



LEAGUE OF WOMEN VOTERS OF ORANGE COAST

Aliso Viejo Costa Mesa Dana Point Huntington Beach Irvine Laguna Beach Laguna Hills
Laguna Niguel Laguna Woods Lake Forest Mission Viejo Newport Beach
Rancho Santa Margarita San Clemente San Juan Capistrano Seal Beach

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California Coastal Commission
200 Oceangate, 10th Floor
Long Beach, CA 90802-4302

February 6, 2017

Agenda Item: 12a, February 9, 2017

Oppose: Application No.: 5-15-2097, Newport Banning Ranch LLC

Dear Commissioners:

We thank the commission for its denial of the Banning Ranch Development plan dated April 12, 2016 that was heard by the commission on September 7, 2016. The League of Women Voters of Orange Coast recommended denial to you at the time, based on the plan's noncompliance with the Coastal Act.

The League now supports the commission's approval of comprehensive and compelling findings to support the commission's denial decision. These findings are extremely important in that they will document the facts and rationale for denial and will undoubtedly establish the parameters to be used when reviewing any future development proposal on this site.

We restate here our opposition to the previously proposed plan:

1. The established policies for California's Coastal Zone protecting coastal resources have not been met regarding environmentally sensitive habitat areas (ESHAs), wetlands, landform alteration, rare ecosystems, endangered species, sensitive biological resources, archaeological resources and bluff and canyon edges. For example, the current proposal:
 - Proposes development on ESHAs, wetlands, and endangered species' habitat and foraging areas;
 - Includes a bluff road that destroys the continuity of critical habitat areas;
 - Alters coastal landforms, destroying the integrity of arroyos and bluffs;
 - Compromises coastal resources with grading and construction; and
 - Unnecessarily Impacts Native American cultural resource sites
2. Portions of the proposed habitable development area do not conform to the required setbacks from fault zones and bluff edges.
3. Lower cost housing requirements have not been adequately met or safeguarded.
4. The availability and provision of adequate water services has not been established.
5. There is no certified Local Coastal Program (LCP) for this area and approval of this development proposal could compromise the future development of a certifiable LCP for the area due to inconsistencies of this proposal with the resource protection policies of the Coastal Act.
6. The project has not received the required permits and approvals from the California Department of Fish and Wildlife, Regional Water Quality Control Board, US Army Corps of Engineers, or US Fish and Wildlife Service.
7. The proposed project is not the least environmentally damaging feasible alternative.
8. The development proposal does not protect the overall quality of the environment or preserve ecological integrity.

Thank you for your dedication to the preservation of our coastal resources by upholding the requirements of the Coastal Act.

Sincerely,

Diane Nied, President



TATTN

TONGVA ANCESTRAL TERRITORIAL TRIBAL NATION

A TRIBAL SOVEREIGN NATION UNDER THE UNDRIP AND AS A CALIFORNIA NATIVE AMERICAN TRIBE –VERIFIED BY
NAHC - SB18-AB 52-AJR 42 RECOGNIZED BY THE STATE OF CALIFORNIA AS THE ABORIGINAL TRIBE OF THE LOS
ANGELES BASIN AND ISLANDS

JOHN TOMMY ROSAS

TRIBAL ADMINISTRATOR/ TRIBAL LITIGATOR

578 WASHINGTON BLVD #384 MARINA DEL REY, CA 90292

310-570-6567

TATTNLAW@GMAIL.COM

California Coastal Commission
Attn: John Ainsworth, Teresa Henry.
200 Ocean Gate, 10th Floor
Long Beach, CA 90802

Re: Application No. 5-15-2097
Adopt the revised findings for Denial of the permit
Applicant: Newport Banning Ranch, LLC

Dear Mr. John Ainsworth, Acting Executive Director, California Coastal Commission
Members-Ms. Teresa Henry , District Manager.

CCC HEARING Application No.: 5-15-2097
Applicant: Newport Banning Ranch, LLC

TATTN responses on ccc staff report errors and false conclusions-
TATTN responses in upper case [not yelling]
//

H. ARCHAEOLOGICAL AND CULTURAL RESOURCES

Section 30244 of the Coastal Act protects cultural resources in the coastal zone and
states:

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

///THE SHPO NEVER HAS MADE ANY DETERMINATIONS OR INDENTIFICATIONS
EVER ON THE BANNING RANCH EITHER HAS THE FEDERAL AGENCIES , ACHP –

1 BUT CCC HAS ILLEGALLY ASSUMED THE SHPO ROLE –MY RESPONSES BELOW
2 EXPLAIN THE ERROENOUS CCC STAFF REPORT AND CCC HEARING WHEN
3 CCC DENIED THE NBR CDP- TATTN OBJECTS TO THAT ILLEGAL
4 DETERMINATION BASED ON FALISIFED INFORMATION.

5
6 Additionally, the Commission was not able to determine//
7 OF COURSE NOT THE OTHER AGENCY PROJECT APPLICATIONS / PERMITS
8 ARE NOT COMPLETED WITH THE OTHER AGENCIES AS CCC WELL KNOWS –
9 ITS ILLEGAL FOR THEM TO DENY NBR PROJECT BEFORE THE AGENCIES HAVE
10 BEEN ENGAGED FOR THEIR SPECIFIC JURISDICTIONAL ISSUES AND PERMIT
11 APPLICATION INCLUDING THE SEC 106 NHPA BY US ACOE AND ACHP- AS CCC
12 CITES LATER IN THIS STAFF REPORT-

13 ITS VERY IMPORTANT TO NOTE FOR THE RECORD –CCC DIDN'T COMPLETE
14 OR CONTINUE TRIBAL CONSULTATION AS REQUIRED – CCC CONTENDS IT
15 HASN'T HAPPENED WITH OTHER AGENCIES –WHICH IS ALSO NOT TRUE –
16 CCC IT IS ALSO IMPORTANT TO NOTE FOR THE RECORD CCC HAS ZERO
17 AUTHORITY TO CONDITION CULTURAL RESOURCES BECAUSE CCC HAS ZERO
18 EXPERTISE OR AUTHORITY TO ATTEMPT THAT INCLUDING BEFORE THE
19 USACOE /ACHP HAS COMPLETED THEIR SEC 106 NHPA PROCESS AND
20 CONDITION THE SITE PROTECTIONS AND MITIGATION WHICH NBR HAS
21 ALREADY AGREED TO ACCEPT AND SUPPORT –

22 ITS ALSO WRONG OF CCC TO ATTEMPT CONDITIONING OF THE CULTURAL
23 RESOURCE SITES –WHICH WOULD BE FOUND TO BE DEFECTIVE AND ILLEGAL
24 AND UNACCEPTABLE TO USACOE / ACHP AND TATTN-

25 WE ALL AGREED INCLUDING TO TEST THE LAND ON THE NBR PROJECT
26 DEVELOPMENT AREA AND NOT DO EXTENSIVE TESTING ON THE COMPLETE
27 PARCEL APPX 400+ACRES- BECAUSE CCC HAD THEIR CDP DEADLINE THAT
28 IMPACTED NOT ONLY THE TESTING PROCESS BUT ALSO LIMITED TO THE NBR
29 DEVELOPMENT FOOTPRINT-

30 IT WAS ALSO ACCEPTED AND LEGALLY COMPLIANT TO DO MORE TESTING
31 WHEN THE USACOE/ACHP SEC 106 PROCESS WHICH WILL REQUIRE THE
32 REQUIRED TESTING AND UNDER A FED APPRROVED TESTING PLAN UNDER A
33 PROGRAMMITIC AGREEMENT / MOA –

34 ALL THESE FACTS SHOW AND ESTABLISH THE CCC CONDITIONS WERE/ARE
35 AN ABUSE OF DISCRETION AND CAPRIOUS UNDER CEQA- INCLUDING CCC
36 CLAIMS THAT 9 TRIBES ARE AGAINST THE PROJECT WHEN MOST ARE NOT
37 LEGAL TRIBES UNDER STATE AND FEDERAL LAWS-TATTN IS A TRIBE –
38 THE REST OF THE 9 ARE MOSTLY JUST MONITORING COMPANIES AND WHY
39 NONE THEM SHOWED UP TO PARTICIPATE IN THE STP'S PROCESS –EXCEPT
40 FOR MORALESS 2 HOUR LUNCH HIT AND RUN-ON 2ND DAY –

41 ANOTHER CRUCIAL FAILURE BY CCC IS THAT THE SHPO WAS NEVER
42 CONTACTED OR AGREED TO THE CCC CONDITIONS OR FALSE STATEMENTS
43 BY CCC –AND I KNOW SHPO NEVER REVIEWED THE CCC /NBR STP' REPORT
44 BEFORE THE CCC HEARING WHEN THE CCC DENIED THE NBR PROJECT –
45 SO THE STATE DEPARTMENT OF PARKS AND RECREATION/SHPO ILLEGALLY
46 WAS EXCLUDED DUE TO CCC ILLEGAL RESTRICTIONS AND TIME FRAMES,

1 INCLUDING THE CCC STAFF REPORTS AND ADDENDUMS- ILLEGALLY GIVING
2 MONITORING COMPANIES ACCESS TO CONFIDENTIAL ARCH REPORTS –WHO
3 LATER PAST THEM AROUND TO OTHERS IN VIOLATION OF THE NBR NDA
4 INCLUDING CCC WHO DIRECTLY VIOLATED THE NBR NDA –
5 CCC HAS A HORRIBLE RECORD OF NON COMPLIANCE TO SHPO/NHPA/ACHP
6 REGULATIONS AS THE HAVE APPROVED HUNDREDS OF PROJECTS WHICH
7 HAD MORE TRIBAL CULTURAL RESOURCES INCLUDING OUR BURIALS –I.E.
8 PLAYA VISTA /WEST BLUFF A SACRED SITE REGISTERED / BALLONA
9 WETLANDS ECOLOGICAL RESERVE WETLANDS SACRED SITE REGISTERED /
10 BOLSA CHICA / CERRITOS WETLANDS / PALOS VERDES / ALMOST ALL OUR
11 SITES AHAVE BEEN DESTROYED UNDER THE REGIME AND CCC PROJECT
12 APPROVALS –
13 THE CCC ILLEGAL OVER BEARING CONDITIONS IMPOSED ON NBR ARE OUT OF
14 SEQUENCE AND LACK LEGAL PROCESS TIMING –ALL IF NOT MOST OF THE
15 CCC CONDITIONS WILL BE REJECTED BY THE OTHER AGENCIES WITH
16 AUTHORITY AND JURISDICTION ON THE GROUNDS THE ARE SUFFICIENTLY
17 REVEIWED/APPROVED BY THE SHPO /USACOE/ ACHP -
18 ALL THOSE CCC CONDITIONS AND DENIALS HAVE DAMAGED AND AFFECTED
19 OUR ABILITY TO WORK WITH NBR TO FULFILL THE NBR AGREEMENT TO
20 PROTECT OUR TRIBAL CULTURAL RESOURCES AND RESTORE THE LANDS
21 THERE -
22 if the project, as proposed or as conditioned, would avoid all cultural resources present
23 on the site because the boundaries of the known resources were not mapped///
24 NOT TRUE THEY ARE MAPPED AND THE PROPERTY HAS 5 ARCHAEOLOGICAL
25 REPORTS –I HAVE MADE OVERLAYS TRANSPARENCIES ON VARIOUS
26 GRAPHICS AND ALSO ON GOOGLE EARTH PRO FORMAT S WHICH I HAVE A
27 LICENSE AND SIGNED AGREEMENT WITH GOOGLE INC.
28 THE SITE PERIMETERS HAVE NOT BEEN CONFIRMED OR VERIFIED TO BE
29 ELIGIBLE FOR NHPA LIST / UNITED STATES NATIONAL REGISTER OF HISTORIC
30 PLACES LISTINGS ON 2 WERE MENTIONED AS POSSIBLE –AGAIN THE TRIBAL
31 CONSULTATION PROCESS IS IN ITS BEGINNING STAGES –AT THIS TIME THERE
32 ARE NONE ON THE UNITED STATES NATIONAL REGISTER OF HISTORIC
33 PLACES LIST OR ON THEIR MAP [SEE TATTN GRAPHIC BELOW]

National Register of Historic Places

Public, non-restricted data depicting National Register spatial data processed by the Cultural Resources GIS facility. Data last updated in April, 2014.



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TRIBAL HISTORIC PRESERVATION PROCESS INCLUDES THE NPS TRIBAL PRESERVATION PROGRAM ASSISTS INDIAN TRIBES IN PRESERVING THEIR HISTORIC PROPERTIES AND CULTURAL TRADITIONS. AMONG THE RESPONSIBILITIES ASSUMED BY THESE TRIBES ARE CONDUCTING HISTORIC PROPERTY SURVEYS, MAINTAINING PERMANENT INVENTORIES OF HISTORIC PROPERTIES, NOMINATING PROPERTIES TO THE NATIONAL REGISTER OF HISTORIC PLACES, AND REVIEWING FEDERAL AGENCY ASSISTED PROJECTS. AGAIN ONLY THIS PROCESS IS LEGAL NOT THE FRADULANTLY CRAFTED CLAIMS THE CCC NAHC CRAFTED TO HAVE A FALSE NEGATIVE REASON TO DENY THE NBR PROJECT. HERE IS THE ACHP NHPA PROCESS FLOWCHART BELOW

Section 106 Regulations Flow Chart

Click on parts of the flow chart for more information.(Flow chart best viewed in Netscape 4.0 or higher)

Initiate Section 106 Process

Establish undertaking
Identify appropriate SHPO/THPO *
Plan to involve the public
Identify other consulting parties

► *No undertaking/no potential to cause effects*

▼
Undertaking is type that might affect historic properties

Identify Historic Properties

Determine scope of efforts
Identify historic properties
Evaluate historic significance

► *No historic properties affected*

▼
Historic properties are affected

Assess Adverse Effects

Apply criteria of adverse effect

► *No historic properties adversely affected*

▼
Historic properties are adversely affected

Resolve Adverse Effects

Continue consultation

► *Memorandum of Agreement*

▼
FAILURE TO AGREE

► **COUNCIL COMMENT**

Key Elements of the Section 106 Process

[The Roles of Participants](#)

[Involving the Public](#)

[Consultation](#)

[Documentation](#)

[Click here to view all flow chart explanatory material in one long document—suitable for printing](#)

* The regulations define the term "THPO" as those tribes that have assumed SHPO responsibilities on their tribal lands and have been certified pursuant to Section 101(d)(2) of the NHPA. Nevertheless, remember that tribes that have not been so certified have the same consultation and concurrence rights as THPOs

1 **when the undertaking takes place, or affects historic properties, on their tribal**
2 **lands. The practical difference is that during such undertakings, THPOs would be**
3 **consulted *in lieu of* the SHPO, while non-certified tribes would be consulted *in***
4 ***addition to* the SHPO.**

5 and the status of the property as a religious, cultural landscape is still in question.

6 ///OF COURSE IT IS STILL IN QUESTION PARTLY BY CCC LACK OF TRIBAL
7 CONSULTATION AND WONT BE KNOWN AND WITHOUT QUESTION UNTIL ITS
8 BEEN THRU ALL THE REQUIRED THE FEDERAL PROCESS[S] WITH THE FEDS
9 AND STATE AGENCIES TRIBAL CONSULTATION –BUT IF CCC HAD COMPLETED
10 THEIR SUSPENDED TRIBAL CONSULTATION BY THE CCC- THEN THE CCC
11 WOULD HAVE FOUND OUT AT LEAST WHO HAD /HAS STANDING LIKE TATTN
12 WIH DNA DOCUMENTATION TO ESTABLISH THE APPROPRIATE DESIGNATIONS
13 AND CONDITIONS UNDER NAGPRA/AIRFA ETC ETC .

14 Thus, the Commission determined it was appropriate to deny the project and provide
15 guidance to the applicant regarding how to craft an approvable alternative project in the
16 future. ///

17 THUS ALL THEIR REASONS ARE NOW SERIOUSLY IN QUESTION SINCE THE
18 CCC DETERMINATIONS WERE/ARE BASED ON FALSE INFO –FALSE STAFF
19 REPORTS AND DEFECTIVE PROCESSING –NON-COMPLIANT EVALUATIONS OR
20 EVALUATIONS FALSILY IMPOSED ON NBR – SO BASED ON THE FACTS CCC HAS
21 ZERO TRUE FACTS IN WHICH THE CCC MADE THEIR DETERMINATIONS AND
22 ILLEGAL DENIAL OF THE NBR PROJECT.THE CCC SHOULD REVERS THEIR
23 DENIAL OF THE NBR PROJECT.

24 Numerous Native American archeological sites are present on Banning Ranch, which
25 attest to

26 the historic and widespread habitation of the site by the Gabrieleno and Juaneno tribes,
27 and in turn, the site's current cultural and historical significance.

28 NO MAPS SHOW THAT THE JUANENOS OR ACHAMAN HAD ANY USE OR WERE
29 EVER CONSIDERED TO HAVE ANY VILLAGES OR ANYTHING ELSE –WE DO
30 RECOGNIZE THAT SOME HAVE FAMILY TIES AND WERE PROBABLY PART OF
31 SOME TOURS OR VISITS THERE –ROBLES ARE RELATED TO ME AND I KNOW
32 THEY WERE ON BOTH AREAS BUT ALL THE OTHERS ARE NOT ARE HAVE NO
33 EVIDENCE TO PROVE THEIR CLAIMS OR THEY WOULD HAVE PRESENTED IT
34 ALREADY -

35 At the request of the Tribal Chairman of the Gabrieleno Tongva San Gabriel Band of
36 Mission Indians, the state Native American Heritage Commission (NAHC) added the
37 “Banning Ranch Cultural Properties and Landscape”

38 located on the site to the NAHC Sacred Lands File because of its cultural significance
39 MORALESS HAS NO PERMISSION OR AUTHORITY TO MAKE THE REQUEST TO
40 NAHC BECAUSE THE SEC 106 PROCESS IS NOT COMPLETED AND ONLY
41 ACHP/NPS CAN MAKE THAT DESIGNATION AND ACHP/ NPS HAVE NOT MADE
42 THE APPLICATION BECAUSE THE AREA IS NOT A QUALIFIED AREA TO RECEIVE
43 THAT FEDERAL DESIGNATION-AGAIN NAHC HAS ZERO CODES TO SUPPORT
44 THEIR CLAIM OR WRITE A LETTER STATING THAT DESIHNATION INCLUDING
45 ATTEMPTING THAT ILLEGALLY WITHOUT SHPO AGREEING AND AUTHORIZING

1 THE APPLICATION TO ACHP/NPS AGAIN SEE ABOVE CITING OF THE PROCESS-
2 CITE –

3 CULTURAL AND PALEONTOLOGICAL RESOURCES SECTION 30244 OF THE
4 COASTAL ACT REQUIRES THE PROTECTION OF ARCHAEOLOGICAL AND
5 PALEONTOLOGICAL RESOURCES AND STATES IN PART: **WHERE**
6 **DEVELOPMENT WOULD ADVERSELY IMPACT ARCHAEOLOGICAL OR**
7 **PALEONTOLOGICAL RESOURCES A IDENTIFIED BY THE STATE HISTORIC**
8 **PRESERVATION OFFICER, REASONABLE MITIGATION MEASURES SHALL BE**
9 **REQUIRED. THAT ABOVE IS FROM THE CCC COMMENT LETTER FOR THE**
10 **DRAFT NBR EIR BY CITY OF NEWPORT BEACH .CCC HAS VIOLATED THE**
11 COASTAL ACT BECAUSE THE CCC NEVER RECEIVED ANY REQUIRED
12 DETERMINATION OR MITIGATION PLANS FROM SHPO . THAT FACT
13 ESTABLISHES THE LEGAL BASIS FOR THE CCC TO REVERSE THEIR ILLEGAL
14 DENIAL OF THE NBR PROJECT. THE CCC IS NOT EVEN FOLLOWING THEIR
15 COMMENT AS EXAMPLED REVERSED IN THE LATEST CCC STAFF REPORT.

16 5-15-2097 (Newport Banning Ranch, LLC)

17 5. There are 9 distinct tribal entities with ties to the land on the NAHC contact list. To
18 date, the proposed

19 project has the support of 2 tribal entities, while the remaining 7 groups oppose the
20 project or are

21 concerned about the project. TATTN IS 1 WHICH IS A TRIBE THAT ENDORSED THE
22 PROJECT WITH CONDITIONS THE OTHER 7 ARE MONITORING COMPANIES AND
23 5 OF THEM HAVE ZERO TERRITORIAL CLAIMS OR ANY LEGITIMATE
24 CONNECTIONS WITH THAT AREA –THE CCC ONLY INVOLVED TO BOLSTER
25 THEIR FALSIFIED DEFECTIVE STAFF REPORT AND WAS ILLEGALLY FABRICATED
26 TO UDERMINE THE NBR PROJECT –THERE ARE NO HISTORICAL MAPS THAT
27 SHOW THAT ANY OF THE JUANENEOS OR ACHAMANS HAVE ANY
28 DOCUMENTED TERRITORY –ALL OUR TONGVA LANDS ARE DETERMINED TO BE
29 MAPPED AND THE CLOSEST BORDER SOUTH/ SOUTH WEST ARE OVER 20
30 MILES AWAY –ITS ALSO WHY NONE OF THEM KNEW THE CORRECT VILLAGE
31 NAME THERE PREVIOUSLY IN THAT AREA WHICH IS CALLED MOYOONGNA OR
32 MOYO –I HAVE THE MAP OF THE DOCUMENTED VILLAGES –AS FACTUAL TRUE
33 EVIDENCE - **IN 1994, THE STATE OF CALIFORNIA OFFICIALLY RECOGNIZED**
34 **THE GABRIELINO-TONGVA TRIBE IN ASSEMBLY JOINT RESOLUTION 96,**
35 **RESOLUTION CHAPTER 146 OF THE STATUTES OF 1994. THE JOINT**
36 **RESOLUTION STATES THAT THE STATE OF CALIFORNIA RECOGNIZES THE**
37 **GABRIELINOS AS THE ABORIGINAL TRIBE OF THE LOS ANGELES BASIN AND**
38 **TAKES GREAT PRIDE IN RECOGNIZING THE INDIAN INHABITANCE OF THE LOS**
39 **ANGELES BASIN AND THE CONTINUED EXISTENCE OF THE INDIAN**
40 **COMMUNITY. IN 1994, THE STATE OF CALIFORNIA RECOGNIZED THE**
41 **TONGVA IN ASSEMBLY JOINT RESOLUTION 96, CHAPTERED BY THE**
42 **CALIFORNIA SECRETARY OF STATE AS RESOLUTION CHAPTER 146,**
43 **STATUTES OF 1994. THE JOINT RESOLUTION STATES THAT THE STATE OF**
44 **CALIFORNIA “RECOGNIZES THE GABRIELINO-TONGVA NATION AS THE**
45 **ABORIGINAL TRIBE OF THE LOS ANGELES BASIN AND TAKES GREAT PRIDE IN**
46 **RECOGNIZING THE INDIAN INHABITANCE OF THE LOS ANGELES BASIN AND**

1 THE CONTINUED EXISTENCE OF THE INDIAN COMMUNITY". THIS LAND AND
2 TERRITORY INCLUDES NEWPORT BEACH AREA WHERE THE BANNING RANCH
3 IS LOCATED.

4 STATE RECOGNITION ALSO GOES TO "WHO" THE TONGVA ARE, FOR ONLY
5 ONE TRIBE IS RECOGNIZED. ANY ATTEMPT TO SEPARATE THE TONGVA INTO
6 "BANDS" MIGHT BE HELPFUL FOR THOSE INTERESTED IN MULTIPLE CASINO
7 LOCATIONS OR TO LET IMPOSTERS TO COMMIT FRAUD TO DO MONITORING
8 OR FALSEIFY SOME STANDING IN WHICH THEY DON'T HAVE . RECOGNIZING
9 SEVERAL "BANDS" INSTEAD OF ONE "NATION" WOULD BE CONTRARY TO
10 CALIFORNIA'S PUBLIC POLICY.

11 STATE RECOGNITION ACCOMPANIED BY SUBSTANTIAL RIGHTS IS
12 APPROPRIATE FOR THE SAME REASONS THAT CALIFORNIA HAS, WITHOUT
13 FEDERAL APPROVAL, UNDERTAKEN SEPARATE POLLUTION-CONTROL
14 STANDARDS AND OTHER STATEWIDE INITIATIVES. WE IN CALIFORNIA HAVE A
15 UNIQUE HISTORY, INCLUDING A SAVAGE SIDE AGAINST RATHER DOCILE
16 NATIVE AMERICANS. TATTN/ JTR HAS THE MOST COMPLETE STANDING
17 DOCUMENTED BY DNA AND WITH THE HISTORICAL DOCUMENTATION BACK
18 TO THE 1781 PUBELO BY SPAIN AT YANGNA IN WHICH THE ROSAS FAMILY
19 WAS 2 OF THE ORIGINAL 11 FOUNDING FAMILIES AND HAS LIVED IN THE L A
20 AREA BEFORE AND SINCE THEN.

21 WHICH IS ALL DOCUMENTED IN MISSION RECORDS, NUMEROUS HISTORIAL
22 REPORTS AND OFFICIAL GOVERNMENT RECORDS INCLUDING ROSAS FAMILY
23 BURIALS LOCALLY AND AT THE SAN GABRIEL MISSION , WHERE MY FATHERS
24 FATHER IS BURIED THERE FRONT AND CENTER WITH NUMEROUS OTHER
25 ROSAS FAMILY BURIALS. NO OTHER TONGVA FAMILIES CAN CLAIM THAT
26 SENIOR AND OLDEST STANDING IN THE TATTN-TONGVA TRIBE.

27
28 . Therefore, staff is recommending the development plan authorized through this permit
29 consist of a scaled down development that can be addressed through conditions of
30 approval without a Land Use Plan, and one that avoids all impermissible impacts to
31 ESHA and Wetlands and cultural resources.

32 ///

33 ITS CONVIENT FOR THE CCC /STAFF TO CLAIM THAT NOW WHEN ALL THE CCC
34 CLAIMS WERE PROCESSED IN THE EIR/FEIR WHICH WAS CERTIFIED –AGAIN
35 THE CCC NOR THE NBR FEIR PROCESS INTENDED OR IS LEGALLY EVEN ABLE
36 TO PERFORM ANY CONDITIONS THAT ONLY THE FEDERAL AGENCIES THAT
37 HAVE THE JURISDICTION WILL DETERMINE THOSE ASPECTS WHEN THEIR
38 APPLICATIONS AND PERMITS ARE PROCESSED .SO THE ILLEGAL CCC
39 REASONING FOR THE SCALED DOWN PROJECT WAS BASED ON NO TRUTHFUL
40 LEGAL BASIS OR VIABLE DETERMINATIONS. CCC CONSTANLY FAILS TO
41 UNDERSTAND THE CCC AUTHORITY AND THEIR AREAS OF LAWS AND
42 JURISDICTION , WHICH IS INCONSISTENT FEDERAL AGENCY WITH NOAA AND
43 THE FEDERAL CZMA- WHICH THE CCC HAS TO COMPLY AND ARE NOT AND IN
44 COMPLETE VIOLATION TO CZMA.

45 Commission staff requested the City or County assist in the development of an LCP or a
46 Land

1 Use Plan for the site prior to the submittal of the coastal development permit (CDP)
2 application,
3 however that was not done and the applicant has chosen not to wait for such a process
4 to be
5 completed, but to pursue a permit at this time. Therefore, staff is recommending the
6 development
7 plan authorized through this permit consist of a scaled down development that can be
8 addressed
9 through conditions of approval without a Land Use Plan, and one that avoids all
10 impermissible
11 impacts to ESHA and Wetlands and cultural resources. The projected timeline for build-
12 out of
13 the entire development is at least 10 years. The scale and scope of development
14 exceeds what is
15 typically approved under a single CDP and such a proposal is more suited to a Specific
16 Plan or
17 LCP segment.
18 In this particular case, some of the major issues that the applicant and staff cannot
19 agree upon are
20 those that, again, are typically addressed through a planning document with community
21 input,
22 including: the circulation element, parks and open space, and in this case, the Sacred
23 Lands
24 designation. In addition, The ecological and cultural resources of the site have yet to be
25 addressed by a number of resource agencies; however, the applicant has chosen to
26 seek
27 Commission approval first, and then go through Federal consultation processes
28 triggered by
29 5-15-2097 (Newport Banning Ranch, LLC)
30 6
31 Army Corps of Engineers (ACOE) review, including review by the US Fish and Wildlife
32 Service
33 (USFWS). The input from USFWS will be particularly important to address the
34 adequacy and
35 size of the vernal pool complex, and the range and size of reserved habitat areas
36 necessary to
37 support the California gnatcatcher and Burrowing Owl, which are protected and
38 sensitive species
39 present on the property.
40 The ACOE jurisdictional delineation of Waters of the US on the site and subsequent
41 permit
42 consideration would trigger the Section 106 process, which would address the concerns
43 of the
44 Native American community related to the Sacred Lands designation and Traditional
45 Cultural
46 Landscape by an agency having direct jurisdiction over such issues.

1 CCC CITES SOME OF THE FEDERAL PROCESS AND IT'S THE SAME ONE THE
2 CCC HAS BEEN INTERFERRING WITH AND HAS ATTEMPTED TO ILLEGALLY
3 CLAIM THE CCC CAN SUPESEDE THAT PROCESS WITH THE CCC FALSE CLAIMS
4 AND FALSE PRETENCES. AND THEN TRY AND JUSTIFY IT NOW ON THE CCC
5 DENIAL OF THE NBR PROJECT , WITH THEIR NEW BOGUS STAFF REPORT TO
6 FURTHER THE CCC FRAUDULANT VOTE AND DECISION.

7 The applicant has recently conducted more specific archeological testing, as
8 recommended by Native American tribes, in an attempt to rule out any potential for
9 burials or other significant cultural or archeological resources within the proposed
10 development footprint.

11 CCC ALSO AGREED AND APPROVED OF THAT TESTING IN THE APPROVED CCC
12 ADMIN CDP FOR THAT TESTING –AFTER THE STP TESTING RESULTS WERE
13 99% NEGATIVE ON FINDING ANY TRIBAL CULTURAL RESOURCES, CCC DIDN'T
14 HAVE THE PROOF OR EVIDENCE TO SUPPORT THEIR CLAIMS NOR NAHC
15 FRAUDALANT LETTER AFTER THE KNOW TESTING RESULTS WERE REVIEWED.
16 THE CCC DIDN'T FOLLOW THE LAWS/REGS ON THE PROCESS INCLUDING THE
17 CCC COMMENT ON THE NBR EIR WHERE THE CCC STATES " **The Coastal**
18 **Commission requires that an ARP be subject to peer review by at least three**
19 **qualified archaeologists and review and comment opportunity be extended to the**
20 **State Historic Preservation Officer, Native American Heritage Commission**
21 **(NAHC), and Native Americans with cultural ties to the area, as determined by the**
22 **NAHC. THE ABOVE QUOTE FROM CCC ON NBR EIR WAS NOT IMPLEMENTED**
23 **OR DONE BY CCC FOR THE ARP CCC APPROVED FOR THE NBR ARP /STP**
24 **RESULTS REPORT IN COMPLETE VIOLATION OF STATE LAW BUT ALSO WENT**
25 **AGAINST WHAT THE CCC ACCUSED CITY OF NEWPORT BEACH. CCC WAS/IS**
26 **FULLY AWARE OF THIS PART OF THE PROCESS , THE CCC CAN NOT DENY A**
27 **PROJECT WHEN THE CCC FAILED TO ABIDE AND COMPLY TO THE KNOWN**
28 **AND ACKNOWLEDGED PROCESS. AN ADDITIONAL BASIS AND GROUNDS THAT**
29 **CCC SHOULD REVERSE THEIR DEFECTIVE ILLEGAL DENIAL OF THE NBR CDP**
30 **IN SEPT-2016 WHEN THE SHPO NOR THE PEER REVIEWED OCCURRED AS**
31 **REQUIRED. THERE IS NO EVIDENCE OR PROOF THAT SHPO APPROVED THE**
32 **ARP / STPS OR THAT CCC COMPLIED WITH THAT REQUIREMENT IN THEIR**
33 **DENIAL OF THE NBR CDP.**

34 There are some tribal interests that believe the entire property is a Sacred and Religious
35 site and should be preserved as open space.

36 " SOME TRIBAL INTERESTS " ? CCC DIDN'T NAME THEM TATTN RECOGNIZED
37 THAT THE TONGVA MOYO VILLIAGE WAS THERE IN THAT AREA , SO DID NBR
38 AND THEY ARE ON THE RECORD AND HAVE TOLD US THEY WILL NOT EVER
39 IPACT ANY SITE WITH COMPLETE AVOIDANCE AND PRESERVE OUR TONGVA
40 SITES BUT ALSO RESTORE THE APPX 325 ACRES IN OPEN SPACE FOR OUR
41 TRIBAL USEAGE AND FOR THE PUBLIC, INCLUDING TONGVA CEREMONIAL
42 AREAS WHERE THE SITES ARE AND OTHER PLACES FOR OUR USE INCLUDING
43 A CULTURAL CENTER AND TONGVA CULTURAL PROJECTS ,.E. CONOE
44 BUILDING AND AP DOME TONGVA HOUSE FOR DEMONSTARTIONAL USE AND
45 PUBLIC EDUCATIONAL USE.

1 Given the amount of land that will be retained in open space, even with the proposed
2 development, it is
3 possible that most of the concerns regarding preservation and avoidance of tribal
4 cultural
5 resources and traditional cultural landscapes can be addressed; but that should occur
6 before an
7 extensive development plan is approved for the property.

8 ///SOUNDS LIKE CCC FORGOT THE REASONS FOR DENIAL BECAUSE THEIR
9 ABOVE STATEMENT REVERSES THE CCC DENIAL CLAIMS INCLUDING WHAT IS
10 CONTAINED IN THEIR NEW CCC STAFF REPORT –WHICH IS FINE AND THE CCC
11 CAN REVERSE THEIR DECISION AND NOT APPROVE THEIR FINAL
12 DETERMINATION AS INTENDED IN THEIR NEXT HEARING ON FEB 09 2017 .

13 Relationship between Oil Facility Remediation and Proposed Development

14 The subject site is presently used for oil extraction and includes a network of roughly 40
15 miles of
16 pipelines and nine miles of paved and unpaved roads that wind to various well heads,
17 storage
18 facilities, and other oil processing equipment areas spread across the site. There are a
19 number of
20 sensitive species using the property in its current disturbed, but still incredibly rich
21 ecological
22 state.

23 THE “SO CALLED INCREDIBLY RICH ECOLOGICAL STATE” IS ONLY IN A FEW
24 AREAS AND THE REST WILL BE RESTORED AS PLANNED –IT WOULD ON THAT
25 RESTORATION PROCESSING –IF CCC HADNT DENIED THE NBR CDP –AND THE
26 HISTORICAL USE OF THE LAND WAS WHEN ALL THE LAND WAS PLOWED BY
27 VARIOUS FARMERS GROWING THERE WHICH EXPOSED MOST OF THE
28 ARTIFACTS AND WERE REMOVED BEFORE THE OIL FIELDS WERE DEVELOPED
29 . MORE LAND WAS GRADED WHEN THE OILFIELDS WAS DEVELOPED. GRADED
30 IN MOST AREAS TO THE HARD PAN WHICH WE CONFIRMED WHEN
31 EXCAVATING FOR THE STP’S . VERIFIED RECENTLY DURING THOSE STP’S BY
32 THE GEOLOGIST FOR BONTERRA /PSOMAS

33 The proposed oil field clean-up and implementation of the restoration required through
34 the

35 recommended special conditions will likely be beneficial for habitat; however, clean-up
36 of the

37 site will have to occur as part of various required restoration activities and when the oil
38 wells

39 are abandoned, regardless of the plans for residential and commercial development.

40 Of the more than 400 wells that have been drilled on the property, the great majority
41 have

42 already been abandoned. The settlement agreement and orders issued by the
43 Commission in

44 March 2015 to address alleged unpermitted development on the site requires the
45 applicant to,

1 among other things, abandon 17 additional wells on the project site, restore 18.45 acres
2 of
3 habitat, and preserve 24.6 acres of the site as open space; the applicant/landowner is
4 bound to
5 perform the restoration and mitigation activities required by the Consent Orders
6 regardless of the
7 Commission's denial action on this application.

8 Further, in accordance with a stipulated agreement that arose from a dispute over the
9 legality of

10 certain wells on the property, described in more detail in Appendix B, the mineral rights
11 owner -

12 Horizontal Development LLC - has applied to the Commission for a coastal
13 development permit

14 (CDP No. 9-15-1649) to (a) restrict its ongoing and future oil operations to within an
15 approximately 15 acre portion of the site made up of two heavily developed industrial
16 areas on

17 the property known as the Oil Remainder Areas and (b) carry out some additional well
18 abandonment activities. Permit application no. 9-15-1649 is currently being reviewed
19 and is

20 expected to come before the Commission later this year was heard by the Commission
21 in

22 December 2016 and its approval authorized a variety of clean-up and abandonment
23 5-15-2097 (Newport Banning Ranch, LLC)

24 7

25 activities, including closure and removal of wells; removal of structures, buildings and
26 concrete pads and foundations; and collection and offsite disposal of debris, out-of-
27 service

28 equipment and infrastructure.

29 ///THE CCC APPROVED CONDITONALLY THE HDL CDP WITH THE VERY SIMILAR
30 CONDITONS IMPOSED ON NBR CDP THE CCC DENIED WHICH FURTHER
31 ESTABLISHES THE DEFECTIVE DENIAL – AND THE OVERLAPPING LAND USE BY
32 BOTH NBR AND HDL FURTHER PROVES THE CONDITIONS BY CCC WILL BE
33 IMPOSED ON NBR BUT WITHOUT THE NBR PROJECT CDP .THERE IS A STRONG
34 CONFLICT TO IMPOSE THOSE CONDITION AGAINST NBR DIRECTLY BUT
35 WITHOUT THE LAND USE WHICH IS A TAKING UNDER EMINATE DOMAIN LAWS.
36 AGAIN CCC HAS NO AUTHORITY OR JURISDICTION TO DO SO AT ALL .

37 Staff recommends a YES vote. Passage of this motion will result in approval of the
38 permit as

39 conditioned and adoption of the following resolution and findings. The motion passes
40 only by

41 affirmative vote of a majority of the Commissioners present.

42 Passage of the motion will result in the adoption of revised findings as set forth in this
43 staff report.

44 TATTN FORMALLY OBJECTS AND OPPOSES THE CCC NEW STAFF REPORT AND
45 ANY ADOPTION OF THE STAFF REPORT MOTION BECAUSE THE CCC STAFF
46 REPORT HAS NUMEROUS DEFECTS WHICH ARE COMPOUNDED BY FALSE

1 PRETENSES SUBMITTED WITHOUT EVIDENCE OR ANY OTHER DEFECTS
2 CORRECTED TO HAVE A LEGAL BASIS TO ADOPT THEIR FINDINGS. WHICH
3 AGAIN IMPOSES VARIOUS CONDITIONS IN WHICH CCC HAS ZERO AUTHORITY ,
4 THE CCC HAS OVER EXTENDED ANY COASTAL ACT REQUIREMENTS BEFORE
5 THE FEDERAL AGENCIES CAN PROCESS THE APPLICATIONS AND PERMIT
6 WITH TRIBAL CONSULTATION. THIS HDL CDP WILL NOT BE ABLE TO BE
7 COMPLETED WITH CONDITIONS WHICH OVERLAP THE NBR PROPERTY. CCC
8 CAN NOT REQUIRE THOSE CONDITIONS WITHOUT THE COMPLETION OF THE
9 NBR TONGVA TRIBAL CULTURAL RESOURCES BEING COMPLETELY
10 EVALUATED AND PROCESSED THRU THE FEDERAL AND STATE AGENCIES.

11 The motion requires a majority vote of the members from the prevailing
12 side who are also present at the February 9, 2017 hearing, with at least three of the
13 prevailing members voting. Only those Commissioners on the prevailing side of the
14 Commission's action are eligible to vote on the revised findings.

15 **Commissioners on the prevailing side are: Commissioners Cox, Howell, Groom,**
16 **Luevano,**
17 **Shallenberger, Turnbull-Sanders, Vargas, Bochco, and McClure.**

18 ///

19 In the time between the
20 April 2016 staff report was published and the September Commission hearing, the
21 applicants
22 applied for a second permit (CDP 5-16-0649) to conduct archaeological investigations
23 on the
24 site; the permit was approved by the Commission August 2016 and described in more
25 detail in
26 Section H. Archaeological and Cultural Resources. The project also includes
27 establishment of 15
28 acres of oil remainder areas and work within them is proposed and currently being
29 reviewed in
30 was approved by the Commission at the December 2016 hearing, CDP application No.
31 9-15-
32 1649.

33 ///

34 The Commission recently approved a coastal development permit application from the
35 oilfield operator, Horizontal Development LLC has submitted (CDP No. 9-15-1649), that
36 includes abandonment and removal of three wells and several structures as well as
37 some
38 clean-up activities and a variety of future oil and gas production, processing, storage,
39 and
40 transport activities that would be carried out it proposes to pursue within the oil
41 remainder
42 areas. Without NBR's current proposal to abandon oilfield operations throughout most
43 of the
44 site and carry out commercial and residential development in those areas, the oilfield
45 operator

would be required to carry out the oilfield shut-down, infrastructure removal, and clean-up activities at a future date when it discontinues oil production. This latter approach is the more typical and standard process for oilfield abandonment. However, the current condition of the oilfield would also need to be addressed even without NBR's current proposal.

Cultural Knowledge and Significance of Resources///Native Americans and some professional archeologists believe, and ethnographic evidence supports the idea, CCC CLAIMS THIS AND DOESN'T DISPLAY OR NAME THE PEOPLE THEY ARE STATED CLAIM THIS FALSE INACCURATE STATEMENT – IT FURTHER PROVES THE CCC HAS NO IDEA OR IGNORANTLY BELIEVES THE MONITORING COMPANIES FALSE CLAIMS – GENGA IS 10 MILES FROM THERE- MOYOOGNA IS THE VILLAGE OF THAT AREA AND I HAVE THE EVIDENCE FORM OLD MAPS AND IT ALSO PROVES THAT CCC ET AL –DO NOT KNOW THE SO THEY CANT DECRIBE THE VILLAGES AND CCC CLAIM THEY HAVE ETHNO EVIDENCE BUT HAS NOT PROVIDED IT –ITS ANOTHER CCC FALSE CLAIM.

///

that the Banning Ranch site is one of the many village sites located along the Santa Ana River on the Western Newport Mesa that is a subsidiary settlement site of the primary village center- Genga, - NO MOYO IS THE VILLAGE IN THAT AREA –SEE ABOVE.

and that the Banning Ranch site overlooking the river and the ocean was used for special activities, including cultural and religious ceremonies. The reason the property as a whole, all 401 acres, is regarded as a Traditional Cultural Landscape is because of the site's vast array of special vegetation and wildlife and biological resources: It is this ecosystem [of Banning Ranch] that led the Gabrielino and Juaneno-Acjachemen ancestors to settle here, NO JUANENOS OR ACHCHAMAN WERE EVER THERE ITS DOCUMENTED TONGVA TERRITORY AND CCC IS AGAIN ATTEMPTING IT TO FALSILY IMPLY THAT SO THE JUANENOS AND AHCHAMANS HAVE SOME STANDING SO THEY CAN SUPPORT THR FALSE SCHEME OR IMPACTS ANS OTHER SUPPORT FOR THEIR BOOGUS UNFOUNDED CLAIMS.

collect the plants and animals, hold ceremonies, and bury their dead. It is this ecosystem, that together with the archaeological sites, forms this sacred landscape of the Banning Ranch Cultural Property and Landscape. [letter dated May 3, 2016 from the CA Cultural Resource Preservation Alliance to the Coastal Commission].

CCRPA HAS DR.PAT MARTZ WHO IS VERY KNOWLEDGABLE BUT INCORRECT ON HER CLAIMS AND THEY HAVE NUMEROUS JUANENOS AND AHCHAMANS ON

1 THE BOARD OF DIRECTORS SO THERE IS SOME DIRECT CONFLICT OF
2 INTERESTS AND CCC CITES HER LETTER BECAUSE IT SUPPORTS THE CCC
3 FALSE CLAIMS.
4 Regulations of Archaeological and Cultural Resources
5 SB 18
6 California Senate Bill 18 (SB 18) was passed in 2004 and requires cities and counties to
7 consult
8 with California Tribal Governments anytime a city or county amends or adopts a
9 General Plan.
10 The requirements of SB 18 are separate from the CEQA process, but can be engaged
11 at the time
12 of CEQA review.
13 According to PRC section §65300, each City and County is required to adopt a General
14 Plan
15 which is meant to guide future development over the next 20 years. California
16 Government Code
17 (GC) Section 65352.3 and Section 65562.5 requires tribal consultation at the time of a
18 General
19 Plan or Specific Plan adoption or amendment, or a decision involving the designation of
20 Open Space. Prior to the adoption or any amendment to a General Plan, or a change in
21 land use
22 involving open space, the local government shall conduct consultations with California
23 Native
24 American tribes for the purpose of preserving or mitigating impacts to Cultural Places.
25 SB 18
26 requires notice to and consultation with California Native American Tribes that are on
27 the
28 contact list maintained by the California Native American Heritage Commission.
29 SB 18 refers to Cultural Places described as places, features, and objects described in
30 PRC
31 Sections 5097.9 and 5097.995 as Native American sanctified cemetery, place of
32 worship,
33 religious or ceremonial site, or sacred shrine and Native American historic, cultural, or
34 sacred
35 site, that is listed or may be eligible for listing in the California Register of Historic
36 Resources
37 pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground,
38 any
39 archaeological or historic site.
40 Local governments notify tribal governments and tribes respond if they wish to
41 participate in
42 consultation. Local governments and tribes engage in consultation for the purpose of
43 preserving
44 a cultural place. PRC 21083.2 requires lead agencies to determine effects on
45 archaeological
46 resources and may recommend mitigation in the form of: Planning construction to avoid

resources, deeding sites in permanent easements, capping or covering before building, or planning parks, open space to incorporate sites. PRC 21084.1 states that Substantial adverse change in a historical resource is a significant effect on the environment. Historic resources include resources listed or eligible to be listed in the California or a local registry. Not being listed or eligible for listing does not preclude a lead agency from determining something may be a historical resource. 361 acres of the Banning Ranch site are under the jurisdiction of the County of Orange with a General Plan land use designation of Open Space. The County of Orange has not amended the 5-15-2097 (Newport Banning Ranch, LLC) 103 General Plan to change the land use designation to allow for residential or commercial use on the site, and therefore SB 18 Consultation between the County and Tribal Governments has not yet occurred.

SO WHAT ITS ANOTHER PROCESS BUT ISNT A NEGATIVE AFFECT AS CCC TRIES TO IMPLY.

Approximately 40 acres of the Banning Ranch site are under the jurisdiction of the City of Newport Beach. The City of Newport Beach adopted a land use designation of open space for the property (as primary use with an alternative use as residential village with retail and parks if not acquired for open space within a set amount of time) in 2006, that was voter approved. The Primary use of open space includes the consolidation of oil operations, the restoration of the wetlands, and provisions for a nature educational facility and active parks to serve surrounding neighborhoods.

///

AB 52 SB18 is triggered preceding an adoption or amendment of general plans or specific plans or open space designations (Gov. Code § 65352.3, subd. (a)(1); § 65562.5), but Assembly Bill 52 (AB 52) is triggered with all CEQA review for which an NOP, Notice of Mitigated Negative Declaration or Notice of Negative Declaration is filed or issued after July 1, 2015 (Stats. 2114, ch. 532, § 11(c)).

CCC HAS VIOLATED THE AB52 CONSULTATION LAW AND IS STILL IN NON COMPLIANCE, CCC STAFF TOLD ME WHEN I REQUESTED IT , THAT THE CCC

DOESN'T HAVE TO DO THAT PROCESS BUT THEY ARE AGAIN TRYING TO USE THE AB52 PROCESS NOT BEING DONE YET AGAIN TO SUPPORT THERE FALSE CLAIMS OF IT NOT BEING DONE.

The goals of Tribal Consultation under AB 52 include: gathering information in order to preserve the options of avoidance of cultural resources or preservation in place early in the planning process, to build working relationships with tribes that are traditionally and culturally affiliated to the project area, to avoid inadvertent discoveries of Native American burials and work with tribes in advance to determine treatment if burials are inadvertently discovered. Tribes must contact the local government to request consultation with the lead agency. TATTN DID THAT REQUEST AND IT WAS DENIED BY CCC STAFF. TATTN OBJECTED AND OPPOSED THAT DECISION.

If the request for consultation is made, environmental documents cannot be released until consultation has been initiated.

AGREED AND SO CCC SHOULD NOT HAVE PROCESSED CDP WITHOUT THE AB 52 PROCESS –SEE ABOVE.

(Pub. Resources Code §21080.3.1, subd. (b)). Environmental documents for a project with a significant impact on an identified tribal cultural resource cannot

be certified until consultation, if initiated, has concluded. (Pub. Resources Code § 21082.3, subd.

(d)(1)). Under AB 52, Consultation is concluded when either of the following occurs: The parties

agree to measures to mitigate or avoid a significant effect, if a significant effect exists to a tribal

cultural resource; or a party, acting in good faith and after reasonable effort, concludes that

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mutual agreement cannot be reached. (Pub. Resources Code § 21080.3.2, subd. (b)).

Mandatory topics of Consultation include exploring alternatives to the project, recommended

mitigation measures, and identification of significant adverse effects. Other discretionary topics

of Consultation include the types of environmental reviews necessary for the project, the significance of tribal cultural resources, the significance of the project's impacts on the tribal

cultural resources; and if necessary, project alternatives or appropriate measures for preservation

or mitigation that the tribe may recommend. (Pub. Resources Code § 21080.3.2, subd. (a)).

1 Because the Newport Banning Ranch proposal was certified with a mitigated negative
2 declaration in 2012, before the passage of AB 52, the lead agency, the City of Newport
3 Beach,

4 did not engage in the above described consultation with the local tribal groups.

5 However, if a

6 subsequent, supplemental, or addendum to the EIR is required as a result of the
7 changes or new

8 information since the certification of the EIR, the City will be required to engage in AB
9 52

10 consultation with tribes that request it.

11 Section 106

12 Because at least 3 archeological sites are eligible for listing on the National Register,
13 SHPO will

14 get involved in evaluation of the resources and to consult with local tribes when Section
15 106

16 Consultation⁷

17 is required concurrently with Federal approvals, in this case, the Section 404

18 permit from the US Army Corps of Engineers (Army Corps). Army Corps will need to do
19 a

20 Jurisdictional Delineation of the Waters of the US that are on the Banning Ranch site
21 (wetlands,

22 vernal pools, and erosional streams) and issue a permit for the project and any

23 mitigation that is

24 required. Army Corps will also initiate a US Fish and Wildlife consultation at that time to
25 obtain

26 a biological opinion of the federally listed species on the site and the status of the critical
27 habitat

28 areas.

29 THERE ARE ONLY 2 THAT ARE CLAIMED TO BE ELIGIBLE .SO YET

30 Section 106 requires Federal agencies to take steps to identify historic (and prehistoric)
31 properties or sites, including consulting with SHPO and possibly with the Tribal Historic
32 Preservation Officer, and seek information from the Native American tribes in the area
33 that have

34 cultural knowledge of the site, and ultimately determine if the project will impact the
35 historic

36 qualities of the property or site. A property can be deemed eligible for listing in the
37 National

38 Register by a tribal government or a professional archeologist through a nomination
39 process. A

40 property can be added to the National Register by a consensus determination of
41 eligibility, where

42 Federal decision makers and SHPO can determine if the property meets the criteria for
43 listing.

44 Owner objections may affect the listing of the entire property, but not the eligibility and
45 not the

46 identification of the boundaries of archaeological sites or traditional properties.

1 NBR HAS NOT BEEN IN THAT DISCUSSION

2 If the private owner of a property objects to listing, the property (with boundaries based
3 on an objective
4 assessment of the full extent of the significant resources) may be determined eligible for
5 the
6 National Register but not listed. Properties listed and eligible for listing are afforded the
7 same
8 protections.

9 7

10 Section 106 of the National Historic Preservation Act is codified at 16 U.S.C. § 470f.

11 ///

12 In the case of Banning Ranch, Section 106 will require Army Corps to consult with the
13 nonfederally
14 recognized tribes of the region, if they request it.

15 TATTN HAS ALREADY DONE THAT WITH USACOE

16 SHPO will review the consultation and will search for any recorded sacred lands files.
17 The local tribes are able to review areas of concern, suggest additional indirect impacts
18 of the project that may occur to both the
19 archeological sites and the cultural attributes of the property that Army Corps may not
20 be aware

21 of, determine the status of the property as eligible for listing on the National Register,
22 and

23 request protective measures including avoidance. If there are adverse effects of the
24 project, the

25 parties (Army Corps, SHPO, and the local tribal governments) will enter into an
26 agreement

27 (MOU) to formalize any mitigation measures that must occur as a result of the impacts
28 of the

29 project.

30 Section 106 regulations, in the Code of Federal Regulations, Title 36, section

31 800.4(c)(1)

32 requires federal agencies to acknowledge the special expertise of Native Americans
33 and their

34 cultural knowledge in assessing the eligibility of historic properties that may be of
35 religious or

36 cultural significance to them. Because the site is now in the Sacred Lands File, and
37 because this

38 listing includes information about how 4 of the 8 known archeological sites may be
39 connected

40 and are believed to be a village site, SHPO will review that information at the time of the
41 Section

42 106 consultation. SHPO could make the determination that the complex of the 4
43 archeological

44 sites or all known archaeological sites should be treated as 1 large site eligible for listing
45 in the

1 National Register, or could determine that the entire 401 acres of the property are
2 considered
3 sacred lands and a Traditional or Tribal Cultural Landscape that may be eligible for
4 listing in the
5 National Register as a Traditional Cultural Property.

6 A Tribal Cultural Landscape is any place in which a relationship, past or present, exists
7 between
8 a spatial area, resource, and as associated group of people whose cultural practices,
9 beliefs, or
10 identity connects them to that place.

11 THAT IS NOT TRUE AND IT DOESN'T APPLY TO THE BANNING RANCH ANY
12 MORE.

13 TATTN closing remarks, I am stopping here the rest below is more of the same rhetoric
14 by CCC staff-

15 Either its bogus fabricated info or its actually what CCC ca not decide or assume
16 illegally some kind of authority /jurisdiction- again –TATTN has submitted this response
17 for the admin record –take formal notice of that .

18 /S/ JOHNTOMMY ROSAS [SIGNATURE ON FILE

19 A tribal cultural landscape is determined by and known to a
20 culturally related group of indigenous people with a relationship to that place rather than
21 being

22 determined by external criteria. Relationships may vary from group to group and may be
23 defined

24 temporally or geographically through oral traditions and cultural practices. Because of
25 the age of

26 archaeological sites and their ability to represent multiple time periods spanning
27 thousands of

28 years and various indigenous migration and settlement patterns of occupation over
29 time, one area

30 can hold significance for many groups. Multiple tribes may hold knowledge about and
31 connections to the same place, as is the case with Banning Ranch.

32 A Traditional Cultural Property is considered by the National Register to be a type of
33 significance rather than a property type, is determined based on a set of specific criteria,
34 and it

35 can contain and often does contain a complex or a district of 1 or several archeological
36 sites. In

37 the context of eligibility determination or nomination to the National Register, intrusions
38 if

39 severe enough may compromise the property's integrity. In planning subsequent to
40 nomination or

41 eligibility determination, the Advisory Council on Historic Preservation's regulations
42 define

43 "isolation of the property from or alteration of the character of the property's setting" as
44 an

45 adverse effect "when that character contributes to the property's qualification for the
46 National

Register" (36 CFR 800.9(b)(2)). Similarly, the Council's regulations define as adverse effects "introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting" (36 CFR 800.9(b)(3)). To assist in determining whether a given 5-15-2097 (Newport Banning Ranch, LLC)

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activity outside the boundaries of a traditional cultural property may constitute an adverse effect, it is vital that the eligibility documentation evaluate those qualities of a property's visual, auditory, and atmospheric setting that contribute to its significance, including those qualities whose expression extends beyond the boundaries of the property as such into the surrounding environment. Traditional Cultural Property contributing attributes that may be protected can include a site's view shed, sense of feelings (wind, cool air, vegetation smells, overall presence of the site) and can even include sounds (wildlife sounds, the lack of noise from urban life such as cars on the roadways, sounds of ocean waves, etc.)

A Traditional Cultural Property can be a Tribal Cultural Landscape and is broader than the individual archeological sites, and is often a religious or ceremonial site because of unique landscape features, such as a mountain top or a bluff top, a place with significant natural views, a place with rivers or estuaries, special vegetation or wildlife that may contribute to its significance, a place with evidence of cultural traditions or evidence of burials, or a place with religious artifacts or monuments. As stated above, Native American tribal groups with ties to Banning Ranch believe that the entire 401 acres of the site will rise to the level of this significance and is eligible for listing as a Traditional Cultural Property. Tribal governments that identify Traditional Cultural Landscapes often equipped themselves to represent their interests and are concerned with and participate in ongoing management grounded in cultural knowledge, and implementation of site restoration, protection, planning, and land management.

Governor's Order Executive Order B-10-11 requires that all State Agencies under Executive Control engage in Government-to-Government Consultation. The 2011 order states: it is the policy of this

Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes. State Government staff must consult on projects within their jurisdiction with Tribal Government representatives with ties to the property in question. Sometimes this involves several tribal governments for one site or one project. Additionally, Tribal governments contacted must be from both federally recognized and non-federally recognized tribes. In California, there are 111 federally recognized tribes and approximately 60 non-federally recognized tribes and the Native American Heritage Commission acknowledges both and keeps a record of contact information for each area. In the case of Banning Ranch, there are 9 independent tribal entities with ties to the land.

Executive Order B-10-11 encourages state agencies to: engage in the timely and active process of respectfully seeking, discussing and considering the views of California Indian Tribes, Tribal communities and Consortia in an effort to resolve concerns of as many parties as possible.

Commission Staff Consultation Efforts

Commission staff has engaged all 9 tribal entities on the Native American Heritage Commission list, as well as known interested parties with Native American heritage and cultural affiliations, and Native American organizations that work directly with and speak on behalf of some tribal governments. Discussion topics included both archeological sites and cultural resources. The concerns that have risen from these consultations are mainly: the status of the Banning Ranch as sacred land and religious and ceremonial site, the status of the property and a Traditional Cultural Landscape, any ground disturbance must include Native American monitors and include as many tribal groups as possible, the lack of adequate testing for archeological resources done to

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date, the presence of additional burials on the site, the connection of the site to the larger prehistoric village of Genga and other regional religious sites and villages, and the cultural

1 connection to the land and the biological resources of the site. Other comments include
2 some
3 tribal groups not being contacted to participate in the project planning under CEQA
4 review in
5 2009 and not being contacted by the applicant or invited to engage in consultation at all
6 until
7 June 2016. Archaeological documents and studies were not shared with the tribal
8 groups until
9 June 2016 and the tribal groups are concerned with the limited amount of time to review
10 past
11 archeological documents and cultural documents and respond to the project proposal
12 and
13 evaluate the project's impacts on the archeological sites and the cultural significance of
14 the site,
15 while attempting to participate in the monitoring of the site's ongoing investigations with
16 little
17 advanced notice.
18 Consistent with the intent of the governor's order, staff has met with representatives of
19 all the
20 Native Nations on several occasions as a group, as well as separately, and with various
21 tribal
22 entities in an attempt to address the concerns expressed. While there is some
23 disagreement
24 among the parties, there is mostly a consensus that the land is a religious and sacred
25 site and that
26 the significance of the 401 acres is not diminished by the disturbed archaeological
27 deposits found
28 to date and the disturbed areas are not a representation of the archeological and
29 cultural resources
30 and significance that exist on the site. Staff has attempted to address the concerns to
31 the
32 maximum extent feasible through the conditions of approval, discussed in detail below.
33 Regional Cultural Sites and Past Commission Actions
34 The Native American Heritage Commission (NAHC) identifies and catalogs cultural
35 resources
36 (i.e., places of special religious or social significance to Native Americans, and known
37 graves
38 and cemeteries of Native Americans on private lands) in California. NAHC is charged
39 with the
40 duty of preserving and ensuring accessibility of sacred sites and burials, the disposition
41 of Native
42 American human remains and burial items, maintaining an inventory of Native American
43 sacred
44 sites, and reviewing current administrative and statutory protections related to these
45 sacred sites.

1 At the request of the Tribal Chairman of the Gabrieleno Tongva San Gabriel Band of
2 Mission
3 Indians, the state NAHC added the "Banning Ranch Cultural Properties and Landscape"
4 to the
5 NAHC Sacred Lands Inventory because of its cultural significance, which this quote
6 describes:

7 The Banning Ranch sites represent the activities that the ancestors carried out
8 centuries ago
9 and are named in our oral traditions and songs, including artifacts, plant gathering
10 areas,
11 and natural features of the landscape that have spiritual meaning. As such they hold
12 great
13 significance for Gabrieleno descendants as a sacred power area, a place where they
14 could
15 gather to honor the ancestors and gain spiritual renewal. The fact that many of the
16 [archaeological] sites have been disturbed does not diminish the area's spiritual
17 significance
18 as the place of our ancestors. [February 24, 2016 letter from Anthony Morales, Tribal
19 Chairman, to NAHC in support of nomination.]
20 Additionally, one Juaneño-Acjachemen tribal government was under the impression
21 they had
22 listed site on the Sacred Lands Inventory before 2016, but no records were found for
23 that listing.

24 ///

25 8

26 According to the National Register's Guidelines for Evaluating and Documenting
27 Traditional
28 Cultural Landscapes, because properties of traditional cultural significance are often
29 kept secret,
30 it is not uncommon for them to be "discovered" only when something threatens them--
31 for
32 example, when a change in land-use is proposed or a new development project is
33 proposed in the
34 vicinity. The sudden revelation to local governments, applicants or developers with
35 economic or
36 political interests in the proposed project can lead to charges that the cultural
37 significance of a
38 property has been invented only to obstruct or otherwise influence the project. While
39 this could
40 be true and should be considered along with archaeological or ethnographic evidence, it
41 is often
42 the case that until the change was proposed to the property in question, there was
43 simply no
44 reason for the disclosure.

45 In past Court decisions (Environmental Protection Information Center, Inc. v. Johnson
46 (1985)

(170 Cal App 3
rd 604), the Court held that the NAHC has jurisdiction and special expertise, as a
state agency, over affected Native American resources impacted by proposed projects,
including
archeological places of religious significance to Native Americans, and to Native
American
burial sites. In past Commission actions (HNB-MAJ-1-12, the Ridge) the NAHC
indicated that
areas adjacent to the property in question that contained burials should be protected
and should
be avoided if at all possible pursuant to CEQA Guidelines Section 15370 (a) to avoid
destruction
of cultural resources. SHPO also indicated that because the property was part of a very
large
village complex ranging from 9000 to 2000 years old (Before Present) and all the known
archaeological sites were connected, and the property was adjacent to sites with
hundreds of
Native American burials that were listed on the National Register, SPHO identified the
property
as a Traditional Cultural Property and determined that the impacts of the project could
not be
mitigated to a less than significant level, and therefore could be not found consistent
with Section
30244 of the Coastal Act. Ultimately, the property in question was protected by the
Commission
because of this determination.
The situation at Banning Ranch is similar. Banning Ranch is immediately adjacent
seaward of
Fairview Park in Costa Mesa where a prehistoric village site of 18 acres was found,
called
Genga. Over the years, more than 235 burials have been found within the park site, as
well as
countless other objects, including shells, religious and ceremonial objects and
asphaltum (crude
oil) lined baskets. The village site spanned 3 time periods: millingstone, intermediate,
and late
pre-historic horizons, which is very unique. Slightly farther inland, following the Santa
Ana
River course, 2 miles inland of the Banning Ranch northern property line, a small village
site
connected to the larger village of Genga was found with 20 burials and additional
religious and
cultural objects. 3 miles inland of the Banning Ranch property line another small village
site was
found with 19 more burials, as well as whale vertebrae and fishhooks, shells, and other
objects.

1 These village sites contain objects that were collected from the ocean. The inhabitants
2 of the
3 inland village sites likely would have used or traveled through the Banning Ranch site
4 and
5 surrounding areas to access these coastal resources.
6 Ethnographic interviews yielded information about the connection between Genga and
7 the
8 smaller surrounding village sites. It is described as a village complex, and all the
9 villages were
10 found less than 1 mile from each other. All of the sites were found on the Western
11 Newport
12 Mesa, where Banning Ranch is located today. Because of this, Native Americans and
13 some
14 5-15-2097 (Newport Banning Ranch, LLC) 109 professional archeologists believe that
15 the Banning Ranch site is another village site that has connections to the larger village
16 of Genga. Archaeological Studies on Banning Ranch To date several cultural resource
17 studies have been conducted on the Banning Ranch site. Archaeological sites were
18 originally found in the 1930s, but not given identification numbers (ORA) until 1964,
19 1979, 1980, and 1998 investigations. Additional testing was done at the time of CEQA
20 review in 2009 and further investigation was done in August 2016. 1930s investigation
21 Archeological records of the inland adjacent Fairview Park site, indicate that a dairy site
22 (the Banning Dairy Site), located 1 ½ miles south of Fairview Park contained a burial
23 with a decomposed skeleton, under which was a rough floor of sand stones. Two (2)
24 minor residential bases on the Banning Ranch site are located almost exactly 1 ½ miles
25 south of this point in Fairview park. According to this record, the burial was located on
26 the Banning Ranch site, near these residential bases. The record goes on to indicate
27 that the investigation started on the Banning Ranch site because the archeologist at the
28 time believed that there would be a community burial site somewhere around that
29 location. Native Americans believe that many more burials will be found on the site if it
30 is subject to grading and ground disturbance. Native American tribes note that
31 ancestors were often buried in coastal locations overlooking water sources, and much
32 evidence exists to support this supposition. The discovered prehistoric villages surround
33 Banning Ranch had many burial locations that were located along the bluffs adjacent to
34 the historic flow of the Santa Ana River facing West. Native Americans believe that
35 there are ancestor burials located along the western bluffs of the Banning Ranch site,
36 facing the river and the ocean. 1980s investigation As a result of additional oil well
37 drilling in the 1980s, Mobil Oil hired archaeologists to investigate sites and perform data
38 recovery and excavation of areas that were planned to be oil wells prior to drilling.
39 Studies were done by VanHorn in 1980-1982 which identified 2 minor residential bases
40 and sites of significance. A small "roasting platform" made from fire - cracked rock was
41 found (and left in place) which indicates an early phase of the prehistoric occupation of
42 the site. The archeology notes indicate that the depth of this deposit exceeded 140 cm,
43 at which point digging was stopped due to lack of funds and time. The full potential of
44 this deposit was not reached and it still holds significance. The report notes that the site
45 prehistoric, millingstone, and paleocoastal time periods may be represented: [There is]
46 evidence that the Late Prehistoric or Gabrielino Horizon and the preceding Intermediate

Horizon are both stratigraphically represented at the site...prehistoric people exploiting a broad array of animal and plant food, coastal sites typically comprising dense shell middens. Prior to this time, particular emphasis seems to have been placed upon seed gathering as evidenced by a preponderance of stone milling tools. These tools were unknown to the earliest inhabitants of southern California, who seem to have survived principally by hunting. It is possible that this entire sequence is represented at [this archeological site]...

VanHorn also draws comparisons between the Banning Ranch site and the Genga site:
The

general sparsity of shell in the older horizon suggests strong similarities with Ora-58 [the Fairview Site] situated about a mile to the north.

2009 investigation and Eligible sites

The 2009 investigation done for the preparation of the EIR did not investigate for new, unknown

sites, but re-visited the 8 archeological sites that had been previously documented in order to

determine their eligibility for listing on the National Register. In the process, the archaeologists

identified a third residential base, that is considered a major residential base.

To recap the findings of the EIR, in the opinion of the archaeological consultant that prepared

this portion of the EIR, three of the sites (CA-ORA-839, CA-ORA-844B, and CA-ORA-906)

are eligible for listing in the California Register of Historic Resources (CRHR) and the National

Register of Historic Places (NRHP). These three sites, in combination with other noncontributing

archeological sites and natural features on Banning Ranch, make up the Native American traditional cultural landscape.

A resource is eligible for listing on the NRHP if it meets the following criteria found in Public

Resources Code Section 5024.1 and 14 California Code of Regulations Section 4852):

A. Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;

B. Is associated with lives of persons important in our past;

C. Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values; or

D. Has yielded, or may be likely to yield, information important in prehistory or history.

The EIR archaeological consultant further opined that one of the cultural landscape's archaeological sites rises to the level of a unique archaeological resource because it contains data

that supports the theory the region was occupied during the 3 periods: Late Prehistoric, Millingstone, and the Intermediate Period, which had not been supported by other sites.

It also

1 yields information about how Native Americans in coastal Orange County migrated and
2 settled

3 due to changes in sea level rise. Public Resources Code Section 21083.2(g) defines a
4 unique

5 archaeological resource as follows:

6 [an] archaeological artifact, object, or site about which it can be demonstrated
7 that, without merely adding to the existing body of archaeological knowledge,
8 there is a high probability that it meets any of the following criteria:

9 1. Contains information needed to answer important scientific research

10 questions and that there is a demonstrable public interest in that information.

11 2. Has a special and particular quality such as being the oldest of its type or the
12 best available example of its type.

