

CALIFORNIA COASTAL COMMISSION

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Energy and Ocean Resources
Staff: J JL, SMH—SF
Staff Report: August 24, 2001
Hearing Date: September 12, 2001

STATUS REPORT ON SONGS MITIGATION PROGRAM

Following is a brief status report for the mitigation projects required in Southern California Edison Company's (SCE) coastal development permit for the San Onofre Nuclear Generating Station (SONGS) Units 2 and 3 (permit no. 6-81-330, formerly 183-73). The conditions originally were adopted by the Commission in 1991 to mitigate the adverse impacts of the power plant on the marine environment. The 1991 conditions also require SCE to provide the funds necessary for Commission technical oversight and independent monitoring of the mitigation projects, to be carried out by independent contract scientists under the direction of the Executive Director. In 1993, the Commission added a requirement for the permittee to partially fund construction of an experimental fish hatchery. The Commission has since approved amendments to the conditions in April 1997 and October 1998.

WETLAND RESTORATION MITIGATION**The Project**

Condition A of the permit requires the permittee to create or substantially restore a minimum of 150 acres of wetlands to mitigate for impacts to fishes caused by the operation of SONGS. In April 1997, the Commission reaffirmed its 1992 approval of the permittee's choice of the San Dieguito River Valley as the site for the wetland restoration project and allowed for up to 35 acres credit for enhancement at San Dieguito Lagoon on the condition of perpetual inlet maintenance.

Progress Report

Wetland Restoration Planning. The Commission approved SCE's preliminary wetland restoration plan for the San Dieguito Lagoon in November 1997. The CEQA/NEPA environmental review incorporated the mitigation project into the overall San Dieguito River Valley Regional Open Space Park project and included additional wetland restoration required under the permittee's settlement agreement with the Earth Island Institute. The lead agencies for the CEQA/NEPA review were the San Dieguito River Valley Regional Open Space Park Joint Powers Authority (JPA) and the U.S. Fish and Wildlife Service.

Following the review period on the January 2000 draft EIR/EIS, the final EIR/EIS was released on September 5, 2000. At a public hearing on September 15, 2000, the JPA certified the EIR and voted to support the EIR's designation of Mixed Habitat plan as the environmentally preferred alternative. The Commission's contract scientists attended the meeting and concurred with this decision. As required by NEPA, the availability of the final EIR/EIS was published in the Federal Register in September 2000, and the USFWS will prepare and issue a final Record of Decision.

The permit requires SCE to submit the final restoration plan to the Commission within 60 days following the final action on the EIR/EIS. SCE is proceeding diligently to complete the planning process and is in compliance with the Commission's permit conditions on the wetland restoration project. In January 2001, SCE submitted an administrative draft final restoration plan to the JPA for review of the plan's compliance with the Final EIR/EIS.

SCE has continued to work with the parties to resolve the remaining issues involving the least tern nesting sites (e.g., maintenance and maintenance monitoring responsibilities, mitigation of potential impacts to existing wetlands). Although the least tern nesting sites are included in the overall plan, they are a previous requirement from a coastal development permit granted to the 22nd Agricultural District (CDP No. 6-84-525), and not a requirement of SCE's SONGS permit. SCE has agreed to construct the nesting sites for the District in exchange for access to and use of District property near the rivermouth. At issue is who is to take on the financial responsibility for implementing the maintenance, monitoring, and mitigation requirements.

Staff is working with SCE, USFWS, Department of Fish and Game, the JPA, and the 22nd Agricultural District (District) to bring these issues to closure as soon as possible. At a meeting on April 26, 2001, staff discussed the annual nesting site maintenance and maintenance monitoring (i.e., site maintenance, including vegetation control and fence inspection and repair, predator monitoring and control, and bird monitoring) needed to maintain a viable least tern habitat as required under the District's coastal development permit. Staff also discussed the need for mitigating impacts to existing wetlands caused by the construction of the nesting sites. As a follow-up to the meeting, staff presented a draft annual maintenance plan and estimated annual costs. In a July 27, 2001 letter, staff presented a formal interpretation of the District's obligations under its permit (attached). Staff will continue to work with the parties to try to reach consensus and enable SCE to move forward with the Final Restoration Plan.

Least Tern Observations. As a point of interest, recent observations made by the Commission's contract scientists during pre-restoration fish sampling at San Dieguito lagoon August 7-10, 2001, indicated temporary heavy use of the 22nd Agricultural District's south overflow parking lot by California Least Terns. Birds were observed to be feeding along the San Dieguito River from the inlet. On August 9, 2001, about 120 terns were observed to be roosting on the District's south overflow parking lot just east of Jimmy Durante Boulevard. Many of these were this year's fledglings and were being fed on the site by adults. In response to requests from Commission contract scientists and biologists with the US Fish and Wildlife service, the District staff erected temporary barriers to parking where the birds were seen to roost. On August 10, 2001, birds were observed roosting outside of the cordoned areas and the District staff erected more barriers to increase the protected area. By the weekend, the least terns had left the area.

Litigation on Final EIR. Lawsuits challenging the adequacy of the final EIR (FEIR) were filed by the Del Mar Sandy Lane Association and Citizens United to Save the Beach. In a July 27,

2001, final ruling, Superior Court Judge Lisa Guy-Schall determined that the FEIR is inadequate with regard to several issues, most significantly her belief that there is insufficient evidence supporting the FEIR's conclusion that the project will not increase scour and loss of sand at the river mouth. Judge Guy-Schall set aside the certification of the FEIR and remanded the matter back to the JPA for further consideration. The final ruling is substantially the same as the tentative ruling issued June 28, 2001. The JPA expects to file an appeal of the Judge's ruling by October 2001. SCE supports the JPA and stands behind the FEIR. Additionally, the USFWS agreed that the JPA should pursue an appeal. The JPA, SCE and USFWS also have agreed to move forward to address the points in the FEIR deemed inadequate by Judge Guy-Schall in order to be ready to re-circulate and re-certify the FEIR if necessary after the appeals process is finished.

Pre-restoration Monitoring. The Commission contract scientists continued pre-restoration monitoring in San Dieguito Lagoon and in other southern California wetlands that may be used as reference sites in post-restoration monitoring. In recent months, this monitoring has focused on determining the appropriate number and spacing of samples for use in the post-restoration monitoring of intertidal epibenthic and infaunal invertebrates. Fieldwork for this study, carried out in Tijuana Estuary, Mugu Lagoon, and Carpinteria Salt Marsh, was completed in early December 2000. Laboratory analysis of the samples is continuing. The contract scientists are continuing to monitor water quality in San Dieguito Lagoon, Carpinteria Salt Marsh, and Mugu Lagoon.

