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STATE OF CALIFORNIA -- THE RESOURCES AGENCY GRAY DAVIS, *Governor*

CALIFORNIA COASTAL COMMISSION
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RECORD PACKET COPY

Permit Action:	12/11/02
Request Submitted	1/10/03
Staff:	MKH
Staff Report:	2/20/03
Hearing Date:	3/05/03

STAFF REPORT: REQUEST FOR RECONSIDERATION
ARCO DOS PUEBLOS GOLF COURSE

APPLICATION NO: A-4-STB-93-154-CC-R2 (Second Request for Reconsideration)

APPLICANT: CPHPAH Dos Pueblos Associates, LLC; Capital Pacific Holdings, Inc.; Patriot American Hospitality, Inc., Makar Enterprises, Inc., Richard W. Hollis, Jr.

AGENT: Steven Kaufmann, Attorney, Richard, Watson & Gershon; Richard W. Hollis, Jr., President, CPHPAH Dos Pueblos Associates, LLC

PROJECT LOCATION: Naples area of Gaviota Coast, approximately 1.5 miles west of U.S. Highway 101/Winchester Canyon Exit (Goleta), seaward of and adjacent to U.S. Highway 101, Route 1, Box 275, unincorporated Santa Barbara County.

PROJECT DESCRIPTION: 18-hole and 9-hole golf courses with clubhouse and associated development, including amendments, described in detail on pages 20-22 of Exhibit 2.

COMMISSION ACTION: The Commission denied the Permit and Proposed Amendments pursuant to New Hearing on Changed Circumstances by unanimous vote (10-0), December 11, 2002 (San Francisco).

STAFF RECOMMENDATION: Staff recommends that the Commission **Deny** the Reconsideration Request

MOTION & RESOLUTION: The motion & resolution are found on page 4

PROCEDURAL NOTE

§13109.5 of the California Code of Regulations provides that at any time within thirty (30) days following a final vote upon an application for a coastal development permit, the applicant of record may request that the Commission grant a reconsideration of the denial of an application for a coastal development permit or of any term or condition of a coastal development permit which has been granted.

The grounds for reconsideration of a permit action are provided in §30627 of the Coastal Act, which states in pertinent part that: The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the initial decision.

SUMMARY OF STAFF RECOMMENDATION

The applicants contend that both bases provided in §30627 of the Coastal Act for the granting of reconsideration are met. They allege that there is new evidence which they could not have presented at the December 11, 2002 hearing, and that errors of fact and law have occurred which have the potential of altering the Commission's decision to deny the project. The reconsideration request letter prepared by the applicants' agent and attorney, Steven Kaufmann, is attached as Exhibit 1.

Staff does not believe that the applicants' request meets the standard for reconsideration established in the Coastal Act. Every allegation made by the applicants in the reconsideration request was already presented at or previous to the Commission's December 11, 2002 hearing, and was already considered by the Commission, or does not have the potential to have altered the Commission's decision. Points of disagreement continue to exist between the applicants and the Commission, but that does not rise to the Coastal Act standard for granting reconsideration. The applicants claim that - "new information" exists, consisting of their new claim that they were not allowed to propose changes that they wanted to make to the project, prior to the Commission's vote.

The applicants had numerous opportunities to propose revisions to their project, and in fact did make some changes to their project prior to the Commission's vote; however, the applicants also rejected the changes that would have rendered the project consistent with Santa Barbara County's certified Local Coastal Program. The changes that the applicants now propose to make if granted reconsideration – such as deletion of the Par 3 course -- were among the changes previously suggested by staff. The applicants specifically rejected the recommended revisions to the project, as shown in the applicants' writings to the Commission after the publication of the November 22, 2002 staff report. See, for example the applicants' refusal to delete the Par 3 course, as stated in Exhibit 4 at pages 36 and 37.

Moreover, although the conceptual changes proposed for a grant of reconsideration would improve the project, the changes are not extensive enough to render the proposed project consistent with the applicable policies and provisions of the LCP and thus would be unlikely to obtain favorable review. Specifically, the applicants do not propose to revise the golf course layout in the areas of the proposed 16th, 17th and 18th fairways. These fairways are proposed on the bluffedge portions of the 208-acre site that contains the Environmentally Sensitive Habitat Area of the white-tailed kite. Thus, the applicants still propose to develop golf facilities within an identified ESHA, contrary to the provisions of Santa Barbara County's certified LCP (the legal standard of review for the applicants' previous permit, a former appeal). The Commission rejected the previous project, which proposed to construct these fairways in the white-tailed kite ESHA. The applicants have not changed the project to address this inconsistency with

the LCP. Therefore, even if changes to a project offered after-the-fact of Commission denial were a basis for granting reconsideration under the Coastal Act, the applicants have not proposed changes that would resolve the most important policy inconsistencies contained in their previous proposal.

The applicants' representatives have stated that they hope the conceptual offer to revise the project in the ways they propose in their request will convince the Commission to grant reconsideration. Such an offer is not a legal basis for granting reconsideration under the Coastal Act. The grounds for reconsideration are narrow and do not include after-the-fact revisions that an applicant might wish, with hindsight, to offer in exchange for the opportunity to obtain a different decision. The applicants have provided no evidence to support their other stated reasons for seeking reconsideration.

While there remain differences of opinion between the applicants and the Commission on points of law, or of expert opinion, the applicants have already made their assertions to the Commission and their arguments were considered by the Commission. The applicants' request for reconsideration generally amounts to a re-argument of the same material. Neither have the applicants demonstrated there is "new evidence, which in the exercise of reasonable diligence could not have been presented" at the December 11, 2002 hearing. As such, the Commission is unlikely to render a different decision.

For these reasons, therefore, staff recommends that the Commission **deny reconsideration** of CDP A-4-STB-93-154. The motion and resolution are located on page 4.

I. STAFF RECOMMENDATION:

MOTION: ***I move that the Commission grant reconsideration of Coastal Development Permit No. A-4-STB-93-154.***

STAFF RECOMMENDATION TO DENY RECONSIDERATION:

Staff recommends a **NO** vote on the motion. Failure to adopt the motion will result in denial of the request for reconsideration and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of Commissioners present.

RESOLUTION TO DENY RECONSIDERATION:

The Commission hereby denies the request for reconsideration of the Commission's decision on coastal development permit no. A-4-STB-93-154 on the grounds that there is no relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing, nor has an error of fact or law occurred which has the potential of altering the initial decision.

II. LIST of EXHIBITS

1. Reconsideration request, letter received January 10, 2003, from Steven Kaufmann, Attorney, Richards, Watson & Gershon. 17 pages, no attachments.

2. Staff Report dated November 22, 2002, which is record of final Commission action denying CDP A-4-STB-93-154 on December 11, 2002, including cover memorandum. The complete Exhibits to the staff report and addendum are substantial and are not reproduced in full here. The exhibits are available for review at the District Office in Ventura or at Commission headquarters, in San Francisco. 77 pages, without attachments.

3. Transcript of December 11, 2002 Commission hearing, Agenda Item W22. 157 pages.

4. Applicants' letter to the Commission, dated December 4, 2002, prepared by M. Andriette Culbertson, President, Culbertson, Adams, & Associates, Planning Consultants, applicants' agent. 50 pages, including attachments.

5. Applicants' letter to the Commission, dated December 4, 2002, prepared by Steven H. Kaufmann, Attorney, Richards, Watson & Gershon, applicants' agent/attorney. 92 pages, including attachments.

6. Applicants' letter to the Commission, dated December 9, 2002, prepared by Ms. Culbertson, applicants' agent. 22 pages, including attachments.

7. Applicants' Biological Resources Map, dated May 3, 2002, prepared by Dudek & Associates, attached to the previous staff report as Exhibit 3, 3 pages.

8. Report of Santa Barbara County Environmental Quality Compliance Monitor, John Storrer, Storrer Environmental Services, dated April 1, 2002, "Status of Southern Tarplant at the Dos Pueblos Golf Links Project Site". Attached to previous Staff Report as Exhibit 33.

9. Report of John Storrer (above), dated June 3, 2002, "Summary of White-tailed kite (*Elanus leucurus)* Observations on 3 May 2002 Dos Pueblos Golf Course Property." Attached to previous Staff Report as Exhibit 44.

10. Report of applicants' consultant, Pacific Southwest Biological Services, Inc., prepared June 7, 2002, titled "Dos Pueblos Golf Links, Goleta, Santa Barbara County, White-tailed Kite Nesting Survey." Attached to previous Staff Report and Addendum as Exhibit 42.

11. Excerpt from Santa Barbara County's certified LCP, AG-II zone district permitted uses, and uses permitted with conditional use permits. Attached to previous Staff Report as Exhibit 54.

12. Memorandum of Jacqueline Bowland regarding pending change in California Native Plant Society sensitivity status of southern tarplant, Applicants' senior biological consultant. Attached to previous Staff Report as Exhibit 33.

III. FINDINGS AND DECLARATIONS

The Commission hereby finds and declares:

A. Project Description and Background.

The proposed project includes construction of a public 18-hole golf course (approximately 75 acres according to the applicants) to operate 360 days per year and serve approximately 60,000 rounds of golf per year, a 9-hole, Par 3 executive golf course (approximately 8 acres) to serve approximately 20,000 rounds per year, a clubhouse, banquet facility, approximately 300 paved parking spaces, and other appurtenant facilities, and approximately 350,000 cu. yds. of grading, set forth in detail in Exhibit 2 (pages 20 – 22, Staff Report).

The subject site is approximately 208 acres, located on a coastal marine terrace immediately east of the Naples area, approximately 1.5 miles west of the intersection of Winchester Canyon and U.S. Highway 101, on the Gaviota Coast of Santa Barbara County. The site and its physical setting are more fully described on pages 23 – 25 of the previous Staff Report, dated November 22, 2002, prepared for the Commission's December 11, 2002 hearing, hereinafter "Staff Report", attached as Exhibit 2.

The history of CDP A-4-STB-93-154 and a discussion of the changed circumstances review are found on pages 4 – 20 of the previous Staff Report (Exhibit 2).

B. Grounds for Reconsideration.

The California Code of Regulations provide, in §13109.2, that at any time within thirty (30) days following a final vote upon an application for a coastal development permit, the applicant of record may request that the Commission grant a reconsideration of any term or condition of a coastal development permit which has been granted.

The grounds for reconsideration of a permit action are provided in §30627 of the Coastal Act, which states in relevant part that:

> The basis of the request for reconsideration shall be either that there is relevant new evidence which, in the exercise of reasonable diligence, could not have been presented at the hearing on the matter or that an error of fact or law has occurred which has the potential of altering the initial decision.

Pursuant to §13109.2 of the California Code of Regulations, staff shall prepare a staff report which makes a recommendation to the Commission on the merits of the request for reconsideration. Pursuant to §13109.5 of the California Code of Regulations, reconsideration of the permit shall be granted by a majority vote of the Commission. If reconsideration were granted, the application would be processed as a new application.

> § 13109.5. Hearing on Reconsideration.
>
> (a) The executive director shall schedule a hearing on the reconsideration request at the next regularly scheduled meeting or as soon as practicable after the executive director distributes notice of the hearing consistent with the provisions of section 13063. The executive director shall report the request for reconsideration to the commission with a preliminary recommendation on the grounds for reconsideration.
>
> (b) The applicant and all aggrieved parties to the original commission decision shall be afforded a reasonable time to address the merits of the request.
>
> (c) Reconsideration shall be granted by a majority vote of the commissioners present. If reconsideration is granted, the application shall be processed as a new application in accordance with sections 13050-13120 and sections 13156-13168 of these regulations, as applicable. However, no new fee shall be charged to process the new application.

C. Applicants' Request for Reconsideration

On January 10, 2003, staff received a written request for reconsideration of Permit A-4-STB-93-154. This letter, Exhibit 1, was submitted by the applicants' attorney/agent

Steven Kaufmann, of the law firm Richards, Watson, & Gershon, Los Angeles. The request for reconsideration comprises three contentions which are as follows:

Alleged Errors of Law

The applicants' request for reconsideration lists five alleged mistakes of law. These are addressed below, in the order they appear in the applicants' request.

1. The first alleged error of law is that the Commission failed to comply with Section 35-97.7 of the LCP. The applicants assert that denial of the project was not warranted, but that rather, approval subject to conditions as discussed in Section 35-97.7 was appropriate given the unique facts and circumstances presented. Section 35-97.7 states that: "A coastal development permit may be issued subject to compliance with conditions set forth in the permit which are necessary to ensure protection of the habitat area(s)." It goes on to give examples of types of conditions.

Contrary to the applicants' assertion, Section 35-97.7 was quoted in the Staff Report. See, Staff Report Changed Circumstances and Project Amendments, 11/22/02, Page 58 (hereafter "Staff Report"). Additionally, Section 35-97.7 while cited in full on page 58 of the previous Staff Report was additionally cited by ordinance section number in at least five other places in the Staff Report and was discussed by staff at the December 11, 2002 hearing.

The applicants assert that Section 35-97.7 requires that the Commission should have approved the project and imposed conditions to protect ESHA. However, Section 35-97.7 only provides that a permit **may** be issued subject to compliance with conditions, but it does not require approval of all projects subject to conditions. In addition to Section 35-97.7, when there is ESHA on a site, the project must also comply with the applicable standards in Sections 35-97.8 through 35-97.19. Among other provisions, this project must comply with the standards in Section 35-97.14, including the prohibition on development in kite roosting and nesting habitat. The Commission determined that, contrary to Section 35-97.14, this project would remove White Tail Kite habitat that the Commission biologist has identified as ESHA. Both at the hearing and before the hearing, the applicants clearly indicated that modifications to the project to avoid development in the kite roosting and nesting habitat identified as ESHA were not acceptable to them. Thus, the applicants indicated that there were no conditions acceptable to them that could result in compliance with Section 35-97.14 of the LCP. Therefore, it was not a legal error for the Commission to deny the project, rather than approve it subject to conditions.

Although the applicants suggest otherwise, after denial of a permit extension due to changed circumstances, it is appropriate for the Commission to deny a permit if, in evaluating the changed circumstances, it finds that the project is not consistent with the LCP. The fact that the Commission is acting on a matter after denial of a permit extension is not a special circumstance that limits the actions the Commission may take on the project to approval with conditions.

2. The second alleged error of law is that denial of the project is an unconstitutional taking of applicants' property. This assertion was made by the applicants prior to the hearing (see Exhibit 5, page 12) and was addressed by the Commission. The applicants assert there is no other viable use of the project site. The Commission found that even if a "championship" golf course is not permitted on the site, there are other potential uses, including residential development.

The LCP provides a mechanism for evaluating residential development on the "Naples Townsite" small lots that are located on applicants' site. The applicant has not applied for any other use of the property, but simply claims that only a small amount of potable water is available from Goleta Water District and therefore no other use is possible. It is clear that some amount of potable water is available or is expected to be available for use in the proposed golf course clubhouse, restaurant and banquet facilities; however, evidence of the amount of water available was not provided. Similarly, evidence regarding the amount of residential development that the available water could support was not provided. The applicants have not submitted any evidence documenting their claim that limits on availability of potable water prevent any use other than a golf course. The applicants have not provided evidence of any request or application to the water district for a specific amount of water that was denied.

Additionally, and regardless of the Commission's decision concerning the previous golf course proposal, the applicants have a significant residential use of their property. The applicants presently own three separate lots comprising the 208-acre site. Two of the lots are approximately 100 acres in size, and a third, a former inholding lot of about 4 to 6 acres in size. In addition, the western end of the site is additionally overlain by approximately 21 very small, former "Naples Townsite" lots, with residential development potential. The applicants are entitled by the AG-II land use designation and zoning applied to these lands by the certified LCP to construct a minimum of three residences. The construction of at least one residence on a lot zoned AG-II is considered to be a "use by right." A golf course on AG-II lands is not a use by right - that is, it is not a principal permitted use in that designation or zoning. A golf course requires a conditional use permit. Therefore, regardless of whether the Commission denies the golf course permit, the applicants retain the right to significant development that is unaffected by the Commission's decision concerning the golf course proposal. Considering the spectacular setting of the subject lands, the three residences, minimum, that the applicants could construct could be of estate ranchette stature. Such estates are highly coveted on the Gaviota coast, and therefore would likely be of high real estate market value.

In addition to the three existing lots, the applicants also have the option of securing a development agreement with Santa Barbara County concerning the use of the 21 Naples lots, as discussed in the Staff Report. The adjacent landholders, who hold substantially more "Naples Townsite" lots, are processing a development memorandum of understanding with Santa Barbara County presently. The LCP offers the applicants a window of time, until July of 2005, to secure agreement with Santa Barbara County concerning the development potential of Naples Townsite lots. Such agreement would likely require an amendment of the certified LCP. Prior to the certification of the

amendment that offered this option, development of the Naples Townsite lots was considered almost impossible, but that has changed due to litigation that has occurred since the LCP was originally certified.

It is also notable that even with the complete retirement of the 21 Naples lots and the construction of a golf course, as was envisioned in the former permit, the applicants appear to additionally retain the right to develop three residences on the subject lands, as noted above. The applicants suggest that they may not be able to develop these lots, and that they do not retain residential development rights for three residences in addition to golf course construction. Upon request of staff, the applicants' attorney/agent, Mr. Kaufmann stated that Special Condition 66 of previous permit A-4-STB-93-154 would not allow construction of the 3 residences (the permit and conditions were attached to the previous Staff Report as Exhibit 4, and included the revised findings for approval of the permit adopted by the Commission on February 8, 1995). Condition 66, however, stated only the following:

> 66. *The on-site Antiquated Naples lots shall not be developed with single family residences.*

No other condition of the former permit would have restricted the land owners from additionally developing at a very minimum, at least three single family residences on the subject lands after development of the golf course. The Commission found in 1995, in adopting revised findings for approval of former permit A-4-STB-93-154, that potentially 23 single family residences could be constructed on the subject lands (the inholding parcel of 4 to 6 acres in size was subsequently acquired by the applicants, in addition to the two previously existing, approximately 100-acre lots, which exist with or without the 21 Naples Townsite lots). Therefore a maximum potential total of 24 single family residences could be constructed on the subject site, and that total potential would be adjusted, probably downward given the negotiations regarding the adjacent Naples lots, through the process with Santa Barbara County.[1] In addition, according to the applicants at least six previous residences existing on the site while it was in use for oil and gas development. These residences were demolished during the applicants' abandonment activities. Thus, it appears that potable water supplies for residential use have been demonstrated on the subject site.

Therefore, the applicants do have a use of their property, even if the golf course proposal is denied. At the very least, the applicants could build a minimum of three residences and associated amenities on the three legal lots in accordance with the provisions of the certified LCP. Other uses allowed on AG-II lands, including uses allowed with a Conditional Use Permit, are shown in Exhibit 11, which was also attached to the previous Staff Report.

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[1] The development potential of the "Naples Townsite" lots requires the review and approval of Santa Barbara County, pursuant to the provisions of the certified LCP, and may require an LCP amendment to apply the development agreement that would thereby result to the subject lands, as noted in the previous Staff Report and Exhibits thereto.

Furthermore, the applicants assert it was error to suggest that a revised golf course that would not remove nesting and roosting habitat is feasible. The applicant has the burden of proving that no use of the site that avoids or reduces this impact is feasible. The applicants have not met this burden. They have not provided any evidence supporting their claim that a reduced scale golf course development, which is certainly possible on the site, is not economically feasible. Nor have they submitted any evidence that a residential use of the subject lands, or another of the allowable uses on AG-II lands, including conditionally permitted uses, is not economically feasible. Accordingly, it is not an error of law to find that the evidence has not established that denial of this project is a taking.

3. The applicants assert that the only "changed circumstance" since permit approval in 1994 that the Commission may evaluate is the presence of Red-legged frogs. This claim was raised by applicants prior to the hearing (See Exhibit 5, particularly at pages 2, 3, 19 - 21) and at the hearing (See Exhibit 3 at pages 53 - 55) and was considered and rejected by the Commission. The applicants assert that the regulation at 14 California Code of Regulations 13169(d) limits the Commission's review to the changed circumstances that were the basis of its denial of the request for extension of the permit's expiration date. The regulation states that after denial of the extension, the applicant "shall submit any information that the executive director determines is necessary to evaluate the effect of the changed circumstances."

The Commission has historically interpreted Section 13169 to function as a two-step process. First, the Commission considers whether there are changed circumstances such that the permit extension should be denied. Second, if the permit extension is denied, the development is to be set for a full hearing pursuant to the Commission's permit regulations. Changed circumstances are the standard for the extension hearing, and the review is of the changed circumstances that exist at the time that decision is made. But if the permit is not extended, then the Commission conducts a full review, and like any decision making body, applies the facts and the law that exists at the time the decision is made on this full review. Consistent with the Coastal Act and with CEQA, this means that the Commission must evaluate all significant impacts in light of the appropriate legal standard (here, the certified LCP). An interpretation of Section 13169 limiting the Commission's review at this "full review" stage to the changed circumstances that existed at the time of the extension hearing is not consistent with the Commission's past interpretation of its regulation as applied to this second "full hearing" stage of review, nor with the scope and intent of the regulatory change made by the Commission in 1999.

Therefore, the Commission has fully considered the proper scope of the changed circumstances review, pursuant to the applicable regulations, and no error of law has been made.

4. Applicants assert that presence of white-tailed kites nesting on the site is not a changed circumstance. Applicants assert that this was anticipated and addressed in the

1993 project EIR and the County's conditions of approval that the Coastal Commission incorporated into its approval of the project.

The applicants made this argument at the hearing (See Exhibit 3 at pages 55 - 60), and in extensive writings submitted to the Commission prior to the hearing (See Exhibit 4 at pages 4 - 6, and Exhibit 5 at pages 2 - 10) and it was considered and rejected by the Commission.

When the full discussion of project impacts on raptors in the EIR is reviewed, it does not indicate that removal of kite roosting and nesting habitat would result from the project, and that mitigation for this impact was imposed. In fact, the EIR reveals that kites had not been observed, but were only identified as a "potential" species at this site. The EIR does not contain any documentation of kites nesting at the site. In fact the EIR documented that white-tailed kites had not been observed on the site, but speculated that they might "abandon the area" as a result of a loss of foraging habitat and perch sites. There is absolutely no discussion of nesting by white-tailed kites in the EIR, and hence no "anticipation" of their doing so. There is only a generic observation that removing trees eliminates nesting, perching, and roosting habitat for raptors. This, of course, is true in all cases in all localities, regardless of whether raptors are ever present. Generalized comments about potential impacts that may be included EIR do not provide the basis for appropriate mitigation of actual impacts. For example, would the generic mitigation be equally appropriate if the raptors actually on site were a few individuals of a ubiquitous species or if the raptors were the last known population of an endangered species?

The Staff Report (Exhibit 2, p. 65) for example points out that:

> *"Although the FEIR speculates that white-tailed kites might potentially use the site, it does not analyze the impacts of the proposed project on white-tailed kites nesting on the site. The FEIR stops short of considering any meaningful impact analysis concerning the potential effects of the proposed project specifically upon the white-tailed kite--lacking in particular any consideration of the applicable policy requirements concerning Kite habitat set forth in the certified LCP, or providing any specific mitigation measures to preserve nesting trees, provide buffers from disturbance for nesting trees, or address foraging habitat necessary to ensure nesting success."*

In addition, staff testified at the hearing as to the existence of at least one other EIR prepared the same year as the subject FEIR, for a different project (Ellwood Specific Plan) proposed for a location where white-tailed kites had been documented. That EIR specifically invoked the LCP policies and provisions concerning the white-tailed kite, and recommended specific mitigation measures to protected their nesting and foraging habitat. Unlike impacts to raptors and raptor nesting habitat generally, Santa Barbara County's certified LCP contains specific protections for the habitat of the white-tailed kite. These provisions were not mentioned or applied in the Arco Dos Pueblos final EIR. The staff pointed out that this was in contrast to the Ellwood Specific Plan EIR, which

was a clear and contemporaneous example of the manner in which the Arco Dos Pueblos EIR would have treated white-tailed kite habitat if it had been known to exist.

In addition, the Commission' staff including the Commission's chief counsel specifically addressed this matter on pages 152 and 153 of Exhibit 2 (the hearing transcript), in response to a question from Commissioner McClain-Hill (page 151 of the transcript)

> "Commissioner McClain-Hill: *"...So what I am trying to reconcile, and if staff could just help me with its thinking on the matter, to the extent that the white-tailed kite was presumed present, how is it that it -- on what basis is there a changed circumstance? Because in my mind, if you presume it to be, then you are moving from the perspective that it exists. So if you could simply help me with your line of reasoning in that regard, just on the white-tailed kite, I would be a lot more comfortable supporting the motion in chief."*

In addition to other staff testimony in response, (transcript pages 151, 152) Chief Counsel Faust concluded (p. 153):

> *"But, I think that, from my own perspective, the thing that I found most persuasive, in terms of whether or not the local government at the time actually considered this, was the fact that the specific LCP policies having to do with the white-tailed kites, were not applied in the permit, and if the county, and the Commission, had thought that the kites were a species of concern, and were being affected by it, they were required by the LCP to apply those LCP policies, and no one mentioned it. No one applied it. It simply wasn't done. And, that to me was the most critical fact, with respect to the kites.*

Given these facts, staff recommended and the Commission concurred that the documented presence of nesting white-tailed kites was a changed circumstance. Therefore, the Commission has considered the issue and does not believe that it has made an error of law.

5. Applicants assert that the Commission's decision is invalid under the Marine Forests case. The Court of Appeal decision in the case has not become final and the Commission has filed an appeal with the California Supreme Court. Therefore, there has not been any final, binding determination regarding the Commission's jurisdiction to act on this coastal development permit application.

Alleged Errors of Fact:

The applicants' request for reconsideration lists four alleged mistakes of fact. These are addressed below, in the order they appear in the applicants' request.

1. Alleged erroneous facts regarding the number of butterflies.

The applicants' reconsideration request asserts (page 11 of Exhibit 1) that erroneous facts were reported to the Commission concerning monarch butterfly counts: Specifically, the January 10, 2003 letter states in pertinent part (note: Transcript references may be reviewed in attached Exhibit 3):

> *"**Erroneous facts regarding the number of butterflies.** The Staff Report and thus the Commission's decision, erred in two significant respect regarding the number of monarch butterflies…*
>
> *"First, the findings repeatedly state in error that Dr. Meade counted over 72,000 butterflies (instead of 4,800, which he counted in calendar year 2000). This grossly overstated the number of monarchs observed in 2000. One speaker, Diane Conn, reiterated this inflated figure…. At the hearing, staff (Ms. Hale) acknowleged that it overcounted the number of butterflies, but did not clarify the number and stated "that they are still in the many thousands"." (Transcript p. 18). One commissioner, Commissioner Wan, underscored the importance of the number of butterflies: "Relative to the changed circumstance, there is a big difference between a couple of hundred butterflies and thousands of butterflies." (Transcript p. 155).*

Commission staff corrected the error regarding the butterfly count at the Commission's December 11, 2002 hearing, during the staff presentation (Exhibit 3, at pages 18 and 19). Nevertheless, the point of the discussion of monarch butterfly counts on the subject site was not to produce a mathematically detailed population analysis of the butterflies, but to demonstrate that there are now two areas of the site being used by the monarch butterflies in significant ways that were previously unknown to the Commission; that is, for autumnal roosting, and for overwintering -- and that the butterflies are present in far greater numbers than had been known by the Commission at the time of its 1994 approval of the former permit (at which time the maximum count established in the FEIR was no more than 130 monarch butterflies, and no aggregations).

In correcting the error regarding the butterfly count, staff noted that in spite of the error in adding individual butterfly counts that the consultants had undertaken sequentially, (the consultants advised, through the applicants' agents, that the counts were not meant to be added because the autumnal aggregations could be reconstituted of different individual butterflies on different days) the butterfly clusters nevertheless numbered in the "many thousands" of monarch butterflies. The applicants' reconsideration request asserts that the staff correction to "many thousands" was insufficient, yet the Staff Report (Exhibit 2) contained far more precise recitations of the applicants' data, as did the applicants own corrections of the record (see for example Exhibits 4 and 6).

For example, Exhibit 4 shows that the correct information concerning the butterfly counts was reported to the Commission in a letter dated December 4, 2002, prepared by the applicants' lead agent, M. Andriette Culbertson. Attachment A of Ms. Culbertson's letter, contained a very specific list of corrections to the Staff Report which Ms. Culbertson's

requested that the Commission take note of. On Page 1, Attachment A of her letter in Exhibit 4 states:

> *"...Page 11, 1st full paragraph: It is a totally false misrepresentation for Staff to state 72,208 monarch butterflies from the Althouse and Meade report. An accurate report would state that the largest single count was 6,700. The 72,208 number includes the same butteries numerous times."*

In addition, Ms. Culbertson submitted additional correspondence to the Commission on December 10, 2002, at the Commission hearing. That letter is dated December 9, 2002 and is attached in Exhibit 6. Ms. Culbertson again highlighted the mistake staff made concerning the tabulation of the butterfly count in the Althouse & Meade report, which was only a misunderstanding of the consultants' data collection and tabulation method, and which the staff corrected at the hearing, upon receiving the correction from the applicants.

As stated, the point of noting these counts at all was to compare the more recent patterns and locations of use of the site by the monarch butterfly with the information known about monarch butterfly use of the site at the time the Commission approved the former permit in November of 1994. That is the purpose of the changed circumstances hearing which resulted in the denial of the permit.

As the previous Staff Report stated, (See Staff Report, Exhibit 2, at pages 37, 38, 41 for example) the EIR for the subject project (Santa Barbara County 92-EIR-16) indicated that (page 5.1-19, which is also page 000374 of the administrative record of former permit A-4-STB-93-154):

> *"A recent survey of the County conducted by a monarch butterfly expert indicated that Eagle Canyon was used by approximately 130 butterflies during October, 1990. ...Eagle Canyon is a small monarch aggregation site that is abandoned early in the season by monarchs searching for a higher quality wintering site. ... Clustering or roosting within the proposed golf course has not been reported. A brief survey conducted by The Monarch Project (1987) indicates that eucalyptus trees onsite provide nectaring habitat for monarchs, but do not constitute a significant or sensitive monarch resource. These trees are not the more sensitive winter habitat site as discussed in Policy 9-22 and 9-23 of the County LCP."*

Compared to the conclusions of the EIR, which comprised most of the record concerning the monarch butterfly resources on the site at the time of the Commission's 1994 approval of the former permit, the numbers of butterflies, and locations and patterns of their use of the subject site is clearly a changed circumstance. This is shown by the most conservative data reported by the applicants, which indicates that compared to the circumstances known by the Commission in 1994, there is now evidence of: a) monarch butterfly overwintering on site, b) monarch butterfly autumnal roosting on site, and c) substantially higher numbers of monarch butterflies are using the site (thousands, versus fewer than 150). This information contrasts sharply with the previous baseline (FEIR), which dismissed the subject site as having no significance for monarch

butterflies. The correction of the approximately 72,000 number to "many thousands" by staff at the hearing does not diminish the fact that the use of the site by the monarch butterflies represents a changed circumstance. Having made that determination, the Commission denied the project for a number of reasons, which were not limited to the potential impacts to the monarch butterflies. The Staff Report, and staff testimony at the hearing, presented the relevant information concerning the monarch butterfly use of the subject site accurately. There was no error of fact, and even if there had been such an error, the Commission denied the proposed project primarily for reasons concerning the placement of the project within the environmentally sensitive habitat area of the white-tailed kite.

Additionally, to warrant reconsideration, an alleged error must have the potential to alter the Commission's decision to deny the project. The error in tabulation of the consultants' butterfly counting data was corrected by staff at the December 11, 2002 hearing, and by the applicants in multiple writings they submitted to the Commission before the hearing. Thus, the original error by staff which the applicants raise as a new error for reconsideration purposes, was clearly corrected before the Commission acted on the permit. Moreover, any alleged error regarding the numbers of butterflies using the site would not have had any impact on the Commission's determination that the proposed project would result in removal of existing White-tailed kite nesting and roosting habitat, which is not permitted under the standards in the LCP. Therefore, this alleged error does not have the potential of altering the Commission's decision to deny the project.

Applicants' additional assertion regarding monarch butterflies:

The applicants reconsideration request make an additional assertion regarding the facts concerning the monarch butterflies: The request reports the partial conclusions of the applicants' consultants' survey of monarch butterflies on the subject site that was apparently undertaken after the staff report was published. Of the report's complete conclusions, the applicants' attorney states on page 12 of the reconsideration request (Exhibit 1) only that:

> *Since the principal concern of Staff was the so-called "Upper Western Grove," there was no evidence of "changed circumstances" as to the monarch butterfly at the time the Commission considered this matter because* ***there were no butterflies*** *at the relevant time in question."* (emphasis his)

First, as noted, this is only a partial citation of the results of the consultants' survey of Eagle Canyon in November of 2002. Although the reconsideration request does not so state, the applicants agent had previously reported to the Commission (Exhibit 6) the full conclusions, which additionally stated that:

> *"... At the western grove... the maximum number of butterflies observed by us was* ***2,170 on November 30, 2002****. The aggregation has moved approximately 100 feet further down the canyon to the northeast from previous years, and is now further away from the Dos Pueblos Golf Links property. This demonstrates*

the highly variable nature of the location of Monarch butterfly aggregations in Eagle Canyon and the substantial variation in population size that can occur from year to year. Butterfly numbers and aggregation locations vary at Eagle Canyon, a condition that has been consistent for at least the last thirteen years."

Thus, the Commission was in possession of the full and accurate facts concerning the applicants' 2002 monarch butterfly counts, because the applicants submitted the information themselves before the hearing on December 11, 2002. There is nothing in the latest report of the applicants' consultants that contradicts the evidence in the record that the site has been used by thousands of monarch butterflies in previous years, in contrast to the minimal use of the site known at the time of Commission approval of the former permit in 1994.

In addition, the applicants' consultants account of the butterfly numbers found on site in November 2002 did not mention this, according to widely published accounts by monarch butterfly researchers, monarch butterfly counts at traditional aggregation and overwintering sites throughout California are down by over 30% this year, and have been declining for the past five years. This may account for the lower population counts on the subject site this year, but far from discounting the value of the habitat, reinforces the findings made by the Commission on December 11, 2002.

Further, the applicants' monarch butterfly consultant, Dr. Meade, emphasizes that the 2002 counts are consistent with the variability of the monarch population and this point was also made previously in the Staff Report (Exhibit 2) and in the staff presentation at the December 11, 2002 hearing. Transcript, Exhibit 3, at page 20:

"There is complexity regarding what attracts monarch butterflies in any given year or season, to use specific trees, and the patterns of their use. It is not stable. It could be very different year to year. But, we do believe that there has been an important change, and that we need to look at the protection of those colonies."

The Staff Report, Exhibit 2, states on page 39 in pertinent part:

"Monarch butterflies west of the Rocky Mountains move to the west coast of California in late summer and early fall. Monarch butterflies enter the coastal zone and seek out aggregation sites in protected locations near the ocean. The number of monarch butterflies that aggregate in any one grove may change dramatically from year to year, as trees grow or fall, and as weather conditions vary among seasons and years. These sites are dynamic with respect to their ability to provide appropriate aggregation conditions, and are dependent on the condition of the trees, associated vegetation, site-specific topography, and changes in the local environment."

Thus, the Commission considered the variability of the monarch butterfly populations and determined, in light of the record as a whole, that monarch butterfly presence on the site is a changed circumstance, despite anticipated fluctuations in specific populations and locations from year-to-year. If anything, the consultants' December 9, 2002 letter

(Exhibit 6) reporting the 2002 monarch butterfly counts in Eagle Canyon illustrates the fragility of the monarch butterfly populations and serves to reinforce the Commission's determination that there are changed circumstances concerning the monarch butterfly on the subject site.

Thus, the applicants' reconsideration request fails to demonstrate that the Commission made an error of fact, particularly an error of fact that could have caused the Commission to make a different decision (approve the proposed project) at the December 11, 2002 hearing.

2. Alleged erroneous facts regarding number of southern tarplant individuals.

The applicants' reconsideration request states on page 12 that "(There were) **Erroneous facts regarding the number of tarplant individuals.** The reconsideration request specifically states:

> *"Similarly, the Commission's findings underscore that in 1998 a count of the southern tarplant identified over 4,500 individuals strictly within the footprint of the area disturbed by the approved abandonment of the warehouse and loading racks on the property. The findings are misleading. They do not explain that the number of species identified in the warehouse/loading racks footprint dropped dramatically in the subsequent years, and that the evidence is that there were but 372 plants total in 1999, 403 plants in 2000, and 436 plants in 2001."*
>
> *..."Thus, your findings completely ignore the legal standard (whether correct or incorrect) set out in your decision that the Commission must look at "the facts and the law at they exist at the time the Commission makes its decision." While the decision suggests that the Commission must look at the Project in terms of what is presently existing, (e.g., how wetlands are identified), not the "historic" extent of plants, it clearly did not do that in the case of tarplant (or, as noted, butterfly)."*
>
> *..."Still further, the Commission must recognize that it is grossly unfair to count tarplants that arose only because of the Commission's 1994 approval and the Applicants' abandonment activities in reliance thereon. In reality, when the area of the warehouse/loading racks is eliminated - as it should it be, there were but 9 to 125 total plants observed in three locations during the period 1999 - 2001."*

First, the record supporting the Commission's decision includes the November 22, 2002 Staff Report, does not contain any misleading facts regarding the southern tarplant. The Staff Report included extensive Exhibits. Among these Exhibits was a report by County biological monitor, John Storrer (See Exhibit 8, which contains Mr. Storrer's April 1, 2002 report concerning the southern tarplant at the Arco Dos Pueblos site, and was previously identified as Exhibit 33, 5 pages, to the November 22, 2002 Staff Report). Mr. Storrer's report, prepared on behalf of Santa Barbara County, specifically described the location and likely cause of the germination of the approximately 4,500 plants counted by a consulting botanist in the fall of 1998.

In addition, the Staff Report, Exhibit 2, on pages 54 and 55 discussed the plants' life cycle and germination pattern, together with the dynamics of its persistent soil seedbank--stating in pertinent part:

> *"...This annual plant's life cycle is one of lush germination after disturbance to a site, thick growth in the initial year or years, then failure of the plant to compete successfully with more aggressive colonizers. The successful initial years result in large seedset and the replenishment of the soil seedbank. At least some of the seeds of Southern Tarplant seem to remain viable for as long as decades, thus preserving the plant's genetic heritage and future growth potential through what amounts to a long period of relative dormancy once successional changes take over and send the plant back underground, literally, into the residual seedbank phase of its life cycle. When disturbance arises again, the competition is removed, the cycle repeats, perpetuating the Southern Tarplant."*

Thus, contrary to the applicants' assertions in their request, they have provided no evidence that there was unfair or misleading presentation of the facts concerning southern tarplant by staff.

The staff did not, as the applicants' reconsideration request asserts, conceal any facts concerning the fact that as is typical for a disturbance following rare annual plant, the plant's numbers sometimes decline substantially in the years following a disturbance-induced germination. The staff specifically testified that the counts in the newly germinated location declined in the following years and have since remained at approximately 300 to 400 individuals as counted by the applicants' consultants annually since 1998. For example, at page 23 of the December 11, 2002 hearing transcript (Exhibit 3), staff noted:

> *"...So, the plant has now been established to bloom in, I believe, nine different locations on the site, and the location where the primary population grows, it now has 300 to 400, according to the annual census that has been conducted. It is right where the clubhouse, and a piece of the Par-3 course, and some of the parking would be established."*

In addition, the staff presentation at the hearing only supplemented the information set forth in the Staff Report and its exhibits. The Staff Report set of Exhibits included a reduced copy of a Biological Resources Map prepared by the applicants and dated May 3, 2002. The Map was submitted by the applicants and the staff included the reduced copy of the map also prepared by the applicants as an Exhibit to the previous two Staff Reports (the Map is attached hereto as Exhibit 7, and was Exhibit 3 to the previous Staff Report).

The referenced Biological Resources Map mapped the locations and numbers of individual plants for southern tarplant populations documented on the Arco Dos Pueblos site during the 1991 and 1992 pre-EIR surveys, and during the 1998, 1999, 2000, and 2002 surveys. This map indicates that in the area of the former warehouse, where the

4,500 southern tarplants were counted in 1998, the populations counted were 403 in 2000 and 363 in 2001. Thus, the applicants also provided the information concerning subsequent declines in the annual southern tarplant counts directly to the Commission prior to the previous hearing. The exact data provided by the applicants, therefore, was forwarded to the Commission by staff in the staff report, and testified accurately to at the hearing on December 11, 2002.

As stated above, the applicants' reconsideration request alleges that the applicants' abandonment activities in the old warehouse triggered the germination of the southern tarplant in that area of the site (the 4,500 plants in 1998 and by extension, the remnant populations that have bloomed in that general area of the site since) and that therefore these populations somehow should not "count" and should be eliminated from Commission consideration. Further, as noted in the previous Staff Report, staff learned from County staff and the applicants' former consultants, and from the applicants' agent, that the applicants had removed seed from the southern tarplant population (the one numbering 4,500 in 1998), grown the seed off site, and then disposed of the resultant plants when they did not secure a grading permit that year. Thus the applicants reduced the seedbank in that area of the site and may have contributed directly to the decline in southern tarplant numbers from 4,500 plants in that location of the site, to the fraction of that population that was counted the following season, and in the years since. The applicants have no basis, therefore, to claim that this population of the rare southern tarplant should "not count."

As stated above, this is not a new argument. The applicants already raised their complaint that the southern tarplant identified where they propose to build their clubhouse, parking, and part of the Par 3 course should not be considered by the Commission. Hearing Transcript, Exhibit 3, at pages 64, applicants state:

> *" Other than the original tarplant location reported in the 1994 proceeding to the Commission, the "new" tarplant locations are the result of remediation efforts approved by the Commission's 1994 permit. In fact, many of the locations mirror the exact shape of the original oil field facility. It is beyond dispute that tarplant emergence is promoted by disturbance of the earth. In fact, the term "tarplant" derives its origins from its association with oil fields, which are being constantly disturbed by operations. The plant is not a very good competitor with either native or non-native species, and if left alone reduces in number over a very short period of time."*

As Commission biologist John Dixon, Ph.D., responded at the hearing (Transcript, Exhibit 3, page 127):

> *"...It was also suggested that the tarplant population was created by recent remediation activities. The tarplant does respond to disturbance, but only where there is an existing seedbank. And, although it responds to disturbance, it doesn't require disturbance. In areas where there is sufficient unoccupied space, tarpalnt fluctuates wildly from year to year, probably based on poorly understood variations and environmental conditions, such as rainfall.*

We also observed this in the Bolsa Chica hearing, where there were order of magnitude differences in the number of tarplants that were apparent from one year to another. So the important thing, in protecting tarplant, is not where you saw them last year, but all of the micro-habitats where the plants exist, and in fact we're limited to where it has been observed, and may very well miss some areas, because of that, but at least those areas where the tarplant has been observed need to be protected, in order to protect the population."

In addition to all of the above considerations, it is also clear that the applicants knew of the 4,500-count southern tarplant bloom in an area of the site that was previously unknown, and did not present this information at the time of the Commission's 1999 hearing. The applicants now seem to assert that if the Commission didn't discover information that it had no way to obtain, but which the applicants possessed (yet withheld), the Commission cannot now address that changed circumstance, which existed at the time the Commission denied the extension of the applicants' permit (June, 1999). The applicants appear to argue that they should benefit from their decision to withhold information material to the Commission's consideration of whether or not to extend the permit in 1999.

Additionally, to warrant reconsideration, an alleged error must have the potential to alter the Commission's decision to deny the project. Any alleged error regarding the rarity of the southern tarplant would not have any impact on the Commission's determination that the proposed project would result in removal of existing white-tailed kite nesting and roosting habitat, which is not permitted under the standards in the LCP. Therefore, this alleged error-- which the applicants have not substantiated -- does not have the potential of altering the Commission's decision to deny the project.

3. Alleged error regarding timing of listing of southern tarplant by Native Plant Society.

Applicants allege that the Commission's findings do not fully explain the timing of when Southern tarplant became a Native Plant Society List 1B species. The applicants' allege error because the findings do not state that tarplant became a 1B species before the Commission acted on the project in 1994. Contrary to the applicants' assertion, the Commission's findings contain this information. The findings state: "In fact, the southern tarplant was officially upgraded from CNPS List 3 to List 1(b) by the time the Commission acted on the former permit in November of 1994 ...." (Staff Report, Page 13). The applicants also presented this information about the timing of the change in status in their testimony to the Commission at the December 2002 hearing. Ms. Culbertson stated: "The tarplant was listed as a category 1-B species in February of 1994, nine months before you approved this project, nine months." Therefore, the Commission was not mistaken about the facts. It had all the information when it made its decision.

The applicants request for reconsideration also appears to include the assertion that it is legal error for the Commission to regard the change in status of the tarplant as a changed circumstance, since the change occurred prior to the Commission's 1994 decision. Applicants seem to argue that since the Commission relied on the information in the EIR, and did not discover the correct status regarding rarity of the tarplant before its 1994 decision, the Commission is barred from now considering the correct information. Under this theory, applicants would have an incentive to withhold information from the Commission regarding errors in an EIR, or changes in the status of resources discussed in an EIR (see Exhibit 12, memorandum of applicants' consultant concerning changes to southern tarplant sensitivity listing that were pending before the EIR was certified. This change was subsequently implemented by the CNPS).

Nevertheless the Commission found that the change in status of the tarplant is one of the changed circumstances concerning the southern tarplant that is relevant to analysis of the project's compliance with the LCP. The Commission does not agree with applicants' argument that the Commission is prohibited from considering the correct information regarding rarity of the tarplant because it relied on outdated information in the EIR and failed to discover on its own that the EIR was no longer accurate in this respect (even though this information was apparently known to the applicants but not provided to the Commission). Therefore, this does not constitute an error of law.

Additionally, to warrant reconsideration, an alleged error must have the potential to alter the Commission's decision to deny the project. Any alleged error regarding the rarity of the tarplant would not have any impact on the Commission's determination that the proposed project would result in removal of existing White-tailed kite nesting and roosting habitat, which is not permitted under the standards in the LCP. Therefore, this alleged error does not have the potential of altering the Commission's decision to deny the project.

4. Alleged erroneous facts regarding tarplant as ESHA.

The applicants assert that reference to the "non-profit" Native Plant Society's determination of rarity of the southern tarplant does not warrant consideration of the plant's habitat as Environmentally Sensitive Habitat Area (ESHA). The previous Staff Report, Exhibit 2, at pages 12 and 13 explained the stature of the California Native Plant Society and the implications of determinations of rarity by the CNPS Rare Plant Scientific Advisory Committee, as published in the *Inventory of Rare and Endangered Plants*. It is not clear why the applicants believe the "non-profit" status of CNPS is relevant; however, the California Deparment of Fish and Game Natural Diversity Database is maintained by the CDFG in reliance on the data of the CNPS.

Nevertheless, these matters notwithstanding, the applicants overlook the fact that the published standard of review properly relied upon by the Commission in denying the proposed project is Santa Barbara County's certified LCP. The LCP states in the Coastal Zoning Ordinance, at Section 35-97.18 (to which the Commission is led by Section 35-97.3 Identification of Newly Documented Sensitive Habitat Areas) in pertinent part that:

35-97.18. Development Standards for Native Plant Community Habitats

Examples of such native plant communities are: coastal sage scrub, chaparral, coastal bluff, closed cone pine forest, California native oak woodland (also individual oak trees), **endangered and rare plant species as designated by the California Native Plant Society**, and other plants of special interest such as endemics. (emphasis added)

Thus, the Commission properly relied upon the listing of the southern tarplant by the California Native Plant Society as a "List 1(b)" species – an indication rare and endangered status in California – in determining that southern tarplant habitat on the proposed Arco Dos Pueblos Golf Course site is ESHA. This is what the certified LCP requires. Therefore no error of fact occurred. In addition, as stated above, to warrant reconsideration, an alleged error must have the potential to alter the Commission's decision to deny the project. Any alleged error regarding the determination that the habitat of the southern tarplant is ESHA would not have any impact on the Commission's determination that the proposed project would result in removal of existing nesting and roosting habitat, which is not permitted under the standards in the LCP. Therefore, this alleged error does not have the potential of altering the Commission's decision to deny the project.

3. Applicants' Contentions Regarding Relevant New Evidence

The applicants' request for reconsideration lists four allegations that there is relevant new evidence/erroneous facts which, in the exercise of reasonable diligence, could not have been submitted prior to the close of the public hearing. These are addressed below, in the order they appear in the applicants' request.

1. Alleged erroneous facts/new evidence regarding applicants' willingness to make project changes.

The applicants state (Exhibit 1, page 13):

> **"There is relevant new evidence which, in the exercise of reasonable diligence, could not have been submitted prior to the close of the public hearing"**

The applicants describe the "relevant new evidence" as follows (Exhibit 1, page 13)

> **"Erroneous facts Regarding the Applicants' Willingness to Make Changes to the Project.** At the December 11 hearing, there was an implication in the Staff's testimony that the Applicants were unwilling to make revisions to the golf course, or at least confusion in that regard. The Applicants were not asked to address the issue, although several Commissioners and Staff expressed potential support for a revised Project. To clarify that issue, as explained at the outset, the

Applicants are prepared to make substantial changes to the Project. This request for reconsideration asks for the opportunity to do that."

Both at the hearing on December 11, 2002 and prior to the hearing, applicants had the opportunity to make all changes to the project that they believed were appropriate. In fact, the applicants did make changes to the project that they documented in writing, prior to the hearing. In addition, prior to the hearing, the applicants received the Staff Report that identified inconsistencies with the LCP and they had the opportunity to further revise the project to address those inconsistencies prior to the hearing. The applicants' desire to make additional changes now does not reflect a mistake of law or fact that has the potential to alter the decision, or new information that could not have been submitted at the hearing. Therefore, this is not a basis for granting reconsideration.

As staff stated in the November 22, 2002 Staff Report, and testified at the December 11, 2002 hearing, staff conferred extensively with the applicants prior to the hearing to consider potential alternatives to the proposed project design that might resolve the outstanding issues raised by the development in light of changed circumstances on the site of the proposed project. Staff met the applicants and their representatives, including agents, attorneys, and consultants over a period of nine (9) months prior to the Commission's December 11, 2002 hearing. The applicants specifically rejected revised plans and changes to project management practices (chemical applications, for example) that had previously been proposed by staff as draft special conditions for Commission consideration at the June, 2002 initial hearing on changed circumstances.

At that hearing (June 10, 2002), the Commission held only a preliminary hearing on the proposed project and directed staff and the applicants to meet to explore possible changes to the project that might resolve some of the issues that had been identified.

Staff thereafter met and conferred extensively with the applicants, but the applicants declined to make most of the changes that staff believed would have rendered the project consistent with the certified LCP, as noted in the November 22, 2002 Staff Report (Exhibit 2, at pages 2, 3, 76, 77) and in the staff presentation. The changes that the applicants now claim they are willing to make to the project were specifically suggested by staff in those meetings and in the published Staff Reports preceding the December 11, 2002 hearing. The changes recommended by staff included the deletion of the Par 3 9-hole Executive course, redesign of the reclaimed water storage lake, moving the clubhouse and reducing the paved parking. After receiving the Staff Report dated November 22, 2202, the applicants submitted a letter to the Commission dated December 4, 2002, that states in detail the applicants' opposition to the changes suggested by staff, including changes to the reclaimed water pond, elimination of the Par 3 course, preservation of butterfly habitat, and other changes recommended by staff (including changes recommended by staff in the previous Staff Report published in May of 2002 for the Commission's previous hearing in June 2002). In fact, Exhibit 4 contained an edited version of the former special conditions drafted by staff for the June 2002 hearing, striking out many of the revised plan modifications that would have

accomplished the changes the applicants state that they now wish to propose -- and that they were deprived of proposing previously.

Although the applicants now state they are willing to implement certain project changes that they previously rejected, there is one major component of the project that they are not proposing to change. The applicants do not propose changes to the layout of the project to avoid removal of habitat that the Commission has determined is ESHA because it is used by white-tailed kites for roosting and nesting.

To warrant reconsideration, an alleged error must have the potential to alter the Commission's decision to deny the project. Regardless of their willingness to make certain changes to the project, there is no error concerning the fact that the applicants are not willing to reconfigure the golf course to avoid removal of roosting and nesting habitat that the Commission's biologist has identified as ESHA. Without this critical revision, other changes to the project that the applicants seek to propose would not have any impact on the Commission's determination that the project would result in removal of existing White-tailed kite nesting and roosting habitat, which is not permitted under the standards in the LCP. Therefore, even if there was an error regarding this issue, it does not have the potential of altering the Commission's decision to deny the project.

Nor does the applicants' current proposal to make additional changes to the project constitute relevant new evidence that, in the exercise of reasonable diligence, could not have been submitted at the hearing. The applicants had ample opportunity to propose these changes to the proposed project prior to the Commission's action denying the project on December 11, 2002. In addition to the multiple meetings and conferences held between the applicants and staff during the nine months that preceded the Commission's December 2002 hearing, the applicants also had time to consider changes to their project after the November 22, 2002 Staff Report was published but before the Commission vote on the proposed project. The applicants also provided substantial testimony on the record of the actual public hearing, where they had the opportunity to offer these changes to the project but failed to do so.

Thus, there are no "erroneous facts regarding the applicants' willingness to make changes to the project" in the record of the Commission's December 11, 2002 decision concerning Permit A-4-STB-93-154. As explained above, even if there was an error regarding this issue-- which the applicants have not substantiated --it does not have the potential to alter the Commission's decision. Finally, the applicants' current proposal to make changes to the project does not constitute relevant new information that could not have been presented at the hearing. Therefore, this does not constitute grounds for reconsideration.

2. Alleged erroneous facts/new evidence regarding pesticide use on the Par-3 course.

The applicants state on page 14 of the reconsideration request that:

"After the close of the public hearing, Staff incorrectly emphasized that pesticides would be used on the Par-3 course and that pesticides would adversely impact the red-legged frog, southern tarplant and monarch butterfly."

The applicants apparently assert that their agreement to restrict pesticide use on the Par 3 course to emergencies is relevant new information that could not have been presented at the hearing. However, the applicants' proposal to restrict pesticide use on the Par 3 course to emergencies was set forth in information provided to the Commission before the hearing. There was no error of fact regarding this issue. In addition, since the Commission had the information prior to the hearing, it does not constitute relevant new information.

This restriction on pesticide use was included in the changes the applicants made to the proposed project on November 20, 2002 pursuant to the recommendations of Dr. Jeffrey Froke. Dr. Froke's recommendations were brought to the Commission's attention. They were included in full, as part of his complete reports and memoranda that were distributed—as the applicants requested - as an attachment to the Exhibit package accompanying the November 22, 2002 Staff Report..

In addition, applicants included this information in their letter to the Commission dated December 4, 2002, with attachments, setting forth their arguments concerning the staff recommendation. Attachment 4 to this letter states:

"... We propose to place strict restrictions on the use of rodenticides and limit the use of pesticides within the par-three course to emergencies."

Therefore, the Commission was informed that the applicants proposed to restrict pesticide use on the Par 3 course to emergencies. However, the Commission considered the fact that the proposal did not constitute a total ban on pesticide use on the Par 3 course, but rather restricted applications to "emergency" needs, and left the determination of an "emergency" to the golf course manager. What would constitute an emergency warranting use of pesticides is not defined. Even under the applicants revised proposal, pesticides could be used on the Par 3 course whenever the presence of pests (insects, weeds, fungi, rodents, etc.) is deemed an emergency by the responsible golf course employee. It is entirely unknown how frequently this would occur, and with the exception of some increased restrictions on rodenticides, the other chemicals the applicants have proposed for use on the course—set forth in various documents attached as Exhibits to the previous Staff Report (for example, the applicants' Agronomic Turf Management, Habitat Conservation, and Biological Enhancement Landscape Plans) - remained essentially unchanged. Thus, there remains the possibility of adverse impacts to monarch butterflies from pesticide use on the Par 3 course, due to application errors, overspray, wind dispersal, etc. In addition, spray applications on the rest of the golf course – particularly certain areas, such as the 18th fairway, driving range, or 1st fairway – could result in pesticide drift to the area where the Par 3 course is proposed, raising concerns about impacts to butterflies.

As explained above, the evidence regarding restricting pesticide use on the Par 3 course to emergencies was provided to the Commission; therefore, there was no error of fact and the information does not constitute relevant new evidence. Furthermore, the concerns about pesticide impacts on monarch butterflies that Commission staff testified about remain, even if this restriction is implemented. Finally, to warrant reconsideration, the alleged error must have the potential to alter the Commission's decision to deny the project. Any alleged error regarding pesticide impacts on monarch butterflies would not have any impact on the Commission's determination that the proposed project would result in removal of existing nesting and roosting habitat, which is not permitted under the standards in the LCP. Therefore, this alleged error does not have the potential of altering the Commission's decision to deny the project and the Commission finds that this information does not support any reconsideration of Permit A-4-STB-93-154.

3. Alleged erroneous facts regarding White-tailed Kite nesting.

The Request for Reconsideration alleges "Erroneous facts regarding WTK nesting." The following statement regarding white-tailed kites (WTK) by staff ecologist Dr. John Dixon was quoted from the record (Exhibit 3, Transcript pp. 126-127):

> ***"Now, this is the first time that this information [the assertion by Ms. Culbertson that the applicant's consultant, Dr. Froke, looked in the east nest and found no evidence of eggs] has been shared with staff, and no date was given for the observations. I suspect that if there were such observations, it must have been late in the season. On the other hand, the county observer, Mr. Storrer, observed a behavior which in his professional opinion indicated incubation."***

The Request for Reconsideration then asserts that this statement "overlooks" Dr. Froke's letter of December 8, 2002, which is quoted in part as follows:

" [O]f the two pairs observed onsite during 2002, only one (the 'western pair') was observed to have completed a nest (to actually have nested); and only that pair was observed to have produced eggs, i.e., to have *bred* or *reproduced*. [Successful breeding requires having fledged young from the nests]. Staff falsely reported to the Commission that the eastern pair was observed to incubate or 'brood' eggs; but no such observations were made or reported, and no evidence of eggs was suggested, by either the applicant's consultants or the Commission staff's own uncompensated observers."

In fact, such evidence was observed by the County's biological observer, Mr. John Storrer, as reported by Dr. Dixon in the testimony quoted above. In a letter to Kristen Getler (S.B. County P&D Energy Division) dated May 17, 2002, cited previously, Mr. Storrer states:

> ***"One individual from the east pair was observed carrying nesting material (grass) to a specific location in a Monterey cypress numbered Tree 67 in an inventory prepared for the proposed Dos Pueblos Golf Links Project (see attached map). This bird remained stationary at this location for a period of more than two hours, during which time it was observed with a spotting scope. Subsequent observations from a closer vantage point***

(approximately 100 feet) confirmed that this bird was on a nest structure in what appeared to be an incubating posture."

In his subsequent report to Santa Barbara County, dated June 3, 2002 (Exhibit 9) Mr. Storrer observed:

"An adult kite was observed on the nest in Tree No. 67, in an incubating posture. A second adult kite was perched in a nearby tree for much of the observation period. These birds were referred to as the "eastern pair" in my earlier report.

In summary, we locate an active nest with (5) young white-tailed kites in Tree No. 127. This is undoubtedly the same nest reported by Mark Holmgren and Morgan Ball. It appears that the birds occupying the nest in Tree No. 67 are still in the incubation or brooding stage of the nesting process."

Similar evidence was reported by the applicant's consultant, Mr. Michael Evans in a June 7, 2002 report to Ms. Culbertson entitled "Dos Pueblos Golf Links Goleta, Santa Barbara County, California, White-Tailed Kite Nesting Survey" (Exhibit 10). Referring to the eastern pair, Mr. Evans reported as follows (p. 4):

"The presumed female of this pair spent considerable time, just barely visible, in the tree subsequently used for nesting (#67; see Figure 2a). We also observed the presumed female taking grass to the nest tree as nest lining material."

"On 23 May 2002, both members of this pair were visible at various times of the day, with the female spending much of the time on the nest."

At the December 11, 2002 Hearing, Ms Culbertson acknowledged that the eastern pair of white-tailed kites nested (Transcript p. 120):

"There were two nests, and we knew where they were.... As it turns out, when we retained Dr. Froke, we had him look in the easterly pair's nest. This is the nest along the 18th fairway, and although those kites did mate and build a nest, they produced no eggs...."

Thus, it is clear that there was no "false report" nor were "erroneous facts" presented by staff to the commission regarding nesting by white-tailed kites or regarding evidence of incubation. The applicant appears to agree with staff that the eastern pair mated and nested. In May, Mr. Storrer observed one of the kites sitting on a nest in an incubating posture. The applicant's consultant, Mr. Evans, made similar observations. At some unspecified later date (presumably during one of his visits in August, November, and December 2002; Request for Reconsideration, p. 15), Dr. Froke was reported by Ms. Culbertson (on December 11, 2002) to have looked in the eastern nest and found no evidence of eggs (notwithstanding Dr. Froke's December 8, 2002 assertion that only the

western pair had completed a nest). An absence of evidence late in the season could mean that no eggs had been laid, or that eggs were laid and destroyed by predators, or that eggs were laid and hatched and that the shells were removed from the nest by the birds or the wind. Dr. Froke's report of what he saw when he climbed the nesting tree (presumably Dr. Froke climbed the tree *after* nesting season had ended) does not call into question Mr. Storrer's and Mr. Evan's earlier observations. In addition, after the nesting survey was terminated by the applicants, the site was under the sole physical control of the applicants, who secure the site with guards. Thus, there is no independent data to ascertain why the second pair, deemed by the observing experts to be displaying active nesting behavior at the time the survey ended, did not produce fledglings. No one else was allowed to investigate the nest area. Thus, the after-the-fact observations of the applicants consultants, reported in December 2002 - well outside of the nesting season, which ended by September, are of no relevance. In any event, at the time of the hearing, the Commission had before it all the available evidence, including the apparent differences of expert opinion. Thus, the Commission made no error of fact, and no new evidence is presented in the Request for Reconsideration.

4. Alleged erroneous facts regarding possible alternatives.

The applicants allege that staff made incorrect statements at the hearing in December 2002 regarding possible alternatives. It also appears that applicants assert that there is relevant new evidence concerning these issues that, in the exercise of reasonable diligence, could not have been presented at the hearing.

First, applicants refer to a statement by Commission staff (Mr. Damm) at the December 2002 hearing, after the public hearing was closed, that the site is designated in the LCP as agriculture and that use is permitted by right. These statements are not incorrect. The applicants assert that the Commission should have also been informed that: "the record from your 1994 decision demonstrates, through extensive evidence, that an agricultural use is not economically viable use of the property, a fact noted in the Court of Appeal decision." The content of the Commission's 1994 findings and the Court of Appeal decision filed in 1997 is not "relevant new evidence that, in exercise of reasonable diligence, could not have been presented at the hearing." Therefore, this is not grounds for reconsideration based on new evidence. As stated above, staff's statement is not factually incorrect and therefore, this does not constitute a mistake of fact. Furthermore, the Commission's findings recognize that there is a procedure in the LCP for evaluation of proposals for non-agricultural development on the "Naples Townsite" small lots through a development agreement. (Staff Report, Page 77). The findings also state that approximately 23 Naples Townsite small lots are part of the project site. (Id.) The Commission had this information when it made its decision.

Second, applicants assert that staff (Mr. Damm) made an erroneous statement when he indicated that as to the adjoining property to the west, in the Naples antiquated subdivision, the County is evaluating residential development. Applicants note that that adjoining property, known as the Morehart property, has its own source of water and their property, Dos Pueblos, does not. This is not new evidence. The applicants' representative made the same statement at the hearing, before the Commission made

its decision. She stated: "Morehart has water, but it belongs to Morehart, that is the property that Ms. Hale was talking about, to the west. It belongs to him. He is using it for his development." Therefore, the assertion regarding water for development on the Morehart property is not relevant new evidence. In addition, the statement by staff cited above is not incorrect and does not constitute a mistake of fact. Furthermore, as explained above, applicants asserted at the December 2002 hearing that they have the right to only a small amount of potable water. There is no evidence, however, regarding the amount of potable water available or the amount of residential development that it could support. The applicants themselves stated that approximately six residences existed previously on the subject site and were removed during the abandonment of Arco facilities. In addition, as stated previously, the applicants have, in addition to whatever residential development rights may be determined for the 21 Naples Townsite lots on their site, three legal lots – two of approximately 100 acres each, and one (former inholding) lot of between 4 and 6 acres in size. These lots are each entitled to development of a least one residence, for a minimum of three potential residences on the subject site. Thus, there is no evidence demonstrating that the Commission made a mistake of fact regarding the issue of water availability or the potential residential use of the site.

Third, applicants note that staff pointed out that the golf course would include a restaurant, bar and banquet facility and that these amenities are required to have potable water. Applicants admit this, but also state: "there is no potable public water pipeline to the Dos Pueblos property at this time. It stops at Bacara, would have to cross another property owner's property, and would occur only with approval of the golf course." There is no reason why applicants could not have made this assertion at the hearing. This information, in the exercise of reasonable diligence, could have been presented at the hearing, or prior to the hearing. In addition, the applicant simply asserts that a pipeline for potable water can only cross adjacent properties if the golf course is approved. There is no explanation of why this is the case and no evidence documenting the applicants' claim that a pipeline to bring potable water to the site is only possible for the proposed golf course. Therefore, the applicants' assertion does not constitute relevant new evidence, nor does it establish that the Commission made a mistake of fact or law.

Therefore, in conclusion, the three alleged erroneous facts regarding alternatives do not constitute grounds for reconsideration.

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Via Hand Delivery

Mike Reilly, Chair
and Coastal Commissioners
California Coastal Commission
45 Fremont Street, Suite 2000
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Re: **REQUEST FOR RECONSIDERATION**
Dos Pueblos Golf Links Project
A-4-STB-93-154-CC AND -A2

Dear Chairman Reilly and Commissioners:

This firm represents the Applicants CPH Dos Pueblos Associates, LLC, and Makar Properties, Inc., ("Applicants") in the above-referenced matter. On December 11, 2002, the Commission voted to deny a permit for the Dos Pueblos Golf Links Project. Pursuant to Section 30627 of the Coastal Act, the Applicants now respectfully request reconsideration of that decision on the grounds that:

(1) there are several material errors of fact and law which have the clear potential to alter the Commission's decision, and

(2) there is relevant new evidence which in the exercise of reasonable diligence could not have been submitted at the hearing.

In addition, under Section 13109.5 of the Commission's regulations, the Applicants request that the Commission schedule a hearing on this request for reconsideration for its next Southern California hearing in February.

At the December hearing, several Commissioners and Staff indicated potential support for the golf course if revised to address the habitat issues. However, the nature and extent of those revisions were not explored at the hearing with the Applicants.

As discussed below, in the event the Commission votes to grant reconsideration, the Applicants are prepared to amend their application to substantially revise the Golf Links Project in several respects. The proposed

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Prop Dos Pueblos Golf Course
Applicants' Request for Reconsideration

revisions would include: (1) deletion of the Par-3 executive course; (2) deletion of a portion of the driving range; (3) relocation of the clubhouse and parking lot and placement of the cart barn under the clubhouse to avoid impacts to the southern tarplant; (4) reduction in the size of the paved parking lot (because of the deletion of the 3-Par), but an increase in the number of parking spaces devoted to coastal access users (25 spaces total); (5) relocation of the reclaimed water pond to a site north of the railroad tracks and over one mile from Eagle Canyon Creek; and (6) creation of substantial areas of native grasslands as white-tailed kite foraging area. We are in the process of preparing a revised site plan to reflect those proposed modifications to the Project.

We believe these modifications to the Project are fully responsive to the issues raised by your Staff as to the red-legged frog, southern tarplant, monarch butterfly, and the white-tailed kite, and at the same time permit the Applicants to go forward with the Golf Links Project. Your grant of reconsideration will enable the Applicants to address those modifications more fully at a subsequent hearing.

I.

THERE ARE MATERIAL ERRORS OF LAW WHICH HAVE THE POTENTIAL TO ALTER THE COMMISSION'S DECISION TO DENY THE APPLICATION

We previously submitted a detailed letter setting forth the Applicant's legal position with respect to the Staff Report, which has now become the Commission's decision. This reconsideration request now asks the Commission to consider the following additional errors of law which, we respectfully submit, have the potential to alter your decision to deny the Project.

1. Under the Unique Facts and Circumstances of this Application, the Commission Should Have Approved the Project, as Guided by the Certified LCP.

The Commission's December 11th decision relied on Section 35-97.3 of the Coastal Zoning Ordinance (CZO) to suggest that if new "ESHA" is identified on the property, it must be addressed even if not mapped. At the hearing, the Applicants urged several reasons why the Commission could not legally consider purported new

ESHA, other than the red-legged frog, in the "changed circumstances" proceeding. Assuming, arguendo, Section 35-97.3 does apply, the Commission failed to follow the concepts set forth in that provision as to conditions which would ensure the protection of ESHA.

Section 35-97.3 states: "If a newly documented environmentally sensitive habitat area, which is not included in the ESH Overlay District [i.e., is not already mapped], is identified by the County on a lot or lots during application review, the provisions of 35-97.7 - 35.97.19 shall apply." (Emphasis added.)

Section 35-97.7 was not quoted in the Staff Report. It provides:

> "A coastal development permit may be issued subject to compliance with conditions set forth in the permit which are necessary to ensure protection of the habitat area(s). Such conditions may, among other matters, limit the size, kind, or character of the proposed work, require replacement of vegetation, establish required monitoring procedures and maintenance activity, stage the work over time, or require the alteration of the design of the development to ensure protection of the habitat. The condition may also include deed restrictions and conservation and resource easements. Any regulation, except the permitted or conditionally permitted uses, of the base zone district may be altered in furtherance of the purpose of this overlay district by express condition in the permit." (Emphasis added.)

The Commission is aware of the unusual and extended history of this Project. It was approved by the Commission in 1994 following an appeal from the unanimous approval of the Santa Barbara County Board of Supervisors. The Commission's decision was then fully litigated and upheld by the Santa Barbara Superior Court in 1996, and then the Court of Appeal in 1997. Relying on the Commission's decision, ARCO removed viable and substantial oil and gas facilities (with 50 productive years yet remaining) and proceeded to finish condition compliance, expending approximately $11 million dollars only to find itself stymied by a "second" round appeals from the ministerial permits ultimately issued by the County -- appeals which have never been heard. What followed was the discovery of the red-legged frog, the denial of an extension, and the Applicants' efforts, at considerable additional expense, to obtain a Section 10 permit from the Fish and Wildlife Service.

The Applicants respectfully submit that outright denial of the permit here was not warranted. An approval with conditions, applying Section 35-97.7, was particularly appropriate for a previously approved Project under the unique facts and circumstances presented.

The granting of reconsideration would permit the Commission to consider Project revisions and/or conditions to ensure protection of the habitat areas on site.

2. Reconsideration is Necessary to Avoid an Unconstitutional Taking.

In denying the Golf Links Project, the Commission's December 11 decision has resulted in an unconstitutional "taking" of the Applicants' property. There is no other reasonable or economically viable use of the project site, and thus the decision violates Section 30010 of the Coastal Act. Section 30010 provides, in relevant part:

> "The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission . . . to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without payment of just compensation therefor . . . ." (Emphasis added.)

In accepting Staff's recommendation, the Commission's decision offers a brief, legally flawed "alternatives" discussion. First, your decision concludes, with admittedly no golf expertise, that the proposed course may simply be radically redesigned. As a links style course, the Golf Links has been carefully designed to avoid the railroad tracks and scattered wetlands, drainages, and other previously identified sensitive resources on the property. Your decision does not address how the same habitat concerns would be overcome with a fictitious revised course.

Second, the decision suggests that even if the 18-hole course were retained, modifications would be required to the 16th, 17th and 18th fairways which "would all require major redesign and substantial relocation." This is not explained or supported by any evidence. By contrast, the evidence before the Commission made clear that a redesign in that manner simply is not possible, given the sweeping approach of Staff to temporal white-tailed kite nests which the experts agree will likely not even be used again by the kite. The golf course designer, Bill Coore, of Coore and Crenshaw, testified:

> "I can't address a lot of the issues you are faced with. I can absolutely address this issue. Without question, there is no way this will work . . . .
>
> "I know it is very, very difficult to understand for those who are not versed in golf, and golf architecture. It must seem that holes are merely like tiles on the floor, that you can pick them up and move them around in any fashion. It really isn't the case." (Transcript, pp. 110-111; emphasis added.)

Third, the decision points to the Applicants' 23 Naples lots and states that "there is an alternative for residential development on the Applicants' property." Without a substantially more affirmative and detailed commitment by this Commission to a residential use, this alternative is illusory. Specifically:

> In its 1994 decision, the Commission inferred that a residential use is not consistent with the purpose of the AG-II zoning for the property.

> Importantly, the Naples lots on the Dos Pueblos property have no domestic water, unlike the current Project, which proposes to construct a reclaimed water line to serve the golf course use. Remarkably, at the December hearing, Staff stated:

> "The applicants have raised the issue of how to have potable water for those sites. That would require further analysis. We don't have an answer to that question. That isn't before us." (Transcript, p. 36.)

Wrong! If Staff was recommending denial, that issue was precisely before you. Here is what the Court of Appeal had to say about it in Surfrider Foundation v. California Coastal Com., which upheld your 1994 decision:

> "There is no water on-site and the water ARCO purchases for industrial use may not be used for agriculture." (Decision, p. 3; emphasis added.)
>
> ". . . [T]his site does not have a "shortage" of irrigation water. It has no irrigation water at all." (Decision, p. 13; emphasis added.)

> Putting aside the lack of water on the Dos Pueblos site, the Commission's decision points to a 2001 County LCP amendment, and implies that this necessarily permits residential use of the Naples lots by way of a County approved development agreement. What your decision does not explain is that in certifying the 2001 LCPA, the Commission reserved to itself the authority to review any future development agreement requiring yet further another amendment to the LCP, and that the Commission's findings stated: "[W]ithout adequate information regarding what such an agreement might involve, it is not possible for the Commission to determine whether such an agreement would be consistent with Policy 2-13 of the LCP, which requires that residential development of the existing lots in Naples be discouraged by attempting to transfer development rights to other appropriate urban areas."

> Finally, despite all of the litigation surrounding the Commission's 1994 decision, the Staff Report – now the Commission's decision – suggested the possibility of uses consistent with the AG-II designation. This is truly astounding, when virtually all of the concrete evidence before the Commission in 1994 demonstrated – without any doubt – that an agricultural use was not economically viable. In that respect, the Commission has unwittingly ignored the discussion by the Court of Appeal in the Surfrider case:

> ". . . [T]he Commission was entitled to conclude that the lack of irrigation water would prevent commercial agriculture on the property, even though farmers across the County also contend with water shortages. First, this site does not have a 'shortage' of water. It has no irrigation water at all. There is no evidence that dry farming on the site had ever been profitable. Surfrider submitted the opinion of one expert that the site would support commercial agriculture [but without any economic data]. Other experts, including representatives of the County's agricultural community, disagreed. In fact, ARCO's consultant testified that a dry farm would operate at a loss and the County's EIR described the site as marginally viable for agriculture. An agricultural use could not support the high cost of bringing irrigation water to the site . . . ." (Decision, p. 13.)

The Commission should grant reconsideration to avoid the possibility of an unconstitutional taking. The proper course is to enable this Applicant to come back with a modified proposal and to approve the Project with conditions.

3. Under the Commission's Regulations, the Commission May Consider Only "the Changed Circumstances" – the Red-legged Frog – That Were Identified by the Commission in Denying the Extension.

At the December hearing, your legal staff provided its view of why the extension regulation, Section 13169, was amended to its present language. However, legal staff ignored the plain language of the regulation and your June 1999 decision to deny the extension.

Section 13169(d) states, in relevant part:

> "(1) If three (3) commissioners determine that there are changed circumstances that affect consistency of the development with Chapter 3 policies of the Coastal Act or with a certified local coastal program if applicable, the extension shall be denied and the development shall be set for a full hearing of the commission pursuant to Subchapter 1 of these regulations. However, the applicant shall not be required to file a new permit application but instead shall submit any information that the executive director determines is necessary to evaluate the effect of the changed circumstances." (Emphasis added.)

Under this provision, the Commission may consider only "the changed circumstances" that were recited at the June 1999 extension hearing – namely, the presence of the red-legged frog in Eagle Canyon. This is because the regulation does not permit consideration of "any" changed circumstances -- which is staff's interpretation, but is limited to evaluation of "the effect of the changed circumstances." The regulation could have been drafted to the broader scope urged by Staff, but was not.

We ask that you consider the following:

> Failure to adhere to the actual words used in the regulation violates a fundamental rule of statutory construction. As recently stated by the California Supreme Court in Equilon Enterprises v. Consumer Cause, Inc. (2002) 29 Cal.4th 53, 59: "When interpreting statutes, we follow the Legislature's intent, as exhibited by the plain meaning of the actual words of the law . . . . This court has no power

to rewrite the statute so as to make it conform to a presumed intention which is not expressed." (Internal quotes omitted.) Staff's interpretation rewrites the regulation, plain and simple.

> In denying the extension in June 1999, the Commission analyzed several different possible changed circumstances. In the end, it determined that there was a single changed circumstance, the red-legged frog. In fact, the Commission rejected changed circumstances as to the following: monarch butterfly, wetlands, and the western snowy plover. In expanding the scope of "changed circumstances" in its December decision, the Commission has impermissibly "reconsidered" the June 1999 decision, which at this point in time it had no power to do.

Again, notwithstanding this argument, if the Commission grants reconsideration, the Applicants' proposed modifications will address all of the habitat issues.

4. **Evidence That Two Pairs of White-tailed Kites Have Been Observed Nesting on the Property is Not a "Changed Circumstance" Because it was Specifically Anticipated and Addressed in the 1993 Project EIR, the 1993 County's Conditions Which the Commission Incorporated in its 1994 Project Approval.**

The Commission's December 11 decision also improperly treats evidence that two pairs of white-tailed kites have been observed nesting on the property as a "changed circumstance." Even assuming, arguendo, that the Commission were not confined to issues relating to the red-legged frog, the white-tailed kite is **not** a "changed circumstance" at all.

At the December hearing, Staff did not disagree that the white-tailed kite was specifically addressed in the project EIR as follows. The following passage from the EIR was **omitted** from the Staff Report -- now your decision:

> ". . . **It is expected that raptor populations in the project area would decline as a result of the reduction in foraging habitat and perch sites, and several species such as black shouldered kite [now called the white-tailed kite] and red-shouldered hawk may abandon the area.** Overall

declines due to cumulative development of some species expected to utilize the site (e.g., prairie falcon, peregrine falcon) may result in long-term extirpation (elimination from a portion of the known range) in the Goleta Valley. **As previously mentioned, the removal of trees would eliminate nesting, perching and roosting habitat for sensitive raptors and is therefore considered a significant impact. These trees would be replaced at a ratio of 3:1, which would reduce impacts to less than significant levels over the long term. Impact to raptors associated with the loss of trees would remain significant until the replacement trees reached maturity. These impacts are therefore considered short-term and mitigable (Class II).**" (Page 5.1-36 – 5.1-37.)

The Staff Report gave you half a loaf on this issue. The impact of the Project on "nesting, perching and roosting habitat" for the white-tailed kite was expressly anticipated by the 1993 EIR, and dealt with through mitigation measures and County Condition no. 11, which the Commission in 1994 incorporated by reference in its own decision. That condition specifically addressed the impacts associated with tree removal in connection with the project.

At the hearing, Staff conceded that the species was presumed in the EIR, but, simply put, it did not like the way the kite was treated in the environmental document. As Ms. Hale explained:

"When you presume that the species is present, you cannot know what use it makes of the site. Is it simply foraging, because these raptors take so many acres for foraging, or is it nesting? If it is nesting or roosting, those are specifically defined activities that invoke specific applications of those policies and provisions of the LCP." (Transcript, p. 152.)

The kite – whether 2 or 10 nests are at issue -- is not a "changed circumstance " because its presence was expressly assumed in the EIR, including "nesting, perching and roosting." The EIR did not merely make passing reference to the kite. Impacts through the loss of trees was specifically mitigated.

Staff's position today is simply that it does not like the level of discussion concerning the kite in the EIR or the mitigation which was imposed. However, the EIR cannot now be challenged. Not only is the EIR conclusively presumed valid on

this issue, but it is final and binding on the Commission. (Pub. Res. Code § 21167.2.)

There is a vast difference between "changed circumstances" and a "changed view" regarding the way a circumstance previously considered should have been addressed. That Staff might do it differently today than the County and Commission did in 1994 is not a "changed circumstance."

Nonetheless, reconsideration will give the Applicants the opportunity to address the white-tailed kite through the project modifications we would propose.

5. The Commission's decision is invalid under the Marine Forests case.

To avoid any potential argument concerning the Applicants' exhaustion of administrative remedies, the Applicants further object to the Commission's exercise of jurisdiction in denying the Project for the reasons set forth by the Court of Appeal decision in Marine Forests Society v. California Coastal Com., 3rd Civ. C038753 (filed 12/30/02).[1]

As with the foregoing arguments, we wish to assure the Commission that the Applicants' objective here is for the Commission to reconsider its December decision, and, after further review, to approve it with conditions.

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[1] This argument is preserved, although the Applicants submit that the issue need not be raised before the Commission. (Cal. Const. Art. III, § 3.5 [an administrative agency has no power to declare a statute unconstitutional]; State of California v. Superior Court (Veta) 12 Cal.3d 237, 251 [challenge to the 1972 Coastal Act; "It would be heroic indeed to compel a party to appear before an administrative body to challenge its very existence and to expect a dispassionate hearing before its preponderantly lay membership on the constitutionality of the status establishing its status and functions."].)

II.

THERE ARE CLEAR ERRORS OF FACT WHICH HAVE THE POTENTIAL TO ALTER THE COMMISSION'S DECISION TO DENY THE APPLICATION

There are numerous material errors in the Commission's decision. In addition, as discussed in Section III, there is factual evidence which, in the exercise of reasonable diligence, the Applicants could not have presented to the Commission because it arose through Staff comments *after* the close of the public hearing. While we believe these factual matters have the potential to alter the Commission's December decision, we should emphasize that they will be mooted because the Project modifications the Applicants are prepare to make will avoid impacts to the monarch butterfly, southern tarplant, red-legged frog and white-tailed kite.

Erroneous facts regarding the number of butterflies. The Staff Report, and thus the Commission's decision, erred in two significant respect regarding the number of monarch butterflies. To preface this, the Applicants commissioned Dr. Daniel Meade, of Althouse and Meade, Inc., to address the monarch butterfly issues. Dr. Meade is the recognized authority on the monarch butterflies in Santa Barbara County. However, the Commission's findings completely misread his report.

First, the findings repeatedly state in error that Dr. Meade counted over 72,000 butterflies (instead of approximately 4800, which he counted in calendar year 2000). This grossly overstated the number of monarchs observed in 2000. One speaker, Diane Conn, reiterated this inflated figure. (Transcript, p. 111: "Both the upper western grove, and Eagle Canyon west must be protected for 72,000 monarchs, that is incredible.") At the hearing, Staff (Ms. Hale) acknowledged that it overcounted the number of butterflies, but did not clarify the number and stated "that they are still in the many thousands." (Transcript, p. 18.) One commissioner, Commissioner Wan, underscored the importance of the number of butterflies: "Relative to the changed circumstances, there is a big difference between a couple of hundred butterflies and thousands of butterflies." (Transcript, p. 155.)

Second, responding to the Applicants' point that the Commission extension regulation only permits the Commission to consider "the changed circumstance" specifically identified at the June 1999 hearing – namely, the red-legged frog, the

Commission's findings state:

> "There is no restriction that limits the Commission's review to only the changed circumstance that was identified in June 1999 when the Commission denied the permit extension. Rather, under applicable legal principles the Commission must apply the facts and the law as they exist at the time the Commission makes its decision." (Emphasis added.)

Assuming, arguendo, that this is a correct statement of law (a position we do not believe is correct, given the plain language of Section 13169), the Staff Report erred in addressing the butterflies closest to the Par-3 course at all. In fact, you will find that the Staff Report – now your decision – is completely contradictory under this legal interpretation as to both the butterflies and the tarplant.

By letter dated December 9, 2002, Dr. Meade explained:

> "This year, during October and November of 2002, no butterflies were found in the autumnal aggregation site we call the "Upper Western Grove" on the Dos Pueblos Golf Links property." (Letter, Dr. Meade to Chair Wan, p. 3.)

Since the principal concern of Staff was the so-called "Upper Western Grove," there was no evidence of "changed circumstances" as to the monarch butterfly at the time the Commission considered this matter because **there were no butterflies** at the relevant time in question.

Erroneous facts regarding the number of tarplant individuals. Similarly, the Commission's findings underscore that in 1998 a count of the southern tarplant identified over 4500 individuals strictly within the footprint of the area disturbed by the approved abandonment of the warehouse and loading racks on the property. The findings are misleading. They do not explain that the number of species identified in the warehouse/loading racks footprint dropped dramatically in the subsequent years, and that the evidence is that there were but 372 plants total in 1999, 403 plants in 2000, and 436 plants in 2001.

Thus, your findings completely ignore the legal standard (whether correct or incorrect) set out in your decision that the Commission must look at "the facts and the law at they exist at the time the Commission makes its decision." While the

decision suggests that the Commission must look at the Project in terms of what is presently existing (e.g., how wetlands are identified), not the "historic" extent of plants, it clearly did not do that in the case of the tarplant (or, as noted, butterfly).

Still further, the Commission must recognize that it is grossly unfair to count tarplants that arose only because of the Commission's 1994 approval and the Applicants' abandonment activities in reliance thereon. In reality, when the area of the warehouse/loading racks is eliminated – as it should it be, there were but 9 to 125 total plants observed in three locations during the period 1999-2001.

Erroneous facts regarding the timing of listing of the tarplant by the Native Plant Society. The Commission's findings also fail to fully explain to the Commission "when" the tarplant became a Native Plant Society List 1B species. In fact, the tarplant was treated as a sensitive plant species in the EIR, and it became a List 1B species *before* the Commission even acted on the application in 1994. In other words, the listing of the species was not a "changed circumstance." The findings somehow put the onus on the Applicant at the time to ferret out a change in status of the plant. However, as shown by your recent Staff Report, it is the function of your professional staff to obtain that type of information, as obviously they were able to do in preparing the Staff Report for the December 11 decision.

Erroneous facts regarding tarplant as ESHA. The Applicants submit that the characterization of the southern tarplant as "ESHA" is incorrect. Although it has been listed by the non-profit Native Plant Society, it has *never* been listed as rare, endangered or threatened species by any state or federal fish and wildlife agency.

III.

THERE IS RELEVANT NEW EVIDENCE WHICH, IN THE EXERCISE OF REASONABLE DILIGENCE, COULD NOT HAVE BEEN SUBMITTED PRIOR TO THE CLOSE OF THE PUBLIC HEARING

Erroneous facts Regarding the Applicants' Willingness to Make Changes to the Project. At the December 11 hearing, there was an implication in the Staff's testimony that the Applicants were unwilling to make revisions to the golf course, or at least confusion in that regard. The Applicants were not asked to

address the issue, although several Commissioners and Staff expressed potential support for a revised Project. To clarify that issue, as explained at the outset, the Applicants are prepared to make substantial changes to the Project. This request for reconsideration asks for the opportunity to do that.

Erroneous facts regarding pesticide use on the Par-3 course. After the close of the public hearing, Staff incorrectly emphasized that pesticides would be used on the Par-3 course and that pesticides would adversely impact the red-legged frog, southern tarplant and monarch butterfly.

In September 2002, the Applicants submitted a letter to Staff from Dr. Froke recommending that the Par-3 be "chemical free" except for emergencies. We verbally indicated to Staff that the Applicants would agree with that recommendation, and would amend the project description accordingly. Ultimately, Ms. Culbertson and Mr. Damm agreed that a letter should be submitted which revised the project description in that manner. Accordingly, on November 20, 2002, the Applicants expressly amended the project description to eliminate the use of pesticides and herbicides on the Par-3 course, except in controlled emergency situations. ("It is proposed that chemical and pesticide use on the Par 3 golf course be restricted to bonafide emergency situations.") Indeed, the November 20 letter was e-mailed (Exhibit 8 to the Staff Report), faxed and fed-exed to Staff.

Notwithstanding the agreement with Staff and the formal change in the project description, the revision was not addressed by Staff at the hearing, and thus was not brought to the Commission's attention. Instead, Ms. Hale quoted from the earlier Habitat Conservation Plan that within the Par-3 course, "herbicides would be applied from a boom sprayer 15 to 18 feet in width, attached to a 250 gallon tank on the back of a golf course utility truck." (Transcript, p. 127.) She stated that buffer setbacks would be inadequate "if there were an accidental application." (Id., p. 128.) She pointed out that the agrinomic turf management plan listed 23 preferred use chemicals and another 25 more toxic chemicals which would serve as a back up. Finally, she added:

> "The issue, also, of spray applications, with the tar plant. It is an issue with the monarch butterflies, but it also applies to the tar plant populations. It is not staff's imagination that there can be overspray or misapplications, or unauthorized applications of herbicides with catastrophic consequences for

> small, sensitive populations. [¶] There is another industrial site just down the coast from ARCO, where there is another southern tar plant populations, and the county records indicate – and John Storrer is here to affirm this, if you wish him to do so – that misapplication, unauthorized application of herbicides completely wiped out that population in one year." (Id. at pp. 130-131.)

Despite this very heavy emphasis on the adverse effects of pesticide application, Staff failed to mention the Applicants' amendment to the project description which deleted pesticide/herbicide usage from the Par-3. Nonetheless, at least one commissioner, Commissioner Wan, responded to Staff's concerns as follows:

> "And, another thing I do have to say, is pesticide application near a butterfly grove is certain death to those butterflies, and you are going to sit them there as sort of a trap for them. They are going to have water on the blades of grass, and they are going to go drink that water, and it is going to be poison." (Transcript, p. 155.)

Another commissioner, Commissioner Nava, added: ". . . I can't imagine this Commission agreeing to participate in a process where, by its very nature, you engage in poisoning of the monarchs." (Transcript, p. 143.)

Erroneous facts regarding WTK nesting. After the close of the public hearing, Dr. Dixon noted that Ms. Culbertson testified that Dr. Froke actually looked in the east nest and found no evidence of eggs. (Transcript, p. 126.) Dr. Dixon seemed surprised by this:

> "Now, this is the first time that this information has been shared with staff, and no date was given for the observations. I suspect that if there were such observations, it must have been late in the season. On the other hand, the county observer, Mr. Storrer, observed a behavior which in his professional opinion indicated incubation." (Id., pp. 126-127.)

Staff's comment overlooks Dr. Froke's letter to the Commission, dated December 8, 2002. Dr. Froke explained, concerning his visits to the site in August, November and December (page p. 2):

> "... [O]f the two pairs observed onsite during 2002, only one (the 'western pair') was observed to have completed a nest (to actually have nested); and only that pair was observed to have produced eggs, i.e., to have *bred* or *reproduced*. [Successful breeding requires having fledged young from the nests]. Staff falsely reported to the Commission that the eastern pair was observed to incubate or 'brood' eggs; but no such observations were made or reported, and no evidence of eggs was suggested, by either the applicant's consultants or the Commission staff's own uncompensated observers."

Erroneous facts regarding possible alternatives. After the close of the public hearing, Staff made several incorrect statements regarding the "takings" argument.

First, Mr. Damm stated: "... I just want to remind the Commission that this site is designated in the Local Coastal Program as agriculture. That is the use that is permitted by right." (Transcript, p. 124.) However, as noted above, the record from your 1994 decision demonstrates, through extensive evidence, that an agricultural use is not economically viable use of the property, a fact noted in the Court of Appeal decision.

Second, Mr. Damm stated that as to the adjoining property to the west, in the Naples antiquated subdivision, the County of Santa Barbara is evaluating residential development in that antiquated subdivision right now. (Id., p. 125.) However, the adjoining property -- Morehart – has its own source of water. Dos Pueblos does not.

Third, Mr. Damm pointed out that the golf course would include a restaurant, bar area and banquet facility that is required to have potable water. (Id.) While this is true, the onsite water infrastructure was removed during abandonment, and there is no potable public water pipeline to the Dos Pueblos property at this time. It stops at Bacara, would have to cross another property owner's property, and would occur only with approval of the golf course.

CONCLUSION

The Applicants merely seek from the Commission the opportunity for full and fair consideration of the Golf Links Project. The Applicants respectfully request reconsideration of the Commission's decision on "changed circumstances" for the

purpose of (1) correcting the errors of fact and law identified above and (2) providing new evidence germane to the Commission's consideration that could not have been presented at the December 10, 2002 public hearing.

We recognize that a grant of reconsideration does not guarantee any particular decision on the merits of the application. However, as noted, the Applicants are prepared to propose substantial revisions to the Golf Links Project which we believe will enable the Commission to approve the Project with conditions, consistent with the certified LCP.

Finally, pursuant to Section 13109.5 of the Commission's regulations, the Applicants request that the Commission schedule the hearing on this request for reconsideration for its February meeting.

We appreciate your consideration of this request.

Respectfully submitted,

Steven H. Kaufmann

cc: Mr. Peter M. Douglas (hand delivered 1/10/03)
Mr. Ralph Faust, Jr. (hand delievered 1/10/03)
Mr. Chuck Damm (hand delivered 1/10/03)
Ms. Melanie Hale (hand delivered 1/10/03)
Ms. Jamee J. Patterson (by federal express)
Mr. Paul Makarechian
Mr. Samuel Weissbard, Esq.

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CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

To: Commissioners and Interested Parties

From: South Central Coast District Staff

Date: February 11, 2003

Regarding: Reconsideration Request: A-4-STB-93-154-R2
Arco Dos Pueblos Golf Course

This cover memorandum is attached to the 77-page staff report, dated November 22, 2002, that is now the record of the Commission's final decision to deny Application A-4-STB-93-154 pursuant to the new hearing on changed circumstances, and amendments to the proposed project, held December 11, 2002, in San Francisco. The Commission voted 10-0 to deny the project.

EXHIBIT NO. 2
APPLICATION NO. A-4-STB-93-154-R2
Arco Dos Pueblos Golf Course
Commission Decision 12/11/02 - Cover Memo

W22

ATE OF CALIFORNIA -- THE RESOURCES AGENCY GRAY DAVIS, Governor

ALIFORNIA COASTAL COMMISSION
UTH CENTRAL COAST AREA
SOUTH CALIFORNIA ST., SUITE 200
NTURA, CA 93001
)5) 585-1800

Staff Report:	11/22/02
Hearing Date:	12/11/02
CDP Approved:	11/16/94
Extension Denied:	6/07/99
Previous Hearing:	6/10/02
Staff:	MKH
Commission Action:	Denied
Vote:	10-0

STAFF REPORT
CHANGED CIRCUMSTANCES and PROJECT AMENDMENTS

Application No. A-4-STB-93-154-CC, and --A2 (ARCO Dos Pueblos Golf Links)

Applicant: CPHPAH Dos Pueblos Associates, LLC; Capital Pacific Holdings, Inc.; Patriot American Hospitality, Inc.; Makar Enterprises, Inc.; Richard W. Hollis, Jr.

Agent: Andriette Culbertson, Culbertson, Adams, Inc.; Steven Kaufmann, Attorney, Richard, Watson & Gershon; Richard W. Hollis, Jr., President, CPHPAH Dos Pueblos Associates, LLC

Project Location: Naples area of Gaviota Coast, approximately 1.5 miles west of U.S. Highway 101/Winchester Canyon Exit (Goleta), seaward of and adjacent to U.S. Highway 101, Route 1, Box 275, unincorporated Santa Barbara County.

Project Description: 18-hole and 9-hole golf courses with clubhouse and associated development, described on page 19, including proposed amendments set forth on page 20.

Purpose of Hearing: Hearing on changed circumstances to evaluate the consistency of the proposed project with the applicable policies and provisions of the certified Santa Barbara County Local Coastal Program (LCP) and with the coastal access and recreation policies of Chapter 3 of the Coastal Act. The hearing also includes proposed amendments to the previously approved project description.

Motion and Resolution: Page 3

Summary of Staff Recommendation: Staff recommends **denial** of the proposed project. Changed circumstances since Commission approval (November 16, 1994) of CDP A-4-STB-93-154 have rendered the proposed development inconsistent with applicable requirements of Santa Barbara County's certified LCP, including policies and provisions protective of environmentally sensitive species and habitats.

The California red-legged frog, tidewater goby, southern tarplant, white-tailed kite, and monarch butterfly have been identified on the subject site in previously u[illegible] locations or populations, or are utilizing the site in ways that they previou[illegible] example for nesting by the white-tailed kite). These facts either did not e[illegible]

(Report = 77 pages)

EXHIBIT NO. 2
APPLICATION NO. A-4-STB-93-154-A2
Arco Dos Pueblos Golf Course
Commission Decision Staff Report of 11/22/02

not known to the Commission at the time of the Commission's November 16, 1994 approval of former CDP A-4-STB-93-154, or at the time of the Commission's June 7, 1999 hearing on the applicants' request to extend the previous permit. In addition, some of these species have received state or federal protected status, or elevated sensitive species status since Commission approval of the permit.

Other changed circumstances include the discovery of new wetlands after oil and gas facilities were removed from the site in December 1997 and January 1998. An appeal to the Commission of a County-approved final CDP for the proposed project, including changes to the project that were reviewed by the County through a substantial conformity determination, is pending. Most of the changes addressed in the appealed permit have also been proposed by the applicants as amendments to the presently proposed project. A second appeal is also pending regarding remediation of contaminated soils on the site. These appeals will be dealt with at a separate hearing.

Substantive File Documents:

Santa Barbara County certified Local Coastal Program (LCP); Guide to the California Environmental Quality Act, 1999 Edition, Remy, Thomas et al, Solano Press Books; ACOE/NRCS wetland delineation documents for Arco Dos Pueblos site (on file); Recovery Plan for the California Red-legged Frog (*Rana aurora draytonii*). U.S. Fish and Wildlife Service, Portland, Oregon, viii + 173 pp.

Staff Note: The correspondence received by staff concerning this project is extensive and due to the size of exhibit package distributed with this report, will be distributed separately in the subsequent addendum.

In addition, staff notes that the applicants and the applicants' consultants have worked with staff since the Commission's June 10, 2002 hearing to identify potential solutions to the impacts to sensitive resources on the Arco Dos Pueblos site that have been identified in this report. Staff met several times with the applicants' agents and consultants and attended site visits, including site visits in both Monterey and Santa Barbara County to further evaluate the resources of concern. Staff ultimately concluded, however, despite the best efforts of all parties to explore potential alternatives and mitigation measures, that without a substantial redesign of the golf course the project will have significant, impermissible and potentially irreversible, adverse impacts on Environmentally Sensitive Habitat Area (ESHA) and sensitive species on the Arco Dos Pueblos site. These impacts include the removal of nesting habitat relied on by at least two pairs of white-tailed kites, a raptor afforded specific protections by statute as a California Fully Protected Species. The applicants have stated that they cannot accept a redesign of the golf course to protect the identified nesting habitat in large part because the nesting areas are located in the midst of the blufftop stretch they require for the spectacular vistas that would set apart a "championship" course from the more mundane course that they apparently believe result if the nesting areas were not part of the golf course footprint. Thus, a redesign that would relocate the affected 16th, 17th, and 18th proposed fairways may be feasible,

but would be unacceptable to the applicants. The impacts on ESHA that the project will otherwise have in the professional opinion of the Commission's staff ecologist render the project inconsistent with the policies and provisions of the Coastal Act and with the requirements of the County's certified LCP, specifically with policies and provisions set forth in the LCP that are protective of ESHA. Therefore, while appreciative of the applicants' efforts, staff finds it necessary to recommend that the Commission deny the project as proposed.