13 3. Is directly associated with a scientifically recognized important prehistoric or
14 historic event or person. During the CEQA process, archeologist evaluated the
15 archeological sites that were previously found on Banning Ranch. The evaluation re-
16 visited 8 known archeological sites and completed the work to federal level standards
17 (Section 106 of the NHPA) because of the need for federal permits. 3 archeological
18 sites on the Banning Ranch property contain 3 residential bases that are eligible for
19 listing on both the National Register of Historic Places (NRHP) and the California
20 Register of Historic Resources (CRHR). The EIR states that final determinations are to
21 be made by the State Historic Preservation Officer (SHPO). Other resources (5 other
22 archaeological sites) found on the site include thick deposits of shell and lithic scatter,
23 and further evidence of a large population of inhabitants on the site, supporting the idea
24 that the Banning Ranch site is another prehistoric village site. All 8 known sites are
25 included on the "Banning Ranch Cultural Properties and Landscape" Sacred Lands file
26 with the NAHC. Because these sites are eligible for listing on the NRHP they are
27 protected by the Office of Historic Preservation. Sites that are on the National Register
28 and sites that are eligible for listing are afforded the same protections. As proposed,
29 these 3 sites are avoided by the development plan. Additional testing done in August
30 2016 determined the boundaries of these sites to ensure the development plan avoids
31 them. August 2016 Study Because the EIR investigation focused only on the eligibility of
32 listing for each known site, and there had not been thorough investigations to determine
33 if there were additional sites that may be impacted by the proposed development plan,
34 the applicant was informed on several instances through incomplete letters that
35 additional testing would be required and an Archaeological Research Plan (ARP) would
36 need to be submitted to guide further testing. These documents are typically peer-
37 reviewed and reviewed by Native American groups with ties to the land in question,
38 which is particularly important for Commission staff because there is no Commission
39 Archeologist. When the applicant filed for dispute resolution over non-filling letters,
40 these issues were dropped. When archeological documents were finally released to
41 local tribal groups in June 2016, there were many concerns noted with the lack of
42 adequate testing to date and the undetermined impacts of the project upon known and
43 unknown resources. Ordinarily, archaeological testing on sites where there are known
44 archaeological resources should be carried out through a permit for the implementation
45 of an ARP. The goal of the ARP is to determine where development can be allowed that
46 will avoid impacts to archaeological resources and that those resources can be

1 preserved in place. Consistent with past Commission action, the ARP must be peer
2 reviewed and be subject to review and comment by the State Historic Preservation
3 Officer (SHPO), Native American Heritage Commission (NAHC) and affected tribal
4 groups. Native American monitor(s) must also be present during implementation of the
5 ARP. The ARP must also include the preparation and submittal of a final report. The
6 final report would also be subject to the same review and comment of the ARP. The
7 applicant submitted an ARP (CDP application 5-13-032) in July 2014 for the
8 archaeological testing/salvage that was previously carried out during investigations for
9 the EIR in 2009. The
10 ARP that was submitted only revisited already known sites, and focused on the
11 archeological sites' conditions and whether or not the sites were eligible for listing on
12 the California Register of Historic Resources or the National Register of Historic Places.
13 The ARP did not demonstrate that the archaeological testing already performed was
14 adequate to determine that the proposed development (5-15-2097) would not impact
15 known or unknown archaeological resources. Since the ARP was drafted, Native
16 American groups with ties to the land have stated collectively that adequate testing has
17 not been done and that additional testing should precede any approved development
18 plan. The ARP notes: The fact that the Newport Banning Ranch Project site is located in
19 this coastal, lagoonal habitat, most of which has been destroyed and developed
20 throughout most of Southern California, and that little to no archaeological investigation
21 has taken place here, creates its own "data gap" in Southern California coastal
22 archaeology. This makes any relevant information gathered as a result of the study that
23 much more important. As such, additional testing to determine if all sites (sites currently
24 known and any others that are yet-to-be discovered) are avoided by the proposed
25 development plan subject is necessary. As a result, the applicant applied for a second
26 permit (CDP 5-16-0649) to implement a revised ARP that was approved at the August
27 2016 hearing. The applicant conducted Ground Penetrating Radar (GPR), which
28 identified anomalies. The permit approved the test pits to investigate the anomalies,
29 determine the approximate borders of known archeological sites within close proximity
30 of the proposed development footprint, and to test for potential additional archeological
31 sites that are yet to be found within the development footprint. A summary of the testing
32 was submitted to Commission staff on August 23, 2016, and to the Native American
33 groups, and the NAHC for review and comment. The August 23, 2016 submittal,
34 "Banning Ranch Archaeological Testing Memorandum", was an executive summary
35 describing the archaeological testing that was carried out on a portion of the project site
36 from August 17 through August 21, 2016. The executive summary is a six page memo
37 and eight additional pages containing a spreadsheet of the excavations and
38 corresponding maps. Commission staff contacted the applicant and requested that the
39 submittal also be shared with the Native American groups identified by NAHC to be
40 culturally tied to the project area for their review and comment, as was required by the
41 Administrative Permit that authorized the testing. No comments have been received to
42 date from the Native American groups to whom the information was sent. Staff also
43 requested the applicant submit the final report noting that the August 23, 2016 submittal
44 was an executive summary. On September 1, 2016 the applicant submitted "Banning
45 Ranch Archaeological Testing", a memorandum dated September 1, 2016 with an email
46 stating the submittal constitutes the final report . The six page final report contains

several deficiencies including incomplete and unsupported statements. The test results show that a portion of the development as proposed by the applicant encroaches into the known archaeological site CA-ORA-148. However, this encroachment is written off as insignificant with a statement that the portion of the archaeological site where the development is proposed was, "found to lack sufficient density, diversity, and integrity to address any research question relevant to the site and/or surrounding region".

Despite this statement, CA-ORA-148 is a known archaeological site indicating that it is an area that was used by Native American tribes in prehistoric times. While it may or may not be able to address scientific research questions, this archaeological site as well as the other 7 known sites on the project site nonetheless have value to several Native American tribal groups as a documented traditional cultural use area. The Commission further notes that the entire 401 acre property has been designated by the NAHC as a Traditional Cultural Landscape and all 8 known archaeological sites have the NAHC designation of Traditional Cultural Properties. The archaeological report fails to acknowledge these NAHC designations but instead discusses whether the known sites can answer unspecified scientific research questions or whether the sites are eligible for listing in the National Register of Historic Places.

Although the stated goal of the testing was to determine the boundaries of six known archaeological sites that are adjacent to the applicant's development footprint or within the oilfield cleanup areas, and the Testing Results Summary (page 1) of the 9/1/16 final report states, "3. Existing known boundaries of Cultural Resources Sites did not change as a result of the testing", the testing that was performed on the project site does not support this determination. Although the report includes maps showing the proposed development footprint and the shovel test pit (STP) excavation locations, the maps do not show the boundaries of the known archaeological sites. From the testing that has been done to date, it is not possible to conclude the proposed development will not encroach into the archaeological sites nearest the proposed development footprints because the boundaries of the site have not been determined. The boundary determination is especially critical where an archaeological site still retains significant midden soils, such as with CA-ORA-843 located west of the proposed North Family Village.

Additionally, the Commission finds that the archaeological testing carried out on the project site does not demonstrate that the project as proposed will not adversely impact known archaeological resources that are outside of the development footprint but that would be impacted by oilfield cleanup activities. Despite the fact that Testing Results

Summary 5 states that avoidance measures that have been incorporated into the project design will eliminate impacts to "Historic Properties", no recommended avoidance measures were identified in the report. During the site visit on June 10, 2016 the developer and archaeologist stated they would carry out oilfield cleanup operations in a manner that would lessen or avoid impacts to the archaeological sites that are within the proposed open space areas, such as hand cutting and removal of pipelines and other oil infrastructure, the use of lighter weight mechanical equipment and vehicles where hand work is not feasible, and cap the archaeological sites and/or utilize a sensitive trail design to avoid public access impacts to the archaeological sites. However, none of these measures are contained within the report, or anywhere else in the project proposal, and, thus, for any development approved, such measures must would need to be addressed through conditions of approval.

Finally, the Newport Banning Ranch property is located immediately adjacent to a once highly significant prehistoric Native American village known as "Genga". The archaeological testing that has been done to date has not addressed the extensive archaeological work done by others in the area, evidenced by only 3 references cited in the final report and no mention of the well-known and readily available past archaeological work (including but not limited to SERA, WPA, Paul Apodaca, Hank Koeper, Roger Mason and Nancy Wiley) in the body of the report. As conditioned, Special Condition 17 requires preparation of a revised ARP to address the deficiencies identified above and to consider any comments of the Native American tribal groups with ancestral ties to the area, other archaeologists (peer review) in designing the ARP, as well as any comments from NAHC and SHPO. By doing this, a research plan will be developed and implemented that will determine the location (boundaries) of archaeological/cultural resources on the project site identify project design features and mitigation measures that should be implemented to avoid adverse impacts to any significant intact cultural these resources.

Resources found on Banning Ranch

Four temporal horizons are seen along the Southern California coast: Early Man, Milling Stone, Intermediate, and Late Prehistoric:

The ARP describes how unique the deposits are at the Banning Ranch site:

The Newport Banning Ranch archeological sites allow for a different perspective on resource procurement and settlement as the sites are farther from: the upper Newport Bay, the freshwater marsh in Irvine, and the San Joaquin Hills, and the rocky coast of Corona del Mar. On Banning Ranch, at least three time periods are represented, and possibly all four in cultural deposits ranging in depth from 60 cm to 240 cm and ranging in size from a meter to 3 acres. This is very rare for Coastal areas in the region. On the Banning Ranch site, the Late Prehistoric Period is represented by the presence of beads and prehistoric tools. The rarely seen early intermediate period is also represented on the site. The ARP explains that environmental changes in Newport Bay region are related to an absence of occupation in the 5-15-2097 (Newport Banning Ranch, LLC) 115 early and middle intermediate period (3000-2500 YBP8) during a decrease in sea level converting the saltmarshes to freshwater, which resulted in a decrease in available shellfish (a main food source). A settlement shift may have occurred during this period away from these freshwater areas. As a result, very little is known about the early intermediate period. The ARP notes that very little is known about the intermediate period major settlement shifts from a mobile year-round system to a sedentary territorial system. What is unique about the archeological deposits on the Banning Ranch site, is that there is evidence (shellfish) of settlement during the early intermediate period. The Millingstone Period is represented on the site indicating rocky shore habitat exploitation with food sources such as shellfish, shark, sea otter, and other marine species. What is even more fascinating, is that one archeological site on Banning Ranch may pre-date the onset of the Milling Stone Horizon (i.e. prior to 6,000 YBC) and may represent two major Periods of occupation: the Late Prehistoric Horizon, and a shift from the Milling Stone Period to a pre-Milling Stone (cf. Paleocoastal) Period. Given the limited regional knowledge of the occupation and habitat of the area, the resources on NBR can provide unique chronological and subsistence information and change about two or possibly three prehistoric cultural periods. The 2009 investigation notes:

1 The data from this site could easily contribute to the research design categories of
2 chronology
3 and subsistence and settlement patterns. Again, little is known about
4 the prehistoric use of the mouth of the Santa Ana River and its estuary; therefore, the
5 data from
6 this site could easily contribute to research questions regarding chronology and
7 subsistence and
8 settlement pattern.

9 In summary, 1 burial, 2 minor residential bases and 1 major residential base have been
10 found to
11 date on the site, and several areas of thick shell deposits, a roasting platform, as well as
12 tools and
13 other objects.

14 Project Impacts on Cultural Resources and Archaeological sites

15 Many Native Americans and professional archaeologists commented that because
16 boundaries of
17 the archeological sites had not been determined, the Commission cannot be sure that
18 the
19 development footprint avoids these resources. Because some of the known
20 archaeological sites
21 are 2-3 acres in size, it is important to determine the boundaries of these areas to
22 ensure that they
23 are not impacted by the proposed development.

24 Additionally, many Native Americans and professional archaeologists commented that
25 the
26 testing that had been done to date was inadequate to determine if there are additional
27 archaeological sites within the proposed development footprint. Prior to August 2016,
28 there was
29 no investigation within the proposed development footprint, and the ARP did not discuss
30 the
31 potential for finding any more archaeological resources within the development footprint.

32 In past
33 Commission actions, the Commission has not approved a permit for development in
34 locations of
35
36 8

37 YBP stands for "Years before Present," a scale of temporal measurement used in
38 Archeology. Because the
39 "present" time changes, standard practice is to use January 1, 1950 as commencement
40 date of the age scale.

41 5-15-2097 (Newport Banning Ranch, LLC)
42 116
43 known archaeological significance without an ARP that has been peer reviewed and
44 that
45 adequately investigates the potential for additional archaeological resources within the
46 proposed

development footprint (5-05-098/5-05-229 (Hellman Tank Farm)).

Impacts of Development Plan

The 3 known archaeological sites that are eligible for listing would be avoided by the proposed residential and commercial development plan and are conditioned to be avoided by the proposed soil clean-up, but the other sites would be impacted by the planned development.

Because the

proposed project involves significant grading, there is a high likelihood of discovering additional

resources that are currently unknown. Only as conditioned to concentrate development within the

buildable areas as shown on Exhibit 4 would the development likely avoid all currently known

archeological sites. The Commission also imposes Special Condition 17 which requires monitoring during grading. The development plan, as conditioned, is the least likely to impact

any future yet-to-be discovered archeologist sites.

Impacts of Soil Clean Up

Complete avoidance of resources during the clean-up activities is possible and could be achieved

by capping or avoidance of known cultural resource locations. In contrast, the applicant proposes

to mitigate for any impacts caused to any unknown archeological resources by excavating (data

recovery or salvage) the resources and donating them to the Cooper Center in Santa Ana, CA.

However, this mitigation option is not most protective of the cultural resources and is not an

appropriate treatment method in the opinion of many tribal groups.

Instead of the most protective mitigation measure, i.e. capping or avoidance, the applicant

proposes to remove any yet-to-be found resources if impacted by oil clean-up. Capping of the

resource site is only proposed as a secondary measure, to prevent further impacts to the site from

foot traffic, erosion, etc. Data recovery excavation, again, is proposed for unknown resources as

opposed to capping or redesign of the project to avoid the impacts. The applicant's plans do not

include capping these resources, including any human burials found during grading.

The applicant's proposal includes mitigation measures which require that a qualified archaeologist monitor the grading and excavation activities and conduct salvage excavation as

necessary. Additionally, a Native American representative is proposed to be present onsite

1 during all grading and excavation activities.

2 As conditioned by Special Condition 8, sampling within 200 feet of all known
3 archeological
4 resources is required and shall be done in the least invasive way possible, to determine
5 if cleanup
6 is required in these areas. Furthermore, Special Condition 17 establishes further
7 requirements related to protection of cultural resources including but not limited to
8 establishing monitoring procedures that are inclusive of all Native American groups that
9 have an interest in the resources on the site.

10 Impacts of Unpermitted Development

11 During investigations for the EIR, the required coastal development permit for the
12 development
13 activities associated with the resources assessment, including excavation through
14 shovel test pits

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17 and hand units, was not secured, and thus, this archaeological testing was not subject
18 to

19 Commission review prior to its occurrence. Additionally, fire-affected rock was discarded
20 during

21 this investigation, which has yet to be mitigated.

22 Further, the 2010 archaeological investigation concluded:

23 Earth-moving activities associated with oil lease production have greatly disturbed all of
24 the

25 recorded cultural resources on the Project site. Disturbances that have affected cultural
26 resources include road building, quarrying and preparation, closure, and rehabilitation of
27 drilling pads. Fill, acquired from numerous locations on the property through time, was
28 often

29 utilized to create roads and pad sites in the lower wetlands.

30 In some cases, these disturbances have resulted in isolated cultural loci within sites as
31 consequences of grading rather than cultural activities. The fact that disturbances have
32 occurred

33 to most sites does not diminish their scientific value in light of the general lack of
34 knowledge

35 regarding the prehistoric occupation of the Santa Ana River mouth estuary.

36 In 1982, 95% of ORA-843 had been destroyed by grading, but the portion that was left
37 in good

38 condition and recorded as very significant. During the 2010 investigation, ORA- 843 was
39 not

40 found significant and was lacking integrity indicating that the site had been subject to
41 damage.

42 This damage is yet to be mitigated.

43 Avoidance of Resources by Alternative Buildable footprint

44 In contrast to the applicant's proposal, the alternative development plan of the
45 "proposed

development areas” as conditioned, would lessen or avoid significant adverse impacts to known archeological sites on Newport Banning Ranch. Special Condition 17 requires capping of the known sites and monitoring of grading and construction activities that have the potential of adversely impacting additional unknown sites and cultural resources that may be found during site grading and construction. The Special Condition outlines the procedures that must occur prior to development and if cultural deposits are encountered during the grading and construction, which includes a permit amendment to avoid any found resources, regardless of their significance or eligibility for listing. The measures that are most protective of both known and unknown resources (capping and avoidance), which would lessen or avoid additional adverse impacts to cultural sites, would be consistent with previous Commission action (CDP 5-97-367, Hellman and HNB-MAJ-1-12, the Ridge). The proposed project, which results in avoidable impacts to cultural resources, is not consistent with the Section 30244 of the Coastal Act. Only as conditioned, can the project be found consistent with Section 30244 of the Coastal Act.

Conclusion

As described above, the Banning Ranch site will be subject to Section 106 of the National Historic Preservation Act, which requires federal agencies to take into account the effects of undertakings (projects) upon historic properties (including pre-historic properties). During this review process and before issuing a permit, Army Corps will have to engage the State Office of 5-15-2097 (Newport Banning Ranch, LLC) 118 Historic Preservation (SHPO) and federally and non-federally recognized tribal governments, once the tribe has notified the agency of its intent to participate. One step in the Section 106 process is to identify possible historic properties and determine their National Register status, which is done in consultation with tribes. The national status of 3 individual archaeological sites is already determined, however the status of the 3 archaeological

1 sites in connection to the other non-contributing archaeological sites that have been
2 destroyed
3 and natural features, and the site as a Traditional Cultural Landscape and Sacred Land
4 has not
5 yet been evaluated and boundaries have not been determined for National listing.
6 Like any other types of historic properties, a property that once had traditional cultural
7 significance can lose such significance through physical alteration of its location, setting,
8 design,
9 or materials. In some cases a traditional cultural property can also lose its significance
10 through
11 alteration of its setting or environment. For example, a location used by an American
12 Indian
13 group for traditional spirit questing is unlikely to retain its significance for this purpose if
14 it has
15 come to be surrounded by housing tracts or shopping malls.
16 The Sacred Lands listing of the Banning Ranch site as a traditional cultural landscape
17 notes that
18 the entire site was used for religious and medicinal cultural purposes, was a village site
19 connected to the larger village of Genga, and that the oil operations on the site have
20 destroyed
21 the integrity of some archeological deposits but have not destroyed the religious and
22 cultural
23 significance of the site to date. However, the Native American tribe that listed the site
24 and other
25 tribal groups believe the introduction of housing and commercial development and
26 roads across
27 the site as proposed, with the introduction of noise, lights, impacts to the wildlife, etc.
28 would
29 destroy the character of the landscape and would threaten the cultural and religious
30 significance
31 of the property, which is currently primarily open space.
32 As of now, the site as a whole is not listed with SHPO and has not been deemed eligible
33 for
34 listing. However, additional testing may be necessary and additional review by Federal
35 agencies
36 is required. If the archeological sites are connected and NAHC or SHPO determines
37 that it does
38 constitute a traditional cultural landscape, then the development project would not be
39 avoiding all known archeological resources. then as conditioned the applicants are
40 required to
41 apply for a permit amendment to avoid parts of the land that are deemed eligible for
42 listing on
43 SHPO in order to be found consistent with Coastal Act policies. If burials or significant
44 resources are found during grading, applicants are required to leave the burials in-situ
45 and apply
46 for a permit amendment to address them.

1 The clean up of the site as proposed would impact archeological resources, and the
2 residential and commercial development plan as proposed would likely avoid known
3 resources, however it would not attempt to avoid or cap unknown resources found
4 during
5 the grading process. Additionally, only two of the nine affected tribal nations have
6 supported the proposed project, mainly because there are additional unanswered
7 questions
8 regarding the status of the land as a sacred landscape, and some tribal groups feel it is
9 premature to make a decision without the opinion of SHPO on record. Because of the
10 public process mandate in the Coastal Act, tribal groups should be involved in the
11 planning
12 of the project and should have sufficient information about the status of the land as a
13 5-15-2097 (Newport Banning Ranch, LLC)
14 119
15 sacred land before the Commission approves a development project on the site. While
16 Federal permitting processes usually do not take place until after the state and local
17 permits are approved, the project could be conditioned to return for an amendment to
18 limit the scope of the development should a federal agency determine that the site
19 cannot
20 support the development plan as proposed. The proposed project, which results in
21 avoidable impacts to cultural resources without providing reasonable mitigation is not
22 consistent with Section 30244 of the Coastal Act.

23 ////////////////

24
25 /S/JOHNTOMMY ROSAS
26 JOHN TOMMY ROSAS
27 TRIBAL ADMINISTRATOR
28 TRIBAL LITIGATOR
29 TONGVA ANCESTRAL TERRITORIAL TRIBAL NATION
30
31
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33
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35



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February 3, 2017

Item Th12a

VIA ELECTRONIC MAIL & U. S. MAIL

Dayna Bochco, Chair
Honorable Coastal Commissioners
California Coastal Commission
45 Fremont Street, #2000
San Francisco, CA 94105

Re: CDP Application No. 5-15-2097 (Newport Banning Ranch, LLC)
Item Th12a (Revised Findings)

Dear Chair Bochco and Commissioners:

On behalf of Newport Banning Ranch LLC (“NBR”), we appreciate the opportunity to comment on the above Revised Findings. Unfortunately, Staff’s recommended Revised Findings do not accurately reflect the Commission’s discussion following the close of the September 7, 2016 public hearing or the basis on which the Commission acted to deny the Newport Banning Ranch Project (“Project”). For the reasons set forth below, NBR respectfully requests that the Commission continue the agenda item and direct Staff to make changes and to bring back the Revised Findings for adoption at the next regularly scheduled Commission meeting.

The Commission made clear that in denying the Project, there remain unresolved issues and the Commission was not prepared to “find a project” between NBR’s proposed project and Staff’s recommendation without the opportunity to consider additional site-specific and scientific information. Set forth below are quotes from the Commission’s deliberations from a number of Commissioners reflecting that decision. The draft Revised Findings, however, do not reflect this direction. If adopted in the form proposed, the draft Revised Findings would preempt further Commission review and, despite the Commission’s discussion, simply adopt the conclusions regarding Coastal Act consistency that Staff recommended in the September 2016 staff report – which was not the action taken. More significantly, the current draft of the Revised Findings reflect the lack of nexus between the evidence that was presented to the Commission and the Commission’s deliberations – precisely the basis for the Applicant’s decision to legally challenge the Commission’s decision for abuse of discretion.

A copy of this letter has been provided to Coastal Commission Staff

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The Revised Findings should therefore be revised before Commission adoption. Minor revisions to the “Overview” portion of the staff report are needed to conform to the sentiments expressed by Commissioners, and we have included a short redline for that purpose. The Commission made no final determinations regarding the consistency of the Project with the applicable Chapter 3 policies of the Coastal Act, although the draft Revised Findings, if adopted without revision, would do so as to all of the policies. Minor revisions to the Revised Findings should be made to permit the Commission to fully consider all of the information which bears on the Project so that it can make the informed judgment the Commission felt it was unable to make at the conclusion of the hearing. And, the conclusion reached as to each coastal resource policy should read as follows:

“Without additional site-specific or scientific information, the Commission is not able to determine whether the Project, as proposed or conditioned, is not consistent with Section ____ of the Coastal Act.”

Accordingly, the Commission should continue the agenda item and provide direction to Staff to make changes and to schedule the Revised Findings for adoption at the Commission’s next regularly scheduled meeting.

I.

The “Overview” to the Revised Findings

The Introduction to the draft Revised Findings – the “Overview” – does capture in many respects the general sentiment expressed by Commissioners in acting to deny the permit application. The draft Revised Findings themselves, however, do not reflect that sentiment or the articulated basis for the action taken. As the hearing transcript demonstrates, there is instead a fundamental “disconnect” between the comments that the Commissioners made and Staff’s recommended Revised Findings which, if adopted, do nothing more than cement Staff’s incomplete view of the evidence and its analysis and conclusions from the September 2016 Staff Report.

The Overview correctly states that Commissioners noted they were not opposed to approving development on a portion of the site, but that they “were not prepared to ‘find a project’ between the applicant’s project and the staff recommendation and therefore did not make an amending motion at the hearing.”

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(Overview, p. 4.) Commissioners clearly expressed that they were not comfortable making the decision without the benefit of additional site-specific and scientific evidence and that there remain many unresolved issues which require more attention. Staff's version of the Revised Findings nonetheless proceeds to resolve those issues anyway and base conclusions regarding Coastal Act consistency on Staff's own evidence to the exclusion of the rest of the substantial evidence in the record, including that presented by NBR, and the information that the Commission has not yet had the opportunity to fully review, analyze and consider.

Put another way, Staff has framed the Revised Findings to make determinations that the record demonstrates the Commission did not make and which, consequently, would undermine and foreclose the very flexibility and additional information the Commission has requested that would enable NBR, Staff and the Commission to achieve an approvable project in the future.

Attached are the following:

- (1) A redline of the "Overview" portion of the draft Revised Findings (Pages 2-4);
- (2) A matrix which neatly encapsulates the Commissioner comments made after the close of the public hearing, broken down by issue area; and
- (3) A summary of some of the evidence on key issues that has not been reflected in the draft Revised Findings.

It is abundantly clear from the evidence reflected in the record that there were no "Commission" determinations as Staff suggests in the Revised Findings. Rather, the door was left open to continue the dialogue, to review site-specific and scientific information, and then, at a future hearing, to make final decisions on whether or how to approve the NBR Project consistent with Chapter 3 policies.

The Overview accurately states that the Commission "did agree that a substantial amount of development was likely approvable on the site, although the Commission determined that more information was needed to conclusively identify the precise location of the developable acres." The absence of any precise determination was highlighted by several earnest Commissioner comments:

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- Commissioner Shallenberger was the first Commissioner to offer comments: “They’ve [NBR] has made it clear with a 55-page document, which we got this morning, which has been, you know, underlined, redlined, how they would like this to be, taking Staff’s language and crossing out and adding. *Something that we clearly are unable to read, much less analyze.*” (Transcript, p. 365; italics added.) Thus, there was no determination made on the issues raises, much less consideration of NBR’s detailed, written response to the Staff. Instead, Commissioners made loud and clear that they needed more information and that the NBR Project is one that, in the words of Commissioner Shallenberger, the Commission needs “to get right.”
- Commissioner Luevano echoed Commissioner Shallenberger’s comments: “And there are too many issues here that seem unresolved or at least still require more attention,” and again that “there just isn’t an opportunity in my opinion to get this right tonight, and we’d need to get it right.” (Transcript, pp. 397-398.)
- Commissioner Cox stated: “I think that the proposal that has been laid out by the developer I think is – is not something’s probably going to be sustained based on the staff’s recommendation. On the other hand, I think the staff’s recommendation is – is over limiting . . . I’m somewhere in between. I . . . don’t like necessarily staff’s limitation in regards to the – the 19 acres or whatever the residual of that is, I’d really like to see some additional opportunities, maybe, to take another look at the – the south parcel.” (Transcript, pp. 441 and 443.)
- Commissioner Vargas stated: “. . . [M]y fear on this tactic of – of denying the project is that we’re basically taking the commissioners’ ability to have a negotiation and a discussion. We’re taking our power out of this, and we’re handing it to a judge, potentially. . . . So I . . . at least want to have a discussion with my fellow commissioners in terms of whether they see any other opportunities for adaption of the staff recommendation, that might save us from a scenario like that.” (Transcript, p. 393.)
- Commissioner Uranga stated: “. . . there is a project, staff is recommending a “yes” vote, so there is something there. It’s just not to the capacity or to the level that is acceptable to everyone. I mean, there’s still a lot of issues,

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questions, things to clear up, because there's still some debate on this, obviously. There's a lot of debate on this. And there's probably still some opportunity to come to a middle ground on this. We just haven't reach that yet." (Transcript, p. 432.)

- Commissioner Turnbull-Sanders: "And I share the concerns, I believe, of – of my fellow commissioner, Commissioner Luevano in that if we make a decision today, there is no way to kind [of] undo whatever – whatever happens going forward, and in light of particularly a level of raising of consciousness around issues pertain to indigenous people's rights . . . I think it's very important that we make sure that we get that piece of it right. (Transcript, p. 402.)
- Chair Bochco: "So let me just say that I don't think that if we support this motion of a denial today that that's the end of this project. I don't think that that's going to happen." (Transcript, p. 446.)

The clear sentiment of Commissioners was that more information is required so that the Commission can "get it right." But, the further information becomes irrelevant and the Commission's ability to "get it right" would be fruitless if the Commission were to adopt the Revised Findings, without changes, along with Staff's conclusions at this point regarding Coastal Act consistency.

II.

THE "DISCONNECT" BETWEEN THE OVERVIEW AND

DRAFT REVISED FINDINGS

While Staff took pains in the "Overview" to acknowledge the Commission's discomfort at making a decision at the conclusion of the hearing without having a fuller opportunity to consider everything, the rest of Staff's draft Revised Findings, if adopted, would simply preempt any future effort by the Commission to fully evaluate the evidence and, if possible, to find a middle ground by virtue of Staff's proposed conclusions that would lock its September 2016 recommendation in place.

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Again, as noted, Commissioner Shallenberger's opening comments astutely explained:

"They've [NBR] has made it clear with a 55-page document, which we got this morning, which has been, you know, underlined, redlined, how they would like this to be, taking staff's language and crossing out and adding. *Something that we clearly are unable to read, much less analyze.*" (Tr. p. 365, line 4; italics added.)

In fact, although the Commission conducted a lengthy public hearing on what admittedly is a complex project, NBR's submissions were not timely provided to the Commission. This included NBR's 10 expert reports which addressed, in particular, the biological issues. It included Psomas' "Banning Ranch Archaeological Testing Memorandum," which concluded that "1) no new tribal cultural sites were found; 2) There are no impacts to the known archaeological sites on the property; 3) nothing of significance was found in the proposed development area; and 4) avoidance measures incorporated into the Project's design will eliminate impacts to historic properties." It also included a revised set of grading plans that modified the development plan and Bluff Road specifically to eliminate all Staff proposed ESHA and wetland impacts, which Staff explained it would not and did not review or analyze.

While NBR submitted its 55-page document (a comprehensive letter addressing the issues, exhibits, and a detailed redline of the conditions) on September 2, 2016, the Friday before the hearing, it was, unfortunately, buried in the midst of a 231-page addendum posted to the Commission's website at 3 p.m. the day before the hearing and, as Commissioner Shallenberger noted, was not provided to Commissioners until the morning of the hearing. While we have great faith in the Commission's ability to digest documents, that timing sequence, coupled with the sheer amount and nature of the material, would not have enabled the Commission to digest NBR's detailed written arguments and reference to the evidence.

So, indeed, the Commission was careful to determine only that "more information was needed to conclusively identify the precise location of the developable acres," (Draft Revised Findings, p. 3), that "the differences between staff's recommended conditions and the applicant's were too great to bridge at the public hearing" (*id.*, p. 3), and that "the Commissioners were not prepared to 'find project' between the applicant's project and the staff recommendation." (*Id.*, p. 4).

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The transcript of Commissioner comments following the close of the public hearing makes clear that the Commission made no determination whatsoever as to conformity of the NBR Project with Section 30240 (ESHA), Section 30233 (wetlands), Section 30231 (clean-up and site remediation), or Section 30244 (archaeological resources). The best that can be said is that the Commission was not satisfied that it had before it sufficient site-specific and scientific information relating to the burrowing owl or evidence that the Project, as proposed or conditioned, would avoid all cultural resources on site. (*Id.*, p. 3.) The Commission made no other determinations, but simply left the door open to secure additional information so that it could make an informed decision on whether or how ultimately to approve the Project. This was prudent, but it would be a mistake to interpret this as an endorsement of the staff report that Staff prepared for the September 2016 hearing. But that is what the draft Revised Findings, if adopted, would accomplish.

Directly contrary to the Commissioners' comments, the draft Revised Findings would adopt, almost in toto, the analysis and definitive conclusions that Staff recommended in its September 2016 staff report on virtually every issue – ESHA and ESHA buffers (*e.g.*, pp. 7, 42-43, 53, 62), burrowing owl and foraging habitat and buffers (*e.g.*, pp. 45, 47-53, 55-59), potential ESHA qualifying as ESHA (*i.e.*, the highly degraded area adjacent to occupied Gnatcatcher habitat which protocol surveys for years have indicated no occupied Gnatcatcher use – *e.g.*, p. 42), Bluff Road (*e.g.*, pp. 7, 47, 57), fuel modification in buffers (*e.g.*, pp. 59, 64), seasonal features C and CC and 100' wetland buffers (*e.g.*, p. 88), and site clean-up in wetlands (*e.g.*, p. 85).

It is important to understand that preemptive statements appear throughout the Revised Findings. For example, at several places, the draft Revised Findings retain the flat statement from the original Staff Report that, in Staff's view, approximately 19 acres of the property could be developed.¹ (Draft Revised Findings, pp., 3, 7, 61 and 133.) The draft states that it is necessary to designate 64 acres of grasslands for burrowing owl foraging. (*Id.*, pp. 49, 62.) And, the draft further states that new development "outside of the mapped constraints" would be approvable. (*Id.*, p. 4; emphasis added.)

¹ For the sake of accuracy, the habitable developable area is not 19 acres at all, but rather less than 10.2 acres of the 401-acre site, reduced to three tiny, disjunct areas, which could not possibly support "hundreds" of housing units, as Staff suggests.

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These preemptive conclusions are completely inconsistent with the sentiment expressed by the Commission and reflected in the Overview. As discussed in Attachment 3 to this letter, the issue of burrowing owl ESHA and foraging habitat completely unraveled at the public hearing. Of note, Commissioner questions demonstrated inadequate literature view, that the Commission's ecologist, by her own admission, is not "a burrowing owl expert," and that the paid opposition biologist on which Staff relied based his foraging habitat opinion on a faulty assumption -- "breeding burrowing owl," not overwintering burrowing owl. Without the further information sought by the Commission, the definitive reference to "19 acres" (which had been 55 acres in the May 2016 staff report), or definitively designating "64 acres" of burrowing owl foraging habitat which would wipe out the entire South Village hotel/hostel/park/ residential development, or locking in Staff's "mapped constraints" makes no sense and it is at best premature and unsupported. Constraints will have to be "remapped," as informed by the additional information.

Pages 84-86 of the draft Revised Findings also include new additions to the discussion of whether clean-up activities conform to the wetland policy in Section 30233 of the Coastal Act. But, this was never discussed in the September 2016 staff report and addenda, was not raised or discussed by Staff at the hearing, and was certainly not discussed by Commissioners. That kind of post-hoc addition to Revised Findings is not proper.

Most importantly, at this point, Staff has presented basically one side of the evidence, its staff report from the September hearing. The draft Revised Findings will therefore necessarily only reflect that information. But, while the Commission has called for additional site-specific and scientific evidence to inform its decision, there is overwhelming evidence in the record right now that the Commission has not had the opportunity to consider. Whether it would ultimately produce a different result is not the issue. It is that the Commission have that evidence in hand and the opportunity to analyze and address it before looking for a way to bridge the gap between Staff and the Applicant and finally committing one way or the other on this Project.

Attachment 3 is a summary of some of the evidence on key issues that has not been reflected in the draft Revised Findings. This evidence is provided merely to demonstrate that while the Commission, in effect, denied the application "without

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prejudice,” the Revised Findings should be modified in a way that, like the Overview, preserves the parties’ options for future review.

NBR has edited the “Overview” portion of the draft Revised Findings to conform them to the Commissioners’ comments. (*See* Attachment 1.) We have not, however, gone line by line through the draft Revised Findings to propose redlined changes. That, we believe, is better addressed by Staff through direction by the Commission. We also would be happy to provide our own thoughts to Staff. As noted, while the draft Revised Findings simply recite Staff’s view of the evidence as of September 2016, without regard to the additional evidence in the record and which the Commission has requested, NBR respectfully submits that the conclusion as to each coastal resource policy issue should read as follows:

“Without additional site-specific or scientific information, the Commission is not able to determine whether the Project, as proposed or conditioned, is consistent with Section ____ of the Coastal Act.”

That would be consistent with the Commission’s determination that it neither fully agreed with Staff nor fully agreed with the Applicant, and would enable the Commission in the future to make a well-considered decision concerning the Project, based on all the evidence. To simply adopt the Revised Findings proposed by Staff, however, would instead place the Commission and the parties in a straight-jacket.

III.

CONCLUSION

There was a recognition by Commissioners that the NBR Project offers substantial public benefits – several hundred acres of oil field abandonment, site remediation, ESHA and wetland restoration, and miles of public access to an area that currently is fenced-off and highly degraded. Even without the further information the Commission would like to see, Staff’s reference to 19 acres of developable area is not 19 acres at all, but rather less than 10.2 acres of the 401-acre site, reduced to three tiny, disjunct areas, which could not possibly support “hundreds” of housing units, as Staff suggests, much less an economically viable development meeting NBR’s reasonable investment-backed expectations sufficient to justify the \$75 million

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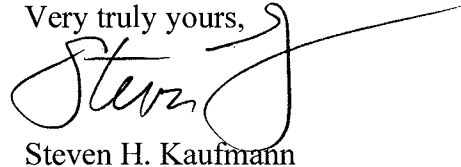
needed to produce the public benefits that Staff seems to think are constitutionally required on this Property.

The Commissioners' comments reflected the clear desire to ferret out further site-specific and scientific evidence so that the Commission might better determine whether and how to approve the NBR Project, consistent with the Chapter 3 policies of the Coastal Act. The Commissioners underscored their view that development of the NBR property is too important and that they want to "get it right." While the Commission very clearly concluded that it could not make that determination based on the state of the record, the Staff's recommended Revised Findings would force that determination, undermine the Commission's request for more information, and eliminate the possibility of a solution that might produce a win-win for the public and the Applicant.

For these reasons, NBR respectfully requests that after the close of the public hearing, the Commission move to continue the Revised Findings and direct Staff to make the modest changes requested above and bring back the Revised Findings for adoption at the next regularly scheduled Commission meeting.

We look forward to discussing these issues further with you at the hearing.

Very truly yours,

A handwritten signature in black ink, appearing to read "Steven H. Kaufmann", with a long horizontal flourish extending to the right.

Steven H. Kaufmann

Ccs (w/attachments):

Jack Ainsworth, Acting Executive Director
Karl Schwing, Deputy Director
Teresa Henry, District Manager
Amber Dobson, Coastal Program Analyst
Mike Mohler, NBR
George Basye, NBR
Chris Yelich, NBR

CALIFORNIA COASTAL COMMISSION

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Th12a

Filed:	12/16/15
270th Day:	9/11/16
Staff:	A. Dobson-LB
Hearing Date on CDP:	9/7/16
Staff Report on Rev. Findings:	1/21/17
Hearing on Rev. Findings:	2/9/17

STAFF REPORT: REVISED FINDINGS

Application No.: 5-15-2097

Applicant: Newport Banning Ranch, LLC

Agent: Mike Mohler, Brook Street Consulting, etc.¹

Project Location: 5100 Block of Pacific Coast Highway, Newport Beach, Orange County

Project Description: Abandon oil operations and clean and remediate soil; subdivide the 401 acre site into residential, commercial, mixed use, open space, park, and public street lots; grade 2.8 million cu.yds. of soil and construct residential and commercial development including approximately 12 acres of roads, 37 acres of residential with 895 residential units, 45,100 sq.ft. of commercial use, a 75-room resort and a 20-bed hostel; create 5 acres of park, and construct public trails within the 329 acre Natural Open Space Preserve, with oil operations to remain on 15 acres.

Commissioners on Prevailing Side: Commissioners Cox, Howell, Groom, Luévano, Shallenberger, Turnbull-Sanders, Vargas, Bochco, and McClure

Staff Recommendation: Adopt the revised findings for Denial of the permit

¹ Complete list of agents on file

5-15-2097 (Newport Banning Ranch, LLC)

STAFF NOTE

The ~~pending application~~ **application before the Commission in September 2016** ~~is~~ **was** the latest iteration of a proposal first submitted to the Commission in early 2013 to convert most of a 401-acre site known as Banning Ranch from an active oil field to a mixture of residential and commercial development, with large areas preserved as open space. A previous version of the ~~current~~ proposal for development of this site (CDP application 5-13-032) was heard by the Commission in October 2015. Although the Commission provided some direction, it did not act on the application at that hearing, and the item was continued, tentatively planned to be scheduled for the January 2016 hearing. Because of the impending deadline for Commission action pursuant to the Permit Streamlining Act (PSA) and the need for additional site visits, corrections to mapping and data, and ongoing working meetings, the applicant withdrew application 5-13-032 in December of 2015 and immediately submitted the proposal under a new application (5-15-2097). At the October 2015 hearing, the Commission made several comments and suggestions for a revised project and for staff and the applicant to work together to develop a revised plan, and several Commissioners asked staff to develop a recommendation of approval for a revised project that is consistent with the Coastal Act. In an effort to address changes needed to meet the requirements of the Coastal Act, there ~~have been~~ **were** additional working meetings with the applicant and three comprehensive site visits since the October hearing. Staff and the applicant ultimately agreed on a goal of having the item heard at the May 2016 hearing, but after a staff report was published for that hearing, the applicant requested a postponement in order to respond to the staff recommendation and granted an extension of the PSA deadline for Commission action. The PSA deadline ~~now requires~~ **required** the Commission to make a decision on this application before September 11, 2016 (at the September hearing) unless the applicant ~~chooses~~ **chose** to withdraw the application, **which they did not**. As always, the applicant has the right to re-apply after the withdrawal **or denial**, in accordance with Section 13056.1 of the Commission's regulations.

SUMMARY OF STAFF RECOMMENDATION AND COMMISSION ACTION

Overview

Staff is recommending that the Commission adopt the following revised findings in support of the Commission's September 7, 2016 denial of the coastal development permit application 5-15-2097. Fundamentally, the Commission determined that **absent consideration of additional site-specific information, as proposed, many elements of the project and many areas of the proposed development would be inconsistent with multiple Chapter 3 policies of the Coastal Act, which constitutes the Commission's standard of review for this project. On that basis alone, the Commission can, and did, deny the project.**

Staff did identify areas where **based on its analysis at the time, development could be allowed as consistent with Chapter 3. Commission staff identified a potential development area of approximately 19 acres, and while the Commission did not agree entirely with Commission staff's analysis, the Commission did agree that a substantial amount of development was likely approvable on**

5-15-2097 (Newport Banning Ranch, LLC)

the site, although the Commission determined that more information was needed to conclusively identify the precise location of coastal resources and the developable acres. Approximately 19 acres of the property could have been developed under the staff recommended conditions, and hundreds of units could have been accommodated on the identified acres, even though the property is currently only 4 legal lots.

Because the Commission agreed that large areas of the property seem developable, in theory, the proposal could have been conditionally approved, with conditions designed to revise the project in order to bring it into compliance with the Coastal Act. However given the large scale and size of the property and development proposed, the significant coastal resources and acreages and unresolved issues as to both, the number of places where development as proposed would be inconsistent with the Coastal Act, and the various number of ways in which the proposal could be revised, redesigned, or conditioned in order to bring the project into compliance with the Coastal Act; the Commission recognized the difficulty of conditioning the project to be consistent with the Coastal Act, and concluded at the time that it would not be appropriate, or even feasible, to condition the project from the dais in order to vote for approval of the project.

Further, as indicated above, the Commission was not satisfied that even with the conditions proposed by staff, the project would be consistent with the Coastal Act. For example, the Commission found that there was at least one subject matter where there ~~is~~was insufficient site-specific information (such as night time owl surveys) and information provided available in from the scientific body of research, namely (specifically the lack of information available to determine appropriate foraging standards for wintering, and not breeding, burrowing owls in Southern California), making it difficult to determine if the project as proposed would be consistent with Section 30240 without erring on the side of resource conservation.

Additionally, the Commission was not able to determine if the project, as proposed or as conditioned, would avoid all cultural resources present on the site, because the boundaries of the known resources were not mapped and the status of the property as a religious, cultural landscape is still in question. Thus, the Commission determined it was appropriate to deny the project and provide guidance to the applicant regarding how to craft an approvable alternative project in the future.

Finally, the applicant made it clear that they were in opposition to the staff recommended conditions, and therefore the Commission denied the proposal, because without the conditions, the project ~~is~~would not be consistent with the Coastal Act. The applicant did not agree with the staff recommended special conditions and presented their own set of conditions to the Commissioners. The Commission found that the applicant's proposed conditions would not bring the project into compliance with Coastal Act requirements and that the differences between staff's recommended conditions and the applicant's were too great to bridge at the public hearing. Thus, the Commission exercised its discretion to deny the project. The denial of a project does not mean that the Commission is unwilling to consider any form of development. It is a denial of the current proposal, not a denial of any and all development forms that may be considered in the future.

5-15-2097 (Newport Banning Ranch, LLC)

The Commission is under no obligation to redesign a project that as proposed is inconsistent with the Coastal Act in order to make it consistent through the imposition of conditions of approval. Ultimately, none of the Commissioners supported the project, as proposed or with the conditions requested by the applicant, as being consistent with the Coastal Act.

Many of the Commissioners noted that they were not opposed to approving development on a portion of the site, but because the applicant could not accept the staff recommendation, the Commissioners were not prepared to “find a project” between the applicant’s project and the staff recommendation and therefore did not make an amending motion at the hearing. Denial of the permit does not constitute a takings or an exaction, as the applicants and landowners continue to have an economic interest in the on-going oil operations on the site, and there are many possible approaches to designing some additional, new development outside of the remapped constraints that would be approvable as consistent with the Coastal Act. Denial of the permit does not mean that the applicant cannot continue to pursue a coastal development permit for an alternative proposal on the site.

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Site Description and Project Summary

Banning Ranch is comprised of 401 acres, divided into 4 legal lots, and is the largest and last remaining privately owned lands of its size along the coast in southern California. Banning Ranch is located partly in the City of Newport Beach and partly within unincorporated Orange County, adjacent to the mouth of the Santa Ana River where it meets the Pacific Ocean ([Exhibit 1](#)). Despite its history of oil development and the presence of isolated areas that are severely degraded, the site as a whole continues to support a remarkable and unique array of sensitive coastal species and habitats, including nesting and foraging habitat for the threatened California Gnatcatcher, a very rare vernal pool watershed that supports the Endangered San Diego fairy shrimp, coastal wetlands, habitat for burrowing owls, and rare purple needlegrass grassland, as well as riparian habitat and coastal marsh lands. Banning Ranch contains a lowlands area consisting of approximately 130 acres of brackish and freshwater marsh habitat and a mesa (coastal terrace) that covers approximately 262 acres consisting of scrub habitats, grasslands, and vernal pools. The many arroyos on the site and marsh lands support rare and sensitive vegetation that provides habitat for many native animals including several rare species. The coastal bluffs and the canyon bluffs along the arroyos support rare and sensitive vegetation communities, such as coastal bluff scrub and California brittle bush scrub, and the Mesas contain native and non-native grasslands that both provide habitat for federally threatened and sensitive bird species living on the site. Commission technical staff has determined that approximately 219 acres of the property rise to the level of environmentally sensitive habitat areas (ESHAs) ([Exhibit 3](#)).

Numerous Native American archeological sites are present on Banning Ranch, which attest to the historic and widespread habitation of the site by the Gabrieleno and Juaneno tribes, and in turn, the site’s current cultural and historical significance. At the request of the Tribal Chairman of the Gabrieleno Tongva San Gabriel Band of Mission Indians, the state Native American Heritage Commission (NAHC) added the “Banning Ranch Cultural Properties and Landscape”

COMMISSIONER SHALLENBERGER	
Timing of Submissions	
“The developer has made it clear that they do not accept the staff’s recommendation, and they’ve made it clear with a 55-page document, which we got this morning, which has been, you know, underlined, redlined, how they would like this to be, taking staff’s language and crossing out and adding. Something that we clearly are unable to read, much less analyze.”	Page 365 Line 4
Rarity of Coastal Bluff Ecosystem	
“And this is a project that we have to get right. We can’t get just good enough on this one. And we can’t get just good enough on this one for a number of reasons. We heard earlier it is the only intact coastal bluff ecosystem left in southern California, other than Bolsa Chica. The only one. And so we have to do it right.”	Page 365 Line 13
Endangered/Threatened Species	
“It is the largest concentration of threatened and endangered species in all of Orange County.”	Page 365 Line 21
“We’ve already missed it on the Coastal Cactus Wren. It’s gone. The habitat has been destroyed, there is no more Coastal Cactus Wren on this land.”	Page 367 Line 3
“We heard from US Fish and Wildlife Service in 2007. They designated all of Banning Ranch as critical habitat for the Gnat Catcher. And yet there isn’t any agreement on protecting that habitat with an adequate buffer. The proposal is that the buffer in some cases be -- that the fuel modification be overlaid on the buffer which is to protect habitat for threatened species.”	Page 367 Line 7
Native Americans	
“We heard from Native Americans about the burial sites, sacred sites, ancestral tribal nations, residences and sites. You can’t make a mistake with that and then turn back when you find out that you didn’t have it quite right.”	Page 365 Line 23
“We have to have all nine tribes involved in this, not two out of nine. They don’t speak for other, they speak for themselves. So the risks are too high. We know that there any -- that there are many sites there that are eligible for listing on the Historic Register. They have to be avoided. And if there is actual consensus and proof that they cannot be avoided, they must be capped. And that’s not what’s being proposed here.”	Page 366 Line 18

SHALLENBERGER
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Attachment No. 2

The Burrowing Owl	
<p>“We heard from -- we heard about the Burrowing Owl. Dr. Bloom's letter, which I think was dated the 7th of this month, basically said he believes first of all that there's more than one owl there, the surveys that have been done have not been done at night, which is when the owls are out foraging, so, you know, if you wanted to find out how many Burrowing Owls are on this property, don't bother to go in the daytime. So we don't know, but we have to know, because if we're wrong, there will be no Western Burrowing Owls on this land.”</p>	<p>Page 366 Line 5</p>
<p>“Again, we heard from Peter Bloom in his letter that if the habitat is not protected for the Burrowing Owl, including foraging, because we all know, is why we stop for dinner, it doesn't do you any good to have a house if you don't have anyplace to eat. And that is precisely what we're talking about with the foraging. So he said that the owl will no longer exist on Banning Ranch if we don't get both the habitat including the foraging right.”</p>	<p>Page 367 Line 15</p>
Site Cleanup	
<p>“...we heard it from a lot of the supporters, and I think they have been misled in many ways to think that the only way that this land is going to get cleaned up is for us to approve this. But there -- we already have a consent order, and that consent order for the cleanup of many of these sites stands no matter what we do today.”</p>	<p>Page 368 Line 9</p>
Land Management	
<p>“So let me get to the part I really don't understand very well, and that's the partnership in this, because it seems to me as I understand it, that there are three partners in Banning Ranch. One Aera Energy, who came about some time in the 1990s when Exxon Mobil and Shell, they formed Aera Energy. So behind one-third of the partnership here, we have two oil companies. And then we have Cherokee Investment, who I confess I don't understand who they are, and then we have Burke Street... who is the developer here. So -- and then we have a trust, which I -- don't actually have independent knowledge of this other than what was reported in the LA Times, who actually has done some pretty darn good deep research on what's happening on the coast and the Coastal Commission.... If it's true that this -- that the trust, which is the project proponent is proposing that all of the open spaces and conservation area, whatever, be managed by this trust, and the -- the board of directors of the trust is mostly made up by members of the vice president of ...somebody from Brooks Street and somebody else from Aera, so we really, if that's true,</p>	<p>Page 368 Line 19</p>

does staff know if that's true? I just know what I read in the paper. But it is very troubling.”	
“...the trust is actually, the majority of the board is made up of people who represent, who come from the partners of Banning Ranch. If you don't know, that's okay. You know, it's -- I'm just saying I read it in the paper. Again, another very troubling thing. And I recognize that if we were to take the staff's proposal, they wouldn't necessarily go with this trust as the land manager, because we have lots of criteria that have to be -- to be sure that they're viable, that their tax status is in place, that they are really a non-profit.”	Page 369 Line 25

COMMISSIONER VARGAS <i>Vargas' comments appear here in plain text with his questions highlighted in red. Staff's responses appear in italics. Parts of the exchange have been edited for clarity.</i>	
The Burrowing Owl	
“So it seems that the recent discovery or -- or at least taking into account the recent information on the Burrowing Owl has kind of changed that and altered that, but prior to that we were -- we were getting close. So I really want to – maybe before moving forward, just kind of explore the Burrowing Owl question and maybe ask a couple questions of Dr. Engel.”	Page 373 Line 19
Burrowing Owl – Species of Special Concern Designation	
<p>“...the Burrowing Owl is a species of special concern, and I wanted to kind of understand how those types of determinations are made, and I believe, and correct me if I'm wrong, is that a California Department of Fish and Wildlife designation?”</p> <p><i>DR. ENGEL: “Yes.”</i></p>	Page 374 Line 3
Burrowing Owl – Viability in Populated Areas	
“So there's in that very large book that addresses several species is the Burrowing Owl, and there's about ten pages dedicated to that. So while I was reading those ten pages...I saw some kind of items that I just wanted to...ask questions about.... there's a section called "Ecological Requirements" for the Burrowing Owl, obviously. And the first sentence in that section of ecological requirements states as follows: ‘The Burrowing Owl is primarily a grassland species. But it persists and even thrives in some landscapes highly altered by human activity....’	Page 374 Line 18

SHALLENBERGER/VARGAS

<p>I'm just wondering. So it's saying in that sentence that the Burrowing Owl can persist and even thrive in some landscaped highly altered by human activity. Is that your understanding?"</p> <p><i>DR. ENGEL: "Yes, especially agricultural fields... And disturbed areas that have lots of... low-lying vegetation where their prey is, such as the Harvest mouse, lizards, insects, as long as their prey is there...they are...ground burrowers, they live in the ground squirrel burrows... So they are susceptible to disturbance, so when...you say they thrive in disturbed areas, it's not really where active human disturbance occurs, it's the fact that they were disturbed by agriculture...they're not natural habitats necessarily. And I want to say one more thing... They are also designated as an S3, a state 3 rare species. This is a new Natureserve, the California Department of Fish and Wildlife has adopted the Natureserve categories of rarity, and so in addition to being a California species of special concern, it's also listed as a state 3 rare species, in addition to the BLM and US Fish and Wildlife Service rarity rankings."</i></p>	<p>Page 375 Line 11</p>
<p>Burrowing Owl – Viability in Populated Areas continued...</p>	
<p>"...there's another sentence, which is as follows: 'In urban areas,' not agricultural areas, 'In urban areas such as much of Santa Clara County, Burrowing Owls persist in low numbers in highly-developed parcels such as Moffett Federal Airfield, in busy urban parks, and adjacent to roads with heavy traffic.' And it cites two different sources for that as well.... is that also your understanding?"</p> <p><i>DR. ENGEL: "Oh, I think that Moffett Field I think it's like an...airfield... And so there would be airplanes coming in and out... but there would be lots of open space for them... and since they are foraging at night, they're probably hunkered down in their burrows while the flights are going... it's not a housing development, it's an open – large open field."</i></p>	<p>Page 377 Line 1</p>
<p>"Right. But also says 'in busy urban parks and adjacent to roads with heavy traffic.'"</p> <p><i>DR. ENGEL: "Well, as...Dr. Bloom in his letter has said that one of their most -- the most causes of their mortality is the -- their roadkill. So I think that they maybe aren't wise about cars....and we could ask Dr. Bloom, who is here....and he...is a Burrowing Owl expert."</i></p>	<p>Page 378 Line 8</p>

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<p>“...so do we feel that the statement in this book...would not be an accurate statement...?”</p> <p><i>DR. ENGEL: “Oh, I think it's very accurate....we're looking at it myopically...there's a lot more around it...Dr. Bloom is right there if you want to...”</i></p>	<p>Page 378 Line 24</p>
<p>Burrowing Owl – Viability in Populated Areas continued...</p>	
<p>“It seems to me by reading this that there -- while staff has taken an approach to be as -- as cautious as possible to the Burrowing Owl or kind -- kind of arrowing to... to the extreme, there is citation in this Species of Special Concern book with relation to the Burrowing Owl that A, they even thrive, they in landscapes highly altered by human activity; and B, that they persist, and I'm using the words of the book, so “thrive and persist in busy urban parks and adjacent to roads with heavy traffic.”</p> <p><i>DR. BLOOM: “There's nothing inaccurate about...”</i></p> <p>“I'm sorry, I didn't ask you....Dr. Engel?”</p> <p><i>DR. ENGEL: “I noticed that you asked, that you did say they were in low numbers... I understood you to say that they were in low numbers, that they thrive in very low, very low numbers in some highly urban areas. And so we don't know if that is foraging area or burrow habitat...it makes a difference, and so I -- I think that the testimony of the birds is that there are less than three as of 2002, there are less than three breeding pairs known to exist in all of Orange County, and that they are nearly extirpated in a highly urban area... where else do they go in those areas? They are definitely in low numbers...that is not their preference, but if they have nowhere else to go, they will...live there.</i></p>	<p>Page 380 Line 4</p>
<p>“‘However,’ the quote, ‘However, urban development at moderate levels appeared to benefit owls by increasing prey availability,’ in parentheses, ‘(arthropods and lizards) near homes and reducing mortality from natural causes....’ What are your thoughts on that?”</p> <p><i>DR. ENGEL: “You know, to be honest...I am not a Burrowing Owl expert. I... have done reading and I have, you know, I have a background in science, but I think that, you know, so you're asking me what my thoughts on that are. I think that yes, in moderately urban... areas that have prey items for them, they would survive, they would not thrive in those areas. I think that high intensity residential development with the noise, the traffic, the artificial</i></p>	<p>Page 382 Line 20</p>

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<p><i>lights, would not be suitable to a Burrowing Owl given that it lives in the ground, and another problem for Burrowing Owls is that anticoagulants are used on their prey, and they could eat those and suffer from that... in southern California they are nearly extirpated because of human disturbance in the form of rapid urban development and loss of habitat. So yeah, I think that's what I think."</i></p>	
<p>Burrowing Owl – Research Methodology</p>	
<p>"So with regard to the Burrowing Owl, if I can ask, how did you establish the methodology...did you reference this book or this guidebook...Put out by the CDFW?"</p> <p><i>DR. ENGEL: "I... read a lot of the peer-reviewed literature, I read... the 2008-2012 California Department of Fish and Game conservation guidelines.... the BSSC that you're referring to, the 2003 listing petition by the Conservation Biology Institute. Do not - this is not meant to be insulting, but it doesn't take a brain surgeon to figure out what kind of foraging habitat they need. They prefer open grassland which it doesn't matter if it's disturbed, if it's ruderal that has low shrub and grassland, and that has ground squirrel burrows.... that's super important. And that has little disturbance, you know, your moderate disturbance doesn't seem to bother them. As I said, they are nocturnal, they're crepuscular, they forage primarily during the early morning and in the dawn or dusk, and so they're going to be down in the burrows hiding when a lot of the disturbance is going on in a moderate urban area.... definitely spent a lot of time reading, and...in all transparency, this didn't come to our attention until we received the letter from Dr. Bloom.... I was focusing on Gnat Catchers, on vernal pools... on wetlands, on the Coastal Scrub, so it was an oversight.... I thoroughly admit that we -- we dropped the ball on the Burrowing Owl."</i></p>	<p>Page 384 Line 7</p>
<p>Burrowing Owl – Required Acreage</p>	
<p>"Okay. I appreciate..."</p> <p><i>MR. AINSWORTH: "I would like to make one point...looking at the disturbed landscapes that you were describing...in that reference... what's not mentioned are the acreage requirements that the Burrowing Owls need in order to thrive in those environments. So those environments that you describe may have a fair amount of large acreages and the burrows themselves may be separate from those moderate urban areas. I think that's a critical point that we need to focus on as well.... Dr. Bloom may have insight into that, but I think that's a critical component of what you were citing</i></p>	<p>Page 386 Line 3</p>

VARGAS

<p><i>there as there's a certain critical mass of acreage, grassland that those birds need, and it is a large area of acreage.... So even some of the urban parks you may mention that may be used could have large expanses... of grassland open space.... and the birds may not be thriving in those ... in those contexts either. They could be stressed."</i></p> <p>"So...I appreciate that. And I...certainly don't, you know, want to insinuate that...you didn't apply a strict methodology to this. I'm just -- I think with regard to the Burrowing Owl and with regard to what I read, and again there's a quote here regarding their persistence, 'and adjacent to roads with heavy traffic.'"</p>	
Burrowing Owl – Impact of the Bluff Road	
<p>"...I'm just curious, with regard specifically to the Burrowing Owl, and that Bluff Road extension, would the Bluff Road itself, it seems to me based on what this is saying in this species of special concern handbook, that the Bluff Road wouldn't by itself lead to extirpation of this Burrowing Owl. Do you feel that's -- is that a correct assumption to make, or is that a leap or..."</p> <p><i>MR. TEUFEL: "If I could just jump in. In that...same reference you're referring to, I'm familiar with that, it actually sits on my desk right in front of my computer.... I bought it myself, and refer to it quite frequently. But there's a really critical section in that -- in that chapter on Burrowing Owls and it's called 'Threats.' And one of the important statements in that section reads as follows: 'In addition to loss of nesting burrows from extermination of ground squirrels, developed environments pose a substantial risk to Burrowing Owls from mortality caused by traffic. Owls nesting along roadsides or parking lots are at greatest risk, although owls foraging along roads over a kilometer from the nest burrow,' and then it goes on to note a number of citations and go into a little more detail about specific cases where that's -- that's occurred. And I think that was a really critical part of our analysis as well in evaluating not only the development, but the -- but the road, and as Dr. Bloom noted earlier and mentions in his letters, traffic is a particular cause -- noted cause of mortality for these birds."</i></p>	<p>Page 387 Line 20</p>
Burrowing Owl – Consideration of Alternative Conservation Strategies	
<p>"So we're going to get into dueling quotations, so the... next page on that under 'Management and Research Recommendations for the Burrowing Owl,' it... highlights two particulars ones that I'm just curious of the thoughts of staff on. For the Burrowing Owl, one of the management and research recommendations is 'maintain suitable vegetation structure through mowing, re-</p>	<p>Page 389 Line 6</p>

<p>vegetation with low-growing and less dense native plants or controlled grazing as appropriate.’ And...the second highlight is ‘Assess various strategies for maintaining owl populations in urbanizing areas.’ Did we assess different strategies for...for this particular approach? Were there other strategies for maintaining owl populations in this particular area that we considered?</p> <p><i>DR. ENGEL: “Did we consider other strategies such as mowing the - the habit...”</i></p>	
<p>No, no.... I referenced that as something that's in the management and research recommendations, but in particular there's another recommendation which is Assess various strategies for maintaining owl populations in urbanizing areas." And I'm just wondering if, you know, I -- I think that in other circumstances where there have been Burrowing Owls on developments, there have been other kind of strategies that have been contemplated."</p> <p><i>DR. ENGEL (record attributes this to Vargas, but seems like a mistake): “Well, we did not assess different strategies since the actual exact habitat that they need is right here at this site, and they are using the site now for overwintering, and so no, it was not in our purview to need to assess different strategies.”</i></p> <p><i>MR. TEUFEL: “Just to add to that real briefly.... I think the primary strategy that we evaluated was conservation of their foraging and nesting areas... And that was reflected in our recommendations.”</i></p>	<p>Page 390 Line 2</p>
<p>Burrowing Owl – Potential Acquisition of School District Land for Preservation</p>	
<p>“So, and this is why I bring up that Newport Mesa Unified School District, and I haven't talked to anybody, the applicant or staff or anybody, really about this, but I'm just wondering, there's an 11 and a half acre parcel there that is right next to where these Burrowing Owls have been sighted. It seems like prime candidate for this open space habitat preservation as well, except that it's just now owned by the applicant. And it's 11 and a half acres. I'm curious to ask the representative of the applicant whether they -- whether they would consider a condition that required them to seek the purchase of that parcel so that they can create a dedication of open space preserve and habitat for that Burrowing Owl in an -- in an area that is suitable for that foraging area, and in exchange, allow 11 and a half acres on one of the areas that they were proposing to develop anyway. I don't know if anybody, and again, I'm just -- I'm just shooting ideas here, but I think it's worth having a conversation.”</p>	<p>Page 394 Line 19</p>

Newport Banning Ranch
9/7/16 Hearing – Commissioner Comments

<p><i>MR. MOHLER: "Chair Bochco, members of the Commission, Mike Mohler for Newport Banning Ranch. It's certainly thinking out of the box, but public, government agencies don't do head-to-head negotiations like that. It would not be feasible from a process standpoint."</i></p>	
<p>Vargas on the Prospect of Litigation</p>	
<p>"...I feel like there's a you know, our staff counsel had mentioned earlier that, you know, it's a tactic of developers to ask for the moon and then only get a piece of that, and make us feel guilty about it, but that's what they were going for anyway. But another tactic, you know, from the other side that I've obviously always observed is...demanding nothing, and...sending that to litigation. So my fear is that if we move towards a project denial, such as the maker of the motion is seeking, that we're going to be going towards a -- a scenario of litigation. Right?"</p>	<p>Page 393 Line 4</p>
<p>"Because if we're denying this project in its current state, then we -- then, you know, the applicant can assert some type of taking, and that goes to litigation. I've seen this, you know, I've only been on the Coastal Commission for I think three and a half years now, but I've seen this a couple of times in -- in my tenure where we -- we take this tactic, things move to litigation, it moves to courts with judges that don't necessarily have the same understanding of the Coastal Act as our staff does, nor as the commissioners do. And we get a decision remanded back to us that forces our hand and makes us approve a project that we probably wouldn't have wanted to approve anyway. So my -- my fear on this tactic of -- of denying the project is that we're basically taking the commissioners' ability to have a negotiation and a discussion. We're taking our power out of this, and we're handing it to a judge, potentially. And that's my concern about this. So I... at least want to have a discussion with my fellow commissioners in terms of whether they see any other opportunities for adaptation of the staff recommendation, that might save us from a scenario like that."</p>	<p>Page 393 Line 17</p>

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COMMISSIONER LUEVANO	
Need to act on staff recommendation	
<p>“I have to put my trust in staff that they have, you know, worked with the applicant, I believe the applicant has worked in good faith with staff, and they aren't in agreement, and that's why we're here, and I feel like we need to act on what the staff has recommended. So that's my reasoning in terms of -- of seconding the motion. And without having to reiterate, I want to -- I just want to echo all of the comments that Commissioner Shallenberger made in proposing her motion. I mean, there just isn't an opportunity in my opinion to get this right tonight, and we'd need to get it right.”</p>	<p>Page 397 Line 18</p>
Avoiding past mistakes (Playa Vista example)	
<p>“I'm from Los Angeles, I grew up there, and one of the last remaining wetlands in Los Angeles County, Playa Vista, was developed probably now more than 20 years ago, and at the time it was talked about as a very important and valuable resource. And I don't know, you know, I don't know if anyone's done any polling, but I would imagine that there are probably as many people, experts and residents included, that today would say that that was a bad idea, as there are people who would say it was a good idea. And I just don't want to make the same mistake here.”</p>	<p>Page 398 Line 5</p>
ESHA/The bluff road/The burrowing owl	
<p>“And there are too many issues here that seem unresolved or at least still require more attention, and I -- I -- I don't want to bring Dr. Bloom because I feel like we could be here, again, all night, but the ESHA concerns, the -- the impacts to ESHA with regard to the Bluff Road that staff has outlined to the species that we've talked about, the Burrowing Owl.”</p>	<p>Page 398 Line 18</p>
Native Americans	
<p>“...I have some concerns about what I've heard today, you know, very distinct and different opinions about how outreach was done to Native American tribes, and the input that they've able to have in this process. And I just can't in good conscience go forward the support something when there's that much question in my mind.”</p>	<p>Page 399 Line 2</p>

LUEVANO

COMMISSIONER TURNBULL-SANDERS

Turnbull-Sanders' questions to staff are highlighted in red. Staff responses appear in italics.

Subsurface rights and takings analysis

"I wanted to start first with someone that was mentioned in the -- in the public comments section -- session, and that was related to the bifurcation of the application, the separation of the oil development from the above-ground development and maybe perhaps our counsel could in on this, Mr. Helperin, you had mentioned three kind of parts of the standard for determine when a taking might occur, and concluded and went through an analysis and basically determined that in your opinion and in staff's opinion that a taking would not occur in this -- in this instance. And I would like to get some clarification on how the bifurcation process works, separating the subsurface rights from the developable rights above the surface, and whether or not the oil development, the right to develop oil is part of that takings analysis, and maybe just kind of to close the loop on what Commissioner Vargas was mentioning about the potential takings if there was an absolute kind of denial...of the application... whether that would subject us to a higher risk for a takings claim."