KELP REEF MITIGATION

The Project

Condition C of the permit requires construction of an artificial reef that consists of an experimental reef and a larger mitigation reef. The experimental reef must be a minimum of 16.8 acres and the mitigation reef must be of sufficient size to sustain 150 acres of medium to high density kelp bed community. The purpose of the experimental reef is to determine what combination of substrate type and substrate coverage will best achieve the performance standards specified in the permit. The design of the mitigation reef will be contingent on the results of the experimental reef. Construction of the 56-module experimental reef was completed in September 1999. Construction monitoring done by SCE confirmed that the area and the percentage covers of reef material of the modules conformed closely to the design specifications.

In April 1997, the Commission added the requirement for a payment of \$3.6 million to the State's Ocean Resource Enhancement and Hatchery Program (OREHP) to fund a mariculture/marine fish hatchery to provide compensation for resources not replaced by the artificial mitigation reef. SCE has fully satisfied this requirement.

Progress Report

Some of the major results seen in the analyses done to date are:

- (1) The amount of artificial reef material placed on the reef as determined from dive surveys by Commission contract scientists is considerably higher than the intended nominal coverages of 17%, 34% and 67%.

- (2) There has been substantial colonization of giant kelp on all reef designs with a trend for declining density of new kelp with increasing distance from the nearest natural kelp bed (San Mateo Kelp bed).
- (3) The abundance of invertebrates and understory algae on the artificial reef tends to increase with the coverage of hard substrate. The abundance and number of species of invertebrates and understory algae on the artificial reef is generally within the range observed on nearby natural reefs. The relative abundance of invertebrates and algae, however, differs substantially between artificial and natural reefs.
- (4) Fish species composition and abundance on the artificial reef modules is generally similar to that found on nearby natural reefs with the exception that water column species were substantially less abundant on the artificial reef.

Commission contract scientists presented talks on these issues for the symposium, "Marine Ecology of Rocky Reefs and Areas of Biological Significance," held as part of the Southern California Academy of Sciences annual meeting on May 4-5, 2001.

The contract scientists recently completed the first of their two semi-annual surveys of giant kelp for 2001. The annual summer survey of benthic invertebrates and macroalgae was begun in July 2001 and is near completion. Data from this survey are being entered into the database. The first survey of the second year's fish sampling was begun and is scheduled for completion in August. Analyses of kelp and invertebrate data are being done to determine whether the sampling effort for both surveys can be reduced without compromising the quality of the data.

FISH BEHAVIORAL MITIGATION

The Project

Condition B requires the permittee to install and maintain behavioral barrier devices at SONGS to reduce fish impingement losses.

Progress Report

SCE conducted a number of laboratory and in-plant experiments testing the behavioral response of fish to lights and sound devices from 1992 through 1999. None of the experiments showed evidence that these devices would reduce fish impingement losses as required by Condition B. At the same time, SCE continued its modified heat cleaning treatments at the plant, which result in a considerable reduction in fish impingement losses.

In October 2000, the Commission reviewed the conclusions on the effectiveness of the behavioral barriers (see staff report entitled *Executive Director's Determination that Fish Behavioral Barriers Tested at SONGS are Ineffective*, dated September 22, 2000) and concurred that (1) the fish behavioral barriers installed and tested at the plant were ineffective and unlikely to result in a two metric ton (MT) reduction in fish impingement losses as required by Condition B of the permit, (2) no currently available alternative behavioral barriers are likely to be effective or feasible in reducing fish losses as required by Condition B, and (3) a procedural modification made by SCE in the heat cleaning treatment of the cooling water intake systems of SONGS Units 2 and 3 has reduced fish losses on average by approximately 4.3 MT per year. Based on this determination, the Executive Director concluded that no further testing of alternative behavioral

barriers should be required at this time, provided that (1) SCE continues to adhere to the operating and monitoring procedures for the modified heat cleaning treatments and (2) SCE makes every effort to test and install, if feasible, future technologies or techniques for fish protection if such techniques become accepted industry standards or are required by the Commission in other power plant regulatory actions. Thus, the Executive Director determined, and the Commission concurred, that SCE is currently in compliance with Condition B of the SONGS permit.

The staff received SCE's *2000 Annual Marine Environmental Analysis* report on August 2, 2001, and is currently reviewing the report's data and analysis on the fish chase procedure at SONGS.



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July 27, 2001

Mr. Bob Vice
Chairman, Master Plan Committee
Board of Directors
22nd District Agricultural Association
2260 Jimmy Durante Blvd.
Del Mar, CA 92014-2216

Re: Outstanding Obligations of the District under Coastal Development Permit No. 6-84-525

Dear Mr. Vice:

Thank you for your May 18, 2001 letter. As we discussed at our meeting on April 26, there was mutual agreement on the desirability of a statement by the Commission staff setting forth the nature and scope of the outstanding obligations of the District under its coastal development permit (No. 6-84-525). Our letter of May 7 was not intended to fulfill that objective, but was a follow-up to our discussions during the meeting.

The purpose of this letter is to provide a formal interpretation of the District's obligations under its coastal development permit (CDP) (No. 6-84-525) and to respond to the issues raised in your May 18 letter.

In short, the District is obligated under the terms of the December 1984, Memorandum of Agreement (MOA) between the District and the California Department of Fish and Game (CDFG), as incorporated into the condition of approval of the District's CDP 6-84-525, to create sixteen acres of nesting habitat for the California Least Tern in the manner specified in the 1984 MOA.

The reason this obligation remains outstanding is that, for a variety of reasons, none of the efforts of the District to satisfy it have been successful. When in 1992 the Coastal Commission approved the San Dieguito Lagoon as the restoration site for mitigation required by Southern California Edison and its partners under a separate coastal development permit, it was mutually agreed that the District should defer further efforts until the planning for the overall San Dieguito wetland restoration project was complete. For this reason the Commission did not hold the District in non-compliance with CDP 6-84-525 during this period. We are now at the point where planning for the overall project is largely finished. Thus, we will try in this letter to eliminate any remaining uncertainty regarding the District's obligations under its coastal permit so that the District can move forward with compliance. In addition we will address the San Dieguito wetland restoration project as it relates to the District's obligations.

I. DISTRICT'S COASTAL PERMIT OBLIGATIONS

Determination of Least Tern Nesting Site Acreage Owed by the District

As part of the Commission's approval of the District's CDP 6-84-525 in November 1984, the Commission found that construction of the proposed infield tunnel would intensify the use of the south overflow parking lot, which is the site of an historic least tern nesting area. The Commission required that sixteen acres of appropriate nesting habitat be provided for the California Least Tern as mitigation for that increase in intensity of use. To satisfy the mitigation requirement, the District proposed to enter into an agreement with the California Department of Fish and Game (CDFG).