SECTION I. MOTION AND RESOLUTION

MOTION: ***I move that the Commission approve Coastal Development Permit No. A-4-STB-93-154-CC-A2 as proposed by the applicants.***

STAFF RECOMMENDATION of APPROVAL:

Staff recommends a **NO** vote. Failure of this motion will result in the denial of the permit, including the applicant's proposed amendments to the permit, and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO DENY THE PERMIT:

The Commission hereby **denies** Coastal Development Permit A-4-STB-93-154-CC, including the amendments to the permit proposed by the applicant pursuant to application A-4-STB-93-154-A2 and adopts the findings set forth below on grounds that the development, including the proposed amendments, does not conform with the policies and provisions of the certified Local Coastal Program of Santa Barbara County or with the public access and recreation policies of Chapter 3 of the Coastal Act. The proposed project and amendments thereto do not comply with the California Environmental Quality Act because there are feasible mitigation measures and/or alternatives that would substantially lessen the significant adverse effects of the development on the environment.

SECTION II. FINDINGS

1.0 BACKGROUND

1.1 Standard of Review

Santa Barbara County's certified Local Coastal Program is the legal standard of review for the Commission's hearing on changed circumstances. The certified LCP is also the standard of review for the amendments to the approved project that the applicants now propose. The project is located between the first public road paralleling the sea and the shoreline, therefore the project must also conform with the public access and recreation

policies of the Coastal Act (Public Resources Code 30603 and 30604) in addition to the policies and provisions of the certified LCP.

1.2 Permit History

The Arco Dos Pueblos project site was originally given a Coastal Dependent Industry (M-CD) land use and zoning designation in the Santa Barbara County Local Coastal Program (LCP).[1] This designation was based upon the existing industrial facilities on the site, and the long-standing use of the site for oil and gas production dating from the mid-1940s.

Arco's petroleum production facilities were deemed non-conforming when the County adopted the South Coast Consolidation Planning Area Policy in 1990. In 1991, the site was redesignated and rezoned Agriculture II (AG-II), 100-acre minimum as part of Major LCP Amendment 3-90 which consolidated oil and gas sites at two locations within the South Coast Consolidation Planning Area. Through these measures the County sought to limit the sprawl of energy facilities along the Gaviota coast.

At the time the Commission certified LCPA 3-90, no specific proposal for a golf course had been developed. Therefore, neither the County nor the Commission had evaluated the specific, relative impacts of a golf course versus agricultural or other recreational land uses, or compared the impacts of a golf course on the site with the impacts of the baseline residential uses authorized for the subject site under the redesignation and rezoning. In certifying the Agricultural land use and zoning designation for the property, the Commission acknowledged the intent of ARCO (Arco Oil and Gas owned the site at the time) to potentially develop a golf course on the site, and specifically indicated that the redesignation of the land as Agriculture, while not authorizing a golf course without further review and approvals, did not preclude the possible future use of the site for a golf facility.

A golf course is a conditionally permitted use in the County's LCP on lands zoned Agriculture II. Other permitted and conditionally permitted uses on lands zoned AG-II are shown in Exhibit 54 (which contains relevant pages from the certified Coastal Land Use Plan and the Coastal Zoning Ordinance).

On October 25, 1991, ARCO applied to Santa Barbara County for a Conditional Use Permit and Coastal Development Permit to construct two golf courses and appurtenant facilities on the site. The Conditional Use Permit (CUP 91-CP-085) was approved by the County in August 1993 and was appealed to the Commission by Surfrider Foundation thereafter.

The Coastal Commission determined that the Surfrider appeal raised a substantial issue with respect to conformity with the County's certified LCP and asserted coastal development permitting jurisdiction over the project (November 17, 1993 hearing). On

[1] The County's LCP was certified in 1982.

April 13, 1994 the Commission conducted a *de novo* public hearing on the merits of the appeal and denied the project. The applicant requested a reconsideration of the Commission's action. On July 3, 1994 the Commission voted to grant reconsideration of the previous denial of the permit. The Commission approved CDPA-STB-93-154 on November 16, 1994, subject to special conditions requiring the consolidation of the antiquated substandard lots (known as a portion of the former Naples Townsite) comprising a portion of the western end of the site and restricting the future redivision of the resultant two large parcels, the provision of vertical and lateral access easements offered by the applicants, and specifically incorporating all of the County's conditions of approval of the previous CUP into the Commission's permit. The Commission adopted revised findings reflecting this decision on February 8, 1995.

Surfrider Foundation petitioned for a writ of mandate in Santa Barbara County Superior Court challenging the Coastal Commission's approval of the permit. The trial court denied Surfrider Foundation's petition and the Court of Appeal upheld that decision on January 27, 1997. The Court of Appeal found that the Commission's findings and decisions regarding the project were legally valid.

During the litigation, the two-year time limit on the original Coastal Development Permit approval for the project was tolled. Consequently, the first term of the permit was extended until January 28, 1999. On January 7, 1999 the applicants submitted a timely request to extend the permit.

In addition, before the expiration of the permit for the golf course, the applicants also processed other permits for various aspects of the oil and gas facility abandonment and removal. The project description for the golf course permit states that separate permits for the abandonment and removal of the former Arco oil and gas production facilities, and the subsequent cleanup afterward, would be processed and issued as separate approvals by the Santa Barbara County Planning Department, Energy Division. Santa Barbara County thereafter approved and issued two Coastal Development Permits for various aspects of the abandonment and removal of oil and gas processing facilities and other structures on the site. The authorized development was completed in December, 1997 and January, 1998. The County approved a third CDP for contaminated soil remediation. The first two of the three permits were for removal of the physical facilities, which was completed in December of 1997 and January of 1998. The third CDP addressed contaminated soils discovered on the site after the removals (ARCO refers to the cleanup as a "Remedial Action Plan"), and was approved in 1998.

The first two permits were not appealed to the Commission. The third CDP, concerning remediation of contaminated soils was approved by County staff in 1998 and timely appealed to the Commission thereafter. Therefore, the CDP for the ARCO Remedial Action Plan was not issued, and the appeal is pending.

ARCO also proposed a number of project modifications to the golf course project description, which the County authorized through a substantial conformity determination in 1998. The County approved a final CDP for the project, including the project

changes that had been processed through substantial conformity determination, on December 3, 1998. This CDP was timely appealed to the Commission, and is also pending. The latter appeal addresses similar project modifications to those the applicants presently propose to the project that was the subject of the previous permit, CDP A-4-STB-93-154.

On November 9, 1998 ARCO submitted an application to the Coastal Commission for amendments to CDP A-4-STB-93-154, encompassing the changes to the project description that were approved by County staff pursuant to the pending appeals. On December 3, 1998 the County approved the final CDP for the proposed project, including the changes that were the subject of the amendment application. The Commission's Ventura District Office received a notice of final action on December 4, 1998, and staff subsequently received a timely appeal. Staff received the administrative record from the County on December 18, 1998.

During this period, according to the applicants' agents, some or all of the present applicants closed escrow with the former permittee, ARCO, for purchase of the Dos Pueblos golf course site. CDP A-4-STB-93-154 was transferred from ARCO to the applicants on March 2, 1999.

1.3 Changed Circumstances

The applicants' representatives have submitted a lengthy and detailed argument that the scope of Commission review is limited in this proceeding. Therefore, the Commission finds that a detailed response is necessary.

The Commission denied the applicant's request for an extension of the subject permit in June 1999. The applicable regulation states:

> ***If three (3) commissioners determine that there are changed circumstances that affect consistency of the development with Chapter 3 policies of the Coastal Act or with a certified LCP if applicable, the extension shall be denied and the development shall be set for a full hearing of the commission pursuant to Subchapter 1 of these regulations. However, the applicant shall not be required to file a new permit application but instead, shall submit any information that the executive director determines is necessary to evaluate the effect of the changed circumstances. (14 Cal. Code of Regulations, Section 13169(d)(1)).***

The "full hearing of the commission" referred to in the regulation is a hearing that addresses whether, in light of changed circumstances since the date of Commission approval of the subject project, the project meets the standards of review set forth in Section 30604 of the Coastal Act. With the exception of the findings of consistency that may be affected by changed circumstances, the Commission's 1995 findings, adopted after the Commission approved the project in November 1994, are final and binding and may not be reconsidered. As discussed below, those findings were challenged in court

by Surfrider Foundation, and were upheld by the Court of Appeal. This is both consistent with the regulation cited above and the common law principles of law of the case and *res judicata*, which direct that an agency may not take an action that conflicts with the Court of Appeal's decisions regarding the same matter, except as expressly authorized by statute. Therefore the Commission's findings regarding consistency with the County LCP policies concerning conversion of agricultural land and preservation of prime agricultural soil, and provisions that require preservation of stable urban boundaries and ensure adequate services for new development, continue to apply.

Notwithstanding those issues for which there are no changed circumstances, the Commission must evaluate the project, including new information regarding the effect of the changed circumstances, to ensure consistency with the certified Santa Barbara LCP. As discussed in detail below, the following changed circumstances have been identified on the project site since approval of CDP A-4-STB-93-154 in November 1994:

- Presence of California Red-legged Frog
- Presence of Tidewater Goby
- Increased population size of Monarch Butterflies
- Increased population size and habitat area of Southern Tarplant
- Nesting habitat of White-tailed Kite
- Previously unidentified wetlands that formed after energy facilities were removed
- Previously unidentified contaminated soil areas (separately addressed in pending appeal)

Applicants' Arguments Regarding Scope of Commission Review

The applicants have made several legal arguments related to the scope of the Commission's jurisdiction to review the golf course project. The Commission does not agree with these arguments, for the reasons briefly discussed below. The Commission finds that it has jurisdiction to evaluate all of the environmental impacts of the project that are addressed in these findings.

The first argument the applicants make is that the Commission may not review or evaluate the impacts of the project that relate to changes in the biological resources on the site that have occurred since the last Commission hearing on the project in June 1999. The applicants argue that the only "changed circumstance" that the Commission may consider is the presence on the site of red-legged frogs, a threatened species under the federal Endangered Species Act (ESA). This is the changed circumstance that was the basis for the Commission's denial of the request for extension of the permit in June 1999. The applicants argue that after a finding of changed circumstances, at the new hearing on the project, the Commission may not consider any additional changed circumstances that have subsequently occurred, in determining whether the project complies with the LCP. The Commission disagrees with this position. Neither

the Coastal Act nor its implementing regulations contain such a limit on the Commission's review of a project in this situation.

In this case, the Commission found that the presence of threatened red-legged frogs was a changed circumstance in June 1999. The applicants then developed a habitat conservation plan that was reviewed and eventually approved by the U.S. Fish and Wildlife Service. Only after obtaining approval of the habitat conservation plan in January 2002, the applicant had the necessary authorization from the U.S. Fish and Wildlife Service to proceed with the project in a manner that would not jeopardize the survival of the threatened red-legged frog. The approved habitat conservation plan embodies the applicants' proposal for addressing the changed circumstance – the red-legged frogs – that was identified at the June 1999 hearing. However, in the course of reviewing the reports prepared by the applicants' consultants after the June 1999 hearing, as well as information obtained by Santa Barbara County, and other information that was obtained after the June 1999 hearing, the Commission has determined that there are additional changed circumstances involving the biological resources at the site and the impacts of the proposed project on those resources that have occurred since the June 1999 denial of the permit extension. In deciding at this time whether to approve the permit, the Commission may properly evaluate the additional changed circumstances on the site that have occurred since the Commission's last hearing on the project in June 1999. There is no restriction that limits the Commission's review to only the changed circumstance that was identified in June 1999 when the Commission denied the permit extension. Rather, under applicable legal principles the Commission must apply the facts and the law as they exist at the time the Commission makes its decision. Thus, the Commission must now decide whether, with project modifications proposed by the applicant, and in light of the changed circumstances relating to coastal resources on the site that have occurred since the last hearing in June 1999, the project complies with the LCP.

The applicants' second argument regarding the scope of the Commission's review is that the Commission already had the opportunity to review the impacts of the project on raptors, including white-tailed kites, and may not address this now. The applicants assert that when the County initially approved the CDP for the project, potential adverse impacts on raptors, including white-tailed kites, were identified and certain mitigation measures were imposed. Therefore, the applicants argue that the fact that white-tailed kites have nested at the site in the last few years does not represent a changed circumstance and the Commission may not evaluate whether the project complies with the LCP standards applicable to nesting kites. The Commission disagrees because at the time of the hearing on the CDP in 1994 and the hearing on the request for extension of the permit in June 1999, there was no evidence that white-tailed kites nested at the site. The administrative record indicated that white-tailed kites were a "potential" species on the site, but that they were not "documented" to be present. Since, according to the information in the administrative record, kites were not nesting at the site, the consistency of the project with the LCP provisions that protect roosting, nesting and foraging habitat of kites was not evaluated. Because there was no evidence that kites nested at the site in 1994 when the Commission approved the CDP,

there was also no basis for the Commission to impose conditions to require compliance with the white-tailed kite development standards in the LCP. Since there was no evidence that kites were nesting at the site at the time of the Commission's previous hearings on the project in 1994 and in June 1999, the fact that kites have nested at the site in the last few years represents a changed circumstance.

The applicants' third argument regarding the Commission's scope of review relates to whether the LCP protections for white-tailed kites are applicable to the ARCO Dos Pueblos site. The County Land Use Plan identifies kite habitat at one location known as More Mesa. However, a review of the LCP as a whole indicates that, although More Mesa may have been the only known kite habitat at the time the LCP was certified, the LCP requires protection of kite habitat that is found at other locations in the future. The local implementation plan included in the LCP is referred to as the "Coastal Zoning Ordinance." This Ordinance contains Section 35-97, which is entitled "ESH Environmentally Sensitive Habitat Area Overlay District." Habitat of the white-tailed kite is one type of environmentally sensitive habitat that is protected by this Ordinance. Section 35-97.14 of the Ordinance is entitled: "Development Standards for White-Tailed Kite Habitats." The applicable development standards are set forth in paragraphs 1 through 4. Paragraphs 1 through 3 apply to all kite roosting and nesting areas. Paragraph 4, while it does refer to "preserving the ravine and plant communities on More Mesa for nesting and roosting sites", also more generally requires that "the maximum feasible area shall be retained in grassland to provide feeding area for the kites." This latter requirement is not limited to More Mesa.

Furthermore, the Ordinance clearly states that any environmentally sensitive habitat that is discovered after certification of the LCP shall be protected by the Ordinance. Section 35-97.3 is entitled: "Identification of Newly Documented Sensitive Habitat Areas" and states:

> *"If a newly documented environmentally sensitive habitat area, which is not included in the ESH Overlay District, is identified by the County on a lot or lots during application review, the provisions of Secs. 35-97.7 – 35-97.19 shall apply."*

This provision makes it clear that the development standards for kite habitats in Sec. 35-97.14 apply to kite habitat in any location where a project is proposed. Therefore, the Commission disagrees with the applicants' argument that the development standards in the LCP that protect white-tailed kites only apply to kites found on More Mesa.

A final argument that applicants have made is that Commission staff improperly delayed issuance of the CDP for the golf course project until the expiration date passed, and therefore the Commission should be estopped from denying the project at this time. The applicants assert that issuance of CDP A-4-STB-93-154 before the expiration date would have allowed the development to commence and ARCO would not have needed a permit extension. Then the Commission could not have addressed

any changed circumstances, including discovery of red-legged frogs, and could not deny the project based on the existence of changed circumstances. The Commission rejects this argument because, as explained below, the Commission staff did not improperly delay issuance of the CDP.

Commission staff did not issue CDP A-4-STB-93-154 prior to the expiration date of January 28, 1999 because there were unresolved issues regarding whether the project, as modified, complied with the prior to issuance conditions of the permit. The County imposed numerous conditions of approval in its Conditional Use Permit (CUP) for the project, which were also incorporated by reference into the Commission's permit, CDP A-4-STB-93-154, on appeal. The litigation challenging the Commission's CDP was finally resolved in March 1997. Pursuant to the tolling provision of the judgment, the applicant had until January 1999 to vest the permit (a period of 22 months). However, it was not until very close to the end of this period, on December 3, 1998, that the County made its determination that all the prior conditions of approval were satisfied and approved Coastal Development Permit No. 98-CDP-274. Issuance of this CDP is the method the County used, pursuant to its LCP, to make a determination that the project as modified complied with the conditions of approval imposed through the CUP. (The County utilizes a two-permit process – its first discretionary permit approval (the CUP) imposes conditions on the project and its second permit approval (the CDP) determines that the conditions have been met. Pursuant to the County's LCP, both permit decisions are appealable to the Commission). The County's approval of Coastal Development Permit No. 98-CDP-274, which determined that the project as modified complies with the conditions of the CUP, which were also incorporated as conditions of the Commission's CDP, was appealed to the Commission on December 18, 1998. The Commission staff determined that it was not appropriate to issue the permit without the Commission having addressed the unresolved issues concerning compliance with the prior to issuance conditions of the CDP (CDP A-4-STB-93-154).

The appeal was received on December 18, 1998, which did not allow sufficient time for Commission staff to evaluate the appeal, prepare a report and recommendation, mail the report and provide the required public notice of the hearing, in time to schedule it for hearing at the next meeting, which was during the week of January 4, 1999. Therefore, the Commission opened and continued the hearing on the appeal on January 5, 1999. The matter was scheduled for the next Commission hearing, on February 4, 1999. However, CDP A-4-STB-93-154 expired on January 28, 1999; therefore, on January 7, 1999, ARCO applied for an extension of the permit. In January 1999, information was raised regarding presence of threatened red-legged frogs at the site. The Commission subsequently denied the request for extension of the permit based on the presence of threatened red-legged frogs, which constituted a changed circumstance. As explained above, it was reasonable for Commission staff not to issue the permit until the appeal that raised issues regarding compliance with the permit conditions was resolved.

In addition, it appears that ARCO did not have authorization from the County to legally commence construction prior to the expiration date of CDP A-4-STB-93-154. The County made its determination that all its conditions of approval were satisfied on

December 3, 1998, through its approval of Coastal Development Permit No. 98-CDP-274. This CDP was appealed to the Coastal Commission on December 18, 1998. Pursuant to the applicable regulations and the County LCP, the County's approval of the project was suspended during the appeal. Therefore, ARCO did not have the necessary local approval to commence the project prior to the January 28, 1999 (the expiration date of CDP A-4-STB-93-154).

Other evidence of changed circumstances exists as well. Data collected between October 2000 and March 2001, and submitted by the applicants at the request of staff confirmed that thousands of monarch butterflies were using the site by that time. A count of 72,208 total monarch butterflies was made by the applicants' consultants, Althouse and Meade as the result of butterfly counts recorded on site on 28 different dates from October 6, 2000 to March 9, 2001. Evidence also showed that the butterflies were aggregating in a 159-tree eucalyptus grove within the proposed Par 3 course adjacent to Eagle Canyon (north of the railroad) - a location that had not been documented previously. The applicants' consulting biologists, writing to the Commission on behalf of the applicants on February 1, 1999, merely noted that "a few" butterflies were seen on the site, and that the stand (of eucalyptus trees) "in Eagle Canyon near the train tracks is dense enough to support roosting." This stand is likely the grove identified as "Grove J" which is newly identified as an aggregation grove for monarch butterflies. The butterflies were not previously documented to use this grove at the time of the Commission's 1994 approval. [2]

As discussed in detail below, reports prepared by the applicants for the USFWS review and information submitted at the request of Commission staff have identified the presence of tidewater gobies; a significantly increased number and usage pattern of monarch butterflies; new populations and significant numbers of southern tarplant—together with information that southern tarplant is now designated as a California Native Plant Society (CNPS) List 1(b) species; and nesting by at least two pairs of white-tailed kites. The white-tailed kites are designated by Fish and Game Code section 3511 as a fully protected species and as such they cannot be taken at any time by permit or otherwise except for scientific research or to protect livestock. In addition, new wetlands have been formally delineated on site in locations where oil and gas facilities were removed in December of 1997 and January of 1998, as has the presence of contaminated soils left from the use of the site for oil and gas production and related activities.

There is also evidence of the existence of some changed circumstances that would potentially have been relevant to the Commission at the June 1999 permit extension request hearing. The record supporting the Commission's 1994 approval of the former permit only identified the butterflies numbering approximately a maximum of 150, and ranked the use of the site by monarch butterflies as minor (1992 EIR). As noted, the

[2] Commission staff notes that monarch butterflies have been observed by staff on site visits in September 2001, March 2002, and November 2002 and appear to be utilizing the site all year.

applicants have recently submitted reports to the Commission that counted thousands of monarch butterflies utilizing the Eagle Canyon area of the site in the years following the 1999 hearing. The counts were only made by consultants on behalf of the applicants after the June 1999 hearing. In one year, the applicants' consultant counted approximately 70,000 monarch butterflies at the site.

In another example of information concerning changed circumstances not known to the Commission in June, 1999, a rare plant was discovered by the applicants in 1998, before the final County CDP was even issued for the golf course project -- in a new location on the site, and in a significantly larger number than had been documented previously. The administrative record supporting the Commission's approval of the former permit in 1994 only contained evidence that the southern tarplant had been identified in the area proposed for the 18th fairway, and in a population numbering only 20 to 30 individual plants. In 1998, however – almost a year before the Commission's June 1999 hearing on the permit extension request—the applicants documented a new population of southern tarplant, in a different location of the site, numbering approximately 4,500 individual plants. This population would be eliminated by the proposed development.

This information would have identified a changed circumstance concerning the plant had it been made available on or before the date of the Commission's June 1999 hearing. However, this information was not made available to the Commission staff until March of 2002.

In 2002, a Santa Barbara County environmental compliance monitor informed Commission staff that in 1998 he discovered a large population of southern tarplants (later numbered at approximately 4,500) on the site where the clubhouse/parking lot and a portion of the Par 3 course are now proposed. The Commission staff had requested that the applicant prepare an updated vegetation map for the purpose of performing the changed circumstances review. The applicants submitted a map dated November 2001 that did not show southern tarplant growing anywhere on the site. Subsequently, after further consultation, the applicants submitted an updated map to Commission staff in April 2002 that included the 1998 population of the southern tarplant. This map documents nine different locations of southern tarplant on the site, including the location where approximately 4,500 southern tarplants were observed in 1998, and is reproduced in reduced for in Exhibit 3 (Biological Resources Map, dated May 5, 2002, prepared by Dudek & Associates).

The administrative record supporting the Commission's November, 1994 approval of the previous permit, listed southern tarplant as a California Native Plant Society[3] List 3

[3] The California Native Plant Society (CNPS) *Inventory of Rare and Endangered Plants of California (Inventory)* is widely accepted as the premier scientific reference on rarity in California flora. The *Inventory* currently includes distribution, ecology, and legal status information on over 2,000 rare taxa. The *Inventory* is the result of decades of investigation by CNPS in close collaboration with professionals in the California

species as described in the CNPS *Inventory of Rare and Endangered Plants of California (Inventory)* (List 3 status means that CNPS requests more information about the plant to establish whether it is rare, threatened or endangered – List 3 constitutes a "need more information" list). The only analysis of the plant's location on the site established in the administrative record up until November 1994 was that contained in the 1992 Environmental Impact Report (EIR) prepared for the proposed project. The final EIR, certified by the County Board of Supervisors in 1993, stated that 20 to 30 of the plants were located in an area proposed for development as the 18th fairway of the golf course, that the plant was designated CNPS List 3, and that loss of the population could be mitigated elsewhere on site with no residual adverse impacts to the southern tarplant. The EIR incorporated this analysis by reference from documents prepared by the applicant's consulting biologists (Interface Planning). In fact, the southern tarplant was officially upgraded from CNPS List 3 to List 1(b) by the time the Commission acted on the former permit in November of 1994 (and was known by the applicant to be slated for such change as early as May 1992 (Exhibit 28), before the EIR for the proposed project, listing the plant as CNPS List 3, was certified. This information was not provided to the Commission when it acted on CDP A-4-STB-93-154 in 1994 or provided to the Commission at the June 1999 hearing on the request for extension of the permit.

There is a significant difference between the way a List 3 plant (a list indicating that more information is needed to determine the accurate status of the species) and a List 1(b) plant (rare, threatened or endangered California native plant) are considered. This is particularly true when determining whether it is appropriate to change a project to avoid impacts (List 1(b) status indicates this according to the CNPS and the CDFG) or whether allowing the impact, with mitigation, to occur. (See CNPS-related documents, including statement of CNPS policy in opposition to transplanting rare, threatened, or endangered plants, Exhibit 36).

Department of Fish and Game, Bureau of Land Management, National Park Service, U.S. Fish & Wildlife Service, U.S. Forest Service, University of California, California State Universities, and other private and public institutions. Both the USFS and CDFG have signed memoranda of understanding with CNPS regarding information sharing for the *Inventory*. Academic researchers use the *Inventory* as a source for scientific information on the rarity and distribution of, and threats to, rare California plant species. Agencies such as CDFG, USFS, and BLM use the *Inventory* to develop their sensitive plant lists, to prioritize protection for endangered taxa, and to assist them in identifying potential rare plant impacts for individual projects. The *Inventory* has been maintained by CNPS since 1968 and is currently in its sixth edition. The CNPS Rare Plant Scientific Advisory Committee (RPSAC), composed of eminent botanists from throughout California, supervises development of the *Inventory*. Decisions on inclusion are based on an impartial scientific evaluation of information derived from all available sources following a set of formal criteria. CNPS botanical staff, RPSAC, and a network of over 400 professional botanists throughout the state continuously and rigorously review the *Inventory* for accuracy and completeness.

It is notable that elevation from List 3 to List 1(b) status qualifies a plant as a *de facto* candidate for state, and possibly federal, listing as threatened or endangered pursuant to the state and federal Endangered Species Acts. List 1(a) status, the only rank higher than 1(b) in the *Inventory* indicates that a plant is considered to be extinct. Of more importance to the Commission is the implication of the change in status, combined with the significant population numbers noted in 1998, for evaluation of the proposed project's consistency with the certified LCP. This is discussed in more detail in the relevant section of the findings.

There is some debate about whether List 3 status confers status as a rare or endangered species on a plant so listed, in terms of the interpretation of the applicable provisions in the County's certified LCP. Classification as a List 1(b) plant establishes that the plant's habitat is ESHA and must be protected pursuant to the ESHA protection policies of the LCP (including but not limited to LUP Policy 9-36 and Coastal Zoning Ordinance sections 35-97.1, .3, .7, and .18). Therefore, there are changed circumstances with regard to the southern tarplant.

1.4 Staff Review of Changed Circumstances

At the June 7, 1999 hearing, the Commission denied the applicant's request for an extension of Coastal Development Permit A-4-STB-93-154. The Commission denied the extension of the permit in light of new information, confirmed by the U.S. Fish and Wildlife Service, that credible reports had identified the federally threatened California red-legged frog within Eagle Canyon, on the eastern edge of the site.

The applicants' then-pending amendment request was rendered moot by the Commission's denial of the extension, and the pending appeals were continued until the red-legged frog matter could be addressed (the applicants' attorney testified at the June, 1999 hearing that Permit Streamlining Act timelines did not apply to the appeals). The applicants indicated to the Commission that necessary reviews by U.S. Fish and Wildlife Service (USFWS) would be completed before a further Commission hearing on changed circumstances. Although it was not anticipated at the June 1999 hearing, this review took almost three years to complete, ending in January of 2002.

In anticipation of the forthcoming completion of the USFWS review, the applicants contacted Commission staff during the summer of 2001 to arrange meetings and project updates. The applicants had occasionally updated the Commission staff since the June 1999 hearing on the progress of the USFWS review. The applicants informed Commission staff at that time that the USFWS was progressing in its administrative review of a Habitat Conservation Plan for the California red-legged frog and tidewater goby.

Staff visited the site in September, 2001 at the applicants' invitation. The Commission staff sighted white-tailed kites foraging on the site during the site visit, and noted

significant stands of native bunchgrasses. After the site visit, staff requested an updated biological resources survey of the subject site, including specifically an updated vegetation map. The applicants subsequently submitted surveys undertaken by Dudek, Inc., which included a report summarizing raptor use of the site, and a vegetation map, both dated November 2001.

During this period of time, Commission staff additionally submitted comments to the USFWS concerning the potential impacts of the proposed project on the California red-legged frog. The final HCP prepared by the applicants, and associated documents, including the Section 10(a) incidental take permit were authorized by USFWS in January, 2002 and submitted to Commission staff thereafter by the applicants.

The applicants had previously informed Commission staff during the fall of 2001 that the Commission hearing on changed circumstances should preferably be scheduled after the USFWS had made final determinations concerning the applicants' HCP and the Section 10(a) permit for the proposed project. The applicants further concurred with the staff recommendation that given the relatively short time then remaining until the Commission's scheduled April 2002 hearing in Santa Barbara, the item should be placed on that agenda. The applicants supported this tentative schedule.

Representatives of interested parties (Surfrider Foundation, Sierra Club) discussed the proposed project with Commission staff during a conference call they had requested, in February 2002. The Surfrider and Sierra Club representatives stated during the conference call that among other impacts posed by the project, they were concerned that the project would adversely affect a rare plant, southern tarplant.

Staff subsequently researched the opponents' claims concerning the southern tarplant, and determined that the sensitivity status of this plant is California Native Plant Society (CNPS) List 1(b), a designation that shows that the plant is considered rare, threatened or endangered and is therefore a *de facto* candidate for listing as threatened or endangered under the California Endangered Species Act. (CNPS List 1(a) status - the only higher ranking under the state's Natural Diversity Database classification system– indicates that a plant is extinct). The CNPS rankings are available in the California Natural Diversity Database maintained jointly by the CNPS and the California Department of Fish and Game.

Staff additionally reviewed the administrative record and the most recent vegetation map submitted by the applicants (the November 2001 map prepared by Dudek, Inc., and submitted at the request of staff). The map did not show southern tarplant in <u>any</u> location on the subject site, nor was the plant mentioned in the updated biological resources report prepared by Dudek and Associates concerning the subject site in November 2001 and submitted by the applicants.

The staff also reviewed the HCP related materials prepared by the applicant for USFWS and discovered brief references to the plant, but no mapping of the plant. Staff reviewed the project EIR (prepared in 1992, certified by Santa Barbara County Board of

Supervisors in 1993) and found that southern tarplant had been documented growing in a single location of 20 to 30 individual plants in the midst of the proposed 18th Fairway. The EIR indicated that the status of the plant was CNPS List 3, however, which does not denote the degree of rarity that CNPS List 1(b) status confers upon a plant so listed.

In early March, 2002, Commission staff requested that the applicants clarify the occurrence of southern tarplant on the subject site. Initially the applicants responded that the southern tarplant grew "under the (proposed) clubhouse where it always has been." The applicants subsequently indicated that in fact the population of southern tarplant at the proposed 18th Fairway location that is identified in the EIR was the only population that had ever been identified in the administrative records supporting previous Commission actions concerning the subject project.

Staff contacted the Santa Barbara County Energy Division staff, which further referred questions about the plant's occurrence on the subject site to the County's contract environmental compliance monitor for the Arco Dos Pueblos project, John Storrer. Mr. Storrer reported that he had identified an extensive population of Southern Tarplant during the summer of 1998, after abandonment of old oil and gas facilities had exposed the soils beneath the site of the old ARCO warehouse and loading racks. The southern tarplant seeds dormant in the soil had germinated under the ideal conditions of site abandonment (possibly including soil disturbance, availability of light and warmth, lack of competition from other plants, and perhaps other unknown factors). County staff were unable to locate specific reports prepared by the applicants to assess the Southern Tarplant population discovered in 1998, but referred Commission staff to Jaqueline Bowland,[4] a consulting botanist who had evaluated the population.

On request Ms. Bowland stated to Commission staff that in 1998 she performed a field investigation of the population discovered by Mr. Storrer and numbered the Southern Tarplant population at approximately 4,500 individual plants. This was a significant find -- a Southern Tarplant population of this size is known to occur in only a handful of other locations in the state.

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[4] Ms. Bowland was the senior biologist for Interface Planning when that firm performed the first biological surveys of the site on behalf of Arco Oil and Gas Company, commencing in 1990/1991. Ms. Bowland documented the population of Southern Tarplant on the proposed 18th Fairway, and noted that the discovery was thought to be a northerly range extension for the Southern Tarplant, which had not been documented any further north than the Arco Dos Pueblos site at that time, in California. Interface Planning was purchased by Dudek, Inc., the firm that presently provides consulting services to the applicants. Ms. Bowland is now an independent botanical consultant, and in that capacity performed a survey of the new Southern Tarplant population discovered by Mr. Storrer. Ms. Bowland estimated the population of Southern Tarplant in the location Mr. Storrer had discovered as numbering approximately 4,500 plants in 1998.

Ms. Bowland further stated that she could not find any maps she may have made in 1998 of the Southern Tarplant population location (although Mr. Storrer was able to locate the area of the population spatially) and noted that she had informed the applicants' consultant, Dudek, Inc., of her conclusions regarding the 4,500 southern tarplants, in 1998.

On March 14, 2002, Commission staff visited the subject site with applicant/agent Richard W. Hollis, Jr., then-County Energy Division Planner Kristen Gettler, Mr. Storrer, and Klaus Radkte, Ph.D., and John Thomas, Ph.D., of GeoSafety, Inc. No germination of Southern Tarplant was evident in the old warehouse/loading rack location that was the site of the 1998 population bloom. Skeletal remains of the previous years plants (the plant is a late summer blooming annual that dies in the fall) were visible, however and at least fifty of the dried plants were flagged and an estimate made that at least several hundred could be identified.

Subsequently, the applicants provided on Commission staff request a number of documents, including other surveys by Dudek, Inc., that memorialized the presence of Southern Tarplant in approximately nine locations on site. This information concerning the Southern Tarplant indicates that the increase in numbers and locations of Southern Tarplant on the subject site is a changed circumstance.

Information also came to light during this period that the applicant proposes to remove the soil and seedbank in the area of the newest large Southern Tarplant population described above when the contaminated soils in that area are excavated. This had not been disclosed previously to the County staff. Thus the County staffs' approval of a CDP finding the project in substantial conformity with the previously imposed conditions (with an appeal to the Commission presently pending) was processed without an understanding of the impacts the proposed project or amendments thereto would have on this rare plant.

The applicants realized in late March, 2002 that they would be unable to adequately address the questions raised by Commission staffs' discovery of the Southern Tarplant information in time for staff to prepare an adequate recommendation for the Commission's April hearing. In addition, as explained below, a raptor nesting survey was underway during the month of May, and therefore a June hearing was scheduled for this item.

As noted previously, Commission staff (then-staff ecologist Jon Allen, Ph.D.) observed white-tailed kites foraging on the subject site during a site visit in early September 2001. Subsequently, the applicants' consultant, Dudek, Inc., prepared a report concerning raptor use on the subject site, and an associated map. The Dudek report and map indicated that white-tailed kites were present on the subject site, albeit outside of nesting season, and noted the presence of white-tailed kite nests on the subject site. However, the applicant subsequently asserted that the Dudek, Inc. report dated November of 2001 had incorrectly identified kite nests on the subject site because the nests had been noted outside of nesting season and were not in active use. (White-

tailed kite nesting season lasts from approximately April through August). Therefore, the reports and maps prepared by Dudek, Inc. were revised to delete reference to presence of white-tailed kite nests and substitute the phrase: "accumulation of sticks and debris."

As nesting season had almost arrived, Commission staff requested that the applicants verify their position that there were no white-tailed kites nesting on site by doing a followup survey undertaken *during* nesting season, which was about to commence. The applicants complied and retained a biological consulting firm (Pacific Southwest Biological Services to perform the site visit.

During this time, Commission staff also received anecdotal reports from County staff that white-tailed kites had regularly been seen foraging on the Arco Dos Pueblos site and that reports of white-tailed kites nesting on the site had also been received. Commission staff requested that the County staff ask Mr. Storrer, who had long monitored the Arco Dos Pueblos site and is a respected naturalist with extensive environmental impact analysis experience in Santa Barbara County, to address the possibility of white-tailed kite nesting on the site. In response, Mr. Storrer reviewed his site monitoring field notes, which recorded his observations of kite nest building activity in March 2000. Mr. Storrer also suggested that Commission staff contact Mark Holmgren, who is the curator of the vertebrate collection at the University of California, Santa Barbara, Museum of Systematics and Ecology. Mr. Holmgren is a well known wildlife expert with special expertise in raptor ecology. According to Mr. Storrer, Mr. Holmgren had also supervised a number of systematic surveys of white-tailed kites in the Santa Barbara County area.

Conferring further with the Commission's senior staff ecologist regarding white-tailed kite nesting on site, learned that the Commission's technical services staff had developed specific study protocols for winter roosting or nesting season evaluation of raptors. The protocols were developed in consultation with several noted raptor experts who provided independent review of the raptor habitat issues associated with the Bolsa Chica project.

Staff immediately provided the nesting season survey protocols to the applicants, and requested that the applicants implement the survey in accordance with the established protocols, to the extent feasible given the time remaining before the then-scheduled June 2002 Commission hearing.

PSBS commenced the protocol nesting surveys in May 2002 on behalf of the applicants. John Storrer accompanied the PSBS surveyors as the County's representative, at the request of Commission staff. Through almost the end of May 2002, the PSBS survey only documented one pair of kites on the subject site. The survey eventually documented two pairs of nesting white-tailed kites on the subject site when UCSB biologists provided detailed instructions to PSBS on where to locate the second pair. After the second nest was confirmed, PSBS terminated the study one week early at the applicants' request.

At the request of Commission staff, Mr. Holmgren and his research associate, Morgan Ball, also conducted a survey of white-tailed kite use of the Arco Dos Pueblos site area, in conjunction with the applicants' consultants' survey. Commission staff accompanied Mr. Holmgren and Mr. Ball for one morning survey in mid-May 2002. Using spotting scopes and binoculars, and positioned at an elevation-appropriate vantage point, the group was able to identify and track the movements of two pairs of white-tailed kites utilizing the subject site. Mr. Holmgren and Mr. Ball also noted behavioral evidence that the westernmost pair already had chicks in the nest. The results of field surveys performed by Mr. Holmgren and Mr. Ball were provided in written form to Commission staff, accompanied by annotated aerial photographs, in June 2002.

Subsequently, it was verified to the satisfaction of the applicants and Commission staff that a) two pairs of white-tailed kites nested on the subject site in 2002, and b) the westernmost pair not only had chicks in the nest, but successfully fledged five white-tailed kites from that nest. The reproductive success of the easternmost pair was not documented because the applicants terminated the study after egg laying had likely occurred but before nesting success was known.

The raptor nesting survey was terminated by the applicant on May 30, 2002 when the applicant's consultant, and the County of Santa Barbara's environmental monitoring contractor confirmed the UCSB biologists' observations that two pairs of White-tailed Kites were nesting on the site (one pair had five fledglings by the time the survey ended). Commission staff received the applicant's nesting report conclusions on June 7, 2002. The project was scheduled to be heard by the Commission on the following Monday. Consequently, the staff report published on May 31, 2002 only contained a recommendation based on the one confirmed Kite nest (within the proposed 18th Fairway of the course).

Because staff and others did not have time to adequately evaluate the implications of the second confirmed White-tailed Kite nest, the Commission opened the public hearing on June 10, 2002, took preliminary staff, applicant, and public testimony, and then continued the hearing. The Commission requested that staff and the applicant confer further regarding outstanding issues, and that staff evaluate the site's habitat value for species subject to changed circumstances. The Commission also requested that staff clarify whether recommendations for revised plans, if such recommendations were made by staff, specifically indicate whether a golf course project would still be feasible.

In accordance with the Commission's direction, staff and the applicants' representatives met on July 3, 2002 in the Ventura District office. Subsequently, the applicants retained a new consultant, Jeffrey B. Froke (Ph.D. in geography, UCLA, M.S. in ornithology, wildlife studies, Humboldt State University, Principal, California Wildlife Ecology, former principal of Golfauna Consulting). Dr. Froke and Dr. Dixon met in San Francisco in September 2002 to discuss the project. According to Dr. Dixon, Dr. Froke provided anecdotal observations of Monterey County and other golf courses he lived near or had

consulted on, where white-tailed kites used some portion of the sites. The applicants' agents suggested that the October Commission hearing proposed by staff be postponed to allow Dr. Dixon to visit the Monterey County golf courses familiar to Dr. Froke. Dr. Dixon and Dr. Froke subsequently attended site visits to the Monterey County golf courses arranged by Dr. Froke.

On Tuesday, October 8, the applicants' agents and Commission staff met again in the Ventura District office, with Dr. Dixon and Dr. Froke attending via conference telephone. The applicants' agents proposed the submittal of a report and recommendations by Dr. Froke to Dr. Dixon for consideration by October 9 (the next day). Staff and the applicants agreed that the matter would be placed on the Commission's November agenda if possible, but with the understanding that staff must have time to adequately consider and respond to the applicants' pending proposal.

On November 4, 2002, Commission staff, including Dr. Dixon, met with Dr. Froke and Mr. Storrer on the subject site. The purpose of the visit was for Dr. Dixon to observe the white-tailed kite habitat on site. Dr. Dixon's memorandum report concerning his observations and his professional opinion as the senior Commission staff ecologist are attached as Exhibit 13, and a map, Exhibit 1A, illustrates his conclusions regarding environmentally sensitive habitat of white-tailed kites on the subject site. In short, report finds that the project as proposed would not be consistent with the protection of the roosting, nesting and foraging habitat of the white-tailed kite on site, as discussed further below.

2.0 PROJECT DESCRIPTION and SETTING

2.1 Proposed Project

The proposed project includes construction of a public 18-hole golf course (approximately 100 acres) to operate 360 days/year and serve approximately 60,000 rounds of golf (1-4 golfers per round); 9-hole executive golf course (approximately 8 acres) to serve approximately 20,000 rounds per year; driving range and putting green (approximately 12 acres); turf farm (up to 3 acres); approximately 9,300 sq. ft. of clubhouse (restaurant/bar with 130 seats, banquet facilities, pro-shop, meeting rooms, administrative facilities, lockers); 8,012 sq. ft. cart barn; 7,974 sq. ft. maintenance and office building; approximately 15,000 sq. ft. maintenance yard (including wash-off area and fueling island/gasoline tanks, service yard); approximately 5,000 sq. ft. enclosed chemical and trash storage area including 800 sq. ft. chemical storage building; approximately 300 paved parking spaces, including 15 public coastal access parking spaces (clubhouse, cart facilities, parking cover approximately 8 acres, total), 700 sq. ft. halfway house (including snackbar, restrooms, starter station), other restroom facilities and three shelters; two 100 ft. long, 14 ft. high x 14 ft. wide tunnel undercrossings of the railroad tracks (to route golf carts paths through a zigzag course layout -- both undercrossings are located within riparian corridors; approximately 310,000 cu. yds. of grading (155,000 cu. yds. of cut; 155,000 cu. yds. of fill, including a maximum elevation change of 25 feet from existing to finished grade, with grading estimated to impact 125

acres); installation of 5,200 linear feet of 8" reclaimed water line from Goleta to site; construction of 4 acre-foot reclaimed water storage lake (8 ft. deep, 30,000 sq. ft. surface area), private on-site septic disposal system reliant on three (3) drywell pits for effluent disposal; dedication, construction, operation and maintenance of various public coastal access improvements; landscaping; installation of acceleration and deceleration lanes in Caltrans right-of-way; merger of all 23 existing lots (including 21 substandard-sized lots) into two parcels totaling 202 acres and applicant's proposal to restrict the resultant parcels from future subdivision; and development setbacks of a minimum of 55 feet from the bluff edge for all permanent, structural developments, and except for public coastal access trails, development setbacks of a minimum of 30 feet from top-of-bluff seaward edge for all other non-structural development (such as greens, fairways, tee boxes, cart paths, landscaping).

2.2 Proposed Amendments

The applicant proposes to amend the previously approved project in accordance with the revised project description dated February 28, 2002, and as clarified on June 4, 2002 . The applicants have also provided additional amendments on November 20, 2002 incorporating recommendations concerning the white-tailed kite. As part of the proposed project, the applicant proposes to waive any future right to request approval for the installation of shoreline protective devices, pursuant to the attached letter dated April 5, 2002. (See Exhibits 8 and 9) The applicants also submitted additional amendments in the form of a proposed white-tailed kite habitat enhancement plan prepared October 10, 2002 by Dr. Jeffrey Froke, and attached in the set of documents submitted for collation with this report by the applicants (the packet of documents supplied by the applicants is attached at the end of the Exhibit packet for this report).

The applicants clarified on November 20, 2002 that certain additional recommendations made by Dr. Froke in a draft plan dated September 10, 2002, which Dr. Froke had previously provided as a conceptual document to Commission staff ecologist John Dixon, Ph.D., which were not carried forward into Dr. Froke's October 10, 2002 final report, are also proposed by the applicants. Dr. Froke's September 10, 2002 memorandum, as well as his consideration of issues concerning the California red-legged frog and the reclaimed water storage lake are also included in the attachment. The applicants' agent advised staff on November 21, 2002 (telephone conversation Andriette Culbertson to Melanie Hale) that Dr. Froke and Mark Jennings, Ph.D., an expert on the California red-legged frog who had provided comments concerning the advisability of providing an uncovered water reservoir and of using chemicals throughout the proposed golf course, were conferring further and that possibly a joint update of their recommendations concerning the placement and best design of the reservoir could be forthcoming (it would be included in an addendum if so).

The changes proposed by the applicant are generally described as: modification of the golf course layout, relocation of vehicular access, changes to location and layout of the tunnel undercrossings of the railroad tracks, and the slight relocation and significant redesign of reclaimed water storage lake, including an increase in depth from the 8 feet

previously approved to at least 15 feet in depth, with a volumetric increase in stored water from approximately 4 acre-ft. to 5.4 acre-ft. of storage capacity, with surface area remaining approximately the same - 30,000 sq. ft. In addition, the sides of the lake will slope to approximately the 4 ft. mark, with the sides extending vertically the remainder of the way to the bottom. The applicant also proposes modifications to the architectural design of buildings, changes to drainage and erosion control features and design (including a water quality management program that will divert up to the two-year storm volume of water on the proposed Par 3 course away from Eagle Canyon), installation of a future horse tie-up/bicycle rack; and an increase in the number and location of bridges. The applicant proposes changes to the location and design of public vertical accessways, addition of one previously excluded inholding parcel, and the merger of the resultant 24 total lots into two lots including the applicant's proposal to restrict the resultant 208 acres/two (2) parcels from future redivision. The applicant proposes to add an approximately 700 sq. ft. pumphouse and padmounted electrical transformer for pumping of reclaimed water, and additionally proposes revised Agricultural Turf Management Plan, Integrated Pest Management Plan, and Water Quality Plan.

The applicant has also submitted a technical water quality plan review (a full copy is included in the applicants' attachment appended at the end of the exhibit package). The new plan applies primarily to grading and best management practices added to improve protection of the Par 3 golf course area drainage. The plan incorporates elements that prevent up to approximately the two-year storm from running into Eagle Canyon Creek. Analyses by Commission water quality unit staff are contained in Exhibits 49 and 50.

2.3 Pending Appeal/Contaminated Soils

An appeal filed in 1998 is pending concerning a County approval of ARCO's plan to address contaminated soils remaining on the subject site. Petroleum hydrocarbons, heavy metals, and other contaminants were detected in various areas of the site that were formerly used for oil and gas production since the 1940s.

According to the present applicants, the resolution of the contamination is the sole responsibility of the former site owner and initial golf course permittee, ARCO (Atlantic Richfield, a subsidiary of British Petroleum). ARCO obtained County administrative-level approval for a "Remedial Action Plan" (RAP). ARCO's proposal generally allows all but the worst contaminated soils to remain in place--only highly contaminated surface soils would be excavated and removed from the site. The remaining contaminated soils would be entombed on site after either being regraded and mixed with clean soils to dilute contaminant levels and to form the desired golf course contours (then capped with two feet of clean soils), or simply left undisturbed where the contaminants were originally detected. ARCO has indicated that groundwater monitoring wells are unnecessary on the subject site, although some concentrations of certain contaminants are reportedly high enough to continue subsurface migration.

Changed circumstances affecting the physical environment within which the RAP would be implemented have arisen as stated above. Although the Commission staff prepared a preliminary recommendation in 1999 of "no substantial issue" concerning the grounds for the appeal concerning the RAP, staff did not know at that time, for example, that southern tarplant, a CNPS List 1(b) sensitive native plant species now grows in an area proposed for contaminant excavation and offsite disposal. In addition, the final grading and drainage plans for the golf course project do not address the locations of contaminated soils in the manner the RAP anticipated. The grading plans do not show the locations of existing (baseline) or post-grading contaminated soils, even though the most recent grading and drainage plans, executed by both applicant and County representatives after the RAP was locally approved could have included this information (but do not).

Thus, the Commission cannot fully consider the changed circumstances and appealed project associated with the cleanup without first considering the applicants proposal for the golf course. Otherwise the staff would have to recommend that the Commission find "substantial issue" with regard to the RAP appeal. Therefore, after acting on the golf course permit vis-à-vis the changed circumstances review, the Commission will consider the RAP appeal at a subsequent Commission hearing.

2.4 Physical Setting

The project site is located on a coastal marine terrace immediately east of the Naples area, approximately 1.5 miles west of the intersection of Winchester Canyon and U.S. Highway 101, on the Gaviota Coast of Santa Barbara County. The site is bounded on the north by Highway 101, and along the south by steep coastal bluffs facing the Pacific Ocean. Undeveloped open space and grazing lands border the property on the upcoast (west) and downcoast (east). The Baccara Resort (formerly the Hyatt) is located approximately one mile downcoast, toward Goleta, on the south side of Highway 101. The lands north of Highway 101 are presently open space/agricultural land ascending into the Santa Ynez Mountains of the Los Padres National Forest.

Most of the site is comprised of two large parcels bisected by the Union Pacific Railroad tracks. Since the Commission approved former CDP A-4STB-93-154, the applicants have also purchased a 4-acre lot that was previously an inholding owned by a separate party. Twenty-one of the old Township of Naples substandard, antiquated lots are located at the westernmost end of the site. The development potential of these substandard sized lots has not been determined, but the Commission certified an LCP amendment in April 2002 that authorizes the owners of the Naples lots to seek development agreements concerning the lots with Santa Barbara County. The County is presently negotiating a Memorandum of Understanding concerning potential development plans for Naples lots on the lands adjacent to the subject site.

Slopes on the terraced portions of the site are generally less than 10 percent, but nine coastal drainages incise the site, descending at slopes often greater than 30 percent

into riparian canyons below. The coastal bluffs at the southern edge of the terraces descend almost vertically to the beach below.

Eagle Canyon marks the eastern parcel boundary, and Tomate Canyon extends north-south in the western portion of the site. Seven smaller unnamed drainages exist on the site, all flowing generally from north to south, toward the Pacific Ocean.

Soils on the site are primarily of the Diablo Series. This high clay soil series is characterized by slow permeability, high shrink-swell potential. In some areas, where former energy facility abandonment has occurred, excavation and compaction of the typical clay soils on site has resulted in the formation of new wetlands (one of the changed circumstances addressed in this report). In some areas of the site, the soils are comprised of deep beds of old alluvial soils, which are highly permeable.

The local climate is marine dominated, with mild winter and summer temperatures, consistent onshore winds, and periodic summer fog. Average rainfall along this portion of the coast is approximately 17 inches per year. As is characteristic of the Mediterranean climate pattern of Southern California, most of the annual rain falls between November and March.

The most predominant vegetation on the site consists of large expanses of ruderal (non-native) grasslands interspersed with patches of native grasslands. Numerous specimen non-native trees, such as cypress, pine, and eucalyptus dot the site, forming informal windrows in some locations and groves in others (particularly in Eagle Canyon). Some eucalyptus groves in or adjacent to Eagle Canyon have become increasingly important as fall and winter monarch butterfly aggregation and overwintering sites.

The mature specimen trees south of the railroad tracks have attracted a relatively rare raptor, the white-tailed kite, previously not known to visit the site. White-tailed kites had been thought on the verge of extinction in California in the 1930s, made a rebound and possibly peaked in numbers during the 1970s, and have fluctuated in numbers since. White-tailed kites were afforded special protection in the Santa Barbara County LCP in the early 1980s, but by the early 1990s, kites were virtually absent from the County. Abandonment of the area by white-tailed kites during that time was likely caused, at least in part, by the prolonged drought the ended in 1993. This spring, two pairs of white-tailed kites nested in Monterey pine and cypress trees (see Exhibit 1A).

Other habitat on site includes coastal sage scrub, small isolated wetlands (including a vernal pool of anthropogenic origin), riparian wetlands and stream corridors, southern willow scrub, fresh water marsh, an estuary in the mouth of Eagle Canyon, and the beachfront areas at the foot of the bluffs. Tomate Canyon contains a seasonal pond with high wildlife values, north of the railroad tracks.

Burmah Beach, located 1,600 feet east of the western parcel boundary is a known harbor seal "haulout" and rookery. In addition, the beach at the foot of the cliffs on the

site is a resting area for hundreds of Brown Pelicans. Naples Reef, which is considered a unique and sensitive habitat area, and an important surfing location, is located in the Pacific Ocean in close proximity to the western end of the site.

Eagle Canyon, which traverses the easterly boundary of the site, drains to the Pacific Ocean via a small estuary at the mouth of the canyon. Eagle Canyon Creek has been found to contain breeding habitat for the federally endangered California red-legged frog. In addition, the estuary at the mouth of the creek contains the federally threatened tidewater goby.

Two sensitive plants are found on site: southern tarplant and cliff aster. The cliff aster tends to inhabit the shale bluffs of the site, and therefore is mostly located outside of the proposed development envelope according to the applicants' consulting botanist, Dr. Kathy Rindlaub. Southern tarplant is a California Native Plant Society List 1(b) plant and was known when the project EIR was prepared in 1992 to occur in one location, with 20-30 plants, at that time. The presence of the southern tarplant on site has since been determined to be far more extensive and significant than was thought when the Commission approved the former permit for the golf course proposal in 1994 and nine populations have been documented on site - one containing at least 4,500 plants in 1998.

Finally, a number of new wetlands have been documented since the site was characterized at the time of project approval. The underlying environmental assessments for the proposed project were prepared at the end of approximately five dry years - a drought cycle. Since the original project approval, however, energy facility abandonment (soils excavation and compaction, in an area of low-permeability clay soils) in 1996 - 1998 combined with wetter rainfall years produced a series of new, small wetlands. The applicant delineated these wetlands in consultation with the U.S. Army Corps of Engineers and the Natural Resources Conservation Service. Some of the amendments presently proposed by the applicant are adjustments of the golf course layout to avoid these wetlands.

3.0 ENVIRONMENTALLY SENSITIVE RESOURCES; WATER QUALITY

The environmentally sensitive species and habitats on the site of the proposed project for which the Commission finds changed circumstances include: California red-legged frog; tidewater goby; monarch butterfly; southern tarplant, white-tailed kite, and wetlands. Findings concerning the potential impacts of the proposed development on each are considered in the following sections.

3.1 California red-legged frog

Life History

The California red-legged frog, a native amphibian believed to have inspired Mark Twain's fabled short story "The Celebrated Jumping Frog of Calaveras County," gained Endangered Species Act (ESA) protection as a threatened species in May 1996.[5]

The historic range of the California red-legged frog extended coastally from the vicinity of Point Reyes National Seashore, Marin County, California and inland from the vicinity of Redding, Shasta County, California, south to northwestern Baja California, Mexico. The frog has sustained a 70 percent reduction in its geographic range in California, and a population decline by at least 90 percent as a result of habitat loss and alteration, overexploitation, introduction of exotic predators, and exposure to pesticides. A single population remains in Southern California. Rangewide, only four populations contain more than 350 adults.

The California red-legged frog was once so abundant as to be a major human food source in the Bay area and the Central Valley. About 80,000 frogs were consumed annually in the late 1800s and early 1900s. As the population declined, bullfrogs were exported from the East Coast to keep the "froggery" going. Bullfrogs, however, are voracious predators. They helped drive the red-legged frog (and many other species) populations lower yet. Habitat loss to logging, wetland draining, water diversions, dams, cattle grazing, pesticides, urban sprawl, and agricultural expansion also decimated the species. California has lost 90% of it historic riparian areas and wetlands.

Conservation of amphibians like the California red-legged frog are important for many reasons, including their role as "indicators" of significant environmental changes that may go undetected by humans. Their bodies are much more vulnerable to factors such as disease, pollution, toxic chemicals, radiation, and habitat destruction.

The largest native frog in the western United States, the California red-legged frog ranges from 1.5 to 5 inches in length. An adult frog is distinguished by its unique coloring: an olive, brown, gray or reddish back marked by small black flecks and larger dark blotches and a rusty-red hue to its belly and the undersides of its hind legs.

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[5] Note: Much of the technical information regarding the California red-legged frog cited below, particularly concerning the habitat of the frog in Santa Barbara County, is quoted from: "U.S. Fish and Wildlife Service. 2002. Recovery Plan for the California Red-legged Frog (*Rana aurora draytonii*)." (published by U.S. Fish and Wildlife Service, Portland, Oregon. viii + 173 pp.), absent further internal citations within the document.

The California red-legged frog requires a variety of habitat elements with aquatic breeding areas embedded within a matrix of riparian and upland dispersal habitats. Breeding sites of the California red-legged frog are in aquatic habitats including pools and backwaters within streams and creeks, ponds, marshes, springs, sag ponds, dune ponds and lagoons. Additionally, California red-legged frogs frequently breed in artificial impoundments such as stock ponds and reservoirs.

California red-legged frogs utilize a variety of habitats in the Santa Barbara County area, including dune swale ponds (Vandenberg Air Force Base), and population numbers are higher where bullfrogs, which are significant predators of California red-legged frogs, are not present. The USFWS and researchers advising the Service have determined that overall, California red-legged frogs are most likely to persist where multiple breeding areas are embedded within a matrix of habitats used for dispersal. California red-legged frogs live in a Mediterranean climate in Santa Barbara County, which is characterized by temporal and spatial changes in habitat quality. In addition to climatic fluctuations, the habitats used by this species typically change in extent and suitability in response to the dynamic nature of floodplain and fluvial processes (i.e., natural water flow and sedimentation regimes that, in flux, create, modify, and eliminate deep pools, backwater areas, ponds, marshes, and other aquatic habitats) (N. Scott and G. Rathbun *in litt.*1998). Therefore, the frog uses a variety of areas, including various aquatic, riparian, and upland habitats. Rangewide, and even within local populations, there is much variation in how frogs use their environment; in some cases, they may complete their entire life cycle in a particular habitat (i.e., a pond is suitable for all life stages), and in other cases, they may seek multiple habitat types. Overall, multiple breeding areas are embedded within a matrix of habitats used for dispersal Scott and G. Rathbun *in litt.* 1998).

Although previous characterizations of the subject site (1992 EIR, for example, and more recent surveys by the applicants various consultants) have tended to minimize its value for California red-legged frog habitat, the most recent literature compiled by the USFWS indicates that the frogs rely on, and will utilize for breeding habitat, more marginal water sources than had been noted previously by site reviewers. Tadpoles have been observed by several observers over the years in the vernal pool on site, for example. In one case (Interface Planning comments in the 1992 FEIR) the tadpoles were identified after-the-fact as likely being those of bullfrogs, although the applicants have since stated that there are no accounts of bullfrog observations on the subject site. In light of more contemporary information published by the USFWS, it seems that these dismissals may have been based on incomplete information and the tadpoles could potentially have been those of red-legged frogs. In addition, suitable breeding habitat has been identified in Tomate Canyon by the standards recently documented by USFWS, although Tomate Canyon (nor other site areas) has never been surveyed for tadpoles (the applicants' consultants state that California red-legged frog surveys do not look for tadpoles because disturbing habitat to look for the tadpoles could result in an impermissible "take" of the species).

Frogs spend considerable time resting and feeding in riparian vegetation when it is

present. It is believed that the moisture and cover of the riparian plant community provide good foraging habitat and may facilitate dispersal in addition to providing pools and backwater aquatic areas for breeding. California red-legged frogs can be encountered living within streams at distances exceeding 3 kilometers (2 miles) from the breeding site, and have been found up to 30 meters (100 feet) from water in adjacent dense riparian vegetation, for up to 77 days (Rathbun *et al.*1993).

California red-legged frogs often disperse from their breeding habitat to forage and seek summer habitat if water is not available. This summer habitat could include spaces under boulders or rocks and organic debris, such as downed trees or logs; industrial debris; and agricultural features, such as drains, watering troughs, abandoned sheds, or hay-ricks. California red-legged frogs use small mammal burrows and moist leaf litter (Jennings and Hayes 1994); incised stream channels with portions narrower and deeper than 46 centimeters (18 inches) may also provide habitat (U.S. Fish and Wildlife Service 1996a).

Reproduction. California red-legged frogs breed from November through April (Storer 1925). Males appear at breeding sites from 2 to 4 weeks before females (Storer 1925). At these sites, males frequently call in small groups of two to seven individuals, although some instances they may call individually (Jennings *et al. in litt.* 1992). Females are attracted to the calling males. A pair in amplexus (breeding position) moves to an oviposition site (the location where eggs are laid) and the eggs are fertilized while being attached to a brace. Braces include emergent vegetation such as bulrushes (*Scirpus* spp.) and cattails (*Typha* spp.) or roots and twigs; the egg masses float on the surface of the water (Hayes and Miyamoto 1984). Each mass contains about 2,000 to 5,000 eggs that are each about 2.0 to 2.8 millimeter (0.08 to 0.11 inches) in diameter (Figure 8). The eggs are dark reddish brown (Storer 1925).

Growth and Development. Eggs hatch in 6 to 14 days depending on water temperatures (Jennings 1988b). Typically, most adult frogs lay their eggs in March, or earlier, depending on localized temperatures. Eggs require approximately 20-22 days to develop into tadpoles, and tadpoles require 11 to 20 weeks to develop into terrestrial frogs. Sexual maturity can be attained at 2 years of age by males and 3 years of age by females Jennings and Hayes 1985); adults may live to 10 years.

Activity Patterns and Movements. Hayes and Tennant (1985) found juvenile frogs to be active diurnally and nocturnally, whereas adult frogs were largely nocturnal. The season of activity for the California red-legged frog seems to vary with the local climate (Storer 1925); individuals from coastal populations, which rarely experience low temperature extremes because of the moderating maritime effect, are rarely inactive. Individuals from inland sites, where temperatures are lower, may become inactive for long intervals (Jennings *et al. in litt.* 1992) and no information is available on the activity levels of California red-legged frogs at higher elevations.

Feeding. The diet of California red-legged frogs is highly variable. The foraging ecology of larvae has not been studied, but they are thought to be algal grazers (Jennings *et al.*

litt. 1992). Hayes and Tennant (1985) found invertebrates to be the most common food items of adult frogs. Vertebrates, such as Pacific tree frogs (*Hyla regilla*) and California mice (*Peromyscus californicus*), represented over half of the prey mass eaten by larger frogs, although invertebrates were the most numerous food items. Feeding typically occurs along the shoreline and on the surface of the water; juveniles appear to forage during both daytime and nighttime, whereas subadults and adults appear to feed at night (Hayes and Tennant 1985). Radiotracking studies suggest that frogs also forage several meters into dense riparian areas (G. Rathbun pers. comm 1993, as cited in U.S. Fish and Wildlife Service 1996a).

Reasons for Decline and Threats to Survival

The California red-legged frog is threatened by human activities, many of which operate synergistically and cumulatively with each other and with natural disturbances (i.e., droughts or floods). Factors associated with declining populations of the frog include degradation and loss of its habitat through agriculture, urbanization, mining, overgrazing, recreation, timber harvesting, non-native plants, impoundments, water diversions, degraded water quality, use of pesticides, and introduced predators. The reason for decline and degree of threats vary by geographic location. California red-legged frog populations are threatened by more than one factor in most streams. The following discussion is organized according to the five listing criteria under section 4(a)(1) of the Endangered Species Act.

The proposed project will include several features that may attract California red-legged frogs from their known breeding habitat within Eagle Canyon into the upland and dispersal areas elsewhere in the site (for example to the vernal pool or seasonal ponds and riparian/wetland habitats in Drainage 4, Tomate Canyon, and elsewhere on the site depending on annual rainfall patterns. At the same time the golf course operations provide attractions for the frogs (examples, irrigated greens and fairways, the uncovered reclaimed water storage lake) and nuisances at the same time. The broader areas of the golf course are not subject to any more restrictive protective measures concerning chemical applications for turf management, etc. Therefore exposure to dispersing frogs attracted onto the golf course at large may occur.

Measures to mitigate these impacts, such as broader restrictions on chemical applications throughout the subject site than have previously been proposed by the applicants, undergrounding and covering the proposed reclaimed water reservoir and re-routing the undercrossing in Tomate Canyon, and possibly the undercrossing in Drainage 4 to avoid impacts to the riparian wetlands (seasonal ponds) known to form in these canyons north of the railroad tracks in wet years, would have been imposed through special conditions. These measures have not been imposed because impacts of the proposed project discussed elsewhere have rendered the project as a whole, inconsistent with the applicable requirements of the County's certified LCP and therefore the project, as proposed, cannot be approved.

The construction of a network of golf cart paths and maintenance routes on the proposed project site, combined with the estimated 40,000 rounds per year of golf and relatively intensive maintenance equipment access to the site (mowing, spraying, trash collection, halfway house & turf farm management, etc.) would result in impacts to the site analogous to some amount of roadway/urbanization affects. Irrigated turf areas would likely become attractive corridors for frog dispersal, and mortality due to crushing by carts, maintenance vehicles, etc. appears to be unavoidable.

Because other impacts of the proposed project addressed elsewhere in this report have resulted in the Commission's denial of the proposed project, special conditions that would have been associated with an approval have not been imposed. Had the Commission required conditions for the subject project, however, conditions to provide frog refugia, potential additional aquatic habitat of breeding quality to offset the unavoidable, predictable loss of some California red-legged frogs due to golf course operations, and other measures would have been required

Urbanization typically results in changes in hydroperiod due to new or increased irrigation and intensified land use activities. In the case of the Dos Pueblos Golf Links, the applicants propose to install a 5.4-acre (.7 acre surface area) uncovered reclaimed water reservoir that will receive gray water for irrigation purposes from the Goleta Sanitary District. The proposed reservoir is located in the southeastern area of the site, south of the railroad tracks, and close to the Eagle Canyon creek and estuary where the breeding population of the California red-legged frog is located.

The proposed reservoir would introduce a perennial water source at the site (the reservoir would be 15 feet deep and would be drained to as little as the 11-ft. level, but would still have a minimum of at least three or four feet of water under all conditions). This feature would easily result in the colonization of the reservoir by non-native predators of the California red-legged frog, most notably, by bullfrogs, which were noted on site by the applicants' consultants, SAIC, in 1999. Previously, tadpoles spotted in the vernal pool that is situated near the proposed reservoir site were noted in the 1992 project EIR, and were described in comments by the Interface/Dudek senior biologist as likely being bullfrog tadpoles in comments published in the FEIR. It is not known how or in what numbers the bullfrogs became established at the site: often they are placed in a riparian corridor or wetland deliberately (frequently as the release of childrens' petstore tadpole-raising projects), and then breed prolifically. Bullfrogs are voracious predators of red-legged frogs. Usually bullfrog populations are limited in areas with seasonal drying because it takes the bullfrog tadpoles two years to mature (as opposed to the typical California red-legged frog tadpole which can mature from tadpole to emergent frog in as little as about two months, though typically requires somewhat longer).

The applicants assert nevertheless that bullfrogs will be prevented from colonizing the reclaimed water lake by means of an annual survey for bullfrogs and removal of any non-native frogs detected during the survey. The most certain way to eliminate breeding habitat for the bullfrogs, however, is to underground and completely cover the

reclaimed water reservoir. There are other problems with the reservoir as well. For example, to obtain approval for the proposed project Habitat Conservation Plan, and for the Section 10(a) permit for incidental "take" of a federally threatened species, the applicants have proposed to render the reclaimed water lake more or less biologically sterile or at least inhospitable for breeding populations of the California red-legged frogs. The applicants propose amendments to the previous project approval that would prevent the growth of aquatic vegetation within the reservoir and would not provide dense, sheltering growth around the reservoir, and additionally would draw the lake down during a single evening with strong pumping (necessary to achieve sufficient pressure to water the 208-acre site in the time available because reclaimed water can only be legally applied during nighttime hours according to the applicants). These issues are the subject of letters by the applicants' and opponents' consulting biologists, and have been additionally considered by Commission staff ecologists. The applicants assert that California red-legged frogs in the lake when drawdown pumping commences would "immediately sense the lowering water levels and move to the sides and exit the lake." The reservoir is large, almost an acre in surface area, fifteen feet deep, holding 5.4 acre-feet of water. It has not been demonstrated that a red-legged frog anywhere within the lake would sense the lowering water levels and behave as the applicants assert, in time to reach the sides and emerge before the water levels drained to the vertical point of the reservoir's sides (approximately six feet down from surface). The applicants have stated that they are opposed to undergrounding and permanently covering the lake because they assert that this would cost $2 million more than the proposed lake, and render the project infeasible.

Commission staff has conferred with the applicants' biologist, Dr. Galen Rathbun, to consider design modifications that could reduce the reservoir's potential impact on California red-legged frogs and result in the best possible design of the options that the applicants indicated that they would be willing to implement if such a structure should eventually be approved. The Commission staff did not indicate to the applicants however, that the aboveground uncovered reservoir favored by the applicants was the preferred design of the staff ecologists. Moreover, the proposals to cover the reservoir put forward in early discussions by the applicants, relied on a semi-permeable cover that would still allow the frogs to sense water inside and thus be attracted to the reservoir. Once frogs are attracted to the structure, if they cannot enter, they may simply await an opportunity and die at the foot of the reservoir. The problem of frog barriers has been documented by the research of Dr. Rathbun. In light of that possibility, Commission staff concluded that an uncovered reservoir would be better than a semi-covered reservoir if frogs could escape. The uncovered reservoir would still render frogs that entered it highly visible, and therefore vulnerable to, predators. Dr. Froke noted projects he has consulted on or is otherwise familiar with in northern California where uncovered reservoirs have been constructed on golf courses or other sites. He believes that frogs either do not use the reservoirs, or do so safely, but acknowledges that in these examples there has been no systematic monitoring to verify this. It is possible that California red-legged frogs within the reservoir when drawdown occurs at night would be particularly vulnerable either in declining water levels or while

trying to escape the draining pond, to predation by known nighttime predators of California red-legged frogs, such as raccoons or night herons.

For these reasons, had the project been otherwise consistent with the applicable policies and provisions of the County's certified LCP, the Commission would have imposed a condition to underground and fully cover the reservoir, thereby avoiding the potential adverse impacts the reservoir may have upon California red-legged frogs. In the present case, however, impacts to sensitive species and habitats that are discussed in other sections have rendered the project inconsistent with the applicable standards and the Commission therefore denies the project.

In addition, the previous staff reported dated May 31, 2002 contained substantial analysis of the potential impacts of the applicant's proposal to apply pesticides and other chemical turf management products on the subject site. The applicant's notified staff on November 21, 2002 that they were amending their application to severely restrict such application of chemicals but the amendment is only at a very conceptual, general level presently and has not addressed the inconsistencies between the conceptual proposal and specific chemical use authorizations requested by the applicants through the HCP and Agricultural Turf Management/Integrated Pest Management Plans that are also part of the applicants proposed project description presently.

Therefore, the findings stated in the previous staff report dated May 31, 2002 concerning potential adverse impacts to riparian habitat and species on site that may occur and the resultant inconsistencies with the applicable standards of the County's LCP that result, continue to apply and are hereby incorporated by reference. The Commission would require significant changes to the applicants' proposals through revised plans and other special conditions if this project were otherwise approvable to address the concerns about chemical management and impacts upon sensitive species. The key change the Commission would require if the project had been approvable, would have been the elimination of the Par 3 course altogether to ensure the protection of the monarch butterfly, tidewater goby, southern tarplant and California red-legged frog populations that are all jeopardized by the construction and operation of the Par 3 course. The applicants have asserted that changes proposed to the grading plans for the Par 3 course, in addition to other Best Management Practices the applicants would implement, would avoid the potential adverse impacts of chemical applications on the Par 3 course (up to the 2-year storm would be diverted from Eagle Canyon through positive grading away from the canyon, and through the placement of swales). The Commission's water quality staff has evaluated these proposals (Exhibit 50) and while noting that the proposals are well developed for this type of development, the implementation of the proposed water quality measures cannot assure against the intrusion of polluted runoff into the waters of the site, particularly Eagle Canyon Creek. Therefore, although the applicants' proposal has merit, it does not eliminate the risk to the threatened and sensitive species, particularly the California red-legged frog. The applicants also indicate that Eagle Canyon and other upland riparian habitat corridors denoted as California red-legged frog habitat by the USFWS and others would be

protected by "chemical use buffers" (shown with broken lines on Exhibit 1) setback from these habitats. The Commission has determined however that these "buffers" are really not buffers at all but only demark areas where the same chemical management practices authorized elsewhere on the golf course will, when undertaken in these areas, simply trigger certain monitoring requirements. There is not other restriction offered by the "buffers" and this has been verified by the Commission's water quality unit technical staff (see Exhibit 50). The water quality staff has developed potential special conditions also noted in these exhibits that would have been imposed to mitigate the adverse impacts of the proposed project consistent with requirements that are typically imposed on all development proposals of this significance by the Commission, but these measures will not be required because as noted, the project must be denied due to other impacts discussed elsewhere in this report that render it inconsistent with the LCP.

Applicable LCP Policies and Provisions

Santa Barbara County's certified Local Coastal Program (LCP) contains the following Land Use Plan (LUP) policies and provisions and implementing ordinances regarding Environmentally Sensitive Habitat and Water Quality. The portions that are that are applicable to the changed circumstances consideration of the project regarding the California Red-legged Frog and the consideration of the proposed amendments are set forth in pertinent part below:

LUP Policy 2-11: *All development, including agriculture, adjacent to areas designated on the land use plan or resource maps as environmentally sensitive habitat areas, shall be regulated to avoid adverse impacts on habitat resources. Regulatory measure include, but are not limited to, setbacks, buffer zones, grading controls, noise restrictions, maintenance of natural vegetation, and control of runoff.*

The LUP provides in Section 3.9.3. (Planning Issues) that "*Habitats are considered to be environmentally sensitive when they exhibit extreme vulnerability to disturbance or destruction from human activities. In Santa Barbara County, recreational uses, agricultural practices, and development pose the greatest threats to habitats because existing County regulations do not provide adequate protection.*

The LUP states on page 119: *While the (ESHA) designations reflected on the land use plan and resource maps represent the best available information, these designations are not definitive and may need modification in the future. The scale of the maps precludes complete accuracy in the mapping of habitat areas and in some cases, the precise location of habitat areas is not known. In addition, migration of species or discovery of new habitats would result in the need for designation of a new area. Therefore, the boundaries of the designations should be updated periodically in order to incorporate new data.*

In addition, the LUP states on page 120: *Most native plant communities are not designated on the land use plan and resource maps because they exist in so many*

locations throughout the coastal zone. Only major streams and wetlands are shown on the land use plan maps.

The LUP further states on pages 119 and 120: *Significant habitat resources in the coastal zone which meet at least one of these criteria are designated on the land use plan maps. Environmentally sensitive habitat areas have been grouped into the following categories: (*dunes, wetlands, native grasslands, vernal pools, butterfly trees, marine mammal rookeries and hauling grounds, White-tailed Kite habitat, subtidal reefs, rocky points and intertidal areas, kelp beds, seabird nesting and roosting areas, native plants, streams) ... *Due to the limitations of mapping techniques and, in some cases, incomplete information on habitat areas, the following policies shall apply to development on parcels designated as a habitat area on the land use plan and/or resource maps and to development on parcels within 250 feet of a habitat area or projects affecting an environmentally sensitive habitat area.*

LUP Policy 9-1: *Prior to the issuance of a development permit, all projects on parcels shown on the land use plan and/or resource maps with a Habitat Area overlay designation or within 250 feet of such designation or projects affecting an environmentally sensitive habitat area shall be found to be in conformity with the applicable habitat protection policies of the land use plan. All development plans, grading plans, etc., shall show the precise location of the habitat(s) potentially affected by the proposed project. Projects which could adversely impact an environmentally sensitive habitat area may be subject to a site inspection by a qualified biologist to be selected jointly by the County and the applicant.*

Habitats found in the County and policies for protecting these habitats are listed below. These policies are in addition to existing State and Federal regulations which protect many species of plants and animals and their habitats.

According to the FEIR for the subject project (92-EIR-16), Tomate and Eagle Canyons (LUP pg. 135) are among the ESHAs designated on site by the County's LCP. In addition, native grassland areas, rare plant habitat areas, and wetlands and riparian drainages providing upland habitat for the red-legged frog, and the vernal pool south of the railroad, at the railroad bridge, are all ESHA pursuant to the requirements or the LCP.

LUP Policy 9-9 (Wetlands buffers): *A buffer strip, a minimum of 100 feet in width, shall be maintained in natural condition along the periphery of all wetlands. No permanent structures shall be permitted within the wetland or buffer area except structures of a minor nature, i.e., fences, or structures necessary to support the uses in Policy 9-10. ... the (wetland boundary) definition shall not be construed to prohibit public trails within 100 feet of a wetland.*

LUP Policy 9-10: *Light recreation such as birdwatching or nature study and scientific and educational uses shall be permitted with appropriate controls to prevent adverse impacts.*

LUP Policy 9-13: *No unauthorized vehicle traffic shall be permitted in wetlands and pedestrian traffic shall be regulated and incidental to the permitted uses.*

LUP Policy 9-14: *New development adjacent to or in close proximity to wetlands shall be compatible with the continuance of the habitat area and shall not result in a reduction in the biological productivity or water quality of the wetland due to runoff (carrying additional sediment or contaminants), noise, thermal pollution, or other disturbances.*

LUP Policy 9-15: *Mosquito abatement practices shall be limited to the minimum necessary to protect health and prevent damage to natural resources. Spraying shall be avoided during nesting seasons to protect wildlife…biological controls are encouraged.*

LUP Policy 9-19: *No mosquito control activity shall be carried out in vernal pools unless it is required to avoid severe nuisance.*

LUP Policy 9-20*: Grass cutting for fire prevention shall be conducted in such a manner as to protect vernal pools. No grass cutting shall be allowed within the vernal pool area or within a buffer zone of five feet or greater.*

LUP Policy 9-21: *Development shall be sited and designed to avoid vernal pool sites as depicted on the resource maps.*

The LUP states on page 136: *Streams and creeks affect both the quantity and quality of local water supplies. Heavy siltation of the stream bed can clog the natural flow of water from the surface into groundwater reserves. Increased sedimentation in streams also results in higher flows and increased flood hazards. Polluted runoff from upland development or direct discharge into a stream can infiltrate the groundwater, thereby polluting underground water resources. Development and land use activity within and adjacent to the watercourse has profound effects on stream hydrology, channel geometry, and water quality. Protection of streams requires regulation of land use within the immediate environment as well as control of land use in the larger watershed. The following policies are directed at development within the stream corridor. Regulation of land uses in watershed is addressed in Section 3.3 of the (coastal) plan.*

Definitions:

Stream: *watercourses, including major and minor streams, drainageways and small lakes, ponds, and marshy areas through with streams pass. (Coastal Wetlands are not included.)*

Riparian Vegetation: *vegetation normally found along the banks and beds of streams, creeks, and rivers.*

Stream Corridor: *a stream and its minimium prescribed buffer strip.*

Buffer: *a designated width of land adjacent to the stream which is necessary to protect biological productivity, water quality, and hydrological characteristics of the stream. A buffer strip is measured horizontally from the banks or high water mark of the stream landward.*

Policies:

LUP Policy 9-37: *The minimum buffer strip for major streams in rural areas, as defined by the land use plan, shall be presumptively 100 feet, and for streams in urban areas, 50 feet. These minimum buffers may be adjusted upward or downward on a case-by-case basis. The buffer shall be established based on an investigation of the following factors and after consultation with the Department of Fish and Game and Regional Water Quality Control Board in order to protect the biological productivity and water quality of streams:*

a. soil type and stability of stream corridors;
b. how surface water filters into the ground;
c. slope of the land on either side of the stream; and
d. location of the 100-year flood plain boundary.

Riparian vegetation shall be protected and shall be included in the buffer. Where riparian vegetation has previously been removed, except for channelization, the buffer shall allow for the reestablishment of riparian vegetation to its prior extent to the greatest degree possible.

LUP Policy 9-38: *No structures shall be located within the stream corridor except: public trails, dams for necessary water supply projects, flood control projects where no other method for protecting existing structures in the flood plain is feasible and where such protection is necessary for public safety or to protect existing development; and other development where the primary function is for the improvement of fish and wildlife habitat. Culverts, fences, pipelines, and bridges (when support structures are located outside the critical habitat) may be permitted when no alternative route/location is feasible. All development shall incorporate the best mitigation measures feasible.*

LUP Policy 9-40: All *development, including dredging, filling, and grading within stream corridors, shall be limited to activities necessary for the construction of uses specified in Policy 9-38. When such activities require removal of riparian plant species, revegetation with local native plants shall be required except where undesirable for flood control purposes. Minor clearing of vegetation for hiking, biking, and equestrian trails shall be permitted.*

3.2 Tidewater Goby

The federally threatened Tidewater Goby, is a small brackish water fish endemic to California estuaries has been discovered in the estuary at the mouth of Eagle Canyon Creek since permit approval in November 1994. The fish is subject to the same potential impacts from project construction and operations that may affect the waters of Eagle Canyon Creek as is the California Red-legged Frog discussed in the previous section, and those findings are therefore incorporated here by reference and extend equally to the Tidewater Goby. Special Conditions that the Commission would otherwise have imposed to address impacts of the proposed project upon the goby will not be necessary because due to unmitigable adverse impacts of the proposed project on other environmentally sensitive habitat and species elsewhere on the subject site, the Commission denies the proposed project.

3.3 Monarch Butterfly

The Santa Barbara County LCP protects butterfly habitat (specifically trees harboring roosting populations of the insects). The certified Land Use Plan states that tagging studies indicate that the Monarch butterfly (*Danaus plexippus*) migrates southward over long distances to escape the cold winters of the central and northern states. Their wintering grounds are areas within a coastal strip extending from Los Angeles to Monterey. These wintering grounds are roosting habitats consisting of a circular configuration of tall trees, usually eucalyptus, which are essential for the mating phase of the butterfly's life cycle. During the fall and winter months the trees are used by massive numbers of Monarch butterflies as communal roosts. These winter clusters represent the most sensitive part of the Monarch's life cycle. Repopulation of the species depends upon the mating phase which occurs in these specialized habitats. Little is known about the behavior patterns and migration routes of the Monarch butterfly; therefore, this habitat is of important scientific, educational, and general public interest.

In addition, the Monarch butterfly is also considered a state "sensitive animal" and wintering sites for this species are considered sensitive resources by the California Department of Fish and Game. Though the Monarch butterfly is not endangered, its overwintering sites and annual migration are threatened by human activity. In 1984, the International Union for Conservation of Nature and Natural Resources classified the migration and overwintering behavior of the monarch butterfly as a "threatened phenomenon." Many scientists agree that if overwintering sites are not protected, especially in Mexico, the migration and overwintering phenomenon could disappear in as little as 20 years (Marriott, in Outdoor California, February 2002).

Changed Circumstances

The Final Environmental Impact Report for the project (92-EIR-16) stated (page 5.1-19, page 000374 of the Administrative Record) that :

A recent survey of the County conducted by a monarch butterfly expert indicated that Eagle Canyon was used by approximately 130 butterflies during October, 1990. ...Eagle Canyon is a small monarch aggregation site that is abandoned early in the season by monarchs searching for a higher quality wintering site. ....clustering or roosting within the proposed golf course area has not been reported. A brief survey conducted by The Monarch Project (1987) indicates that eucalyptus trees onsite provides nectaring habitat for monarchs, but do not constitute a significant or sensitive monarch resource. These trees are not the more sensitive winter habitat site as discussed in Policy 9-22 and 9-23 of the County LCP.

The applicant does not deny that monarch butterfly use of the site has increased significantly since the 1992 EIR was prepared for the proposed project. A study commissioned by the applicant and prepared by Althouse and Meade, June 2001. The Meade study indicates that butterflies are using an aggregation site of eucalyptus trees located within the eastern area of the Executive Par 3 Course. This area is also proposed for placement of a bioswale drainage feature.

The newly identified aggregation site, identified in the report as the "Upper Western Grove Site" contained a maximum of 4,848 butterflies on October 24, 2000. The report states that this peak of population size in the third week of October is a classic autumnal aggregation trend. Autumnal sites typically harbor large numbers of transient butterflies. Autumnal sites are considered important to aggregation phenomena and are protected as Environmentally Sensitive Habitats. The report also indicates that during a prior survey 12,910 monarch butterflies were counted in Eagle Canyon (east site) on a single November day in one case.

A total of 72,208 monarch butterflies were counted during the 2000-2001 survey on twenty-eight different dates from October 6, 2000 to March 9, 2001, in Eagle Canyon.

The Eagle Canyon West Grove contained a maximum aggregation size of 6,710 butterflies on November 13, 2000.

This is a significant change compared to the FEIR identification of approximately 130 butterflies in October, 1990, ten years earlier. The 1990 count was relied on by the County in approving the Conditional Use Permit for the project, and by the Commission in approving the project in November 1994.

For these reasons, changed circumstances exist with regard to the Monarch butterfly use of the site, both in location of aggregation and in intensity of use of butterfly trees.

Life History

According to Althouse and Meade, Inc., the Monarch butterfly is a cosmopolitan and well-known species with distribution across the temperate zone of North America and much of the world. In North America, they express the dramatic population level phenomena of overwintering migration, where populations collapse their distribution from an area of more than two-hundred million acres in the summer months to less than several hundred acres in the winter.

Monarch butterflies west of the Rocky Mountains move to the west coast of California in late summer and early fall. Monarch butterflies enter the coastal zone and seek out aggregation sites in protected locations near the ocean. The number of monarch butterflies that aggregate in any one grove may change dramatically from year to year, as trees grow or fall, and as weather conditions vary among seasons and years. These sites are dynamic with respect to their ability to provide appropriate aggregation conditions, and are dependent on the condition of the trees, associated vegetation, site-specific topography, and changes in the local environment.

The overwintering period of the Monarch butterfly is a vulnerable stage of the life cycle of the species. (Althouse and Meade, Inc., June 2001)

LCP Policies and Provisions

The County's LCP defines Monarch butterfly habitat as Environmentally Sensitive Habitat Area, and thus all ESHA policies and provisions are applicable to Monarch sites. The County's LCP contains two policies specifically applicable to Monarch butterfly sites:

Land Use Plan Policy 9-22: *Butterfly trees shall not be removed except where they pose a serious threat to life or property, and shall not be pruned during roosting and nesting season.*

Land Use Plan Policy 9-23: *Adjacent development shall be set back a minimum of 50 feet from the trees.*

These policies are replicated as development standards in Section 35-97.12 of the Coastal Zoning Ordinance:

Section 35-97.12. *Development Standards for Butterfly Tree Habitats*

1. *Butterfly trees shall not be removed except where they pose a serious threat to life or property, and shall not be pruned during roosting and nesting season.*
2. *Adjacent development shall be set back a minimum of 50 feet from the trees.*

In addition to policies specifically protective of butterfly trees (set forth above), the certified LCP protects Environmentally Sensitive Habitat Areas. The Upper Western Grove and the Eagle Canyon West Grove (the overwintering site) collectively constitute ESHA.

Certified coastal Land Use Plan policy 2-11 cited above states that:

All development, including agriculture, adjacent to areas designated on the land use plan or resource maps as environmentally sensitive habitat areas, shall be regulated to avoid adverse impacts on habitat resources. Regulatory measures include, but are not limited to, setbacks, buffer zones, grading controls, noise restrictions, maintenance of natural vegetation, and control of runoff.

Monarch Butterfly Habitat in Eagle Canyon Eucalyptus Groves

According to the applicant's consultants, Althouse and Meade, Inc., the Monarch butterfly aggregations occur in two locations in and adjacent to Eagle Canyon. The more aggregation site identified as the "Upper Western Grove" and the other site is identified as "Eagle Canyon West." The latter is located within Eagle Canyon, in a relatively steeply sloping area that is not proposed for development (the grove is approximately 80 feet east of the Par 3 Course). This site was the most populated site in 2000, according to the applicant's consultant.

The Eagle Canyon West Grove tends to be more prominently used for overwintering, whereas the Upper Western Grove tends to be most populated during the fall months, and is referred to as an autumnal aggregation site. (See aggregation counts for each grove prepared by Althouse and Meade, Inc., 2000-2001).

The Upper Western Grove is located within the Executive Par 3 Course. (See Exhibit 3). The Par 3 Course is not set back 50 feet horizontally from the dripline of the trees as required by the County's LCP. The course is placed under the trees, with one of the greens immediately under the overhanging branches. The applicant asserts that this design is acceptable because of the height of the overhanging branches (inferring vertical separation as a substitute for the horizontal) and because the type of encroaching development is an "irrigated lawn." Specific impacts to the aggregation groves are discussed in the following section.

The construction of the proposed Par-3 golf course does not comply with the requirements for a 50-foot setback from butterfly trees applicable to all development, as required by the County's certified LCP, as discussed below. Monarch aggregation was not occurring in the eucalyptus grove amidst the Par-3 course at the time of permit approval, therefore this inconsistency between the development footprint and the requirements of the LCP did not exist at that time. As discussed below the applicants acknowledge that the proposed Par 3 course is not set back the minimum distance of 50 feet from the outer canopy of the eucalyptus grove (Grove J on applicants' tree plan) that contains the new butterfly aggregation site identified as a changed circumstance. The applicants argue that such a setback is not necessary and need only be measured from the handful of specific trees their consultants have recorded with butterflies affixed to them. They argue that other trees comprising the grove, even immediately adjacent to the trees they have documented with aggregations on them, are not protected by the

onsite and be incorporated into the final ATMIPM (Agroturf Management and Integrated Pest Management Plan) program (the 3 restrictions applicable to the Par 3 Course)*:*

1. *During the rainy season (November through April), no herbicides or pesticides will be applied within 24 hours prior to forecasted rain or within 24 hours after rainfall.*

2. *Application of herbicides and pesticides will be administered after the morning dew has evaporated and before the evening dew has set.*

3. *In no case shall any spraying of chemicals take place anywhere onsite when wind conditions exceed five (5) miles per hour (mph).*

Analysis of the applicant's chemical management plan and consideration of the plans' assurances of environmental protection is addressed in more detail previously in these findings (see the Red-legged Frog section B.1). That section contains a fuller evaluation of the details and problems of the chemical management strategies the applicant proposes.

As stated previously, the Final EIR for the approved project states on page 5.4-1, Administrative Record page 000452, (Section 5.4.1.1 Regional Setting, Climate and Meteorology) that:

The prevailing winds are from the northeast at approximately five miles per hour *(1990 windrose from the El Capitan State Beach air quality monitoring station). This is caused by the Pacific High, an anticyclone high pressure cell over the Pacific Ocean several hundred miles to the west. Locally, there is a tendency for the diurnal land/sea breeze cycle to cause the prevailing winds to change direction and move offshore from early evening to morning and then return to the general onshore wind flow. Afternoon wind speeds are approximately 10–20 miles per hour (mph) during the spring and summer, approximately 10 mph during the fall and* ***approximately 3 mph during the winter.***

Thus, as noted previously, the winter season is the only time winds fall below the 5-mile per hour measure, and this increases the likelihood that ideal spraying opportunities will arise during the months when the monarch aggregations have formed on site. The Par 3 Course is essentially at "ground zero" from the Monarch Groves, and the prevailing wind direction would blow any application of chemicals on the Par 3 Course north of the railroad tracks directly into the Monarch trees. Even a sudden, brief change in wind direction and velocity could catch a spraying applicator unprepared and send overdrift into the aggregates.

The application windspeed requirements in the HCP, even if ideal, would potentially deliver pesticides to the Monarch aggregates in seconds (the measurement of windspeed in miles per hour is virtually meaningless in such close spaces). Pesticide overspray is a serious problem, and some notable cases of overspray and spray drift

from agricultural spray applications in Ventura County -- most notably at the Mound Elementary school located adjacent to lemon groves from which accidental overapplication of Lorsban or Dursban (trade names for chlorpyrifos-- which is not proposed as a chemical of use on the course) sickened school children nearby on approximately November 10, 2000 according to the Ventura County Agricultural Commissioners office (contacted by Commission staff) Such incidents demonstrate that even licensed operators applying authorized chemicals have accidents and make errors that may have significant adverse consequences.

The applicant's consultants state that if the conditions for chemical use in the HCP are met, impact to Monarch butterflies from chemicals on site "will be reduced to acceptable levels." While it is not clear what "acceptable levels" would be, it does appear very difficult even under ideal conditions, to comply with the HCP requirements. When possible applicator error and sudden wind changes are considered, exposure of Monarch butterfly aggregations in the Upper Western Grove to harmful chemicals appears quite likely.

In addition to the HCP chemical application restrictions listed above, the consultants recommend that: The *use of pesticides shall be controlled during the aggregation season to ensure that no insecticides come in contact with Monarch butterflies.*

As noted above, windspeeds suitable for compliance with the rules are best predicted in the winter season, when butterfly aggregates are present and sensitive. In addition, some of the chemicals proposed for use by the applicant indicate that wintertime application is recommended, which dramatically increases the risk of destroying the aggregations of nearby butterflies if misapplication occurs. Other chemicals on the list recommend irrigation after application to ensure penetration of the chemical to the roots of turf grasses. This requirement renders the HCP pledge to apply chemicals after dew dries in the morning and before dew forms in the evening, essentially meaningless, since water must be applied to the turf after these chemicals are applied. The chemically treated, wet turf then becomes an attractant to butterflies, as stated above.

The data sheets for some of the applicant's "preferred use" chemicals indicate that application near the aggregate groves could pose a substantial risk of mortality to the gathered butterflies. For example, the plan adds Imadaclorpid (brand name "Merit") to the list of "Preferred use chemicals" which are supposed to be the least toxic category of allowable chemicals, and represent the chemical options the applicant should use before turning to more toxic chemicals. The material safety data sheet for Merit, which is used to control insect pests on golf course turf, states the following information for the insecticide (insect killer):

ENVIRONMENTAL HAZARDS:

This product is highly toxic to aquatic invertebrates. Do not apply directly to water, or to areas where surface water is present or to intertidal areas below the mean high water mark. Do not contaminate water when disposing of equipment washwaters.

*This product is **highly toxic to bees exposed to direct treatment or residues on blooming crops or weeds. Do not apply this product or allow it to drift to blooming crops or weeds if bees are visiting the treatment area.***

The instructions for "Merit" further state:

*The active ingredient in MERIT 75 WSP Insecticide has sufficient **residual activity** so that applications can be made preceding the egg laying activity of the target pests. High levels of control can be achieved when applications are made preceding or during the egg laying period. ...Optimum control will be achieved when applications are made prior to egg hatch of target pests, **followed by sufficient irrigation or rainfall to move the active ingredient through the thatch.***

Use of this chemical in compliance with the instructions for use would conflict with the directive by Althouse and Meade not to combine pesticides and wet grass because butterflies are drawn to wet grass, where they imbibe liquid.

This chemical ("Merit") is just one of the many "preferred use chemicals" that the applicant represents will be applied to the golf course. The only means the applicant proposes to confirm that in fact the application is not harmful to sensitive species is through subsequent water sampling in adjacent waterways after the chemical is applied in areas marked on the site plan as "chemical use buffer areas" (shown with a broken line) adjacent to waterways on site.

The applicant relies on water testing after chemical application as the only method to insure that its chemical use does not harm sensitive species. Even if the water testing is done properly and yields accurate results, should chemical residues be found, no action is immediately required. The applicant is permitted to make adjustments to the chemical applications, keep testing the water, and see how it goes for up to two years. No intervention in operations, ban on use of chemicals, or investigation of ecological damage to sensitive habitat or species is required if water or soil testing results are positive for contaminants.

Section 3.0 of the HCP states that buffer areas have been identified for Eagle Canyon, Tomate Canyon and Drainage 4 North and that use of chemicals authorized for application on site within these buffer areas will trigger chemical sampling outlined in Section 3.1.1. Section 3.1.1 (Chemical Sampling) of the HCP (pages 31 & 32) only states, however, relatively vague standards for sampling. In one reference, "Table 3" is the standard, in another reference use of "certain chemicals" (unspecified) will trigger "additional sampling" but only if used within the "buffer areas."

Despite the use of the term "chemical buffer area", application of chemicals is not prohibited in these areas. The "chemical use buffers" shown on the site plan only indicate a zone that triggers testing when certain chemicals are applied.

The Table 3 testing parameters are identified in the HCP as required only for the first two years of golf course operations, or additional time to followup on adaptive management if contaminants are detected. Thus, the Table 3 testing appears to have a sunset feature, and will terminate. Therefore, the proposed project does not include any meaningful, enforceable prohibition on further chemical use if necessary to avoid harm to sensitive species

Nothing in the HCP or applicants proposal requires testing for the residues of insecticides, fungicides, herbicides and other toxic chemicals authorized for use on the site in the TMP/IPM that might harm Monarch butterflies. Moreover, there is no testing proposed at all to ensure that toxins do not enter the terrestrial and botanical habitat areas utilized by the Monarch butterflies since the HCP proposes measures that are aimed at protecting the Eagle Canyon Creek.

While the proposed chemical management procedures may be adequate for general purposes in many locations on the 208-acre site, these procedures are completely inadequate for use in the Executive Par-3 Course located at Eagle Canyon. The Monarch butterflies found in this area of the site are highly sensitive to disturbance. The entire butterfly aggregation in the Upper Western Grove could be extirpated by a chemical application mistake.

The risk of upset associated with building and maintaining the Executive Par-3 Course in the highly sensitive Eagle Canyon area is unacceptable and cannot be mitigated to levels consistent with the requirements of Santa Barbara County's certified LCP. The Commission finds that the project can only be rendered consistent with the certified LCP through the implementation of Special Condition 3, which requires deletion of the Executive Par-3 Course, among other changes to the project described in the Special Condition.

The elimination of the Par-3 Course will ensure that the significant populations of autumnal and overwintering populations of Monarch butterflies documented on site will be sufficiently buffered from the remainder of the golf course operations to prevent accidental poisoning of the butterflies through chemical applications.

Additionally, the elimination of the Par-3 Course will also eliminate the applicant's proposal to remove or thin trees in that area of the site, which is consistent with the Althouse and Meade recommendation that such removal or thinning be limited as much as possible to avoid undermining the fragile parameters of the microclimate that attracts and protects the butterfly aggregates in and adjacent to Eagle Canyon.

The elimination of the Par-3 Course will also ensure that golfers are not playing toward, and immediately under the autumnal aggregations located near Holes 3 and 6. It will prevent the noise, errant golf shots and human presence that could result in disturbance to and potential flushing of butterfly aggregations, and prevent the adverse consequences to the Monarch populations of chronic stress associated with use of the habitat area for the estimated 20,000 rounds of golf (1 to 4 players per round) per year.

Assuming that the maximum 80,000 golfers is evenly distributed by month, for sake of illustration, over 6,000 golfers could pass beneath the Upper Western Grove site on the Par-3 course in a single month.

Thus, the construction and operation of the Par-3 course poses unacceptable levels of potentially adverse habitat impacts, potential chemical destruction of thousands of aggregating butterflies, and the removal or thinning of eucalyptus trees to create sufficient clear playing space.