Page 399
Line 16

MR. HELPERIN: "Well, I actually think there would be a lower risk of the type of taking that I was focusing on primarily, which is exactions, because an exaction as I mentioned earlier is a requirement to either convey a property interest or requirement to pay a fee, and there was an argument made by the applicant that the conditions recommended by staff involved such exactions. A denial would clearly not involve an exaction, so it would have less of a risk of that type of regulatory taking. The other two types of regulatory takings that I discussed were complete denials of all the value in the property, and denial of reasonable investment-backed expectations. I think it's clear from everything that's been said here today, and everything that we would put in revised findings if we were to do a denial, that we are not -- that this Commission is not suggesting that they can't do anything with the property. The idea would be that as Commissioner Shallenberger said, we still have some way to go to figure out common ground about what they can do. And so I don't think there would be a high risk of either of the other two types of takings either. And with respect to your separate question, I believe it's a separate question, about takings of the oil interests or the mineral rights, there's a separate owner for those mineral rights, and whether or not they have the right to take some value from those mineral rights isn't really before this Commission. They're doing so currently, and they have certain

<p><i>rights to continue to do so, whether or not his Commission approves this project, approves a different project, or denies this project. So I think that's a separate question, if I'm understanding you correctly.</i></p>	
<p>Subsurface rights and takings analysis continued...</p>	
<p>"I guess my question is does the takings analysis include the subsurface rights or is that considered separately?"</p> <p><i>MR. HELPERIN: "I didn't consider subsurface rights when I was assessing takings today. I -- I, as I said just now, I don't think those are really before this Commission, there's no proposal to limit or deny those, they're currently being exercised, so I don't think there's much of an issue there, but I -- it was not part of what I discussed earlier, no."</i></p>	<p>Page 402 Line 1</p>
<p>Native Americans</p>	
<p>"And my concern is based on what was mentioned in public comment, whether there was adequate notice given to the -- the tribes that were represented. And I share the concerns, I believe, of -- of my fellow commissioner, Commissioner Luevano in that if we make a decision today, there is no way to kind undo whatever -- whatever happens going forward, and in light of particularly a level of raising of consciousness around issues pertaining to indigenous people's rights, everything that's happening around Standing Rock, I think it's very important that we make sure that we get that piece of it right."</p>	<p>Page 402 Line 21</p>

<p>COMMISSIONER MCCLURE</p> <p><i>*McClure's questions to staff are highlighted in red. Staff responses appear in italics.</i></p>	
<p>Site contamination – impact on the food chain</p>	
<p>"Yes, I have several questions in relationship to the contamination and how it affects the critters that live on the property. And primarily you mentioned that sometimes the pesticides or the -- the poisons that are used, for instance, for a rat population in a -- in a neighborhood can reach to the owl in relationship to that they absorb that. Is -- are hydrocarbons absorbed the same way in...animals... does the animal absorb the hydrocarbons into their system and potentially poison up the food chain?"</p> <p><i>DR. ENGEL: "Martha, I really don't know. I do not -- I can't imagine that unless the hydrocarbons are in the prey that they're eating, that they would be taking that into their system and have it bio-accumulate, but their prey consists of insects, they eat a lot of birds,</i></p>	<p>Page 403 Line 13</p>

<i>the owls, and they eat mammals and reptiles. Cassidy knows more, but the – these hydrocarbons are like two feet below the surface.”</i>	
Site contamination - impact on the burrowing owl	
“And so my concern is that if we are wanting to protect the owl, if the owl's food source is potentially contaminated by hydrocarbons, then wouldn't cleanup be a priority for that critter...”	Page 404 Line 25
<p>“So that's my question is what is that level of contamination for these critters...Allison, you have that answer?”</p> <p><i>MS. DETTMER: “I think I maybe have a little bit to offer there. It's my understanding that the location of where the birds are is not an area where there is much in the way of petroleum hydrocarbon contamination. It's the area that has been cleaned up before that we spoke about earlier. And that -- this site actually as far as we know actually doesn't have a lot of oil contamination site-wide. I do have some experience with this another site in the Central Coast of California, and I think the -- the general answer to your question about -- about what the effect is on wildlife is it depends. It depends what -- what kind of contaminants are there, in what form they are there, and what concentration, and it depends on what the wildlife is that you're...talking about. So at the Guadalupe oil field, for example, they did an ecological risk assessment out there, which is a very large -- large undertaking. So it's...a difficult question to answer, because I think it all depends. Now, on this particular site, a lot of what they are going to be removing is this very old road base materials, which to my understanding is not a to wildlife. In the same way that soil contamination and groundwater contamination, where you have more free product is more of a threat to wildlife than weathered, old roads. Now, you want to eventually take it out, but it's my understanding that it doesn't have the same kind of risk.”</i></p>	Page 406 Line 3
Site contamination - Prioritizing decontamination	
“...I kept saying to myself, what is my priority? And for me, my priority is to get the poison out of the land, because I believe that that's what -- when you look at an oil well, especially with the nine miles of roads that have been covered with a very -- an oil product that is one that ends up with a plume as it moves through, where I know that some of the oil, the crude, the thick, thick oil has a tendency not to migrate. But when I was trying to look at studies as I'm reading this looking at the migration, the plumes, and how far does it go, I just kept coming back in my	Page 405 Line 14

head, we're not cleaning it up.”	
Site contamination – contamination levels observed	
<p>“So then I have a question in relationship to the -- back to the hydrocarbons, that there are 10 parts per million, there is required cleanup. And when in – when you look at C and CC, can you tell me how many parts per million were in there, in those tests that were done that actually identified the hydrocarbons?”</p> <p><i>MR. TEUFEL: “Yeah, I can -- I can actually -- if I can have some help from AGP, if you can pull up the PDF I gave you, the first staff response. Same one that you had up a little while ago. And I'm asking because it has a table that shows the exact numbers and quantities.”</i></p> <p>“Was it greater than 10?”</p> <p><i>MR. TEUFEL: “Well, I think the number is a hundred parts per million for some types of hydrocarbons, and this is from the remedial action plan that was approved by the Regional Water Quality Control Board highlighted in with...the yellow highlighter there and circled in the blue boxes are the two sample locations that have the elevated levels that exceed the -- the water board-approved hydrocarbon contamination levels. And there's -- there are two standards; one for open space areas and one for proposed residential areas. The open space standard I believe is a thousand parts per million, and the residential areas is 100 parts per million.”</i></p>	Page 413 Line 5
<p>“Okay. And the TPH from my notes the TPH was 10 parts per million.”</p> <p><i>MR. TEUFEL: “So 10 parts per million wouldn't trigger a cleanup under either standard.”</i></p> <p>“Okay. But – and this one a hundred, so it does trigger a cleanup.”</p> <p><i>MR. TEUFEL: “If you bear with me for just one second, I will pull up the table so I can give you the exact numbers. So at pool CC, the TPH number was actually 197 parts per million at just one site, and at the other site it was 212...So those exceeded -- again, those exceeded the 100 parts per million standard for residential, but they didn't exceed the 1000 parts per million for open space.”</i></p>	Page 414 Line 14

Site contamination – environmental hazards	
<p>“Okay. And then my next question in relationship to the soil and the water, if we were to leave it as is, what's the environmental hazard that would happen with rain and contamination?</p> <p><i>MR. TEUFEL: “The environmental hazard is that there would be -- hydrocarbons would be available for a take by plants, could be taken by anything else that interacted with it, probably burrowing invertebrates that would...interact with it.”</i></p>	<p>Page 415 Line 7</p>
Site contamination – natural remediation	
<p>“Okay. And then I'm going to jump back to the 158 acres that are considered contaminated at this point. If those 158 acres are left as is, what will happen?”</p> <p><i>MR. TEUFEL: “So to clarify one thing, I think that 158 acres lumps together quite a few different...proposed cleanup targets...And so not all of those things would necessarily be called contamination. That would include pipelines, that would include these asphalt-like roadbed materials that are really, you know, in some cases have been there for many, many decades and are heavily weathered and are pretty intact and are not migrating, spreading through plumes or anything like that. And so I would have -- no, I would actually go further and say that for the most of the contamination or the cleanup targets that have been identified by -- by NBR on this site, are those types of materials. Heavy chain hydrocarbons, heavily-weathered crude materials that have been there for a very long time, a lot of these roadbeds, and so in with those types of materials, they're not really going anywhere. They're just slowly continuing to degrade over time. That's the -- the soil remediation proposal that's part of this project, was actually just to collect a lot of the hydrocarbon-contaminated soil and spread it around so that the microbes that naturally exist in the soil out there can essentially just speed up the current process of breaking that material down. So that's occurring right now, will be happening tomorrow, and on into the future. The place of that breakdown probably wouldn't -- isn't occurring as fast as it would be as if they were putting it in these treatment cells and diking it and rotating it and applying water to it, you know, doing everything they could to accelerate it. But that's going to be occurring on into the future.”</i></p>	<p>Page 425 Line 5</p>
<p>“So if it's left alone, it's going to self correct and all... will be right with the world? Is that what you're saying?”</p> <p><i>MR. TEUFEL: “Over a long enough time period...absolutely.</i></p>	<p>Page 426 Line 3</p>

<p>“Okay. Hundred years, probably? Or?”</p> <p><i>MR. TEUFEL: “It really depends, and – and that's...something that's...interesting, too. There are some locations on site that have been identified as historic sumps, and so those locations are anticipated to have a much higher level of contamination, much more dense contamination, and so those would be likely on the order of decades before they are treated. The more dispersed, lower concentrations would be breaking down much faster.”</i></p>	
<p align="center">Burrowing owl – breeding vs. wintering</p>	
<p>“I have just a couple of questions, and one of the questions was on some of the research I was doing, that it looked like the California Department of Fish and Wildlife had put out standards of how much foraging space was necessary, but that was for a breeding pair when they are nesting. So were your conclusions brought forward on breeding pair nesting? Or wintering?”</p> <p><i>DR. BLOOM: Breeding pair nesting. There...is no nesting dat[a] in California, or no winter dat[a] in California.</i></p>	<p>Page 407 Line 17</p>
<p>“Exactly. There is no winter data, but the nesting data is there, but the conclusion of the -- of the report that I was reading stressed that the nesting foraging area has -- needs to be close to the -- to the burrow site because the pair, they leave and come back and feed and take care of the chicks. But my question is that when I asked and tried to find research on how far do they travel, I recognized that there were actually birds that I think were out of Canada that were found in the Imperial Valley of California in a non-nesting time. And I -- looking at those, I'm questioning is the -- since we know nothing about the wintering habitat foraging requirements because the rationale of the -- of the report that I read, and I think of what you put forward was that when they are nesting they need to stay close to the burrow, but when they are not nesting and wintering, their foraging area expands dramatically. In fact, I think Dr. Dixon in his statement, and I don't know how you interpret his statement, that he felt that the foraging habitat on Banning Ranch isn't enough for -- for wintering, because they go such a long way, and he even identified the other two areas of open space that are close to the ranch. Can you tell me why he would have made that conclusion?”</p> <p><i>DR. BLOOM: Absolutely. Understand first that the bird is breeding, it has a home range. It has an area that might be -- that might go out a half a kilometer, it might go out two kilometers. And use</i></p>	<p>Page 408 Line 5</p>

<p><i>whatever the best available habitat there is within that area. The birds you're talking about that come in Canada is an entirely different behavior. That's migration. And... I might add that I didn't mention this earlier, but we actually have a location where an animal was banded in Pasco, Washington and re-sited and recaptured at Naval Weapons Station Seal Beach. Now, the habitats that those birds use on their -- on their breeding grounds in Washington are very similar to what they use in California or in Mexico. That is short grasslands, little bit of sagebrush, vacant agriculture fields."</i></p>	
<p>Burrowing Owl – population decline and possibility of recovery</p>	
<p>"And then my next question is in relationship to Bolsa Chica. And the lack of Burrowing Owls that have -- there hasn't been a sighting even though it's been a restored area that -- my question is when -- what will attract? I mean, I know that like for instance in the Imperial Valley they do actually artificial burrows and nesting because they're working on the rehabilitation of the Burrowing Owl because that was the breeding place. I question like, for instance, the Salton Sea that used to have a breeding, a huge breeding population and it's completely gone. So I'm not sure that wintering foraging habitat is what's going to assist this owl. I'm concerned that maybe this owl is possibly being poisoned."</p> <p><i>DR. BLOOM: "My first answer is that regarding -- regarding the state of California, it's declining statewide. There are no regions where the owl is increasing. To -- to back up a moment about the Imperial Valley, that population hasn't disappeared. There's still thousands of pairs. But it has diminished significantly, say, in the last 15. The reason they're not showing up as frequently as they used to at Bolsa Chica or anywhere else is that there probably are simply fewer of them...We have fewer wintering birds coming in. If you wanted them -- if we wanted them to be coming -- coming into Bolsa Chica or this ranch -- this, the Banning Ranch, you could establish artificial burrows and you might attract them. It may take a couple, three years, but they often do come in. And I would certainly recommend it if I was a consultant to consider that, if that was important."</i></p>	<p>Page 410 Line 4</p>
<p>Burrowing owl and other raptors – mapping and protection of foraging areas</p>	
<p>"Okay. And then I -- I'm going to go back one more time to the owl in relationship to other raptors....You said that we did do it once with another bird that we identified foraging, I forgot which one you..."</p>	<p>Page 421 Line 10</p>

<p><i>DR. ENGEL: "White-tailed Kites."</i></p> <p>"Okay. So we did it with the White-Tailed Kites, and when we did that, was there information available, scientific information, for instance...on the foraging needs?</p> <p><i>DR. ENGEL: "There was mapped foraging routes that were, you know, that were used to delineate the boundary of the foraging habitat, yes, that's true."</i></p>	
<p>"And -- but we don't have any kind of that type of mapping?"</p> <p><i>DR. ENGEL: "No, we do not."</i></p> <p>"... for the wintering. And will this kind of overlay of foraging, does that now become part of the osprey, does that now become part of any other raptor in California that we are as a commission going to have raptor foraging as our -- as our restraint for development?"</p> <p><i>DR. ENGEL: You mean for future projects?</i></p> <p>"Uh-huh."</p> <p><i>DR. ENGEL: "We -- we treat listed species as ESHA if they rise to the level of the state or federal listing, and where..."</i></p> <p>"Of level of concern."</p> <p><i>DR. ENGEL: "Species of special concern....Whether they are threatened or endangered, state 1 through 3 listed. And so we protect their nesting areas, and if the -- the particular species is reliant on the foraging habitat to persist, yes, we would protect their foraging habitat. And so in terms of non-listed species, when there is evidence over time of a particular area being used year by year, by a number of different raptors, we have protected their nesting sites, we have not up to this point that I am aware of protected non-listed foraging habitat for raptors."</i></p>	<p>Page 422 Line 3</p>
<p>Burrowing owl and other raptors – mapping and protection of foraging areas continued...</p>	
<p>"It does make sense, but it's what I would consider a very slippery slope. For instance, if we were doing a, you know, a piece of property and we were having -- a bird was in the -- one of the trees, we've protected trees in the past because we've known they've been raptor nesting sites or perching sites. But many of them have a distance to fly that will cover all sorts of other</p>	<p>Page 423 Line 10</p>

<p>people's property to -- and I'm not sure how far we can reach on a project outside of the -- the APN numbers of what we're actually working on, so...to me that's kind of scary."</p> <p><i>DR. ENGEL: [We've only] looked at these very large project sites like at More Mesa in Santa Barbara, the Dos Pueblos Ranch up north in Santa Barbara, and Banning Ranch, in terms of foraging habitat, and at UCSB."</i></p>	
Change in setbacks	
<p>"Then back to staff, I -- I also, you know, went back and reread the May report and then looked at this report, and I'm curious as to why the setbacks were so dramatically different."</p> <p><i>DR. ENGEL: "I don't think that they were dramatically different... could you elaborate, please?"</i></p> <p>"Yeah, I -- I think that we had -- we had identified that we would have the 100-foot setback from the Gnat Catcher, but a 50-foot setback from sensitive vegetation and ESHA, a 100-foot setback from wetlands and a 50-foot setback from archeological resources."</p> <p><i>DR. ENGEL: "Yeah, that is exactly correct, and at that time we also had 160 foot, or 50 meters from the Burrowing Owl burrow habitat, which is what the California Department of Fish and Wildlife recommends solely to protect the burrows from absolute direct disturbance....That's the same in both reports."</i></p> <p>"Okay. I thought that we were asking for a 100 percent set -- a 100-foot setback, period, from the ESHAs that we identified."</p> <p><i>DR. ENGEL: "...that is correct that there is a 50 -- we recommended a 50-foot minimum setback from any sensitive vegetation."</i></p>	<p>Page 411 Line 24</p>
Vernal pools	
<p>"And then I'm going to skip to a whole new -- to the vernal ponds... what is the fate of the complex if the hydrology is not restored? I'm just worried that if we don't do something, we're going to lose..."</p> <p><i>DR. ENGEL: "The fate of the complex if the hydrology is not restored, it is -- it is right now there is no problem with the hydrology of the vernal pool complex. The -- the problem is the five-year drought. That right now -- so if it was just left alone there -- there is -- Fugro -- Fugro did a watershed analysis and the eight vernal pools are within a watershed that contains, you know, that</i></p>	<p>Page 415 Line 18</p>

<p><i>supports the vernal pools because it allows for water accumulation."</i></p>	
<p>"My question...is related to how the roads bifurcate the vernal pool area, and if everything is just left as is."</p> <p><i>DR. ENGEL: "None of the roads right now go through any of the vernal pools."</i></p> <p>"Around the area. Because you -- you were trying to go to the -- we're trying to get the flow to happen again, right? I mean..."</p> <p><i>DR. ENGEL: "Oh, do you mean for the proposed development, the roads?"</i></p> <p>"...I mean for, if the vernal pools are not -- if the restored hydrology and habitat connectivity is not improved around the vernal pools, what is the fate of the vernal pools?"</p> <p><i>DR. ENGEL: "Well, I guess I'm sorry, Martha, but I'm not really understanding your question, because the fate of the vernal pools, they are doing just fine right now."</i></p> <p>"Oh, okay. That kind of surprises me."</p>	<p>Page 416 Line 13</p>
<p>Potential ESHA</p>	
<p>"Yeah, there was the whole thing about the potential ESHA, there's a reference to that some of this area could be potential ESHA, and so how was that, how do you measure potential ESHA?"</p> <p><i>DR. ENGEL: "I don't know, again, I don't know what you're -- I don't -- I never referred to potential ESHA. Huh?"</i></p> <p>"I thought it was also in the -- I thought it was in the staff report. Excuse me. Weren't we looking at the property as if it were totally restored in measuring the ESHA?"</p> <p><i>DR. ENGEL: "No, we were looking, when we looked at the on-the-ground conditions in identifying ESHA on the site."</i></p> <p>Okay. "I'm going to have to go back and I'll dig through these notes, then, because that's not what I was writing down from the report that I was reading."</p>	<p>Page 417 Line 15</p>

Invasive Plants	
<p>“And then the other, the ice plant. The -- the 92 acres of invasive plants that are found on the property, but the ice plant in particular was one that was of complete worry to me when I saw it, because it was all over the grassland, and it wasn't allowing any native -- it was taking away the native plants, and it's my understanding that the -- I guess from you I would like to know the rate of the invasion, because ice plant, when we visited two years ago, it had spread. It was everywhere. And it was spreading fast, it appeared.”</p> <p><i>DR. ENGEL: “We could bring up the vegetation map from the applicant's consultants, and they do have ice plant maps on the map, so the applicant did map the vegetation in 2012 and then again mapped it in 2015. We have not done that analysis to look at a change in the percent cover of ice plant. To be honest, I have been out there many times. I haven't seen a change in the amount of ice plant from year to year. It -- there is quite a bit of ice plant....But it is remaining about the same, in my opinion.”</i></p>	<p>Page 418 Line 10</p>
<p>“ Okay. Can I ask the applicant if they saw -- if there is an increase in the amount of ice plant that has -- since it's not being controlled?”</p> <p><i>MR. MOHLER: “Chair Bocho, to the commissioner, Mike Mohler again. There is -- in the veg mapping there was a pronounced increase in invasives, but they were lumped together, so it was a combination of ice plant and even more so in the case of mustard.”</i></p>	<p>Page 419 Line 9</p>
<p>“Okay. Thank you. And so I guess my question to staff is that if we do nothing, the 92 -- the current 92 acres of invasive species, based on your knowledge of invasive species, what do I anticipate it to look like five years from now, ten years from now if nothing is done?”</p> <p><i>DR. ENGEL: “Well, one thing we definitely have seen is with the cessation of mowing, there has been a real resurgence in the Coastal Scrub habitat, and the -- the -- as I discussed a little earlier, there -- there also has been, due to the drought...some invasion of the Russian Thistle and the mustard, which -- but these -- these weeds have very short life spans, and they die back, and they're typically annuals, and the -- much of the native plants are perennials, and they through time will likely out compete the invasives, especially with the lack of mowing on the site.”</i></p>	<p>Page 419 Line 19</p>

Shrimp species	
<p>"And then also the invasive shrimp that is found in either it was C or CC. I'm not sure which."</p> <p><i>DR. ENGEL: "There's no such thing as invasive shrimp on the site. There are two...There are -- there's the Common Fairy Shrimp, the Lindahli, and then there's the San Diego Fairy Shrimp. Now, the San Diego Fairy Shrimp is the endangered species. The Common Fairy Shrimp is the -- as the name implies, common. They're -- the applicant's consultant purported that there is potential for these species to hybridize, and that is -- that happens naturally. I don't think of that as a problem....And we don't even know if that occurs, that, you know, that is pretty unique for species to hybridize. They usually have strong ability to prevent hybridization. We don't know that they do hybridize."</i></p>	<p>Page 420 Line 14</p>
Abandoned oil wells	
<p>"Okay. And then one final question about the wells. There is not required cleanup at this point with the abandoned wells that are on the site, that -- it's my understanding from the staff report that the cleanup will be triggered when the last well closes?"</p> <p><i>MR. TEUFEL: "No, that's -- that's not the case. So there's... two separate cleanup requirements that the Division of Oil and Gas and Geothermal Resources, essentially two types of triggers. The last well on the site trigger that I think you're referring to, is -- is when the last well on a lease is triggered or abandoned, then the division looks at the whole lease and makes sure that it's restored to natural conditions. In addition to that, every time a single well is abandoned, they need to seek a well abandonment permit from -- from DOGGR, and before DOGGR issues that permit or part of their process of overseeing the issuance and signoff on that permit is to ensure that all the infrastructure that serves that well, so I'm talking about the power lines, the transformers, the pumps, the pipelines, all those types of things, are removed. And so it's essentially kind of a piecemeal removal, everything that's going to that well is taken -- required to be taken out. And as an example of that, the whole Southern Mesa portion of the site where the wells were abandoned in that way, in fits and starts, now there isn't -- there aren't any pipelines, there aren't any power lines. Historically there was all that stuff out there, and it's all been taken away through the issuance of those well abandonment permits. And that's our consent cease and desist order that the Commission approved last year, the requirement to abandon 17 wells on the site is going to trigger the need for those well abandonment permits, which is also going to trigger that requirement that all the</i></p>	<p>Page 426 Line 24</p>

<p><i>infrastructure and services that go to those individual, 17 individual pipe wells also be removed."</i></p>	
<p align="center">Abandoned oil wells continued...</p>	
<p>"Okay. And that triggers one more question for me. And that is that when we -- we have the wells that we -- that are part of the cease and desist. It's my understanding there's still a number of wells that DOGGR didn't require them to remove stuff on. Is that - - I mean, why haven't -- if these wells are already abandoned... why did we have to go to a cease and desist if... did DOGGR not do its job?"</p> <p><i>MR. TEUFEL: "So, no, these -- these wells are actually wells that some of them are idle, some of them are currently actively operation....And the cease and desist order came about because there was a disagreement about what was exempted, what development was exempted on the site, and as a result of that, through the Commission staff's investigation, a portion of the staff's investigation it appeared that a certain number of wells were drilled without Coastal development permits that were necessary. And those are the wells, the 17 wells that we're requiring to be removed. Additionally, there are 23 more wells that rather than just mandating removal, NBR has the opportunity to seek after-the-fact authorization and retain those wells, or to remove them at their -- it's up to them. In addition, there's -- so -- so essentially DOGGR has required that all the wells that are abandoned on the site, there are no --there is no infrastructure serving those wells.</i></p> <p>"That's all been cleaned up."</p> <p><i>MR. TEUFEL: "That's all been cleaned up....There are other materials that have been accumulated on site, like the concrete debris and pumping units and other types of things that DOGGR is currently, as we speak today, undergoing an investigation to address those types of things."</i></p>	<p>Page 428 Line 19</p>
<p align="center">Involvement of Horizontal Development</p>	
<p>" And then I get a little nervous when I hear that one of the oil companies involved is called Horizontal -- what was that, Horizontal...Horizontal Development, because that to me might be code word for fracking."</p> <p><i>MR. TEUFEL: "To my -- to the best of my knowledge, and this is a question that I posed directly to them, and the response I got is that geologic conditions are not conducive to fracking, and so it's not something that they're interested in pursuing. That -- the permit</i></p>	<p>Page 430 Line 11</p>

<i>that that company, Horizontal Development, LLC, which actually it's a return to one of Commissioner Turnbull-Sanders' question, they are the entity that owns the mineral rights throughout the entire site....And when they come before you for their proposed drilling of additional wells within the oil remainder area, that's certainly something that -- that you can ask them directly as well."</i>	
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COMMISSIONER URANGA	
Importance of making the property accessible	
"My perspectives on this whole thing is a little different. I think I've learned more about Burrowing Owls than I wanted to, or that I need to. It is important, I know. All the ESHA, we've had workshops on that and I know that's important as well. But, you know, I'm a human being and I -- and I deal with human relations, and this project initially for me was one that opened up a blighted area. Opened up an area that is fenced off, that is inaccessible, that has no value to anybody other than to the inhabitants that live there, the Burrowing Owls and everybody else that -- every other animal that lives there. But nobody gets to enjoy it, because nobody gets to see it."	Page 431 Line 23
"But the bottom line is that we want to get this right, we want to know what we can do tonight so that we can build our future for tomorrow. And a lot of the commentaries that I heard tonight, what about, you know, opening up the access, having classes for kids, access from 17th Street to PCH to the beach; providing an opportunity for people to --for this property to get activated, to bring down the fence, to open up the gate and get people involved. That's what I would want to see, but apparently that's not what everybody can agree with today. Maybe there is one for tomorrow, but that would be more discussion, more debate..."	Page 434 Line 3
"... I'm pretty sure that even at this point right now we could still come up with something that would be amenable to not only staff, to the Commission and to the applicants, but to everybody who is here who has a real genuine concern about not only what we're trying to protect in terms of the ESHA and the Burrowing Owls, but for our kids and for the future of than land. And for opening it up and activating it so people could enjoy it. Right now, nobody is enjoying anything out of. It's gated. It's fenced. It's nothing. You know, it's one of those tree-in-the-forest type of thing. If you don't see it, does it exist? So the people know, yes, people who are around it know it. But does a person driving	Page 435 Line 8

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down PCH know it? Do they -- do they see it? No, they don't. Unless you have a sign there that says, you know, right there, you know, it's Banning Ranch up on the hill. Fine. There's a sign that says Banning Ranch up on the hill, but you can't go in there. You can't see it. You can't enjoy it. You can't hear the birds. You can't smell the flowers."	
Consequences of denying the application	
"And my question at this point would be if we approve this motion, we essentially kill the project. What does that do to the applicants in regards to their future ownership of that land, and I know there's been some suggestions about putting it up for sale and having other groups buy it, but I don't see that happening. I think it's going to be very expensive to purchase by somebody else...."	Page 432 Line 12
"So I guess the question is, and it's one that was raised by Commissioner Vargas, is if we deny this tonight and we essentially kill this project, what's the future? What's the future?"	Page 433 Line 19
Difficulty of reaching an agreement	
"... there is a project, staff is recommending a "yes" vote, so there is something there. It's just not to the capacity or to the level that is acceptable to everyone. I mean, there's still a lot of issues, questions, things to clear up, because there's still some debate on this, obviously. There's a lot of debate on this. And there's probably still some opportunity to come to a middle ground on this. We just haven't reached that yet. Commissioner Shallenberger was right in the sense that we need to get this right. However, the path we're taking right now I don't think we can ever get there, because there is -- we're so far apart and they're so -- the differences in opinions and observations are so wide that there's -- there's -- we could argue this to ad infinitum, with just no solution. And I don't see one coming tonight. I mean, I'm very frustrated with the discussion that's going on tonight, because I don't see a solution to this."	Page 432 Line 21
"So I'm not -- I'm not supportive of the motion, I think there's a project there, and if we can, some way or another, that we can push this out a little more or, and I know that we have timelines, I know that we have deadlines and I know that the way this Commissioner works anyway. You know, on the city council we could say, you know, study it some more, bring it back, and we'll - - we'll...revisit the issue....We can't do that here, apparently. We have timelines and permits expire. And -- and there's no opportunity to keep on forward. I was hoping that maybe there's	Page 437 Line 9

<p>some kind of way we can continue this discussion, get to that yes point, because there is one there. Staff is recommending a yes vote....The Commission is saying no, or the motion is no. So I think we – we need to push this out a little further and have some more discussion.”</p>	
<p align="center">Likelihood of litigation</p>	
<p>“If we vote this down tonight, and we essentially kill this project, are we opening up our -- we had a closed session earlier today and we have a whole list of lawsuits against the Commission. Are we going to add another one on this one?”</p> <p><i>MR. PEDERSON: “Certainly there is the possibility of litigation if the Commission denies the project. There's a possibility of litigation if the Commission approves the project.”</i></p> <p>“So there's litigation either way. Okay. Well, you know, (chuckles) it's one of those situations, damned if you do, damned if you don't. And for me, you know, for me, I've always been the type of person, you know, I'd rather be damned if I do than don't. Because at least I know I took a risk, I took a chance.”</p>	<p>Page 436 Line 10</p>

<p align="center">COMMISSIONER COX</p>	
<p align="center">Nature of staff recommendation</p>	
<p>“I'm kind of maybe at the same point were Commissioner Uranga is in -- in regards to a, you know, we've got our staff that is recommending a proposal for some limited development, which means that they're -- they're not opposed to seeing development on a portion of the property, but we have the applicant who is saying that that's, you know, if that's what's ultimately approved it's tantamount to not having a project, because it's not economically feasible...”</p>	<p>Page 438 Line 14</p>
<p>“... I think that the proposal that has been laid out by the developer I think is -- is not something's probably going to be sustained based on the staff's recommendation. On the other hand, I think the staff's recommendation is -- is overly limiting.”</p>	<p>Page 441 Line 18</p>
<p align="center">Role of the Commission</p>	
<p>“...our job isn't necessarily to make their project economically feasible, but it's to try to implement the various elements of the Coastal Act in a responsible manner.”</p>	<p>Page 438 Line 23</p>

Burrowing owl – past experience	
<p>“And -- and I -- I've had some limited experience, certainly not as much as Dr. Engel or others in regards to the -- to the Burrowing Owl. When I was mayor of Chula Vista, one of the things I was really proud of was we -- I was one of the leaders that encouraged the development of the Chula Vista Nature Center, and now it's called the Living Coast Discovery Center. And one of the things that has happened out there is they actually created a Burrowing Owl exhibit where they had some Burrowing Owls that were not releasable...”</p>	<p>Page 439 Line 2</p>
<p>“And in my role on the board of supervisors, we're dealing with Burrowing Owls in the East Otai Mesa, and there it's kind of interesting, the US Fish and Wildlife Service has taken the position that there's about 2300 acres of land there, and a lot of it is set aside or identified as potential Burrowing Owl habitat and foraging areas, and they're basically, Fish and Wildlife Service is basically saying that if you're going to develop in that area, you need to mitigate one for one acre. And half of that has to be on site, and half of it can be somewhere else that is suitable, so in other words you're going to end up with kind of a patchwork quilt of areas that may not even be directly contiguous that would be set aside as foraging areas for the Burrowing Owl. So I understand that, you know, there is no hard and fast rules among the resource agencies in regards to what is the best prescriptive answer in any given situation.”</p>	<p>Page 439 Line 18</p>
Burrowing owl – artificial burrows	
<p>“The -- the document that Commissioner Vargas was -- was referring to earlier under the management and resource recommendations are also as a caveat or a suggestion that says that where nesting burrows are lacking, enhance habitat by using artificial burrows or encouraging the presence of ground squirrels. It seems to me since the meeting we had last May when we were considering this proposed development, and today that the Burrowing Owl seems like it's the one that has inserted itself or has been raised to an additional level of consciousness, and I -- I guess I kind of feel like in my own situation in San Diego County and East Otai Mesa, while, you know, the Burrowing Owl is an important species, it seems like one of the ways to deal with the Burrowing Owl is to create, you know, maybe it's not a shortage of Burrowing Owls as much as it is a shortage of ground squirrels.”</p>	<p>Page 440 Line 13</p>

COX

“In other words, if we had a captive breeding program for ground squirrels and released them in this area, since they create the burrows that they like -- the Burrowing Owl likes to live in, and they're actually a part of their food chain, that maybe we would actually have an enhanced environment for Burrowing Owls.”	Page 441 Line 7
The south development – low cost accommodations	
“ The one part of this project that I was really, I guess I don't want to say excited, but encouraged about was the, what has been referred to I think by staff is the South development, which was the 11.9 acres that had the 75-room hotel, the limited number of residential units, and the hostel. And I think, you know, as we've dealt with projects over the years, heaven knows, over the last two plus years that I've been on this Commission we've been focusing on trying to do whatever we can to create more low cost visitor-serving accommodations.”	Page 441 Line 23
The south development – bluff road	
“So I guess I -- you know, I'm somewhere in between. I...don't like necessarily staff's limitation in regards to the -- the 19 acres or whatever the residual of that is, I'd really like to see some additional opportunities, maybe, to take another look at the -- the south parcel, which means that maybe the -- the Bluff Road is not something that is the spine of this project, it's something that provides access to the southern parcel, and the 17th Street access is something that is maintained for the parcels to the north.”	Page 443 Line 14
Site accessibility	
“The developer has represented that they are prepared to spend upwards of \$75 million in habitat restoration and other enhancements to this site. Keeping it fenced off, I mean, I guess, you know, that's one of the consequences of the actions that we may or may not take today, but I don't think it's going -- and, you know, there are some requirements that they will have to clean up portions of this site, but the -- the bottom line is this is a site that's going to be basically fenced off, not available to -- to the public.”	Page 442 Line 16
Public educational opportunities	
“I do think there's a lot of educational opportunities that we ought to be trying to encourage, and I think by having a good restoration and enhancement plan that is set up as a part of any approved development is something that could make this area an asset, not only to the existing creatures, but to improve the environment for expansion of the species that are somewhat limited in their ability to utilize the area here, and at the same	Page 443 Line 2

time provide I think some good educational opportunities and some additional opportunities to the public to have access to this area.”	
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COMMISSIONER HOWELL	
Positive aspects of the project	
“And like Commissioner Cox mentioned, there is a lot to like about this project. I like – I like the hostel, I -- I like the public access, I like the educational components, and of course I'd like cleaning up the polluted site.”	Page 444 Line 19
Burrowing Owl	
“But for me, ultimately that looks like bright lights and the neon signs. And I know we've talked a lot about the Burrowing Owl, and I'm not about to start, and we've talked as much as we need to. All right? And, you know, and the way I see these things shaking out perhaps, is we all end up on the front page of -- of the newspaper obsessing over the Burrowing Owl, or in some sort of appellate court decision. I like the Burrowing Owl, too, and I wish one would settle in my neighborhood and eat the mole that's like in my front yard and causing all these problems.”	Page 444 Line 24
Items neglected during project review	
“But we talk about this project in kind of an odd way. We don't talk about the traffic. We haven't talked about the pollution. We don't -- we're not talking about it like we talk about other projects.”	Page 445 Line 12
Endangered and threatened species	
“And ultimately, I think that the Coastal Commission needs to be the last court of appeal for the Gnat Catcher, the Fairy Shrimp, the Coastal Scrub, which isn't as cute as the Burrowing Owl, but it's important too...”	Page 445 Line 21
Protection of riparian habitats	
“...in my opinion neither the staff-recommended project nor the applicant's project adequately protects the riparian habitats, the wetlands, the vernal pools, or complies with the Coastal Act.”	Page 445 Line 25

COX/HOWELL

VICE CHAIR BOCHCO	
Consequences of denial	
"So let me just say that I don't think that if we support this motion of a denial today that that's the end of this project. I don't think that that's going to happen..."	Page 446 Line 20
Sensitivity of the habitat	
"I think what we really do need to do is take a much closer look at a very, very sensitive habitat. That's the problem. It's not that the applicant is looking to do a bad project. It's actually a wonderful project. Someplace else. It's just that this particular piece of property is so sensitive. It has been battered, it has been bruised, it has been, you know, decimated for 70 years, but yet they still are there. Those little animals, those -- those weeds and bushes and all the things that matter in this environment, they're still there. You can't kill it with a stick."	Page 446 Line 23
Science behind staff's conclusions	
"I think the staff proposal is amazingly supported by science. I mean, I've studied all of the papers that you attached. I went back and looked at other papers that you referred to. I read all of the applicant's science. I certainly read Dr. Bloom's paper. And I think on the whole the substantial goes with staff on this one. By far."	Page 447 Line 16
Fuel modification in the buffer	
"I mean, for someone to argue that fuel modification should be in the buffer, I don't know where you get that. We don't do that. We never have done that. You know, the guidelines on buffers, if you go back to 1981, you'll see it has always been the way it is. And I think the staff has been flexible on buffers. It's not a hundred buffer everywhere. What they did is they looked at every specific type of ESHA in this giant project. I mean, this is huge. And they did a very careful job of that."	Page 447 Line 24
Burrowing owl – protection of winter foraging habitat	
"So I have to say not only am I going to support the motion, but I did want to tell Commissioner Vargas, because I went and did some Googling on the owl, too, and what I found, when I looked up how do you determine winter foraging habitat, what I read was the way to -- to promote winter foraging habitat is to set aside sizable tracts of grassland under conservation easements, and eliminate the poisoning of small mammals."	Page 448 Line 10

Burrowing owl – threats posed by residential development	
<p>“And that of course is exactly what's the problem here in terms of just this one species is that you're going to put in a lot of houses that are going to have a lot lawns and lot of pets. And I really appreciate when the applicant had their scientist say, hey, look, we'll put a CC&R there against, you know, outdoor cats. I thought, you know, they're really trying. So that is certainly a step in the right direction. But they're still not going to want those squirrels in their yards. They're going to dig holes and we're going to poison them. That's what people do.”</p>	<p>Page 448 Line 19</p>
Balancing human and conservation needs	
<p>“So I think we have a problem between what Commissioner Uranga and Cox would like to see, which is the availability of the site to be improved and available for humans, and that has to be set right next to the necessary preservation of the very rare habitat of this site.”</p>	<p>Page 449 Line 7</p>

**FURTHER SITE-SPECIFIC AND SCIENTIFIC INFORMATION NOT YET
REVIEWED, ANALYZED OR CONSIDERED BY THE COMMISSION**

1. Bluff Road: NBR's August 23, 2016 Submittal Providing Minor Modifications and a Bridge to NBR's Grading Plan Relating to Bluff Road to Avoid All ESHA Impacts

The draft Revised Findings cryptically state in several places: “The applicant (8/23/16) proposed additional changes to the project to address issues and reduce impacts. However, with only three days until the production deadline, staff was unable to analyze the changes and reflect them in this staff report due to insufficient time for reviewing and updating all the relevant analysis and exhibits. Staff preliminarily reviewed the new site plan prior to the hearing and stated on the record that it did not change [the] staff recommendation, nor any of the special conditions.” (Draft Revised Findings, p. 20, fn. 3; *see also* p. 57 (stating that “the Commission itself did not find the changes to be significant enough to alter its fundamental analysis,” despite the fact that the transcript shows no Commissioner commented on the issue.) Elsewhere, the draft Revised Findings inaccurately characterize this as “some last minute changes to reduce some of these impacts.” (*Id.*, p. 8, fn. 2.) The draft Revised Findings do not explain that these changes pertain to minor changes to the development plan and Bluff Road impacts.

As the Commission knows, applicants and project opponents often submit evidence right up to or at the public hearing. That is the nature of a public hearing. In a July 11, 2016 e-mail, Staff advised that NBR's grading plan still included direct ESHA impacts. On August 15, 2016, Staff e-mailed NBR regarding the “Impacts of the Development Plan.” Staff asked: “It also appears that the bridge over main arroyo would have impacts to Gnatcatcher habitat, as well as the construction of culverts under the road near pool E, and sensitive vegetation. Are these impacts intentional, or is a second revised grading footprint necessary?”

In response, one week later, on August 23, 2016 – before issuance of the Staff Report and 15 days before the public hearing – NBR submitted a revised map and GIS files to modify NBR's grading limits. The files included minor tweaks to the grading/disturbance line and reflected a bridge design instead of a culvert under Bluff Road – changes which avoid all vernal pool/wetland, riparian, native grassland, gnatcatcher and burrowing owl ESHA impacts, as identified at the time by Staff. Yet, that same day, on August 23, 2016, Staff surprisingly advised NBR by e-mail that it would not consider the responsive revisions to the Grading Plan. Although the Grading Plan very clearly demonstrated that the revisions eliminated any direct ESHA impacts, the Staff Report and Addenda refused to acknowledge the submittal, and Staff continued to assert, without explanation, that the development plan and Bluff Road would cause direct ESHA impacts.

Staff had more than ample time to review the plans, as it does routinely on every other project. The fact that the grading plan, Bridge and its supports, as revised, fully avoided ESHA and wetlands was easily determined from the submittal. The Commission should have been advised accordingly.

The draft Revised Findings nonetheless conclude that the Project would directly impact ESHA (vernal pool/wetland, riparian, CSS and gnatcatcher habitat) and therefore would be inconsistent with Coastal Act Section 30240. The additional site-specific evidence submitted, if properly analyzed, would better inform the Commission as to the Project's consistency with Section 30240.

2. The Extent and Status of Invasive Vegetation on the Property: Reversal of Position Concerning the Increasing Dominance of Invasive Vegetation on the Property

Following the close of the public hearing, the Staff ecologist inaccurately stated that she had not observed evidence of a threat of invasive vegetation on the property. In response to a question from Commissioner McClure, the Staff ecologist stated: "[M]uch of the native plants are perennials, and they through time will likely outcompete the invasives, especially with the lack of mowing on the site." (Transcript, p. 418.) However, on a noticed field trip prior to the October 2015 hearing, in response to a question from Commissioner McClure, the Staff ecologist explained to Commissioners just the opposite: "It's on its way to becoming the dominant species." That was accurate, based on substantial evidence in the record, supported by mapping, which demonstrates that approximately 10-15% of the vegetation on the property is invasive and that it is increasing with time.

The Staff ecologist also inaccurately stated that, with cessation of mowing, native plants will outcompete invasives. This is contrary to decades of Staff recommendations and Commission findings that invasive species have a tendency to displace native species, not the other way around, and are a continued threat to native habitats.

3. The Issue of Gnatcatchers and Buffers: Omission of the Commission's Decision on the Immediately Adjacent Property with Exactly the Same Vegetation Regarding Gnatcatcher ESHA and the Appropriate Buffer

The most obvious Commission precedential decision concerning the treatment of California Brittlebrush (*Encelia*) and gnatcatcher ESHA on the property was the Commission's approval of Sunset Ridge Park (Application No. 5-11-302) on the immediately adjacent property. The Commission reversed the staff recommendation in that decision, but Staff chose not to bring it to the Commission's attention.

After the close of the public hearing, in response to NBR's criticism of the staff report for this critical omission, the Staff ecologist explained only: "Regarding the California Brittlebrush on the Sunset Ridge Park site that the applicant referred to, the Commission found that the vegetation there was legally mowed once or twice a year such that it was never allowed to become a natural habitat, and it was not appropriate to identify it as ESHA." (Transcript, p. 351.) In fact, in its Sunset Ridge Park decision, the Commission overruled the staff recommendation and found (**the strike-out is Staff's original language; the Commission's adopted language is underscored**):

“... [D]ue to the following site specific reasons, the Disturbed Encelia Scrub within the footprint of the proposed park does not qualify at this time as ESHA: 1) the Encelia Scrub (a subgroup of coastal sage scrub) that is present on the subject site is predominantly composed of Encelia californica, and that plant, in and of itself does not necessarily qualify as ESHA in coastal Orange County; 2) furthermore, in this case, there is no documentation of usage of the Disturbed Encelia Scrub by sensitive species, including the California gnatcatcher, for foraging or nesting habitat, or evidence that such habitat sufficiently developed on the site; 3) the vast majority of the site was subject to intense levels of disturbance and elimination of the site’s natural topography by extensive pre-Coastal Act grading; 4) the vast majority of the site was graded and consistently maintained in a disturbed condition through consistent, recurrent mowing of vegetation since before the Coastal Act until now, first by Caltrans and then by the City, after purchase by such; and 5) required fuel modification to protect existing adjacent residential development from fire hazards involves regular disturbance over much of the project site and significantly reduces overall vegetation coverage on the subject site adjacent to the Disturbed Encelia Scrub area. Due to these circumstances, the vegetation does not reach the level of significance necessary to qualify as ESHA. Therefore, the impacts of development on the site should be considered under the site’s current condition– i.e. an area of native vegetation which has not been documented to support native species and without reference to Section 30240. Therefore, the Disturbed Encelia Scrub serves as a habitat for a federally listed species and plays a special role in the ecosystem which could easily be degraded by human activity. Therefore, the Disturbed Encelia Scrub qualifies as ESHA. (Sunset Ridge Park Revised Findings, p. 52.)

Furthermore, the most obvious precedential decision concerning the appropriate buffer from gnatcatcher habitat is, again, the Commission’s approval of Sunset Ridge Park project, where the Commission overturned Staff’s recommendation on that property and required buffers consistent with NBR’s proposed buffers. Staff also did not bring this decision to the Commission’s attention. In its Sunset Ridge Park decision (5-11-302), the Commission explained:

“The Commission has typically imposed buffers of 50-100 feet for gnatcatcher occupied ESHA (e.g. CDP 5-03-013, MT No. I, LLC, 5-92-188-A4, CPH Resorts). The Commission has typically not allowed significant grading or significant permanent development within buffers in order to prevent temporary and long term impacts to the adjacent ESHA. When required to offset the impacts of adjacent development and increase habitat values, these buffers have also been restored or vegetated with native species.” (Sunset Ridge Park Revised Findings, p. 57.)

And the Commission’s decision in Sunset Ridge Park immediately next door imposed a 50 foot buffer from occupied Gnatcatcher habitat, in contrast to the draft Revised Findings here which, if adopted, would impose a 100-foot buffer from potential and admittedly unoccupied Gnatcatcher habitat. In fact, the draft Revised Finding do not explain that gnatcatchers occupy habitat adjacent to urban development and noise, as documented in NBR’s site-specific analysis addressing onsite gnatcatcher buffers, and that the Commission has in past permit actions

approved 0'-50' buffers from occupied habitat instead of Staff-recommended 100' buffers from unoccupied gnatcatcher habitat here.

4. Burrowing Owl

The Commission, in particular, recognized the need for additional information concerning the overwintering burrowing owl. There were numerous failings on this issue that would be addressed by the further site-specific and scientific information requested.

At the September 7, 2016 hearing, Acting Executive Director Ainsworth candidly acknowledged that Staff's ESHA recommendation for burrowing owl foraging habitat came "late in the process." (Transcript, p. 89.) After the close of the public hearing, the Staff ecologist also candidly explained, in response to questions from Commissioner Vargas, "You know, to be honest - I am not a Burrowing Owl expert." (Transcript, p. 383.) Nonetheless, the Staff ecologist, as reflected in the staff recommendation and orally at the hearing, expressed a number of erroneous lay opinions concerning burrowing owl foraging habitat. Staff, in turn, erroneously insisted that its ESHA analysis was substantiated, despite limited observations and an admitted lack of expertise with this species, and that its recommendation for a sweeping ESHA foraging area was based entirely on the opinion of a paid consultant hired by project opponents which the public hearing confirmed was based upon a fundamental mistaken assumption.

A. The Staff Ecologist's September 25, 2015 Determination That the Southern Portions of the Property are not ESHA

The Staff ecologist did not advise the Commission that her September 25, 2015 Memo Re ESHA and Wetlands Determination for Banning Ranch, prepared for the October 2015 hearing, were 180 degrees contrary to the Memo she prepared for the September 7, 2016 hearing. The memo she prepared for the October 2015 hearing explained:

"The burrowing owl winter survey data for two southern portions of the property suggest that these areas are not frequently occupied by over-wintering burrowing owls and while they represent sensitive areas there are insufficient data to designate a particular area as ESHA." (P. 27; emphasis added.)

The burrowing owl data did not change between the October 2015 and September 2016 public hearings, yet the Staff ecologist recommended precisely the opposite at the September 2016 hearing and Staff, in turn, recommended the elimination of all development on the two southern portions of the property – the entire South Family Village, the hotel, the hostel, the youth programs proposed, and the parks.

B. The Paid Opposition Expert's Mistaken Assumption Regarding Burrowing Owl Survey Data

On June 24, 2016, Dr. Peter Bloom, a paid opposition consultant, provided Staff with a letter concerning the burrowing owl. In formulating his letter, Dr. Bloom neither walked the NBR property nor conducted any independent surveys relating to the burrowing owl. Dr.

Bloom's June 24, 2016 letter, on which Staff relied for its burrowing owl ESHA and foraging acreage recommendation, erroneously assumed as the basis for his conclusions that "survey data show that this area supports a known minimum wintering owl population of up to several individuals annually." (6/24/16 Bloom letter, p. 2.) The evidence is otherwise.

The evidence demonstrates that in most years, only a single owl has been observed on the NBR property, and in a few years, two owls. NBR conducted protocol surveys, following the CDFW survey protocols, which are similar in method and general parameters to those set forth in the 993 Burrowing Owl Consortium Guidelines and the Western Riverside Multiple Species Habitat Conservation Plan. Three individuals were observed during the 2008 survey season, but one of the occurrences was offsite on the School District property and the owl on the Southern Mesa was a transient that was only present for about two weeks and not detected after two weeks for the remainder of the winter season. For the majority of years, only one individual has been detected during protocol surveys by biologists highly experienced in conducting protocol burrowing owl surveys. (Letter, NBR to Commission and Staff, 9/2/16, pp. 1-2.) Staff did not correct this significant mistaken assumption.

C. Absence of Staff Research Regarding Alleged Non-Protocol Burrowing Owl Sightings

Staff did not research or qualify for the Commission alleged burrowing owl sightings by non-biological project opponents that contradict known science. The alleged sightings were not the product of protocol surveys. Moreover, any sightings, from an off-site area would be impossible to interpret relative to the actual number of owls during any one season as observations, especially from a distance, may have been the same owl in different locations. In any case, with respect to a 2013 photograph of a burrowing owl submitted by project opponents, the specific location was not disclosed, so Dudek searched the perimeter of the property to determine its visual signature. Dudek concluded that the photograph was likely taken from within or proximate to a neighboring fenced area topped with barbed wire, potentially outside of the project site or study area or project area, and it observed burrows proximate to the fence to determine its approximate location offsite, without trespassing and using binoculars. (8/19/16 Letter from NBR to CDFW, p. 7.)

D. Staff's Fundamentally Inaccurate Assumption of Foraging Area Based on "Breeding Foraging Owls," Not Overwintering Burrowing Owls

It is uncontradicted that no breeding burrowing owls have ever been observed at NBR or any adjacent property. (8/19/16 Letter from NBR to CDFW, p. 1; 9/2/16 Letter from NBR to Commission, p. 6.) This was underscored by Dr. Bloom himself in a 2013 L.A. Times Article related to the Seal Beach Naval Weapons Station:

Redacted from: LA TIMES - CALIFORNIA | LOCAL
Navy Steps Up Efforts to Protect Burrowing Owls at [Seal Beach] Weapons Base

August 10, 2013 | By Louis Sahagun

There are four breeding pairs of burrowing owls left along the Southern California coast between Santa Barbara and Encinitas, and all of them nest at the Orange County base. "The next nearest burrowing owl nests along the coast are 70 miles to the south and 90 miles to the northeast." (Peter Bloom, a biologist who has been monitoring the base's avian life for 35 years)."

Dudek further explained:

"Although some burrowing owls are year-round residents in California, others are migratory. In parts of coastal of southern California, such as in coastal Santa Barbara and Los Angeles counties, burrowing owls are known to winter but are no longer known to breed. In Orange County, the CNDDDB includes recent nesting records for the Seal Beach Naval Air Station and vicinity and the University of California, Irvine, area. Additional records from other locations, such as the El Toro Marine Corps Air Station, Fairview Park in Costa Mesa, The Great Park in Irvine, and Huntington Beach Wetlands have involved only wintering owls. The seasonality of burrowing owl records in such places is a result of the migratory nature of some owls. Burrowing owl populations of lowland areas of the state are likely augmented by migrants from elsewhere during the winter." (9/2/16 Letter from NBR to Commission, p. 2.)

Dudek further explained:

"The origin of most burrowing owls wintering in California is unknown, western burrowing owls have been documented traveling as far as 2,450 kilometers (more than 1,500 miles) to their wintering grounds." (*Id*; emphasis added.)

This is confirmed in studies in which data on burrowing owls captured and banded by researchers provided insight on where owls wintering in California may come from. (7 Haug, E. A., B. A. Millsap, M. S. Martell. 2011. Burrowing Owl (*Athene cunicularia*). In *Birds of North America Online*, ed. A. E. Poole. Ithaca, N.Y.: Cornell Lab of Ornithology. Access March 2013 at <http://bna.birds.cornell.edu.bnaproxy.birds.cornell.edu/bna/species/061>. One recent study available on the CDFW website but not referred to in the Staff Report, Addenda, or public hearing -- Final, "Winter Burrowing Owl Banding Project (February 2016), prepared CDFW for the period September 2014 to March 2016" -- explained as to such studies it reviewed that "that owls breeding or fledged in British Columbia, Washington State and Oregon migrate south to winter in northern, central and southern California, confirming its conclusion as to its own research that "owls wintering in the foothills were from outside the region and they left to breed elsewhere." ("Winter Burrowing Owl Banding Project," p. 2.)

Nonetheless, after the close of the public hearing, in response to questions from Commissioner McClure, Dr. Bloom testified that his conclusions regarding foraging habitat on the NBR property were based on "breeding pair nesting." (Transcript, p. 408.) There is a

fundamental difference between breeding pair nesting and overwintering burrow owl foraging. As correctly noted by Commissioner McClure, “when they are nesting they need to stay close to the burrow,” and when they are not nesting, but wintering, and there foraging area expands dramatically. (*Id.*, p. 409.)

Staff did not point out this fundamental distinction in its presentation and the expert studies which support it and Dr. Bloom’s erroneous application of foraging acreage requirements that apply only to breeding burrowing owls, and not non-breeding burrowing owls who are not tied to the site.

E. The Correct Amount of Foraging Area Proposed for the Site

Following the close of the public hearing, the Staff ecologist did not provide the Commission with the correct amount of acreage of burrowing owl foraging habitat proposed on site and how that would favor and enhance the foraging habitat of the overwintering burrowing owl. While Staff arbitrarily added 64 acres of burrowing owl foraging habitat – essentially non-native grasslands, disturbed oil field roads, well pads, and ruderal areas defying vegetative classification, Staff did not advise the Commission that the NBR plan would conserve and restore approximately 199 acres of burrowing owl foraging habitat onsite, plus substantial additional acreage immediately offsite at Talbert Park and Fairview Park. (9/2/16 Letter from NBR to Commission, Figure 1 (“Potential Burrowing Owl Foraging Habitat Area”))

Staff failed to consider or explain the expansive burrowing owl foraging areas available and utilized in the large, protected areas off-site, Talbert Regional Park and Fairview Park. NBR’s avian experts explained:

“Landscape-level mapping of potential foraging habitat in areas adjacent to the site was performed and includes approximately 76 acres within 600m, 17 acres between 600m and 1km, 622 acres between 1km and 3km, this includes adjacent and nearby open space such as Talbert Regional Park, Fairview Park, and the Huntington Beach Wetlands and 1,077 acres between 3km and 6km, which includes areas such as upper Newport Bay. This does not include other smaller infill parcels or beach foraging opportunities which represent additional viable areas to forage.” (9/2/16 Letter from NBR to Commission, p. 4.)

Figure 1 to the 9/2/16 Letter from NBR to the Commission reflects the results of the mapping.

The Staff ecologist inaccurately opined, without any evidentiary support, that the burrowing owl requires foraging habitat as ESHA over an additional 53 acres on the Mesa, despite her concession at the hearing that she is not a burrowing owl expert, and her insistence that only the paid opposition consultant’s opinion, based on “breeding pair nesting,” be considered by the Commission. While the literature concerning the Burrowing Owl provides considerable information regarding Burrowing Owl breeding habitat, little information is provided concerning the transient overwintering Burrowing Owl. As stated in the *USFWS Status Assessment and Conservation Plan for the Western Burrowing Owl in the United States*, “very little is known about habitats used during the winter.” (See also the Final, “Winter Burrowing

Owl Banding Project (February 2016), prepared CDFW for the period September 2014 to March 2016, page 2, which made the same observation, explaining that banded bird studies have shown “that owls breeding or fledged in British Columbia, Washington state and Oregon migrate south to winter in northern, central and southern California.”

F. Inadequate Review of Literature Regarding Burrowing Owl Foraging Habitat

At the hearing, Commissioner Vargas read or referred to several key passages from the treatise, “California Bird Species of Special Concern: A Ranked Assessment of Species, Subspecies, and Distinct Populations of Birds of Immediate Conservation Concern in California, a collaborative project of CDFW, PRBO Conservation Science, and Western Field Ornithologists (2008). This treatise is readily available on the CDFW’s website, but was not a part of the Staff ecologist’s apparent literature review. Staff, including the Staff ecologist, did not bring those passages to the attention of the Commission in discussing the overwintering burrowing owl foraging habitat, and did not adequately respond to Commissioner Vargas’ questions or comments concerning those passages, except to candidly explain, “I am not a Burrowing Owl expert.” (Transcript, p. 383.) This included the following from “California Bird Species of Special Concern”:

- a. “Owls in agricultural environments nest along roadsides and water conveyance structures (open canals, ditches, drains) surrounded by crops (DeSante et al. 2004, Rosenberg and Haley 2004). Burrowing Owls often nest near and under runways and associated structures (Thomsen 1971, Gervais et al. 2003). In urban areas such as much of Santa Clara County, Burrowing Owls persist in low numbers in highly developed parcels, such as Moffett Federal Airfield, in busy urban parks, and adjacent to roads with heavy traffic (Trulio 1997, D. K. Rosenberg pers. obs.).” (*Id.*, p. 221; Transcript, p. 377, 381-382.)
- b. “During the breeding season, owls forage close to their burrows but have been recorded hunting up to 2.7 km away (Haug and Oliphant 1990, Gervais et al. 2003). Over 80% of foraging observations in agricultural areas of the southern San Joaquin and Imperial valleys occurred within 600 m of the nest burrow (Gervais et al. 2003, Rosenberg and Haley 2004).” (*Id.*)
- c. “However, urban development at moderate levels appeared to benefit owls by increasing prey availability (arthropods and lizards) near homes and reducing mortality from natural causes (Millsap and Bear 2000, Millsap 2002). This pattern may hold for California, but presently this is not known.” (*Id.* at 222; Transcript, p. 383.)

In addition, the Staff ecologist noted review of CDFW’s “Staff Report on Burrowing Owl Mitigation” (2012), but omitted (at p. 13): “Where a burrowing owl population appears to be highly adapted to heavily altered habitats such as golf courses, airports, athletic fields, and business complexes, permanently protecting the land, augmenting the site with artificial burrows, and enhancing and maintaining those areas may enhance sustainability of the burrowing owl population onsite.” (Page 13.)

The Commission was entitled to have the correct information regarding the overwintering burrowing owl in assessing whether the project proposes adequate foraging habitat onsite and offsite.

G. Addressing Methods to Enhance Burrowing Owl Habitat Onsite

Staff did not explain to the Commission that there are other methods available to enhance the burrowing owl burrow and foraging habitat onsite, rather than eliminating the development proposed. This includes NBR's repeated proposal to staff to include Burrowing Owl and Foraging Habitat Enhancement Plans in its proposed Restoration Plan, a proposal that Staff omitted from its analysis prior to the September 2016 hearing because it determined that, as proposed, the project provided adequate foraging habitat, but then rejected owing to a lack of knowledge regarding the suitable foraging habitat that would be restored and preserved onsite with the project. But, even Dr. Bloom admitted at the public hearing:

"We have fewer wintering birds coming in. If you wanted them – if we wanted them to be coming – coming into Bolsa Chica or this ranch – this Banning Ranch, you could establish artificial burrows and you might attract them. It may take a couple, three years, but they often do come in. And I would certainly recommend it if I was a consultant to consider that, if that was important." (Transcript, p. 411.)

And this was echoed by Commissioner Cox, who noted that the document referred to by Commissioner Vargas, but not utilized or referred to by Staff, suggested "that where nesting burrows are lacking, enhance habitat by using artificial burrows or encouraging the presence of ground squirrels." (Transcript, p. 441.) And, NBR proposed a comprehensive set of conditions in a Burrowing Owl Long-Term Management Plan" – not addressed by Staff -- to "maximize the potential for long-term persistence of wintering Burrowing Owl on the site:

- “• Ground squirrels will be allowed to persist throughout the open space areas on the site to ensure that a robust population of ground squirrels remains on the site as this is critical to maintain suitable conditions for wintering Burrowing Owls.
- Appropriate exclusion fencing (e.g., post and cable) with appropriate signage will be installed at the limits of the buffers that surround all burrow complexes in open habitat (e.g., grasslands) and other habitat areas, to ensure that access is strictly controlled and that the buffers function as intended.
- The project's CC&Rs will include restrictions on outdoor cats, stating that occupants are prohibited from having outdoor cats so as to reduce potential predation on Burrowing Owls and other avifauna. (It is expected that the onsite coyote population will remain and will provide a source of control of feral cats, which is presumably the existing condition).
- As already covered in the Habitat Restoration Plan prepared for the site, disturbed areas, areas of non-native grassland or ruderal vegetation, and degraded areas of purple

needlegrass grassland will be restored with native grassland habitats. Such restoration will increase the biomass over much of the mesa, which would in turn increase the potential prey base, reducing the area over which burrowing owls must range to find prey.

- Develop a lighting plan that ensures potential lighting impacts to Burrowing Owl ESHA is reduced to acceptable levels.
- Develop a signage plan specific to Burrowing Owl ESHA that directs the public to refrain from entering and disturbing conservation areas (OSCA) on the project site and educates the public about the habitat value and lists common disturbances to wildlife which are to be avoided, including but not limited to: domestic pets, littering, loud noises, lights, etc.
- Include artificial burrow structures at three locations within the grassland restoration areas to ensure that burrow complexes are available regardless of ground squirrel population fluctuations.” (9/2/16 NBR Letter to Commission, pp. 5-6.)

H. Inaccurate Information Regarding the Commission’s Dos Pueblos and More Mesa Decisions Applied to Breeding, Not Overwintering Foraging Habitat

The Staff ecologist inaccurately stated that the Commission has previously designated overwintering foraging habitat at Dos Pueblos and More Mesa, sites in Santa Barbara County. In fact, in both cases, the Commission made foraging habitat ESHA designations for breeding/nesting habitat, not overwintering foraging habitat.

5. “Potential ESHA” vs. ESHA.

NBR and Staff are in agreement that occupied Gnatcatcher habitat is ESHA, and the Project, as proposed, will avoid and protect that ESHA. However, the Revised Findings, if adopted, would go beyond that to incorrectly designate “potential ESHA” as ESHA. That encompasses an area *adjacent* to the occupied gnatcatcher habitat that (1) is substantially degraded, with the sparse presence of a single plant species, and (2) also includes disturbed scrub with no gnatcatcher observations ever, plus scrub areas that may have had gnatcatcher observations once or twice since 1992, but in any event more than 10 years ago.

Under the Coastal Act, an area that could be ESHA in the future, *i.e.*, “potential” ESHA, does not qualify legally as ESHA within the meaning of the Coastal Act. The fact that an area here “may” at some point in the future be used by gnatcatchers in the face of protocol surveys performed that demonstrate otherwise is not ESHA.

The Commission’s prior decisions have drawn this clear distinction, but the distinction based on the evidence, is not reflected in the draft Revised Findings. In Stoloski (A-2-HMB-12-005), the Commission found an appeal to present “no substantial issue,” rejecting the claim that red-legged frogs and the San Francisco Garter Snake might potentially come to the “Pullman” ditch, despite the lack of any evidence that they have done so.

Second, the most direct precedent is one that, again, the Revised Findings do not address, Sunset Ridge Park, the immediately adjacent property, with the same plant species, and the same issue, and no documented contemporary Gnatcatcher use. The Commission found: “Due to these circumstances, the vegetation does not reach the level of significance necessary to qualify as ESHA.” (Sunset Ridge Park Revised Findings, 5-11-302, p. 40.)

6. Seasonal Features C and CC

A. Whether Seasonal Features “C” and “CC” Qualify as Wetlands

The draft Revised Findings would designate Seasonal Features “C” and “CC” as wetlands. The evidence is that C and CC are minute, isolated features created by excavations to effect pipeline repairs. C is approximately 5 feet by 5 feet. They have no hydrological connection. They contain a monoculture of non-native, invasive plants and are situated in crude oil contaminated soils that impact habitat value and would require remediation and removal of the plants in any event.

Although not addressed in the Revised Findings, under the Coastal Act, the Commission has discretion to determine what is a coastal wetland and what is not, and, even adhering to the Commission’s long-standing one parameter test for a wetland determination, the Commission is not hamstrung by the presence of a small number of non-native, invasive plants, created through pipeline repair, that would have to be removed in order to remediate and then create an actual wetland.

There is no dispute that the Commission has the one-parameter test for wetlands. But, using Staff’s logic here, persistent running water in a street gutter might provide “hydrology,” one of the parameters, but that would not constitute a wetland, nor would the Commission or Staff consider it so.

In 6-01-64 (North County Transit District Development Board), for example, the Commission noted that approximately a half dozen cattails growing in 2 to 3 inches of soil in a five or six square foot area of a concrete culvert did not constitute a wetland. The Commission explained (at page 6):

“A combination of many different factors have led the Commission to the determination that the half dozen cattails identified at this site, although hydrophytic plants, do not constitute a wetland within the meaning of the Coastal Act. The Commission concluded that “the few isolated specimens of freshwater hydrophytic vegetation that have emerged in the concrete culvert do not constitute a wetland.”

Similarly, in 5-03-355 (Boeing), the Commission considered the impact to 385 individuals of southern tarplant, a plant species the Commission has typically regarded as ESHA. The Commission concluded in that instance, relying on the opinion of Dr. Dixon, that the tarplant was not ESHA. Dr. Dixon explained (at p. 16 of the Staff Report):

“... [A]t the Boeing site, the tarplant is not growing in one of the specialized natural habitats that has historically supported it, but rather it is growing among sparse exotic vegetation within a drainage ditch that was excavated from compacted fill materials. Tarplant was able to colonize the ditch because the fill is probably saline, the ditch has a great deal of bare space, and it is ephemerally flooded following rain events, factors that approximate the necessary characteristics of the plant’s native habitat. However, the ditch containing the tarplant does not form part of a natural ecosystem, the area of the ditch is very small, it is closely surrounded by urban development, and it is separated from the nearest semi-natural tarplant habitat (Helman Ranch) by the disced field and the retarding basin. Although southern tarplant and its native habitat are rare in coastal southern California, the artificial habitat in which a small population is growing at the Boeing site is neither rare nor especially valuable, and I recommend that the north drainage ditch not be considered ESHA under the Coastal Act.”

Here, Dr. Dixon opined that Seasonal Feature P, for example, is not a wetland within the meaning of the Coastal Act because the Act was not meant “to include asphalt, concrete, and the like even where the sediments are sufficient to support some plants that have accumulated at the surface.” (Memo, 4/29/16, revised 8/25/16, pp. 11-12.)

Staff can certainly discriminate between what is actually wetland or ESHA, and so, too, can the Commission. One look at Seasonal Features C and CC compels the conclusion that neither is a wetland within the meaning of the Coastal Act. At the hearing, Staff Analyst Teufel dismissed the fact that the plants in C and CC are non-native invasive species, stating that the survey results show that 100% of the species observed in each area occur only in wetlands. However, the fact that the non-native invasive plants also are hydrophytes in a tiny, unnatural man-made condition, owing to pipe repair, and as isolated features providing no habitat value or wetland function whatsoever, compels the conclusion that that neither area is a wetland, a determination that is for the Commission to make, based on the evidence.

B. Whether to Impose a 100 Foot Buffer Around Seasonal Features “C” and “CC” as Wetlands

While the Commission generally has applied a 100-foot buffer to protect wetlands, on numerous occasions it has also approved wetland buffers substantially less than 100 feet, including, in an appropriate case, a buffer width of 25 feet. Here, the Revised Findings would indiscriminately require the maximum, combined 100-foot buffer, despite the dubious status of Seasonal Features C and CC as “wetlands” – supposed wetlands having no conceivable habitat value, where the non-native invasive plants would actually have to be destroyed in order to remediate two small ditches previously excavated for pipeline repairs.

The determination of an appropriate buffer requires some exercise of discretion. Yet, the Revised Findings, if adopted, would destroy the notion of any discretion and is inconsistent with facts presented as to each feature and prior Commission decisions which have determined a far small buffer to be appropriate.

7. Fuel Modification in an ESHA Buffer

The draft Revised Findings do not accurately present information provided by NBR demonstrating that the Commission has permitted fuel modification in buffers on a case-by-case basis, and for conditions very similar to those that exist at NBR. Although one Commissioner commented that the Commission has never done that, in fact the Commission has and Staff did not correct the facts.

The draft Revised Findings (at p. 61) state: “There are some locations on the subject site where the potential buffer is currently a road or disturbed area and development of such areas can include other measures to buffer the impact and allow a reduced buffer.” Despite this acknowledgement, the Staff Report contains no information, no graphics, and no analysis of the above factors in relation to the existing conditions of the site or the proposed Project buffers and fuel modification plan. NBR, however, provided site-specific information documenting that the large majority of area adjacent to the proposed development envelope consists of developed and disturbed (largely bare dirt) areas, oil infrastructure, stockpiled debris, and non-native/invasive vegetation. The draft Revised Findings ignore this important factor in its analysis of buffers and proposed fuel modification and inaccurately characterizes the proposed fire-safe restoration planting as a heavily maintained fuel modification zone when, in fact, it was specially designed to provide both fire protection and habitat. Given these existing developed and disturbed conditions, the proposed fire-safe restoration planting plan would contribute 25.5 additional acres of functioning gnatcatcher and coastal cactus wren habitat, where none currently exists, which would require maintenance only in the form of non-native plant species removal.