There is apparently continuing confusion about the amount of least tern nesting site acreage required under CDP 6-84-525 and about who is responsible for creating the habitat. In your letter of May 18, you refer to the District's "7-acre share" of the least tern nesting habitat. For the reasons discussed below, we cannot agree with the District's position that it is responsible for only 7 acres of the 16-acre requirement.

1984 MOA. The agreement between the District and CDFG, incorporated as a special condition of CDP 6-84-525 and dated December 1984, provided for the creation of a sixteen-acre permanent Least Tern nesting site within the San Dieguito Lagoon Enhancement Plan (SDLEP) area.¹ Sections 3 and 4 of the 1984 MOA provided for two potential means to satisfy this requirement. (The 1984 MOA also required the District to designate and manage a four-acre interim least tern nesting site on the south overflow lot until such time as a permanent site was established under either Section 3 or 4 of the agreement.)

Section 3 of the 1984 MOA identified the preferred permanent least tern nesting site as being the property known as Del Mar 88, then in private ownership. The terms of the MOA required the District to cause seven acres to be made available for a least tern nesting site in conjunction with a CDFG effort to obtain an additional nine acres. It is from this section that the District apparently believes it is responsible for only 7 acres of the required 16 acres. However, Section 4 of the 1984 MOA set forth a timeframe in which the creation of the preferred permanent nesting site referenced in Section 3 was to have occurred. Section 4 also provided for an alternate requirement for the creation of a permanent nesting site, stating "[i]n the event that the District and the DFG are unable on or before October 1, 1989, to cause the preferred suitable Tern nesting habitat to be made available, as provided in Section 3, then the District shall create a sixteen (16) acre Tern nesting site on State lands leased or owned by the DFG within

¹ Restoration planning for the San Dieguito Lagoon began in 1978 with the City of Del Mar and the State Coastal Conservancy's development of the San Dieguito Lagoon Enhancement Plan. This plan, approved by the Coastal Commission in 1980, identified appropriate activities and site improvements to enhance the lagoon, proposed procedures to implement plan activities, and suggested land use regulations to insure the viability of the lagoon enhancement proposals. The District's south overflow parking lot was designated in the plan for wildlife enhancement use as a least tern habitat, based on an historic use of that area by least terns.

the SDLEP area.”² When the District was unable to cause the preferred permanent least tern nesting site to be made available within the required timeframe it became responsible under Section 4 of the 1984 MOA for creation of the entire 16 acre permanent nesting site.

1990 MOA. In June 1990 the District attempted to satisfy its obligations under the 1984 MOA by entering into a second MOA with the CDFG. This 1990 MOA provided for the creation of least tern nesting habitat on five acres of land near the mouth of the San Dieguito River (denominated by the 1990 MOA as “the Rivermouth Property”). The District had purchased this property in December 1989 for, as stated in the District's letter of March 22, 1999, “the primary purpose of being able to keep the rivermouth open to avoid flooding on the Fairgrounds, in addition to providing land needed to satisfy the least tern nesting requirements.”³

Because of the significant differential in the size of the useable portion of the Rivermouth Property relative to the size of the permanent nesting site required by Section 4 of the 1984 MOA (5 vs. 16 acres), its acceptability as a means of fulfilling the District's obligations under that MOA could only be determined through a proceeding before the Commission to amend CDP 6-84-525. Before any such amendment proceeding was commenced, the District abandoned the 4-acre interim site and prepared the south overflow lot for parking. Consequently, Commission staff initiated an enforcement action against the District.

1991 Settlement Agreement. To resolve the District's obligations for providing a mitigation area for the least tern, in October 1991 the District and Commission entered into a Settlement Agreement. Under the terms of Section 1(d) of the Settlement Agreement (SA), the District agreed that the Executive Director of the Commission shall have the authority to “determine the appropriate permanent Least Tern nesting site or alternative mitigation” on or by means of which the District could satisfy its obligations under the 1984 MOA and CDP 6-84-525. The SA expressly provided that this authority included the power to determine the suitability of the Rivermouth Property for this purpose.

The SA also provided for consideration of alternative means by which the District could satisfy its obligations under the 1984 MOA and CDP 6-84-525. Section 1(c) of the SA directed the District to evaluate alternative sites on which the District could create least tern nesting habitat in fulfillment of its obligations under these authorities. Section 1(d) of the SA provided that the District may fulfill its obligations by creating least tern nesting habitat on any alternative site that is agreed to by both the Executive Director and the District. If the agreed-upon site differs in any substantial way in terms of size or

² Section 4 of the MOA requires the District to create 16 acres of least tern nesting habitat “on land owned by the CDFG.” The Commission staff interprets this stipulation as having as its purpose relieving the District of the cost of acquisition for an alternative permanent nesting habitat. Any program of least tern nesting habitat creation that did not impose on the District the cost of site acquisition would be consistent with this underlying purpose of the MOA, regardless of who actually owned the site.

³ Letter from B. Gessner, 22nd District Agricultural Association, to J. Loeffler, California Coastal Commission, dated March 22, 1999.

other characteristics from those specified in the 1984 MOA, Commission approval of an amendment to the District's CDP 6-84-525 would be required, as well as a new permit authorizing construction of the nesting site.

Conclusion: Sixteen-acre Obligation Still in Effect. Efforts to find a way for the District to satisfy its obligations have continued. In 1992, the District submitted a coastal development permit application for the Rivermouth Property as well as an evaluation of alternative permanent sites (discussed below). In addition, nesting sites intended to fulfill the District's obligations were identified as part of the planning and environmental review process for the San Dieguito wetland restoration project. At this time, the Executive Director and the District have not yet been able under the terms of the SA to agree on a permanent least tern nesting site to satisfy the District's obligations under the 1984 MOA and CDP 6-84-525. However, this fact does not in any way vitiate those obligations. They remain today as binding on the District and as subject to the Commission's legal enforcement authority as they were when they were first imposed.

Determination of Suitability of Rivermouth Property as Least Tern Nesting Habitat

As noted above, Section 1(d) of the 1991 SA confers on the Executive Director of the Commission the authority to determine whether the Rivermouth Property is a site that is suitable for satisfying the District's obligations under the 1984 MOA. Although the Executive Director, acting through the staff of the Commission, has in correspondence with the District raised concerns over the suitability of the Rivermouth Property to support least tern nesting habitat,⁴ he has never *definitively* determined that the Rivermouth Property is unsuitable for such a purpose. In order to erase whatever uncertainty may have been occasioned by this failure, this letter shall serve as notice to the District of the Executive Director's determination under Section 1(d) of the SA that the Rivermouth Property is unsuitable as a site on which to create viable least tern nesting habitat for the following reasons.