The applicant's consultants recommend against the reduction in the density of eucalyptus groves to the west and north of the aggregation sites and note that tree thinning and removal may affect the microclimate conditions within the aggregation sites. Protection from wind and sunlight, and amelioration of extremes in temperature and humidity are functions that groves of trees outside of the immediate aggregation area provide. Reduction of the density of foliage or the number of trees in groves near the butterfly aggregations should be minimized, according to the consultants. The consultants also note that all of the eucalyptus trees on the north side of the railroad, near the entrance to the property contribute to the microclimate conditions of the aggregation sites.

The applicants have reiterated that they do not propose to remove any of the eucalyptus trees within Eagle Canyon itself, or within Grove J, just north of the railroad tracks and adjacent to the Canyon, on the Par 3 course. However, the applicants propose placement of tees and/or greens within less than the minimum 50 feet of setback area called for by the certified LCP from butterfly trees. The applicants justify this placement by asserting that only the smaller subset of trees within that grove that have butterfly aggregations affixed to them during the autumnal roosting or overwinter season are technically protected as butterfly trees. They assert that so long as the setback is preserved from that smaller subset of trees, the project is consistent with the applicable policies. The Commission has always interpreted the butterfly tree policies as protecting the entire cluster or grove of trees and not just a few specific trees, when the trees are closely configured as in this case. The setback is imposed from the outermost edge of the grove, because otherwise diseased trees may be deemed a potential hazard to humans utilizing the golf facilities close to such trees, thereby increasing the pressure to remove trees from the grove. Even if the trees so removed do not individually attract aggregates of monarch butterflies, the loss of outer trees increases the wind and chill factor the butterflies endure and renders the remaining trees more vulnerable to "blowdown", thereby incrementally weakening the habitat of the grove overall and thus gradually diminishing the habitat value of the monarch butterfly ESHA.

The applicants' consultants, Althouse and Meade have submitted a recent update indicating that removal of trees north of Grove J, within the Par 3 course but not trees in Grove J itself (which the applicants do not propose) would not adversely affect the monarch butterfly habitat of Grove J.

The Commission concludes that even though it will not be necessary to impose special conditions in this case because for other reasons the Commission denies this project, if the project had been approved, a condition for revised plans to delete the Par 3 course would have been required among other measures to protect the monarch butterfly habitat consistent with the requirements of the LCP.

3.4 Southern Tarplant

The Southern Tarplant (sometimes called "Spikeweed") is considered a Federal "*Species of Concern*" and a California Native Plant Society "List 1(B)" species, which signifies that is a rare, threatened, or endangered California native plant. List 1(B) status qualifies the plant for listing status as a rare, threatened, or endangered plant under the California Endangered Species Act. The only higher status that can be conferred on a plant is List 1(A) which essentially means that the plant is extinct.

Southern Tarplant is an annual species, in the aster (Sunflower) family, and at seasonal maturity can grow to as large as 1.5 feet in width and approximately two feet tall (maturity size ranges significantly in response to adequacy of environmental conditions during a particular season's germination and growth). The peak of bloom occurs in late summer and early fall, when the plants are covered with small, bright yellow flowers. The skeletal remains of dead tarplant resemble tumbleweed.[6]

- **Information Known at the Time of Project Approval**

The Southern Tarplant was first discovered on the Arco Dos Pueblos site in 1991, as part of a Biological Resources Analysis (June 28, 1991, Revised October 15, 1991) undertaken by Jacqueline Bowland, then Senior Biologist at Interface Planning and Counseling Corporation, the consulting firm serving as agent for then-applicant, Arco Oil and Gas.

- **20 - 30 plants on proposed 18th Fairway**

Ms. Bowland, undertaking field surveys to support the analysis, discovered a small population of Southern Tarplant numbering approximately 20 to 30 plants by her estimate, in the middle of what is presently proposed to be the 18th Fairway of the golf course. According to Ms. Bowland, that population was considered to be the most northerly range extension of the Southern Tarplant known at that time, and discovery of the plant was something of a surprise.

Ms. Bowland's biological survey was submitted to Santa Barbara County as part of the materials developed by Interface to support the original application for the golf course

[6] Background information on southern tarplant was provided to Commission staff by John Storrer, Storrer Environmental Services, who is an experienced environmental condition compliance consultant under contract with Santa Barbara County to monitor the Arco Dos Pueblos project.

and appurtenant facilities (the Biological Resources Analysis comprised Section IX of the application, dated October 25, 1991, submitted by Whitt Hollis as employee/agent, Arco Oil and Gas). The biological survey was eventually incorporated by reference into the Environmental Impact Report prepared for the subject project (92-EIR-16) under the direction of Santa Barbara County staff.

- **CNPS "List 3" Status**

At the time the 1991 Interface biological analysis was prepared, the California Native Plant Society status of the Southern Tarplant was "List 3." This status was reported by the Interface analysis in the application to Santa Barbara County, and subsequently re-stated the Final EIR for the project. March 1993 (FEIR 92-EIR-16 was certified in 1993).

"List 3" status for a plant is a designation of much less concern than List 1(B) status. List 3 status means that more information is needed, but does not constitute listing the plant as rare, endangered, or threatened.

The Interface Biological Resources Analysis (County application, Section IX, Page IX-3) states:

A special interest plant was encountered in the ruderal grassland community on the south side of the railroad tracks. Southern tarplant or spikeweed (Hemizonia australis) was found in one small population adjacent to a windrow to the west of barranca #3 on the south side of the access road that parallels the bluffs (refer to Figure 1) (Figure 1 is an Addendum Exhibit). The population occurs within a disturbed area associated with an active oil and gas production facility, where brushing for fire control has occurred recently. This plant is on List 3 of the CNPS Inventory of Rare and Endangered Vascular Plants of California (Smith and Berg, 1988). List 3 indicates that more information is needed to obtain information such as the plant's distribution and current threats to its existence, and to define appropriate protection policies. According to one local flora, this plant occurs from the Ellwood area south to lower California and is generally found in sandy substrates near the coast (Smith, C.F., 1974).

This summary of the status of the Southern Tarplant was repeated in the Environmental Impact Report for the project. Final EIR 92-EIR-16 was dated February 1993 and finalized in March 1993 by Santa Barbara County, incorporating comments and responses. 92-EIR-16 was certified by the County Board of Supervisors on August 17, 1993.

Page 5.1-16 of the FEIR, dated March 1993, Administrative Record Page 000371 states:

Southern Tarplant. The southern tarplant (Hemizonia australis) has no official status, but it is on List 3 of the California Native Plant Society's (CNPS) Inventory of Rare and Endangered Vascular Plants of California (Smith and Berg, 1988). "List 3" is a compendium of plants for which CNPS lacks the information necessary to determine

rare, threatened or endangered status. CNPS believes that many historic occurrences of southern tarplant have been extirpated but requests additional rarity or endangerment information. This species occurs throughout southern coastal California, from San Diego County to Santa Barbara County. According to Smith (1976), it is "common in many sandy fields near the ocean, between Goleta and Ellwood." The occurrence of this species on the project site appears to constitute a range extension since its northern limit is reported to be Ellwood Mesa. A small population of southern tarplant was located by Interface (1991) immediately south of the coastal road and west of Drainage #3 (Figure 5.1-1), as verified by the EIR consultants.

The List 3 status of the Southern Tarplant was interpreted by the County as requiring that the impacts to the plant be addressed through mitigation, rather than through avoidance of the impact (preservation of the population in its existing location).

Mitigation Measure B8 (FEIR page 5.1-48) stated that the collection of seed, greenhouse germination of the collected seed, and subsequent transplanting of the greenhouse stock elsewhere on site would be sufficient mitigation, and required that the BELP (Biological Enhancement Landscape Plan) drafted by the applicant be revised to include these measures (including monitoring and a contingency plan in case of high mortality). Thus, the FEIR concluded that "*Implementation of the above measure would reduce impacts to sensitive plants occurring onsite to less than significant levels (Class II).*

Thus, the FEIR did not consider project alternatives that would avoid impacts to the Southern Tarplant, protecting the population in place.

- **Upgrade to CNPS "List 1(B)" Status**

On April 4, 2002 the applicant submitted a binder to Commission staff, in response to an earlier request by Commission staff for documents in the applicant's records concerning Southern Tarplant. The binder contained a one page memorandum, under tab 3, from Jackie Bowland (Interface Planning and Counseling Corporation, Senior Biologist) to Whitt Hollis, labeled as "Memorandum to Dos Pueblos Golf Links File" RE: Southern Tarplant, dated May 14, 1992.

The memorandum regarding Southern Tarplant advises of a pending change in the California Native Plant Society's assigned status for the plant. The memorandum notes that the plant's listing would possibly change from List 3 to List 1(B) in the then-pending publication of the CNPS updated Inventory of Rare and Endangered Plants of California anticipated later in that year. The memorandum states in part:

... A new edition of this publication is due out this fall, which will list the southern tarplant as 1B. List 1B includes "plants rare, threatened or endangered in California and elsewhere." The importance of this change is that all plants listed in the Inventory as 1B are considered rare under Section 15380 of the State CEQA Guidelines, whether they are listed as such by the California Department of Fish and Game (CDFG) or not.

... This change elevates the importance of this plant population, and may require mitigation measures to reduce or eliminate potential adverse impacts. Acceptable mitigation measures are subject to approval by the CDFG and Santa Barbara County, and could include such approaches as avoidance and ongoing protection of the population, avoidance with a minimum buffer area of undisturbed habitat surrounding the population, transplantation elsewhere, or a combination of some or all of these measures.

Ms. Bowland's memorandum is dated May 14, 1992. The Southern Tarplant was subsequently elevated to List 1B status in the CNPS Inventory revised edition as Ms. Bowland predicted. Although the change in status of the Southern Tarplant had already occurred, the FEIR that was subsequently issued in 1993 was not corrected to reflect the change from 3 to 1(B) in the CNPS Inventory.

As the result, upon finalization of the EIR the mitigation approach of collecting seed but destroying the donor population was deemed acceptable as a condition of approval in the County's subsequent approval of the project, and was later incorporated by reference into the coastal development permit approved by the Commission in 1994.

- **Changes in the Distribution and Number of Southern Tarplant locations & populations since 1994 permit approval**

The new hearing on changed circumstances also provides staff with the opportunity, under the Commission's regulations, to request information staff believes necessary to properly evaluate the project in light of potentially changed circumstances. Staff requested in September 2001 that the applicant provide an updated map of biological resources on site, particularly vegetation. In response, the applicant supplied a full sized, to-scale site map represented as the current vegetation map of the site (November 21, 2001 vegetation map prepared by Dudek & Associates, full-sized copy on file at District office; no reduced copy available.)

In addition, the applicant submitted a report dated November 26, 2001 prepared by Dudek & Associates, by Sherri L. Miller, Senior Biologist, titled: "Update of Biological Resources Report for the ARCO Dos Pueblos Golf Links Project, Santa Barbara County, California." The report states in part:

This report documents the results of a biological resources survey conducted by Dudek and Associates, Inc. (DUDEK) at the approximately 208-acre Dos Pueblos Golf Links project area. The project site is located in an unincorporated area of Santa Barbara County, California.

The purpose of this letter report is to determine if there are any significant changes (e.g., changed circumstances) relating to vegetation communities on the Dos Pueblos Golf Links site from the original environmental review in 1993 (92-EIR-16) to current

conditions. The site's current physical conditions remain substantially unchanged as compared to the physical conditions recorded in 1991 and 1992 (citations) *and in the 1993 EIR for the project...*

The report stated in summary:

When comparing the current physical conditions onsite to those recorded in 1991 and 1992 (and presented in the 1993 EIR on the proposed project), it is apparent that physical conditions onsite have not changed substantially (see Table 1). The acreage of developed lands has decreased due to the abandonment of the oil and gas facilities and the differentiation between ornamental plantings from developed lands in recent surveys. In addition, the abandonment of the oil and gas facilities has resulted in the creation of disturbed wetlands areas and a slight increase in annual non-native grassland acreage (i.e., grasses have volunteered within some previously developed areas). The golf course has been designed to avoid these disturbed wetlands areas.

The report contained no analysis of changes in the locations or number of Southern Tarplant on site, though attached Appendix A contained a "floral compendium" of "vascular plant species" arranged by family. *Hemizonia* parryi ssp. *Australis*, Southern Tarplant, is listed under the family Asteraceae (Sunflower Family).[7]
Subsequently, interested parties raised a concern about the project's impacts on the Southern Tarplant, among other issues. Commission staff then reviewing the project for changed circumstances was unaware that the Southern Tarplant existed on the subject site, and examined the administrative record for information about the issue. Staff consulted the applicant's November 2001 report and vegetation map referenced above. No Southern Tarplant locations, including the one shown in the 1993 EIR were

[7] "Mulefat" - (*Baccharis salicifolia*) a shrub that is also a member of the Sunflower family, as is Southern Tarplant, was noted on site in the 1993 EIR Appendix 5.1-1 list of plants observed on site by Interface (1991), Rindlaub (1992), and Bowland and Ferren (1992), but does not appear on the plant list appended to Ms. Miller's November 2001 report. The Final EIR documents Mulefat as part of the plant community identified as "Southern Willow Scrub" occurring in patches along drainages on site. The binder submitted by the applicant on April 4, 2002 contains, under Tab 18, a letter dated October 13, 1998 addressed by the office of the applicant's consulting landscape architect to the County Energy Division planner reviewing the Biological Enhancement Landscape Plan for the Arco Dos Pueblos project. The letter states on page 4: *"...(TABLE A)... 5. Suggested change incorporated. The project biologist, Sherri Miller, requests excluding Mule Fat from the Riparian mix because mule fat scrub is habitat regulated by CDFG, and we do not want to create a regulated habitat."* The revised version of the BELP dated November, 1998 does not include Mulefat in the riparian mix, but does include Mulefat in the Southern Willow Scrub mix. From the lack of identification of Mulefat in the November 2001 plant list, it is not clear whether the plant has disappeared from the site since the surveys included in the 1993 EIR were undertaken, or whether it may simply have been overlooked in the 2001 surveys.

mapped, nor were changes to the distribution or number of plants noted in the Miller report regarding site changes since project approval.

Staff requested that the applicant supply additional information about the Southern Tarplant on site, and conferred with the County Energy Division. The Energy Division's environmental monitor, John Storrer explained on request that he had noted a significant population of Southern Tarplant in bloom on the site when Arco abandonment activities were closing down in the summer of 1998. Mr. Storrer explained that he directed that the area be roped off to prevent disturbance to the plants, and that the applicant's consultants investigated the extent of the population and provided that information directly to the County staff.

Mr. Storrer indicated that the population was extensive and coincided almost exactly with the footprint of the former warehouse/loading racks. He sent an informal map of the area to County staff, and the map was provided to Commission staff.

Staff requested a site visit to evaluate the current location of the plants in the area that was discovered in 1998. Mr. Storrer and others accompanied staff (March 14, 2002 site visit), and Mr. Storrer prepared a responsive report, dated April 2, 2002, including a map of the general area of tarplant distribution. This map was eventually incorporated into a revised map prepared by the applicant.

Subsequently, the applicant at the request of staff prepared an iterative series of map revisions and provided supplemental information (the binder received April 4, 2002 and referenced previously, for example) concerning the locations and extent of Southern Tarplant on the subject site. In all, as shown on Exhibit 3, there are nine (9) locations now reported, ranging significantly in size of population from a few individual plants to as many as 4,500 individual plants in one location. The latter was the site discovered by Mr. Storrer in 1998, though the plant count was prepared by others (memorandum of Jackie Bowland to Sherri Miller dated October 6, 1998).

Thus, there is now substantial evidence to conclude that changed circumstances since the Commission's approval of Coastal Development Permit A-4-STB-93-154 exist on site with regard to the Southern Tarplant.

In summary, the changes consist of the significantly increased number of locations where the plant is known to exist on site (nine now compared with one known at the time of project approval), and the population size (largest and only known population at time of approval was 20 to 30 individuals in the middle of the proposed 18th Fairway, compared with as many as 4,500 plants in 1998 in the area presently proposed for a portion of the parking adjacent to the clubhouse, and a portion of the Par-3 Course north of the railroad, near Eagle Canyon). In addition, though not the same kind of changed circumstance, there is new (and accurate) information about the status of the Southern Tarplant as a California Native Plant Society List 1 (B) species. This is an indication that the native plant is considered to be rare, threatened or endangered. The

plant's sensitive status was not accurately reflected in the environmental review and subsequent project approvals.

As a result, the need for preserving the Tarplant was underestimated and measures that would avoid destruction of the plants were not fully evaluated. The mitigation measure implementation approved subsequent to project approval by the County allowed destruction of Tarplants and mitigation for this impact. The applicant's Biological Enhancement Landscape Plan (CUP condition 14/B8) originally provided for the mitigation of the loss of 20 - 30 plants (the number counted in the only population known on site at the time of approval) through seed collection, greenhouse growth of plants from resultant seeds (Matilija Nursery), and later transplantation of the cultivated plants to a designated mitigation site on the Arco project site (and reservation of some seed in case of poor survival/self reseeding). The mitigation requirement finalized in the applicant-prepared BELP only called for a 1:1 ratio (the EIR and the special condition did not set a ratio), and the number of plants to be mitigated was dependent on the number of plants *actually counted* in the year that grading commenced.

The applicant implemented seed collection in 1998 in anticipation of commencing construction shortly after obtaining final County approval that winter, and the issuance of the Coastal Development Permit from the Commission. The plants were grown successfully by Matilija Nursery, but when project approval was delayed, the applicant directed the destruction of the resultant propagated plants, and has repeated the cycle annually thereafter awaiting authorization to commence construction. The applicant explained to staff at the March 14, 2002 site visit that the plants grown by these means every year have been destroyed when each successive year since 1998 failed to yield construction authorization. Thus, genetic material from the donor populations has been lost instead of stored in the soil seedbank. [8]

Life History

Southern Tarplant is a summer-to-fall- flowering annual herb with spine-tipped leaves and abundant, small bright yellow flowers. The mature plant is of variable size, depending on the suitability of the environmental conditions present. Mature plants may range from a few inches in height to a diameter of approximately two feet (with a rounded overall form not unlike that of the tumbleweed). Southern Tarplant reaches its northern limit at the project site (Ellwood was formerly thought to be its northernmost range extension). It is also found in the Goleta Slough, on the UCSB Campus, and in very limited, localized distributions in other coastal southern California areas.

This annual plant's life cycle is one of lush germination after disturbance to a site, thick growth in the initial year or years, then failure of the plant to compete successfully with more aggressive colonizers. The successful initial years result in large seedset and the replenishment of the soil seedbank. At least some of the seeds of Southern Tarplant seem to remain viable for as long as decades, thus preserving the plant's genetic

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heritage and future growth potential through what amounts to a long period of relative dormancy once successional changes take over and send the plant back underground, literally, into the residual seedbank phase of its life cycle. When disturbance arises again, and competition is removed, the cycle repeats, perpetuating the Southern Tarplant.

According to staff report for the Bolsa Chica Coastal Program Land Use Plan Amendment No. 1-95/Implementing Actions Program, dated November 27, 2000, of only about 30 populations of Southern Tarplant known to remain in the Los Angeles Basin, most are small (less than 1,000 individuals) and at least 12 of those populations are threatened by development. At Bolsa Chica the population has fluctuated widely from year-to-year (consistent with observations at Arco Dos Pueblos). In 1991, no plants were found. In 1992, Southern Tarplant was again present and in 1993 around 545 individuals were observed. There were no detailed surveys until recently. In 1999 and 2000, consultants for Hearthside Homes conducted careful surveys of the entire Bolsa Chica Mesa. They counted 3,401 individuals in 1999, and 9,292 individuals in 2000.

- **Spatial and Temporal Patchiness is Normal for Southern Tarplant**

- **Soil Seedbank Importance**

Besides annual variations in number, the locations of the denser stands also varied considerably from year to year. These existing data indicate the extreme temporal and spatial patchiness in the distribution of this rare plant that must be considered in any protection plan. Fred M. Roberts, who was from 1991 to 1999 a botanist for U.S. Fish and Wildlife Service where he worked on rare plant issues, including issues related to Southern Tarplant, is quoted in the Bolsa Chica report explaining the significance of this variability as follows:

"This variability in response to climatic and other influences significantly increases a species' potential for surviving unfavorable times. Species may produce prodigious amount of seed one favorable year to weather a more typical 4-5 contiguous unfavorable years. Likewise, seeds with slightly different genetic codes will exploit slightly different germinating conditions. All this increases the vigor and potential of the species. The population that is in evidence one year may represent only a fraction of the total seed bank potential, both in number and in area. If conservation does not consider enough habitat for population dynamics, only a small fraction of the seed bank will be protected and this will significantly reduce the potential for species to survive hard times."

According to the Bolsa Chica report, there are only about five populations of Southern Tarplant in existence known to have over 8,000 individuals. Thus, the 1998 count in one location on the Arco Dos Pueblos site of over 4,500 individuals is clearly significant and indicative of the extent of soil seedbank reserves of tarplant genepool the 208-acre site harbors.

- **Range of micro-habitats, preservation of sufficient habitat**

The Bolsa Chica report emphasizes that simply preserving one portion of an area that had large numbers of individuals this year or any given year provides no assurance that the viability of the population will be maintained. It is important that the range of micro-habitats supporting the species be protected. It is also important to preserve sufficient habitat to insure that populations of pollinators are maintained. In the case of Southern Tarplant, pollination biology is unknown, however native bees are pollinators for rare saltmarsh species such as Saltmarsh Bird's Beak (Parsons, L.S. and J. B. Zedler, 1997, in Bolsa Chica report, *Factors affecting reestablishment of an endangered annual plant at a California salt marsh. Ecological Applications 7:253-267)* and Saltmarsh Goldfields (Ferren, Wayne, letter to staff ecologist John Dixon dated October 28 2000, in Bolsa Chica report, re: wetland edges, transitions, and upland habitats) making preservation of adequate habitat for pollinators doubly important.

LCP Policies and Provisions

Santa Barbara County's certified Local Coastal Program defines rare plant communities as Environmentally Sensitive Habitat by definition, without regard for mapping status.

LUP Policy 2-11: *All development, including agriculture, adjacent to areas designated on the land use plan or resource maps as environmentally sensitive habitat areas, shall be regulated to avoid adverse impacts on habitat resources. Regulatory measure include, but are not limited to, setbacks, buffer zones, grading controls, noise restrictions, maintenance of natural vegetation, and control of runoff.*

The LUP provides in Section 3.9.3. (Planning Issues) that "*Habitats are considered to be environmentally sensitive when they exhibit extreme vulnerability to disturbance or destruction from human activities. In Santa Barbara County, recreational uses, agricultural practices, and development pose the greatest threats to habitats because existing County regulations do not provide adequate protection.*

The LUP states on page 119: *While the (ESHA) designations reflected on the land use plan and resource maps represent the best available information, these designations are not definitive and may need modification in the future. The scale of the maps precludes complete accuracy in the mapping of habitat areas and in some cases, the precise location of habitat areas is not known. In addition, migration of species or discovery of new habitats would result in the need for designation of a new area. Therefore, the boundaries of the designations should be updated periodically in order to incorporate new data.*

In addition, the LUP states on page 120: *Most native plant communities are not designated on the land use plan and resource maps because they exist in so many locations throughout the coastal zone. Only major streams and wetlands are shown on the land use plan maps.*

The LUP further states on pages 119 and 120: Significant *habitat resources in the coastal zone which meet at least one of these criteria are designated on the land use plan maps. Environmentally sensitive habitat areas have been grouped into the following categories: (*dunes, wetlands, native grasslands, vernal pools, butterfly trees, marine mammal rookeries and hauling grounds, White-tailed Kite habitat, subtidal reefs, rocky points and intertidal areas, kelp beds, seabird nesting and roosting areas, **native plants**, streams) ... *Due to the limitations of mapping techniques and, in some cases, incomplete information on habitat areas, the following policies shall apply to development on parcels designated as a habitat area on the land use plan and/or resource maps and to development on parcels within 250 feet of a habitat area or projects affecting an environmentally sensitive habitat area.*

LUP Policy 9-1: *Prior to the issuance of a development permit, all projects on parcels shown on the land use plan and/or resource maps with a Habitat Area overlay designation or within 250 feet of such designation or projects affecting an environmentally sensitive habitat area shall be found to be in conformity with the applicable habitat protection policies of the land use plan. All development plans, grading plans, etc., shall show the precise location of the habitat(s) potentially affected by the proposed project. Projects which could adversely impact an environmentally sensitive habitat area may be subject to a site inspection by a qualified biologist to be selected jointly by the County and the applicant.*

Habitats found in the County and policies for protecting these habitats are listed below. These policies are in addition to existing State and Federal regulations which protect many species of plants and animals and their habitats.

Further, the LCP Coastal Zoning Ordinance provides that if newly documented environmentally sensitive habitat area, which is not included in the ESH Overlay District, is identified on a lot or lots during application review, then the provisions of Secs. 35-97.7. - 35-97.19. shall apply. (Sec. 35-97.3)

The Coastal Zoning Ordinance defines Environmentally Sensitive Habitat Area (ESHA) as: *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.*

Thus, the LCP clearly establishes that the Southern Tarplant populations located on site are defined as ESHA. This is particularly true in light of the plant's accurate sensitivity status in the California Native Plant Society (CNPS) Inventory of Rare and Endangered Plants of California, which identifies the Southern Tarplant as a List 1(B) species (the only rarer status, List 1(A), indicates species that are generally extinct).

Therefore, as Southern Tarplant populations are ESHA, and newly discovered on site (since the time of permit approval), the provisions of Coastal Zoning Ordinance (CZO) Secs. 35-97.7 and 35-97.18 apply:

CZO Sec. 35-97.7 Conditions on Coastal Development Permits in ESH

A coastal development permit may be issued subject to compliance with conditions set forth in the permit which are necessary to ensure protection of the habitat area(s). Such conditions may, among other matters, limit the size, kind, or character of the proposed work, require replacement of vegetation, establish required monitoring procedures and maintenance activity, stage the work over time, or require the alteration of the design of the development to ensure protection of the habitat. The conditions may also include deed restrictions and conversation and resource easements. Any regulation, except the permitted or conditionally permitted uses, of the base zone district may be altered in furtherance of the purpose of this overlay district by express condition in the permit.

CZO Sec. 35-97-18. Development Standards for Native Plant Community Habitats.

Examples of such native plant communities are: coastal sage scrub, chaparral, coastal bluff, closed cone pine forest, California native oak woodland (also individual oak trees), endangered and rare plant species as designated by the California Native Plant Society, and other plants of special interest such as endemics.

...(2) When sites are graded or developed, areas with significant amounts of native vegetation shall be preserved. All development shall be sited, designed, and constructed to minimize impacts of grading, paving, construction of roads or structures, runoff, and erosion on native vegetation. In particular, grading and paving shall not adversely affect root zone aeration and stability of native trees.

Construction and Operations Impacts

The project will grade and remove most areas of Southern Tarplant now identified on the subject site. In addition, the largest population of plants (discovered in 1998, as described above) is established in a former oil and gas development area of the site that has residual contaminated soils (this is true in a number of areas of the site). The applicant received a Coastal Development Permit from Santa Barbara County for a proposed remedial action plan (RAP), which is currently pending on appeal to the Commission and will be scheduled for a future hearing. The RAP calls for the excavation and offsite disposal of soils in the primary tarplant population area, with the attendant destruction of the soil seedbank. These issues (soil cleanup) will be addressed separately when the appeals are considered.

The previous sections have established that Southern Tarplant is considered a rare, threatened, or endangered California native plant. Under the County's LCP, as stated previously, the plant's status renders the habitat supporting it ESHA. Special provisions of the Coastal Zoning Ordinance set forth above apply to development that could affect an ESHA.

Separate sections of this report discuss the adverse impacts upon the sensitive habitat and resources of the Eagle Canyon area that would be caused by the construction (and operation) of the Executive Par-3 Course, the 9 hole course at the eastern end of the site (Water quality impacts to Eagle Canyon Creek, California Red-Legged Frog, Tidewater Goby, and the impacts of constructing and operating the Par-3 course on the eucalyptus groves hosting fall and winter aggregations of Monarch butterflies). The Commission's findings in those sections required the imposition of Special Condition 3 (Revised Plans) to ensure that the unavoidable, significant adverse effects Par-3 Course construction would have on these environmentally sensitive habitats and species would be avoided. Revisions to the project layout are also required to protect the area where the largest populations of Tarplant have occurred on the site, which would otherwise be destroyed by the proposed parking lot and portions of the Par 3 Course. In addition, the section of the findings that addresses White-tailed Kite ESHA requires imposition of the condition for revised plans to buffer an area around an established nesting site. That area generally incorporates the second significant tarplant population, which is in approximately the same location documented in the 1993 EIR - in the proposed 18th Fairway. The third population is located on the western margins of Tomate Canyon, and minor adjustments to the project footprint appear sufficient to protect that population. By conserving primary populations in three areas of the site, better mitigation will result through capture of a wider array of microhabitats, populations will be more widely distributed for native pollinators (especially important because Southern Tarplant pollination is not well understood) and backup seed sources in the event of a population crash in one or more of the sites will exist.

As noted previously, Southern Tarplant numbers may fluctuate significantly in time and space, and the primary location of the plant's genetic material is in the soil seedbank that awaits future opportunities for growth, maturity, and new seed set. Thus it is useful to think about mitigation for impacts to the Southern Tarplant in terms of overall site impacts (grading and development) that will destroy the seedbank and development impacts related to the management of the site (landscaping, for example) and surface treatment thereafter that would inhibit Southern Tarplant germination and even if germination occurred, would impair the ability of the seedlings to mature and set new seed (germination in an area of managed turf would be an example). Thus the proposed grading of virtually all of the terraced areas where most tarplant is found on the site can be expected to eliminate both the plants and the plants' seedbank (future genebank), throughout the majority of the site.

John Storrer, County monitor for the Arco site and an experienced field biologist who has prepared environmental analyses of Southern Tarplant locations, writes in a report on the subject site's primary population that Southern Tarplant mitigation may be most usefully thought of in spatial terms.

To preserve healthy Tarplant populations on site over the long term, it is necessary to set aside the areas where Tarplants have previously been present, along with a buffer that will prevent disturbance of plants that are growing and will also preserve sufficient

seedbank to maintain the population. This can be accomplished by preserving the population in the area currently proposed for the Par-3 Course.

In addition, a Tarplant recovery plan is necessary to provide mitigation of tarplant populations and seedbank resources that will be permanently lost through soil remediation and grading for the golf course elsewhere throughout the site.

If the Commission had approved the proposed project with special conditions, a condition that requires the preparation of a Tarplant Area Restoration Plan (TARP) to provide for adequate mitigation of adverse impacts to Southern Tarplant and for the management of the tarplant conservation areas would have been required. The plan would have required preservation of tarplant ESHA, with mitigation of the loss of outlier populations only where such loss was minor compared to the preserved populations and otherwise unavoidable. It is not clear that there are any areas where the loss of southern tarplant on the subject site is necessarily unavoidable for revised plans to redesign the project footprint would likely protect most if not all of the southern tarplant populations on site.

In addition, the conceptual special conditions would have required the applicant's present Biological Enhancement Landscape Plan (BELP) to delete the use of herbicides in the tarplant mitigation areas. Because revised plans would have required the elimination of the Par 3 course, as discussed elsewhere herein, many of these concerns would have been addressed by that change. The chemical management methods described in the BELP are inconsistent with the requirements set forth in the applicable special conditions for protection and buffering of water quality in Eagle Canyon, and the protection of sensitive species (including Monarch butterfly aggregates that could be adversely affected by chemical management within the former Par-3 course area).

As discussed in detail elsewhere within this report, the applicant's Agricultural Turf Management & Integrated Pest Management Plan as submitted relies heavily on chemical management of the Par 3 Course that will be set aside as a tarplant restoration site and a buffer for the sensitive species and habitats in and adjacent to Eagle Canyon. The applicants have indicated that they may be rethinking chemical management on the site, but have not deleted any of the proposed chemical use authorizations contained in these management plans to date. Revised plans would also have required adjustments to the clubhouse parking footprint to avoid the primary population of the tarplant. Therefore, although there may have been ways to mitigate or avoid certain impacts to southern tarplant that could have been implemented through special conditions, particularly conditions for revised plans that emphasize avoiding tarplant populations, the project is inconsistent with the policies and provisions of the County's LCP for reasons set forth elsewhere in these findings and is therefore denied.

3.5 White-Tailed Kite

The white-tailed kites (*Elanus leucurus*) (formerly known as black-shouldered hawks or kites) are designated by Fish and Game Code section 3511 as a fully protected species and as such they cannot be taken at any time by permit or otherwise except for scientific research or to protect livestock. The U.S. Fish and Wildlife Service considers the species as a Migratory Nongame Bird of Management Concern. Such species are considered to be of concern in the United States because of documented or apparent population declines, small or restricted populations, or dependence on restricted, vulnerable, or declining habitats.

The mature white-tailed kite is a medium-sized, graceful, long-winged hawk. The kite hover-hunts, with wings held high and beating vigorously. When the white-tailed kite dives to take prey, the wings are lifted and the kite appears to float down.[9]

The adult white-tailed kite is approximately 14.5 inches long, with a wingspan of 40 inches. The sexes look similar, with white head, chin, throat, chest, belly and underwing coverts. The bird has a white underwing with primary feathers darkening at the ends, a white tail, and a pale gray back and upperwing with flight feathers darkening towards outer wing. Gulls and terns look similar in coloration but lack black shoulder and have a different bill shape.

Juvenile white-tailed kites have a brown head, nape and back and a white face, with brown streaks on white breast, dark upperwing with pale tips to the coverts and a dark band at tip of white tail.

The white-tailed kite primarily preys on diurnally (daytime) active small rodents, with peak foraging in the morning hours. The meadow vole provides the principal component of the white-tailed kite diet. Kites are not known to prey significantly on gophers according to the UCSB Museum of Systematics and Ecology. This may be due to the relatively small size of white-tailed kites compared to most other raptors - gophers are bigger than voles and more difficult for kites to carry, and gophers remain underground, feeding on plant roots, more than voles. Voles feed on seeds and small insects gathered above ground and are thus more readily obtainable prey for the white-tailed kites. Therefore, a critical component of the white-tailed kite's habitat is an adequate supply of voles, and thus the habitat that the voles themselves require for existence.

White-tailed kite nest-building occurs January through August, with pair bonding and initial tree selection in the earliest phase, followed by nest construction. Egg laying begins in February and probably peaks in March and April, though this species can double clutch and very occasionally even triple clutch. A single nest may have from 2 to 6 eggs. Peak fledging typically occurs in May and June with most fledging complete by October.

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[9]Where not otherwise attributed, the general background information concerning white-tailed kites is from literature and online sources of the CDFG and the U.S. Geological Survey (USGS), and from the archival records of Santa Barbara County.

White-tailed kites have been observed to nest in a variety of native and non-native trees, including live oaks, Monterey pines, cypress, and Eucalyptus. The nests are generally 20 to 50 feet or so from the ground and somewhat cryptic. Groups of trees are much preferred over isolated trees. The surrounding trees not only place the nests out of direct view, but also provide perching opportunities for courtship and sentinel activities.

Although white-tailed kites range widely for prey, during nesting, adequate prey must be present close enough to the nest to supply not only sufficient food to raise their chicks, but also to allow the parents to remain nearby to guard the nest against predators--which include crows and other raptors.

Kite nests are constructed simply and sparsely of loosely arranged sticks and twigs. The strength of the nest depends primarily on the stability of the tree and branches holding the nest. Santa Barbara County records indicate that white-tailed kite nests constructed in eucalyptus trees have failed during summer windstorms, destroying nests located in the trees. Eucalyptus trees, which may satisfy some nest selection requirements for the kites, especially where more suitable alternative trees do not exist, often have relatively flimsy, breakable, and easily-moved branches that sway in high winds and thus render eucalyptus trees riskier for successful nesting. At the subject site, as discussed below, there is an abundance of potential eucalyptus trees for the white-tailed kites to choose from, yet they seem to select the mature cypress and Monterey pine trees on site in preference to eucalyptus trees. Dr. Dixon notes that of the approximately 985 trees present on site, some 326 are planned for removal, including 12 of the 15 trees used for nesting and related activities by white-tailed kites in 2002.

During the fall and winter, the birds have been known to roost communally in the Goleta Valley area of Santa Barbara County, although evidence recorded by UCSB researchers affiliated with the University's Museum of Systematics and Ecology shows that habitat fragmentation associated with increased urbanization and development has shifted kite roosting and nesting behavior and locations. Kites have been locally extirpated in some locations. No winter roosting surveys have been performed, although the applicants consultants observed foraging white-tailed kites during a January 1999 survey for California red-legged frogs on the subject site (SAIC, Thompson, 1999).

The Environmental Impact Report prepared for the Ellwood Beach- Santa Barbara Shores Specific Plan Area in 1992 noted that at that time the number of kites along the south coast area of the county had been consistently low during the previous five years relative to the mid-1970s. During the 1970s the population of the kite rebounded from near-extinction in the 1930s, reaching a high of 98 birds and a low of 23 birds, with a mean of 42 birds, in the annual Santa Barbara County Christmas Bird Counts sponsored by the Audubon Society between 1973 to1983. In the years from 1984 to 1988, 29, 21, 21, 18, and 18 kites were counted. UCSB research records indicate that

kites subsequently "evacuated" from the Goleta Valley during a prolonged drought (equated with low prey) and no kites resided in the Goleta Valley between 1989 and 1991.
Mark Holmgren, Curator of the Vertebrate Collection, UCSB Museum of Systematics and Ecology,[10] notes that kites are a mobile species, and while generally not migratory, may become nomadic and abandon a foraging or nesting area due to depletion of prey resources or in response to disturbance (Holmgren and Ball, June 6, 2002).

Data collected by UCSB indicates that approximately 30 to 35 individual kites, total, occupied the south coast area of the County in 2002, with an estimate of 6 occupied territories south of highway 101 and 6 or 7 occupied territories north of the highway.

The UCSB biologists estimate that the new information described below documenting the use of the ARCO Dos Pueblos site by at least two pairs of nesting white-tailed kites renders the site as perhaps the most important site for kites between Goleta and Gaviota, and is potentially as important as Ellwood Mesa and More Mesa as measured by the number of breeding pairs. (Holmgren and Ball, June 6, 2002).

Changed Circumstances

The Commission's present review of the proposed project is limited to full review of the project based on changed circumstances in the biological and physical environment of the subject site, or to new or revised development proposed (amendments), since the Commission approved the project in 1994. With regard to the white-tailed kite, changed circumstances exist because the fully protected species, previously not observed on the project site at the time of Commission approval of former CDP A-4-STB-93-154, has been documented nesting on the site and foraging there throughout the year.

Field studies of the site between 1999 and the present have documented that at least two pairs of white-tailed kites have been nesting on the site. Nesting by white-tailed kites had never been documented on the site at the time of the Commission's 1994 approval of the former permit for the presently proposed project. As discussed below, the presence of nesting pairs of white-tailed kites on the subject site is therefore evaluated herein as a changed circumstance.

Information about the White-tailed Kite at Time of Permit Approval

In the late 1800s, the White-tailed Kite was considered a relatively common raptor in Southern California; by the late 1920s, however, only ten pairs were known in Santa Barbara County area, and by the 1940s, the Kite was on the verge of extinction. Over the next 40 years the Kite population increased somewhat, but fluctuated significantly, reaching a peak in the mid-1970s and then declining to 797 (statewide count) in 1978 - four years before the Santa Barbara County LCP was certified. (Source: "A Biological

[10] The Museum's data includes research on white-tailed kites in the Goleta Valley and the south coast of Santa Barbara County dating back to the mid-1960s.

Evaluation of More Mesa" completed by a team of biologists at UCSB and published August 31, 1982.) The Kite population in southern coastal Santa Barbara County fell from a high of 110 birds in 1975 to zero sighted in 1991 and 1992. 20 Kites were counted during the 1993/94 Audubon Christmas Bird Count, January 1, 1994. There is no evidence in the administrative record that any of these Kites were counted on the Arco Dos Pueblos project site.

At the time the applicant's original application was prepared and submitted to Santa Barbara County, the documents submitted by the applicant indicted that the White-tailed Kite had not been detected on the subject site. No additional information was presented to supplement these documents prior to the Commission's approval in 1994.

The applicant submitted a Biological Resources Analysis, dated June 28, 1991 (Revised October 15, 1991) prepared by Interface Planning and Counseling Corporation (Section IX of the application) that documented that the White-tailed Kite (also referred to as the Black-Shouldered Hawk or Kite) was not known to be present on the site. This report was subsequently incorporated into the FEIR, and the Interface Planning and Counseling Corporation staff provided extensive comments on the FEIR (and upon the Commission staff's subsequent staff reports for the Commission's consideration). Interface staff commented on the draft EIR (published in the Appendices to the FEIR, at page 6 of the comment letter supplied by Jacqueline Bowland, Senior Biologist, Interface Planning and Counseling Corporation, dated January 20, 1993:

" ... (43) ...Page 5.1-17: The text should include a general discussion of raptors that could occur on the site, given the protected status of these birds. During surveys conducted by Interface, few raptors were seen. These included soaring red-tail hawks, turkey vultures, and kestrals. ***No roosts or nests were identified on the project site.***" (Administrative record page 000829, emphasis added)

Ms. Bowland's comments continue, offering an explanation for the absence of any significant raptor use of the site:

"... Discussions with Paul Collins of the Santa Barbara Museum of Natural History of the habitat quality of this site indicates a possible lack of sufficient prey base for raptors in the project vicinity, as a result of ongoing cattle grazing and other agricultural land uses." (as above)

Staff has reviewed the administrative record for the original permit proceedings, which is comprised of over 5260 pages in 31 volumes. This staff review disclosed only one document (other than the above referenced application) in which the White-tailed Kite was expressly referenced. The document in the record for the original permit proceedings where the potential issue of the White-tailed Kite was discussed was in the "Final Environmental Impact Report for the Arco Dos Pueblos Golf Links Project, 92-FEIR-16" (FEIR) dated March 1993 (Administrative Record, 000280 et seq.).

The FEIR, prepared for the County of Santa Barbara's Resource Management Department, discussed and considered impacts to Biological Resources in section 5.1, commencing on pg. 5.1-1. In that section, raptors are mentioned generally on page 5.1-9 but the White-tailed Kite is not mentioned specifically:

"... Thirty sensitive bird species potentially could utilize one or more of the habitats on the project site. Most of these sensitive species are raptors and riparian habitat species that have become increasingly rare due to cumulative loss of habitats. The grasslands onsite provide some foraging habitat for raptors (owls, hawks, vultures, eagles), and the large trees (eucalyptus, tamarisk, etc.) provide perching and/or nighttime roosting sites. Raptors expected to frequent the site include turkey vulture (Cathartes aura), great horned owl (Bubo virginianus), barn owl (Tyto alba) red-tailed hawk (Buteo jamaicensis) and American kestrel (Falco sparverius).

The White-tailed Kite is notably absent from this list. In addition, nesting, by any raptor, is not mentioned in this section on the environmental setting of the project. Administrative record page 000364).

Commencing on page 5.1-16, the FEIR addresses sensitive fauna indicated on site based on springtime surveys, observations, species records for the Santa Barbara area. The White-tailed Kite is not identified as a sensitive species found on the site, although the section references Table 5.1-2 (which is only found in the Appendix to the FEIR) as providing *"a list of these sensitive species with their legal status."* The White-tailed Kite is listed among other birds in the referenced Table 5.1-2, however the table states that the Kite is only potentially present, and has not been observed on site.[11]

Thus all biological surveys, the final EIR, the comments on the EIR (including those of the applicant's consultants), and the record of decision underlying the CUP and CDP A-4-STB-93-154, performed and documented prior to the Commission's consideration of the coastal development permit, was negative for the presence of the White-tailed Kite.

Although the FEIR speculates that White-tailed Kites might potentially use the site, it does not analyze the impacts of the proposed project on White-tailed Kites nesting on the site. The FEIR stops short of considering any meaningful impact analysis concerning the potential effects of the proposed project specifically upon the White-tailed Kite--lacking in particular any consideration of the applicable policy requirements concerning Kite habitat set forth in the certified LCP, or providing any specific mitigation

[11] The FEIR section on "Sensitive Taxa - Fauna" (FEIR pg. 5.1-16, 000371) states that Table 5.1-2 (Appendices) provides a list of all sensitive animals expected to use the project site as residents, breeders, foragers, or migrants. The actual list is produced in Appendix 5.1-2 (001042), titled "Wildlife Taxa of the Project Area." White-tailed Kites are on this list, which is virtually the "kitchen sink" of species that might be present on the site, but not a list of species actually documented to be present. The Appendix species list shows that White-tailed Kites were *not* observed during any of the surveys upon which the FEIR was based.

measures to preserve nesting trees, provide buffers from disturbance for nesting trees, or address foraging habitat necessary to ensure nesting success.

Although the FEIR speculates that White-tailed Kites "may abandon the area", it also states that Kites had never been observed utilizing the site. The EIR states: "...It is expected that raptor populations in the project area would decline as a result of the reduction in foraging habitat and perch sites, and several species such as the black shouldered kite and red-shouldered hawk may abandon the area." (EIR, page 5.1-36). Furthermore, the FEIR sensitive species list indicates that White-tailed Kites might potentially use the site, but it does not specifically identify any potential for nesting by Kites at the site. Rather, the record reflects that White-tailed Kites were not nesting at the site in the early 1990s, or at the time of the County and Commission actions to approve the proposed project. Therefore, the current documented White-tailed Kite nesting on the site is a changed circumstance.

Recent White-tailed Kite Use of the Proposed Project Site

Two pairs of white-tailed kites nested on the site of the applicants' proposed development in the spring of 2002, during a raptor survey of the site undertaken by the applicants, and one nest produced 5 fledglings before the survey was terminated on May 30, 2002. Thus, it is now known that the species occurs as a year-round resident breeder at the Dos Pueblos site, and evidence of this has been documented by a variety of other qualified observers, including biologists from four consulting firms reporting for the applicants, County staff and environmental condition compliance monitors, UCSB biologists, and the Commission's staff ecologists.

At the time of the Commission's last hearing on the proposed project (June 10, 2002) the applicants consulting biologists (Pacific Southwest Biological Services) had just terminated a survey of white-tailed kite nesting on the subject site, after establishing conclusively that two pairs of white-tailed kites were successfully nesting on the site at the study's end. The westernmost of the two pairs fledged five nestlings and the outcome of the easternmost pair, still incubating eggs when the study ended, is unknown (no further observations were conducted).

Field biologists under contract with the applicants recorded incidental observations of white-tailed kites utilizing the site as early as January 1999, while surveying for the California red-legged frog (no previous surveys for raptors had been undertaken on the site to the knowledge of staff since the surveys prepared in 1991 and 1992 for the associated environmental impact report). The County's environmental compliance monitor, John Storrer (Storrer Environmental Services) recorded evidence of nesting on the site by a pair of kites in March of 2000 while undertaking routine condition compliance monitoring of ARCO activities. The Commission staff, including a staff ecologist, observed foraging kites on the site in September 2001, and on November 4, 2002. Subsequent to the September 2001 observations, the senior biologist for the applicants' consultant, Dudek and Associates, documented four adult kites perching and foraging on the site later the same month. Subsequently, in May of 2002, four

qualified observers (the applicants' consultant--Michael Evans of Pacific Southwest Biological Services, the County's environmental compliance monitor--John Storrer, and Mark Holmgren and Morgan Ball--from the UCSB Museum of Systematics and Ecology), confirmed nesting by two pairs of kites on the subject property. One nest produced five fledglings before the applicants terminated the on-site survey. A second pair of white-tailed kites was still actively brooding eggs when the survey was terminated but the outcome of the second nest was not documented.

The applicants submitted a report to the Commission dated June 7, 2002, titled "Dos Pueblos Golf Links White-Tailed Kite Nesting Survey" prepared by Pacific Southwest Biological Services, Inc. (PSBS) documenting the results of the raptor nesting survey that had commenced the previous month. The survey protocol is attached. The survey was undertaken on five of the six required days, one week apart, between May 9, 2002 and May 30, 2002.

The survey determined that the kites were nesting in Tree #127 (numbering conventions for trees arise from number assignments established in the applicants' tree inventory plan; most trees discussed herein can be identified by their tree number on Exhibit 1A and in other attached documents, including the tree inventory) and Tree #67, both planned for removal under the applicants previous proposal. The PSBS report stated that these removals would not impact the white-tailed kites and that kites are not known to require the same nest site for subsequent nesting. A previous report prepared by Dr. Julie Vanderwier, Senior Biologist, Dudek & Associates, Inc., at the applicants' request, titled "Raptor Survey for Dos Pueblos Golf Links," dated November 26, 2001, confirmed the presence of four adult white tailed kites on the subject site during the September 20, 21, 2002 survey. Dr. Vanderwier did not undertake her survey during nesting season and therefore could not confirm active nests, but a map and field notes from her survey submitted at the request of staff the following spring contained notations about old nest site locations on the subject site.

PSBS biologists noted repeated use by white-tailed kites of specific clusters of trees for perching and as sentinel lookouts for nest protection, in support of the active nest sites. The numbers for these trees are documented in the respective reports (all reports associated with the white-tailed kite observations on site are attached)

A third consulting firm retained by the applicants concerning the white-tailed kites on site produced additional analyses and recommendations addressed below. Dr. Jeffrey Froke indicated in pertinent part (report dated October 10, 2002) in his report with regard to kite nesting selection, that:

> "...kites try something new each year, and should be offered attractive options..."

Dr. Froke prepared a report dated October 10, 2002 providing recommendations for landscape design and management practices that he believes will provide alternative nesting locations and enhanced prey populations to mitigate impacts associated with the applicant's proposed project. Dr. Froke's proposal does not redesign the course to

avoid the nesting and other trees identified as significantly used trees by Dr. Dixon, as discussed below. Thus, Dr. Froke's recommendations acknowledge the removal of the presently documented white-tailed kite nesting and associated trees, which are considered environmentally sensitive habitat areas, both under the Coastal Act and the County's certified Local Coastal Program, as discussed below.

Commission staff senior ecologist John Dixon, Ph.D., has evaluated Dr. Froke's recommendations in a memorandum report dated November 19, 2002 (hereinafter "report"—See Exhibits 1A and 13), and finds that the data collected to date demonstrate the use of the site by white-tailed kites for at least 4 years and, hence, probable use in the future if conditions remain the same. One or two nesting pairs are significant numbers at the local or county level, as verified by UCSB biologists with access to accumulated white-tailed kite population data collected in Santa Barbara County since the 1960s. Dr. Dixon concludes that it is important to try to maintain the reproductive output represented by these birds.

The Commission staff ecologist's report states that the proposed project places the reproduction of one or two pairs of kites at risk because it could potentially result in human disturbance that causes kites to avoid the foraging and nesting habitat that would remain at the site and the loss of 200 acres of foraging habitat and of many of the trees that have been, or potentially could be, utilized for nesting and perching by kites. In this regard, the report recounts the opinion of noted raptor experts that displaced raptors cannot simply move "somewhere else." Though this argument is often made, raptor experts consulted by staff point out that it is unlikely that displaced raptors will find new nesting or foraging territory that is not already being exploited by other competitors that are already established at the supposed "somewhere else." Thus, loss of raptor habitat inevitably equates with loss of the raptors that depend on the habitat.

Dr. Froke's proposes to develop nesting opportunities elsewhere on the subject site by means of certain landscaping and management treatments. Dr. Froke believes these measures will allow rodent prey populations to increase for the kites' benefit, thereby offsetting, in his estimate, the loss of nesting habitat and foraging that will inevitably result from the construction and operation of the golf course facilities as presently proposed. Dr. Froke would supplement tree plantings, and move mature trees to new areas (although such transplantings of mature specimen trees are often unsuccessful). Dr. Froke states that even if the trees are likely to die, they will become snags.

Snags offer raptor perches, but not raptor nesting sites for snags are too exposed to disturbance, the elements, and predation. In the case of the white-tailed kite, snags additionally lack the architectural elements of the fuller-canopied trees that typically cradle the simply constructed twig and stick nest the kite constructs.

There are at least three important considerations that must be taken into account by any plan to maintain the kites on site: 1) Provision of suitable nesting and perching habitat; 2) Protection from excessive disturbance, especially around the nesting habitat;

and 3) Provision of an adequate foraging base. In the 2002 nesting survey (Evans, 2002), it is stated that, "...suitable nesting trees, nearby perching trees, and foraging areas, both around the nest site and farther away are all key elements in the local survival of a pair of Kites." Dr. Froke addresses these issues and makes recommendations for a golf course management plan intended to provide the necessary resources.

For successful nesting to take place, suitable nesting trees must be present within the vicinity (from the kites' point of view) of adequate foraging areas. Based on a tree inventory prepared by Interface Planning and Counseling, there are about 985 trees on site, of which some 326 are planned to be removed, including 12 of the 15 trees used for nesting and related activities in 2002. Dr. Dixon states that most of the remaining trees probably are suitably close to foraging grounds and will continue to be so situated if Dr. Frokes' recommendations for native vegetation and rodent friendly management practices are followed and successful. However, there apparently has been no analysis as to the proportion of remaining trees that will be suitable for nesting (i.e., trees with appropriate height and configuration that are in appropriate clusters and adequately buffered from disturbance) after the development. As noted above, Dr. Froke recommends creating a number of nesting groves utilizing some existing trees and in some areas augmenting them by transplanting some adult trees and deeply planting others that would probably die but would act as snags, which might be used for perching but probably not for nesting. New trees would also be planted to maintain a suitable grove in the future.

The Commission ecologist's report also notes that it is important that nesting and foraging kites be protected from excessive disturbance. Nesting behavior, especially in the early stages, is most susceptible to disturbance. Experienced raptor biologists recommend anywhere from about 50 meters to 100 meters or more (100 meters equals approximately 300 feet), depending on the types of disturbance expected and on the individual biologist's personal experiences. Dr. Froke states that, "Nesting birds can be expected to tolerate low-frequency and non-disruptive activities to within 150 to 200 feet of their nest tree (better small grove)." Dr. Dixon states that at the applicants' Dos Pueblos site he recommends that 200-ft (61 meter) buffers be established around any existing nesting tree ESHA and any groves created and maintained as potential nesting sites as part of the golf course plan.

The Commission staff ecologists' report notes that there is also concern that golfing activities might disrupt foraging behavior and that kites might not utilize foraging habitat (existing or newly created) that is sandwiched between fairways (post construction). Dr. Froke presents evidence (observed also by Commission staff accompanying Dr. Froke during meetings at golf courses in Monterey County in October 2002) that white-tailed kites forage effectively in such areas on golf courses in the Monterey. According to Dr. evidence collected by Dr. Dixon for his report, white-tailed kites that forage or nest in close proximity to people tend to either have a genetic predisposition for tolerating the level of disturbance on golf courses or have habituated to golfing activities. He believes

that it is speculative whether kites would tolerate the amount of human activity that would result from the proposed golf course at this site.

Dr. Froke's proposal describes the proposed project as a "high end, low-round" course, which he defines as plus-or-minus 20,000 rounds per year. However, the proposed project description has always stated that the Dos Pueblos Champion Links Style 18-hole Golf Course would serve between 50,000 to 60,000 round of golf per year, open 350 to 360 days per year, and that the smaller Par 3 Executive Golf Course by Eagle Canyon, on the eastern end of the site would serve 20,000 rounds per year.

Dr. Froke may have misunderstood the proposed intensity of the 18-hole course as that actually associated with the intensity of use proposed for the 9-hole course alone. Thus, Dr. Froke's estimate that the 18-hole course, which affects the white-tailed kite habitat directly, will run 20,000 rounds per year, underestimates the intensity of that portion of the project by as much as 2/3 of the actual intensity of golf rounds the applicant proposes to provide on the 18 hole course. This means that the number of golf carts that would pass by a given point per hour (by a nesting tree, for example, as is presently proposed) would actually be three times greater than Dr. Froke has considered. In addition, the most sensitive season for the white tailed kite occurs during the February through August nesting season, which coincides with peak public use seasons for the golf course as well (there will not be an even distribution of golfers-per-hour on the course over the 350 to 360 operating days).

Dr. Dixon states that it is difficult to generalize from Dr. Froke's observations of the behavior of two pairs of kites, which were observed in Monterey, and notes that this adds to the uncertainty of maintaining kites at the site in the face of the planned development.

During staff observations on the Arco Dos Pueblos site in September 2001 and November 2002, the adult kites observed perching or foraging on the Dos Pueblos site maintained great distance from approaching humans, and flew when their perching trees were approached by the walking group of site visitors when the group was an estimated 200 feet or greater from the tree of concern. No kites foraged within 500 feet of the site visitors on either of the two referenced site visits noted.

Dr. Froke's proposal to encourage rodents through planting and maintenance treatments of roughs and out-of-bounds areas on the golf course is considered in Dr. Dixon's report. Raptor experts, and the literature on the subject consulted by staff note that kites in the Santa Barbara County area are vole specialists and that no data have been presented to demonstrate the degree to which restored native grasslands will support that species. The establishment of native vegetation may have a high probability of success, but the pattern of rodent proliferation that would follow is not well known, and only increases in voles would be helpful to the kites, according to the Commission staff ecologist's review of Dr. Froke's proposal.

Dr. Froke's recommendations also restrict the use of rodent bait poisons, recommending trapping, to be followed with fumigation methods of killing rodents if the golf course superintendent insists that such application is necessary to protect the greens and fairways from rodent damage. It appears that there is a potential for the implementation of serious efforts to increase rodents on the site, pursuant to Dr. Froke's objectives, to conflict with other objectives that would be typical for a golf course manager maintaining a championship level course. Thus, where Dr. Froke's recommendations state that certain actions (i.e., fumigation for rodents, application of various chemical management measures to maintain golf course playing quality) only be taken in a "bona fide emergency" to be determined by the golf course superintendent raises the concern that even well intended recommendations would be implemented by personnel charged with other priorities than fostering maximum potential rodent populations on the golf course property.

Dr. Dixon concludes that while Dr. Froke's proposals are worthy, and could produce benefits for white-tailed kites, the proposals are also speculative and untried and lack proof of performance. No published studies have been presented to support the theories underpinning Dr. Froke's proposals. In sum, Dr. Froke's plans are essentially experimental proposals and there is no ability to ensure that the experiments will succeed before the impacts upon the white-tailed kites would be felt by implementation of the proposed project. Thus, even with the implementation of Dr. Froke's full range of recommendations, white-tailed kites could still be driven away from the site, and potentially would not sustainably return.

Dr. Dixon additionally evaluated the documented patterns of use of the site by white-tailed kites to determine what portion of the site constitutes Environmentally Sensitive Habitat Area (ESHA) under the Coastal Act. Section 30107.5 of the Coastal Act defines ESHA:

> **"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.**

The County's certified LCP incorporates the definition set forth in Section 30107.5 as the guiding definition of ESHA in the LCP, as well. (certified Coastal Land Use Plan, at page 116). The LCP further states at LUP page 117 that:

> **"Habitats are considered to be environmentally sensitive when they exhibit extreme vulnerability to disturbance or destruction from human activities."**

The certified Coastal Zoning Ordinance (LCP Implementation Plan) specifically defines ESHA exactly as ESHA is defined in the Coastal Act, in the definitions section of the CZO on page 21:

> **"<u>ENVIRONMENTALLY SENSITIVE HABITAT AREA:</u> 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."

In addition, the certified LUP lists white-tailed kite habitat as a specific form of ESHA (at pages 119 and 120), and further states that provisions in the LCP that are protective of ESHAs are in addition to existing State and Federal regulations which protect many species of plants and animals and their habitats. Further, the County's certified Coastal Zoning Ordinance states that certain kinds of protected species and habitats warrant ESHA designation and protection wherever they are found (CZO at page 175):

Sec. 35-97.1. ESH Purpose and Intent. Within the County of Santa Barbara there are areas which contain unique natural resources and/or endangered species of animal or plant life and existing and potential development may have the impact of despoiling or eliminating these resources. The purpose of this overlay district is to protect and preserve areas in which plant or animal life or their habitats are either rare or especially valuable because of their role in the ecosystem and which could be easily disturbed or degraded by human activities and developments. The intent of this overlay district is to ensure that all development in such areas is designed and carried out in a manner that will provide maximum protection to sensitive habitat areas.

Sec. 35-97.3. Identification of Newly Documented Sensitive Habitat Areas. If a newly documented environmentally sensitive habitat area, which is not included in the ESH Overlay District, is identified by the County on a lot or lots during application review, the provisions of Secs. 35-97.7 – 35.97.19 shall apply.

The CZO further states that certain findings must be made if a proposed project that may affect ESHA is to be approved. These findings include the requirement that development that may affect white-tailed kite habitats be consistent with the following requirements. If the project cannot be found consistent with these requirements, it must be denied or given the minimum use consistent with the applicable development rights associated with the applicable land use designation and zoning standards. For the white-tailed kite, these requirements are set forth in Section 35-97.14:

Coastal Zoning Ordinance Section 35-97.14. Development Standards for White-Tailed Kite Habitats

1. There shall be no development including agricultural development, i.e., structures, roads, within the area used for roosting and nesting.
2. Recreational use of the roosting and nesting area shall be minimal, i.e., walking, bird watching. Protective measures for this area should include fencing and posting so as to restrict, but not exclude, use by people.
3. Any development around the nesting and roosting area shall be set back sufficiently far as to minimize impacts on the habitat area.

4. In addition to preserving the ravine plant communities on More Mesa for nesting and roosting sites, the maximum feasible area shall be retained in grassland to provide feeding area for the kites

Therefore, considering the ESHA associated with the use of the subject site by white-tailed kites, Dr. Dixon states (Exhibits 1A, 13):

"You have asked me to address the issue of ESHA on the site in the context of white-tailed kites. Section 30107.5 of the Coastal Act includes as ESHA those habitats which are especially valuable because of their role in the ecosystem. At Dos Pueblos, trees that are used for nesting activities by white-tailed kites, a California Fully Protected Species, clearly meet this part of the definition because suitable nesting trees and nearby perching trees are a necessary prerequisite for the successful reproduction of this sensitive species on the site. In other similar cases, the Commission has designated as ESHA trees that provide important habitat to individual birds of sensitive species; for example, a discrete grove of Eucalyptus trees used for nesting, perching, and roosting by several species of raptors at Bolsa Chica was designated ESHA. In addition, Section 35-97.14 of the Local Coastal Plan protects white-tailed kite roosting and nesting areas."

"Although there is no question that the some of the trees at Dos Pueblos provide an ecological service to white-tailed kites that qualify them as ESHA, identifying the ESHA footprint at the Dos Pueblos site is difficult for several reasons. First, trees potentially suitable for nesting and perching are scattered over much of the site and do not form discrete clumps or groves distant from other suitable tree habitat. Second, white-tailed kites often, perhaps typically, do not return to the same tree to nest each year. For example, Holmgren and Ball[12] found that the distances between successive nests in the Goleta Slough area varied from around 33 m to nearly 400m. On the other hand, kites have been observed to use the same tree in three successive years at the U. C. Santa Barbara campus[13]. Whether kites return to the same or different trees may be a function of the relative availability of suitable nesting trees at a given site. At Dos Pueblos, based on the kites' usual behavioral pattern, it appears probable that the exact trees that were used for nesting in 2002 will not be used in 2003. Some other trees, perhaps close by - perhaps distant, are more likely candidates. Finally, we have no knowledge of which trees or groups of trees have been most used historically. Designating all trees as ESHA would protect the important habitat with certainty, however it is difficult to justify in the case of particular trees for which there is no history of use. An alternative with a strong empirical rationale is to protect all trees with a history of use and adjacent trees. The adjacent trees are important because they are potential nest trees, they provide perches for critical activities related to courtship and nest protection, and they define a grove of trees, a configuration that is generally necessary to provide a suitable nest site."

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[12] M.A. Holmgren & M. Ball. Distances between kite nests within and between seasons at a long-term territory. Data and maps submitted to the CCC on June 6, 2002.
[13] M. A. Holmgren, personal communication to J. Dixon November 8, 2002.

"In my opinion, it is appropriate to designate as ESHA all trees that fall within the smallest radius circles, centered on each documented 2002 nest tree, that contain all the immediately adjacent trees for which important use was documented. In addition, designate as ESHA all trees with white-tailed kite nests from previous years and those adjacent trees within the average radius observed in 2002. Finally designate as ESHA each of the more distant trees for which important use was documented in the 2002 nesting season. All trees within the circles around the observed nest trees should be given a 200-foot buffer; the distant trees with documented use should be given a 100-foot (30-m) buffer. These buffers are necessary to prevent abandonment of nests or interference with courtship, nesting, and foraging activities."

"During 2002, kites nested in Trees 67 (eastern pair) and 127 (western pair). Other trees were also used for important activities. For example, in a discussion of the observed use of trees near the eastern nest site (trees 81,82,83,113, & 117), the applicant's consultant wrote, "These trees seemed essential for performing courtship-related activities and for serving as sentinel perches...."[14] The western pair were also observed to use trees (128,149,153-155,157,187,&188) other than the nest tree in their routine activities. Nest-building activity was also observed in 2000 in Tree 83[15]."

"For nest tree 67, a circle with a radius of 256 feet (78 m)[16] would contain trees 81-83. For nest tree 127, a circle with a radius of 322 feet (98 m) would contain trees 128, 149, 153-155, & 157. So, in 2002 a circle with an average radius of 289 feet (88 m), centered on the nest tree, contained all the other trees with observed important use. Therefore, following the above protocol, the ESHA would include all trees within 256 feet of Tree 67, all trees within 322 feet of Tree 127, and all trees within 289 feet of Tree 83. In addition, ESHA would include trees 113, 117, 187 and 188. It is very probable that this protocol underestimates the number of trees that have actually been used by kites historically and underestimates the number of trees that would be used in the future in the absence of development, but it is based on existing data that documents use, avoids arbitrariness, and protects groups of trees."

"In certain instances, there also is an ecological basis and a Commission precedent for designating as ESHA foraging habitat for raptors. However, in the present case I don't think there is a strong basis for identifying which of the potential foraging areas within the region are most important for white-tailed kites or for establishing boundaries that delineate foraging ESHA. On the other hand, a significant amount of foraging area must be provided on site in order for the development to be consistent with section 30240(b) of the Coastal Act (*Coastal Act section 30240 (a) and (b) are also incorporated into the County's certified LUP as a guiding policy, on page 116*) which

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[14] M.U. Evans. Dos Pueblos Golf Links, Goleta, Santa Barbara County, California, White-Tailed Kite Nesting Survey. A report by Pacific Southwest Biological Services to Culbertson, Adams, and Associates dated June 7, 2002.
[15] J. Storrer. Letter to K. Getler (S.B. County P&D Energy Division) dated June 3, 2002.
[16] Radii estimated by scaling distances from the tree map provided by the applicant.

requires that, "Development in areas adjacent to environmentally sensitive habitat areas...shall be compatible with the continuance of those habitat...areas." In the above report, Dr. Froke recommends changes in the project design that would result in approximately 80 - 100 acres of the project site being managed in a way intended to promote robust populations of voles that are the major prey of white-tailed kites. If the management plan is successful and if the rodent habitats scattered about the golf course are all utilized by kites, the managed foraging habitats on the project site should support one or two pairs of white-tailed kites."

On the basis of these comments, and the statements set forth in the balance of his November 19, 2002 memorandum, Dr. Dixon concluded that ESHA associated with the white-tailed kite nesting habitat is therefore that area illustrated in Exhibit 1A. Staff concludes that although many elements of Dr. Froke's plans are commendable, and a step in the right direction, the plan still relies on 1) the elimination of much of the ESHA Dr. Dixon has identified and 2) impermissible mitigation for these impacts through methods that are speculative and amount to experimentation.

The applicants' proposed project would construct much of the 16th, 17th, and 18th fairways and greens within the areas that are designed as ESHA by Dr. Dixon. These areas are used for roosting, sentinel perching, and nesting by kites. Paragraphs 1, 2, and 3 of the Coastal Zoning Ordinance, Sec. 35-97.14 (cited above), prohibits removal of the trees used by kites for roosting and nesting and construction of golf course fairways in these areas. Since the applicants propose development of golf course fairways in the identified kite roosting and nesting areas, the Commission finds that the proposed project is inconsistent with Section 30240 of the Coastal Act because it includes removal of ESHA. Section 30240 is incorporated into the County LCP as one of the "guiding policies" for the protection of land and marine habitats. (Santa Barbara County Coastal Plan, section 3.9.1, p. 114-116).

Almost none of the white-tailed kite ESHA identified by Dr. Dixon would remain intact if the golf course is developed as presently proposed. What would remain of the important trees and surrounding habitat utilized by kites would become fragmented, more visible and therefore more vulnerable to predators, and subject to disturbance from the golfing traffic that would pass by the white-tailed kite nesting habitat. At a frequency of up to 60,000 rounds of golf per year as proposed for the 18th fairway, this level of disturbance would be substantial. Thus, the proposed project, even with the implementation of Dr. Froke's commendable, but experimental recommendations, is not consistent with the applicable policies and provisions of the certified LCP.

Staff had previously recommended that a number of measures be implemented through special conditions. These measures would require a redesign of the golf course layout to avoid the impacts that would be caused by the construction and operation of the 18th fairway. Since the publication of that recommendation, however, a second nesting pair of white tailed kites was identified on, and fledged 5 nestlings from, a site on the proposed 16th and 17th fairway areas. The applicants stated that even the extent of the previous staff recommendation would be unacceptable to them. They held that a

championship golf course must have the spectacular vistas and blufftop location of their proposed 18th fairway and that the revised plans recommended by staff could not, and would not be implemented. Thus, the applicants have indicated that they are not willing to modify the project to preserve the kite roosting and nesting area at the site. Because extensive changes would be necessary to conform the project to the LCP and because golf course projects and their design are both unique and specialized, the Commission declines to recommend changes or conditions at this time to bring the project into conformity with the LCP. Therefore, the Commission finds that the proposed project is inconsistent with the certified Santa Barbara County LCP. Accordingly, the Commission denies the proposed project.

3.6 New Wetlands

New, small wetlands have emerged on site since the project was approved by the Commission November, 1994. The footprint of these wetlands coincides with areas of former Arco oil and gas facility abandonment undertaken between 1996 and 1998. Disturbance, excavation and soil compaction, etc., have collected and retained moisture in the wake of the abandonment activities. The applicant secured a wetland delineation in consultation with the Army Corps of Engineers and the Natural Resources Conservation Service (the latter required because the site is classified as rangeland). For the most part, the amendments proposed by the applicant adjust the golf course design to avoid these wetlands. Some golf cart paths, tees, and greens may be closer than 100 feet buffer required by the County's LCP, and if the Commission had approved the proposed project, special conditions to revise the plans so that the necessary buffers were preserved and other measures typical of wetland protection standards would have been required. For other reasons, the proposed project is not consistent with the requirements of the certified LCP and therefore the project is denied and the special conditions to achieve these mitigation measures for wetland impacts that are not already addressed in the applicants' proposal will not be imposed.

The Commission notes that an appeal of ARCO's contaminated soil remediation proposal for the site will impact many of these small wetlands. That appeal is pending and will be heard at a subsequent hearing.

4.0 Alternatives

The Commission's denial of this project does not eliminate all use of the parcels for the applicants (property owners). First, the applicants can redesign the golf course. The site is comprised of 208 acres, which can accept the footprint of a golf course, albeit not the presently proposed design, consistent with the environmental protections discussed in this report.

Staff considered the alternative of a revised plan that addressed many of the projects' adverse impacts on coastal resources that are the subject of changed circumstances by deleting the Par 3 course, undergrounding and covering the reservoir, re-siting of the Clubhouse and parking somewhat, relocating tunnel undercrossings, and other

adjustments or revisions of the project design and layout. This alternative would have retained the 18-hole golf course, but the applicants stated that this alternative was unacceptable. Moreover, with the confirmation of white-tailed kite ESHA on the subject site rendered the modified alternative even less acceptable to the applicants because the 16th, 17th and 18th fairways would all require major redesign and substantial relocation, which also affects the design of the overall course. Nevertheless, as noted above, a redesign for an 18-hole golf course is available on the 208-acre site.

In addition the property presently owned by the applicants consists of 2 large agriculturally zoned lots and one 4-acre former in-holding lot. The lands also contain, according to the applicants, 23 of the Naples Townsite small lots. The County has included these lots in its LCP amendment that allows for County approval of a development agreement with the property owners of the small lots known as the former Naples Townsite.

The County is presently negotiating a development agreement in accordance with the provisions of the certified LCP with the adjacent landowner for residential use of the lots covered by the LCP on that adjoining property. Therefore there is an alternative for residential development on the applicants' property.

In addition to a redesigned golf course or residential use, all of the uses allowed in the County's LCP for property zoned Agriculture II (AG-II) could be considered for this site. These include the uses enumerated in the County's LCP allowed by CUP or CDP.

5.0 California Environmental Quality Act (CEQA)

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

The Commission finds that there are feasible alternatives and feasible mitigation measures that while not proposed by the applicants would avoid or eliminate the significant adverse effects on the environment within the meaning of the California Environmental Quality Act of 1970 that the project as proposed will otherwise have. Therefore, the proposed project is not consistent with CEQA, the policies of the Coastal Act, or the policies and provisions of the certified Local Coastal Program (LCP) of Santa Barbara County. Therefore, the Commission denies the proposed project.

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ARCO DOS PUEBLOS GOLF LINKS COUNTY OF SANTA BARBARA	Permit No. A-4-93-154-HCC-A2

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Wednesday
December 11, 2002
Agenda Item No. 22.

The Hyatt Regency Hotel
5 Embarcadero Center
San Francisco, California

157 pages

EXHIBIT NO. 3
APPLICATION NO. A-4-STB-93-154-R2
Arco Dos Pueblos Golf Course
Transcript December 11, 2002 hearing

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California Coastal Commission

December 11, 2002

ARCO Dos Pueblos Golf Links, Permit No. A-4-93-154-HCC-A2

* * * * *

4:00 p.m.

CHAIR WAN: Before we get started, is the staff that is here on the Dos Pueblos -- who is doing the Dos Pueblos?

SENIOR DEPUTY DIRECTOR DAMM: We are here and ready.

CHAIR WAN: Okay, do you know how long the staff presentation is going to take, approximately?

SENIOR DEPUTY DIRECTOR DAMM: About 25 minutes.

CHAIR WAN: Okay, about 25 minutes.

The reason I ask that is that -- is the applicant around, because the applicant wanted about the same amount of time.

SENIOR DEPUTY DIRECTOR DAMM: The applicant is here, yes.

CHAIR WAN: Okay, fine, I just wanted to get that information to them.

Okay, next one.

CHIEF COUNSEL FAUST: Madam Chair, before you go on with the agenda, may I report on the closed session.

[Closed Session Report Included:]

And, finally, with respect to the ARCO Dos Pueblos Golf project, the last item on today's agenda, the Commission received a report from its attorneys with respect to its litigation risk on that matter, because litigation has been threatened, with respect to several parties to that matter, but took no action.

[Regular Agenda Taken Up]

4:45 p.m.

SENIOR DEPUTY DIRECTOR DAMM: Good afternoon, Madam Chair, Commissioners. The next matter on the Commission's agenda is Item 22, Application A-4-STB-93-154-HCC-A2.

As you can tell from the volume of paper, this is a contentious matter involving a proposed golf course in the Santa Barbara County area. This golf course has a long permit history with the Commission, originally, approving the golf course --

CHAIR WAN: Okay, we'd like -- what happened to 19.a?

SENIOR DEPUTY DIRECTOR DAMM: Item 19.a?

CHAIR WAN: It is postponed?

SENIOR DEPUTY DIRECTOR DAMM: I am told --

COMMISSIONER REILLY: An "open and continued" is postponed?

CHAIR WAN: Okay, neither one of us had it on

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there as postponed.

All right, I've been asked for a five-minute break before we get started into this.

SENIOR DEPUTY DIRECTOR DAMM: Okay, I just came up here when I saw the North Central staff leave. It is postponed.

[Recess]

CHAIR WAN: Let's get started. If everybody would take their seats, please.

SENIOR DEPUTY DIRECTOR DAMM: Okay, as I started to say a few minutes ago, the matter before the Commission now is Item 22 on your agenda, and this is a contentious matter, and the staff will be needing about 25 minutes for our presentation.

You do have a great deal of material associated with this project, including addendum materials, should, in the course of the hearing, you need copies of any of those materials, because they are misplaced --

CHAIR WAN: I need at least one of you to stay in the room, so that we have a quorum.

SENIOR DEPUTY DIRECTOR DAMM: This project involves a golf course in the Santa Barbara County, and has a long permit history with the Commission, originally being approved in November of 1994. The most recent action by the Commission was to deny an extension of the permit, expiration

date in June of 1999.

The golf course proposal is now back before the Commission for hearing on changed circumstances that affect the Commission's original decision in 1994, with regards to the approval of the golf course, at that time.

Melanie Hale, one of the supervisors in our Ventura office, in conjunction with the Commission's staff biologist, Dr. John Dixon, will be making the staff presentation.

However, I do what to make a few introductory comments, in light of the applicants' representative's December 4 and December 9 letters, responding to the staff recommendation, as well as previous correspondence received from the applicants' representatives with regards to this project.

First, the staff has worked very hard to review the large amount of information related to this project, and based on advice from legal counsel, our review has consistently focused on issues that, in our opinion, are changed circumstances since the time the Commission originally approved the project in 1994.

We have done this as expeditiously as we could; however, I need to note that there has been a requirement for the applicant to provide additional information, in light of the changed circumstances, and that has lead to the

applicant, as well as staff, over the approximately last 18 months having a number of meetings to discuss the changed circumstances. And, I also want to express our appreciation to the applicants' representatives for working with the staff to provide that information, in order for us to fully evaluate the issues that you will be hearing more on in just a little bit.

You are, also, going to be hearing in the staff presentation today, as well as the applicants' presentation, and you will also be hearing from opponents to this project, and during that testimony you will be hearing and realizing -- as you probably already do -- that there is a strong disagreement between the staff, with regards to this recommendation, and the applicant.

The staff wants to make it very clear that when you make your decision, the fundamental issue is whether you believe there are revisions that need to be made to the golf course, or whether the golf course should be denied because the circumstances that have changed since the original 1994 approval, as relates to preserving and protecting the red-legged frog, tide water goby, monarch butterfly, southern tar plant, and white-tailed kite, all of which are species that the staff believes are afforded protection under the policies of the certified County of Santa Barbara Local Coastal Program, that those changed circumstances warrant revisions

to the golf course, or as the staff is recommending, denial of the golf course.

Another point that the staff wants to make clear is that while there is strong disagreement between the staff and the applicants' representative, with regards to the appropriateness of the staff recommendation for denial, we have worked, as I mentioned, very closely with the applicant, and frankly should the Commission disagree with the staff recommendation, the result of working closely with the applicant is that this is a better project, in our opinion, than it was in 1994, and that is particularly the case with regards to the provisions dealing with water quality, and foraging areas for white-tailed kite.

It is very easy to get caught up in the emotions. This has, as I mentioned, been a very difficult and contentious matter; however, we do believe that the facts before the Commission are fairly presented by the staff, and again while there is a strong disagreement, one of the important roles of the staff is to present all of the information to the Commission, in order to assist you in your decision-making. We have done our very best to try and present that information to you.

I know it is a great deal of material, but we did feel that it was necessary that the Commission have that material, in case there is a requirement to refer to any of

the history and background, as relates to this project.

The Commission may recall that in this past June's Commission hearing, this matter was scheduled, and the hearing was opened, with regards to the golf course project, and at that time, staff had been recommending approval with special conditions. Among those special conditions were conditions that required deletion of the proposed Par-3 golf course -- not the main golf course, but the smaller Par-3 golf course, which is located at the easterly end of the property -- in order to, in staff's opinion, provide adequate protection and buffering for the red-legged frog and monarch butterflies.

However, shortly before that June Commission meeting, controversy developed with regards to the presence of the white-tailed kite, whether the white-tailed kite was using this property, and whether the white-tailed kite was nesting on the property. The white-tailed kite is a fully protected raptor species, and the staff felt that this was an issue that needed to be further evaluated.

And, since the June hearing, we have confirmed that there is, at least, one pair of white-tailed kites that are nesting on the property, and other white-tailed kites have exhibited characteristics of mating, and possibly nesting on this property, as well.

Because the white-tailed kite is a fully protected

species, this was an important issue, and the result of that is in evaluating this, and having the staff biologist, Dr. John Dixon, go out and look at the site, as well as communicating with the applicants' expert in this regard, the conclusion of the staff was that in order to adequately protect the white-tailed kite, the 16th, 17th, and 18th fairways located on the golf course, which are located between the railroad tracks and the bluff edge -- on that slide that is now up on the screen -- that those three fairways needed to be preserved area for the white-tailed kite, and as such, the staff changed its recommendation to a recommendation of denial.

In discussing this with the applicants' representative, they had indicated that those fairways were critical to the golf course, and as such the golf course, in their opinion, is not a feasible project without those three fairways.

So, in light of that, the staff did feel that a recommendation of denial was the appropriate recommendation, and that is what you have before you today. I just wanted to make it clear, that since the June hearing, we had modified our original recommendation for approval with suggested modifications, due to the presence of the white-tailed kite.

Another issue, in the way of opening comments that staff wants to make, is that we are not basing our recommend-

ation on issues which do not constitute changed circumstances. And, again, some of the Commissioners way recall at the June Commission meeting there was opposition indicating that the project should be denied because the site is designated as agriculture in the County of Santa Barbara Local Coastal Program; however, the staff's opinion is that the issue related to the golf course, and whether or not it is an appropriate use on property designated agriculture, was an issue that was decided in 1994. It is not discussed in the staff report. It is not a basis for our recommendation of denial, because we do not believe that is a changed circumstance.

We clearly do believe that the issues related to the red-legged frog, the tide water goby, the monarch butterfly, the southern tar plant, and the white-tailed kite, do constitute changed circumstances, and that those species are afforded protection under the certified County of Santa Barbara Local Coastal Program, and for that reason, we do believe that those changed circumstances warrant the recommendation of denial.

At this point, I would like to turn the presentation over to Melanie Hale, as I mentioned, she is one of the supervisors in the Ventura office. In this particular instance, she was also the lead planner responsible for drafting the staff report.

COASTAL PROGRAM ANALYST HALE: Commissioners, I would like to lead you through a bit of an overview of the site, and then describe the changed circumstances, the species, and the habitat areas, and how they are situated on the site, and why the project will raise issues with regard to those species.

And, I think that, perhaps, the best way I can do that is to lead you through our presentation of slides so that you can better see what the site terrain is like. And, some Commissioners were able to visit this area in April at the Commission meeting on our bus tour, and I will explain a few of the perspectives that we had from that site, because we stopped and looked, out on the coastal bluffs, at the adjacent property, and we were next to this site, then.

Could I have the second slide, and we will go back to that.

This is a handout that the County of Santa Barbara prepared for the bus trip to the Gaviota coast, and the parcels that are outlined in bright red, in the center lower part of the frame, are the ARCO Dos Pueblos site. You can see that it is bisected laterally by the railroad tracks, and --

I am a little worried about using this pointer with you sitting right there. Can you -- I think, maybe I will use the podium. Okay, it is on.

So, back to the site. This is the red I was trying to describe, and the two parcels that are bisected by the railroad track are about 100 acres, each, so the site is a total of about 208 acres.

What you see with the yellow lattice work overlaying is the old Naples town site that has been discussed. It was discussed on the trip, and it is an antiquated subdivision that is being studied now for development potential by Santa Barbara County and the owners of those parcels. There is a memorandum of understanding under review by the county, I believe, now.

Some of those parcels are also shown on the applicants' site. And, I think there are 21 to 25, depending on the way they are counted.

Then, the balance of this site, the Dos Pueblos site, is outlined in light blue. The Highway 101 is just north of this site, and then at this end is the Bacara Resort property, and just further off of the screen here, if we had a larger image, you would see the Sand Piper Golf Course, which is 160-acre parcel, with an active golf course on it.

Can we go back to the aerial in that previous slide?

This is an aerial view of the site in 1993, which was the year before the Commission approved the permit on appeal for this project, and at the time, as you can see, it

was actively in use as an oil and gas facility.

I think this image is the best place for me to start to lay out where the resource issues are on the site, because in some ways they are connected to the history of disturbance on the site.

At this end, at the eastern-most end, is Eagle Canyon. You can see that this riparian corridor extends quite far inland. Eagle Canyon and Eagle Canyon Creek are the location where the California red-legged frog has been found to have breeding habitat, that arose in 1999.

Since that time, the tide-water goby exists in the estuary at the mouth of the creek, and the frog is in the -- we have some slides of the habitat where the frog lives.

And, then, there are two upland areas that have also been identified by Fish and Wildlife Service as habitat, and they are in this drainage area, right here, I believe. And, then here, this is Tomate Canyon, which is a very significant riparian corridor, as well.

And, this is the parcel boundary, that you can see, is the Dos Pueblos property.

Back at this end of the site, the applicants are presently proposing to put the Par-3 nine-hole course roughly in this area, and then the clubhouse and that facility would go here, and then the 18-hole course is played -- it zigzags across this, pretty much the entire site, in various

locations, ending up over at this stretch is the 18th fairway, and then returning to the clubhouse over this historic wooden bridge.

To accommodate the project, to have the through play that they desire, there would need to be tunnels placed into two of these riparian corridors to allow golf carts to go back and forth.

You probably know more about the California red-legged frog issue, as a Commission, that the other issues, because it has been before you in the past. We have also identified, since that time, other changed circumstances the staff believes exists, and they start in this area. This is a eucalyptus forest here. It grows down into Eagle Canyon, and up on the terraces just north of the railroad tracks, right here, extends quite far up into the property.

At the time that the baseline was drawn for what the resources were on this site, which was established at the time the Commission took its action in November of 1994, the record for the project was, essentially, comprised of the environmental impact report that was prepared in 1992, and it was certified in '93, and the county's record of review for the project.

At that time, this eucalyptus forest was seen as a very minor site for butterflies. I think they had counted up to, perhaps, 150 and it was dismissed as a relatively

unimportant area for the monarch butterfly.

Since that time, the applicants have prepared studies indicating that, indeed, the site is being used -- the forest in some ways -- in similar areas for over wintering, but there are two sites now that are being used. One is an autumnal site, where the butterflies stop while they are beginning their migration, and rest, and then continue on. And, the other is an over-wintering site, that contains clusters of the butterflies all winter, and that is a much more sensitive time for the butterflies, according to their studies.

Some of the counts that have been prepared indicate that thousands of butterflies have been recorded on different days, and the applicants have pointed out to us -- their consultants have accurately -- that their counts were not meant to be totaled, summed, that in the autumnal migration the counts can actually change. What they count on one day are not necessarily the same butterflies, they are moving, so there would be more butterflies than there are actually counted, perhaps, but the over-wintering aggregates are stable, more or less.

So, in some places I think we over counted the number of butterflies, but the fact remains that they are still in the many thousands, and that is a changed circumstance from being almost absent from this site when the

data was originally collected for this project. And, so we have now two locations, not just down in Eagle Canyon, but up in the corner here, where the Par-3 course will be.

The applicants have prepared some drainage management strategies for the project that will place a berm in that corner. One of the reasons for that is to prevent drainage from entering into Eagle Canyon. It is a protective measure. But, that, and parts of the Par-3 course, are encroaching, we believe, too close to those butterfly trees, and the applicants, I believe, feel that the trees should be counted -- only the trees that are actually maintaining clusters. But, we believe the Commission has a practice, and a history of counting the trees that form the grove, and establishing setbacks from the grove, and not only from individual trees that may be hosting the aggregations.

In your addendum packet, I believe there is an Exhibit A-6 that is a view of a portion of the full-sized plan that we colored so that you could better see the distinction between the applicants' position for protecting the monarch butterflies, and the position that we are recommending, which is that the Commission evaluate setbacks from the grove. And, the Commission, in the past, has actually imposed 100-foot setbacks on the Ellwood project.

So, that is the basis for our belief that there is a changed circumstance with the monarch butterflies, and we

are concerned about issues of overspray and drift for pesticides. We are concerned about the proper setbacks from the grove, because if the setbacks from the grove aren't imposed, then as development encroaches closer, as time goes by, and eucalyptus trees could become diseased, if they become hazard trees in some ways, then they could be subject to removal for the protection of people on the site, whereas, if the setback is adequate there is less of a concern that trees that could be important to these colonies will have to be removed.

There is complexity regarding what attracts monarch butterflies in any given year or season, to use specific trees, and the patterns of their use. It is not stable. It could be very different year to year. But, we do believe there has been an important change, and that we need to look at the protection of those colonies.

CHAIR WAN: Before you go on, I am trying to find -- you referenced in the addendum A-6? and I am trying to find that.

COASTAL PROGRAM ANALYST HALE: It is the first addendum packet, had a stapled set of plans that are folded --

CHAIR WAN: Okay, I can only find --

COASTAL PROGRAM ANALYST HALE: -- 1 through 17. That's it, Commissioner Reilly has what I am

referring to.

CHAIR WAN: Okay, thank you.

COASTAL PROGRAM ANALYST HALE: I think it is A-6 that has colorized -- the applicants delineation of where the monarch colonies are.

I would like to move on from the monarchs to another species issue. It is also focalized in this area, adjacent to Eagle Canyon, where the Par-3 course and the clubhouse and its parking lot would be placed.

In the baseline analysis that was established in the EIR, a relatively rare plant was discovered on the site, during the applicants' surveys that preceded the application to the county. The plant is called the southern tar plant, and it was found in one location, numbering 20 or 30 individuals, right here on the 18th fairway, or the proposed 18th fairway.

At the time, it had a List-3 status established by the California Native Plant Society, and that status really means that we need more information. It doesn't denote a special rarity. It doesn't mean it is a candidate for listing.

And, at the time that the Commission approved the project, the county had established a condition to mitigate the 20 or 30 plants elsewhere on the site. It was done through condition, I believe it is 8 in the permit -- I would

have to check -- but, at any rate, there was a proposal for mitigation that would have allowed the construction to take place on the 18th fairway and to mitigate for the plant.

Time passed, and no more of this plant; however, last spring, in March, we became aware that had been discovered a second population. The County of Santa Barbara's environmental quality monitor is here. His name is John Storrer. He is, actually, very familiar with this site. He monitored condition compliance for Santa Barbara County on this site for a very long time, and in 1998, after some abandonment of these facilities -- that you can see in the 1993 slide -- occurred. The tar plant bloomed in that area in large numbers, which is consistent with the life cycle of this annual. It blooms after disturbance. It blooms prolifically. It sets a lot of seed, and it dies. It is an annual. And, so it replenishes its seed bank in that way, in the location where it finds the disturbance, and the opportunity to do so.

You can see that there is a pattern of disturbance based on where the development is on this site that follows, but the plant bloomed in those numbers, and then it wasn't acknowledged to staff at that time. We weren't taking an action at that time that would have allowed new environmental review. The plant was identified, and then the county's condition compliance document was amended to insert that

number, but the document in the review didn't require additional mitigation.

What happened is that the condition was constructed in such a way that it is self-fulfilling. The applicant is only bound to mitigate the number of plants that are actually surveyed before they implement construction, and if it happens to be zero, that is their obligation. It is not based on the historic patterns. It is, probably, not the ideal way to construct a condition. It wasn't constructed by the Commission staff, and it is a relic of an earlier time, and probably not complete understanding of this plant, because it wasn't well understood at that time.

But, since that time, this plant has been elevated by the Native Plant Society in status, and it is now a List 1-B plant, which means that it is a candidate for state listing. It doesn't make it a state listed plant, but it does have the status of being rare, threatened or endangered by that measure.

So, the plant has now been established to bloom in, I believe, nine different locations on the site, and the location where the primary population grows, it now has three to 400 hundred, according to the annual census that has been conducted. It is right where the clubhouse, and a piece of the Par-3 course, and some of the parking would be established.

That map that I referenced A-6 also shows, in the upper left corner, roughly, where the tar plant is, in relation to the clubhouse and the footprint. So, you can see it actually intersects with what would be a 100-foot setback from the eucalyptus grove.

This Par-3 area, the proposed Par-3 area, has an intersection of a number of sensitive species' issues in that place. It drains at greater than a two-year storm -- even under the applicants' proposal -- into Eagle Canyon. It has the eucalyptus forest, and it has the primary population that is now known on this site as the tar plant.

There are, also, now pocket wetlands that have formed, where various of these facilities were, ultimately, abandoned. The grading operations, the compaction of soils, and the native soils that, perhaps, had been imported to create a platform for those structures in the first place, don't drain well, apparently. They have become wetlands.

The applicants did their delineation in accordance with the Army Corps, and Natural Resource Conservation Service standards, and they adjusted the footprint of the project to avoid those wetlands. Those amendment have, more or less, been incorporated into the present project. There are few changes that, had we been recommending approval, we would have wanted to see in revised plans, to set back pathways properly from the buffers.

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As I mentioned, the tunnels for the golf carts would have to go into these two riparian corridors, and that had a relationship, in our view, to the upland habitat for the California red-legged frog. We had, in June when we were before you, before with the recommendation of approval with conditions, we had suggested a condition to revise plans to move those, to put undercrossings in different areas.

But, after we deliberated further since June, we had to take up the issue of the white-tailed kite, which our staff ecologist is here to explain more of to you, is going to explain our evaluation of the habitat of that raptor, and the basis for our evaluation of changed circumstances.

But, I wanted to show you where the locations are that affect the kite habitat, as we understand it. This area, again, where the 18th fairway is, again, is roughly where that original population of tar plant was found. Well, in this area, and you can see it all along this bluff top edge. There are mature cypress, Monterey pine, and other trees that were planted in, I believe I understood from the applicant the 1940s, those were part of the landscape features that came along with the use of the site, and they have matured in that place, and the raptors have been nesting in one tree that I believe is in this area right here, and the other is right over here, on the bluffs here. Those structures there are one of the wetlands that you can see on

the site as the big rectangular wetland, and the trees that John Dixon will explain more about to you, are all along this corridor.

You can see that north of the railroad, there isn't much there. It is pretty much open pasture land, and it was grazed at one time. That has been discontinued for years, but I will go through my slides now and show you a sense of the site's habitat, and then I would like to turn this over to John Dixon, so he can explain the kite issues better.

If you would advance two more forward, that would start those.

This is back at the eastern end of the site. This is the mouth of Eagle Canyon, where it drains, and the estuary where the tide water goby is.

Next slide.

This is the trail that leads down into Eagle Canyon. You can see a bit of the eucalyptus forest.

This is a view of the riparian area of Eagle Canyon.

And, a little bit close-up view of some of that vegetation.

This is a close up -- some of these slides were taken by our former staff ecologist, Dr. Allen. He took this slide to show you the area where the red-legged frogs had

actually been documented in the past. This is what that habitat looks like. There is pretty much water in the Eagle Canyon Creek year 'round.

This slide, in 1993, was taken in the spring -- or the slide earlier, the aerial photo was in the spring. This slide was taken in the fall. It was pretty dry, and yet there was this much moisture there.

Next slide.

This is the culvert where Eagle Canyon Creek goes underneath Highway 101. You can see that the highway is not an impassable barrier, and many have theorized that the red-legged frogs can migrate up and down the Eagle Canyon corridor, for this reason.

And, this is the other side of the culvert.

Okay, and, you can continue the slides, okay.

There is another view, approaching the outlet of the creek.

And, this is back up on the railroad track, where some of the eucalyptus border on the north side.

This is where that historic wooden bridge crosses the railroad track. You can see it right here, and this area beneath it -- and it extends to both sides of the bridge -- is termed a vernal pool. By species it is diagnosed as a vernal pool. It actually has manmade origin, because it dates back to some of the very early development on this

site, but that was abandoned years ago, and because water collects here, it has become habitat. Tadpoles has been found in it. It is a very rich habitat in its season.

Next slide.

Another view.

EXECUTIVE DIRECTOR DOUGLAS: Could you give the number of the slides?

COASTAL PROGRAM ANALYST HALE: I could if I was sitting over there.

EXECUTIVE DIRECTOR DOUGLAS: How about if you identified it with labels?

COASTAL PROGRAM ANALYST HALE: I could -- you know, I'll say the label, because the labels do coordinate with the numbers, that is a good idea.

This is the intertidal area view.

Next slide.

And, this is looking down from the bluffs, down at the pelican roosting areas on the beach.

Next slide.

And, the pelicans off shore.

And, the next series -- and I'll label them as we go through -- are just a walk through the site.

This is one of the native grassland. It is termed unidentified grass on site. There are three different species of native bunch grasses, and I am afraid I can't

repeat them for you, but they are generally mapped on the maps you have as valley, I think, valley needle grass, or valley grasslands.

Next.

This is the harbor seal haulout area, down below.

Coastal scrub in the canyons. We have coastal sage scrub in a number of these canyons, in relatively undisturbed condition.

And, there are five frames -- if you could just forward through them -- five frames of coastal sage scrub.

COMMISSIONER WOOLLEY: Are these all recent?

COASTAL PROGRAM ANALYST HALE: Yes, these are all from last year.

And, then, back again, a little bit further back aerial view that shows the Ellwood Pier at one end.

And, again, here we are in Eagle Canyon. This was the very edge of that earlier photo that I showed. This gives you a little bit better look at it.

And, here is that eucalyptus forest, again.

Here we are with the railroad tracks.

This is the bridge, right there, and the vernal pool is right there.

And, the applicants proposes to put their reclaimed water lake right here, I think. That is pretty close. This roadway here shows up on those maps.

And, again, this is the bluff edge. Here is the 18th fairway. This is roughly it.

The clubhouse, and all of that, is here, the Par-3 course here.

The driving range, and then the fairways start in this area, work their way back and forth, then end back here on the 18th fairway, and then cross back to the bridge to return to the clubhouse.

And, with that, because I know that the issues Dr. Dixon will be describing are important to you, I would like to turn this back over to Dr. Dixon to discuss the white-tailed kite, and then when he is finished, I would like a brief moment to discuss the alternatives analysis, but I think I would like to stay on point with the kites.

If you could advance the slides forward, there are two more slides I just wanted those -- back two more.

That is a picture of the tar plant. It is hard to see. It looks a lot like tumbleweed. It blooms in neon yellow, and that is the area that was graded when some of those areas were abandoned near the clubhouse footprint, and the Par-3 course.

Next slide, keep going, keep going, there.

This is a view of the white-tailed kites, and with that I will turn the presentation over to Dr. Dixon.

ENVIRONMENTAL PROGRAM MANAGER DIXON: Good after-

noon, Commissioners.

I would like to briefly review the rationale underlying staff's recommendation for delineating environmentally sensitive habitat areas, or ESHA, based on the presence of trees used for nesting and associated activities by white-tailed kites at the Dos Pueblos site.

I think it is evident that the trees used by the California fully protected species for courtship, nesting, perching, and guarding against nest predators are especially valuable because of their role in the ecosystem, and therefore qualifies as ESHA under the *Coastal Act*.

The Commission has made a similar determination in other cases, such as the Bolsa Chica. In the case of Bolsa Chica, the Commission found that all of the trees on the site constituted ESHA, because of their importance as perching, roosting, and nesting locations to several species of raptors, including white-tailed kites.

This use had been documented by periodic observations going back at least 20 years; however, there was no information available as to which particular trees were used, nor was there a demonstration that every tree had been used at some time.

Nevertheless, the California Department of Fish and Game, the U.S. Fish and Wildlife Service, and the Coastal Commission concluded that the entire grove of trees

constituted sensitive habitat, based on the evidence that many of the trees were known to have been used, and that most, if perhaps all of the trees had the potential for such use.

The situation at Dos Pueblos is similar, but more difficult in terms of delineating ESHA. Only data for white-tailed kites are being considered. There have been few formal observations of habitat use by white-tailed kites at this site, and only one year of detailed observations of tree use have been made.

