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addendum posted on December 8, 2009

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DATE: November 20, 2009

TO: Coastal Commissioners and Interested Parties

FROM: Peter M. Douglas, Executive Director
Robert S. Merrill, North Coast District Manager
James R. Baskin AICP, Coastal Planner

SUBJECT: **Appeal No. A-1-EUR-09-049** (CUE VI, LLC, CDP-09-0004), Former Union Pacific Railroad Maintenance Yard, Eureka, Humboldt County. Filed November 19, 2009.

Recommendation: Staff recommends that the Commission determine that **a substantial issue exists** with respect to the grounds on which Appeal No. A-1-EUR-09-049 has been filed and that the Commission hold a *de novo* hearing. Staff recommends a **NO** vote on the following motion & resolution:

Motion & Resolution. I move that the Commission determines and resolves that: Appeal No. A-1-EUR-09-049 raises no substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency with the Certified Local Coastal Plan and/or the public access and recreation policies of the Coastal Act.

Following the staff recommendation will result in the Commission conducting a *de novo* review of the application, and adoption of the following findings. Passage of this motion, via a yes vote, will result in a finding of No Substantial Issue and the local action will become final and effective. The motion passes only by an affirmative vote of the majority of the appointed Commissioners present.

Findings: On November 3, 2009, the Eureka City Council approved the first phase of the Marina Center development project, consisting of various hazardous materials cleanup and abatement actions detailed within an approved “Supplemental Interim Remedial Action Plan (SIRAP) (see Exhibit Nos. 7 and 8). Phase 1 includes: (a) the removal of various debris piles, old foundations and other structures and remnants that remain on site as a result of the past use of the site as a railroad maintenance facility; (b) remediation of contaminated soils in five focused areas by excavating the contaminated soils and then back-filling with clean material; (c) the restoration of wetlands within an 11.89-acre area surrounding Clark Slough by excavating and re-contouring a portion of the area surrounding the slough to create new seasonal and muted tidal wetlands and removing debris that has accumulated within the watercourse and the concrete rip-

rap that has been placed along its banks; and (d) modifying the remainder of the site to alter the flow of storm water on the site to promote natural infiltration of storm water and to reduce or eliminate stormwater from leaving the site through site grading and placing imported clean cover materials up to a two-foot thickness over the site to provide additional stormwater infiltration capacity and eliminate potential drainage into the environmentally sensitive waters of Humboldt Bay and utilizing impermeable materials as may be deemed appropriate to capture, detain and direct runoff into the municipal stormwater drainage system. Pursuant to Coastal Act Sections 30603(a)(2) and 30613, this approval is appealable to the Commission because the approved development is: (a) within 100 feet of a wetland; and (b) on lands, in whole or in part, for which coastal development permitting authority has been delegated to a local government that the commission, after consultation with the State Lands Commission, has determined are: (1) filled and developed and are (2) located within an area which is committed to urban uses, but nonetheless may be subject to the public trust.

Appeal A Contentions: Commissioner-Appellants Stone and Mirkarimi claim the development as approved by the City is inconsistent with the LCP because: (1) filling wetlands to provide additional stormwater storage and drainage control is not a permissible use; (2) feasible alternatives to filling the wetlands exist that would achieve the project phase objectives of preventing continued discharges of stormwater-entrained pollutants from discharging into Humboldt Bay; (3) the development has not been sited and designed to prevent impacts which would significantly degrade adjacent wetland Environmentally Sensitive Habitat Area (ESHA); and (4) the biological productivity of aquatic resources and water quality will not be sustained to maintain optimum populations of aquatic organisms and to protect human health (see Exhibit No. 5).

Appeal B Contentions: Appellants Humboldt Baykeeper / Environmental Protection Information Center / Northcoast Environmental Center (HB/EPIC/NEC) assert the development as approved by the City is inconsistent with the LCP because: (1) the approved conversion and utilization of a wetland Environmentally Sensitive Habitat Area (ESHA) is not a resource-dependent use within an ESHA; (2) filling wetlands to provide additional stormwater storage and drainage control is not a permissible use; and (3) feasible alternatives to filling the wetlands exist that would achieve the project phase objectives of preventing continued discharges of stormwater-entrained pollutants from discharging into Humboldt Bay (see Exhibit No. 6).

Appeal C Contentions: Appellant Ralph Faust asserts the development as approved by the City is inconsistent with the LCP because: (1) filling wetlands to provide additional stormwater storage and drainage control is not consistent with the relevant provisions of the LCP; (2) the approved conversion and utilization of a wetland Environmentally Sensitive Habitat Area (ESHA) is not consistent with the relevant provisions of the LCP; and (3) the City erroneously invoked the conflict resolution provisions of the Coastal Act expressly reserved to the Commission for resolving situations where the application of two or more policies are in conflict to one another (see Exhibit No. 7).

Coastal Act Section 30625(b) requires the Commission to hear an appeal unless it determines that no substantial issue exists with respect to the grounds on which the appeal has been filed.¹ Commission staff has analyzed the City's Notice of Final Local Action for the development (Exhibit No. 7), appellants' claims (Exhibit Nos. 5, 6, and 7), and the relevant requirements of the LCP (Attachment A).