According to wildlife experts at USFWS and CDFG, the Rivermouth Property is not "a practicable nesting area."⁵ It is too low and surrounded by obstructions and subject to periodic inundation, erosion, and loss during storms. This site is also located adjacent to a beach intensely used by dogs and people, which could disrupt nesting activity. Further, use of this site would involve placing fences in the flood plain that could trap debris during periods of high river discharge.

Determination of Suitability of Alternate Sites

As noted above, Section 1(c) of the Settlement Agreement directed the District to submit an evaluation of alternative sites to the Commission and other involved agencies by November 15, 1991. The SA provided that all proposed alternative sites "shall meet the intent of the original agreement [i.e., the 1984 MOA] and criteria identified [therein]

⁴ Letter from E. Lirley, California Coastal Commission, to P. Butler, BRG, consultant to 22nd District Agricultural Association, dated May 18, 1998.

⁵ Letter from C. F. Raysbrook, CDFG, and K. S. Berg, USFWS, to R. Parsky, President 22nd District Agricultural Association, dated November 19, 1999.

to the maximum extent possible." The intent of the SA was to ensure that a permanent nesting site "be permitted and prepared prior to the start of the 1992 least tern nesting season (i.e., prior to April 1, 1992)".⁶

The District submitted to the Commission only a report outline by the deadline given in the SA.⁷ On March 25, 1992, too late for permitting and preparation of a permanent site by the start of the 1992 nesting season, the Commission's San Diego office received via facsimile from the District's consultant, Butler Roach Group, the required alternative sites report.

Commission staff has not formally responded to the District's alternative sites report during the years that planning for the overall San Dieguito wetland restoration has been underway. Thus, this letter also shall serve as notice to the District of the Executive Director's determination under Section 1(d) of the SA of the suitability of the seven alternative sites and alternative mitigations provided in the District's March 1992 report as potential least tern nesting habitat.

The alternative sites analyses were prepared by the Butler Roach Group, a consultant firm working for the District. Commission staff used these analyses, together with the input of staff from the CDFG and USFWS, to evaluate the suitability of the seven alternative nesting site locations. Since no map of the alternative site locations was included with the District's report, staff has prepared a draft map depicting the alternative sites (see Figure 1). Please note that the sites are superimposed over a map from the San Dieguito wetland restoration project showing *current* land ownership (JPA, 1999). The District should review the accuracy of the alternative site locations shown on Figure 1 to ensure that these are the locations intended by the District.

Alternative 1. Preferred sites identified in the 1984 MOA

Alternative 1 refers to the approximately 100-acre parcel then known as the Del Mar 88 property that is west of Interstate 5 and south of the San Dieguito river channel. The District's analysis described it as containing primarily existing wetlands in the western section and disturbed wetlands and uplands in the eastern section. The District did not identify on which of the 100 acres the tern habitat would be sited.

This entire plot is now owned by the San Dieguito River Valley Regional Open Space Park Joint Powers Authority (JPA) and is referred to as the "Airfield" property in the EIR/S for the restoration of San Dieguito Lagoon. The District acknowledged in its alternative sites analysis that the JPA might accept locating the least tern nesting site within the lower lagoon as part of the overall restoration project, but cited the unknown timing of the planning process as a disadvantage. That planning process is now largely completed, and two nesting sites for California Least Terns (designated NS11 and 12) proposed in the preferred plan (Mixed Habitat Alternative) in the EIR/S are within the area designated in this alternative. The location, configuration, and size of these nesting

⁶ 1991 Settlement Agreement, Section 1(d).

⁷ Letter from P. Butler, BRG, consultant to 22nd District Agricultural Association, to E. Lirley, California Coastal Commission, dated November 15, 1991.

sites were developed on the recommendations of wildlife biologists in the CDFG and the USFWS with expertise on the habitat needs of the California Least Tern and the need to minimize destruction of seasonal salt marsh. Thus, NS 11 and 12 contained within the original preferred permanent site are suitable for least tern nesting habitat. However, because of their small size (2.96 usable acres), these two sites alone are not sufficient to meet the District's obligations.

Alternative 2. Preferred site identified in 1990 MOA, the Rivermouth Property

Alternative 2 consists of the Rivermouth Property, which is located immediately west of the Del Mar Fairgrounds/Racetrack between the railroad berm and Highway 101. For the reasons set forth above (see "Determination of Suitability of Rivermouth Property"), this parcel is not suitable as a nesting site for California Least Terns.

Alternative 3. Alternative sites on CDFG-owned land

Alternative 3 is located within the 100-acre CDFG parcel located immediately west of Interstate 5 and south of the former Del Mar 88 property acquired by the JPA. The District noted that the only possible location for a nesting site for California Least Terns within this property (on Crest Canyon fill from CDFG's Phase I restoration) has been deemed unsuitable by CDFG experts because it is very small and tucked into the base of a bluff that provides perch sites for avian predators. In addition, powerlines that cross the parcel provide perch sites for these predators. The District also noted that construction of a nesting site in this location would require the conversion of existing wetlands to uplands at the expense of other established wetland habitat needs. The District stated that CDFG determined that creation of least tern nesting habitat on this parcel did not take precedence over other CDFG habitat restoration projects. For all of these reasons, the Commission staff concurs that the CDFG parcel is unsuitable for least tern nesting habitat.

Alternative 4. Alternative sites on 22nd District-owned land

Alternative 4 targets the sandy beach at the mouth of the San Dieguito River and the Fairgrounds south overflow parking lot. In the opinion of wildlife experts, both locations would be acceptable nesting sites for California Least Terns if public access were prohibited. The beach is higher in elevation than the Rivermouth Property and provides an open view of the ocean and would not be as susceptible to loss during periods of high river discharge. However, the District noted that California Least Tern nesting at the sandy beach would eliminate a locally popular beach area, thereby affecting coastal access. The Commission staff concurs with the District's assessment that the sandy beach is not an acceptable nesting site because its existing use as a recreational resource in San Diego County is incompatible with California Least Tern nesting.