The draft Revised Findings further ignore prior Commission decisions approving not only fuel modification, but physical development, within habitat buffers with conditions similar to NBR. In 2013, in A-NOC-12-005 (involving construction of a 33,368 sq. ft. office building, a three-story, 58,970 sq. ft. office building, surface and underground parking, and other improvements on a 14.35 acre hilltop property containing California coastal sage scrub and Southern maritime chaparral, within which California gnatcatcher had been observed foraging on the site), the Commission approved the project allowing for what it determined to be low impact development between the office uses and upland ESHA, consisting of at-grade parking, sidewalks and landscaping. The Commission permitted parking, sidewalk and landscaping areas with an average combined width of 79 feet to serve as the project’s ESHA buffer, concluding:

“While this is not a natural buffer area, this area will provide separation between the upland habitat and the commercial buildings” and “the at-grade parking, sidewalk and landscape areas will be sufficient to conclude that the project will not adversely impact the adjacent upland resources consistent with the City’s LCP.”

In A-6-CII-00-087-A2, involving a Carlsbad golf course, the Commission approved the project with zero buffers to upland habitat containing gnatcatcher habitat, determining that, given the passive nature of golfing and the fact that the golf course would be a vegetated area, the golf course would not have the same development impacts associated with the development of structures directly adjacent to ESHA and its associated disruption would not be significant enough to require a buffer. The Commission later determined that a paved emergency access

route, given the limited necessary use of the road, also would not result in impacts on adjacent native habitat areas.

More recently, in its review and approval of the adjacent Sunset Ridge Park project (CDP 5-11-302), the Commission noted that “The Commission has typically imposed buffers of 50-100 feet for gnatcatcher occupied ESHA (e.g. CDP 5-03-013, MT No. I, LLC, 5-92-188-A4, CPH Resorts),” and that the “buffer width is designed based on the specific circumstances of the habitat which is being protected and the impact of the development.” In the case of Sunset Ridge Park, the project site immediately adjacent to NBR, far less degraded and with the same vegetation and species constraints, the Commission approved a 50 ft. buffer from occupied gnatcatcher habitat, allowing for native landscaping, drainage and water quality improvements within the buffer. Although obviously highly pertinent to a determination of the buffer required under the Coastal Act, Sunset Ridge Park was not discussed in the September 2016 staff report or the draft Revised Findings.

These prior Commission actions highlight the need and appropriateness to consider site-specific conditions when establishing buffers, and buffer uses, for new development on sites containing gnatcatcher habitat. Given the specific context of the NBR site, its currently degraded conditions and ongoing oil field operations that effectively result in zero buffers from adjacent habitat areas, additional site-specific data and analysis should be fully considered in determining appropriate uses in habitat buffers, including fuel modification.

It is noteworthy that the draft Revised Findings’ discussion of fuel modification in buffers is incorrect and requires revision for the following reasons:

1. The buffer analysis, including identified buffer uses, does not reflect the modified development plan and Bluff Road submitted for the Commission’s review on August 23, 2016.
2. The buffer analysis, including buffer uses, assumes an adopted ESHA footprint, and there is none.
2. Staff’s description of NBR’s fire-safe restoration planting plan as a proposed, site-wide condition is incorrect; not all buffers are proposed to have fire-safe restoration planting.
3. Staff’s description of NBR’s fire-safe restoration planting plan is incorrect in terms of required maintenance; as noted, the only maintenance required would be removal of non-native plant species, consistent with habitat restoration best practices.

8. Compliance with the Native American Consultation Process.

A. Inadequate Explanation of Compliance with Native American Consultation Process

Staff did not accurately inform the Commission of the numerous archaeological resource studies completed for the NBR property, prior Native American consultation conducted by the City for the project, and failed to document for both the Commission and NBR the results of Staff’s efforts to conduct timely government-to-government consultation with Native Americans as directed by the Commission in May 2016.

Three Commissioners indicated that untimely or improper Native American consultation was a reason for denying the application, although the consultation is, by law, the sole responsibility of the Commission's Staff. (Transcript, pp. 365-366 [Commissioner Shallenberger]; *id.*, p. 399 [Commissioner Luevano]; *id.*, p. 402 [Commissioner Turnbull-Sanders].) Staff did not correct the incorrect assumption by Commissioners that somehow NBR, as applicant, fell short on this issue. The draft Revised Findings state that archaeological documents were "finally released to local tribal groups in June 2016," suggesting that NBR withheld the information, but the evidence is that Staff had on file since 2013 numerous archaeological resource studies conducted on the NBR Property which Staff should have provided to the Native American tribes upon initiating consultation, as directed by the Commission in May 2015.

In any event, NBR went beyond what it was required to do in terms of reaching out to the Native American tribes. This issue was not raised until Commissioner deliberations, and therefore NBR itself was not able to correct the record. Staff did not correct the record to provide input to the Commission regarding what it was required to do, and it made no record of outreach, unlike NBR, which documented its outreach efforts.

B. Failure to Provide the Commission NBR/Psomas' "Banning Ranch Archaeological Testing Memorandum."

The Staff Report, and now the draft Revised Findings, leave archaeological resource issues unresolved in the August 25, 2016 Staff Report, despite the fact that at the time of the hearing, Staff had the results of archaeological testing. On August 17, 2016, Staff issued a CDP for archaeological testing utilizing Staff's criteria. Pursuant to that CDP, NBR engaged directly with Gabrialeño and Juaneño monitors, and its consultant, Psomas, conducted the required archaeological testing. On August 23, 2016, the "Banning Ranch Archaeological Testing Memorandum" prepared by Psomas was submitted to Staff. Staff delayed review of the document. The August 23, 2016 Psomas Memorandum was neither attached to the Staff Report nor the Addenda, although Staff found it possible to include a later-dated August 25, 2016 letter to the Staff Report from CDFW. Staff further failed to bring the Psomas Memorandum and archaeological testing to the Commission's attention at the hearing, again leaving the issue hanging. Instead, the absence of comment by Staff created the impression that issues relating to archaeology were unresolved despite the Memorandum's conclusions:

- 1) "No new tribal cultural resources sites were found;
- 2) There are no impacts to the known archaeological sites on the property;
- 3) Nothing of significance was found in the proposed development areas; and
- 4) Avoidance measures incorporated into the Project's design will eliminate impacts to historic properties."

Addendum #1 made reference to the Psomas Memorandum, which it incorrectly characterized it as an "executive summary" when it was a final report, and, again importantly, it did not bring to

the Commission's attention the conclusions quoted above, and again did not attach the report to the Staff Report or either Addenda. At the hearing, NBR indicated its willingness to comply with the archaeology condition recommended by Staff. Nonetheless, Staff's failure to provide this Memorandum and its conclusions to the Commission and to correct the record created an erroneous impression concerning NBR's compliance with respect to archaeological issues.

9. Oil Field Cleanup in Relation to ESHA and Wetlands

The draft Revised Findings regarding oil field clean up do not reflect, to any extent, the Commission's deliberations or decision on the NBR application. Generally, Commissioners expressed support for NBR's plan to clean up the site in the near term, and concern over leaving the site in a contaminated condition and the resulting potential for ongoing impacts to plants and wildlife, and precluding future public access opportunities.

The draft Revised Findings suggest the below findings, which reflect NBR's comprehensive and site-wide clean-up plan, carefully designed in coordination with Staff, be deleted. In their place, Staff suggests the Commission identified an entirely new "alternative," which the hearing transcript demonstrates was not the case. Presumably, Staff's new "alternative" is intended to address oil field clean-up activities limited to a very small portion of the site containing Seasonal Features C and CC. However, the draft Revised Findings instead are broadly written, and incorrectly and misleadingly conclude that 1) NBR's proposed clean-up activities are not an attempt to restore and enhance the marine resources of the wetlands, vernal pools and arroyos on the site, 2) the proposed oilfield clean-up component of the project would not include feasible mitigation measures to minimize adverse environmental effects, although such measures were developed in close coordination with Staff (as described in the September 2016 staff report), and 3) that NBR proposes to address impacts to wetlands by enhancing other wetland areas, as opposed to in-situ and in-place restoration. Nothing is further from the truth.

The primary driver behind the proposed site-wide clean-up plan is to restore and enhance the variety of ESHA and wetlands on the property. This is unquestionably the case for clean-up activities slated for the 322 acres of proposed open space area, parks and public access amenities, which would be cleaned-up and restored solely for the purpose removing an industrial site, to be followed by habitat and water quality restoration, and introducing public access and recreational opportunities to the property. It goes without saying that over more than 80% of the property, the proposed type, level and extent of clean-up activities are in no way influenced or otherwise affected by the residential and commercial uses proposed. Only in the instance of Seasonal Features C and CC does NBR proposed to provide mitigation for remediation impacts on another portion of the site.

NBR's site-wide clean-up plan is, in substance, identical to Staff's suggested "final alternative" (which they refer to as "integration of oilfield clean-up activities in wetland areas into a comprehensive plan for the restoration and protection in place of those wetlands".) The draft Revised Findings suggesting that the Commission considered and adopted a new and "final alternative" for site clean-up – an issue that the Commission never even discussed -- should be deleted from the draft Revised Findings, and the findings should reflect that the clean-up activities, as proposed by NBR, are an attempt to restore and enhance ESHA and wetlands and,

with appropriate restoration and mitigation plans, would be consistent with the Coastal Act. Accordingly, the following findings should not be stricken from the Revised Findings, as recommended by Staff, as they remain wholly applicable to NBR's proposed clean-up plan (see p. 77):

“However, with additions and revisions to address the shortcomings in its proposal, NBR's Habitat Conservation and Conceptual Mitigation Plan (HCCM Plan) can be modified to integrate more fully with the proposed oilfield clean-up activities into a robust site-wide restoration program, ensuring that any temporary disturbance of ESHA is the minimum necessary to fully restore the ESHA in place. The Commission finds this can be achieved if the proposed clean-up activities are carried out in such a way as to (1) effectively and completely remove the chronic, ongoing, sources of significant disruption to that and adjacent habitat discussed above; and (2) integrate the revised HCCM Plan into a comprehensive and carefully implemented restoration program. With such modifications the Commission could find the proposed oilfield clean-up operations would serve to protect against significant disruption of habitat values.

Key to the success of this approach, however, is the implementation of measures to (1) limit the scope, duration, extent and severity of clean-up impacts within the target and surrounding areas; (2) thoroughly survey and document existing physical and biological conditions within those sensitive habitat sites in which clean-up would occur; (3) design and carry out a site-specific revegetation and restoration plan for each area of impact that includes clear habitat restoration and revegetation goals for that site based on quantifiable metrics and the results of the pre-impact physical and biological survey of that site; (4) design and carry out the appropriate level of supplemental habitat creation to address the temporal loss of habitat function between when it is affected and restored and to make up for limitations in the ability of restoration to fully replicate habitat; (5) carry out adequate ongoing monitoring of performance criteria, supplemental restoration, and maintenance activities until site-specific restoration goals have been met; and (6) provide for the long-term protection and preservation of restored areas and adjacent intact habitat areas.

These six key elements are essential to the successful development and conduct of the restoration component of the oilfield clean-up activities. When combined with the complete removal of the clean-up targets that act as chronic and ongoing disruptions to habitat values, this restoration component would ensure that the project would enhance the biological productivity and functional capacity of the portions of the site from which oil contamination and oil and gas production infrastructure would be removed, and would lead to a significant improvement to habitats and wildlife resources within those areas. Implementation of this type of combined clean-up and restoration plan would improve the quality and quantity of ESHA both within the clean-up areas and throughout the oilfield site.

CALIFORNIA COASTAL COMMISSION

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Th12a

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Staff Report on Rev. Findings:	1/21/17
Hearing on Rev. Findings:	2/9/17

STAFF REPORT: REVISED FINDINGS

Application No.: 5-15-2097

Applicant: Newport Banning Ranch, LLC

Agent: Mike Mohler, Brook Street Consulting, etc.¹

Project Location: 5100 Block of Pacific Coast Highway, Newport Beach, Orange County

Project Description: Abandon oil operations and clean and remediate soil; subdivide the 401 acre site into residential, commercial, mixed use, open space, park, and public street lots; grade 2.8 million cu.yds. of soil and construct residential and commercial development including approximately 12 acres of roads, 37 acres of residential with 895 residential units, 45,100 sq.ft. of commercial use, a 75-room resort and a 20-bed hostel; create 5 acres of park, and construct public trails within the 329 acre Natural Open Space Preserve, with oil operations to remain on 15 acres.

Commissioners on Prevailing Side: Commissioners Cox, Howell, Groom, Luévano, Shallenberger, Turnbull-Sanders, Vargas, Bochco, and McClure

Staff Recommendation: Adopt the revised findings for Denial of the permit

¹ Complete list of agents on file

STAFF NOTE

The ~~pending application~~ **application before the Commission in September 2016** is ~~was~~ the latest iteration of a proposal first submitted to the Commission in early 2013 to convert most of a 401-acre site known as Banning Ranch from an active oil field to a mixture of residential and commercial development, with large areas preserved as open space. A previous version of the ~~current~~ proposal for development of this site (CDP application 5-13-032) was heard by the Commission in October 2015. Although the Commission provided some direction, it did not act on the application at that hearing, and the item was continued, tentatively planned to be scheduled for the January 2016 hearing. Because of the impending deadline for Commission action pursuant to the Permit Streamlining Act (PSA) and the need for additional site visits, corrections to mapping and data, and ongoing working meetings, the applicant withdrew application 5-13-032 in December of 2015 and immediately submitted the proposal under a new application (5-15-2097). At the October 2015 hearing, the Commission made several comments and suggestions for a revised project and for staff and the applicant to work together to develop a revised plan, and several Commissioners asked staff to develop a recommendation of approval for a revised project that is consistent with the Coastal Act. In an effort to address changes needed to meet the requirements of the Coastal Act, there ~~have been~~ **were** additional working meetings with the applicant and three comprehensive site visits since the October hearing. Staff and the applicant ultimately agreed on a goal of having the item heard at the May 2016 hearing, but after a staff report was published for that hearing, the applicant requested a postponement in order to respond to the staff recommendation and granted an extension of the PSA deadline for Commission action. The PSA deadline ~~now requires~~ **required** the Commission to make a decision on this application before September 11, 2016 (at the September hearing) unless the applicant ~~chooses~~ **chose** to withdraw the application, **which they did not**. As always, the applicant has the right to re-apply after the withdrawal **or denial**, in accordance with Section 13056.1 of the Commission's regulations.

SUMMARY OF STAFF RECOMMENDATION AND COMMISSION ACTION

Overview

Staff is recommending that the Commission adopt the following revised findings in support of the Commission's September 7, 2016 denial of the coastal development permit application 5-15-2097. Fundamentally, the Commission determined that, as proposed, many elements of the project and many areas of the proposed development would be inconsistent with multiple Chapter 3 policies of the Coastal Act, which constitutes the Commission's standard of review for this project. On that basis alone, the Commission can, and did, deny the project.

Staff did identify areas where development could be allowed as consistent with Chapter 3. Commission staff identified a potential development area of approximately 19 acres, and while the Commission did not agree entirely with Commission staff's analysis, the Commission did agree that a substantial amount of development was likely approvable on

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the site, although the Commission determined that more information was needed to conclusively identify the precise location of the developable acres. Approximately 19 acres of the property could have been developed under the staff recommended conditions, and hundreds of units could have been accommodated on the identified acres, even though the property is currently only 4 legal lots.

Because the Commission agreed that large areas of the property seem developable, in theory, the proposal could have been conditionally approved, with conditions designed to revise the project in order to bring it into compliance with the Coastal Act. However given the large scale and size of the property and development proposed, the significant coastal resources and acreages, the number of places where development as proposed would be inconsistent with the Coastal Act, and the various number of ways in which the proposal could be revised, redesigned, or conditioned in order to bring the project into compliance with the Coastal Act; the Commission recognized the difficulty of conditioning the project to be consistent with the Coastal Act, and concluded at the time that it would not be appropriate, or even feasible, to condition the project from the dais in order to vote for approval of the project.

Further, as indicated above, the Commission was not satisfied that even with the conditions proposed by staff, the project would be consistent with the Coastal Act. For example, the Commission found that there was at least one subject matter where there is insufficient site-specific information (such as night time owl surveys) and information available in the scientific body of research (specifically the lack of information available to determine appropriate foraging standards for wintering, and not breeding, burrowing owls in Southern California), making it difficult to determine if the project as proposed would be consistent with Section 30240 without erring on the side of resource conservation. Additionally, the Commission was not able to determine if the project, as proposed or as conditioned, would avoid all cultural resources present on the site because the boundaries of the known resources were not mapped and the status of the property as a religious, cultural landscape is still in question. Thus, the Commission determined it was appropriate to deny the project and provide guidance to the applicant regarding how to craft an approvable alternative project in the future.

Finally, the applicant made it clear that they were in opposition to the staff recommended conditions, and therefore the Commission denied the proposal, because without the conditions, the project is not consistent with the Coastal Act. The applicant did not agree with the staff recommended special conditions and presented their own set of conditions to the Commissioners. The Commission found that the applicant's proposed conditions would not bring the project into compliance with Coastal Act requirements and that the differences between staff's recommended conditions and the applicant's were too great to bridge at the public hearing. Thus, the Commission exercised its discretion to deny the project. The denial of a project does not mean that the Commission is unwilling to consider any form of development. It is a denial of the current proposal, not a denial of any and all development forms that may be considered in the future.

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The Commission is under no obligation to redesign a project that as proposed is inconsistent with the Coastal Act in order to make it consistent through the imposition of conditions of approval. Ultimately, none of the Commissioners supported the project, as proposed or with the conditions requested by the applicant, as being consistent with the Coastal Act.

Many of the Commissioners noted that they were not opposed to approving development on a portion of the site, but because the applicant could not accept the staff recommendation, the Commissioners were not prepared to “find a project” between the applicant’s project and the staff recommendation and therefore did not make an amending motion at the hearing. Denial of the permit does not constitute a takings or an exaction, as the applicants and landowners continue to have an economic interest in the on-going oil operations on the site, and there are many possible approaches to designing some additional, new development outside of the mapped constraints that would be approvable as consistent with the Coastal Act. Denial of the permit does not mean that the applicant cannot continue to pursue a coastal development permit for an alternative proposal on the site.

Site Description and Project Summary

Banning Ranch is comprised of 401 acres, divided into 4 legal lots, and is the largest and last remaining privately owned lands of its size along the coast in southern California. Banning Ranch is located partly in the City of Newport Beach and partly within unincorporated Orange County, adjacent to the mouth of the Santa Ana River where it meets the Pacific Ocean ([Exhibit 1](#)). Despite its history of oil development and the presence of isolated areas that are severely degraded, the site as a whole continues to support a remarkable and unique array of sensitive coastal species and habitats, including nesting and foraging habitat for the threatened California Gnatcatcher, a very rare vernal pool watershed that supports the Endangered San Diego fairy shrimp, coastal wetlands, habitat for burrowing owls, and rare purple needlegrass grassland, as well as riparian habitat and coastal marsh lands. Banning Ranch contains a lowlands area consisting of approximately 130 acres of brackish and freshwater marsh habitat and a mesa (coastal terrace) that covers approximately 262 acres consisting of scrub habitats, grasslands, and vernal pools. The many arroyos on the site and marsh lands support rare and sensitive vegetation that provides habitat for many native animals including several rare species. The coastal bluffs and the canyon bluffs along the arroyos support rare and sensitive vegetation communities, such as coastal bluff scrub and California brittle bush scrub, and the Mesas contain native and non-native grasslands that both provide habitat for federally threatened and sensitive bird species living on the site. Commission technical staff has determined that approximately 219 acres of the property rise to the level of environmentally sensitive habitat areas (ESHAs) ([Exhibit 3](#)).

Numerous Native American archeological sites are present on Banning Ranch, which attest to the historic and widespread habitation of the site by the Gabrieleno and Juaneno tribes, and in turn, the site’s current cultural and historical significance. At the request of the Tribal Chairman of the Gabrieleno Tongva San Gabriel Band of Mission Indians, the state Native American Heritage Commission (NAHC) added the “Banning Ranch Cultural Properties and Landscape”

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located on the site to the NAHC Sacred Lands File because of its cultural significance. There are 9 distinct tribal entities with ties to the land on the NAHC contact list. To date, the proposed project has the support of 2 tribal entities, while the remaining 7 groups oppose the project or are concerned about the project.

The version of the proposed development **primarily** considered in this report is the NBR Project Description dated July 10, 2016. In this version of the project, the applicant proposes removal of most of the oil facilities and remediation of oil contaminated soils, grading 2.77 million cubic yards of soil on the site, providing for the continuation of oil and gas production operations on approximately 15 acres, and construction of 895 residential units, a 75-room resort hotel and a 20-bed hostel, 45,100 sq.ft. of retail space, a 5-acre park, a public trail network, and establishment of a 329-acre nature preserve on the property (**Exhibit 2**). The applicant ~~has recently~~ (8/23/16) proposed additional changes to the project to address issues and reduce impacts. However, with only three days until the production deadline, staff was unable to analyze the changes and reflect them in this staff report due to insufficient time for reviewing and updating all the relevant analysis and exhibits. **Staff preliminarily reviewed the new site plan prior to the hearing and stated on the record that it did not change staff recommendation, nor any of the special conditions.**

Given the extent of sensitive habitats and other development constraints on the site (**Exhibit 4**), as well as the large scale of the proposed development and its inconsistency with the Coastal Act, staff **would have had** to develop an extensive and complicated set of recommended conditions to accompany **any** the recommended approval of the project. ~~It has been a significant challenge to develop a set of conditions of approval necessary to bring the proposed project into conformance with the Coastal Act while still leaving the applicant with discretion as to how to revise the project to fit within the appropriate development footprints as determined by the identified site constraints.~~

Commission staff requested the City or County assist in the development of an LCP or a Land Use Plan for the site prior to the submittal of the coastal development permit (CDP) application, however that was not done and the applicant has chosen not to wait for such a process to be completed, but to pursue a permit at this time. ~~Therefore, staff is recommending the development plan authorized through this permit consist of a scaled down development that can be addressed through conditions of approval without a Land Use Plan, and one that avoids all impermissible impacts to ESHA and Wetlands and cultural resources.~~ The projected timeline for build-out of the entire development is at least 10 years. The scale and scope of development exceeds what is typically approved under a single CDP and such a proposal is more suited to a Specific Plan or LCP segment.

~~In this particular case, some of the major issues that the applicant and staff cannot agree upon are those that, again, are typically addressed through a planning document with community input, including: the circulation element, parks and open space, and in this case, the Sacred Lands designation. In addition,~~ The ecological and cultural resources of the site have yet to be addressed by a number of resource agencies; however, the applicant has chosen to seek Commission approval first, and then go through Federal consultation processes triggered by

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Army Corps of Engineers (ACOE) review, including review by the US Fish and Wildlife Service (USFWS). The input from USFWS will be particularly important to address the adequacy and size of the vernal pool complex, and the range and size of reserved habitat areas necessary to support the California gnatcatcher and Burrowing Owl, which are protected and sensitive species present on the property.

The ACOE jurisdictional delineation of Waters of the US on the site and subsequent permit consideration would trigger the Section 106 process, which would address the concerns of the Native American community related to the Sacred Lands designation and Traditional Cultural Landscape by an agency having direct jurisdiction over such issues. The applicant has ~~recently~~ conducted more specific archeological testing, as recommended by Native American tribes, in an attempt to rule out any potential for burials or other significant cultural or archeological resources within the proposed development footprint. There are some tribal interests that believe the entire property is a Sacred and Religious site and should be preserved as open space. Given the amount of land that will be retained in open space, even with the proposed development, it is possible that most of the concerns regarding preservation and avoidance of tribal cultural resources and traditional cultural landscapes can be addressed; but that should occur before an extensive development plan is approved for the property.

Relationship between Oil Facility Remediation and Proposed Development

The subject site is presently used for oil extraction and includes a network of roughly 40 miles of pipelines and nine miles of paved and unpaved roads that wind to various well heads, storage facilities, and other oil processing equipment areas spread across the site. There are a number of sensitive species using the property in its current disturbed, but still incredibly rich ecological state. The proposed oil field clean-up and implementation of the restoration required through the recommended special conditions will likely be beneficial for habitat; however, clean-up of the site will have to occur **as part of various required restoration activities and** when the oil wells are abandoned, regardless of the plans for residential and commercial development.

Of the more than 400 wells that have been drilled on the property, the great majority have already been abandoned. The settlement agreement and orders issued by the Commission in March 2015 to address alleged unpermitted development on the site requires the applicant to, among other things, abandon 17 additional wells on the project site, restore 18.45 acres of habitat, and preserve 24.6 acres of the site as open space; the applicant/landowner is bound to perform the restoration and mitigation activities required by the Consent Orders regardless of the Commission's **denial** ~~action on this application~~.

Further, in accordance with a stipulated agreement that arose from a dispute over the legality of certain wells on the property, described in more detail in Appendix B, the mineral rights owner - Horizontal Development LLC - ~~has~~ applied to the Commission for a coastal development permit (CDP No. 9-15-1649) to (a) restrict its ongoing and future oil operations to within an approximately 15 acre portion of the site made up of two heavily developed industrial areas on the property known as the Oil Remainder Areas and (b) carry out some additional well abandonment activities. Permit application no. 9-15-1649 ~~is currently being reviewed and is expected to come before the Commission later this year~~ **was heard by the Commission in December 2016 and its approval authorized a variety of clean-up and abandonment**

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activities, including closure and removal of wells; removal of structures, buildings and concrete pads and foundations; and collection and offsite disposal of debris, out-of-service equipment and infrastructure.

The proposed development plan ~~should be~~ **was** evaluated in its own right, not allowed to serve as a catalyst that results in more extensive clean-up and soil disturbance, under the guise of necessary clean-up, than would otherwise be necessary to remove contaminants and restore the property's habitat value. Moreover, the extent of soil disturbance proposed following oil well abandonment in this proposal exceeds the amount of soil disturbance necessary for actual clean-up of the site for open space, and is proposed in some areas to make way for the residential and commercial development plan.

Primary Inconsistencies – Site Constraints and Permissible Development

In the May 2016 staff report and exhibits, approximately 55 acres of the site was identified as potentially developable because of its location outside of the mapped constraints. The ESHA determination of the May 2016 staff report determined that the Burrowing Owl wintering burrows on the site were ESHA and a buffer was assigned to the burrow habitat. However, the Burrowing Owl foraging habitat was not identified as ESHA. As a result, there was strong criticism of the staff report from professional biologists who noted that without the foraging space, protecting the burrow habitat was essentially pointless because there is no other location within the vicinity where these owls can forage except for the open grassland on the Banning Ranch site. Thus, even with their burrow habitat protected and designated ESHA there would be no food source and the owls would be extirpated from the site and from the region. As such, ~~the staff's~~ ESHA determination ~~has been~~ **was** revised to reflect that the grasslands of the site rise to the level of ESHA because of the special role they serve as valuable habitat for the sensitive Owl species (**Exhibit 13a**). As a result of the revised determination, ~~there is approximately 19.7 acres of identified~~ **staff identified 19.7 acres of** developable space located outside of the mapped constraints (**Exhibit 4**).

Since October **2015**, the staff and the applicant have tried to get closer to agreement on an acceptable development plan, but one of the biggest stumbling blocks remains the proposed Bluff Road as a thoroughfare through the property connecting 17th Street to Coast Highway. The road would bridge one arroyo and include a series of box culverts in a second arroyo in an effort to minimize impacts, but it would still have direct, impermissible impacts on ESHA and wetland habitat and would bisect the central open space corridor that contains the majority of the relatively undisturbed ESHA and wetlands that creates the connectivity and ecological balance of the property (**Exhibits 5 and 6**). ~~Staff, therefore, does not believe~~ **Therefore**, Bluff Road is ~~supportable~~ **not approvable** under Chapter 3 policies of the Coastal Act. Nor ~~do~~ **does** staff ~~support that~~ the applicant's public access arguments suggesting that the movement of residents to the coast makes the proposal approvable, because the proposed development and its future residents would create the demand for the roadway which does not currently exist. In addition, existing roads surrounding the project site already provide coastal access for inland residents and the public that are superior to what would be provided by Bluff Road, and there is opposition to the development of Bluff Road by residents in the area. Additionally, the development proposed on the Southern mesa would remove large areas of ESHA foraging habitat and have detrimental

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impacts on the sensitive species of the site which is also not supportable under Chapter 3 policies of the Coastal Act (**Exhibits 5 and 6**). The development project as proposed would impact approximately 42 acres of ESHA and Wetlands.²

Other public access elements of the project, including public parking and visitor serving uses, would be enhancements for the public in coastal Newport Beach, but would not provide any substantial new coastal access opportunities. Furthermore, these parking opportunities and visitor serving uses are not sited consistent with the resource protection policies of the Coastal Act. The proposed trail network throughout the site, though, does provide for non-automobile circulation and additional recreational opportunities for the public. The proposed improvements to water quality would also enhance the habitat value of the site, so these elements of the proposal are supportable under the Coastal Act.

Takings

The Commission's denial of the proposal that was before it at the September, 2016 hearing does not constitute a taking. As the Commission indicated expressly and extensively at both at the October, 2015 hearing, and the September, 2016 hearing, there seems to be a significant, approvable project at the site. However, more work needs to be done to identify the precise parameters, and the applicant needs to make a proposal that fits within those parameters, rather than proposing a project that far exceeds the limitations of the site and then relying on the Commission to mold the proposal into something approvable. Consequently, the Commission has not yet rendered a final decision on the use to which the property in question may be put.

However, it is clear that, even with the development restrictions, a substantial use of the property is possible,, and a substantial amount of economic value could be derived from such development, especially considering the number of residential units or the amount of other economically profitable development that could be fit into such a development envelope.

While the applicant may argue that, given the significant costs of developing the site, the amount of development that could occur consistent **with the Ch.3 Coastal Act policies and the identified constraints** ~~staff's recommended conditions~~ does not provide an economically viable project, neither the Coastal Act nor the state and federal constitutional provisions prohibiting takings require that this Commission guarantee developers a profitable return on their investments. Moreover, as indicated above, the subject site comprises only four legal lots **and any alternative development plan could be comprised of more than 4 lots or 4 units.**

² **As was discussed at the hearing, the applicant proposed some last minute changes to reduce some of these impacts. Because of the timing of those proposals, staff could not update all of the analysis and figures throughout its report to reflect those changes and address them as comprehensively as it had analyzed the July version of the project, but as was explained at the hearing, doing so was not necessary, as the revised proposal was not sufficiently modified from the July proposal to alter any of the fundamental conclusions in the staff recommendation. For example, the revised proposal would not have reduced this 42 acre figure by more than approximately 1/2 acre.**

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Nevertheless, Staff's recommendation would allow for a substantial amount of residential development on the project site, far exceeding 4 units. Consequently, this Commission is under no obligation to authorize additional development in order to avoid a taking. Nor must this Commission authorize additional development in order to provide the developer with sufficient revenue to fund the clean-up operation, as the oil operator is already obligated to complete that clean-up under existing law.

Nor do any of the requirements the Commission has indicated are necessary here constitute exactions that lack a direct nexus to the impacts of the project or exceed what is necessary to offset those impacts. The vast majority of the Commission's concerns have been with aspects of the proposal that would intrude into wetlands, ESHA, or buffer areas around the same. Those aspects of the project can be rectified by changing the design, without any payment of fees or forfeiture of property rights.

As for affirmative requirements to do things such as building trails, cleaning up contaminated areas, and restoring habitat, counsel made clear at the hearing that those requirements are limited to areas where the applicant is proposing work that would have related impacts, and most are simply regulating the manner in which the applicant performs work it is proposing to do. Finally, as counsel also made clear, the requirement to offer to dedicate an easement or fee title interest in some of the property was tailored to the impacts of the project by limiting it to the areas immediately surrounding the areas that would be developed.

In addition to all of the above, it is important to note that even if the applicant were not able to build any new development on the site, denial of the permit would not constitute a taking as the applicant and landowner continues to have an economic interest in the on-going oil operations on the site.

Finally, although some elements of the proposal would provide benefits to coastal resources such as public access and recreation, and those benefits are supported and even encouraged by the Coastal Act, that is not a basis for approval, as the Coastal Act only requires a balancing of benefits and harms when a project presents a conflict between one or more Coastal Act policies. Since the Coastal Act only encourages approval of such benefits and only when they can be provided in a manner that is consistent with other policies, the fact that the current proposal would violate other policies means that the Coastal Act does not require approval of those benefits as currently proposed, so there is no conflict among policies. Moreover, there are alternative means of providing those same benefits without violating other Coastal Act policies. Thus, those aspects of the project present no conflict to be resolved.

CEQA

In addition, the Commission must make findings that the approved project would be consistent with CEQA, specifically including a finding that the project approved is the least environmentally damaging feasible alternative. The proposed project is not the least environmentally feasible damaging alternative. While there are project alternatives that would be less environmentally damaging alternatives, such as preservation as open space, the development footprint recommended by staff would **could be designed to** provide an alternative that would

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avoid ESHA and wetlands; mitigate any adverse impacts to coastal resources; and protect sensitive habitats and resources in perpetuity, while also achieving the project goals to the maximum extent feasible.

The Commission finds that the project as proposed is inconsistent with Chapter 3 policies of the Coastal Act and must be denied.

~~Therefore, staff is recommending approval of the project as conditioned to include: oil well abandonment and clean-up to the appropriate levels with habitat restoration, protection of all sensitive resources, both biological and cultural, development of water quality improvements and the residential areas to the north of the site specifically the Urban Colony and the North Family Village with a road between the two, and all associated infrastructure and utilities confined to the areas outside of mapped constraints with access limited to 17th street. Staff is also recommending approval of the 329 acre Open Space dedication and habitat restoration.~~

~~The recommended conditions are attached to the end of staff report after the Findings due to the number and size to help with navigation through the report in digital format. Conditions of approval would result in a revised plan that avoids sensitive resources and identified site constraints by focusing the development into a smaller footprint and by limiting the circulation. The conditions of approval include: a requirement to revise the development plans to avoid harming the resources that the Coastal Act requires be protected, except for temporary impacts that are necessary as part of a clean-up and restoration effort; restrictions on future development; habitat protection; a requirement for in-situ restoration and mitigation for impacts to ESHA and wetlands due to oil operation clean-up; protection of cultural resources; requirements for other regulatory agency approvals; a requirement that the landowner offer to dedicate the lands of the proposed 329 acre preserve, trails, and recreational areas for their protection; a provision to ensure that no future bluff or shoreline protective devices will be constructed to protect the authorized development; and submittal of evidence of water supply. Conditions of approval also include the submittal of several final plans for landscaping, lighting, construction staging and phasing, construction BMPs, water quality, and geotechnical review. Only as conditioned can the project be found consistent with the Coastal Act.~~

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~~Appendix F– Additional letters submitted~~

EXHIBITS

Exhibits were not revised and are not attached to this report. Exhibits linked in the September 2016 report are still relevant: <http://documents.coastal.ca.gov/reports/2016/9/w14d-9-2016.pdf>

Exhibit 1 – Vicinity Map

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Exhibit 13a – ESHA Memo – Site specific analysis of wetlands and ESHA on Banning Ranch by Drs. Dixon and Engel dated 4/29/2016 and revised 8/26/2016

Exhibit 13b- ESHA and Wetland Determination for Banning Ranch by Dr. Jonna Engel dated 9/25/2015

Exhibit 13c- Letter to Cal Fish and Wildlife Service re: Burrowing Owl Habitat

Exhibit 14– Fault Zone Map

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Exhibit 17 – Example Material Processing, Treatment, and Disposal Site Plan (8/2016 version)

Exhibit 18 –Estimated Oilfield Clean-Up Sites in ESHA and Wetlands

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Exhibit 20 – Example Clean-up Targets/Sites Photos

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I. MOTION AND RESOLUTION

Motion:

~~I move that the Commission approve Coastal Development Permit No. 5-15-2097 pursuant to the staff recommendation.~~

+

"I move that the Commission adopt the revised findings proposed by staff in support of the Commission's action on September 7, 2016, denying Coastal Development Permit Application 5-15-2097."

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.~~

Passage of the motion will result in the adoption of revised findings as set forth in this staff report. The motion requires a majority vote of the members from the prevailing side who are also present at the February 9, 2017 hearing, with at least three of the prevailing members voting. Only those Commissioners on the prevailing side of the Commission's action are eligible to vote on the revised findings.

Commissioners on the prevailing side are: Commissioners Cox, Howell, Groom, Luevano, Shallenberger, Turnbull-Sanders, Vargas, Bochco, and McClure.

Resolution:

~~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 will substantially lessen any significant adverse impacts of the development on the environment.~~

The Commission hereby adopts the findings set forth below for the denial of Coastal Development Permit Application 5-15-2097 on the grounds that the findings support the Commission's decision made on September 7, 2016 and accurately reflect the reasons for it.

~~II. STANDARD CONDITIONS~~

~~This permit is granted subject to the following standard conditions:~~

- ~~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 on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.~~
- ~~3. **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.~~

III. REVISED FINDINGS AND DECLARATIONS:

Staff Note: The following revised findings incorporate the changes to the staff made to its own recommendation in issuing the September 2, 2016 addendum, with the exception of the stricken special conditions, and also include all of the changes made by the Commission in denying the proposed project at the hearing on September 7, 2016. The portions of the staff recommended findings that are being deleted are ~~struck through~~, and additions to the staff recommended findings are **bolded and underlined**.

A. PROJECT LOCATION AND BACKGROUND

Location & Current Ownership

Banning Ranch is a four-lot, 401.1 acre site in Orange County at the borders of Newport Beach, Huntington Beach and Costa Mesa (**Exhibit 1**). The site is bounded on the west by the Santa Ana River and the Semeniuk Slough, a remnant channel of the Santa Ana River that adjoins 92 acres of restored salt marsh basin owned and managed by the US Army Corps of Engineers; on the south by Pacific Coast Highway; on the east by a residential area and Sunset Ridge Park in the City of Newport Beach, and parcels partially occupied by storage that are owned by the Newport Mesa Unified School District; and to the north by the City of Costa Mesa Talbert Nature Preserve, an approximate 180-acre nature preserve and wilderness park owned and operated by Orange County Parks. Approximately 40 acres of the project site are located within the

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incorporated boundary of the City of Newport Beach, while the remainder of the project site is located within unincorporated Orange County. The City of Newport Beach has indicated an intent to annex the property, demarcating it in the City's "Sphere of Influence." The City of Newport Beach issued local approvals for the development project and was the Lead Agency for the production and certification of the Environmental Impact Report (EIR) required pursuant to the California Environmental Quality Act (CEQA). The site is not certified (deferred certification) in the City of Newport Beach's Coastal Land Use Plan (LUP), and presumably, the City would create a plan for the site after annexation. All 401 acres of the site are in the Coastal Zone.

The applicant for the pending proposal is Newport Banning Ranch LLC (NBR), a partnership that includes Aera Energy, Cherokee Investment Partners, and the real estate company Brooks Street, which own the surface rights to the site. The underlying mineral rights are held by Horizontal Development, LLC, whose operating affiliate, the West Newport Oil Company, has been conducting the oilfield operations on the site since 1983. In addition, the City of Newport Beach operates approximately 16 wells and an oil processing facility at the southwest corner of the site adjacent to Pacific Coast Highway.

Site History

Banning Ranch (BR) has a rich natural history with important ecological and cultural functions. The site was once occupied by Native Americans. Adjacent to the Santa Ana River and the Pacific Ocean, the site likely offered productive habitat, freshwater, and hunting and foraging resources. Cultural recourses have been found on the BR site and many more resources are likely still present, yet to be found. At the time of initial European contact, the Santa Ana plain was occupied by the Gabrielino Native Americans. Central Orange County was shared by both the Juaneño and the Gabrielino tribes. An area called "Genga" is located in what today is Talbert Regional Park, immediately inland of the Banning Ranch (BR) site. The site was a shared land between two Native American tribes, the Juaneño and the Gabrielino tribes. Today, the site still contains 8 known archeological sites from these tribes and likely more yet to be discovered sites. BR is just one of many sites in Orange County that were occupied by Native Americans.

Among the more significant sites known along the northern coast of Orange County is the complex of sites surrounding Bolsa Chica, including the "Cog Stone" site or the "Griset Site". As with Bolsa Chica, Newport Bay also is surrounded by a number of prehistoric sites. The sites along the southern Orange County coast in the San Joaquin Hills include multi-component complexes at Bonita Mesa, Pelican Hill, and Shady Canyon. The BR site has been recorded with the Native American Heritage Commission (NAHC) as sacred land as of February 2016. The State NAHC added the "Banning Ranch Cultural Properties and Landscape" located on the site to the Sacred Lands Inventory because of its cultural significance, above and beyond the conditions of the artifacts present on site.

Some Native Americans and professional archeologists believe that the site is an extension of the prehistoric village Genga and that the individually labeled archeological sites recorded on the BR site are all connected and actually represent a small village. Archaeological excavation notes from the 1930s at Genga included digs at the BR site where a burial was found. The

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archaeologist notes that they were looking for a community gravesite on BR, similar to the gravesite found at Fairview park. Although no community gravesite was found in the 1930s, testing was only performed on the northern quarter of the site. Testing that was done later in the 1980s was only performed around locations proposed for oil wells. Investigations done during the environmental review was limited to verifying the location and quality of existing known sites that were discovered in the 1980s. To date, there has not been an investigation with the goal of identifying all archaeological sites or investigating whether or not a community grave is present onsite, or if the site is connected to village Genga.

In 1801, all the land that lay east of the Santa Ana River, from the Pacific Ocean and inland for 25 miles to the mountains was used for grazing cattle and eventually became known as the *Rancho Santiago de Santa Ana*, totaling over 62,000 acres, which included the BR site. The land was later sold to Mary Hollister Banning in 1874. Thereafter, the site was referred to as the Banning Ranch. Over the years, portions of the property were leased to local farmers.

It wasn't until 1939 that 1,750 acres of the Banning Ranch, including the subject site, were leased for drilling operations by the Thompson Company, an independent operator. Parts of the Banning Ranch were sold off and/or developed. Today, the subject 401 acre remainder of Banning Ranch still supports an extensive network of ecological habitats, as described by the City of Newport Beach's General Plan Land Use Element:

Although the Banning Ranch site contains an assemblage of diverse habitats that have been historically disturbed, when this area is considered with the contiguous Semeniuk Slough and restored wetlands, it provides wildlife with a significantly large, diverse area for foraging, shelter, and movement. Biological studies performed for Banning Ranch indicate that, while disturbance associated with oil activities diminishes the quality of existing habitat to some extent, overall, the area should be regarded as relatively high-quality wildlife habitat due to its size, habitat diversity, and continuity with the adjacent Semeniuk Slough and federally-restored wetlands.

The Banning Ranch project site has supported ongoing oil and gas production operations since approximately 1944. Over 470 oil and natural gas production and steam and water injection wells have been drilled during 72-years of operations, and access roads, pipelines, power lines, and other associated infrastructure have been installed and used. Over time, as operational practices changed and evolved and oil formations at different depths and locations on the site were targeted, wells and infrastructure were abandoned, removed, relocated, and replaced across the site. Peak annual oil and gas production on the site occurred in the early 1980s from over 300 active wells and has declined steadily until recent years when it appears to have stabilized with less than 60 active production wells. The majority of these wells are located in the central portion of the site near the 17th St. entrance and the two lowland sites proposed to remain as oil production areas (also referred to as the "oil remainder areas").

In 1973, Proposition 20 (the predecessor to the Coastal Act) took effect, and the California Coastal Zone Conservation Commission granted an exemption from Proposition 20's permit requirement (E-7-27-73-144) to the oilfield operator at that time, General Crude Oil and G.E.

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Kadane & Sons, for continuation of the oil production activities occurring or in development at the time, including the use of the 328 wells that existed onsite and the 28 additional wells that were in development. In addition, the “abandonment of wells in accordance with requirements and approval of the State Division of Oil and Gas and removal of surface equipment and pipelines per state and local agency requirements” was exempted from coastal development permit requirements.

While this document establishes that certain well abandonment and surface equipment removal activities are exempted from coastal development permit requirements, these activities are limited in type and scope. The exemption states that the abandonment of wells and the removal of surface equipment and pipelines carried out according to the State Division of Oil and Gas (currently known as the California Department of Conservation’s Division of Oil, Gas and Geothermal Resources or DOGGR) authorization is exempt. However, none of the proposed abandonment activities currently contemplated have been required or authorized by DOGGR. In addition, typical well abandonment activities considered by DOGGR are limited to the capping of active wells and the removal of oil infrastructure and clean-up of visible areas of oil. The extensive onsite soil and concrete processing, treatment, and disposal element of NBR’s proposal significantly exceeds the scope of what DOGGR would (much less did) require under its oilfield restoration regulations and is therefore not exempt. Further, as described in greater detail, the Commission has additional authority to review the proposed project under its federal consistency regulations, and NBR has included the entirety of the proposed project - both oilfield clean-up activities and residential and commercial development - in its CDP application.

Coastal Commission Action

A previous version of the current proposal for development of this site (CDP application 5-13-032) was heard by the Commission in October 2015. No action was taken at that hearing and the item was continued, tentatively planned to be scheduled for the January 2016 hearing. Because of the time constraints and the need for on-going site visits, corrections to mapping and data, and working meetings, the applicant withdrew the application 5-13-032 and resubmitted the application (as 5-15-2097). Staff and the applicant ultimately agreed on a goal of having the item heard at the May 2016 hearing. At the October 2015 hearing, the Commission made several comments and suggestions for a revised project and for staff and the applicant to work together to develop a revised plan. In an effort to address these comments, staff scheduled several working meetings with the applicant and several additional site visits. A staff report was published in April 2016, with a recommendation of approval, however the applicant chose to postpone the hearing in order to respond to the staff recommendation. In the time between the April 2016 staff report was published and the September Commission hearing, the applicants applied for a second permit (CDP 5-16-0649) to conduct archaeological investigations on the site; the permit was approved by the Commission August 2016 and described in more detail in Section H. Archaeological and Cultural Resources. The project also includes establishment of 15 acres of oil remainder areas and work within them is proposed and ~~currently being reviewed in~~ **was approved by the Commission at the December 2016 hearing,** CDP application No. 9-15-1649.

B. STANDARD OF REVIEW

Approximately 40 acres of the site are under the general jurisdiction of the City of Newport Beach, and 361 acres are under the jurisdiction of the County of Orange. However, for Coastal Act permitting purposes, the entire site is in the Commission's permitting jurisdiction. This is true for two reasons. First, although the City of Newport Beach Coastal Land Use Plan (LUP) was certified by the Commission in 1982, and was updated in 2005 and 2009, the current LUP leaves the site in a state of deferred certification (**Exhibit 7**). Second, since the City has no Implementation Plan, it does not have a fully certified LCP. The City is currently pursuing the Implementation Plan for its LUP. The LUP states:

1.1 Purpose- The Coastal Land Use Plan sets forth the goals, objectives, and policies that govern the use of land and water in the coastal zone within the City of Newport Beach and its sphere of influence, with the exception of Newport Coast and Banning Ranch... Banning Ranch is a deferred certification area due to unresolved issues relating to land use, public access and the protection of coastal resources.

2.2.4-1- Designate the Banning Ranch Property as an area of deferred certification until such time as the future land uses for the property are resolved and policies are adopted to address the future of the oil and gas operations and the protection of the coastal resources on the property.

The 40 acres of the site within the City of Newport Beach's boundaries are included in the City's General Plan as a "planned community." Despite the fact that the entire site is not formally a part of the City of Newport Beach, the City's general plan (not certified by this commission) includes a designation for the site and prioritizes the site as open space, or alternatively as open space with residential, which was added and voter-approved in 2006. The approximately 361 acres under the jurisdiction of Orange County have a land use designation of Open Space and zoning designations of light industrial, residential, business, and an overlay zone allowing for oil production (not certified by this commission). The entire Project site has a *County of Orange General Plan Land Use Element* designation of Open Space (**Exhibit 7**). The Land Use designation had a priority use of Open Space to include consolidation of the oil operations, restoration of the wetlands, provisions for a nature and educational center, and active neighborhood parks. If not acquired for open space within a specific time period, the alternative use of the property allows for residential, retail, schools, active parks, and preserved open space. Neither the City of Newport Beach nor the County of Orange has a certified Local Coastal Program that includes the Newport Banning Ranch site. Because the proposed project is inconsistent with the County and City plans, subsequent changes to the plans will require land use designation changes. The Orange County General Plan will need to be amended if the property remains within unincorporated Orange County. If the City of Newport Beach annexes the property, Newport Beach will be able to incorporate the property into the LCP and it will require an LCP amendment. The project was approved by the Newport Beach City Council and an Environmental Impact Report was certified by the City of Newport Beach in August 2012. The project does not have local approval from the County of Orange.

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Despite the current land use designations in the County and City General Plans of priority as open space, the project includes proposed new land-use designations for mixed use development. The policies of the Coastal Act encourage and protect higher priorities uses, which include areas for open space, lower cost recreation, and visitor serving development. As stated, the site is not formally annexed to the City of Newport Beach, which is in the process of creating an implementation plan and certifying their LCP. Approval of this project under a coastal development permit, because it is inconsistent with the policies of the Coastal Act, would prejudice the ability of the local government to certify their LCP. Only as conditioned to be consistent with Chapter 3 policies of the Coastal Act, can the project be approved without prejudicing the LCP.

The EIR describes a development agreement between the applicant and the City of Newport Beach with contingencies for annexation:

Pursuant to the City Code and Section 65864 et seq. of the California Government Code, a development agreement is proposed between the Project Applicant and the City of Newport Beach in order to describe the development rights of and public benefits to be provided by the Applicant, and outline the terms for annexation of the property to the City.11 Section 65865(b) allows a city to enter into a development agreement for property in unincorporated territory with the city's Sphere of Influence; however, the validity of the agreement is contingent upon completion of annexation proceedings. The Pre-Annexation and Development Agreement (Development Agreement) between the Applicant and the City would vest the Project's development approvals to allow buildout of the Project site under the development standards and requirements in place at the time of Project approval. The Development Agreement includes requirements of the City that would need to be accomplished by the Applicant in return for the vesting of Project approvals. The Development Agreement addresses affordable housing requirements; parkland dedication/in lieu fee requirements; infrastructure phasing including Traffic Phasing Ordinance (TPO); permitting by the City pursuant to the Newport Banning Ranch Master Coastal Development Permit subsequent to approval by the Coastal Commission; vesting of City entitlements and applicable land use regulations; and other issues relevant to the Project in order to describe the development rights of and public benefits to be provided by the Applicant and to outline the terms for annexation of the property to the City. The Development Agreement would not preclude the need for future site plans, tentative tract maps, or other permit processing prior to development. If the City does not have a certified Local Coastal Program by such date on which the Development Agreement is entered into, the Development Agreement would be submitted to the Coastal Commission for its approval.

The suitability of the site as a mixed use development has not been addressed through any LUP or through a certified Local Coastal Program. For a project of this scale, land uses/designations should be identified through a local coastal program prior to any coastal development permit being processed. The standard of review is Chapter 3 of the Coastal Act. Preceding submittal and again upon submittal of the subject CDP application to the Commission, staff advised the applicant that any development plan for Banning Ranch should be addressed in the context of an LCP. The applicant was asked to pursue a certified land use plan for the site in collaboration with either, or both, the City of Newport Beach and the County of Orange. Letters from both

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agencies were received that indicated that the local governments were unable or unwilling to seek certification of an LCP for the subject area or, at minimum, seek certification of a coastal LUP. Thus, the applicant decided to proceed with the CDP application.

C. PROJECT DESCRIPTION

The proposed project includes abandoning oil operations, clean-up and disposal of contaminated soil, oil and gas production infrastructure, and debris material, and constructing a housing and mixed-use development on the 401 acre site. The project also involves mass grading, a habitat impact mitigation and conservation proposal, and a subdivision. The revised development proposal submitted July 11, 2016 includes 12 acres of roads, 37 acres of residential with 895 residential units; 45,100 sq.ft. of commercial use, 8 acres of retail and resort with a 75 room hotel and 20 bed hostel; 5 acres of park and 7 miles of public trails and 329 acres of Natural Open Space Preserve (**Exhibit 2**). Active oil operations would remain on roughly 15 acres of the site. Details of the proposal are described further below.³

Grading

Mass grading is proposed to prepare the site for the ultimate project. Over-excavation and cut and fill associated with the development plan includes grading for parks, roads, underground utilities, and development lots. Grading is proposed in the Open Space Preserve to establish trail grades, prepare mitigation areas and provide maintenance access and water quality basin creation areas. Estimated total grading for the Project is approximately 1.4 million cubic yards of cut and fill for mass grading, and 1.3 million cubic yards of grading for the housing development proposed, which would involve removal and re-compaction of three to five feet of soil on the mesa. The project requires a total of 2.8 million cubic yards of grading (**Exhibit 10**). Grading is proposed 25 feet into the proposed reduced 50 foot ESHA buffers for the construction of a 10 foot wide trail.

Subdivision

The applicant is proposing Tentative Tract Map no. 17308 to subdivide the 401 acre site. The Tentative Tract map approved by the city of Newport Beach will be revised due to the Coastal Commission review process. The property is proposed to be subdivided into 35 residential lots (some of which contain multiple units and/or condominiums); 1 resort/commercial lot, 15 open space lots, and 3 park lots. The balance of the lots are for streets, access, landscape and the remaining oil use areas (**Exhibit 9**). The road lots and park lots are proposed to be dedicated to the City of Newport Beach. A lot that would provide a transition between the project site and PCH would be dedicated to CalTrans. Open Space lots and some landscaped lots would be deeded for Conservation. The residential lots would be divided among individual homeowners and an HOA. The resort lot and retail area would be owned by the Resort operator.

Residential and Commercial Development

³ As recent as **On** August 23, 2016 (three days prior to the publication date of this report) the applicant made additional changes to the project to address issues and reduce impacts. However, these changes ~~are~~ **were** not reflected in the ~~current~~ **September, 2016** staff report as there was not sufficient time for staff to review that information and update all the relevant analysis and exhibits, **before the hearing took place on September 7, 2016.** **However, staff did address the proposed revisions to the grading plan in its oral presentation at the hearing.**

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Under the proposal, approximately 72 acres of the site would be developed with roadways, housing, retail/commercial space, resort development, and oil operation areas, (see [Exhibit 2, site plan](#)) divided into the following:

The Urban Colony, high density multi-family residential with 411 units in 3 different housing product types on 13.7 acres to the north of the site, near 17th street. The multi-family homes within the Urban Colony would contain 1 parking structure with 648 spaces for residential uses.

The North Family Village would contain low density single family residential above the North-South Arroyo in the central area of the site with a total of 82 units. This residential community is proposed to be 11.9 acres.

The South Family Village bordering the property line to the east near 15th street would include a community garden and a farm on 7.2 acres containing 115 residential units.

On the southern Mesa the applicant proposes to construct an 11.9 acre mixed use colony which would include visitor serving commercial, a 75 room hotel with residential approximately 43 units above, and a 20 bed lower- cost hostel, and a complex of 244 residential units with partial subterranean parking with access taken off Bluff Road from PCH.

The project also includes establishment of roughly 15 acres of oil remainder areas (work within which is proposed and currently being reviewed in CDP application No. 9-15-1649), with existing access off of PCH, adjacent to the Semeniuk Slough, largely configured as two areas with a connecting road between them.

The entire project is proposed to meet the standards of LEED-ND (Leadership in Energy and Environmental Design, Neighborhood Design).

Low-density housing (Traditional Homes and Cluster Residential) range in square footage from 1,850 - 4,150 sq. ft. and are proposed to be 36 feet high with up to 3 additional feet of architectural features. Moderate density housing (Townhomes 1 and 2) range in square footage from 1,650-3,000 sq. ft. and are proposed to be 45 feet high with up to 3 additional feet of architectural features. High density multi-family housing (Wrap condominiums and Resort condominiums) range in square footage from 1,000-2,000 sq. ft. and are proposed to be 60 feet high with up to 3 additional feet of architectural features. The retail and resort structures are proposed to be up to 50 feet high with up to 15 additional feet of architectural features.

Commercial and retail space totaling 45,100 sq. ft. would include 41,600 sq. ft. of visitor serving uses including the following proposed spaces:

South Village Commercial Use	Visitor Serving	Square footage
Art Gallery	X	3,000

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Bicycle Rentals	X	3,000
Commercial/Personal Services		2,000
Health/Fitness	X	3,000
Offices		1,500
Restaurants	X	6,750
Tourist Info Center	X	100
Visitor Serving Retail	X	25,750

The multi-family homes within the Urban Colony would contain 1 parking structure with 648 spaces for residential uses. A second parking structure would be located in the Southern Colony for residential, retail, and hotel use with a total 566 parking spaces, which is proposed to be partially subterranean with 2 levels under the residential and hotel structures.

A 20-bed hostel is proposed in the resort colony, with rates proposed to be \$79 for a private room and \$59 per bed in a shared room. The hostel would be constructed as a second floor to the visitor serving retail space. The hostel would contain a common entry space shared kitchen and living area, with 4 hostel rooms, each with 2 bunk beds and a sofa, and 1 queen bed (with an optional private divider) and shared bathrooms. In the hostel, there would be a total of 16 single beds and 4 queen beds.

Roads and Infrastructure

The 12 acres of proposed roads include 2-lane, 2-way entrances to the site from Pacific Coast Highway, 15th, 16th and 17th Streets. The backbone of the development is the road network through the site, which includes Bluff Road from West Coast Highway up to connections at 17th Street, 15th Street and 16th Street. Bluff Road is proposed to be 50 feet wide from curb to curb and includes a 10 foot median and would accommodate public parking on both sides. A 5 foot sidewalk and 10 foot parkway bioswale are proposed on either sides of the street for a total right-of-way of 80 feet. The reach from West Coast Highway to the entrance to the resort area would have one sidewalk only on the east side. Bluff Road widens to 63 feet curb to curb at the intersection of West Coast Highway to accommodate turn lanes. 15th Street and 16th Street are also proposed to be 50 feet wide from curb to curb and have sidewalk proposed on both sides. Interior 2-lane, 2-way roads for access to residential are proposed to be between 54-60 feet wide and would include public street parking on both sides of the street.

A bridge is proposed to span the main arroyo toward the south of the site to create a continuous connection for Bluff Road between the North and South colonies. All roads are proposed to be open to the public and interior roads would provide public parking opportunities. Five foot wide minimum on street bicycle lanes are proposed for both sides of arterial roadways and all streets

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would have sidewalks separated from the street by vegetation and bioswales. No parking fees have been identified for the public parking. The applicant submitted proposed changes to the special condition of the May 2016 staff report. According to the changes, the public parks and trails are proposed to have the following restrictions: upland trails would be open for use by the general public 24 hours per day, 7 days a week, but Lowland trails would be open 6 a.m. to Sunset. Parks and public parking in the parks would be open 6 a.m. to 11 p.m. and posted with “No Overnight Parking” signs.

Utility development on the site would include: new infrastructure and utilities, including water, sewer, and storm drain facilities to serve the proposed development. A sewer main extension and sewer lines would be constructed under the trail proposed to parallel the existing oil remainder area roadway to connect to the Orange County Sanitation District pump near PCH. Stormdrain lines would be constructed under the trails in the west end of the Main Arroyo. Stormdrain lines from the Urban Colony and the North Family Village would be constructed along existing oil operation roads from the mesa to the lowlands. Some utility connections would need to be constructed within the Oil remainder areas. New water, sewer and stormdrain facilities would connect to existing City and County facilities located adjacent to the property.

Water Quality Systems

Approximately 5 acres within the Open Space Preserve would be developed with Water Quality basins and diffuser basins to control stormwater into the wetlands and to treat runoff largely from the proposed housing developments on the mesa and the flow of run-on from nearby developed areas (**Exhibit 12**). The Project includes the construction of new drainage, flood control, and water quality facilities to control the flow of surface water across the site and direct flows into the existing arroyos and reduce flow rates and volumes of runoff to the Semeniuk Slough and the Santa Ana River. The project also includes construction of water quality basin on-site dedicated to the treatment of off-site flows that discharge untreated and uncontrolled into the site and into the Semeniuk Slough.

Water Quality systems designed for the Urban Colony, North & South Villages and the Mixed-Use Resort Colony will include series of harvest and reuse systems or biotreatment basins. All development areas will also include localized Hydrologic Source Control (HSC's) to reduce pollutant loads directly at the source. HSC's capture stormwater for use later, and reduce the amount of run-off. HSC's will include but are not limited to: impervious areas dispersion, downspout dispersion, localized on-lot infiltration and rain barrels (for single family detached residential). Additional water quality improvements consist of Low Impact Design (LID) features such as bioswales, landscaping biocells, and permeable pavement, where feasible, as well as source-control and treatment-control Best Management Practices (BMPs).

Rainwater Harvesting and BMPs that capture and store storm water runoff for later reuse for irrigation purposes to reduce potable water usage are proposed for the development areas within the Urban Colony, Mixed-Use Resort Colony and community park areas.

A water quality/detention basin is proposed near the site entrance off of 16th Street to treat urban run-on and would direct flows into the Southerly/Main Arroyo. The man-made basin will be approximately 0.75 acre and will be designed to accommodate up to a 4-foot treatment depth.

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Flows will be treated by native plants on the surface and will also include bioretention soil media mix to promote treatment through the soils and collection into a sub-drain. The basin would be planted with native emergent marsh and riparian species to promote water quality cleaning and natural energy dissipation.

One diffuser basin is proposed within the lowlands, just north of the northern oil remainder site, downstream of the North Village. Flows from the North Village area will be treated prior to reaching the diffuser basin by HSC's and either perimeter basins or the harvest and reuse systems. The diffuser basin would be constructed of rip-rap.

The second diffuser basin is proposed within the Open Space Preserve at the west end of the Southerly/Main Arroyo prior to flows entering Semeniuk Slough. A culvert would be constructed under the existing oil remainder site roadway in order for the flows from the Main Arroyo to exit the site into the Slough. The purpose of this diffuser basin is to control flows into Semeniuk Slough from the Southerly/Main Arroyo and the South Village development areas. Flows from the South Village development areas will be treated prior to reaching the diffuser basin by HSC's and either biotreatment basins or harvest and reuse systems. The diffuser basin would also be constructed of rip-rap. The diffuser basins proposed are in and adjacent to wetland and riparian habitat. Construction plans for the water quality detention basin, diffuser basins, and dissipator were not provided in the application materials.

Parking

A total of 54 off-street public parking spaces would be provided within the Community Park area. The Community garden and farm would include surface parking lots with 24 spaces. In addition, public off-street parking would be provided as shared parking within the resort area parking structure with 225 spaces would be available for retail uses and 160 spaces would be available for hotel uses. This structure includes 284 spaces for residential uses. Any remaining spaces would be available for coastal visitors. Additional parking is proposed off of Bluff Road near the entrance from PCH where a public shade structure would be and a small surface parking lot with 37 spaces.

A shuttle stop at the resort is proposed to provide service from the visitor serving/ resort area to the West Newport Park on the hour, Friday through Sunday, from Memorial Day through Labor Day, operated by the visitor serving commercial manager.

Habitat Conservation and Conceptual Mitigation Plan

Most of the impacts to the site would be a result of the implementation of the proposed oilfield clean-up work and the mass grading to prepare the site for the housing development ([Exhibit 11](#)). The applicant is proposing compensatory mitigation onsite for most of these impacts, as opposed to restoration in-place. The plan for the mitigation is the Habitat Conservation and Conceptual Mitigation Plan (HCCMP). The HCCMP was prepared as a mitigation proposal and assumes that the underlying impacts to the sensitive resources would be approvable under the Coastal Act.

Open Space

The 329 acre “Natural Open Space Preserve” would remain protected as permanent natural land and managed open space and control over the area to achieve these purposes would be transferred to a third party by an offer to dedicate. The applicant proposes these lands would be managed by the non-profit Newport Banning Land Trust (NBLT), which has negotiated a Memorandum of Understanding (MOU) with the applicant that would allow the NBLT to assume stewardship responsibility for the Natural Open Space Preserve. Funding for preservation of these open space areas would likely be provided by the Homeowners Association established for the proposed housing developments. Approximately 160 acres of the Open Space Preserve would be subject to restoration and enhancement or newly created habitat, as a result of mitigation for the development proposal.

Trails

The proposal includes 7 miles of public trails in areas adjacent to wetlands and ESHA. This trail system would provide connections between the lowlands of the site and the mesa, as well as connections to larger regional trails: Santa Ana River Regional Trail System and the Talbert Nature Reserve. The trails would be around the perimeters of the proposed “villages and colonies” with native landscaping. The trails are proposed to be 10 feet wide, within ESHA buffers. Bordering the trails would be a 40 foot wide buffer between the trail and ESHA, with maintained vegetation containing native scrub or purple needle grass which would also serve as a fuel modification zone. The trails in the lowlands primarily following the pattern of existing oil operation roads. Additionally, trails proposed to cross through the western end of the Southerly/Main Arroyo would follow the pattern of existing roads. A trail would connect from the lowlands to the Main Arroyo trail, parallel to the Orange County Sanitation District easement, and the existing road connecting the two remainder oil operations sites.

The 7 miles of public trails would be located within 10-foot-wide public easements or dedications as designated on the project subdivision map. Within the 10-foot-wide trail easements/dedications, generally six feet would be trail surface area and a maximum two-foot transition to native ground would be provided adjacent to each side of the trail surface for a maximum total improved area of 10 feet. The trail surface would consist of native soil or decomposed granite and would meander and/or become narrower or incorporate sections of elevated walkways as necessary to avoid identified special-status habitats.

On-street bicycle paths are proposed throughout the project. Five foot wide on-street bicycle trails are proposed for both sides of arterial roadways including Bluff Road, 17th Street, and 15th Street. Bike racks would be provided as a part of the proposed neighborhood retail center, parks, and the multi-family residential uses.

Parks

The project would include development of approximately 5 acres of active park near 16th street and additional park space near the southern residential community off 15th street ([Exhibit 2](#)). The 5 acre park near 16th street is partially located within the City of Newport Beach and partially within unincorporated Orange County, but would be dedicated to the City. The Community Garden off 15th street is located within the City of Newport Beach and would be

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dedicated to the City. The preliminary site plans for the active park includes active play areas with a community pool, basketball court, sports field, and a public restroom facility. The park would include 54 parking spots in a surface parking lot. The applicant has indicated that the park plans would utilize “dark-sky” technology in the lighting plans.

The site plan includes a community garden and a farm near the southern residential community off 15th street. The plans for the community garden have not been provided and it is unclear if the garden space will be available to members of the public or if it is strictly for use by occupants of the proposed residential communities.

Interpretive Parks are proposed to be located on the periphery of the Natural Open Space Preserve and would incorporate a vernal pool interpretive area and trailheads for the Interpretive Trail System in the Natural Open Space Preserve. Construction plans for the Trailhead and interpretive parks/trails have not been provided.

Oilfield Abandonment and Clean-up

While the owner of the site’s mineral rights, Horizontal Development LLC, has submitted a coastal development permit application (No. 9-15-1649) to continue and expand oil and gas production within two existing industrial areas on the lowland portion of the site (referred to on maps and figures as “Oil Remainder Areas”), the limited oil operations that are currently occurring throughout the rest of the site are proposed to be terminated. This would allow NBR to prepare those areas for the proposed commercial and residential development and would entail shutting down the current oil and gas production operations there (roughly 66 active or idle wells), removing all associated equipment, and treating all areas in which hydrocarbons or other contaminants are present in the soil. Of those approximately 66 active or idle wells, roughly half are located on the upland mesa (predominantly in the central portion near the entrance to 17th St.) and half are located in the lowland. To guide this proposed oilfield clean-up work, NBR has developed both an Oil Field Abandonment Plan (Abandonment Plan) and a Remedial Action Plan (RAP).

Generally speaking, the Abandonment Plan describes NBR’s proposed approach for shutting down oilfield operations and collecting and disposing of oilfield infrastructure while the RAP was developed as a formal submittal to the Santa Ana Regional Water Quality Control Board (Water Board). It describes the various clean-up targets (infrastructure and pollutants) and establishes the threshold levels for various types of contaminants. In approving the RAP in December of 2015, the Water Board accepted NBR’s proposed clean-up targets and threshold levels for contaminants. These thresholds are based on the type of contaminant (level of toxicity, potential impact on the environment and public health), as well as the depth and location of the contaminant and the proposed future use of the area in which it is located. For example, the most stringent clean-up levels are applied to the top 15 feet of soil within areas of proposed future residential use and the least stringent are applied to soil deeper than 15 feet below the surface in upland areas of proposed open space and lowland areas deeper than 3 feet below the surface. Although the RAP establishes these thresholds, the land use designations approved by the Commission for particular areas on the site (commercial/residential or open space/park land) will determine which clean-up thresholds would be applied there.

Existing and Future Site Conditions

Although the proposed closure and abandonment of the majority of the oilfield and its conversion to new residential, commercial, and open space uses triggers the need for an extensive and comprehensive removal of oilfield contaminants and infrastructure from those areas, it is important to note that a substantial amount of clean-up and restoration is also required on the site regardless of the proposed project. In fact, in several instances it appears that NBR's implementation of agency-required restoration efforts and clean-up activities on the site is long overdue - in some cases by well over a decade. In other words, one should not assume that the site would remain in its current condition if the clean-up activities proposed to prepare the site for residential and commercial development did not occur. Specifically, resolution of these past, recently completed, and ongoing efforts and investigations by state and federal resource agencies will significantly improve the existing conditions on the site:

- Commission Consent Cease and Desist Order/Restoration Order No. CCC-15-CD/RO-01 requires 18.45 acres of native coastal sage scrub, grassland, wetland and riparian habitat restoration on the site within areas two through six on the map included as Exhibit 15. The Orders also require passive restoration, i.e. cessation of mowing across the entire site, except for in limited strips, as necessary for fire protection;
- Commission Consent Cease and Desist Order/Restoration Order No. CCC-15-CD/RO-01 requires 0.4 acres of concrete debris to be cleaned-up and removed to an appropriate location;
- Commission Consent Cease and Desist Order/Restoration Order No. CCC-15-CD/RO-01 requires abandonment and closure of 17 wells, and removal of the remaining wells addressed by the 2015 Consent Orders that are located outside the oil remainder areas if NBR does not seek authorization for the wells, or the Commission does not authorize the wells. The well abandonment work also will include removal of all pipelines, power lines, pumps, well pads, other equipment, infrastructure, and visibly contaminated soil associated with those wells, as required California Department of Conservation, Division of Oil, Gas, and Geothermal Resources regulations;
- The Santa Ana Regional Water Quality Control Board requires, in compliance with its Cleanup and Abatement Order No. 01-77, that NBR partner Aera Energy and the oilfield operator carry out 2.87 acres of wetland restoration and ongoing soil and water clean-up and remediation activities within the lowland portion of the site;
- As described in lease inspection reports and deficiency letters, prior and ongoing investigations by the California Department of Conservation, Division of Oil, Gas, and Geothermal Resources indicate that extensive areas of derelict equipment, abandoned infrastructure and debris located throughout the site need to be removed and disposed of at a certified disposal facility;
- The extensive mapping and enhanced understanding now available of the existing sensitive habitats, wildlife, and vegetation communities on the site will

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allow for significant improvements in environmental stewardship as part of any ongoing and future operations.