The problem is complicated by the fact that these birds seldom use the same nest twice, and generally don't even use the same tree in successive nesting attempts. Although, a given tree may be used repeatedly over the course of several years by the same, or by different birds. In addition, kites prefer to nest in trees that is a part of a clump, or grove of trees, rather than in isolated trees.

The problem then is deciding which of the 900, or so, trees on the site constitute ESHA for white-tailed kites. Of course designating all of the trees on the site as ESHA, as was done at Bolsa Chica, would guarantee that the important trees were preserved, and protected. However, the situation is sufficiently just different, in that I think such an approach can be scientifically justified.

At Dos Pueblos, there have not been observations

of kite use of trees throughout the site, and the trees do not occur in a discreet grove, distant from other such habitat.

Therefore, I recommended that the most defensible approach was to base the ESHA determination on the empirical observations of actual kite use for nesting and associated activities.

The applicants' consultant, Michael Evans, emphasized the importance of these other trees, in part, as follow, quote:

> "These trees seemed essential for performing courtship related activities, and for serving as sentinel perches."

Unquote.

Staff defined ESHA as the nest tree, the nearby trees with observed important use, and adjacent trees that together defined a small grove which these bird prefer for nesting. This defined grove included all trees that were closer to the nest tree than the most distant tree that had been used for the nest-associated activities.

These adjacent trees are important because they are potential nest trees. They provide perch sites for critical activities related to courtship and nest protection, and they define a small grove, which is generally necessary to provide a suitable site. In addition, more distant perch

sites were individually designated as ESHA.

The following slides demonstrate the procedure that was used to define ESHA around nest trees.

Slide one shows the western nest tree that was used this year. All of the trees in the area are designated by black triangles and black circles.

Slide two shows the other trees which were observed to be used by the nesting kites, as dark blue circles.

Slide three shows the nest tree connected with a red line to the most distant of the other trees that were used by the kites.

Slide four shows the circle defined by the red line radius, and centered on the nest tree.

Slide five shows all of the adjacent trees within the circle as light blue, our turquoise circles. I designated all of the trees within the red circles, centered on the nest tree, as ESHA.

Slide six shows the creation of a 200-foot circular buffer around each ESHA tree.

And, slide seven shows the ESHA with the 200-foot buffer defined by the intersection of the individual tree buffers. This buffer is necessary to prevent abandonment of nests, or interference with courtship nesting and foraging activities.

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The size of such a buffer, recommended by various raptor experts, varied from about 150 feet to 300 feet, and more. The applicants' consultant, Dr. Froke wrote that, quote:

> "Nesting birds can be expected to tolerate low frequency and non-disruptive activities to within 150 to 200 feet of their nest tree, better small grove."

Unquote.

Based on the range of recommended buffer size, and the relatively low level disturbance of golfing activities, I recommended a 200-foot buffer. A smaller, 100-foot buffer, was established around perching trees used during foraging.

The protocol used to establish these areas as sensitive habitat undoubtedly does not capture all of the trees that have been used in the past by white-tailed kites at this site, nor all of the trees that would be used in the future, in the absence of development, and as Bolsa Chica, may include some trees that have not been used.

However, it is based on the pattern of observed use, and protects trees in the context of small groves, which are favored by these birds.

And, that concludes my presentation.

COASTAL PROGRAM ANALYST HALE: I had asked to come back to the idea of the alternatives analysis before we

closed, and this is back to the adjacent properties on Dos Pueblos, for which there is presently a memorandum under review for alternative uses there, for the small lots.

This is Slide 28, and the other that I will show you is Slide 29. The purpose in showing this to you is to illustrate that adjacent lands are being considered for other uses, and there are the small lots on the applicants' parcel, as well, that could have a residential use.

The applicants have raised the issue of how to have potable water for those sites. That would require further analysis. We don't have an answer to that question. That isn't before us.

But, we also point out that the Dos Pueblos properties -- which were, themselves, once proposed for a golf course, by the way -- could potentially have some area, especially up where the railroad tracks traverse them, up here. They, themselves, are outlining this as an agricultural conservation easement. It seems like something that could be worth thinking about. Could you put a couple of more golf holes along this area, in exchange for some other alternative combination of land uses. These are just opportunities to investigate ways, if it could be possible to set aside those lands down where the habitat is sensitive, where the kite nesting is, and find another way to expand the golf course, or to look at a residential use. We think that

that exists. They already have a residential use for a couple of houses, at least.

So, I will close with that.

SENIOR DEPUTY DIRECTOR DAMM: Just in conclusion, Commissioners, I think the slides that Melanie Hale showed gives the Commission a very good overview of the property.

But, I want to reiterate, because it is very easy to lose site of the principle issue, and that is whether or not there are changed circumstances, since this project was originally approved in 1994, that could lead the Commission to different decision, either for redesign of the golf course, or as staff is recommending, denial.

And, we pointed out those four issues to the Commission, with regards to the white-tailed kite, the red-legged frog, the southern tar plant, and the monarch butterflies, and we think all four of those are reasons for the Commission to reach a different decision, and that is why we are recommending denial.

CHAIR WAN: Does that conclude the staff's presentation?

SENIOR DEPUTY DIRECTOR DAMM: Yes.

CHAIR WAN: I am going to call for ex parte communications.

Why don't I start at my right, Commissioner Nava.

COMMISSIONER NAVA: Thank you, Chairman Wan.

On December 5, I had a lunch-time meeting in Santa Barbara with David Neish, Sr. During the course of our lunch, he made reference to -- or actually provided me with some of the material that other Commissioners received here, today. We discussed the aspect of potential litigation. We talked briefly about changed circumstances, and the scope of the Commission review, as it relates to the changed circumstances.

On December 6, I met with Ariana Katovich in my office. We talked about the staff report, the staff report recommendations, the identification in the staff report of the changed circumstances. We discussed specific language of the LCP, and that concludes that one.

On December 6, at about 5:30 in the afternoon, I received a telephone call from a Mr. Scott Bull. Again, with Mr. Bull, we talked about the staff report. We discussed changed circumstances. We also talked about the significance of this project, as it relates to the overall issue of the Gaviota coast, and how it is the gateway to one of the last undeveloped stretches of coast land in, certainly in the Santa Barbara - San Luis Obispo area.

Later that same evening, I received a telephone call from Mr. Robert Keats. Mr. Keats and I talked about the impact that this development would have on the Gaviota coast, and how there are issues with respect to potential cumulative

impacts, if development is permitted in this fashion on this particular stretch of the Gaviota coast, because of its proximity to other development existing, and other proposed development, specifically, the proposal of Naples, and the residences that are contemplated at one of the borders of the golf course.

And, we also discussed the possibility, or likelihood, of that there may be a willing seller, and negotiations and discussions of potential source of funding for such a sale.

COMMISSIONER WOOLLEY: On, let's see, first I had a conference phone call conversation with David Neish on December 9, in my office, and much of what Commissioner Nava reported on with David Neish was reflected, as well as he talked about -- I asked questions about how this is -- is this a private or public, not publicly owned, but a public golf course, and he said it was to be a public course. It has an improved access to the beach, and has a California coastal trail through it, with trails going to the beach.

And, also, I had a continuation conversation with him, David Neish, this morning at 8:00 o'clock reiterating his concerns, as expressed earlier, and noted that in the document -- I've lost track of which date it is, but it has the tab F in it, but I forget the date in it, but if we are to consider special conditions, there are some suggested

special conditions that we may want to undertake.

At lunch hour, I had a conversation with Mark Massara over, again, similar descriptions of the property, and its background, including the monarch fly description which we heard, as well as the trees for the raptors.

I had a phone call conversation with David Nawi, I think it is, and he wanted to reiterate that he believed our staff were accurate, that the changed circumstances did warrant us the ability to review, and to consider denial. The staff report, he felt, was credible. And, then we discussed a 300-foot buffer, and wanted to determine if that was adequate, or not, and if there were any kinds of potential modifications to that size, as well as taking a look at the 9-hole golf course.

This afternoon, I called Jeff Dunk, who is a professor and wildlife biologist at Humboldt State, who I know, and discussed his comments that were in the staff report, much that they have been reflected by Dr. Dixon. It was interesting to note, for me, that these raptors have a communal roost. And, I think the key for us, I believe, is making sure that we protect in a foraging area for them, as well as making sure the trees are of a size and sufficiency to not only provide for nesting, but for roosting capacity, as well.

And, I think that completes my ex parte.

COMMISSIONER NAVA: I have one more.

You may want to hear from Shirley, first.

CHAIR WAN: Okay, back to Commissioner Nava.

COMMISSIONER NAVA: Yeah, out of an abundance of caution, I recall having spoken -- may have been yesterday, with a print reporter for the *Santa Barbara News Press* by the name of Morgan Green, and she asked about this matter coming up before the Commission.

She asked how I felt about it. I said, obviously, I could not make up or form an opinion until after having heard staff presentation -- I think staff presentation is an important element of having the basis upon which to make a decision -- and the public participation. And, that I felt that the staff report was well written.

CHAIR WAN: Commissioner Dettloff.

COMMISSIONER DETTLOFF: On December 4 I had a meeting with Dave Neish. We went over the history of the project, all of the approvals that the project had received, the lawsuits, and how the property owner had prevailed in those lawsuits.

We went over the changed conditions, and the position of the applicant that those changed conditions cannot be taken into account, as we go through our decision-making process.

I, then, met on December 10 with Mark Massara. He

went over the history of the project, and the importance of the habitat areas that they felt should be preserved, and felt that the staff report had been well written, and had detailed all of the problems he saw with that site.

CHAIR WAN: Commissioner Reilly.

COMMISSIONER REILLY: This past Sunday, from home I had a conversation with Andi Culbertson, that focused somewhat on the processes this application has been through over the last several years, some of the salient legal issues that they were bringing up now, and also some modifications they had made to their proposal, in response to staff concerns.

And, that same day, had another phone call with Mark Massara, where he went over a lot of his concerns regarding the need for greater habitat protection, basically agreeing with our staff report, and expressing concern that the applicant hadn't been willing to make more changes.

I think, at that point, my phone battery died, and I had a discussion with my wife about using the phone for weekend conversations, instead of having them, you know, in the office during the week.

Since I have been here, I had three very brief conversations with Mark Massara, nothing, just reemphasizing, one having to do with the relevancy of the Morro Bay Storage case being cited, and feeling it wasn't relevant in this

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case, because of the differences in the LCPs.

And, during lunch today had a conversation, again, with Andi Culbertson, Dave Neish, regarding their approach and the process for the hearing this afternoon, and their approach to the hearing.

And, I think all of my other ex partes are on file.

CHAIR WAN: On the 6th of the month, I had a phone call from David Neish. He gave a short history of the project. He challenged the changed circumstances finding regarding the extension, ask that I read the two documents, the letters from Andi Culbertson and Steve Kaufmann that had been sent. Said that the changed circumstances do not accrue because of the failure of issuance of the CDP, and can only look at the frogs, not other issues. However, they are willing to accommodate the issues, and address them, anyway.

He said the issues involved the tar plants, the butterflies, and the kites, said the tar plant appeared after the oil field was remediated, and that they are mitigating it at a 7:1 ratio on other portions of the property.

He says the butterflies were known when the plan was approved, and the LCP requires a buffer, but that -- and they provided more than 50-foot buffer, except not around the grove, because it is, as measured from specific trees.

The kite, they retained an expert to look at it, a

Jeff Froke, from Monterey, that they went out with Dixon, two pairs nested. They don't roost in the same places, so will not roost there again, so it is okay to remove the trees.

Staff says that they need a 300-foot buffer around the nesting trees, needed for foraging. They said this eliminates the golf course.

The LCP policies regarding kites states that recreational use of roosting areas shall be minimal, does not exclude use by people, that there are major public benefits, 26 lots on the western portion will go away.

He also talked about the new water quality program, which was state-of-the-art, and was improved over the original plan.

Also, on the 6th, later that morning, I received a phone call from David Nawi. He said that they supported the staff report, that you must look at all changed circumstances, that you need to look at what modifications are necessary for the 18th hole of the golf course that they need to redesign, and that the applicant is taking a minimalist view when it comes to protections.

CHAIR WAN: Commissioner Potter.

COMMISSIONER POTTER: On December 2, I had lunch with Dave Neish, who duplicated the presentation he gave to Commissioner Dettloff.

Last night, I had a refresher briefing with both

the Neish people.

And, on the way to lunch, this morning, I encountered Jeff Froke while crossing the street, and he briefly discussed with me the kite nesting habits.

CHAIR WAN: Commissioner Desser.

COMMISSIONER DESSER: On December 9, I had a phone call with Dave Neish, and getting to that phone call necessitated trading calls a number of times -- so let me just be on the record that, in fact, I do return phone calls -- and we discussed the legal documents, and the letter that had been sent by Mr. Neish and his associates, specifically, again, what constituted changed circumstances, the issue of the white-tailed kite, and the buffer zone, and the tar plant, red-legged frog, and I think that is about it. It wasn't a very long conversation.

CHAIR WAN: Commissioner Peters.

COMMISSIONER PETERS: Thank you, Madam Chair.

My staff had a meeting with Dave Neish, as described in a ex parte that has been filed.

Also, today, I just briefly spoke with Mark Massara, who just indicated if I had questions about the Sierra Club's concerns, he was available to talk to me about those, and that was it.

CHAIR WAN: Commissioner Hart.

COMMISSIONER HART: On Monday afternoon, driving

up here, I had a conversation with Andi Culbertson. She asked me if I had gotten the packet of materials that she had sent to me, and I had not because I had not been to my city hall office, and she said she would give me one of those packets, I think, yesterday, and she did.

And, then I had a conversation that evening with Dave Neish, Sr. and Jr., about the project, and their frustration with the last minute addendum from staff, and their interest in moving ahead with the project, and their concerns about the liability of the Commission, legally, regarding a decision that we might take.

CHAIR WAN: Commissioner McClain-Hill.

COMMISSIONER MC CLAIN-HILL: On Wednesday, December 4, I had a conversation in my office with Dave Neish, Sr. We discussed the staff recommendation. We discussed, also, the -- briefly discussed the letter that I was to receive later that day, or the next day, from his partner outlining their legal position.

And, we discussed the project history, and I think that's it.

COMMISSIONER NEAL: I didn't.

CHAIR WAN: Okay, any others?

[No Response]

All right, with that I will open the public hearing, call the applicant. You have requested 25 minutes

and then eight -- no?

MS. CULBERTSON: Excuse me, Madam Chair, I respectfully request we have the same as the staff.

CHAIR WAN: And, how long did the --

SENIOR DEPUTY DIRECTOR DAMM: The staff presentation, Madam Chair, and I apologize, took significantly longer, I think, primarily because of the power point presentation, and it took 45 minutes to do the entire staff presentation.

CHAIR WAN: Okay, you want --

MS. CULBERTSON: We would like the same amount of time.

CHAIR WAN: -- but, you also wanted eight minutes for rebuttal, was what you requested from me.

MS. CULBERTSON: I may not need that much, Madam Chair.

CHAIR WAN: So, you are asking for 45 minutes?

MS. CULBERTSON: I would like to have at least what staff had --

CHAIR WAN: Okay, fine --

MS. CULBERTSON: -- Madam Chairman.

CHAIR WAN: -- go ahead.

MS. CULBERTSON: But, I will try to be very efficient with -- I'll try to be very efficient.

Madam Chair, members of the Commission, I am Andi

Culbertson. I am president of Culbertson, Adams, and Associates, and we represent Makar properties, the owners of the Dos Pueblos Golf Links.

This has been a very long and complicated project, beginning with your Commission's approval of this project, and granting of the permit in 1994.

I would like to organize my presentation as follows: I would like to give the Commission a brief history from our perspective of what has happened with this permit. And, I would like to then move to what I hope will be an interesting presentation to you, on why this permit should be granted, as requested by the applicant, based on nothing more than the *Coastal Act* and the LCP.

Finally, I would like to speak to the takings matter, the discussion in the staff report about why this isn't a takings.

Let me take the Commission back. This permit was granted, originally, by the County of Santa Barbara and was appealed to this Commission. It was heard. It was initially denied. There was a motion for reconsideration, and on reconsideration it was granted by this Commission in 1994.

As Ms. Hale pointed out, this property was occupied by an active and operating oil field that had been there over 50 years. When the applicant was granted its permit by the Commission, there were only two Commission

conditions, very few Commission conditions granting easements, and whatnot, and the remainder of the conditions simply were composed of incorporating the county's conditions of approval when they originally granted the permit.

And, the reason this was, is that when an appealed permit is accepted for hearing by your Commission, the lower permit is vacated, and therefore Mr. Douglas at the hearing is shown in the transcript as pointing out, quite accurately, that the Commission granting the new permit would have to bring forward the county's conditions.

Thereafter, litigation ensued. That litigation was won at trial, and at the court of appeal by this Commission. During that period of time, the time to issue the permit, the expiration was tolled, the time clock was stopped, and the applicant, together with the Commission, side by side with the Commission, having been successful prevailing on the merits of the court of appeal, initiated the closure of the oil field.

Now, this took several -- it took a long time. It took $8 million, and it left 20 years of oil in the ground. I do not bring before you today what the value of that 20 years of oil is, but I am sure, given the energy constraints in California, you can imagine it is considerable.

Now, the applicant, after closure, and the cleaning up of the site, was in the final stages of cleaning

up the site -- which is after you remove the facilities, you remediate the soils, and whatnot -- the applicant was performing this work during the el nino rains, and the wetlands that are on this site are a direct and proximate result of the impoundments that the applicants created prior to the onset of winter, after remediating the oil facilities. They were impoundments to keep runoff, because the winter caught up with them before the contaminated soils were removed, so that the contaminated soil runoff did not run off, it is a requirement. And, thereafter, the wetlands impounded water. It is a very familiar pretext.

Now, when the applicant, in 1998, presented the compliance with the Commission-imposed conditions, the new ones, and the county conditions, it was already autumn of 1998. This permit's expiration date was in late January, 1999. In spite of the fact that the county conditions, the county had signed off on their conditions, and the paper work had been done on the legal conditions, this permit was not issued by the Commission staff.

Now, I am not going to speculate here before you today why that was, or if there was a reason, but I think that we can all agree that after what was then a good four years of litigation after granting, that it was at least, at the very least, a manifest injustice not to issue this permit.

Now, the applicant, also at that time, moved forward responsibly, I think, to redesign this golf course for the sixth time, to avoid the wetlands that were created by the remediation. And, they filed an amendment with the Commission to fulfill that. The amendment was recommended for approval. Thereafter, two appeals were filed, which never made it to the Commission, in late 1998, two appeals were filed. Now, these are a second round of appeals.

Please recall, Commissioners, that in 1994, your approval of this project arose out of an appeal permit granted by the county. The County of Santa Barbara LCP has a second tier of CDPs where they conform their permits to what you granted, and it was this second, what we believe, administrative permit process, that focused on the two appeals.

One, was to adjust the golf course to the Commission's approval, and to the wetland rearrangement, and the second appeal permit was to remove 541-cubic yards of contaminated soil as the final act of remediation.

Now, Commissioners, none of the permits that were granted by the county of Santa Barbara to remove these millions of dollars of oil facilities were appealed to your commission, none.

When the permit was not issued by staff, and then the expiration date drew near, the Commission staff suggested

that an extension be filed. Now, this is normal, because after that investment, you do not want to see your permit expire. The applicant had no alternative, at that point, because Commission staff did not issue the permit, did not bring the appealed staff reports to hearing promptly -- did not bring the amendment.

Now, I don't think, personally, I will tell you Commissioners, it is my considered opinion that those appeals and amendment had nothing to do with the issuance of that permit.

Think about it for a moment, with me. You issue the permit, nothing can happen. You have a county permit that is already on its way to you that has a different project than the issued permit. The applicant cannot move forward without your final approval, but in issuing the permits, this terrible situation that we are facing today on this granted permit that is backed by part performance, to the extent of closing down the oil fields, it would not be in peril now. We would not be sitting here tonight talking about it, if just the permit had been issued.

Taking you back to 1999, January, an extension was filed, and shortly thereafter that, thereafter it was announced that red-legged frog had been heard -- not found -- heard on the property. Now, it wasn't until June of 1999, that the extension, the appeals, and the amendment were

brought before your Commission.

The applicant argued at that hearing, and the record shows that the applicant asked you to continue this matter, continue the extension hearing to allow them to produce more evidence. The U.S. Fish and Wildlife Service would have to grant a 10-A permit. That doesn't affect the Commission, necessarily, you can make your own judgment, at that time.

However, what the Commission decided to do was this, the Commission decided that it would deny the extension, trail the two appeals and the amendment matter, and direct the applicant not to return until the 10-A permit was granted.

Now, ostensibly, and what the record shows, this was for the purpose of guiding Commission staff, and the Commission, in what they should do about the red-legged frog, and Chairman Wan, specifically -- in the transcript -- is shown as asking the staff, are you sure that nothing will happen on this property during the term, until this permit comes back with the 10-A, and the answer was affirmative, yes, nothing would happen.

Now, a 10-A permit takes a long time to get. There is no question in my mind, that had the Commission thought about it for a minute, and I don't think the Commission's conduct was intentional. I think everybody

thought this process would be faster, and that there wouldn't be this terrible chaos at the end, but you could have conditioned, could you not, you could have conditioned the permit to comply with the 10-A, and if there were any changes brought about by the 10-A -- which, in fact there were -- the matter would come back to you. That would have stopped the staff's allegation that accrued changed circumstances occur over time.

You found one changed circumstance in 1999, one, and you directed the applicant to go back for a 10-A, which he did. That 10-A was granted almost a year ago, in January of 2002.

Now, Commissioners, during the period of time where this site that had been used by man for over 50 years, sat idle, completely idle, and was colonized by just about everything.

Now, I arrived, we are now standing here tonight, 3.5 years after the denial of the extension of time, trying to resolve these nuisances that came to the property. And, they are nuisances to us, for this reason, for this reason, we have an investment-backed expectation of this permit being honored by this Commission, and there is not a trouble with that, there is no trouble, because of the $8 million, and because of what I will tell you next.

Now, what we are proposing to the Commission is

that you consider our legal arguments that are presented in my letter, and in Mr. Kaufmann's letter, carefully. We have also given you expert testimony that the factual basis in the staff report is wrong. But, I think there is an easy way out of this, for the Commission, and it is just following the LCP.

What I would like to do now, is in spite of the late addendum, which by the way I got yesterday, and I am sure the Commissioners did, as well, that addendum contains three letters dated prior to the publication of the staff report, which were never provided to the applicant, and they are letters that were obviously relied on in the development of the staff report, and I find that troubling.

Let me go through the issues, one at a time. We are going to start with white-tailed kite, and I would like to tell the Commission how this matter can be found consistent, how you don't have to deal with this as a changed circumstance. It is the applicants' position that white-tailed kite presence on the property, whether they are roosting, nesting or perching, is not a new circumstance. Please let me tell you why.

The white-tailed kite was described in the 1993 EIR. They are a very important raptor, very noticeable. Their use of the property was documented, including nesting. Did they send out specialized protocol nesting surveys in

1993? no, but everybody knew they were using the property. There are over 900 trees, as staff told you, on the property. The 900 trees provide more than enough places for a white-tailed kite to establish a nest.

But, here is something important about them, they don't go back to the same nest every year, necessarily. They build a new nest every year, and in the two years that they have been observed on the property, when they have been observed either nesting or looking like they were going to, they were in a different tree each time.

What the EIR says -- and I would like to put this in the record -- the EIR says that, in part -- now, this is in your document, this is in Mr. Kaufmann's letter as attachment 2 -- that the removal of the trees for the golf course would eliminate nesting, perching, and roosting habitat for sensitive bird species. The white-tailed kite is listed as one of those species.

It goes on to mitigate that effect, it goes on to mitigate it, so in our point of view white-tailed kite was already anticipated on the property, all of its associated activities, including nesting, were anticipated, the white-tailed kite was mitigated, including for nesting, and a decline in its population was acknowledged in the EIR, as the result of the golf course.

I can't -- this was before your Commission in

1994, and your Commission concurred in this finding of the county, and I really think that although we are actually --white-tailed kite is a very good neat bird. It is a very neat raptor, and it does like living -- it is one of the few that like living on golf courses, and we have documented evidence of that, that it lives on golf courses, if it has the other support habitat components.

There is no question, and it astonishes me that we are sitting here tonight talking about a changed circumstance, and white-tailed kite when nothing could be more clear. It doesn't matter to me, from a legal standpoint, whether somebody actually saw them nesting on the property, the property was presumed to be a site where the birds nested -- presumed by the Commission, and mitigated.

Now, I would like to have the next one, please David, next one.

What do we do -- let's assume that you do not agree with me, and let us now go to the LCP, and figure out what do we do when we have a changed circumstance of a white-tailed kite? Dr. Dixon showed you an impressive series of circles and buffer areas, but that is not what the LCP tells us to do. The LCP doesn't tell us to go out and try to figure it out. It has already identified what we are to do.

These words are very important. The policies in the LCP are identical to these development standards, that

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are in the certified LCP. First policy, there shall be no development -- including agriculture development -- i.e. structures and roads within the area used for roosting and nesting -- structures and roads. The very next policy tells us that recreational use of the roosting and nesting area shall be amendable, walking, bird watching, I think most golfer would fit into that category.

Protective measures for this area should include fencing and posting, so as to restrict, but not excluded use by people. There is absolutely no basis in the LCP for excluding people from the nesting areas, assuming you can identify what a nesting area is on this site.

Next, any development around nesting and roosting areas shall be set back sufficiently. Going back, we know that recreational use is not development. Development is structures and roads. We don't have any structures and roads on this golf course, in the nesting area, in any setback area.

Bolsa Chica was raised, as an issue by Dr. Dixon, and I would like to speak for a moment to that. Bolsa Chica was a matter before this Commission that was not a certified LCP. In other words, the Commission was applying Chapter 3 policies of the *Coastal Act*. They didn't have a document like this. They were trying to decide whether to certify a document like this, and that is an important difference,

because under those circumstances, the staff, and the Commission may, of course, establish ESHA.

But, in this case, we believe the circumstance has already been addressed in the EIR. To the extent you don't agree with that position, the LCP policies clearly state, and I think taken together, and taken together with the other arguments in the LCP, itself, clearly, clearly indicate that a golf course is a type of recreational use envisioned for this.

We can keep all of the nesting trees, by the way. The trees that the nests were built in, we have already indicated to staff they don't have to be removed. That wasn't in the staff presentation, but I wanted to make sure the Commission understood that.

We have put in other things that weren't mentioned in the staff presentation, in our proposed project. Working with Dr. Froke, who lead the Roger Torrey Peterson Institute, he was president of it, just one of his many engagements, I got Dr. Froke involved to help advise me on the number of enhancements that we could do. We eliminated rodenticides, and that helps with the kites. That doesn't eliminate their food source, and doesn't poison them. We eliminated many of the chemicals we were using. We reduced our chemical program considerably.

Dr. Froke's expert letter, that was handed out to

you yesterday, points out a number of things in the staff report, but there is no question that the white-tailed kite were anticipated, they were mitigated, they were assumed to be nesting on the property. There is no surprise here, that they are here, and they are not, in our view, a changed circumstance.

I would like to turn to the monarch butterflies. Monarch butterflies --

Next one, David, next one -- oh, excuse me, back one, David.

Just one last thing on the white-tailed kites, those yellow areas that are there --

If you can't, that's okay.

-- those yellow areas, Dr. Froke had recommended that we could enhance additional foraging area by converting areas that were sort of idle within the golf course, and turning them into grassland. These would be native grassland areas. The roughs would be mowed to only five inches -- to keep it the length of five inches, which increases the number of voles and harvest mice and rodents that the white-tailed kite prey on.

I should mention that the two white-tailed kites that built nests on the site, only one had reproductive success. We, actually, looked in the other nest, the easterly pair, and the only pair that had reproductive

success is right here, the others did not.

Okay, now go on.

Now, monarch butterflies, we engaged the services of the leading authority on monarch butterflies in this area, Dr. Daniel Meade. We didn't really need to, because the LCP, once again, tells us what to do. It says adjacent development -- butterfly tree shall not be removed -- okay, we are not removing the butterfly trees, and shall not be pruned during roosting and nesting. We are proposing none of that. Adjacent development shall be set back a minimum of 50 feet from the trees. A minimum of 50 feet.

Please go to the next one, David.

We are set back 50 feet. This is the monarch butterfly. This is the new area. This is the one that you knew about at the time of your '94 hearing. There is debate on whether this is new.

No, David, please go back.

There is debate on whether this is new, this area; however, the area of the, right here, this area here, is set back 50 feet, and how I know this, Commissioners, is we moved the Par-3 to do it. We moved it over when this area was discovered, and we went ahead and moved the Par-3 50 feet away.

Now, it is interesting that this autumn, this particular site was not used by the monarch butterfly. So,

either, if it is a changed circumstance, it didn't occur this year.

We, also, defended, chose to defend our Par-3 golf course with very minimalist concepts. We don't have any spraying of pesticide, so the overspray comments in the staff report are totally without foundation. We have no spraying. We have the merit herbicide that was talked about in the pesticide for the treatment of the Par-3, that can be applied at times when the monarch butterflies are not there, so there is no danger in having these butterflies come into contact with irrigated lawn.

The only facility, and it is part of the water quality program, is something this Commission is well familiar with, which is the bioswale. It is raked once or twice a year, to keep it free of debris, and it is what the golf course waters pass through to do bioswale filtering.

Again, our expert letter from Dr. Meade takes exception to the staff report, and should be considered by the Commission.

I would like to move to the red-legged frog. The red-legged frog is a species that we got the 10-A, they wanted us to move the access so that it didn't go down into the wetland area, which we did. We worked with staff on that. But, the red-legged frog doesn't require the Par-3 to come out, at all. the red-legged frog -- the defense of the

Par-3 is significantly reduced, or eliminated, chemicals. The reclaimed water pond, which is right here, which staff wants us to bury, at the cost of $2 million, I have not found a single expert that can say anything more than, "Well, yes you could bury it, and then it would be below ground, and that would be better."

Our experts say that this is not necessary. We made the pond to not allow frogs to get out. We redesigned it. We also have indicated to staff -- but we never got an answer back -- that we are happy to put another water feature in there, in between Eagle Canyon Creek, and the reclaimed water pond to attract the frogs.

But, the basis thing is that the U.S. Fish and Wildlife Service, which has the authority over this species, has said that there is no problem, and several of our experts that have gone out there, also, say there is no problem.

So, we don't really believe -- and a comment was made in the staff report about breeding habitat. Breeding habitat was never established in Eagle Canyon Creek for the red-legged frog, even the Service didn't do that. They didn't do the studies to establish breeding habitat. What they did do is they simply assumed breeding habitat for the purposes of finishing the 10-A more expeditiously.

The tar plant is not ESHA. The tar plant was listed as a category 1-B species in February of 1994, nine

months before you approved this project, nine months. It was a Category 1-B when you acted.

We have proposed, contrary to -- this is the approximate location of the tar plant -- contrary to what has been said, we have proposed substantial mitigation. The reference was made to the mitigation in 1994; however, we have since amended our project description and for the 400 plants that are there, we propose planting 3000. That is a 7:1 ratio.

They would be planted right down in this area. There is enjoy a mesic environment, so there is a small area leftover from the oil facility. But, we do not believe that this is an ESHA at all. You choose to mitigate the only naturally occurring stand of it, when you acted in 1994, and it was Category 1-B then. This is artificially created.

In conclusion on the issues, we think this project is complete consistent with the LCP, as proposed. There is no need for setbacks. I will tell you that the setbacks that are proposed by staff will completely destroy the ability to put a golf course on this property.

This golf course has given up -- although the statement is made in the staff report, "Gee it is 208 acres, so there is plenty of room."

What you have to understand is that over 100 acres of that has already been surrendered to preserve Tomate

Canyon, to do setbacks from the bluffs, to have areas that are restored to conservation easement, and wetlands, incidental wetlands. We don't have anything left to give, believe me, I think this applicant would have given it to you if they could, because this is a very expensive, and troubling process.

But, I think the thing that caught our attention the most is the takings argument. The staff, I think if I understand the staff's position, it is, you have 21-lot sub-division, plus two additional lots, you have 23 lots, why don't you build them? We don't have water.

And, in fact, what is important about this is the court of appeal noted this, your Commission litigated this case. The court of appeal makes the statement, it is not a question of how much water is available for agricultural use, there isn't any water at all, potable water.

We can irrigate the golf course with reclaimed water. We don't have potable water, except for the club house. It is very small amount that we are allegated from Goleta Water District. Morehart has water, but it belongs to Morehart, that is the property that Ms. Hale was talking about, to the west. It belongs to him. He is using it for his development.

We have no water available to us now, therefore, it is a false statement to say that it is not a takings. The

only use on this property, that can be placed on it, is what is in this permit now. The residential, unless there is some miracle on water, the residential simply isn't feasible for us.

Although, if you want, you know, I suppose you can incentivize this applicant, if you wanted to approve residential tonight, instead of the golf course, I suppose you could incentivize the applicant to go beg up some water somewhere, or for some price; however, I can tell you, that as we stand here today, looking at the facts as we see them today, there is no water to this site, except from Goleta Water District, that is only reclaimed, except for the small allotment to the clubhouse, for potable water.

Commissioners, in closing, I would say that the applicant has tried to accommodate every reasonable request imposed by staff. The water quality plan was our idea. We terraformed this entire side of the property to drain it away from Eagle Canyon, for the two-year storm, and less. In fact, the part ocean-ward of the railroad is all storms, and nuisance.

We have, in spite of the fact that we believe that we don't have changed circumstances, we've tried to work together. We have really tried. But, we are at a point now, where there is nothing left to give. This golf course cannot be -- today I have with me, Bill Coore, of Coore and

Crenshaw, these are the designers of the golf course. You can't just pick up fairways and move them. It is not like a housing subdivision, where you could take three or four houses off, and it is very understandable. It doesn't work that way.

And, I am sorry to say, that -- and I think this applicant, speaking for my client, I think this applicant would have done it, if it could have been done. They are not being obstinate, as evidenced by their many, many modifications to this project, but it just can't be done.

And, what the Commission will face here is that this will be a taking. This is a granted permit that has a huge amount of investment behind it, not to speak of the plans, and everything, just what they acted on, that everyone stood by and watched.

This Commission, in not allowing this matter to come back until they had the 10-A -- and now it seems that the 10-A doesn't really matter, that is the staff's position -- in not allowing to come back, this Commission has -- I believed totally unintentionally -- placed this property in peril, because things happen on property when you don't use it, things happen.

And, as far as we are concerned, we think that we have a project that is appropriate for this area, it is a hard decision for you, and we understand that. We understand

that you might not have decided it now, like it was decided in 1994, but I am afraid that is not the issue before us.

The issue before is a person who acted in good faith, who won litigation side by side with you. You won it, too. You made all of these same arguments, and now we are here talking about a totally impossible plan.

White-tailed kites don't need setbacks like that, like staff proposes. They live, we have documented, and taken Dr. Dixon -- Dr. Froke has taken Dr. Dixon to areas where there are golf courses where this works. It will work. The white-tailed kites will stay on the property, and it is not a problem, but it is also not a changed circumstance. You thought about it, you chose to mitigate it, and that, I think is final.

What I think you need to think about, is I think there was a really nice quote today by Chairman Wan, when she made her comment, and I took it down word for word, I think. She said the Coastal Commission must have the courage to uphold the law. I agree with that. I totally agree with that, but it runs both directions.

Thank you, very much.

CHAIR WAN: Monty Parsons, a neutral speaker, you have three minutes.

MR. PARSONS: Madam Chair, Commissioners, my name is Monty Parsons, and I manage the property directly to the

east of the project site. Our common property line runs down Eagle Creek. You just heard a great deal about Eagle Creek, and the habitat in that vicinity, so I won't go into detail on that.

The owners I represent, generally, support the project, but believe the following two modifications to the project must be made for it to be consistent with the Coastal Commission goal of environmental protection.

One, termination of the second beach access point on the easterly end of the project site, at Eagle Creek; and, two, relocation of the entire public trail north of the railroad tracks.

As we understand staff has recommended that the public trail through the project be routed north of the railroad tracks, from the west end of the property, to the historic wooden bridge, then south of the railroad tracks from that bridge to the eastern termination at Eagle Creek.

Due to environmental impact concerns, the Commission is currently requiring that the easterly portion of the trail -- that being south of the tracks, east of the bridge -- be closed for at least seven months each year. Part of this closure will be for the white-tailed kite nesting season, harbor pupping season, from March 1st through August 31st. This period could be extended past August 31st if nesting activity is observed, and in fact, staff report

mentions the possibility of this going until October.

Furthermore, the *Coastal Act* as proposed for the east edge of this property site, the project site is scheduled to be closed off starting February 1st, for harbor seal pupping, and red-legged frog breeding, and this period could begin as early as November 1st if activity is witnessed inside of the creek, by trespassers.

It is a certainty that people will make their way into the creek, therefore the access point will only be opened two months out of the year, at the most, and a few days out of the year, at a minimum. Even for these two months, this secondary access poses a serious threat to the sensitive habitat in Eagle Creek.

The staircase proposed for this secondary access point will deposit people directly into the mouth of Eagle Creek, and will thereby guarantee intrusions into the habitat area, by unleashed dogs, insensitive hikers, and children looking to play with and catch polliwogs, fish and other small animals.

Worse yet, is the fact that the trail terminates past the head of the staircase that is proposed for this coastal access, and terminates at the creek, itself, so that even in the months that the access is closed, people will still be directed right into the creek. At a bare minimum, the trail should terminate at the head of the staircase.

However, we feel that the negligible benefit to the public at this redundant access point is far outweighed by the damage its existence will do to the delicate environment in this vicinity. This, combined with the fact that there will be public access at the west end of the project site, and that the proximity of public access at the Bacara Resort to the east is enough to convince us that this access point should be removed from the plan altogether.

CHAIR WAN: Okay, I think you will have to wind up, okay.

MR. PARSONS: Okay.

To wind up, there is no trail alignment deeded, or expected, due east of this project site. To terminate the coastal trail south of the railroad tracks at this time, when the neighbors to the east are adamantly opposed to a trail running through their property south of the tracks, would be a mistake in planning. It would make far more sense to place the entire trail north of the railroad tracks. This will open the door to potential future extension of the trail.

Thank you.

CHAIR WAN: All right, before we start the opponents, we are going to take a break for our court reporter, five minutes, folks.

[Recess]

CHAIR WAN: With this, I am going to call the

opponents. You have David Nawi, you have asked for 10 minutes, and, actually 20 minutes for your combined presentation.

Staff, will you give him 10 minutes.

MR. NAWI: Madam Chair --

CHAIR WAN: Staff, would you help him bend that so that it will work.

MR. NAWI: Madam Chair, members of the Commission, my name is David Nawi, with the law firm of Shutt, Mahauly, and Weinberger. We represent the Surfrider foundation, in connection with this project.

Initially, we would like to call your attention to the letter we submitted, dated December 5, which you should have received copies of last week.

As indicated in that letter, we support the staff recommendation for denial. We find the staff report thorough, complete, and credible, and we think the grounds advanced for denial are appropriate, and in fact require the Commission to deny the project.

Initially, I would like to address the issue of changed circumstances, and what scope the Commission has to address changed circumstances. The applicant did not raise that in their oral presentation here, but it has been raised a lot in their written submissions.

The applicants' position is that the Commission is

limited to consideration of changed circumstances affecting the red-legged frog, only, and cannot look at actual conditions as they exist on the ground, and as conditions and circumstances have changed, with regard to other resources and species.

The applicant focuses on a provision of the Commission's regulations, which, essentially says that the applicant shall be required to provide information regarding the earlier identified changed circumstances, as identified by the Executive Director. That regulation no where says that the Commission is limited to consideration of the previously identified changed circumstance.

In our view, it merely sets out the minimum requirement the applicant must fulfill. It prevents neither the Commission from considering information on different changed circumstances, nor does it constrain the Executive Director from asking that the applicant present such information to the Commission.

This is a standard way permits are evaluated. They are evaluated in the context of the law, and facts, in effect at the time the deciding authority considers -- the Commission.

A very important Supreme Court case involving the Commission in 1976 called AVCO Community developers, the court, addressing vested rights, said that the Commission

must apply the law and regulations in effect at the time of final action on a permit. That was a case where the applicant had expended over $2 million, and in 1976, that was more money than it is now; nevertheless, the court found the permit could be denied at a subsequent date, and makes no sense to apply regulations in effect at the time an application is considered, if the facts on which those regulations were applied are not the current facts.

We note that the applicant did not mention this issue in the presentation before you. We hope that the applicant has abandoned that argument, but we certainly think that the Commission should consider that you are free to consider changed circumstances with regard to each and every circumstance that the staff has brought before you, specifically, including the white-tailed kite.

As indicated by the staff, the circumstances regarding the white-tailed kite are the most significant circumstance you have to face. Contrary to the applicants' position, the white-tailed kite is not a nuisance. The California Legislature, itself, has name the white-tailed kite as a fully protected species. That means that species cannot be taken, harmed, or possessed. There are only 13 avian species that the legislature has granted that fully protected status to. It is a very important species. Its numbers are very small. It needs to be protected.

Here, we have a situation where one, probably two, nesting pairs were sighted, and in what I understand to be a very rare biological occurrence, they actually fledged five chicks. So, this is a very valuable population, of a very valuable species.

The applicant takes the position that this species, and the kite, was fully and adequately dealt with in the earlier EIR and in the earlier approvals by the county and the Commission.

To begin with, there was no specific information, whatever, of the presence of white-tailed kite nesting on the site. Now, of course, we have that information.

Significantly, the approach in the EIR was general mitigation. There was nothing specific about avoidance. There was no measures taken to really see that the species was protected, and perhaps most significantly, there was no reference at all to the policy your saw flashed on the screen in the LCP that addresses protection of the white-tailed kite. Clearly, their presence, their actual known presence is a new circumstance that needs to be addressed.

The applicant believes that the regulations of the county -- they made this argument in writing -- that simply says under the county's regulations, if new habitat is identified, the proper course under the LCP is for the county to update the ESH overlay and buffer area.

They make the argument that under the county's regulation, when you find new habitat, you can't consider it, you can't take protective measures. All you can do, in fact, is not treat it as ESHA, but rather go back and update the ESHA map. We think that is clearly incorrect.

The county's regulation in the LCP has two sentences, we think these two sentences are additive, one on top of the other. The first says, if the newly documented environmentally sensitive habitat area, which is not included in the ESH overlay district is identified by the county on a lot, or lots, during the application review, the provisions of Section 3597.7 through 97.19 shall apply. Then, it goes on to say that the map shall be periodically updated.

Clearly, if all that could be done was to update the map, there would never be a situation for the first sentence to apply to, that is, you would never have unmapped ESHA habitat that needed to be addressed. The county had specific regulations that tell you, in the case of unmapped ESHA, go to these other regulations.

This is very different from the situation in the Morro Bay Mini Storage case, where San Luis had an entirely different regulation.

And, here, the applicant focused on the provision of the regulation that talks about restricting, but not eliminating use by people. That does not mean 60,000 rounds

of golf a year. The regulation cited by the applicant, in the part of the section that they didn't focus on, said any use shall be minimal, and 60,000 rounds of golf is not minimal.

In terms of the protection required, we think that the staff recommendation is fully appropriate. That is, Dr. Dixon's presentation was extremely clear and convincing. We think his recommendations are very supportive; in fact, as he indicated, there is a school of thought that says what he is recommending is not protective enough, and should go further.

An earlier report by Dr. Mark Holmgren, in June of this year, said a minimum of 100 meters setback would be required. Dr. Dixon is taking what we think is an appropriately conservative position, both in terms of protecting the species, and assuring that you are carrying out your responsibilities to protect the species, and at the same time not being unduly intrusive, or restrictive on what an applicant can do.

We will briefly address the facts of the tar plant, and the monarch butterfly. You are aware that changed circumstances exist with regard to both the butterfly, in terms of the vastly increased numbers, and of the tar plant with the new populations, and in particular we would like to support the idea that a minimum of a 50-foot buffer, probably 100-foot buffer, is required from the grove boundary, as the

Commission, itself, decided in applying similar, or the same provisions, in connection with the Ellwood - Santa Barbara Shores project.

We believe that a viable 18-hole golf course can be built on this site. We think the issue you have to focus on is that 18-hole golf course. The 9-hole golf course has unavoidable impacts, and should be stricken as earlier suggested. But, we think, as proposed, the 18-hole golf course cannot be, lawfully approved. You could approve the project with the 18-hole golf course, in our mind, either by ignoring the law, and/or by proceeding on a basis of less than substantial evidence, which would, of course, expose you to legal vulnerability on that basis.

You heard a lot from the applicant about the problems they've had, about the what-ifs, if people had done this, had done that at earlier times, things would have been different. The fact of the matter is, that as presently before you, the applicant does not have a permit. We do not believe that any legal rights of the applicant have been either abridged, or denied, and we hope your legal staff has confirmed and concurs with us in that opinion.

CHAIR WAN: Your time is up, so please wind up.

MR. NAWI: I am just about to conclude, Madam Chair, thank you, very much.

We think the allegations in the applicants'

papers, in particular, regarding their mistreatment by the staff, and others, are unfounded, and should not sway this Commission.

Your overriding mandate is to protect the resources in accordance with the certified LCP, and with the *Coastal Act*. We think you can, and should do that, and by following the staff report, you would be doing that.

And, the final word is you heard from the staff, in their opening comments, that this is a better project now, then it was in 1994. It simply, in our minds, is not good enough to merit approval by the Commission.

CHAIR WAN: Mark Massara.

He has the balance of the 20 minutes -- 10 minutes, right. Yes, I gave them 20 minutes, combined.

MR. MASSARA: Good evening, Madam Chair, Commissioners, I am Mark Massara, and I represent the Sierra Club, and I really appreciate your patience and willingness to sit through what has become a very, very long day.

Initially, we want to emphasize that no one, Sierra Club, or otherwise, is saying that applicants cannot build a golf course at this site.

What we are saying is that what has gone wrong with this process is that the applicants have steadfastly refused to redesign the proposed golf course, and/or to modify it in any meaningful way to protect hugely important

and significant coastal resources, or accommodate rare, endangered, threatened, and fully protected species on site, that include red-legged frogs, tide water gobys, monarch butterflies, white-tailed kites, and the southern tar plant.

At the outset, we wish to clarify that the spectacular scenic nature of the property, and that applicants' consistent claim that this is a waste land, and a former degraded oil industrial property, as our pictures demonstrate, nothing could be further from the truth.

Even at the peak of oil operations, the work consisted primarily of low impact, above-ground pipelines, and took place on only a very small percentage of the property.

Applicants' approach has consisted of two basic arguments: first are their legal positions. Applicants argue that you are estopped from recognizing all of the amazing resources on this site, and that you must cover your eyes and bury your head in the sand, an blindly approve the project, and condone destruction of habitat and wildlife on site.

As your staff, and lawyers, have explained, applicants' legal arguments are unpersuasive, and amount to nothing more than a red herring. In particular, the citation to the Morro Bay mini storage case is completely off base. The kites dealt with the old San Luis Obispo LCP and ESHA maps contained in that LCP. This property is not in San Luis

Obispo, but is in Santa Barbara County, and the Santa Barbara County LCP is not defective in that regard, and allows both you and the county to recognize, account for, and protect environmental resources on site whenever and wherever they are found. You can call it the full reality provision: take account of reality on this property.

As for the claim that nature here is your fault, because you have delayed this project, that claim begs the question of why the applicants' waited so long to complain about these delays. It is, solely, because the claim has no legal merit whatsoever. Listen to your lawyers, listen to our lawyers, listen to lawyers without a financial interest in this golf course.

Scientific issues are the second argument made by the applicants. In reality, 80 percent, in my estimation, of the applicants' problems associated with this project, are related to the 9-hole mini course. This course, in which fairways lie underneath monarch butterfly roosting trees, and flows down into the red-legged frog, and tide water goby estuary is designed to withstand a two-year storm event. I, personally, have never seen a development proposed with a more dangerous runoff capability.

A two-year storm event, means that whenever it rains, all of the wildlife in the estuary will be killed, or at least every two years. Even in the event that the water

quality impacts could somehow be reasonably addressed, allowing thousands of monarch butterflies to dangle just above fairways where novice golfers are whacking away at golf balls, sets the stage for monarch massacre. Yet, even if the butterflies could survive the golfers, picture them foraging on chemically treated lawns?

In short, there is no way that the 9-hole mini course can pass *Coastal Act* muster, yet, even if we eliminated the 9-hole course, the applicants' refusal to redesign the 18-hole course, to allow for the survival of white-tailed kites requires you to deny the project here tonight.

What you have at this site, is two white-tailed kite nests, and five fledglings this year, making it one of the most significant and spectacular resource events on the entire California coastline.

And, the applicants' refusal to accommodate the kites boils down to views. Simply put, those trees that run along the bluff edge throughout the entire property are crucial for kite nesting and survival.

The applicants insist on destroying those ESHA trees in order to enhance golfers' coastal views, while on the coastside fairways. Elimination of kites from the property merely to enhance view is obscene, and unconscionable, especially given the extraordinary number of the

fledglings occurring there.

And, less you be persuaded by the applicants' golfing biologist that kites and golf are entirely compatible, consider this: less than a mile down coast of this proposed golf course, is another struggling 18-hole golf course called Sand Piper. It has no nesting kites. This is despite the fact that kites nest right next door, on the undeveloped Ellwood Shores property.

Your staff's approach here is not over zealous, nor is it radical, as the golfing experts and biologists of the applicants suggest. In fact, UCSB Professor Mark Holmgren, a biologist with no financial interests in the project, and a long history of kite analysis, points out that even staff's 200-foot buffer is unlikely to sustain kites, if the golf course is built.

In Holmgren's letter to you, dated June 6, 2002, on page 9, he says:

> "One hudred-meter buffer equals 3.1 hect acres, which is only 18 percent of the smallest territory known for white-tailed kites."

That is the end of the quote.

I am telling you, in fact, white-tailed kites need 20 to 50 acres in order to survive. Unless you be persuaded by applicants' golf professionals, that an 18-hole course cannot be feasible constructed around white-tailed kites,

consider this: these same golf course designers -- who stand to profit handsomely from the construction of this course -- have not tried to consider designing an 18-hole course by utilizing the land currently dedicated to the 9-hole course, and the driving range.

We are confident that a denial of this project -- that upon denial of this project, the golfers and the designers will find a way, after all, that is their job. And, remember, these fairways are nothing more, at this time, but lines on a piece of paper.

Lastly, we want to, again, highlight to woeful public access component of this project. Given this project surrounds one of the most famous surfing environments on the coast, you'd never know it, given 15 public parking spaces -- 15 public parking spaces, and 300 spaces for golfers. What are the priorities here? 15 parking spaces, and a mile walk up a fenced viewless corridor, along the railroad tracks, to reach the beach. That, Commissioners, is not acceptable.

Look at Ocean Trails Golf Course in Palos Verdes, the most recent course approved by this Commission. That course includes unlimited public parking, and public trails all over the golf course, not some second class, segregated corridor.

And, by the way, I wanted to touch on the legal lots that were referenced in the maps that were shown on the

-- and are on this property. From our view, those legal lots represent a conservation opportunity. Those lots can be retired in a conservation acquisition, and tax credits gained in excess of over $10 million.

Now, I don't dispute that there is water problems associated with those lots, but by retiring them, and taking advantage of tax credits, you don't need water.

In the end, there are simply too may problems to fix with this project today, and this is not your fault. Your staff has tried for over a year to get applicants to redesign this course, and they have stubbornly refused at their own peril.

We urge that you not attempt to build applicants a golf course from the dais tonight, but instead provide relief through denial to wildlife, habitat, concerned public, and the applicants, so that they can begin the process of designing a project that is consistent with the *Coastal Act*.

Thank you.

CHAIR WAN: John Ucciferri, and members of the public have two minutes, followed by David Duffy.

When I call the second name, if you would find a seat up in the front, so we can move this along, please.

State your name for the record.

MR. UCCIFERRI: My name is John Ucciferri. I am a citizen of Santa Barbara County.

Madam Commissioner, Honorable Commissioners, it is with some pride that I stand before you today as a concerned citizen from Santa Barbara County. I am from Santa Barbara even though I lived in Orange County for the first 18 years of my life, until I was old enough to decide for myself where I would reside.

Santa Barbara County is one of the most desirable places in the world to call home, precisely because it is not Orange County. Whereas Orange County's coastline is almost entirely developed, Santa Barbara is blessed to still possess some of its natural character.

The proposed Naples golf course would be a tragic defilement of some of California's most beautiful and valuable coastline. This golf course would transform some of California's most valuable natural heritage into just another shortsighted, and after the proposal here, it is a fatally flawed business proposition.

Last year, I hosted a friend from Costa Rica, who had dreamed of touring the California coastline for her whole life. I took her on a drive from just the northern border of Tijuana, all the way up to San Luis Obispo. She was disappointed to find that almost all of the entire coastline had been developed into sprawling suburbia, for most of the stretch up to Santa Barbara County. She liked Santa Barbara County the most, and she thought San Diego, Orange County,

Los Angeles County, and Ventura Count were sad disappointments, as compared to what she'd seen on television. Santa Barbara's high quality of life, and correspondingly high property value, are largely due to its open spaces, and natural beauty.

The potential benefits of this golf course are clearly outweighed by the prospective benefits to the public of alternative processes currently being pursued regarding the Gaviota coast. By denying this project, you would allow the various alternatives to this proposal to go forward. Conversely, these processes might lead --

CHAIR WAN: You will have to wind up, your two minutes are up.

MR. UCCIFERRI: Sure, I am in the final. -- but might be derailed by approving it.

Currently, Santa Barbara County is considering the mediated process called common ground, and holds much promise.

CHAIR WAN: You do have to wind up.

MR. UCCIFERRI: Okay.

CHAIR WAN: One sentence, please.

MR. UCCIFERRI: There are many processes that are alternatives to their proposal on the ground for this, alternatives to this proposal, and they should be pursued.

Thank you.

CHAIR WAN: David Duffy, followed by Michael Paquet.

[No Response]

UNIDENTIFIED SPEAKER: David is outside of the room.

CHAIR WAN: Okay, Michael Paquet, followed by Scott Bull.

[No Response]

Scott Bull.

Followed by Nathan Post.

MR. BULL: Madam Chair, members of the Commission, my name is Scott Bull. I am a 10-year resident of Goleta, and live within minutes of the proposed ARCO Dos Pueblos Golf Links.

Staff has concluded the presence of white-tailed kites and greater number of southern tar plant and monarch butterflies constitute changed circumstances. Without extensive changes by the applicant, the project is inconsistent with the *Coastal Act*, and the Santa Barbara Local Coastal Plan.

Staff states that the project, as is, will have, quote, significant impermissible, and potentially irreversible adverse impacts on environmentally sensitive habitat areas, and sensitive species, end quote.

The applicants have strong arguments against

staff, as claimed in the report by Dr. Froke, with regards to kite; however, certain flaws exist. First off, Dr. Froke's referral to the golf course is at Pebble Beach as the basis for making recommendations on kite issues at Dos Pueblos is not credible. The Pebble Beach golf courses have expansive nearby open space, without cattle grazing, multiple nearby reserves, a 15- to 25-mile an hour speed limit on nearby roads, and multiple nesting opportunities in Monterey cypress. Comparing that area to Dos Pueblos, a strip of land wedged between the ocean and an interstate highway, is comparing apples to oranges.

Second, not a single proposal Froke sets forth is backed by strong scientific evidence. Froke includes untested speculation, such as the notion that the kites will move back to their original nests, once the trees are removed, or that planted and manicured rough will provide suitable habitat for enough voles to support one to two breeding kites pairs. There is no doubt that it has been gathered at Dos Pueblos, or cited even in Froke's report.

Coastal policies should not be guided by speculation. Froke's assertion that kites and golfers are compatible is not based on documented scientific fact, and should be questioned.

The fact remains, regardless of the process, and what ifs, that we are to get what we are here, is that these

nuisances, as Andi Culbertson states, are on the site now, and must be preserved as required by LCP and the *Coastal Act*.

She says the applicants --

CHAIR WAN: I am sorry, but your two minutes are up. Just one concluding sentence.

MR. BULL: -- are trying to accommodate staff, and nothing works.

As I have stated to this Commission many times before, this site is clearly inappropriate for this development, conflicts with the LCP and *Coastal Act* and must be denied.

Thanks.

CHAIR WAN: Nathan Post, followed by Robert Keats.

MR. POST: Madam Chair, before I begin, I have been asked to ask you whether or not it is permissible to donate time to other speakers?

CHAIR WAN: Do you want to donate your time to somebody else?

MR. POST: No, I believe that somebody would like to donate time.

CHAIR WAN: I would need their name, what's their name?

MR. POST: Keith Zandona.

MR. ZANDONA: I've had time donated to me, and obviously -- [not on microphone, voice fades out of hearing

range]

CHAIR WAN: Yes, excuse me, but the procedures are actually posted out there, and yes, but that is not the question. Do you have someone who wishes to donate time to you?

MR. POST: No, I don't, I just wanted to see --

CHAIR WAN: Well, okay, then let's just go forward with this.

MR. POST: Okay.

CHAIR WAN: Robert Keats.

MR. POST: Madam Chair, members of the Commission, my name is Nathan Post. I wish I had time to respond to the applicants' presentation, but recall that we wanted the Coastal Commission, oh, so many years ago, and at the rehearing, and subsequent vote was part of a process of what we believe was a corruption of the Coastal Commission by ARCO.

Given the economics of golf and our community, it is unlikely that any golf course on the site would be profitable. Privately owned golf courses in our community are struggling financially. For example, Rancho San Marcos Golf Course is in bankruptcy, Sand Piper golf course, which is located on the ocean one mile from the Dos Pueblos site, recently sold for $6 million less than the previous owner paid for it. Glenn Annie Golf Course, just two miles from

Sand Piper is losing money on its golf operations, and is only staying afloat economically, because of its popular restaurant. According to the manager of the Rancho San Marcos Course, there enough golfers in the community to support the number of courses that we already have, adding one more public golf course to the community will inevitably result in economic failure for somebody.

Eight years ago, we came before the Commission to express opposition to a project that we believe is inconsistent with the *Coastal Act* and the Local Coastal Plan for Santa Barbara County. At that time, Commissioner staff strongly recommended denial of this project. Today, we stand before you again, seeking environmental justice for the endangered resources of this precious coast.

We are hoping that the Commission will vote to uphold the letter and intent of the *Coastal Act*, and of our own Local Coastal Plan, and we pray that the Commission will vote to fulfill the wishes of many, if not most citizens of Santa Barbara County, who hope to preserve the coast for future generations.

Thank you, very much.

CHAIR WAN: Robert Keats, and you have two speaker slips, so you have four minutes.

MR. KEATS: Thank you, Madam Chair, and members of the Commission, my name is Bob Keats, and I am vice-chairman

of the Santa Barbara Chapter of the Surfrider Foundation. I would like to thank Coastal Commission staff for their excellent report, and I strongly support staff's recommendation of denial for this project.

The site for the proposed golf course project is on the Gaviota coast, which contains the last significant stretch of undeveloped, rural, coastal land in southern California. Protection of open space on the Gaviota coast has become a high priority for our community, and in fact, one of the possible options for this property, if it were not developed as a golf course, would be for the owners to sell the land to an organization, like Trust for Public Lands, which is very interested in acquiring and conserving properties on the Gaviota Coast.

Trust for Public Lands recently facilitated the acquisition of hundreds of acres of land on the nearby El Capitan Ranch.

Another possible alternative to the golf course, would be for the owners to make use of their potential development rights on some of the antiquated lots on the western end of the property. Given that houses on the Gaviota coast are selling for millions of dollars each, and that the property has approximately 4-acre feet of potable water, this is an option which would produce a substantial profit, and would result in at least two-thirds of the site

remaining undeveloped, which would protect the environmentally sensitive habitats, and the species that depend on them.

Another alternative would be to use the site for agriculture. According to Dr. James Ahern, a professor of agri-business at CalPoly San Luis Obispo, who testified at two previous Coastal Commission hearings on this project, the site could be used profitably for raising crops.

Although 25 percent of the site has been used for oil production, 75 percent of the usable land on the site has never been used for anything other than agriculture.

In addition, the remaining oil reserves cannot be reached with currently permissible drilling technology, that is why the oil field has been abandoned. Furthermore, a project that move 310,000 cubic yards of dirt, is definitely development.

With regard to a letter that you recently received, I believe, from Mr. Ben Crenshaw -- and with all respect to Mr. Crenshaw, I certainly admire his record as a golfer -- if the applicant truly wanted a par-72 championship course, the developer would not have included the 9-hole course in the plan, nor would they have chosen a site with a railroad track bisecting the site, and running the full length of the course.

The famous championship courses, such as Augusta

National, where Ben Crenshaw won the Masters Championship, those courses don't have railroad tracks running through them.

Furthermore, the applicant has refused to even try to redesign the course in accordance with the guidelines recommended by your staff. The Commission, in response, should refuse to grant a permit for this project.

Moreover, this project would set a precedent to the conversion of good agricultural land to non-agricultural commercial use, in the midst of an undeveloped coastal plateau that the community desires to preserve. That is why the majority of the letters and postcards that you have received on this issue have expressed opposition to this project.

That has been the case, not only for this hearing, but for the previous hearings on this project. In fact, the hearing in 1994, at which the Commission voted to deny a permit for this project, former Coastal Commission Gary Giacomini made the following comments -- if I have time, I would like to excerpt --

ACTING CHAIR REILLY: Actually, you don't, you need to concluded.

MR. KEATS: Okay.

Well, Mr. Giacomini urged the Commission to deny a permit for this project, and I concur with his request.

Thank you.

ACTING CHAIR REILLY: Thank you.

Mark Morey, followed by Ariana Katovich.

MR. MOREY: Good evening, my name is Mark Morey. I would like to focus my time clearing up some disinformation, and emphasizing some points concerning the incomplete study of the ESHA on the ARCO Dos Pueblos parcel.

In a desperate move, there has been some basic speculation concerning a fantasy that threatened species living on the site were somehow planted there, in a black operation to derail the project. Personally, I am flattered. Now, I may have a Ph.d. in chemistry from UC Santa Barbara, but I am no Dr. Doolittle telling some birds and butterflies where to roost.

But, seriously, it is not possible for a professional biologist, much less militant environmentalists to introduce white-tailed kites anyway. Red-legged frogs cannot be dropped in a creek, and expected to persist, unless suitable habitat is present. If suitable habitat exists, red-legged frogs would already be there. One does not introduce 4500 plants of southern tar plants, and nine other birds of prey species to the property.

It is far more likely that the proponents of this project have simply overlooked these resources, in hopes that they would not be noticed. This is a classic case of not

looking to avoid finding something, and illustrates a disturbing pattern of behavior.

A glaring example of this omission, from pages 18 and 19 of the staff report, is that the applicant shut down the study after fledgling baby birds were first noticed at one of the two nesting pair sites. This was just at the time that fledglings would have appeared at the second nest. The second nesting pair certainly would have had fledglings too, as opposed to some abstinent unmarried bird-loving couple living in sin.

Why did the applicant abruptly stop the study after fledglings were found in the first nest? Everyone knows you need two points to make a line, but every time there is an ESHA indicator found the study stops. If comments by the applicant concerning kites and other protected species are to be considered as anything more than simple speculation, wouldn't it seem reasonable to conduct an actual complete scientific study of the parcel?

Since development on pristine viable ag --

CHAIR WAN: You are going to have to wind up. Just a sentence --

MR. MOREY: Okay.

CHAIR WAN: -- because your time are up.

MR. MOREY: With all of the uncertainty arising from the limited studies, it is clear that the developer

should play golf, and not God, and if they want to play golf, they should play it at one of the many financially faltering courses nearby where there is no waiting.

Thank you.

CHAIR WAN: Ariana Katovich, followed by Dan Fontaine.

MS. KATOVICH: Hi, my name is Ariana. I had a really serious speech, but it is late, so I am changing it. This is the lighter side of me.

"Biology is bought and sold,
But the story of the land must be told;
Ten years for this particular fight,
What about the white-tailed kite?
Thousands of years in its flight.
A poor project is this golf course,
Staff tells you to deny without remorse;
Their homework they have done,
Now, the battle to save the Gaviota can be won.
But, what of the war, you ask?
Saving the entire Gaviota coast is quite a task.
Let us locals show you the way,
We know what our community has to say;
That open space and agriculture need to stay.
No pesticides, no clubhouses,
No tunnels beneath the tracks,

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Just frogs, grasses, fledgling kites,
With two parents protecting their backs.
The developers want to hide all of the facts.
Don't worry about our projects, impacts are zero,
Ah, but here comes the staff report, my new hero.
With regulations, policies and facts to prove,
That the Par-3 of the nine hole,
And the 16th, 17th, and 18th have to move.
ESHA is ESHA says the LCP,
If ESHA were protected, staff would let it be.
So, a golf course is what you want, you say,
Fine, but there is a better way.
Redesign to protect the protected bird,
Let the voices of the monarch and [redacted]legged frog be heard.
Not, choked to death with pesticide,
Not smacked by the golf carts as the golfers ride.
Is your interest the coast?
Should rare and endangered species become a ghost?
Golfers have plenty of places to play,
Some species might not see another day.
Let us work together to find a better solution,
One that doesn't make us part of the pollution.
Develop a better project, turn it back to ag,
Can the Trust for Public Land buy it?

Despite the high price tag?
I hope you can support your staff's recommendations,
As nature needs to continue to have its relations.
This is not a matter for us to take lightly, or laugh,
So, take this seriously, and listen to your staff.

Thank you.

CHAIR WAN: Dan Fontaine, followed by Mark Kram.

MR. FONTAINE: Madam Chair and Commissioners, my name is Dan Fontaine, and I am very thankful to be here.

It is literally with great privilege that I have the time to use this valuable opportunity to speak with you today.

In past hearings, I have typically focused on the issues with the most immediate legal leverage. Some of these issues have been on the table for a decade now, and all of them are well covered in the excellent report prepared by your staff.

In equal detail, the Santa Barbara LCP, and the *Coastal Act* spell out the manner in which these issues should be handled, but written law is a matter of interpretation, and interpretation is a function of internal belief, and external persuasions. And, I appreciate how truly challenging a job it is to balance the utility and the preservation of the California coast.

I visited the property in question before leaving

for this hearing. I can say with certainty that even just gazing on open coastal bluff tops, is an endangered experience in southern California. The land has become a refuge for plants, animals, and people from the increasingly taxing environment on the other side of the urban limit line.

It is no surprise that this property has changed, and is covered with ESHA. Coastal habitat is sensitive, merely by the virtue that some of it still exists, unpaved, not manicured, and otherwise outside the heavy hand of man.

Regarding the potential utility of a championship golf course, the applicant has made a convincing presentation and I sympathize with the difficulty they find themselves in. It may not be for me to say, if there exists an acceptable design for this course, but it is clear that the applicants have yet to find it, and from my perspective, a 10-year legal battle does not, and has not, turned a bad design into a good one.

As proposed, the utility of this golf course falls far short of justifying the impact on the coast. Two minutes cannot contain the desparation, or sincerity, with which I want to persuade you that this project is out of balance with the coast, but that is what I've tried to do.

Thanks.

CHAIR WAN: Mark Kram, followed by Edward Easton.

MR. KRAM: Hi, thank you for staying so late. I

am tired, myself.

I would like to express my concerns about the current proposals for building a golf course --

CHAIR WAN: You have to state your name for the record, please.

MR. KRAM: Mark Kram.

I would like to express my concerns about the current proposals for building a golf course at the ARCO property, and for the enormous housing development under consideration at the adjacent Naples area.

As you know, both of these properties are located west of the Santa Barbara urban limit line, along the glorious Gaviota coast. Of the hundreds of local citizens that I have met over the past several years, the overwhelming consensus is that these areas of special ecological and cultural significance, should be preserved for future generations to enjoy in perpetuity.

The current proposals do not serve the community well, and they could serve as the harbinger of negative impact to our envied way of life. As you heard, more compatible options exist. The current proposals at ARCO and Naples, are precedent setting, in that they could be used to justified further inappropriate development along this beautiful coastline.

As a concern citizen, I strongly urge you to do

all in your power to protect these areas for the local community. These places have served as refuge for various rare and endangered species, and have been very dear to me and my friends over the past 20-plus years.

It is not uncommon to see 40 seals in the water just below the cliffs, where pesticide-laden runoff could soon flow to the sea.

I hope you and your families have a peaceful holiday season. This season, my family and I will express our gratitude for the wonderful gifts we enjoy in our unique community. Please do your best to protect these areas, by voting against this proposal.

Finally, I would like to commend your staff for their integrity and courage displayed by their recommendation for project denial. Please show the same courage, in your deliberation.

Thank you.

CHAIR WAN: Edward Easton, followed by Loren Luyendyk.

MR. EASTON: Madam Chair, members of the Commission, my name is Edward Easton. I am a resident of Goleta, California.

I am a golfer. I took up the sport late in life, when I retired to Santa Barbara, but I will never be able to play this course, even if you approve it. I'll never be able

to afford it. Let's be clear about who these courses are really for. It isn't for folks who have to work for a living, or wear jeans. These courses are for rich folk, tourists, and big spenders.

In short, these courses -- and there are plenty of them already -- aren't for 99 percent of the population of California. I call that 99 percent, the public.

This is neither coastal protection, nor increasing accessibility by the public. This has nothing to do with the public. However, with your vote, you send a message to the public.

The result of allowing a golf course in this location, this golf course, will be plain, another stretch of the coast, the same coast you swore to protect, will vanish to make another playground for the rich. Wasn't Bacara a big enough lump to force down the public's throat?

Don't you trust your staff? is the whole Gaviota coast up for grabs when the rich folk want to dance? or is this just a game played at the expense of future generations?

You, each one of you, have a choice. You can use caution, and act conservatively. You can acknowledge that breaching established policies carries consequences yet unknown, and damage to resources which will never be replaced.

You can support your staff, they have the law and

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the facts to defend your decision, against any appeal. That doesn't mean you have become environmentalists.

CHAIR WAN: You have one sentence to wind up, please.

MR. EASTON: The choice is yours, the generations will see, and know, and remember, while your grandchildren travel up the Gaviota coast, to see what their grandparents did with their opportunity for greatness. What will they see?

Thank you.

CHAIR WAN: Loren Luyendyk, followed by Keith Zandona.

MR. LUYENDYK: Madam Chair, Honorable Commissioners, my name is Loren Luyendyk. I am a life-time resident of Santa Barbara. I was born and raised here, a UCSB graduate in biology.

First of all I would like to honor everyone for staying here, hanging in. It is amazing how much we are going through. And, I would also like to honor all of the volunteers that have come up here, locals from Santa Barbara, who have donated their time to show how much they really care about this project. This is really important to all of us.

As a child, I grew up with white-tailed kites in my back yard. I grew up on More Mesa. At that time, it was said that it was probably the only nesting pair of white-

tailed kites that was in existence at that point. So, ever since I have been a child, they have been really important to me. And, I never really understood how much they would mean to us, and now we are starting to figure out how much they do.

I would just like to state that we have a lot of talk about the LCP. The LCP defines environmentally sensitive habitat as dunes, wetlands, native grasslands, vernal pools, butterfly trees, marine mammal rookeries and hauling grounds, white-tailed kite habitats, sub-tidal reefs, rocky points, and intertidal areas, kelp beds, seabird nesting and roosting areas, native plants and streams. Naples scores 12 our of 13 of those. Now, I think that makes, pretty much, this entire project ESHA, if you ask me, because I don't consider any piece of that parcel of non-sensitive habitat. And, that is really all that I have to say right now.

I just hope that we all see what is really happening here on the Gaviota coast, and we have a chance here to set a precedent, and we can really decide right now what we are going to do. And, I support staff's denial of this project.

Thank you.

CHAIR WAN: Keith Zandona, and you have a second speaker slip, is Jack McCurdy here? yes, okay, you have four

minutes.

MR. ZANDONA: Okay, thank you. It is hard to know how much time when you come up here, and how prepared you have to be.

Good evening, Madam Chair, and Commission, and staff. My name is Keith Zandona. I am a second-generation Santa Barbara native, also. I have been surfing, hiking, and nature observing for over 35 years at this site. For over 10 years I have been opposing this proposed golf course at hearings like this.

Myself, the Gaviota Coast Conservancy, and Save Our Coast, urge this Commission to follow their very capable staff's recommendation of denial. It is not surprising that staff has come up with this conclusion. This project was recommended for denial by the Coastal Commission staff in 1994 -- or '93, I am not sure, it has been so long -- and, also denied by the California Coastal Commission at that time. So, your predecessors actually denied this project, also. But, that decision was politically overturned.

What has happened to this property is nothing short of incredible. I like to think of it as divine intervention, but really, it is nature restoring itself when given half a chance. This whole property should be declared an ESHA.

The EIR, done by the county, was prepared after a

six-year drought. It is not surprising conditions have changed.

Some species that I have observed living on this property is astonishing: seal rookery, nearly 100 strong; brown pelican rest, 150 to 200 strong; snowy egrets 2 to 3 dozen at all times at the mouth of Eagle Creek; all types of seabirds, foxes, bobcats, coyotes, red-legged frogs, tide water goby, southern tar plant, native grasslands.

The increase of the monarch butterflies from a couple of hundred to thousands is a direct result of the destruction of the Tecolote roosting site, because of the construction of the Bazara Hotel.

Now, we have the white-tailed kite. We observed this kite a couple of years ago, two, three, four of them, flying around, around those trees. And, now we have fledglings coming out of those trees. That is absolutely incredible. This place is a veritable wonderland of wildlife. Unfortunately, the proponents of this golf course call them nuisances. There is no where else for them to go. We have proposals on either side of them. This is the last place for them. Are we going to shove them out and west, even further?

Last spring, when the Commission met in Santa Barbara, you the Commissioners, were taken on a bus trip of the beautiful Gaviota coast. I noticed Commissioner Hart was

not on that bus, even though he is a local office holder. You observed open ag land outside of the urban boundary line. These lands need to be protected, not frittered away with CUPs and MOUs.

Please vote as your staff has recommended, to deny this proposed --

CHAIR WAN: Your time is up, so you have to wind up.

MR. ZANDONA: -- golf course, and please put this proposal to bed.

Thank you.

CHAIR WAN: Tom Phillips, followed by Diane Conn.

MR. PHILLIPS: Madam Chair, Commissioners, my name is Tom Phillips and I am a 43-year resident of Santa Barbara - Goleta area.

I have been opposed to this project from the time of the original staff recommendation of denial, and the Commission's original vote for denial.

This project, if approved, does not conform with the Local Coastal Plan. It is beyond the City of Goleta's urban limit line. Approval would also set a precedent for future development along the Gaviota coast, which is currently under study by the National Park Service, for protection and preservation.

You each need to ask yourselves some questions.

Will this be a viable project that serves the whole community? With two nearby golf courses in financial trouble, it is very doubtful. Is this project worth the rarity and integrity of the fragile resources located on the property? The white-tailed kites, the red-legged frogs, the monarch butterflies, tidewater gobys, southern tar plant, represent many changed circumstances. These must be protected and preserved.

I strongly urge you to vote consistent with your staff's recommendation for denial, thank you.

CHAIR WAN: Diane Conn, followed by Richard Nichols.

MS. CONN: Madam Chair, esteemed Commissioners, it is really good to see you, and I want to join my colleagues in appreciating your patience and dedication. My name is Diane Conn. I am here representing Citizens for Goleta Valley. We are a grass roots organization that supports comprehensive planning that protects our quality of life, including environmentally sensitive habitat.

As your staff has articulated, this project as proposed does not protect environmentally sensitive habitat as required and therefore much be denied. An illustration is the monarch habitat. Here, a minimum of a 50-foot buffer is not provided around the monarch habitat at Eagle Canyon, the 3-Par executive course prohibits that.

As proposed, the project either cannot use pesticides, because of the wind, or their application will directly impact the monarchs. The applicant contends that the HC, the habitat conservation plan, impacts two monarchs, will be reduced to acceptable levels. So, does this mean it is acceptable that monarchs drink pesticides, or gets sprayed and die? No, not under our *Coastal Act*.

Now, when looking at protecting monarchs at the Ellwood Mesa in '98 we were discussing an average of 100-feet buffer around the grove, the entire grove, not individual trees, with a minimum 50-foot buffer. So, a 50-foot buffer is a minimum, absolute minimum. We are not even sure that that is going to protect them, and this project does not provide that. Both the upper western g[redacted] and Eagle Canyon west must be protected for 72,000 monarchs, that is incredible. We really need to take care of them.

Most troubling is the applicants' assertion that the kites need no buffer, and golf is compatible. Now, I hope you have had the time to review Mr. Holmgren and Morganball's response, or letter to Mr. Dixon, that really goes through what the kites need, to the best of our knowledge.

But, let's just think about in real terms, imagine 60,000 rounds of golf a year, that is 166 a day, that is 16 to 20 rounds of 2 to 4 golfers, tromping through the kites'

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territory an hour. When are they going to hunt? how are they going to eat?

CHAIR WAN: Your two minutes are up.

MS. CONN: They hunt during the day.

CHAIR WAN: You will have to wind up.

MS. CONN: It is just not compatible, so as the others, and your staff, please deny this project.

Thank you, very much.

CHAIR WAN: Richard Nichols, followed by Maya Kasberg.

MR. NICHOLS: Commissioners, my name is Richard Nichols, from Sebastopol, California. That is in Sonoma County, not anywhere near Santa Barbara, nonetheless, this is important to people in northern California, also, because it is sensitive coastline that we are trying to save.

As the executive director of Coast Walk, representing the board of directors and members, I stand to oppose the project. I support the staff's position to deny this project, and I echo the passionate opposition that you have been hearing. They have said it all very well, and I don't need to repeat it.

The highest and best use for this property, in my estimation, is as open space and habitat, but even if a project were approved, at minimum, the property on the coastal side of the tracks, should be set aside as open

space, for habitat and open space, and a very sensitive coastal trail route should be established on the bluffs for public access.

So, the last thing I want to say is to please stop killing the coast, and deny this project.

Thank you.

CHAIR WAN: Maya Kasberg.

MS. KASBERG: Maya Kasberg, Honorable Coastal Commissioners, today you could be voting on the fate of the very last southern California coastline that is undeveloped.

I would like to thank your staff for their brilliant report on white-tailed kites. The staff states that with new information, quote:

> "The use of the ARCO Dos Pueblos site by at least two pairs of white-tailed kites, renders the site as perhaps the most important site for kites between Goleta and Gaviota."

I am from Santa Barbara, and I am an avid bird watcher, and I have never seen white-tailed kites north of the ARCO and Naples site.

As you know, from the staff report, there are only 30 to 35 white-tailed kites in Santa Barbara County, and only 13 nesting sites. Now, imagine two tiny families of kites nesting below the Santa Ynez Mountains on the mesas of the

new developed proposed golf course. If the kites even choose to build their nests there, the best case scenario is that they will lay two to six eggs. The eggs will hatch in March, and the father will go out to hunt for voles to raise his young.

With 200 acres of foraging habitat gone, he is forced to forage on the northbound side of the freeway. He hovers over the foothills, and sights his prey, the vole, and goes in for the kill. With his hunt successful, he turns to fly home. Pulled down by the weight of the vole, he is hit by the traffic on the 101 freeway, by a car or semi going 70 miles per hour trying to get home to Los Angeles.

Now, the single widowed mother kite with two to six chicks to feed, is left to feed them alone, thus the population is not as healthy as it should be, and this has happened. This has happened. I have a friend that has actually scraped five white-tailed kite off of the freeway in Carpinteria.

Clearly, we should be confident in protecting the populations of a fully protected species, especially on the last undeveloped southern California coastline.

Like Teddy Roosevelt said about the Grand Canyon, when he was saving one of the most natural, beautiful resources we have: leave it alone, you cannot improve on it.

Good bye.

CHAIR WAN: Okay, with that, that completes the opponents, and I will go back to the applicants. You have --

MS. KASBERG: I want to give some of this to you.

CHAIR WAN: If you want to, you can give it to staff, and they will give it out to us.

COMMISSIONER REILLY: Give it to our Executive Director, there.

CHAIR WAN: And, you will have to --

COMMISSIONER REILLY: It is poison oak, right?

CHAIR WAN: -- explain what it is.

MS. KASBERG: It is mistletoe. It will kiss the coast.

CHAIR WAN: I see.

COMMISSIONER POTTER: That is a frightening thought.

CHAIR WAN: If you will state your name for the record.

They have eight minutes for rebuttal.

MS. CULBERTSON: Thank you, Madam Chair, members of the Commission. Once again, Andi Culbertson. I will not take the full eight minutes, Madam Chairman. Thank you for being so generous in the presentation.

I was trying to get this booted up, all right.

Well, I am sorry to have disappointed Mr. Nawi by not talking about 13169 and the changed circumstance. There

is just only so much time in a presentation. We have covered it in our written materials. We have not abandoned the argument. We think it is fairly clear, that both the words, as the regulation is written, the changed circumstance, and the 1998 staff report cited in our materials, that referenced how that language came to be, are dispositive on that issue, so we have not overlooked it, but I just decided not to take the Commission's time with it.

There was a statement made by Mr. Nawi that this was a generalized EIR, and I was quite surprised, having spent 30 years in CEQA. This is a project level, construction level document. This is not a general plan EIR, a zone change EIR, it is a project EIR. And, it covered all of the normal topics.

I was attracted by the comment that the golf courses on the Gaviota coast get little play, and are going broke, but that 60,000 rounds of golf will be played on this course, and thereby -- something is wrong. One of those statements has got to be wrong. So, we think this golf course will be fine.

Let me focus on --

David, bring up the butterfly slide.

There has been a lot of discussion about what the setback, the 50-foot minimum setback is from the butterfly area. I've told you, in my presentation, that there weren't

any butterflies in that roosting site this year. They only come to that portion two months out of the year. There weren't any this year. So, if you are going to take the facts as they stand this year, they weren't there, at all.

Let's have a look at this. It says butterfly trees shall not be removed -- right here, all right. And, then it goes, adjacent development shall be set back a minimum of 50 feet from the trees. I don't see the word "grove" in there at all. And, that is what we have to -- we have to obey the words. It is the butterfly trees, and we are 50-foot setback.

I was grateful for Mr. Massara's comment that the Sierra Club does not say that the applicants cannot build a golf course. I think that was voluntary on his part, and was very good; however, what he said was unless the experts tell us, who are designing, that they cannot do this, then, you know, how do we know it is true?

Well, first, just to give the Commission an order of magnitude, this site is 208-acres in size, over 100 acres has already gone to resources, is not used by the golf course.

And, to ask Mr. Coore, the setback area that we are contesting, is more than 30 acres. Now, I would like to just do the math, and ask Mr. Coore of Coore and Crenshaw to tell this Commission whether he can design a golf course in

70 to 78 acres?

Mr. Coore, can you do that?

MR. COORE: How much?

MS. CULBERTSON: Seventy to --

DEPUTY ATTORNEY GENERAL PATTERSON: He would need to come to the microphone.

CHAIR WAN: He would have to come to the micro-phone.

MS. CULBERTSON: He is coming, Madam Chairman, he is just getting out over the people.

CHAIR WAN: You will state your name for the record, please.

MR. COORE: Madam Chairman, Commissioners, my name is Bill Coore. I am a principle in the golf architectural firm of Coore and Crenshaw, and I have been in this profession for 30 years, and Ben Crenshaw and I have been partners for the past 17 years.

I can't address a lot of the issues you are faced with. I can absolutely address this issue. Without question, there is not way this will work. I say that, having studied this land, walked this land, since November of 1990.

I think, for those who might be interested enough to enquire about our reputation, and our record, I think you will find that we have the reputation of being extremely

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studious, when it comes to studying properties. We have done this. We have laid out a golf course that we felt was absolutely the best that could be created on that wonderful site, in 1990 and 1991.

Since that time, there have been, by my calculations, 7 different major alterations to this routing, trying to address the concerns that have been brought forth in this process.

I know it is very, very difficult to understand, for those who are not versed in golf, and golf architecture. It must seem that holes are merely like tiles on the floor, that you can pick them up and move them around in any fashion. It really isn't the case.

Thank you, very much.

MS. CULBERTSON: That's our testimony from the expertise.

I wanted to also correct something. I am sorry that Mr. Massara thought that we are taking out the trees along the cliffs. We proposed to staff, quite a long time ago, that we would keep this line of trees, including the tree where the white-tailed kite is nesting; although, they were originally to be removed for views, that is a true statement on Mr. Massara's part, but it has been some time since we have agreed to keep those trees. So, they are not, they are not leaving.

There was a statement about why the white-tailed kite study was stopped, and I kind of take this a little personally on today. The reason the white-tailed kite study was stopped is that when the white-tailed kites were discovered, it was over a month before I was told by staff. I had people looking into it, before I was told by staff that there was a published raptor nesting protocol to follow. I immediately hired a consultant. I immediately began the study. It was for the purpose of deciding whether there was nesting.

It was only a week, about a week and a half, to your hearing in June, where I thought we were proceeding, I had to make a choice between publishing the report, or doing another week of observation, when the two kites pairs had already built nests, and I turned to staff, and I asked them what they wanted me to do, and we all agreed. I agreed. They agreed, that we needn't do -- there weren't any more kites in the area. There were two nests, and we knew where they were, so there wasn't anything more to do.

As it turns out, when we retained Dr. Froke, we had him look in the easterly pair's nest. This is the nest along the 18th fairway, and although those kites did mate and build a nest, they produced no eggs, so they did not do that.

Thank you, very much, Madam Chairman, for your patience.

CHAIR WAN: With that, I will close the public hearing, and return to staff.

SENIOR DEPUTY DIRECTOR DAMM: Thank you, Madam Chair, the staff is going to have a number of comments, in response to the presentation by the applicants' representative, as well as the public speakers. We will try to keep our comments just as brief as we possibly can. And, I will lead off with several comments, followed by Dr. Dixon, then Melanie Hale.

First of all, I do want to reiterate once again, since there was a number of references made in the course of the public testimony with regards to issues that are outside of the basis for the staff recommendation, that our recommendation for denial is based on the changed circumstances. References to seal haul outs, pelicans, and some of those sort of things are not the basis for the staff recommendation.

Second item I just want to mention is the applicants' representative, at the beginning of her presentation, did indicate that they felt that the issuing of the Coastal Development Permit, or in their opinion, the delay in issuing the Coastal Development Permit, was somehow responsible for this having to come back to the Commission.

I want to point out that the staff was working, in late 1998, very closely with the applicants' representatives.

At that time, there were a number of issues that were before the Commission, including two appeals that were received in December of 1998, with the permit expiration date in late January.

But, the thing that I really want to mention is that even if condition compliance had been met, on the original approved 1994 Coastal Development Permit, those appeals that were received in December of 1998, including an appeal dealing with the issue of condition compliance, would not have been dealt with in time to have the applicant go forward with the project. There was not any sort of intentional, or other- wise, delays on the part of the staff.

Having said all of that, the Commission subsequently did deny the extension request for this project. That was an action that the Commission took, when the extension came before the Commission. That is an action that is done, that is the reason this matter is before the Commission today.

As I mentioned in the staff presentation, it is easy, I think, for issues to get clouded with all of the material that both the staff and the Commission has received on this, and I do want to acknowledge that the applicants' representative has done a good job in having reports prepared to address various issues. That is why you have so much material before you today -- one of the reasons you do -- but

in looking at the changed circumstances, the staff ultimately concluded that we had to recommend denial of this project.

Again, back in June of this year, we had been recommending approval with special conditions. When the white-tailed kite issue came to the forefront, that was an issues that staff felt triggered the need to recommend denial, since the applicants had indicated -- and you've heard that again today, from their golf course expert -- that the golf course without having 16th, 17th, or 18th fairway was, in their opinion, not a feasible project. So, that is the basis for the staff recommendation of denial.

The white-tailed kite issue aside, the other changed circumstances, with regards to the red-legged frog, and monarch butterfly, the southern tar plant, the staff was recommending in June, and we still believe that those issues combined do necessitate the deletion of the Par-3 golf course, that is in proximity to Eagle Canyon. We do think that that is a buffer area. To have golfing in proximity to the monarch butterflies, to have the golfing activity in the same area in proximity to the red-legged frog, in our opinion is not the most protective of that rare species, and we are recommending that that is an area that is more appropriately maintained as natural open space to protect the red-legged frogs, and the monarch butterflies.

Another issue that was mentioned was the Local

Coastal Program policies, with regards to protection of the white-tailed kite and that the golf course was somehow the same as those examples given in the policies, such as walking, or bird watching, and the staff does not agree with that. The construction of a golf course, in no way, has the same impacts as simply a walking trail, or bird watching.

This golf course involves extension grading, in order to create the golf course. We do not believe that that is same as a minimal use, such as walking or bird watching, as spelled out in the policy, and the Local Coastal Program that deals with examples of uses that can be allowed in proximity to white-tailed kites.

One last thing, before turning the microphone over to Dr. Dixon.

With regards to the takings argument, I just want to remind the Commission that this site is designated in the Local Coastal Program as agriculture. That is the use that is permitted by right. Nevertheless, as you have heard, there are some, approximately, 23 antiquated lots on the property. In staff's opinion, there certainly is potential for residential development. We don't have any proposal before us. We certainly can't say how many residential units would ultimately be allowed on this site.

But, as you heard, on the adjoining property to the west, in the Naples antiquated subdivision, the County of

Santa Barbara is evaluating residential development in that antiquated subdivision right now.

I would also note, with regards to the water issue, that the golf course does include a clubhouse of substantial size, that it includes a restaurant and bar area with 130 seats, and in addition, a banquet facility that is required to have potable water. While the staff cannot say that there is potable water available at this point in time, as you heard from Ms. Hale with regards to residential development on the property, there certainly is some source of potable water available for the restaurant, banquet facilities, and clubhouse, in general.

Also, with regards to the takings argument, you did hear from the applicants, and the applicants' golf course expert, that a redesigned golf course that would maintain the area recommended by staff, for the preservation of the white-tailed kite is not feasible.

Certainly, Commission staff is not, and does not have expertise, in golf course design, but I would note that this particular golf course does include things such as a sod farm, and open areas that are not, at this point -- as you heard from the applicants' representative -- a portion or usable, part of the golf course. It also includes a driving range. And, what the staff was suggesting is, yes, you may not get the same sort of championship sort of golf course

that is proposed, but we still believe there is area for a redesigned golf course on this property.

With that, I will turn it over to Dr. Dixon.

ENVIRONMENTAL PROGRAM MANAGER DIXON: I would like to address several assertions Ms. Culbertson made in her presentation.

One, she stated that the red-legged frog was heard, but not found on the site, and that there was no evidence of breeding. However, in the applicants' habitat conservation plan, it is stated that Eagle Canyon contains the only suitable breeding habitat, in other words, containing year-round water, on the project property for the California red-legged frog during normal to wet years.

Surveys of the site conducted 11 to 12 January 1999 were negative, SEIC, '99A, subsequent surveys of the creek from U.S. Highway 101 to the ocean found three adult California red-legged frogs in the lagoon on 4 March 1999. Of the three frogs, two were found in amplexis, signifying that Eagle Canyon Creek is a breeding site, so I believe there is evidence that there is breeding there.

It was asserted twice that Dr. Froke actually looked in the east nest and found no evidence of eggs. Now, this is the first time that this information has been shared with staff, and no date was given for the observations. I suspect that if there were such observations, it must have

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been late in the season.

On the other hand, the county observer, Mr. Storrer, observed a behavior which in his professional opinion indicated incubation. Mr. Storrer is here with us today, to answer any questions the Commission may have on this matter, but he does have to leave in about an hour, or so.

It was also mentioned that the wetland was created by recent remediation activities. There is no doubt that the wetlands on the site were formed by human activities, but not recently. Hydric soils were present. The NRCS did the delineations, and they require all three of the parameters, and hydric soils take many years to form in Mediterranean climates.

It was also suggested that the tar plant population was artificially created. Tar plant does respond to disturbance, but only where there is an existing seed bank. And, although, it responds to disturbance, it doesn't require a disturbance. In areas where there is sufficient unoccupied space, tar plant fluctuates wildly from year to year, probably based on poorly understood variations and environmental conditions, such as rainfall.

We also observed this in the Bolsa Chica hearing, where there were order of magnitude differences in the number of tar plants that were apparent from one year to another.

So, the important thing, in protecting tar plant, is not where you saw them last year, but all of the micro-habitats where the plants exist, and in fact were limited to where it has been observed, and may very well miss some areas, because of that, but at least those areas where the tar plant has been observed, needs to be protected, in order to protect the population.

That is all that I have, thank you.

CHAIR WAN: Anything else?

COASTAL PROGRAM ANALYST HALE: Yes, please, Madam Chair.

I would like to address several issue areas. One was the comment that there would be no spraying on the site. I believe the statement was made a couple of times, that there would be no spray applications of pesticides, which include herbicides and all of the other cides, that could be applied to manage the golf course. But, reading from several exhibits to the staff report, and one is from the applicants' own habitat conservation plan, the same document that Dr. Dixon read from, it is Exhibit 5 -- it is an appendix to Exhibit 5 of your report, which is their turf management plan. It states:

"Within the golf course areas, Par-3 course, 18-hole course, putting green, driving range, and turf farm, herbicides would be applied

from a boom sprayer 15- to 18-feet in width, attached to a 250 gallon tank on the back of a golf course utility truck."

It says:

"In no case, shall any spraying of chemicals take place anywhere on site when wind conditions exceed 5 miles per hour."

But, buffer setbacks, even at their greatest, the butterfly groves, for example, if you applied the 100-foot setback, those distances mean almost nothing when something is moving in miles per hour. That would close almost instantaneously if there were an accidental application. So, we believe the staff report has addressed this in more detail.

Also, it was said that there would be very limited chemical use, but at present, in the agrinomic turf management plan, Exhibit 5, I believe 23 preferred use chemicals are listed, and another 26 more toxic, that are back up, if the first list doesn't work for a particular pest infestation.

There was a comment made about the EIR having addressed the white-tailed kite in 1993 -- I believe Ms. Culbertson said. There is an appendix to the EIR, which lists the biological survey data upon which it is based, and that appendix lists the observed species, both flora and

fauna. The white-tailed kite is not listed in that list. It is only listed as a presumed species. It was never seen on the site, let alone nesting on the site, during any of the baseline surveys upon which those documents and subsequent decisions were based.

There is another EIR, and I referenced it briefly. It is for Ellwood. It was done in the same era, and the white-tailed kites were known to be nesting on that site, and they are discussed in great detail, which is a good example of another document that was prepared almost simultaneously where the kites were known to exist, and how it would have been addressed, if it were true that the kites were known on that site.

The issue, also, of spray applications, with the tar plant. It is an issue with the monarch butterflies, but it also applies to the tar plant populations. It is not staff's imagination that there can be overspray or misapplications, or unauthorized applications of herbicides with catastrophic consequences for small, sensitive populations.

There is another industrial site just down the coast from ARCO, where there is another southern tar plant population, and the county records indicate -- and John Storrer is here to affirm this, if you wish him to do so -- that misapplication, unauthorized application of herbicides completely wiped out that population in one year. It came

back because it had an established seed bank. If it had been an artificially scattered population that year, with no established seed bank, that would have been the end of it for that plant population. There were also a number of other references in the exhibited documents to pesticide application.

And, I also wanted to say that the applicants' proposal to mitigate the tar plant with 3000 tar plants, that sounds like a lot of plants, but it really isn't an ecologically sound approach to mitigating a plant of that kind, and that is affirmed by the California Native Plant Society, and by the Department of Fish and Game, the rare plant program. It completely discourage mitigation in a separate area, if avoidance can be achieved. They do not affirm that approach to the mitigation of a rare plant.

I think that concludes my remarks.

CHAIR WAN: Does that conclude staff's presentation?

SENIOR DEPUTY DIRECTOR DAMM: Yes.

CHAIR WAN: Commissioner Dettloff.

COMMISSIONER DETTLOFF: We had -- and this would be for the legal counsel -- we had had testimony from both -- well, from the representative of Surfrider, their attorney, but we had a 20-page letter from the applicant, and I think this forms the basis of our then going forward with looking

at changed circumstances.

What were the reasons that you advised our staff, in the staff report, that we could look at, since '99, then could look at the changed circumstances, because I think that forms the basis for us looking at what is now on site.

And, then secondly, there was referencing, certainly, to the LCP that was done at the time that this project came forward, and what would the reasons be that this is not the only document that should guide this Commission, when we make the decision today?

CHIEF COUNSEL FAUST: Through the Chair.

Commissioner Dettloff, let me deal with your first question, and I will take a little time to discuss your extension of permit regulations, and then when I am finished with that, I think I would like to ask you to repeat the second part of your question, because I don't think I fully understood what it was that you were asking.

Section 13169 of the Commission's regulations, involves extension of permits. It assumes that an applicant has obtained a permit, but as the Commission is aware, all Commission permits -- essentially, all Commissioner permits, the Commission doesn't have to apply this -- have a time limit for commencement of development, pursuant to the permit.

If that time limit, which is generally speaking

two years is not met, and then the applicant has the option to seek an extension of the permit, pursuant to Section 13169, or of course they can abandon the permit, which sometimes happens.

In this instance, as in many instances, the applicant, unable to commence development at the time, in an appropriate time frame, sought an extension of the permit, and that invoked this regulation, and brought the matter back to the Commission.

The Commission considered whether or not there were changed circumstances, and finding that there were changed circumstances, denied to extend the permit. This is where things get critical, in terms of the language of that regulation.

Once the Commission denies the extension of the permit, your regulations provide that the extension shall be -- that the extension is denied, and the development shall be set for a full hearing of the Commission, pursuant to Sub-chapter one of these regulations. Subchapter one of your regulations are the regulations that pertain to how you process permits, at all.

So, it basically takes it back to the beginning of that process, and says process it pursuant to your normal procedures, your normal regulations.

The regulation then, as it was amended in 1999,

goes on to state:

"However, the applicant shall not be required to file a new permit application, but instead shall submit any information that the Executive Director determines is necessary to evaluate the effect of the changed circumstances."

Now, I am aware that the applicant has argued that that regulation limits the Commission's ability to look at any changed circumstances, except those that were identified by the Commission at the time it denied the extension of the permit.

That has not been the way the Commission has interpreted this permit, in the past. It has not been the way you have interpreted Section 13169, and that language, which was added in 1999, when you amended the regulation, was not put in for that purpose.

I wanted to talk a little bit about what was happening at that time, under that regulation. We had a consistent practice at the Commission of interpreting a regulation to involve changed circumstances up to the time the Commission makes its decision. It is a general principle of administrative law that provides that a decision-making body, or a judge, applies the law and the facts that are in effect at the time the decision is made, and that is the normal thing, the normal way that a legal decision maker

would approach that. And, that has been the Commission's consistent practice under 13169.

Prior to 1999, the Commission sometimes had difficulties with individuals whose requests for extension had been denied, in terms of what information needed to be provided to the Commission. Arguments ensued, between the various applicants and the staff, with respect to what kind of information they were required to provide? were they required to provide any information? or could they simply just ask that their permit be put back on the agenda?

The difficulty accrues because in normal circumstances, where you have a situation where someone is filing an application for a permit, they are required to provide certain information, and if they don't provide that information, the application simply isn't filed.

Staff says, "We need A, B, C, D, E, in order to evaluate this permit."

They either provide it, or they don't, but if they don't staff is not supposed to accept it for filing.

That doesn't work in the situation where you have an extension, because you are already past the filing stage, and so the difficulty that was being dealt with at that time, was how does the Commission deal with a request for information, with the need for information in order to evaluate what it is they need to evaluate?