Use of the south overflow parking lot for nesting habitat would be acceptable because it is its intensification of use resulting from the District's construction under CDP 6-84-525 of the infield tunnel that led to the District's obligation to provide alternative nesting

habitat for the California Least Tern. The south overflow parking lot is an historic least tern habitat and is designated as a least tern nesting site in the SDLEP. Therefore, construction of 16 acres of viable nesting habitat in this location would be an acceptable alternative to satisfy the District's permit obligation. USFWS and CDFG stand ready to discuss site preparation and predator management needs with Commission staff and the District should the District prefer to fulfill its 16-acre nesting site requirement at the south overflow parking lot area.

Another endangered species, Belding's Savannah sparrow, currently exists on an approximately 2-acre area held as a wildlife conservation easement at the southernmost tip of the parking lot.⁸ Thus, the south flow overflow parking lot has potential for wetland restoration as well.

Alternative 5. Alternative measures on CDFG-owned land

Alternative 5 would provide for the enhancement of two existing nesting sites (NS 15 and the nesting site on W30) within the 100-acre parcel owned by CDFG (discussed in Alternative 3). These two sites were created in the 1980s as part of CDFG's Phase I lagoon enhancement plan. However, experience has shown that these sites will not successfully support nesting California Least Terns because of their proximity to the freeway berm and associated human-related disturbance, and to overhead transmission lines that provide roosting for avian predators. While the District offered to contribute to long-term remedies for these sites, including annual maintenance, predator control, and undergrounding the overhead electric transmission lines, the District also acknowledged that such measures would not create the additional nesting habitat as required in the permit. Thus, this alternative does not constitute a suitable means of satisfying the District's obligations under the permit.

Alternative 6. Alternative measures within San Dieguito Lagoon

Alternative 6 consists of a proposal to underground electric transmission lines that cross the south lagoon area west of Interstate 5. As in Alternative 5, the District acknowledged that this alternative would not provide for the creation of additional nesting habitat. Thus, this alternative does not provide a suitable means to satisfy the District's permit obligations.

Alternative 7. Alternative sites or measures outside of the SDLREP Area

Alternative 7 consists of undefined coastal lagoon or bay areas outside of the San Dieguito Lagoon Resource Enhancement Plan area. The District acknowledged that this alternative is not consistent with the purpose and intent of the original coastal development permit and resulting agreements with the CDFG to create additional least

⁸ Pursuant to Section 1(b) of the 1991 Settlement Agreement, the District is responsible for retaining in open space that portion of the south overflow lot designated by CDFG. Section 1(e) of the SA also requires the District to submit concurrently with the coastal development permit application for the permanent least tern nesting site an amendment to CDP 6-84-525 that designates the extent of the conservation easement to be applied to portions of the south overflow parking lot.

tern nesting habitat within the San Dieguito Lagoon. Thus, this alternative also does not provide a suitable means of satisfying the District's permit obligations.

Summary. In summary, the Executive Director has determined that portions of two alternative sites identified by the District would be suitable sites on which to create least tern nesting habitat required under CDP 6-84-525. Nesting sites NS11 and NS12 in the Mixed Habitat Plan of the EIR/S for the San Dieguito Wetland Restoration Project are within Alternative 1 and are suitable sites on which to create least tern nesting habitat. However, they do not by themselves provide sufficient acreage to fully satisfy the District's obligations. In addition, the south overflow parking lot included as part of the District's proposed Alternative 4 would contain sufficient acreage and be suitable as nesting habitat for the least tern.

Maintenance and Maintenance Monitoring

As we indicated both in our meeting of April 26 and our letter of May 7, it is essential to the success of the nesting sites that they be properly maintained and monitored. It is clearly the intent of CDP 6-84-525 that viable least tern nesting habitat be provided. If the site is not properly maintained, then it would no longer be viable for least tern nesting.

The 1984 MOA supports the objective of the permit to require viable nesting habitat. Section 1 states that one of the primary purposes of the MOA is the "establish[ment of] a *wildlife management program* for the Tern at San Dieguito Lagoon...." (Emphasis added.) The staff has informed the District of the Commission's view that to achieve the goal of viable tern habitat any such program must include at minimum certain elements such as (1) annual vegetation clearance, (2) domestic and wild animal predator control, and (3) monitoring of nesting and rearing success (or lack thereof) and program adjustment in response to such monitoring. These elements are more fully described in the staff's draft maintenance and maintenance monitoring plan provided to the District on May 7, 2001. The draft plan represents what is known to be required to maintain a viable nesting habitat.

The District can benefit from the experience gained at several nesting sites constructed for California Least Terns (e.g., Bolsa Chica, Newport Slough, Upper Newport Bay, Batiquitos Lagoon), which has clearly shown that nesting sites will fail to produce fledglings over the long term unless they are adequately maintained. The two principal maintenance issues that affect the success of constructed nesting sites involve the removal of vegetation prior to nesting and control of ground-based and avian predators. Without adequate management of vegetation and maintenance monitoring of predators and egg and chick survival, constructed nesting sites will not provide their intended resource value.

The District contends that the District's long-term maintenance responsibilities specified in the MOAs are unclear and more limited than the maintenance and maintenance monitoring requirements outlined in the staff's draft plan. We agree that the level of specificity is greater in the May 7, 2001, draft plan. However, the intent of the coastal

permit to maintain viable habitat is supported in both Section 5 of the 1984 MOA and Section 3 of the 1990 MOA, wherein the District is required to maintain the permanent nesting site, including vegetation removal and predator control.

In objecting to the staff's draft plan, the District also points out that Section 6 of the 1984 MOA places responsibility for patrols and biological surveys on the Department of Fish and Game. The District's contract with another entity does not absolve the District of its responsibility under its permit to ensure that maintenance monitoring during the nesting season is sufficient to make certain that disturbances do not reduce the successful production of fledglings. Without these steps, experience has shown that the sites will not be successful and the District would thus fail to achieve the goal of viable tern habitat as required under its permit.

II. EFFECT OF SAN DIEGUITO LAGOON RESTORATION PROJECT ON DISTRICT'S PERMIT OBLIGATIONS

In July 1991, prior to the execution of the Settlement Agreement between the District and Commission, the Commission adopted additional conditions to Southern California Edison Company (SCE) and partners' coastal development permit for the San Onofre Nuclear Generating Station (SONGS) Units 2 and 3 (CDP 6-81-330, formerly 183-73). Those conditions require SCE, among other things, to create or substantially restore 150 acres of wetlands to mitigate the loss of fish caused by the operation of SONGS. In December 1991, SCE completed an evaluation of the suitability of eight wetlands in Southern California as mitigation sites for SONGS Units 2 and 3 impacts, and the Commission approved the San Dieguito Lagoon as the restoration site in June 1992. Detailed planning for the San Dieguito wetland restoration project began, and, after many opportunities for public input, culminated in a final EIR/S in September 2000. SCE currently is preparing a final restoration plan for Commission approval prior to beginning the permitting process.