Infrastructure Collection and Removal

The first element of the proposed partial oilfield closure is the abandonment of approximately 66 active or idle oil wells and the investigation and potential re-abandonment of historically abandoned wells that may not have been plugged according to current standards. This would be followed by the collection and removal of the infrastructure that serves these wells, including the removal of pipelines, pumps, power poles, tanks and vessels; the demolition and removal of roads and oil pads; the demolition of office buildings and storage structures; the removal of historic oil sumps and other areas that NBR has designated as having potential environmental concern (PECs) and the processing and disposal of several acres of concrete debris piles and soil treatment stockpiles that have been stockpiled on site since they were generated during past oilfield abandonment activities carried out in the 1990s. The anticipated maximum disturbance footprint associated with these activities is shown in [Exhibit 21](#). While the removal and collection activities could be carried out in a variety of different manners, there is limited flexibility in their siting as they would need to be located in the areas that currently contain the target materials and infrastructure that need to be removed.

More specifically, as part of the proposed removal activities, approximately 230,000 linear feet of two to four inch diameter pipelines are proposed to be removed after being emptied of usable product and flushed with clean water. Smaller above-ground pipes would be removed by hand and pulled out of vegetated areas, while larger pipe systems would be cut into 20 foot sections and drained into catch basins and transported to one of the proposed onsite staging areas for salvage, recycling, or transport offsite. The vast majority of pipes are above-ground but in locations where pipelines cross access roads or work areas, they may be buried up to three feet underground. The lines in these locations would be excavated and removed. The soil underlying and surrounding the pipes are proposed to be surveyed for visible surface oil and any soil with visible oil contamination would also be tested and excavated for treatment and disposal if necessary.

In addition to the pipelines, the site also includes approximately 306 wooden power poles with lengths of 35 to 40 feet, as well as several electrical panels and transformers. These poles are proposed to be cut at ground level and transported to an onsite staging area for onsite recycling or offsite disposal. Belowground pole sections would be excavated or abandoned in place, depending on their location. All power lines, transformers, and panels would be removed and taken to onsite staging areas for re-use or transport offsite.

Ten steel tanks and vessels are also proposed to be dismantled and removed. Proposed removal would involve isolation from power and fluid sources, draining, disconnection of all valves and fittings, and dismantling or demolition. Recyclable sections would be stockpiled onsite and the remainder would be transported offsite for disposal.

Thirteen buildings, garages, and structures would also be demolished and cleared from the site. Prior to demolition, inspections would be carried out for lead and asbestos and all salvageable

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metals, wires, and materials would be collected. Demolition would be accomplished using heavy equipment such as an excavator equipped with hydraulic cutting shears. Demolished building materials would be collected and transported offsite to a disposal facility.

Five existing concrete debris piles – covering an area of 2.35 acres – would also be targeted during removal operations. As indicated in lease inspection reports and deficiency letters, these debris piles and other soil stockpiles (as well as additional abandoned structures, vehicles, and equipment) were required to be removed from the site in 2006 and earlier by the primary state agency with oversight of oilfield operations, the Department of Conservation Division of Oil, Gas and Geothermal Resources (DOGGR). Letters to DOGGR staff from that time period indicate that NBR partner, Aera Energy, did not comply with DOGGR's requirements regarding the removal of this and other debris and instead sought to keep the debris onsite. The piles are now proposed to be processed and prepared for onsite disposal or reuse. The material in these debris piles would be combined with any additional concrete removed from building foundations, well pads, road beds, or pump supports and brought to one of the two proposed onsite concrete crushing areas. At these sites, large blocks of concrete are proposed to be crushed into smaller pieces. Once crushed, the concrete would be reused or buried onsite in a disposal pit excavated for that purpose. These excavations, part of the soil treatment operations, are proposed to provide a source of clean fill material to backfill clean-up sites, support the grading and construction preparation of the site, and provide a burial/disposal site for treated soil and other material such as concrete waste.

Other material that may also be collected, treated, and buried similar to the concrete waste, is the asphalt-like material present on some of the existing access roads. As described in NBR's Draft Abandonment Plan:

Many sections of the oil field roads have used traditional asphalt paving materials. Historically some roads may have used crude oil impacted tank sediments (tank bottoms) from when the facility tanks were cleaned out, combined with gravels or aggregate to pave roadways. Over time the tank bottom materials became heavily weathered leaving only the heaviest (or longest chain) hydrocarbons similar to normal asphalts. These materials are referred to as Asphalt Like Materials (ALM) and are shown on Exhibit 13. All the roadways that have these materials will be scraped by tracked bulldozers to accumulate the operations related materials and will be transported to the concrete/road processing areas. Any larger sections will be broken up and crushed to a structurally compatible size. These crushed materials will be placed in the deeper sections of the soil borrow pits and if necessary replaced with clean borrow pit soil. Most road and work areas are not expected to require any clean soil backfill.

The site also contains 48 areas in which historic in-ground oil collection or containment areas (sumps) may have been used. These areas are proposed to be located based on historic photographs and tested to determine if excavation and treatment of hydrocarbon impacted soil may be necessary. If contaminated soil is found, it would be transported to the proposed bioremediation areas for treatment. Upon verification that the sump sites have met the

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appropriate clean-up levels, the excavations would be backfilled with clean soils from the proposed upland soil borrow pits.

Material Treatment, Processing, Stockpiling, Borrow, and Disposal

NBR's proposed material treatment plan includes several key elements: bioremediation (collecting and spreading hydrocarbon contaminated soil in thin layers across the ground to facilitate the natural breakdown of the contaminants in that soil by native soil bacteria); excavating contaminated soil and soil with roadbed materials; excavating soil for use as clean fill; soil and material stockpiling; crushing concrete and asphalt road bed material; and underground disposal/burial of concrete waste, asphalt, and treated soil. NBR recently developed a revised site plan showing how the proposed bioremediation, stockpiling, excavation, and disposal areas (jointly called "logistics areas") would be located and configured within their proposed development footprint on the upland portion of the site. This site plan was shared with Commission staff on August 2, 2016, and is provided as [Exhibit 17](#). NBR estimates that between 270,000 and 314,000 cubic yards of material needs to be treated and/or disposed of through onsite burial.

While Commission staff is still reviewing this revised site plan and working with NBR to understand the proposed use of each area, based on previous versions, primary use areas are expected to be divided between duplicate soil borrow/placement sites, soil stockpile or "clean soil flip" sites, concrete processing sites, equipment and material salvage areas, bioremediation areas and staging/stockpiling areas.

NBR's proposal to use these areas to treat and dispose of the contaminated soil, concrete waste, and roadbed material that exists on the site involves several steps: (1) the excavation and removal of roadbed material, concrete, and oil impacted soil from throughout the site; (2) transport of this material to either the concrete processing area (as an interim step) or to one of the two proposed soil bioremediation areas; (3) the excavation of deep borrow/disposal pits; (4) the stockpiling of clean soil from the deep borrow/disposal pits in the adjacent "clean flip sites"; (5) the dumping of concrete waste and roadbed material into the deep borrow/placement pits; (6) the dumping of the treated soil from the bioremediation areas into the deep borrow/placement pits; and (7) the replacement of the stockpiled clean soil from the "clean flip sites" back into the deep borrow/placement pits on top of the waste materials as a clean cap. NBR proposes this cap to be at least ten feet thick over treated soil and 15 feet thick over concrete. Some of the clean soil excavated from the borrow/placement pits would also be used to backfill areas from which oil impacted soil or roadbeds were removed.

NBR has selected the size of the borrow/placement pits and bioremediation areas based on its preferred timeline for completing oilfield clean-up activities (use of a larger area allows the work to be expedited by allowing more clean-up areas to be addressed simultaneously) and estimated need for treatment, clean soil, and disposal capacity. Field verification work carried out in March of 2016 resulted in a reduction of approximately five acres to the estimated clean-up target areas and a corresponding reduction in the estimated material processing and treatment needs. Further reductions may occur as additional field verification work is carried out as an initial step in the clean-up process and could allow for additional reductions in the footprint of

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the material processing and treatment areas shown in [Exhibit 17](#). In addition, NBR has been working with Commission staff to consider the site's environmental constraints (such as the location of sensitive habitat areas) in the design and configuration of material treatment, processing, stockpiling, borrow, and disposal sites. However, as currently designed and shown in [Exhibit 17](#), the "logistics areas" extend into sensitive resource areas and their buffers in a variety of locations. This overlap of logistics areas and sensitive resources is analyzed and addressed in Section E of this report focused on Environmentally Sensitive Habitat Areas.

NBR's proposed method of bioremediation simply relies on mixing and watering to stimulate the growth and action of natural soil microbes that break-down hydrocarbons. As described in the Abandonment Plan:

The impacted soil accumulated at the bioremediation logistics areas will be spread out across the bioremediation cells and soil processing equipment will work on the top 12 to 36-inches of soil, referred to as "lifts", to initiate the bioremediation process. The lifts will be disced and sprayed with water as needed to create optimal conditions for the natural and indigenous bacteria to grow and degrade the hydrocarbons within the soil. Disking and watering has proven to accelerate the bacteria to grow and breakdown the hydrocarbon molecule chains. This process could take from 2 to 6 weeks per lift and each lift will be tested in a routine manner until testing indicates that the approved remediation criteria have been achieved. Additionally, watering and moisture control measures will be employed to control dust and potential odors during the process.

Once the appropriate remediation standards have been achieved, the now remediated soil lift will be moved into clean soil stockpiles for further verification testing by third party laboratories before recycle placement.

D. OTHER AGENCY APPROVALS

Several other federal, state, and local agencies also have review roles that must be completed before the project may proceed.

U.S. Fish and Wildlife Service (USFWS). Because the proposed project requires federal agency permits, including a Clean Water Act Section 404 permit from the US Army Corps of Engineers, the USFWS must conduct a Section 7 or Section 10 Consultation pursuant to the Federal Endangered Species Act. Section 7 Consultation leads to the issuance of a Biological Opinion and a Section 10 Consultation leads to the issuance of an Environmental Impact Statement (EIS). Neither a Biological Opinion nor an EIS has been issued as of the date of this staff report.

California Department of Fish and Wildlife (CDFW). The project would require a Section 1600 Streambed Alteration Agreement from the CDFW pursuant to Section 1602 of the *California Fish and Wildlife Code* or notification from CDFW that an agreement is not required. The applicant applied for a streambed alteration agreement and was informed by CDFW in a letter dated September 30, 2015, that it may complete its project without a streambed alteration agreement. However, this letter also noted that the applicant should notify CDFW if any modifications to the project occur so that it may respond accordingly. As of August 15, 2016,

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NBR ~~had~~ not provided CDFW with notification of the project changes it has made over the past 11 months.

Regional Water Quality Control Board. Before the US Army Corps of Engineers can issue its Section 404 Permit, the California Regional Water Quality Control Board, Santa Ana Region (Regional Board) must issue a Water Quality Certification under Section 401 of the federal Clean Water Act (401 Certification). The 401 Certification issued by the Regional Board would be required for the fill or alteration of “Waters of the State” on the Project site located under the Regional Board’s jurisdiction. Additionally, approval of the final Remedial Action Plan for the oil well/facility abandonment and site remediation is required from the Regional Board. The Regional Board issued a water quality certification in April of 2016 and approved NBR’s Remedial Action Plan in December of 2015.

U.S. Army Corps of Engineers (USACE). The project would require a Clean Water Act Section 404 permit from the USACE for impacts to areas determined to be “Waters of the U.S.” While NBR has applied for the project to be considered under a general Nationwide Permit, USACE is still in the process of determining if this approach would be appropriate or if a more extensive review under the Individual Permit process would be required. As a federal agency, the USACE’s actions also require compliance with NEPA. The application did not include sufficient information for the USACE to identify accurately the “Waters of the U.S.” present on the site. The Jurisdictional Delineations (JDs) submitted by the applicant contained conflicting and incomplete information. Additionally, USFWS in consultation with the USACE, cannot issue a biological opinion without accurate JDs. Once it has accepted the JDs for the site, the USACE would proceed with its review along either the Nationwide Permit or Individual Permit process. Final decisions on these matters are anticipated within the next several months.

State of California Department of Conservation, Department of Oil, Gas and Geothermal Resources (DOGGR). The Department of Conservation Division of Oil, Gas, and Geothermal Resources (DOGGR) also has authority to direct the design, scope, and implementation of oilfield clean-up and abandonment activities. Oil and gas wells to be abandoned or re-abandoned must be abandoned in accordance with the current requirements of DOGGR. This is ensured through DOGGR’s well abandonment permitting process and its review of historic abandonment records for previously abandoned wells. In addition, DOGGR has standards and requirements for comprehensive oilfield abandonment. These include the review and approval of a field restoration plan that includes the removal of all tanks, above-ground pipelines, debris, and other facilities and equipment as well as a construction well site review process used to provide input on the placement of new development near abandoned well locations. While NBR has been in communication with DOGGR to understand these various authorizations and processes, it has not obtained well abandonment permits, submitted a lease restoration plan, or initiated the construction review process. However, these steps would be pursued at a later stage in the implementation of the proposed project.

Orange County Health Care Agency. Approval of the final Remedial Action Plan for the oil well/facility abandonment and site clean-up is required from the RWQCB and Orange County

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Health Care Agency. However, the Orange County Health Care Agency, due to lack of staffing, has deferred to RWQCB on approving the Remedial Action Plan.

Local Agency Formation Commission. The Local Agency Formation Commission (LAFCO) would review the project when the City of Newport Beach formally requests annexation of the 361 acres in unincorporated Orange County. LAFCO is responsible for reviewing and approving proposed jurisdictional boundary changes, including (1) annexations and detachments of territory to and/or from cities and special districts; (2) incorporations of new cities; (3) formations of new special districts; and (4) consolidations, mergers, and dissolutions of existing districts. For the Newport Banning Ranch Project, the annexation would include a change in service district boundaries for water service.

Orange County Transportation Authority. Amendment to the Orange County Master Plan of Arterial Highways would be required for the circulation proposed on the site. The applicant would be asking to remove a road segment that appears on the plan along North Bluff Road just north of 17th Street connection to 19th Street and to redesignate the remaining southern section of North Bluff Road from a Major (six-lane divided street) to a minor 2-lane divided street and the deletion of a second road through the project site to West Coast Highway. The amendment would include deleting the connection from 17th Street westerly to West Coast Highway.

Newport-Mesa Unified School District. An encroachment permit would be required for the construction of the extension of 16th Street and North Bluff Road on the School District's property.

California Department of Transportation. Activities located within California Department of Transportation (Caltrans) right-of-way would require an Encroachment Permit. An Encroachment Permit would be required for widening and improvements to West Coast Highway, modifying the reinforced concrete box (RCB) culvert in West Coast Highway. All activities must be in compliance with Caltrans Statewide National Pollutant Discharge Elimination System (NPDES) Permit. Caltrans has not yet issued approval for these elements of the project.

In the preparation of these findings, the Commission staff consulted with most of the above agencies listed. In particular staff consulted with USFWS, CDFW, RWQCB, USACE, and the OC Health Care Agency regarding the sensitive biological resources and waters onsite. Some of these agencies have yet to issue approvals of the project.

Federal Consistency

As noted above, in order to proceed with the proposed project, NBR needs a permit from the USACE pursuant to Section 404 of the Federal Water Pollution Control Act of 1972, as amended (33 USC § 1344). Because this Section 404 permit is listed in the California Coastal Management Program among those federal agency permit activities that reasonably can be expected to affect any land or water use or natural resource of the coastal zone, Section 307(c)(3)(A) of the Coastal Zone Management Act requires that it be subject to the certification

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process for consistency with the California Coastal Management Program. As provided in Section 307(c)(3)(A):

Any applicant for a required Federal license or permit to conduct an activity, in or outside of the coastal zone affecting any land or water use or natural resource of the coastal zone of that state shall provide in the application to the licensing or permitting agency a certification that the proposed activity complies with the enforceable policies of the state's approved program and that such activity will be conducted in a manner consistent with the program. At the same time, the applicant shall furnish to the state or its designated agency a copy of the certification, with all the necessary information and data.

Therefore, before USACE can issue its Section 404 permit for any part of the project, the Commission must concur with a consistency certification for the project, finding that it would be carried out consistent with the California Coastal Management Program. Although NBR initially submitted a CDP application that did not include those aspects of the project for which it was seeking a Section 404 permit from the USACE, Commission staff worked with NBR to revise its application to include the entirety of the proposed project. This was done to consolidate the Commission's CDP review and federal consistency review of the project because the Commission's approval of a CDP that covered the whole project would duly meet the requirements of the Coastal Act and Section 307(c)(3)(A) of the Coastal Zone Management Act.

~~**Special Condition 22** requires the applicants submit evidence of other agency approvals and that the applicant shall inform the Executive Director of any changes to the project required by the above agencies that are inconsistent with the Commission's approval of this coastal development permit. Such changes shall not be incorporated into the project until the applicant obtains an amendment to this coastal development permit.~~

E. ENVIRONMENTALLY SENSITIVE HABITAT AREAS

Section 30240 of the Coastal Act states:

- (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

Coastal Act section 30107.5 defines environmentally sensitive area:

"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

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Coastal Act section 30250 states:

(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted only where 50 percent of the usable parcels in the area have been developed and the created parcels would be no smaller than the average size of surrounding parcels.

(b) Where feasible, new hazardous industrial development shall be located away from existing developed areas.

(c) Visitor-serving facilities that cannot feasibly be located in existing developed areas shall be located in existing isolated developments or at selected points of attraction for visitors.

The Coastal Act establishes a high standard for protection of areas that are identified as environmentally sensitive. Only resource-dependent uses, such as habitat restoration, are allowed within an environmentally sensitive area (ESHA), and all development within or adjacent to an ESHA must be sited and designed to prevent significant disruption or degradation of the ESHA, respectively.

Under the Coastal Act, if an ESHA is identified, it cannot be relocated, and must instead be avoided, unless the proposed development is “a use dependent on the resource.” This fundamental requirement of the Act was confirmed in *Bolsa Chica Land Trust v. Superior Court* (1999), 71 Cal.App.4th, 493, 507, wherein the Court found:

Importantly, while the obvious goal of section 30240 is to protect habitat values, the express terms of the statute do not provide that protection by treating those values as intangibles which can be moved from place to place to suit the needs of development. Rather, the terms of the statute protect habitat values by placing strict limits on the uses which may occur in an ESHA....

Environmentally Sensitive Habitat Areas (ESHA) are areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities. Coastal Act Section 30240 states that ESHA shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

Summary of Habitats

On the Newport Banning Ranch site there are several different habitat types that contribute to the ecosystem on the site and to the surrounding sites. Because the project site is bordered by the Santa Ana River, the site contains a unique watershed in the lowlands and on the mesa. The historic path of the Santa Ana River before being channelized was vast and had a network of ever-changing outlets into the Pacific Ocean. This wide pattern between the freshwater of the river and salt water of the sea created an estuary of marsh and wetland communities. The Semeniuk slough and the wetlands controlled by USACE adjacent to the site are a few remaining

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examples of the wetland watershed complex in the area. While the wetlands remaining on the Newport Banning Ranch site have been impacted by heavy use of the site for oil operations since the 1940s, and before that for agriculture, the wetlands persist on the site because of the underlying watershed and the site's proximity to both the river and the ocean. The site also represents just one part of a large wildlife corridor following the Santa Ana River. This corridor is one of the few passageways left for wildlife and migrating birds to travel across southern California from the mountains to the ocean.

The site has been documented to be remarkably self-sufficient. The ecosystem on the site is a vast complex of interrelated habitats and species. The site supports a rich seed bank. Once development ceases on the site, the watershed, animals and plants are often able to rebound without intentional restoration. The City of Newport Beach's Coastal Land Use Plan (CLUP) states that the Banning Ranch site: *contains a number of sensitive habitat types including southern coastal bluff scrub, alkali meadow, southern coastal salt marsh, southern coastal black willow forest, coastal brackish marsh, and vernal pools. The property also contains steep coastal bluffs along the southern and western edges of the mesa. The bluff faces have eroded in some areas to form a number of gullies and ravines.*

The Newport Banning Ranch site is largely divided into 2 areas topographically (**Exhibit 8**): the lowlands, which consist of approximately 130 acres of wetlands ranging from 0 -10 feet above mean sea level; and the mesa, which contains 4 "arroyo" streambeds, one drainage area, a vernal pool complex, and multiple seasonal wetlands, all of which together control the flow of water across the site. The mesa ranges in elevation from 10-105 ft above mean sea level and includes coastal bluffs and canyons and riparian areas. The site does receive runoff from areas North and East of the mesa, and the arroyos on the mesa direct the water down to the lowlands and into the Slough. The water helps sustain the wetlands in the lowlands. Tidal influence from the ocean entering the Slough can also reach the wetlands in the lowlands. This mix of fresh and salt water contributes to the large areas of salt marsh. All of these elements are extremely rare habitats in Southern California.

The habitat characteristics as described in the EIR are summarized here:

The site contains 45 vegetation types, including 20 types of coastal sage scrub; 9 types of pools, marshes and mudflats; 8 riparian types; and 8 grassland areas. In general, coastal sage scrub is located along the eastern and southern portions of the project site on the Mesa. The marshes and mudflats occur within the Lowland and are subject to tidal influence. Seasonal features and vernal pools are located in the Upland adjacent to grasslands. Riparian resources are found in portions of the Lowland and Upland. Grassland and disturbed vegetation are found throughout the project site. The project site also supports several special status plants and wildlife species. The federally listed threatened coastal California gnatcatcher and the coastal cactus wren and the San Diego fairy shrimp are present on the project site.

The Lowland (Wetlands) supports wetland habitats, including areas of salt marsh that support the State-listed Endangered Belding's savannah sparrow; they also support willow scrub and willow riparian forest that support the State and federally listed Endangered least Bell's vireo and a

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variety of special status nesting raptors including the white-tailed kite. Additionally, the Lowland supports special status plants, including substantial populations of southern tarplant. Riparian and wetland habitat on the site includes willow riparian forest, willow scrub, alkali meadow, mudflats, freshwater marsh, and salt marsh.

The Mesa of Newport Banning Ranch, therefore must also be viewed in the larger context of its role in the integrated upland and wetland ecosystem. Similar to the Bolsa Chica wetlands and mesa near Huntington Beach, the Mesas and the lowland wetlands are biologically interdependent according to both the California Department of Fish and Wildlife and the U.S. Fish and Wildlife Service. Together, the wetlands in the lowlands and the mesa with the riparian arroyos and vernal pool complexes, combine to make this area an important upland-wetland ecosystem. These biological interdependencies are vital to maintaining biological productivity and diversity. Both the 9/2015 memorandum by Dr. Engel and the 8/2016 Memo. by Drs. Dixon and Engel describe in detail the different habitats present on the site, as summarized below ([Exhibits 13a and 13b](#)).

Vernal Pools and Wetlands

A number of plant and animal species are endemic to (found only in) vernal pools. Wetlands that provide habitat for plants and wildlife only found in vernal pools may rise to the level of ESHA. Vernal pools typically occur on coastal terraces in southern California and historic aerial photographs suggest that they were probably common on Banning Ranch before the site was altered by agriculture and oil field development. There are 10 pools on the site, 8 of which support the endangered San Diego fairy shrimp, a diagnostic vernal pool species.

Rare Plant Communities

Coastal sage scrub in southern California provides habitat for about 100 rare species, many of which are also endemic to limited geographic regions. Southern Coastal Bluff Scrub and Maritime Succulent Scrub are coastal scrub communities found on the bluffs and canyons of the site and are considered “very threatened.” Patches of purple needlegrass grassland were present in many areas in 2012, but because of the continuing severe drought these native grasslands have been reduced to three areas on the southern mesa. Native grasslands are one the most endangered habitats in California. Both the native and non-native grasslands on the site provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species of mammals, birds, and reptiles. Burrowing owls, red-tailed hawks, Cooper’s hawks, American kestrels, and peregrine falcons have been observed perching and foraging at various locations within and in the vicinity of the purple needlegrass grassland across the entire site. The riparian habitat found adjacent to drainage areas and arroyos on the NBR site is greatly reduced in extent from its historical distribution and it supports rare and endangered species such as the least Bell’s vireo, particularly in the lowlands.

Rare Wildlife

The site also supports rare, threatened, and endangered animal species. California gnatcatchers (CAGN) are obligate, year-round inhabitants of coastal sage scrub plant communities. In the last 60 years extensive southern California suburban sprawl has reduced and fragmented coastal scrub habitats, resulting in a significant decline in California gnatcatcher populations. CAGN is a

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federally-listed species. Coastal cactus wren are extremely rare. They rely on the prickly pear patches and other cacti found on the NBR site. Historically, cactus wren were documented on the NBR site but have not been seen since 2009. Burrowing owls have been seen on the mesa of the NBR site. Burrowing owls are protected by the Migratory Bird Treaty Act in the United States and Mexico. They are listed as Endangered in Canada and Threatened in Mexico. They are considered by the U.S. Fish and Wildlife Service (USFWS) to be a Bird of Conservation Concern. At the state level, Burrowing Owls are listed as Endangered in Minnesota, Threatened in Colorado, and as a Species of Concern in California, Montana, Oklahoma, Oregon, Utah, Washington, and Wyoming. They are a grassland specialist distributed throughout Western North America, primarily in open areas with short vegetation and bare ground in desert, grassland, and shrub-steppe environments. Burrowing Owls are dependent on the presence of prairie dogs and ground squirrels whose burrows are used for nesting and roosting. Other sensitive species that have been seen on the NBR site include: Loggerhead shrike, yellow warbler, yellow-breasted chat, least Bell's vireo, Belding's savannah sparrow, white-tailed kite, and northern harrier.

Other Biological Factors

Annual grasslands, although dominated by non-native species, provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species of mammals, birds, and reptiles including burrowing owls and many species of raptors. Burrowing owls as well as several species of raptors including red-tailed hawks, Cooper's hawks, and American kestrels, have been observed perching and foraging at many locations. The animals that forage on the site, including ospreys and other raptors, as well as large mammals like coyotes, all play an important role in the ecosystem of the site.

Riparian Habitat

One of the connections linking the Newport Banning Ranch upper mesa and lowlands are the riparian areas and drainages. The applicant has documented four main drainages on the site. According to the HCCMP, the "small arroyo" is located near the northeastern corner of the site, originating at the eastern property boundary where a concrete culvert discharges stormwater runoff and flows onto the site. Dominant species include riparian vegetation: arroyo willow, black willow, and southern cattail, and mulefat communities. The small arroyo drains into the northernmost portion of the lowland wetlands and supports minimal riparian vegetation at the toe of slope. The small arroyo supports a denser and healthier riparian black willow and mulefat thicket along the northernmost boundary of the lowlands, which supports sensitive species such as the least Bell's vireo. The arroyo may be impacted by abandonment and remediation activities, but is outside of the proposed development footprint.

The Middle Arroyo is located in the upper portion of the site, originating at the eastern property boundary where a concrete culvert discharges stormwater runoff and flows onto the site. Dominant native species include arroyo willow, black willow, and mulefat, as well as some non-natives. The water flows toward the lowland wetlands. The arroyo may be impacted by abandonment and remediation activities. A storm water dissipater is proposed to be constructed in combination with trails in the area of the middle arroyo. The dissipater would control flows from the proposed urban colony into the middle arroyo.

The Southern Arroyo (also called the Main or Large Arroyo), is a high-functioning drainage located near the southern portion of the project site, and includes one tributary swale. This arroyo is the least disturbed drainage on site. Dominant vegetation includes arroyo willow, black willow, mulefat, some non-natives. The Main Arroyo is largely avoided by the development proposal, except for the bridge that spans the arroyo on Bluff Road proposed to connect the South Family Village to the North Family Village. The bridge foundational supports would fill a portion of the arroyo and would result in bluff face and bluff edge impacts to the arroyo's canyon bluffs.

Drainage D is a riparian erosional feature covering about 0.45 acre. The feature is located near the southern boundary of the property in a north-south trending canyon that was created in connection with regional highway improvements during the 1960s. The feature originates approximately 1,000 feet from the property boundary at Pacific Coast Highway (PCH), extending toward PCH for approximately 700 feet. Approximately 200 linear feet of this feature contains riparian vegetation, consisting of arroyo willow and mulefat, however, much of this feature also supports dense patches of non-natives. Drainage D is proposed to be filled and developed with an access road connecting the site to PCH, Bluff Road.

The "North-South Arroyo" on the mesa is depicted on the National Wetlands Inventory, although it is difficult to recognize on the site today due to heavy disturbances from oil operations. The Arroyo begins just south of the Vernal Pool watershed and runs south toward the Main Arroyo, serving as a tributary to the Main Arroyo. Mapping of the North-South Arroyo was not completed, nor was complete watershed mapping of the site. The head of the North South Arroyo is proposed to be graded and filled for development of Bluff Road, which would divide the arroyo from the Vernal Pool Complex. The grading footprint in this area would also impact the wetland habitat around pool E, immediately north of this arroyo.

Defining ESHA

ESHA, as defined in Section 30107.5 of the Coastal Act, is "...any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities." Thus, Section 30107.5 sets up a two part test for determining what constitutes ESHA. The first part is determining whether an area includes plants, animals or their habitats that are either: (a) rare; or (b) especially valuable because of their special nature or role in an ecosystem. If so, then the second part asks whether such plants, animals, or habitats could be easily disturbed or degraded by human activities. If so, then the area where such plants, animals, or habitats are located is deemed ESHA by Section 30107.5.

Defining "rare"

There are several types of rarity, but each of them is fundamentally related to threats to the continued existence of species that naturally occur in larger or more widespread populations. Increasing numbers of species have become absolutely rare, having been reduced to a few hundreds or thousands of individuals. The prognosis for these species is very poor. Another common pattern is for species to be globally rare but locally abundant. Such species only occur

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at a few places either as a result of natural processes or human perturbations. The remaining populations of tidewater goby and coastal California gnatcatcher, for example, appear to be constrained in their natural distribution as a result of widespread loss of suitable habitat areas. Some species, such as the Pacific pocket mouse, are characterized as “narrow endemics” because they have evolved adaptations to a very limited range of environmental variables (e.g., soil type, temperature, humidity, availability of shelter and forage species etc.), which restrict their spatial distribution. Many other species, such as the least Bell’s vireo and San Diego fairy shrimp, have restricted distributions as a result of human activities, especially agricultural and urban development that results in habitat loss. Many natural endemics have also suffered such habitat loss – compounding the risk to them. All these species may be abundant in the few areas where they still occur. However, regardless of the cause of their restricted distribution, the survival of these species is at elevated risk because localized impacts may affect a large proportion of the population with devastating effects. At the other end of the spectrum of rarity are species such as steelhead that are geographically widespread, but are everywhere in low abundance. Some species naturally occur in this pattern and have life-history characteristics that enable them to persist. However, naturally abundant species that have been reduced to low density throughout their range are at heightened risk of extinction, although their wide distribution may increase their opportunities for survival.

Defining “especially valuable”

All native plants and animals and their habitats have significant intrinsic value. However, the “especially valuable” language in the Coastal Act definition of ESHA makes clear that the intent is to protect those species and habitats that are out of the ordinary and special, even though they may not necessarily be rare. As in all ESHA determinations, this requires a case-by-case analysis. Common examples of habitats that are especially valuable due to their role in the ecosystem are those that support rare, threatened, or endangered species, and those that provide important breeding, feeding, resting or migrating grounds for some stage in the life cycle of animal species and that are in short supply (e.g., California sage scrub provides forage and nesting habitat for the coastal California gnatcatcher and vernal pools and coastal lagoons and estuaries provide nursery habitat for steelhead and the tidewater goby). Habitats may also be especially valuable because of their special nature. Examples include those rare instances of communities that have remained relatively pristine, areas with an unusual mix of species, and areas with particularly high biological diversity (vernal pools for example).

Site Specific ESHA Analyses

The reason ESHA analyses are all site-specific is that there is no simple rule that is universally applicable. For example, a plot of a rare habitat type that is small, isolated, fragmented and highly degraded by human activities would generally not meet the definition of ESHA because such highly impacted environments are so altered that they no longer fit the definition of their historical habitat type. Larger, less isolated, more intact areas that are close to or contiguous with other large expanses of natural habitat are more likely to have a special nature or role in an ecosystem and hence meet the ESHA definition, but “large,” “isolated,” “intact,” and “close to” are all terms that are relative to the particular species or habitat under consideration. What is spatially large to a Pacific pocket mouse is small to a mountain lion or bald eagle. What is isolated for a dusky footed woodrat may not be for a coastal California gnatcatcher. Similarly, an

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area supporting one or a few individuals of a rare species might not meet the definition of ESHA because scattered individuals might be common and not significant to the species. However, this is relative to the actual distribution and abundance of the species in question. If a few individuals of a species previously thought to be extinct were found, the area would clearly meet the definition. Whereas, if the same number of individuals of a species with a population of 25,000 were found in an isolated, degraded location, the area would probably not meet the definition. A conclusion of whether an area meets the definition of ESHA is thus based on a site- and species-specific analysis that generally includes a consideration of community role, life-history, dispersal ability, distribution, abundance, population dynamics, and the nature of natural and human-induced impacts. The results of such analysis can be expected to vary for different species.

Case-by-case analysis of ESHA necessarily occurs at discrete moments in time. However, ecological systems and the environment are inherently dynamic. One might expect, therefore, that the rarity or sensitivity of species and their habitats will change over time. For example, as species or habitats become more or less abundant due to changing environmental conditions, they may become more or less vulnerable to extinction. In addition, our scientific knowledge and understanding of ecosystems, specific species, habitat characteristics and so forth is always growing. Large numbers of new species are discovered every year. The California Native Plant Society's Inventory of Rare and Endangered Vascular Plants of California grew from approximately 1400 listings in 1974 to over 2100 listings in 2001. New legal requirements, such as the numerous environmental laws adopted in the 1970s, may be adopted that reflect changes in our values concerning the current conditions of natural resources. Consequently, ESHA evaluations may change over time. Areas that were once not considered ESHA may become ESHA. It is also possible that rare species might become less so, and their habitats may no longer be considered ESHA. Because of this inherent dynamism, the Commission must evaluate resource conditions as they exist at the time of the review, based on the best scientific information available.

Federally Designated Critical Habitat as ESHA

The definition of environmentally sensitive area in Section 30107.5 of the Coastal Act shares a common focus with the Endangered Species Act definition of critical habitat for those species listed as threatened or endangered. Specifically, critical habitat for a threatened or endangered species is defined in section 3(5)(A) of the Endangered Species Act (ESA) as:

- i. the specific areas within the geographic area occupied by a species, at the time it is listed in accordance with the Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and
- ii. specific areas outside the geographic area occupied by a species at the time it is listed, upon a determination that such areas are essential for the conservation of the species.

Additionally, the term "endangered species" is defined in the ESA as "any species which is in danger of extinction throughout all or a significant portion of its range" and the term "threatened species" is defined as "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."

In other words, critical habitat includes those habitat areas in which species imminently or foreseeably at risk of becoming extinct are located that may require special protection and that are essential to the conservation of those species or those areas not directly occupied by threatened or endangered species but that otherwise have been determined to be essential for the existence of those species.

This definition of critical habitat is similar to the Coastal Act definition of ESHA because endangered and threatened species can, by definition, also be expected to be rare. This common focus on rare species would ensure that those portions of critical habitat so designated due to the presence of a threatened or endangered species would also qualify as ESHA. Additionally, it is often true that those species listed, protected and designated with critical habitat under the Endangered Species Act are recognized as being under imminent threat of extinction due to human induced habitat loss or degradation, or, as stated in the Coastal Act definition of ESHA, “easily disturbed or degraded by human activities.”

Although the Commission is not limited to designated critical habitats when defining ESHA, the Commission can rely on critical habitat designations as one of the components supporting an ESHA determination. As detailed below, the Commission finds that portions of the proposed project area that are specifically designated as critical habitat by the U.S. Fish and Wildlife Service (FWS) due to the recognized and established presence of federally listed threatened or endangered species and/or the importance of these areas to the conservation of threatened or endangered species and that contain the Primary Constituent Elements (PEC) of gnatcatcher habitat in the form of coastal sage scrub and associated non-sage scrub habitats contained within the areas designated as coastal California gnatcatcher occupied areas by Drs. Dixon and Engel in their April 28, 2016 memorandum qualify as environmentally sensitive habitat areas, ESHAs. The primary constituent elements for coastal California gnatcatchers are (1) coastal sage scrub habitats that provide space for individual and population growth, normal behavior, breeding, reproduction, nesting, dispersal and foraging; and (2) non-sage scrub habitats such as chaparral, grassland, and riparian areas, in proximity to sage scrub habitats as described for PCE 1 above that provide space for dispersal, foraging, and nesting.

ESHA Determination

Upon Commission direction at the hearing on this item in October 2015 (CDP application no. 5-13-032), Commission staff biologists have more critically reviewed the data and analyses received from the applicant’s consultants and others, reviewed new data and analyses, pursued other means of assessing current site conditions (including site visits), and reviewed additional ecological studies and corrections in mapping provided by the applicants, in making their current ESHA determination. While the ESHA determination has changed since October 2015, and the delineations of some sensitive habitat areas have expanded while others have contracted, the site still has been found to support a vast amount of rare and valuable habitat types that rise to the level of ESHA. The Memorandum by Dr. Jonna Engel written 9/2015 continues to apply to the site for many habitat areas, except where the ESHA determination has been modified, as described in the Memorandum (ESHA Memo.) by Dr. John Dixon and Dr. Jonna Engel, included as **Exhibit 13a**.

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The revised ESHA Memo indicates that there continues to be a significant amount of ESHA on the NBR site, over 219 acres of ESHA total, including vernal pools and San Diego Fairy Shrimp, coastal sage scrub communities and Gnatcatcher habitat, purple needle grass grasslands and foraging habitat, Burrowing Owl wintering habitat and foraging habitat, and wetlands (wetlands are described in Findings F. Marine Resources) ([Exhibit 3a](#)). The Commission concurred with the **majority of the** conclusions in the ESHA Memo, **with the exception of the burrowing owl foraging space for which the Commission wanted further clarification, and while the Commission questioned staff's analysis, ultimately they did not disagree with the ESHA determination.** and hereby adopts it and incorporates its findings, analysis, and conclusions herein.

Vernal Pools and San Diego Fairy Shrimp

Wetlands that provide habitat to plants and wildlife only found in vernal pools are wetlands that may rise to the level of ESHA. There are 10 vernal pools on the NBR site. Vernal pools differ from most seasonal wetlands in that they have a characteristic suite of plant and animal species, an extremely impermeable soil layer, hydrology based only on rainfall, and generally small watersheds. While some wetlands on the NBR site may have been created by human activities, others may have been created naturally, but have been disturbed. The ESHA Memo. states: "there is no way after-the-fact to distinguish the one type of wetland from the other." Either way, it is possible for wetlands with anthropogenic origins to provide ecological functions of vernal pools. The vernal pools on the site meet the definition of ESHA because they are rare, because *they are aggregated and form vernal pool complexes which play an especially valuable* ecosystem role, and because they are easily disturbed and degraded by human activities and development.

San Diego Fairy Shrimp is a federally endangered species only found in Vernal Pools in coastal Southern California. San Diego Fairy Shrimp (SDF shrimp) have been found in 8 pools on the NBR site (Vernal pools: 1, 2, 3, E, G, H, I, J). Vernal pools A and M do not contain SDF shrimp. There may be additional pools with SDF shrimp that previously had inconclusive results and may be subject to additional surveys. The HCCMP acknowledges the interconnection between the pools, noting that there is a potential for long-term dispersal of sensitive plants and animals between the vernal pools. Unfortunately, the entire watershed on the site has not been mapped. Particularly the complete vernal pool watershed has not been mapped. Because SDF shrimp are extremely rare and must be protected under the federal Endangered Species Act, the vernal pools where they reside are determined to be ESHA.

Coastal Bluff Scrub and Maritime Succulent Scrub

Southern Coastal Bluff Scrub and Maritime Succulent Scrub are recognized as rare plant communities. Both plant communities persist on the NBR site, often found together, mainly along the coastal bluff faces and coastal and canyon bluff tops and they perform important functions by serving as habitat for special status species, specifically Gnatcatchers. These vegetation communities are easily disturbed. Therefore, both Coastal Bluff Scrub and Maritime Succulent Scrub meet the definition of ESHA pursuant to the Coastal Act. While both Coastal Bluff Scrub and Maritime Succulent Scrub (CBMSS) are in the family of Coastal Sage Scrub,

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they are different communities from each other, and different from the California Brittle Bush Scrub that described below.

California Brittle Bush Scrub and California Gnatcatcher Habitat

California Brittle Bush Scrub (CBBS) on the NBR site is a type of Coastal Sage Scrub (CSS) with a dominance of California Sunflower (*Encelia californica*), also referred to as Encelia Shrubland Alliance. The CBBS is the most common of the CSS communities on the NBR site. The CBBS association is rare in coastal California. This plant community on the NBR site is found to be ESHA because it is rare and because it provides an especially valuable ecosystem function for the federally threatened California Gnatcatcher. Both the CBBS and the Gnatcatcher are easily disturbed and degraded by human activities and both rise to the level of ESHA. Much of the Coastal Sage Scrub (CSS) on the property is still within the area designated as critical habitat for California Gnatcatchers (CAGN) and provides them with valuable foraging area and offers connectivity with the CSS vegetation on the adjacent property. Several biological surveys of the project area have documented CAGN nests and foraging and use areas. The CAGN, a federally listed species which must be protected under the Endangered Species Act, relies on the habitat provided by CBBS in the project site.

Purple Needle grass Grassland

Purple needle grass grasslands (PNGG) have become increasingly rare in California and the Department of Fish and Wildlife finds this vegetation community to be of high conservation value. On Banning Ranch, purple needle grass (*Nassella pulchra*) has occurred in patches of various sizes and with various coverage. Where it occurs with greater than ten percent relative vegetative cover, it is classified as purple needle grass grassland, a rare habitat type that meets the definition of ESHA in the Coastal Act.

In 2012 PNGG was present in many areas. Although small isolated patches of PNGG and patches that were surrounded by industrial development were not identified as ESHA by Drs. Dixon and Engel, they concluded that patches in larger clusters that aggregated to several acres were ESHA due to the rarity of such grassland communities and because PNGG is easily disturbed and degraded by human activities and development. Since 2012 there has been a severe and continuing drought that has resulted in a general reduction in the vegetative cover of purple needle grass due to a lack of growth, increased herbivory, and death of individual plants. Although there was a significant reduction in the extent of PNGG by 2015, this rare vegetation community was still widely present on the southern mesa. However, by March of 2016 only three areas had sufficient cover to be classified as PNGG. Purple needle grass is still present at low cover and density in many of the areas where it was previously mapped as native grassland. Therefore, PNGG on the project site currently exists in two categories: ESHA purple needle grass grassland and Non-ESHA purple needle grass.

Riparian Habitat

The riparian habitat borders drainage areas and arroyos on the site and is found in areas of the lower mesa and in the arroyos on the upper mesa. Riparian habitat is greatly reduced in extent from its historical distribution in southern California. The riparian habitat on the site rises to the

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level of ESHA because it is a rare habitat type, it supports rare and endangered species such as the least Bell's vireo, and is easily disturbed and degraded by human activities and development.

Burrowing Owl Wintering and Foraging Habitat

Western burrowing owls (*Athene cunicularia*) are a California Species of Special Concern that are rare in Orange County due to loss of suitable grasslands to development, especially near the coast. Western burrowing owls are often found in burrows created by ground squirrels, of which there are countless in the project location. Most Western burrowing owls nesting in California remain at their breeding grounds throughout the winter, sometimes staying in the same burrows and sometimes wandering within the region. Burrowing owls were thought to have been extirpated in all of Orange County (and most of coastal Southern California), except for a small breeding population in Seal Beach. Two large earthen berms on the project site provide habitat for the burrowing owls near vernal pools H, I, and J and a burrow was found on the southern mesa. The Commission finds these areas to rise to the level of ESHA because the area supports wintering burrowing owls, a sensitive species, and because the area is easily disturbed and degraded by human activities and development. Additionally, the Burrowing Owls use the open native and non-native grasslands as foraging habitat. The ESHA determination made as part of the April 2016 staff report would have protected the burrows as ESHA but not the foraging habitat. As a result, strong criticism of the memo. from professional biologists noted that without the foraging space, protecting the burrows as ESHA was essentially pointless, because there is no other location within the vicinity where these owls can forage except for the open grassland on the Banning Ranch site. Thus, even with their burrow habitat protected, the owls would likely be extirpated from the site. As such, **staff recommended that** the grasslands of the site rise to the level of ESHA because of the special role they serve as valuable habitat for the sensitive Owl species. **In response, the Commission questioned staff's analysis of the grasslands as ESHA and found that the grassland foraging areas may indeed rise to the level of ESHA because of the special role they may serve as crucial habitat for the sensitive owl species if more definitive information was available to support that the grasslands are actually used for foraging and to delineate precisely which areas of grassland would constitute ESHA and need to be preserved. Without that information, the Commission was not prepared to adopt the staff recommendation. Ultimately, however, the Commission did not disagree with the ESHA determination either.**

Raptor Foraging Habitat

Both native and non-native grasslands provide important foraging opportunities for both Burrowing Owls and other raptors present on the NBR site. Much of the Mesa of the site is composed of both native and non-native grasses, and while it is used for foraging, delineating a particular, contiguous use area is difficult. While the grasslands that support Burrowing Owl foraging are identified as ESHA, the raptor grassland foraging areas of the site have not been delineated as ESHA, because burrowing owl are a listed species and the raptors that forage in the grasslands are not listed species. However, the native and non-native grasslands that serve burrowing owl, for the most part, also serve raptors. If native and non-native grasslands that serve raptor foraging outside of the burrowing owl foraging areas are disturbed as part of the soil-clean up or development project, they ~~do~~ **would** require mitigation; ~~pursuant to the Habitat Management Plan~~ **Special Condition 14.**

Impacts of Residential and Commercial Development Plan

As proposed, approximately 42.4 acres of ESHA would be impacted due to the residential and commercial development plan ([Exhibit 6](#)).

Vernal Pools

VP1, VP2, VP3, G, H, I, J, and E are occupied by the federally listed SDF Shrimp. Vernal pools M and A are not occupied by fairy shrimp, but contain vernal pool plants. These features are proposed to be protected within the proposed “vernal pool complex.” Vernal pools M and E will be avoided by the revised development plan, but both will be impacted by the clean-up activities. In addition, Vernal Pool E will be immediately adjacent to Bluff Road in the proposed plan, without a sufficient buffer. The Riparian vegetation around VP1, which is part of Vernal pool/wetland habitat, would be directly impacted by the grading footprint for the Urban Colony. Approximately 0.16 acres of impacts to the Vernal Pool watershed would result from the proposed Urban Colony and North Family Village plan and an additional 0.1 acre of impact would result from the proposed Bluff Road. The applicant’s representation that all impacts to ESHA as designated by Commission staff are avoided with the proposed development is incorrect. As noted, the proposed grading would result in some direct impact to ESHA and indirect impacts would also occur due to a reduced or no buffer. ~~As revised through the conditions of approval, all impacts to ESHA would be avoided and adequate buffers to protect the ESHA provided.~~

Wetlands C and CC would be filled by the proposed development of North Family Village, and the proposed Resort Colony would impact the buffer of Wetland MM, as explained under Wetland/Marine Resources Findings below.

Purple Needle grass and Foraging Grassland

Almost all of the PNGG on the site is within the footprint of the abandonment and remediation activities and development plan. The development of the Resort and park and Southern Family Village would impact approximately 28 acres of grassland ESHA on the Southern Mesa of the site ([Exhibit 6](#)). Pursuant to the HCCMP, a small patch of PNGG is proposed to be created to mitigate for the loss of the grasslands within the development footprint. Non-ESHA PNGG and grassland Foraging ESHA would be permanently impacted by the development of the Bluff Road bridge over the main arroyo due to grading and construction of bridge supports. The staff recommendation alternative, as conditioned, would not support the development of Bluff Road or development on the Southern Mesa and would not include these impacts.

Riparian Habitat

The Small Arroyo, the Middle Arroyo, and the North-South Arroyo contain ESHA riparian habitat that may be impacted by abandonment and remediation activities; however, within these locations, necessary riparian impacts would, only as conditioned, be restored in place. A portion of the head of the North-South Arroyo would be impacted for the development of Bluff Road as a through road connecting the proposed 5 acre park to the North Village, and would impact approximately 0.1 acre of riparian habitat surrounding pool E, which is also considered part of the wetland. Additionally, the Bluff Road bridge spanning the Main Arroyo would have bridge

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supports that would impact the riparian habitat in the arroyo. Approximately 0.1 acre of riparian habitat would be permanently impacted by the development of the Bluff Road bridge over the Main Arroyo due to grading and construction of bridge supports. The applicant's representation that all impacts to ESHA as designated by Commission staff are avoided with the proposed development is incorrect. As noted, the proposed grading would result in some direct impact to ESHA and indirect impacts would also occur due to a reduced or no buffer. ~~As revised through the conditions of approval, all impacts to ESHA would be avoided and adequate buffers to protect the ESHA provided.~~

CAGN Habitat and Scrub Communities

The California gnatcatcher (CAGN) specifically prefers to nest and feed in CSS on the mesa. CBBS and the other scrub communities, including southern coastal bluff scrub and maritime succulent scrub, which comprise gnatcatcher habitat, would be significantly impacted by the development plan, as proposed. Approximately 0.25 acres of CBBS and approximately 0.17 acre CAGN habitat area would be permanently impacted by the development of the Bluff Road in two locations: 1) the bridge over the Main Arroyo would impact CAGN habitat due to grading and construction of bridge supports and; 2) the series of culverts proposed near Pool E to support Bluff Road would impact CAGN habitat.

An alternative residential development plan for the Urban Colony and North Family Village, with a reduced development footprint to avoid ESHA and provide appropriate buffers, taking access from 17th Street, as conditioned, could be found consistent with the Coastal Act.

Burrowing Owl Habitat

Two types of area make up burrowing owl habitat on the site, winter burrow areas and foraging areas. The Burrowing Owl burrowing/wintering habitat on the NBR site is a total of 1.17 acres. The Burrowing Owl wintering habitat may be impacted by clean-up activities and 1.3 acres would be permanently impacted by the development of the Urban Colony residential units, Bluff Road, and the proposed 5 acre park. The development plan, as proposed, ~~would~~ **may** not provide sufficient buffers to support Burrowing Owl wintering habitat ESHA.

In consideration of the need to address the adequacy of foraging habitat for the burrowing owl, Commission staff sought input from the California Dept. of Fish and Wildlife (CDFW) through a letter dated August 15, 2016 and the Dept. replied in a letter dated August 25, 2016. (Exhibit 13c). In response to staff's request to CDFW, the applicant submitted a letter dated August 19, 2016 to Ed Pert, Regional Manager, California Department of Fish and Wildlife, regarding protection and conservation of the burrowing owl at Newport Banning Ranch, from Michael A. Mohler, Newport Banning Ranch LLC. As detailed below, all of the information included in the applicant's letter and attachments had been reviewed by Commission staff and considered as a basis for the staff's ESHA determination regarding foraging habitat for the burrowing owl. In addition, staff acknowledged the input received from Dr. Bloom and transmitted that information to CDFW.

In an email with attachments to Commissioners sent September 1, 2016, the applicant

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asserts that the applicant's technical analyses have been omitted by staff from the current staff report, while the opinions of other experts opposed to the project have been included. This is an incorrect characterization and minimization of the degree of evaluation Commission staff has given to the volumes of technical information provided by the applicant and interested parties for this project. Although the response from CDFW suggests the burrowing owl impact assessment that has occurred since 2008 may be incomplete, the Commission finds **staff recommended that** there is sufficient data and analysis provided by the applicant and others, to determine the contiguous non-native and native grasslands on the southern mesa should be retained as open space to provide foraging habitat for the burrowing owl on the subject site. **The Commission questioned staff's analysis of the grasslands as ESHA and found that the grassland foraging areas may indeed rise to the level of ESHA because of the special role they may serve as crucial habitat for the sensitive owl species, particularly if more definitive information was available to support that the grasslands are actually used for foraging and to delineate precisely which areas of grassland would constitute ESHA and need to be preserved.**

As stated, all the documents attached to the Mohler letter to Pert and the email to Commissioners were considered and are summarized and/or referenced in the ecologist's ESHA memo attached as Exhibit 13a to the staff report or in the staff report findings. This information was used by staff to make its independent determination regarding the extent of foraging habitat for the burrowing owl that should be protected within the habitat management plan for this property. It is not possible, nor is it Commission practice, to attach every submitted technical report to the staff report.

In a letter dated August 19, 2016 to Pert, regarding protection and conservation of the burrowing owl at Newport Banning Ranch, the applicant asserts the following points in italicized text below:

NBR has dedicated significant time and resources in response to prior CCC Staff inquiries relative to fully studying, documenting and identifying burrowing owl use of the site, along with identifying appropriate project design elements and mitigation measures, including substantial habitat conservation and restoration, to avoid potentially significant impacts to the species. Throughout the CCC review process, our biological team has reviewed and considered the direction contained in the CDFW 2008 Guidance for Burrowing Owl Conservation and the 2012 Staff Report on Burrowing Owl Mitigation as these guidelines may apply to wintering burrowing owl.

The information previously submitted by the applicant and used as a basis for staff's ESHA determination includes three complete burrowing owl survey reports for work done by their biological consultants in winter 2009 and 2014 and spring 2012. In addition, information on burrowing owl winter and spring surveys conducted by their biological consultants in 2008 and 2010 is reported in the project EIR. Their biological consultants also conducted detailed vegetation mapping of the site. These surveys and the vegetation mapping, contributed to the Commission ecologists decision to revise the burrowing owl ESHA burrow determination, along with review of comment letters from avian biologists,

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the peer-reviewed literature on burrowing owls, burrowing owl sightings on Banning Ranch made by the public every year between December and March from 2011 to 2016, the California Department of Fish and Wildlife's (CDFW) 2008 and 2012 burrowing owl conservation and mitigation guidelines, and other burrowing owl reports.

The Commission's staff ecologist ~~is recommending~~ **recommended** that the Commission protect burrowing owl foraging habitat in accordance with the best available science and wildlife agency guidelines. This would be accomplished by addressing the need for a large, contiguous area of grassland which is the key habitat element missing from the acreage that would be left over to function as foraging habitat outside of the development footprint proposed by the applicant. A close review of the mitigation measure (MM 4.6-2) for this impact included in the EIR for burrowing owl indicates that it would also not provide adequate protection. This measure relies on the preservation and restoration of grassland areas lost as a result of the development and calls for the application of a 0.7:1 mitigation ratio for such areas. Under the larger project considered in the EIR, this would result in about 70 acres of grassland – 50 acres of restored native grasslands and 20 acres of preserved non-native grasslands. Although this would be a substantial area, the mitigation measure allows it to be comprised of areas within fuel modification zones (areas located in close proximity to development and subject to disturbance); alkali meadows in the lowlands (habitat that is not ideal foraging habitat for burrowing owl); as well as areas not located on the Banning Ranch site.

Therefore, to avoid extirpation of the burrowing owl from the site, the staff ecologist ~~concludes~~ **concluded** it is necessary to apply the best available science and designate for protection the 64 acres of large, contiguous grasslands that are currently available for burrowing owl foraging and have many years of documented burrowing owl use.

*NBR completed the mapping efforts and documented a marked decline in PNGG on the site such that much of the PNGG initially mapped in 2012 and 2013 no longer met the CCC's minimum 10% cover threshold for mapping PNGG as a vegetation community. It is our understanding that CCC staff concurs with the mapping methods and results of these additional studies. Attached is a mark-up of the vegetation map provided by CCC Staff in their August 15, 2016 letter with areas of remaining PNGG circled is [sic] red. Our biological team has advised that the most likely contributing factors to the decline in native PNGG are current drought conditions, increased herbivory by rabbits, an increase in Russian thistle (*Salsola* sp: tumbleweed) and cessation of annual vegetation mowing conducted by the oil field operator which likely controlled invasive plant species (e.g. Russian thistle) from spreading and affecting the health and composition of PNGG.*

The Commission ecologists agree with NBR that there has been a significant decrease in the percent cover of purple needlegrass on Banning Ranch due to the extended drought, excessive grazing, and drought facilitated invasion by Russian thistle. The Commission ecologists do not agree that annual vegetation mowing likely controlled invasive species from spreading and affecting the health and composition of PNGG. Rather Commission

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ecologists believe that the annual mowing on Banning Ranch has greatly contributed to the presence of many non-native and invasive species. The invasion of the grasslands on the site by Russian thistle is a response to the drought; Russian thistle is remarkably adapted to drought conditions and has been observed throughout disturbed areas in coastal Orange County (pers. comm, Christine Medak, USFWS, Marc 2016).

However, on this site, the decrease in the percent cover of purple needlegrass does not translate into a loss of suitable burrowing owl burrow and foraging habitat. According to the 2012 CDFW *Staff Report on Burrowing Owl Mitigation* “Burrowing owl habitat generally includes, but is not limited to, short or sparse vegetation (at least at some time of year), presence of burrows, burrow surrogates or presence of fossorial mammal dens, well-drained soils, and abundant and available prey.”

The 2008 CDFW *Guidance for Burrowing Owl Conservation* provides the following definition of burrowing owl habitat:

“Burrowing owl habitat can be found in annual and perennial grasslands, deserts, and scrublands characterized by low-growing vegetation (Zarn 1974). Suitable owl habitat may also include trees and shrubs if the canopy covers less than 30 percent of the ground surface. Burrows are the essential component of burrowing owl habitat: both natural and artificial burrows provide protection, shelter, and nests for burrowing owls (Henny and Blus 1981). Burrowing owls typically use burrows made by fossorial mammals, such as ground squirrels or badgers, but also may use man-made structures, such as cement culverts; cement, asphalt, or wood debris piles; or openings beneath cement or asphalt pavement.”

The burrowing owl burrow and foraging habitat on Banning Ranch consists of ground squirrel burrows within native (purple needlegrass grassland, salt grass flats) and nonnative (European annual grasses) grassland, grassland interspersed with native and nonnative shrubs, and ruderal and disturbed areas. While the purple needlegrass cover has decreased, non-native grasses and weeds have increased. This change in the character of the habitat does not impact burrowing owl prey and therefore does not decrease the value of the habitat for burrowing owl foraging.

*We believe that accurately depicting current site conditions, along with observed trends in vegetation community changes that have been documented onsite since 2012, provides important context for assessing potential project impacts and benefits to burrowing owls, given that long-term protection and maintenance of open grassland areas is fundamental to sustaining annual burrowing owl use of the site. In the case of NBR, with the observed decline in native PNGG onsite, spread of invasive plant species (most notably Russian thistle), and transition of previously open grassland habitat to scrub vegetation (a monoculture of *Encelia*) since 2012, it is possible that much of the existing burrowing owl habitat onsite is currently transitioning to less suitable or unsuitable habitat types, irrespective of whether or not the proposed project moves forward.*

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Grassland and scrub habitats naturally fluctuate in cover and extent and level of admixture through time in response to natural disturbances such as drought, fire, and grazing interspersed by periods of calm. Human impacts such as invasive species, vegetation clearance, and fire suppression clearly influence the nature of landscapes. Coastal mesas are typically characterized by coastal prairie and scrub habitats. Scrub habitats tend to dominate bluffs and slopes while coastal mesas tend to be dominated by grassland partially in response to the underlying soils. Review of historical aerial photographs of Banning Ranch show that the relatively flat areas on the upper mesas consistently support grassland habitat while the slopes and edges of the slopes support the majority of the scrub habitat. Through the years the percent cover of these habitats do increase and decrease but this general pattern is consistent through time. The Commission ecologists believe that while the various habitats will invariably change through time with natural and human induced disturbance, the general pattern of the flat mesas on Banning Ranch supporting grassland habitat will continue going forward.

Currently, the NBR property contains approximately 52 acres of native and non-native grasslands and 47 acres of disturbed/ruderal areas, most of which (but not all) is located on the mesa where wintering burrowing owls have been observed. As illustrated on the vegetation map, much of the grasslands and ruderal areas are isolated and interspersed among active oil field facilities including roads, oil well pads, structures, parking, staging and stockpile areas. Despite the presence of suitable habitat, there have been a number of years since 2001 where burrowing owls have not been observed onsite.

The 52 acres of native and non-native grasslands and 47 acres of disturbed/ruderal areas with scattered ground squirrel burrows on the upper mesa on Banning Ranch is exactly the type of habitat suitable for burrowing owls. The fact that the grassland is spread about in patches interspersed with ruderal/disturbed areas is irrelevant. The important thing is that these areas are rich in burrowing owl prey such as insects, reptiles, small mammals, and birds. Additionally, the largest area of burrowing owl foraging habitat we have identified is in the southern part of the mesa – an area that has not supported any active oil production operations, wells, or infrastructure for several decades. Existing use patterns in this portion of the site are very limited and it was specifically selected because it contains both the appropriate habitat for burrowing owl foraging and very limited amounts of human disturbance.

We are unaware of any burrowing owl surveys occurring between 2001 and 2007. However, one or more over-wintering burrowing owls have been observed by the applicant's biological consultants every year surveys have been conducted; 2008, 2009, 2010, and 2014. Furthermore, from the property boundary, the general public has observed burrowing owls on the site every year from 2011 through 2016. The 2012 CDFW *Staff Report on Burrowing Owl Mitigation* states the following regarding occupied burrowing owl habitat:

“Burrowing owls may use a site for breeding, wintering, foraging, and/or migration stopovers. Occupancy of suitable burrowing owl habitat can be verified at a site by

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an observation of at least one burrowing owl, or, alternatively, its molted feathers, cast pellets, prey remains, eggshell fragments, or excrement at or near a burrow entrance. Burrowing owls exhibit high site fidelity, reusing burrows year after year (Rich 1984, Feeney 1992). A site should be assumed occupied if at least one burrowing owl has been observed occupying a burrow there within the last three years (Rich 1984).”

Following this guidance and considering the recent multi-year record of burrowing owls documented on the site, it should be considered an occupied site.

The preserved and enhance burrowing owl habitat onsite, combined with suitable habitat on other preserved open space areas immediately adjacent to the site are expected to provide adequate foraging habitat to support continued use of the site by the species.

The Commission ecologists do not agree that the applicant’s proposal for preservation and enhancement of owl habitat on and offsite will result in the survival and persistence of burrowing owls on Banning Ranch for the reasons detailed above as well as the following:

A. The applicant’s proposed burrowing owl mitigation consists of small fragmented patches of grassland habitat that would be immediately adjacent to development. As discussed above and detailed in the CDFW’s 2008 and 2012 burrowing owl conservation and mitigation documents, burrowing owls are very susceptible to disturbance and need large contiguous areas of suitable burrow and foraging habitat.

B. Burrowing owls exhibit burrow site fidelity – they return to burrows they have used in the past breeding and over- wintering seasons. Disturbance or destruction of occupied burrow sites could cause burrowing owls to leave the area.

C. Re-location of owls has not been successful so preserving occupied burrows in place is important.

D. Despite NBR’s suggestion that “other preserved open space areas immediately adjacent to the site” would provide adequate foraging areas and support the site’s continued use by burrowing owls, it is not clear what areas NBR may be referring to. Other than the grasslands located on the site’s mesa, there are no other large, open burrow habitat and foraging areas shown to be suitable to burrowing owls immediately adjacent to the areas of the site that have been shown to support burrowing owls. While NBR may be referring to Talbert Park, the Commission ecologists are not aware of any documented use at that site and it is nearly a mile away from the nearest observed burrowing owl use site on the Banning Ranch site. Accessing Talbert Park from the documented burrow areas on Banning Ranch would involve passing over the proposed Urban Colony development area and an additional half-mile of unsuitable foraging habitat. While possible, it is unlikely

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that burrowing owls would remain on the Banning Ranch site if the open space at Talbert Park was the nearest available area with suitable foraging conditions. Further, Talbert Park is located adjacent to Fairview Park, an area where a burrowing owl has been observed that may be foraging at Talbert Park already. Given the large area requirements of foraging burrowing owls, Talbert Park may not be able to support any additional influx of foraging burrowing owl.

According to the ESHA determination, the development on the Southern Mesa of the Resort Colony, retail, hostel, Southern Family Village, Bluff Road, and the 5 acre park would directly impact more than 28 acres of Burrowing Owl Foraging Grassland ESHA and would impact the Burrowing Owl burrow on the Southern Mesa. Limiting the development to the North Family Village and Urban Colony only, ~~as conditioned,~~ would avoid impacts to the grasslands foraging and wintering Burrowing Owl ESHA completely.

Mitigation Proposal

Most of the impacts to the site would be a result of the proposed clean-up and the mass grading to prepare the site for the housing development. The applicant proposes to offset most of these impacts, as opposed to restoring the resources in place, by creating habitat elsewhere, as a form of mitigation. The applicant's proposal for the mitigation is the Habitat Conservation and Conceptual Mitigation Plan (HCCMP). The HCCMP presents a program for the onsite compensatory mitigation that is designed to mitigate the biological impacts caused as a result of the proposed project. The HCCMP for the mitigation associated with the Newport Banning Ranch Project addresses on-site wetland/riparian establishment mitigation, restoration and enhancement, vernal pool establishment mitigation and enhancement, as well as upland scrub and grassland restoration, for impacts to jurisdictional waters, riparian habitat, vernal pool and seasonal features, and scrub and grassland habitat resulting from proposed oil field clean up and implementation of the development project. As described previously, under previous permits and past Commission actions regarding oil well abandonment and remediation, the Commission has required applicants to restore the habitat impacts in place. Moreover, case law has clarified that Section 30240 does not allow for the relocation of ESHA. In this case, the applicant proposes not to restore, but to mitigate for these impacts in areas of the site that are not suitable for development and in the proposed open space areas.

The HCCMP has not been updated by the applicant since 2013 and is not based on the site constraints, including the ESHA and the wetlands present on the site as identified by the Commission. It has not been made consistent with the recent revised site plan (of July 2016) and the approved RAP or revised clean-up disturbance area estimate developed as a result of the field-verification process carried out in November of 2015 and March of 2016.

Generally the HCCMP proposes mitigation for impacts to wetlands and vernal pools and other ESHA that the Commission finds are avoidable. The plan proposes to mitigate for the destruction of wetlands by establishing new wetland and vernal pool habitat within the vernal pool complex on the mesa that would be surrounded by newly created purple needle grass.

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While the HCCMP does detail the impacts to the CAGN territories containing scrub, it does not detail the impacts that would be caused to rare scrub communities on the site, such as coastal bluff scrub, maritime succulent scrub, and California brittle bush scrub. These communities are rare and sensitive and afforded protection under the Coastal Act regardless of whether or not they support listed bird species. See the ESHA Memo ([Exhibit 13a](#)) for more information. The plan, as proposed, includes inadequate mitigation for impacts to both purple needle grass and CAGN habitat and no mitigation for the proposed loss of sensitive scrub communities.

The HCCMP includes a Third Party Mitigation 30-acre “mitigation bank” in the lowlands of the site. The applicant has confirmed in writing that a mitigation bank is no longer proposed. The HCCMP was prepared as a mitigation proposal and assumes that the underlying impacts to the sensitive resources would be approvable under the Coastal Act. Sections of the Coastal Act that protect ESHA and Wetlands enumerate specific, limited uses (only resource dependent uses) that are allowed to cause impacts to these resources, and that may, as a result of the allowed impact, require restoration in place and mitigation for those impacts. While the applicant has proposed mitigation for the impacts of the proposed project, the approved impacts still need to be for an allowable use. The proposal for clean-up work in ESHA and restoration following may be found to be an allowable use, and consistent with the resource protection policies of the Coastal Act, for the reasons stated below, provided there is subsequent in-place restoration, so that the impacts are only temporary. On the other hand, the proposed large-scale development plan which results in the location of new structures within, and permanent impacts to, ESHA is not for a purpose that is allowable, and it would do so despite the fact that it could be redesigned to avoid all of that ESHA and still provide substantial development. That portion of the proposal is therefore not consistent with the resource protection policies of the Coastal Act.

Potential Impacts from Development Adjacent to ESHA

Coastal Act Section 30240 requires that development in areas adjacent to ESHA shall be sited and designed to prevent impacts which would significantly degrade ESHA, and shall be compatible with the continuance of ESHA. The proposed project would reduce the ability of the ESHA onsite and in surrounding areas to serve as habitat, through both direct and indirect, as well as temporary and long-term, impacts, as described above.

The project would result in a significant change in the type of use and the level of human activity on the site, which would cause significant impacts to ESHA. Activities on the site that result in additional noise or disturbance impacts would negatively impact the sensitive avian species, habitat areas, the water quality of the wetlands, and the presence of rare native vegetation.

Buffers

To ensure compliance with Section 30240 of the Coastal Act, development (aside from resource dependent uses) must be located outside of all environmentally sensitive habitat areas and must not cause significant disruption of the habitat values within those areas. Further, development adjacent to an ESHA must be sited to prevent impacts to the ESHA that would significantly degrade those areas, in part through the provision of a setback or buffer between the ESHA and the development.

