CALIFORNIA COASTAL COMMISSION

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Commission Action:	

STAFF REPORT AND RECOMMENDATION ON COMBINED COASTAL DEVELOPMENT PERMIT APPLICATION AND CONSISTENCY CERTIFICATION

COASTAL DEVELOPMENT PERMIT APPLICATION NO: 5-07-125

FEDERAL CONSISTENCY NO: CC-029-07

APPLICANT: County of Orange, Watershed and Coastal Resources Div. Attn: Susan Brodeur, P.E.

AGENTS: Noel Davis and Lisa Louie, Chambers Group, Inc.

PROJECT DESCRIPTION: Consistency Certification CC-029-07: Off-shore disposal of up to 177,000 cubic yards of dredge material.

Coastal Development Permit 5-07-125: Temporarily install a 150 foot long dock attached to an existing marina to moor boats to accommodate dredging of up to 177,000 cubic yards from navigational channels, shoaled areas under docks, swimming/small craft boating lagoon and areas adjacent to storm drain outlets to design depths varying from -7 ft. MLLW in the swimming/small craft boating lagoon to -8 ft. MLLW in the marina and boat dock areas; with off-shore disposal at LA-3.

PROJECT LOCATION: Newport Dunes Waterfront Resort, 1131 Back Bay Drive, City of Newport Beach, Orange County

Offshore Disposal: at EPA approved disposal site known as LA-3 located approximately 4 miles southwest of the entrance to Newport Harbor, Orange County

OTHER APPROVALS: Regional Water Quality Board Section 401 Water Quality Certification (pending); CA Department of Fish & Game Streambed Alteration Agreement Notification No. 1600-2006-0444-R5; Proposed Regional General Permit (RGP) No. 54, U.S. Army Corps of Engineers File No. 200602112-DPS (pending CCC permit); California State Lands Commission lease agreement; and an e-mail from Allan Ota of the U.S. Environmental Protection Agency to Daniel Swenson of the U.S. Army Corps of Engineers dated May 8, 2007 giving preliminary concurrence with ocean disposal of dredged material from the Newport Dunes site.

SUBSTANTIVE FILE DOCUMENTS: City of Newport Beach Certified LUP; CDP 5-99-282(City of Newport Beach & County of Orange);CDP 5-89-259 (City of Newport Beach); CDP 5-86-130 (City of Newport Beach); CDP 5-85-729 (City of Newport Beach); CC-078-99 and CC-077-01; *Newport Dunes Maintenance Dredging Project Initial Study and Negative Declaration* prepared by the County of Orange dated June 22, 2007; *Newport Dunes Eelgrass Survey* prepared by Chambers Group, Inc. dated February 2005; *Eelgrass Mitigation and Monitoring Plan for the Newport Dunes Maintenance Dredging Project, Newport Beach, CA* prepared by Chambers Group, Inc. dated June 2007; and *Dredge Material Evaluation, Newport Dunes Maintenance Dredging* prepared by Kinnetic Laboratories, Inc. and Moffatt & Nichol dated March 2007.

PROCEDURAL STAFF NOTE:

A coastal development permit is required for the project pursuant to Section 13252(a) (2) because it involves more than one hundred thousand (100,000) cubic yards of dredging within a twelve month period, as well as other development that is not exempt. A consistency certification is required for disposal of dredge materials at the LA-3 site because it is a federally permitted activity located outside the coastal zone that has effects on the coastal zone.

To facilitate Commission review of these items, both the coastal development permit application and the consistency certification will be heard at the same time. Commission staff recommends approval of the coastal development permit application and concurrence with the consistency certification.

SUMMARY OF STAFF RECOMMENDATION:

1. Coastal Development Permit Application: Staff is recommending approval of the proposed project with special conditions regarding; 1) approval from California State Lands Commission if necessary; 2) construction responsibilities; 3) staging area; and 4) project limits; 5) turbidity control; 6) timing of construction; 7) biological monitoring; 8) compliance with proposed eelgrass mitigation plan; 9) pre-construction Caulerpa Taxifolia survey; and 10) post completion report. The primary issues associated with this development are recreation, water quality and protection of sensitive biological resources.

2. Consistency Certification: The project includes a consistency certification for the disposal of approximately 177,000 cubic yards of sediment at LA-3, an EPA designated ocean disposal site located five miles southwest of Newport Beach, Orange County. This consistency certification is needed to authorize the disposal of the dredged material beyond the three mile limit of state waters.

The Commission has previously authorized other dredge disposal projects at this location. The proposed project is the least environmentally damaging alternative and will not have significant impacts to marine resources. The dredge materials proposed for off-shore disposal are not suitable for beach replenishment because they consist of fine sediment. The proposed project will result in temporary impacts to benthic organisms and a temporary increase in water turbidity. Sediment chemistry data indicate generally low levels of contaminants, solid phase bioassay test results suggest low potential for toxic effects and bioaccumulation test results show low potential for chronic effects. The dredge material is considered suitable for ocean disposal and will not

impact water quality or marine resources in or around LA-3 or in the coastal zone. The EPA has confirmed the materials are suitable for disposal at LA-3. Therefore, the project is consistent with the dredging, water quality, marine resources and sand supply policies of the Coastal Act (Sections 30230, 30231 and 30233). The project will have no negative effects on commercial or recreational boating or fishing in the area. Therefore, the project is consistent with the recreational and boating policies of the Coastal Act (Sections 30234, 30234.5, 30220 and 30224).

A. STAFF RECOMMENDATION, MOTION AND RESOLUTION OF APPROVAL OF COASTAL DEVELOPMENT PERMIT

Staff recommends that the Commission make the following motion and adopt the following resolution to APPROVE the permit application with special conditions.

MOTION

I move that the Commission approve Coastal Development Permit No. 5-07-125 pursuant to the staff recommendation.

Staff recommends a YES vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION OF APPROVAL WITH CONDITIONS

The Commission hereby approves a coastal development permit for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

B. STAFF RECOMMENDATION, MOTION AND RESOLUTION OF CONCURRENCE WITH CONSISTENCY CERTIFICATION

Staff recommends that the Commission make the following motion and adopt the following resolution to CONCUR with the consistency certification.

MOTION

I move that the Commission concur with consistency certification CC-029-07 that the project described therein is consistent with the enforceable policies of the California Coastal Management Program (CCMP).

Staff recommends a YES vote on the motion. Passage of this motion will result in a concurrence in the certification and adoption of the following resolution and findings. An affirmative vote of a majority of the Commissioners present is required to pass the motion.

RESOLUTION TO CONCUR IN CONSISTENCY CERTIFICATION:

The Commission hereby concurs in the consistency certification by the County of Orange in CC-029-07, on the grounds that the project described therein is consistent with the enforceable policies of the CCMP.

C. STANDARD CONDITIONS (Coastal Development Permit)

1. Notice of Receipt and Acknowledgment. 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 this permit is reported to the Commission. 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. Interpretation. Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

4. 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.

5. 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.

D. SPECIAL CONDITIONS (Coastal Development Permit)

1. **California State Lands Commission: PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, applicant shall provide to the Executive Director written evidence from the California State Lands Commission that the proposed development is consistent with the terms and conditions of any applicable tidelands grant as well as a copy of any permit issued by the California State Lands Commission, or letter of permission, or evidence that no permit or permission is required. The applicant shall inform the Executive Director of any changes to the project required by the California State Lands Commission. Such changes shall not be incorporated into the project until the applicant obtains a Commission amendment to this coastal development permit, unless the Executive Director determines that no amendment is legally required.

2. **Construction Responsibilities:** Dredging activities authorized under this CDP shall comply with the following construction-related requirements:

    a. No construction materials, debris, waste, oil or liquid chemicals shall be placed or stored where it may be subject to wave erosion and dispersion, stormwater, or where it may contribute to or come into contact with nuisance flow;
    b. If turbid conditions are generated during construction a silt curtain shall be utilized to minimize and control turbidity to the maximum extent practicable;

c. The discharge of any hazardous materials into the harbor or any receiving waters shall be prohibited;
d. Floating booms will be used to contain debris discharged into coastal waters and any debris discharged will be removed as soon as possible but no later than the end of each day.
e. Non-buoyant debris discharged into coastal waters will be recovered by divers as soon as possible after loss.

3. Staging Area for Construction

A. **PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT**, the applicant shall submit a plan for the review and approval of the Executive Director which indicates that the construction staging area(s) will avoid impacts to beach areas or to sensitive habitat areas.

1. The plan shall demonstrate that:
(a) Construction equipment or activity shall not occur outside the staging area
(b) Public parking areas shall not be used for staging or storage of equipment
(c) Sandy beach or habitat (vegetated) areas shall not be used as staging areas
(d) The staging area for construction of the project shall not obstruct vertical or lateral access to the beach, marina or other recreational facilities

2. The plan shall include, at a minimum, the limits of the staging area(s) and location of construction fencing and temporary job trailers, if any.

B. The permittee shall undertake development in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

4. Maintenance dredging project limits:

A. For this CDP the term dredging operations shall mean: navigation of the dredging vessel at the dredging site, excavation of dredged material within the project boundaries, and placement of dredged material into a hopper dredge or disposal barge or scow.

B. Under this CDP, dredging operations are limited to -8 feet MLLW with a 2 feet allowable overdraft. Discharge of material dredged from below –10 feet below MLLW (dredging design depth plus overdredge depth), which represents the characterization depth, or dredged from outside the project boundaries (as shown on attached Exhibit 4), is not authorized by this CDP.

C. Dredging operations authorized in this permit shall be limited to the areas identified on the plan titled “Plans for Maintenance Dredging of Newport Dunes Marina and Lagoon” and dated February 23, 2006 as shown in Exhibit 4. No dredging operation is authorized in any other location under this permit. No more that 177,000 cubic yards of dredged material is authorized for dredging operations.

5. Turbidity Control

The applicant shall ensure that the project does not result in: 1) increases of water turbidity by more than twenty percent (20%) of the natural turbidity during non-storm conditions, nor 2) dissolved oxygen in the receiving waters being depressed below 5.0 mg/l.