The District has often stated its expectation that the wetland restoration plan would provide sufficient least tern nesting habitat to satisfy the District's outstanding obligations under CDP 6-84-525. The staff believes that the final EIR/S *does* identify suitable least tern nesting habitat sufficient to satisfy the District's permit obligations as discussed below.

Suitability of Nesting Sites Identified in EIR/S

Four new nesting sites for California Least Tern are identified in the preferred plan (Mixed Habitat Alternative) in the final EIR/S for the San Dieguito wetland restoration project (designated as NS 11, 12, 13 and 14). As we noted in our May 7, 2001, letter to the District, the staff, in consultation with the CDFG and USFWS, has concluded that, with proper maintenance and maintenance monitoring and any mitigation required as a result of construction impacts (discussed below), these four sites (as slightly reconfigured) would be suitable for least tern nesting site habitat. Representatives of both the CDFG and USFWS concur with our conclusion.

In your May 18 letter, you make several references to the District's understanding that the wetland restoration project would include within its scope sufficient least tern nesting habitat to satisfy the District's outstanding obligations under CDP 6-84-525. Through an amendment to the District's permit, which the staff is willing to support, these four sites would provide the habitat necessary to fulfill these obligations for the reasons discussed below.

Location. The 1984 MOA, as incorporated as a requirement of CDP 6-84-525, specifies that the permanent least tern nesting site be located within the area encompassed by the SDLEP. The area of the SDLEP generally conforms to the portion of the current wetland restoration plan that is west of Interstate 5. The current wetland restoration plan also includes significant acreage east of I-5. Two of the nesting sites, NS 11 and 12, are located within the original SDLEP area west of I-5 and two sites, NS 13 and 14, are located within the expanded wetland restoration area east of I-5.

The SDLEP, approved in 1980 by the Commission, was a joint effort by the City of Del Mar and State Coastal Conservancy in recognition of the historic ecological degradation that has occurred in the San Dieguito Lagoon wetlands, and the need to maintain as well as enhance the biological, recreational and education potential of the area. Since then, interest in restoring the overall San Dieguito Lagoon has increased, culminating in the current wetland restoration plan. The intent of the permit requirement is to provide least tern habitat to replace the historic least tern habitat lost as a result of the District's intensification of use from the infield tunnel on the south overflow lot. So long as viable habitat is created in accordance with the intent of the permit, the staff is willing to recommend to the Commission that the area for locating the required least tern mitigation be expanded to include the entire San Dieguito wetland restoration project area.

As noted above, the 1984 MOA requires the District to create the 16 acres "on land owned by the CDFG." The staff interprets this stipulation as having as its purpose relieving the District of the cost of acquisition for an alternative permanent nesting habitat. Creating the required least tern nesting habitat without imposing site acquisition costs would be consistent with this underlying purpose of the MOA, regardless of actual site ownership. The four new nesting sites proposed in the restoration plan all are on property that is being made available by the JPA and SCE for project implementation. Thus, the District would not be liable for any acquisition costs in accordance with this provision of the 1984 MOA.

Size. As discussed above, the provisions of CDP 6-84-525 and the 1984 MOA require the District to provide 16 acres of least tern nesting habitat to compensate for the approximately 16 acre historic habitat now used by the District for parking. It was also intended that the 16 acres be contiguous.

After many years of study and planning, public input, and extensive consultation with state and federal resource agencies, the EIR/S identified four new nesting sites. Based on SCE's latest grading plans, the total footprint for the 4 sites is 18.07 acres, with a total usable acreage of 11.83 acres. The four sites are not contiguous. Nevertheless,

based on input from project biologists, CDFG and USFWS, these four sites have the greatest potential for success and would be compatible with the overall restoration plan.

In the opinion of experts on California Least Tern, the construction of multiple nesting sites is advantageous. Multiple nesting sites provide the opportunity for terns to move from one site to another if a site becomes unsuitable due to the presence of predators or other factors. In addition, the nesting sites identified in the EIR/S are located as far away as possible from perch sites for avian predators (power lines, adjacent high land). California Least Terns prefer to nest on sites with an open panorama (e.g., not next to a freeway berm). In this regard, the nesting sites west of the freeway (NS11 and 12), with a less obstructed view of the ocean, probably have the best chance of successful use.

Thus, despite the fact that the total amount of usable acreage is less than the required 16 acres, the staff is willing to recommend that the Commission approve an application from the District to amend CDP 6-84-525 to accept these four California Least Tern nesting sites with maintenance and monitoring in fulfillment of the District's obligation under that permit to provide 16 acres of viable tern habitat. USFWS and CDFG also concur in the recommendation that the staff is willing to offer to the Commission.

Mitigation for Habitat Construction Impacts to Existing Wetlands

Two of the nesting sites (NS 11 and 12) identified in the final EIR/S would impact existing wetlands. It is generally the Coastal Commission's historic practice to require mitigation for such impacts in a 4:1 ratio to meet Coastal Act policies requiring maximum feasible mitigation.⁹ In discussing the requirement for the District to mitigate impacts to existing wetlands that may occur as a result of the construction of NS 11 and 12, the District believes that it should not be held as the responsible party. We respectfully disagree.

It is the District that has benefited from the permit and it is the District's obligation under CDP 6-84-525 to provide least tern nesting habitat. Should the construction of the permanent least tern nesting habitat required under CDP 6-84-525 result in impacts to existing wetlands, then those impacts will have to be mitigated in accordance with the Coastal Commission's historic interpretation of Coastal Act policies regarding maximum feasible mitigation. Further, the Commission has already found in approving the preliminary plan for the San Dieguito restoration project that a mitigation ratio of 4:1 "is required for impacts where existing wetlands are *eliminated*."¹⁰ (Emphasis in original.) Given SCE's commitment to the San Dieguito project and recent proposals related to SCE's "Villages" property, the staff believes that restoration opportunities for mitigation credits within the overall project will probably be available to the District from SCE.

Your May 18 letter raises several issues regarding mitigation of impacts to existing wetlands which we discuss below.

⁹ See California Coastal Commission, *Procedural Guidance for the Review of Wetland Projects in California's Coastal Zone* (1994) pp. 33-4 (Ch. 2, sec. IV).

¹⁰ Adopted Findings and Conditions on Condition Compliance for CDP 6-81-330-A (SONGS), dated November 5, 1997.