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A buffer, in the context of the Coastal Commission, is a barrier, “safe zone”, or bordering strip of natural habitat or land between ESHA and development or human disturbance. Buffers and development setbacks protect biological productivity by providing the horizontal spatial separation necessary to preserve habitat values and transitional terrestrial habitat area. Spatial separation minimizes the adverse effects of human use and urban development on wildlife habitat value through physical partitioning. Buffers may also provide ecological functions essential for species in the ESHA. The required width for buffers varies depending on the type of ESHA and on the type of development, topography of the site, and the sensitivity of the resources to the particular kind of disturbance.

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

The ESHA on the site should be free from non-resource-dependent development and assigned buffers to adequately protect the identified resource. The Commission staff ecologists recommend buffers for all sensitive vegetation (all CSS communities, Riparian, and PNGG) to be a minimum of 50 feet, except for areas where proposed road encroachments into the buffers would incorporate special features to provide additional physical buffering, in limited circumstances, as addressed below.

Recommended buffers ([Exhibit 3b](#)) for Vernal pools, Wetlands, and CAGN habitat, and Burrowing Owl Foraging habitat are a minimum of 100 feet, except for roads that incorporate special features to provide additional physical buffering, in limited circumstances, as addressed below.

The recommended buffer for Burrowing Owl wintering habitat is 164 feet or 50 meters. As stated in the ESHA Memo by Dr. Engel dated 9/25/2015:

In order to avoid disturbance to burrowing owls, the California Burrowing Owl Consortium and the California Department of Fish and Wildlife recommend 50-m buffers during the non-breeding season. Given that the existing use at Banning Ranch is by wintering and migrant birds, I recommend that a 50-m (164-ft) buffer be established around the defined burrowing owl habitat, which is in accord with previous Commission action.

In areas where the development plan avoids ESHA, the applicant proposes to have 50 foot wide ESHA buffers, instead of the above recommended buffers according to habitat type. Within these

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buffers, the applicant proposes to grade 25 feet into the buffer for the construction of the 10 foot wide trails in the buffers. The grading footprint encroachments into the 50 foot proposed ESHA buffer leaves only 25 feet of buffer between ESHA and the construction. In some areas, there would be 0 foot buffers, and in other areas the development plan continues to directly impact ESHA (**Exhibit 5**). Additionally, what ESHA buffers the applicant does offer are proposed to serve as a Fuel Modification zone and be planted with native plant palettes and actively managed in perpetuity, which conflicts with the function and purpose of a true buffer.

While the trails are resource-dependent uses within ESHA and buffers, the other proposed development is not resource dependent development. The proposed grading footprint would only leave 25 feet of intact buffer between the ESHA and the proposed development, which is not sufficient for the protection of the ESHA. A buffer around ESHA is intended to prevent disturbances and impacts. As Fuel Modification zones the buffers would, as proposed, be subject to regular maintenance activities to maintain the native plants selected for the area, to remove non-natives, and to ensure the plants are kept a certain distance spaced apart for Fire safety. Buffers that include regular maintenance activities do not prevent human activity from disturbing the sensitive birds and vegetation. Section 30240 requires development adjacent to ESHA must be sited to prevent impacts to the ESHA that would significantly degrade those areas. Regular landscaping and maintenance activities are forms of development that need to be designed to occur outside of ESHA buffers and prevent impacts to ESHA. Therefore, these activities cannot occur immediately adjacent to areas of ESHA. As proposed for reduced buffers with grading impacts into the buffers, and for regular maintenance of the vegetation as a fuel modification zone, the project is not consistent with Section 30240 of the Coastal Act.

According to the site plan submitted July 11, 2016, the proposed grading footprint for the Urban Colony and surrounding trail would encroach into the buffer leaving a reduced 25 foot ESHA buffer around CSS, Gnatcatcher and Riparian habitat. The proposed reduced 50 foot buffer and additional 25 feet of grading encroachments would have direct impact to the mapped Vernal Pool Watershed, Burrowing Owl wintering habitat buffer, riparian habitat, and would only leave a 25 foot buffer around Vernal Pool 1, 2, and 3, Pool M and Pool J, and the southern edge of Pool E. Additionally, the grading footprint as proposed would impact existing CSS within the restoration areas required pursuant to the settlement agreement.

The proposed grading footprint for the Northern Family Village and surrounding trail would encroach into the proposed 50 foot buffers, leaving a reduced 25 foot ESHA buffer around CSS, Gnatcatcher and Riparian habitat. Again, the proposal would have direct impact to the mapped Vernal Pool Watershed, Burrowing Owl wintering habitat buffer, riparian habitat, and would only leave a 25 foot buffer around Pool G. The applicant proposes to completely remove and grade wetlands C and CC for the development of residential structures. Bluff Road connecting the park to the Northern Village would be constructed with a series of culverts under the road to allow for Wildlife movement. The construction of the road and placement of the culverts would impact riparian vegetation, Gnatcatcher habitat, and CSS at the head of the North-South Arroyo.

The grading footprint around the proposed 5 acre park would encroach 90 feet into the Burrowing Owl wintering habitat buffer and would directly impact foraging habitat.

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The grading footprint associated with Bluff Road would have direct impacts to CSS and Gnatcatcher habitat adjacent to the Main Arroyo for development of the bridge supports. **Although staff did not have time to include, within the September 2016 staff report, a comprehensive analysis of the revised grading plan submitted by the applicant a couple weeks prior to the hearing, Staff did address that new grading plan in its oral presentation at the hearing, indicating that the revised proposal was not sufficiently modified from the July proposal to alter any of the fundamental conclusions in the staff recommendation. Similarly, the Commission itself did not find the changes to be significant enough to alter its fundamental analysis.**

Within the Southern Family village, CSS and Gnatcatcher habitat ESHA in some areas would have 0 foot buffers and the foraging grasslands would be removed by the proposed development plan.

In the Resort and Residential Colony, the grading plan would leave a 25 foot buffer around Wetland MM for the development of the hostel. The proposed reduced 50 foot ESHA buffer and additional 25 feet of grading encroachments for the construction of the southern-most residential structure would only leave a 25 foot buffer Gnatcatcher habitat and CSS and Purple Needle Grass ESHA and the foraging grasslands would be removed by the proposed development plan.

Furthermore, the proposed reduced buffers, in combination with the significant grading encroachments, and planned maintenance of the ESHA buffers, and the project's direct impacts to areas of ESHA, would have detrimental effects on the sensitive resources in adjacent ESHA areas. The current proposal for the development is inconsistent with Coastal Act Section 30240, which requires development adjacent to ESHA to be consistent with the continuance of the habitat areas. ~~As conditioned, a minimum of 50 foot buffers around sensitive vegetation and 100-164 foot buffers around sensitive wildlife habitat and wetlands with no vegetation maintenance activities in the buffers is required.~~

The applicant provided some information that asserts that the Commission has not applied consistent buffers in the past and cites several instances of varying buffer widths. The projects cited by the applicant were very different from the Banning Ranch site in various ways, and therefore were assigned buffers based on specific site characteristics. For example, various buffer widths were assigned to habitat in the North Coast Corridor in San Diego involving the replacement/expansion of major infrastructure facilities including highway (I-5) and rail (LOSSAN). In this instance, the existing transportation corridors were, in some cases, already located directly adjacent to ESHA and wetlands and therefore, the buffers were based on the existing space available between the existing infrastructure and the habitat. The existing transportation corridors could not be relocated to an alternative location that would allow for an increased buffer.

Another example cited is the CDP 5-03-355 (Boeing) in Seal Beach, which imposed a reduced buffer of 25 feet around the unnatural features, for the following reasons:
Typically, the Commission imposes buffers of 100 feet from the edge of habitat areas.

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However, in this case, the 25 foot buffer is expected to be effective because the wildlife usage on the site is limited to common avifauna, such as black phoebe, American crow, mourning dove, killdeer, and house finch which are adapted to the urban setting. Also, the limited amount of existing wetland is a mix of native and non-native herbaceous species that exhibit very limited habitat value. The ditches are not natural and were created as drainage conveyance devices. The existing habitat value is marginal and the proposed disturbance is minimal. The proposed CHCP will enhance the existing marginal on-site habitat areas. For these reasons, the Commission finds that, in this case, the proposed reduced buffers will be effective.

Part of the project site included the Los Alamitos Retarding Basin (LARB), for which the Commission imposed a larger setback from the development (a parking lot) ranging from 80 feet to 170 feet, with an average distance of 115 feet. Also, in this case, all habitat on-site was protected in place and expanded. The differences between the habitat found around the ditches and the habitat found on the NBR site are vast, being mainly that the extent and significance of the habitat present is far greater and far more easily disturbed on the NBR site.

The applicant also cites the Marblehead project in San Clemente as having a ‘minimum 50’ buffer’. It's important to note that the conditions of approval on CDP 5-03-013 which authorized the Marblehead development require 100 foot buffers for wetlands and terrestrial ESHA as the standard rule, with certain selected exceptions made for reduced buffers.

Another buffer cited by the applicants was the City of Newport Beach LUP. The LUP requires a *minimum* 50 foot buffer, to be determined on a case-by-case basis, which is exactly what was done for this project.

Banning Ranch, compared to these other projects, is a blank slate and one of the last remaining large (401 acres), undeveloped properties susceptible to development in Newport Beach and along the coast of southern California. Although the property is located in Orange County and surrounded by an urban metropolis, it is actually quite isolated and protected from the surrounding development and disturbances because it is bordered on three sides by the Talbert Nature Preserve, the Santa Ana River and the ACOE wetlands, and in close proximity to the Pacific Ocean. The property is topographically and biologically diverse consisting of a low wetland area surrounded by coastal bluffs and canyons that rise to an upper mesa that is relatively flat except for several large arroyos that in total support a rich array of habitats and species, many of which are rare.

The Newport Beach LUP includes a 50 foot *minimum* buffer policy for sensitive habitats and species. Staff ecologists have taken this into consideration and have concluded that 50 foot buffers is not protective enough for the rare listed animals and their habitats on the site given the current setting, status of the site as critical habitat, and the nature of the proposed development. The reason these animals and habitats presently occur on Banning Ranch is because it is currently undeveloped and relatively free from disturbance. The staff ecologists have recommended buffers that are the absolute minimum to protect the

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rare animals and their habitats from the various types of disturbance that will result from the proposed development including noise, artificial lighting, domestic animals, traffic, invasive species, and herbicides and pesticides, to name a few.

Finally, the applicant asserted that staff has relied solely on information provided by the public and has disregarded information provided by the applicant in the determination of burrowing owl foraging ESHA. The Commission is legally required to review relevant technical information, and the Coastal Act provides for just such analysis based on all current available information. Commission staff reviewed the information provided by the public and professional biologists that suggested that the grasslands should be considered ESHA for owl foraging and buffers. However, the determination was not made without support from the data provided by the applicant in the form of multiple burrowing owl surveys and vegetation grassland surveys. The applicant ultimately provided the information upon which the determination was made, as explained above.

To ignore important scientific information, as well as general public comments and consensus, made available to staff would both violate the Coastal Act, and undercut the crucial and legal significance of public involvement in decisions made under the Coastal Act. Further, failure to address known information would expose the Commission to potential legal action.

All ESHA buffers should be planted with native vegetation consistent with and appropriate for the habitat type it surrounds and the buffer should be of sufficient size to avoid degradation of the resource it is designed to protect. The Commission has typically required buffers to be planted in appropriate native vegetation and protected in perpetuity to prevent future development from impacting the ability of the buffer to protect adjacent ESHA.

Fuel Modification in Buffers

As stated above, the proposed reduced buffers with the grading footprint encroachments leaves only 25 feet of buffer between ESHA and the construction in most areas. After construction, the proposed 50 foot buffer would include a 10 foot wide trail, essentially leaving 40 feet of maintained vegetated strips, that the applicant is proposing as ESHA buffers. These ESHA buffers are also proposed to serve as a fuel modification zone.

The Fuel Modification zone proposal includes 20 feet of defensible space from the habitable structures within the proposed development footprint and a 10 foot wide non-combustible trail within the ESHA buffer as zone “A,” while the combined zones “B and C” would serve as 40 feet of native, fire-resistant vegetation within the ESHA buffer, subject to maintenance.

The applicant submitted a letter from the City of Newport Beach Fire Department that describes the requirements for the Fuel Modification zones. The property has been removed from the “high fire hazards zone.” The letter states that prior to the issuance of building permits, the Fire Department will determine what, if any, additional fuel modification (beyond the proposal above) is necessary prior to the introduction of any combustible material in the area. The letter

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does not sanction the proposed fuel modification zones as adequate or more than sufficient for fire protection and notes that the site will continue to be monitored and the fire department will require flammable vegetation be treated should it be determined that flammable vegetation exists on the site. The Fire Department reserves the right to, at any time, require thinning or clearing of vegetation 100-120 feet away from habitable structures. If the Fire Chief were to decide that vegetation within 100 feet of habitable structures needed to be cleared for fire safety, under the current proposal, the entire proposed ESHA buffer would be subject to clearing, and up to 50 feet of ESHA itself would be cleared.

It is for these reasons that ESHA buffers should not serve as Fuel Modification zones. Pursuant to Section 30240 of the Coastal Act development adjacent to ESHA must be compatible with the continuance of the ESHA. Fuel modification, because of maintenance, thinning, or clearing, is not considered to be compatible with protection of ESHA. A letter was submitted on 7/5/16 by the Banning Ranch Conservancy summarizing the many instances where the applicant was informed by Staff that fuel modification must be within the development footprint, and outside of ESHA and ESHA buffers. On past permit actions, there have been few exceptions to permit fuel modification within ESHA buffers. It has occurred in areas with significantly vast ESHA buffers (up to 300 feet) or within areas with natural buffers, such as natural topographical features where development was separated from vegetation (5-92-188-A4). That is not the case here. Permitting a site wide fuel modification zone in the ESHA buffer (and reduced ESHA buffer) is not consistent with Section 30240, however there are a few select areas where reduced buffers may be appropriate with mitigation measures, as explained below.

~~The defensible space is a 60 foot setback between the ESHA buffer and the first habitable structure. As conditioned, the proposal must include a minimum of 60 feet of defensible space within the development footprint. With 60 feet of defensible space, and a 10 foot wide trail, there would be 70 feet of appropriate fire safety that could be divided into fuel modification zones. If in the event the Fire Department determines that 100 feet of clearance is necessary, then the ESHA buffers would be intact and would still adequately protect the adjacent ESHA. Only as conditioned can the project be found consistent with Section 30240.~~

The applicant has argued that the project, as conditioned in the staff recommendation ~~as conditioned to require~~ a 60-foot defensible space setback, does not leave adequate room for development. It is misleading to say that the defensible space is not part of the development footprint, because this space can include many forms of development that are proposed and necessary for the project, such as: trails, roads, landscaping (fire resistant), hardscape, front and back yards, etc.

For example, the proposed project includes tennis courts (hardscape) at the northern-most point of the 8.8 acre area (Urban Colony), which would be considered an appropriate “fire safe” use in the defensible space (Exhibit 23). ~~In this instance, the conditioned 60 foot setback would require no change the proposed plans.~~ Another example is the narrow development footprint between the 8.8 acre area (Urban Colony) and the 1.8 acre area (North Family Village). This is the only logical place for a road to be situated to connect the two residential developments. It is part of the defensible space which can include roads and

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hardscape, and therefore requires no change to the applicant's proposal. Several elements of the development appropriate for the defensible space are already elements of the proposed project, and therefore, ~~imposing the 60 foot setback does not, in actuality,~~ **including defensible space and fuel modification in the development footprint does not have to** reduce the buildable footprint.

~~The area of the buildable footprint that is not subject to the 60 foot definable space setback is area that is suitable for habitable development, which would include houses and habitable structures.~~ Within the ~~19.7~~ **approximately 19 acre** buildable footprint **recommended by staff**, there is 11 acres of area suitable for residential, habitable structures and 8.6 acres suitable for roads, trails, hardscape, driveways, front and back yards, etc. **The Commission found that fuel modification is not appropriate in habitat buffers.**

~~As required by Special Condition 1, the applicant would submit revised plans for a revised site plan that can include alternative plans for the Urban Colony and North Family Village that maximize the area of habitable development by utilizing the defensible space for elements described above.~~

Areas of Reduced Buffers

Despite the proposal for reduced buffers, staff ~~continues to~~ **recommended** 50 foot buffers for all sensitive vegetation and 100 foot buffers for Vernal pools, Wetlands, Burrowing Owl foraging habitat, and CAGN habitat (except for roads that incorporate special features to provide additional physical buffering, as addressed below), and 164 foot buffer for Burrowing Owl wintering habitat.

In some instances, modified buffers may be acceptable to accommodate access to developable space where they can be designed to provide adequate protection of the resource. There are some locations on the subject site where the potential buffer is currently a road or disturbed area and development of such areas can include other measures to buffer the impact and allow a reduced buffer.

Between wetlands C and CC there is a small area "pinch-point" immediately northwest of pool CC that is currently a dirt road and that would require a buffer adjustment to merge the two wetland buffers together and allow a road immediately northwest of pool CC to access the 2.9 ac. of potential development area within North Village, as described more specifically in the findings below addressing Wetlands and Marine Quality. The development space in the buildable footprint immediately northwest of pool CC is approximately 50 feet wide. ~~To minimize disturbance of resources, all road right-of-ways within the development, including roads within habitat buffers, are conditioned to be no more than 50 feet wide, one lane of traffic in each direction, with on-street parking lanes on each side of the street. Bikelanes and sidewalks can only be constructed in areas where there is sufficient space in the identified buildable footprint. Areas within the buildable footprints around Wetlands C and CC, and between the Urban Colony and North Family Village have narrow development footprints, which may be not wide enough to accommodate on-street bike lanes and parallel sidewalks. In~~

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~~these cases pedestrian and multi-use trails can be designed to serve as alternatives to sidewalks and bike lanes where none can be provided within the buildable footprint.~~

Lastly, ~~Trails (both multi-use trails and pedestrian trails) can be located within buffer areas and can be located adjacent to areas of ESHA, and while not reducing the width of the buffer, some resource dependent uses can be constructed within the ESHA buffers. with conditions to limit the width and total disturbance during construction of the trails. Trails shall serve as options for circulation throughout and around the site to reduce vehicle miles traveled. A trail network is proposed within the lowlands, with connections to the mesa, and across the arroyos. Multi-use trails can also serve as secondary access points for Fire and other Emergency services to access residential and commercial development areas. As conditioned, the grading footprint for a 10-foot wide trail shall be no wider than 10 feet, and the grading footprint for a 20-foot wide multi-use trail shall be no wider than 20 feet.~~

Conformity of Proposed Residential and Commercial Development with the Coastal Act's ESHA Policy

Although much of the applicant's proposed development in the northern portion of the mesa would be within the developable areas shown on the constraints map, much of it would also extend beyond those limits into the buffer areas for various sensitive resources, and even have direct impacts on the sensitive resources themselves. In the central and southern portion of the mesa, the applicant's proposed development would cover extensive areas of ESHA. Under the proposal, approximately 72 acres of the site would be developed with roadways, housing, retail/commercial space, and resort development, and oil operation areas. The proposal includes direct impacts to approximately 42 acres of ESHA and Wetlands, and additional impacts to buffers. The proposed Urban Colony and North Village, combined would impact less than 2 acres of ESHA and Wetlands and could be designed to avoid these impacts. The Southern Colony, including the park and Resort Colony and Bluff Road, would impact approximately 40 acres of ESHA (See [Exhibits 5 and 6](#)).

There are approximately 64 acres of Burrowing Owl foraging grasslands on the Southern Mesa of the site that are comprised primarily of purple needle grass, non-native grasses, and salt grass. The development plan of July 11, 2016 would have impacts to approximately 36 acres of Burrowing Owl foraging ESHA, as well as some CSS and CAGN habitat.

Residential and commercial development is not a use dependent upon these resources, and the development would completely eliminate the resources in the location where the development is proposed. Thus, such development is inconsistent with section 30240. ~~and the project is being conditioned to limit the scope of this development to the developable areas.~~

In a natural environment there are often wildlife and habitat corridors. For example, in the region of coastal Orange County, the Santa Ana River and surrounding open spaces provide a wildlife corridor for wildlife, specifically birds, to reach the Pacific Ocean from Inland areas. On the NBR site, there are wildlife corridors that connect the open spaces in the form of the arroyos and vernal pool watersheds, as well as lowlands. Section 30240 states that development in areas adjacent to environmentally sensitive habitat areas (ESHA) shall be sited and designed to prevent impacts that would significantly degrade those areas, and shall be compatible with the continuance of those habitats. There is significant ESHA on the NBR site such that any

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development would be located within close proximity to some habitat areas, and therefore is required to be sited and designed to prevent impacts to, and be compatible with the continuance of those habitats. In this case, that would include development that preserves the site's natural connectivity.

Occupants of the proposed residential communities are likely to have domestic animals such as dogs and cats. Domestic pets can enter sensitive habitat areas and disturb wildlife, compete with wildlife for resources, or hunt wildlife. In order to prevent these disturbances, the project has been conditioned to include perimeter fencing, walls, and gates along the open spaces areas to deter domestic pets from entering conservation, open space areas. In order to prevent fragmentation, these boundaries must be designed in order to allow for the movement of wildlife, including coyotes.

The proposed 5 acre park near 16th street would occupy space between the North-South Arroyo and the Main Arroyo. The construction of Bluff Road within the fault-zone setback would impact a portion of the North-South Arroyo and vegetation of Pool E with a series of culverts supporting the road. Bluff Road would fill a portion of the Main Arroyo for bridge supports and would directly impact the burrowing owl wintering habitat buffer and impact the foraging habitat and would separate the North-South Arroyo from the Vernal Pool Complex, as well as impact several areas of sensitive habitat, all of which would significantly degrade the connectivity of the site and would not be compatible with the continuance of habitat areas. The proposed plan would not be consistent with Section 30240.

~~In order to preserve site connectivity and prevent impacts to ESHA and Wetlands, **Special Condition 1** requires revised plans that eliminate the proposed segments of Bluff Road where it would directly impact ESHA and as a through road from PCH. The project, as conditioned, does not allow residential and commercial development and associated infrastructure to occur within areas of ESHA and wetlands and buffers, so the proposed access, Bluff Road, cannot be constructed. Therefore, the only access to this site that can be constructed without impacting ESHA and Wetlands would be from 17th street.~~

~~The elimination of Bluff Road from the plans provides for an ecological connection in this area on the mesa situated between the Main Arroyo and the North-South Arroyo and adjacent to the vernal pool complex and is critical for the site's overall habitat connectivity.~~

Further, Section 30250 requires that new residential and commercial development be located within or next to areas of existing developed areas and where it will not have significant adverse effects, individually and cumulatively, upon coastal resources. The proposed Bluff Road developed through the site would impact habitat areas of federally threatened species, would impact areas of ESHA, and would have significant adverse effects. Bluff road as proposed would divide the North-South arroyo from the vernal pool complex and would divide the watershed. The development plan would have impacts on habitat connectivity and would locate high intensity development adjacent to habitat areas, and cumulatively would lead to fragmentation of the wildlife corridors.

Additional impacts from the loss of habitat linkages due to the current proposal's physical impediments include structures houses, fences, roads, as well as disturbances from noise, light, domestic animals, and other human activity which would all intensify at the site and would be

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detrimental to the existing habitat and wildlife. **Lastly, the proposed plan would not include adequate buffers for the sensitive habitat onsite and would encroach into the limited buffers for fuel modification purposes. The Commission found that fuel modification is not appropriate in habitat buffers.**

Measures to ensure that the development does not have a significant individual or cumulative adverse impact on coastal resources would include preventing development in the resource areas and protecting the buffers per **Special Condition 1**, maximizing the amount of open space and providing wildlife overpasses or underpasses for free movement across the site as required in the Final Habitat Management Plan by **Special Condition 14**, minimizing the amount of site division due to development and reducing the density and intensity of development areas immediately adjacent to natural corridors as required by **Special Condition 1**. The proposed project does not provide for these measures. In order to prevent the introduction of non-native plants to the habitat areas of the site, **Special Condition 4** requires a revised landscaping plan and **Special Condition 5** requires submittal of a revised lighting plan that utilize “dark sky” technology and lighting directed away from areas of ESHA and wetlands. Within the residential and commercial developments all structures are required to have bird-safe glass and all open space and conservation areas shall have perimeter fences and barriers that are safe for wildlife movement but prevent domestic animals from entering conservation areas per **Special Condition 2**. Only as conditioned can the project be found consistent with Section 30250 to ensure that new residential and commercial development on the site will not have cumulative significant adverse effects on the site’s connectivity. During grading, site preparation, and the construction of the residential and commercial developments, **Special Condition 13** requires barriers around sensitive habitat areas. **Special Condition 14** requires a Final Habitat Management Plan for construction phase rare plant protection measures are included, dust control plans, and biological monitoring of avian species.

As described above, there are aspects of the proposed plan involving residential and commercial development that are inconsistent with the resource protection policies of the Coastal Act in various ways. In accordance with Section 30240(a) of the Coastal Act, ESHA shall be protected against any significant disruption of habitat values and only resource dependent uses are permitted within ESHA. Resource dependent uses are limited to trails, public accessways, low impact campgrounds, interpretive signage and use, and habitat restoration. **The applicant proposes to impact a significant amount of ESHA with development that is not resource dependent. Furthermore, the proposed development in areas outside of ESHA does not provide adequate buffers for the sensitive resources in adjacent ESHA areas. The current proposal for the development is inconsistent with Coastal Act Section 30240, which requires development adjacent to ESHA to avoid significantly degrading it and to be consistent with the continuance of ESHA areas.**

The proposed residential developments can be located outside of ESHA and wetlands. **Special Condition 1** requires revised plans for the entire development plan and requires the residential development be designed and sited outside of ESHA and wetlands and provides the necessary buffers. The condition precludes development within the protected resources, requires habitat buffers, and prevents development between the North-South Arroyo and the Main Arroyo, and details the areas of reduced buffers for the construction of a road only around pools C and CC. **Special Condition 10** also requires dedication of the Open Space Conservation areas to restrict

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use and create public lands, along with Special Condition 28 for a deed restriction, and Special Condition 11 restricts the use of the trails within the Open Space Conservation areas while Special Condition 10 ensures public access and recreational use of the Open Space areas. Special Condition 12 which requires a Maintenance and Management plan for the open space.

The applicant has proposed, through the tentative tract map dated August 12, 2016 (TTM)(Exhibit 9) and a Habitat Management Plan, to protect and restore 324 acres of land as open space. These lands are identified on the TTM as “lettered” lots for ‘open space/conservation’ as opposed to the “numbered” lots and public streets that are planned for residential and commercial development. With conditions, the proposal can be found consistent with Sections 30233, 30240, and 30250 among others because it would result in the long term protection and enhancement of wetlands and ESHA. Special Condition 10 specifies that the proposed conservation areas are to be offered for dedication, in fee title as an easement, for habitat conservation and restoration purposes. Special Condition 10 also outlines the types of uses and development that are authorized at this time and those that may occur through a future Commission authorization.

The proposed open space conservation areas (OSCAs) are spread across the site and include significant portions of the existing wetlands and ESHA that **would** require protection. However, as noted on Exhibit 5 and 6, there are habitat areas that would not be protected by the proposed plan. The special conditions imposed through this action include limiting residential and commercial development on the site to the Urban Colony and North Family Village only and within the ‘buildable footprint outside of constraints’ identified on Exhibit 5, 6 and others. This would create an area of unprotected habitat and buffers adjacent to the approved development that are not within the proposed lettered lots. Thus Special Condition 10 includes a requirement that the OSCA be expanded to incorporate these lands adjacent to the ‘buildable footprint’, minus the 10 foot wide area at the edge of the buffer that would be used for a public trail that would be covered by the requirements of Special Condition 11 (Trails Within the Open Space/Conservation Area).

As described and depicted in Exhibits 6, 13a and 13b there is ESHA along the easterly and southerly portions of the site that would be impacted by the applicants proposed residential and commercial development plan (in the South Village, Mixed use Resort Colony and active parks). The conditions imposed through this action would not allow the proposed development to proceed at this time in those areas in order to protect ESHA. Since these areas were proposed for development, they are not within the proposed OSCA. Thus, one option would be to apply the requirements of Special Condition 10 to these areas. Doing so, however, would largely foreclose future consideration of potentially compatible uses in the areas that are not constrained by the presence of ESHA, wetlands, buffers, and archeological resources. Future uses in these areas should be considered in the context of an LCP planning effort. Thus, Special Condition 25b (Future Development) imposes a deed restriction over these areas stating that no development, as defined in Section 30106 of the Coastal Act, including but not limited to, alteration of landforms, removal of native vegetation or the erection of structures of any type, shall occur unless approved by this Commission as an amendment to this permit. Exhibit 22 (Open Space Conservation Area & Future Development Deed Restriction) graphically portrays the areas that would be

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subject to the requirements of Special Condition 10 versus Special Condition 25b.

The area to which Special Condition 10 applies does not include lettered lots F, Q and N on the TTM. The areas of lots F and Q were intended by the applicant for water quality improvement structures. However, given the reduction in development area authorized through this action, it's unclear whether these water quality improvement areas remain necessary for that purpose. In addition, there is ESHA present in these areas that would need to be considered. The area of Lot N is adjacent to the City of Newport Beach's Sunset Ridge Park (CDP 5-11-302) and has been identified by the City as one potential location for a park access road. Based on the location of ESHA present at this time and buffers (Exhibit 5a/b), such a road might be possible but would need further study. Given uncertainty about uses and the potential for compatible development in the areas of Lots F, Q and N, Special Condition 25b is applied to these areas.

Special Condition 14 requires is a Final Habitat Management Plan which will detail the restoration, mitigation, and enhancement proposed and required for the impacts to the sensitive habitat areas and wetlands and details monitoring of the habitat both during construction and after restoration. The condition requires a plan to enhance the buffers of Wetlands C and CC and the vernal pool complex. Prior to the clean-up activities and soil disturbance, the top 6 inches of wetlands would need to be preserved and stockpiled for later use, according to the plan. A qualified biologist is required to monitor the implementation of the HMP and a long-term monitoring plan is required for a minimum of 5 years after restoration. Only as conditioned to confine residential and commercial development to areas outside of ESHA, buffers, and wetlands can the project be found consistent with section 30240.

The portions of the proposal that would protect existing habitat, the 329 acre Open Space Preserve, are consistent with Section 30240 and can be permitted.

Oilfield Abandonment and Remediation Activities in ESHA

While there are a variety of regulations⁴ mandating that proper oilfield abandonment and infrastructure removal activities be conducted and completed as part of both individual well shutdowns and full oilfield closures, compliance with these requirements is typically the obligation of the oilfield operators on the site. However, in this case, NBR has entered into an agreement with the operator of the Banning Ranch Oilfield and assumed responsibility for carrying out the abandonment process in exchange for the operator's cooperation in relocating its operations into the "oil remainder areas," the roughly 15 acre portion of the site that is proposed to remain in use for oil and gas production.

⁴ These regulations include those of state agencies such as the California Division of Oil, Gas, and Geothermal Resources, the California Department of Toxic Substances Control, and the Regional Water Quality Control Board as well as relevant local agencies such as the Orange County Health Care Agency. The specific governing regulations depend on a variety of factors including the location of the operation, the type of operation, presence of contaminated material, and presence of environmental resources.

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The Commission recently approved a coastal development permit application from the oilfield operator, Horizontal Development LLC ~~has submitted~~ (CDP No. 9-15-1649), that includes abandonment and removal of three wells and several structures as well as some ~~clean-up activities~~ and a variety of future oil and gas production, processing, storage, and transport activities that would be carried out ~~it proposes to pursue~~ within the oil remainder areas. Without NBR's current proposal to abandon oilfield operations throughout most of the site and carry out commercial and residential development in those areas, the oilfield operator would be required to carry out the oilfield shut-down, infrastructure removal, and clean-up activities at a future date when it discontinues oil production. This latter approach is the more typical and standard process for oilfield abandonment. However, the current condition of the oilfield would also need to be addressed even without NBR's current proposal. For example, known areas of contamination that pose a threat to human health or environmental resources would need to be cleaned up and removed along with derelict and abandoned equipment, infrastructure, and materials. Several agencies, including the Regional Water Quality Control Boards and Department of Conservation, have been working for many years to address these types of issues on the Banning Ranch Oilfield and would continue to do so if oil operations there were to continue into the future. The continued work of these agencies would result in significant improvements on the site compared to current conditions. Specifically, resolution of these past, recently completed, and ongoing efforts and investigations by state and federal resource agencies will significantly improve the existing conditions on the site:

- Commission Consent Cease and Desist Order/Restoration Order No. CCC-15-CD/RO-01 requires 18.45 acres of native coastal sage scrub, grassland, wetland and riparian habitat restoration on the site within areas two through six on the map included as Exhibit 15. The Orders also require passive restoration, i.e. cessation of mowing across the entire site, except for in limited strips, as necessary for fire protection;
- Commission Consent Cease and Desist Order/Restoration Order No. CCC-15-CD/RO-01 requires 0.4 acres of concrete debris to be cleaned-up and removed to an appropriate location;
- Commission Consent Cease and Desist Order/Restoration Order No. CCC-15-CD/RO-01 requires abandonment and closure of 17 wells, and removal of the 24 remaining wells addressed by the 2015 Consent Orders that are located outside the oil remainder areas if NBR does not seek authorization for the wells, or the Commission does not authorize the wells. The well abandonment work also will include removal of all pipelines, power lines, pumps, well pads, other equipment, infrastructure, and visibly contaminated soil associated with those wells, as required California Department of Conservation, Division of Oil, Gas, and Geothermal Resources regulations;
- The Santa Ana Regional Water Quality Control Board requires, in compliance with its Cleanup and Abatement Order No. 01-77, that NBR partner Aera Energy and the oilfield operator carry out 2.87 acres of wetland restoration and ongoing soil and water clean-up and remediation activities within the lowland portion of the site;

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- As described in lease inspection reports and deficiency letters, prior and ongoing investigations by the California Department of Conservation, Division of Oil, Gas, and Geothermal Resources indicate that extensive areas of derelict equipment, abandoned infrastructure and debris located throughout the site need to be removed and disposed of at a certified disposal facility;
- The extensive mapping and enhanced understanding now available of the existing sensitive habitats, wildlife, and vegetation communities on the site will allow for significant improvements in environmental stewardship as part of any ongoing and future operations.

Clean-up of Oilfield Impact Sites

As shown by the total estimated historic oilfield footprint in [Exhibit 19](#) (areas NBR has shown through historic aerial photographs and/or field surveying to have evidence of direct or indirect use for oil production), much of the Banning Ranch Oilfield has been used at some point over the past several decades for oil and gas production or support activities. Within this total historic use footprint is a smaller footprint of areas that have been shown in NBR's analysis - which included field survey work and photo-documentation provided to Commission staff - to contain materials left over from this historic use that would be required to be cleaned-up and removed once oilfield operations cease and the oilfield is properly abandoned. This smaller footprint – the estimated clean-up areas – is shown in [Exhibit 21](#). Compared to the map that was provided as an exhibit to the staff report for the October 2015 hearing, this current map shows an overall reduction in estimated clean-up disturbance area of more than 25 acres. This reduction is a result of the field survey work carried out by NBR consultants in November of 2015 and March of 2016. It is important to note that not all of the areas highlighted in this map would be excavated and/or graded as part of clean-up, and even though it integrates the results of field survey work, the footprint it shows is still intended to depict a “worst case” disturbance area⁵. The specific activities that would occur within this area would vary from more intensive clean-up approaches such as grading, excavation, and demolition of structures to less intensive approaches, such as using hand labor or cranes from existing roads to pick up and remove equipment, surface pipelines, and power poles from within habitat areas. Which clean-up techniques would be used would be based on the size, location, and type of clean-up target, the sensitivity of the surrounding habitat, and the applicable clean-up requirements.

These clean-up requirements are the same as those that would be triggered by the closure and abandonment of any oilfield area and are intended to ensure that infrastructure, equipment, wastes, and contaminants resulting from oil and gas production activities are not left behind where they can pose a risk to the environment or public health and safety. Funding for such closure and clean-up activities is a necessary and assumed business cost for oil and gas operations, but as an additional assurance that funding is available, current regulations for oil and gas wells and production facilities allow for surety bonds to be established that are intended to

⁵ This “worst case” representation is intentional and typical of this type of mapping and analysis as it prevents complications that may arise from decisions based on an under-representation of factors such as material volumes, impact levels, and the timing and duration of work.

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cover the costs of well abandonment and facility clean-up. On the Banning Ranch Oilfield site, 94 wells are covered by such bonds. In coastal Orange County, requirements for an oil operator to engage in the proper and complete end-of-life clean-up of its facility are typically imposed by state and local agencies such as the Santa Ana Regional Water Quality Control Board, California Department of Conservation Division of Oil, Gas and Geothermal Resources, the Orange County Health Care Agency, and the Orange County Fire Authority. As described in more detail above, some of these agencies have outstanding requirements for clean-up and removal of materials from the site that have yet to be addressed by NBR or the oilfield operator.

At the Banning Ranch Oilfield site, the proposed clean-up of known and suspected areas with infrastructure, equipment, wastes, and oil contamination needing to be removed as part of oilfield closure would include the removal of surface and buried oilfield infrastructure (such as pipelines, wells and utility poles) and the excavation of oil contaminated soils and historic roads that contain dispersed gravels and asphalt-like materials. In some locations, NBR's proposed oilfield clean-up activities would occur in ESHA and result in unavoidable impacts to ESHA. The approximate location and extent of the proposed activities in ESHA are shown graphically in [Exhibit 18](#), and include clean-up of areas within and adjacent to areas historically used for oilfield activities. Although Commission staff has worked closely with NBR to accurately depict on [Exhibit 18](#) the anticipated disturbance footprint of clean-up activities on sensitive habitats, the actual disturbance area is likely to be somewhat different as new targets are discovered during the course of clean-up, or other targets are eliminated or removed with less than expected disturbance. For this reason, [Exhibit 18](#) is purely an estimate, and the disturbance area calculations it includes are also estimates and subject to revision based on the results of ongoing clean-up activities. The process of revising these estimates to determine the actual impact area is discussed further towards the conclusion of this section.

Historic Oilfield Use Areas and ESHA

As indicated in [Exhibit 18](#) and by comparing [Exhibit 19](#) and [Exhibit 3a](#), the Commission finds that some of the proposed clean-up areas currently support ESHA despite their historic use for oil operations. This situation may have arisen because of the biological traits of these areas prior to their oilfield use (for example, surface pipelines may have been placed within sensitive habitats) persisted despite that use, and/or because the long history and fluctuating use patterns and intensities of operations on the Banning Ranch Oilfield allowed sensitive vegetation communities and habitats to return, recover, or establish in areas of historic oilfield use (such as surrounding oilfield features that have been rarely accessed since initial installation or long ago abandoned). For example, over 400 of the oil wells on the site have been abandoned and are no longer in use (including all of those wells in the southern portion of the mesa area designated as ESHA for the burrowing owl), often meaning that the access roads, utilities, and pipelines serving these wells have also not been used or maintained for an extended time period, which has allowed vegetation and wildlife to re-establish.

Additionally, sensitive habitat has also developed around and within areas historically used as roads in which gravel or asphalt-like-material (often "tank bottoms" or other oil production wastes) was long ago dispersed as a roadbed or dust control measure, but which since has become fragmented, buried, and interspersed with intact plant communities. In some locations

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on the site, sensitive habitat has also developed over the top of areas in which oil contaminated soil is present or oil contaminants have spread belowground into sensitive habitat areas. As native vegetation has recolonized, recovered, or established in areas of historic oilfield operations, associated wildlife activities such as foraging, breeding, and nesting have also returned to those areas. As indicated in **Exhibit 18** some of the vegetation communities and habitat uses that have developed in these areas that contain oilfield wastes now support their designation as ESHA.

Further, while in some cases the discrete area supporting particular clean-up targets may not be sensitive habitat, ESHA is present in areas surrounding the proposed clean-up targets such that in order to effectively remove the target, it may be necessary to clear some habitat to facilitate access and excavation of the proposed target or in order to confirm that complete removal of the clean-up target has been achieved. This is reflected in the disturbance footprint of clean-up activities shown in **Exhibit 21**, most clearly around features such as power poles, abandoned well sites, and surface pipelines that are depicted with **estimated disturbance footprints** ~~buffers~~ of five to twenty-five feet around them, in order to show areas that may be cleared or disturbed for use as vehicle or pedestrian access.

Oilfield Closure and Clean-up Regulations

Several state and local agencies have regulations that apply to the cessation and closure of oilfield operations and clean-up of wastes and oil contamination within oilfields, and NBR has developed and submitted (or plans to submit) plans to these agencies that detail their proposed activities.

To meet the requirements of the Santa Ana Regional Water Quality Control Board (RWQCB) and the Orange County Health Care Agency (OC Health), NBR developed a Remedial Action Plan (RAP). This plan included proposed clean-up targets, clean-up methods, and clean-up levels. During its consideration of the RAP, OC Health determined that it had insufficient staff resources to complete its review and elected to defer to the RWQCB for approving the proposal. This RAP was revised by NBR on September 16, 2015, and amended on November 5, 2015 with a variety of changes related to clean-up levels and soil sampling and testing. On December 15, 2015, the RWQCB issued a letter to NBR that concurred with the amended revised RAP and imposed eight conditions.

The RAP essentially establishes a roadmap for how the required oilfield closure and clean-up will be achieved. It describes the various clean-up targets (infrastructure and pollutants) and establishes the threshold levels for various types of contaminants. These thresholds are based on the type of contaminant (level of toxicity, potential impact on the environment and public health), as well as the depth and location of the contaminant and the potential future use of the area in which it is located. For example, the most stringent clean-up levels are applied to the top 15 feet of soil within areas of proposed future residential use and the least stringent are applied to soil deeper than 15 feet below the surface in upland areas of proposed open space and lowland areas deeper than 3 feet below the surface. Although the RAP establishes these thresholds, the land use designations approved by the Commission for particular areas on the site

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(commercial/residential or open space/park land) will determine which clean-up thresholds would be applied there.

Implementation of the RWQCB approved RAP would include extensive activities throughout the Banning Ranch Oilfield site, including areas either within or adjacent to designated ESHA. Such activities would include the excavation of oil contaminated soils, abandonment or re-abandonment of wells, excavation of roadbed materials, and removal of pipelines, power poles, metal tanks, vessels, structures, pumps, and equipment. In addition, NBR would also excavate and remove soil from all areas known or anticipated to contain contaminated materials. These areas are referred to as areas with Recognized Environmental Concerns or Potential Environmental Concerns (RECs/PECs). As discussed below, some of these activities would occur within and result in adverse impacts to ESHA.

Oil-treated Roads

NBR's Abandonment Plan includes the removal of all existing and historic access roads on the site that have been verified during ground-truthing efforts to contain asphalt-like materials, gravels, or concrete road bed materials. Road areas identified for clean-up include several historic road alignments that now support sensitive vegetation and habitats designated as ESHA, either within the historic alignment or adjacent to it. An example of this type of area is provided in **Exhibit 20**. NBR proposes to grade to a depth of approximately 12- to 18-inches all of these road alignments in order to collect and extract roadbed materials. In total, NBR's initial estimates were that up to 108,000 cubic yards of roadbed material would be collected during this effort (however, this is expected to be an over-estimate since it pre-dates the reduced clean-up area that was developed through the field survey process). Once collected, this material would be taken to the proposed onsite concrete crushing/processing area, broken down and buried within the proposed onsite disposal pits. Consistent with the RWQCB-approved RAP, all asphalt-like-material in these pits would be placed no shallower than 15 to 20 feet below final grade elevations.

Areas of Recognized or Potential Environmental Concerns

Based on the historical investigations and soil testing it carried out, NBR initially estimated that 27 areas on the site had recognized or potential environmental concerns (RECs/PECs). Additional investigations indicated that contaminated material was indeed present at 11 of these 27 sites. Seven of these areas showed crude oil contamination at the surface or in shallow soils and one area includes all sites of potential historic oil containment sumps. The other areas were identified because historic activities that occurred may have resulted in the release of oil or other contaminants into the soil. Such activities include the current or historic presence of steam or air injection facilities, stockpile areas, sumps, workshops, storage sheds, electrical transformers, fueling areas, and field offices. An example of this type of area is provided in **Exhibit 20**. As part of its Abandonment Plan, NBR proposes to carry out additional testing and investigation of these areas and to excavate and remove any contaminated soils found. Based on the level and type of contamination, this removed soil would be taken to the onsite bioremediation areas for treatment and onsite disposal or transported offsite for disposal at a certified receiving facility. NBR's initial estimate is that up to 163,000 cubic yards of contaminated material would be

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excavated from these sites and other select areas around historic oil sumps and wells (however, as noted above, actual volumes may be lower).

Wells and Infrastructure

In addition to the removal of road bed materials and contaminated soils, NBR also proposes to work with DOGGR to authorize the abandonment of 66 active or idle production or injection wells. These wells include the 42 that remain within the central portion of the upland mesa and 24 within the lowland area. Abandonment and removal of these wells under DOGGR regulations requires that “any auxiliary holes, such as rat holes, shall be filled with earth and compacted properly; all construction materials, cellars, production pads, and piers shall be removed and the resulting excavations filled with earth and compacted properly to prevent settling; well locations shall be graded and cleared of equipment, trash, or other waste materials, and returned to as near a natural state as practicable.” In addition, DOGGR also typically requires the removal of all utility poles, transformers, pumps, and pipelines serving the abandoned well. In some locations, the proposed removal of this infrastructure or contaminated soil around the well site would result in the loss of ESHA. In addition, because oilfield operations on the project site would only remain within the approximately 17 acre area in the lowland portion of the site (the “oil remainder areas”), all pipelines, utility poles, pumping units, storage equipment, supports, and pads throughout the rest of the site would be collected and removed. Because much of this infrastructure was installed many years ago or has been essentially abandoned in place, in many locations it is surrounded by areas of intact habitat areas that have been identified as ESHA. Removal of infrastructure and equipment from such areas would result in adverse impacts to ESHA associated both with direct extraction activities (excavation and disassembly) and activities associated with removal such as the creation and use of access routes and staging areas.

Total Impacts

The Commission’s best estimate at this time is that in total, approximately 59 acres of ESHA across the site would be disturbed or removed during the implementation of NBR’s proposed oilfield clean-up operations and excavation and removal of the targets described above. This area estimate was developed through a comparison of two maps:

1. **Exhibit 21** - The estimated disturbance footprint of clean-up operations developed by NBR partner Aera Energy and its consultants through analysis of historic oilfield use areas and verified through site-wide field surveys carried out in November of 2015 and March of 2016.
2. **Exhibit 3a** - Vegetation mapping of the site carried out by NBR biological consultants and reviewed and described by Commission staff ecologists in the memorandum provided in **Exhibit 13a**. As detailed in that memorandum, areas were included on this map as ESHA that support rare and easily disturbed plant communities, wildlife species, and habitat areas.

While this estimate of 59 acres of potential ESHA impacts is based on the most accurate information available on both the type and location of clean-up targets and ESHA, the nature of

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the clean-up work being proposed and its targets – some of which have little or no surface expression - means that the actual impacts of the clean-up work on ESHA may be less than or greater than 59 acres. The actual affected area would increase if additional clean-up targets, such as oil contaminated soils that extend further than estimated, are discovered once clean-up and excavation work begins and the actual affected area would decrease if some clean-up targets, such as areas of dispersed gravel, are abandoned in place, removed in a way that results in a disturbance footprint that is less than estimated, or are not as extensive as initially anticipated.

During its review of NBR's proposed project, Commission staff worked closely and collaboratively with NBR and the staff of the Santa Ana Regional Water Quality Control Board (RWQCB), as well as the California Department of Conservation, Division of Oil, Gas and Geothermal Resources (DOGGR), to ensure that the proposed clean-up activities address each agency's regulatory requirements and guidelines while also avoiding if possible, and at least minimizing adverse impacts to any wetlands and environmentally sensitive habitat areas that may be present in or adjacent to potential work areas.

In approving NBR's Remedial Action Plan (RAP), the RWQCB is requiring several conditions that:

- Prohibit implementation of the RAP until RWQCB staff issues a Section 401 Water Quality Standards Certification, the U.S. Army Corps of Engineers issues a Permit under Section 404 of the Clean Water Act, and the Commission issues a CDP for the proposed project;
- Require that NBR consult with RWQCB staff regarding any proposed modifications to the scope and location of activities included in the RAP;
- Confirm that the RAP may be further revised during the Commission's review process - particularly by locating contaminated soil treatment, clean soil excavation, and material and equipment stockpiling activities within the Commission approved development footprint and away from sensitive resource areas;
- Authorize NBR to use clean treated soil as backfill for excavated contaminated soil in the lowland portion of the site;
- Authorize NBR to minimize soil disturbance in areas in which soil testing indicates an absence of contaminated materials; and
- Require that mitigation measures included in a CDP be carried out to address impacts to sensitive resources or wetlands that occur during implementation of the RAP.

Division of Oil, Gas, and Geothermal Resources

The Department of Conservation Division of Oil, Gas, and Geothermal Resources (DOGGR) also has authority to direct the design, scope, and implementation of oilfield clean-up and abandonment activities.

Regardless of **Separate from** the outcome of this coastal development permit application, the owner of mineral rights for the Banning Ranch site, Horizontal Drilling LLC, ~~is pursuing~~ **recently received the Commission's approval of its** a coastal development permit **application** ~~that would allow it to condense the its operations that currently occur throughout the site into the~~

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roughly 17 acre “Oil Remainder Areas” identified in Exhibit 2. Nevertheless, In addition to Horizontal Drilling LLC’s operation in the Oil Remainder Areas, NBR could still continue use of the 26 existing wells it owns outside of these remainder areas, apply to the Commission to continue use of 24 **additional** existing wells within the larger site⁶ or apply for permits for an expanded operation. Therefore, because it has not yet committed to discontinuing the ongoing operation of its existing wells, NBR has not yet formally initiated the process of seeking permits from DOGGR for abandonment activities. However, NBR has engaged in preliminary discussions with DOGGR regarding review timing and permitting needs. Commission staff have also been in close coordination and consultation with DOGGR staff on the scope and focus of its potential future review. The following provides a description of the three primary elements of that review.

When oilfield operations cease, DOGGR requires that wells be properly abandoned and production-related equipment, materials, and buildings/structures that hold or held production equipment be removed, including those that pose a potential threat to human health and safety or environmental resources. The primary focus of DOGGR’s review is to ensure that oil and gas production wells are closed and capped in such a way as to minimize the potential for fluid movement between subsurface zones. The primary way this is achieved is through its well abandonment permit process. Prior to closing and capping the 66 active or idle wells NBR has proposed to abandon, NBR would be required to obtain from DOGGR a well abandonment permit for each well. Through these permits, DOGGR would ensure that NBR complies with a standardized closure, capping, testing, and oversight process established under its regulations for the closure and abandonment of the approximately 66 wells that NBR owns on the site. Because well abandonment permits are only valid for 12 months and NBR has not yet committed to the closure of its oil operations, NBR has not yet initiated the process of applying for or obtaining these permits.

In addition to well abandonment, DOGGR also has a role in reviewing and regulating the closure and abandonment of oilfield operations through its requirements on lease restoration. These requirements are triggered by the plugging and abandonment of the last well on an oil or gas lease and call for submittal of a plan for the removal of aboveground equipment, infrastructure, and hazardous materials from within the lease area within one year of the plugging and abandonment of the last well on a lease. If the 66 **NBR owned** wells proposed to be abandoned as part of the project include the last well or group of wells on an oil or gas lease, NBR would be required to submit a lease abandonment plan to DOGGR for review.

Finally, DOGGR staff would also review and provide input on the proposed project through its construction review process. This is a process designed as a way for DOGGR technical staff to provide input and recommendations on the design and configuration of construction activities within close proximity to abandoned oil and gas production wells, with the goal of retaining access to the well heads without the need to remove development. Once NBR has a more refined

⁶ As established in Settlement Order

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development configuration that includes details on the specific location of roads and structures, DOGGR staff would be available to assist with construction review.

Conformity of Proposed Oilfield Clean-up Activities with the Coastal Act's ESHA Policy

As described above, the Commission has determined that NBR's oilfield clean-up operations will result in unavoidable ESHA impacts, cumulatively affecting an estimated 59 acres of ESHA, as shown in [Exhibit 18](#). In order for such impacts to be found consistent with the Coastal Act's ESHA protection policy, Section 30240(a), these clean-up operations must be "uses dependent on those [ESHA] resources" and cannot result in "any significant disruption of habitat values."

Resource-Dependent Use

Clean-up activities, per se, are clearly not a use that is dependent upon the ESHA resource. Such activities are focused on the removal of contamination in response to pollution that is related to historic oil field operations that only incidentally were located in sensitive habitat. However, habitat restoration is obviously dependent on the resource being restored, as one needs to work within a sensitive resource in order to restore it, and the clean-up of pollutants could be an important part of such restoration, as discussed in more detail below.

Significant Disruption of Habitat Values

The ongoing presence of oil contaminated materials in ESHA is currently resulting in significant disruption of habitat values. As noted in Romero-Zerón (2012), environmental pollution caused by petroleum is of great concern because petroleum hydrocarbons are toxic to all forms of life. Oil contaminated materials and soils disrupt habitat values by placing both plants and animals within that habitat at risk of poisoning and physical injury due to ingesting or interacting with those contaminants, and can restrict the abundance and diversity of wildlife and vegetation communities, limit their growth rates, reproductive potential and survivorship. Non-volatile heavy fractions of crude oil such as those frequently found in high concentrations in soil testing from proposed clean-up sites on the Banning Ranch Oilfield tend to be absorbed by the soil and persist at the site of release, serving as a long-term source of harm for wildlife through skin contact or through intake of contaminated water or food. These heavy fractions of crude oil consist mainly of naphthene-aromatics and poly-aromatic compounds that are carcinogenic, and long exposure to these compounds has been shown to lead to tumors, cancer, and failure of the nervous system in mammals (Abha and Singh 2012). Petroleum is toxic and can be lethal depending upon the nature of the petroleum fraction, the way of exposure to it, and the time of exposure. Chemicals in crude oil can cause a wide range of health effects in people and wildlife, depending on the level of exposure and susceptibility. The highly toxic chemicals contained in crude oil can damage any organ system within an animal's body, including the nervous system, respiratory system, circulatory system, immune system, reproductive system, sensory system, endocrine system, liver, kidney, etc. and consequently can cause a wide range of diseases and disorders (Costello 1979). Oil contaminated soil may also restrict water movement, limit invertebrate abundance and diversity, and may serve as a physical and chemical impediment to the growth and spread of many native plant species.

In addition to the detrimental effects of oil contamination, oilfield equipment, infrastructure, and other materials may also present other sources of disruption for sensitive habitat areas. Asphalt-

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like roadbed materials and oilfield infrastructure such as aboveground pipelines, well pads, pumps, and utility poles in ESHA physically limits and displaces habitat, restricting the growth, connectivity, and expansion of vegetation, impeding wildlife movement, and potentially serving as a source of wildlife entrapment, injury, and mortality. Old pipelines and other oil field infrastructure over time will degrade, corrode, and break, likely leading to spillage of any remaining oil and other hazardous substances used during oil field operations. In addition to being a chronic source of degradation, oil contamination and deteriorating oilfield infrastructure may also limit wildlife and plant populations in the surrounding areas by causing the injury and mortality of some individuals, thus restricting reproductive and dispersal capacities.

Cumulatively, all of these physical and chemical factors associated with oil contamination and oil production infrastructure within ESHA combine to significantly disrupt a variety of the key habitat values of that ESHA, including its ability to support the plant and animal species that depend on it, provide forage and refuge opportunities for wildlife species, and promote species diversity, abundance, and resiliency.

While the proposed clean-up and removal of the sources of disruption of habitat values from ESHA certainly has the potential to enhance these habitat areas and protect them against future disruption from these sources, in order to ensure that the ESHA is protected against “any significant disruption,” it is also necessary to consider if the removal activities themselves could also be a source of further disruption.

Some of the less intensive clean-up activities proposed in ESHA - such as using hand tools, foot traffic, and locating support equipment in existing oilfield use areas to dismantle, collect, and withdraw infrastructure like surface pipelines – would only result in very limited and short term impacts (slight crushing of vegetation along footpaths, wildlife disturbance for the minutes or hours needed to complete the work) that would not rise to the level of significant disruption. However, other proposed clean-up activities – primarily grading and excavation within habitat areas - could result in more extensive, potentially permanent impacts to ESHA that would more clearly reach the level of significant disruption.

When evaluating this type of activity, it then becomes necessary to consider the measures proposed to minimize that disruption and whether the activity, when combined with a suite of additional activities aimed expressly at the restoration, enhancement, and protection of the affected habitat, would ensure the long-term health and persistence of the ESHA (i.e., whether the activity that would affect the ESHA is an integral component of a comprehensive restoration effort). It is also relevant to consider the purpose of the proposal. As currently proposed, NBR’s oilfield clean-up activities within sensitive habitat areas are not clearly part of such a project or effort. Although NBR has developed and submitted a Habitat Conservation and Conceptual Mitigation Plan as part of its application, in its current form, this Plan lacks the detail, specificity, comprehensiveness, and clear linkage between impacts to sensitive habitats and their in-place, in-kind, restoration needed to assure that its implementation would be capable of reducing disruptions of habitat values to below the level of significance. The Plan lacks a clear accounting mechanism to ensure that total, post-clean-up impact areas are quantified and the appropriate mitigation ratios needed to address the temporal loss and uncertain replication of habitat are applied. The Plan also lacks a comprehensive suite of impact avoidance and

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minimization measures to ensure that the extent, magnitude, and duration of impacts are limited as much as possible. Finally, far from ensuring that the sensitive resources are restored, the proposal actually involves placing permanent residential and commercial development in the location where sensitive resources currently exist, after clean-up efforts are complete. Thus, much of NBR's proposed **oilfield clean-up** activities are not consistent with the Coastal Act's ESHA protection policies because they cause a significant disruption of ESHA.

However, with additions and revisions to address the shortcomings in its proposal, NBR's Habitat Conservation and Conceptual Mitigation Plan (HCCM Plan) can be modified to integrate more fully with the proposed oilfield clean-up activities into a robust site-wide restoration program, ensuring that any temporary disturbance of ESHA is the minimum necessary to fully restore the ESHA in place. The Commission finds this can be achieved if the proposed clean-up activities are carried out in such a way as to (1) effectively and completely remove the chronic, ongoing, sources of significant disruption to that and adjacent habitat discussed above; and (2) integrate the revised HCCM Plan into a comprehensive and carefully implemented restoration program. With such modifications the Commission could find the proposed oilfield clean-up operations would serve to protect against significant disruption of habitat values.

Key to the success of this approach, however, is the implementation of measures to (1) limit the scope, duration, extent and severity of clean-up impacts within the target and surrounding areas; (2) thoroughly survey and document existing physical and biological conditions within those sensitive habitat sites in which clean-up would occur; (3) design and carry out a site-specific revegetation and restoration plan for each area of impact that includes clear habitat restoration and revegetation goals for that site based on quantifiable metrics and the results of the pre-impact physical and biological survey of that site; (4) design and carry out the appropriate level of supplemental habitat creation to address the temporal loss of habitat function between when it is affected and restored and to make up for limitations in the ability of restoration to fully replicate habitat; (5) carry out adequate ongoing monitoring of performance criteria, supplemental restoration, and maintenance activities until site-specific restoration goals have been met; and (6) provide for the long-term protection and preservation of restored areas and adjacent intact habitat areas.

These six key elements are essential to the successful development and conduct of the restoration component of the oilfield clean-up activities. When combined with the complete removal of the clean-up targets that act as chronic and ongoing disruptions to habitat values, this restoration component would ensure that the project would enhance the biological productivity and functional capacity of the portions of the site from which oil contamination and oil and gas production infrastructure would be removed, and would lead to a significant improvement to habitats and wildlife resources within those areas. Implementation of this type of combined clean-up and restoration plan would improve the quality and quantity of ESHA both within the clean-up areas and throughout the oilfield site.

In order to implement this approach, **Special Conditions 7 and 8** would provide for the first key element described above to be met by: (1) requiring site-specific surveys to be carried out at each clean-up area in and immediately around areas of ESHA and wetlands identified on **Exhibit 18**

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in order to confirm the presence of valid a clean-up target, delineate its extent, and aid in the development of a site-specific clean-up plan for that site that would limit the scope, duration, extent and severity of clean-up impacts on habitat; (2) requiring that NBR's Oilfield Abandonment Plan be revised to include a Remediation Action Areas Site Plan that would ensure that the stockpiling, treatment, processing, borrow, and disposal of oilfield wastes does not adversely affect ESHA or wetlands; and (3) requiring that NBR's Oilfield Abandonment Plan be revised to include a variety of impact avoidance and minimization measures to additionally limit the adverse effects of clean-up activities on sensitive habitats.

Special Condition 14 would provide for the second key element described above to be met by requiring that a pre-disturbance physical and biological survey be carried out at each ESHA or wetland site that would be adversely affected by clean-up activities in order to fully document the existing biotic and abiotic characteristics of those areas.

Special Condition 14 would provide for the third key element described above to be met by requiring that NBR to submit a Final Habitat Management Plan that includes a site-specific restoration and post-construction monitoring program that includes site-specific restoration plans for each of the ESHA or wetland sites that would be adversely affected by clean-up activities. As described in that special condition, these plans would be based on the pre-disturbance condition of each site and would be designed to restore the disturbed or damaged habitat to those conditions documented by the pre-disturbance survey results.

Restoration following Soil Clean-up

The site-specific restoration plans and restoration of impacted or disturbed sensitive habitats in-place is critical because ecosystems are defined by complex and often less than fully understood arrays of factors that include continua of physical parameters, species assemblages, and complex interactions between each of these. Due to such intricacies, particularly when extensive biophysical gradients and ecotones (or transitional areas between discrete habitat types) are involved, restoration of ecosystems within the sites they occupy to a well-functioning state tends to be more successful than attempts at de novo habitat creation at entirely new sites (Suding 2011). This can be attributed to any multitude of physical factors including geologic and soil composition, topography and slope face orientations, hydrology, wind exposure, sun exposure, precipitation and temperature regimes, and disturbance regimes (e.g., fire frequency) (Riordan & Rundel 2009). Interactions among species can be even more subtle and difficult to recreate in de novo situations (Longcore 2003; Moreno-Mateos et al 2013). The exchange of certain losses for uncertain gains associated with de novo mitigation (even if a site is degraded) also contributes to the widely accepted preference for on-site restoration measures (Maron et al 2012; USACE & EPA 2008).

Special Conditions 9 and 14 would provide for the fourth key element described above to be met by (1) requiring clean-up impacts assessment and quantification surveys to be carried out at the completion of clean-up activities at each site in and immediately around ESHA or wetlands in order to document the type and amount of habitat impacts that occurred; and (2) requiring NBR to submit a Final Habitat Management Plan that includes a general restoration and post-construction monitoring program that would be designed to carry out the appropriate level of

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supplemental habitat creation to address the temporal loss of habitat function between when it is adversely affected by clean-up activities and when it is restored in-kind and in-place and to make up for limitations in the ability of restoration to fully replicate habitat. To accomplish this, **Special Condition 14** also identifies the appropriate ratios to be used to fully mitigate for impacts to the various types of habitats present within the estimated clean-up areas. These ratios would be applied based on the type and amount of habitat removal and disturbance documented in the clean-up impacts assessment and quantification surveys carried out at the conclusion of clean-up activities in each area.

Mitigation ratios identified in **Special Condition 14** were selected based on a combination of factors including: (1) past Commission decisions on similar types of habitats and temporary impacts that have frequently found a 4:1 (restoration:impact) ratio to be appropriate for wetlands (including vernal pools without state or federally listed fairy shrimp species) and a 3:1 ratio to be appropriate for ESHA vegetation (including purple needlegrass); (2) guidance from the Newport Beach Coastal Land Use Plan that requires 4:1 mitigation for vernal pools and saltmarsh and 3:1 mitigation for coastal sage scrub occupied by California gnatcatchers and rare vegetation communities including native grasslands and southern maritime chaparral; (3) the analysis and recommendations of Commission staff ecologists provided in **Exhibit 13a** that include a recommendation of 10:1 mitigation for disturbance of vernal pool habitat with federally endangered San Diego Fairy Shrimp; (4) the documented success of past habitat creation and restoration efforts carried out onsite by NBR; and (5) the observed recovery and re-vegetation of areas onsite in which mowing operations were discontinued as part of the settlement agreement between NBR and the Commission (CCC 15-CD-01 & CCC 15-RO-01, dated May 12, 2015).

Special Condition 14 would also provide for the fifth key element described above to be met by requiring NBR to develop and submit a Final Habitat Management Plan that establishes quantitative performance criteria for habitat restoration and mitigation areas and includes provisions for monitoring and maintenance of the restoration sites until restoration goals have been achieved.

Finally, **Special Condition 1 and 10** would provide for the critical sixth key element described above to be met by providing for the long-term protection and preservation of restored areas and adjacent intact habitat areas by (1) requiring the proposed residential and commercial development to be sited outside of them; and (2) through the recording of a conservation easement that would restrict the use of such areas of land for habitat conservation and public passive recreation.

As described above and with implementation of the specific measures established in **Special Conditions 7, 8, 9, 10 and 14**, the Commission finds that oilfield clean-up component of the proposed project would be for the express purpose of removing surface and subsurface petroleum hydrocarbon contamination and infrastructure to restore the former oilfield site to its pre-oilfield natural state, and, more importantly, would restore ESHA. As such, this component of the project would be a "restoration" project and would therefore be a use-dependent on ESHA resources.

Conclusion

The proposed project would have significant impacts on ESHA for the abandonment and remediation activities and a proposed housing and commercial development, non-resource dependent uses, with impacts to the ESHA identified on the site. **The proposed project is not consistent with Section 30240 of the Coastal Act.** Staff is recommending approval of an alternative that is consistent with the resource protection policies of the Coastal Act that identifies a 19.7 acre development footprint. The Banning Ranch Conservancy submitted an alternative plan that also represents a smaller development footprint than what is proposed (in **Appendix E** and attached to Ex Partes), however it is not based on the constraints identified by staff. The project as proposed is inconsistent with section 30240. With implementation of **Special Conditions 7, 8, 9, 10 and 14**, the Commission finds that the project will protect ESHA against any significant disruption of habitat values, and that the oilfield clean up and restoration program outlined above would constitute a use dependent on ESHA resources. The Commission therefore finds the project, as conditioned, consistent with Coastal Act Section 30240(a).

F. MARINE RESOURCES AND WETLANDS

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, in relevant part:

(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.

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(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(6) Restoration purposes.

(7) Nature study, aquaculture, or similar resource dependent activities.

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

Wetlands

Seasonal Wetlands often occur under Mediterranean climate conditions of the West coast. Seasonal wetlands have a natural lining of bedrock or a lining of hard clay that prevents water from infiltrating into the soil. During rain events, a shallow layer of water covers the depression in the soil and “awakens” the seeds, eggs, and/or cysts present. During a wet season, a seasonal pool may fill and dry out several times and in years of drought, it may not fill at all. The seeds, eggs, and cysts can survive the drought conditions until the pool fills again.

Title 14 California Code of Regulations (“CCR”) section 13577(b) defines “wetlands”:

Measure 100 feet landward from the upland limit of the wetland. Wetland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes, and shall also include those types of wetlands where vegetation is lacking and soil is poorly developed or absent as a result of frequent and drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentrations of salts or other substances in the substrate. Such wetlands can be recognized by the presence of surface water or saturated substrate at some time during each year and their location within, or adjacent to, vegetated wetlands or deep-water habitats. For purposes of this section, the upland limit of a wetland shall be defined as:

- (A) the boundary between land with predominantly hydrophytic cover and land with predominantly mesophytic or xerophytic cover;*
- (B) the boundary between soil that is predominantly hydric and soil that is predominantly nonhydric; or*
- (C) in the case of wetlands without vegetation or soils, the boundary between land that is flooded or saturated at some time during years of normal precipitation, and land that is not.*

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The Banning Ranch site includes roughly 130 acres of wetland and riparian habitats in the lowlands portion of the site and 12 additional wetlands on the mesa (identified as wetland features VP1, VP2, A, C, E, M, V, W, CC, KK, MM, and OO). Nine periodically ponded area on the mesa are also classified as vernal pools. These types of seasonal wetlands often occur under the Mediterranean climate conditions of the West coast and typically have a natural lining of bedrock or other impervious surface such as a lining of hard clay that prevents water from infiltrating into the soil. During rain events, a shallow layer of water can cover depressed areas in the soil and can trigger the emergence of wetland vegetation and invertebrates by “awakening” the seeds, eggs, and/or cysts that these plants and animals may have left behind during growth cycles that occurred during previous periods of inundation. During a single wet season, a seasonal pool may fill and dry out several times and in years of drought, it may not fill at all. Typically, the seeds, eggs, and cysts that may be present in the soils of seasonal wetlands are adapted to these conditions and can survive both inter-seasonal and intra-seasonal drought conditions until the pool fills again.

If seasonal wetlands contain plant and/or animal species that are characteristic of that habitat and seldom found elsewhere, they are called ‘vernal pools’ and may rise to the level of ESHA. Research suggests that approximately 90% of California’s historic vernal pool habitats have been lost. Due to their extreme rarity and sensitivity to disturbance, these vernal pools are subject to protection under both Section 30240 of the Coastal Act *and* under Section 30233.