6. Timing of Construction

To avoid adverse impacts on breeding California least tern, Belding's savannah sparrow and light-footed clapper rail, construction shall not occur between and including March and September. However, the permittee may undertake construction during this period upon obtaining a written statement of the Executive Director authorizing construction on specified dates. To obtain such a determination, the permittee must submit a declaration from the Department of Fish and Game stating that construction on the specific dates proposed will not cause adverse impacts to any sensitive or endangered species. The declaration must contain an assessment of the breeding and nesting activities of California least tern, Belding's savannah sparrow and light-footed clapper rail found in the area and a statement that the construction activity on the specific dates proposed will not interfere with the breeding and nesting activities of the California least tern, Belding's savannah sparrow and light-footed clapper rail. Should such a determination be granted, an appropriately trained biologist shall monitor the proposed development as indicated in Special Condition #7.

7. Biological Monitor

An appropriately trained biologist shall monitor the proposed development for disturbance to sensitive species or habitat area. At minimum, monitoring shall occur once a week during any week in which construction occurs. Daily monitoring shall occur during development which could significantly impact biological resources such as dredging or construction that could result in disturbances to the California least tern, Belding's savannah sparrow and light-footed clapper rail. Based on field observations, the biologist shall advise the applicant regarding methods to minimize or avoid significant impacts, which could occur upon sensitive species or habitat areas. The applicant shall not undertake any activity, which would disturb sensitive species or habitat area unless an amendment to this coastal development permit for such disturbance has been obtained from the Coastal Commission.

8. Eel Grass Mitigation

A. Compliance with Eelgrass Mitigation Plan. The applicant shall implement and comply with the recommendations and mitigation contained within *Newport Dunes Eelgrass Survey* prepared in February 2005 prepared by Chambers Group, Inc. and *Eelgrass Mitigation and Monitoring Plan for the Newport Dunes Maintenance Dredging Project, Newport Beach, CA* dated June 2007 prepared by Chambers Group, Inc. as they pertain to the development that is the subject of this coastal development permit. The mitigation plan shall be undertaken in full compliance with the "Southern California Eelgrass Mitigation Policy" (SCEMP) Revision 8 (except as modified by this condition) adopted by the National Marine Fisheries Service. All impacts to eelgrass habitat shall be mitigated at a ratio of 1.2:1 (mitigation:impact). The exceptions to the required 1.2:1 mitigation ratio found within SCEMP shall not apply. Eelgrass from the donor site(s) shall be transplanted at the proposed transplantation location(s) prior to

commencement of the development authorized under this permit. Any changes to the approved mitigation plan, including but not limited to changes to the monitoring program to ensure success of the eelgrass mitigation site, shall require an amendment to this permit from the Coastal Commission or written concurrence from the Executive Director that the changes do not require a permit amendment.

B. Pre-construction Eelgrass Survey. A valid pre-construction eelgrass survey shall be completed during the period of active growth of eelgrass (typically March through October). The pre-construction survey shall be completed prior to the beginning of construction and shall be valid until the next period of active growth. The survey shall be prepared in full compliance with the "Southern California Eelgrass Mitigation Policy" Revision 8 (except as modified by this condition) adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Game. The applicant shall submit the new eelgrass survey for the review and approval of the Executive Director within five (5) working days of completion of the new eelgrass survey and in any event no later than fifteen (15) working days prior to commencement of construction. If the new survey identifies, within the proposed project area, any eelgrass which is not documented in the eelgrass survey described in Special Condition No. 8.A. above, the newly identified eelgrass shall be transplanted prior to commencement of construction at a 1.2:1 ratio at the same transplantation locations identified in the eelgrass mitigation plan described in Special Condition No. 8.A. above. The transplantation shall occur consistent with all provisions of the mitigation plan described in Special Condition 8.A. above.

C. Post-construction Eelgrass Survey. After completion of project construction, the applicant shall survey the project site to determine if any eelgrass was adversely impacted. This post-construction survey shall be completed in the same month as the pre-construction survey during the next growing season immediately following the completion of construction within coastal waters. The survey shall be prepared in full compliance with the "Southern California Eelgrass Mitigation Policy" Revision 8 (except as modified by this condition) adopted by the National Marine Fisheries Service and shall be prepared in consultation with the California Department of Fish and Game. The applicant shall submit the post-construction eelgrass survey for the review and approval of the Executive Director within thirty (30) days after completion of the survey. If any eelgrass has been impacted, the applicant shall replace the impacted eelgrass at a 1.2:1 ratio at the transplantation site and in accordance with the mitigation plan described in Special Condition No. 8.A. above.

9. Pre-construction *Caulerpa Taxifolia* Survey

A. Not earlier than 90 days nor later than 30 days prior to commencement or re-commencement of any development authorized under this coastal development permit (the "project"), the applicant shall undertake a survey of the project area and a buffer area at least 10 meters beyond the project area to determine the presence of the invasive alga *Caulerpa taxifolia*. The survey shall include a visual examination of the substrate.

B. The survey protocol shall be prepared in consultation with the Regional Water Quality Control Board, the California Department of Fish and Game, and the National Marine Fisheries Service.

C. Within five (5) business days of completion of the survey, the applicant shall submit the survey:

(1) for the review and approval of the Executive Director; and

(2) to the Surveillance Subcommittee of the Southern California Caulerpa Action Team (SCCAT). The SCCAT Surveillance Subcommittee may be contacted through William Paznokas, California Department of Fish & Game (858/467-4218) or Robert Hoffman, National Marine Fisheries Service (562/980-4043), or their successors.

D. If *Caulerpa taxifolia* is found within the project or buffer areas, the applicant shall not proceed with the project until 1) the applicant provides evidence to the Executive Director that all *C. taxifolia* discovered within the project and buffer area has been eliminated in a manner that complies with all applicable governmental approval requirements, including but not limited to those of the California Coastal Act, or 2) the applicant has revised the project to avoid any contact with *C. taxifolia*. No revisions to the project shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

10. Post Completion Report

The Permittee shall submit a post-dredging completion report to the Executive Director of the Commission within 30 calendar days after completion of dredging project to document compliance with all general and special conditions defined in this permit. The report shall include all information collected by the Permittee, the biological monitor, the dredging operations inspector and the disposal operations inspector or the disposal vessel captain as required by the special conditions of this permit. The report shall indicate whether all general and special permit conditions were met. Any violations of the permit shall be explained in detail. The report shall further include the following information:

1) Permit and project number.
2) Start date and completion date of dredging and disposal operations.
3) Total cubic yards disposed at the authorized disposal site(s).
4) Mode of dredging.
5) Mode of transportation.
6) Form of dredged material.
7) Frequency of disposal and plots of all trips to the authorized disposal site(s).
8) Tug boat or other disposal vessel logs documenting contact with the USCG before each trip to the authorized ocean disposal site.
9) A certified report from the dredging site inspector indicating all general and special permit conditions were met. Any violations of the permit shall be explained in detail.
10) Pre-dredging hydrographic survey.
11) A detailed post-dredging hydrographic survey of the dredging area. The survey shall show areas above the dredging design depth shaded green, areas between the dredging design depth and overdredge depth shaded yellow, areas below overdredged depth that were not dredged or areas that were deeper than the overdredge depth before the project began as indicated on the predredging survey

shaded blue, and areas dredged below the overdredge depth or outside the project boundaries shaded red. The methods used to prepare the post-dredging survey shall be the same methods used in the predredging condition survey. The survey shall be signed by the Permittee certifying that the data are accurate.

E. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

I. Background, Project Location and Description

Background

Historically, the County of Orange has carried out maintenance dredging in navigational channels and areas under docks within Newport Dunes that have become shoaled due to sediment build up, including the publicly accessible swim/small craft boating lagoon. Newport Dunes is a County of Orange leasehold serving recreational boaters and provides recreational activities for visitors. The County of Orange previously received Commission federal consistency certification for dredging in 1990 for 50,000 cu. yds. and 76,000 cu. yds. in 1996. The 1990 sediments were dredged hydraulically and placed in an adjacent sediment basin. The 1996 sediments were permitted for disposal at LA-3. Pursuant to Section 30610(d) of the Coastal Act, maintenance dredging less than 100,000 cubic yards in one year is exempt from coastal development permit requirements.

Project Location

The Newport Dunes Waterfront Resort and Marina is located in a cove within Upper Newport Bay at 1131 Back Bay Drive in the City of Newport Beach, Orange County (Exhibit 1 and 2). Upper Newport Bay Ecological Reserve is located immediately northeast of the project site and extends over 2.5 miles. The Newport Dunes Waterfront Resort consists of 100 acres of State tidelands surrounded by land designated as Recreational & Environmental Open Space (REOS) in the City of Newport Beach certified Land Use Plan (LUP). It is intended for recreational and visitor serving uses with 406 space recreational vehicle park, 450 slip marina, boat launch facility, dry boat storage, restaurant, surface parking, and swimming/small craft boating lagoon day use facilities. The northern half of the site includes the marina, boat launch ramp, dry stand storage for boats and the Back Bay Café. The southern half of the site consists of a publicly accessible swim lagoon with sandy beach, boat rental dock, boardwalk, concessions, restrooms and recreational vehicle stalls. A village center with grocery store, pool and spa, administrative and banquet rooms are adjacent to the lagoon on the southwest corner of the facility (Exhibit 3).

The proposed dredging plan (Exhibit 4) fully defines the areas within Upper Newport Bay to which this consistency certification and coastal development permit applies. The north half (marina/ramp/channels) design depth is -8 MLLW and the south half (swim/small craft boating lagoon) to -7 MLLW with an allowance of 2’ over depth dredge.

The proposed project includes areas of the harbor that are tidelands that were granted either to the City of Newport Beach or the County of Orange by the California State Lands Commission. The County of Orange is the applicant. The proposal does not include submerged lands that are privately owned. The project area is located within State tidelands which were granted to the County of Orange (Statutes of 1919, chapter 526, page 1138). These areas are generally located around

Harbor Isle, some portions of Linda Isle and within the Upper Newport Bay. The tidelands grant to the County does not authorize the County to dredge within the grant area without prior approval from the California State Lands Commission (CSLC). Approval may be granted through a tidelands lease from CSLC. The applicant has applied for such a lease.