Mitigating Loss of One Sensitive Habitat Type for Creation of Another. The District points out that the SDLEP, which was approved by the Commission, "clearly shows the proposed creation of least tern nesting sites in the western lagoon in areas that were and are today wetlands, presumably recognizing the offsetting values of restoring a healthy, functioning coastal marsh environment."

If one of the resource agencies were constructing the least tern nesting habitat purely to benefit an endangered species, it would be simpler to make the argument that replacing one endangered habitat (wetlands) with habitat for an endangered species needn't require a 4:1 mitigation ratio for the lost wetlands. However, as stated above, the purpose of the least tern habitat required under the District's permit is to compensate for impacts to an area at the fairgrounds which was historically used by least terns. If wetlands are destroyed as a result of constructing the least tern habitat, it is clear that there will be a net loss of wetlands and of overall resource values. The entire resource value of the proposed least tern habitat area has already been spent to compensate for earlier in-kind losses. Thus, additional compensation is required for the new impacts.

Delete Sites Impacting Existing Wetlands. The District suggests that the two least tern nesting sites identified in the EIR/S that impact existing wetlands (i.e., NS 11 and 12) be deleted from the restoration plan.

According to USFWS and CDFG wildlife experts, of the four new nesting sites proposed in the restoration plan, NS 11 and 12 have the greatest potential for success. As noted above, NS 11 and 12 have the least obstructed view of the ocean. These sites have been reconfigured to avoid impacts to wetlands to the maximum extent possible and still retain a viable habitat area. According to SCE's latest grading plans, the resulting impacts are 0.23 acres from construction of NS 11 (reduced from about an acre) and 1.86 acres from construction of NS 12. The resource agencies are in agreement that further reconfiguration or reduction in size of NS 12 to avoid impacts to wetlands would significantly reduce its potential for success.

Although NS 11 and 12, as reconfigured in SCE's latest grading plans, have a total usable acreage of only 3.63 acres, they are considered the most favorable sites. The staff would not support a recommendation to the Commission to reduce the total acreage owed by the District without the inclusion of these sites. If NS 11 and 12 were deleted from the restoration plan leaving only NS 13 and 14 (which have a total usable acreage of about 8.2 acres), then the District would be required to create an additional 7.8 acres of least tern nesting habitat elsewhere in the San Dieguito restoration area. The EIR/S process contained a thorough investigation of sites and configurations, and, with the exception of the District's south overflow parking lot that was not considered, it does not appear likely that other suitable sites could be located within the restoration area. Thus, the District would be obligated to look for alternative sites outside the San Dieguito restoration project area, which would raise a whole host of new issues.

Lack of Input into Design of Nesting Site Plan. The District acknowledges that the resource agencies are "best qualified to develop an optimal habitat restoration plan that would include appropriate acreage and locations for least tern nesting sites." Yet

the District now claims that because it had no input to the design it is unfair that it should be responsible for mitigation of impacts caused by "their design."

As discussed above, the nesting sites identified in the restoration plan are, in fact, the optimal sites for least tern nesting habitat (short of converting the entire south overflow parking lot to nesting habitat). The staff, USFWS, CDFG, JPA and SCE all stand ready to find a means and location within the restoration project to fulfill the District's wetland mitigation responsibility that would result from the nesting area construction.

Additionally, both the draft EIR/S (January 2000) and the final EIR/S (September 2000) identified the locations, and discussed the anticipated impacts of the nesting sites and the potential need for mitigating construction-related impacts to wetlands at a 4:1 ratio (see sections 4.4.1.1.2 in both documents). (The EIR/S suggests that an argument could be made that, because the nesting sites would contribute to wetland functions and values, such impacts need not require mitigation in the 4:1 ratio. However, the EIR/S makes no differentiation, as the Commission does, that the District is creating the nest sites in compensation for earlier resource losses, as discussed above.) The final EIR/S acknowledged that the provision of nest sites could result in the need for additional mitigation and included information showing the consequences of a 4:1 mitigation ratio for nesting sites on restoration acreage credit (Table 4.4-2, p. 4.4-14). That the District apparently chose not to participate to the fullest extent in the public review of these documents is not now a valid reason to claim that the sites were designed "in bad faith" by the resource agencies with no input from the District.

Furthermore, the District certainly must have been aware of the existence of wetland habitat within the preferred site identified in Alternative 1 of the alternative sites analyses prepared by the District's consultant. As noted above, NS 11 and 12 are located within the area encompassed by Alternative 1.

III. CONCLUSION AND NEXT STEPS

Regardless of the reasons that the required permanent least tern nesting habitat has not yet been created, there should be general recognition that the District has benefited from its coastal development permit since 1984 and at the same time that a long-term loss of habitat has occurred. We certainly agree that cooperation is needed, and we will do whatever we can to ensure that the issues are resolved to enable the San Dieguito wetlands restoration project to move forward. However, the Commission also has regulatory responsibilities to ensure that the District's least tern mitigation is achieved pursuant to its permit. We believe these can be balanced, and that the District can fulfill its obligations under CDP 6-84-525 in a manner that also facilitates implementation of the San Dieguito wetlands restoration project.

As discussed above, the San Dieguito wetland restoration project will provide 11.83 new, usable acres of least tern nesting habitat (out of an 18.07-acre footprint). While the acreage proposed in the restoration plan is short of the 16 acres required under CDP 6-84-525, the sites provide the most favorable locations for a successful least tern habitat. These sites also offer considerably more usable acreage than the proposed Rivermouth

Property, which is not suitable for the reasons enumerated above. If the District agrees with the Executive Director pursuant to the Settlement Agreement that these four sites, together with maintenance and monitoring and wetland mitigation, are acceptable for creating least tern nesting habitat in fulfillment of the District's permit obligations, then the District must submit an amendment to CDP 6-84-525 for Commission review and approval.

In accepting the four new nesting sites identified in the EIR/S, the District will benefit in several ways.