The wetland areas in the lowlands portion of the site would only be affected by the proposed oilfield clean-up activities while the wetland areas on the mesa would be affected by both proposed clean-up activities and the proposed residential and commercial development plan. ~~As discussed in the preceding section of this report, with the imposition of the recommended special conditions, all impacts of the clean-up activities to both wetlands and ESHA would be addressed through in place, in kind restoration and mitigation consistent with past Commission action and local policy guidance. Also consistent with past Commission action on similar types of clean-up operations in wetland habitats, these special conditions—in particular Special Conditions 1, 7, 8, 9, 10 and 14—would help ensure that the project disturbance footprint near sensitive areas is minimized to the maximum extent feasible and that a restoration plan is developed and implemented to mitigate for unavoidable impacts to wetlands and other habitats and to provide for their lasting protection and preservation.~~

In those cases where it is clearly designed and implemented to expand, enhance, or promote wetlands or address a threat or source of degradation to their habitats and resources, restoration of wetlands has been an allowed type of development in wetlands and considered by the Commission to be an allowable use consistent with Section 30233(a)(6), quoted above. In a variety of permit actions, the removal of oil and gas production infrastructure or contamination from wetland habitats and the subsequent restoration of those habitats **in kind and in place** has been found to be for restoration purposes. Housing and commercial development, however, is not an allowed use under Section 30233(a), and therefore the proposed fill of wetlands for the construction of residential and commercial development, roads, utilities and other elements of the proposed plan is not consistent with this policy. In particular, the proposed filling of the wetland features referred to as “C” and “CC” for the construction of residential development is

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not consistent with the wetland policies of the Coastal Act. Although, as discussed in the memorandum provided in **Exhibit 13a and 13b**, these features are small in size and may have been created or augmented through human activity, they have been shown in repeated formal wetland surveys and delineations to meet the definition of a “wetland,” as explained in the ESHA Memo.

In order to be consistent with Section 30233(a), a project that involves filling or dredging in a wetland must meet all three “tests” of that section: the use must be one of the uses specifically allowed, it must be the least environmentally damaging alternative, and it must provide adequate mitigation to offset any impacts created by that fill or dredging. As discussed further below, as proposed, the **proposed removal and loss of wetlands as part of oilfield clean-up activities and aspect of the project involving** the placement of residential or other permanent development where wetlands currently exist does not meet the list of limited approvable projects for fill of wetlands under section 30233, nor **are these** is it the least environmentally damaging **feasible** alternatives. Lastly, the mitigation proposed for the fill of the wetlands is inappropriate because the project does not meet the limited uses.

Proposed Fill/Dredging

The development plan would impact 2 of the 17 wetlands on the mesa (C and CC) for single family homes in the North Family Village and site grading.

The vernal pool complex and wetlands and arroyos are connected throughout the site. A complete mapped watershed encompassing drainage courses over the entire site was not provided and staff is unable to identify impacts of the watershed of the site, as a whole. However, the development footprint as proposed with Bluff Road dividing the vernal pool complex from the North-South Arroyo would completely surround the vernal pool complex with development and would isolate and adversely affect the vernal pool and wetland watershed connections. The proposed culverts under the road would provide for wildlife movement but would not prevent impacts to ESHA and the watershed.

In addition, the proposed oilfield clean-up activities include approximately 7 acres of wetland habitat areas within their estimated disturbance footprint. While the majority of these areas would be located on the lowland portion of the site, significant portions of several vernal pools in the upland mesa would also be included – as shown in **Exhibit 18. Proposed Oilfield clean-up activities within wetland habitats would involve both fill and dredging of wetlands and would involve both low-intensity work such as the removal of surface pipelines and power poles using hand labor and cranes and equipment staged on existing oilfield access roads, as well as high-intensity work such as the excavation of historic roadbeds, re-abandonment of wells, and excavation of oil contaminated soils. These proposed clean-up activities would result in a variety of direct and indirect impacts to wetlands, including their loss through excavation, grading, fill, and construction activities. The applicant proposes to address some of these adverse impacts to wetlands through enhancement of other wetlands in other areas on the site and inclusion of existing wetland areas in the portion of the site that is proposed to be open space.**

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1) Allowable Use

Residential development is not included in the uses listed above, No. 1-7 of Section 30233. Thus, the proposed fill of wetlands “C” and “CC” through grading and development of residential units is not an allowable use. Therefore, the proposed development is inconsistent with the first “test” of Section 30233 of the Coastal Act with regard to uses allowed within wetlands.

The dredging and fill of wetlands associated with oilfield clean-up activities is an allowable use when combined with in-place and in-kind restoration efforts directed at addressing the effects of those clean-up activities on the same affected wetlands. **However, such efforts are not proposed as part of the project. The proposed clean-up activities would instead result in the direct and permanent loss of wetlands from some areas through excavation and fill. Although the applicant proposes to address these losses by enhancing other wetland areas and including existing wetlands in the portion of the site proposed to be open space, this approach would not be restoration. To be restoration, the proposed oilfield clean-up activities would need to be implemented as part of an integrated plan for the replacement in place and in kind of the wetlands affected by clean-up activities. Therefore, the proposed clean-up not qualify under the “restoration purposes” category included in the uses listed above, No. 1-7 of Section 30233. This means that, as proposed by the applicant, the oilfield clean-up activities are not consistent with the first “test” of Section 30233 of the Coastal Act.** As modified through the implementation of **Special Conditions 1, 7, 8, 9, 10 and 14**—as discussed more fully in the previous section of this report—the proposed oilfield clean-up activities would be implemented as part of an integrated plan for the restoration and protection of the wetlands and other sensitive habitats throughout the Banning Ranch site and would qualify under the “restoration purposes” category included in the uses listed above, No. 1-7 of Section 30233. Therefore, as modified through the measures required through these conditions, the proposed oilfield clean-up activities are consistent with the first “test” of Section 30233 of the Coastal Act.

2) Alternatives

No less environmentally damaging alternatives to the proposed fill of wetlands for the residential development have been given substantial consideration with the current development plan proposal. However, an obvious less environmentally damaging alternative to the proposed fill of wetlands would be a reduced or modified development footprint that avoids the wetlands and seasonal features on the mesa portion of the site and/or a designation of these sites as open space and wetland restoration. These alternatives are presented in the buildable areas identified in the constraints map provided as **Exhibit 4**. Given the available acreage outside of wetland areas shown on the constraints map, this avoidance alternative would be a feasible way to implement the project in a less environmentally damaging manner. ~~As such, **Special Conditions 1 and 10** were developed to facilitate the implementation of this alternative by identifying a residential development plan area that would avoid the dredging or fill of wetlands on the mesa and the wetland/vernal pool watershed. As conditioned in this way, the project could be found to be consistent with the second “test” of Section 30233.~~

Alternatives to the proposed oilfield clean-up plan were also considered. Such alternatives included alternative removal methods, in-situ treatments such as phytoremediation and heat

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treatment, and abandonment in place of contaminated materials and oilfield infrastructure in wetland areas, **and integration of oilfield clean-up activities in wetland areas into a comprehensive plan for the restoration and protection in place of those wetlands.** However, each **Most** of these alternatives **were** rejected either because they were infeasible or would not be less environmentally damaging. **For example, A** alternative removal methods such as selective removal of only visible surface materials were rejected due to concerns about their inability to completely and effectively remove the clean-up targets. In-situ treatments were rejected because they would either result in more extensive impacts or because they would not be an appropriate and effective way to remove the target materials. These techniques are most often used for more volatile, less persistent chemical contaminants that are less weathered and tightly bound to soils than many of the target materials on the Banning Ranch site. As such, the application of these techniques could result in environmental impacts without effectively removing the target materials. Abandonment of contaminants and/or materials in place – in addition to being at odds with DOGGR and Water Board requirements for removal of these targets – was rejected because it would not address the ongoing degradation and damage to wetland habitats and resources that is being caused by the presence of these materials. ~~As such, the proposed physical removal of the clean-up targets was determined to be the least damaging alternative—as long as that removal was carried out only in those locations where it was found to be necessary; included all feasible impact avoidance and minimization measures; and was followed with site-specific restoration activities oriented around the in-kind, and in-place restoration of the affected habitat areas. With modification to include these additional elements, the proposed clean-up activities would be the least environmentally damaging feasible alternative and would therefore be consistent with the second test of Section 30233.~~

The final alternative considered - integration of oilfield clean-up activities in wetland areas into a comprehensive plan for the restoration and protection in place of those wetlands – was not rejected, however. This alternative would involve several steps to ensure that wetlands are protected and enhanced as a result of clean-up activities. These steps include thorough documentation of wetland resources in and around areas of proposed clean-up activities; confirmation of the presence of valid clean-up targets in such areas; careful design of clean-up activities in and around wetland areas to minimize any resulting disturbance of wetland resources; follow-up restoration and replacement, in kind and in place, of any disturbance that occurs as a result of clean-up activities to ensure that the affected wetland resources are not lost as a result of clean-up work; and supplemental mitigation – through either creation of new additional wetlands or significant enhancement of existing wetlands – to make up for the temporal losses of wetland resource values that would happen between when clean-up related impacts occur and in place restoration is successfully completed. This alternative would be both feasible and less environmentally damaging than the applicant’s proposed clean-up activities because it would ensure that wetlands in and around clean up areas are not lost and effects to wetlands from those clean-up activities are avoided, minimized, and appropriately mitigated.

The existence of these feasible less environmentally damaging alternatives to the applicant’s proposals means that, as proposed by the applicant, both the commercial and

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residential development and the oilfield clean-up activities are not consistent with the second “test” of Section 30233 of the Coastal Act.

3) Mitigation

Section 30233 of the Coastal Act requires that wetland projects include feasible mitigation measures to minimize adverse environmental effects.

Clean Up Activities

As described above, the proposed clean-up activities with impacts on wetlands could be **integrated into a comprehensive plan for the restoration and protection in place of those wetlands and thus** mitigated to reduce their adverse environmental impact ~~and ultimately, restore the wetlands to valuable wetland habitat.~~ However, **such** mitigation methods were not proposed. **Therefore, the proposed oilfield clean-up component of the project would not include feasible mitigation measures to minimize adverse environmental effects and would therefore not be consistent with the third and final test of Section 30233.**

~~were carefully considered in order to develop a comprehensive list of feasible mitigation measures that would minimize adverse environmental effects. These measures include: (1) ensuring that clean-up activities are only carried out in wetland areas once a valid clean-up target has been confirmed and, if possible, delineated so that the scope, type, and duration of habitat disturbing activities can be limited (provided through Special Condition 8); (2) avoidance and minimization measures to limit the scope, extent, and severity of clean-up and associated activities in wetlands (provided through Special Condition 7); (3) the implementation of site-specific restoration activities oriented around the in-kind, and in-place restoration of the affected wetland areas (provided through Special Condition 14); (4) implementation of supplemental restoration activities using the appropriate mitigation ratio to address the temporal lag between when impacts occur and when successful restoration is accomplished (provided through Special Condition 14); and (5) the long-term protection and preservation of restored impact sites and mitigation areas through the exclusion of such areas from the residential and commercial development plan and their coverage under a conservation easement (provided through Special Conditions 1 and 10).~~

~~With the inclusion of the Special Conditions described above, the proposed oilfield clean-up component of the project would include feasible mitigation measures to minimize adverse environmental effects and would therefore be consistent with the third and final test of Section 30233.~~

Residential and Commercial Development Plan

Wetlands C and CC are in the center of the proposed North Family Village where buildable areas existing on either side of the wetlands. The location of the wetlands limits access between the development areas. Section 30233 requires feasible mitigation measures to minimize adverse environmental effects to wetlands. In this case, the recommended 100 foot buffer around wetland would minimize adverse environmental effects.

There is potential development area between the two pools, although ecologically it is best for these two pools to have one combined buffer and not to allow development to occur between the

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pools. Were the wetlands entirely surrounded by development, pools C and CC would have reduced functionality and less potential for significant restoration, even with 100-ft buffers. In addition, as islands of habitat in an urban sea, they would provide fewer benefits to wildlife, be subject to urban run-off and over time, would be degraded. Preserving the connection between these two pools, and the connection to the North-South Arroyo is critical for the pools' long term functionality as wetlands.

~~The development of a road in the vicinity of C and CC is necessary to access the buildable areas of approximately 3 acres southwest of the pools. As conditioned, a road may be developed within the outer 50 feet of the buffer of wetland CC, on the side away from wetland C; however, this is only allowable with mitigation measures that (1) prevent water quality or other impacts to the marine resources, and (2) add to the remaining merged buffer an area equivalent to the area lost to development.~~

Consistency with Section 30233

Although not all wetlands are within the project footprint, all wetlands, including those in the lowlands, need to be protected under the Coastal Act section 30233. The development plan does not meet the list of limited approvable projects for fill of wetlands, nor is it the least environmentally damaging alternative, nor does the project include adequate mitigation for the impacts. The development plan, as proposed, is inconsistent with Coastal Act section 30233. ~~Only as conditioned to avoid fill of wetlands and vernal pools can the development plan be found consistent with Section 30233. The footprint identified in the "Buildable areas" on Exhibit 4 would completely avoid wetlands, vernal pools, and arroyos and is, therefore consistent with Section 30233. Special condition 1 requires revised plans for the development plan to conform to this alternative and also requires complete avoidance of wetlands and vernal pools. Special Condition 14 requires site specific and general restoration and mitigation plans for temporary impacts to wetlands as a result of clean-up work and Special Conditions 7 and 8 ensure project impacts to wetlands are avoided and minimized. Only with the inclusion of these conditions can the project be found consistent with Section 30233.~~

Marine Resources

Section 30230 states that marine resources shall be maintained, enhanced, and restored. The wetlands, vernal pools and arroyos of the site are all marine resources. The watershed of the site connected directly to the Semeniuk slough, and from there to the Santa Ana River and Pacific Ocean. ~~The clean-up activities proposed are an attempt to restore and enhance the marine resources of the wetlands and vernal pools and arroyos and, as conditioned for restoration and mitigation plans, are consistent with Section 30230.~~

The development plan for residential and commercial, as proposed, is not consistent with the provisions for maintenance, enhancement, and restoration of the marine resources on the site. Impacts to the North-South arroyo is proposed for the development of Bluff Road culverts and impacts of the Main Arroyo is proposed for the bridge abutments to support the span across the arroyo and allow Bluff Road to connect the South and North of the site. The proposed fill of wetlands C and CC and impacts to the arroyos is inconsistent with the section above.

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Section 30231 states that the biological productivity and the quality of wetlands shall be maintained without *interference with surface water flow*. The proposal to fill the wetlands would permanently impact all aquatic organisms in the pools and would be inconsistent with section 30231 that requires the maintenance of biological productivity in wetlands. In addition, the development footprint as proposed will divide the vernal pools from the North-South Arroyo, while the culverts will allow for wildlife movement, they may interfere with surface flow of the watershed. ~~The project, as conditioned to limit the road would allow for the natural hydrological connectivity of the site by avoiding the head of the North-South Arroyo and as conditioned to revise the residential development would maintain the productivity of wetlands by avoiding their fill. Preserving the complete arroyo and the natural connection to the vernal pool complex would protect the surface flow and ensure the long term productivity of the site's natural watershed. Additionally, as conditioned, the project would avoid other sensitive resources in this area, such as Gnatcatcher habitat by preserving the head of the arroyo and providing alternative non-automobile circulation elements to the proposed Bluff Road.~~ The preservation of this central area is critical for the site's watershed and for the site's overall habitat connectivity for wildlife.

Buffers

Section 30231 states that wetlands shall be maintained with natural vegetation buffer areas.

The Commission has typically required buffers of at least 100 feet for development adjacent to wetlands. The project did not provide appropriate buffers around the wetlands onsite, specifically around pools E, C and CC. It is for these reasons that a minimum 100-foot buffer is strongly recommended with development occurring around wetlands. **Thus, the proposal is inconsistent with Section 30231 of the Coastal Act.** ~~Only as conditioned for 100-foot buffers around all wetlands and vernal pools, and as recommended in the ESHA Memo, 10 foot buffers around mapped Vernal Pool watersheds, and the combined buffers of wetland C and CC, and for the preservation of the head of the North-South Arroyo with riparian vegetation and connecting vernal pool complex, and for the avoidance of impacts to the natural watershed of the site can the project be found consistent with Section 30233 to minimize adverse environmental effects to wetlands.~~

Water Quality of Marine Resources

The proposed development plan could have an impact on the marine resources, including the tidal slough, riparian features, and wetlands, on and off the site. Much of the pollutants entering the ocean come from land-based development. The Commission finds that it is necessary to minimize to the extent feasible within its jurisdiction the cumulative adverse impacts on water quality resulting from incremental increases in impervious surface areas associated with additional development. Reductions in the amount of pollutants in the existing runoff would be one step to begin to reduce cumulative adverse impacts to coastal water quality. As such, appropriate measures must be taken to assure that adverse effects on water quality are minimized. The proposed development has a potential for a discharge of polluted runoff from the project site into coastal waters, both during Construction and Post-Construction.

Pre-Construction

The applicant has provided a Storm Water Pollution Prevention Plan (SWPPP) that describes the pre-construction and during construction management of site water and protection of the marine

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and sensitive water resources on and off site. Potential sources of pollution during construction include abandonment and remediation, oil clean-up activities, storage and handling of construction materials, clearing and construction related activities that have the potential to discharge, improper dumping, spills, or leakage.

The SWPPP provides specifications and guidelines for reducing the sediment loading into receiving water bodies that could occur during the construction and post-construction of site development. Although some erosion and soil loss is unavoidable during land-disturbance activities, the proper siting and design of erosion and sediment controls will reduce the amount of sediment transported off-site. Effective site management minimizes excessive soil erosion by keeping the soil stabilized and by directing runoff from disturbed areas to locations where sediments are removed prior to discharge to water bodies.

Specific Construction BMPs proposed include erosion control measures to prevent soil particles from being transported into the storm water runoff by covering and/or binding the soil particles prior to the onset of rain. Methods of erosion control proposed include: scheduling grading for dry months, preservation of existing vegetation, using mulch, and placing rolled erosion control products on the site. Earth dikes and drainage swales will be used to intercept and divert runoff to avoid sheet flow over sloped surfaces, direct runoff towards a stabilized watercourse, and intercept runoff from paved surfaces. Velocity dissipation devices, shall be used at new outlets of pipes, drains, culverts, slope drains, diversion ditches, swales, conduits, or channels. Slope drains shall be used where concentrated flow of surface runoff must be conveyed down a slope. This includes, drainage for top of slope diversion dikes and swales, drainage for top of cut and fill slopes where water can accumulate, and emergency spillway for a sediment basin. Disturbed stream channels, streambanks, and associated riparian areas shall be stabilized with vegetation, hydroseeding, hydraulic mulch, geotextiles & mats, and/or other erosion control measures. Non-vegetative stabilization include use of decomposed granite (DG), degradable mulches, gravel mulch and geotextiles and mats for temporary erosion control on areas prone to erosion where vegetation is not feasible, such as vehicular or pedestrian traffic areas, arid environments, rocky substrates, or where vegetation will not grow adequately within the construction time frame.

Sediment Control is a specific Construction BMPs proposed. Temporary sediment control materials would be maintained on-site throughout the duration of the project to allow implementation of temporary sediment controls in the event of rain and for rapid response to failures or emergencies, which includes silt fences, sediment basins, sediment traps, check dams, fiber rolls, gravel bag berms, street sweeping & vacuuming, sandbag barriers, and storm drain inlet protection.

Tracking controls and wind erosion controls are specific Construction BMPs proposed, which would be considered and implemented year round and throughout the duration of the project. Tracking controls would be located at all access (ingress/egress) points to the project site where vehicles and/or equipment may track sediment from the construction site onto public or private roadways and would include rumble racks (i.e. shaker plates) to provide additional sediment removal. Areas that are graded for construction vehicle transport and parking shall be stabilized. Roadways can be stabilized using aggregate, asphalt or concrete. Wind erosion control BMPs

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would be on all disturbed soils that are subject to wind erosion, and when significant wind and dry conditions are anticipated during project construction. The objective of wind controls would be to prevent the transport of soil from disturbed areas to off-site locations by wind. Dust control measures are proposed to stabilize soil from wind erosion, primarily in the form of construction watering (i.e. wet suppression), mainly on unpaved roads, drilling and blasting locations, soil and debris storage piles, batch drop from front-end loaders, unstabilized soil, and final grading. In addition, wind screen fencing would be implemented along the perimeter of the project site.

Non-Storm Water Management

Non-storm water management BMPs proposed include: water conservation practices, proper set up of temporary Arroyo crossings, clear water diversion, potable water/irrigation, vehicle and equipment cleaning and maintenance. Additionally, the proposal includes avoidance of overspraying curing compounds. Should run-off be generated, cure water shall be directed away from inlets to areas for infiltration or collection and disposal and drain inlets would be protected prior to the application of curing compounds. Use of covers, equipment attachments or platforms to collect debris is proposed. Debris and waste generated during demolition would be stored away from watercourses.

Material and waste management would consist of implementing procedural and structural BMPs for collecting, handling, storing and disposing of wastes generated by a construction project to prevent the release of waste materials into storm water discharges. The proposal includes: proper management of material delivery and storage, material use, stockpile management, spill prevention and management of hazardous waste, contaminated soil, concrete waste, and liquid waste.

Storage or placement of construction materials, debris, or waste in a location subject to erosion and dispersion or which may be discharged into coastal water via rain or wind would result in adverse impacts upon the marine environment that would reduce the biological productivity of coastal waters. For instance, construction debris entering coastal waters may cover and displace soft bottom habitat. Sediment discharged into coastal waters may cause turbidity, which can shade and reduce the productivity of foraging avian and marine species' ability to see food in the water column. **BMPs could be conditioned to find the project consistent with the Coastal Act, but that project was denied for other Coastal Act inconsistencies.** ~~In order to avoid adverse construction-related impacts upon marine resources, the Commission imposes Interim Erosion Control Plan and Construction Responsibilities **Special Condition 23**, which outlines construction-related requirements to provide for the safe storage of construction materials and the safe disposal of construction debris. This condition requires the applicant to remove any and all debris resulting from construction activities within 24 hours of completion of the project. In addition, all construction materials, excluding lumber, shall be covered and enclosed on all sides, and as far away from a storm drain inlet and receiving waters as possible. Only as conditioned does the Commission find the proposed development to be consistent with Sections 30230 and 30231 of the Coastal Act.~~

Post-Construction

Section 30230 of the Coastal Act requires that marine resources including biological productivity

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be protected. Section 30231 of the Coastal Act requires that the biological productivity of coastal waters be maintained, and where feasible, restored. In addition, Sections 30230 and 30231 require that the quality of coastal waters be maintained and protected from adverse impacts.

Single-family residences and commercial structures have the potential to increase local runoff due to the creation of impervious areas. This runoff could carry with it pollutants such as suspended solids, oil and grease, nutrients, metals, and synthetic organic chemicals. This is especially of a concern in locations that are adjacent to wetlands and arroyos, and the Santa Ana River, such as the proposed project.

Hardscape features and other site appurtenances (i.e. area drains and drain lines) should be setback at least 60 feet from the bluff edge to minimize the potential that the development will be affected by erosion and landslide hazards. **Again, Post Construction water quality measures could be conditioned to be found consistent with the Coastal Act, but the project was denied for other reasons.** Thus, the Commission is imposing **Special Condition 24**, which requires the applicant to submit a revised drainage and run-off control plan.

The proposed water quality management design would include a variety of water quality features. Low Impact Development (LID) Best Management Practices (BMPs) are proposed to ensure that water quality within the surrounding region is protected. Throughout the eleven Drainage Management Areas (DMAs) proposed within the development footprint, multiple BMPs including hydrologic source controls (HSCs), harvest and reuse systems and various bio-treatment mechanisms will be utilized.

HSCs - hydrologic source controls

Water quality control would start with the individual residential and visitor serving lots. For each single family detached residential product type in the North and South Family Villages (traditional and clustered), the HSCs proposed include: two rain barrels for each home strategically located near roof downspouts and backyard landscaping to capture runoff from roof downspouts during rain events and detain that runoff for later reuse for irrigating landscaped areas.

The proposed home lots would also include impervious areas dispersion, directing runoff from impervious areas onto the surface of adjacent pervious areas. The combination of the rain barrels and impervious area dispersion techniques will result in an average 42% runoff reduction of the annual runoff volume of water for each product type. HSC's will also be implemented for all areas of development including higher density residential (multi-family attached) and retail/resort areas in the form of impervious area dispersion and on-lot retention.

Harvest and Reuse Area BMPs

Harvest and reuse BMPs would capture and store storm water runoff for later use. These BMPs would create stored water to be used for water demands, such as landscape irrigation, after a rain event has occurred. Harvest and reuse BMPs include both above-ground and below-ground

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cisterns, with storage volumes that achieve 40% capture efficiency or higher. Harvest and reuse cisterns are also designed to overflow to biotreatment BMPs in case of short durations between storm events.

Eight (8) of the eleven (11) proposed DMA's would incorporate harvest and reuse BMPs as the primary BMP based on feasibility criteria. The three (3) remaining areas would incorporate biotreatment basins as the primary BMP based on the same feasibility criteria. The cisterns would be designed to hold the full capacity of the design capture volume. Overflow would flow into a connected biotreatment system (modular wetland system – MWS) to maintain water quality.

The MWS units would be connected to the harvest and reuse systems to treat the overflow runoff once the cistern capacity is reached. The combination of harvest and reuse cisterns and MWS units are proposed throughout each DMA based on the proposed grading plan and identified low points. Storm drain flows would flow into localized catch basins and into the proposed storm drain lines. The storm drain lines would include low-flow diversion structures which will direct water quality flows to the harvest and reuse cisterns. The cisterns would include a pre-treatment filter that can remove particulates sufficient for pre-treating Total Suspended Solids and associated heavy metals attached to sediment.

In addition, all internal roads within Harvest and Reuse areas would include bi-weekly street sweeping to prevent build-up of sediments and associated pollutants on streets and parking areas. The water stored in the cisterns would be connected to a pump system and irrigation line to allow for landscape irrigation. Any additional treatment needed during frequent storm events would be provided by the MWS units connected to the harvest and reuse cisterns.

Biotreatment Area BMPs

Biotreatment BMPs would reduce storm water volume and treat storm water using various treatment mechanisms characteristic of biologically active systems, and discharge water to the downstream storm drain system or directly to receiving waters. Treatment mechanisms include media filtration, vegetative filtration, general absorption processes, biologically-mediated transformations, and other processes to address both suspended and dissolved constituents. Examples of biotreatment BMPs for the site include bioretention basins with underdrains, vegetated swales, and localized rain gardens. Stand-alone biotreatment BMPs would be implemented in the regions where harvest and reuse is not feasible. The biotreatment areas include 3 DMAs throughout the North Village and a portion of the South Village. In addition, biotreatment BMPs would be implemented on the streets and parkways throughout the entire site.

The biotreatment water quality basins would be integrated into landscape areas throughout the North Family Village and a portion of the South Family Village. These basins would be landscaped shallow depressions that capture and filter stormwater runoff. These facilities would act as a plant-based filtration device that removes pollutants through physical, biological, and chemical treatment processes. As stormwater passes down through the planting soil, pollutants are filtered, adsorbed, biodegraded, and sequestered by the soil and plants. After treatment, flows

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would be collected back into the main line for conveyance to the Lowlands for additional incidental treatment including infiltration and evapotranspiration. Flow-through planters and MWS units would be incorporated into the streets and parkways BMP design. Flow-through planters act similarly to the biotreatment basins.

Off-site Runoff Treatment

Implementation of the plan would include an on-site water quality treatment basin for the sole purpose of treating off-site runoff (water that runs on to the site from adjacent areas, or run-on) in a lined basin approximately 0.75 acres. Approximately 46 acres of off-site runoff from the City of Costa Mesa and Newport Beach including commercial, light industrial and residential would be treated by the proposed water quality basin near 16th Street.

The system would provide an expected reduction in annual pollutant loads and annual pollutant concentrations. In addition the treatment of flows, the basin will also serve as a dissipation feature to control flows into the Main Arroyo. Controlling flows into the Arroyo will serve to reduce erosion potential within the Arroyo, reduce sediment transport to the Seminiuk Slough and improve habitat establishment along the bank. The Basin would impact 0.75 acre of burrowing owl foraging grassland ESHA and the dissipater would impact riparian habitat. These features would improve the overall water quality of the water in the arroyo and would have a positive impact on the habitat if they were not located directly in the habitat.

Alternative locations for these features could easily be identified outside of the habitat constraints, however the project was denied for other Coastal Act inconsistencies. As conditioned by Special Condition 23, the final location of this Basin and associated dissipaters in the Main Arroyo shall be outside of site constraints consistent with Special Condition 1, and could be located in habitat buffers. If an alternative location for these features cannot be identified outside of the habitat constraints prior to permit issuance, the applicant could apply for a subsequent CDP or amendment to this permit to find a suitable location for these features without impacting habitat, or a construction design of these features that is consistent with the continuance of the habitat near which it is located.

Conveyance

The proposed plans would include construction of an energy dissipator basin within the Open Space Preserve to control stormwater flows from the Urban Colony and the North Family Village before discharging into the Lowlands. Flows from the North Family Village area and the Urban Colony will be treated prior to reaching the diffuser basin by HSC's and either perimeter basins or the harvest and reuse systems. No water quality treatment will occur within the proposed energy dissipator basin and the diffuser basin would be constructed of rip-rap.

The second diffuser basin is proposed within the Open Space Preserve at the west end of the Main Arroyo prior to flows entering Semeniuk Slough. A culvert would be constructed under the existing oil remainder site roadway in order for the flows from the Main Arroyo to exit the site into the Slough. The purpose of this diffuser basin is to control flows into Seminiuk Slough from the Main Arroyo, including runoff from the South Family Village development areas, the Resort Colony and the proposed park areas. Flows from the South Family Village development areas, the Resort Colony and park areas will all be treated prior to reaching the diffuser basin by HSC's

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and either biotreatment basins or harvest and reuse systems. The diffuser basin would also be constructed of rip-rap.

The diffuser basins proposed are adjacent to wetland and riparian habitat. Construction plans for the water quality detention basin, diffuser basins, and dissipator were not provided in the application materials but grading limits and cross section details were provided to assess impacts. Construction specifications are needed to evaluate the basins' effectiveness for the proposed development and for the impacts the construction of these basins would have on ESHA and wetland habitat. Treated fresh water discharges into the lowlands are not anticipated to impact the salinity of the existing salt marsh as the majority of storm events will remain within the lowland berms and overflows into the existing salt marsh only occur under large storm events. However, studies regarding the amount of freshwater introduction on an occasional basis and the effects of reduced salinity levels on the habitat have not been provided.

Residential Development Water Quality

Typically, adverse water quality impacts to coastal waters can be avoided or minimized by directing storm water discharges from roof areas and other impervious surfaces to landscaped areas where pollutants may settle out of the storm water. In addition, reducing the quantity of impervious surfaces and increasing pervious water infiltration areas can improve water quality. However, these common techniques of addressing water quality problems, by design, result in increased infiltration of water into the ground. As noted in the hazard section of these findings, the infiltration of water into the bluff is a primary potential source of bluff instability at the project site. Therefore, increasing the quantity of pervious areas, directing runoff to those pervious areas, and encouraging water infiltration for water quality purposes could have adverse impacts upon bluff stability. There are measures, however, that would contribute to increased water quality that could feasibly be applied even to bluff top lots (on the mesa) such as the subject site without increasing instability.

The primary contributors to storm drain pollution stemming from single family residential development are irrigation, fertilizers, swimming pool discharges, and pet waste. These can be eliminated or significantly reduced. For example, permanent, in-ground irrigation tends to result in over-watering, causing drainage to run off site. Irrigation runoff carries with it particulates such as soil, debris, and fertilizers. Limiting irrigation to that necessary to establish and maintain plantings reduces the chance of excess runoff due to over-irrigation. Permanent, in-ground irrigation, in general, is set by timer and not by soil moisture condition. Thus, the site is irrigated on a regular basis regardless of the need, resulting in oversaturation and run off. The run-off, carrying soil, fertilizer, etc., is then directed either to the storm drain system. This can be avoided by limiting over-irrigation on the mesas.

Another way to improve water quality on bluff top lots without jeopardizing stability is the use of native/drought tolerant plantings. Low water use, drought tolerant, native plants require less water than other types of vegetation, thereby minimizing the amount of water introduced into the bluff top. As these plantings use less water than ornamental plants, incidents of over-watering, causing saturation and excess runoff, is substantially reduced. As previously stated, reducing site runoff reduces the extent of pollutants carried into the storm drain system and into the ocean.

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Water quality and water conservation measures conditions could make the project consistent with the Coastal Act, however the project is inconsistent with other Sections of the Coastal Act and was denied. Special Condition 4 requires native and drought tolerant vegetation on individual residential lots and within the maintained commercial landscaped areas and prohibits permanent irrigation that does not include water use efficiencies. **Special Condition 4** also mandates that individual residential lots not be developed with swimming pools, in order to avoid improper discharges into the dedicated conservation areas for the protection of the water quality of the arroyos and wetlands.

Conclusion

While the water quality features are sufficient for the site development proposed, the overall southern portions of the development plan would have permanent impacts to acres of ESHA, and the North Family Village would impact 2 wetlands, and is inconsistent with the marine protection policies and wetlands and habitat protection policies of Ch. 3 of the Coastal Act. The alternative "Buildable areas" for the North Family Village and Urban Colony allows for the natural connectivity of the site by avoiding fill of wetlands and avoids impacts to ESHA as required by **Special Condition 1**. Preserving the natural connection between Wetlands C and CC to the North-South Arroyo and vernal pool watershed would ensure the long term productivity of the site's natural watershed. The preservation of this central area is critical for the site's watershed and for the site's overall habitat connectivity. As conditioned, the Water Quality Management Plan **Special Condition 24** would be revised to conform with the restricted buildable footprint and limit the water quality features to those associated with these 2 residential areas, with revised plans for the dissipater basin in the lowland to be relocated from directly impacting wetlands into areas of wetland buffers, as conditioned by **Special Condition 1**. The site-wide improvements to water quality, such as the basin to treat run-on before water is conveyed into the Main Arroyo require revised plans and are conditioned for final review and approval of the Executive Director, see **Special Condition 1**.

The proposed water quality plans for Pre-construction and Post-construction protection of marine resources would largely be consistent with Coastal Act Sections 30230 and 30231, with the exception of water quality structures located in the lowlands and within wetlands as described above. However, the development plan as a whole, for which the above described water quality systems are designed, is not consistent with the protection of wetlands, is inconsistent with Sections 30230, 30231, and 30233 of the Coastal Act, **and 30240, as explained previously.** Only as conditioned to avoid fill of wetlands, avoid impacts to the watershed, and preserve the site connectivity, provide 100 foot wetlands and vernal pool buffers and watershed buffers as required by **Special Condition 1** and to submit final plans for the pre and post construction water quality measures and drainage plans and final plans for commercial space water quality BMPs, as well as a final water quality monitoring plan required by **Special Condition 24**, and construction plans for water quality systems outside of the wetlands as required by **Special Condition 1**, can the project be found consistent with Sections 30230, 30231 and 30233 of the Coastal Act.

G. HAZARDS

Section 30253 of the Coastal Act states, in relevant part:

New development shall do all of the following:

(a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

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

Grading and Landform Alteration

The grading plans include corrective grading for development proposed in the upland area, which would involve 1,416,000 cubic yards of cut, and 1,356,000 cubic yards fill, for a total of 2,772,000 cubic yards of grading. This represents one of the largest grading projects in the Coastal Zone of California in recent years.

~~Limiting development to areas outside of ESHA, and requiring development be setback from the canyon bluff/arroyo edges a minimum of 15 feet, as required by **Special Condition 1**, would significantly reduce the amount of grading required for the project and would minimize landform alteration and would not impact the ability of the project to assure structural stability, safety from hazards, and would not contribute to overall destruction of the site. Therefore, only as conditioned can the project be found consistent with Section 30253 of the Coastal Act.~~

Flood Hazards

The project site is partially within the floodplain of the Santa Ana River. However, the development, as conditioned, would be limited to the Mesa, which lies well above the floodplain, it would be safe from flood hazards. The project site also is partially within the Tsunami inundation zone, according to California Department of Conservation's official tsunami inundation maps (**Exhibit 24**). The inland extent of the inundation zone includes the lowlands of the site that are subject to tidal action. The Mesas of the site are not included in the inundation zone and would be safe from Tsunami hazards. **The proposed oil remainder areas of the site are within the inundation zone, but the proposed housing and mixed use development would be limited to the Mesas, outside of the inundation zone.** ~~Because the development, as conditioned, would be limited to the Mesas of the site, all development approved by this permit would be safe from tsunami hazards.~~

Geologic Hazards

The NBR site is located on the Orange County Coastal Plain and adjacent Newport Mesa. Part of the Newport Mesa forms the eastern, upland portion of the NBR site. The Orange County Coastal Plain is one of the coastal alluvial basins of the Los Angeles Sedimentary Basin. The Orange County Coastal Plain is bounded to the north by the Puente Hills, to the east by the Santa Ana Mountains, to the west by the San Gabriel River, and to the southwest by the San Joaquin Hills and the Pacific Ocean.

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The central portion of the coastal plain forms the broad alluvial floodplain of the Santa Ana River. The Santa Ana River originates in the San Bernardino Mountains. The river flows approximately 100 miles from the San Bernardino Mountains to the NBR site where it discharges into the Pacific Ocean.

The mesa consists of consolidated alluvial sediments which have been uplifted along a fault zone, and carved into their present morphology by the Santa Ana river. The lowland portion of the NBR consists of recent alluvial sediments. The active Newport-Inglewood fault zone, locus of the 1933 M_w 6.4 Long Beach Earthquake, is located along the southern boundary of the NBR.

The NBR site is bounded to the west by the mouth of the Santa Ana River and to the south by marsh channels, the former course of the Santa Ana River where it once flowed into Newport Bay. The marsh channels are connected by a culvert to the mouth of the Santa Ana River.

Geotechnical investigations were performed for the site by Guptill and Heath (1981), Woodward-Clyde Consultants (1985), the Earth Technology Corporation (1986), Pacific Soils Engineering, Inc. (1993), Leighton (1997), and Earth Consultants (1997). The studies conducted by Guptill and Heath and the Earth Technology were mainly related to the geological evaluation of splays of the Newport-Inglewood fault. Two distinct zones of faulting were identified within the site. The main active trace of the Newport-Inglewood fault is less than 1 mile from the site and the Palos Verdes fault is within 11 miles from the site. These faults are capable of generating significant ground shaking at the site. Several splays of the active Newport-Inglewood fault zone have been mapped across the site and in the site vicinity. Faults that break the ground surface during an earthquake can do considerable damage to structures built across them. Therefore, fault studies are typically designed to evaluate whether a fault is active. If a fault is deemed active, structures cannot be placed across the trace of the fault (Alquist-Priolo Earthquake Fault Zoning Act).

Converse Consultants (1994) discovered an active fault system on the site called the “West Mesa Fault.” This fault traverses the NBR site. It has been encountered in trenches in two distinct areas, and building setbacks have been established so that habitable structures are not built across this fault. Conservatively, these two areas are assumed to be connected, and building setbacks have been established between these areas as well.

The West Mesa Fault and the Newport-Inglewood fault system should be considered likely sources for future earthquakes that would generate strong ground motions at the site. In addition, surface rupture at the site is possible along the West Mesa Fault.

The studies by Woodward-Clyde Consultants and Pacific Soils Engineering, Inc., covered other geotechnical aspects including liquefaction and dynamic settlement. Both studies concluded that the upper 10 to 12 feet of the subsurface soils in the lowland areas were highly susceptible to liquefaction. Below 10 to 12 feet, localized zones of liquefiable soils were encountered. In addition, the study by Woodward-Clyde found that the upper 4 to 10 feet of the subsurface materials contained soft, highly plastic clay that might not be suitable for use as structural fill.

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The proposed development is located on a coastal bluff, despite the fact that it is inland of PCH and not currently subjected to marine erosion. Coastal bluff edges are also located along the Mesa facing the Seminouk Slough. Coastal bluff erosion is caused by a combination of inherent environmental factors and the anthropogenic factors. Environmental factors include gravity, seismicity, wetting and drying of bluff face soils, wind erosion, rodent burrowing and piping, percolation of rain water, adverse bedding orientation, surface water runoff and poorly consolidated soils. Factors attributed to anthropogenic causes include: improper irrigation practices; building too close to the bluff edge; improper site drainage; use of impermeable surfaces which concentrate runoff; use of water-dependent vegetation; pedestrian or vehicular movement across the bluff top, face and toe, and breaks in irrigation lines, water or sewer lines.

In addition to irrigation water or runoff at the bluff top, increased residential development inland leads to increased water percolating beneath the surface soils and potentially outletting on the bluff face along fracture lines in the bluff or points of contact of different geologic formations, forming a potential slide plane. The Commission's Staff Geologist, Dr. Mark Johnsson, has reviewed all geotechnical investigations submitted by the applicant and has concurred that these investigations have adequately addressed concerns regarding bluff erosion and slope stability of the project site.

Conformance with Geotechnical Recommendations

The development, as proposed, would likely be safe from geologic hazard, however conditions described below are applied to insure that the development: *assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site.*

The geotechnical consultants have found that the proposed development is feasible provided the recommendations contained in the geotechnical report prepared by the consultant are implemented as regards the design and construction of the project. **If the project were carried out in conformity with consultant's recommendations it could be consistent with Section 30253.** ~~In order to insure that risks of development are minimized, as per Section 30253, the Commission imposes **Special Condition 21**, which states that the geotechnical consultant's recommendations should be incorporated into the design of the project. As a condition of approval the applicant shall submit for the review and approval of the Executive Director foundation plans reviewed and signed by a consulting geologist.~~

Bluff Top Setback

Development on coastal bluffs is inherently risky due to the potential for slope failure. Bluff top development poses potential adverse impacts to the geologic stability of bluffs and the stability of structures. To meet the requirements of the Coastal Act, bluff top developments must be sited and designed to assure geologic stability and structural integrity for its expected economic lifespans while minimizing alteration of natural landforms. In order to assure that this is the case, a development setback line must be established that places the proposed structures a sufficient distance from unstable or marginally stable bluffs to assure their safety, and that takes into account bluff retreat over the life of the structures, thus assuring the stability of the structures

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over their design life. The goal is to assure that by the time the bluff retreats sufficiently to threaten the development, the structures themselves are obsolete.

Commission Staff Geologist, Dr. Mark Johnsson, concluded that the bluff edge is in the location depicted on **Exhibits 4 and 22**, and with the proposed 60 foot bluff edge setback for all structures, the development would be safe from slope instability (as demonstrated by extensive quantitative slope stability analyses) and bluff erosion (as demonstrated by studies of historic erosion rates) for the economic life of the project. In addition, coastal canyon edges along the arroyos were evaluated and the Staff Geologist determined that 15 foot canyon edge setbacks would be sufficient to assure stability. The proposal includes residential development outside of the 60 foot setback from the fault zones and outside of the 60 foot setback from the coastal bluffs. **Special Condition 1** ensures adequate setbacks from coastal canyons edges as well.

Assumption of Risk

~~Coastal bluffs in southern California are recently emergent landforms in a tectonically active environment. Any development on an eroding coastal bluff involves some risk to development. Although adherence to the geotechnical consultant's recommendations will minimize the risk of damage from erosion, the risk is not entirely eliminated. Development on coastal bluffs involves risks and that structural engineering can minimize some of the risk but cannot eliminate it entirely. Therefore, the standard waiver of liability condition has been attached via **Special Condition 19**.~~

Bluff Protective Devices

~~Coastal bluff lots are inherently hazardous, especially those located adjacent to the ocean. It is the nature of bluffs to erode. Bluff failure can be episodic, and bluffs that seem stable now may not be so in the future. Even when a thorough professional geotechnical analysis of a site has concluded that a proposed development is expected to be safe from bluff retreat for the life of the project, it has been the experience of the Commission that in some instances, unexpected bluff retreat episodes that threaten development during the life of a structure sometimes do occur. In the Commission's experience, geologists cannot predict with absolute certainty if or when bluff failure on a particular site may take place, and cannot predict with certainty if or when a residence or property may become endangered.~~

~~Section 30253 of the Coastal Act requires that new development shall not require construction of protective devices that would substantially alter natural landforms along bluffs and cliffs. The proposed development could not be approved as being consistent with Section 30253 of the Coastal Act if projected bluff retreat would affect the proposed development and necessitate construction of a protection device. **Special Condition 20** prohibits the construction of bluff protective devices in the future.~~

Future Development

~~To assure that future development is consistent with the Chapter 3 policies of the Coastal Act, the Commission imposes **Special Condition 25**, to limit future improvements. As conditioned, the development conforms with the Chapter 3 policies of the Coastal Act relating to geologic hazards.~~

Deed Restriction

Special Condition 28 requires that the property owner records a deed restriction against the property, referencing all of the above Special Conditions of this permit and imposing them as covenants, conditions and restrictions on the use and enjoyment of the Property. Thus, as conditioned, any prospective future owners will receive notice of the restrictions and/or obligations imposed on the use and enjoyment of the land including the risks of the development and/or hazards to which the site is subject, and the Commission's immunity from liability.

Conclusion

Limiting development to areas outside of ESHA, and requiring development be setback from the canyon bluff/arroyo edges a minimum of 15 feet, as required by Special Condition 1, would significantly reduce the amount of grading required for the project and would minimize landform alteration and would not impact the ability of the project to assure structural stability, safety from hazards, and would not contribute to overall destruction of the site. Therefore, only as conditioned can the project be found consistent with Section 30253 of the Coastal Act.

The development, as proposed, would likely be safe from geologic hazard and could, with certain conditions, be found consistent with section 30253 which requires that development: assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site... However, the current development proposal includes elements that render the project as a whole inconsistent with the biological and visual resources policies of the Coastal Act. For instance, a total of 2,772,000 cubic yards of grading impacts sensitive resources and results in fill of wetlands on the site. Therefore, the proposed development is inconsistent with the Coastal Act and cannot be approved.

H. ARCHAEOLOGICAL AND CULTURAL RESOURCES

Section 30244 of the Coastal Act protects cultural resources in the coastal zone and states:

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

Section 30116 of the Coastal Act defines archeological sites as designated by the State Historic Preservation Officer as Sensitive Coastal Resources in the coastal zone:

"Sensitive coastal resource areas" means those identifiable and geographically bounded land and water areas within the coastal zone of vital interest and sensitivity. "Sensitive coastal resource areas" include the following:

- (a) Special marine and land habitat areas, wetlands, lagoons, and estuaries as mapped and designated in Part 4 of the coastal plan.*
- (b) Areas possessing significant recreational value.*
- (c) Highly scenic areas.*

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- (d) *Archaeological sites referenced in the California Coastline and Recreation Plan or as designated by the State Historic Preservation Officer.*
- (e) *Special communities or neighborhoods which are significant visitor destination areas.*
- (f) *Areas that provide existing coastal housing or recreational opportunities for low- and moderate-income persons.*
- (g) *Areas where divisions of land could substantially impair or restrict coastal access.*

Coastal Act Section 30244 states that reasonable mitigation measures shall be required where development would adversely impact archaeological resources. These resources may include sacred lands, traditional cultural places and resources, and archaeological sites. Cultural resources are not confined to the boundaries of archaeological sites, but instead can encompass landscapes that are significant to Native American tribal groups because of habitation or use for cultural practices. In this context, impacts to archaeological and cultural resources may not sufficiently be avoided by simply siting development outside polygons drawn around the archaeological sites. For that reason, in order to preserve the cultural landscape of a property if identified as a resource by the State Historic Preservation Officer with un-mitigatable impacts, conditions may be imposed that require preservation of the areas that encompass a patchwork of archaeological sites, which indicate a historic use pattern and cultural significance, as open space.

Cultural Knowledge and Significance of Resources

Native Americans and some professional archeologists believe, and ethnographic evidence supports the idea, that the Banning Ranch site is one of the many village sites located along the Santa Ana River on the Western Newport Mesa that is a subsidiary settlement site of the primary village center- Genga, and that the Banning Ranch site overlooking the river and the ocean was used for special activities, including cultural and religious ceremonies. The reason the property as a whole, all 401 acres, is regarded as a Traditional Cultural Landscape is because of the site's vast array of special vegetation and wildlife and biological resources: *It is this ecosystem [of Banning Ranch] that led the Gabrielino and Juaneno-Aejachemen ancestors to settle here, collect the plants and animals, hold ceremonies, and bury their dead. It is this ecosystem, that together with the archaeological sites, forms this sacred landscape of the Banning Ranch Cultural Property and Landscape.* [letter dated May 3, 2016 from the CA Cultural Resource Preservation Alliance to the Coastal Commission].

Geographically, the resources present on Banning Ranch, considered in the context of the regional archaeological and cultural sites nearby such as Bolsa Chica, Hellman, Ridge, Fairview Park, etc. is related to the regional ephemeral and malleable nature of the historic mosaic pattern of the Santa Ana River outlet to the Pacific Ocean which created a vast estuary in coastal Orange County leading to the settlement of the region by Native Americans because of the strong connection between settlement sites and fresh water sources. One archeological site (ORA 906) has the potential to answer questions about the relationship of these regional settlements and connection the river's various outlet points.

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Temporally, the Banning Ranch site is significant because some archaeological deposits have great depth and document 3 or possibly 4 occupation periods ranging from 6000-1350 YBP, or approximately 6,000-1,000 years ago. It is highly likely that the site was occupied intermittently through environmental changes over time including changes in sea level rise, changes in the salinity of the wetlands, and changes in the types of marine species present and available as food sources, according to the ARP.

Regulations of Archaeological and Cultural Resources

SB 18

California Senate Bill 18 (SB 18) was passed in 2004 and requires cities and counties to consult with California Tribal Governments anytime a city or county amends or adopts a General Plan. The requirements of SB 18 are separate from the CEQA process, but can be engaged at the time of CEQA review.

According to PRC section §65300, each City and County is required to adopt a General Plan which is meant to guide future development over the next 20 years. California Government Code (GC) Section 65352.3 and Section 65562.5 requires tribal consultation at the time of a General Plan or Specific Plan adoption or amendment, or a decision involving the designation of Open Space. Prior to the adoption or any amendment to a General Plan, or a change in land use involving open space, the local government shall conduct consultations with California Native American tribes for the purpose of preserving or mitigating impacts to Cultural Places. SB 18 requires notice to and consultation with California Native American Tribes that are on the contact list maintained by the California Native American Heritage Commission.

SB 18 refers to Cultural Places described as places, features, and objects described in PRC Sections 5097.9 and 5097.995 as Native American sanctified cemetery, place of worship, religious or ceremonial site, or sacred shrine and Native American historic, cultural, or sacred site, that is listed or may be eligible for listing in the California Register of Historic Resources pursuant to Section 5024.1, including any historic or prehistoric ruins, any burial ground, any archaeological or historic site.

Local governments notify tribal governments and tribes respond if they wish to participate in consultation. Local governments and tribes engage in consultation for the purpose of preserving a cultural place. PRC 21083.2 requires lead agencies to determine effects on archaeological resources and may recommend mitigation in the form of: Planning construction to avoid resources, deeding sites in permanent easements, capping or covering before building, or planning parks, open space to incorporate sites. PRC 21084.1 states that Substantial adverse change in a historical resource is a significant effect on the environment. Historic resources include resources listed or eligible to be listed in the California or a local registry. Not being listed or eligible for listing does not preclude a lead agency from determining something may be a historical resource.

361 acres of the Banning Ranch site are under the jurisdiction of the County of Orange with a General Plan land use designation of Open Space. The County of Orange has not amended the

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General Plan to change the land use designation to allow for residential or commercial use on the site, and therefore SB 18 Consultation between the County and Tribal Governments has not yet occurred. Approximately 40 acres of the Banning Ranch site are under the jurisdiction of the City of Newport Beach. The City of Newport Beach adopted a land use designation of open space for the property (as primary use with an alternative use as residential village with retail and parks if not acquired for open space within a set amount of time) in 2006, that was voter approved. The Primary use of open space includes the consolidation of oil operations, the restoration of the wetlands, and provisions for a nature educational facility and active parks to serve surrounding neighborhoods.

At the time the General Plan was adopted and the EIR was certified in 2006, the City was required to engage in SB 18 consultation with the local Tribal Governments. However, at that time of consultation, the site was not listed on the Native American Heritage Commission's list of sacred lands. The site was not added to the list until early 2016. Some tribal governments have commented that they were not contacted for the SB 18 consultation, nor were they contacted to participate in the initial planning and scoping and testing done under the CEQA process in 2009.

Because of the status as a sacred land (listed in 2016) since the EIR was certified (in 2012), and because of the recent addition of AB 52 to the CEQA process, some tribal groups assert that there has been no meaningful consultation between the tribal governments and the lead agency, or local government, to resolve tribal concerns. The NAHC has dealt with this issue in the past at other project sites and has stated that without a thorough archeological investigation until late in the environmental decision-making process, decision-makers do not have sufficient information to advise them or to adequately ascertain the impacts of a project.

AB 52

SB18 is triggered preceding an adoption or amendment of general plans or specific plans or open space designations (Gov. Code § 65352.3, subd. (a)(1); § 65562.5), but Assembly Bill 52 (AB 52) is triggered with all CEQA review for which an NOP, Notice of Mitigated Negative Declaration or Notice of Negative Declaration is filed or issued after July 1, 2015 (Stats. 2014, ch. 532, § 11(c)).

The goals of Tribal Consultation under AB 52 include: gathering information in order to preserve the options of avoidance of cultural resources or preservation in place early in the planning process, to build working relationships with tribes that are traditionally and culturally affiliated to the project area, to avoid inadvertent discoveries of Native American burials and work with tribes in advance to determine treatment if burials are inadvertently discovered. Tribes must contact the local government to request consultation with the lead agency.

If the request for consultation is made, environmental documents cannot be released until consultation has been initiated. (Pub. Resources Code §21080.3.1, subd. (b)). Environmental documents for a project with a significant impact on an identified tribal cultural resource cannot be certified until consultation, if initiated, has concluded. (Pub. Resources Code § 21082.3, subd. (d)(1)). Under AB 52, Consultation is concluded when either of the following occurs: The parties agree to measures to mitigate or avoid a significant effect, if a significant effect exists to a tribal cultural resource; or a party, acting in good faith and after reasonable effort, concludes that

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mutual agreement cannot be reached. (Pub. Resources Code § 21080.3.2, subd. (b)).

Mandatory topics of Consultation include exploring alternatives to the project, recommended mitigation measures, and identification of significant adverse effects. Other discretionary topics of Consultation include the types of environmental reviews necessary for the project, the significance of tribal cultural resources, the significance of the project's impacts on the tribal cultural resources; and if necessary, project alternatives or appropriate measures for preservation or mitigation that the tribe may recommend. (Pub. Resources Code § 21080.3.2, subd. (a)).

Because the Newport Banning Ranch proposal was certified with a mitigated negative declaration in 2012, before the passage of AB 52, the lead agency, the City of Newport Beach, did not engage in the above described consultation with the local tribal groups. However, if a subsequent, supplemental, or addendum to the EIR is required as a result of the changes or new information since the certification of the EIR, the City will be required to engage in AB 52 consultation with tribes that request it.

Section 106

Because at least 3 archeological sites are eligible for listing on the National Register, SHPO will get involved in evaluation of the resources and to consult with local tribes when Section 106 Consultation⁷ is required concurrently with Federal approvals, in this case, the Section 404 permit from the US Army Corps of Engineers (Army Corps). Army Corps will need to do a Jurisdictional Delineation of the Waters of the US that are on the Banning Ranch site (wetlands, vernal pools, and erosional streams) and issue a permit for the project and any mitigation that is required. Army Corps will also initiate a US Fish and Wildlife consultation at that time to obtain a biological opinion of the federally listed species on the site and the status of the critical habitat areas.

Section 106 requires Federal agencies to take steps to identify historic (and prehistoric) properties or sites, including consulting with SHPO and possibly with the Tribal Historic Preservation Officer, and seek information from the Native American tribes in the area that have cultural knowledge of the site, and ultimately determine if the project will impact the historic qualities of the property or site. A property can be deemed eligible for listing in the National Register by a tribal government or a professional archeologist through a nomination process. A property can be added to the National Register by a consensus determination of eligibility, where Federal decision makers and SHPO can determine if the property meets the criteria for listing.

Owner objections may affect the listing of the entire property, but not the eligibility and not the identification of the boundaries of archaeological sites or traditional properties. If the private owner of a property objects to listing, the property (with boundaries based on an objective assessment of the full extent of the significant resources) may be determined eligible for the National Register but not listed. Properties listed and eligible for listing are afforded the same protections.

⁷ Section 106 of the National Historic Preservation Act is codified at 16 U.S.C. § 470f.

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In the case of Banning Ranch, Section 106 will require Army Corps to consult with the non-federally recognized tribes of the region, if they request it. SHPO will review the consultation and will search for any recorded sacred lands files. The local tribes are able to review areas of concern, suggest additional indirect impacts of the project that may occur to both the archeological sites and the cultural attributes of the property that Army Corps may not be aware of, determine the status of the property as eligible for listing on the National Register, and request protective measures including avoidance. If there are adverse effects of the project, the parties (Army Corps, SHPO, and the local tribal governments) will enter into an agreement (MOU) to formalize any mitigation measures that must occur as a result of the impacts of the project.

Section 106 regulations, in the Code of Federal Regulations, Title 36, section 800.4(c)(1) requires federal agencies to acknowledge the special expertise of Native Americans and their cultural knowledge in assessing the eligibility of historic properties that may be of religious or cultural significance to them. Because the site is now in the Sacred Lands File, and because this listing includes information about how 4 of the 8 known archeological sites may be connected and are believed to be a village site, SHPO will review that information at the time of the Section 106 consultation. SHPO could make the determination that the complex of the 4 archeological sites or all known archaeological sites should be treated as 1 large site eligible for listing in the National Register, or could determine that the entire 401 acres of the property are considered sacred lands and a Traditional or Tribal Cultural Landscape that may be eligible for listing in the National Register as a Traditional Cultural Property.

A Tribal Cultural Landscape is any place in which a relationship, past or present, exists between a spatial area, resource, and an associated group of people whose cultural practices, beliefs, or identity connects them to that place. A tribal cultural landscape is determined by and known to a culturally related group of indigenous people with a relationship to that place rather than being determined by external criteria. Relationships may vary from group to group and may be defined temporally or geographically through oral traditions and cultural practices. Because of the age of archaeological sites and their ability to represent multiple time periods spanning thousands of years and various indigenous migration and settlement patterns of occupation over time, one area can hold significance for many groups. Multiple tribes may hold knowledge about and connections to the same place, as is the case with Banning Ranch.

A Traditional Cultural Property is considered by the National Register to be a type of significance rather than a property type, is determined based on a set of specific criteria, and it can contain and often does contain a complex or a district of 1 or several archeological sites. In the context of eligibility determination or nomination to the National Register, intrusions if severe enough may compromise the property's integrity. In planning subsequent to nomination or eligibility determination, the Advisory Council on Historic Preservation's regulations define "isolation of the property from or alteration of the character of the property's setting" as an adverse effect "when that character contributes to the property's qualification for the National Register" (36 CFR 800.9(b)(2)). Similarly, the Council's regulations define as adverse effects "introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting" (36 CFR 800.9(b)(3)). To assist in determining whether a given

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activity outside the boundaries of a traditional cultural property may constitute an adverse effect, it is vital that the eligibility documentation evaluate those qualities of a property's visual, auditory, and atmospheric setting that contribute to its significance, including those qualities whose expression extends beyond the boundaries of the property as such into the surrounding environment. Traditional Cultural Property contributing attributes that may be protected can include a site's view shed, sense of feelings (wind, cool air, vegetation smells, overall presence of the site) and can even include sounds (wildlife sounds, the lack of noise from urban life such as cars on the roadways, sounds of ocean waves, etc.)

A Traditional Cultural Property can be a Tribal Cultural Landscape and is broader than the individual archeological sites, and is often a religious or ceremonial site because of unique landscape features, such as a mountain top or a bluff top, a place with significant natural views, a place with rivers or estuaries, special vegetation or wildlife that may contribute to its significance, a place with evidence of cultural traditions or evidence of burials, or a place with religious artifacts or monuments. As stated above, Native American tribal groups with ties to Banning Ranch believe that the entire 401 acres of the site will rise to the level of this significance and is eligible for listing as a Traditional Cultural Property. Tribal governments that identify Traditional Cultural Landscapes often equipped themselves to represent their interests and are concerned with and participate in ongoing management grounded in cultural knowledge, and implementation of site restoration, protection, planning, and land management.

Governor's Order

Executive Order B-10-11 requires that all State Agencies under Executive Control engage in Government-to-Government Consultation. The 2011 order states: *it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes.* State Government staff must consult on projects within their jurisdiction with Tribal Government representatives with ties to the property in question. Sometimes this involves several tribal governments for one site or one project. Additionally, Tribal governments contacted must be from both federally recognized and non-federally recognized tribes. In California, there are 111 federally recognized tribes and approximately 60 non-federally recognized tribes and the Native American Heritage Commission acknowledges both and keeps a record of contact information for each area. In the case of Banning Ranch, there are 9 independent tribal entities with ties to the land. Executive Order B-10-11 encourages state agencies to: engage in the timely and active process of respectfully seeking, discussing and considering the views of California Indian Tribes, Tribal communities and Consortia in an effort to resolve concerns of as many parties as possible.

Commission Staff Consultation Efforts

Commission staff has engaged all 9 tribal entities on the Native American Heritage Commission list, as well as known interested parties with Native American heritage and cultural affiliations, and Native American organizations that work directly with and speak on behalf of some tribal governments. Discussion topics included both archeological sites and cultural resources. The concerns that have risen from these consultations are mainly: the status of the Banning Ranch as sacred land and religious and ceremonial site, the status of the property and a Traditional Cultural Landscape, any ground disturbance must include Native American monitors and include as many tribal groups as possible, the lack of adequate testing for archeological resources done to

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date, the presence of additional burials on the site, the connection of the site to the larger prehistoric village of Genga and other regional religious sites and villages, and the cultural connection to the land and the biological resources of the site. Other comments include some tribal groups not being contacted to participate in the project planning under CEQA review in 2009 and not being contacted by the applicant or invited to engage in consultation at all until June 2016. Archaeological documents and studies were not shared with the tribal groups until June 2016 and the tribal groups are concerned with the limited amount of time to review past archeological documents and cultural documents and respond to the project proposal and evaluate the project's impacts on the archeological sites and the cultural significance of the site, while attempting to participate in the monitoring of the site's ongoing investigations with little advanced notice.

Consistent with the intent of the governor's order, staff has met with representatives of all the Native Nations on several occasions as a group, as well as separately, and with various tribal entities in an attempt to address the concerns expressed. While there is some disagreement among the parties, there is mostly a consensus that the land is a religious and sacred site and that the significance of the 401 acres is not diminished by the disturbed archaeological deposits found to date and the disturbed areas are not a representation of the archeological and cultural resources and significance that exist on the site. Staff has attempted to address the concerns to the maximum extent feasible through the conditions of approval, discussed in detail below.

Regional Cultural Sites and Past Commission Actions

The Native American Heritage Commission (NAHC) identifies and catalogs cultural resources (i.e., places of special religious or social significance to Native Americans, and known graves and cemeteries of Native Americans on private lands) in California. NAHC is charged with the duty of preserving and ensuring accessibility of sacred sites and burials, the disposition of Native American human remains and burial items, maintaining an inventory of Native American sacred sites, and reviewing current administrative and statutory protections related to these sacred sites.

At the request of the Tribal Chairman of the Gabrieleno Tongva San Gabriel Band of Mission Indians, the state NAHC added the "Banning Ranch Cultural Properties and Landscape" to the NAHC Sacred Lands Inventory because of its cultural significance, which this quote describes:

The Banning Ranch sites represent the activities that the ancestors carried out centuries ago and are named in our oral traditions and songs, including artifacts, plant gathering areas, and natural features of the landscape that have spiritual meaning. As such they hold great significance for Gabrieleno descendants as a sacred power area, a place where they could gather to honor the ancestors and gain spiritual renewal. The fact that many of the [archaeological] sites have been disturbed does not diminish the area's spiritual significance as the place of our ancestors. [February 24, 2016 letter from Anthony Morales, Tribal Chairman, to NAHC in support of nomination.]

Additionally, one Juaneño-Acjachemen tribal government was under the impression they had listed site on the Sacred Lands Inventory before 2016, but no records were found for that listing.

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According to the National Register's *Guidelines for Evaluating and Documenting Traditional Cultural Landscapes*, because properties of traditional cultural significance are often kept secret, it is not uncommon for them to be "discovered" only when something threatens them--for example, when a change in land-use is proposed or a new development project is proposed in the vicinity. The sudden revelation to local governments, applicants or developers with economic or political interests in the proposed project can lead to charges that the cultural significance of a property has been invented only to obstruct or otherwise influence the project. While this could be true and should be considered along with archaeological or ethnographic evidence, it is often the case that until the change was proposed to the property in question, there was simply no reason for the disclosure.

In past Court decisions (*Environmental Protection Information Center, Inc. v. Johnson* (1985) (170 Cal App 3rd 604), the Court held that the NAHC has jurisdiction and special expertise, as a state agency, over affected Native American resources impacted by proposed projects, including archeological places of religious significance to Native Americans, and to Native American burial sites. In past Commission actions (HNB-MAJ-1-12, the Ridge) the NAHC indicated that areas adjacent to the property in question that contained burials should be protected and should be avoided if at all possible pursuant to CEQA Guidelines Section 15370 (a) to avoid destruction of cultural resources. SHPO also indicated that because the property was part of a very large village complex ranging from 9000 to 2000 years old (Before Present) and all the known archaeological sites were connected, and the property was adjacent to sites with hundreds of Native American burials that were listed on the National Register, SPHO identified the property as a Traditional Cultural Property and determined that the impacts of the project could not be mitigated to a less than significant level, and therefore could be not found consistent with Section 30244 of the Coastal Act. Ultimately, the property in question was protected by the Commission because of this determination.

The situation at Banning Ranch is similar. Banning Ranch is immediately adjacent seaward of Fairview Park in Costa Mesa where a prehistoric village site of 18 acres was found, called Genga. Over the years, more than 235 burials have been found within the park site, as well as countless other objects, including shells, religious and ceremonial objects and asphaltum (crude oil) lined baskets. The village site spanned 3 time periods: millingstone, intermediate, and late pre-historic horizons, which is very unique. Slightly farther inland, following the Santa Ana River course, 2 miles inland of the Banning Ranch northern property line, a small village site connected to the larger village of Genga was found with 20 burials and additional religious and cultural objects. 3 miles inland of the Banning Ranch property line another small village site was found with 19 more burials, as well as whale vertebrae and fishhooks, shells, and other objects. These village sites contain objects that were collected from the ocean. The inhabitants of the inland village sites likely would have used or traveled through the Banning Ranch site and surrounding areas to access these coastal resources.

Ethnographic interviews yielded information about the connection between Genga and the smaller surrounding village sites. It is described as a village complex, and all the villages were found less than 1 mile from each other. All of the sites were found on the Western Newport Mesa, where Banning Ranch is located today. Because of this, Native Americans and some

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professional archeologists believe that the Banning Ranch site is another village site that has connections to the larger village of Genga.

Archaeological Studies on Banning Ranch

To date several cultural resource studies have been conducted on the Banning Ranch site. Archaeological sites were originally found in the 1930s, but not given identification numbers (ORA) until 1964, 1979, 1980, and 1998 investigations. Additional testing was done at the time of CEQA review in 2009 and further investigation was done in August 2016.

1930s investigation

Archeological records of the inland adjacent Fairview Park site, indicate that a dairy site (the Banning Dairy Site), located 1 ½ miles south of Fairview Park contained a burial with a decomposed skeleton, under which was a rough floor of sand stones. Two (2) minor residential bases on the Banning Ranch site are located almost exactly 1 ½ miles south of this point in Fairview park. According to this record, the burial was located on the Banning Ranch site, near these residential bases. The record goes on to indicate that the investigation started on the Banning Ranch site because the archeologist at the time believed that there would be a community burial site somewhere around that location.

Native Americans believe that many more burials will be found on the site if it is subject to grading and ground disturbance. Native American tribes note that ancestors were often buried in coastal locations overlooking water sources, and much evidence exists to support this supposition. The discovered prehistoric villages surround Banning Ranch had many burial locations that were located along the bluffs adjacent to the historic flow of the Santa Ana River facing West. Native Americans believe that there are ancestor burials located along the western bluffs of the Banning Ranch site, facing the river and the ocean.

1980s investigation

As a result of additional oil well drilling in the 1980s, Mobil Oil hired archaeologists to investigate sites and perform data recovery and excavation of areas that were planned to be oil wells prior to drilling. Studies were done by VanHorn in 1980-1982 which identified 2 minor residential bases and sites of significance. A small "roasting platform" made from fire - cracked rock was found (and left in place) which indicates an early phase of the prehistoric occupation of the site. The archeology notes indicate that the depth of this deposit exceeded 140 cm, at which point digging was stopped due to lack of funds and time. The full potential of this deposit was not reached and it still holds significance. The report notes that the site prehistoric, millingsone, and paleocoastal time periods may be represented:

[There is] evidence that the Late Prehistoric or Gabrielino Horizon and the preceding Intermediate Horizon are both stratigraphically represented at the site...prehistoric people exploiting a broad array of animal and plant food, coastal sites typically comprising dense shell middens. Prior to this time, particular emphasis seems to have been placed upon seed gathering as evidenced by a preponderance of stone milling tools. These tools were unknown to the earliest inhabitants of southern California, who seem to have survived principally by hunting. It is possible that this entire sequence is represented at [this archeological site]...

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VanHorn also draws comparisons between the Banning Ranch site and the Genga site: *The general sparsity of shell in the older horizon suggests strong similarities with Ora-58 [the Fairview Site] situated about a mile to the north.*

2009 investigation and Eligible sites

The 2009 investigation done for the preparation of the EIR did not investigate for new, unknown sites, but re-visited the 8 archeological sites that had been previously documented in order to determine their eligibility for listing on the National Register. In the process, the archaeologists identified a third residential base, that is considered a major residential base.

To recap the findings of the EIR, in the opinion of the archaeological consultant that prepared this portion of the EIR, three of the sites (CA-ORA-839, CA-ORA-844B, and CA-ORA-906) are eligible for listing in the California Register of Historic Resources (CRHR) and the National Register of Historic Places (NRHP). These three sites, in combination with other non-contributing archeological sites and natural features on Banning Ranch, make up the Native American traditional cultural landscape.