In order to assure that the proposed development is consistent with any applicable tidelands grant and any areas held in public trust or over which there is a public trust easement, **Special Condition #1** requires evidence –prior to the issuance of permit - from CSLC that either approval has been granted in the form of a lease agreement or that no approval is necessary.

Project Description - Dredging & Ocean Disposal

The total quantity of dredge material is approximately 177,000 cubic yards (with an allowance for 2 feet over-dredge depth) to pre-existing dredge depths within the areas identified on Exhibit 4.

The material will be removed using clamshell or cutterhead/suction dredge equipment, loaded onto bottom-dump scows and transported to the LA-3 ocean disposal site. The potential construction schedule would involve a dredge loading the dump scows in two 8-hour shifts. A tug and scow would make two trips to LA-3 per 24 hours. Each scow would have 1,200 pay cu. yds. per scow, resulting in 2,400 pay cu. yds. per day. Based on these volumes, the project is expected to involve over 74 dredge days for a final pay quantity of approximately 177,000 cu. yds. The project is anticipated to occur from January through April 2008.

Dredging activities will temporarily impact mooring within the marina slips. Ten (10) to fifteen (15) boats will be moved at any given time to a temporary dock to be installed that is approximately 150 feet long and will be attached to the northern end of the existing marina at either the “K” or “L” docks with a dog-leg extension to the west.

The applicant proposes to stage equipment in an approximately one acre area on the northwest inland portion of the project site across from docks C, D, and E in the marina and adjacent to the dry boat storage area. Other staging areas have not been identified and would be the responsibility of the construction contractor. The loading dock and launching ramp may be used for transferring personnel and equipment with 24 hours notice prior to use. **Special Condition #3** requires submittal of a staging area plan prior to the issuance of permit.

The proposed offshore disposal would occur at the EPA and Commission-approved disposal site known as LA-3 located approximately 4 miles southwest of the Newport Harbor entrance.

II. Status of Local Coastal Program

The standard of review for federal consistency certifications is the policies of Chapter 3 of the Coastal Act, and not any Local Coastal Program (LCP) of the affected area. If the Commission has certified an LCP and incorporated it into the California Coastal Management Program (CCMP), the LCP can provide guidance in applying Chapter 3 policies in light of local circumstances. If the Commission has not incorporated an LCP into the CCMP, the LCP cannot guide the Commission's decision, but it can provide background information. There is presently no certified LCP for the City of Newport Beach. Therefore, the Commission has not incorporated any LCP for the City of Newport Beach into the CCMP.

III. Applicant’s Consistency Certification

The County of Orange has certified that the proposed project is consistent with the California Coastal Management Program.

IV. Chapter 3 Policy Analysis of Coastal Development Permit and Consistency Certification

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.*

Section 30233 of the Coastal Act states:

> *(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.

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable long shore current systems

In this case, the proposed dredging and off-shore disposal would occur in order to restore previously dredged depths in existing navigational channels, in the marina vessel berthing/mooring areas and the recreational swimming/small craft boating lagoon. Sediment grain size analysis concluded that the sediment from the project site was too fine grained for beach replenishment or near-shore disposal; the LA-3 ocean disposal site is the preferred alternative as the sediment composition is similar to the Newport Dunes dredge area.

Without dredging, boat slips within the marina would become silted and unusable, thereby decreasing the usefulness of the site for recreation oriented boating. In addition to swimming activities, the lagoon also contains a small dock offering boat, pedal boat, kayak and windsurfer rentals for within the lagoon (as it is separated from the marina and open upper bay waters by a pedestrian bridge). Sediment build up in the swim/small craft boating lagoon would render it unusable for swimming and small scale boating recreation. Accordingly, the no project alternative would have an adverse impact upon boating related uses of coastal waters.

The dredging is only proposed to occur in previously dredged areas to restore previously dredged depths. There are no feasible alternatives to the proposed dredging which would restore the berthing areas at the subject site and be less environmentally damaging. Impacts to eelgrass are unavoidable and therefore must be mitigated as more fully explained in a following section regarding sensitive habitats. The project will also avoid the areas of Upper Newport Bay (i.e. within the Upper Newport Bay Ecological Reserve) that could potentially disturb the breeding activities of sensitive bird species. **Special Condition #4** requires the maintenance of dredging project limits to ensure that the waters of the Upper Newport Bay Ecological Reserve are not disturbed. Furthermore, **Special Condition #10** requires documentation of compliance with all general and special conditions defined in this permit to ensure protection of sensitive habitat in proximity to the project area. The Commission finds that the proposed dredging is an allowable use and the least environmentally-damaging feasible alternative (with feasible mitigation measures described below). Therefore, the Commission finds the proposed dredging is allowable pursuant to Section 30233(a)(2) and 30233(b) of the Coastal Act. In addition, the Commission finds that the proposed project will not adversely affect resources of the coastal zone, and therefore, the project is consistent with the policies of the CCMP.

a. Sensitive Habitats and Resources

Section 30230 of the Coastal Act requires that marine resources be protected and that the use of the marine environment be carried out in a manner that will sustain the biological productivity of coastal waters. The proposed dredging may impact marine resources. Therefore, mitigation measures are necessary to protect the biological productivity of coastal waters.

In addition, Section 30233(b) of the Coastal Act states:

Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats…

Upper Newport Bay Ecological Reserve is located immediately northeast of the project site and extends over 2.5 miles. Upper Newport Bay contains habitat for a diverse variety of wildlife. The primary habitat is open water and there is salt marsh, tidal flats, sandy beach, subtidal mud seafloor habitat at various locations throughout the bay. Upper Newport Bay is especially rich with sensitive habitat and wildlife. Several sensitive and endangered bird species nest, breed and forage in these habitat areas. For instance, California least tern, Belding savannah sparrow, and light-footed clapper rail nest, breed and forage in the Upper Newport Bay. Eelgrass and other sensitive vegetation are present in some locations. Eelgrass beds provide areas for fish egg laying, juvenile fish rearing, and water fowl foraging grounds. The proposed dredging project will result in direct losses of eelgrass and impact foraging, and possible roosting and nesting of sensitive bird species due to its proximity to the Upper Newport Bay Ecological Reserve.

Eelgrass

The applicant has submitted biological assessments for the Newport Dunes Recreational Resort within Upper Newport Bay. These studies indicate that eelgrass (Zostera marina) is present within the project site at Newport Dunes. Eelgrass typically grows at depths ranging from 0 feet to –15 feet Mean Lower Low Water. Eelgrass is considered worthy of protection because it functions as important habitat for a variety of fish and other wildlife, according to the Southern California Eelgrass Mitigation Policy (SCEMP) adopted by the National Marine Fisheries Service (NMFS), the U.S. Fish and Wildlife Service (USFWS), and the California Department of Fish and Game (CDFG). Sensitive species, such as the least tern, a federally listed endangered species, utilize eelgrass beds as foraging grounds.

In a December 2004 survey, a total of ten eelgrass patches were found in the vicinity of the boat docks within the proposed dredging areas at depths between -4 ft and -8 ft MLLW. No eelgrass was observed in the swim/small craft boating lagoon or other areas. The patches ranged in size with the largest covering two square meters in area, another patch at one square meter and the rest were less than one square meter in area. The total area occupied by eelgrass was less than five square meters.

The total potential eelgrass impacts cannot be determined at this time as a recent eelgrass survey has not been conducted. However, direct losses due to dredging activities are expected. The applicant proposes to prepare and submit to the Executive Director an eelgrass survey 90 days prior to project construction and post-construction eelgrass surveys. The applicant also proposes to mitigate potential impacts by conducting an eelgrass monitoring and transplant program at a 1.2:1 ratio on-site or off-site according to the guidelines of the Southern California Eelgrass Mitigation Policy (NMFS 1991 as amended). To assure that eelgrass mitigation procedures are in place, the Commission imposes **Special Condition #8.**

Sensitive Species

The applicant's biological assessment indicates there are State and Federally listed threatened and endangered species in the project area. One listed plant species and seven listed bird species are known to occur in Upper Newport Bay. However, many of them are associated with marsh, intertidal mudflat, or upland habitat and would not likely occur in the project area. The California brown pelican, California least tern and American peregrine falcon have a high probability of

occurrence in the project area; the light-footed clapper rail, western snowy plover, California gnatcatcher, Belding's savannah sparrow and California black rail are also known to occur in the project area.

The project will temporarily disturb the waters within the project area thereby disrupting potential foraging areas of these sensitive species. Foraging, breeding and nesting activities of the California least tern, Belding's savannah sparrow and light-footed clapper rail could also be directly affected by dredging. Noise from construction equipment could disturb the birds. Additionally, the project will temporarily displace the brown pelican from roosting on top of the existing docks during dredging activities.

Impacts to the peregrine falcon are not expected as no breeding occurs within the Bay itself and falcons most frequently forage on the large flocks of shorebirds and waterfowl in the Upper Newport Bay Ecological Reserve.

The least tern, sparrow, and clapper rail nest and breed in the Upper Newport Bay Ecological Reserve. These species forage throughout the upper and lower bay. However, the impact from the proposed project would only occur in the upper bay near nesting sites because these species need to forage near their nests during the breeding season. Minimal foraging impacts are expected as birds will avoid the project area during construction and forage in suitable nearby areas.

The proposed dredging activities are confined to the areas outside of the Upper Newport Bay Ecological Reserve, thereby avoiding direct nesting impacts. However, dredging activities may impact foraging during the nesting season. The proposed dredging is anticipated to occur from January through April and avoid most of the breeding season. To assure avoidance of adverse impacts to nesting birds, the Commission imposes **Special Condition #6** restricting construction during the breeding and nesting seasons for the California least tern, Belding's savannah sparrow and the light-footed clapper rail. However, dredging activities may continue during this period with a written declaration from the Department of Fish and Game stating that construction will not cause adverse impacts to any sensitive or endangered species. Additionally, as proposed and as conditioned in **Special Condition #7**, if such a declaration is granted from the Department of Fish and Game, then a biological monitor will be present on-site during continued dredging operations in the bird breeding season (March-September). If the biological monitor observes nesting activities in the project area for a sensitive or listed species, construction activities will cease.