And, so the language that was put in at the end of that sentence had to do with providing the Executive Director with the ability to request information for the changed circumstances that had been identified. If there is new information, then we need to get it, in order to do that evaluation.

But, it was never intended -- and I was personally involved in this -- but, there is nothing in the record of which I am aware, and there is no memory that I have that ever suggested that the Commission intended to limit the level of jurisdiction, the scope of jurisdiction, that it previously exercised, with respect to extensions of permits, and the hearings that follow upon the denial of the extension. There was no intent to change that. It was simply an intent to go on, as had been done all along.

So, from our point of view, there is not a time limit on changed circumstances. What really happens is, that if the permit is not exercised within the time, you look at what is new, what is different, and that is what you are supposed to look at in evaluating this.

When a Commission considers changed circumstances, they look at the changed circumstance that exist -- and that is a question of fact, and I want to emphasize that that is a question of fact for this Commission to make. The Commission needs to find -- staff has recommended that you find that

there are changed circumstances with respect to a number of different aspects of this project. That is the staff's opinion. That is their recommendation to you.

But, what you need to do is find that there are, in fact, changed circumstances, and it is entirely possible that you may agree with the staff's recommendation in some respects, disagree in others, but regardless, that is a question of fact: what has happened? and if there are changed circumstances, what do you do about it? You apply the standards that exist at that time.

I am not sure that I have fully answered your question, but I wanted to go through that background.

COMMISSIONER DETTLOFF: The applicant brought up a language of the LCP that would have dictated, as they see it, how you would deal with the kites, and how you would deal with the monarch butterflies, and felt that that was what we should be referencing to, instead of this new found evidence, or staff's recommendation.

What is your response to how we, as a Commission, should look at the LCP that was written for the project, or the language within? or the changed circumstances that are now before us?

CHIEF COUNSEL FAUST: Well, the Santa Barbara County is a county that has a certified LCP, and so the LCP is the standard for review, with respect to whatever it is

that you need to decide.

If you identify an impact, then you should apply the policies of the LCP with respect to that impact. So, in that sense the LCP is the standard of review, and I don't think that staff is suggesting anything different from that, but maybe I am not completely understanding your question, Commissioner?

COMMISSIONER DETTLOFF: I think you understand.

CHIEF COUNSEL FAUST: Okay.

COMMISSIONER DETTLOFF: If there is any additional comments from staff on the language that was referenced to by Ms. Culbertson, when she felt that that was the language we should be following.

COASTAL PROGRAM ANALYST HALE: I have one or two brief comments that may be on point.

I think Ms. Culbertson said that if you -- she listed the kite policies in a frame on the projector, and said that even if these applied, and it was essentially these, and no more, that there wasn't a basis for Dr. Dixon to make his recommendations, with regards to buffers. And, I meant to actually mention that when I made my other comments.

There actually is another policy -- and let me find my reference to it here -- in the staff report, we cited it under the tar plant. It isn't specifically pulled out and rearticulated in the kite section of the staff report, but it

could, and should have been, because in the county's LCP, in the coastal zoning ordinance, which is the implementation provision of the LCP, it is explicitly stated that when environmentally sensitive habitat is found on a site, whether it is mapped or not, in some of the overlay maps that are other planning tools in the LCP, if it is found on the site, then specific provisions of the coastal zoning ordinance apply.

And, there is a specific one that talks about the conditions that must be placed on a permit, that affects ESHA, and it gives a range of measures that can be taken, including redesigning a project, or changing it, if necessary. And, that, I think is the broadest based example of the provisions that offer planning tools to the county, and to the Commission staff in applying those provisions.

CHAIR WAN: Commissioner Nava.

CHIEF COUNSEL FAUST: Madam Chair. Madam Chair, may I add one more thing.

CHAIR WAN: Yes, of course.

CHIEF COUNSEL FAUST: And, I am not sure whether this is what Commissioner Dettloff was asking, but Ms. Patterson suggested it might have been the direction of the question.

The county does have policies that apply to white-tailed kites, and there was one suggestion that was

made in one of the applicants' submissions that those policies were only applicable at More Mesa, and were not applicable elsewhere in the county.

I do not read the LCP policy in that manner. I think that at the time, as I understand it, at the time that the LCP was written, the only known kites in the county were at More Mesa, and the did put in one specific reference to a portion of More Mesa where a particular aspect of the policy needed to be applied, but there is no suggestion in the rest of the policies that those policies should only apply to More Mesa.

The county has, in fact, as was discussed earlier by Ms. Hale, and I think Mr. Damm, the county has, in fact, applied those policies in other situations, and I believe in the Ellwood matter, as well. And, the syntax of the language, itself, I do not think supports the argument that those policies only apply to More Mesa. I think they apply, generally, wherever kites are found, wherever the decision-maker needs to deal with impacts on kites.

CHAIR WAN: Commissioner Nava, then Commissioner Peters.

[**MOTION**]

COMMISSIONER NAVA: Madam Chair, thank you. I am going to make a motion.

I move that the Commission approve Coastal

Development Permit No. A-4-STB-93-154-HCC-A2, as proposed by the applicants, and recommend a "No" vote.

COMMISSIONER WOOLLEY: Second.

CHAIR WAN: Moved by Commissioner Nava, seconded by Commissioner Woolley.

Do you want to speak to your motion?

COMMISSIONER NAVA: Well, just briefly.

I think that it certainly has been adequately covered by the staff report, and amplified by comments that are directed towards specific issues as it relates to our legal ability to treat this as though it were, essentially, a new project, because I think, when you take a look at the history of this project, the procedure, the denial of the extension, and the consequences of that denial, you are, for all intents and purposes evaluating this as though it were a new project.

And, thinking of that, it is clear, that as a new project, all of the environmental issues that have been raised, with respect to the red-legged frog, the high concentration, extraordinary concentration of monarch, the extraordinary level of tar plants, and in particular, the evidence in the record with respect to the presence of the white-tailed kite, and the fledglings that those are exactly the sorts of things that would have to be mitigated for any kind of project on this site.

I just believe, based upon the record, that this is the wrong project, in the wrong place, and at the wrong time.

I don't believe that we are faced with jeopardy with respect to a taking. I think in the LCP, as explained by staff, there are uses for this property that can, in fact, be viable. I think the work by our biologist, incorporating the references to the observations by Mr. Storrer, and the letters that we received having to do with what is required, and I think we are being conservative, with respect to the buffers that relate to the white-tailed kites.

But, I think it is clearly established, there is more than ample evidence in this record, what is going to be necessary to provide, at a bare minimum, the kind of habitat that the white-tailed kite require.

And, I want to compliment staff for the level of detail and analysis in which they have engaged. When staff makes reference to subsections of exhibits in appendices that identify a turf management plan, and specific references to the way in which the golf course intends to deal with all of the problems associated with the management of a golf course, I can't imagine this Commission agreeing to participate in a process where, by its very nature, you engage in poisoning of the monarchs.

The monarchs, as we know, require very specific

kind of plant life, in order to sustain itself. It is reasonable to believe that they will land in various places of the golf course in order to drink water.

And, this is just, again, the wrong project in the wrong place, at the wrong time, and I would encourage my fellow Commissioners to vote denial. With the denial, the applicant will have an opportunity to redesign this course in such a way that should they chose to do so, redesign it in such a way that it is respectful of the environmental limitation and constraints. We can do it by honoring the Local Coastal Plan.

And, so I am asking for a "No" vote for denial.

CHAIR WAN: Commissioner Peters --

Oh, the "seconder" okay, Commissioner Woolley, and then Commissioner Peters.

COMMISSIONER WOOLLEY: Real brief.

I was intrigued by this project, because I felt that it had some merit when I first took a look at it, but the more that I dug into it, I had to agree, from the record created by the testimony by all present, that this project, as Commissioner Nava underscored, left a lot of room that the project did not rise to the significant level that I could approve it, at this point.

I think there is enough, and adequate information provided to us, through this entire hearing, that documents

why this project has to be denied at this point, and provides, still, back to the applicant for them to reconsider that a golf course still could be developed, maybe not a championship golf course, but a golf course still could be developed.

It is not our charge to be looking at what kind. I think we just have to make sure that the environmental constraints are taken care of, and at this point in time, I can clearly say that the documentation before us doesn't allow it to go to that point.

CHAIR WAN: Commissioner Peters, then Commissioner Reilly.

COMMISSIONER PETERS: Thank you, Madam Chair.

I had a couple of questions I had for the applicant, and these are things I would like you to have the opportunity to respond to, but I had a question about two particular statements that Ms. Culbertson made.

The first was, you made a point of saying that there were only two conditions added by the Coastal Commission, in addition to what was imposed by the county, and I just don't understand the significance of that? maybe you could explain that to me.

MS. CULBERTSON: Through the Chair.

The significance of it, Commissioner Peters, is that the two conditions that were added was one for an

omnibus condition that preserved all of the conditions of the county, which, basically, said this is subject to all of the county conditions of approval, that was one.

The second one was the lot consolidation, the different lot consolidation for surrendering the rights to the antiquated subdivision. Now, the significance of this is as follows: the county conditions, by agreement, in fact the record shows that the coastal legal staff agreed that the county could clear those conditions. The Coastal Commission staff had no responsibility for clearing them. All they had to examine was whether the county had cleared them.

And, then they had one legal condition, which was the lot, you know, to look at the lot consolidation, that is all they had to do.

It is not like many permits that you issue, where you have -- I mean, it is a very laborious task to clear the conditions of approval. It takes a long time. This one was not one of those permits, and that is the point.

I hope I have been responsive.

COMMISSIONER PETERS: I think so.

My other question was, you said that there was 20 years of oil left in the ground. You made a point of saying that. And, my question is, why you are not still pumping that oil out? I mean, in other words, you don't have your permits, yet, why would you not continue to pump oil for as

long as it takes to receive the permit?

MS. CULBERTSON: Well, see, the facilities are gone -- through the Chair, again, excuse me.

Commissioner Peters, when the lawsuit, when it was won at the Court of Appeal, and there was no appeal from that decision filed, the applicant began the first step in the development of the project, which was closing down the oil field. There isn't anything to pull the oil out of the ground with, now. All the facilities are gone.

COMMISSIONER PETERS: I understand that, but it seems to me that there was still, you know, obviously, since then there has been a lot of process and uncertainty about whether you get this development approved, and it would just seem to me that you would want to preserve the ability to gain that economic benefit out of that oil for as long as you could, without taking the risk that something like this might happen.

MS. CULBERTSON: Well, it didn't look like a risk at the time the oil field shut down. In fact, it looked just the opposite. There had been a very aggressive defense of the Commission's decision by the Attorney General's Office, and by the applicants attorney, things looked good.

And, it takes a long time to shut down an oil field. I mean, it is a lot of work.

COMMISSIONER PETERS: Right.

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MS. CULBERTSON: So, if you are saying that they took an unreasonable risk, well I am not sure where that takes us. It wasn't much of a risk. They had no permit to receive from the Coastal Commission from doing that.

COMMISSIONER PETERS: Thank you.

I guess, just my perspective on that is that it is a little bit different thing to say that they had a permit in hand, and went ahead and relied on that to close down these oil wells, but I think the fact is that they thought they were pretty close to getting all of the approvals that they had, and they went ahead and took that risk, and proceeded on that basis. But, I thought that was a helpful clarification for me, anyway.

The other thing, I think I want to just clarify Mr. Nava's motion, the statement that it is the wrong project, at the wrong place, and the wrong time, I think I can support that logic, as long as we are clear that the basis for that is the changed circumstances, that is -- as are outlined in the staff report. And, I just want to clarify, and correct me if I am wrong, but assuming that is the basis for your motion, is the changed circumstances, then my --

COMMISSIONER NAVA: Yes, my motion is predicated upon the evidence presented here today, and that which was provided in the staff report, comments by staff, and

testimony.

COMMISSIONER PETERS: Okay, well, thank you.

I do think the changed circumstances is the idea. I think, obviously, there are legal -- there are disagreements over the legal aspects of that determination, that may not be determined, finally, today, but from a factual perspective, I think I am fairly convinced that you have made a case that the circumstances have changed.

As a factual matter, I just am a little less certain, frankly, about the white-tailed kite, given that it seems to have been planned for, but I think on the rest -- speaking for myself, and not for my fellow Commissioners -- but I think on the rest of it, certainly, there is ample evidence that there are changed circumstances, within the meaning of the term, as we understand it.

CHAIR WAN: Commissioner Reilly, then I am going to say something, and then Commissioner McClain-Hill.

COMMISSIONER REILLY: Thank you, Madam Chair, and I think that all of us would probably agree that it is important to have a clear hearing record for this particular project, because it may be reviewed at some point in the future, for one reason or another.

And, to that end, Commissioner Nava had made the comment, the basis here was that we were really looking at this as a new application, new project, and that is different

than my understanding of what we are doing here.

It is my understanding that we are, in fact, limited in our scope to looking just at changed circumstances from the last approval of this project, and that that is really what we need to base our determination and our decision on.

Were we looking at this as a new project, I think the breadth of our questions, and our analysis, would be much, much broader than what it is, in this particular report. So, at least that is my understanding.

And, Mr. Massara made the comment that from his perspective about 80 percent of the resource impact problems with this proposal emanated from the Par-3 course, and I would just like to ask staff, if this Commission were, somehow, theoretically able to get through, or resolve the white-tailed kite issue on 16, 17, and 18, and the Par-3 course were eliminated, what else is there that would create a substantial enough concern on your part to pursue a denial on this particular permit?

SENIOR DEPUTY DIRECTOR DAMM: Commissioner Reilly, well, two things.

First, that your initial comments, as I've said a couple of times, the staff recommendation is based on the changed circumstances.

With regards to your second point, at the June

hearing, staff was recommending, in our initial recommendation, approval with special conditions, and those special conditions dealt with deleting the Par-3 golf course.

The also dealt with, because of the southern tar plant, for relocating, to a degree, the clubhouse, in order to protect the seed bank area of the southern tar plant. But, we were recommending approval.

The critical issue, as staff has indicated that resulted in our changing the recommendation to denial, was the white-tailed kite issue. If somehow that issue didn't exist, then I believe we would have still been recommending approval with special conditions, similar to what we had this past June.

COMMISSIONER REILLY: Okay.

And, I would note that the applicant made about three different levels of compliance comments, or whatever, on white-tailed kite.

I am just concerned whether this is all going to end up somewhere down the line, and maybe it is so complex that the sense of the Commission is the easiest thing for us to do is to deny, and then kind of just let the details get worked out, rather than trying to deal with them up here.

But, I would be curious to hear how other Commissioners feel, one way or the other on the kite issue.

CHAIR WAN: Commissioner McClain-Hill, you want to

go first, and then I'll speak, because I do want to deal with the kite issue, obviously.

COMMISSIONER MC CLAIN-HILL: All right.

First, I tend to agree with the comments by Commissioners with respect to staff having met its burden on the issue of changed circumstances.

Like Commissioner Peters, however, I have more difficulty getting there on the issue of the white-tailed kite, then on the other matters that have been raised by staff.

So, what I am trying to reconcile, and if staff could just help me with its thinking on the matter, to the extent that the white-tailed kite was presumed present, how is it that it -- on what basis is there a changed circumstance? because in my mind, if you presume it to be, then, you know, it is, at least you are moving from the perspective that it exists.

So, if you could simply help me with your line of reasoning in that regard, just on the white-tailed kite, I would be a lot more comfortable supporting the motion in chief.

COASTAL PROGRAM ANALYST HALE: Dr. Dixon can add his comments on the scientific aspect of it.

I would add that saying the raptor is presumed present, is a different look at whether it could be using the

site in one way or another. The policies regarding the white-tailed kite that were not mentioned in the EIR for the ARCO Dos Pueblos project, but were mentioned in a similar EIR -- which is why I raised that -- also done in Santa Barbara County at the same time where kites were known to exist addresses policy issues concerning setbacks and nesting trees, and the things that are in those specific provisions.

When you presume that the species is present, you cannot know what use it makes of the site. Is it simply foraging, because these raptors take so many acres for foraging, or is it nesting. If it is nesting or roosting, those are specifically defined activities that invoke specific applications of those policies and provisions in the LCP.

Does that help?

COMMISSIONER MC CLAIN-HILL: It --

CHAIR WAN: Mr. Faust wants to make a comment.

CHIEF COUNSEL FAUST: If I might add, because I did provide some advice to staff, with respect to this as a changed circumstance.

I do think that there is a legitimate issue here for the Commission to make a decision about. It is not absolutely clear cut. The reason it is not absolutely clear cut is that there is a mention in the EIR -- as the applicants' representative has indicated -- of white-tailed

kites; however, as Ms. Hale pointed out, unlike an EIR that was being processed at the same time, rather than there being an extended discussion of white-tailed kites, there is simply, as best as I can determine, just a single mention of white-tailed kites, as one species that might abandon the area because of reduction in foraging habitat, and perch sites.

It is for the Commission to determine whether that is of the same significance as elimination of nesting trees, which is the situation that you have now.

But, I think that, from my own perspective, the thing that I found most persuasive, in terms of whether or not the local government at the time actually considered this, was the fact that the specific LCP policies having to do with white-tailed kites, were not applied in the permit, and if the county, and the Commission, had thought that the kites were a species of concern, and were being affected by it, they were required by the LCP to apply those LCP policies, and no one mentioned it. No one applied it. It simply wasn't done.

And, that to me was the most critical fact, with respect to the kites.

COMMISSIONER MC CLAIN-HILL: Thank you, very much, I appreciate that illumination.

CHAIR WAN: Commissioner Peters wanted to say --

COMMISSIONER PETERS: Just for the record --

CHAIR WAN: -- just a quick thing.

COMMISSIONER PETERS: -- correct. I now understand that, and I find that Mr. Faust's explanation is persuasive.

CHAIR WAN: Yes, and that takes away a lot of what I was going to say about the white-tailed kite, because that is precisely what I was going to say, is that there is a big difference when you don't know whether something is there, and you have a list of species that could be there, and when you go ahead and you specifically mitigate for something that you know is there.

So, there was no specific mitigations that were done for the white-tailed kite, and that means that you assumed, basically, that it was not there, and so that is very important to me.

The other issue, I did just want to comment about, just for the record, by the way -- and I had a lot of other things to say about the white-tailed kite, but I probably won't do that -- has to do with the butterflies.

You can't look at butterfly trees as individual trees. Trees make up, and need to be protected, because they are the habitat. That is the grove. Our experience at the Ellwood Shores property, told us that this Commission very clearly said, "You don't look at the trees, individually,

that they roost on, you look at the grove."

Because usually, the trees they roost on are in the interior of the grove. They are not on the outside of the grove, because they need very special micro-climate. They need to be protected, for example, from winds, so they need to be buffered. If you take away the outer trees, they won't have adequate habitat. So, they need certain moisture, certain, you know, wind protections. And, so, if you are going to provide a minimum of a 50-foot buffer, it has to be from the habitat.

And, the other thing I do have to say, is pesticide application near a butterfly grove is certain death to those butterflies, and you are going to sit them there as sort of a trap for them. They are going to have water on the blades of grass, and they are going to go drink that water, and it is going to be poison.

Relative to the changed circumstances, there is a big difference between a couple of hundred butterflies and thousands of butterflies. If this Commission gets a development permit in front of it, and somebody comes in and says there are a couple of hundred butterflies in some trees, we would not be protecting that. Now, we believe it needs to be protected.

We can sort of speculate as to what happened here, but there were some changed circumstances, I think, nearby,

possibly that could have resulted in butterflies that weren't there once, that now are there. So, there are changed circumstances, and there is a need to protect both of these species, and it is pretty important that that happen.

Just to sort of a general comment, that really doesn't have much to do with the specifics of changed circumstances, and I am looking at this only as the changed circumstances, and how do you deal with the issues to protect these species. It does concern me, and I think it is wonderful when a site is left alone and nature reclaims it. I don't think that when it reclaims it, that constitutes a nuisance.

Commissioner Hart.

COMMISSIONER HART: Yes, I would agree with the comments from my colleagues, and just wanted to add my thanks for the folks who took all of their time to come this way. It is a very, very long day, long hearing. You came along way in some tough weather, and I appreciate you being here.

And, I think, speaking on behalf of them, and myself, as a resident of Santa Barbara County for virtually my entire life, I am intimately familiar with this area, and it really is a treasure for the entire State of California, something that we are very proud of in Santa Barbara County, and it deserves the highest level of protection that we can afford it, and that is why I will be supporting the staff's

recommendation, as well.

CHAIR WAN: Okay, I have a motion. I have a "second". Is there a need to call the roll?

[No Response]

The maker of the motion is recommending a "No" vote.

Any objection to a unanimous roll call?

[No Response]

Seeing none, the project is denied.

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[Whereupon the hearing concluded at 8:50 p.m.]

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CULBERTSON, ADAMS & ASSOCIATES
PLANNING CONSULTANTS

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CALIFORNIA
COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

December 4, 2002

Sara Wan, Chair
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Wednesday, December 11, 2002
AGENDA ITEM 22

RE: **Dos Pueblos Golf Links**
Wednesday, December 11, 2002
A-4-STB-154-CC and A2 (Dos Pueblos Golf Links)

Dear Chair Wan and Commissioners:

This firm, together with Steven H. Kaufmann, Esq. of Richards Watson Gershon, represents CPHPAH Dos Pueblos Associates LLC and Makar Properties LLC in connection with the above referenced project.

The applicant's legal arguments are presented in a letter dated December 4, 2002 prepared by Richards Watson Gershon (RWG). We also hereby incorporate by reference, as if set forth in full herein, our arguments presented in the joint response to the Staff Report on the above item at your June, 2002 hearing and dated June 4, 2002.

Attachment A to this letter enumerates the many errors and misrepresentations in the staff report. It is unfortunate that the applicant must, once again, disclose to the Commission and the public these entirely avoidable errors. It is particularly important that this be done since the Commission is being asked to rely on these errors in the staff's recommendation of denial. Moreover, and without consulting with the applicant and its experts at all, the staff has come to the conclusion that the golf course can be re-designed. What is interesting is that staff has repeatedly said that it has no expertise in golf design. Yet, the report summarily – and diffidently – concludes that the golf course could be re-designed. Astonishingly, staff blithely states that the golf course property, after all, is 208 acres in size and therefore has more than adequate room. Staff declines to disclose to the Commission, however, that the usable part of this property is about 100 acres. Why is so little usable? It is b[illegible]

EXHIBIT NO. 4
APPLICATION NO. A-4-STB-93-154-R2
ARCO Dos Pueblos Golf Links
Applicants' letter to Commission 12/4/02

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and the many concessions that the staff has extracted to date from the applicant. In other words, staff's conclusion is at best illusory, and at worst, reckless.

Perhaps it is time to reflect on how this permit – approved by the Commission in 1994 and the survivor of a vigorous and well-financed litigation campaign – has come to this point. Principles of equity force us to relate to the Commission the tawdry history of this permit and the continuing conduct of staff, which have since the beginning recommended denial of this permit. We invite the Commission's inspection of the letter of RWG for the tormented history and innumerable delays associated with this permit. The Commission's attention is invited to Attachment B, a chronology of events related to the permit, and Attachment C, the condition compliance for the originally granted 1994 permit which justified the issuance.

But not all of this delay has been for naught. There are many improvements that have been brought to this project in an unsuccessful attempt to overcome staff's obvious disaffection with this golf course. We believe that the combination of the two discussions - history and merit - will provide a more than adequate basis for the Commission to approve this project. After considering these data, we respectfully ask that the Commission approve this project. Towards that end, we respectfully provide proposed conditions of approval for the Commission to consider in order to avoid the further delay of a continuance.

The staff assertions that the applicant "suggested" delaying this hearing

Obviously concerned that the Commission will consider the delays in hearing this permit unconscionable, the staff asserts that in fact the applicant's representative urged them to delay the hearing. This is pure fiction. When the undersigned came to the project in August of 2001 and met with staff in September of 2001, we immediately asked to be scheduled for hearing. Staff would not do so. Staff insisted on a USFWS 10(a) permit for the red-legged frog ("RLF") – the very same permit that now, 3-1/2 years after the extension was denied – they choose to ignore.

The truth is the applicant has continually, requested to be heard. Even when it was known that issuance of the 10(a) permit was a matter of mere paperwork and due by the January 2002 hearing, staff would not schedule this matter. We did not belabor the matter in the interests of cooperation. But to say that we delayed the matter is disingenuous.

And, again contrary to the staff report, the reason the matter was set for April 2002 is that the Coastal Analyst in charge of the project had a back injury and the project was reassigned. The new analyst had little in the way of background knowledge and had to become familiarized.

This is not a situation where the applicant slept on its rights. The applicant is entitled to be heard on the matter that precipitated the delay – the red-legged frog – and only that matter. Furthermore, the 10(a) permit from the USFWS should be entitled to great weight over staff's "opinion" of what the effects are, since staff maintains no inhouse expertise and has been presented with substantial evidence on this point.

IMPROVEMENTS TO THE PROJECT

We now turn to the improvements that have been made to the project. **Staff has asserted (Exhibit 8) that these project revisions were only supplied by e-mail without their attachments. This is FALSE. An original was both faxed and sent by Federal Express, and staff had been given the attachments weeks before the staff report mailout.**

Water Quality

When this project was first reviewed by the undersigned, it appeared that there were improvements that could be made to significantly reduce the effects on Eagle Canyon Creek from a water quality standpoint. This was not suggested by staff, but rather proposed to staff. The applicant welcomed the opportunity to participate in a water quality improvement. The consultant selected to design the improvement was the same consultant used on the much-heralded Newport Coast project, unanimously approved by the Commission in August 2000.

What the water quality proposal did was redesign the grading for the portions of the Par 3 that drained into Eagle Canyon Creek (about 9 acres) and drain them away from Eagle Canyon Creek. For the seaward part of the Par 3, this was done for all nuisance flow and all storms. For the remainder of the Par 3, all nuisance flows and all storms up to and including the 2-year storm were intercepted and drained away from Eagle Canyon Creek after filtering through grass swales. To set the enormity of this measure in context, these 9 acres of watershed is part of a much larger (2,937 acre) watershed for Eagle Canyon. The creek is free flowing at and above the 2-year storm interval so there is no sand bar to impede and collect the pollutants. In addition, the parking lot was treated with bio-swales, the building and surrounding area runoff was routed to bioswales, and the runoff from solid water storage areas and compost piles was contained and treated.

We were confident in this extraordinary measure for another reason – the principal of Geosyntec, Eric Strecker, is also a fisheries biologist and is well acquainted with the measures that are needed to protect aquatic resources.

Staff dismisses this expertise by merely saying that the measures are not enough and that there might be "impacts." There is no evidence whatsoever to support this contention and ample evidence to support the findings of Mr. Strecker. Not stopping with his own qualifications to offer such an opinion, Mr. Strecker went on to compare this golf course as redesigned to several stringent guidelines for water quality published by agencies considered on the "leading edge" in the subject matter. In all cases, the Dos Pueblos Golf Links met or exceed these guidelines. Mr. Strecker concludes:

> "With implementation of these measures together with the previously proposed water quality protection and enhancement measures, the Dos Pueblos Golf Links water quality program should prove to be highly protective of water quality and will likely serve as a model for future golf courses as a state of the art water quality design."

Yet, the staff concludes that this golf course will somehow harm red-legged frogs and Monarch butterflies (discussed later in this letter in detail). The Commission should not abet such a strident departure from the facts.

We respectfully request that the Commission FIND:

1. That the water quality program presented by the applicant is a superior strategy to both the granted permit and the Section 10(a) permit.
2. That this program is in excess of what the Commission could require in this proceeding.

The White-Tailed Kites

This is probably the issue that has received the most attention throughout the latter part of this process. There are several points that need to be made and the staff report conflicts with many of them.

1. The WTK have always been known on the property – Mr. Kaufmann's letter amply documents that the WTK was not only known to frequent on this property, but that nesting and roosting was anticipated in the 1994 approval.
2. It does not matter what their status is because they are specifically addressed in both the approved permit and in the policies of the LCP - The Commission MUST follow these policies. The Commission is not permitted by law to ignore the policies in favor of another approach.
3. If white-tailed kites are an issue on this property because they were seen nesting, it is due solely to the Commission's insistence on an inordinate delay, which put this property into a state of repose for what is now nearly 3-1/2 years – The Commission should not be able to benefit from the a delay it caused by unreasonably refusing to hear this matter in 1999 as the applicant had requested. To add insult to injury, the very reason why the Commission imposed the delay – the perceived need to secure a 10(a) permit in order to apply the Local Coastal Program – was in the end totally ignored by staff in favor of their own articulation of impacts and mitigation. [1]

It is important to state the following policies (which are expressed as development standards in the Coastal Zoning Ordinance) relating to WTK for the Commission consideration. For convenience, the policies/development standards are recited below:

[1] While it did not appear to be the intention of the Commission in June 1999, the Commission itself may have unwittingly precipitated these changed circumstances. At the June, 1999 hearing, the Commission specifically inquired of staff whether the applicant would be empowered to do anything on the property while the USFWS addressed the RLF. The staff stated "no". Therefore, at that point the applicant was deprived of conducting any activities on the site (tree removal, remediation, etc.). In a very real sense, the applicant was forced to accept a timeline outside of their control for resolution of the issue identified by the Commission – RLF – and was simultaneously deprived of any opportunity to protect the property against the accrual of changed circumstances without violating the Coastal Act.

Section 35-97.14. Development Standards for White-Tailed Kite Habitats

1. There shall be no development including agricultural development i.e., *structures, roads*, within the area used for roosting and nesting.
2. Recreational use of the roosting and nesting area shall be minimal, i.e., walking, bird watching. *Protective measures for this area should include fencing and posting so as to restrict, but not exclude, use by people*.
3. Any *development* around the nesting and roosting area shall be set back sufficiently far as to minimize impacts on the habitat area.
4. In addition to preserving the ravine plant communities on More Mesa for nesting and roosting sites, the maximum feasible area shall be retained in grassland to provide feeding area for the kites.

As can easily be seen, no setback from a nesting area is required for a golf course. The Commission and the County anticipated the nesting by raptors by imposing Condition 11, and we have prepared the Biological Enhancement Landscape Plan ("BELP") – which the County has approved – to accomplish that. Neither the County nor the Commission ever required any setback at all. It is only by assuming that this is a proper "changed circumstance" (with which the applicant vehemently disagrees) that the staff reaches the Policy. In fact, Policy 2 – which staff does not even address – says that protective measures (for nesting and roosting areas) should include fencing and posting so as to restrict, but not exclude, use by people. Clearly the policy already authorizes recreational use of the nesting area. In light of the extensive research conducted by the applicant at the request of staff showing that WTK do nest on golf course fairway trees, it is hard to understand staff's draconian application of these policies. Clearly, Policy 1 defines what is meant by the term "development" – "structures and roads" within the area used for roosting and nesting.

In an attempt to accommodate staff's unlawful examination of issues and alterations well beyond the scope of the appeal and changed circumstances review, the applicant commissioned Dr. Jeffrey Froke, a noted expert in these raptors, to ascertain the effects of the golf course on them and what further enhancements – not mitigation, but enhancements – might be proffered to assist in their continued presence on the course after construction.

Not surprisingly, Dr. Froke was able to identify several key points about kites that are useful. First, they do use golf courses. Secondly, they benefit when rodenticides and other chemicals that affect their prey are minimized. Finally, Dr. Froke identified areas where the grasslands they prefer could be introduced, as well as trees and snags to attract them to use these areas. These were all expensive changes to the project, and were all accepted by the applicant.

It is not an answer, as Dr. Dixon and staff would have it, that these measures are "not enough". There is no question on the basis of the policies that humans cannot be allowed into nesting areas – the policy specifically says that there SHALL be no exclusion of people from nesting and roosting areas. The applicant would not have had to do any of these measures because the staff and the Commission are limited to the application of the policies in the LCP specifically on point. The time to challenge

these policies has long since passed when the LCP was certified. There can be no question that a golf course is exactly the kind of passive recreation that the LCP contemplated in these areas.

Staff goes too far in another way. Staff has decided that to "protect" the use of the area by the kites, all trees – whether they are nesting trees or not – have to be saved in a very large area. Staff clearly cannot in any way save trees that are not occupied by nests, and are not a known nesting area. Like most statements in the staff report, they just go too far.

It is noteworthy that the Commission's biologist, by his own admission, is not an expert on these birds as is Dr. Froke. The essence of the Dixon memo is an unfounded assertion – again without any frame of reference to the policies on point in the LCP – that the kite is far too timid to endure the golf course. Despite the fact that Dr. Dixon's assertion is just plain wrong, that is hardly the point. The policies are clear. The Commission – plain and simple – cannot go beyond them, and the project is more than consistent with them.

Raptors of all kinds have always been expected on this property. If this was a housing subdivision (i.e., a structure as defined under the policy), the emphasis might be more appropriate. However, the Commission already resolved whatever potential the WTK posed to this site by calling for mitigation, and further requirements for buffers or other design treatments are clearly outside of the scope of this full hearing on changed circumstances.

We respectfully recommend that the Commission **FIND:**

1. That the White Tailed Kite presence is not a changed circumstance because it was identified in the 1993 EIR, and again in the 1994 approval, and not identified as such even in the 1999 denial of the extension to issue the granted permit
2. That the Coastal Commission regulations restrict the Commission from accruing changed circumstances against the project that were not denied in the extension, whether or not the cause for the delay is the Commission's own action;
3. That there are no changed circumstances with respect to the white tailed kites on the property due to the fact that their use of the property – including nesting and foraging – was known at the time of the granting of the original permit, and addressed, and any further discussion is time-barred;
4. That to the extent that the LCP policies related to White Tailed Kites apply at all, they must be applied exactly as they are written and not with respect to any further "articulation" of ESHA on the property;
5. That to the extent the LCP White Tailed Kite Policies apply to the property, the project meets these policies by having only recreation (no buildings, no roads) in the area of necessary setback and that people are not excluded from the nesting areas;
6. That the foraging areas and chemical restrictions proposed by the applicant further enhance and meet LCP policy objectives.

Red-Legged Frog

Redesign of the reclaimed water pond and alleged future use of the property by RLF

Staff expressed concern that the reclaimed water pond would create an attractive nuisance to RLF that may choose to come to the pond and breed in it. Because staff refused to accept the USFWS determination regarding this potentiality, the undersigned asked Dr. Jon Allen for a recommendation of someone to address this issue. Dr. Allen recommended Dr. Galen Rathbun, an acclaimed RLF expert. Dr. Rathbun's services were secured, and he prepared a letter in addition to conversation with Dr. Allen on his findings. This letter is included as Attachment D.

Dr. Rathbun clearly addresses the following issues: Potential for Additional Breeding Habitat, Potential for Wetlands on Site to Attract Frogs, Design of Pond in Relation to Frogs, Potential for Frogs to be Attracted to Ponds, Potential for Frogs Breeding in Ponds. A review of this letter shows that Dr. Rathbun's conclusions on these issues differ dramatically from the conclusions of staff. Dr. Allen specifically designated Dr. Rathbun as the "go to" source for all decisions related to RLF, in spite of the determination of the USFWS. In conversations with Dr. Allen after receipt of the letter, Dr. Allen asked for Dr. Rathbun to personally participate in a redesign of the pond. Although Dr. Allen said that it was his belief that the permit could be conditioned on this redesign of the edge treatment of the pond, the applicant initiated the work immediately. This resulted in a new plan for edge treatments in the pond directed by Dr. Rathbun and overcoming any possible harm to breeding RLF. This plan was presented to the staff on April 29, 2002 but is not even addressed in the report.

It is difficult for the applicant to attach credibility whatsoever to the conclusions of the staff. This applicant did exactly what the Commission said they needed in 1999 – it obtained a Section 10(a) Incidental Take Permit from the USFWS. This was with the full knowledge of Coastal staff, who also commented on the permit during the public review period. The applicant, at the request of staff, obtained additional input from another Red-Legged Frog expert, who suggested modifications to the pond – and these were made. Then, the applicant asked yet another expert to opine on the pond and how Red-Legged Frogs are known to fare in golf courses. Again, this expert stated that the frogs would be adequately accommodated, to the extent they come up to the golf course at all. The closest golf course element to the Eagle Canyon Creek area – the Par 3 course – was also "rolled back" in terms of chemicals, and will be defended by more natural treatments.

But none of this was enough for the staff, who admit that they possess no specific training or expertise in these frogs. Frankly, our experts are astonished.

The applicant's plan not only obeys the command of the federal agency with responsibility for seeing to it that the frogs are not harmed, it goes well beyond that in terms of chemical treatment. There is simply no evidence whatsoever to support staff's distress about the frogs. All of the necessary precautions have been taken with respect to the frog, some even though they were not required by the

USFWS. We ask that the Commission decline to follow the staff recommendation in this case. A $2 million effort to bury the pond, coupled with the staff's demand that the Par 3 be eliminated, is simply without foundation.

We respectfully request that the Commission **FIND:**

1. That compliance with the Section 10(a) permit issued by USFWS is legally and factually sufficient to address the changed circumstances within the policies of the LCP;
2. That there is no basis for concluding that an open pond designed in the manner suggested will cause harm to frogs;
3. That the Commission asked the applicant to return with the USFWS determination and the applicant has met that directive;
4. That beyond the precautions taken by the federal agency with primary responsibility over this amphibian the applicant has provided additional enhancement to further protect the frogs if they come up to the property, including but not, limited to relocation of the Eagle Canyon Creek access, redesign of the reclaimed water pond, elimination of chemicals in the Par 3 except in times of emergency, implementation of a water quality program eliminating nuisance and up to 2-year storm flows from reaching Eagle Canyon Creek and reducing chemical application on the 18-hole golf course.

Southern Tarplant

The staff's discussion of southern tarplant reduces to the following propositions: that the tarplant has increased in sensitivity in the eyes of the California Native Plant Society (but has not been listed by either the state or the federal government), and that there is more of it than was on the site in 1994. The applicant believes that the Commission should reject these arguments for the following reasons.

The staff inaccurately claims that the status of the southern tarplant (from "List 3" to List 1B") occurred prior to the certification of the project's March 1993 Final EIR. In fact, the southern tarplant was elevated to "List 1B" in February 1994 while the project was before the Commission. Therefore, the Commission approved this project well after the CNPS change in status. There is no state or federal listing for this plant.

The staff inaccurately claims that the "List 3" status of the southern tarplant was the justification for the County's mitigation rather than avoidance. First, the FEIR treated the southern tarplant as a "special interest plant species of local concern" (FEIR, page 5.1-15). This is the same level of a List 1B species. Therefore, the FEIR, the County, and the Commission were proper in the proposed mitigation of the southern tarplant, and the staff is misguided in attempting to argue that the change of status is a change of circumstance.

At last count in September 2001, there were 436 tarplants in 9 locations on the 208-acre property. These plants were located on approximately 8,765 square feet of land area.

Other than the original tarplant location reported in the 1994 proceeding to the Commission, the "new" tarplant locations are the result of remediation efforts approved by the Commission's 1994 permit. In fact, many of the locations mirror the exact shape of the original oil field facility. It is beyond reasonable dispute that tarplant emergence is promoted by disturbance of the earth. In fact, the term "tarplant" derives its origins from its association with oil fields, which are being constantly disturbed by operations. The plant is not a very good competitor with either native or non-native species, and if left alone reduces in number over a very short period of time.

As to the 4,500 southern tarplants once on the site, most of these areas arose immediately after oil operations were abandoned and some of the remediation took place. This is normal. The new populations, not surprisingly, were found exactly where the abandonment and remediation activities had occurred. This information was submitted to staff on April 29, 2002[2]

The year after the 4,500 plants were discovered, there were reductions of large proportions in the populations (to 372 plants). The population as of September 2001 was 436 plants, as shown below:

- 45 plants were observed at the originally shown 1994 tarplant location.
- 12 plants were observed in the vicinity (west) of former loading rack facility.
- 331 plants were observed in the vicinity of the former loading rack facility.
- 48 plants were observed south of the previously removed Arco offices

In the 1994 permit, the Commission required a mitigation area for tarplant restoration. The tarplant restoration area also is managed to avoid as much as possible their natural attrition, and to protect the plants from invasion by competitive species. The applicant has offered a mitigation area in association with wetlands on site (an ideal location for tarplant restoration) that can support as many as 3,000[3] plants. Staff does not mention this aspect of the applicant's proposal. There is no reason to "preserve" the area where tarplant now exists only as a result of oil field abandonment, nor, as stated previously, does the plant have any higher status now than it did at the time of approval in 1994. There is no ESHA involved, since the Commission knew about the presence of tarplant on the property in 1994 and mitigated it. Additionally, the Commission knew or should have known that the habit of tarplant is to colonize disturbed areas (it was found in 1994 in an erosion area) and therefore took into consideration the effects of having tarplant on the site in greater numbers as a result of abandonment and remediation. Simply put, if the tarplant is left in place and there is no management of it, it will probably eventually disappear.

The applicant respectfully requests that the Commission FIND:

1. That the nature of the tarplant is ephemeral;
2. That the newly discovered locations of tarplant are not ESHA because, among other things, the plant was listed as a more sensitive category species at the time of the Commission's original approval and was mitigated;

[2] Report by Sherri Miller, Dudek & Associates, Inc., April 25, 2002.
[3] Report by Sherri Miller, Dudek & Associates, Inc., April 25, 2002.

3. That if the Commission mitigated a naturally occurring population of this plant in 1994, it should be bound to mitigate an unnaturally occurring population.
4. That the Commission accept the applicant's offer of a program for an area that can support 3000 plants in the new mitigation location suggested by the applicant.

Monarch Butterflies

Monarch butterflies are not listed as endangered or threatened by any agency with jurisdiction to control activities related to their conduct. At staff's request the applicant undertook yet another study of Monarch butterflies, even though this was not within the discretion of the Commission staff.

The study was prepared and submitted to staff in November 2001. The study found an autumnal aggregation site in some of the trees in Upper Eagle Canyon adjacent to the Par 3. The overwintering site is in Eagle Canyon near the creek and is not affected by any golf course activities. The trees occupies by the butterflies are in a larger grove. Large portions of the grove are not occupied in any way by the butterflies.

The LCP again instructs staff how to approach this issue but the staff ignores the development standards. The LCP development standard is as follows:

> *Section 35-97.12. Development Standards for Butterfly Tree Habitats*
> 1. *Butterfly trees* shall not be removed except where they pose a serious threat to life or property, and shall not be pruned during roosting and nesting season.
> 2. Adjacent development shall be set back a minimum of 50 feet from the *trees*. [Emphasis added]

The biologist's November 2001 report notes:

> "The minimum setback for any development from such an ESH is 50 feet (LCP Policy 9-231 CZO Section 35-97-12.2). A second aggregation site, the most populated at Eagle Canyon last year, is located on the west bank of Eagle Canyon Creek approximately 150 feet to the east of the autumnal site, and 30 feet below the top of the canyon bank. The nearest point of the proposed development is approximately 80-feet away from the edge of this aggregation area, and as such exceeds the 50-foot setback minimum." (Report, "Monarch Butterfly Aggregations Associated with Eagle Canyon," Daniel Meade, Ph.D. Althouse and Meade, Inc, revised November 2001) [Emphasis added]

Dr. Meade goes on to list several suggested mitigations, all of which were accepted by the applicant. Even a revision in the golf course design of the Par 3 was made and transmitted to staff as a revised map on April 29, 2002. Dr. Meade's mitigation measures were submitted to the staff and incorporated into the project, and include measures related to pesticide control, construction activities and setbacks, to name a few. In addition, Dr. Meade includes a critique of the staff position, provided as an attachment to the statement of errors provided in Attachment A.

With respect to the policies, the staff makes a completely two uncorroborated allegations. First, staff says that there is irrigated area within the dripline of the trees. One would have to stretch the imagination quite far to call an irrigated area development within the meaning of the policy, but we need not argue that. The allegation is simply wrong. What is within the dripline is the bioswales for the water quality treatment, a slightly graded area to allow flows to pass and be filtered – a common condition in coastal development permits in recent years. It poses absolutely no harm to the butterflies. The policy is clearly aimed at disturbance of the butterflies by human activities. This will not happen within the 50-foot setback by the mere presence of the swale.

In addition, the staff errs in the manner in which they apply the policy. They apply it to the dripline of the entire grove of trees, whether occupied by butterflies or not. The Commission should not recognize this imaginary butterfly habitat. The policy is clear – it is a setback from butterfly trees and not tree groves.

The policies of the LCP are absolute and they are applied as you find the property at the time of your decision. The Commission may not legally impute Monarch butterfly use to a grove where none now exists.

Staff's proposal to eliminate the Par 3 Golf Course

Notwithstanding the above information, and without any justification whatsoever based on the clearly articulated LCP policies, the staff simply recommends elimination of the Par 3 golf course. The staff basically states that they do not believe that maintenance personnel will observe the mitigations imposed on the applicant, that the golf balls will hit the butterflies and that overspray will hit the butterflies (even though the applicant already resolved this concern by accepting Dr. Froke's recommendations). They so state without any basis in fact whatsoever.

Staff offers no explanation for its conduct in turning a blind eye to the expressly stated development standards in the LCP. To the extent that the Commission considers anything related to Monarch butterflies to be a changed circumstance, the applicant respectfully requests that the Commission resolve this circumstance by applying the LCP policies and development standards ONLY.

The irresponsible nature of the staff position is even more apparent when it is considered that existing water lines and the Coastal Trail – approved by the Commission when it was known Monarch butterflies were in the grove below – are all within 50 feet of those groves. Clearly, at one time the Commission did not consider such passive uses "development" for the purposes of this policy.

The applicant respectfully recommends that the Commission FIND:

1. That the policies of the LCP apply, and only those policies.
2. That the setback policy is the only one that applies in this case and not any concern about pesticides;

3. That the policy application is limited to the grove or groves where the butterflies currently exist
4. That Sheet G11 of the grading plans clearly shows that the 50-foot setback from occupied butterfly trees is met adjacent to the Par 3.

Conclusion and Request of Applicant

The applicant has worked diligently and in good faith to provide the data that the Commission staff have requested, even where the applicant did not agree that accrual of changed circumstances to the present date was contemplated in the Commission action in June, 1999 or otherwise legally or equitably appropriate. This cooperation has resulted in the following consequences:

1. But for the applicant's cooperation in this regard the project would not have been scheduled for public hearing at all;
2. In spite of the Commission's desire to deal just with the issues concerning the RLF, the staff have adopted a stance that all changed circumstances accumulated on the site must be addressed, whether as a result of the time necessary to process a 10a permit, or by the Commission staff's own inaction.
3. There can be no question that the delay imposed by the requirement of waiting for the 10a permit – instead of the Commission holding a hearing and simply conditioning the permit[4] allowed the "colonization" of this site with species that have the potential under the staff recommendation to make the entire project infeasible.[5]

There is no question that, in spite of these changed circumstances, this project can be found in conformity with the certified LCP if the staff would follow the law. After-the-fact determinations of ESHA in order to upset the unambiguous development standards of the LCP are what the staff has promoted to the Commission in its most recent report.

Were this simply a CDP without a certified LCP, and presented for first impression to the Commission, there might be possible basis for the staff recommendation. But it is not. It is a permit that was granted by the Commission, and that the applicant acted on to its considerable economic disadvantage and in detrimental reliance. The Commission staff now state that some unidentified alternative design is feasible. If staff had employed a comparable expert of its own, there might be something to debate.

But staff has not done so, and moreover did not seek the applicant's input in this last round of theoretically possibly ways to re-design this golf course. The staff attempt to blame this on the

[4] This would have stopped the accrual of changed circumstances.
[5] The first WTK nest was spotted in the spring of 2000 by the County's monitor, but the applicant was unaware of this. The tarplant and butterfly changes took place initially in 2000 and 2001, and the elevation of the tarplant took place in 2000.

applicant, but the applicant has already made their proof – it is staff that must state what this possible alternative is.

But the applicant knows – and Ben Crenshaw has documented – that such an alternative does not exist. This is not applicant preference – this is impossibility. Our Attachment E demonstrates that changes of the nature staff suggest are not feasible for a golf course on this site in the opinion of the designer, Ben Crenshaw of Coore and Crenshaw. Staff did not consult with golf course designers, and the applicant has repeatedly stated that the course is at the bare minimum in terms of yardage to be viable as a championship course.

The applicant respectfully suggests to the Commission that one does not need to be a golfer to understand that a 208-acre site – of which only 108 acres is used as golf course – has already pledged 52% of the site to environmental attributes – grasslands, wetlands, canyons, trees – and has little more to give. It is not an answer for the staff to blithely suggest – on the basis of no evidence whatsoever - that the golf course be redesigned. Such a suggestion begs the question of LCP policy application, and is not supported by any golf course designers consulted on the course.

The applicant respectfully requests that the Commission find that this project is designed in a manner meeting the LCP policies and development standards, that the changed circumstances of RLF have been adequately resolved, and approve this project at the Commission's December 11, 2002 meeting. The applicant further requests that the Commission take notice of the many inaccuracies in the report that are presented in Attachment A.

In the hopes that our entreaty will be acceptable, we propose for the Commission's convenience our proposed Conditions of Approval (Attachment F). Under the circumstances, and if the Commission decides to approve this project as we request, there is no reason to continue this matter. The conditions attached were presented to the Commission and staff in June 2002, and the staff has had more than ample time to review them.

We look forward to addressing the Commission at the hearing.

Sincerely,

M. Andriette Culbertson

M. Andriette Culbertson
President

MAC/kc

c: Peter M. Douglas, CCC
Ralph Faust, Jr., CCC
Chuck Damm, CCC
Jamee Jordan Patterson, AG
Melanie Hale, CCC
Paul Makarechian, Makar Properties
Whitt Hollis, Makar Properties
Samuel Weissbard, Makar Properties
Steve Kaufmann, Esq., Richards, Watson, Gershon

Professional Letter2.doc

Attachments

A Inaccuracies in Staff Report
B Dos Pueblos Chronology memo
C Condition Compliance History
D Letter dated March 5, 2002 from Galen B. Rathbun, Ph.D re Red Legged Frog
E Letter Detailing Infeasibility of Staff Proposed Golf Course Redesign
F Applicant's Desired Conditions of Approval

Inaccurate Statements within the November 22, 2002
Staff Report Changed Circumstances and Project Amendments,
A-4-STB-93-154-CC, and –A2 (ARCO Dos Pueblos Golf Links)

Given the very short time allowed to respond to the staff report due to the late release we have not completed our analysis of the document. Therefore, the following comments on the staff report are preliminary and we respectfully advise the possibility of additional comments will be provided prior to the December 11, 2002 hearing.

Page 1, Applicant:

The only applicant is CPHPAH Dos Pueblos Associates, LLC.

Page 4, 4th paragraph:

The second sentence states Exhibit 54 contains material from the Coastal Land Use Plan and the Coastal Zoning Ordinance. No such material can be found in the exhibits provided to the applicant by the Commission.

Section 1.3 Changed Circumstances, pages 6 – 14:

Overall comment: Please refer to the letters of M. Andriette Culbertson, Esq. And Steven H. Kaufmann, Esq. For a complete response to this section.

Page 7, 1st paragraph:

Additional portions of the Commission's February 8, 1995 Final Revised Findings continue to apply. These are: The Project Provides For Two Coastal Act Priority Uses and Public Access, amongst others.

Page 7, 2nd paragraph:

For reasons elaborated in the letters of Ms. Culbertson and Mr. Kaufmann, referenced above, the listing of all but the California Red-legged Frog are incorrectly listed as changed circumstances.

Page 11, 1st full paragraph:

It is a totally false misrepresentation for Staff to state 72,208 monarch butterflies from the Althouse and Meade report. An accurate report would state that the largest single count was 6,700. The 72,208 number includes the same butteries numerous times.

Page 12, 2nd full paragraph:

The last sentence falsely claims the information regarding the southern tarplant was not made available until March 2002. In fact the information about the additional tarplant populations was a part of the

Biological Enhancement Landscape Plan approved by the County as part of their 1998 CDP issuance and provided to the Commission in December 1998.

Page 13, 1st paragraph:

Staff, in the next to last sentence, claims the applicant was aware of the change in status of the southern tarplant prior to the Commissions' 1994 original approval. They claim the memo contained as Exhibit 28 offers evidence of such. The memo listed as Exhibit 28 only states the status may change. The applicant did not have knowledge of the change in status prior to 2002.

Page 14, 1st full paragraph;

Staff claims classification as a List 1(b) plant is evidence of the plant's habitat being ESH. We do not believe this is correct. Elsewhere in the document, Staff incorrectly claims the Southern Tarplant status was changed prior to the certification of the FEIR. In fact the status changed in June 1994 while the project was before the Commission. However, the FEIR handled the species as if it were already of the new status.

Section 1.4, Pages 14 – 20:

General Comment: Please refer to Ms. Culbertson's' letter regarding the staff's contention that the applicant should have been heard after the USFWS issuance of the Section 10a permit. We did agree only after it was clear staff wouldn't take the matter back, otherwise.

Page 17, 4th full paragraph:

Staff falsely claims the County was not aware of a new location of the southern tarplant in the same location of contaminated soils subject the 1998 CDP for soil remediation. They offer no evidence of this mis-statement. The applicant has personal knowledge of discussion with the County about this very matter. The record clearly demonstrates the County was fully aware that a new population of the plant occurred within an area they approved for remediation.

Page 23, 1st paragraph, last sentence:

Staff indicates the 1998 approved grading and drainage plans do not indicate the locations of contaminated soils subject to the RAP. Staff seems to indicate this should be shown on the plans. There is no condition that this be show on the plans, however, staff does not mention these areas are shown on the grading plans for the RAP and respective CDP. Also all the permit conditions, including the requirements of compliance with the RAP are listed on these grading plans.

This, and other comments, contained with the Staff Report seems to indicate staff wishes to reverse Commission's management's 1997 determination that the County would control permit compliance for those conditions originating from the County's 1993 MCUP.

Page 23, Section 2.4 Physical Setting, 2nd paragraph:

In the next to last sentence Staff states "The development potential of these substandard sized lots has not been determined, *but the Commission certified an LCP amendment in April 2002 that authorizes the owner of Naples lots to seek development agreements concerning the lots with Santa Barbara County" (emphasis added)*. We were unaware of this amendment and verified with the County Planning & Development Department that there been no amendments the LCP regarding these Naples lots in approximately 20 years.

Page 27, last full paragraph, last sentence:

Staff falsely claims suitable breeding habitat has been identified in Tomate Canyon. There is no evidence we are aware of contained in the record to support such a statement. In fact, the USFWS, Galen Rathbun and other experts state the only potential breeding habitat located upon the project site is a small portion of Eagle Canyon located on the extreme eastern (down coast) boundary.

Page 30, 3rd paragraph, next to last sentence:

The Goleta Water District, not the Goleta Sanitary District, provides the reclaimed water for the project.

Page 30, 4th paragraph:

Staff offers no evidence to support their opinion that the pond "...would easily..." result in the colonization by bullfrogs. We understand bullfrogs do not colonize a similar pond located nearby upon the Sandpiper Golf course; therefore the Staff's assumption is incorrect in light of existing evidence.

Page 30, 5th paragraph:

Staff fails to indicate that the bullfrog monitoring and removal plan was approved by the USFWS as adequate mitigation.

Page 31, 1st paragraph, last sentence:

Staff implies the applicant's sole reason for opposing the complete undergrounging and permanent covering of the lake is because the estimated costs would make the project infeasible. In addition to the cost we object to this proposal because we believe the evidence in the record demonstrates the proposal is not legally warranted.

Page 32, 2nd full paragraph:

Staff misrepresents the significant project modification we proposed on November 21, 2002 regarding reducing chemical applications because "...the amendment is only at a very conceptual, general level...". Staff fails to provide the exhibit to this project description revision (Exhibit 8) that in fact contains very specific proposals. We propose to place strict restrictions on the use of rodenticides and limit the use of pesticides within the par-three course to emergencies.

Staff goes onto claim there are inconsistencies with the draft 2002 revised ATMIPM. This assertion is disingenuous, at best, because Staff knows full well the proposed revisions will be incorporated into the Draft ATMIPM. Staff also fails to disclose that the Commission has had approximately nine-months to provide comments on the Draft ATMIPM, which the Commission has approval responsibilities but has declined to submit.

Page 33, 1st paragraph:

Staff claims the USFWS approved "buffers" are not buffers but only trigger monitoring requirements. We believe Staff has again mischaracterized this significant mitigation measure. First, as stated above, the recent revision to the project description requires significant additional restriction on the use of rodenticides and pesticides within the Par-three course. Secondly, the mitigation measures required monitoring measures have been found adequate portions of the staff. See exhibit 49 containing Ms Duffey's memorandum, revised November 8, 2002.

Page 40, 4th paragraph:

Staff falsely claims the Par 3 course is not consistent with the County's LCP. We have never claimed the 50-feet is obtained by measuring vertical separation. Staff, either did not review the grading and drainage plans properly, or chooses to create a totally false statement regarding of the project. The area of the drip lines of the Upper Western grove were located and staked by Dr. Meade. This area was then surveyed in and plotted onto the grading plans to assure that all aspects of the project are consistent with the applicable policies. To claim somehow we are measuring from the height of the branches is totally false and unsupported by any evidence.

Page 40, last paragraph:

Staff's has developed a unique interpretation of the County policy. To claim the word "trees", as found in LCP Policy 9-23 should be applied to a much larger area (referred to as grove J from the tree replacement

plan) is illegal. We are unaware of any similar interpretation being utilizes under the County's LCP.

WE BELIEVE THE STAFF'S INTERPRETATION, IF ADOPTED BY THE COMMISSION, WOULD RESULT IN THE PERMINANTE ELEMINATION OF A COASTAL ACCESS TRAIL SYSTEM THROUGH THE EAGLE CANYON AREA.

Page 41, 2nd full paragraph:

Staff is correct that the Permit condition states: "Pipeline construction shall not occur within 50 feet of the Monarch autumnal roosting trees located in Eagle Canyon between October 1 and January 31." We are fully capable to restrict all construction operations within Eagle Canyon between these months.

Page 42, 2nd full paragraph:

Staff speculates, with no evidence to support the speculation, that golfers would disturb the butterflies. We have presented evidence to the contrary (Meade, June 4, 2002) which Staff elects to ignore.

Page 42, 43 and 44, Pesticide Applications:

Staff elects not to incorporate the project revisions discussed above regarding reduction of pesticides. They also seem to ignore the evidence that the butterflies occur in the area a few months of the year. Staff's argument, once again, is dependent upon a statistical misrepresentation. To claim an average wind speed of 3 mph as the basis of supporting their position that would cause over drift is illogical.

Page 45:

Please refer to the comments above about the proposed revised project description and the approval of the ATMIPM.

Page 46, last full paragraph:

Staff claims we have proposed to remove or thin trees in this area. We are unaware of any such proposal. In fact we have made repeated statements to staff that NO TREES ARE PROPSED TO BE REMOVED. We find the Staff's apparently deliberate misrepresentation troubling.

General Comment: Discussion about tarplant and White tailed Kite: Please refer to Ms. Culbertson's letter for additional comments.

Page 76, Section 3.6 New Wetlands:

Staff misrepresents the County's LCP policies. As evident by the County's issuance of 98-CDP-274 (issued December 3, 1998), they concluded the proposed project is fully consistent with all applicable policies including the "new wetlands".

We find it alarming that Staff does not mention their 1999 determinations that the project was consistent with these policies, nor do they attempt to justify their complete reversal on facts which have not changed.

Page 76-77, Section 4.0 Alternatives:

We again reference the Letters of Ms. Culbertson and Mr. Kaufmann. Please refer to the previous comment regarding Staff's false impression of an amendment to the LCP (Page 24) authorizing Naples lot owners to seek development agreements with the County of Santa Barbara.

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June 4, 2002

Sara Wan, Chair
California Coastal Commission
45 Fremont St., Suite 2000
San Francisco, CA 94105-2219

Re: Dos Pueblos Golf Links
Monday, June 10, 2002, A-4-STB-93-154-CC, and –A2 (Arco Dos Pueblos Golf Links)
AGENDA ITEM 6.5

Dear Commissioner Wan:

This letter responds to the staff report regarding the Arco Dos Pueblos Golf Links project in the Naples area of Santa Barbara County. We have provided consulting services to the project applicant, and are cited in the staff report concerning the proposed project. The staff report accurately cites our reports, and notes our concerns on the impact of the project on Monarch butterfly aggregation sites on the property. However, we feel that the staff report overstates the potential problems from the project, and does not correctly consider the possibility that the proposed conditions could result in viable monarch butterfly aggregation sites on the property, and off the property in Eagle Canyon.

First, we do not know that the use of the Eagle Canyon aggregation site has increased exponentially, as stated on page 50. We do know that since 1990 the number of butterflies in aggregation at the site have been highly variable, ranging in the eastern site from 130 in 1990, to over 12,000 in 1998, to a maximum of 367 in October of 2000. This variability of aggregation size may have been occurring prior to 1990. We have no records that document the butterfly number at Eagle Canyon before the Calvert study. We also have found that many butterflies occur in an autumnal aggregation that we have called the Upper Western Grove. Autumnal aggregations may have been occurring at this site prior to 1990 in similar numbers to our 2000-2001 counts. The observed level of variation may continue at the site, with some years finding very few butterflies and some years large numbers.

We recommended that construction activities should not occur within 200 feet of Monarch aggregations during the period when they can by present (October through March). Staff suggests that if this restriction on the time of construction is not kept, "[construction] will inevitably take place within 200 feet of an aggregation" (page 51,

para. 2). We suggest that this restriction be kept, and that no construction activities occur within 200 feet of an aggregation.

We raised concerns regarding four potential problems from the Par-3 golf course. The staff report states that these problems are insurmountable (page 56, last paragraph), however, they are not. The first potential problem was disturbance to aggregations from people moving underneath the butterfly clusters. The 50-foot setback from the edge of the green addresses this problem. Previously, the green was proposed to be directly under the aggregation trees. Moving the green edge 50-feet from the trees eliminates the pedestrian traffic that would have occurred under the aggregation site. The staff report suggests that "chronic stress" would be a consequence of golfers near the aggregations. I suggest that "chronic stress" has not been demonstrated as possible in insect behavior. If monarch butterflies are sufficiently disturbed, their normal behavior is simply to move to areas where they are not so frequently disturbed. Also, the number of people visiting an aggregation site is not as important as what they do there. In some months more that 6000 people visit the Ellwood main site in Goleta (based on my estimates from counts at the site), and many thousands of people visit the Pismo Monarch butterfly habitat in Pismo Beach each month. In these cases visitors walk directly underneath the clusters. In Ellwood, a continuing concern is the frequent intentional disturbance of butterflies by visitors that hope to observe the insects in the air. The movement of golfers across a green at least 50-feet from the edge of the aggregation site is well below the level of activity at the Ellwood site on a given day, and should not result in disturbance to the aggregations.

Strikes from golf balls were also a concern that we sought to address. Not being an experienced golfer, I was not able to estimate the potential for errant shots to strike a cluster. The trajectory from the tee to the green is shown on the plan as being to the southeast. This is not directly aimed at the clustering site as stated in the staff report (page 51). Movement of the green to meet the 50-foot setback requirement will result in the target being further to the north, and the trajectory of shots to be nearly due east. Placement of the green further north will eliminate strikes by golf balls as a concern. Further, I am told by experienced golfers that to miss the green by a distance necessary to strike a cluster several meters high in a tree 50 feet beyond the far edge of a green is an extremely unlikely circumstance. The proposed mitigation of moving the green to the 50-foot setback from the aggregation trees will address this concern.

Pesticide effects on Monarch butterflies were my greatest concern regarding this site. The staff report suggests that no adequate solution is available to address this concern. However, the staff report includes assumptions regarding conditions on the site that are not accurate. They state on page 52 that "the winter season is the only time winds fall below the 5-mile per hour measure." This is a mis-interpretation of the average windspeed measures compiled seasonally for the area. Although the average afternoon windspeed may be 10-20 mph during the spring and summer, and 10 mph during the fall, there are many days during each season when conditions on the property are calm. I have been on the property on days when wind was calm (dead calm or below 3 mph) in every season. Also, the report states that the "course is essentially at 'ground zero' from the Monarch Groves, and the prevailing wind direction would blow any application of chemicals . . . directly into the Monarch trees" (page 53, para. 1). This is simply an

overstatement. The edge of the developed area (the edge of green) is to be 50-feet away from the nearest Monarch butterfly tree, not directly under it. The statement implies that the applicators are expected to be either incompetent or in violation of spraying rules. The rules state that they are not to use pesticides when drift could occur. Also, a simple rule that pesticides should not be used on the Par-3 course when Monarch butterflies are present in aggregations would eliminate this concern. As far as the type of pesticides used, staff cites MERIT as an insecticide that could create problems. They also quote the warning label on the MERIT product that advises that it is highly toxic to bees. I suggest that warning labels on insecticides should be read by applicators, and that the restrictions on use stated on the labels be followed so that non-target insects (e.g. Monarch butterflies) not be affected. This is not a difficult task, and should be expected of any professional applicator. The examples of the Sandpiper Golf Course in Goleta, and the Marshallia Ranch Golf Course on Vandenberg, which are adjacent to known Monarch butterfly aggregation sites (SB Co. Sites 60 and 11 respectively), should serve as an example that golf course maintenance can be conducted in a manner that will not destroy aggregation sites. Aggregations of Monarch butterflies are found within 50 feet of the fairways of these two courses, and have been present for over ten years.

We expressed concerns regarding the reduction of groves adjacent to the aggregation sites. On page 57 of the staff report it is stated that, "construction of the Par-3 Course as approved previously would require removal of the Upper Western Grove and the placement of approximately 2,600 cubic yards of fill where the grove is located." Based on my review of the proposed project, including the 50-foot setback of development from the Monarch aggregation sites, this statement is incorrect. I understand that no trees in the Upper Western Grove were to be removed by the proposed development.

Finally, on page 53, staff asks what we meant by an "acceptable level" of impact to Monarch butterflies. We suggested that the restrictions agreed to by the USFWS and the applicant in the HCP with respect to chemical use would reduce impacts to an acceptable level. This statement reflects the understanding that all risks are never completely eliminated. We mean that if the HCP restrictions on pesticide use are followed, Monarch butterflies would not be exposed to pesticide in the aggregation site. We also mean that the likelihood of Monarch butterflies encountering pesticide spray from an active spraying operation are low enough to result in less than one individual exposure per day. Although I have never observed a Monarch butterfly fly into a golf course pesticide spraying operation, it is possible that it could happen. I have observed agricultural spraying operations in citrus groves along the coast that use rotary boom sprayers to cover trees with pesticide. I have observed these spraying operations during the aggregation season on groves used by nectaring butterflies. The type of equipment used by golf courses and the method of application is benign in comparison, with very little likelihood of an encounter with a Monarch butterfly. The restrictions presented in the HCP for the project, and our suggestions regarding setbacks and timing of activities will result in insignificant impacts to the Monarch butterfly population.

Sincerely,

Daniel E. Meade

Daniel E. Meade, Ph.D.

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MakarPropertiesLLC

memorandum

TO: Andi Culbertson

FROM: R. W. Hollis, Jr.

SUBJECT: Dos Pueblos Chronology

DATE: December 2, 2002

CC: Steve Kaufmann & Sandy Weissbard

The following are the dates requested in your 11/30/02 email. They are the dates for the golf course permit, not the ARCO remediation. Please refer to the attached table for more details about most of the dates.

Appellate Decision: 1/22/1997

County approval and issuance of CDP: 12/3/98

Submittal of materials for Coastal Conditions:

8/14/98, 10/8/98, 10/13/98, 10/19/98, 10/21/98 & 12/15/98

Instructions from CCC management to deal with County on the Compliance with their conditions: Fall 1997 a couple meetings were held, the last being 11/5/97.

Submittal of evidence of compliance with County conditions: 12/4/98, the CDP was received by the Commission evidencing full County compliance.

Conversations with management that they would issue permit: 10/16/98

Legal Staff clears their conditions: 12/15/98

1st Appeal filed: 12/18/98

Amendment of appeal filed: 12/28/98

E-mail from management that they would issue permit anyway: I am unaware of any such message. An email would have gone to Steve or Nancy.

I made various calls (12/10/99) and visits to Ventura to track the status of the staff writing the Substantial Issue Staff Report during the month of December.

Expiration Date for issuance: 1/28/1999

Permit extension applied for: 1/7/1999. A meeting was held with Damm on 1/6/1999 to review the status of the two appeals.

Red-legged frog alleged on property: 2/3/1999

Appeals scheduled for hearing: On 1/6/1999 Damm agreed to have both on the February hearing.

Extension hearing: 6/7/1999

Dos Pueblos Golf Links
California Coastal Commission
A-4-STB-93-154
PRIOR TO LAND USE CLEARANCE/COASTAL DEVELOPMENT PERMIT ISSUANCE CONDITION REQUIREMENTS

CONDITION #	ACTION REQUIRED		COMPLIANCE HISTORY
CCC Condition – IV (f)(2)(1)(a). Public Access Facilities (pages 19-22 of Final Revised Findings)	Enter into agreement with CCC & SB Co to dedicate, improve, operate, and maintain all public access features.		In the fall of 1997 a series of meetings and/or conversations were had between members of the Golf Links team and the County and the Commission. These discussions dealt with who (County or Commission, or both) is responsible for condition compliance of the permits. In October, Alan Seltzer, County Counsel expressed the opinion that the County was responsible for the County approved conditions, while the Commission was responsible for the conditions they added, or amended. On 10/16/97 a meeting was held in the Commissions' San Francisco offices with Landry and Scholl of the Commissions' staff and Hollis, Lucast and Kaufmann. Landry stated that she believe the Commission had the responsibility for compliance of all conditions. She would verify this with Faust upon his return. On 11/5/97 Lucast and Kaufmann meet with Faust and Patterson at a hearing and both agree with the County's position. On 11/10/97 Kaufmann contacts Landry and informs her of the 11/5 discussion. She agrees that Faust's position is controlling. With this understanding the condition compliance, the Phase 1(b) operations are performed and the golf course compliance commenced in earnest. As to the Access matters: On 8/14/98 Kaufmann sends Bowers (after they have had initial phone conservation's about the access-related conditions) drafts of the Agreement and OTD's. On 8/25/98 Bowers leaves a message with Kaufmann stating he thinks it is important that they talk sooner rather than later an he believes it would be helpful to involve his

CONDITION #	ACTION REQUIRED		COMPLIANCE HISTORY
			associate, Bove. On 9/17/98 Kaufmann sends a revised draft of the documents to Lucast and Fainer indicating that Bowers believes the County should be the primary reviewer and the Commission will review as to form. He also indicated: 1) the customized their form was acceptable, and 20 the OTD's could be lumped together into one document. RAIP approved by CDFG 9/29. In early October a meeting with Damm was set for the 16th in his San Diego offices. With Damm's concurrence requests for a meeting with the Ventura office staff was initiated. No meeting was held with Ventura due to their workload. On 10/8/98 Kaufmann send Bowers the revised documents, which reflect the County's comments and requests the Executive Director's approval. On 10/13/98 Dudek sends all access plans to Damm. On 10/13/98 Kaufmann send Damm the documents. On 10/16/98 Hollis, Lucast and Kaufmann meet with Damm and he agrees about condition compliance and the access elements are reviewed. On 10/19/98 Kaufmann sends the revised OTD reflecting the County Park and Recreation Departments changes. On 10/20 Bowers and Bove send their comments on the documents. On 10/21/98 revised Fence/Sign Plans are sent to Damm via Dudek. On 10/21 revised final documents are sent to Bowers and Bove. 10/27/98 County Board authorizes Chair to execute Agreement and Acknowledges OTD.

CONDITION #	ACTION REQUIRED		COMPLIANCE HISTORY
			10/28/98 CCC sends comments re Deed Restrictions. ***NMFS approves the RAIP on 10/30.*** Damm wants to review landings for west of Tomate. Plans are sent on 10/13/98. Damm approves on10/21/98. ***CPH Dos Pueblos Associates, LLC executes Agreement on 11/12/98. County executes on 11/17/98.*** ***CPH Dos Pueblos Associates, LLC executes OTD on 11/12/98. County approves as to form on 11/17/98. Recorded on 12/11/98, inst. # 98-096919.*** ***CPH Dos Pueblos Associates, LLC executes two Deed Restrictions on 11/12/98.*** ***Kaufmann sends OTD, Agreement and Deed Restrictions to CCC (Bowers) along with Title Reports on 12/15/98.*** ***On 12/16/98 Kaufmann sends Damm the final documents.*** On 12/16/98 a meeting with Staff (Capella and Damm) is held to review appeals and amendment
CCC Condition IV(f)(2)(1)(f)(4) – Assumption of Risk	Execute & record a deed restriction waiving future claims against CCC for future damage from hazards.		Refer to CCC Condition IV (f)(2)(1)(a).
CCC Condition IV (f)(2)(1)(f)(5) – Public Availability of Facilities	Execute & record a deed restriction that golf facilities will be open to the general public.		Refer to CCC Condition IV (f)(2)(1)(a).

Galen B. Rathbun, Ph.D.
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5 March 2002

M. Andriette Culbertson, President
Culbertson, Adams & Associates
85 Argonaut, Suite 220
Aliso Viejo, California 92656

Dear Ms. Culbertson,

You have asked me to address several issues surrounding California red-legged frogs and the proposed Dos Pueblos Golf Course. As you are aware, I have been studying red-legged frog behavior and movements for over 8 years, including extensive radio-tracking studies. As a result, I have published several technical papers in scientific journals on these frogs. In addition, based on my expertise with this species, I serve on the U.S. Fish and Wildlife Service California Red-legged Frog Recovery Team.

I visited the golf course site and I have inspected the various wetlands and natural drainages, including Eagle Canyon, as well as the site of the proposed constructed reservoir. I have also reviewed the various environmental documents associated with the project that were sent to me. These include the January 2002 Environmental Assessment, the January 2002 Habitat Conservation Plan, U.S. Fish and Wildlife Service Permit TE045997-0, and the letter from Dr. John Bulger dated 18 September 2001. With regard to Bulger's letter, I agree completely with his assessments and views.

Potential for Additional Breeding Habitat

With the exception of the small coastal lagoon associated with the mouth of Eagle Canyon, there is no red-legged frog breeding (winter) or summer habitat on the property. I have considerable experience with red-legged frogs in coastal lagoons in the San Simeon area of San Luis Obispo County and in my experience the Eagle Canyon lagoon is so small that in many years it is probably not suitable for successful red-legged frog reproduction. This is because the small lagoon probably experiences relatively unpredictable changes in water salinity associated with variable creek flows and seawater intrusion through and over the sandbar. Even under the best of conditions, the lagoon probably does not support a large number of red-legged frogs.

Potential for Wetlands on Site to attract Frogs

In general, red-legged frogs can be found in upland habitats during the wet winter months because they are migrating between established breeding and summer habitats, or they are juveniles dispersing in search of aquatic habitats. With regard to migration, it is unlikely that significant numbers of red-legged frogs will be found crossing or using the upland and wetland habitats on the property because it does not appear to separate important winter and summer frog habitats. Similarly, it is unlikely that large numbers of dispersing juvenile frogs will use the property because there apparently is no large breeding population on or adjacent to the property to serve as a source of frogs. However, frogs are known to move long distances during wet weather, and there is a possibility that a small number might cross the uplands at night and take refuge in the riparian and wetland habitats during the day. However, in my opinion movements of this type would be rare given the known distribution of red-legged frog habitats in the area.

Design of Pond in Relation to Frogs

I have reviewed the two designs proposed for the water reservoir - an irregular pond with a vertical cement bulkhead around the perimeter and a rectangular pond covered with an impermeable but flexible cover that would be completely sealed around the perimeter. I have also reviewed the operation of the pond, and the most significant factors in terms of red-legged frogs are the use of tertiary treated residential wastewater and the 2 to 11 foot fluctuation of water level in the pond on a daily basis.

I do not have any specific knowledge regarding the potential contaminants found in treated wastewater and what hazards these may pose to red-legged frogs. However, I do know that in many areas of California red-legged frogs are found in treated wastewater and successfully breed in these situations.

Potential for Frogs to be Attracted to Ponds

It is difficult to assess whether a fully-covered pond would pose a risk to red-legged frogs, mainly because there are little or no data in these situations. I have some experience with established artificial ponds being cleared of red-legged frogs and then covered with fine mesh netting and sealed around the edges with sandbags and dirt. In this situation, where frogs had established themselves in a pond and then were moved, they attempted to return and some perished at the outside edge of the cover. However, the covers were not solid and they were installed after the frogs had occupied the ponds. It seems reasonable that if a pond is covered before frogs move in and the cover is solid, rather than composed of mesh netting, then they will not try to return to the pond or be attracted to it.

Although a covered pond might not attract red-legged frogs, and it would definitely prevent them from entering the water, an open design probably would attract red-legged frogs. However, this may not be a serious problem if designed to accommodate frogs. In order to allow frogs (or indeed any wildlife) to leave the pond on their own, the concrete

bulkhead that forms the perimeter of the pond should not be vertical but rather sloped with a rough surface. If the design of the pond requires that some portion of the bulkhead be vertical, I suggest that at least 80% be sloped and any vertical segment be positioned where it would be least likely to intercept frogs that might move between Eagle Canyon and the pond. Although it may not be necessary to extend the sloped surface to a depth of 11 feet (the maximum predicted daily drawdown of the pond), it might be prudent to extend it to a depth that would allow a frog to crawl out during the dark of night. This would permit frogs to leave the pond when they are most active and presumably least likely to become prey.

Potential for Frogs Breeding in Ponds

Little is known about how red-legged frogs choose sites for laying eggs. It is assumed that males aggregate in suitable habitat and form small breeding territories where they attract receptive females by calling. Presumably once in amplexus, the females move to a nearby site that is suitable for egg laying and fertilization. These sites probably include relatively warm and stable water conditions that also have props for attaching egg masses near the surface. I suspect that red-legged frogs will not find the constructed reservoir suitable for egg laying because the water level will fluctuate 2-11 feet every day, there will be no emergent vegetation for cover and egg attachment, and the sloping edge will be relatively steep and made of concrete. However, I am not aware of any specific examples that support my belief that a reservoir with these characteristics will not attract breeding red-legged frogs.

If I can be of any further assistance with regard to red-legged frog biology and the design of your water reservoir please let me know.

Sincerely,

Galen B. Rathbun, Ph.D.

COORE & CRENSHAW
GOLF COURSE ARCHITECTS

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June 4, 2002

Mr. R.W. Hollis, Jr.
Makar Properties
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RE: Feasibility of Proposed Staff Recommendations on Dos Pueblos Golf Links

Dear Mr. Hollis:

As a golf course architect and professional golfer for many years, I have been asked to comment as a professional golf course designer on the feasibility of the recommendations contained in the staff report for Application A-4-STB-93-154-CC and A2, Arco/Dos Pueblos Golf Links to be heard at the Coastal Commission on June 10, 2002. I am attaching my resume to this letter.

It must first be understood that, due to the manner in which the game of golf is played, golf course design is not completely flexible. For example, a golf course must be designed to championship levels in order to be financed and built. "Tournament play," "challenging," and "beautiful conditions" are watchwords of all properly designed championship golf courses.

When my partner, Bill Coore, and I became involved in this project our goal was to design the very best championship golf course for the project site. We have tried to design the most natural course that fits the most comfortably on and complements the beautiful site and still could be classified as a championship course. Our concept in designing Dos Pueblos Golf Links was to take advantage of the retention of the extraordinary resources on-site as much as possible to overcome the bare minimum performance of the course as a championship golf course.

As you know the phrase "championship" is very over used today. To most people the term "championship course" means a Par 72, 7,000+-yard golf course with four Par 5s. To accomplish this design for an 18-hole championship golf course, the "Front 9" would usually be designed for 36 strokes, and the "Back 9" would be designed for 36 strokes. For each 9-hole segment, this requires two Par 5s and two Par 3s (for a total of 16 strokes) and the other 20 points made up of Par 4s.

However, because of the our desire to compliment the site and extensive avoidance of environmental conditions and resources on the Dos Pueblos site, Bill and I were unable to design a typical Par 72 championship golf course. By contrast, Dos Pueblos Golf Links is a Par 70, the

bare minimum for a championship golf course. Even more critical is the yardage. The minimum desirable yardage for a Par 70 is 7,000. However, because of resource retention on Dos Pueblos Golf Links, this course has been designed with only 6,700 yards. Finally, instead of four Par 5s – the normal required for a championship golf course – this golf course could only accommodate two Par 5s.

Further, restrictions required as part of the oil field abandonment operations creation of disturbed wetlands have already eroded the quality of the course. Thus, the only reason this golf course still has the chance to be designed, as a championship golf course is its location and spectacular views of the ocean. By contrast, nearby Sandpiper Golf Course is a Par 72, 7,068-yard course with four Par 5s.

It is very sad to realize the proposed Conditions of Approval would restrict an additional approximately 20% of the property. We honestly do not believe we, nor any other designed could design a championship quality golf course over the remaining available land. I also note in the Conditions of Approval that there is a limitation that the golf course not be opened until 9:00 a.m. This is impossible for a golf course, which typically begins to operate at sunrise. The fact that no maintenance or other activities on the course can occur from sundown to sunrise is in itself a significant burden on operating this golf course. Therefore, a 9:00 a.m. start is fatal.

I am certain that the recommendations of staff are well intentioned. However, it is apparent to me that the recommendations have been made by persons who are not familiar with how golf courses are designed. If this were a housing subdivision, eliminating uses would be understandable and probably easy to accommodate. However, in a golf course there are particular regulations on how to design the golf course and, given the extensive resource preservation on-site, there is simply no other way to design this golf course, retain the resources, and keep it at championship level, which is the only level a lender will finance.

Therefore, the staff recommendations are fatal to the golf course.

Respectfully submitted,

Ben Crenshaw

Coore and Crenshaw, Inc. Project History

Jobs by Coore & Crenshaw in the late 1980's included renovation work at Houston Country Club and Prairie Dunes Country Club in Hutchinson, Kansas. In 1991 they completed 18 holes at the Barton Creek Club in Austin, Texas and The Plantation Course at Kapalua, Maui, Hawaii, which will be the site of the PGA Tour's Mercedes Championship beginning in 1999.

In 1992, Coore & Crenshaw, Inc. completed a nine-hole addition at Southern Hills Country Club in Tulsa, Oklahoma and a complete restoration of Brook Hollow Country Club in Dallas Texas. Other restoration projects by Coore & Crenshaw include the Arlington course at Hot Springs Country Club in Hot Springs, Arkansas (1994), Lakewood Country Club in Dallas, Texas (1993-1995), Shady Oaks Country Club in Fort Worth, Texas (1995) and Onion Creek Country Club in Austin, Texas (1996-1997).

In June, 1995 Coore & Crenshaw opened their most ambitious project, the Sand Hills Golf Club near Mullen, Nebraska. Built among the dunes of Nebraska, the property is very reminiscent of land in Scotland or the Australian coastline Built at a cost of only $1.2 million, the Sand Hills was named best new private course for 1995 by GOLF DIGEST. In 1997, the Sand Hills was ranked as the 17th best course in the world and the 10th best course in the United States by GOLF magazine.

The company philosophy of Coore & Crenshaw is to work on a maximum of two projects at any time, giving their clients the most of their time and attention. While this limits the number of projects in the company portfolio, it allows the partners to choose the best sites that lend themselves to classic design, requiring a minimum amount of dirt to be moved.

Recently completed projects by Coore & Crenshaw include the Warren course at The University of Notre Dame, East Hampton Golf Club on Long Island, Austin Golf Club and Chechessee Creek Golf Club on Spring Island.

Projects currently under construction include Friar's Head (Riverhead, N.Y.), Hidden Creek Golf Club (near Atlantic City, N.J.)

Coore & Crenshaw, Inc. Project History:

Houston Country Club (master renovation) 1986; Houston, Texas

Prairie Dunes (green renovation) 1986; Hutchinson, Kansas

The Plantation Club, Kapalua (18 holes; opened 1991); Maui, Hawaii

Barton Creek Club (18 holes; opened 1991); Austin, Texas

Southern Hills Country Club (9 holes; opened 1992); Tulsa, Oklahoma

Brook Hollow Golf Club (master renovation; opened Oct. 1993); Dallas, Texas

Lakewood Country Club (renovation; 1993 & 1995); Dallas, Texas

Riviera Country Club (green/bunker renovation; complete Aug. 1993); Pacific Palisades, California

Sand Hills Golf Club (18 holes; opened June 1995); Mullen, Nebraska

Onion Creek Country Club (9 hole addition opened 1996); Austin, Texas

Onion Creek Country Club (renovation; 1996)

Hot Springs Country Club (Arlington Course, restoration; 1995)

Shady Oaks Country Club (renovation; 1995)

Klub Rimba Irian (18 holes; opened 1996); Kuala Kencana, Indonesia

Cuscowilla Golf Club (18 holes; opened 1997) Lake Oconee, Georgia

Talking Stick (36 holes; opened 1997) Scottsdale, Arizona

The Warren Golf Course at The University of Notre Dame (18 holes; opened 2000); South Bend, Indiana

East Hampton Golf Club (18 holes; opened 2000); East Hampton, New York

Austin Golf Club (18 holes; opened 2000); Austin, Texas

Chechessee Creek (18 holes; opened 2000); Spring Island, South

Friar's Head (18 holes; under construction); Long Island, New York

Hidden Creek (18 holes; under construction); Atlantic City, New Jersey

Cross Pines Golf & Fishing (18 holes to begin in Sept 2001); Mineola, Texas

Bill Coore Projects:

Waterwood National Country Club and Resort (with Pete and Roy Dye); Waterwood, Texas

Rockport Country Club (18 Holes); Rockport, Texas

Kings Crossing Golf and Country Club (18 holes); Corpus Christi, Texas

Golf du Medoc: The Chateau Course; Bordeaux, France

Denver Country Club (master renovation project); Denver, Colorado

Projects Bill Coore was associated with while employed by Pete Dye and Associates

The Cardinal Club; Greensboro, North Carolina

John's Island Club: North Course; Vero Beach, Florida

Kingsmill Country Club; Williamsburg, Virginia

Country Club of Montreal (re-design and construction); Montreal, Canada

Ben Crenshaw Projects:

Sports Club at Las Colinas: TPC Course (consultant), Irving, Texas

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Section III. Special Conditions

The special conditions set forth in CDP A-4-STB-93-154 remain fully applicable except as modified herein. Where any new special condition of approval set forth below may conflict with the provisions of one of the previously imposed conditions of approval, the provisions in the new special conditions shall prevail. Any dispute regarding the interpretation of these provisions shall be resolved by the Executive Director or the commission.

Existing Special Conditions:

Special Condition 1:

The project shall be subject to all conditions attached to County approval (91-CP-085) except as specifically modified by subsequent amendments to the project description, or as specifically modified by special conditions set forth in this coastal development permit. any deviations or conflicts shall be reviewed by the Executive Director to determine whether an amendment to the Coastal Permit is required. Where the requirements of the Special Conditions set forth below conflict with the requirements of any condition attached to County approval (91-CP-085) the provisions of the Special Conditions set forth below shall prevail.

Special Condition 2:

Within sixty days of ~~Prior to~~ the issuance of Coastal Development Permit A-4-STB-93-154-CC-A2, the applicant shall merge the ~~six-acre lot added to the project site with the lands created through the previous merger of~~ 23 lots into 2 lots, creating thereby a total of two lots comprising all lands on the subject site. The applicant shall provide evidence to the Executive Director's satisfaction that this merger has been completed.

Please see Special Condition 2. The terms of this condition should continue.

The applicant shall submit a deed restriction to the Executive Director for review and approval which irrevocably precludes the re-subdivision of the lots merged as proposed in the amended project description (amendment dated November 14, 1994). The approved deed restriction shall be recorded within sixty days of recordation of the lot merger.

The document shall run with the land, binding all successors and assigns and shall be recorded free of prior liens and encumbrances which the Executive Director determines mya affect the interest being conveyed.

~~Prior to issuance of Coastal Development Permit A-4-STB-93-154-CC-A2, the applicant shall execute and record a deed restriction in a form acceptable to the Executive Director that irrevocably precludes the re-subdivision of the lots on the project site, including the~~

~~additional six-acre lot acquired within the project boundaries since the date of project approval, merged as proposed by the applicant. in the amended project description (amendment dated November 14, 1994) The document shall run with the land for the life of the structures approved in this permit. binding all successors and assigns, and shall be recorded free of prior liens and encumbrances that the Executive Director determines may affect the enforceability of the restriction. This deed restriction shall not be removed or changed without a Commission amendment to Coastal Development Permit A-4-STB-93-154-CC-A2.~~

Special Condition 3: Revised Plans

Prior to issuance of Coastal Development Permit A-4-STB-93-154 the applicant shall submit two (2) full, to-scale sets of revised plans prepared by a licensed civil engineer, for the review and approval of the Executive Director that incorporate the following elements as described below, as generally shown in Attachment A and/or as shown in exhibits referenced herein:

~~1. Delete Par 3 course.~~

2. Revise Drainage and Erosion Control Plan to collect all runoff from the clubhouse, parking and ancillary facility complex, ~~and any portion of the golf course grounds north of the railroad tracks that would otherwise drain to Eagle Canyon,~~ collect runoff and treat through a filter system, and release non-erosively through a system of biofilter swales that further clean runoff and direct the runoff away from Eagle Canyon; additionally ensure that the maintenance yard, fueling facility, and chemical storage area, including all temporary construction staging and management areas, are sufficiently bermed to collect the maximum potential spill without contaminated runoff leaving the bermed area. Collect all runoff any portion of the golf course grounds north of the railroad tracks that would otherwise drain to Eagle Canyon and treat and release non-erosively through a system of biofilter swales.
3. Delete desiltation basin in Eagle Canyon unless a licensed civil engineer certifies that it is required to mitigate adverse environmental impacts of the project.

~~4. Adjust (relocate) footprint of clubhouse/parking/ancillary facilities as shown in Exhibit 5, to avoid construction within the Tarplant area Restoration Plan primary tarplant site; add fence to separate facility users from tarplant area (fencing design and footprint to be included in the final Tarplant Area Restoration Plan required pursuant to Special Condition 6 below).~~

~~5. Delete portion of the approximately 5,000 sq.ft. lawn area adjacent to clubhouse (not previously shown on approved plans) and that portion of the paved parking area that encroaches into the tarplant mitigation area as shown in Exhibit 5; relocate 15 public coastal access parking spaces elsewhere within parking lot; and additionally relocate or redesign any remaining proposed redevelopment that encroaches into the tarplant population or buffer and mitigation area shown in Exhibit 5. Revise plan to use underground cart barn, if necessary to avoid development in these areas.~~

~~6. relocate tunnel undercrossing presently located in Tomate canyon to the western area of the parcel, as shown on Exhibit 5X.~~

~~7. Relocate and redesign components of development associated with present 18th Hole as shown on Exhibit 5.~~

~~8. Relocate and redesign development associated with the present 16th and 17th Holes as shown on Exhibit 5.~~

~~9. Relocate reclaimed water storage reservoir to area within active golf course, and place underground (cover).~~

10. Delete horse tie-up area adjacent to Eagle Canyon~~, or relocate north of railroad tracks and outside of defined sensitive habitat mitigation areas (such as the tarplant mitigation area, wetlands and vernal pools, riparian drainages, and Kite nesting areas) and outside of drainage to Eagle Canyon.~~

~~11. Relocate lateral public coastal access trail and golf cart paths to north side of railroad tracks except at portion east of bridge crossing; incorporate fencing and/or landscape features to ensure user safety.~~

~~12. Delete turf farm. The golf course footprint may be revised to occupy this area.~~

13. Revise final project plans, including grading plans, to delineate 30-ft. setback from top of slope or top of bluff for all construction envelopes, including grading. Plans shall indicate that setbacks shall be fenced in the field from actual top of bank or bluff as surveyed in the field prior to completion of final project plans and as shown in accordance with survey. Explanatory notes on plan sheets shall include requirement that fences shall remain in field continuously during construction. All biofilters, swales, erosion control measures, and other temporary and permanent features for drainage and erosion control shall also comply with the required 30-ft. setback, which is to be preserved in undisturbed vegetated state pending any authorized habitat restoration or enhancement activities that may occur within the setback areas.

14. The public access path from the railroad bridge to the lower Eagle Canyon shall be fenced to encourage users to stay on the trail. ~~The area south of the tracks and commencing immediately west of the bridge shall be fenced and signed for "no access" and access shall be prohibited during White-tailed kit nesting season, March 1 through August 31 (or later if late nesting is observed), annually~~.

15. Relocate drainage swale/biofiltration buffer strip for stormwater runoff shown in area of western grove Monarch butterfly aggregation shown in Addendum Exhibit to ensure that it does not encroach closer to the trees than 25 feet from the dripline of the outer grove canopy.

~~16. Revise plans to set back all development a minimum of 100 ft. from the outer boundary of all wetlands mapped on-site or any area used for mitigation of impacts to wetlands.~~

~~17. Designate all areas not utilized for final golf course and appurtenant facility development authorized herein as part of native grassland, coastal sage scrub, and southern tarplant mitigation areas and/or White-tailed kite protection areas that must be preserved as open space, pursuant to Special Condition X below.~~

All development shall be conducted in compliance with the approved revised plans. No changes to the development shall be made without an amendment to this Permit unless the Executive Director determines that no amendment is required.

Special Condition 4: Timing and Staging of Construction; Construction Management

Prior to issuance of the Coastal Development Permit, the applicant shall submit for the review and approval of the Executive Director a final plan for timing, staging, and management of site development, including all activities authorized by Coastal Development Permit A-4-STB-93-154-CC-12 (including but not limited to site preparation, vegetation removal, grading, staging, parking and equipment storage, materials storage, construction, waste management and disposal). All activities associated with the presently approved permit, and any future amendments to this coastal development permit, shall be undertaken in strict accordance with a final schedule establishing the timing, duration, location, and staging of all activities on the subject site ~~(see general location of areas subject to restrictive schedules on Addendum Exhibit)~~. The final plan shall include phasing of permitted activities in accordance with the sensitive seasonal and life cycle stages of the California red-legged frog, the tidewater goby, the Monarch butterfly, the southern tarplant, the white-tailed kit, or protected habitat areas described in this permit or shown on the attached Addendum Exhibit, so that sensitive resources are not disrupted (for example, by proximity or type of disturbance during breeding or nesting season of sensitive species), and shall be prepared in consultation with a qualified biologist. The final plan submitted to the Executive Director shall be accompanied by written evidence that the approved biologist has evaluated the plan and determined that sensitive species and resources protected through the special conditions set forth in this permit will not be disrupted by implementation of site development activities. The restrictions set forth in the final plan approved by the Executive Director shall be clearly incorporated into the final construction and grading plans, both in written plan notations and in graphic form within the actual plan pages where applicable.

Special Condition 5: Final Integrated Pest Management, Predator and Turf Management Plans

The applicant shall submit final Integrated Pest Management and Turf Management Plans for the review and approval of the Executive Director that includes all measures set forth in the draft plans and, in addition, incorporates the following requirements into the previously submitted plans:

a. ~~Prohibit insecticide, fertilizer, turf management or other chemical applications within the chemical application buffer areas except specifically on "greens" and then only in accordance with the hierarchal protocols set forth in the draft plans. Non-chemical management strategies shall always have priority over chemical management of pests and turf conditions.~~

b. The final plans shall include the placement of structures and/or landscaping features designed to encourage predation of rodents by raptors and other predators, and this portion of the plans shall be prepared by a qualified biologist approved by the Executive Director.

c. No hunting or poisoning of predators such as opossums, coyotes, raccoons, or other potential predators shall be allowed. Where such predators are demonstrated by

compelling evidence to constitute a serious nuisance on-site, only live trapping shall be allowed, and only with the written authorization of the Executive Director.

d. Rodenticides shall not be utilized anywhere on the site except within enclosed structures such as the clubhouse facilities. Dead rodents shall be promptly discarded in enclosed containers. Rodent control shall be accomplished by encouraging predation by raptors and other predators and efforts to encourage the use of the site by natural predators shall take precedence over artificial methods of controlling rodents. Where all other means of controlling rodents has failed, the applicant shall, in consultation with a qualified biologist approved by the Executive Director, prepare a temporary rodent control plan for a single control episode only, that incorporates methods of rodent control that will not adversely affect White-tailed kits or other predators, and will not diminish prey populations (such as California voles) critical to the survival of White-tailed kites utilizing the site. The applicant shall not implement the temporary plan without authorization by the Executive Director. A log of all rodenticide, pesticide, fungicide, and fertilizer applications or other chemical treatments applied on site shall be kept at all times, indicating the date and specific area of application, climate conditions (wind speed, precipitation), climate conditions within seven days prior to the application (particularly noting dates and amounts of rainfall). Copies of these logs shall be provided quarterly to the approved biological monitor.

e. Management of the portions of the site subject to the Tarplant Area Restoration Plan (TARP) and other specified sensitive species or habitat areas shall be undertaken without the use of chemicals unless such use is authorized by the written approval of the Executive Director after consulting with a qualified biologist. The Executive Director hereby authorizes the "grow and kill" weed eradication procedure discussed in Section 2.3.3.1 of the Biological Enhancement Plan, dated August 1998 ("BELP"). Management of weeds or undesirable vegetation or incorporation of periodic disturbance pursuant to the DPTARP shall be undertaken by mechanical or hand removal. ~~No application of chemicals may be applied within the 300-ftl buffer setback from the top of canyon of Eagle Canyon as shown on Addendum Exhibit.~~

f. All chemicals that are authorized for application through the final approved plans shall target the smallest feasible area at a time, shall be hand applied to the greatest extent practicable, ~~no commercial spray rigs shall be allowed,~~ and no aerial applications of any kind shall be allowed. Preference shall be given to hand placement (to the greatest extent practicable) of the smallest effective dose, applied to the smallest area necessary, of any chemical application authorized herein.

g. Roughs shall incorporate vegetative and/or structural shelters for use by dispersing red-legged frogs; ~~these shelter shall be interspersed among the fairways at intervals conducive to preferential use by frogs and to reduce sheltering by dispersing frogs within the portions of the roughs that are subject to mowing~~. The number and location of the shelters within the fairways shall be shown on the final plans and shall be reviewed by the approved biological consultant.

In accepting Coastal Development Permit A-4-STB-93-154, the applicant agrees to construct and operate the development approved in this coastal development permit at all

times in accordance with the requirements of the final approved Integrated Pest, Predator, and Turf Management Plans.

Special Condition 6: Tarplant Area Restoration Plan and Deed Restrictions

Prior to issuance of Coastal Development Permit A-4-STB-93-154 the applicant shall submit a Tarplant Area Restoration Plan prepared by a qualified biologist, botanist or restoration ecologist that provides a sufficient Southern Tarplant mitigation area to provide a 4 1:1 ratio for the maximum extent of southern Tarplant estimated on-site in 1998 and for a soil seedbank and backup tarplant mitigation area. ~~as shown. Primary populations of tarplant in the former loading rack location and in the Fairway 18 locations shall be preserved and shall be subject to a 250-ft buffer to be measured from the outer area of the protected population, as shown on Addendum Exhibit.~~

The final plan shall additionally provide that:

a. All ~~Other~~ tarplant populations ~~(seven)~~ mapped on Addendum Exhibit shall be surveyed, and seed collected, if available, and grown in off-site nursery for seedbank and future sowing on site.
b. Tarplant restoration area is prepared and managed in a manner compatible with the protection of other sensitive resources on-site, and is accomplished by hand removal of non-native species and appropriate implementation of disturbance, episodically as outlined in the plan, to maintain adequate germination of Southern Tarplant populations.
c. Mitigation monitoring, restoration goals and performance standards, and adaptive management strategies and quarterly (for the first year and semi-annual basis thereafter until the revegation success criteria contained in Table C of the BELP is acheived) reporting requirements.
d. Measures to ensure that Southern Tarplant ~~populations are protected during construction and operations (including but not limited to monitoring by qualified biological monitor approved by the Executive Director, final grading and construction plan notes and graphic depiction of off-limits boundaries protective of tarplant, and construction crew briefings), and that~~ seed collection has been satisfactorily implemented (satisfactory implemented shall be defined as when the conditions of Section 5.1.2 of the BELP have been achieved) prior to commencement of any site disturbance near donor plant populations. Construction and implementation of site operations shall be timed and staged subordinate to the provisions of this Special Condition.
e. Tarplant restoration areas shall be permanently fenced and signed as off limits except on specified pedestrian pathways, and interpretive, educational signage about the restoration project shall be placed within view of adjacent pathways.