A resource is eligible for listing on the NRHP if it meets the following criteria found in Public Resources Code Section 5024.1 and 14 California Code of Regulations Section 4852):

- A. Is associated with events that have made a significant contribution to the broad patterns of California's history and cultural heritage;
- B. Is associated with lives of persons important in our past;
- C. Embodies the distinctive characteristics of a type, period, region, or method of construction, or represents the work of an important creative individual, or possesses high artistic values; or
- D. Has yielded, or may be likely to yield, information important in prehistory or history.

The EIR archaeological consultant further opined that one of the cultural landscape's archaeological sites rises to the level of a unique archaeological resource because it contains data that supports the theory the region was occupied during the 3 periods: Late Prehistoric, Millingstone, and the Intermediate Period, which had not been supported by other sites. It also yields information about how Native Americans in coastal Orange County migrated and settled due to changes in sea level rise. Public Resources Code Section 21083.2(g) defines a unique archaeological resource as follows:

[an] archaeological artifact, object, or site about which it can be demonstrated that, without merely adding to the existing body of archaeological knowledge, there is a high probability that it meets any of the following criteria:

1. Contains information needed to answer important scientific research questions and that there is a demonstrable public interest in that information.
2. Has a special and particular quality such as being the oldest of its type or the best available example of its type.
3. Is directly associated with a scientifically recognized important prehistoric or

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historic event or person.

During the CEQA process, archeologist evaluated the archeological sites that were previously found on Banning Ranch. The evaluation re-visited 8 known archeological sites and completed the work to federal level standards (Section 106 of the NHPA) because of the need for federal permits. 3 archeological sites on the Banning Ranch property contain 3 residential bases that are eligible for listing on both the National Register of Historic Places (NRHP) and the California Register of Historic Resources (CRHR). The EIR states that final determinations are to be made by the State Historic Preservation Officer (SHPO).

Other resources (5 other archaeological sites) found on the site include thick deposits of shell and lithic scatter, and further evidence of a large population of inhabitants on the site, supporting the idea that the Banning Ranch site is another prehistoric village site. All 8 known sites are included on the “Banning Ranch Cultural Properties and Landscape” Sacred Lands file with the NAHC.

Because these sites are eligible for listing on the NRHP they are protected by the Office of Historic Preservation. Sites that are on the National Register and sites that are eligible for listing are afforded the same protections. As proposed, these 3 sites are avoided by the development plan. Additional testing done in August 2016 determined the boundaries of these sites to ensure the development plan avoids them.

August 2016 Study

Because the EIR investigation focused only on the eligibility of listing for each known site, and there had not been thorough investigations to determine if there were additional sites that may be impacted by the proposed development plan, the applicant was informed on several instances through incomplete letters that additional testing would be required and an Archaeological Research Plan (ARP) would need to be submitted to guide further testing. These documents are typically peer-reviewed and reviewed by Native American groups with ties to the land in question, which is particularly important for Commission staff because there is no Commission Archeologist. When the applicant filed for dispute resolution over non-filling letters, these issues were dropped. When archeological documents were finally released to local tribal groups in June 2016, there were many concerns noted with the lack of adequate testing to date and the undetermined impacts of the project upon known and unknown resources.

Ordinarily, archaeological testing on sites where there are known archaeological resources should be carried out through a permit for the implementation of an ARP. The goal of the ARP is to determine where development can be allowed that will avoid impacts to archaeological resources and that those resources can be preserved in place. Consistent with past Commission action, the ARP must be peer reviewed and be subject to review and comment by the State Historic Preservation Officer (SHPO), Native American Heritage Commission (NAHC) and affected tribal groups. Native American monitor(s) must also be present during implementation of the ARP. The ARP must also include the preparation and submittal of a final report. The final report would also be subject to the same review and comment of the ARP.

The applicant submitted an ARP (CDP application 5-13-032) in July 2014 for the archaeological testing/salvage that was previously carried out during investigations for the EIR in 2009. The

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ARP that was submitted only revisited already known sites, and focused on the archeological sites' conditions and whether or not the sites were eligible for listing on the California Register of Historic Resources or the National Register of Historic Places. The ARP did not demonstrate that the archaeological testing already performed was adequate to determine that the proposed development (5-15-2097) would not impact known or unknown archaeological resources. Since the ARP was drafted, Native American groups with ties to the land have stated collectively that adequate testing has not been done and that additional testing should precede any approved development plan.

The ARP notes: The fact that the Newport Banning Ranch Project site is located in this coastal, lagoonal habitat, most of which has been destroyed and developed throughout most of Southern California, and that little to no archaeological investigation has taken place here, creates its own "data gap" in Southern California coastal archaeology. This makes any relevant information gathered as a result of the study that much more important.

As such, additional testing to determine if all sites (sites currently known and any others that are yet-to-be discovered) are avoided by the proposed development plan subject is necessary. As a result, the applicant applied for a second permit (CDP 5-16-0649) to implement a revised ARP that was approved at the August 2016 hearing. The applicant conducted Ground Penetrating Radar (GPR), which identified anomalies. The permit approved the test pits to investigate the anomalies, determine the approximate borders of known archeological sites within close proximity of the proposed development footprint, and to test for potential additional archeological sites that are yet to be found within the development footprint. A summary of the testing was submitted to Commission staff on August 23, 2016, and to the Native American groups, and the NAHC for review and comment.

The August 23, 2016 submittal, "Banning Ranch Archaeological Testing Memorandum", was an executive summary describing the archaeological testing that was carried out on a portion of the project site from August 17 through August 21, 2016. The executive summary is a six page memo and eight additional pages containing a spreadsheet of the excavations and corresponding maps. Commission staff contacted the applicant and requested that the submittal also be shared with the Native American groups identified by NAHC to be culturally tied to the project area for their review and comment, as was required by the Administrative Permit that authorized the testing. No comments have been received to date from the Native American groups to whom the information was sent. Staff also requested the applicant submit the final report noting that the August 23, 2016 submittal was an executive summary.

On September 1, 2016 the applicant submitted "Banning Ranch Archaeological Testing", a memorandum dated September 1, 2016 with an email stating the submittal constitutes the final report . The six page final report contains several deficiencies including incomplete and unsupported statements.

The test results show that a portion of the development as proposed by the applicant encroaches into the known archaeological site CA-ORA-148. However, this encroachment is written off as insignificant with a statement that the portion of the archaeological site

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where the development is proposed was, “found to lack sufficient density, diversity, and integrity to address any research question relevant to the site and/or surrounding region”. Despite this statement, CA-ORA-148 is a known archaeological site indicating that it is an area that was used by Native American tribes in prehistoric times. While it may or may not be able to address scientific research questions, this archaeological site as well as the other 7 known sites on the project site nonetheless have value to several Native American tribal groups as a documented traditional cultural use area. The Commission further notes that the entire 401 acre property has been designated by the NAHC as a Traditional Cultural Landscape and all 8 known archaeological sites have the NAHC designation of Traditional Cultural Properties. The archaeological report fails to acknowledge these NAHC designations but instead discusses whether the known sites can answer unspecified scientific research questions or whether the sites are eligible for listing in the National Register of Historic Places.

Although the stated goal of the testing was to determine the boundaries of six known archaeological sites that are adjacent to the applicant’s development footprint or within the oilfield cleanup areas, and the Testing Results Summary (page 1) of the 9/1/16 final report states, “3. Existing known boundaries of Cultural Resources Sites did not change as a result of the testing”, the testing that was performed on the project site does not support this determination. Although the report includes maps showing the proposed development footprint and the shovel test pit (STP) excavation locations, the maps do not show the boundaries of the known archaeological sites. From the testing that has been done to date, it is not possible to conclude the proposed development will not encroach into the archaeological sites nearest the proposed development footprints because the boundaries of the site have not been determined. The boundary determination is especially critical where an archaeological site still retains significant midden soils, such as with CA-ORA-843 located west of the proposed North Family Village.

Additionally, the Commission finds that the archaeological testing carried out on the project site does not demonstrate that the project as proposed will not adversely impact known archaeological resources that are outside of the development footprint but that would be impacted by oilfield cleanup activities. Despite the fact that Testing Results Summary 5 states that avoidance measures that have been incorporated into the project design will eliminate impacts to “Historic Properties”, no recommended avoidance measures were identified in the report. During the site visit on June 10, 2016 the developer and archaeologist stated they would carry out oilfield cleanup operations in a manner that would lessen or avoid impacts to the archaeological sites that are within the proposed open space areas, such as hand cutting and removal of pipelines and other oil infrastructure, the use of lighter weight mechanical equipment and vehicles where hand work is not feasible, and cap the archaeological sites and/or utilize a sensitive trail design to avoid public access impacts to the archaeological sites. However, none of these measures are contained within the report, or anywhere else in the project proposal, and, thus, for any development approved, such measures ~~must~~ **would need to** be addressed through conditions of approval.

Finally, the Newport Banning Ranch property is located immediately adjacent to a once highly significant prehistoric Native American village known as “Genga”. The

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archaeological testing that has been done to date has not addressed the extensive archaeological work done by others in the area, evidenced by only 3 references cited in the final report and no mention of the well-known and readily available past archaeological work (including but not limited to SERA, WPA, Paul Apodaca, Hank Koeper, Roger Mason and Nancy Wiley) in the body of the report. ~~As conditioned, Special Condition 17 requires preparation of a revised ARP to address the deficiencies identified above and to consider any comments of the Native American tribal groups with ancestral ties to the area, other archaeologists (peer review) in designing the ARP, as well as any comments from NAHC and SHPO. By doing this, a research plan will be developed and implemented that will determine the location (boundaries) of archaeological/cultural resources on the project site identify project design features and mitigation measures that should be implemented to avoid adverse impacts to any significant intact cultural these resources.~~

Resources found on Banning Ranch

Four temporal horizons are seen along the Southern California coast: Early Man, Milling Stone, Intermediate, and Late Prehistoric:

Cultural Period	Radiocarbon Dates
Paleo-Coastal Period (PC)	
PC	Prior to 8000 YBP
Milling Stone Period (MS)	
MS1	8000 to 5800 YBP
MS2	5800 to 4650 YBP
MS3	4650 to 3000 YBP
Intermediate Period (INT)	
INT1	3000 to 2300 YBP
INT2	2300 to 1350 YBP
Late Prehistoric Period (LP)	
LP1	1350 to 650 YBP
LP2	650 to 200 YBP
YBP: years before present Source: Mason and Peterson 1994; Drover et al. 2001a:17.	

The ARP describes how unique the deposits are at the Banning Ranch site:

The Newport Banning Ranch archeological sites allow for a different perspective on resource procurement and settlement as the sites are farther from: the upper Newport Bay, the freshwater marsh in Irvine, and the San Joaquin Hills, and the rocky coast of Corona del Mar.

On Banning Ranch, at least three time periods are represented, and possibly all four in cultural deposits ranging in depth from 60 cm to 240 cm and ranging in size from a meter to 3 acres. This is very rare for Coastal areas in the region. On the Banning Ranch site, the Late Prehistoric Period is represented by the presence of beads and prehistoric tools.

The rarely seen early intermediate period is also represented on the site. The ARP explains that environmental changes in Newport Bay region are related to an absence of occupation in the

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early and middle intermediate period (3000-2500 YBP⁸) during a decrease in sea level converting the saltmarshes to freshwater, which resulted in a decrease in available shellfish (a main food source). A settlement shift may have occurred during this period away from these freshwater areas. As a result, very little is known about the early intermediate period. The ARP notes that very little is known about the intermediate period major settlement shifts from a mobile year-round system to a sedentary territorial system. What is unique about the archeological deposits on the Banning Ranch site, is that there is evidence (shellfish) of settlement during the early intermediate period.

The Millingstone Period is represented on the site indicating rocky shore habitat exploitation with food sources such as shellfish, shark, sea otter, and other marine species.

What is even more fascinating, is that one archeological site on Banning Ranch may pre-date the onset of the Milling Stone Horizon (i.e. prior to 6,000 YBC) and may represent two major Periods of occupation: the Late Prehistoric Horizon, and a shift from the Milling Stone Period to a pre-Milling Stone (cf. Paleocoastal) Period. Given the limited regional knowledge of the occupation and habitat of the area, the resources on NBR can provide unique chronological and subsistence information and change about two or possibly three prehistoric cultural periods. The 2009 investigation notes:

The data from this site could easily contribute to the research design categories of chronology and subsistence and settlement patterns. Again, little is known about the prehistoric use of the mouth of the Santa Ana River and its estuary; therefore, the data from this site could easily contribute to research questions regarding chronology and subsistence and settlement pattern.

In summary, 1 burial, 2 minor residential bases and 1 major residential base have been found to date on the site, and several areas of thick shell deposits, a roasting platform, as well as tools and other objects.

Project Impacts on Cultural Resources and Archaeological sites

Many Native Americans and professional archaeologists commented that because boundaries of the archeological sites had not been determined, the Commission cannot be sure that the development footprint avoids these resources. Because some of the known archaeological sites are 2-3 acres in size, it is important to determine the boundaries of these areas to ensure that they are not impacted by the proposed development.

Additionally, many Native Americans and professional archaeologists commented that the testing that had been done to date was inadequate to determine if there are additional archaeological sites within the proposed development footprint. Prior to August 2016, there was no investigation within the proposed development footprint, and the ARP did not discuss the potential for finding any more archaeological resources within the development footprint. In past Commission actions, the Commission has not approved a permit for development in locations of

⁸ YBP stands for "Years before Present," a scale of temporal measurement used in Archeology. Because the "present" time changes, standard practice is to use January 1, 1950 as commencement date of the age scale.

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known archaeological significance without an ARP that has been peer reviewed and that adequately investigates the potential for additional archaeological resources within the proposed development footprint (5-05-098/5-05-229 (Hellman Tank Farm)).

Impacts of Development Plan

The 3 known archaeological sites that are eligible for listing would be avoided by the proposed residential and commercial development plan and are conditioned to be avoided by the proposed soil clean-up, but the other sites would be impacted by the planned development. Because the proposed project involves significant grading, there is a high likelihood of discovering additional resources that are currently unknown. ~~Only as conditioned to concentrate development within the buildable areas as shown on Exhibit 4 would the development likely avoid all currently known archeological sites. The Commission also imposes Special Condition 17 which requires monitoring during grading. The development plan, as conditioned, is the least likely to impact any future yet-to-be discovered archeologist sites.~~

Impacts of Soil Clean Up

Complete avoidance of resources during the clean-up activities is possible and could be achieved by capping or avoidance of known cultural resource locations. In contrast, the applicant proposes to mitigate for any impacts caused to any unknown archeological resources by excavating (data recovery or salvage) the resources and donating them to the Cooper Center in Santa Ana, CA. However, this mitigation option is not most protective of the cultural resources and is not an appropriate treatment method in the opinion of many tribal groups.

Instead of the most protective mitigation measure, i.e. capping or avoidance, the applicant proposes to remove any yet-to-be found resources if impacted by oil clean-up. Capping of the resource site is only proposed as a secondary measure, to prevent further impacts to the site from foot traffic, erosion, etc. Data recovery excavation, again, is proposed for unknown resources as opposed to capping or redesign of the project to avoid the impacts. The applicant's plans do not include capping these resources, including any human burials found during grading.

The applicant's proposal includes mitigation measures which require that a qualified archaeologist monitor the grading and excavation activities and conduct salvage excavation as necessary. Additionally, a Native American representative is proposed to be present onsite during all grading and excavation activities.

~~As conditioned by Special Condition 8, sampling within 200 feet of all known archeological resources is required and shall be done in the least invasive way possible, to determine if cleanup is required in these areas. Furthermore, Special Condition 17 establishes further requirements related to protection of cultural resources including but not limited to establishing monitoring procedures that are inclusive of all Native American groups that have an interest in the resources on the site.~~

Impacts of Unpermitted Development

During investigations for the EIR, the required coastal development permit for the development activities associated with the resources assessment, including excavation through shovel test pits

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and hand units, was not secured, and thus, this archaeological testing was not subject to Commission review prior to its occurrence. Additionally, fire-affected rock was discarded during this investigation, which has yet to be mitigated.

Further, the 2010 archaeological investigation concluded:

Earth-moving activities associated with oil lease production have greatly disturbed all of the recorded cultural resources on the Project site. Disturbances that have affected cultural resources include road building, quarrying and preparation, closure, and rehabilitation of drilling pads. Fill, acquired from numerous locations on the property through time, was often utilized to create roads and pad sites in the lower wetlands.

In some cases, these disturbances have resulted in isolated cultural loci within sites as consequences of grading rather than cultural activities. The fact that disturbances have occurred to most sites does not diminish their scientific value in light of the general lack of knowledge regarding the prehistoric occupation of the Santa Ana River mouth estuary.

In 1982, 95% of ORA-843 had been destroyed by grading, but the portion that was left in good condition and recorded as very significant. During the 2010 investigation, ORA- 843 was not found significant and was lacking integrity indicating that the site had been subject to damage. This damage is yet to be mitigated.

~~*Avoidance of Resources by Alternative Buildable footprint*~~

~~In contrast to the applicant's proposal, the alternative development plan of the "proposed development areas" as conditioned, would lessen or avoid significant adverse impacts to known archeological sites on Newport Banning Ranch. **Special Condition 17** requires capping of the known sites and monitoring of grading and construction activities that have the potential of adversely impacting additional unknown sites and cultural resources that may be found during site grading and construction. The Special Condition outlines the procedures that must occur prior to development and if cultural deposits are encountered during the grading and construction, which includes a permit amendment to avoid any found resources, regardless of their significance or eligibility for listing.~~

The measures that are most protective of both known and unknown resources (capping and avoidance), which would lessen or avoid additional adverse impacts to cultural sites, would be consistent with previous Commission action (CDP 5-97-367, Hellman and HNB-MAJ-1-12, the Ridge). The proposed project, which results in avoidable impacts to cultural resources, is not consistent with the Section 30244 of the Coastal Act. ~~Only as conditioned, can the project be found consistent with Section 30244 of the Coastal Act.~~

Conclusion

As described above, the Banning Ranch site will be subject to Section 106 of the National Historic Preservation Act, which requires federal agencies to take into account the effects of undertakings (projects) upon historic properties (including pre-historic properties). During this review process and before issuing a permit, Army Corps will have to engage the State Office of

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Historic Preservation (SHPO) and federally and non-federally recognized tribal governments, once the tribe has notified the agency of its intent to participate.

One step in the Section 106 process is to identify possible historic properties and determine their National Register status, which is done in consultation with tribes. The national status of 3 individual archaeological sites is already determined, however the status of the 3 archaeological sites in connection to the other non-contributing archaeological sites that have been destroyed and natural features, and the site as a Traditional Cultural Landscape and Sacred Land has not yet been evaluated and boundaries have not been determined for National listing.

Like any other types of historic properties, a property that once had traditional cultural significance can lose such significance through physical alteration of its location, setting, design, or materials. In some cases a traditional cultural property can also lose its significance through alteration of its setting or environment. For example, a location used by an American Indian group for traditional spirit questing is unlikely to retain its significance for this purpose if it has come to be surrounded by housing tracts or shopping malls.

The Sacred Lands listing of the Banning Ranch site as a traditional cultural landscape notes that the entire site was used for religious and medicinal cultural purposes, was a village site connected to the larger village of Genga, and that the oil operations on the site have destroyed the integrity of some archeological deposits but have not destroyed the religious and cultural significance of the site to date. However, the Native American tribe that listed the site and other tribal groups believe the introduction of housing and commercial development and roads across the site as proposed, with the introduction of noise, lights, impacts to the wildlife, etc. would destroy the character of the landscape and would threaten the cultural and religious significance of the property, which is currently primarily open space.

As of now, the site as a whole is not listed with SHPO and has not been deemed eligible for listing. However, additional testing may be necessary and additional review by Federal agencies is required. If the archeological sites are connected and NAHC or SHPO determines that it does constitute a traditional cultural landscape, **then the development project would not be avoiding all known archeological resources.** ~~then as conditioned the applicants are required to apply for a permit amendment to avoid parts of the land that are deemed eligible for listing on SHPO in order to be found consistent with Coastal Act policies. If burials or significant resources are found during grading, applicants are required to leave the burials in-situ and apply for a permit amendment to address them.~~

The clean up of the site as proposed would impact archeological resources, and the residential and commercial development plan as proposed would likely avoid known resources, however it would not attempt to avoid or cap unknown resources found during the grading process. Additionally, only two of the nine affected tribal nations have supported the proposed project, mainly because there are additional unanswered questions regarding the status of the land as a sacred landscape, and some tribal groups feel it is premature to make a decision without the opinion of SHPO on record. Because of the public process mandate in the Coastal Act, tribal groups should be involved in the planning of the project and should have sufficient information about the status of the land as a

sacred land before the Commission approves a development project on the site. While Federal permitting processes usually do not take place until after the state and local permits are approved, the project could be conditioned to return for an amendment to limit the scope of the development should a federal agency determine that the site cannot support the development plan as proposed. The proposed project, which results in avoidable impacts to cultural resources without providing reasonable mitigation is not consistent with Section 30244 of the Coastal Act.

I. PUBLIC ACCESS AND RECREATION

The Coastal Act provides that development should maintain and enhance public access to the coast and encourages the provision of public coastal recreational. The following policies which encourage public access and recreational use of coastal areas are applicable to the proposal:

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, in part:

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

Section 30214 of the Coastal Act states, in part:

The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case include, but not limited to, the following:

- 1. Topographic and geologic site characteristics.*
- 2. The capacity of the site to sustain use and at what level of intensity.*
- 3. The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses...*

Section 30222 of the Coastal Act states:

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.

Section 30252 of the Coastal Act states, in part:

The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing non-automobile circulation within the development, (4)

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providing adequate parking facilities or providing substitute means of serving the development with public transportation....(6) assuring that the recreational needs to new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of onsite recreational facilities to serve the new development.

Section 30253(d) of the Coastal Act states, in relevant part:
New development shall do all of the following:

(d) Minimize energy consumption and vehicle miles traveled.

Visitor Serving Uses and Recreation and Public Access

The proposal includes a resort complex on the southern mesa, a low-cost hostel, visitor serving commercial, bluff trails, a park, and public parking. The Resort Inn is proposed to be a 75 room high-cost resort located on the southern mesa of a coastal bluff overlooking PCH. The Resort would be developed in conjunction with visitor serving commercial and retail space, and a parking garage. The resort would include a lobby, a spa, a kitchen, a restaurant, and a pool. The approximate square footage per guest room would be 900 sq. ft. and there would be some number of suites, with approximately 43 residential units above. The Resort Colony would also include a 20-bed low-cost hostel. The project includes development of approximately 5 acres of active public park. The proposed development includes parklands dedication to the City of Newport Beach. The Southern Resort, hostel, retail, and Community park would impact areas on the site that supports foraging Burrowing owls and it also impact large semi-contiguous patches of purple needle grass.

These elements of the proposal are consistent with Sections 30222 and 30252 in that they provide visitor-serving commercial recreational facilities on private lands and they enhance public access to the coast with the proposed shuttle service and provide for the recreational needs to new residents of the proposed residential communities with parks so as to avoid overloading nearby coastal recreation areas. The proposed hostel would be consistent with the above policies and with Section 30213 by providing an overnight lower-cost visitor serving facility. However the resort, hostel, retail, and park would have permanent impacts to purple needle grass, gnatcatcher habitat and Burrowing Owl habitat, and ESHA scrub communities. As discussed in finding for ESHA above, these impacts cannot be found consistent with Section 30240 of the Coastal Act. As proposed, the project is inconsistent with Sections 30210 and 30214, which require that the development of public recreational opportunities shall not be at the expense of, or the overuse of natural resources.

~~Only as conditioned by **Special Condition 1** for a revised site plan that avoids ESHA can the project be found to be consistent with Sections 30210 and 30214.~~

The proposed 7-mile trail network would be located within the proposed Open Space Preserve comprising the majority of the site, and would connect to the existing regional coastal trail network. The trail network is consistent with all the public recreational and access policies above, including the provision of a low cost visitor serving use, and can be constructed in a way that is consistent with Section 30240, as conditioned, and would not impact the sensitive resources on the site. As such, the Commission supports the

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development of the trail network and Open Space Preserve, but does not support the development of the visitor serving commercial, high-cost resort, low-cost hostel, and public park in the location proposed because of the impact they would have on sensitive resources of the Southern Mesa. ~~The conditions of approval provide the opportunity for the applicant to relocate these elements within the 19.7 acre identified buildable footprint as an alternative to the proposed residential development.~~

~~The applicant has provided a response that suggests that the special conditions would remove all public access benefits from the project, which is inaccurate. The trail system and proposed public open space are public access and recreational elements supported by the conditions.~~

The applicant has indicated if the proposed project is limited the 19.7 acres of buildable area identified outside of the site constraints, then the remainder of the site (approximately 365 acres) would continue to be closed to the public and the soil would not be cleaned- up or remediated. The Commission action on this coastal development permit is addressing the elements of the project, as proposed by the applicant, that can or cannot be found consistent with Chapter 3 policies of the Coastal Act. Elimination of all public access and recreation improvements in conjunction with the new residential and commercial development of the site would likely not be found consistent with the public access protection and enhancement policies of the Coastal Act.

~~Section 30210 requires maximum access, which shall be conspicuously posted. The applicant has proposed many public facilities. Special Condition 16 requires a signage plan to direct the public to the public access and recreation easement areas on the project site and adjacent public access and recreation areas accessible from the site, as well as direct the public to refrain from entering and disturbing conservation areas on the project site and educates the public about the habitat value and lists common disturbances to wildlife which are to be avoided, including domestic pets, littering, loud noises, lights, etc. Directional signage on the trails is required and interpretative signage for to environmental and cultural education. The condition limits the use of Community monuments and entry signs into the development so as not create the appearance that the community is private. Only as conditioned, is the project consistent with Section 30210.~~

Parking

The Commission has consistently found that a direct relationship exists between the provision of adequate parking and the availability of public access to the coast. Section 30252 of the Coastal Act requires that new development should maintain and enhance public access to the coast by facilitating the provision of transit service and providing adequate parking facilities. Therefore, in order to conform to the requirements of the Coastal Act, the proposed project must provide adequate parking in order not to negatively impact existing parking for coastal access.

Public parking would be provided throughout the site to support access to and use of the proposed park and trail system and proposed on public streets, within community parks, and additional public parking in the retail and report areas. Parking would be available for use by coastal recreationists and park users as capacity permits. The applicant proposes all parking in the public areas to be free and open to the general public. The Conditional Use Permit for the

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resort issued by the City of Newport Beach indicates that 63 parking spaces are required for the resort and hostel. All single family homes would have 2-car garages to provide sufficient parking and multi-family homes would have parking structures with sufficient spaces for the residences. The residential structures are all proposed to be self-parked and meet the parking standards of the City of Newport Beach zoning code. The site plan indicates there would be 1 parking structure proposed in the mixed-use Urban Colony and 1 in the Southern Colony, however complete architectural and construction plans were not submitted.

While the project may be consistent with the Coastal Act Sections above, the development of the Southern Mesa would not be consistent with Section 30240 and would have detrimental impacts on the habitat present in the south of the site. Only resource-dependent uses are allowed on the Southern Mesa including the development of a trail network to be consistent with Section 30240.

Transportation

Section 30253(d) of the Coastal Act requires that new development minimize energy consumption and vehicle miles traveled. Therefore, in order to conform to the requirements of the Coastal Act, the proposed project must provide measures to minimize energy consumption and vehicle miles traveled and facilitate the provision of transit service. Section 30252 of the Coastal Act states that new development should include provisions for non-automobile circulation and provide adequate parking or provide alternative transportation. The proposed trail networks would provide for circulation across the site, as well as access to regional trails and the nearby coast.

The trail network can contain different types of trails for pedestrian use and wheelchair use, constructed with native soils, or decomposed granite or similar material and multi-use trails to allow for alternative transportation through the site and around the site. Non-automobile vehicles such as golf carts, bicycles, and automatic wheelchairs, and similar transportation methods could be allowed on multi-use trails, which shall also support pedestrians. Multi-use trails can be constructed with permeable paving, such as interlocking pavers, bricks, decomposed granite, permeable asphalt, or a similar material. **Trail networks such as these could be found consistent with Section 30240 with conditions, however the project was denied for other Coastal Act inconsistencies.** ~~These elements of the proposal, as conditioned by Special Condition 4, are consistent with Section 30252 and are considered resource-dependent uses consistent with Section 30240.~~

Construction Traffic

As part of its proposed oilfield and clean-up plan, NBR proposes to treat and bury onsite hydrocarbon contaminated soils and debris (including road bed material and concrete waste). In order to carry out these proposed activities onsite, as well as other associated activities such as material stockpiling, concrete crushing, and clean soil harvesting (for backfilling clean-up excavations), NBR needs a substantial amount of space to operate. In the most recent plans provided to Commission staff (shown in **Exhibit 17**), NBR's configuration of these "logistics areas" encompassed approximately 50 acres on the upland mesa portion of the site, including roughly 20 acres in the central and southern mesa areas. As discussed in the prior section of this report on environmentally sensitive habitat area (ESHA), a substantial portion of the central and

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southern mesa has been determined to be ESHA and would therefore be unavailable for use during material treatment, disposal, stockpiling, and harvest activities. ~~as required through **Special Condition 7**. The result of this is that~~ NBR may not have sufficient area to carry out the entirety of its proposed material treatment and disposal operations onsite and may need to transport material offsite for treatment or disposal. While NBR had already proposed to transport offsite the most heavily contaminated material, additional material would likely also need to be removed.

The precise volume of material that may need to be transported offsite is unknown but can be roughly estimated based on the approximate total volume of material that would be generated during clean-up operations - between 270,000 and 314,000 cubic yards - and the space that remains available on the site to support NBR's proposed "logistics areas" outside of ESHA, wetland, ESHA and wetland buffers, cultural resource sites and other spatial constraints. Because NBR's latest plans indicate that approximately 50 acres would be needed for the logistics areas to address 270,000 to 314,000 cubic yards of material onsite, one can estimate that reducing the available area by 20 acres or 40% (the area of the proposed logistics areas within ESHA) would similarly reduce the onsite treatment and disposal volume capacity by 40% or between 108,000 and 125,600 cubic yards. This is the volume of material that may then need to be transported offsite. ~~However, **Special Condition 7** establishes a process whereby this volume can be further reduced. Specifically, this condition would require that if NBR does not have sufficient land area to carry out all of its proposed material stockpile, treatment, processing, borrow, and disposal activities onsite, it shall implement alternative material treatment and disposal options to fit as much of these activities as possible onsite. Such alternative treatments would include the following:~~

- ~~1. As provided for the in the Santa Ana Regional Water Quality Control Board approved Remedial Action Plan, placement of clean, treated material within clean-up excavations in the lowland portion of the site (including any such excavations in ESHA, wetlands, ESHA buffer, or wetlands buffer in the lowland portion of the site) rather than disposal pits in the upland area;~~
- ~~2. Phasing clean-up and material treatment activities to reduce treatment volumes and areas needing to be processed at one time;~~
- ~~3. Offsite rather than onsite disposal of concrete waste that cannot be recycled and reused onsite;~~
- ~~4. Use of more selective extraction and removal techniques for waste materials such as dispersed asphalt-like material, gravel and concrete (such as targeted removal rather than grading) that reduces the volume of non-target material collected;~~
- ~~5. Use of direct loading of excavated materials onto trucks in place of stockpiling wherever feasible.~~
- ~~6. Reuse of removed asphalt, asphalt-like material, gravel, and concrete as roadbed, foundation, and construction materials whenever possible.~~
- ~~7. Off site disposal of soil and material volumes unable to be reused onsite or treated and disposed outside of ESHA, wetland, buffer, and cultural resource areas and lowland clean-up excavations.~~

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~~Implementation of these measures are expected to substantially reduce the volume of material that may need to be trucked offsite, potentially by 50% or more. For example, measure four on this list alone—selective removal of dispersed roadbed materials—could reduce the volume of waste material generated during clean-up operations by as much as 40,000 cubic yards. This would be accomplished through the selective collection of dispersed roadbed material (chunks of asphalt-like material, piles of gravel, and concrete pieces) rather than the proposed mass grading to a depth of 18” of the 19.2 acres in which this dispersed material is located. While the grading approach would be effective, it would also generate over 46,000 cubic yards of material, most of it likely made up of non-target clean soil. Several other measures on the list—reuse of material rather than burial onsite and placement of clean, treated soil within clean-up excavations—would also likely reduce the volume of material needing to be trucked offsite by a substantial amount.~~

However, these estimated volumes are rough and their potential to reduce offsite truck trips is uncertain. Therefore, it is appropriate to consider a worst-case scenario in which the area on the site outside of spatial constraints (ESHA, wetlands, buffers, cultural resource areas, etc.) only has sufficient capacity to handle 25% of the estimated waste material volume and none of the measures listed above provide any benefit (essentially assuming a 75% reduction in the volume of material that can be treated onsite in an effort to address a worst-case scenario). This would leave 202,500 to 235,500 cubic yards of material that would need to be transported offsite for disposal. As described above, this is expected to be a great exaggeration but as a worst-case scenario, it nevertheless provides context. Using the assumption that the City of Newport Beach adopted in its EIR – that a transport truck has a capacity of 16 cubic yards – removing these volumes from the site would require between 12,657 and 14,719 round-trip truck trips over the entire three to five year period of clean-up operations (somewhere on the order of 6,000 to 10,000 individual trips to and from the site per year). For comparison, the beach replenishment project at Broad Beach included the transport of approximately 300,000 cubic yards of material - about 21,000 truck trips - over six months. Given the dense urban area surrounding the NBR site, these truck trips may have potential traffic implications that could negatively affect coastal access by increasing vehicle transit times to the coast or discouraging visitation.

To better understand these traffic implications, Commission staff compared this worst-case truck transit scenario with the traffic analysis provided in the City of Newport Beach’s EIR for the project considered in that document (which was substantially larger than NBR’s current proposal and included 1375 residential units, 75,000 square feet of retail space, and a 75 unit resort). To evaluate the potential traffic impacts of this development on the surrounding area, the EIR used the well-established protocols, generation factors and equations for forecasting traffic from Trip Generation (8th Edition) published by the Institute of Traffic Engineers. With this approach, the EIR determined that the number of vehicle trips (defined as one-way vehicular movements, either entering or exiting the generating land use) that would be added to streets in Newport Beach and Costa Mesa once the project was completed would approach 15,000 *each day*.

For comparison, this is 30% to 60% more trips in a single day than would be generated over an entire year under the worst-case offsite transport of waste material scenario described above. Most importantly, however, the EIR also found that this amount of traffic (14,989 trips per day) would not cause any significant impacts after implementation of several mitigation measures

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designed to increase traffic flow at several of the most traffic-prone intersections near the project site.

The EIR also specifically considered traffic generated by the offsite trucking of waste material during the oilfield clean-up and while the volume of material in this analysis was substantially less than the worst-case scenario presented here, the EIR imposed hourly limits on construction truck traffic of 16 trucks per hour between June 1 and September 1, and 25 trucks per hour at all other times. Additionally, the EIR requires that the applicant prepare a Traffic Management Plan to obtain a Haul Route permit from the City that identifies the planned travel patterns for haul vehicles.

These traffic mitigation measures would enhance traffic flow in the project area and protect against adverse impacts to coastal access that may result from construction traffic associated with the proposed project. ~~As such, they are included in **Special Condition 29** which would limit truck traffic to the 16 trucks per hour in the summer months and 25 outside the summer months described above and require NBR to submit a traffic management plan that includes implementation of the transportation improvement mitigation program elements described in the EIR for Newport Beach and Costa Mesa.~~

Conclusion

While the project will provide public recreational opportunities in the form of trails, public open space, public on-street parking, visitor serving retail, and a resort colony, the project does not do so consistent with the protection of the natural resources on the site. Several elements of the project proposed for public access and recreation would have direct impacts to ESHA, **such as the development of the hotel and hostel and visitor serving commercial within the Burrowing Owl foraging ESHA, as described earlier.** The project is largely consistent with section 30252 **to enhance public access to the currently closed off site**, but is inconsistent with Section 30210 and 30214 which requires that the development of public recreational opportunities shall not be at the expense of the overuse of natural resources and inconsistent with Section 30240 for natural resource protection. ~~Only as conditioned for revised plans to avoid all impacts to ESHA and wetlands can the project be found consistent with the sections 30210, 30213, 30214, 30222, 30252, and 30253(d) and 30210 above.~~

J. SCENIC AND VISUAL RESOURCES

Section 30251 of the Coastal Act states [emphasis added]:

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

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Landform Alteration

Based on the applicant's 30% grading plans prepared by Fusco Engineering the proposed project would involve 1.4 million cubic yards of cut, and 1.36 million cubic yards fill, for a total of 2.77 million cubic yards of grading (Exhibit 10). This would constitute one of the largest grading projects to be undertaken in the Coastal Zone of California in recent years. Large areas of cut and fill are proposed to create level areas for the construction of homes, commercial development, and the park. There would also be areas filled for the construction of Bluff Road in Arroyos.

In addition to visual impacts, the landform alterations would require grading that has impacts upon biological resources within the arroyos and upon the mesa, including wetlands, impacts upon habitat buffer areas, and adverse changes to wetland hydrology. These impacts resulting from the proposed landform alteration are discussed more fully elsewhere in these findings in the "ESHA" and "Wetlands" sections.

The proposed project calls for the construction of three large areas for development designed to accommodate hundreds of housing units, the commercial retail and resort components. The area proposed for the Urban Colony is relatively flat as existing. Significant grading is proposed for the south village residential area, park, and resort colony. Heavy grading is proposed along the edges of the Main Arroyo at the location proposed for the water quality basin (near 16th Street) and the bridge abutments to support the Bluff Road bridge. The bridge would be 120 feet long with 40-50 foot long supports on either side and retaining walls would be constructed on the canyon edges. Fill is proposed on both sides of the Main Arroyo for the development of the bridge, which is also in the location of existing CBBS and CAGN habitat.

The proposed grading for the north village would change the landform from gently to steeply sloping natural grades to a relatively flat manufactured mesa and would fill wetland C and CC. This proposed development would degrade the natural landform appearance of the site and does not minimize the alteration of natural landforms as required under Section 30251 of the Coastal Act.

~~There are alternatives to the grading and filling of landscape features on the project site. As conditioned for revise plans grading would be confined to more level areas that do not require as much land movement, such as off of 17th street and avoiding the wetlands C and CC and avoiding impacting the head of the North-South Arroyo. Alternatively, building pads could be fashioned to accommodate individual building footprints (such as on the Sea Ranch property) such that mass grading could be minimized or avoided. As conditioned, the character of the existing arroyo and other landscape features would be maintained.~~

The Commission finds that the proposed project does not minimize landform alteration. There is ample space on the project site where development could be accommodated without the substantial alteration of existing landscape. Therefore, the Commission finds that the proposed project is inconsistent with Section 30251 of the Coastal Act. ~~Only as conditioned for revised grading plans based on the alternative "potential development areas" and that minimizes grading wherever possible can the project be found consistent with Section 30251.~~

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Visual Resources

The coastal bluffs of the site contain natural bluff formations as well as rare coastal bluff scrub vegetation. The natural resources are visible from Coast Highway and comprise a visual resource. Coast Highway is known as a highly scenic area. The proposed development would include a 50 foot high resort (with architectural elements for a structure up to 75 feet high) atop of the coastal bluffs facing PCH.

The visual analysis of the proposed resort shows that the resort would be visible from PCH. The height of the proposed resort is not consistent with the character of the area. The surrounding developments are limited to 35 feet in height. The structures immediately seaward of the resort and bridge are within the City of Newport Beach's Shoreline Height Limitation Zone, which limits the height of all structures to 35 feet high. Development is required to be visually compatible with the character of the surrounding areas. Because of the significant height differences, the proposed developments would not be consistent with the character of the areas, and therefore is inconsistent with section 30251 of the Coastal Act.

~~As conditioned for revised plans to avoid impacting areas of ESHA, the project would not be visible from PCH and the tall structures would be located inland near other existing tall structures. As conditioned, the project be found consistent with Section 30251.~~

K. WATER SUPPLY

Section 30250 of the Coastal Act states:

(a) New residential, commercial, or industrial development, except as otherwise provided in this division, shall be located within, contiguous with, or in close proximity to, existing developed areas able to accommodate it or, where such areas are not able to accommodate it, in other areas with adequate public services and where it will not have significant adverse effects, either individually or cumulatively, on coastal resources. In addition, land divisions, other than leases for agricultural uses, outside existing developed areas shall be permitted only where 50 percent of the usable parcels in the area have been developed and the created parcels would be smaller than the average size of surrounding parcels.

(b) Where feasible, new hazardous industrial development shall be located away from existing developed areas.

(c) Visitor-serving facilities that cannot feasibly be located in existing developed areas shall be located in existing isolated developments or at selected points of attraction for visitors.

Section 30250 of the Coastal Act requires that new development be supported by adequate services, including water supply, waste water capacity, and adequate road circulation.

Urban Water

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The Urban Water Management Plan (UWMP), the guiding document for local and regional water planning, is required to be updated every five years. Water suppliers to the City of Newport Beach include Municipal Water District of Orange County (MWDOC) which receives its water supplies from Metropolitan Water District (Metropolitan). Local urban water providers, including the City of Newport Beach, are also required to prepare an UWMP to be updated every five years. Each UWMP is required to analyze the reliability of water sources available to the water provider over a 20-year planning horizon considering normal, dry, and multiple dry years and to identify any new specific water supply projects it expects to rely on to meet its projected water needs. For the local region (Newport Beach and MWDOC), one of the most critical aspects of the regional Metropolitan UWMP is the determination of Metropolitan's ability to meet current and projected local water demands.

In 2005, Metropolitan adopted a 2005 Regional Urban Water Management Plan (Regional UWMP), and MWDOC adopted a 2005 UWMP. The City subsequently adopted its 2005 UWMP which was prepared through coordination and planning with MWDOC and Metropolitan to maintain consistent assumptions in projecting supply and demand.

The 2010 Water Supply Assessment (WSA) for the proposed development identifies the sources of the City's water supply and provides information relevant to the supply of water received by the City to be used by the project based on information provided in the City's 2005 UWMP. As the 2010 UWMP was not yet available (published in May 2011), the WSA utilized the most up-to-date water supply information at the time which was contained in the 2005 Metropolitan Regional UWMP and the 2005 MWDOC UWMP relevant to the City's water supply. A combination of water sources were explored for the project.

Imported Water

The City receives imported water from MWDOC, of which the City is a member agency. In turn, MWDOC receives much of its supply from Metropolitan, of which MWDOC is a member agency. Metropolitan's 2005 Regional UWMP contains a water supply reliability assessment with a detailed evaluation of the supplies necessary to meet demands of its member agencies, including MWDOC, over a 25-year period in average, single dry-year and multiple-dry year periods. Metropolitan uses the Southern California Association of Governments (SCAG) regional growth forecast and direct input from its member agencies in calculating regional water demand projections for southern California.

Groundwater

The City obtains groundwater pumped from four wells owned and operated by the City and managed by Orange County Water District (OCWD.) The City's wells are located in the City of Fountain Valley, approximately five miles north of Newport Beach. OCWD regulates the supply of groundwater to the City through a Groundwater Basin Management Plan that is updated every five years with the most current plan adopted in June 2015. The only constraints affecting groundwater supply to the City are the pumping capacity of the wells and pumping limitations established by OCWD to maintain the groundwater basins.

Recycled Water

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The City purchases some recycled water from OCWD. The City has programs and policies in place to promote increased recycled water use in future years including financial incentives as identified in the City's 2005 UWMP. Since the NBR-WSA was published, the OCWD Groundwater Replenishment System (GRS) went through an expansion which increased its water productivity from approximately 72,000 AF/year to 100,000 AF/year in 2015. The final expansion (currently being implemented) will increase productivity to 130,000 AF/year which will further increase local water reliability throughout Orange County and make the GRS the largest water recycling plant in the world. The NBR-WSA includes a summary of the historical and projected water supply for the City provided from all three of the above sources through the year 2030 based on information contained in the City's 2005 UWMP. As described in the WSA, the City's water supply from all three sources has steadily increased annually beginning with 17,820 acre feet per year in 2005 and is projected to continue to increase annually up to 21,716 acre feet per year until the year 2030 with the greatest percentage increase in supply occurring from groundwater sources.

Since the October 2015 Newport Banning Ranch Coastal Commission hearing, there have been several noteworthy updates in terms of local and regional water supply planning. As aforementioned, Metropolitan provides water to MWDOC and 25 other member agencies throughout southern California and serves as the primary distributor of imported water supplies for the region. Metropolitan's most recent Regional UWMP (2015) was released for public comment in February 2016. The Metropolitan 2015 UWMP represents the most current and available planning projections of supply capability and demand through 2040 developed across a collaborative process with the member agencies.

The analysis that goes into creating the Metropolitan Regional UWMP is extensive and includes utilizing computer models that run hundreds of model simulations to determine water supply availability scenarios with current and growing demands and variable levels of conservation. Direct communication with Metropolitan's member agencies occurs on an on-going and frequent basis regarding water supplies and demand to ensure that the member agencies are providing their most current long term demand projections and the most accurate data is being utilized for analysis. The 2015 UWMP highlights whether or not Metropolitan will be able to provide water supply to current and projected water demands throughout southern California. The Regional Metropolitan UWMP serves as the guiding document for all other member agencies to prepare their own UWMPs which are due within six months following the release of MWD's Regional UWMP.

In addition to Metropolitan regional water planning documentation, MWDOC has also been independently conducting extensive water modeling studies to determine water supply reliability specific to Orange County. The studies show an overall reduction (~17%) of future water demand in Orange County which has surprised local water managers (OC Register, February 5, 2016) due to slower growth projections, increased water efficiency and water conservation.

MWDOC's March 2016 Draft UWMP anticipates just a 3.27% increase in water supply demand during the next 25 years and expects to meet that demand using its existing and

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already planned water supply programs. Analysis from model simulations of water supply and demand include multiple climate scenarios and assume no additional conservation or water infrastructure projects (i.e. desalination, increasing stormwater capture, regional water transfer agreements) for purposes of testing the impact of potential future supply investments by Metropolitan, the Metropolitan member agencies outside of Orange County and also for projects within Orange County. Preliminary findings suggest a number of water supply options to reduce or eliminate potential shortages in the future.

The total average annual water demand for the revised proposed project (895 residential units) is estimated to be 267 acre feet per year, or 0.24 million gallons per day (mgd). This is less than the April 2016 estimated water demand of 400 acre feet per year despite the same amount of units because of an increase in high density residential units and decrease in single family units, commercial space and park space. The July 2016 proposed water demand of 267 acre-feet per year is also substantially less than the average 1,005 acre feet per year demand planned for in the City's 2005 UWMP and the 613.5 ac-ft evaluated in the 2011 EIR (1,375 Units). The WSA includes an evaluation of estimated future normal year, single dry-year, and multiple dry-year conditions. The evaluation demonstrated that City water supplies will be sufficient to meet future demands during single and multiple dry-year period conditions through the year 2040.

Since the October 2015 hearing, MWD's 2015 UWMP has been released with updated demand and supply projections. The report states that there is enough water supply capabilities to meet current and projected demands throughout southern California and the analyses show potential surpluses in various scenarios (see Table 2-5 below from the 2015 Metropolitan UWMP). Specifically it states:

Metropolitan has supply capabilities that would be sufficient to meet expected demands from 2020 through 2040 under the single dry-year and multiple dry-year conditions [Regional UWMP, 2016, pg. ES-5].

The member agencies, including MWDOC and Newport Beach, have also finalized their own projections of local water supply and demand knowing that MWD supplies can meet the forecasted demands through 2040. Both MWDOC and City of Newport Beach 2015 UWMPs forecast that future water supply including MWD and local supplies will meet growing demands through 2040.

~~As conditioned, the project would be limited to residential development of approximately 411 units in the Urban Colony and 82 units in the North Family Village, or some similar development within the Buildable Footprint, resulting in a further reduced water demand of the project. However,~~ Approval of the WSA does not entitle the Newport Banning Ranch project any water rights, priority or allocation to any supply, capacity or facility, or affect the City's obligation to provide service to its existing customers or any potential future customers. The City Council's approval of the WSA does not constitute an entitlement to water rights or service for the project or a will serve commitment for water to the proposed project. The WSA is not the final water supply analysis that will be required for this project, from the City's

perspective, and subsequent water supply evaluations are required for implementation of the project. **While the project may be supported by a municipal water supply for an initial period of the life of the development and could be found consistent with Section 30250 of the Coastal Act, the development project for which the water supply is needed is inconsistent with several other Coastal Act policies and cannot be approved.**

~~**Special Condition 26**~~ requires the applicant to submit evidence that the City of Newport Beach has committed to supply water to the development. Only as conditioned can the project be found consistent with Section 30250 of the Coastal Act.

L. INDEMNIFICATION

Coastal Act section 30620(c)(1) authorizes the Commission to require applicants to reimburse the Commission for expenses incurred in processing CDP applications. *See also* 14 C.C.R. § 13055(g). Thus, the Commission is authorized to require reimbursement for expenses incurred in defending its action on the pending CDP application. Therefore, consistent with Section 30620(c), the Commission imposes **Special Condition 18**, requiring reimbursement of any costs and attorney fees the Commission incurs “in connection with the defense of any action brought by a party other than the Applicant/Permittee challenging the approval or issuance of this permit.”

L. TAKINGS ANALYSIS

As discussed above, the proposed project is fundamentally inconsistent with several Chapter 3 policies of the Coastal Act. When the Commission denies a project, however, a question may arise as to whether the denial results in an unconstitutional “taking” of the applicant’s property without payment of just compensation. Coastal Act Section 30010 addresses takings and states as follows:

The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefore. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Consequently, although the Commission is not a court and may not ultimately adjudicate whether its action constitutes a taking, the Commission must assess whether its action might constitute a taking so that the Commission may take steps to avoid it. If the Commission concludes that its action does not constitute a taking, then it may deny the project while still complying with Section 30010. If the Commission concludes that its action might constitute a taking, then Section 30010 requires the Commission to approve some level of development, even if the development is otherwise inconsistent with Coastal Act policies or LCP policies, if applicable. In this situation, the Commission finds that some level of development could likely be allowed on many acres of the site. The Applicant’s

proposed project is inconsistent with Chapter 3 policies of the Coastal Act, however, and the Commission therefore denies the project as proposed and suggests that the Applicant work with staff to finalize the constraints analysis and to develop an alternative project located on the portions of the site outside of the identified constraints that may be more consistent with the Chapter 3 policies of the Coastal Act.

General Takings Principles

The Fifth Amendment of the United States Constitution provides that private property shall not “be taken for public use, without just compensation.” Article 1, section 19 of the California Constitution provides that “[p]rivate property may be taken or damaged for public use only when just compensation...has first been paid to, or into court for, the owner.”

The idea that the Fifth Amendment proscribes more than the direct appropriation of property is usually traced to *Pennsylvania Coal Co. v. Mahon* ((1922) 260 U.S. 393). Since *Pennsylvania Coal*, most of the takings cases in land use law have fallen into two categories (see *Yee v. City of Escondido* (1992) 503 U.S. 519, 522-523). First, there are the cases in which government authorizes a physical occupation of property (see, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419). Second, there are the cases in which government merely regulates the use of property (*Yee, supra*, 503 U.S. at pp. 522-523). A taking is less likely to be found when the interference with property is an application of a regulatory program rather than a physical appropriation (e.g., *Keystone Bituminous Coal Ass’n. v. DeBenedictis* (1987) 480 U.S. 470, 488-489, fn. 18). The Commission’s actions here would be evaluated under the standards for a regulatory taking because the Commission is not authorizing a physical occupation of the subject property in its action.

In recent takings cases, the United States Supreme Court (Court) has identified two circumstances in which a regulatory taking might occur. The first is the “categorical” formulation identified in *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1014. In *Lucas*, the Court found that regulation that denied all economically viable use of property was a taking without a “case specific” inquiry into the public interest involved (*Id.*). The *Lucas* court emphasized, however, that this category is extremely narrow, applicable only “in the extraordinary circumstance when no productive or economically beneficial use of land is permitted” or the “relatively rare situations where the government has deprived a landowner of all economically beneficial uses” or rendered it “valueless” (*Id.* at pp. 1016-1017 [emphasis in original]) (see *Riverside Bayview Homes, supra*, 474 U.S. at p. 126 [regulatory takings occur only under “extreme circumstances”]).⁹

⁹ Even where the challenged regulatory act falls into this category, government may avoid a taking if the restriction inheres in the title of the property itself; that is, background principles of state property and nuisance law would have allowed government to achieve the results sought by the regulation (*Lucas, supra*, 505 U.S. at pp. 1028-1036).

The second circumstance in which a regulatory taking might occur is under the three-part, ad hoc test identified in *Penn Central Transportation Co. (Penn Central) v. New York* (1978) 438 U.S. 104, 124. This test generally requires an examination into the sufficiency of the applicant's property interest, its economic impact, and its interference with reasonable, investment-backed expectations (*Id.* at p. 134; *Ruckelshaus v. Monsanto Co.* (1984) 467 U.S. 986, 1005). In *Palazzolo v. Rhode Island* (2001) 533 U.S. 606, the Court again acknowledged that the *Lucas* categorical test and the three-part *Penn Central* test were the two basic situations in which a regulatory taking might be found to occur (see *id.* [rejecting *Lucas* categorical test where property retained some development value following regulation and did not leave the property "economically idle" but remanding for further consideration under *Penn Central*)).

One final category of Takings cases involves what are known as "exactions" (requirements to forfeit property interests or money) that lack a direct nexus to the impacts of the project or exceed what is necessary to offset those impacts. However, as indicated above, the vast majority of the Commission's concerns can be addressed by changing the design, which would not require any exaction. And as counsel made clear at the hearing, the requirements to take certain affirmative actions or offer to dedicate property that were considered at the hearing were proposed to be tailored to the impacts of the project.

Final Government Determination

Before a landowner may seek to establish a taking under either the *Lucas* or *Penn Central* formulations, however, the landowner must demonstrate that the taking claim is "ripe" for review. This means that the takings claimant must show that government has made a "final and authoritative" decision about the use of the property (e.g., *Williamson County Regional Planning Com. v. Hamilton Bank* (1985) 473 U.S. 172; *MacDonald, Sommer & Frates v. County of Yolo* (1986) 477 U.S. 340, 348). Premature adjudication of a takings claim is highly disfavored, and the Supreme Court's cases "uniformly reflect an insistence on knowing the nature and extent of permitted development before adjudicating the constitutionality of the regulations that purport to limit it" (*Id.* at p. 351). Except in the rare instance where reapplication would be futile, the courts generally require that an applicant resubmit at least one application for a modified project before it will find that the taking claim is ripe for review (e.g., *McDonald, supra*).

In this case, although the Commission denies the project proposed by the Applicant, there are Several alternative projects have been presented to the applicants by staff over the course of the application periods (see exhibits of staff report 5-16-2097 from hearing 9/7/2016) and could be conditioned, that would provide for visitor serving, commercial and residential uses of the property. Thus, even with the constraints identified in the staff report, the Commission believes that some alternative project could be constructed on the portions of the site identified outside of the site constraints consistent with the Chapter 3 policies of the Coastal Act rather than the proposed project. This is because the sites identified are of sufficient size in the aggregate—approximately 19 acres—to accommodate a visitor-serving use, commercial development and residential use and a project on these sites would have fewer resource impacts compared to other portions of the proposed

project site. The Commission advises the Applicant to consider submitting an alternative proposal for development on the sites identified outside of the constraints. In these circumstances, the Commission has not made a final and authoritative decision about the use of the subject property, as it is clear that some development could be allowed on the subject property to avoid a taking of private property without just compensation. This decision does not preclude the Applicant from applying for some other development or use of the site, such as a smaller-scale development project that still proposes visitor serving, mixed-use commercial and residential uses but more carefully addresses the site's constraints.

Conclusion

The Commission finds that the project, as proposed, is inconsistent with the Chapter 3 policies of the Coastal Act identified in the staff report and must therefore be denied. The Commission also finds, however, that an alternative project could be approved on the portions of the site identified. Thus, this denial is not a final adjudication by the Commission of the potential for development on a portion of the project site, as it does not preclude the Applicant from applying for some other development or use of the site, such as a smaller-scale development project that proposes visitor serving, commercial and residential uses and more carefully addresses the applicable Coastal Act policies.

M. UNPERMITTED DEVELOPMENT

Unpermitted development, as described in Appendix A, occurred on the site prior to submission of this permit application, and the Commission has taken action to address the applicant's liability for all unpermitted development subject to the 2015 Consent Orders, through its issuance of said orders.

The Commission issued the 2015 Consent Orders to address drilling and operation of new wells; removal of major vegetation, in part through the mowing of extensive portions of the site; grading; installation of pads and wells; construction of structures, roads and pipelines; placement of solid material; discharge or disposal of dredged material or liquid waste; removing, mining, or extraction of material; and change in intensity of use of the land that had occurred on the site.

Commission Ecologist Dr. Jonna Engel conducted a site-specific analysis to assess the likely status, prior to the unpermitted development that was the subject of the 2015 Consent Orders, of the biological resources in areas impacted by the unpermitted development that remain disturbed as a result of those activities. According to Dr. Engel's analysis, vegetative communities immediately adjacent to areas on the site impacted by the unpermitted development consist of various native plant communities and wildlife habitats that the Commission has consistently treated as ESHA. Dr. Engel determined that areas impacted by the unpermitted development contained or were immediately adjacent to coastal scrub and/or grassland habitat prior to the development at issue, and those areas therefore met the definition of ESHA under the Coastal Act or were adjacent to areas that met that definition at the time they were affected by the alleged unpermitted development. The Commission concurred with Dr. Engel's general conclusion.

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By entering into the 2015 Consent Orders, NBR LLC, although not admitting to any wrongdoing or liability under the Coastal Act, agreed 1) to remove certain allegedly unpermitted wells and either apply for after-the-fact authorization or remove other allegedly unpermitted wells, such that all allegedly unpermitted wells located outside of two areas of the site under West Newport Oil Company's (WNOC) control, i.e. the "Oil Remainder Areas", will be removed or addressed in an after-the-fact CDP application(s); 2) restore many acres affected by the disputed activities and restore additional acres as mitigation, with the combined restoration totaling 18.45 acres; 3) deed restrict 24.6-acres of the site for open space and restoration; and 4) not to engage in the large-scale mowing activities previously undertaken by the oilfield operator that spanned much of the upland areas of the Properties that have resulted in impacts to native habitats. The cessation of mowing activities has allowed for many more acres of the site to begin to recover from this activity. In many previously mowed areas, natural habitat, such as coastal sage scrub, is beginning to flourish after the cessation of mowing.

The 2015 Consent Orders were issued, in part, for the purpose of resolving NBR LLC's liability for alleged unpermitted development on the site to provide clarity for permitting actions, such as the present application, in part by providing for active restoration of certain impacted areas and passive restoration of the remainder of the impacted areas through the cessation of activities that disturbed these areas, thus allowing for an accurate analysis of the resources on site. Although the Consent Orders do help to lay the groundwork for review of this application, the obligations of the Consent Orders are independent of the Commission's action on the application; NBR is bound to perform the restoration and mitigation activities required by the Consent Orders regardless of the Commission's action.

Staff is currently reviewing the restoration plan, which proposes planting of native plant species in disturbed areas across the site, that NBR LLC has prepared pursuant to the Consent Orders. Although these areas have not yet been restored, through the Consent Orders, NBR LLC and the Commission have agreed to immediately treat the restoration areas as if the areas are restored with native habitat. In addition, NBR LLC agreed, by signing the Consent Orders, that it shall not use the restoration or mitigation projects described in the Consent Orders for the purpose of generating mitigation or restoration credits to satisfy any State or Coastal Commission requirement for restoration or mitigation.

Although development has taken place prior to submission of this permit application, consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act. Review of this permit application does not constitute a waiver of any legal action with regard to the unpermitted development that has occurred on the site, although, as noted above, the Commission has already taken action to address the applicant's liability for the unpermitted development that was the subject of the 2015 Consent Orders, nor does it constitute an admission as to the legality of any development undertaken on the site without a coastal permit.

N. LOCAL COASTAL PROGRAM

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal development permit only if the project will not prejudice the ability of the local government

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having jurisdiction to prepare a Local Coastal Program which conforms with Chapter 3 policies of the Coastal Act:

(a) Prior to certification of the Local Coastal Program, a coastal development permit shall be issued if the issuing agency, or the commission on appeal, finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) of this division and that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200). A denial of a Coastal Development Permit on grounds it would prejudice the ability of the local government to prepare a Local Coastal Program that is in conformity with the provisions of Chapter 3 (commencing with Section 30200) shall be accompanied by a specific finding which sets forth the basis for such conclusion.

Coastal Act section 30604(a) states that, prior to certification of a local coastal program ("LCP"), a coastal development permit can only be issued upon a finding that the proposed development is in conformity with Chapter 3 of the Act and that the permitted development will not prejudice the ability of the local government to prepare an LCP that is in conformity with Chapter 3. The Coastal Land Use Plan (CLUP) for the City of Newport Beach was effectively certified on May 19, 1982. The certified CLUP was updated on October 2005 and in October 2009. The project site is listed as "deferred certification" in the LUP.

The majority of the site is under the jurisdiction of the County of Orange. Neither the County of Orange nor the City of Newport Beach has a certified Local Coastal Program that includes the project site. The Commission recently certified the LCP of the City of Newport Beach. While the City has an LCP, the portion of the project site remains deferred certification, although the City has expressed an intent to annex the project site in the future. ~~City is in the process of creating an implementation plan for the Coastal Land Use Plan and certifying their LCP.~~ Pursuant to Section 30604(a) of the Coastal Act, **the project cannot be found to be the least environmentally damaging alternative and is inconsistent with Ch.3 Coastal Act policies and therefore, approval of the project under a coastal development permit could prejudice the ability of the City of Newport Beach to certify the deferred certification portion of the LCP in the future.** ~~only as conditioned to be the least environmentally damaging alternative can the project be found consistent with Ch. 3 policies of the Coastal Act and therefore, will not prejudice the ability of the City of Newport Beach to certify the pending LCP.~~

O. GREENHOUSE GASES/CLIMATE CHANGE

The proposed project would result in greenhouse gas (GHG) emissions during construction and oilfield clean-up operations as well as during the occupancy and use of the residential and commercial development. Of these sources of GHG emissions, the residential and commercial uses far exceed all other sources combined (such as emissions from construction and clean-up operations).

The Commission has in past permit and LCP actions addressed the generation of GHG¹⁰ emissions related to larger developments such as major water, energy, telecommunication, and transportation projects. These types of projects can significantly increase GHG emissions and therefore global warming, which in turn can cause significant adverse impacts to coastal resources of California. The Coastal Act has a number of provisions that provide direct authority to the Commission to assess increased risks caused by climate change (i.e. increased coastal flooding and potentially increased fire danger from climatic shifts causing drier weather patterns) when considering proposals for new development. The Coastal Act also provides a regulatory avenue to ensure that proposed development is compatible with non-emission's related planning controls that can have the effect of reducing GHG emissions (where emission's specific controls are governed solely by the federal Environmental Protection Agency and state air resources agencies), like reducing vehicle miles traveled and minimizing energy consumption (i.e. through public transit and pedestrian/bike travel options when evaluating proposed development or in the context of LCP proposals). These include the Coastal Act's public access and recreation policies (Sections 30220 and 30211), marine resource and water quality policies (Sections 30230 and 30231), the environmentally sensitive habitat area protection policy (Section 30240), and the coastal hazards policy (Section 30253(a) and (b)). Further, Section 30253(c) and (d) require new development to be consistent with requirements imposed by an air pollution control district or the California Air Resources Board (CARB) and to minimize energy consumption and vehicle miles traveled.

In evaluating the GHG emissions of project operations in the EIR, the City of Newport Beach found that without mitigation, the additional vehicle trips and traffic generated through the use of the proposed residential and commercial development would result in 18,542 metric tons per year of carbon dioxide equivalent emissions (also referred to as MTCO₂e/yr - the standard measure of GHG emissions). This would account for nearly 72% of the project operation related emissions. In addition, another 6,824 MTCO₂e/yr would result from the completed project's use of electricity, natural, gas, water, sewage, and other similar systems. Implementation of the mitigation measures proposed in the EIR would bring the total GHG emissions down to 18,949 MTCO₂e/yr. As described in the EIR, this level of GHG emissions greatly exceeds both the significance thresholds used by the South Coast Air Quality Management District (3,000 MTCO₂e/yr for residential and commercial projects) and the City of Newport Beach (6,000 MTCO₂e/yr) and the EIR therefore found that "Despite application of all feasible mitigation, the Project would make a cumulatively considerable contribution to the global GHG inventory and would have a significant and unavoidable GHG emissions impact."

¹⁰ Greenhouse gases are any gas, both natural and anthropogenic, that absorbs infrared radiation in the atmosphere and includes water vapor, carbon dioxide (CO₂), methane (CH₄), and nitrous oxide (N₂O). These greenhouse gases lead to the trapping and buildup of heat in the atmosphere near the earth's surface, commonly known as the "Greenhouse Effect." Carbon dioxide is the major anthropogenic greenhouse gas. All greenhouse gases are quantified collectively by the carbon dioxide equivalent, or the amount of CO₂ that would have the same global warming potential, when measured over a specific time period.

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However, it is important to note that the project considered in the EIR is substantially larger than both the project currently proposed by NBR and the project recommended by Commission staff. Specifically, the EIR evaluated a project that included 1,375 residential units, 75,000 square feet of retail/commercial space, a 75 room resort, and 28 acres of active parks. NBR's current proposal is smaller and would include 895 residential units, 45,100 square feet of commercial use, a 75 room resort and a 20- bed hostel and 5 acres of active parks. Adjusting the GHG emissions analysis from the EIR to account for this reduction in project scale would result in an estimated reduction in mobile emissions (which account for over 70% of the total emissions) of approximately 40% - from 12,368 MTCO₂e/yr to roughly 7,544 MTCO₂e/yr. Although a reduction, this level of GHG emissions would still exceed the relevant significance thresholds and would be a significant adverse impact.

~~Implementation of the recommended Special Conditions included with this report would, however, result in additional reductions to the scale of the proposed project that would further reduce the GHG emissions associated with the occupation and use of the proposed development.~~ If NBR constructed only the currently proposed configuration of 82 single family units and 411 multi-family or condo/townhome units within the areas outside of the site constraints identified on [Exhibit 4](#), GHG emissions would be expected to be reduced still further. Using the same approach used above to adjust the analysis from the EIR to apply to this reduced scale project suggests that mobile emissions would be reduced from 12,368 MTCO₂e/yr (under the project considered in the EIR) to roughly 2,226 MTCO₂e/yr. While this estimate does not account for the additional GHG emissions associated with the completed project's use of electricity, natural gas, water, sewage, and other similar systems, those emissions would also be greatly reduced with a smaller scale project, and the total combined emissions from the project may fall below the South Coast Air Quality Management District and the City of Newport Beach thresholds for determining significant GHG emissions impacts.

~~As described above, the project, as conditioned, is therefore not expected to result in the generation of a significant amount of GHGs which would contribute substantially to global climate change and result in potential significant impacts to coastal resource effects. Thus, as conditioned, the project is consistent with the relevant Coastal Act policies.~~

P. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

The City of Newport Beach is the Lead Agency for the CEQA review. An Environmental Impact Report (EIR) was done by BonTerra Consulting in 2011 for the City of Newport Beach. The EIR was certified by the City in 2012 with a statement of overriding consideration.

Section 13096 Title 14 of the California Code of Regulations requires Commission approval of a coastal development permit application 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 under the Commission's CEQA-certified regulatory program if there are feasible alternatives or feasible mitigation measures available that

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would substantially lessen any significant adverse effect that the activity may have on the environment.

The proposed project is not the least environmentally damaging feasible alternative, **so, pursuant to the above requirements, the Commission could not approve it as proposed.** Through the CEQA process, the Lead Agency issued a ‘statement of overriding consideration’ to enable the project to be approved consistent with CEQA. The EIR describes several alternatives for the project, including Alternative B, Open Space and Park: *Alternative B would have fewer impacts than the proposed Project because it would involve less grading and site disturbance. This Alternative would have less demand on public services and utilities. However, this Alternative would not assist the City in meeting its RHNA housing requirements or implementing the General Plan Housing Element. Alternative B would be able to avoid the significant and unavoidable impacts associated with traffic, air quality, greenhouse gases, and certain noise impacts, when compared to the proposed Project.* Ultimately Alternative B was not proposed due to assumed economic restrictions, however under CEQA it is a less environmentally damaging alternative.

~~Commission staff has identified an alternative project footprint, based on site constraints. There are countless projects that could be designed within that footprint, so Commission staff did not attempt to redesign the applicant’s project, but rather, to recommend conditions establishing general parameters. Ultimately, however, the Commission decided to deny the application instead, rendering CEQA inapplicable, since it does not apply to project denials. However, any project that adheres to those constraints, as the proposed conditions would require, and that abides by the other conditions, would qualify as the least environmentally damaging alternative feasible, while still accomplishing a project, because the project would respect the ESHA, wetlands, archaeological and cultural resources and other on-site resource constraints and conform to all other resource protection conditions, so that it could be found consistent with Ch. 3 of the Coastal Act.~~

As explained above and as incorporated here by reference, the proposed project is inconsistent with Sections 30240, 30233, 30231, 30255, 30253, 30210, 30251 of the Coastal Act due to adverse impacts upon natural landforms and biological resources including wetlands. The project’s consistency with other sections of the Coastal Act cannot be determined based on the information provided. In addition, the Commission has also found that there are feasible alternatives which would avoid such impacts. Therefore, the Commission could not approve the project as proposed and chose to deny it.

~~As conditioned, there are no feasible alternatives or additional feasible mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment. Therefore, the Commission finds that the proposed project, as conditioned to mitigate the identified impacts, is the least environmentally damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.~~

IV. SPECIAL CONDITIONS

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[The original, August 25, 2016 staff report for the Commission's September, 2016 hearing included 56 pages of recommended special conditions of approval. Commission staff modified its recommendations on some of those conditions through its September 2, 2016 addendum as well as at the hearing. However, because the Commission decided to deny the application, neither the original nor the modified version of staff's recommended conditions is included in this report.]