The increase in suspended sediments caused by dredging could also decrease light penetration, deter small fish from using the protective habitat, and interfere with bird foraging. Eelgrass beds and foraging California least tern can be adversely affected from increased turbidity in the water column caused by the proposed dredging. The tern uses sight to forage for small fish near the surface of the water. The increase in turbidity can interfere with this sight-based feeding. However, wildlife foraging for food in the water column would not need to go a significant distance to avoid areas that are affected by turbidity. Furthermore, the Regional Water Quality Control Board (RWQCB), as one state agency that regulates discharges into coastal waters, sets turbidity standards. The RWQCB standards for acceptable levels of turbidity include a maximum increase of 20% of naturally occurring turbidity and dissolved oxygen levels of not less than five milligrams per liter.

The project proposes to incorporate standard Best Management Practices (BMPs) to minimize turbidity. Discharge onto scows will be controlled, utilizing techniques necessary to ensure that turbidity during dredging does not increase in the immediate area more than 20% above ambient

levels. Turbidity will also be monitored so that general construction activities (e.g., operation of dredge) do not increase turbidity in the immediate area more than 20% above ambient levels. A silt curtain/boom will be installed around the entrance of the Newport Dunes Resort on the north side where it connects to the access channel across from Shellmaker Island. The Commission finds that it is necessary to ensure that these turbidity standards are not exceeded. To assure that acceptable levels of turbidity are maintained, the Commission imposes **Special Condition #5.**

Therefore, as proposed and conditioned to mitigate and avoid impacts to marine resources, the Commission finds the proposed project is consistent with Sections 30230 and 30233(b) of the Coastal Act. In addition, the Commission finds that with these measures, the proposed project will not adversely affect resources of the coastal zone, and therefore, the project is consistent with the policies of the CCMP.

b. Water Quality

One of the potential adverse effects from dredging and ocean disposal activities is the re-suspension and relocation of contaminants. Dredge material can contain elevated levels of heavy metals, pesticides, organics, and other pollutants. These contaminants usually are bound to finer grain material such as clay and silt. Pursuant to the requirements of the Corps and under the direction of the U.S. Environmental Protection Agency (EPA), the applicant conducted physical, chemical, and biological tests on the sediments within the proposed dredging areas of Newport Bay proposed for aquatic disposal at the federally-approved ocean disposal LA-3 site.

With respect to the proposed disposal at LA-3, the Commission's main concern is the effects on marine resources and commercial and recreational fishing over the need to assure that the material to be disposed of at LA-3 is uncontaminated and suitable for ocean disposal. The Commission generally uses the federal standards and guidelines for evaluating the suitability of sediment for aquatic disposal. The chemical and biological testing requirements and procedures detailed in the Inland Testing Manual (ITM), (USEPA/USACE 1998) and the Ocean Disposal Testing Manual (Greenbook), (USEPA/USACE 1991) were used to evaluate the suitability of the dredge sediments for ocean disposal. In some cases, the sediment chemistry occurs in a range where it may or may not be suitable for ocean disposal and would require upland or confined aquatic disposal. Contaminants of potential ecological concern (COPECS) included heavy metals, chemical analogues of the pesticide DDT, and polynuclear aromatic hydrocarbons (PAHs) (i.e. chemicals formed during the incomplete burning of coal, oil, gas and other organic substances).

Four sample cores from five areas were taken from proposed dredging areas and combined into a single composite sample representing dredge material from the mudline down to -9.0 or -10.0 MLLW. These samples were subjected to a comprehensive suite of physical, chemical and biological (toxicity, bioassay and bioaccumulation) tests as reported in "Dredged Material Evaluation, Newport Dunes Maintenance Dredging" (March 2007) prepared by Kinnetic Laboratories, Inc.

Sediment from the Newport Dunes dredge area consists predominantly of silt with lesser amounts of sand; LA-3 reference sediments were similar. The bay sediments have varying levels of pollutants generally within the range of urbanized estuaries on the California coast due to urban runoff and some past industrial uses of the bay. Sediment tests provided survival data from amphipods, worms and other organisms that live in and ingest the sediment. These tests show that mortality of these organisms exposed to sediments from the dredge sites is not statistically significantly different than the mortality of organisms exposed to a reference site. Testing results

indicate levels of pollutants are low enough that the dredged material can be safely disposed at the ocean disposal site. In addition, toxicity and bioaccumulation tests demonstrate that the aquatic disposal of sediments will have no measurable impacts on coastal resources. As noted above, some of the sediment to be dredged is known to have contaminant levels elevated above natural conditions. The U.S. EPA and U.S. Army Corps of Engineers have affirmatively stated that ocean disposal of sediments dredged from within the approved dredging area is acceptable.

In addition, **Special Condition #2** requires the permittee comply with other water quality best management practices for the duration of the dredging period in order to protect water quality.

As conditioned, the Commission finds the proposed project consistent with Section 30231 of the Coastal Act. In addition, the Commission finds that with these measures, the proposed project will not affect water quality resources of the coastal zone, and therefore, the project is consistent with the Water Quality policy of the CCMP.

c. Caulerpa Taxifolia

As noted above, eelgrass is a sensitive aquatic plant species which provides important habitat for marine life. Eelgrass grows in shallow sandy aquatic environments which provide plenty of sunlight. In the late 1990's, a non native and invasive aquatic plant species, Caulerpa taxifolia (herein C. taxifolia), was discovered in parts of Huntington Harbour (Emergency Coastal Development Permits 5-00-403-G and 5-00-463-G) which occupies similar habitat. C. taxifolia is a tropical green marine alga that is popular in the aquarium trade because of its attractive appearance and hardy nature. In 1984, this seaweed was introduced into the northern Mediterranean. From an initial infestation of about 1 square yard it grew to cover about 2 acres by 1989, and by 1997 blanketed about 10,000 acres along the coasts of France and Italy. Genetic studies demonstrated that those populations were from the same clone, possibly originating from a single introduction. This seaweed spreads asexually from fragments and creates a dense monoculture displacing native plant and animal species. In the Mediterranean, it grows on sand, mud and rock surfaces from the very shallow subtidal to about 250 ft depth. Because of toxins in its tissues, C. taxifolia is not eaten by herbivores in areas where it has invaded. The infestation in the Mediterranean has had serious negative economic and social consequences because of impacts to tourism, recreational diving, and commercial fishing[1].

[1] References : Meinesz, A. (Translated by D. Simberloff) 1999. Killer Algae. University of Chicago Press

Chisholm, J.R.M., M. Marchioretti, and J.M. Jaubert. Effect of low water temperature on metabolism and growth of a subtropical strain of Caulerpa taxifolia (Chlorophyta). Marine Ecology Progress Series 201:189-198

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Komatsu, T. A. Meinesz, and D. Buckles. 1997. Temperature and light responses of the alga Caulerpa taxifolia introduced into the Mediterranean Sea. Marine Ecology Progress Series 146:145-153.

Gacia, E. C. Rodriquez-Prieto, O. Delgado, and E. Ballesteros. 1996. Seasonal light and temperature responses of Caulerpa taxifolia from the northwestern Mediterranean. Aquatic Botany 53:215-225.

Belsher, T. and A. Meinesz. 1995. Deep-water dispersal of the tropical alga Caulerpa taxifolia introduced into the Mediterranean. Aquatic Botany 51:163-169.

Because of the grave risk to native habitats, in 1999 C. taxifolia was designated a prohibited species in the United States under the Federal Noxious Weed Act. In addition, in September 2001 the Governor signed into law AB 1334 which made it illegal in California for any person to sell, possess, import, transport, transfer, release alive in the state, or give away without consideration various Caulerpa species including C. taxifolia.

In August 2000, an infestation of C. taxifolia was discovered in Huntington Harbor in Orange County. Genetic studies show that this is the same clone as that released in the Mediterranean. Other infestations are likely. Although a tropical species, C. taxifolia has been shown to tolerate water temperatures as low as 50ºF. Although warmer southern California habitats are most vulnerable, until better information if available, it must be assumed that the whole California coast is at risk. All shallow marine habitats could be impacted. In response to the threat that C. taxifolia poses to California's marine environment, the Southern California Caulerpa Action Team, SCCAT, was established to respond quickly and effectively to the discovery of C. taxifolia infestations in Southern California. The group consists of representatives from several State, federal, local and private entities. The goal of SCCAT is to completely eradicate all C. taxifolia infestations.

If C. taxifolia is present, any project that disturbs the Bay bottom could cause its spread by dispersing viable tissue fragments. The proposed project would disturb the harbor bottom by dredging and C. taxifolia could be distributed to other parts of the bay or to the open ocean through transport of the dredge spoils for ocean disposal. In order to assure that the proposed project does not cause the dispersal of C. taxifolia, the applicant is proposing to survey for the presence of C. taxifolia in the project area –in accordance with SCCAT protocols and has agreed not to commence the project if C. taxifolia is found in the project area. The applicant would apply to implement measures to eradicate C. taxifolia from the project area and could commence with the project once the eradication is complete. The Commission imposes **Special Condition #9** to implement the applicants' proposal. Therefore, as proposed and conditioned to mitigate and avoid impacts to marine resources, the Commission finds the proposed project is consistent with Sections 30230 and 30233(b) of the Coastal Act. In addition, the Commission finds that the proposed project will not adversely affect resources of the coastal zone, and therefore, the project is consistent with the policies of the CCMP.

d. Recreation and Public Access

The proposed project is consistent with the following Coastal Act policies which encourage public access and recreational use of coastal areas.

Section 30210 of the Coastal Act states:

> *In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

Section 30213 of the Coastal Act states:

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.