- First, SCE has agreed to construct the sites in fulfillment of the District's obligation under CDP 6-84-525 at no direct cost to the District in exchange for access to the river mouth for inlet maintenance. SCE is not required under its SONGS permit to provide for least tern nesting habitat as part of its obligation to restore 150 acres of wetlands to mitigate the loss of fish caused by the operation of SONGS. When included in the overall San Dieguito wetland restoration project, SCE estimated construction costs alone for the four nesting sites at approximately \$1 million. Construction of these nesting sites separate from the wetland restoration project would exceed \$4 million.¹¹ The District also would avoid permitting costs and the staff commitment necessary to process a project independently since the least tern nesting sites would be included in the processing of the wetland restoration plan. Thus, the District would receive a direct value of at least \$1 million for allowing SCE to construct the nesting sites to fulfill the District's obligations in exchange for river mouth access.
- Second, the JPA and SCE will be donating the land on which to construct the nesting sites. Thus, the District is relieved of any cost for land acquisition.
- Third, the District purchased the Rivermouth Property at a cost of \$235,000 for the purposes of constructing the tern habitat as well as enabling the District to breach the lagoon mouth when District property was harmed by high water levels resulting from inlet closures. Part of SCE's permit requirement for the wetland restoration is to maintain the lagoon mouth open to tidal influence, in perpetuity. By granting SCE access to the Rivermouth Property, the District will be relieved of its need to maintain the inlet for flood control. At an estimated cost of \$250,000 to \$300,000 for the initial opening of the inlet, the District would more than recover its acquisition cost in the first year of inlet maintenance. Further, the District would be relieved of the cost for subsequent inlet breaching, estimated between \$80,000 and \$133,000 per episode.¹²
- Finally, the District would be in compliance with its least tern mitigation requirements under CDP 6-84-525, a goal that we know you share with the Commission.

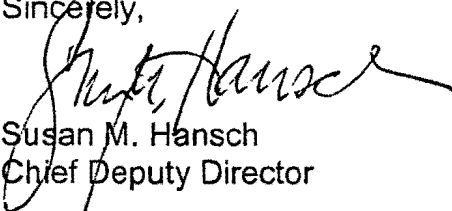
¹¹ Communication via e-mail from S. Tanious, SCE, to S. Schroeter, California Coastal Commission, dated June 25, 2001.

¹² Costs estimated by H. Elwany, Coastal Environments, Inc., June 14, 2001.

As we carry on our dialogue to resolve the least tern nesting site issues, the Coastal Commission staff will continue to work closely with all parties to achieve compliance with all pending coastal permits and prepare solid, scientifically sound recommendations for consideration and action by the Coastal Commission. SCE is currently preparing its Final Restoration Plan for the SONGS mitigation program for submittal to and approval by the Commission. Ideally, the amendments to CDP 6-84-525 needed to make the changes we have indicated in this letter should be reviewed and acted upon concurrently with SCE's final plan.

We believe that it would be helpful to have further face-to-face discussion of the issues after the District has had an opportunity to review this letter. In the meantime, if I can be of further assistance, please call me at (415) 904-5244.

Sincerely,



Susan M. Hansch
Chief Deputy Director

cc: 22nd District Board of Directors
Tim Fennell, 22nd District
Ron Small, Dept. of General Services
Patricia Butler, BRG Consulting
Supervisor Pam Slater
Dick Bobertz, JPA
Jack Fancher, USFWS
Terri Stewart, CDFG
David Kay, SCE
Coastal Commissioners

Fig. 1. Draft map of alternatives 1-6 provided to San Diego office of California Coastal Commission by Butler Roach Group Two on March 25, 1992. Alternative locations are superimposed on Fig. 3.1.1 from Final EIR/S for the San Dieguito Lagoon Restoration Project.

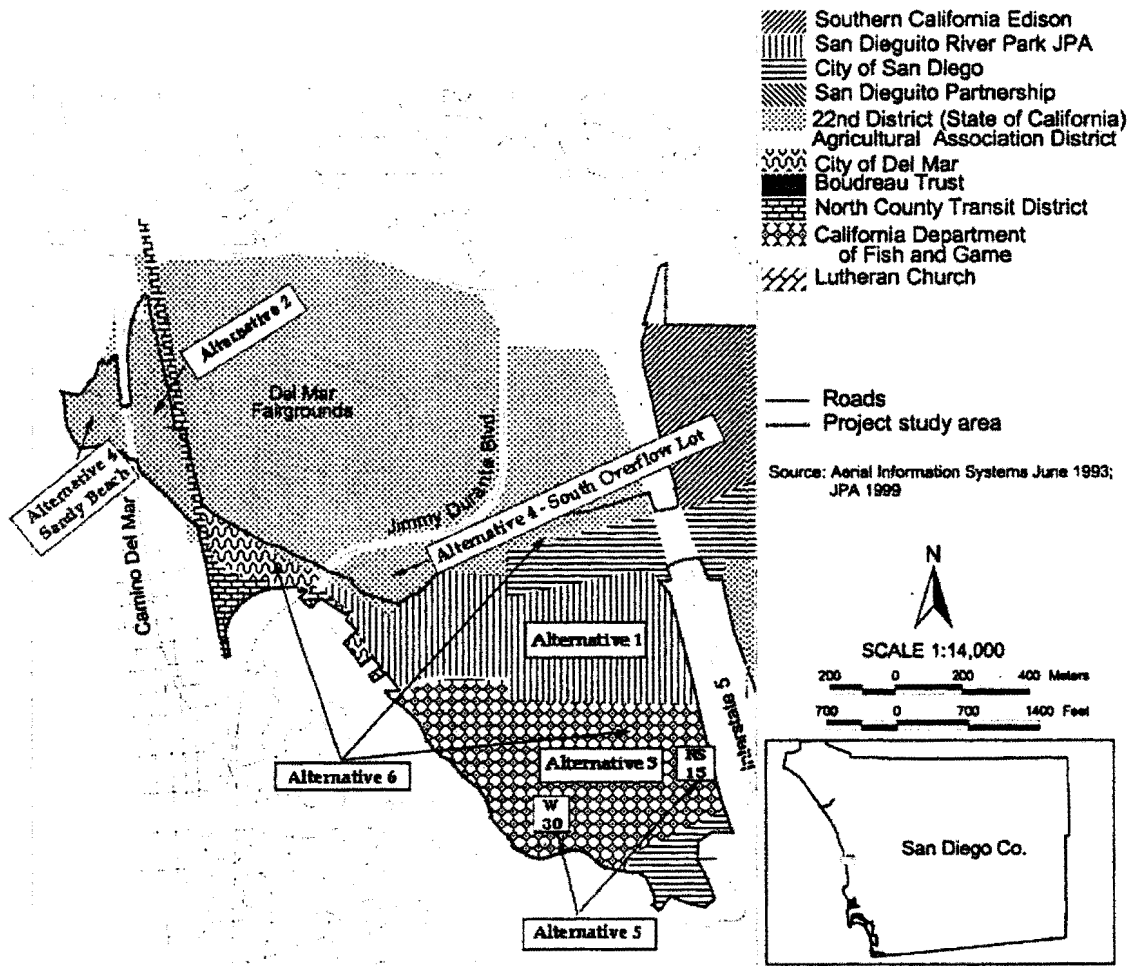


Figure 3.1-1
 Land Ownership in the Project Area