Implementation of the southern Tarplant Area Restoration Plan required pursuant to this Special Condition shall be conducted and monitored by a qualified restoration ecologist, biologist, or botanist.

~~**Special Condition 7: Future Development Deed Restriction**~~

~~All areas shown in the revised plans required by Special Condition 3 as native grassland, coastal sage scrub, and/or southern tarplant mitigation areas or White-tailed kit protection areas shall be restricted to open space for purposes of wildlife protection and habitat conservation/restoration, and no development as defined in section 30106 of the Coastal Act shall occur in the open space areas, except for removal of non-native vegetation, planting native vegetation, or other actions to enhance growth of native vegetation that are included in the approved Tarplant Area Restoration Plan required by Special Condition 6.~~

~~Prior to issuance of Coastal Development Permit A-4-STB-93-154-CC-A2, the applicant shall execute and record a deed restriction in form and content acceptable to the Executive Director, reflecting the above restriction on development in the designated open space areas. The deed restriction shall include legal descriptions of both the parcels that constitute the site and the open space areas. The deed restriction shall run with the land, binding all successors and assigns, and shall be recorded free of prior liens or encumbrances that the Executive Director determines may affect the enforceability of the restriction. This deed restriction shall not be removed or changed without a Commission amendment to this coastal development permit.~~

~~**Special Condition 8: Wetland Monitoring, Buffering and Restoration**~~

~~Prior to issuance of the Coastal Development Permit, the applicant shall submit final project plans that incorporate a minimum 100-ft. setback from the outer edges of all wetlands as a buffer area from development. Pedestrian pathways for light recreational use may be included within buffer areas.~~

Special Condition 9: Final Grading Plan

Prior to the issuance of the Coastal Development Permit, the final grading plan shall be revised to show the outer limits of Southern Tarplant ~~and White-tailed Kit protected habitat areas~~ and other sensitive resource exclusion or caution areas. The plans shall show the placement of temporary construction fencing around all areas prohibited from disturbance either permanently or seasonally or in accordance with phasing requirements set forth elsewhere, and plan notes shall clearly describe the applicable limitations and requirements. The revised grading plan must be reviewed and approved by the Executive Director. All development shall be conducted in compliance with the revised, approved grading plan.

Special Condition 10: White-tailed Kit Habitat Protection Plan

Prior to issuance of the Coastal Development Permit, the applicant shall submit a White-tailed Kite Habitat Protection Plan prepared by a qualified biologist approved by the Executive Director. The plan shall, at a minimum:

a. Provide for the preservation of the maximum feasible mature specimen trees in the area shown in Dr. Froke's October 10, 2002 report. ~~in the area shown on Addendum Exhibit.~~

~~b. Provide for the preservation of specific tree clusters that have been used for, or contain potential nest remnants of, White-tailed Kit nesting since March 2000. These shall be mapped on an addendum exhibit that is finalized in conjunction with the completion of the continuing raptor nesting survey scheduled to conclude on June 6, 2002, but are partially shown, based on data collected by publication, in Exhibits 3, 8 and 9.~~

be. Provide for the relocation on site of mature specimen trees suitable for raptor perching or nesting, where a consulting arborist determines that relocation may be accomplished, in lieu of destroying such trees. Where removal of mature, specimen trees is unavoidable, planting of mature specimen nursery stock of species determined by qualified biologist to provide optimal raptor perching or nesting architecture, with preference given to locally native species such as oaks, shall be required where suitable locations exist.

cd. Provide for post-construction maximum native grassland habitat plantings and revegetation designed to encourage and sustain populations of the California vole as close to the nesting and primary perching sites ~~shown on Exhibits 3, 8, and 9 as possible.~~

~~e. Incorporate a ban on use of rodenticides throughout the course except as specifically approved by the Executive Director in limited circumstances outlined in other applicable special conditions herein.~~

~~f. Establish a 300-ft. buffer from nesting trees shown in Exhibits 8 and 9(which may be revised to include additional information gathered during the continuing raptor nesting survey that will conclude on June 6, 2002) which shall be designated as a white-tailed Kite protection area on the revised plans required by Special Condition 3. No development shall be allowed within these buffers. Light bird watching use by pedestrians may be authorized in these areas provided such use is regularly monitored by the approved biological monitor. The biological monitor shall immediately stop any encroachment into the 300-ft. buffer areas during breeding and nesting season if there is any evidence that the kits are adversely affected by the proximity of people within the buffer area. The plan shall prohibit horses, dogs, or other pets, or vehicles. Bicycles, scooters, strollers, roller skates, and other wheeled transportation shall not be allowed within the buffer area.~~

dg. ~~Minor development on the periphery of the nesting areas and outside of the 300-ft. buffer area may be allowed where no feasible alternative location exists and where disturbance to the kites is minimized. any such development must be included in the revised plans required by Special Condition 3 and approved by the Executive Director.~~ The approved biological monitor shall observe and report to the Executive Director on the effects of the use of such development during kit breeding/nesting season during the first two years of project operations. If interference with kite breeding/nesting activities is observed by the approved monitor, the applicant shall propose propose additional measures to eliminate the interference. If approved the applicant shall incorporate these approved measures. The approved biological monitor shall continue observations. ~~area shall be placed off limits and an application~~

~~to amend the Permit shall be submitted if the applicant proposes to reroute or relocate such development.~~

~~h. Construction and repair and maintenance activities shall be prohibited in the area shown in Addendum Exhibit from March 1 through August 31, annually, and disturbance in this area shall be kept to an absolute minimum, and subject to the oversight of the approved biological monitor, during the breeding/nesting season.~~

ei. The final plan shall include White-tailed Kit habitat enhancement and protection goals, milestones, performance standards, monitoring and reporting timelines, and adaptive management strategies.

f. The roughs as indicated by the site plan represent a potentially critical feature in determining the overall suitability of this links course as wildlife habitat, especially as foraging habitat for kites. To assure the best prospects for kites, as well as for other diurnal and nocturnal predators, the roughs should be planted with native perennial grasses, or a mix of natives and appropriate turf varieties such as fescues. Valuable and popular native species for denser roughs include California Hair-grass (DESCHAMPSIA CAESPITOSA and/or HOLCIFORMIS), California Fescue (FESTUCA CALIFORNICA), and June-grass (KOELERIA CRISTATA), among others. All of the named native species can be cut (5-8 inches) and raked for maintenance purposes without damaging the plants or their usefulness to burrowing wildlife. LEYMUS TRITICOIDES is useful as a fringe grass that can be banded along the outer edge of the roughs, especially near drainages.

g *Erosion Control Seeding* (Transition Areas) -- The following species that are included in the BELP and HEP, are to be deleted from the seed mix:

BROMUS HORDEACEUS
BROMUS MADRITENSIS
LOLIUM MULTIFLORUM
TRIFOLIUM HIRTIUM

The following species are proposed to be added to the seed mix:

BROMUS DIANDRUS
BROMUS CARINATUS var. MARITMUS
NASELLA PULCHRA
KOELERIA CRISTATA
HORDEUM BRACHYANTHERUM
DESCHAMPSIA CAESPITOSA
RUBRA, CALIFORNICA and/or IDAHOENSIS

Eradication of existing onsite Lolium stands is not as important as avoiding importation and development of new stands. Typically, Lolium that would encroach into the turf and rough environments will be managed by routine mowing (to prevent seeding) and mechanical removal of offending patches.

h Except where necessary, as on steeper slopes, hydro-seeding should be minimized or carefully 'cranked-down' to avoid caking the soil surface and thereby inhibiting microhabitat development by and for burrowing, grass-tunneling and grazing rodents.

i. There is a sufficient amount of open space distributed among six locations across the 18-hole course where kite nesting and/or perching options could be developed. Specifically, the following relatively large open areas (providing circular diameters of 250-300 feet in out-of-play ground) appear to be available for exploration:

(a) Center of grouping 6-8-9;
(b) Center of grouping 4-5-turf farm;
(c) NW corner above 7 tees;
(d) SW corner below 5 dog-leg;
(e) The large area noted as "disturbed wetland" between holes 16 & 17; and
(f) On the narrow terrace bluff behind 17 back-tee.

Trees for these purposes could be relocated from other parts of the project area; and several large cut trees should be 'transplanted' to 'replant' as snags on vicinity of live-planted trees.

j. A cover removal plan should be developed that will not hinder the normal and economical construction project, rather it can be planned to capitalize on construction staging. Total ice-plant removal can be accomplished after construction grading and planting has been completed and grassland habitats as well as turf are in advanced stages of grow-in.

k. Course management should set a relatively high threat threshold for rodents. Normally, treatment of burrowing rodents (pocket-gophers, moles, voles, ground-squirrels) in turf areas should be limited to trapping. However, in emergency situations, e.g., when burrowing rodents are encroaching towards or into greens complexes, management other than trapping should emphasize use of fumigants such as phosphine gas. Presently, fumigation is the most practical and ecologically sound method for controlling burrowing rodents within greens complexes. The professional golf course superintendent should be relied on to determine whether a rodent problem constitutes an bona fide emergency (threat to greens) and thereby be the one to decide when non-trapping methods such as fumigation should be employed. Poison baits should not be used for removing rodents. Finally, under no circumstances should rodent management by any means be conducted in non-turf environments, such as transitional and natural areas.

l. The applicant shall provide golfer education to protect against unnecessary encroachment into kite nesting areas, including the use of out-of-bounds areas where no ball retrieval is allowed when kites are present.

m. Chemical and pesticide use on the Par 3 golf course be restricted to bonafide emergency situations. On the 18-hole course all pesticide use be tightly restricted to managed turf areas except for limited use of herbicides to manage non-native plant infestations in either in-play or out of play rough and natural habitat areas.

The approved project shall be constructed and operated at all times in accordance with the requirements of the final approved White-tailed Kit Habitat Protection Plan.

Special Condition 11: Restrictions on Night Lighting and Hours of Use

In accordance with the applicant's proposal, there shall be no night lighting on the golf course except emergency and security lighting in the clubhouse area, and this shall be the minimum necessary, shielded downward, and on a motion detector/timer. No lighting shall shine outside of the immediate clubhouse, outbuilding, and parking lot areas, and no lighting shall shine toward Eagle Canyon. Golf course functions shall be limited to daytime use only, and all facilities shall close within one-half hour after sundown. Golfing shall not be allowed to commence on the course after such time as play can be concluded by sundown.

~~No repair and maintenance activities shall be conducted on the golf course or adjacent areas between sundown and 9:00 a.m.~~

~~**Special Condition 12: Final Septic Disposal Plan**~~

~~Prior to the issuance of the Coastal Development Permit, the applicant shall submit final septic disposal plans that demonstrate that the effluent of the final project design can be processed via the three drywell septic pit design authorized in the original project approval, without daylighting of effluent in any of the riparian corridors on-site. The applicant's consulting geologist shall affirm in writing that the final septic disposal plans are adequate to ensure the effective disposal of all facility septic effluent without effluent discharge into the riparian corridors providing breeding or upland habitat for the California red-legged frog on-site.~~

Special Condition 13: Streambed Alteration Agreement

Prior to the issuance of the Coastal Development Permit, the applicant shall submit an executed copy of the extended Streambed Alteration Agreement currently under review by the California Department of Fish and Game, including any attachments or conditions thereto. Any significant changes to the approved project required by the CDFG shall require an amendment to the Coastal Development Permit, unless the Executive Director determines that no permit amendment is required.

Special Condition 14: Deed Restriction: No Future Shoreline Armoring

A. By acceptance of this Permit, the applicant agrees, on behalf of itself and all successors and assigns, that no bluff or shoreline protective device(s) shall be constructed on the property subject to Coastal Development Permit No. A-4-STB-93-154-CC-A2, or any other property, now or in the future, for the purpose of protecting the development approved pursuant to Coastal Development Permit No. A-4-STB-93-154-CC-A2, in the event that the development is threatened with imminent damage or destruction from waves, erosion, storm conditions, bluff retreat, landslides, or other

natural hazards in the future. By acceptance of this Permit, the applicant hereby waives, on behalf of itself (or himself or herself, as applicable) an all successors and assigns, any rights to construct such devices that may exist under Public Resources code Section 30235. The applicant may submit an application for a permit amendment to relocate portions of the golf course that are threatened in the future by bluff erosion, if it does not propose to relocate any portion of the golf course to an area that is restricted to open space for purposes of wildlife protection or habitat conservation/restoration or to an associated buffer area required by this Permit.

B. Prior to the issuance of Coastal Development Permit No. a-4-STB-93-154-CC-A2, the applicant shall execute and record a deed restriction, in a form and content acceptable to the Executive Director, which reflects the above restrictions on development. The deed restriction shall include a legal description of each of the parcels that constitute the project site. The deed restriction shall run with the land binding all successors and assigns, and shall be recorded free of prior liens or encumbrances that the Executive Director determines may affect the enforceability of the restriction. This deed restriction shall not be removed or changed without a Commission amendment to this Coastal Development Permit.

Special Condition 15: Biological Enhancement Landscape Plan

Prior to the issuance of the Coastal Development Permit, the applicant shall submit evidence that the Biological Enhancement Landscape Plan previously submitted has been revised to incorporate the provisions and requirements set forth in these special conditions, including all final plans and project designs. The applicant shall submit evidence to the Executive Director that the revised Biological Enhancement Landscape Plan has been reviewed and approved by Santa Barbara County.

Please see condition28 of 91-CP-085 and A-4-STB-93-154. These proposed conditions are already part of the project.

~~**Special Condition 16: Erosion and Sediment Control Plan**~~

~~PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit an **Erosion and Sediment Control Plan**, prepared by a qualified resource specialist, for review and approval by the Executive Director. The erosion and sediment control plan shall be reviewed and approved by a Certified Engineering Geologist to ensure that the plans are in conformance with the consultants' recommendations. The plan shall be in substantial conformance with the following requirements:~~

~~a) The plan shall delineate the areas to be disturbed by grading or construction activities and shall include any temporary access roads, staging areas and stockpile areas. The natural areas on the site shall be clearly delineated on the project site with fencing or survey flags.~~

~~b) The plan shall specify that should grading take place during the rainy season (November 1 – March 31) the applicant shall install or construct temporary sediment basins (including~~

~~debris basins, desilting basins or silt traps), temporary drains and swales, sand bag barriers, silt fencing, stabilize any stockpiled fill with geofabric covers or other appropriate cover, install geotextiles or mats on all cut or fill slopes and close and stabilize open trenches as soon as possible. These erosion and sediment control measures shall be required on the project site prior to or concurrent with the initial grading operations and maintained throughout the development process to minimize polluted runoff during construction. All sediment should be retained on-site unless removed to an approved dumping location either outside the coastal zone or to a site within the coastal zone permitted to receive fill.~~

~~c) The plan shall also include temporary erosion control measures should grading or site preparation cease for a period of more than 30 days, including but not limited to: stabilization of all stockpiled fill, access roads, disturbed soils and cut and fill slopes with geotextiles and/or mats, sand bag barriers, silt fencing; temporary drains and swales and sediment basins. These temporary erosion control measures shall be monitored and maintained until grading or construction operations resume.~~

Special Condition 16: Water Quality Management Plan~~2~~

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for the review and approval of the Executive Director, a **Water Quality Management Plan**. This plan shall describe the drainage and polluted runoff control plan for the project both in a written document and in graphic detail on a site plan. The plan shall incorporate structural and non-structural Best Management Practices (BMPs) designed to control the volume, velocity and pollutant load of stormwater leaving the developed site. In addition to specifications above, the plan shall be in substantial conformance with the following requirements:

a) BMPs shall be selected to address the pollutants of concern for this development, including sediments, nutrients, pesticides, fertilizers, metals, petroleum hydrocarbons, trash and debris, and organic matter.

b) Source control BMPs shall be preferred over treatment control BMPs.

c) Selected BMPs (or suites of BMPs) shall be designed to treat or filter the amount of stormwater runoff produced by all storms up to and including the 85th percentile, 24-hour runoff event for volume-based BMPs, and/or the 85th percentile, 1-hour runoff event, with an appropriate safety factor (i.e., 2 or greater), for flow-based BMPs.

d) Runoff shall be conveyed off site in a non-erosive manner.

e) Energy dissipating measures shall be installed at the terminus of outflow drains, where necessary to prevent erosion.

f) The plan shall include provisions for maintaining the drainage system, including structural BMPs, in a functional condition throughout the life of the approved development. Such maintenance shall include the following: (1) BMPs shall be inspected, cleaned and repaired when necessary prior to the onset of the storm season, no

later than September 30th each year and (2) should any of the project's surface or subsurface drainage/filtration structures or other BMPs fail or result in increased erosion, the applicant/landowner or successor-in-interest shall be responsible for any necessary repairs to the drainage/filtration system or BMPs and restoration of the eroded area. Should repairs or restoration become necessary, prior to the commencement of such repair or restoration work, the applicant shall submit a repair and restoration plan to the Executive Director to determine if an amendment or new coastal development permit is required to authorize such work.

Special Condition 173 Water Quality Monitoring Plan

PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit for the review and approval of the Executive Director, a **Water Quality Monitoring Plan**. The plan shall describe the methodology for monitoring, including specific threshold levels and sampling protocols, location of monitoring sites, schedule for monitoring, and reporting of results. A contingency plan describing the actions to be taken if water quality impacts are discovered shall also be included in the monitoring plan. In addition to specifications above, the plan shall be in substantial conformance with the following requirements:

a) The plan shall include monitoring for all pollutants of concern, including nitrates, nitrites, phosphates, dissolved oxygen, pH, total suspended solids (TSS), acute and chronic toxicity, and chemicals and additives. These parameters shall be sampled for according to the frequencies specified in the Surface Water Sampling Schedule in the Draft Final Agronomic Turf Management and Integrated Pest Management Plan, March 2002. Total suspended solids (TSS) shall be sampled for at the same frequency as the nutrients.

b) The plan shall specify maximum threshold levels for each water quality parameter, consistent with those established in the Draft Final Agronomic Turf Management and Integrated Pest Management Plan, March 2002.

c) The plan shall specify sampling protocols to be used for each water quality parameter. Measurements must be precise enough to evaluate compliance with applicable water quality threshold levels.

d) Monitoring shall be conducted at sites specified by the CCRWQCB and the County of Santa Barbara and as shown in Appendix C of the Draft Final Agronomic Turf Management and Integrated Pest Management Plan, March 2002.

e) If possible, sSampling for baseline data shall be conducted a minimum of three (3) times and during different level storms to acquire a representative sample of water quality conditions at the site.

f) Monitoring shall continue according to the Surface Water Sampling Schedule in the Draft Final Agronomic Turf Management and Integrated Pest Management Plan, March 2002 for a full three (3) years before this frequency may be considered for reduction.

g) The use of any chemical(s) within the established chemical use buffer zones as shown in Appendix C of the Draft Final Agronomic Turf Management and Integrated Pest

Management Plan, March 2002 shall trigger sampling for that chemical within 48 hours of its use. In addition, the use of any chemical(s) within any area tributary to Eagle Creek shall trigger sampling for that chemical within 48 hours of its use. The chemical use buffer zone for Eagle Creek shall be updated on all plans to reflect this area.

h) Results of monitoring shall be submitted to the Executive Director annually.

i) If any water quality threshold levels referred to above in b) are exceeded, the applicant (or successor interest) shall notify the Executive Director of the exceedances and potential impacts and within 48 hours of receipt of the monitoring data. At the same time the applicant shall consult with the Executive Director regarding the need for additional sampling to evaluate the exceedance or corrective action to minimize water quality impacts. The applicant shall report to the Executive Director on the possible causes of the exceedance and proposed corrective actions within 30 days of the initial receipt of the data.

j) If any water quality impacts persist after one year of detection, not withstanding any corrective actions taken by the applicant, all use of the chemicals that exceed water quality threshold levels shall cease.

Special Condition 18 4

The applicant shall follow the protocols specified in the Draft Final Agronomic Turf Management and Integrated Pest Management Plan (IPM Plan), March 2002. Any changes to the IPM Plan shall be submitted to the Executive Director for review and approval. The plan shall also be in substantial conformance with the following requirement:

a) The IPM Plan shall favor non-chemical strategies over chemical strategies for managing pests on site. Chemical strategies shall only be employed after all other strategies have been used and proven ineffective. This shall be demonstrated by providing written notice to the Executive Director of the non-chemical strategies that were used, the reasons for their ineffectiveness, and the chemical strategies that are being considered.

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Sara Wan, Chair
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: **Dos Pueblos Golf Links** **AGENDA ITEM 22**
Wednesday, December 11, 2002
A-4-STB-93-154-CC AND -A2

Dear Chair Wan and Commissioners:

This firm, together with M. Andriette Culbertson, Esq., of Culbertson Adams & Associates represents CPHPAH Dos Pueblos Associates and Makar Properties, Inc., in connection with the abandonment of oil and gas facilities and subsequent construction of a public golf course in Santa Barbara County.

This project – the Dos Pueblos Golf Links Project – **has previously been approved by the Commission.** The purpose of this letter is to set forth the Applicant's legal position with respect to the Staff Recommendation, which now recommends a complete about-face and denial of the project. The legal issues are summarized below, but we have set them out in detail under the attached Tabs 1-13.

We truly regret the need to bring these issues to the Commission. However, the Staff Recommendation is so far afield that it ignores the Commission's prior approval, the prior extension proceeding, the "changed circumstances" standard in the Commission's regulations, the expert evidence submitted by the Applicant at Staff's request, and the County's certified LCP.

For over eight years, this Applicant and its predecessor, ARCO, have at all times worked cooperatively with Staff to complete this golf course project – approved by the Commission in 1994 following an appeal from the unanimous approval of the Santa Barbara County Board of Supervisors. The Commission's decision was then fully litigated and upheld by the Santa Barbara Superior Court in 1996, and then the Court of Appeal in 1997. Indeed, in that litigation we stood arm-in-arm with the Attorney General and Santa Barbara County Counsel.

92 pages

EXHIBIT NO. 5
APPLICATION NO. A-4-STB-93-154-R2
Arco Dos Pueblos Golf Links
Applicants' 12/4/02 Letter to Commission

In complete reliance upon the Commission's decision, the Applicant removed viable and substantial oil and gas facilities (with 50 productive years yet remaining) and proceeded to finish condition compliance, thereby expending approximately $11 million dollars only to find itself stymied by (1) opponent Surfrider's attempted "second" round of *unlawful* appeals from the ministerial permits ultimately issued by the County, (2) Staff's *improper* refusal to reject those appeals as "frivolous" (as required by Section 30621 of the Coastal Act) and (3) the outright *failure* of the assigned staff person to prepare a timely staff report on one of the appeals. This forced the Applicant to request an extension, which the Commission in June 1999 declined to grant because of Surfrider's "discovery" at the eleventh hour of a single "changed circumstance" – three red-legged frogs in Eagle Canyon Creek at the downcoast end of the property – frogs which the record demonstrates were not present three weeks earlier when the Creek and rest of the property were surveyed by biologists from SAIC in Santa Barbara.

When the Commission declined to immediately calendar this matter for a "changed circumstances" hearing, as required by Section 13169 of the Commission's regulations, the Applicant spent an additional 2½ years to obtain a Section 10a permit from the U.S. Fish and Wildlife Service (USFWS) and now 10 more months in Staff review. Despite substantial voluntary project revisions by the Applicant (e.g., relocating the vertical accessway at Eagle Canyon to avoid the frog and tidewater goby, development of a state-of-the-art Water Quality program and Turf Management and Integrated Pest Management plans, and yet additional mitigation for the red-legged frog, tarplant, monarch butterfly and white-tailed kite), Staff has reversed course, principally now because of the observation of two white-tailed kites nests – an activity expressly anticipated in the project EIR and mitigated for by the County and this Commission in 1994, indeed nests that the experts explain will likely not be there next year because that is not the habit of this bird species.

The Staff Recommendation attempts to address the legal issues which the Applicant has raised. However, in the end it does not address those issues at all. Rather, it is more a case of stating that Staff disagrees because it chooses to disagree. For that reason, we urge the Commission to give closer scrutiny to the many legal issues raised. We believe you will agree that the Staff Recommendation is simply way off base, and that the "changed circumstances" properly before the Commission have been adequately and fully addressed by the Applicant.

Staff has erroneously changed the regulation unilaterally to read "any changed circumstances," as opposed to the actual language, "the changed circumstances." That the regulation limited follow-up review to the specific "changed circumstance" identified is evident not merely from the language itself, but, as shown under Tab 1, by the Staff Recommendation which led to adoption of the regulation. If Staff wishes a broader approach to changed circumstances, then its sole remedy is to recommend that the Commission amend its regulation.

In response, the Staff Report (p. 8) states neither the Coastal Act nor the regulation contain such a limit on the Commission's review. Obviously, that is wrong. The regulation is explicit. Staff simply ignores it. Staff also states that the Commission must apply the facts and law as they exist at the time of the Commission's decision. Wrong again. The Commission is strictly bound by its regulation. It has no jurisdiction to de facto amend the regulation for this matter or to willy nilly act in excess of the jurisdiction the Commission conferred on itself under the regulation to deal with "changed circumstances."

Simply put, the Commission does not have carte blanche to consider any and all "changed circumstances" that might be conjured up over time – especially in a case, as here, where the property has effectively been required to lay dormant by the Commission while it deferred jurisdiction to the USFWS in its separate evaluation of the red-legged frog. The sole "changed circumstance" properly before the Commission – as set forth in this Commission's June 1999 Staff Report -- is the presence of the red-legged frog in Eagle Canyon. This "changed circumstance" has been fully addressed by the Applicant through the HCP and additional mitigation proposed.

2. **Evidence That Two Pairs of White-tailed Kites Have Been Observed Nesting on the Property is Not a "Changed Circumstance" Because it was Specifically Anticipated and Addressed in the 1993 Project EIR, the 1993 County's Conditions Which the Commission Incorporated in its 1994 Project Approval, and the Biological Enhancement Landscape Plan Which the Commission and the County Required. (Tab 2)**

Staff improperly treats evidence that two pairs of white-tailed kites have been observed nesting on the property as a "changed circumstance." Even assuming the Commission were not confined to issues relating to the red-legged frog (but it

is, as explained in the preceding Section), the white-tailed kite is not a "changed circumstance" at all. It is important to emphasize that it was specifically addressed in the project EIR as follows **(these passages from the EIR are omitted from the Staff Report)**:

Section 5.1 of the 1993 project EIR addressed "Biological Resources." Two passages in the EIR specifically address the issue. The EIR first explains:

> "The proposed development plan indicates that approximately 273 (out of a total of 901 trees) trees would be removed to accommodate the golf course. This count includes eucalyptus trees that would be removed for development of the desalination facility. Tree windrows are important to wildlife, providing perches and nesting habitat for many bird species. Coastal windrows are particularly valuable to migratory songbirds, providing them with resting and feeding habitat during migration periods. **Raptors can utilize trees for roosting and hunting perches. The windrows within the open grassland onsite are particularly valuable in this regard, as raptors prey on small mammals, reptiles, and ground birds that frequent grassland habitats. The removal of trees would eliminate nesting, perching, and roosting habitat for sensitive bird species.** Removal of trees (especially willows) would also decrease cover for other animal species. The removal of willow trees would thereby reduce the biological value of the drainages onsite by making them less likely to be utilized as wildlife movement corridors. The removal of willows and windrow trees is considered a significant mitigable (Class II) impact." (Page 5.1-33.)

Addressing potential project-related impacts to birds, **including the white-tailed kite**, the EIR further states:

> **". . . It is expected that raptor populations in the project area would decline as a result of the reduction in foraging habitat and perch sites, and several species such as black shouldered kite [now called the white-tailed kite] and red-shouldered hawk may abandon the area.** Overall declines due to cumulative development of some species expected to utilize the site (e.g., prairie falcon, peregrine falcon) may result in long-term extirpation (elimination from a portion of the known range) in the Goleta

> Valley. **As previously mentioned, the removal of trees would eliminate nesting, perching and roosting habitat for sensitive raptors and is therefore considered a significant impact. These trees would be replaced at a ratio of 3:1, which would reduce impacts to less than significant levels over the long term. Impact to raptors associated with the loss of trees would remain significant until the replacement trees reached maturity. These impacts are therefore considered short-term and mitigable (Class II).**" (Page 5.1-36 – 5.1-37.)

Staff has given the Commission half a loaf on this issue, but purposefully ignored the critical facts which bear on whether the white-tailed kite is a "changed circumstance." Nesting by the kite was expressly anticipated by the 1993 EIR. Moreover, it was dealt with through mitigation measures and County Condition no. 11, which the Commission in 1994 incorporated by reference in its own decision. That condition specifically addressed the impacts associated with tree removal in connection with the project. That Staff might do it differently today than the County and Commission did in 1994 is not a "changed circumstance."

The kite – whether one, two or ten nests have now been observed on the property – is not a "changed circumstance," and, importantly, there is no substantial evidence in the record to counter that conclusion.

In response on this issue, the Staff Report says there is a "changed circumstance" because "at the time of the hearing on the CDP in 1994 and the hearing on the request for extension of the permit in June 1999, there was no evidence that white-tailed kites nested at the site" (p. 8), only that they were potential species on the site. However, the EIR expressly assumed the presence of the bird on this property, regardless of whether it was actually observed or not, and then both the County **and** this Commission specifically mitigated for it again. The fact that in one year the white-tailed kite actually showed up is nothing more than reflective of what the EIR, the County and the Commission all expected might happen in the future. Again, that is neither legally nor factually a "changed circumstance."[1]

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[1] Nor would the result be any different under CEQA. The white-tailed kite is not a "changed circumstance" or "new significant information" since its presence was specifically assumed in the EIR and County and Commission

You have ask yourself, if the white-tailed kite was not considered in 1994 -- as Staff erroneously suggests, why on earth was it addressed in the EIR and mitigated for?

3. To the Extent that "Changed Circumstances" Have Accumulated on the Site Since June 1999 (including kite nesting), the Commission is Estopped to Address Them Because the Commission Failed to Exercise its Jurisdiction Properly and Promptly. (Tab 3)

Moreover, even if "changed circumstances" were deemed to have accumulated on this site since 1999, it is plainly as a result of the Commission's failure to properly and promptly exercise its jurisdiction. The Commission had no legal authority to act on the red-legged frog outside of the LCP-designated ESHA on the property (Eagle Canyon), and thus there was no need to delay the permit for a response from the USFWS, which conducted its separate review under an entirely different regulatory scheme – the Endangered Species Act. Section 13169 of the Commission's regulations required that the matter be set expeditiously for a hearing on "the changed circumstance." Moreover, as in other instances, had the Commission acted consistent with its regulations, it could have timely done everything within its authority (i.e., made its decision in terms of the Coastal Act and certified LCP, as required), and additionally could have conditioned its permit approval to require the Applicant to also obtain a Section 10a permit and/or return to the Commission to reconcile any inconsistency with the action of the USFWS.

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decisions, and in any event CEQA does not expand the jurisdiction of the Commission under the Coastal Act. Rather, CEQA provides that the Commission's actions must be consistent with express or implied limitations on the agency's authority found in other laws, i.e., the Coastal Act and Commission's regulations. (Pub. Res. Code § 21004; CEQA Guidelines § 15040(e); Corona-Norco Unified Sch. Dist. v. City of Corona (1993) Cal.App.4th 1577, 1587; Kenneth Mebane Ranches v. Superior Court (1992) 10 Cal.App.4th 276, 291.) As demonstrated above, in this instance the Commission's regulations restrict the Commission's review to "the changed circumstances" identified at the extension hearing – the red-legged frog, and do not extend to the other habitat issues asserted by Staff.

The unique circumstances here require the Commission to recognize that it shares the fault that this site – after many years of elevated human activity (i.e., active oil production and then active abandonment) – was made to become dormant deliberately, thereby permitting other allegedly "sensitive species" to appear or even colonize the site. The Commission is necessarily estopped to claim any "changed circumstances" beyond the issue of the red-legged frog in Eagle Canyon.

The Staff Report simply offers no response on this issue.

B. STAFF HAS MISAPPLIED THE LCP PROVISIONS ON THE WHITE-TAILED KITE, WHICH ARE EXPRESSLY LIMITED TO THE MORE MESA AREA (Tab 4)

In its zeal to deny the golf course, the Staff Report has turned a blind eye to the provisions of the County's Coastal Plan and Coastal Zoning Ordinance and selectively pulled language out of context to apply white-tailed kite policies to this site. Santa Barbara County Coastal Plan policies 9-26 through 9-29 and the Coastal Zoning Ordinance provision which implements those policies – Section 35-97.14 – are strictly and expressly limited in their application to the More Mesa location.

As discussed more fully in the attached argument (Tab 4), which details the applicable provisions of the County Coastal Plan and Coastal Zoning Ordinance, the applicable LCP provisions do **not** apply to Dos Pueblos.

In response, the Staff Report superficially addresses the issue and errs fundamentally in four respects. Importantly, this is confirmed in a recent trial court case which resulted in a ruling against the Commission under nearly identical circumstances – Morro Bay Mini-Storage, Inc. v. California Coastal Commission, San Luis Obispo County Superior Court Case No. CV00-0578, a copy of which is attached hereto under Tab 5.

First, the Staff Report ignores the applicable policies of the County Coastal Plan, Policies 9-26 through 9-29, and refers only to the ordinance provisions which implement those policies. Section 3.9.4 of the County Coastal Plan addresses "Environmentally Sensitive Habitat Overlay Designations." It identifies the habitats which have been *designated* for protection, and lists the various habitats followed by the location where those "habitats [are] found in the County." (Policy 9-1.) As

to the white-tailed kite, it specifies the designated area as "More Mesa," and then follows that with the four policies which apply to kites on More Mesa. It is astounding that the Staff Report ignores the "Location" identified and the policies themselves. Policies 9-26 through 9-29 apply only to More Mesa, and the Coastal Zoning Ordinance does no more than implement that. Indeed, under Section 30513 of the Coastal Act, that is the sole function of the CZO.

Second, Staff glosses over the Coastal Zoning Ordinance which implements the policies. This is critical because the provisions which deal with the white-tailed kite are set forth under Section 35-97, entitled "ESH Environmentally Sensitive Habitat Area Overlay District." This Section deals with **specifically designated** EHSAs – period. Section 35-97.2 explains:

> "The provisions of this overlay district shall apply to land or water zoned ESH on the applicable overlay district to any lot of land or water, the zoning maps shall be the guide. **If the habitat area delineated on the applicable zoning maps is determined by the Coastal Planner not to be located on the particular lot or lots, the regulations of this overlay district shall not apply.**" (Emphasis added.)

In other words, where, as here, there is no mapped ESH overlay designated for white-tailed kite on the Dos Pueblos site, this Section dealing with the "Overlay District" does not apply by its terms.

As noted, a recent trial court decision reached the same conclusion. In Morro Bay Mini-Storage v. California Coastal Com., supra, the County Coastal Zone Land Use Ordinance identified and mapped ESHAs. It was conceded, as here, that there was no map which identified ESHA. The Commission nonetheless made the ad hoc decision that ESHA was present on the property, and approved the project subject to conditions which were challenged. The Court (at p. 16) overturned the Commission's decision, ruling:

> "There is no evidence whatsoever in the Administrative Record of a map containing the Project site showing its designation as an ESHA . . . . Both the Morro Group Report and the Commission made ad hoc decisions that the site was an Environmentally Sensitive Habitat Area simply because an endangered species was found on it and it supported coastal scrub vegetation

> that provided habitat for the snail. The Commission concedes all this in footnote 3 and goes on to state that it defines Environmentally Sensitive Habitat Areas in its own way, that is, as the ' resources exist on the ground, rather than as delineated on a map.' The Commission is bound by the definition of the plan it approved and the ordinances implementing it even in its de novo capacity. Public Resources Code section 30603(b)(1) limits the grounds for appeal to an allegation that the development does not conform to the standards set forth in the certified Local Coastal Plan."

Third, Section 35-97.3 does deal with newly discovered ESHA. However, Staff fails to quote the entire provision in that regard. Section 35-97.3 ("Identification of Newly Documented Sensitive Habitat Areas") states:

> "If a newly documented environmentally sensitive habitat area, which is not included in the ESH Overlay District, is identified by the County on a lot or lots during application review, the provisions of Section 35-97.7 - 35-97.19 shall apply. **The county will periodically update the application of the ESH Overlay District to incorporate these new habitat areas (including the 250 foot area around the habitat.**" (Portion in **bold** omitted from Staff quote.")

Thus, if new habitat area is identified, the proper course under the LCP is for the County to update the "ESH Overlay District" and buffer area.

Finally, even were this provision somehow to apply, a "denial" of the project, as recommended by Staff, is not permitted. Section 35-97.7 states, in pertinent part: "**A coastal development permit may be issued subject to compliance with conditions set forth in the permit** which are necessary to ensure protection of the habitat area." (Emphasis added.) In this respect, while preserving its legal position, the Applicant has gone to great lengths to address conditions that more than adequately protect the white-tailed kite (see letter from Ms. Culbertson).

In short, there are multiple failings in the Staff analysis on this issue.

areas where oil facilities were abandoned should have been assumed), and the monarch butterfly (which was address specifically in Condition 9 by the County and Commission), it was obligated to do so in 1994 when this matter was first before the Commission. That it did not so forecloses the Commission from re-addressing those matters now.

This issue is a replay of Sierra Club v. California Coastal Com., Los Angeles Superior Court Case No. BS060762, a copy of which is attached under Tab 6. There, the Sierra Club sued the Commission to prohibit Pepperdine University in Malibu from proceeding with the development of its upper campus because of the impact of the development upon an environmentally sensitive habitat for purple needle grass. The court denied a preliminary injunction sought to block the project (after which petitioner dismissed the case), explaining:

> "The Coastal Commission approved the development of the upper campus 10 years ago, in 1990, in spite of protests about the effect of the project upon an environmentally sensitive habitat for purple needle grass. Pepperdine University has recently sought an amendment to its coastal permit because of certain changed that it seeks to make in the project, but the evidence shows that none of these changes affect the habitat for purple need grass. It is not the recent amendment that affects that habitat, but the original development which was approved in 1990.
>
> "It therefore appears that the Sierra Club is not likely to prevail on the merits because it is using the recent application for an amendment to the permit to attack a decision of the Coastal Commission was made 10 years ago. It there appears likely that the petition is barred by the statute of limitations contained in the California Coastal Act, Public Resources Code Section 30801."

Likewise, apart from the red-legged frog, if Staff wished to address other habitat on the property differently from its treatment in 1994, then Staff was legally obligated to raise those matters in 1994. Because neither Staff nor the Commission did so in 1994, Staff's effort to do so now in the context of the current proceeding is plainly barred by the statute of limitations in Section 30801 of the Coastal Act.

E. THE ALTERNATIVES DISCUSSION IS LEGALLY INADEQUATE AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD (Tab 8)

Recognizing that its recommendation of denial will result in an unconstitutional taking, the Staff Recommendation offers a brief, trumped up and legally flawed "Alternatives" discussion.

First, the Staff Report opines (p. 76), with absolutely no evidence of golf expertise or evidence, that the proposed course may simply be radically redesigned. As a links style course, the golf course has been carefully designed to avoid the railroad tracks and scattered wetlands, drainages, and other sensitive resources on the property. Staff's glib assertion does not address how the same habitat concerns would be overcome with a fictitious revised course, and is not remotely supported by substantial evidence in the record.

Second, the Staff Report suggests (p. 77) that even if the 18-hole course were retained, modifications would be required to the 16th, 17th and 18th fairways which "would all require major redesign and substantial relocation." This is not explained or supported by any evidence. However, the evidence before the Commission makes clear that a redesign simply is not possible given the sweeping approach of Staff to current white-tailed kite nests which the experts indicate will likely not even be used again by the birds.

Third, the Staff Report points to the Applicant's 23 Naples lots and states that a development agreement is being negotiated with the *adjacent* landowner for residential use on the upcoast Morehart property. However, that development agreement does not involve this site or this Applicant, and one can only speculate about the outcome of that process, particularly given the long-standing litigation involving the Morehart property and the tortured path this project has had to follow with a previously approved and judicially sanctioned project. To say "there is an alternative for residential development on the applicants' property" at this point (Staff Report, p. 77) – without a substantially more affirmative and detailed commitment by this Commission – is truly illusory at best.

Fourth, if the Staff is arguing in favor of residential development at Dos Pueblos, then the Commission needs to take into account that the Commission in

1994 inferred that a residential use is "not inconsistent with the purpose of the AG II Zone District," and thus would require a reversal of the position it took in 1994. Further, the Commission should consider that, currently, the Naples lots have no domestic water, unlike the current Project which proposes to construct a reclaimed water line to serve the golf course use.

Finally, it is remarkable and frankly embarrassing that after all the litigation surrounding the Commission's 1994 approval, Staff would toss out the possibility of uses consistent with the Ag II designation, where virtually all of the concrete evidence previously before the Commission demonstrates – without any doubt – that an agricultural use was not viable. Staff has forgotten the discussion by the Court of Appeal in its decision in this matter in Surfrider Foundation v. California Coastal Com. (at p. 13), a copy of which is attached under Tab 7:

> ". . . [T]he Commission was entitled to conclude that the lack of irrigation water would prevent commercial agriculture on the property, even though farmers across the County also contend with water shortages. First, this site does not have a "shortage" of irrigation water. It has no irrigation water at all. There is no evidence that dry farming on the site had ever been profitable. Surfrider submitted the opinion of one expert that the site would support commercial agriculture [but without any economic data]. Other experts, including representatives of the County's agricultural community, disagreed. In fact, ARCO's consultant testified that a dry farm would operate at a loss and the County's EIR described the site as marginally viable for agriculture. An agricultural use could not support the high cost of bringing irrigation water to the site. . . . "

In short, the Alternatives noted by Staff are illusory, simply offered in an effort to avoid a "taking."

F. THE STAFF RECOMMENDATION, IF ADOPTED, WOULD RESULT IN AN UNCONSTITUTIONAL TAKING OF THE APPLICANT'S PROPERTY AND A DENIAL OF SUBSTANTIVE DUE PROCESS (Tab 9)

Adoption of the Staff Recommendation would represent a complete about-face from the approval this Commission granted in 1994 and the California courts

thereafter upheld as valid. The radical reversal of position proposed by Staff would result in a denial of development on this property and an unconstitutional taking of the Applicant's property, as well as a denial of substantive due process. This result is really no different than City of Monterey v. Del Monte Dunes, where the United States Supreme Court held that where an agency creates a tortuous path and protracted history to frustrate a developer's attempts to develop its property, those actions may give rise to a regulatory taking and damages. That would be the unfortunate consequence of the Staff Recommendation, as currently formulated.

In Del Monte Dunes, the Supreme Court noted that after five years, five formal decisions, and 19 different site plans, the developer filed a Section 1983 action and ultimately was awarded $1.4 million in damages. The Court held that the jury properly determined that a city's denial of a development plan was not reasonably related to legitimate public interests in light of the tortuous and protracted history of the case, where the city had denied the developer's proposal five times over a period of five years, each time imposing more rigorous demands. The significant fact in Del Monte Dunes was that the question submitted to the jury "was confined to whether, in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proferred justifications. (Id. at 706.) The jury in that case held it was not, and the High Court found no error in that instruction. (Id. at 707.)

Del Monte Dunes demonstrates that where an agency creates a tortuous path and protracted history to frustrate a developer's attempts to develop its property, those actions may give rise to a regulatory taking and damages.

Were the Commission to follow the course urged by Staff, this case would undeniably provide the same type of "bad" facts. Like Del Monte Dunes, the efforts to frustrate this project – after approved and upheld by the courts – capped by the current Staff Recommendation for denial would give rise to a regulatory taking, a denial of substantive due process and liability for damages.

II.

THE APPLICANT IS LEGALLY ENTITLED TO PROCEED UNDER ITS ORIGINAL 1994 COMMISSION APPROVAL

While the Applicant has consistently endeavored to work cooperatively with Staff through the "changed circumstances" process, there are three reasons why, as a matter of law, the Applicant nonetheless is entitled to proceed with the Golf Links project under the Commission's 1994 permit approval. As noted, the Applicant would prefer to proceed before the Commission with the Applicant's proposed refined project. Yet, if the Commission adopts the Staff Recommendation, the Applicant must reserve its legal right to proceed in accordance with its 1994 judicially-approved project.

1. The Unprecedented Round of "Second Appeals" From the County-Approved CDPs for Soil Remediation and Golf Course Construction Were Void Ab Initio – the Applicant has a Right to Proceed Under the Commission's 1994 Permit Approval. (Tab 10)

The Applicant's inability to commence this project before the January 28, 1999 expiration date was set in motion by a single circumstance – opponent Surfrider's unprecedented attempt at a round of "second appeals" from the ministerial County-issued CDPs (following condition compliance), appeals which were absolutely "void," and thus are subject to challenge at any time. (Buckley v. California Coastal Com. (1998) 68 Cal.App.4th 178, 191.) Under Section 30621 of the Coastal Act, Staff was required to legally reject these appeals as "patently frivolous," as requested by the Applicant. Indeed, this Commission had already granted its approval of the project in 1994 on appeal from the County's 1993 discretionary decision to approve the project. No further or second "appeal" was permitted or called for under the Coastal Act or the County's LCP.

Who ever heard of the right to a second "appeal" to the Commission from what is effectively a ministerially issued building permit? In response on this issue, the Staff Report states that the County LCP permits a "second" appeal from a ministerial approval. Wrong. As the attached analysis demonstrates (Tab 7), there is clearly no right to appeal all over again. Neither the Coastal Act nor the County

LCP contemplated an endless cycle of hearings, appeals, lawsuits and condition compliance-- an absurd and nightmarish result suggested by the Staff Report.

The opponents, still desperate to attack this project after losing in the trial court and appellate court, were not legally entitled to a "second bite at the apple." But Staff handed it to them. Staff refused to reject outright these appeals as required, and then the experienced staff planner (no longer with the Commission) whose original 1994 staff recommendation for denial was overturned by the Commission professed an inability to timely prepare a staff report on one of the appeals (while San Francisco energy staff easily prepared its no substantial issue staff recommendation on the other appeal involving remediation),[2] preventing this project from commencing before the January 28, 1999 expiration date.

Indeed, these appeals have become perverse in their treatment. Although they set this entire process in motion, as noted in footnote 2 below, Staff now has chosen not even to agendize them with this matter, despite the Applicant's repeated urging that they do so. The Surfrider appeals were void from the outset. The Applicant remains legally entitled to proceed under the original 1994 approval.

2. <u>The Running of Time Under the Commission's Original 1994 Permit Approval has Been Equitably Tolled</u>. (Tab 11)

The trial court in <u>Surfrider Foundation v. California Coastal Commission</u> recognized that the Applicant was not able to proceed with condition compliance during the period of the litigation challenging the Commission's 1994 decision. Therefore, a provision was inserted in the final judgment "tolling" the running of time under the Commission's decision to January 28, 1999. The Applicant remains in the same straightjacket that served to toll the original approval.

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[2] It is extremely disappointing that Staff would refuse to agendize the very appeals that precipitated the tortured history that leads to the current hearing before the Commission. Soil remediation of 520 cy of soil – the focus of one appeal -- was previously approved by the Commission in 1994, and the County issued a final ministerial CDP authorizing it to commence. That appeal should have been disposed of by Staff at the current hearing on the basis of the same "no substantial issue" recommendation made twice previously by Staff.

Equitable tolling of the original two-year period necessarily continues in effect because of (1) the improper filing of the second round of appeals, and (2) the deliberate failure of the staff planner to prepare a simple staff report on one of the appeals (when the SF office had no problem timely preparing the other, more complex staff report), and (3) the failure of Staff to complete review of access-related condition compliance documents despite a firm commitment to do so. This Applicant was effectively forced into filing an extension request, when legally it should have been able to commence work before expiration of the 1994 approval. It gave Staff more than sufficient notice at the time that it was fully prepared to break ground in a timely manner.

In response, the Staff Report states (at p. 9-10) that it did not improperly delay issuance of the CDP. Unfortunately, the cold record demonstrate otherwise.

Because of equitable tolling, the clock has never stopped running on the Commission's original approval. At this point, approximately 2 months remain assuming Staff follows through on expediting its review of previous County-approved access documents.

3. Under the Principles of Vested and Equitable Rights, the Commission is Estopped to Deny the Applicant its Legal Right to Complete the Project Under the Commission's Original 1994 Permit Approval. (Tab 12)

The Commission approved this project as one involving the removal of the existing oil and gas facilities and construction of the golf course. It also incorporated County conditions which permitted separate CDPs to issue for abandonment and golf course construction. In full reliance upon the Commission's 1994 approval and to obtain issuance of final County permits, the Applicant removed all oil and gas facilities from the site (despite approximately 50 years of remaining economic life), incurring an expenditure of approximately $3.5 million in the process. But for the Commission's approval of the golf course, the Applicant would never have proceeded to abandon its facilities.

Applying the related doctrines of vested rights and equitable estoppel, discussed more fully under Tab 12, the Commission is equitably estopped to deny the Applicant its legal right to develop the Golf Links Project in accordance with the terms and conditions of the Commission's judicially-approved 1994 approval.

III.

AT THE VERY LEAST, THE APPLICANT IS ENTITLED TO REINSTATE ITS PREVIOUSLY EXISTING SUBSTANTIAL OIL AND GAS FACILITIES (Tab 13)

In reliance on the Commission's approval of the golf course, substantial oil and gas facilities with a 50-year economic life remaining were removed from the property. (See discussion in the Court of Appeal opinion under Tab 7, p. 5.) "These include five single family homes, nineteen other buildings, twenty-three wells, two large tanks and miles of oil and gas pipelines." (Court of Appeal opinion, p. 4.) As noted, **but for the Commission's approval**, these facilities would never have been removed.

Based upon California case law (Furey v. City of Sacramento (1979) 24 Cal.3d 862), discussed under Tab 13, the Applicant submits that if the Commission were to adopt the Staff Recommendation and deny this project, then equity and fundamental fairness would require that the Applicant be permitted to reinstate this prior valuable use. Staff cannot have it both ways.

CONCLUSION

This Commission not only previously approved the Golf Links Project, which the courts then upheld, but this particular Applicant and its predecessor ARCO have at all times bent over backwards in efforts to work cooperatively with Staff. The Staff Recommendation would send this Commission down the wrong course in a sea of legal issues that we believe ultimately spells liability for the Commission. The old maxim is that "bad facts make bad law." The tortured path down which Staff is prepared to cast the Commission and this Applicant are a prescription for a "bad facts" case – a course the Commission simply need not and should not endorse.

For the foregoing reasons, we respectfully ask the Commission to consider the Applicant's efforts and approve the refined project, as proposed by the Applicant.

Very truly yours,

Steven H. Kaufmann

13 Attachments

cc (w/attachments):

Mr. Peter M. Douglas, CCC
Mr. Ralph Faust, Jr., CCC
Mr. Chuck Damm, CCC
Ms. Melanie Hale, CCC
Ms. Jamee J. Patterson, SDAG
Ms. Andi Culbertson, Culbertson Adams
Mr. Paul Makarechian, Makar Properties
Mr. Samuel Weissbard, Makar Properties
Mr. Whitt Hollis, Makar Properties

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DOS PUEBLOS GOLF LINKS

UNDER THE COMMISSION'S REGULATIONS, THE COMMISSION MAY CONSIDER ONLY THOSE "CHANGED CIRCUMSTANCES" THAT WERE RECITED AT THE HEARING ON THE EXTENSION MATTER IN JUNE 1999

The Staff Report recognizes that the current proceeding before the Commission is limited in scope to the issue of "change circumstances," and is not a de novo hearing on the project. However, the Staff Report incorrectly states that the Commission may consider "any" "changed circumstances" which may have arisen after the Commission's action on the extension matter. Under the Commission's regulations, the Commission may consider only those "changed circumstances" that were recited at the hearing on the extension matter in June 1999. In other words, the Commission may address only the single "changed circumstance" it identified at the extension hearing – the presence of three California red-legged frogs in the Eagle Canyon drainage.

This issue is critically important because the Staff Report disregards the regulation and improperly addresses so-called "changed circumstances" (e.g., Monarch butterfly, southern tarplant, White-tailed kite) that were never identified by the Commission at the June 1999 hearing.

Section 13169(d) of the Commission's regulations, which is not quoted in the Staff Report, provides in relevant part:

> "(1) If three (3) commissioners determine that there are changed circumstances that affect consistency of the development with Chapter 3 policies of the Coastal Act or with a certified local coastal program if applicable, the extension shall be denied and the development shall be set for a full hearing of the commission pursuant to Subchapter 1 of these regulations. However, the applicant shall not be required to file a new permit application but instead, shall submit any information that the executive director determines is necessary to evaluate the effect of the changed circumstances." (Emphasis added.)

Thus, the Commission's regulations not only specify that the instant proceeding is limited to "changed circumstances" but it is limited to evaluation of "the effect of the changed circumstances." As noted above, the Staff Report has incorrectly read the words "the changed circumstances" to mean "any changed circumstances."

Importantly, this provision of the Commission's regulation was revised (by unanimous Commission vote) in 1998 to include the above language. The Staff Recommendation (see attached excerpts) which proposed the adoption of that language included a matrix to assist the Commission and the Office of Administrative Law (OAL) to understand the nature and purpose of the revision. Under "Proposed Revision and Effect," the matrix explained:

> "The proposed revision would clarify that when the commission denies an extension and schedules the proposed development for a hearing, the applicant must submit information regarding how the changed circumstances affect the proposed development if such information is necessary for the commission to evaluate the proposed development." (Emphasis added.)

Under "Purpose and Rationale for the Proposed Revision," the matrix further explained:

> "The purpose of the proposed revision is to eliminate ambiguity over whether a denial of an extension request forces the commission to schedule the proposed development for action without obtaining information need to evaluate the development. since the development had been previously found consistent with the Coastal Act, the only information necessary is that relating to whether the changed circumstances affect that prior determination of consistency." (Emphasis added.)

At the June 1999 hearing, the Staff Report identified only the following "changed circumstance" – the presence of the three California Red-legged frogs in Eagle Canyon. (Staff Report, pp. 4-7). The current Staff Report concedes this as well. The Commission rejected as a "changed circumstances" objections raised regarding the (1) Western snowy plover (Staff Report, p. 8), (2) Monarch Butterfly (Staff Report, p. 8), and (3) Coastal Wetlands (Staff Report, p. 9). Indeed, the Staff Recommendation provided the following summary:

> "Staff recommends that the extension be denied for the following reason: The discovery of the California red-legged frog at the project site and the frog's federal listing as a threatend species, both of which have occurred since the Commission's approval of the subject development, together constitute changed circumstances such that the proposed development may not be consistent with the Coastal Act." (Emphasis added.)

This Staff Recommendation was confirmed by Staff (Deputy Director Damm) at the June 1999 hearing:

> "The real issue before the Commission, at this time on the extension request, in staff's opinion, is the question of the red-legged frog on the property does present a changed circumstance that could affect the Commission's decision with regards to your earlier approval of the golf course." (6/99 Transcript, p. 65.)

In short, the Commission identified but one changed circumstance – the red-legged frog. However, the Staff Report ignores the plain language of the regulation, and improperly enlarges the scope of the hearing to address other so-called "changed circumstances" that were not identified at the June 1999 hearing. As explained above, the Commission's regulation is very rational in its approach to "changed circumstances." It contemplates that the Commission will proceed to hold a further hearing on "the changed circumstances." It does not create an indiscriminate and indefinite opportunity to address "any" additional matters as they may arise. The interpretation in the Staff Report would permit the Commission to take advantage of its own delays in returning the matter to hearing, adding "changed circumstances" with the passage of time. This case is a prime example, where the Commission ceded its jurisdiction in the first instance to the USFWS, waited 2 ½ years before resuming its review of the process, and then took an additional 6 months to bring the matter to hearing. Had the regulation been written as Staff now interprets it (and contrary to its express wording), it would have been opposed by interested parties, and might have found stiff opposition at the time it was considered by the Office of Administrative Law.

The Applicant has endeavored to work carefully and cooperatively with Commission staff on each of the so-called "changed circumstances" asserted in the Staff Report. Despite its position, the Applicant has incorporated in its project description a number of acceptable changes to address Staff's concerns. Nonetheless, the current recommendation simply kills the project. Consequently, if the Commission is not willing to consider the Applicant's current proposal, then the Applicant submits that the Commission must adhere to its regulation and confine its review in this proceeding to the red-legged frog issue.

STATE OF CALIFORNIA—THE RESOURCES AGENCY PETE WILSON, Governor

CALIFORNIA COASTAL COMMISSION
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M-10

MEMORANDUM

May 21, 1998

TO: Coastal Commissioners

FROM: Ralph Faust, Chief Counsel
Dorothy Dickey, Deputy Chief Counsel
Ann Cheddar, Staff Counsel
Amy Roach, Staff Counsel

SUBJECT: **Adoption of Proposed Revisions to Portions of Chapters 5 and 6 of the Commission's Permit Regulations**

I. STAFF RECOMMENDATION

The staff recommends that the Commission adopt proposed amendments to the coastal development permit regulations (Chapters 5 and 6 of Title 14 of the California Code of Regulations) as set forth in Exhibit 1 and as modified in this staff report. As instructed by the Commission at its January 13, 1998 hearing, staff has carried out various rulemaking procedures that must be satisfied prior to adoption of the amendments. Those steps included circulating the proposed amendments (as set forth in Exhibit 1) for public notice and comment. The remaining requirements are to hold a public hearing and respond to all comments received at the hearing. The Commission continued its previously scheduled April 9, 1998 adoption hearing prior to the receipt of public testimony or a presentation by its staff.

Staff has received only three comment letters since circulation of the proposed amendments. (See Exhibit 5.) All of these letters were received prior to April 9, 1998. In response to those comments, staff recommends that the Commission make several nonsubstantial and grammatical corrections to the proposed amendments prior to adoption. These corrections can be made without triggering a requirement to recirculate the proposed amendments for additional public comment prior to adoption. Under the Administrative Procedure Act (the "APA"), any changes to proposed amendments that have already been published for notice and comment require an additional public comment period prior to adoption unless they are

nonsubstantial or solely grammatical. (Government Code § 11346.8(c).) Changes that are sufficiently related to the proposed amendments that the public would be on notice that they might occur trigger the need for an additional 15-day public notice and comment period prior to adoption. All other changes trigger the need for an additional 45-day public notice and comment period prior to adoption.

II. SUMMARY OF RESPONSES TO PUBLIC COMMENTS

As of the date of this staff report, staff has received three written comments concerning the proposed amendments. The most extensive of these were submitted by Mr. James Lichter of the Regulatory Review Unit, Trade and Commerce Agency. The following is a brief summary of the comments and staff's responses, which are set forth in greater detail in section VI of this staff report.

(1) Permit application fees (section 13055) should be shown in tabular form. Staff recommends that the fee schedule be revised to be set forth in tabular form.

(2) References to the "Coastal Act" should be consistent. Staff recommends that the references be revised to be consistent.

(3) The Executive Director should not have authority to summarize written comments that are presented at a hearing too late to be copied and distributed to commissioners (§ 13060(c)). Staff recommends that this authority be retained.

(4) A permit applicant should have the right to postpone a hearing after public testimony has been taken (§13073(a)). Staff recommends that the Commission maintain the current requirement that an applicant must exercise his or her one right to postpone before the public testimony portion of the hearing begins.

(5) Applicants for permit extensions should be required to post a notice of a proposed administrative extension within three working days, rather than three calendar days, of the Executive Director's mailing of notice to interested persons (§ 13169(b)). Staff recommends that the notice be posted within three calendar days to ensure the public has adequate opportunity to comment within the 10 calendar day comment period.

(6) There should be a deadline for Commission action on submittal of information updating the identity of a permittee. Staff recommends that there be no deadline because Commission staff's review and filing of the information does not affect a permittee's ability to amend, extend, or take other action concerning the permit.

Section	Description of Existing Regulation	Proposed Revision and Effect	Page No. In the Text
Extension of Permits - Ch. 5, Subch. 6, Art. 6			
AMEND 13169	This section authorizes the commission to extend the expiration date of permits. It specifies what must be included in an application for an extension and provides for: automatic approval of extensions by the executive director when there are no changed circumstances, commission hearings on whether there are changed circumstances, and commission hearings on permits that are not extended because of changed circumstances. This section establishes a process for public notice of extension applications that the executive director proposes to approve administratively. If a written objection is received, the extension is referred to the commission for a hearing on whether there are changed circumstances that may affect consistency of the development with the Coastal Act.	1) The proposed revision would clarify that it is development, not construction, that must commence within 2 years of commission approval in order to avoid expiration of the permit. 2) The proposed revision would clarify that the fee for extension applications is no longer $50 and that the fee is identified in § 13055. 3) The proposed revision would clarify that a permit can be extended even if the permittee has not yet satisfied "prior to issuance" conditions. 4) The proposed revision would require permittees to provide the commission with stamped envelopes addressed to persons known to be interested in an extension application, including those identified in § 13054 (i.e., people who live/own property within 100 feet of the property on which the development is proposed). 5) The proposed revision would clarify that the applicant, not the executive director, has the obligation to post a notice of the proposed extension at the site of the development. 6) The proposed revision would require the executive director to report immaterial extensions (i.e., those extensions that can be approved administratively because there are no changed circumstances) to the commission so that the commissioners have an opportunity to object to the executive director's determination that there are no changed circumstances. 7) The proposed revision would establish a process for the executive director to designate an objection to an immaterial extension as invalid, to report such designation to the commission (at the time of reporting the extension) and to approve the extension administratively if the commission does not object.	34-36 34-36 34-36 34-36 34-36 34-36 34-36

Exhibit 5, page 24 of 92

Section	Description of Existing Regulation	Proposed Revision and Effect	Page No. In the Text
		8) The proposed revision would clarify that the standard for review of an extension application is whether there are changed circumstances that affect consistency of the proposed development with Chapter 3 policies of the Coastal Act or with a certified local coastal program if applicable.	34-36
		9) The proposed revision would clarify that when the commission denies an extension and schedules the proposed development for a hearing, the applicant must submit information regarding how the changed circumstances affect the proposed development if such information is necessary for the commission to evaluate the proposed development.	34-36
		10) The proposed revision would clarify that the prohibition on vesting a permit (by commencing development) after filing an extension request, applies only during the time that the permit would be expired but for the submission of an extension application (which stays the expiration until commission action).	34-36
Assignment of Permits - Ch. 5, Subch. 6, Art. 7			
AMEND 13170	This section requires that a landowner who is not the original permittee obtain assignment of a permit before undertaking any development pursuant to the permit.	1) The proposed revision would allow new landowners to complete development approved under a permit obtained by the prior landowner without having to obtain an assignment of the permit from the prior permittee.	36-37
		2) The proposed revision would allow landowners to reflect changes in ownership, and hence changes in permittees, by reporting a transfer of the permit to the commission.	36-37
		3) The proposed revision would allow permittees to reflect changes in ownership without payment of a fee.	36-37
Existing Single-Family Residences - Ch. 5, Subch. 6			
AMEND 13250	This section lists those types of improvements to single family residences that involve a risk of adverse environmental effect and therefore are not exempt from permit requirements under	1) The proposed revision would clarify that a permit is required for improvements that are either in one of the sensitive areas identified in § 13250(b)(1) or to a structure located in one of these sensitive areas.	37-38

Exhibit 5, page 25 of 92

Section	Description of Existing Regulation	Proposed Revision and Effect	Page No. In the Text
		8) The proposed revision would clarify that the standard for review of an extension application is whether there are changed circumstances that affect consistency of the proposed development with Chapter 3 policies of the Coastal Act or with a certified local coastal program if applicable.	34-36
		9) The proposed revision would clarify that when the commission denies an extension and schedules the proposed development for a hearing, the applicant must submit information regarding how the changed circumstances affect the proposed development if such information is necessary for the commission to evaluate the proposed development.	34-36
		10) The proposed revision would clarify that the prohibition on vesting a permit (by commencing development) after filing an extension request, applies only during the time that the permit would be expired but for the submission of an extension application (which stays the expiration until commission action).	34-36
Assignment of Permits - Ch. 5, Subch. 6, Art. 7			
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		2) The proposed revision would allow landowners to reflect changes in ownership, and hence changes in permittees, by reporting a transfer of the permit to the commission.	36-37
		3) The proposed revision would allow permittees to reflect changes in ownership without payment of a fee.	36-37
Existing Single-Family Residences - Ch. 5, Subch. 6			
AMEND 13250	This section lists those types of improvements to single family residences that involve a risk of adverse environmental effect and therefore are not exempt from permit requirements under	1) The proposed revision would clarify that a permit is required for improvements that are either in one of the sensitive areas identified in § 13250(b)(1) or to a structure located in one of these sensitive areas.	37-38

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Section	Description of Existing Regulation	Proposed Revision and Effect	Purpose and Rationale for the Proposed Revision	Page No. In the Text
AMEND 13168	This section establishes an application fee for permit amendments.	The proposed revision would clarify that the fee for amendment applications is no longer $25 and that the fee is identified in § 13055.	The purpose of the proposed revision is to make this section consistent with the fee regulation (§ 13055), which was revised in 1991 to increase the fee for amendments (to 50% of the permit fee).	33-34
Extension of Permits - Ch. 5, Subch. 6, Art. 6				
AMEND 13169	This section authorizes the commission to extend the expiration date of permits. It specifies what must be included in an application for an extension and provides for: automatic approval of extensions by the executive director when there are no changed circumstances, commission hearings on whether there are changed circumstances, and commission hearings on permits that are not extended because of changed circumstances. This section establishes a process for public notice of extension applications that the executive director proposes to approve administratively. If a written objection is received, the extension is referred to the commission for a hearing on whether there are changed circumstances that may affect consistency of the development with the Coastal Act.	1) The proposed revision would clarify that it is development, not construction, that must commence within 2 years of commission approval in order to avoid expiration of the permit. 2) The proposed revision would clarify that the fee for extension applications is no longer $50 and that the fee is identified in § 13055. 3) The proposed revision would clarify that a permit can be extended even if the permittee has not yet satisfied "prior to issuance" conditions. 4) The proposed revision would require permittees to provide the commission	1) The purpose of the proposed revision is to eliminate ambiguity resulting from the current provision that "construction" must be commenced within 2 years in order to vest a permit. Permits can authorize actions that are development but not construction (i.e., subdivision) and therefore it is commencement of development, not commencement of construction that vests a permit. (See comments concerning amendment of § 13156, note 2.) 2) The purpose of the proposed revision is to make this section consistent with the fee regulation (§ 13055), which was revised in 1991 to increase the fee for extensions (to $200-$400). 3) The purpose of the revision is to reflect that some "prior to issuance" conditions may require a significant amount of time to complete. The purposes of the Coastal Act are not furthered by forcing permittees to reapply for a new permit in two years simply because they have not satisfied all "prior to issuance "conditions. 4) The purpose of the proposed revision is to place the cost of mailing notice of an extension	34-36 34-36 34-36 34-36

Exhibit 5, page 27 of 82

Section	Description of Existing Regulation	Proposed Revision and Effect	Purpose and Rationale for the Proposed Revision	Page No. In the Text
		with stamped envelopes addressed to persons known to be interested in an extension application, including those identified in § 13054 (i.e., people who live/own property within 100 feet of the property on which the development is proposed).	on the applicant rather than the commission.	
		5) The proposed revision would clarify that the applicant, not the executive director, has the obligation to post a notice of the proposed extension at the site of the development.	5) The purpose of the proposed revision is to eliminate confusion over who must post notice of the requested extension at the site.	34-36
		6) The proposed revision would require the executive director to report immaterial extensions (i.e., those extensions that can be approved administratively because there are no changed circumstances) to the commission so that the commissioners have an opportunity to object to the executive director's determination that there are no changed circumstances.	6) The purpose of the proposed revision is to insure that the commission is informed of extension applications that the executive director proposes to approve administratively without a hearing.	34-36
		7) The proposed revision would establish a process for the executive director to designate an objection to an immaterial extension as invalid, to report such designation to the commission (at the time of reporting the extension) and to approve the extension	7) The purpose of the proposed revision is to reduce delays that occur as a result of receipt of an objection to an extension where the objection does not identify changed circumstances that could affect consistency of the development. The proposed revision would allow the commission to review and overrule the executive	34-36

Exhibit 5, page 28 of 92

Section	Description of Existing Regulation	Proposed Revision and Effect	Purpose and Rationale for the Proposed Revision	Page No. In the Text
		administratively if the commission does not object.	director's determination that the objection is essentially invalid.	
		8) The proposed revision would clarify that the standard for review of an extension application is whether there are changed circumstances that affect consistency of the proposed development with Chapter 3 policies of the Coastal Act or with a certified local coastal program if applicable.	8) The purpose of the proposed revision is to eliminate the current ambiguity over whether certification of a local coastal program after approval of the permit results in review of the consistency of the development with the certified LCP rather than Chapter 3 policies of the Coastal Act.	34-36
		9) The proposed revision would clarify that when the commission denies an extension and schedules the proposed development for a hearing, the applicant must submit information regarding how the changed circumstances affect the proposed development if such information is necessary for the commission to evaluate the proposed development.	9) The purpose of the proposed revision is to eliminate ambiguity over whether a denial of an extension request forces the commission to schedule the proposed development for action without obtaining information needed to evaluate the development. Since the development had been previously found consistent with the Coastal Act, the only information necessary is that relating to whether the changed circumstances affect that prior determination of consistency.	34-36
		10) The proposed revision would clarify that the prohibition on vesting a permit (by commencing development) after filing an extension request, applies only during the time that the permit would be expired but for the submission of an extension application (which stays the	10) The purpose of the proposed revision is to eliminate any suggestion that filing an extension request prior to the expiration date of a permit causes the permittee to lose the ability to vest the permit prior to the expiration date.	34-36

Exhibit 5, page 29 of 82

Section	Description of Existing Regulation	Proposed Revision and Effect	Purpose and Rationale for the Proposed Revision	Page No. In the Text
		administratively if the commission does not object.	director's determination that the objection is essentially invalid.	
		8) The proposed revision would clarify that the standard for review of an extension application is whether there are changed circumstances that affect consistency of the proposed development with Chapter 3 policies of the Coastal Act or with a certified local coastal program if applicable.	8) The purpose of the proposed revision is to eliminate the current ambiguity over whether certification of a local coastal program after approval of the permit results in review of the consistency of the development with the certified LCP rather than Chapter 3 policies of the Coastal Act.	34-36
		9) The proposed revision would clarify that when the commission denies an extension and schedules the proposed development for a hearing, the applicant must submit information regarding how the changed circumstances affect the proposed development if such information is necessary for the commission to evaluate the proposed development.	9) The purpose of the proposed revision is to eliminate ambiguity over whether a denial of an extension request forces the commission to schedule the proposed development for action without obtaining information needed to evaluate the development. Since the development had been previously found consistent with the Coastal Act, the only information necessary is that relating to whether the changed circumstances affect that prior determination of consistency.	34-36
		10) The proposed revision would clarify that the prohibition on vesting a permit (by commencing development) after filing an extension request, applies only during the time that the permit would be expired but for the submission of an extension application (which stays the	10) The purpose of the proposed revision is to eliminate any suggestion that filing an extension request prior to the expiration date of a permit causes the permittee to lose the ability to vest the permit prior to the expiration date.	34-36

Exhibit 5, page 30 of 92

DOS PUEBLOS GOLF LINKS

EVIDENCE OF A NESTING PAIR OF WHITE-TAILED KITES ON THE DOS PUEBLOS PROPERTY DOES NOT CONSTITUTE A "CHANGED CIRCUMSTANCE"

The Staff Report explains that at one point this year two pairs of white-tailed kites were observed nesting in two trees on the property. The question raised is whether this presents a "changed circumstance" within the meaning of the Commission's regulations. The answer is no. The reason is that the potential existence of such nests was assumed and specifically addressed in the 1993 project EIR, the County's conditions of approval which were incorporated in the Coastal Commission's 1994 decision, and the Biological Enhancement Plan (BELP) prepared and approved by the County in 1998 as a part of condition compliance.

1993 Project EIR

Section 5.1 of the 1993 project EIR addressed "Biological Resources." Two passages in the EIR specifically address the issue. The EIR first explains:

> "The proposed development plan indicates that approximately 273 (out of a total of 901 trees) trees would be removed to accommodate the golf course. This count includes eucalyptus trees that would be removed for development of the desalination facility. Tree windrows are important to wildlife, providing perches and nesting habitat for many bird species. Coastal windrows are particularly valuable to migratory songbirds, providing them with resting and feeding habitat during migration periods. **Raptors can utilize trees for roosting and hunting perches. The windrows within the open grassland onsite are particularly valuable in this regard, as raptors prey on small mammals, reptiles, and ground birds that frequent grassland habitats. The removal of trees would eliminate nesting, perching, and roosting habitat for sensitive bird species.** Removal of trees (especially willows) would also decrease cover for other animal species. The removal of willow trees would thereby reduce the biological value of the drainages onsite by making them less likely to be utilized as wildlife movement corridors. The removal of willows and windrow trees is considered a significant mitigable (Class II) impact." (Page 5.1-33.)

Addressing potential project-related impacts to birds, the EIR further states:

> "**. . . It is expected that raptor populations in the project area would decline as a result of the reduction in foraging habitat and perch sites, and several species such as black shouldered kite [now called the white-tailed kite] and red-shouldered hawk may abandon the area.** Overall declines due to cumulative development of some species expected to utilize the site (e.g., prairie falcon, peregrine falcon) may result in long-term extirpation (elimination from a portion of the known range) in the Goleta

Valley. **As previously mentioned, the removal of trees would eliminate nesting, perching and roosting habitat for sensitive raptors and is therefore considered a significant impact. These trees would be replaced at a ratio of 3:1, which would reduce impacts to less than significant levels over the long term. Impact to raptors associated with the loss of trees would remain significant until the replacement trees reached maturity. These impacts are therefore considered short-term and mitigable (Class II).**" (Page 5.1-36 – 5.1-37.)

Thus, the 1993 EIR expressly contemplated that tree removal would eliminate nesting, perching and roosting habitat for sensitive raptors, and the latter passage above specifically identified the "black shouldered kite," which today is known as the White-tailed Kite.

1993 County Project Approval

The EIR contained a mitigation measure specifically to address the impacts associated with tree removal in connection with the project. That mitigation measure, in turn, was adopted by Santa Barbara County in its 1993 approval of the project CUP as Condition 11, which states:

"(B5) **Trees The applicant shall replace all trees as shown on the tree inventory map (with the exception to tamarisk) as mitigation for impacts to sensitive riparian communities, bats and raptors and to facilitate raptor control of rodents through the use of trees as raptor perches. All non-willow trees shall be replaced at a ratio of 3:1 and all willows shall be replaced at a ratio of 5:1.** Excavation work within the canopy and/or dripline of willows shall be avoided to the maximum extent feasible. Where excavation must be performed adjacent to willow trees or within southern willow scrub (see Figure 5.1-1) it shall be performed with hand tools only. If the use of hand tools is deemed infeasible by RMD, excavation work may be authorized by RMD to be completed with rubber-tired construction equipment weighing five tons or less. If significant large rocks are present, or if spoil placement will impact surrounding trees, then a small tracked excavator (ie., 215 or smaller track hoe) may be used as determined by RMD staff. **Plan Requirements: A revised BELP including the tree replacement, prepared by a RMD-approved biologist and approved by RMD shall be implemented.** Prior to issuance of CDP, the applicant shall file a performance security bond with the County to complete planting and maintain plantings for a three-year period. Construction requirements for work near native trees shall be noted on all building and construction plans. **Timing:** Tree planting shall commence immediately following the completion of construction activity and be completed prior to opening of the golf course.

"**MONITORING:** RMD/EQAP staff shall ensure tree installation and maintenance through periodic site visits. Performance security bond release required Permit Compliance sign-off."

1994 Commission Project Approval

The Commission had all of the County conditions before it when it considered the Golf Links project in 1994, including Condition 11 above, and it approved the project "subject to all conditions attached to the County approval (91-CP-085) . . . ."

1998 Biological Enhancement Landscape Plan

Thereafter, the Applicant performed extensive condition compliance as to all County- and Commission-imposed conditions of approval. Among other things, the Applicant submitted and County staff approved the Biological Enhancement Landscape Plan, or BELP, required by Condition 11. Section 2.1.2 of the BELP requires:

> "**Specimen Trees**
>
> "Trees to be retained/removed will be verified against the tree inventory map, dated June 1998, and report by the Owner's representative and the OEC for compliance.
>
> "**A qualified wildlife biologist shall evaluate all dead or diseased trees proposed for removal for use by raptors or other sensitive bird species, if the trees do not block a playing corridor or have pitch canker or other disease. In the event that these trees are used, or appear to have recently been used, as roost or nesting sites by any sensitive bird species, these trees shall not be removed from the project until the nests have been abandoned.** Dead trees which are (or become) a safety hazard to humans and/or occupied structures will be removed.
>
> "Trees scheduled to be removed, which are close to sensitive habitats or other vegetation which is to remain, will be selectively removed by a specifically assigned crew using methods normally employed by the trade to remove trees without disturbing adjacent vegetation. These methods entail climbing trees, or using hydraulic lifts ("Buckets") cutting with chainsaws, and lowering large branches with ropes so as not to disturb adjacent vegetation. Willows to be removed will be removed in conformance with Permit Condition 11, i.e., with hand tools only, unless deemed unfeasible by the OEC. Trees will not be bulldozed in areas where other trees are to remain or near sensitive habitats. Trees will be cut into manageable lengths and removed from the site. Stumps will be removed. See Tree Inventory Report (Table B).
>
> "Trees to be removed, which are not near sensitive habitats or other vegetation to remain, will be removed by earth moving equipment during the clearing and grubbing, and grading process and removed from the site." (Pages 1-2.)

Accordingly, the potential existence of a nesting site used by the White-tailed Kite was specifically anticipated in the 1993 EIR, 1993 County CUP approval, and, finally, the Commission's 1994 approval of the Golf Links project. Evidence that a pair of kites are or may be nesting on the property therefore does not constitute a "changed circumstance."

DOS PUEBLOS GOLF LINKS

THE COMMISSION IS ESTOPPED TO ADDRESS ANY "CHANGED CIRCUMSTANCES" THAT MAY HAVE OCCURRED ON SITE SINCE ITS ACTION ON THE EXTENSION REQUEST IN JUNE 1999 BECAUSE THE COMMISSION ITSELF FAILED TO PROPERLY AND PROMPTLY EXERCISE ITS JURISDICTION

Equally fundamental, the Commission is estopped to cite any "changed circumstances" that may have occurred on site during the period following the Commission's action on the extension matter in June 1999 because the Commission itself failed to properly and promptly exercise its jurisdiction in the Dos Pueblos matter. This is a simple matter of equity, and it forecloses application of the County's LCP insofar as it applies at all to any white-tailed Kite nesting, or any of the other habitats (e.g., monarch butterfly, tarplant) which Staff states have been recently observed on the property.[1]

The record demonstrates that the Dos Pueblos property was an active oil field at the time the Commission approved the project in 1994. At that time there was substantial human activity, interference and presence on the site. There were five houses; people lived and worked there. The 1993 project EIR reported low raptor activity at the time.

The property remained an active oil field while that plans were being processed to shut it down. Indeed, the applicant expended approximately $11 million, including $3.5 million in hard costs on abandonment, and in the process eliminated a use which, over time, would have continued to produce substantial revenues for another 50 years. The abandonment process itself was a noisy and disturbing process involving equipment, trucks, demolition, etc. – i.e., lots of human activity.

The Applicant was prepared to break ground for the final remediation and construction of the golf course when the following events transpired:

1. The opponents improperly filed a second round of appeals from the 1998 ministerial CDPs issued by the County for final remediation and the golf course, but not the previously issued County permits for abandonment.

2. The then coastal planner (who no longer works for the Commission) claimed an inability to find time to prepare a simple staff report on one of the appeals despite intimate familiarity with the project since 1993. This forced the applicant, who was otherwise prepared to break ground in January 1999, to request a permit extension prior to the expiration date, January 28, 1999.

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[1] In a separate argument, the Applicant also contends that under the Commission's regulation's, the Commission may only consider those "changed circumstances" that were recited at the hearing on the extension matter in June 1999.

3. The appeals stopped any further physical work on the property, thus stopping human activity on the property as a matter of law.

4. In June 1999, the Commission decided nearly 8 months after the appeals that the post-extension request discovery of three red-legged frogs in the downcoast drainage justified a delay to address what, if any, changes are necessary to accommodate the red-legged frog. However, the Commission designated the USFWS and its permit process as the sole vehicle to do this. This clearly was an unnecessary condition precedent as the Commission, under the Coastal Act, had the full authority to act on the extension. The Commission did not have to retain jurisdiction and delay the completion of the permit extension process, which in this case consumed 2½ years before the applicant obtained its separate Section 10 permit.

Thus, to the extent any "changed circumstances" may have accumulated on the Dos Pueblos site since 1999, this is plainly as a result of the Commission's failure to exercise its jurisdiction properly and promptly. The Commission had no legal authority to act on the red-legged frog outside of the designated ESHA on the property (Eagle Canyon), and thus there was no reason to delay the permit for a response from the USFWS. Further, in a very real sense, the USFWS "occupies the field" under the Endangered Species Act with respect to the red-legged frog, and displaces the Commission's ability to act to the contrary. In reviewing the extension request, the Commission could have timely done everything within its authority (i.e., made it decision in terms of the certified LCP, as required), and additionally could have conditioned its permit approval to require the applicant to also obtain a Section 10 permit and/or return to the Commission to reconcile any inconsistency with the action of the USFWS.

The unique factual circumstances of this particular matter therefore require the Commission to recognize that the Commission itself shares the fault that this site – after years of elevated human activity – was made to "go to sleep" deliberately, thereby permitting other "sensitive" species to appear (e.g., a nesting pair of white-tailed kites) and/or even colonize the site. For this reason, the Commission is necessarily estopped to apply the LCP provisions discussed under Tab 4, to the extent they apply to any white-tailed kites that are or may presently be nesting on the property.

DOS PUEBLOS GOLF LINKS

THE LCP PROVISIONS WHICH ADDRESS THE WHITE-TAILED KITE ARE LIMITED TO THE MORE MESA AREA, AND DO NOT APPLY TO THE DOS PUEBLOS PROPERTY

This legal analysis addresses the proper interpretation of the provisions of the Santa Barbara County Coastal Plan and Coastal Zoning Ordinance (CZO) as they relate to the White-tailed kite. The issue is whether those provisions relate generally to the white-tailed kite irrespective of where they might be found in the County's coastal zone, or whether they pertain solely to the identified location in the LCP, More Mesa. As explained below, the provisions at issue, Coastal Plan policies 9-26 through 9-29 and CZO section 35-97.14, are limited in their application to More Mesa in terms of the white-tailed kite, and therefore do not apply to the Golf Links project. Staff ignores the Coastal Plan policies and erroneously applies the CZO provision.

County Coastal Plan

Section 3.9.4 of the County Coastal Plan addresses "Environmentally Sensitive Habitat Area Overlay Designation." The introductory portion of this Section explains that the "following criteria were used in determining which habitats in the County's coastal zone warranted the Habitat Area overlay designation: . . . 4. Specialized wildlife habitats which are vital to species survival, i.e., White-tailed Kite habitat, butterfly trees."

The land use plan policies in the Section begin with Policy 9-1, which is followed by the explanation that "[h]abitats found in the County and policies for protecting these habitats are listed below." Thus, several different habitat types are listed, **followed by the location where those "[h]abitats [are] found in the County**."

As to the white-tailed kite, the location where the "[h]abitats [are] found in the County" is More Mesa. (Coastal Plan, p. 129.) While multiple areas are listed to identify the location for other habitat types, More Mesa is the sole location specifically listed for the white-tailed kite. Further, the discussion as to kite specifies that "[t]he More Mesa grassland provides a feeding and nesting habitat for the White-tailed Kite. . . The kites use the oak trees, found in the northwest portion of More Mesa, for communal roosting at night and as nesting sites during the breeding season."

Following the above discussion, the Coastal Plan sets forth Policies 9-26 through 9-29 (this is key because the identical language is set forth in CZO section 97.14). **Significantly, the Staff Report fails to mention or quote these policies or the accompanying discussion above.** Policy 9-29, for example, specifically mentions More Mesa: "In addition to preserving the ravine plant communities on More Mesa for nesting and roosting site, the maximum feasible area shall be retained in grassland to provide feeding area for the kites."

FILED
SAN LUIS OBISPO
SUPERIOR COURT

MAR 19 2001

BY Patricia Van Orden
DEPUTY CLERK

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

MORRO BAY MINI-STORAGE, INC.,

Petitioner

vs.

CALIFORNIA COASTAL COMMISSION,

Respondent.

Case No. CV00-0578

~~PROPOSED~~ STATEMENT OF DECISION

Petitioner, Morro Bay Mini-Storage, Inc., is found hereby to be entitled to a Writ of Administrative Mandamus:

(1) Commanding Respondent/Defendant, CALIFORNIA COASTAL COMMISSION, to set aside Special Condition 1 adopted by the Commission on May 11, 2000 (Appeal No. A-3-SLO-99-083). Said Special Condition 1 provides:

"1. Scope of Permit/Revised Plans. This permit authorizes the construction of a one-story storage facility and related parking and circulation areas, and appropriate habitat setbacks, on a 0.86 acre (37,462 square foot) portion of the site. The remainder of the site (2.14 acres) shall be restored to coastal dune scrub habitat pursuant to Special Conditions 3 and 4 below. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for Executive

Director review and approval, revised plans for the storage facility that achieves these objections. The applicant may pursue an alternative use of the 37,462 square foot developable portion of the site, in coordination with the required habitat restoration and applicable provisions of the San Luis Obispo County Local Coastal Program, by applying for and obtaining an amendment to this Coastal Development permit."

(2) Commanding Respondent/Defendant, CALIFORNIA COASTAL COMMISSION, to set aside Special Condition 2 adopted by the Commission on May 11, 2000 (Appeal No. A-3-SLO-99-083). Said Special Condition 2 provides:

"2. Compliance with Local Conditions of Approval. All Conditions of Approval adopted by San Luis Obispo County on September 17, 1999 adopted pursuant to an authority other than the Coastal Act (attached as Exhibit D), continue to apply to the project, with the following exceptions:

(a) Condition 1 is no longer applicable, as the scope of the project has been revised by Special Condition 1, above; and,

(b) Condition 9, requiring the replacement of habitat at a 1:1 ratio, is replaced by Special Condition 4, below."

(3) Commanding Respondent/Defendant, CALIFORNIA COASTAL COMMISSION, to set aside Special Condition 3 adopted by the Commission on May 11, 2000 (Appeal No. A-3-SLO-99-083). Said Special Condition 3 provides:

"3. Deed Restriction. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, AND WITHIN 180 DAYS OF THE COMMISSION'S ACTION, the applicant shall finalize, execute, and record, in a form and content acceptable to the Executive Director, a Deed Restriction over 2.14 acres of the project site that limits the use

3) the names and qualifications of the biologist that will supervise all restoration and monitoring and maintenance activities.

Submission of this plan shall be accompanied by written evidence that it has been reviewed and approved by the U.S. Fish and Wildlife Service, or evidence that such approvals are not required." (A.R. 1872-1873)

(6) Commanding Respondent/Defendant, CALIFORNIA COASTAL COMMISSION, to set aside Special Condition 4b. adopted by the Commission on May 11, 2000 (Appeal No. A-3-SLO-99-083). Said Special Condition 4b. provides:

"b Timing. PRIOR TO THE COMMENCEMENT OF CONSTRUCTION OF THE APPROVED STORAGE FACILITY OR OTHER STRUCTURAL DEVELOPMENT APPROVED THROUGH AN AMENDMENT TO THIS PERMIT (see Special Condition 1), AND WITHIN ONE YEAR OF THE COMMISSION'S ACTION, the applicant shall submit, for Executive Director Review and Approval, evidence that off-site habitat restoration and protection measures have been initiated in accordance with the approved restoration plan. Said evidence shall include, at a minimum: written evidence from the [that] U.S. Fish and Wildlife Service that the provisions of the Settlement Agreement have been satisfied; and, photographs and other documentation showing that the initial removal of exotic species and the installation of any landscaping called for in the approved restoration plan has been completed.

PRIOR TO THE OCCUPANCY OF ANY OF THE STORAGE UNITS OR OTHER STRUCTURE APPROVED THROUGH AN AMENDMENT TO THIS PERMIT, AND WITHIN ONE YEAR OF THE COMMISSION'S ACTION, the applicant shall submit, for Executive Director review and approval, evidence that on-site habitat

Obispo on September 17, 1999, as set forth in the Administrative Record herein on pages 4 through 13.

(10) Re-instating the County approved project, the approval of which is tolled during the pendency of the Commission's appeal and this litigation.

STATEMENT OF FACTS

A. The Parties.

Petitioner/Plaintiff, MORRO BAY MINI STORAGE, INC. ("MBMS, INC.") is a corporation duly organized under the laws of the State of Missouri, and is the owner of approximately 3 acres of property at the intersection of Mountain View Avenue and San Ynez Avenue, in the unincorporated area of the County of San Luis Obispo, known as Los Osos, California [APN 074-223-004] (hereinafter "Property"). 1 A.R. passim.

The Commission is a political subdivision of the State of California created by and subject to the California Coastal Act, California Public Resources Code §30000, et seq. ("P.R.C."), and has jurisdiction pursuant to P.R.C. §30603(a) to hear certain appeals for development projects within the California Coastal Zone after the approval of those projects by local governments within the Coastal Zone following the certification of the City's and/or County's certified Local Coastal Program (LCP").(2 A.R. 189, 1713, 1868.)

B. Petitioner's/Plaintiff's Project.

On July 27, 1998, A.J. Wright on behalf of MBMS, INC. obtained Construction Permit No. B972324-001, which was applied for with the Department of Planning and Building of the County, and which authorized the grading and stockpiling of soil on Petitioner's/Plaintiff's Property. (1 A.R. 30.) The site preparation began shortly following the permit issuance and included the clearing and grubbing of the area for the fill material. Other site work included the removal of substantial quantities of debris, including discarded furniture, couches, appliances, dozens of tires and miscellaneous trash. As the site work commenced, Gordy Owen, the Building and Grading Inspector for the County, was asked by A.J. Wright if the entire site could be grubbed while the contractor was mobilized. The Inspector replied that he

did not see any problem in preparing the site to that extent. (10 A.R. 1848.) In reliance thereon, and in a good faith belief that such authorization was proper, agents for Petitioner/Plaintiff performed the work that was completed. Of the entire site consisting of 2.84 acres of Petitioner's/Plaintiff's Property, 0.15 acres of unprepared area remained. On January 26, 2000, Barnie McKay, Chief Building Official of the County, determined that the work that was done seemed to be the result of a misunderstanding by the Inspector rather than an overt disregard for County regulations by the agents of Petitioner/Plaintiff. (10 A.R. 1848.)

Under the County's LCP, the highest and best use for the Property would involve residential development for condominium units. (1 A.R. 180, passim.) However, Petitioner's/Plaintiff's Property was located within the Prohibition Zone enacted by the Regional Water Quality Control Board of the State of California due to the lack of a community sewer system within the Los Osos area. Petitioner/Plaintiff applied for a Minor Use Permit from the County to construct a mini-storage facility on the property. (1 A.R. 31.) While processing this permit for a mini-storage facility, other agents of the County noted the removal of coastal dune scrub habitat, including possible [redacted] for the endangered Morro shoulderband snail. (1 A.R. 146-147.) Prior to performing the site preparation, Petitioner/Plaintiff was unaware of the existence or listing status of the Morro shoulderband snail. (A.R. 146-147.)

On August 20, 1998, the Morro Group, Inc., a contractor of the County, contacted the United States Department of Interior, Fish and Wildlife Service (hereinafter "U.S. Fish and Wildlife Service") regarding the alleged removal of coastal dune scrub habitat. (1 A.R. 146-147.) The U.S. Fish and Wildlife Service is the primary federal agency having jurisdiction over the enforcement of the Federal Endangered Species Act. During September, 1998, the Staff and a law enforcement officer of the U.S. Fish and Wildlife Service toured the property and, among other things, found a live Morro shoulderband snail within the brush and soil pile on the northwest corner of the property. On February 19, 1999, the County suspended processing Petitioner's/Plaintiff's application for a Construction Permit for a mini-storage facility pending

the outcome of the U.S. Fish and Wildlife Service's investigation of whether the grading resulted in the take of a Morro shoulderband snail, which the U.S. Fish and Wildlife Service alleged would be a violation of § 9 of the Federal Endangered Species Act of 1973, as amended. (1 A.R. 128).

On September 1, 1999, in lieu of issuing a Notice of Violation and Civil Penalty, the U.S. Fish and Wildlife Service and Petitioner/Plaintiff entered into a written Settlement Agreement (10 A.R. 1693-1699), pursuant to which, Petitioner/Plaintiff agreed to:

(A) Pay a settlement amount of $7,000 relating to the investigation by law enforcement of the U.S. Fish and Wildlife Service.

(B) Conduct the following mitigation measures to compensate for the loss of the species and its habitat as follows:

(1) Purchase a 1.79 acre site (Block M.1 of the town of El Morro, California [APN 038-721-014]), which the U.S. Fish and Wildlife Service determined to have equivalent habitat value for the snail ("Mitigation Site"). Petitioner/Plaintiff agreed to convey such Mitigation Site to the California State Parks Department, or another entity acceptable to the U.S. Fish and Wildlife Service, by October 1, 1999. The property was restricted for use specifically for the preservation in perpetuity of snail habitat.

(2) Conduct habitat restoration and three years of monitoring to the U.S. Fish and Wildlife Service on the 1.79 acre Mitigation Site, after preparation of and in compliance with a Habitat Restoration Monitoring Plan ("Plan"). The Plan is required to be reviewed and approved by the U.S. Fish and Wildlife Service prior to implementation, and is to be consistent with a Biological Opinion ("BO") to be prepared by the U.S. Fish and Wildlife Service that sets forth the terms and conditions for future incidental take of the snail on the Mitigation Site as a result of

the implementation of the Plan. The Plan is required to include provisions for reporting results of Plan implementation to the U.S. Fish and Wildlife Service. Access to the Mitigation Site for review of restoration monitoring efforts was granted to the U.S. Fish and Wildlife Service upon request.

(3) Comply with the terms and conditions of the BO which is required to include, without limitation, a provision ensuring that a qualified biologist provide monitoring of restoration activities and proper education and training to individuals conducting restoration work on the 1.79 acre Mitigation Site.

(4) Pay $17,500 into an escrow account by October 29, 1999, to be used by the Trust for Public Land, or another entity acceptable to the U.S. Fish and Wildlife Service, for the purchase of 0.35 acres or more of habitat to be preserved in perpetuity for the snail.

(5) Record an Open Space Easement over the approximately 0.15 acre ungraded area along the northerly boundary of the Property, which shall expressly prohibit stockpiling, deposition of trash or other items and use of the area for parking or vehicle turnaround, or any other actions that would result in a take of the snail or would adversely affect the ability of the 0.15 acre area to support the species. (10 A.R. 1694-1699).

On September 17, 1999, the County approved Petitioner's/Plaintiff's Project to grade for and construct a mini-storage facility, consisting of 12 individual buildings with a maximum height of 16.9 feet, totaling approximately 60,000 square feet, an entrance driveway, and parking on the property. (1 A.R. 4-13.) As approved, the project would occur in two phases, each phase equal to approximately half of the total project. Pursuant to the California Environmental Quality Act, the County approved a Mitigated Negative Declaration for the project. (1 A.R. 54.) The Mitigation Plan and written Settlement Agreement with the U.S.

Fish and Wildlife Service were incorporated into a written Developer Statement executed by Petitioner/Plaintiff and approved by the County's Environmental division. (1 A.R. 52-53.) The County's approval of the project was "tentative", and would become final after both the County 14-day appeal period and the Commission's 10-day appeal period. (First Amended Petition, pp. 7-8, ¶ 9; 1 A.R. 4.)

In approving the Minor Use Permit for the project the County imposed 13 conditions of approval, including detailed conditions on biological resource protection consistent with the Agreement reached by the Petitioner/Plaintiff with the U.S. Fish and Wildlife Service. (1 A.R. 7-9.) In addition, the County imposed Condition 11 during construction activities, which required that any Morro shoulderband snails that are subsequently found anywhere on the property shall cause all such activities to be suspended, with the applicant having responsibility for contacting U.S. Fish and Wildlife Service, which would then assess any potential impacts and the need for compliance with the Federal Endangered Species Act. (1 A.R. 9.) The applicant was required to implement additional mitigation recommended by the U.S. Fish and Wildlife Service, as required by the Environmental Coordinator of the County. Special Condition 12 required that Petitioner/Plaintiff would provide adequate evidence that the U.S. Fish and Wildlife Service is satisfied with methods of mitigation and has received the direct financial habitat compensation for the 0.35 acre portion of the mitigation. (First Amended Petition, pp.8-10, ¶ 10; 1 A.R. 9.)

There was no opposition to Petitioner's/Plaintiff's Project in proceedings before the County. There was no substantial evidence in the record before the County to support a decision or findings contrary to those adopted by the County. (1 A.R. 1-181.)

The decision of the County became final as to the County since it was not appealed to the Board of Supervisors of the County. Thereafter, Petitioner/Plaintiff had the right to proceed with the construction of the Project, unless appealed to the Commission. (1 A.R. 4-13.)

On October 27, 1999, David Potter and Pedro Nava, who are members of the Commission, filed an appeal of the County approved Project. (2 A.R. 183-188.)

On November 1, 1999, the Office of the Solicitor of the U.S. Department of Interior, on behalf of the U.S. Fish and Wildlife Service, advised in writing the Commission that Petitioner/Plaintiff had entered into the Settlement Agreement based upon the understanding that the Project would proceed, and that, therefore, "implementation of the Agreement has been delayed pending resolution of issues with the Coastal Commission." The Commission was advised of the U.S. Fish and Wildlife Service's desire that "such issues can be resolved as quickly as possible so that mitigation can be assured." (10 A.R. 1694-1699; 12 A.R. 2140-2143.)

On February 16, 2000, the Commission conducted a hearing on the appeal to determine whether the appeal raised any substantial issues of inconsistency with the certified LCP of the County. At said "substantial issues" hearing, the Commission purported to find that a substantial issue existed, thereby providing a basis for a subsequent de novo hearing with regard to Petitioner's/Plaintiff's project. (10 A.R. 1713-1762, 1861-1867.)

On May 11, 2000, the Commission conducted a de novo hearing on Petitioner's/Plaintiff's Project. 11 A.R. 1868. The Commission adopted the staff report and granted a permit for the proposed development subject to four (4) special conditions which are the subject matter of Petitioner's petition described above.

On August 8, 2000, the Commission refused to process or hold any hearings on Petitioner's/Plaintiff's request for amendment to Coastal Development Permit A-3-SLO-99-083.