Section 30221 of the Coastal Act states:

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

The proposed project will allow for continued long-term use of coastal waters for recreational boating. Temporary impacts to the use of the recreational facility and marina during dredging is expected. A small percentage of the boat slips will be closed at any given time during dredging and the associated boats will be moved to temporary slips. The total number of boats in the marina requiring temporary removal during the dredging period is approximately 440, where approximately 10-15 boats will be moved at any given time. A temporary dock about 150 feet long will be attached to the northern end of the existing marina at either the "K" or "L" docks with a dog-leg extension to the west. The swim/small craft boating lagoon will also be temporarily unavailable to the public during active dredging. The project is anticipated to occur form January through April, during the off-peak season.

Therefore, as proposed, the Commission finds that the proposed project is consistent with Sections 30210, 30213 and 30221 of the Coastal Act. In addition, the Commission finds that the proposed project will not adversely affect resources of the coastal zone, and therefore, the project is consistent with the policies of the CCMP.

V. Local Coastal Program

Section 30604(a) of the Coastal Act provides for the issuance of coastal development permits directly by the Commission in regions where the local government having jurisdiction does not have a certified local coastal program. The permit may only be used if the Commission finds that the proposed development will not prejudice the ability of the local government to prepare a Local Coastal Program which conforms with the Chapter 3 policies of the Coastal Act.

The Newport Beach Land Use Plan was effectively certified on May 19, 1982. . The certified LUP was updated on October 13, 2005. The City currently has no certified implementation plan. Therefore, the Commission issues coastal development permits within the City based on the development's conformance with the Chapter 3 policies of the Coastal Act. The LUP policies may be used for guidance in evaluating a development's consistency with Chapter 3. The City's LUP states that the City seeks to ensure the highest quality of water in the bay and along their beaches. As conditioned, the proposed project is not expected to create additional long-term adverse impacts to marine resources, water quality and the marine environment in the Bay and along the beaches.

The proposed development is consistent with Chapter 3 policies of the Coastal Act and with the LUP. Therefore, approval of the proposed development will not prejudice the City's ability to prepare a Local Coastal Program for Newport Beach that is consistent with the Chapter 3 policies of the Coastal Act as required by Section 30604(a).

VI. Consistency with the California Environmental Quality Act (CEQA)

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of Coastal Development Permit applications to be supported by a finding showing the application, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The County of Orange is the lead agency for purposes of CEQA compliance. A Mitigated Negative Declaration was prepared for this project in July 2007 pursuant to the provisions of CEQA. Mitigation measures included a measure to minimize any impacts to water quality and biological resources.

The proposed project is located in an urban area. Infrastructure necessary to serve the project exists in the area (i.e., docks, parking). The proposed project has been conditioned in order to be found consistent with the resource protection policies of the Coastal Act. As conditioned, the proposed project has been found consistent with the public access, water quality, and habitat protection policies of the Coastal Act. Mitigation measures to minimize adverse effects include: special conditions related to eel grass mitigation; pre-construction Caulerpa Taxifolia survey; water quality; turbidity control; staging and timing of construction; biological monitor and construction-related best management practices (BMPs). As conditioned, there are no feasible alternatives or feasible mitigation measures available, beyond those required, which would substantially lessen any significant adverse effect which the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified effects, is the least environmentally damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.

