project and how it applies. The soils data collected in accordance with the Arid West Supplement Version 2.0 was completed during the site visits as set forth in the 2015 report and as such the soils data presented in the report are current and not “historic”. If the term “historic” is meant to imply “existing”, please confirm in a response to this letter.

Third, we require further clarification and direction from RWQCB staff regarding the request for an updated “Hydrophytic Soil Assessment” as we are unclear on the type and purpose of such a document. We are assuming you are referring to the determination of “hydric” not “hydrophytic” soils as was discussed in the notification. There were a total of 10 soil series mapped on the property. Of the 10 soil series mapped on-site, seven are known to be hydric. However, it is important to emphasize that the hydric soils lists were designed primarily to generate a list of potentially hydric soils from the National Soil Information System database. They can be useful in making preliminary wetland determinations but in no way should replace field truthing. Field indicators must be and were used for all on-site determinations of hydric soils.

To elaborate, soil samples were reviewed in the field in 2012 as part of the seasonal features determination, the results of which were presented in detail in the *Jurisdictional Determination of Seasonal Features Report for Newport Banning Ranch*, dated May 2013 (revised July 2015). In summary, of the 49 seasonal features examined for soil characteristics, only three soil pits exhibited hydric soil indicators. In each case, the soil pits met the criteria for F8, Redox Depressions. Soils data collected at each feature sample point is provided on the Wetland Determination Data Forms in *Appendix A* of the *Jurisdictional Determination of Seasonal Features Report for Newport Banning Ranch* (Dudek 2015). The remaining 46 features did not support hydric soils and, given the ephemeral nature of these features, are not expected to have developed hydric soils since these features were last field reviewed in 2012. To elaborate and further clarify, hydric soil indicators such as redoximorphic features remain visible in the soil profile for decades and the current drought conditions would have no effect on the ability to make hydric soil determinations when the soil sampling was completed. Given that the soils were sampled in 2012 and remain current based on unchanged site conditions, the information presented in the *Jurisdictional Determination of Seasonal Features Report for Newport Banning Ranch* (Dudek 2015) is fully up to date and accurate for purposes of determining whether hydric soils have formed in any of the 49 subject seasonal features.

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B-4 Please clarify what RWQCB staff means by “hydraulic” report. For purposes of this response, we assume the RWQCB means “existing” instead of “historical” and “hydrology” instead of “hydraulic” when referring to the studies. Hydrology reports have been prepared for the entire site and are all based on existing topographic conditions. The primary hydrology related report is the Watershed Assessment Report (June 30, 2011 by Fuscoe Engineering, Inc). No significant changes have occurred to the topography since these studies were completed that would warrant updates or revisions. As hydrology relates specifically to vernal pools, the existing condition tributary area was analyzed in detail and the development footprint was reduced to maintain a similar natural drainage pattern.

Newport Banning Ranch and their consultant team recognize that once remediation and construction activities commence, existing topography and flow patterns will change, which could impact jurisdictional waters subject to RWQCB regulation absent mitigation. In order to prevent this from occurring, a series of mitigation and monitoring measures were included in the final certified Environmental Impact Report to prevent inadvertent and unauthorized impacts to jurisdictional waters during the various phases of construction. The phasing plan stipulates that for each area of construction, sufficient staging and stockpiling areas are provided along with their associated Best Management Practices (BMPs) to prevent runoff and sediment from entering or contaminating jurisdictional waters of the U.S. and State. More specifically, construction measures consistent with the Construction General Permit (CGP) and the site specific Storm Water Pollution Prevention Plan (SWPPP) will be employed including sediment and erosion control BMPs, non-storm water management and material storage BMPs. Additional protection measures are also identified in the Remedial Action Plan (RAP) which is a separate document that must be approved by the RWQCB.

B-5 We would like to point out that while it is true that California Coastal Commission (CCC) staff may make recommendations for project modifications that, from their perspective, would reduce significant impacts to special-status biological resources, including Environmentally Sensitive Habitat Areas (ESHAs), no such recommendations have occurred to-date and the individuals making these recommendations are staff biologists and planners that do not have the ability to modify, approve or deny the project. The project is scheduled to appear before the CCC commissioners on October 7 at which point the CCC will likely determine the type and extent of ESHA on the property and whether or not further project modifications, beyond what has already been adopted, will be required.

Regarding the status of a Section 404 (b)(1) analysis, we applied to the USACE for a stacked Nationwide Permit 27 and 29 because more than 90% of project impacts to aquatic resources

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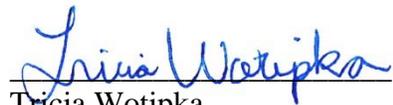
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are due to habitat restoration and oil remediation. Although the project proposes permanent impacts to Feature E, a documented oil production sump, which supports San Diego fairy shrimp, this feature does not meet the USACE's definition of a vernal pool and as such is considered a seasonal feature, not a vernal pool. The project does not propose permanent, development-related impacts to any feature that meets the definition of a vernal pool and as such continues to qualify for the Nationwide Permit Program with no requirement to analyze alternatives under Section 404(b)(1) of the federal Clean Water Act. Additionally, a majority of the impacts to San Diego fairy shrimp are attributed to habitat restoration, which is permissible under Nationwide Permit 27 in accordance with Section 404 of the federal Clean Water Act. Thus, a Section 404(b)(1) alternatives analysis is not required and is not expected to be necessary as part of the project.

We expect that the submittal of this response and the information described herein adequately addresses RWQCB concerns regarding the project and that following receipt of this letter the application will be considered reopened. We would appreciate the opportunity to meet with you in person following your review of this letter to ensure consistency in our understanding of the project and next steps moving forward. We also request a written response to this letter prior to the Coastal Commission hearing on October 7, 2015.

Newport Banning Ranch and their consultant team would like to thank you in advance for exercising independent judgement as it relates to your responsibilities to protect aquatic resources subject to State review and regulation. We sincerely appreciate in advance your cooperation on this matter. Should you have any questions or concerns regarding the content contained herein please feel free to call me at 760.479.4295 or email me at twotipka@dudek.com.

Very truly yours,



Tricia Wotipka
Senior Biologist

*cc: Michael Mohler, Newport Banning Ranch
Rewdy Holstein, Newport Banning Ranch
George Basye, Newport Banning Ranch
April Winecki, Winecki Consulting
Brock Ortega, Dudek
Tony Bomkamp, Glenn Lukos Associates
Ian Adam, Fuscoe Engineering*



EDMUND G. BROWN JR.
GOVERNOR



MATTHEW RODRIGUEZ
SECRETARY FOR
ENVIRONMENTAL PROTECTION

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

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A-2

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.

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| Cont.

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.

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| B-2

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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.

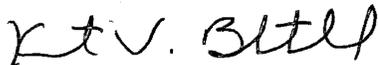
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CCC staff advised us that they have made recommendations for possible modifications to the Project that would alleviate, at least in part, their concerns with respect to the Project impacts on ESHAs and other environmentally sensitive biological resources. 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.

B-5

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)