STANDARD OF REVIEW

The standard of review for the Coastal Commission's decision is the substantial evidence test. (Bolsa Chica Land Trust vs. Superior Court (1999) 71 Cal.App.4th 493, 502-503, citing Sierra Club vs. California Coastal Commission (1993) 19 Cal.App.4th 547, 556-557.) Under the substantial evidence test, the court must indulge in all reasonable inferences in support of the agency's findings. (Burako vs. Munro (1959) 174 Cal.App.2d 688, 692.) The court may not disregard or overturn a finding of fact of an administrative agency simply

because it considers that a contrary finding would have been equally or more reasonable. (Boreta Enterprises, Inc. vs. Department of Alcoholic Bev. Control (1970) 2 Cal.3d 85, 94.) The court may only overturn the factual findings of the agency if the evidence is insufficient as a matter of law to sustain the findings. (Barrie vs. California Coastal Com. (1987) 196 Cal.App. 3d 8, 14.) Put another way, a court may only reverse an agency's decision if, based upon the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency. (Bolsa Chica Land Trust vs. Superior Court, supra, 71 Cal.App.4th 493.)

An administrative agency's decision is presumed to be supported by substantial evidence and the burden is on the petitioner to show there is no substantial evidence whatsoever to support the findings of the agency. (Taylor Bus Service, Inc., vs. San Diego Bd. of Education (1987) 195 Cal.App.3d 1331, 1341.) Substantial evidence has been defined as relevant evidence that a reasonable mind might accept as adequate support for a conclusion. (Id. At 1340.) In determining whether the Coastal Commission's decision is supported by substantial evidence, any reasonable doubts must be resolved in favor of the Commission. (Paoli vs. California Coastal Com. (1986) 178 Cal.App.3d 544, 550; City of San Diego vs. California Coastal Com. (1981) 119 Cal.App.3d 228, 232.) The Commission is the sole arbiter of the evidence and sole judge of the credibility of the witnesses. (Pescosolido vs. Smith (1983) 142 Cal.App.3d 964, 970-971.)

Substantial evidence upon which a decision of the Commission may be based includes opinion evidence of experts, oral presentations at the public hearing, photographic evidence, and written materials prepared by staff. (Whaler's Village Club vs. California Coastal Com. (1985) 173 Cal.App.3d 240, 261; City of Chula Vista vs. Superior Court (1982) 133 Cal.App.3d 472; Coastal Southwest Dev. Corp. vs. California Coastal Zone Conservation Com. (1976) 55 Cal.App.3d 525, 532, 536.)

Accordingly, in this litigation, Petitioner Morro Bay Mini Storage has the burden to show there is no substantial evidence whatsoever to support the Coastal Commission's

findings.

Petitioner contends that "by nature of the issues involved in this case, a heightened standard of review must be applied by the court," citing Nollan vs. California Coastal Commission (1987) 483 U.S. 815 and its progeny. Respondent correctly argues that such "heightened scrutiny" applies only when the government is requiring a property dedication whereas land use conditions are upheld if they substantially advance a legitimate government interest. Landgate, Inc. vs. California Coastal Commission (1998) 17 Cal.4th 1006 summarizes the law that "judicial review of governmental conditions imposed upon development will be more deferential when the conditions are simply restrictions on land use and not requirements that the property owner convey a portion of his property. (Cases cited.)" Landgate, supra, 1022-1023. The Coastal Commission's decision to approve petitioner's permit subject to land use conditions advanced legitimate interests in complying with applicable, existing provisions of the Local Coastal Plan. The Commission correctly argues that its "decision was a common place exercise of the police power to impose land use restrictions, which have long been upheld as advancing legitimate government interest." Therefore, petitioner's request that the Court address six "steps" to analyze a "heightened standard of scrutiny" is denied.

INSUFFICIENCY OF THE EVIDENCE TO SUPPORT FINDINGS

The Court finds that the findings of the Coastal Commission are not supported by evidence.

At the outset, the Court observes the Coastal Commission in this instance was exercising its quasi-judicial capacity to review actions of the local governmental entity, here the County of San Luis Obispo, pursuant to Public Resources Code 30603. A Local Coastal Plan for the County was approved February 25, 1988. (1 A.R. 191 through 9 A.R. 1691) In this case the County approved and conditioned the project and so it is from this that the matter was appealed to the Commission.

The relevant materials which addressed the decisions made in this case are the Coastal Act of 1976 (Public Resources Code Section 30000 et. seq.), the approved Local Coastal Plan

and the County's Coastal Zone Land Use Ordinance (CZLUO).

The Commission made a crucial finding which led to its analysis of the context of petitioner's development, that is, that the development site contains an Environmentally Sensitive Habitat Area (ESHA). From that finding flowed consideration of the policies and ordinance requirements. However, the finding is flawed: the development site does not contain an ESHA. An ESHA is a form of Sensitive Coastal Resource Area (SRA) which itself is defined by Public Resources Code Section 30116 as "an identifiable and geographically bounded land ... area within the coastal zone of vital interest and sensitivity and include "(a) special ... land habitat areas ... as mapped (emphasis added) and designated in Part 4 in the Coastal Plan" (these include ESHA's, wetlands, streams and riparian vegetation, terrestrial habitats and marine habitats). CZLUO 23.07.160 carries this forward in ordinance form by noting that a Sensitive Resource Area to be a (combining) designation on the Official Maps of the Land Use Element to which certain standards are applied for any project within it. The Local Coastal Plan also observes this relationship between the land use element and the Coastal Zone Land Use Ordinance following its statements of policy (5 A.R. 000859). An Environmentally Sensitive Habitat Area is defined generally in Public Resources Code Section 30107.5 and specifically in the Coastal Zone Land Use Ordinance (CZLUO) Section 2311.30 as:

> "A type of Sensitive Resource Area where 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 development. They include wetlands, coastal streams and riparian vegetation, terrestrial and marine habitats and are mapped (emphasis added) as Land Use Element combining designations."

CZLUO Section 23.07.170 sets out the required findings and standards for development within or adjacent to (within 100 feet of the boundary of an ESHA as defined above) and as mapped by the Land Use Element combining designation maps. And the Local Coastal Plan (LCP) in its discussion of the relationship between the land use element and the CZLUO states, "Environmentally Sensitive Habitat Areas are mapped and discussed in the Local Coastal Plan

as Sensitive Resource Areas." The Local Coastal Plan findings state, "the Environmentally Sensitive Habitat areas have been mapped in the land use element and appropriate set-backs from habitat areas have been established. (5 A.R. 000860)

There is no evidence whatsoever in the Administrative Record of a map containing the Project site showing its designation as an ESHA. The Morro Group Biological Assessment makes no reference to a map showing the development site to have been designated an ESHA. Both the Morro Group Report and the Commission made ad hoc decisions that the site was an Environmentally Sensitive Habitat Area simply because an endangered species was found on it and it supported coastal scrub vegetation that provided habitat for the snail. The Commission concedes all this in footnote 3 and goes on to state that it defines Environmentally Sensitive Habitat Areas in its own way, that is, as the "resources exist on the ground, rather than as delineated on a map." The Commission is bound by the definition of the plan it approved and the ordinances implementing it even in its de novo capacity. Public Resources Code Section 30603(b)(1) limits the grounds for appeal to an allegation that the development does not conform to the standards set forth in the certified local Coastal Plan.[1]

The Commission likewise concedes this in its brief but argues for a "strict interpretation of the Local Coastal Plan" which calls for protection of environmentally sensitive habitat areas and for "a liberal reading of the Coastal Act" to essentially find ESHA's wherever habitats may be, including vacant lots in urban areas. Being designated an ESHA is essentially a legislative act which requires notice, at least equivalent to that for passage of a zoning ordinance; see Government Code Section 65854 and Section 65090 (notice by publication). The Commission's designation of Environmentally Sensitive Habitat Areas on a case by case basis simply does not comport with even a liberal reading of the statutes, plan, or ordinances in this case nor with elemental due process requirements.

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[1] Petitioner has argued that since the allegation fails, i.e., this was not an ESHA "as mapped" that the Commission has no appellate jurisdiction. Analytically, it seems preferable to note that the allegation was made and that the Commission's decision on the allegation was simply incorrect.

This holding does not require a remand to the Commission for further evidence-taking. The Commission concedes that petitioner's site is not mapped as an ESHA. There is no additional evidence that could be produced.

Even if one were to accept the Commission's approach to Environmentally Sensitive Habitat Areas, in this case the evidence is insufficient to support its finding that the development as conditioned by the County does not provide the maximum feasible mitigation. Petitioner concedes that the development of 2.84 of 3 acres would significantly disrupt the habitat in violation of the Local Coastal Plan ESHA policy 1 and 27. Petitioner further concedes that its development would significantly impact the habitat and is not consistent with the biological continuance of the habitat thus violating ESHA policy 2. However, EHSA policy 2 provides that the plan for development shall provide for the "maximum feasible mitigation measures" to protect the resource. See also CZLUO 23.07.170 to the same effect.

The only expert opinion evidence concerning feasible mitigation was that of the United States Fish and Wildlife agency. That agency opined that a one for one exchange of land was appropriate because "the cleared lot is in a developed neighborhood and is surrounded by roads and houses" while "the mitigation lands are of much higher quality and occur adjacent to protected lands." (12 A.R. 2140-2143). The Commission observes that it frequently offsets unavoidable impacts to sensitive habitats through the replacement and/or protection of an equivalent type and quality of habitat. Staff Report pages 12 and 14. Nevertheless, the Commission chose a 2:1 mitigation to impact ratio. It supports this chosen ratio largely on the finding that the mitigation site is already a protected habitat and so inferentially the environment is not gaining new acreage for the loss of the project site. This inference misses the point that some development will have to be permitted on <u>both</u> sites; the snail will be losing some environment at mitigation site upon its development; the Petitioner's solution of deeding the full 1.79 acres to the State Parks locks in the full 1.79 acres along with .35 acres (represented by the $17,500 deposit) to no development at all.

The Staff Report adopted by the Coastal Commission further argues that restoration of

2.14 acres on the project site is necessary, essentially in order to keep to a minimum the impact of development to the project site. It does so in the face of United States Fish and Wildlife expert opinion that the success of restoration is uncertain. (12 A.R. 002142). It observes that the development site is small and isolated, close to existing development, and not connected to other suitable habitat. The Agency's expert conclusion is that the project site has minimal biological value to the Morro shoulderband snail. The Commission's insistence on restoration of the project site is, therefore, not rationally connected to its so-called combined approach of keeping the impact to the habitat to a minimum. The project site habitat has been impacted majorly already; all the scrub vegetation has been removed; that event has occurred. The Staff Report concedes that restoration efforts will not be completely successful, citing numerous adverse factors. So one wonders why the insistence on restoration other than to penalize the offending land owner. However, this permit process is not about punishment; it is about development within the parameters of the Public Resources Code, the approved Local Coastal Plan and ordinances. Although the Commission seems to observe this in its report at Section C (11 A.R. 001883), it nevertheless imposes a 2:1 ratio in order "to offset the adverse impacts that the grading and vegetation removal has had on coastal resources." The Commission simply cannot do that in the context of this coastal development permit process.

CONCLUSION

For all the foregoing reasons the Petition for a Writ of Mandate is granted.

DATED: March 9 2001

DONALD G. UMHOFER
JUDGE

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 03/28/00			DEPT. 86
HONORABLE DAVID P. YAFFE	JUDGE	C. HUDSON A. GODINEZ, CRT. ASST.	DEPUTY CLERK
HONORABLE 10.	JUDGE PRO TEM		ELECTRONIC RECORDING MONITO
NONE	Deputy Sheriff	D. CASE	Reporter

9:30 am	BS060762	Plaintiff	JOSEPH J. BRECHER (X)
		Counsel	COUNSEL FOR RPI,
	SIERRA CLUB		ROBERT K. BREAK (X)
	VS	Defendant	
	CALIFORNIA COASTAL COMMISSION	Counsel	DANIEL A. OLIVAS (X)

NATURE OF PROCEEDINGS:

ORDER TO SHOW CAUSE, RE: PRELIMINARY INJUNCTION;

Matter comes on for hearing and is argued.

Application for preliminary injunction is denied.

The Sierra Club sues to prohibit Pepperdine University from proceeding with the development of its upper campus because of the impact of such development upon an environmentally sensitive habitat for purple needle grass.

The Coastal Commission approved the development of the upper campus 10 years ago, in 1990, in spite of protests about the effect of the project upon an environmentally sensitive habitat for purple needle grass. Pepperdine University has recently sought an amendment to its coastal permit because of certain changes that it seeks to make in the project, but the evidence shows that none of these changes affect the habitat for purple needle grass. It is not the recent amendment that affects that habitat, but the original development which was approved in 1990.

It therefore appears that the Sierra Club is not likely to prevail on the merits because it is using the recent application for an amendment to the permit to attack a decision of the Coastal Commission that

MINUTES ENTERE
03/28/00
COUNTY CLERK

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 03/28/00			DEPT. 86
HONORABLE DAVID P. YAFFE	JUDGE	C. HUDSON A. GODINEZ, CRT. ASST.	DEPUTY CLERK
HONORABLE 10.	JUDGE PRO TEM		ELECTRONIC RECORDING MONITOR
NONE	Deputy Sheriff	D. CASE	Reporter

9:30 am	BS060762	Plaintiff	JOSEPH J. BRECHER (X)
		Counsel	COUNSEL FOR RPI,
	SIERRA CLUB		ROBERT K. BREAK (X)
	VS	Defendant	
	CALIFORNIA COASTAL COMMISSION	Counsel	DANIEL A. OLIVAS (X)

NATURE OF PROCEEDINGS:

was made 10 years ago. It therefore appears likely that the petition is barred by the statute of limitations contained in the California Coastal Act, Public Resources Code Section 30801.

Notice is waived.

MINUTES ENTERED
03/28/00
COUNTY CLERK

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SURFRIDER FOUNDATION, a non-profit corporation,

Petitioner and Appellant,

v.

CALIFORNIA COASTAL COMMISSION, and DOES 1-50, inclusive,

Respondent.

ARCO OIL AND GAS COMPANY, a Delaware corporation, COUNTY OF SANTA BARBARA, and DOES 51-100, inclusive,

Real Parties in Interest.

2d Civil No. B101510
(Super. Ct. No. 205719)
(Santa Barbara County)

COURT OF APPEAL - SECOND DIST.
FILED
JAN 22 1997
JOSEPH A. LANE, Clerk
Deputy Clerk

Surfrider Foundation (Surfrider) appeals from the trial court's judgment denying its petition for a writ of mandate to direct the California Coastal Commission (Commission) to vacate its approval of a coastal development permit. The permit would allow ARCO Oil & Gas Company (ARCO) to construct the Dos Pueblos golf links project (the project) on property located along the Santa Barbara County (County) coastline, west of Goleta. Surfrider contends the Commission failed to make

on two other parcels. In connection with this consolidation, ARCO's industrial use of the site has declined since 1991. The industrial facilities, however, are operable and ARCO's state leases have about 50 years of oil and gas reserves remaining.

Although the site contains about 60 acres of prime Diablo Clay agricultural soils, there is no evidence that it has ever been operated as a stand-alone farm. The prime soils on site are scattered in isolated pockets, the largest of which is about 17 acres. These pockets are separated by railroad tracks, drainages, grassland and environmentally sensitive habitat areas. Other portions of the site contain non-prime agricultural soils.

The site contains five environmentally sensitive habitat areas. Tomate and Eagle Canyons, located along the western and eastern edges of the site, have streams and riparian habitats. The site also contains a man-made vernal pool and small, scattered patches of native bunch grass. Finally, a harbor seal haul-out and rookery is located on the beach, at the base of the bluffs along the western end of the site.

Two surf breaks, known as Naples and Naples Reef, are located along the western edge of the site. Over the past 30 years, surfers have worn pathways across the site to reach these surf breaks. ARCO views the surfers as trespassers. In an effort to prevent surfers from crossing the site, ARCO has installed fences, posted signs against trespass, and employed security guards to remove surfers from the beach. The site has no legal beach parking. Thus, to reach the beach, surfers and beachgoers must park along the far side of Highway 101, cross the highway, scale at least one barbed wire fence, cross a

imposing further access restrictions. Additional restrictions could include permanently closing vertical access to the beach.

Naples Township Lots. The project site is comprised of 23 separate lots, 21 of which are located within the antiquated Naples Township. The Commission required ARCO to merge all 23 lots into 2 large lots. Within 60 days after the lot merger is recorded, ARCO must record a deed restriction which irrevocably precludes the re-subdivision of both new lots.

Water Supply. ARCO will use reclaimed water, purchased from the Goleta Water District, to irrigate the golf courses. The water will be delivered through a new, eight-inch line to be constructed between the Sandpiper Golf Course and the project, a distance of approximately one mile. The line will carry only non-potable water, may not be converted for potable water, and may not serve any additional users. ARCO will purchase potable water from the Goleta Water District.

Procedural History

The County planning commission and board of supervisors considered the project for nearly two years before approving it. During that time, the County held five public hearings, drafted and adopted an environmental impact report (EIR), and imposed seventy-nine separate conditions on ARCO's conditional use permit (CUP). The Commission's consideration of the project lasted for more than one year and included four public hearings. Commission staff drafted three staff reports, each of which recommended that the permit be denied. Initially, the Commission followed the staff recommendation. It later granted ARCO's request for reconsideration, and voted to approve the project. Surfrider filed its petition for writ of mandate

after the Commission issued final revised findings supporting that decision.

Standard of Review

Our review of the Commission's findings, like the trial court's, is governed by the substantial evidence standard. (Code Civ. Proc., § 1094.5; *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 511 (hereafter, *Topanga*).) We must, "determine whether substantial evidence supports the findings of the [Commission] and whether the findings support" the Commission's action. (*Topanga, supra,* 11 Cal.3d at p. 511.) This requires us to "examine all relevant evidence in the entire record, considering both the evidence that supports the administrative decision and the evidence against it . . . ." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) We must also determine whether the findings address all applicable requirements of the County LCP and the Coastal Act. (*Topanga, supra,* 11 Cal.3d at p. 516; *City & County of San Francisco v. Board of Permit Appeals* (1989) 207 Cal.App.3d 1099, 1109.) Substantial evidence review includes "the duty to determine whether the agency committed errors of law in applying the facts before it." (*Id.*, at p. 1111.)

Although we must consider the entire administrative record, we may not substitute our judgment for that of the Commission. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) Instead, it is the Commission's responsibility to resolve conflicts in, determine the weight of, and draw inferences from the evidence. (*Sierra Club v. California Coastal Com.* (1993) 12 Cal.App.4th 602, 610; *Pescosolido v. Smith* (1983) 142 Cal.App.3d 964, 970-971.)

We may reverse "'only if, based on the evidence before the agency, a reasonable person could not reach the conclusion reached by the agency.' (*McMillan v. American Gen. Fin. Corp.* (1976) 60 Cal.App.3d 175, 186 [131 Cal.Rptr. 462].)" (*Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th 602, 610 [italics and footnote omitted].) Thus, it is Surfrider's burden to demonstrate that "there is no substantial evidence whatsoever to support the findings of the [Commission] . . . ." (*Saad v. City of Berkeley* (1994) 24 Cal.App.4th 1206, 1212.)

Discussion

The Commission Made Adequate Findings.

CZO section 35-172.8 requires findings on nine separate issues before a major CUP may be issued.[3] Only two of those issues (public access and consistency with the intent of the AG-II zone district) were in dispute at the Commission's

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[3] The required findings are: "1. That the site for the project is adequate in size, shape, location, and physical characteristics to accommodate the [proposed] type of use . . . . [¶] 2. That adverse environmental impacts are mitigated to the maximum extent feasible. [¶] 3. That streets and highways are adequate and properly designed to carry the . . . traffic generated by the proposed use. [¶] 4. That there are adequate public services . . . to serve the project. [¶] 5. That the project will not be detrimental to the health, safety, comfort, convenience, and general welfare of the neighborhood . . . . [¶] 6. That the project is in conformance with the applicable provisions and policies of [the CZO and LUP.] [¶] 7. That in designated rural areas the use is compatible with and subordinate to the scenic and rural character of the area. 8. That the project will not conflict with any easements required for public access through, or public use of the property. 9. That the proposed use is not inconsistent with the intent of the zone district."

hearings. Its findings discuss those issues at length and rely on the County's findings to "address the remaining items found in [CZO Section] 35.172.8 as well as other provisions of the LCP not specifically discussed in these findings. To the extent that the County's findings and conditions do not conflict with the Commission's, they are adopted as further support for the Commission's decision."

Surfrider contends the Commission's findings are inadequate because they do not separately address every issue raised in CZO section 35-172.8. Because the Commission adopted only those County findings which "do not conflict with" its own analysis, Surfrider objects that it is impossible to determine which County findings were adopted and, therefore, to determine the basis for the Commission's decision. We disagree.

The Commission's final revised findings are adequate to "enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action." (*Topanga, supra*, 11 Cal.3d at p. 514; *City & County of San Francisco v. Board of Permit Appeals, supra*, 207 Cal.App.3d at p. 1109.) The Commission had no obligation to separately identify each County finding with which it agreed. Instead, it was entitled to avoid making repetitive findings by adopting portions of the County's findings, its staff reports, or any other document in the record. (*Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 556; *McMillian v. American Gen. Fin. Corp., supra*, 60 Cal.App.3d at pp. 183-184.) We conclude that the Commission's analysis is clear enough to allow the parties and the court to determine which County

findings are in conflict with the Commission's findings, and which are not.

Surfrider argues the Commission could not rely on the County's findings because it considered different evidence and a project proposal that was modified after the County made its findings. (*Respers v. University of Cal. Retirement System* (1985) 171 Cal.App.3d 864, 872. ["Allowing the Board to rely on findings from a prior proceeding involving different evidence does not satisfy the purposes of the findings requirement because the prior findings do not reflect consideration of the 'raw evidence' at issue."].) *Respers* does not require more extensive findings. Most of the evidence presented to the Commission was also before the County. To the extent the Commission considered new evidence, it addressed that evidence in its own findings.[4] ARCO's project modifications related only to public access and the merger of the "Naples lots." These modifications were discussed by the Commission and were not so extensive as to prevent the Commission from relying on the County's findings.

The Project Is Not Inconsistent With The Intent Of The AG-II Zone District.

CZO section 35-172.8, subdivision (9) requires a finding that the project is "not inconsistent with the intent of the zone district[,]" for the project site. The project site is located in an "AG-II" zone district. CZO section 35-69.1 provides that the intent of the AG-II zone district is to

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[4] For example, the Commission discussed evidence it received concerning the viability of the site as a commercial farm, and evidence concerning the proposed reclaimed water pipeline.

uses. (CZO § 35-172.1.) The CZO, however, expressly allows some partially inconsistent uses with a major CUP, even in the AG-II zone district. (CZO §§ 35-69.4; 35-172.1.)

Subdivision (9) instead requires a finding that the project is *not inconsistent* with the intent to establish agricultural uses on large parcels and to preserve soils for long-term agricultural use. (CZO § 35-69.1.) The finding that an agricultural use would be very difficult to establish on the site is legally relevant to that question. If the site cannot feasibly support an agricultural use, permitting a different use is not inconsistent with an intent to establish agricultural uses on other, more suitable parcels. Because the Commission found that agricultural use of the site was not feasible, it was entitled to consider whether the project would conflict with agricultural uses on other parcels or prevent the future agricultural use of this one. Having found that neither circumstance would occur, the Commission was entitled to approve the project.

Substantial evidence supports the finding that agriculture would be very difficult to establish on the site. A United States Department of Agriculture (USDA) soils survey determined that the site had enough prime agricultural soils to be used for farming. However, ARCO's soils consultant presented more recent and more detailed evidence to the Commission which cast doubt on the USDA's conclusion. In addition, Fruit Growers Laboratory prepared a soil analysis demonstrating that the site was not suitable for most commercial agricultural uses. Representatives of the County's agricultural community agreed. The County's EIR reached substantially the same conclusion. This constitutes substantial evidence supporting the

Commission's decision. (*Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th 602, 610; *Gherini v. California Coastal Com.* (1988) 204 Cal.App.3d 699, 708.)

Similarly, the Commission was entitled to conclude that the lack of irrigation water would prevent commercial agriculture on the property, even though farmers across the County also contend with water shortages. First, this site does not have a "shortage" of irrigation water. It has no irrigation water at all. There is no evidence that dry farming on the site had ever been profitable. Surfrider submitted the opinion of one expert that the site would support commercial agriculture. Other experts, including representatives of the County's agricultural community, disagreed. In fact, ARCO's consultant testified that a dry farm would operate at a loss and the County's EIR described the site as marginally viable for agriculture. An agricultural use could not support the high cost of bringing irrigation water to the site. Under these circumstances, the Commission was entitled to credit the opinions expressed by ARCO's experts over those expressed by Surfrider's. (*Sierra Club v. California Coastal Com., supra,* 12 Cal.App.4th 602, 610; *Desmond v. County of Contra Costa, supra,* 21 Cal.App.4th 330, 335-337.)

Surfrider attacks the Commission's finding that the project will preserve prime agricultural soils, claiming that ARCO will "bury" those soils, preventing their future agricultural use. The permit conditions, however, require ARCO to remove and stockpile the top soil, amend the subsoils to improve fertility, and then replace the top soil in its original location. These conditions will help to preserve the prime agricultural soils on site. Surfrider's unsupported fear that

ARCO will violate these permit conditions "is not a reason to ignore the substantial evidence in the record." (*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 153.)

Surfrider objects to the Commission's finding that use of the site for a golf course will increase its potential for future agricultural use. According to Surfrider, the property will become too expensive to be used for farming. CZO section 35-172.8, subdivision (9) does not require the Commission to guarantee that land will revert to agricultural use in the future. Instead, it requires only a finding that agricultural soils are preserved for long term agricultural use. For the reasons stated above, the Commission's finding to that effect is substantially supported.

Finally, the Commission's parcel merger findings are supported by substantial evidence. While residential development is generally prohibited in the AG-II zone district, the Supreme Court's recent decision in *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 764-765, creates uncertainty about whether the County may enforce those regulations against Naples lots. ARCO's agreement to permanently merge the lots removes that uncertainty and creates the large parcels favored by CZO section 35-69.1.

The Project Complies With Land Use Policy No. 8-2

Policy 8-2 of the County's Coastal LUP provides: "If a parcel is designated for agricultural use and is located in a rural area not contiguous with the urban/rural boundary, conversion to non-agricultural use shall not be permitted unless such conversion of the entire parcel would allow for another priority use under the Coastal Act, e.g., coastal dependent

industry, recreation and access, or protection of an environmentally sensitive habitat. Such conversion shall not be in conflict with contiguous agricultural operations in the area and shall be consistent with Section 30241 and 30232 of the Coastal Act." The Commission found that the project meets each of these criteria. The finding is supported by substantial evidence.

First, the project provides coastal access and protects the harbor seal haul-out and rookery. These are priority uses under the Coastal Act. (§§ 30210, 30240.) Surfrider argues these features do not amount to a priority use because they are merely "incidental" to the project's "primary" goal of providing golf courses. The argument fails because policy 8-2 requires the Commission to find that the project will "allow for another priority use . . . ," not that it will allow exclusively for such a use. The Commission need not focus solely on the intended "primary" use for the project, but may consider secondary uses in determining whether the project complies with policy 8-2.

Second, the Commission's finding that the project will not conflict with contiguous agricultural uses is substantially supported. The project EIR concluded that project-generated noise and traffic would have an insignificant impact on surrounding agricultural uses. Nor will the project strain existing water supplies. Instead, its use of reclaimed water will free up for agricultural use the water ARCO currently purchases.

Third, the Commission properly found that the project is consistent with Coastal Act sections 30241 and 30242. It concluded that section 30241 did not apply because

"the site . . . does not have the potential to be farmed commercially . . . ."[5] It found the project complied with section 30242 because agricultural use of the site was not feasible, prime agricultural soils would be preserved, and the project was compatible with adjacent uses.

Surfrider argues that section 30241 applies to this project because policy 8-2 requires a finding that the project is consistent with the statute. The argument is without merit. Section 30241 limits the conversion of "prime agricultural land" to non-agricultural use by requiring that such lands "be maintained in agricultural production" to protect the area's

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[5] Section 30241 provides: "The maximum amount of prime agricultural land shall be maintained in agricultural production to assure the protection of the areas' agricultural economy . . . ." Conflicts between agricultural and urban uses must be minimized: "(a) By establishing stable boundaries separating urban and rural areas, including . . . clearly defined buffer areas . . . . [¶] (b) By limiting conversions of agricultural lands around the periphery of urban areas to the lands where the viability of existing agricultural use is already severely limited by conflicts with urban uses or where the conversion of the lands would complete a logical and viable neighborhood and contribute to the establishment of a stable limit to urban development. [¶] (c) By permitting the conversion of agricultural land surrounded by urban uses . . . . [¶] (d) By developing available lands not suited for agriculture prior to the conversion of agricultural lands. [¶] (e) By assuring that public service and facility expansions and nonagricultural development do not impair agricultural viability . . . . [¶] (f) By assuring that all divisions of prime agricultural lands . . . and all development adjacent to prime agricultural lands shall not diminish the productivity of prime agricultural lands."

Section 30242 provides: "All other lands suitable for agricultural use shall not be converted to nonagricultural use unless (1) continued or renewed agricultural use is not feasible, or (2) such conversion would preserve prime agricultural land or concentrate development consistent with Section 30250. Any such permitted conversion shall be compatible with continued agricultural use on surrounding lands."

"agricultural economy[.]" As the Commission found, however, the project site has never been "in agricultural production" and has never made a significant contribution to the County's agricultural economy. Substantial evidence supports these findings. Under these circumstances, section 30241 does not apply.

Even if the statute did apply, the record supports a finding that the project is consistent with it. Section 30241, subdivision (b) permits the conversion of agricultural lands "around the periphery of urban areas . . . where the viability of existing agricultural use is already severely limited . . . ." The project site is on the periphery of a developed area because it is approximately one-quarter mile from the urban/rural boundary and one-third of a mile from a proposed resort hotel complex. Its viability for agricultural use is severely limited by the scattered prime soils, unavailability of water, and potential for division into parcels too small for farming. Because conversion would be allowed under section 30241, subdivision (b), the Commission could properly have found that the project is consistent with the statute.

Surfrider argues the Commission made an irrelevant finding when it concluded that the site is not suitable for commercial agricultural use. According to Surfrider, policy 8-2 applies to all land zoned for agricultural use, even if the land cannot be farmed at a profit. Policy 8-2, however, does not require the Commission to ignore the plain language of section 30241. If the site cannot feasibly be used for agriculture, its conversion to another use will comply with section 30241 because land will not be removed from agricultural production nor will the area's agricultural economy be harmed. The viability

finding is also relevant to the Commission's finding that the project complies with section 30242 because that section allows conversion where "continued or renewed agricultural use is not feasible . . . ."

The Project Will Not Destabilize The Urban/Rural Boundary

Surfrider contends that the Commission did not, and could not find the project complied with Coastal Act and County policies requiring strict adherence to the urban/rural boundary. Surfrider, however, reads these policies too narrowly. Coastal Act section 30241, subdivision (a) does not prohibit all development outside the urban/rural boundary. Instead, it permits development along the periphery of an urban area to serve as a buffer against development in more rural areas. Similarly, the County LCP does not include a policy to prohibit all development outside the boundary. Under CZO section 35-172.8, such development can occur with a major CUP.

Both the Commission and the County concluded that the project would not destabilize the urban/rural boundary because it would not extend public services beyond the boundary or increase pressure to develop surrounding parcels. These findings are supported by substantial evidence. Existing roads, police service and fire protection are adequate to serve the project. The reclaimed water line will not destabilize the boundary because it is sized to serve only this project, and may not be used to carry potable water or to supply other users. Although some contrary opinions were expressed to the Commission, those opinions assumed that the water line could be converted to carry potable water. That assumption was unfounded. Accordingly, the Commission was entitled to

disregard opinions based upon it. (*Lucas Valley Homeowners Assn. v. County of Marin, supra,* 233 Cal.App.3d at pp. 157-158.)

The Project Provides Adequate Public Access

The Coastal Act and the County LCP place a high priority on public access to the shoreline. (See, e.g., §§ 30001.5, 30210; LUP Policy Nos. 7-1, 7-2, 7-18.) To carry out this policy, section 30211 provides: "Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization . . . ." Section 30212 requires all new developments to provide public access to the shoreline "except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources . . . ." The Commission must, however, implement the public access policy "in a manner that takes into account the need to regulate the time, place, and manner of public access . . . ." (§ 30214.)

The Commission found that the project's public access features complied with the Coastal Act and the LCP. Surfrider argues this finding is unsupported because the project does not provide enough public parking, will destroy established access routes along the west side of the property, and will require beachgoers to walk much further to reach the beach. Surfrider also complains that access restrictions designed to protect the harbor seals are unreasonable.

The Commission's public access findings are supported by substantial evidence. First, the permit requires ARCO to provide and maintain open public access to and along the beach. For the first time, beachgoers will enjoy access without parking illegally, dashing across an interstate highway, climbing over barbed wire fences and a railroad track, shimmying down a steep

bluff, or being escorted off the property by security guards. They will have a legal place to park and free access to paved pathways that follow a safe route to the beach. The route will add less than one mile and only a few minutes' walk to the route currently favored by surfers. Although Surfrider complains that the number of public parking spaces is insufficient, the California Department of Transportation agreed that 15 spaces would be adequate.

Nor will the project destroy any access rights that may have been acquired through public use. The Commission did not decide whether such rights existed, nor could it. (§ 30211.) Its permit conditions require ARCO to acknowledge that the question remains undecided. This was sufficient to satisfy section 30212.

Finally, Surfrider's objections to the harbor seal protection conditions are without merit. State and federal agencies informed the Commission that these restrictions were required under federal law. (*See, e.g.*, 16 U.S.C. §§ 1361-1421h.) Even the LCP recommended that access to this area be limited.[6] The record also demonstrates that endangered harbor seals will not breed or raise their pups when humans are present. Under these circumstances, it was reasonable for the Commission to restrict access. (§ 30214.) The permit guards against unnecessary additional restrictions by requiring a public hearing and an emergency permit before public access may

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[6] "In order to protect the marine resources of Naples Reef and the adjacent beach as a hauling out area for harbor seals, intensive recreational use shall not be encouraged. Access to the site should continue to be by way of boats." (Policy No. 7-19.)

be permanently closed. These conditions satisfy both the Coastal Act and the County LCP.

Conclusion

The Commission's findings are adequate, relevant and supported by substantial evidence. Accordingly, the judgment is affirmed. Costs to respondents.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

STONE, P. J.

GILBERT, J.

Patrick L. McMahon, Judge

Superior Court County of Santa Barbara

Deborah A. Sivas, Nicole J. Walthall; Conservation Law Project, for Appellant.

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David C. Fainer, Jr.; Richard, Watson & Gershon a Professional Corporation, and Steven H. Kaufmann, for ARCO, Real Party in Interest.

Stephen Shane Stark, County Counsel, County of Santa Barbara; Alan L. Seltzer, Chief Deputy, for County of Santa Barbara, Real Party in Interest.

DOS PUEBLOS GOLF LINKS

THE OPPONENTS' UNPRECEDENTED"SECOND APPEALS" FROM THE COUNTY-APPROVED CDPs FOR SOIL REMEDIATION AND GOLF COURSE CONSTRUCTION WERE VOID AB INITIO – THE APPLICANT HAS A RIGHT TO PROCEED UNDER THE COMMISSION'S 1994 PERMIT APPROVAL

This legal analysis is directed to the validity of the appeals filed as to the CDPs issued by Santa Barbara County for soil remediation and the golf course. Because the Commission previously approved the Golf Links Project on appeal and that approval was thereafter upheld by the Courts (Surfrider Foundation v. California Coastal Com.), there was no legal right to an unprecedented second round of appeals from the ministerial issuance of a CDP following condition compliance. These "second appeals" were void when made, and should have been dismissed as "patently frivolous" under Coastal Act 30620.6(b), as timely requested by the Applicant. Staff's failure to dismiss the appeals, and then the failure of the staff planner (who, though no longer with the Commission, had full experience with this project since 1994 when his recommendation for denial was overturned by the Commission) to prepare a timely staff recommendation on the appeals caused the extension request, which the Applicant submits it should never have had to make.

A Second Appeal is Not Available Under the County's Coastal Zoning Ordinance

The appeal provisions in the County's certified Coastal Zoning Ordinance (CZO) parallel the appeal provisions of the Coastal Act.

Section 35-182.4 deals with "Appeals to the Coastal Commission." This Section states, in relevant part:

1. "For developments which are subject to the appeals jurisdiction of the Coastal Commission under PRC § 30603, an action by the Board of Supervisors may be appealed to the California Coastal Commission within ten (10) working days from the date of receipt by the Commission of the County's notice of final action by the applicant, an aggrieved person, or any two members of the Coastal Commission. Appeals must be in writing to the appropriate Coastal Commission district office. No appeal may be filed with the Coastal Commission until local appeals have been exhausted on the project permit.

2. In accordance with Public Resources Code § 30603(a), an action taken by the County of Santa Barbara on a Coastal Development Permit application for any of the following may be appealed to the Coastal Commission:
... [a-d, repeating the types of appealable developments set forth in Section 30603(a) of the Coastal Act.]"

These provisions apply only to appeals "on an action by the Board of Supervisors," as was the case in 1993, when the Board of Supervisors approved the Project and the matter was appealed to the Commission.

The argument has been suggested that subparagraph 2 indiscriminately permits an appeal from any "action taken by the County of Santa Barbara on a Coastal Development Permit application." However, Subparagraph 2 necessarily must be read in conjunction with Subparagraph 1, which sets forth all of the specifics which govern appeals:

- "[A]n action by the Board of Supervisors"
- A 10 working day appeal period "from the date of receipt by the Commission of the County's notice of final action by the applicant"
- The right of appeal by "the applicant, an aggrieved persons any two members of the Coastal Commission.
- The requirement that "[a]ppeals must be in writing to the appropriate Coastal Commission district office.
- The prohibition against the filing of an appeal "until local appeals have been exhausted on the project permit."

Because subparagraph 2 does not provide a separate or independent right of appeal to the Commission, it does not contain any of the procedural requirements set forth in subparagraph 1 to guide an appeal from "an action by the Board of Supervisors." Furthermore, subparagraph 2 merely repeats the types of developments which are appealable by, in essence, duplicating the provisions of Section 30603(a) of the Coastal Act. Lastly, subparagraphs 1 and 2 apply only to an action on an application. Here, of course, the action on the application was taken by the County in 1993 and the Commission in 1994. As explained further below, that does not include the process of satisfying conditions which result in the "ministerial" issuance of a permit.

In short, the County CZO does not provide a right of second appeal from the issuance of the "ministerial" CDP. Indeed, no certified LCP provides such a requirement.

A Second Appeal is Not Available Under the Coastal Act

Neither does the Coastal Act provide a right to a second round of appeals from the ministerial issuance of a CDP following condition compliance.

Section 30625(a) of the Coastal Act permits an appeal only as to an "appealable action." It states, in relevant part:

"... [A]ny appealable action on a coastal development permit ... for any development by a local government ... may be appealed to the commission by an applicant, any aggrieved person, or any two members of the commission. The commission may approve, modify, or deny such proposed development ...."

Where, as here, the local jurisdiction has a certified LCP, Section 30603(a) of the Act additionally provides that an appeal is proper only with respect to "an action taken by a local government on a coastal development permit application." (Emphasis added.)

These provisions reinforce that the only appeal permitted under the Act is one taken from the initial local government discretionary action which approves the project. Although the Commission on appeal is permitted to approve, modify or deny the development, this option is not available to the Commission a second time once it has taken action on the original appeal. Case law and opinions of the Attorney General explain that the Commission lacks the authority to reconsider its original decision once made. (Save Oxnard Shores v. California Coastal Com. (1986) 179 Cal.App.3d 140, 149-159; 59 Ops.Cal.Atty.Gen. 123, 126 (1976) ("The Coastal Commission may not, on the basis of subsequently-received significant information, revoke or modify a permit previously issued ... merely because it might have decided the matter differently had the subsequent information been presented at the original hearing.").)

As stated above, the appealable action here was the County's decision in August 1993 to approve a CUP (the County equivalent to the discretionary approval which, in Commission parlance, is the coastal development permit). That County action was appealed to the Commission, which, in turn, approved the application. Significantly (and not surprisingly), the very parties filing the appeals at issue were involved in the lawsuit in which they unsuccessfully challenged that approval in the Surfrider lawsuit.

The County's issuance of a CDP, following the applicant's compliance with all conditions precedent to permit issuance, is not "an action taken ... " on a coastal development permit application" under Section 30603(a). If that were the case, an applicant for a project in a jurisdiction with a certified LCP could be subject to multiple appeals – a "double jeopardy" not authorized under the Coastal Act. That, in turn, could provoke an endless cycle of hearings, appeals, lawsuits and condition compliance -- again, an absurd result neither permitted nor contemplated by the appeal provisions of the Act.

Other Legal Barriers to the Appeals

Finally, there are other legal barriers to reconsideration of the Commission's 1994 approval under the guise of the appeals purportedly taken from the issuance of the CDPs. These include:

- The appeals renew the argument unsuccessfully asserted by Surfrider in connection with the prior appeal and lawsuit that the County's decision to issue the CDP is inconsistent with various policies of the Coastal Act and the LCP. Those arguments may not be revised in connection with a second appeal.

- Both appeals amount to an improper request for reconsideration of the prior County and Commission decisions.

- Both appeals constitute an improper collateral attack on the prior County and Commission decisions since the appellants assert issues they were required to raise, if at all, in their prior unsuccessful Surfrider lawsuit.

- Both appeals involve the very parties in the Surfrider lawsuit, and thus are barred by the doctrine of law of the case.

- Both appeals raise issues which were or could have been raised in the prior lawsuit, and thus are barred by collateral estoppel and res judicata.

DOS PUEBLOS GOLF LINKS

THE STAFF RECOMMENDATION, IF ADOPTED, WOULD RESULT IN AN UNCONSTITUTIONAL TAKING OF THE THE APPLICANT'S PROPERTY, A DENIAL OF SUBSTANTIVE SUBSTANTIVE DUE PROCESS, AND DAMAGES

The Staff Recommendation blithely assumes, with no apparent golf expertise and no evidence, that the 18-hole course may simply be eviscerated and redesigned. Substantial evidence submitted to Staff from the golf course designer himself, Ben Crenshaw, demonstrates otherwise. Adoption of the Staff Recommendation would represent a complete about-face as to the approval this Commission granted in 1994 and the California courts thereafter upheld as valid. The radical reversal position proposed by Staff would result in a denial of development on this property, an unconstitutional taking of the Applicant's property, and a denial of substantive due process.

Staff's position smacks of the same vice that led to a jury award of damages for a regulatory taking which the United States Supreme Court upheld in City of Monterey v. Del Monte Dunes (1999) 526 U.S. 687. In Del Monte Dunes, in a six-year effort, the developer originally submitted subdivision plans for 344 residential units on a parcel where more than 1000 units were permitted. When the planning commission disapproved that plan and informed the developer that a subdivision of 264 unites would be approved, he submitted plans for a subdivision of 264 units. The planning commission disapproved that plan and asked the developer to resubmit a plan for 224 units, which the developer submitted. When the planning commission disapproved the 224-unit subdivision, the developer appealed to the city council, which referred the project back to the planning commission to consider a 190-unit subdivision. The developer submitted a plan for a 190-unit subdivision to the commission. The commission rejected that plan and the developer appealed to the city council.

The council overruled the commission and granted the developer an 18-month conditional use permit. Several conditions were imposed on the permit including open space and environmental limitations. The developer then spent considerable time revising its proposal and taking other steps to fulfill the city's conditions. Their final plan devoted 17.9 of the 37.6 acres to public open space, 7.0 acres to open landscaped areas, and 6.7 acres to public and private streets (including public parking and access to the beach). The developer submitted his plans to the commission as required by the city council. The commission's staff found that the developer had complied with all of the city's conditions and recommended approval.

The planning commission then rejected its staff's recommendation and again rejected the plan, leaving less than two months on the developer's conditional use permit. The developer again appealed to the city council and requested a 12-month extension on the life of his conditional use permit. The city council finally denied the developer any extension and disapproved his plan. By this time, a sewer moratorium was in place.

The Supreme Court noted that after five years, five formal decisions, and 19 different site plans, the developer filed a Section 1983 action and ultimately was awarded $1.4 million in damages. The Court held that the jury properly determined that a city's denial of a development plan was not reasonably related to legitimate public interests in light of the tortuous and protracted history of the case, where the city had denied the developer's proposal five times over a period of five years, each time imposing more rigorous demands. The significant fact in Del Monte Dunes was that the question submitted to the jury "was confined to whether, in light of all the history and the context of the case, the city's particular decision to deny Del Monte Dunes' final development proposal was reasonably related to the city's proferred justifications. (Id. at 706.) The jury in that case held it was not, and the High Court found no error in that instruction. (Id. at 707.)

Del Monte Dunes demonstrates that where an agency creates a tortuous path and protracted history to frustrate a developer's attempts to develop its property, those actions may give rise to a regulatory taking and damages.

Were the Commission to follow the course urged by Staff, this case would undeniably provide the same type of "bad" facts. Like Del Monte Dunes, the efforts to frustrate this project – after approved and upheld by the courts – capped by the current Staff Recommendation for a defacto denial would give rise to a regulatory taking, a denial of substantive due process and liability for damages.

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DOS PUEBLOS GOLF LINKS

THE ALTERNATIVES DISCUSSION IS LEGALLY INADEQUATE AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE IN THE RECORD

Recognizing that its recommendation of denial will result in an unconstitutional taking, the Staff Report offers a legally flawed "Alternatives" discussion which, importantly, is not supported by substantial evidence in the record.

First, the Staff Report concludes (p. 76), with absolutely no evidence of golf expertise, that the proposed course may simply be radically redesigned. Dos Pueblos is a links style course which has been carefully designed to avoid the railroad tracks and the scattered wetlands, drainages and other sensitive resources on the property. Staff's glib assertion does not address how the same habitat concerns would be overcome with a fictitious revised course, and is not remotely supported by substantial evidence in the record.

Second, the Staff Report suggests (p. 77) that even if the 18-hole course were retained, modifications would be required to the 16th, 17th and 18th fairways which "would all require major redesign and substantial relocation." This is not explained, however the evidence before the Commission makes clear that a redesign simply is not possible given the sweeping approach of Staff to current white-tailed kite nests which the experts indicate will likely not even be used again by the birds. By prior letter, dated June 4, 2002, the course designer, Ben Crenshaw, explained the circumstances and economics of the golf course proposal, noting, among other things:

> "[I]t is apparent to me that the recommendations have been made by persons who are not familiar with how golf courses are designed. If this were a housing subdivision, eliminating uses would be understandable and probably easy to accommodate. However, in a golf course there are particular regulations on how to design this golf course, retain the resources and keep it at championship level, which is the only level a lender will finance.
>
> "Therefore, the staff recommendations are fatal to the golf course."

Third, the Staff Report points to the Applicant's 23 Naples lots and states that a development agreement is being negotiated with the *adjacent* landowner for residential use on the upcoast Morehart property. However, that development agreement does not involve this site or this Applicant, and one can only speculate about the outcome of that process, particularly given the long-standing litigation involving the Morehart property and the tortured path this project has had to follow with a previously approved and judicially sanctioned project. To say "there is an alternative for residential development on the applicants' property" at this point (Staff Report, p. 77) – without a substantially more affirmative and detailed commitment by this Commission – is truly illusory at best.

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Fourth, if the Staff is arguing in favor of residential development at Dos Pueblos, then the Commission needs to take into account that the Commission in 1994 found that a residential use is "not inconsistent with the purpose of the AG II Zone District," which would require a reversal of the position it took in 1994. Further, the Commission should consider that, currently, the Naples lots have no domestic water, unlike the Project which proposes to construct a reclaimed water line to serve the golf course use.

Finally, it is astounding that after all the litigation surrounding the Commission's 1994 approval, Staff would toss out the possibility of uses consistent with the Ag II designation, where virtually all of the concrete evidence previously before the Commission demonstrates – without any doubt – that an ag use was not viable. Staff has forgotten the discussion by the Court of Appeal in the Surfrider case (at p. 13):

> ". . . [T]he Commission was entitled to conclude that the lack of irrigation water would prevent commercial agriculture on the property, even though farmers across the County also contend with water shortages. First, this site does not have a "shortage" of irrigation water. It has no irrigation water at all. There is no evidence that dry farming on the site had ever been profitable. Surfrider submitted the opinion of one expert that the site would support commercial agriculture [but without any economic data]. Other experts, including representatives of the County's agricultural community, disagreed. In fact, ARCO's consultant testified that a dry farm would operate at a loss and the County's EIR described the site as marginally viable for agriculture. An agricultural use could not support the high cost of bringing irrigation water to the site. . . . "

In sum, the Alternatives noted by Staff are simply offered in an effort to avoid a "taking," but, as shown, are illusory and wholly unsupported by substantial evidence in the record.

DOS PUEBLOS GOLF LINKS

THE RUNNING OF TIME UNDER THE COMMISSION'S ORIGINAL 1994 PERMIT APPROVAL HAS BEEN EQUITABLY TOLLED

This legal analysis explains why, notwithstanding the Applicant's prior request for extension and subsequent proceeding thereafter in the extension matter, the running of time under the Commission's 1994 CDP has been equitably tolled.[1] Equitable tolling applies during the period the Applicant was disabled from commencing construction because of (1) the improper filing of the second round of administrative "appeals" after the County issued its final ministerial permits for the project, and (2) the unilateral decision by Staff in January 1999 to defer a determination on condition compliance until resolution of the administrative matters pending before the Commission.

In other words, the filing of the appeals and Staffs determination to defer a decision on condition compliance effectively stopped the Golf Links project "in its tracks," and therefore also tolled the running of time. Thus, time yet remains to commence construction under the two-year period set forth in the Commission's original permit approval regardless of any action the Commission might take in the context of extension – namely, the instant hearing on "changed circumstances."

That equitable tolling is applicable under the current circumstances is underscored by the ruling previously made by the trial court in the Surfrider case, which upheld the Commission's 1994 approval of the Golf Links project. In approving the project, the Commission imposed its standard condition requiring that the permit be exercised within a two-year period. The trial court agreed that the filing of the lawsuit by Surfrider disabled ARCO's efforts to comply with conditions of approval, thereby tolling the running of time. Indeed, the tolling provision was expressly set forth in the final judgment upholding the Commission's decision. To have done otherwise would reward project opponents for filing lawsuits in which their positions are rejected by the court -- by simply putting the applicant's permit at risk through delay. Accordingly, the trial court's judgment ordered that:

> "The running of time under the Commission's and the County's permits for the Dos Pueblos Golf Links project is tolled from January 13, 1995 [the date the lawsuit was filed] until there is a final judgment in this case as a matter of law."

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[1] The analysis in this memo is independent of any vested or equitable rights which the applicant may have to proceed with the development as approved by the Commission. (See Tab 7.) Therefore, for the sake of clarity, the memo merely assumes that no vested or equitable rights are present.

Equitable tolling applies no less in the current circumstances where Surfrider initiated an unprecedent and improper second round of "appeals", thereby bringing the permit issuance process to a complete halt and preventing the Applicant from commencing development within the two-year period.

The Facts Which Give Rise to Equitable Tolling

Equitable tolling in the post-judgment context arises as a result of the following facts:

1996-1998	In reliance upon the Commission's decision, as upheld by the Court of Appeal, that Applicant concentrates efforts to satisfy all 80 County and Commission conditions of approval, entailing expenditure of approximately $11 million and development of numerous detailed project plans.
June 1996	The County issues CDP#1 for Abandonment Phase 1(a), pursuant to which ARCO removed productive oil and gas facilities.
Sept 1997	The County issues CDP#2 for Abandonment Phase 1(b), pursuant to which ARCO removed the remaining oil and gas facilities.
Nov 1997	Commission legal staff confirms that the County will handle condition compliance as to the conditions it imposed; Commission staff will review ARCO's access and lot merger documents.
1998	
August 8	Golf Links submits form of access documents required to be recorded for preliminary Commission legal staff review and guidance.
October 8	Golf Links submits to legal staff form of documents required to be recorded (Irrevocable Offer to Dedicate, Three-Party Agreement, Deed Restrictions regarding waiver of liability and public facilities).
October 13	Condition Compliance materials (access and signage plan, a NMFS-DFG County approved Restricted Access Implementation Plan to protect the harbor seal) submitted to Commission staff for review and sign off.
October 20	Commission legal staff approves form of documents required to be recorded (Irrevocable Offer to Dedicate, Three-Party Agreement, Deed Restrictions regarding waiver of liability and public facilities).
November 6	Amendment Application submitted to Commission proposing "tweaks" to the Project and minor modifications to enhance wetland protection.

November 9 County issues CDP#3 for soil remediation.

Nov 24-30 Surfrider (Nathan Post, et al.) and Urban Creeks Council file unprecedented and improper "appeals" from ministerial issuance of Soil Remediation CDP.

November 25 Commission staff member who worked on the original project claims an inability to prepare a staff recommendation on the Amendment Application for the December 1998 meeting.

December 3 Golf Links objects to new "appeals" as frivolous and invalid, given prior appeal process, the Commission's 1994 approval, the lawsuit and the absence of grounds directed to Condition Compliance.

December 3 Golf Links delivers to County access-related documents for recording, after approval of form and content by Commission legal staff.

December 3 County issues Substantial Conformity Determination relating to Project "tweaks" and CDP#4 for Phase II, the golf course.

December 12 County records the Irrevocable Offer to Dedicate 8 public lateral and vertical access easements across the property.

December 14 Staff Report issued recommending approval of the Amendment Application.

December 15 Golf Links submits to Commission legal staff for sign-off documents previously approved as to form and content, including the recorded Irrevocable Offer to Dedicate and Three-Party Agreement, signed by the applicant and Chair of the Board of Supervisors, Gail Marshall.

December 17 Surfrider (Nathan Post, et al.) "appeals" from ministerial issuance of golf course CDP.

December 18 Staff informs Applicant that staff reports cannot be prepared on the "appeals" for the January 13- 15, 1999 Commission Meeting because a new policy establishes a "cut-off" date of December 18 (nearly one full month before January hearing) for mail-out of staff reports.

December 21 Golf Links objects to new "appeals" as frivolous and invalid, given prior appeal process, the Commission's 1994 approval, the lawsuit and the absence of grounds directed to Condition Compliance.

1999

January 7 — Golf Links requests an extension of the Commission's permit approval because of the pendency of the "appeals" and staff's claimed inability to prepare a staff recommendation.

Jan 14-15 — Staff Reports issued recommending "appeals" raise no substantial issue.

January 15 — Commission continues hearing on Amendment Application to February meeting so it can be heard with the "appeals".

January 15 — Commission legal staff informs Golf Links that, despite prior approval and form of access documents and the recording and/or signing by the County of same, revisions must be made to recitals to incorporate the outcome of the pending proceedings.

Oct 16-
Jan 28 — Golf Links makes repeated requests for Commission staff sign-off of access and fencing plans approved by the County and (2) NMFS-DFG-County approved Restricted Access Implementation Plan. Staff defers sign-off until resolution of the pending proceedings.

The Running of Time Under the Original 1994 CDP Approved by the Commission is Equitably Tolled for the Period of the Pendency of the Second Round of "Appeals" Filed

The application of equitable tolling here serves but one purpose: to provide the same two-year period to the Applicant in which to exercise its permit for a complex, multi-million dollar project as has a permittee with an approved project which is not challenged in a lawsuit or subject to a "double" appeal process.

The equitable tolling principle has been employed by the courts in a variety of contexts, but most often in situations involving tolling of the running under a statute of limitations. (See e.g., Addison v. State of California (1978) 21 Cal.3d 313, 319 (running of 6 month limitation period of Govt. Code section 945.6 tolled while plaintiffs action is pending in federal court); Collier v. City of Pasadena (1983) 142 Cal.App.3d 917, 926 (filing of worker compensation claim tolls period for filing pension disability claim).)

As explained in an earlier case involving the Commission, Liberty v. California Coastal Commission (1980) 113 Cal.App.3d 491, 497:

> "In connection with the concept of equitable tolling of limitations periods, not strictly applicable to the facts here, it has been said: 'The [tolling] rule. . . is a general equitable one which operates independently of the literal wording of the Code of Civil

DOS PUEBLOS GOLF LINKS

UNDER THE PRINCIPLES OF VESTED AND EQUITABLE RIGHTS THE COMMISSION IS ESTOPPED TO DENY THE APPLICANT ITS LEGAL RIGHT TO COMPLETE THE GOLF LINKS PROJECT UNDER THE COMMISSION'S ORIGINAL 1994 PERMIT APPROVAL

This legal analysis addresses why, applying the related doctrines of vested rights and equitable estoppel, the Commission would be equitably estopped to deny the Applicant its legal right to develop the Golf Links project in accordance with the terms and conditions of the Commission's judicially-approved 1994 permit approval[1]. This result arises because, in complete reliance upon the Commission's 1994 approval of a CDP for the Golf Links project, and to obtain issuance of final County permits, the Applicant removed all oil and gas facilities from the site (despite approximately 50 years of remaining economic life), entailing an expenditure of approximately $3.5 million in the process.

THE APPLICABLE FACTS

The following facts bear on this discussion. The original permit proceeding before the Commission in 1994 involved an appeal from the County's approval of a Conditional Use Permit (the County's equivalent of a discretionary CDP) for this oil field abandonment and golf course project. The County, in approving the CUP, explained: "The 202-acre project site currently supports ARCO's Dos Pueblos oil and gas production facility which would be entirely abandoned with the development of the Golf Links Project." Thus, on appeal, the Commission described the project, in pertinent part, as follows:

> "Removal of existing oil and gas production facilities, public 18-hole and 9-hole golf course and appurtenant facilities. . .

(Emphasis added.) Specifically, the abandonment portion of the project contemplated the removal of substantial oil and gas facilities, including five single-family homes, 19 other buildings, 23 wells, two large tank farms and miles of oil and gas pipelines.

---

[1] Because these rights have not been judicially confirmed, the Applicant took the prudent course of applying for an extension when it became clear in January 1999 that Staff would not prepare its Staff Report on one of the two the "appeals" filed for the January 1999 meeting. Notwithstanding its position on vested and equitable rights, the Applicant has continued to work cooperatively with Staff and the Commission on the "changed circumstances" issue. However, because the current Staff Recommendation is fatal to the golf course, it now becomes necessary for the Applicant to assert its position on this fundament issue.

In approving the project, the Commission therefore approved and required abandonment of the oil and gas use before construction of the golf course. The Final Revised Findings adopted by the Commission explain that "[t]he project would replace the existing oil and gas facilities with a public golf course, substantial public beach access and a coastal trail system." (Final Revised Findings, p. 15.) Importantly, the Final Revised Findings further acknowledge the value of the oil and gas operation, noting that if the project proposed were not approved, "the site could be returned to oil and gas production without any additional permits. . . ." (Final Revised Findings, p. 13.)

The Commission imposed two conditions on its grant of a permit. Special Condition no. 1 provides that the project is subject to all conditions attached to County's CUP approval. This includes County CUP Condition no. 72, which anticipated that separate final CDPs would be issued by the County for abandonment and the golf course. That condition provides, in relevant part:

> "It is anticipated that two separate Coastal Development Permits will be issued; the first for demolition and abandonment of the existing facilities, and the second for the construction of the golf links and related improvements."

The Commission's decision was subsequently upheld by the courts. Surfrider Foundation v. California Coastal Commission, 2d Civil No. B101510.

Thereafter, in reliance upon the Commission's approval of the project, the Applicant spent two years and approximately $3.5 million in removing the oil and gas facilities and $11 million total in a concentrated effort to satisfy all 80 detailed conditions imposed on the project.

As provided in Condition no. 72, the County simply divided the project into phases. In June 1996, the County issued CDP#1 for Abandonment Phase 1(a) (removal of the majority of the oil and gas facilities). Relying on the Commission's approval, ARCO then removed oil and gas facilities. This was followed in September 1997 by the County's issuance of CDP#2 for Abandonment Phase 1(b) (removal of remaining oil and gas facilities, except for an existing concrete wall). Again, in reliance on the Commission's approval, ARCO removed the remaining oil and gas facilities. No appeal was filed with respect to either CDP#s 1 or 2.

But for the Commission's approval of the project in its entirety, these established productive oil and gas facilities would never have been removed. In all, the applicant spent $3.5 million in hard costs on abandonment, and in the process eliminated a use which, over time, would have continued to produce substantial revenues.

DISCUSSION

In California, "if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit." (Avco Community Developers, Inc. v. South Coast Regional Com. (1976) 17 Cal.3d 785, 791.) The vested rights doctrine is "predicated upon estoppel of the governing body" (Avco, 17 Cal.3d at 793), and "is a principal of equitable estoppel which may be applied against the government where justice and fairness require it." (Raley v. California Tahoe Regional Planning Agency (1977) 68 Cal.App.3d 965, 975.)

A more compelling factual situation for application of the vested rights doctrine would be difficult to find. Here, the Commission approved this oil field abandonment and golf course project, and directed that final CDPs be issued by the County. That project approval constituted the promise by the Commission that once substantial work commenced on abandonment, and substantial monies were expended, the applicant would have a vested right to complete the project.

Thus, following issuance of CDPs for abandonment and in reliance upon the Commission's judicially approved decision, the applicant proceeded to remove all oil and gas facilities from the site at a cost of approximately $3.5 million, prematurely terminating a use which would have continued to produce substantial revenues over a 50-year period at between $1.75 and $2 million per year.

Having initiated and completed abandonment activities, the applicant obtained a vested right to complete the project in accordance with the terms and conditions of the approval granted by the Commission.

The California courts additionally have applied the doctrine of equitable estoppel where strict application of the vested rights doctrine might otherwise not apply. For example, in Furey v. City of Sacramento (1979) 24 Cal.3d 862, the California Supreme Court applied an equitable estoppel to bar the City from designating plaintiffs' property as open space. There, the plaintiffs were owners of land in county area intended for transition to urban development. Plaintiffs planned future residential and commercial development of their property consistent the adjoining city's general plan. The city and county the participated in establishing a special sewer district, after which large trunk sewer lines and a sewer treatment facility were installed in the area of plaintiffs' property. Plaintiffs were assessed over $1.1 million for the sewer project. Thereafter, the city annexed the area and enacted an open space ordinance that precluded plaintiffs from realizing all or substantially all benefits from the underlying public improvement for an indefinite period of time.

The Supreme Court concluded that the facts of the case demonstrated gross inequities against the plaintiffs. Thus, although the Court concluded that plaintiffs were not entitled to damages by way of inverse condemnation, it held that equitable estoppel precludes the application of the city's changed land use regulations to plaintiffs. (Id. at 878.)

Likewise, in this circumstance, equitable estoppel would operate to preclude the Commission from preventing the applicant from at least going forward with the project as approved when the applicant has removed its oil and gas facilities.

In another case, Hock Investment Co. v. City and County of San Francisco (1989) 215 Cal. App.3d 438, an apartment complex owner brought an action against the City and City officials challenging the City's condominium conversion ordinance and its decision to deny the owner's application to convert apartments to condominiums. The owner spent approximately $13,000 to meet the obligations require to complete the conversion application. However, after the owner submitted its application, the City passed a new ordinance establishing a moratorium on conversions and the owner's application was denied. The Court of Appeal held that the trial court had abused its discretion in sustaining the City's demurrer since it appeared that the owner could state a cause of action based upon estoppel. The Court explained:

> "Although acquisition of a vested right is generally predicated upon issuance of a building permit or its equivalent, the premise of the doctrine is that the issuance of the permit constitutes a *promise* by the approving agency that a subsequently adopted ordinance will not prohibit the proposed use. When the applicant reasonably relies on that promise to its detriment, an estoppel is created. Here we have an *express promise* by the approving agency, the DPW, that the application will be evaluated under the ordinance in effect at the date of the submittal. If Hock reasonably relied upon that promise to its significant detriment in completing and in filing its application prior to notice of any proposed change in the ordinance, we believe the City would be estopped from applying the new ordinance to [the owner]." (Id. at 448-449; italics in original.)

Thus, on the facts presented here, the principles of vested or equitable rights would serve to equitably estop the Commission from denying the Applicant is legal right to proceed with the Golf Links project under the CDP which the Commission approved in 1994 and the California courts thereafter upheld. At the very least, the Applicant would have the right to proceed with the project as originally approved.

DOS PUEBLOS GOLF LINKS

THE APPLICANT IS ENTITLED TO REINSTATE ITS PREVIOUSLY EXISTING SUBSTANTIAL OIL AND GAS FACILITIES

This legal analysis explains why the Applicant would be legally entitled to reinstate its previously existing substantial oil and gas facilities, if the Commission were to adopt the Staff Recommendation and effectively deny the project. This result is dictated by equitable principles and fundamental fairness, and additionally California case law.

Reviewing the Commission's 1994 decision on the Golf Links project, the Court of Appeal in Surfrider Foundation v. California Coastal Commission explained:

> "During the last 50 years, the project site has continuously been used as an oil and gas processing and storage facility." [Footnote 2]
>
> "[Footnote 2] These include five single family homes, nineteen other buildings, twenty-three wells, two large tanks and miles of oil and gas pipelines. All of these facilities will be removed prior to construction of the project."
>
> "The industrial facilities, however, are operable and ARCO's state leases have about 50 years of oil and gas reserves remaining." (Court of Appeal opinion, pp. 4-5.)

Because the Commission approved this project, the Applicant proceeded with abandonment of the oil facilities, despite – as the Court of Appeal noted – 50 years of remaining oil reserves. But for the Commission's approval, these facilities would never have been removed. The Applicant submits that if the Commission were to adopt the Staff Recommendation and effectively deny this project, then equity and fundamental fairness would require that the Applicant be permitted to reinstate this prior valuable use. The Commission cannot have it both ways.

An analogous case is Furey v. City of Sacramento (1979) 24 Cal.3d 862. There, plaintiffs were owners of land in county area intended for transition to urban development. They planned future residential and commercial development of their property consistent the adjoining city's general plan. The city and county the participated in establishing a special sewer district, after which large trunk sewer lines and a sewer treatment facility were installed in the area of plaintiffs' property. Plaintiffs were assessed over $1.1 million for the sewer project. Thereafter, the city annexed the area and enacted an open space ordinance that precluded plaintiffs from realizing all or substantially all benefits from the underlying public improvement for an indefinite period of time.

The California Supreme Court concluded that the facts of the case demonstrated gross inequities against the plaintiffs. Although the Court concluded that plaintiffs were not entitled to damages

by way of inverse condemnation, it held that equitable estoppel precludes the application of the city's changed land use regulations to plaintiffs. (Id. at 878.) Importantly, the Court further stated however, that "prior to the issuance of any judgment the trial court should afford defendants a reasonable opportunity to make use of the reassessment procedures to which we have adverted above . . . or to take other appropriate action directed toward ameliorating in equitable fashion the gross inequities which here appear." (Id.)

In short, as a matter of equity and fundamental fairness, is the Staff Recommendation is adopted and the project is effectively denied, the Commission must permit the Applicant to reinstate the substantial oil and gas use it removed in direct reliance upon the Commission's 1994 permit approval.

fg 3 of Atkinson let re: Monarchs

CULBERTSON, ADAMS & ASSOCIATES
PLANNING CONSULTANTS

December 9, 2002

Sara Wan, Chair
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Wednesday, December 11, 2002
AGENDA ITEM 22

RE: **Dos Pueblos Golf Links**
Wednesday, December 11, 2002
A-4-STB-154-CC and A2 (Dos Pueblos Golf Links)

Dear Chair Wan and Commissioners:

This firm, together with Steven H. Kaufmann, Esq. of Richards Watson Gershon, represents CPHPAH Dos Pueblos Associates LLC and Makar Properties LLC in connection with the above referenced project.

We have previously submitted a response to your Commission to the staff report dated November 22, 2002. The purpose of this communication is to transmit certain expert letters that were not available at the time we provided our original response.

What are attached are our consultants' – recognized experts in their respective fields – strong reactions to the staff report conclusions. In each case the consultant has taken the staff report remarks and conclusions to task, describing the exact basis of the disagreement. These are not mere semantic conflicts, but clear and convincing critiques of the staff report. Dr. Meade, the leading authority on Monarch butterflies in the area, writes in his letter:

> *"This report has shaken my confidence in the scientific objectivity of the Coastal Commission staff."* (Meade, Letter dated December 4, 2002, p. 3)

In yet another letter, the staff's conclusions are disparaged:

22 pages

EXHIBIT NO. 6
APPLICATION NO. A-4-STB-93-154-R2
Arco Dos Pueblos Golf Links
Applicants' Letter to Commission 12/9/02

Exhibit 6, Page 1 of 22

85 Argonaut, Suite 220, Aliso Viejo, California 92656-4105 • (949) 581-2888 • Fax (949) 581-3599

> *"[We] are certain that the statements by staff regarding their belief that a golf course and the related facilities could still be constructed on the remaining portions of Dos Pueblos are well intentioned. However, it is apparent that persons who are not familiar with how golf courses are designed have made the recommendations. The staff recommendations are fatal to any golf course ever being built on the Dos Pueblos site."* (Crenshaw, Letter dated December 5, 2002) [Emphasis in original]

Dr. Jeffrey Froke of California Wildlife Ecology also wrote a letter criticizing the staff report and correcting many misinterpretations and inaccurate statements. Dr. Froke writes:

> *"Staff has determined that the tolerance (for golfers) of kites on golf-habitat complexes in Monterey County is due either to their particular genetic predisposition for "tolerating disturbance" or individual habituation to golf activities. This is a seriously limited point of view that lacks foundation (staff are not vertebrate ecologists). As a species, White-Tailed Kite is naturally predisposed to tolerating, or habituating, to human activities such as farming, ranching, and golf management; kites' association with cultural landscapes (land disturbance and availability of voles) is widely considered to be a defining characteristic of the species in its California range."* (Froke, Letter dated December 9, 2002, p. 4) [Emphasis added]

Finally, Dr. Galen Rathbun has weighed in. As Dr. Rathbun's letter in our June communication to the Commission amply demonstrates, Dr. Rathbun is an undisputed expert in the Red-legged Frog. Dr. Rathbun comments that a properly designed pond can provide a net benefit to frogs, and can be enhanced beyond that already proposed by the applicant. The applicant is amenable to incorporating those suggestions. Dr. Rathbun systematically de-bunks the statements made in the staff report. Importantly, Dr. Rathbun makes the following observation:

> *"Based on my considerable experience with Red-legged Frogs in coastal creeks and lagoons of San Luis Obispo County, and several visits to potential frog habitats in the area of Dos Pueblos, I speculate that the seasonal creek and small lagoon in the lower reaches of Eagle Canyon probably represent a "sink" for Red-legged Frogs, on average."* (Rathbun, Letter dated November 25, 2002, p. 2)

Dr. Rathbun, in a followup conversation, also noted that Red-legged Frogs are known on Sandpiper Golf Course, and in the watercourse adjacent to that facility, Bell Canyon. This is about 2 miles east of the property. In spite of the fact that Sandpiper was built before any accommodation of Red-legged Frogs was considered necessary, the frogs have no known problems there, and there are no bullfrog infestations.[1] This is compelling, since this golf course is operated without any of the precautions imposed and proposed on Dos Pueblos Golf Links, including but not limited to water quality and chemical protocols.

These are strong criticisms that the Commission should weigh carefully. These are not the anxiety of an applicant with a staff report recommending denial, but rather the thoughtful observations of experts

[1] Pers. Comm., Dr. Galen Rathbun, Andi Culbertson, December 8, 2002

in their fields. We believe that these letters provide more than ample evidence to the Commission of merit of our position.

We look forward to addressing the Commission at the hearing.

Sincerely,

M. Andriette Culbertson

M. Andriette Culbertson
President

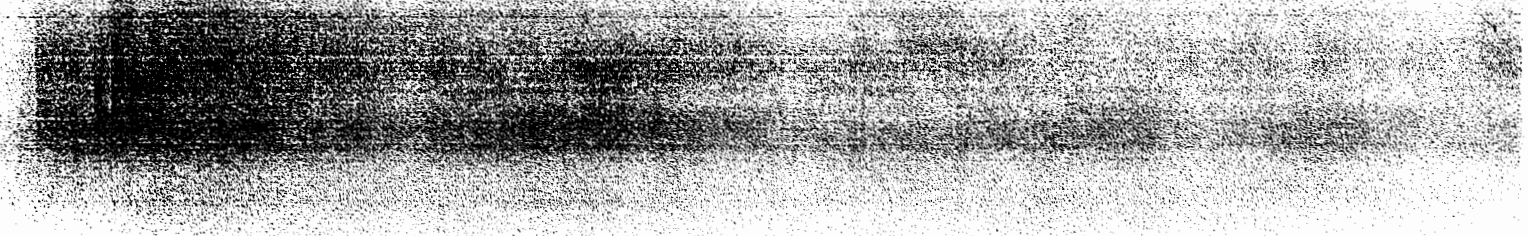
MAC/kc

c: Peter M. Douglas, CCC
Ralph Faust, Jr., Esq., CCC
Chuck Damm, CCC
Jamee Jordan Patterson, AG
Sandy Goldberg, Esq., CCC
Melanie Hale, CCC
Paul Makarechian, Makar Properties
Whitt Hollis, Makar Properties
Samuel Weissbard, Makar Properties
Steve Kaufmann, Esq., Richards Watson Gershon

transmittal of experts letters.doc

Attachments
A Letter from Ben Crenshaw, Coore and Crenshaw dated December 5, 2002
B Letter from Dr. Dan Meade, Althouse and Meade, dated December 4, 2002
C Letter from Dr. Jeff Froke, California Wildlife Ecology, dated December 9, 2002
D Letter from Dr. Galen Rathbun, dated November 25, 2002

ATTACHMENT A



COORE & CRENSHAW

GOLF COURSE ARCHITECTS

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JIM CRAIG
PETE REILLE

December 5, 2002

Mr. R.W. Hollis, Jr.
Makar Properties
P.O. Box 2521
Santa Barbara, CA 93120-2521

RE: Feasibility of Coastal Commission's Assertion That a Golf Course Could Still Be Built With Their Conditions on Dos Pueblos

Dear Mr. Hollis:

I wish that I had been able to change my schedule to be with you at the hearing next week, but prior commitments could not be altered. I really wanted to address the Commission about how special we believe the golf course at Dos Pueblos can be. I am sure my partner, Bill Coore, will be there and available to answer any questions that the commissioners might have regarding the golf course.

You can certainly reference my June 4, 2002 letter in which I, on behalf of Bill, stated that in our professional opinion, the restrictions proposed in the June Staff Report (Application A-4-STB-93-154-CC and A2, Arco/Dos Pueblos Golf Links) would result in making it impossible to build a golf course on the Dos Pueblos property.

I understand the Staff of the Coastal Commission, in their November 22, 2002 Staff Report, has proposed to further expand the portions of the Dos Pueblos that would not be able to be used for a golf course. These proposed restrictions would result in the entire portion of the property, seaward of the railroad and down coast of Tomate Canyon, being unable to be part of the golf course. This would force us to find somewhere else on the property to place the five holes (10th, 11th, 16th, 17th and 18th) that would be impossible to build due to these proposed restrictions.

As you know, Bill and I have spent hundreds of hours walking the entire Dos Pueblos site in the past eleven years. I believe it is accurate to say that we know more about the potential for a golf course to be built on the property than anyone else. And it is our professional opinion that no credible golf course could ever be constructed on the portions of the property proposed by the Staff of the Coastal Commission.

Bill and I are certain that statements by the staff regarding their believe a golf course and the related facilities could still be constructed on the remaining portions of Dos Pueblos are well intentioned. However, it is apparent that persons who are not familiar with how golf courses are designed have made the recommendations. The staff recommendations are fatal to any golf course ever being built on the Dos Pueblos site.

Respectfully submitted,

Ben Crenshaw

Ben Crenshaw

ATTACHMENT B

ALTHOUSE AND MEADE, INC.

BIOLOGICAL AND ENVIRONMENTAL SERVICES

1875 Wellsona Road • Paso Robles, CA 93446 • Telephone (805) 467-1041 • Fax (805) 467-1021

Lynne Dee Althouse, Ph.D.c.
(805) 459-1660 (cell)
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Daniel E. Meade, Ph.D.
(805) 705-2479 (cell)
meadeeco@tcsn.net

December 4, 2002

Sara Wan, Chair
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: Dos Pueblos Golf Links
A-4-STB-93-154-CC, and --A2 (Arco Dos Pueblos Golf Links) AGENDA ITEM W22

Dear Commissioner Wan:

This letter responds to the staff report dated 11/22/02, regarding the impact to Monarch butterflies from the Arco Dos Pueblos Golf Links project.

On page 11 of the report staff cites the number 72,208 as the number of butterflies counted over 28 counting periods at Eagle Canyon. The use of this number to describe the population of butterflies associated with the Dos Pueblos Golf Links project is misleading. This figure was given in our report as a description of the counting effort over the survey period, not as an estimate of population size. The use of this number to describe the butterfly aggregation is simply incorrect. One could just as well claim there were one million butterflies present at the site because 1000 butterflies could be counted every hour for 41.7 days. The actual maximum population at the Dos Pueblos Golf Links site during our survey in 2000-2001 was approximately 4800 counted on October 24, 2000. Using the 70,000 figure to describe the population is a serious ethical breach for any trained scientist. This number is repeated on page 12 without explanation of the counts, and is used again on page 38.

The staff report claims that appropriate setbacks from butterfly trees have not been met by the plan (page 40). I personally staked the locations of the outer edges of trees where Monarch butterflies were roosting as well as those trees where clusters of butterflies where likely to roost near the aggregation site. The proposed plan provides 50-foot setbacks from the canopy edge of trees with observed roosting sites, as well as from trees that could harbor clusters (even if none were observed). A fifty-foot setback is the normal requirement in Santa Barbara County to protect an aggregation site. Since the development proposed for this area is basically lawn, fifty feet is an adequate setback from the edge of the green to the canopy edge of the aggregation site. Requiring a fifty-foot setback from all eucalyptus on the property, or all eucalyptus trees contiguous with an aggregation site is not necessary to protect the aggregation site. Aggregation sites in Santa Barbara County such as Ellwood main, Ennisbrook, The Douglas Preserve,

Lookout Park, Padaro Lane, and Carpinteria Creek (to name a few), have houses or buildings immediately adjacent to or under the canopy edge of trees contiguous with aggregation sites. The proposal for this property is for lawn areas next to the canopy edges of existing trees that are more than fifty feet from butterfly trees. It is important to provide adequate protection for aggregation sites, but the staff is asking for unnecessary setbacks in this circumstance.

A number of pages of the staff report regarding Monarch butterflies address pesticide use (pages 42 through 46). Staff claims inevitable loss of butterflies due to "possible applicator error and sudden wind changes" (page 44). We have addressed these concerns in other correspondence (June 4, 2002 letter to Commissioner Wan, and our November 2001 report, "Monarch Butterfly Aggregations Associated with Eagle Canyon"). It must be understood that the aggregation located on the Golf Links property is only present during the months of October and November in some years (this year no butterflies clustered at this site). This two-month (or less) period is the only time when airborne spray near the aggregation site has potential to cause harm to Monarch butterflies roosting in the site. A simple restriction on spraying when Monarch butterflies are roosting solves this problem. Also, staff again cites average wind speed on the property to conclude that no conditions can be found when spraying is safe (page 43). Staff actually concludes that "the winter season is the only time winds fall below the 5-mile per hour measure." This is a false statement. An average wind speed measure does not show that winds do not fall below the average. Calm days with winds below 5 mph occur on the property during every season.

On page 45 and elsewhere staff makes the claim that the use of some chemicals such as Merit presents a threat to Monarch butterflies because it requires the use of irrigation following application of the pesticide. Staff claims that this prescribed use would be in conflict with our recommendations against applying chemicals to wet grass, or grass when dew is present. Irrigation of chemical into turf is not the same condition over which we expressed concern. Staff is concerned with the possibility that butterflies will be attracted to the irrigated grass, and imbibe irrigation water with pesticide. However, as quoted in the staff report, the directions on this chemical call for "sufficient irrigation or rainfall to move the active ingredient through the thatch." Monarch butterflies will not enter the spray of an operating sprinkler to imbibe water; rather they avoid spray in the air. Also, they remain roosted during rainstorms. Flight into sprinklers or during rainstorms is likely to disable butterflies, and so Monarch butterflies avoid these conditions. Once the chemical has moved through the thatch, it is not available to a butterfly taking water from a blade of grass. The presence of large numbers of Monarch butterflies near the Sandpiper golf course (at the Ellwood sites) for many years suggests that poisoning from applications on the golf course is not a source of high mortality. I have never observed dead monarch butterflies on any golf course near an aggregation site. To place this in perspective, every year hundreds of dead monarch butterflies are found in aggregation sites in Santa Barbara County that have been taken by nascent birds. Also, hundreds of Monarch butterflies are destroyed annually by traffic on US Highway 101, particularly in the Gaviota area. In the dozens of inspections I have done at the aggregation sites near Sandpiper golf course, Marshalia golf course, and the many other sites near lawns (e.g., Lookout Park, Stow Grove Park, La Mesa Park), I have never found poisoned butterflies.

This year, during October and November of 2002, no butterflies were found in the autumnal aggregation site we call the "Upper Western Grove" on the Dos Pueblos Golf Links property. At the western grove, down the slope from the property the maximum number of butterflies observed by us was 2170 on November 30, 2002. The aggregation has moved approximately 100 feet further down the canyon to the northeast from previous years, and is now further away from the Dos Pueblos Golf Links property. This demonstrates the highly variable nature of the location of Monarch butterfly aggregations in Eagle Canyon and the substantial variation in population size that can occur from year to year. Butterfly numbers and aggregation locations vary at Eagle Canyon, a condition that has been consistent for at least the last thirteen years.

Having researched the Monarch butterfly for many years and performed specific observations on their activity at Dos Pueblos, I find it puzzling that staff has never attempted to contact me and discuss the situation.

In summation, it appears that staff has worked diligently to create problems where no real problems exist. Staff claims that setback requirements have not been met, and yet they have. They claim that disturbance will be too great from golf activities, and yet evidence from other sites suggests this will not be the case. They claim that "exposure of Monarch butterfly aggregations in the Upper Western Grove to harmful chemicals appears quite likely" (page 44), and yet such exposure is completely avoidable with simple, and normal use restrictions. Staff claims that the proposed use is "unacceptable and cannot be mitigated to levels consistent with the requirements of Santa Barbara County's certified LCP" (page 46), and yet there are no conditions with respect to Monarch butterfly aggregation sites that are not consistent with the LCP, and furthermore, the County of Santa Barbara has approved the project as designed. These attempts by staff to create problems rather than to understand the solutions are a specious and disappointing exercise. This report has shaken my confidence in the scientific objectivity of the Coastal Commission staff.

Sincerely,

Daniel E. Meade

Daniel E. Meade, Ph.D.

ATTACHMENT C

CALIFORNIA WILDLIFE ECOLOGY
3158 Bird Rock Road : Pebble Beach CA 93953

9 December 2002

Sara Wan, Chair
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, California 94105

Re: Dos Pueblos Golf Links / CCC Agenda Item W22

Dear Chairman Wan:

Herewith, my letter to you responds to the Commission's Staff Report (22 Nov 02) as it relates to the proposed Dos Pueblos project in Santa Barbara County and its possible effects on White-tailed Kites.

My point of view -- including practical expertise and success conserving White-tailed Kite populations -- is from studying and managing California wildlife, especially raptor populations full-time for nearly 30 years. (I am raising my background now because the staff report also did so, however only selectively and without providing useful information or clarity). Presently, and for that past 12 years, I have been in charge of resource analysis, planning and management for the 20,000-acre Santa Lucia Preserve in Monterey County, and there serving as president of the nonprofit Santa Lucia Conservancy that is responsible for Preserve science and stewardship. Prior to the Conservancy, I served as president of the Roger Tory Peterson Institute of Natural History, working with Dr. Peterson through the final years of his life and career, and thereby was constantly ensconced in bird research and conservation. For the preceding eleven years I was a staff ornithologist with National Audubon Society, manager of Audubon's Starr Ranch Sanctuary in Orange County and associate director of the organization's nationwide network of wildlife sanctuaries. Incidentally, and from time to time, I privately consult on wildlife matters, often to do with more interesting golf course projects throughout California. My degrees in resource management and wildlife ecology/ornithology are from Humboldt State University, and my doctorate from UCLA is in biogeography (*ecological responses of bird populations to historical and contemporary landscape change*). I am a Loeb Fellow in Advanced Environmental Studies (landscape ecology) at Harvard University.

Report Page 61

(1) Simple Correction: **Staff stated that the White-tailed Kite also has been known as Black-shouldered *Hawk* and that is not true. As staff also noted, the species was for several years reclassified as the Black-shouldered *Kite*.**

(2) Missing Balance: Although staff fairly emphasized the importance of "voles" (in our area, California Voles), the report incorrectly diminishes the value of other species such as 'gophers" to kites use. In addition to their primary reliance on California Voles, kites are highly capable predators of rodents including Botta's Pocket-Gopher, Western Harvest Mouse and House Mouse, plus numerous species of small birds, reptiles and amphibians, and insects.

Exhibit 6, Page 12 of 23

Report Page 62

(3) Error by Oversight: Staff overlooked a fundamental aspect of kite ecology in its report to the Commission: White-tailed Kites seldom re-use old nests, or even those previously used in the same season (the species commonly double-clutches) for nesting. Any discussions about kites' selection of trees for nesting are meaningless if not to recognize this salient feature of the species.

Report Page 63

(4) Lacks Validation: Referring to use of Dos Pueblos by at least two pairs of kites, staff cites local biologists (Mark Holmgren and Morgan Ball) as claiming that Dos Pueblos is "perhaps the most important site for kites between Goleta and Gaviota, and is potentially as important as Ellwood Mesa and More Mesa *as measured by the number of breeding pairs.*" Despite observed nesting behavior by two pairs, there is evidence only of one pair having *successfully nested and reproduced* on the site ("western pair," 2002). To state that there have been two breeding pairs at Dos Pueblos is either mistaken (unlikely) or intentionally misleading. Staff should reassess its potential ranking of the site, if doing so has ecological merit, based on the confirmation of a single breeding pair.

Elsewhere in the report, staff repeatedly demonstrates its lack of comprehension for and/or confusion with the basic biological terms, *nesting* and *breeding*. For example, of the two pairs observed onsite during 2002, only one (the 'western pair') was observed to have completed a nest (*to actually have nested*); and only that pair was observed to have produced eggs, i.e., to have *bred* or *reproduced*. [Successful breeding requires having fledged young from the nests]. Staff falsely reported to the Commission that the eastern pair was observed to incubate or 'brood' eggs; but no such observations were made or reported, and no evidence of eggs was suggested, by either the applicant's consultants or the Commission staff's own uncompensated observers.

Particularly, on Report Page 66, staff blatantly and falsely reported to the Commission "conclusively that two pairs of kites were successfully nesting on the site..." Again, this was neither observed nor suggested by staff or any of the biologists who studied these birds during 2002.

(5) Lacks Understanding: Staff emphasizes the absence of previously recorded observations of kites nesting on the Dos Pueblos site, i.e., as its basis for 'changed circumstances.' The actual 'circumstance' of this particular raptor is that it is a wanderer whose vagaries are to search for and exploit abundant rodent prey, including nesting where foodstuffs are sufficient to sustain a pair and to raise their young. This 'circumstance' is a constant element of the species' ecology and does not change.

Report Page 63-66

(6) Lacks Perspective: Staff has argued expansively that previous planning surveys, and non-systematic surveys, have failed to produce evidence -- or have produced negative evidence -- that kites had occupied the Dos Pueblos site prior to 1998. In particular, e.g., staff cites a single-year Audubon Christmas Bird Count as failing to specifically identify Dos Pueblos as an occupied site by any of the 20 kites reported for the fixed diameter count circle. However, the staff report is deficient on two points: (1) it does not affirm that Dos Pueblos is inside the count circle, and if it is whether the specific area actually was searched for kites, and (2) it does not mention that the Audubon counts do not publish the specific locations of species occurrences. In other words, the staff has reported nothing to the Commission in this regard.

Report Page 65, Footnote 11

(7) Lopsided Bias: Staff shows a rather strong bias towards information and report excerpts that would substantiate its position that kites were not confirmed to occur onsite prior to 1998, but gives short-shrift in a strikingly pejorative fashion ['kitchen sink'] to a portion of the FEIR that suggests

that kites may be present on site, after all. This prejudicial approach by staff seriously undermines if not extinguishes its own credence in this matter.

Report Page 66

(8) Falsification: Staff has reported to the Commission in a false and misleading manner that "two pairs of [*sic*] white-tailed kites nested on the site of the applicant's proposed development in the spring of 2002." Further, that the applicant's consultants terminated a survey "after establishing conclusively that two pairs of [*sic*] white-tailed kites were successfully nesting on the site..." And, that the "outcome of the easternmost pair *still incubating eggs* when the study ended is unknown...."

Whatever the circumstances that led to termination of surveys by the applicant, I do not understand why the Commission's staff voluntarily ended its own independent observations of the eastern pair before its 'outcome' could be determined. It strikes me that staff was/is more interested in casting doubt on the applicant's efforts than to learn for itself the nature of the eastern pair's nesting efforts. Was the eastern pair important to staff, or not?

Report Page 67

(9) Falsification: Similar to comment (9), staff repeated its false statement to the Commission regarding nesting by two pairs of kites on the Dos Pueblos property, "A second pair of [*sic*] white-tailed kites was *still actively brooding eggs* when the survey was terminated...."

Staff was and certainly remains aware that there has never been substantiation of completed nesting, or particularly production and much less incubation of any eggs at any time by a second pair of kites on the Dos Pueblos property. In addition to receiving reports from both the applicant's consultants and its own non-paid biologists, staff was present on at least one of the field trips conducted by the volunteers during the nesting season.

Report Page 68

(10) Gross Misrepresentation: Staff has failed to understand the methods that I suggested for practical management of kite habitat; and further, staff has carelessly and grossly misrepresented the available information about potential habitat conservation measures to the Commission. This is particularly frustrating because I provided clear descriptions of management options, including case examples, to staff both in writing and in person, onsite.

For example, staff wrote the following in its report to the Commission (*verbatim*):

"*Dr. Froke's proposes to develop nesting opportunities elsewhere on the subject site by means of certain landscaping and management treatments. Dr. Froke believes these measures will allow rodent prey populations to increase for the kites' benefit, thereby offsetting in his estimate, the loss of nesting habitat and foraging that will inevitably result from the construction and operation of the golf course facilities as presently proposed. Dr. Froke would supplement tree plantings, and move mature trees to new areas (although such transplantings of mature specimen trees are often successful). Dr. Froke states that even if the trees are likely to die, they will become snags.*"

Staff's analysis of management alternatives, especially as these have been miscast, is fundamentally flawed and lacks competence.

For clarification,

(a) Tree resources would be managed to create available nesting habitat;
(b) Rodent (prey) populations would be enhanced and sustained by management closer to the ground;

(c) It may be staff's opinion, but I did not say that habitat loss from golf development would be inevitable; and,

(d) Transplantation success rates for mature trees normally are in the 80-95 percent range; and failures are normally mitigated by bonded replacements until target rates are established.

(11) Faulty Calculation: Staff refers to project effects including the loss of 200 acres of kite foraging habitat. This is not true for two reasons: (1) all of the existing 208-acre property is not used (usable) by kites for foraging, and (2) the project will impact only approximately 50 percent of the existing land cover. To suggest otherwise overlooks the available and reported facts.

(12) Lacks Foundation: Staff has determined that new ESHA should incorporate areas that are formed by (a) 200-foot radial areas surrounding confirmed nest trees, (b) 100 to 200-foot radial areas around trees that have been observed used as perches by kites, and (c) same measured areas around trees that were used by kites for other behaviors in previous years. There have been so few observations made of the kites' use of trees onsite, and these during limited and non-systematic visits to the site, that to single-out any trees besides those used for nest construction by the two nesting, or would-be nesting pairs, and immediate groves lacks scientific credence. Notwithstanding the fact that kites will seldom or rarely reuse nests or reoccupy nest trees, only these trees bare any special connection to nesting kites, i.e., that reasonably could be identified as ESHA.

Report Page 69

(13) Correction: The staff report incorrectly characterized my proposal for tree management and particularly inducement of new snags for kite perching habitat. What I told staff on a recent field trip to Dos Pueblos was that certain large trees that would be cut (terminated) could be hauled to out-of-play areas next to the golf course, e.g., in combination with protected tree groves, and placed back in the ground to become relevant snags for kites and other wildlife species. I have directly supervised this method and observed its ready adoption by kites and other perching raptors.

(14) Disagreement: Staff has determined that the tolerance (for golfers) of kites on golf-habitat complexes in Monterey County is due either to their particular genetic predisposition for "tolerating disturbance," or individual habituation to golf activities. This is a seriously limited point of view that lacks foundation (staff are not vertebrate ecologists). As a species, the White-tailed Kite is naturally predisposed to tolerating, or habituating, to human activities such as farming, ranching, and golf management; kites' association with cultural landscapes (land disturbance and availability of voles) is widely considered to be a defining characteristic of the species in its California range. It is the specific nature of the habitat and the manner of human activities that will determine whether kites become tolerant thereof.

Report Page 70-71

(15) Stultified: Staff attempts to create doubt as to whether rodents, especially voles, will effectively proliferate and inhabit the Dos Pueblos site following proposed golf development and habitat restoration activities. Staff has been provided sufficient evidence to the contrary, and it has produced no data or information to support its position. Further, staff argues that rodent management as proposed for Dos Pueblos would be experimental and lacks evidence of likely success: "the proposals are also speculative and untried and lack proof of performance." For staff to suggest that rodent management (population enhancement) is experimental and speculative defies reason.

California Voles and other primary prey species for kites are among the most abundant and widespread vertebrates in California and these species are especially productive in native, marginal

and disturbed grassland environments along the coastal regions of our state. Arguably, we would not have White-tailed Kites in existence today were it not for the extreme adaptability of California Voles and House Mice to disturbed and changing environmental conditions.

Staff has been shown occupied rodent and kite habitat, and foraging kites adjacent to several golf courses in Pebble Beach, particularly the Monterey Peninsula Country Club. Working with golf course architects and managers, I was responsible for the native habitat layout and vegetation (native grassland) planning associated with the Dunes Course at Monterey Peninsula Country Club. The vegetated areas that I designed and that were incorporated into the Dunes Course reconstruction, approximately five years ago, are used on a year-round daily basis by at least one pair of breeding kites. These birds are the only known breeding kites on the Monterey Peninsula, having arrived to the purpose four years ago.

Staff also was given a description of vole and kite occupancy of the Preserve Golf Club that is located a few miles inland of the Monterey Peninsula. This also was one of my projects, where I coordinated the layout and planting of native grasslands alongside the course. Kites moved into the area within the first six months of course completion (1998), and have continuously and successfully exploited the onsite prey and nested since. Elsewhere on the Santa Lucia Preserve, where our active land management has restored several hundred acres of native grassland, kites have moved in and nested. Kites had not nested on the Preserve for at least the eight years preceding the stated management changes and site enhancements.

(16) Worth Discussing: Staff highlighted the part of my proposal that would have the golf superintendent determine when a "bonafide [rodent] emergency" would threaten golf putting greens, and thereby to enact active rodent reduction techniques. The point raised is that of a potential conflict between management for golf *versus* kite prey objectives. The Commission could resolve this matter quickly by conditioning a clearer definition of "emergency," something to the effect of when burrowing rodents (typically pocket-gophers) actually have penetrated the greens complex simultaneously at more than one location and for greater than 36 inches into the putting surface.

For the Commission's information, California Voles are near-surface dwellers that prefer grassy environments with seed-rich and thatchy overhead cover, both conditions that are definitively absent from golf turf and putting environments. The risk of vole invasions onto or underneath greens-complexes i.e., to create an emergency condition that would require treatment, is very low.

In general,

(17) Legal Status: Staff has identified White-tailed Kite as fully protected species pursuant to the California Fish and Game Code, section 3511.

Fully protected birds or parts thereof may not be taken or possessed at any time and no provision of this code or any other law shall be construed to authorize the issuance of permits or licenses to take any fully protected bird and no such permits or licenses heretofore issued shall have any force or effect for any such purpose; except that the commission may authorize the collecting of such species for necessary scientific research and may authorize the live capture and relocation of such species pursuant to a permit for the protection of livestock. Legally imported fully protected birds or parts thereof may be possessed under a permit issued by the department.

To prevent any misunderstanding by the Commission, I will affirm that for my involvement in the proposed Dos Pueblos project, there will be no challenge to or violation of CFGC 3511; and specifically that the risk of taking or possessing kites by the project or its participants is very near nil.

Exhibit 6 Page 16 of 22

Certainly, as you can tell by my comments, I am concerned about the fundamental lack of qualification and scientific comprehension shown by the staff in its report to the Commission. As a result, there is not enough information or useful opinions in the report to encourage a worthwhile debate or dialogue; and therefore, my purpose has been mostly restricted to identifying what I feel are telltale deficiencies in the staff's arguments.

Personally, I am chagrined and discomfited by staff's disregard for the ecologically sound raptor enhancement strategies that I took the time to describe and share. It's dismissal of a basic and supportable wildlife management method leads me to assume that staff does not appreciate the importance of kite conservation. As a practicing ecologist and not as a consultant *per se*, I feel strongly that every opportunity to improve the welfare of kites -- and other raptors -- should be examined carefully by permitting agencies, then incorporated as management conditions to projects that have the land and financial resources to cause implementation. If staff has a bias against Dos Pueblos that motivates it to sweep aside realistic conservation solutions, these should be brought forward and dealt with in an honest and credible fashion.

Thank you, Chairman Wan, for reading and considering the messages of my letter. I will be in attendance at your hearing on the matter and thereby available to answer questions you may have of me.

Sincerely,

Jeffrey B. Froke, Ph.D.

ATTACHMENT D

Galen B. Rathbun
Post Office Box 202
Cambria, California 93428
Voice/Fax 805/927-3059
Email: grathbun@CalAcademy.org

25 November 2002

Ms. Andriette Culbertson, President
Culbertson, Adams & Associates
85 Argonaut, Suite 220
Aliso Viejo, California 92656

Dear Ms. Culbertson,

This is a follow-up letter to the one I wrote you on 5 March 2002 with regard to the design of a reservoir on the proposed Dos Pueblos Golf Course. I will not review my background or familiarity with Dos Pueblos here because I already covered this in my March letter. In this letter, you asked that I provide you with a summary of my professional views on designing the Dos Pueblos reservoir so that it would be an asset to California Red-legged Frogs (*Rana aurora draytonii*).

Background - Frogs

Unfortunately, there is little information on the distribution, abundance, and status of Red-legged Frogs in the various wetlands in the general area of the proposed Dos Pueblos Golf Course. What is known is based on a few short-term surveys. Some of these survey reports are rather brief and others are not easily obtained, thus the quality of the field work is difficult to assess.

It is known or suspected that Red-legged Frogs occur in the larger coastal creeks and lagoons in the area, including Dos Pueblos, Eagle, Tecolote, and Bell creeks. Red-legged frogs also occur in the pond on the Sandpiper Golf Course. The limited information available suggests that the area currently supports a metapopulation of red-legged frogs. Which of the various wetland habitats represent sources and sinks in terms of frog metapopulation dynamics is not known. It is also not clear whether this metapopulation is large and varied enough to persist under the increasing encroachment of urban developments, with the associated problems of habitat loss, exotic predators (e.g., bullfrogs), and elevated populations of some native predators (e.g., raccoons).

Based on my considerable experience with Red-legged Frogs in coastal creeks and lagoons in San Luis Obispo County, and several visits to potential frog habitats in the area of Dos Pueblos, I speculate that the seasonal creek and small lagoon in the lower

reaches of Eagle Canyon probably represent a "sink" for Red-legged Frogs, on average. However, because first-year and second-year Red-legged Frogs are found at wetland sites in the area, including those not suitable for breeding in most years, there are undoubtedly breeding ponds or pools in the area that are net producers of frogs (e.g., sources in terms of metapopulation dynamics).