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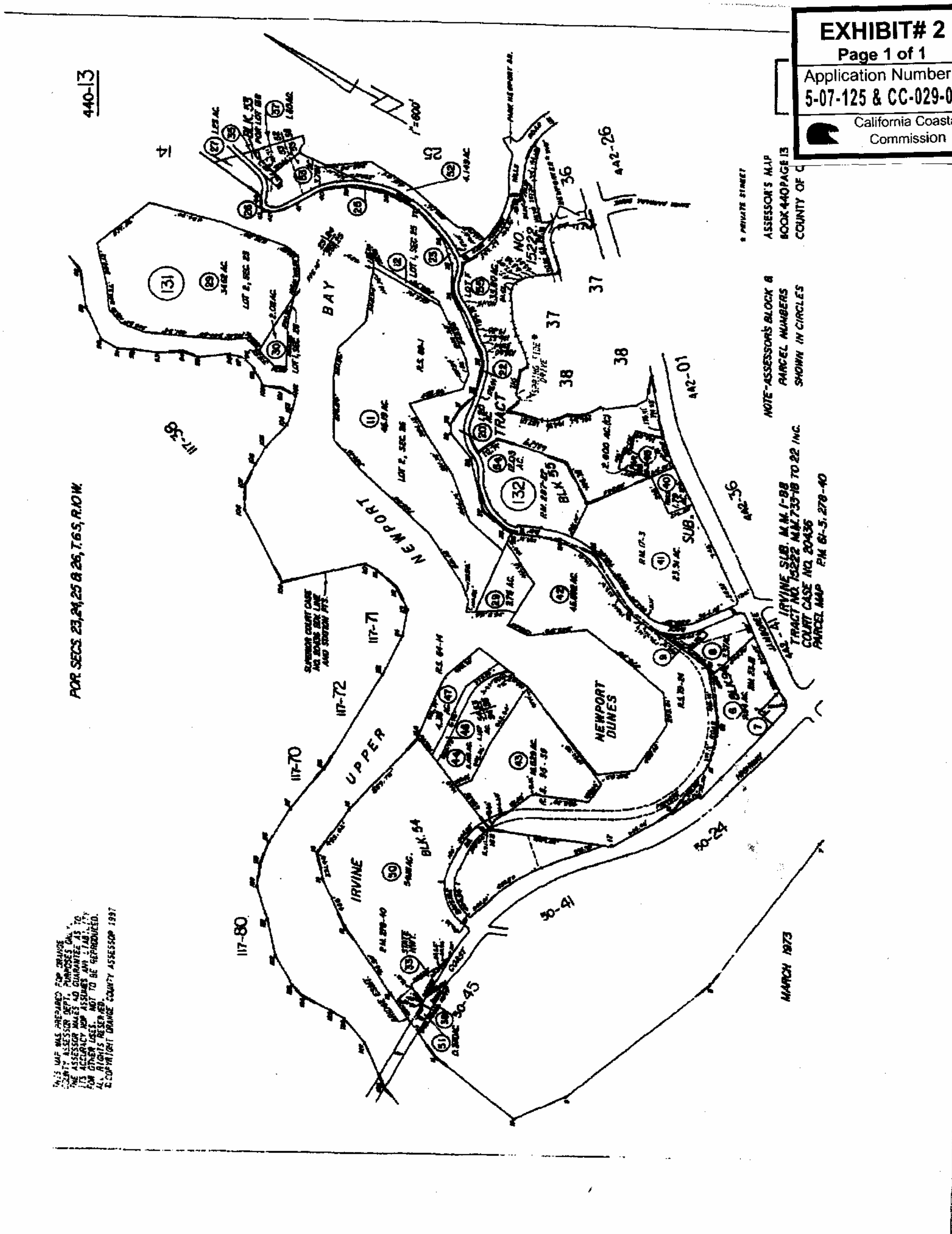
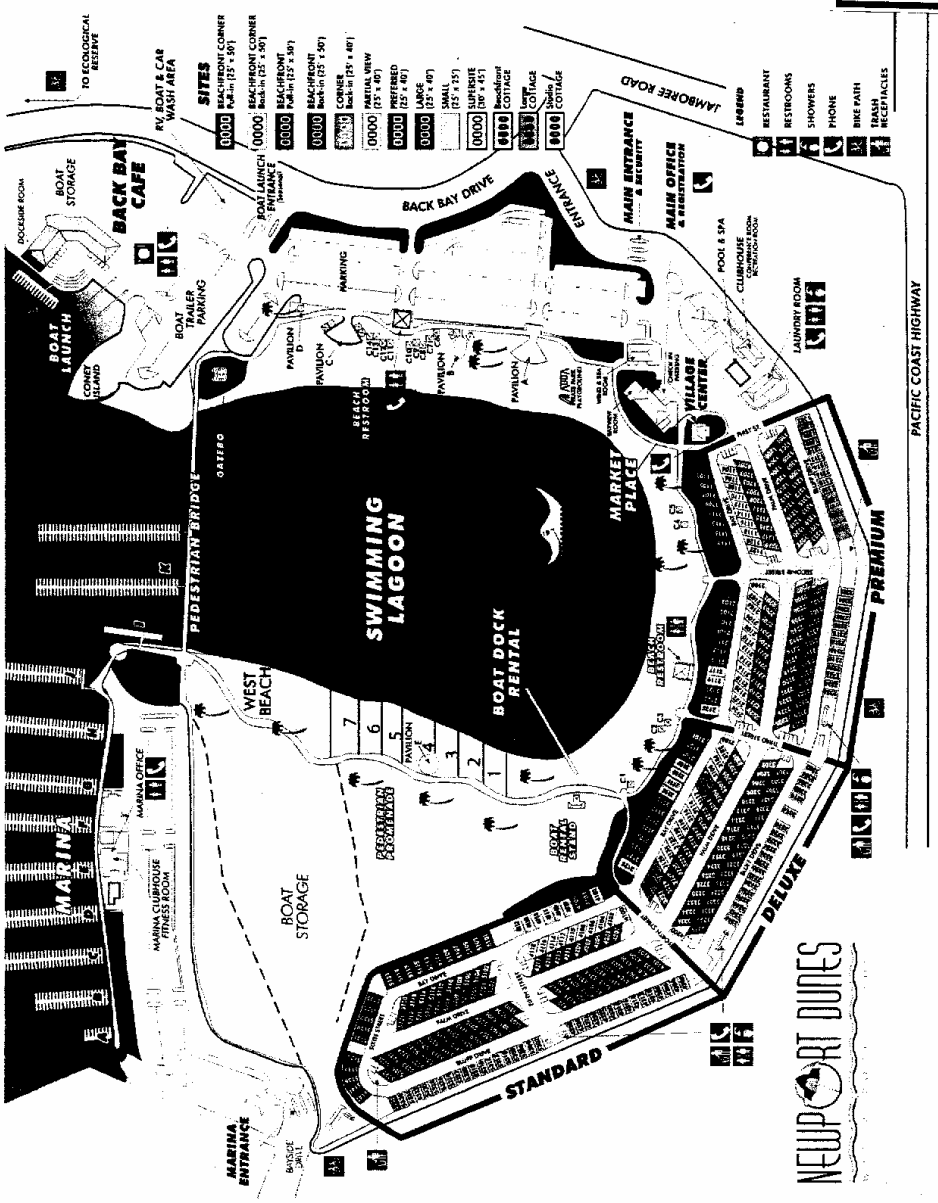
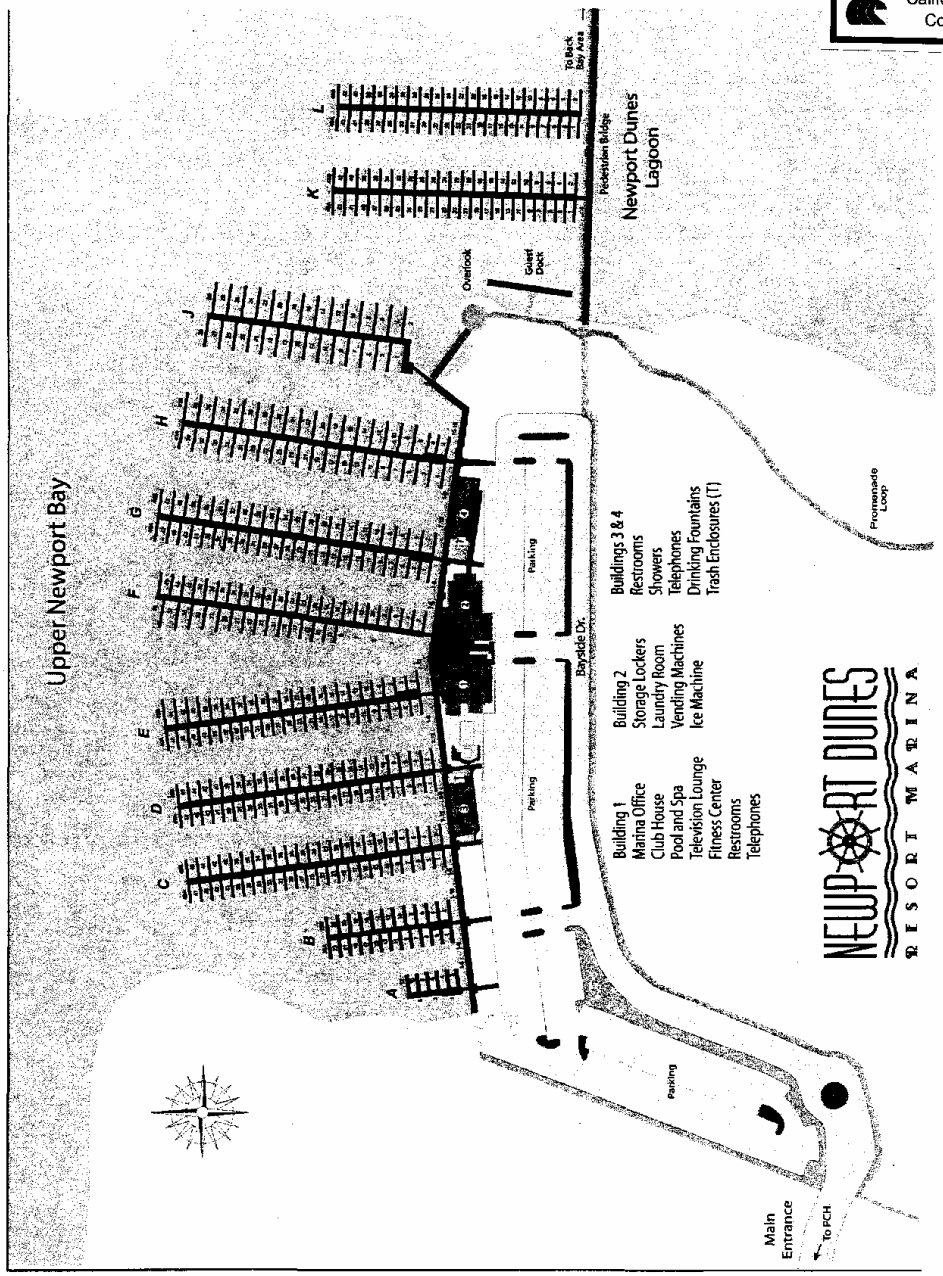
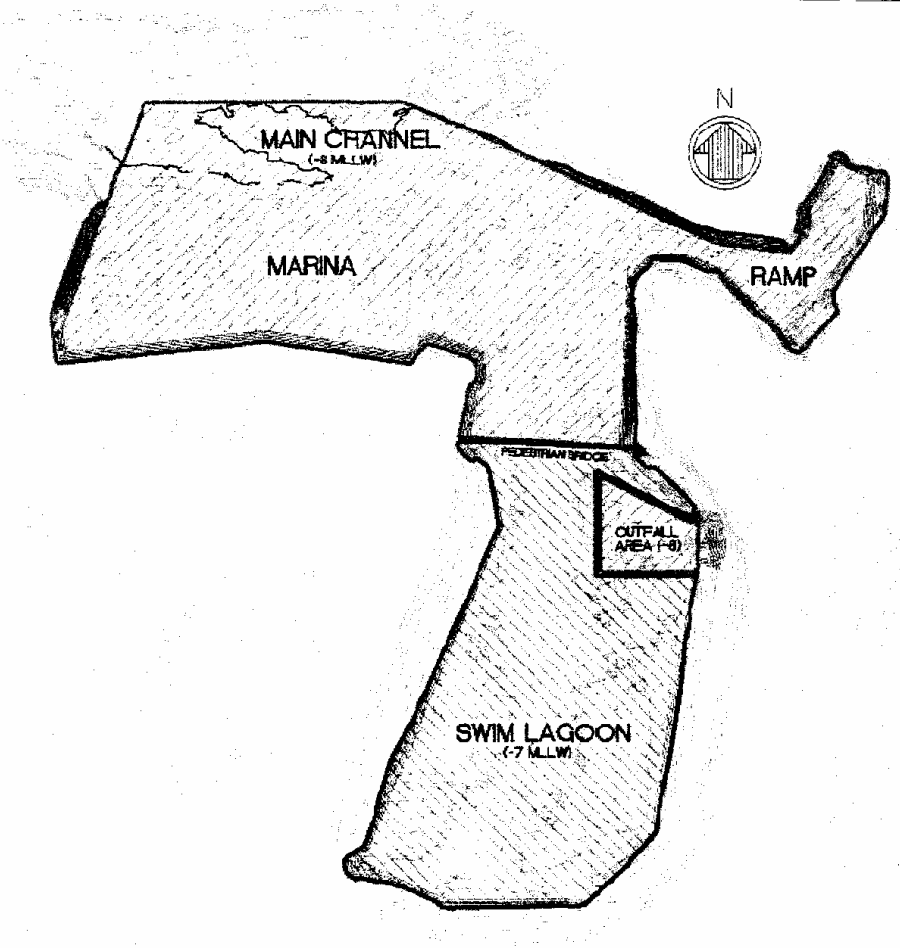




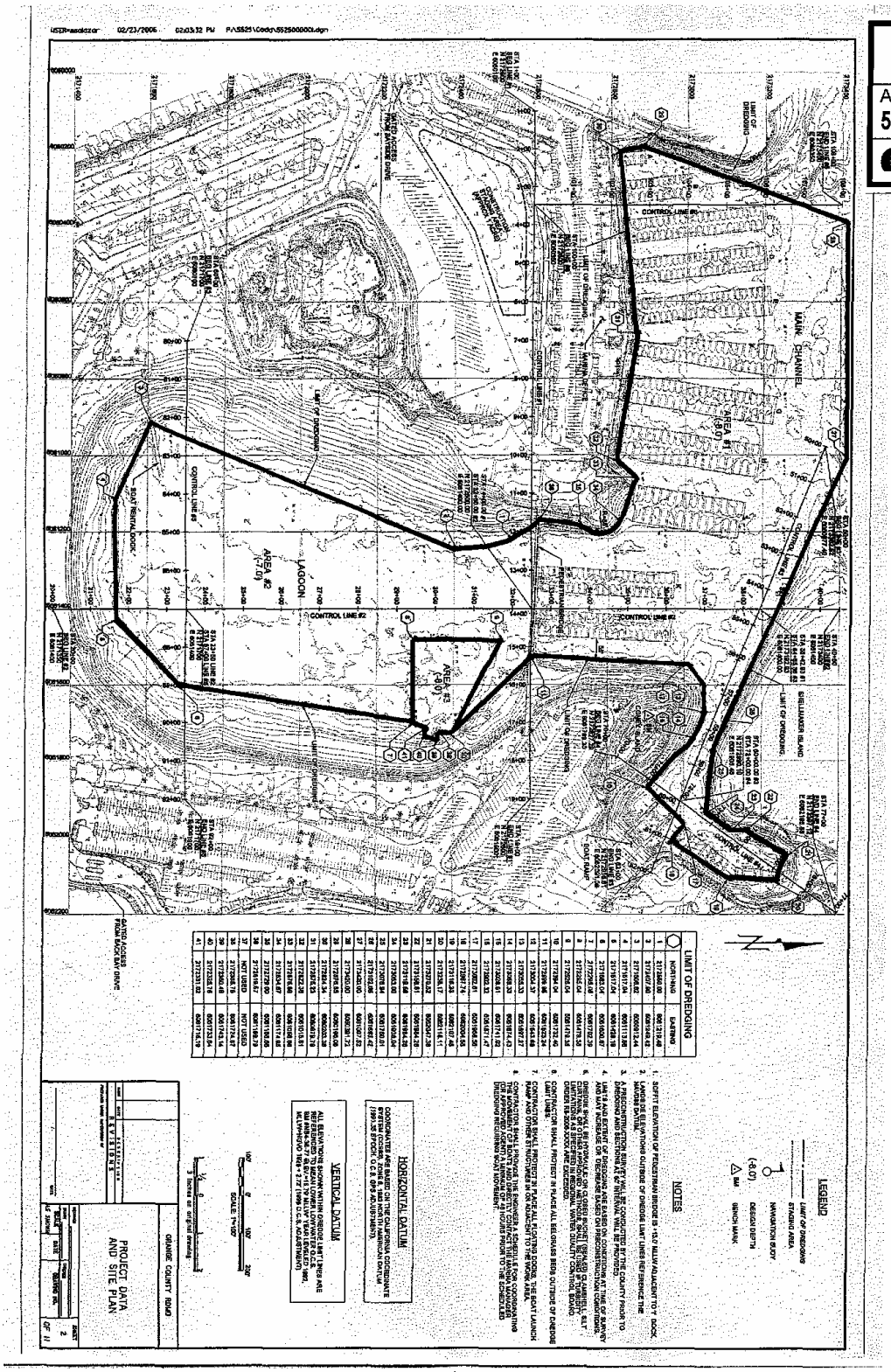
FACILITY MAP

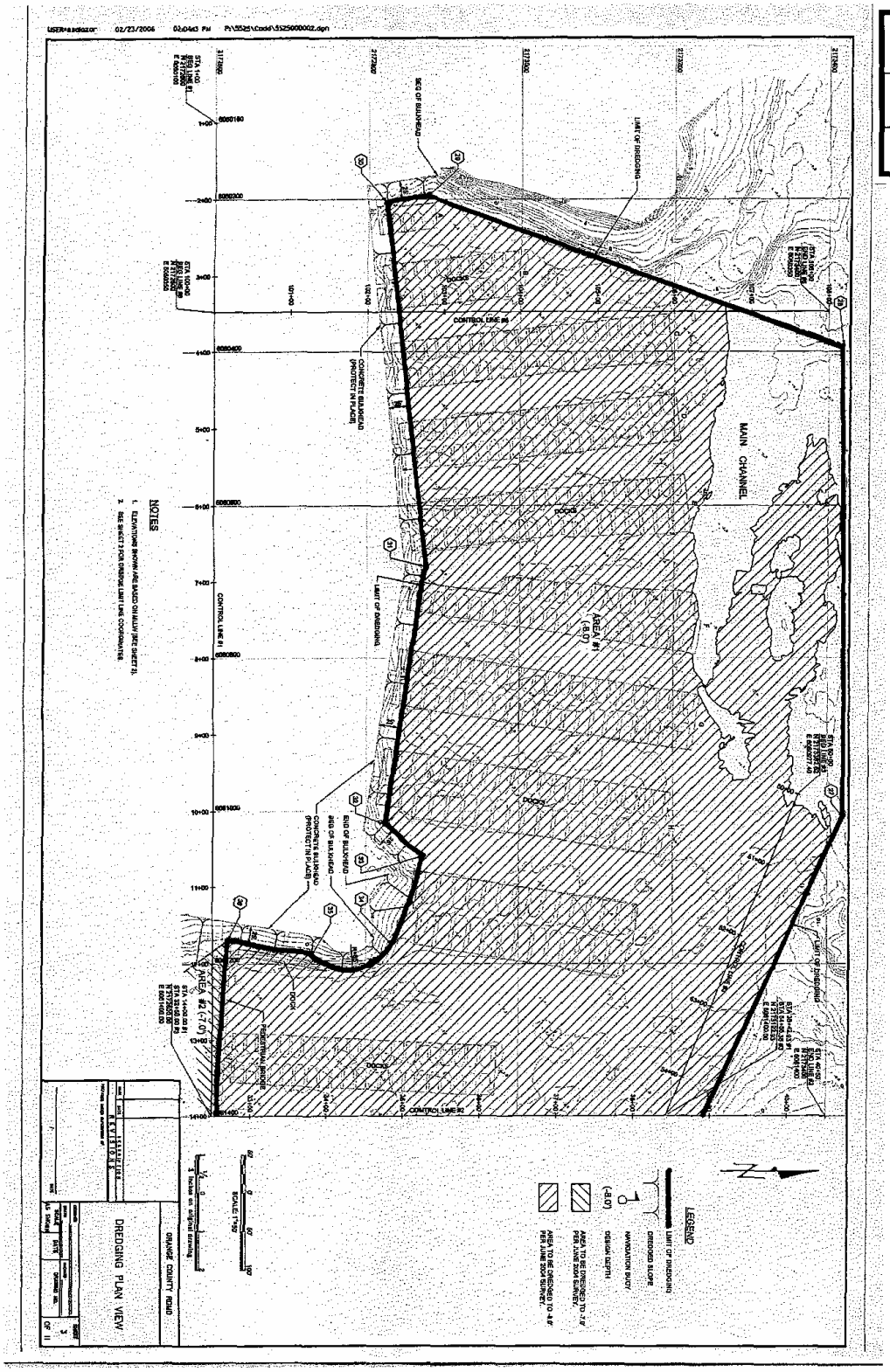


MARINA FACILITY MAP



PROPOSED DREDGE PLAN





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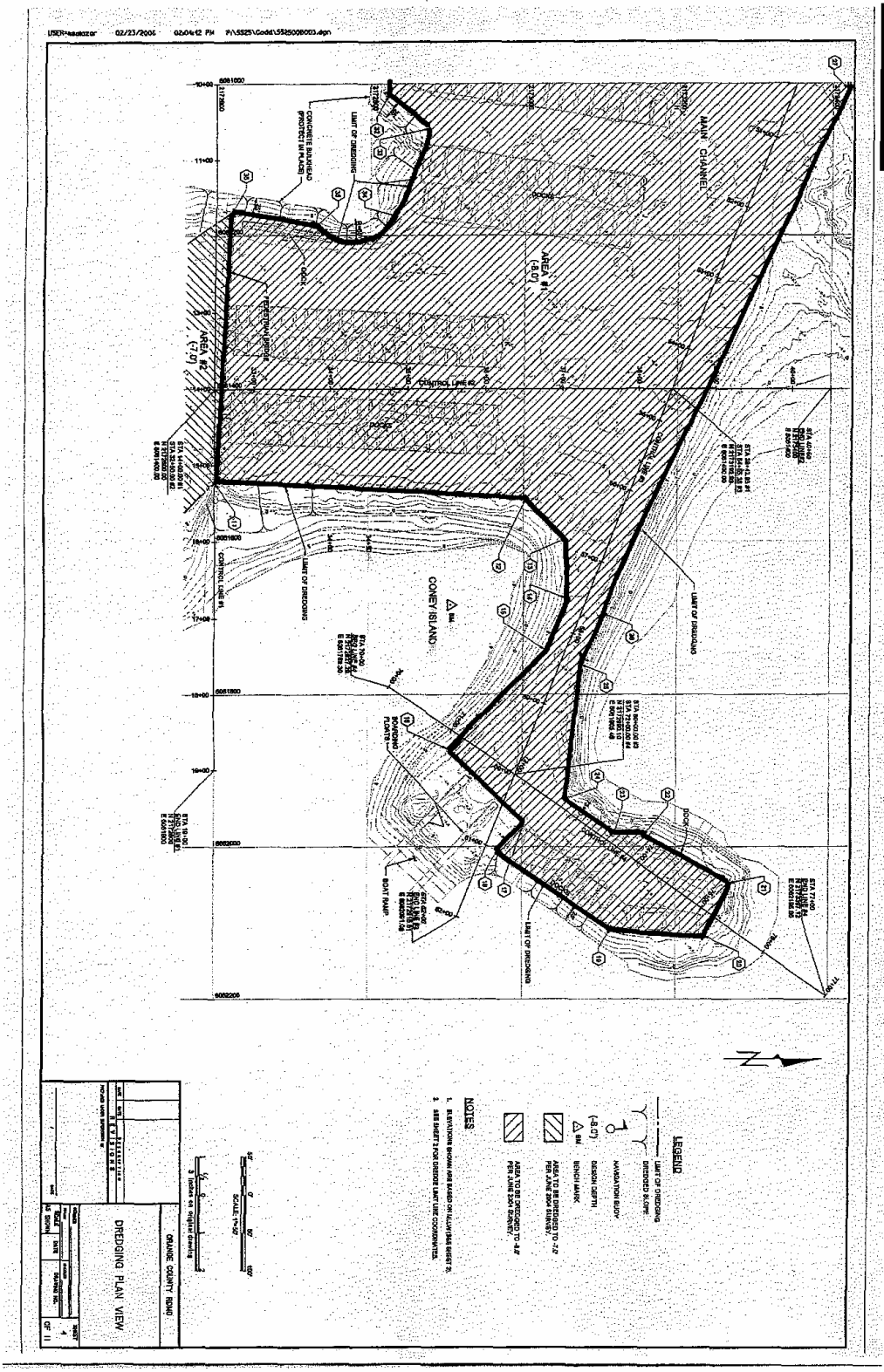