Background - Habitats

The area that includes the proposed Dos Pueblos Golf Course is becoming urbanized, with the result that wetlands in the area that currently support Red-legged Frogs are becoming increasingly altered. This is mostly the result of the proliferation of hard-surface developments (e.g., malls, roads, housing, etc.). As the wetland sites where frogs occur become degraded and isolated, it becomes increasingly difficult for the frogs to move between the various sites. The result will be the gradual extinction of frogs at individual sites and the eventual disappearance of the local frog metapopulation.

Golf courses, out of all the existing and proposed developments in the area, have the greatest potential for having a relatively low impact on the current frog metapopulation. With careful planning, these golf courses could actually enhance the frog metapopulation.

Dos Pueblos Golf Course and Red-legged Frog Habitat

Most biologists familiar with Red-legged Frogs would probably agree that it is important for frog metapopulation dynamics to maintain a mosaic of summer and winter habitats in the Dos Pueblos region. To achieve this, the current wetland habitats used by frogs must be maintained. Unfortunately, many of these habitats have already been impacted by development (e.g., Bell Canyon). If current and future development projects could be encouraged to maintain and even increase the mosaic of habitats suitable for frogs, then this metapopulation may persist even with some additional conversion of wild and agricultural lands to urban uses.

The importance of Eagle Creek and its lagoon for Red-legged Frogs has not been well established. In my experience, creeks and lagoons this small are not likely to be important sources of Red-legged Frogs in any but exceptional years when the interplay of fresh water runoff and sea water intrusion allow eggs to hatch and tadpoles to change into froglets. However, the lagoon also has the potential of providing summer habitat in some years for frogs dispersing from more reliable breeding habitats in the area.

The plan for the Dos Pueblos Golf Course currently has an irrigation pond designed to hold water supplied by local effluent treatment plants. The pond would be located adjacent to Eagle Creek. This pond could be designed to serve as a reliable Red-legged Frog breeding site. If the pond were designed to be "frog-friendly," the golf course could become an asset in terms of supporting the local Red-legged Frog metapopulation. As with any habitat, however, frogs would not be immune from predation or incidental mortality from human activities. But, if appropriately designed the pond could have a net benefit to the local frog metapopulation. This would be preferable to building a pond that

would have a negative effect (a "sink") or even a neutral effect in terms of its contribution to the local frog metapopulation.

General Guidance in Pond Design for Frogs

In preparation for a workshop sponsored by The Wildlife Society aimed at training biological consultants in issues related to Red-legged Frogs, Norm Scott and I prepared an essay entitled "Stockpond Management for the Benefit of California Red-legged Frogs (*Rana aurora draytonii*)." A copy of this document is attached. Although aimed at stockponds, virtually all the information contained in this document is directly applicable to the development and maintenance of golf course ponds as habitat for Red-legged Frogs. However, some of the design features, as well as methods of managing water and exotic animals, would need to be tailored for the Dos Pueblos reservoir.

Water Quality

One issue that is normally not important in the management of stockponds is the use of treated urban water, with its potential to contain contaminants detrimental to frogs. In my experience, and many other biologists familiar with red-legged frogs, breeding in ponds that contain treated urban wastewater does not seem to be a serious problem. For example, there are few if any reports of reproductive failure or deformities from frogs in these situations. However, there are virtually no data related to this issue and in this type of situation it becomes a question of subjectively assessing the relative risks involved. In the case of Dos Pueblos, without improving the current mosaic of habitats in the area, I suspect that the frog metapopulation will decline and eventually collapse. Given the relatively short life expectancy of Red-legged Frogs, the risk of significant problems associated with the accumulation of contaminants from treated wastewater may be low compared to the known risk of disappearing habitat.

A Reservoir With Unique Challenges

It is not difficult to design and build ponds suitable for Red-legged Frogs; the most important characteristics are summarized in the attached document. However, the reservoir at the Dos Pueblos Golf Course includes several complicating challenges, including accommodating a difficult water supply and demand regime, conforming to the wishes of regulatory agencies, and satisfying interest groups with conflicting agendas. Given these factors, a reservoir plan will undoubtedly require several iterations and will probably be the product of numerous creative ideas. To start this process, I propose two possible general designs for the reservoir. Both assume, perhaps incorrectly, that there is little flexibility in the supply of water to the reservoir and its use by the golf course. This water regime apparently will result in a 2-11 foot daily draw-down, which makes it difficult to design a pond that will be used by frogs for breeding.

Possible Reservoir Designs

The first approach would be to reduce the surface area of the reservoir as much as possible, relying on depth rather than surface area to reach the capacity needed. The design features of the reservoir should follow the recommendations that I made in my 5 March 2002 letter. Nearby, a separate frog pond might be built. This pond need not be large, but it should include all the features recommended in the attached document.

The second possibility would be to "join" into one system a frog pond and the reservoir. This would include the features I outlined in my 5 March 2002 letter for the reservoir, but the reservoir would include an arm or section on one side that would include features important to frogs, as outlined in the attached document. Consideration might be given to designing the water input so that it cascades down a short rapids/waterfall into the distal portion of the frog section, and thereby becoming aerated and exposed to sunlight. The water would then move slowly through the frog section and into the adjoined reservoir via some type of skimming device that would prevent frog eggs and tadpoles from entering the reservoir. The frog section would have all the features outlined in the attached document so that the frogs would have suitable vegetative cover for protection from predators, shallow and warm sections for breeding, and a deep portion for further escape from predation.

In both concepts outlined above, the reservoir itself would still experience the daily draw-down, but it would be suitably sloped and rough-surfaced to allow frogs to come and go. Also, the water bodies would be constructed so that they could be drained if necessary to break the life cycle of any exotic predators that might become established to the detriment of Red-legged Frogs. In any case, the routine maintenance of the golf course will need to include keeping the water system "frog-friendly" indefinitely. Therefore, designing a system that is practical to maintain becomes important.

It is likely that the above reservoir concepts will need further refinements. I suspect that the collective ingenuity of the golf course designers, water system engineers, and wetland and frog biologists may be able to produce a water system that would provide the needs of the golf course as well as Red-legged Frogs, and satisfy the regulatory agencies.

If you have any questions about any of my thoughts above, or would like me to expand on any of the points, please let me know.

Sincerely,

Galen B. Rathbun

Galen B. Rathbun, Ph.D.

EXHIBIT NO. 17
APPLICATION NO. A-4-STB-93-154-RE
ARCO Dos Pueblos Golf Links
Biological Resources Map
3 pages

HABITAT TYPES/LANDCOVERS:

BCH	Beach/Sand
BLUFF	Coastal Bluff
CBM	Coastal Brackish Marsh
CSS	Coastal Sage Scrub
CYP	Cypress
DEV	Developed
DW	Disturbed Wetland
EUC	Eucalyptus
FWM	Freshwater Marsh
IP	Iceplant
NNG	Non-native Grassland
OAK	Oak Tree
OC	Open Channel (unvegetated)
ORN	Ornamental Planting
P	*Pittosporum*
PIN	Pine Tree
POS	Poison Oak Scrub
SWS	Southern Willow Scrub
TS	Tamarisk Scrub
VGL	Valley Needlegrass Grassland
VP	Vernal Pool

Waters of the U.S.:

Waters of the U.S. - Intermittent

Waters of the U.S. - Ephemeral

*NOTE: Measurements in feet indicate channel width between markers.

Data Station

DATE: 05/03/02

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SENSITIVE ANIMAL SPECIES:

CBP	California brown pelican
CRLF	California red-legged frog
HS	Harbor Seal
MB	Monarch butterfly[1]
TWG	Tidewater goby
WTK	White-tailed kite[2]

Note: A number after a WTKI label indicates the group number.

A — Accumulation of leaves, sticks & debris[2]

P — Primary perches[3]

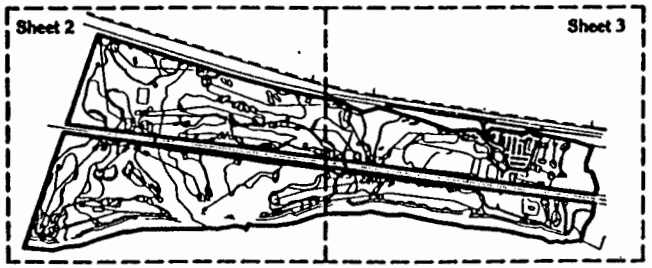
WTK foraging area[2]

MB aggregation site[1]

[1] "Monarch Butterfly Aggregations Associated With Eagle Canyon", Althouse & Meade, Inc., revised November 2001.
[2] "Raptor Survey For Dos Pueblos Golf Links", Dudek & Associates, Inc., November 2001.
[3] "Dos Pueblos Golf Links White-tailed Kite Nesting Survey", Pacific Southwestern Biological Services, Inc., April 2002.

SOIL REMEDIATION AREAS:

- A: Mercury Manometer
- B: Former (208) Tank Farm
- C: Warehouse Storage
- D: Former Gas Compressor
- E: Well 129-2
- F: Active (129/208) Tank Farm
- G: Mudpit Near 208-19 Well
- H: Concrete Abutment



KEY MAP

N

Scale: 1" = 1500'

SENSITIVE PLANT SPECIES:

St *Southern tarplant (Hemizonia parryi ssp. australis, a.k.a. Centro*

- April 1991 survey[1]
- May 1992 survey[2]
- July 1992 survey[3]
- FEIR, March 1993[4]
- May 1995 survey[5]
- October 1998 survey[6]
- November 1999 survey[7]
- October 2000 survey[8]
- September 2001 survey[9]
- March 14, 2002 survey[10]

Note: Number indicates individual plant counts at that location.

Limits of greatest density of Southern tarplant

Ca *Cliff aster (Malacothrix saxatilis ssp. saxatilis)*

- April 1992 survey[11]
- FEIR, March 1993[12]

[1] "Biological Resources Analysis: Section IX, Interface Planning and Counseling Corporation, revised October 1991.
[2] "Dos Pueblos Golf Links Plant Survey", Rindlaub, May 1992. Survey did not specify the location of the population, only verified the plant was located upon the property per the October 1991 survey.
[3] "Wetland Classification and Environmental Analysis for the Dos Pueblos Golf Links" Interface Planning and Counseling Corporation and Ferrin, August 1992. "The entire length of each drainage potentially impacted by the proposed development was surveyed by walking the corridor, either in the bottom of the channel or along the bank. Detailed field noted and photographs were recorded for each drainage system, and a comprehensive plant species list was compiled." Page 11. No additional locations of Southern tarplant were identified.
[4] "Final Environmental Impact Report for the ARCO Dos Pueblos Golf Links Project, County of Santa Barbara, March 1993. The FEIR identifies "A small population of southern tarplant was located by Interface (1991) immediately south of the coastal road and west of Drainage #3 (Figure 5.1-1), as verified by the EIR consultants."
[5] "Letter", Bowland & Associates, May 9, 1995. No southern tarplant was located in the previously identified location.
[6] "Fax Memo", Bowland & Associates, October 6, 1998. The approximate location of a population of 4,505 plants in the vicinity of the former warehouse and loading dock was postulated within an area approximately 66 meters long by 25 meters wide equaling 1650 square meters.
[7] Untitled Survey for Tarplant (all species), Dudek & Associates, Inc. The area of these populations was not estimated, nor surveyed, due to the approved mitigation being based on numbers of plants, not area.
[8] Untitled Survey for Tarplant (all species), Dudek & Associates, Inc. The area of these populations was not estimated, nor surveyed, due to the approved mitigation being based on numbers of plants, not area.
[9] Untitled Survey for Tarplant (all species), Dudek & Associates, Inc. The area of these populations was not estimated, nor surveyed, due to the approved mitigation being based on numbers of plants, not area.
[10] Letter", Storrer Environmental Services, April 1, 2002. Approximate distribution of the former warehouse and loading dock.
[11] "Dos Pueblos Golf Links Plant Survey", Rindlaub, May 1992.
[12] "Final Environmental Impact Report for the ARCO Dos Pueblos Golf Links Project", County of Santa Barbara, March 1993.

Exhibit 3
A-4-STB-93-154-CC-A2
BIOLOGICAL RESOURCES MAP
3 PAGES

Dos Pueblos Golf Links

Biological Resources Map - Sheet 1 of 3

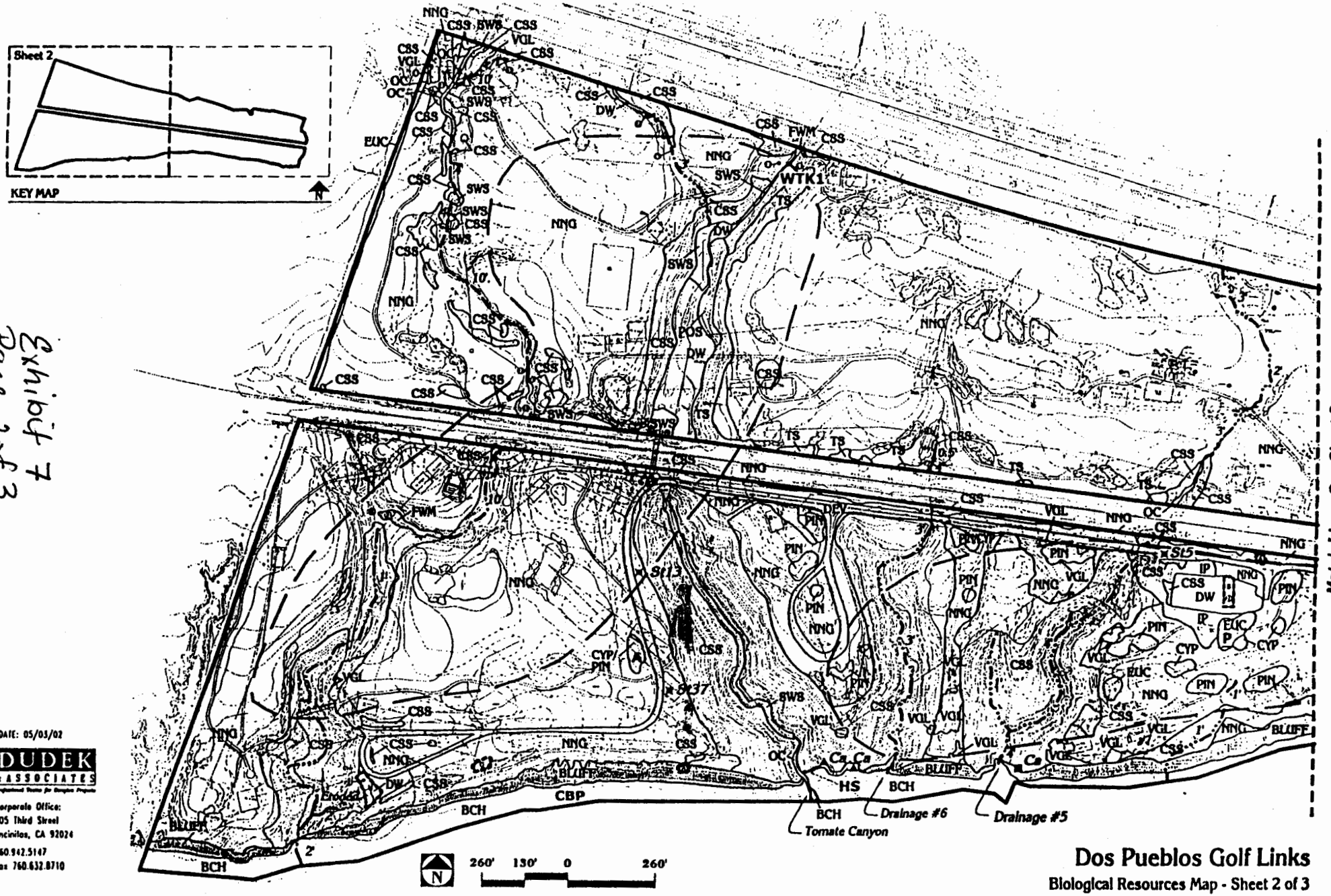


Exhibit 1
Page 2 of 3

DATE: 05/03/02

DUDEK & ASSOCIATES

Corporate Office:
605 Third Street
Encinitas, CA 92024
760.942.5147
Fax 760.632.8710

Dos Pueblos Golf Links

Biological Resources Map - Sheet 2 of 3

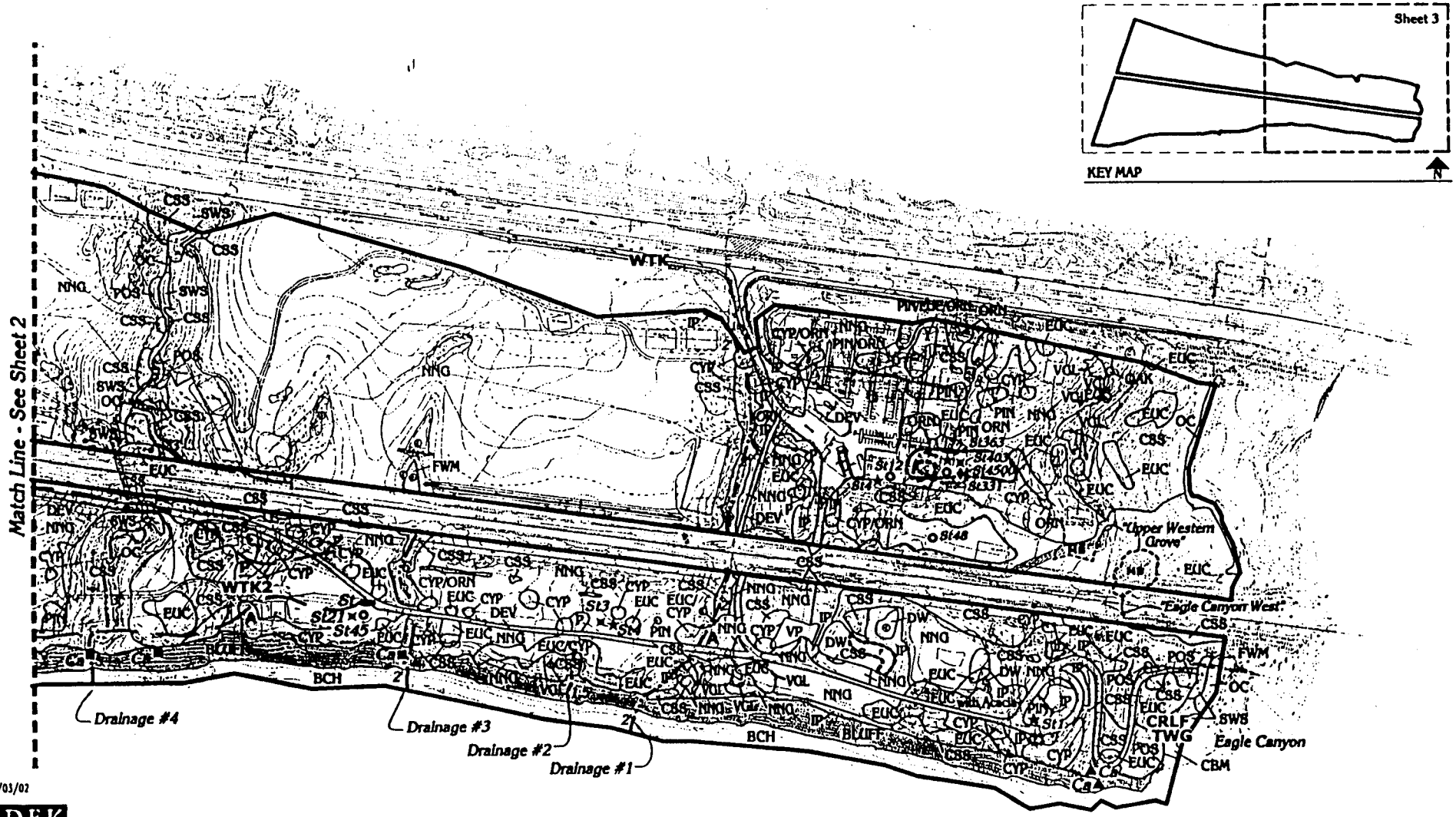


Exhibit 4 page 3 of 3

Dos Pueblos Golf Links

Biological Resources Map - Sheet 3 of 3

STORRER
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COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

2565 Puesta Del Sol Road #3
Santa Barbara, CA 93105
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Kristen Getler
Santa Barbara County
Planning & Development Department
Energy Division
30 E. Figueroa Street, 2nd Floor
Santa Barbara, CA 93101

April 1, 2002

Re: Status of Southern Tarplant at the Dos Pueblos Golf Links Project Site

Dear Ms. Getler:

This correspondence provides background information relative to the distribution of southern tarplant (*Hemizonia australis* ssp. *parryi*) at the Dos Pueblos Golf Links project site. Discussions and observations from our meeting with California Coastal Commission (CCC) staff on March 14, 2002 are summarized. I have also included some insights concerning the regional occurrence, life history, management considerations, and restoration potential for southern tarplant.

My familiarity with southern tarplant stems primarily from my experience with oil and gas compliance monitoring along the south coast of Santa Barbara County. This includes my work as Onsite Environmental Coordinator (OEC) for the ARCO Dos Pueblos Lease Facilities Abandonment Project from spring of 1996 through summer of 1998. In my capacity as the County's OEC, I have also dealt with management of a significant southern tarplant population at Venoco's Ellwood Marine Terminal near Coal Oil Point.

I learned more regarding the status of southern tarplant on the subject property during our site visit on March 14th. You and I met Melanie Hale of the CCC, CCC consultants Klaus Radtke and John Thomas (Geo Safety, Inc.), and Whit Hollis (representing the applicant). The purpose of our meeting was to discuss the history and current status of southern tarplant at the project site. We attempted to locate three of the previously mapped occurrences and determine whether these subpopulations were extant. Our efforts were hampered by the fact that southern tarplant is a late-flowering annual species that is most conspicuous from early summer through late fall, depending on annual weather patterns. Thus, the timing of our inspection was not optimal for detecting southern tarplant. We saw no evidence of recent germination, however we were able to identify approximately 50 desiccated tarplant specimens from last year's crop. This facilitated our efforts to locate the plant and to extrapolate it:

5 pages

(was Exhibit 33 to 11/22/02 staff report)

EXHIBIT NO. 8
APPLICATION NO. A-4-STB-93-154R2
Arco Dos Pueblos Golf Links
Southern Tarplant Report 4/1/02

EXHIBIT NO. 33W
APPLICATION NO. A-4-STB-93-154-CC-R2
John Storrer - monitor tarplant site visit 3/4/02

My understanding is that southern tarplant was first recorded onsite during surveys for the project Environmental Impact Report (EIR) in 1993. Apparently, only one occurrence was recorded at that time. This location, along the access road approximately 100 yards west of south end of the railroad bridge, was mapped in the EIR.

During the abandonment work for the oil and gas facilities, a second subpopulation was observed by me, in the vicinity of the warehouse and loading rack in the northeast portion of the site. I believe that this was in June or July of 1998. Interestingly, the distribution of southern tarplant here conformed almost exactly to the location of the former loading rack facility. I have since speculated that the germination may have been stimulated by removal of the structure which was completed in October of the previous year. Members of the genus *Hemizonia* often respond to soil disturbance with profuse flower and seed production. A search of my files from the lease abandonment work failed to reveal a map or other reference to the plant. Consultants for the applicant reported that this subpopulation consisted of approximately 4,500 individuals in 1998. I believe this to be a reasonable estimation.

The attached maps show the approximate distribution of southern tarplant at the larger, northern site location (the one discovered in summer of 1998), as determined during our March 14th site visit. One map shows the distribution of tarplant relative to the former oil and gas facilities, the other in relation to the proposed golf course development. We used a topographic map and various physical features (e.g. berms, remnants of driveways, building footprints, abrupt changes in vegetation type), as well as my recollection, to interpret the area of occupied and suitable habitat for southern tarplant. I later inspected aerial photographs at the Planning & Development Department (P&D) to further refine the map. The P&D archives contained a photo taken on 6 June 1997 (PW SB10-36). At this point in time, the loading rack had been demolished but the nearby warehouse structure remained in place. The photo clearly showed the "footprint" of the loading rack and was therefore useful in verifying the distribution of southern tarplant at that time. Our inspection on March 14th indicated that some southern tarplant specimens had become established approximately 20 feet beyond its former western limit, presumably as a result of natural (unaided) dispersal. I paced off the area of "occupied" southern tarplant habitat as measuring 60 x 180 feet, or 10,800 square feet. We did not generate a precise estimate of the number of tarplant specimens that occurred within that area, because of the seasonal timing of our inspection. However, we observed at least 50 specimens within this 10,800 square-foot area.

In 1998, the applicant developed a Biological Enhancement and Landscape Plan (BELP). A mitigation component of the BELP entailed seed collection, nursery propagation, and restoration of southern tarplant. It is my understanding that the population has been surveyed each fall by the applicant's consulting biologist and that seed has been collected and propagated so that seedlings may be subsequently installed onsite. Because of delays in getting the project started, the plants have been discarded and the restoration work has not yet begun. Maps were produced during the course of the annual surveys and a census of plants was taken at each location, including the one recorded in the EIR and the one discovered during the lease abandonment work. Four additional occurrences of southern tarplant have been found in the course of these annual surveys, bringing the total to six mapped subpopulations onsite. These data were presented in rough format (i.e. general location of subpopulations indicated on site maps; numbers of plants hand-written on the maps) during our meeting on March 14th. We located the northern subpopulation described above and the site mapped in the EIR. We were unable to locate another mapped subpopulation on the west side of Tomate Canyon during a cursory reconnaissance of that portion of the site. We did not attempt to find the other three mapped occurrences.

EXHIBIT NO. 10.33
APPLICATION NO. 53
A-4-STB-93-154-CC-A2
So. Tarplant Report

During our site visit, we also looked at the proposed southern tarplant restoration site in the vicinity of the vernal pool at the southwest end of the railroad bridge. The site was likely chosen because it lies within the wetland buffer and is outside the development footprint. Additionally, southern tarplant is often found in association with vernal pools, so the habitat context is appropriate for this species.

Some background on the status of southern tarplant at the Ellwood Marine Terminal (EMT) near Coal Oil Point may be useful. Though no attempt has been made to estimate the size of this population within this five-acre facility, it has been sustained at several thousand individuals for at least the past four years. Venoco has modified their operations and maintenance practices to some extent, in order to maintain the viability of this population. The best example of these protective measures is the seasonal timing and method of suppressing vegetation for fire abatement. Weeds are selectively controlled through mechanical, rather than chemical means early in the growing season, to avoid incidental impacts to the later-flowering tarplant. This approach has encouraged the proliferation of southern tarplant with nominal increase in cost of operations. The EMT population would be an excellent seed source for southern tarplant restoration projects.

In my opinion, it would be best to mitigate impacts to this annual species in terms of unit area, rather than number of specimens. The number of tarplants that germinate in any given year can vary significantly, depending on factors such as weather and competition from other plants. I would also plant the material by direct seeding, rather than nursery propagation, though this option would require a greater level of pre-treatment to remove non-native annuals (i.e. competitors). Additionally, I would recommend that there be more than one restoration site, in the event that the primary site is unsuccessful. My experience with southern tarplant, as well as its congener Gaviota tarplant (*Hemizonia increscens* ssp. *villosa*) suggests that this is a good candidate for restoration. It germinates readily and occupies a variety of microhabitats; including sandy terrace or bluff situations, flat coastal meadows with clayey soils, and slightly wetter areas such as those found on the margin of vernal pools. Reducing competition from undesirable plants is probably the most important consideration in successful restoration of this species.

I hope that this information provides useful background in your current review of the project. Please call me if you have any questions concerning my correspondence.

Yours truly,

John Storrer
Storrer Environmental Services

enclosures: figures showing approximate distribution of southern tarplant in the northeastern portion of the site in relative to previous and proposed developments

cc: Michelle Pasini, SBCo P&D Energy Division

EXHIBIT NO. 10 33
APPLICATION NO. 93
A-4-STB-93-154-CC-A2
So. Tarplant Report

Dos Pueblos Golf Links Project

Approximate Distribution of Southern Tarplant

(Hemizonia australis ssp. parryi)

Based on field survey on 14 March 2002 and
review of aerial photograph (PW SB10-36) taken 6 June 1997
Mapped by John Storrer

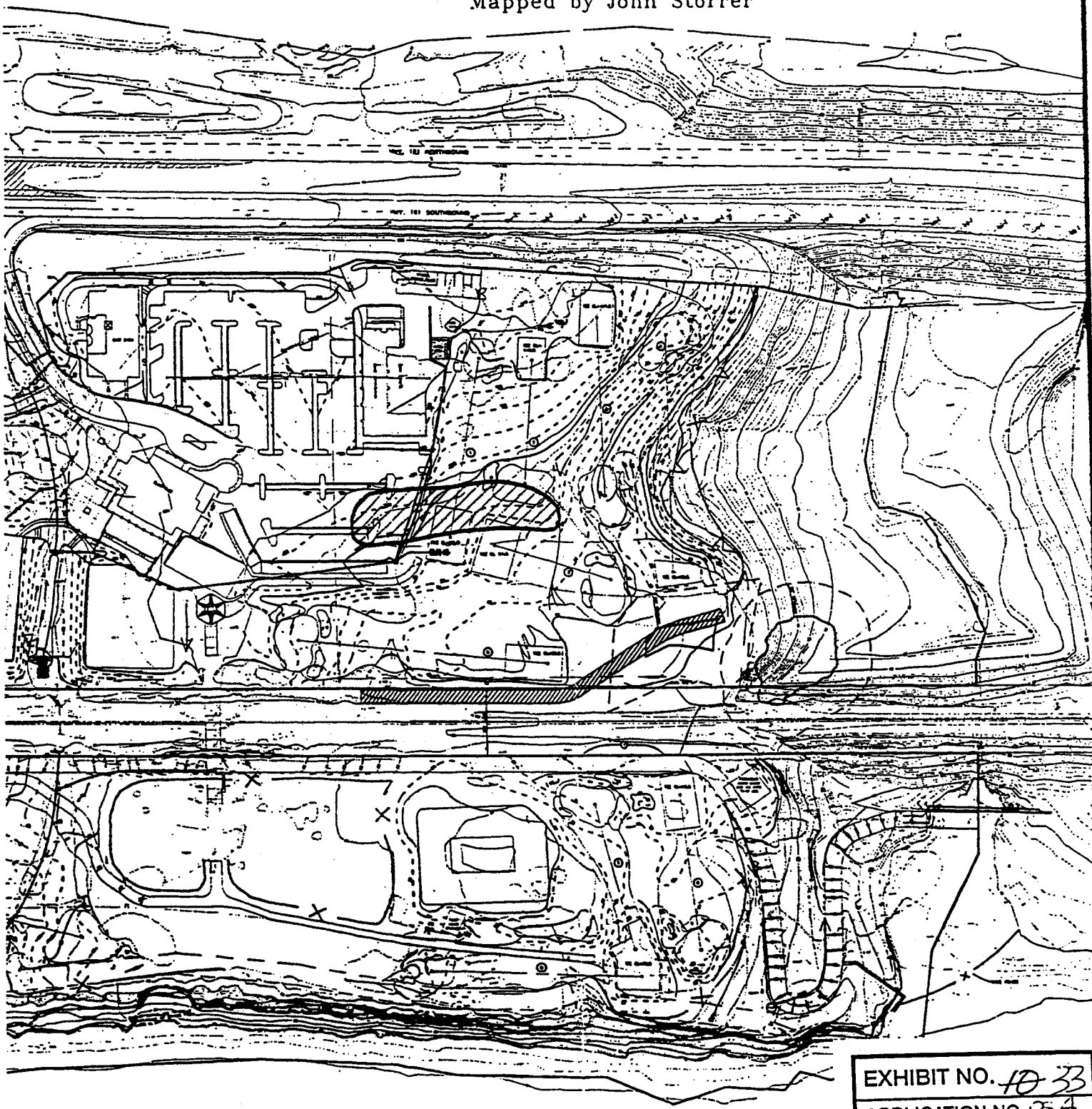
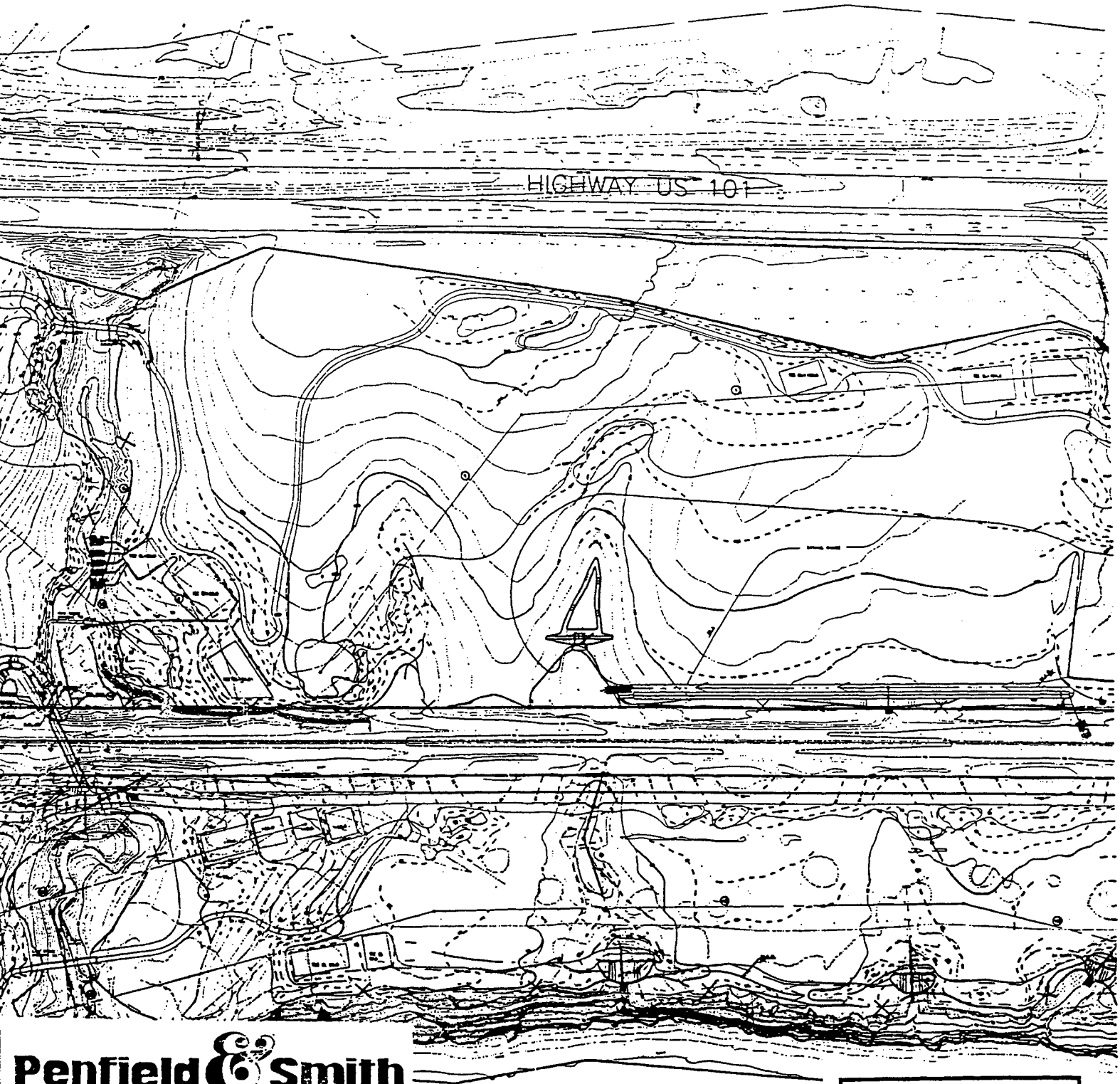


EXHIBIT NO. 10-33
APPLICATION NO. P3-4
A-4-STB-93-154-CC-A2
So Tarplant Report



Penfield & Smith
ENGINEERS • SURVEYORS
101 E. VICTORIA ST. SANTA BARBARA
(805) 963-9532 CALIF. 93101
MAILING ADDRESS: P.O. BOX 98 (93102)

SCALE 1" = 200'
0 100 200 300

EXHIBIT NO. 10 33
APPLICATION NO. P25
A-4-STB-93-154-CC-A2
So. Tarplant Report

STORRER ENVIRONMENTAL SERVICES

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Santa Barbara, CA 93105
(805) 682-2065
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JUN 6 2002
CALIFORNIA
COASTAL COMMISSION
SOUTH CENTRAL COAST DISTRICT

MEMORANDUM

To: Kristen Getler, SBCo P&D Energy Division

From: John Storrer, EQAP Onsite Environmental Coordinator

Date: June 3, 2002

Re: Summary of White-tailed Kite (*Elanus leucurus*) Observations on 30 May 2002 – Dos Pueblos Golf Course Property

The following is a summary of field observations compiled during a survey of the Dos Pueblos Golf Links Property on the morning of 30 May 2002. The survey was performed by biologists Neil Bouscaren of Pacific Southwest Biological Services (PSBS), Inc. (consultant for the property owner) and John Storrer (contractor for Santa Barbara County Planning & Development Department). The information was gathered between 0550 and 0730 on 30 May 2002.

The focus of our effort was on locating an active white-tailed kite nest that had been reported by Mark Holmgren of the UCSB Museum of Systematics and Ecology. The nest was observed in a Monterey pine on 14 and 27 May 2002 by Mr. Holmgren and Morgan Ball, near the middle of the subject property. This generally corresponds to the area where a pair of white-tailed kites (the "west pair") had been persistently active over the last several weeks, as described in my previous correspondence dated 17 May 2002. We also checked the status of the "eastern pair" that was found occupying an active nest on 16 May 2002.

We were able to confirm the location of the nest reported by the UCSB biologists in Tree No. 127, as labeled on the Tree Inventory prepared for the Dos Pueblos Golf Links Project (see attached map). The nest structure was in the crown of a Monterey pine, at a height of approximately 40 feet. It contained five fledgling kites. The young were quite active in the nest and looked to be approximately one week from taking flight. The adult kites were seen perched to the immediate west, in Tree No.157. We saw no hunting activity, nor did we see any incidents of prey being brought back to the nest by the adult birds.

EXHIBIT NO. 9
APPLICATION NO. A-4-STB-93-154-R2
Arco Dos Pueblos Golf Links
June 3, 2002 report of John Storrer

EXHIBIT NO. 44
APPLICATION NO. A-4-STB-93-154-CC-A2
County Monitor's Report - Kites

An adult kite was observed on the nest in Tree No. 67, in an incubating posture. A second adult kite was perched in a nearby tree for much of the observation period. These birds were referred to as the "eastern pair" in my earlier report.

In summary, we located an active nest with (5) young white-tailed kites in Tree No. 127. This is undoubtedly the same nest reported by Mark Holmgren and Morgan Ball. It appears that the birds occupying the nest in Tree No. 67 are still in the incubation or brooding stage of the nesting process.

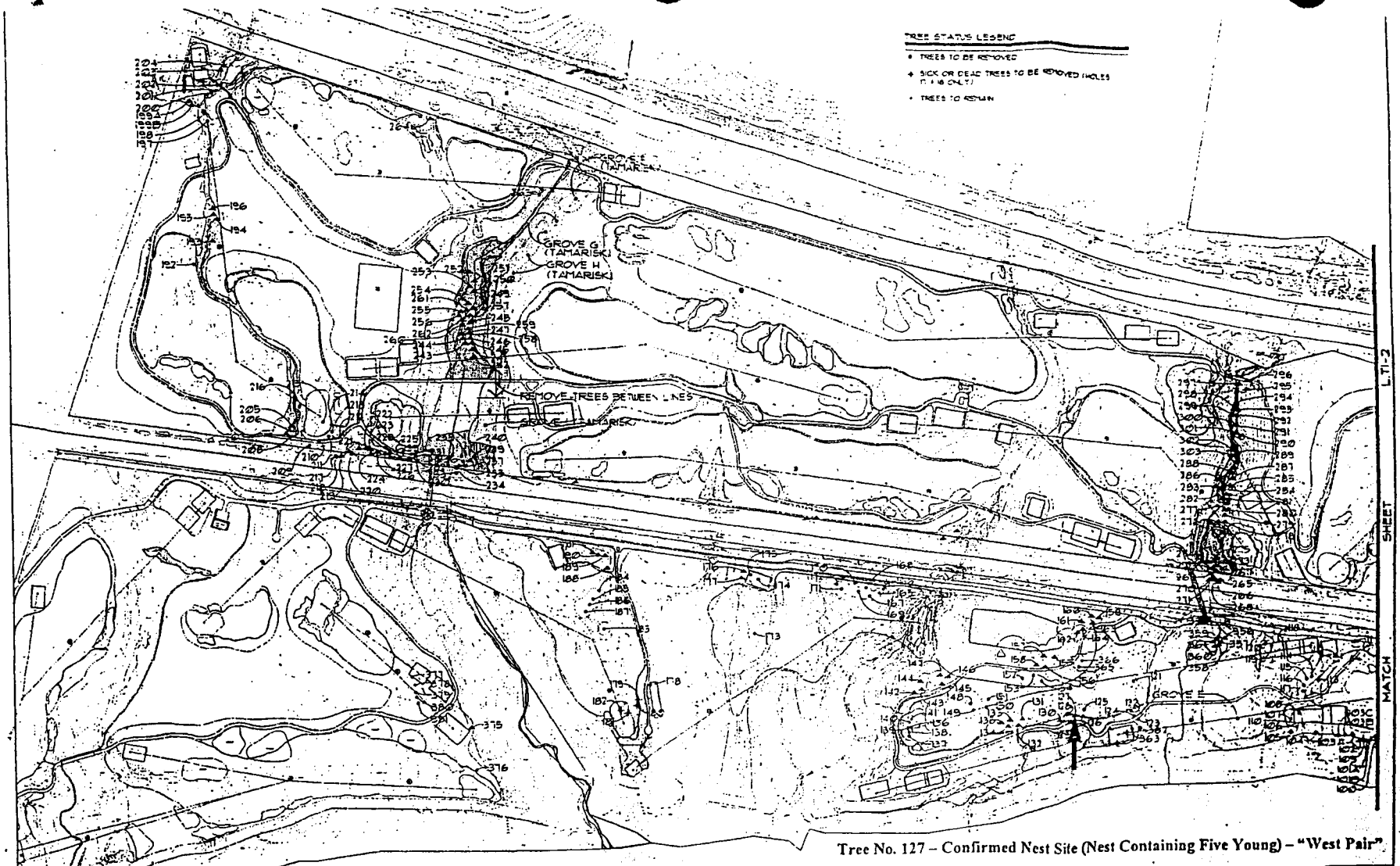
I also confirmed the location of my observation of a pair of white-tailed kites engaged in nest building activity on 10 March 2000. It is Tree No. 83 (see attached map). In previous correspondence (memorandum dated 17 May 2002), I incorrectly labeled this site as Tree No. 54. With the a more detailed map and tree inventory, I was able to determine in the field that the location of the suspected kite nest in March of 2000 is Tree No. 83.

A final survey is scheduled for 6 June 2002. That should provide more information on breeding chronology and nesting success for these two pairs of white-tailed kites.

Please call me if you have any questions concerning this correspondence.

attachment: maps showing location of nest and perch trees

cc: Michelle Pasini, SBCo P&D Energy Division



Tree No. 127 – Confirmed Nest Site (Nest Containing Five Young) – "West Pair"

Dos Pueblos Golf Links Property

White-tailed Kite Survey on 30 May 2002

Survey Performed by N. Bouscaren and J. Storrer

TREE INVENTORY PLAN

SCALE: 1"=100'-0"

Ex. 44 pg. 3

Coore & Crenshaw, Inc.

HOFFPAUIR PLANNING DESIGN

Penfield & Smith

TREE INVENTORY PLAN

DOS PUEBLOS GOLF LINKS

SANTA BARBARA COUNTY, CALIFORNIA

L.T1-1 p2

85

Ex. 9 Page 30/5

TREE STATUS LEGEND

- TREES TO BE REMOVED
- + SICK OR DEAD TREES TO BE REMOVED (HOLES 11 & 18 ONLY)
- TREES TO REMAIN

Tree No. 67 – Confirmed Nest Site (Incubation) – "East Pair"
Tree No. 83 – Suspected Nest Site on 10 March 2000

Dos Pueblos Golf Links Property

White-tailed Kite Survey on 30 May 2002

Survey Performed by N. Bouscaren and J. Storrer

Ex. 44/54

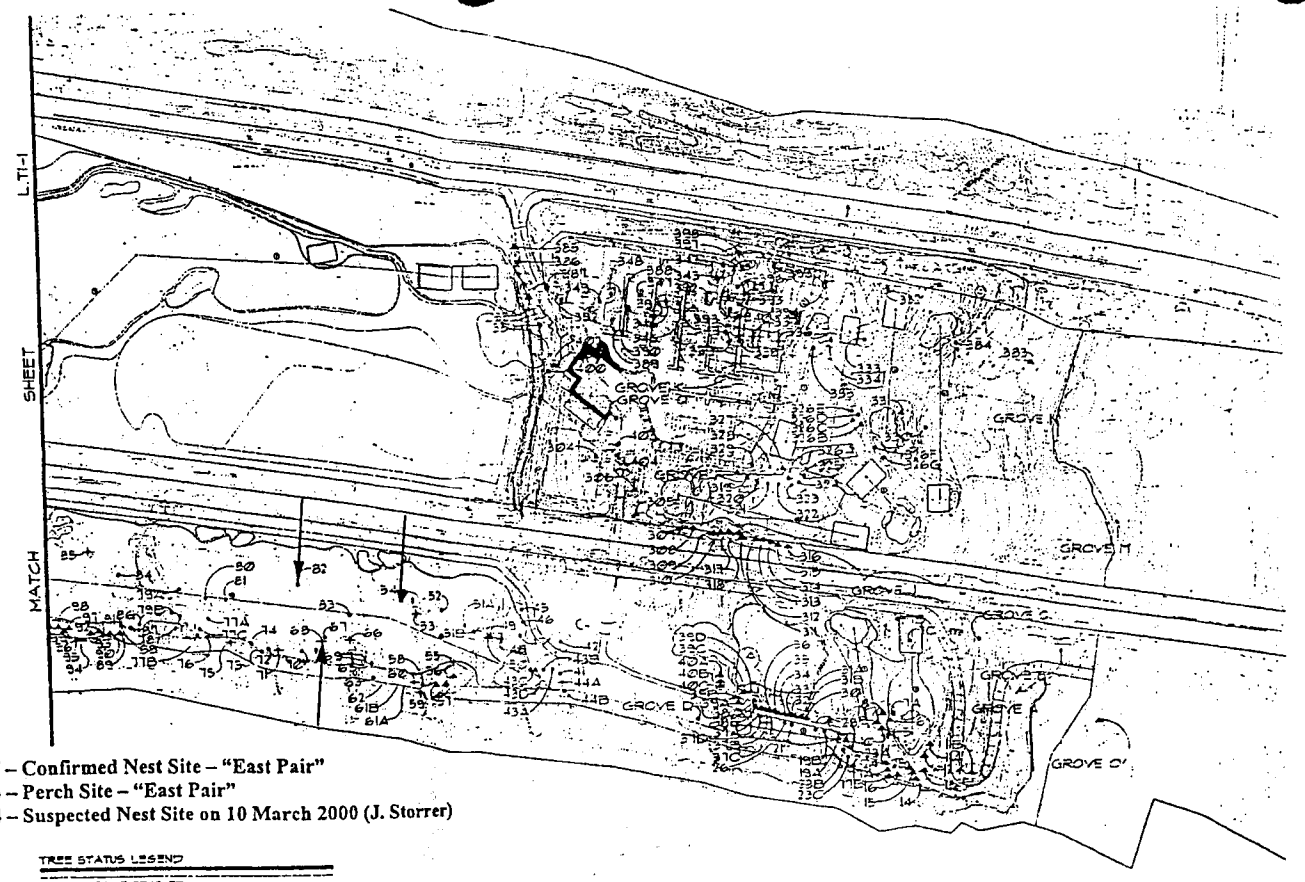
TREE INVENTORY PLAN

Penfield & Smith

HOFFMAN PLANNING DESIGN

TREE INVENTORY PLAN
DOS PUEBLOS GOLF LINKS

Ex. 9 Page 4 of 5



Tree No. 67 – Confirmed Nest Site – "East Pair"
Tree No. 83 – Perch Site – "East Pair"
Tree No. 54 – Suspected Nest Site on 10 March 2000 (J. Storrer)

TREE STATUS LEGEND

- TREES TO BE REMOVED
- SICK OR DEAD TREES TO BE REMOVED (HOLES 11 & 16 ONLY)
- TREES TO REMAIN

Dos Pueblos Golf Links Property

White-tailed Kite Survey on 16 May 2002

Survey Performed by M. Evans and J. Storrer

TREE INVENTORY PLAN

Coors & Crenshaw, Inc.
HOFFPAUIR PLANNING DESIGN

Penfield & Smith

TREE INVENTORY PLAN
DOS PUEBLOS GOLF LINKS

DOS PUEBLOS GOLF LINKS
GOLETA, SANTA BARBARA COUNTY, CALIFORNIA

WHITE-TAILED KITE NESTING SURVEY

7 June 2002

SUMMARY

Pacific Southwest Biological Services, Inc., (Pacific Southwest), at the request of Ms. Andi Culbertson, of Culbertson, Adams, & Associates, surveyed nesting activities of the White-tailed Kites (*Elanus leucurus*) (Kite) on the proposed Dos Pueblos Golf Links site (Site) in an unincorporated area of Santa Barbara County, west of the city of Goleta (Figure 1).

This study followed the Breeding Season Protocol prepared by the California Coastal Commission (see Attachment 1). The Kite is regarded by the U. S. Fish and Wildlife Service (Service) as a Migratory Nongame Bird of Management Concern. Such species are considered to be of concern in the United States because of (1) documented or apparent population declines, (2) small or restricted populations, or (3) dependence on restricted or vulnerable habitats. It is regarded by the California Department of Fish and Game (CDFG) as a Fully Protected species. Such species may not be taken or possessed without a permit from the Fish and Game Commission and/or CDFG.

The survey determined that two pairs of Kites nested on the site during the spring of 2002. During the 2002 survey, the western pair of Kites nested in tree #127 and the eastern pair of Kites nested in tree # 67. Both these trees were planned for removal (Tree Inventory Plan, 1999). However, Kites are not known to require the same nest site for subsequent nesting and would be likely to use other trees for nesting if all the other necessary prerequisites for successful nesting are available (see below). Key factor for potentially successful Kite nesting and foraging areas are discussed, along with suggestions for retaining or reestablishing Kites to the site if they abandon it during construction.

INTRODUCTION

SCOPE OF WORK

Pacific Southwest was requested to determine if Kites were nesting on or near the site and what trees were used by these Kites for nesting, perching, and roosting. Additionally, Pacific Southwest was requested to generally address the potential impacts of the proposed golf course construction, operation, and maintenance activities on the areas currently used by Kites (with specific reference to trees used by Kites).

EXHIBIT NO. 10
APPLICATION NO. A-4-STB-93-154-R2
ARCO Dos Pueblos Golf Course
June 7, 2002 White-tailed Kite Survey

EXHIBIT NO. 4/2
APPLICATION NO. A-4-STB-93-154-CC-R2
Complete exhibit (some pages left out) 12/5

PROJECT LOCATION

The Dos Pueblos Golf Links site (site) consists of approximately 208 acres at the western end of the Goleta Valley, on the southern flank of the Santa Ynez Mountains, on a coastal terrace south of U. S. Highway 101 (see Figure 1). The site is relatively level with elevation ranges from sea level to about 105 feet. Five canyons drain south through the site, the most prominent being Eagle Canyon near the eastern boundary and Tomate Canyon to the west. The site was previously used as an oil pumping field but, except for internal roads and some pads, all the equipment associated with the previous use had been removed by spring, 2002. Vegetation on the site is described in the Final EIR for the project (Santa Barbara County, 1993), and generally consists of about 127 acres of Non-native grassland/mustard field, about 35 acres of Venturan Coastal Sage Scrub, non-native windrows of Monterey Cypress (*Cupressus macrocarpa*), Cluster Pine (*Pinus pinaster*) and various species of Eucalyptus. The site also contains Southern Willow Scrub habitats in the major drainages.

At the time of this study, the site contained no structures but still contained an active railroad line running the length of the site, telephone or power poles and wires and existing internal paved access roads, somewhat in disrepair. The site is fenced to prevent unauthorized vehicular entry, although we observed occasional unauthorized pedestrians during the survey period.

METHODS

Prior to conducting the field surveys, a report of a recent raptor survey of the site was reviewed (Dudek & Associates, 2001). This survey followed a spring raptor nesting protocol prepared by staff from the California Coastal Commission (see Attachment 1). Field surveys for Kite presence, reproductive behavior, and use of various foraging areas and trees were carried out by Michael U. Evans and/or Cornelius W. Bouscaren under the following schedule and field conditions:

Date	Time	Field Conditions
10 April 2002	1410-1705	72-66°F, 60% high clouds, winds south 3 mph becoming east 3 mph
11 April 2002	0630-1410	46-75°F, skies initially clear with fog arriving 0730, generally persisting to light haze, winds calm becoming south, 3 mph
9 May 2002	0600-1400	56-68°F, skies cloudless, hazy to sunny
16 May 2002	0530-1455	55-65°F, foggy, no breeze to sunny, hazy
23 May 2002	0600-1405	52-73°F, clear, wind 3-5 mph
29 May 2002	1530-1740	60°F, clear to foggy, W-wind 5-10 mph, quieting to 0-3 mph
30 May 2002	0540-1110	58-80°F, foggy to fog dissipating, wind E, then W, 3-5 mph

On 16 May and 23 May, Pacific Southwest biologists were joined for part of the day by Mr. John Storrer, a contractor for Santa Barbara County Planning & Development Department. Mr. Storrer also shared his historic observations of Kites in the general project area and his knowledge of the year 2002 observations by Dr. Mark Holmgren (U. C. Santa Barbara) of Kites on the site (observed from public lands). Since the primary goal of the study was to determine whether or not Kites nest on the site, and which trees the Kites are using, once this was well documented by the fourth weekly visit from 9 May through 30 May, it was determined that an additional visit suggested by the protocol was not necessary.

Methods consisted of observing and recording Kite activities from the site entrance area bridge over the railroad track, with Kowa TSN-822, 32X spotting scope (or 15-40X60 spotting scope) and Zeiss 10X50 (or 10X42 binoculars); recording perching sites with Olympus 2100 digital camera (equivalent to a 380 mm for 35 mm camera). Kite use areas and trees were photographed with the digital camera for later verification of tree numbers. After primary activities of kites were determined by initial observations, individual tree numbers were verified by walking or driving to the trees and recording the tree numbers. Additionally, all potential Kite-nesting habitats were searched on foot or from a vehicle. All species of birds identified were recorded daily (see Appendix 1).

Only one pair of Kites was observed during the 10-11 April 2002 fieldwork, a precursor to the protocol survey. Initial observations in May 2002 revealed that two pairs of Kites were using the site during the survey period; these pairs were designated the Western Pair and the Eastern Pair, based on their areas of activity within the site. Initial observations were focused on the Eastern Pair because of their proximity to a convenient observation point for observers, the existing wooden railroad bridge near the entrance to the site. Additionally, the western pair spent most of the time perched in one stand of eucalyptus trees (see below). From this point, both pairs could be observed with spotting scopes. Although detailed records were kept in the field of schedule of activities and what trees the Kites used during the field visits, these are available from field notes and are not recited in this report. The Results section of this report summarizes the Kite's activities and the primary trees used for nesting and perching.

Auxiliary Information. In order to obtain information from professional and amateur ornithologists from their observations of Kites using golf courses and other parkland habitats, requests for observations were made to three separate email discussion groups of ornithologists and birding enthusiasts (via email). Appendix 1 (Pacific Southwest. Results of Electronic Mail Survey of Observations of White-tailed Kites Using Golf Courses and Similar Parklands, Background for Proposed Dos Pueblos Golf Links, Santa Barbara County, California. Prepared June 5, 2002) includes the report of this survey. Although this "polling" of observers should not be considered a "scientific" study, it is perhaps the most efficient way of obtaining valid anecdotal observations where published scientific literature does not exist. This report has been distributed under separate cover.

RESULTS

White-tailed Kite Use Areas and Activities During Study

Initial observations revealed that two pairs of Kites were using the site during the survey period; these pairs were designated the Western Pair and the Eastern Pair, based on their areas of activity within the site. Initial observations were focused on the Eastern Pair because of their proximity to a convenient observation point for observers, the existing wooden railroad bridge near the entrance to the site. From this point, both pairs could be observed with spotting scopes.

Eastern Pair

During the early May 2002 observations, this pair appeared to be in the early stages of courtship. This pair performed four copulation attempts. The male bird performed several wing-up fluttering displays (typical courtship behavior) in the presence of the female (9 & 16 May 2002).

At least three copulations and one courtship feeding between this pair also occurred on 16 May 2002. This pair also chased other birds in the immediate activity area, including American Crows and Red-tailed Hawks. Occasional foraging forays occurred, generally in the Non-native Grassland/mustard fields between Tomate Canyon and west of the canyon nearest to the proposed East Tunnel (see color site plan aerial image with superimposed plan). The presumed female of this pair spent considerable time, just barely visible, in the tree subsequently used for nesting (#67; see Figure 2a). We also observed the presumed female taking grass to the nest tree as nest lining material. We examined tree # 113 (cypress) and found Kite feathers and discarded castings of prey remnants.

On 23 May 2002, both members of this pair were visible at various times of the day, with the female spending much of the time on the nest. The male foraged both north and south of the railroad track, including the area described above. The male attempted to feed the female, performed several Flutter-display flights near the female, and chased American Crows from the vicinity of his perches and the nest at least three times between 600-1400. The male or, with the female, engaged in courtship or perching after courtship episodes in various trees around the nest tree (tree #67, see Figure 2a), including trees # 81, #82, #83, #113, #117. These trees seemed essential for performing courtship-related activities and for serving as sentinel perches for chasing American Crows or joining in chases of Red-tailed Hawks and Great-blue Herons.

Western Pair

During the 9 May 2002 observations, when visible, this pair spent most of the time perching on exposed snags of a stand of Eucalyptus trees, marked as trees 153-158 (see Figure 2b) on the Tree Inventory Plan. At times, one member of this pair was not visible, although the other member was generally visible perching in the eucalyptus trees. This pair only occasionally foraged over the same area as the Eastern Pair and exhibited virtually no social behavior between each other during early May. It was assumed that this pair was in the early stages of pair formation, having established and utilizing a potential nesting territory. One member of this pair also chased American Crows at least once on 9 May. One of this pair also perched several times in tree #149 (Monterey Cypress). On 16 May, this pair displayed much of the same behavior as on the previous field visit (see discussion below, for observations by Dr. Holmgren of this pair from off site).

On 23 May 2002, one member of this pair spent considerable time foraging over the Non-native Grassland areas east and west of Tomate Canyon. The birds continued to perch in eucalyptus trees #153-155, as well as trees #157, #128, #149, #187, #188. Astonishingly (for a pair with a nest), this pair appeared to attempt copulation atop tree #187.

On 30 May 2002, the actual nest of this pair (in cypress #127) was seen from inside the site, with five nearly grown chicks. Both members of this pair were observed perching on the trees described above and foraging in the same localities described above. In reviewing our observations of this pair, plus the observations of Dr. Holmgren on 14 May and 27 May 2002 from U. S. 101, it appears that this pair had a nest site during all of the May observations. However, it was not visible from our main vantage point from the railroad bridge near the eastern end of the site. Our initial observations concentrated on the eastern pair and the various trees they were using. We planned to concentrate observations on the western pair later in the study, since this pair did not appear to engaged in courtship or nesting-tending behavior. Although we examined the trees around the western pair's perching site, in order not to disrupt normal Kite behavior, we did not spend a lot of time in that pair's territory. Based on Dr. Holmgren's and our observations, this pair was apparently spending most of their time away from the actual nest site and did not appear foraging enough to feed a full brood of growing young. Their courtship behavior may have been continued pair bonding or possible preparation for a second clutch of eggs after the young leave the nest.

DISCUSSION

Previous Studies on White-tailed Kites

A significant study on Kites in the Santa Barbara area was performed by Lee B. Waian (Waian 1973), in a Ph. D. dissertation. This study focused on the behavior and ecology of Kites in the Santa Barbara coastal plain, roughly from Refugio, southeast along the coast to east of Goleta, including the Dos Pueblos Links project site. The present survey draws heavily from Waian's dissertation for natural history background for the Kite in the Santa Barbara region. Other references reviewed include Dunk (1995) and Palmer (1988).

Territory Size

Waian (1973) gives the important insight about Kite territory size in Santa Barbara. He refers to two nesting territories of 32.39 hectares (ha) [80.03 acres (ac)] and 15.38 ha (38 ac); these territories increased to 51.69 ha (127.73 ac) and 17.8 ha (43.98 ac) respectively after the young had hatched. It is not clear whether Kite nesting territories usually supply adult Kites and their young with sufficient food sources for survival. Waian further indicates that both (locally) territorial Kites and non-territorial Kites regularly foraged on More Mesa in the subregion.

Trees Used for Nests, Nest Building

Waian (1973) states: "Close observation during nest building is likely to disturb the birds; it is during this period that the birds are most likely to desert if induly [sic] disturbed." Walan indicates that Kites may successfully nest twice in the same season; one pair he observed nested three times in the same season. Waian indicates Kites used the following species of trees during his study:

Eucalyptus (*Eucalyptus* sp)
Willow (*Salix* sp)
Live Oak (*Quercus agrifolia*)
Coyote Brush (*Baccharis pilularis*)

Prey caught by the Kites during these forays was not identifiable from our observation points. However, other studies have shown that a very high percentage of Kite prey species consist of meadow voles of the genus *Microtus*. It is assumed that the Kites on the Dos Pueblos site were feeding on the same vole species. Obtaining prey from areas close to the nesting site during this period is essential because of the number of small prey needed for courtship feeding, feeding the incubating female, and feeding multiple young. Long foraging bouts during this period may not lead to successful nesting.

All or the majority of the trees used by Kites during this study were previously slated for removal for the golf course construction. Kites have not been reported to necessarily use the same nest trees in successive nesting attempts (unlike species such as Golden Eagles for example). Thus, the loss of these particular trees during golf course construction does not mean the Kites would not return to the site.

Potential Effects of Golfing Activities on Kites

This study identified trees and foraging areas used by individual Kites during the survey period. It is likely that Kites, like humans, rely on a series of local situations to carry out necessary life history activities, including successful nesting and raising of young. Thus, suitable nesting trees, nearby perching trees, and foraging areas, both around the nest site and farther away are all key elements in the local survival of a pair of Kites.

POTENTIAL FOR KITE USE OF THE PLANNED GOLF COURSE SITE

Based on the results of the email-based survey for Kite records using golf courses or similarly landscaped public parks in California, it appears that Kites rarely use golf courses. However, they may occasionally use trees in or adjacent to golf courses, if sufficient open foraging areas with non-landscaped grasslands are available nearby. It is assumed that these grasslands need to support the main prey of kites, the meadow vole. It is likely that the Kites presently using the Dos Pueblos Golf Links site would leave the site during the construction phase because of the removal of some trees and the disruption of existing foraging areas. Whether Kites would reinhabit the site is an open question beyond the scope of this study. Kites have been shown to occasionally use non-landscaped areas along highways or on the margins of parkways, although we are not aware of any studies that show if Kites actually use non-landscaped golf course areas and survive in these situations for an extended period. Research in this topic is beyond the scope of this study. However, the list of apparent Kite habitat needs listed below explores this topic.

Kite Habitat Needs for Nesting

Based on existing literature and anecdotal observations, kites appear to need the following habitat elements for successful nesting.

- Suitable nesting trees: trees need to be tall enough to support and hide the nest and provide a view of the surrounding area. Additionally, associated with other trees of similar size within 50-100 ft that can be used as perching sites associated with the nest must be available.

- Nesting trees need to be protected from human disturbance during the early stages of courtship, nest building, egg laying and incubation (generally April through August).

- Nesting Territories (38-80 ac, based on Waian, 1973) must include foraging areas adjacent to nesting trees that include sufficient open grassland fields (not turf) for ready predation of the main food source, the meadow vole.

- Nesting areas should not contain concentrations of other raptors or Corvids (ravens and crows); kites typically try to exclude these species during the nesting phase; high populations of these species may lead to predation or reduced production of eggs and young.

- Extended foraging areas of open fields including grasslands and mustard fields, available for augmenting nesting territory foraging and non-nesting foraging activities, must be available on contiguous or nearby areas.

RECOMMENDATIONS

Neither the applicant's proposal nor the staff's proposal provides sufficient acreage of appropriate habitat for foraging for two White-tailed Kite nesting pairs in the proposed golf course design. There is a potential to allow for the continued use or recolonization of Kites on the completed Dos Pueblos Golf Links site if the key elements for Kite nesting sites outlined above are made available. There may be an opportunity to maintain and/or create habitats for at least one pair of Kites at the proposed grassland revegetation area between proposed holes 7, 8 and 9 in the far-western portion of the site. This area appears to be about 7-9 acres in size. Since there are few existing large trees in this area, additional trees would have to be planted or transplanted to this area. Kites may be able to use existing habitat off-site and to the west as additional foraging area. Given the typical Kite nesting territories measured by Waian (1973) for Santa Barbara County birds, 38-80 acres may be necessary for one nesting territory.

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APPENDIX 1. ANIMALS OBSERVED OR DETECTED

Common Name	Scientific Name
REPTILES	
Phrynosomatidae	
Western Fence Lizard	*Sceloporus occidentalis*
BIRDS	
Pelecanidae (Pelicans)	
Brown Pelican	*Pelecanus occidentalis*
Ardeidae (Herons)	
Great Blue Heron	*Ardea herodias*
Great Egret	*Ardea alba*
Cathartidae (Vultures)	
Turkey Vulture	*Cathartes aura*
Anatidae (Ducks, geese and swans)	
Mallard	*Anas platyrhynchos*
Accipitridae (Hawks, Eagles, Harriers, Kites)	
White-tailed Kite	*Elanus leucurus*
Cooper's Hawk	*Accipiter cooperii*
Red-shouldered Hawk	*Buteo lineatus*
Red-tailed Hawk	*Buteo jamaicensis*
Falconidae (Falcons)	
American Kestrel	*Falco sparverius*
Columbidae (Pigeons and Doves)	
Rock Dove	*Columba livia*
Mourning Dove	*Zenaida macroura*
Trochilidae (Hummingbirds)	
Anna's Hummingbird	*Calypte anna*
Allen's Hummingbird	*Selasphorus sasin*
Picidae (Woodpeckers)	
Nuttall's Woodpecker	*Picoides nuttallii*
Northern Flicker	*Colaptes auratus*
Tyrannidae (Tyrant Flycatchers)	
Pacific-slope Flycatcher	*Empidonax difficilis*
Black Phoebe	*Sayornis nigricans*
Cassin's Kingbird	*Tyrannus vociferans*
Western Kingbird	*Tyrannus verticalis*
Corvidae (Jays, Crows, Ravens, Magpies)	
Western Scrub-Jay	*Aphelocoma californica*
American Crow	*Corvus brackyrhynchos*
Common Raven	*Corvus corax*

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APPENDIX 1. ANIMALS OBSERVED OR DETECTED (CONTINUED)

Hirundinidae (Swallows)	
Northern Rough-winged Swallow	*Stelgidopteryx serripennis*
Cliff Swallow	*Petrochelidon pyrrhonota*
Aegithalidae (Bushtits)	
Bushtit	*Psaltriparus minimus*
Troglodytidae (Wrens)	
Bewick's Wren	*Thryomanes bewickii*
Turdidae (Thrushes)	
Western Bluebird	*Sialia mexicana*
American Robin	*Turdus migratorius*
Timaliidae (Wrentits)	
Wrentit	*Chamaea fasciata*
Mimidae (Mockingbirds and Thrashers)	
Northern Mockingbird	*Mimus polyglottos*
Sturnidae (Starlings)	
European Starling	*Sturnus vulgaris*
Bombycillidae (Waxwings)	
Cedar Waxwing	*Bombycilla cedrorum*
Ptilogonatidae (Silky Flycatchers)	
Phainopepla	*Phainopepla nitens*
Parulidae (Wood Warblers)	
Orange-crowned Warbler	*Vermivora celata*
Yellow Warbler	*Dendroica petechia*
Common Yellowthroat	*Geothlypis trichas*
Yellow-breasted Chat	*Icteria virens*
Thraupidae (Tanagers)	
Western Tanager	*Piranga ludoviciana*
Emberizidae (Towhees, Sparrows)	
Spotted Towhee	*Pipilo maculatus*
California Towhee	*Pipilo crissalis*
Lark Sparrow	*Chondestes grammacus*
Song Sparrow	*Melospiza melodia*
White-crowned Sparrow	*Zonotrichia leucophrys*
Cardinalidae (Cardinals, Grosbeaks, Buntings)	
Blue Grosbeak	*Guiraca caerulea*
Icteridae (Blackbirds, Meadowlarks, Orioles)	
Red-winged Blackbird	*Agelaius phoeniceus*
Western Meadowlark	*Sturnella neglecta*
Brown-headed Cowbird	*Molothrus ater*
Hooded Oriole	*Icterus cucullatus*
Bullock s Oriole	*Icterus bullockii*

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APPENDIX 1. ANIMALS OBSERVED OR DETECTED (CONTINUED)

Fringillidae (Finches)	
Purple Finch	*Carpodacus purpureus*
House Finch	*Carpodacus mexicanus*
Lesser Goldfinch	*Carduelis psaltria*
American Goldfinch	*Carduelis tristis*
MAMMALS	
Leporidae (Rabbits and Hares)	
Desert Cottontail	*Sylvilagus audubonii*
Canidae (Foxes, Wolves, and Relatives)	
Coyote	*Canis latrans*

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ATTACHMENT 1

Nesting Raptor Survey

1) Surveys should be conducted by biologists with formal training in avian biology, significant field experience in raptor survey techniques, and demonstrated ability top identify accurately local species under a variety of field conditions.

2) If available, standard protocols promulgated by the U. S. Fish and Wildlife Service or the California department of Fish and Game should be incorporated in the survey plan.

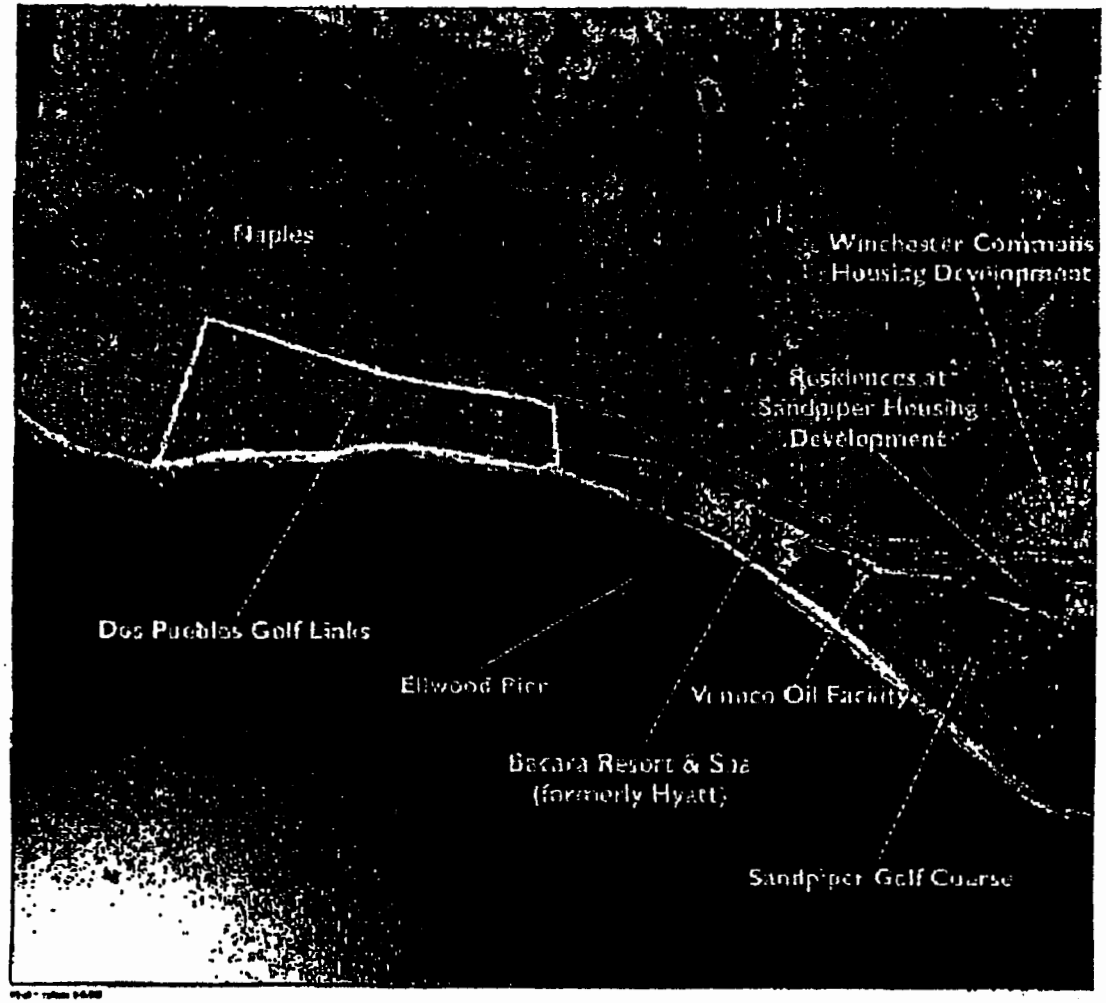
3) If standard protocols are not available form the wildlife agencies, the following elements should be included in the plan:

- The survey should be conducted between March 1 and June 15
- The survey should consist of at least five visits
- Survey visits should be spaced at least one week apart.
- Each visit should consist of at least two hours on site during the period between dawn and 10:00 am. If the site is very large, forested, or contains extensive riparian habitat, each visit should be longer in duration as determined by the best professional judgement of a raptor biologist.
- If there is appropriate habitat for ground-nesting owls on site and such birds are known to occur within the region, there should be at least three additional survey visits, each conducted during the period immediately before nightfall.
- The biologist should specifically search for nests and for foraging birds and birds using trees for perching, roosting, or nesting.

4) The survey report should provide a list of species that could reasonably be expected to use habitats on the site under other probable weather or prey conditions, and a list of species that are known to have used the site in the past.

Aerial Site Vicinity Photo

Figure 1.



The Dos Pueblos Golf Links is situated between the coastline and Highway 101 just west of the Bacara Resort & Spa (formerly Hyatt) now under construction. The site is bisected by the Union-Pacific railroad tracks.

Map Source: Molas Properties, LLC

Pacific Southwest Biological Services, Inc

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Figure 2a. Detail of Tree Inventory
Showing Eastern Pair Nest Tree # 67

Source: Tree Inventory Dos Pueblos Golf Link (4/20/99)

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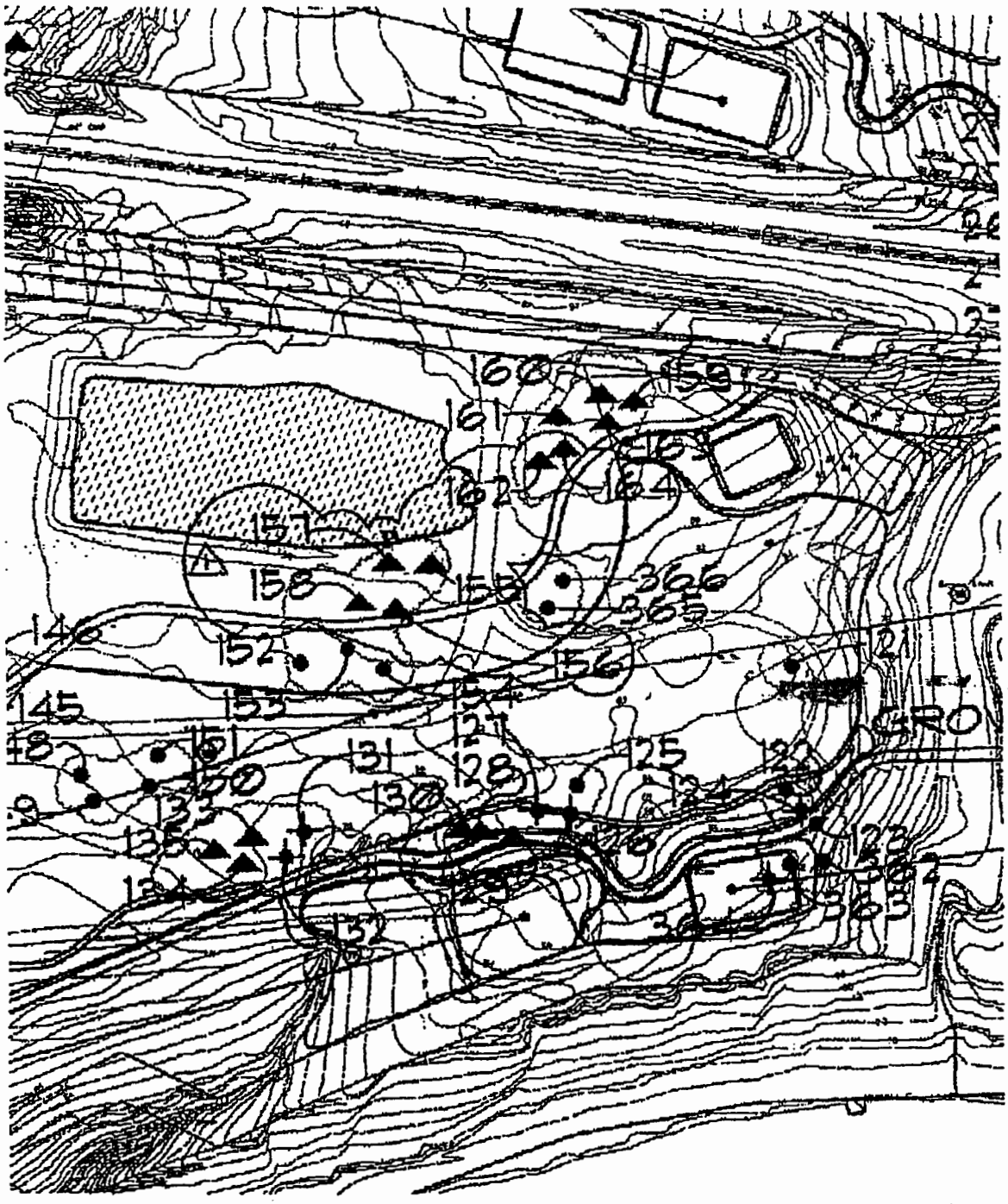

Figure 2b. Detail of Tree Inventory
Showing Western Pair Nest Tree # 127

N
1" = 100'

Source: Tree Inventory Dos Pueblos Golf Link (4/20/99)

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BIOLOGISTS

Sec. 35-69. AG-II Agriculture II

(Amended by Ord. 4298, 3/24/98)

Sec. 35-69.1. Purpose and Intent.

The purpose of the Agriculture II district is to establish agricultural land use for large prime and non-prime agricultural lands in the rural areas of the County (minimum 40 to 320 acre lots) and to preserve prime and non-prime soils for long-term agricultural use.

Sec. 35-69.2. Processing.

No permits for development including grading shall be issued except in conformance with Sec. 35-169. (Coastal Development Permit).

Sec. 35-69.3. Permitted Uses.

1. All types of agriculture and farming, including commercial raising of animals, subject to the limitations hereinafter provided in this Sec. 35-69.
2. Sale of agricultural products produced on the premises provided that such sale is conducted either within an existing agricultural building or from a separate stand not exceeding two hundred (200) square feet and located no closer than twenty (20) feet to the right-of-way line of any street.
3. Commercial boarding of animals.
4. Private and/or commercial kennels. *(Amended by Ord. 4067, 8/18/92)*
5. One single family dwelling unit per legal lot. Such dwelling may be a mobile home certified under the National Mobile Home Construction and Safety Standards Act of 1974 (42 U.S.C. § 5401 et seq.) on a permanent foundation system, pursuant to Health & Safety Code § 18551, subject to the provisions of Sec. 35-141 (General Regulations).
6. One guest house or artist studio per legal lot subject to the provisions of Sec. 35-120 (General Regulations). *(Amended by Ord. 3835, 3/20/90)*
7. Greenhouses, hothouses, or other plant protection structures, and related development, i.e., packing shed, parking, driveways, etc.; however, for any development of 20,000 square feet or more and all additions which existing development total 20,000 square feet or more, a developme submitted, processed, and approved as p Plans). *(Amended by Ord. 3838, 3/20/90)*

19 pages

EXHIBIT NO. 54
APPLICATION NO.
A-4-STB-93-154-CC-A2
(repeated from original 12/22/02 exhibit package)
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EXHIBIT NO. 11
APPLICATION NO.
A-4-STB-93-154-R2
Arroyo Burro Pueblo Golf Course
Santa Barbara County certified LCP, Coastal Zoning Ordinance

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8. On-shore oil development, including exploratory and production wells, pipelines, storage tanks, processing facilities for on-shore oil and gas, and truck terminals subject to the requirements set forth in DIVISION 9, OIL & GAS FACILITIES.
9. Excavation or quarrying of building or construction materials, including diatomaceous earth, subject to the provisions of Sec. 35-177 (Reclamation Plans).
10. Home occupations, subject to the provisions of Section 35-121 (General Regulations. *(Amended by Ord. 3836, 3/20/90)*
11. Accessory uses, buildings, and structures which are customarily incidental to the above uses.

Sec. 35-69.4. Uses Permitted With a Major Conditional Use Permit.

1. Animal hospitals and clinics.
2. Low-intensity recreational development such as hiking trails, public riding stables, recreational camps, campgrounds, retreats, and guest ranches, provided that such development:
   a. is in character with the rural setting,
   b. does not interfere with agricultural production on or adjacent to the lot on which it is located,
   c. does not include commercial facilities open to the general public who are not using the recreational facility, and
   d. does not require an expansion of urban services which will increase pressure for conversion of the affected agricultural lands.
3. Wineries, including processing, distribution, and sale of wine grapes and wine grape products grown off the premises, provided:
   a. the winery is located on premises used for vineyard purposes,
   b. the winery is operated in connection with the processing of wine grapes grown on the premises, and
   c. retail sales of wine grape products shall be limited to those processed on the premises.

4. Facilities for the sorting, cleaning, packing, freezing, and storage of horticultural and agricultural products (not including animals) grown off the premises preparatory to wholesale or retail sale and/or shipment in their natural form provided:

   a. the facility shall be accessory to and supportive of other agricultural operations located on the same premises as the proposed facility and on other local agricultural lands (defined as lands located within 25 miles of the boundaries of Santa Barbara County),

   b. the primary purpose of the facility shall not be to import, on a continuing basis, horticultural or agricultural products from land more than 25 miles beyond the boundaries of Santa Barbara County for local processing, distribution, or sale.

   c. the products are determined by the Planning Commission to be similar to products grown on the premises where the facility is located or on other local agricultural lands, and

   d. the facility processes products grown on the premises or on other local agricultural lands.

5. Piers and staging areas for oil and gas development subject to the regulations in DIVISION 9, OIL AND GAS FACILITIES.

6. Aquaculture, subject to the provisions of Sec. 35-136 (General Regulations).

7. Sorting, cleaning, and further breaking and storing of abalone shells landed live in Santa Barbara County, preparatory to shipment in their natural form.

8. Farm labor camps, including trailers, for housing five or more persons engaged full-time in agriculture working on or off the farm or ranch upon which the dwelling(s) is located, subject to the provisions of Sec. 35-132.9 (General Regulations). *(Amended by Ord. 3838, 3/20/90)*

9. Exploration and production of offshore oil and gas reservoirs from onshore locations, including exploratory and production wells, pipelines, temporary storage tanks, dehydration and separation facilities, and temporary truck terminals located within the Gaviota or Las Flores Canyon Consolidated Oil and Gas Planning Areas,

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subject to the requirements set forth in DIVISION 9, OIL & GAS FACILITIES.

(Added by Ord. 4235, 9/3/96)

Sec. 35-69.5. Uses Permitted with a Minor Conditional Use Permit.

(Amended by Ord. 3838, 3/20/90)

1. Additional dwellings for not to exceed four employees of the owner or lessee of the land engaged full time in agriculture on the farm or ranch upon which the dwelling is located provided:

   a. the applicant can document the existing and proposed agricultural use of the land and demonstrate a need for additional dwellings to support such use; and

   b. the applicant provides proof of the full-time employment of the employees.

Sec. 35-69.6. Minimum Lot Size.

Each main dwelling unit shall be located on a lot having minimum gross lot area as indicated below for the symbol shown on the lot on the applicable Santa Barbara County Zoning Map.

Zoning Symbol	Minimum Lot Size
AG-II-40	40 acres
AG-II-100	100 acres
AG-II-320	320 acres

A dwelling may be located upon a smaller lot if such lot is shown as a legal lot either on a recorded subdivision or parcel map or is a legal lot as evidenced by a recorded certificate of compliance.

Sec. 35-69.7. Height Limit and Setback Regulations.

None, except that no building or structure shall be located within fifty (50) feet of the centerline or within twenty (20) feet of the right-of-way line of any street.

Sec. 35-69.8. Parking.

Parking shall be provided as specified in DIVISION 6, PARKING REGULATIONS except for: *(Amended by Ord. 4067, 8/18/92).*

1. Agricultural Developments not requiring Development Plan (DP) approval, shall not be required to comply with design specifications for marking or striping (Sec.

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Sec. 35-172. Conditional Use Permits.

Sec. 35-172.1. Purpose and Intent.

The purpose of this section is to provide for uses that are essential or desirable but cannot be readily classified as principal permitted uses in individual districts by reason of their special character, uniqueness of size or scope, or possible effect on public facilities or surrounding uses. The intent of this section is to provide the mechanism for requiring specific consideration of these uses.

Sec. 35-172.2. Applicability.

The provisions of this section shall apply to those uses listed below under Sec. 35-172.4 & .5., and those uses listed in the "Uses Permitted with a Conditional Use Permit" section of the various zone districts, Division 8, Services, Utilities and Other Related Facilities and Division 9, Oil and Gas Facilities. *(Amended by Ord. 4084, 12/15/92)*

Sec. 35-172.3 Jurisdiction.

(Amended by Ord. 4227, 6/18/96)

1. The Zoning Administrator shall have jurisdiction for all Minor Conditional Use Permits and the Planning Commission shall have jurisdiction for all Major Conditional Use Permits.

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Sec. 35-172.5. Major Conditional Use Permits.

The following uses may be permitted provided the Planning Commission can make the findings set forth in Section 35-172.9 (Findings). *(Added by Ord. 4263, 6/24/97)*

1. Except for the AG-I, AG-II, Residential Ranchette and Resource Management Districts, the following uses may be permitted in any district that they are not otherwise permitted, with a Major Conditional Use Permit.

   a. Clinics
   b. Club
   c. Conference center
   d. Country clubs
   e. Hospitals, sanitariums nursing homes, and rest homes.
   f. Library
   g. Mausoleum
   h. Mortuary, crematory or funeral home
   i. Museum

2. The following uses may be permitted in any district that they are not otherwise permitted, with a Major Conditional Use Permit *(Amended by Ord. 4084, 12/15/92)*.

   a. Airstrip - temporary
   b. Cemetery
   c. Church
   d. Drive-through facilities for a use otherwise permitted in the zone district subject to the provisions of Sec. 35-172.11.
   e. Educational facilities, not including child care facilities. *(Amended by Ord. 4318, 6/23/98)*
   f. Eleemosynary and philanthropic institutions (except when human beings are housed under restraint).
   g. Extraction and processing of natural, carbonated or mineral waters for sale including but not limited to, storage, bottling and shipping operations. *(Amended by Ord. 4084, 12/15/92)*
   h. Fairgrounds

i. Golf courses and driving ranges

j. Helistops

k. Communication facilities, as specified in and governed by Sec. 35-144F.
(Amended by Ord. 4263, 6/24/97)

l. Mining, extraction and quarrying of natural resources, except gas, oil and other hydrocarbons subject to the provisions of Sec. 35-177. (Reclamation Plans).

m. Polo fields and playing field for outdoor sports.

n. Rodeo

o. Sea walls, revetments, groins and other shoreline structures subject to the provisions of Sec. 35-172.11.

p. Stable, commercial (including riding and boarding).

q. Certified Farmer's Market incidental to a conference center, club facility, fairground, church, school, or governmental or philanthropic institution.
(Added by Ord. 4086, 12/15/92)

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Sec. 35-172.6. Contents of Application. *(Amended by Ord. 4318, 6/23/98)*

1. As many copies of a Conditional Use Permit application as may be required shall be submitted to the Planning and Development Department. Said application shall contain all or as much of the submittal requirements for a Development Plan (Sec. 35-174.) as are applicable to the request.
2. In the case of a Conditional Use Permit application where the project is subject to Development Plan requirements, a Development Plan shall be required in addition to a Conditional Use Permit. *(Amended by Ord. 4318, 6/23/98)*

Sec. 35-172.7. Processing.

1. After receipt of the Conditional Use Permit application, the Planning and Development Department shall process the application through environmental review.
2. The Planning and Development Department shall refer the Conditional Use Permit application to the Subdivision/Development Review Committee for review and recommendation to the Planning Commission or Zoning Administrator. *(Amended by Ord. 4227, 6/18/96)*
3. The Planning Commission or Zoning Administrator will then consider the requested Conditional Use Permit at a noticed public hearing and either approve, conditionally approve, or deny the request. Notice of the time and place of said hearing shall be given in the manner prescribed in Sec. 35-181. (Noticing).
4. The action of the Planning Commission or Zoning Administrator shall be final subject to appeal to the Board of Supervisors as provided under Sec. 35-182.3. (Appeals). Under PRC § 30603, the issuance of a Coastal Development Permit on a conditionally permitted use is appealable to the Coastal Commission as provided in Sec. 35-182.4. (Appeals).
5. Conditional Use Permits may be granted for such period of time and upon such conditions and limitations as may be required to protect the health, safety, and general welfare of the community. Such conditions shall take precedence over those required in the specific zone districts.
6. If a Revised Conditional Use Permit is required as provided in Sec. 35-172.11., it shall be processed in the same manner as the original permit. When approved by

the decision-maker, such revised permit shall automatically supersede any previously approved permit. *(Added by Ord. 4298, 3/24/98)*

Sec. 35-172.8. Findings Required for Approval.

A Conditional Use Permit application shall only be approved or conditionally approved if all of the following findings are made:

1. That the site for the project is adequate in size, shape, location and physical characteristics to accommodate the type of use and level of development proposed.
2. That adverse environmental impacts are mitigated to the maximum extent feasible.
3. That streets and highways are adequate and properly designed to carry the type and quantity of traffic generated by the proposed use.
4. That there are adequate public services, including but not limited to fire protection, water supply, sewage disposal, and police protection to serve the project.
5. That the project will not be detrimental to the health, safety, comfort, convenience, and general welfare of the neighborhood and will not be incompatible with the surrounding area.
6. That the project is in conformance with the applicable provisions and policies of this Article and the Coastal Land Use Plan.
7. That in designated rural areas the use is compatible with and subordinate to the scenic and rural character of the area.
8. That the project will not conflict with any easements required for public access through, or public use of the property.
9. That the proposed use is not inconsistent with the intent of the zone district.

Sec. 35-172.9. Time Limit.

1. Prior to the commencement of the development and/or authorized use permitted by the Conditional Use Permit, a Coastal Development Permit authorizing such development and/or use shall be obtained. At the time of approval of a Conditional

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Use Permit, a time limit shall be established within which a Coastal Development Permit must be obtained. The time limit shall be a reasonable time based on the size and nature of the proposed development or use. If no date is specified, the time limit shall be eighteen (18) months from the effective date of the Conditional Use Permit. The effective date shall be the date of expiration of the appeal period on the approval of the Conditional Use Permit, or if appealed, the date of action by the Board of Supervisors. The time limit may be extended by the decision-maker with jurisdiction over the project pursuant to the provisions of Section 35-172.11., one time for good cause shown, provided a written request, including a statement of reasons for the time extension request, is filed with the Planning and Development Department prior to the expiration date. If the time limit expires and no extension has been granted, then the Conditional Use Permit shall be considered null and void. *(Amended by Ord. 3871, 7/17/90; Ord. 4086, 12/15/92)*

2. A Conditional Use Permit shall become null and void and be automatically revoked if the use permitted under the Conditional Use Permit is discontinued for a period of more than one year. Said time may be extended by the decision-maker with jurisdiction over the project one time for good cause shown, provided a written request, including a statement of reasons for the time extension request, is filed with the Planning and Development prior to expiration date. *(Amended by Ord. 4086, 12/15/92)*

Sec. 35-172.10. Revocation.

If the decision-maker with jurisdiction over the project determines at a noticed public hearing pursuant to Section 35-181 (Noticing) that the permittee is not in compliance with one or more of the conditions of the Conditional Use Permit, the decision-maker with jurisdiction over the project may revoke the Conditional Use Permit or direct that the permittee apply for an Amendment or Revision pursuant to Sec. 35-172.11. *(Amended by Ord. 3887, 9/18/90; Ord. 4086, 12/15/92)*

Sec. 35-172.11. Substantial Conformity, Amendments and Revisions.
(Added by Ord. 4086, 12/15/92; Amended by Ord. 4227, 6/18/96)

Changes to a Conditional Use Permit shall be processed as follows:

1. Substantial Conformity:

The Director may approve a minor change to a Conditional Use Permit, if the Director determines that the change is in substantial conformity with the approved permit, pursuant to the County's Substantial Conformity Guidelines. No public noticing or public hearing shall be required for Substantial Conformity Determinations. The action of the Director shall be final and not appealable. A Coastal Development Permit shall be required, pursuant to the Substantial Conformity Determination. Prior to the approval of such Coastal Development Permit, an additional finding must be made that the Coastal Development Permit substantially conforms to the previous Conditional Use Permit.

2. Amendments:

Where a change to an approved Conditional Use Permit is not in substantial conformity with the approved permit, the Director, or in the case of a Revocation hearing the decision-maker with jurisdiction over the project, may approve, or conditionally approve an application to alter, add, replace, relocate or otherwise amend a Conditional Use Permit, providing:

a. The area of the parcel(s) that is under review was analyzed for potential environmental impacts and policy consistency as a part of the approved permit.

b. All of the following additional findings can be made:

(1) In addition to the findings required for approval of a Conditional Use Permit set forth in this Sec. 35-172.8., the Amendment is consistent with the specific findings of approval, including CEQA findings, that were adopted when the Conditional Use Permit was previously approved.

(2) The environmental impacts related to the proposed change are determined to be substantially the same or less than those identified for the previously approved project.

c. A public hearing shall not be required for amendments to an approved Conditional Use Permit. However, notice shall be given at least ten (10) days prior to the date of the decision as provided in Sec. 35-181. (Noticing). The decision-maker may approve, conditionally approve, or deny the Amendment. *(Amended by Ord. 4298, 3/24/98)*

3. Revisions:

   a. A Revised Conditional Use Permit shall be required for changes to an approved Conditional Use Permit where the findings set forth in Sec. 35-172.11.2. for Amendments cannot be made and substantial conformity cannot be determined.

   b. A Revised Conditional Use Permit shall be processed in the same manner as a new Conditional Use Permit.

Sec. 35-172.12. Conditions, Restrictions, and Modifications.
(Added by Ord. 4227, 6/18/96)

1. At the time the Conditional Use Permit is approved, or subsequent Amendments or Revisions are approved, the Director, Zoning Administrator, Planning Commission or Board of Supervisors may modify the building height limit, distance between buildings, setback, yard, parking, building coverage, landscaping or screening requirements specified in the applicable zone district when the Director, Zoning Administrator, Planning Commission or Board of Supervisors finds the project justifies such modifications and is consistent with the Comprehensive Plan and the intent of other applicable regulations and guidelines.

2. As a condition of approval of any Conditional Use Permit, or of any subsequent Amendments or Revisions, the Director, Zoning Administrator, Planning Commission or Board of Supervisors may impose any appropriate and reasonable conditions or require any redesign of the project as they may deem necessary to protect the persons or property in the neighborhood, to preserve the neighborhood character, natural resources or scenic quality of the area, to preserve or enhance the public peace, health, safety, and welfare, or to implement the purposes of this Article.

3. The Director, Zoning Administrator, Planning Commission or Board of Supervisors may require as a condition of approval of any Conditional Use Permit, or of any subsequent Amendments or Revisions, the preservation of trees existing on the property.

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Sec. 35-172.13. Additional Requirements.
(Amended by Ord. 4227, 6/18/96)

In addition to the provisions set forth above, the following uses shall be subject to additional requirements as set forth below: *(Amended by Ord. 4084, 12/15/92; Ord. 4263, 6/24/97))*

1. Mortuaries, Crematories, and Funeral Homes.

   Subject to the issuance of a Conditional Use Permit, mortuaries, crematories, and funeral homes may be permitted in the following locations:

   a. Within cemeteries operating under a valid use permit;

   b. On any parcel of land abutting such a cemetery; or

   c. On property zoned to permit multiple family dwellings where such property abuts upon or is directly across the street from property zoned for industrial purposes.

   In all such locations, the Planning Commission shall impose conditions requiring that the architectural design of all buildings and structures be compatible with neighboring residential buildings, that signs are unobtrusive, that adequate off-street parking space is provided for funeral procession assembly areas.

2. Handicraft Industries.

   A Conditional Use permit may be issued under the provisions of this section for the manufacture in C-2 and C-3 Districts of handicraft items, jewelry, notions, and other items on a small scale, and involving no effects on surrounding property which would constitute a greater nuisance than those created by other uses permitted in the district in which such manufacture is allowed.

   A Conditional Use Permit for such use may only be issued subject to the provisions of this section and to the following conditions and to any further conditions which are necessary to protect the public peace, health, safety, and general welfare, to maintain property values in the neighborhood, and to safeguard essential community services and values such as traffic circulation, sewage disposal, water supply, fire protection, and neighborhood character:

4. Electrical Transmission Lines.

   a. Transmission line rights-of-way shall be routed to minimize impacts on the viewshed in the coastal zone, especially in scenic rural areas, and to avoid locations which are on or near habitat, recreational, or archaeological resources, whenever feasible. Scarring, grading, or other vegetative removal shall be repaired, and the affected areas revegetated with plants similar to those in the area to the extent safety and economic considerations allow.

   b. In important scenic areas, where above-ground transmission line placement would unavoidably affect views, undergrounding shall be required where it is technically and economically feasible unless it can be shown that other alternatives are less environmentally damaging. When above-ground facilities are necessary, design and color of the support towers shall be compatible with the surroundings to the extent safety and economic considerations allow. *(Added by Ord. 4171, 10/25/94)*

5. Drive-Through Facilities.

   In considering an application for such a Conditional Use Permit, the findings in Sec. 35-172.8., shall not be used and the permit shall be granted only if the drive-through facility is found to have no greater adverse impact upon air quality than the same use without the drive-through facility.

6. Sale of agricultural products grown on the premises.

   a. This use shall not be permitted in the EX-1 Zoning District.

   b. The premises shall consist of two (2) or more contiguous acres.

   c. If a building or structure is required for the sale of such products, the sale shall be conducted either within an existing accessory building or from a separate stand not to exceed two hundred (200) square feet of sales and storage Added 1/86 area except that if the premises consist of five (5) or more contiguous acres, such building shall not exceed six hundred (600) square feet. The building or structure shall be located no closer than 20 feet to the right-of-way line of any street; this requirement shall apply in lieu of