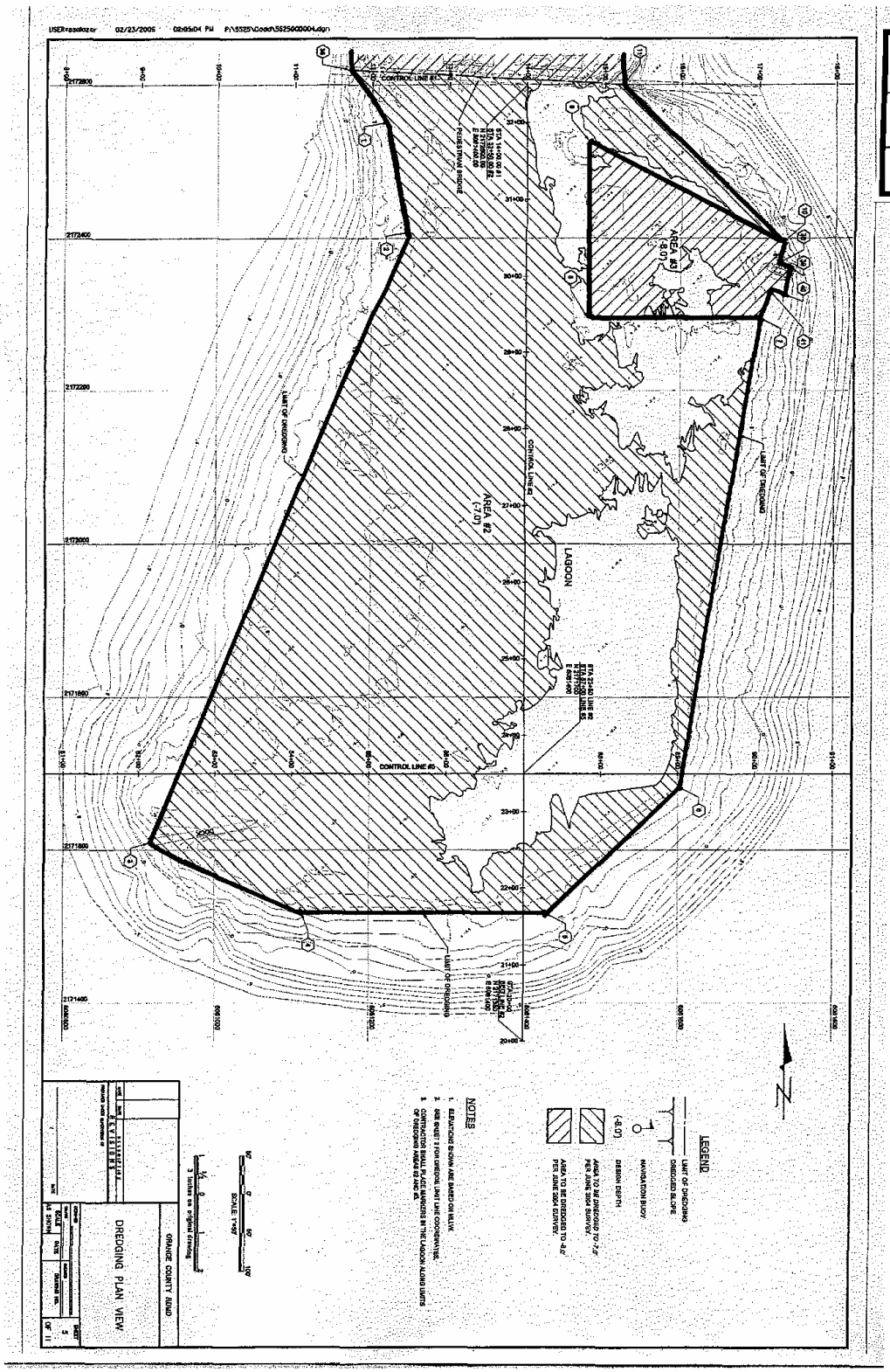

NEWPORT DUNES - MAINTENANCE DREDGING Aug-06
PRELIMINARY DREDGE VOLUME ESTIMATION

DREDGE SITES	DESIGN DEPTH (MLLW)	DREDGE VOLUME TO DESIGN DEPTH (CY)	DREDGE VOLUME WITH 1' OVERDEPTH (CY)	DREDGE VOLUME WITH 2' OVER (CY)
NORTH HALF (MARINA / RAMP / CHANNELS)	-8	58,600	86,300	114,000
SOUTH HALF (SWIM LAGOON / OUTFALL)	-7 & -8	22,400	42,700	63,000
TOTAL		**81,000**	**129,000**	**177,000**
DEPOSITION SITE				
LA-3			**129,000**	**177,000**

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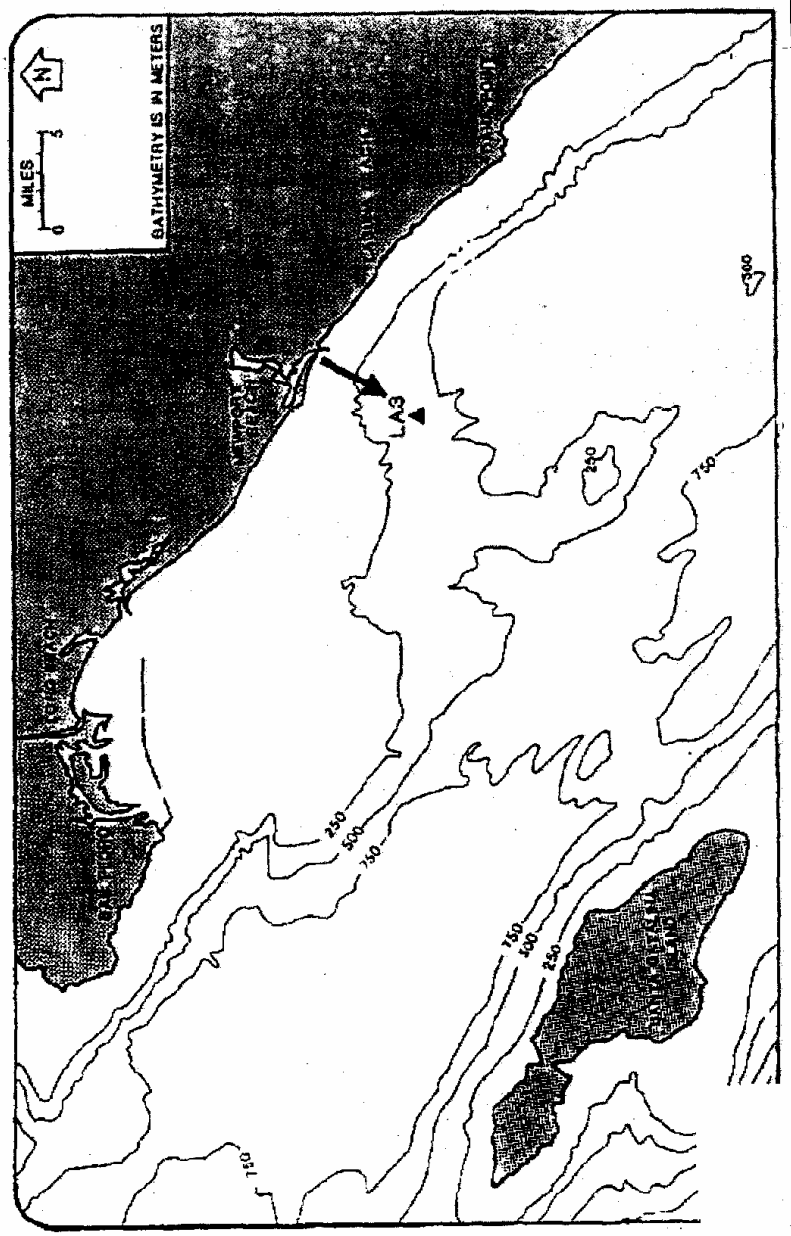

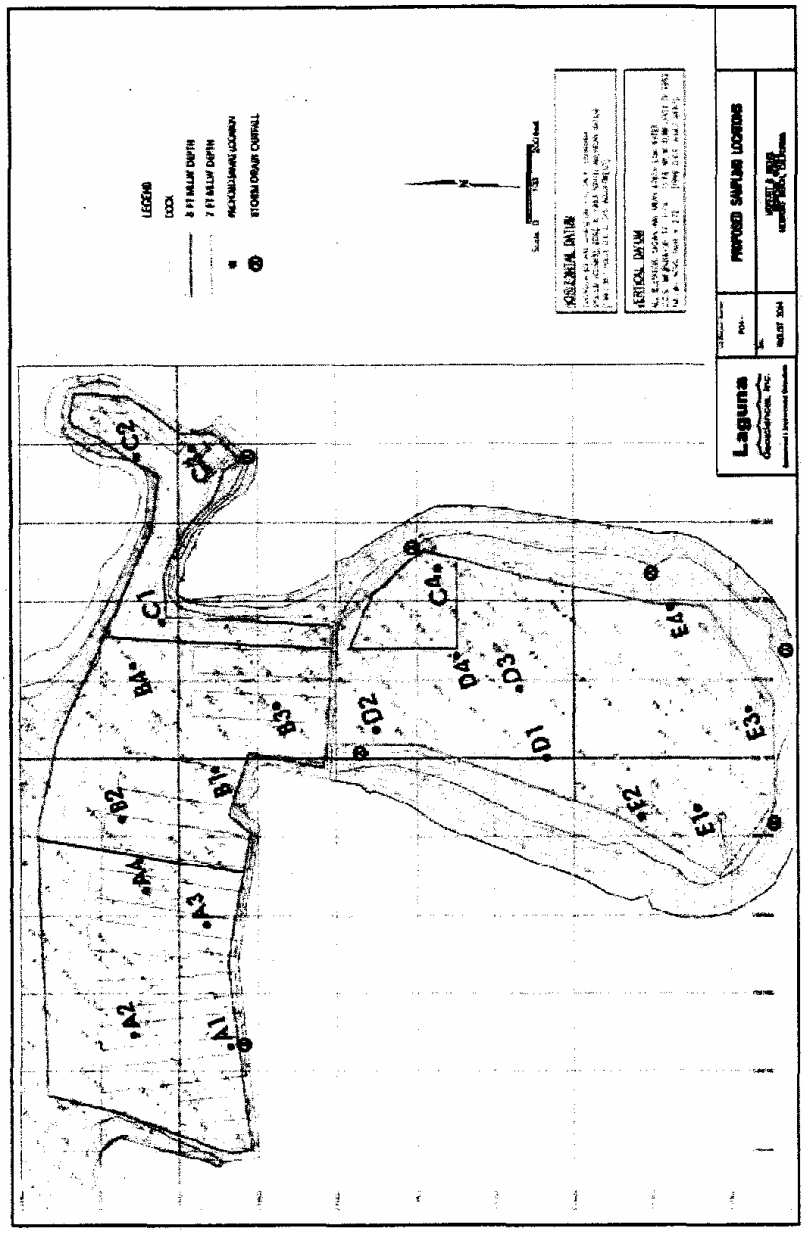

SEDIMENT SAMPLING LOCATIONS