Staff recommends that the Commission find that the appeals raise a substantial issue for the following reasons:

Permissible Use for Diking, Filling, and Dredging of Wetlands: First, the City did not adopt findings that establish how grading and filling the emergent wetlands is consistent with the allowable uses for diking, filling, and dredging in a wetland specified by LUP Natural Resources Policy 6.A.9. and 6.A.14, and Section 10-5-2942.6(a) and 10-5.2942.10 of the Coastal Zoning Regulations (CZR). These policies limit the allowable uses for fill in wetlands to the same kinds of uses for which filling of wetlands is permitted under Section 30233 of the Coastal Act. None of these policies allow grading and filling of wetlands for the purposes of abatement of contaminated stormwater discharges from private lands. The project record for the approved development identifies the project purpose for the grading and filling of wetlands for stormwater management as being a form of "restoration purposes," as identified in LUP Natural Resources Policy 6.A.14.f. and CZR Section 10-5.2942.10(f). "Restoration" comprises actions that result in returning an article "back to a former position or condition," especially to "an unimpaired or improved condition." Accordingly, the primary impetus for the restorative actions being undertaken must be to reestablish and possibly enhance former habitat conditions rather than to compensate for habitat areas being simultaneously converted or lost to another use. In addition, recent case law has clarified that filling wetlands and replacing the wetlands lost with wetlands creation in other locations is not a legitimate form of "restoration purposes" pursuant to Section 30233 of the Coastal Act (see *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.Ap. 4th. 493, 506.)

The stated reason for the approved wetlands grading and filling is to control site stormwater drainage such that entrained pollutants do not continue to be released into the environmentally sensitive receiving waters of Humboldt Bay. These modifications are not being undertaken for the betterment of the onsite dispersed emergent wetlands resources, but instead to control hazardous materials releases associated with the site's former uses as a rail switching and maintenance yard, and petroleum bulk storage terminal. Moreover, considering that the authorized interim remediation work is but an initial phase of a larger general commercial / light industrial / residential mixed-use development project envisioned for construction directly atop the areas graded and filled

¹ The term "substantial issue" is not defined in the Coastal Act or its implementing regulations. In previous decisions on appeals, the Commission has generally been guided by the following factors in making substantial issue determinations: (a) the degree of factual and legal support for the local government's decision; (b) the extent and scope of the development as approved or denied by the local government; (c) the significance of the coastal resources affected by the decision; (d) the precedential value of the local government's decision for future interpretations of its LCP; and (e) whether the appeal raises only local issues, or those of regional or statewide significance.

for stormwater management purposes, the assertion that the filling and grading is for “restoration purposes” is questionable. The intended end use of the wetlands area to be filled and graded must be considered with respect to compliance with the permissible use requirements of LUP Natural Resources Policy Nos. 6.A.4., 6.A.9 and 6.A.14, and CZR Sections 10-5.2942.6, 10-5.2942.10, and 10-5.2942.12.

Thus, the public record for the project lacks substantive factual and legal support for the City’s decision to approve the wetland filling component of the development as being a permissible use consistent with the certified LCP. Moreover, the proposed grading and filling of wetlands involves potential adverse effects to Humboldt the substantial coastal resources of Humboldt Bay, comprising state waters of regional and statewide significance that would be affected by the decision. Additionally, the decision to approve such impermissible wetlands filling, dredging, and diking could set a troublesome precedent with respect to how the City may interpret its LCP in future permitting actions.

Therefore, as the wetlands area approved for grading and filling is not reasonably intended for the purpose of restoring the wetlands specifically being modified, and given that the subsequent phase mixed-use development would not be for one of the other uses enumerated within LUP Natural Resources Policy Nos. 6.A.4. and 6.A.14., and CZR Sections 10-5.2942.10 and 10-5.2942.12, the Commission finds that the appeals raise a substantial issue regarding consistency of the project as approved by the City with the LCP provisions regarding permissible uses for the filling, diking, and dredging of wetlands.

Feasible Least Environmentally Damaging Alternative: Second, the City did not adopt findings that establish how the approved filling of the watercourse involves the least environmentally damaging feasible alternative consistent with LUP Natural Resources Policy 6.A.9 and CZR Section 10-5.2942.6. Under these policies and standards, even if the fill was for an allowable use, which, as discussed above, the Commission finds is not the case, wetland fill can only be allowed if the fill involved is for the least environmentally damaging feasible alternative. The City findings indicate the filling of the emergent wetlands would provide additional storage for stormwater and to allow for its infiltration into underlying soils so that continued discharges of runoff-entrained contaminants into the environmentally sensitive receiving waters of Humboldt Bay could be curtailed. However, the City findings provide no substantive analysis of project alternatives that address other feasible options to the grading and filling of nearly 2/3 of the roughly 40-acre site that would achieved the same water quality objectives. As enumerated in Appeal A, several potential feasible options are available for managing and controlling polluted stormwater originating from the former railroad maintenance yard site without obliterating the emergent onsite wetlands, including, in some inter-functional combination: (a) installing perimeter berming to impound contaminated surface and groundwater flows; (b) grading the site to drain to onsite retention/detention basins; (c) controlling the entry of stormwater into hazardous materials contaminated areas; (d) in-situ remedial treatment; and (e) removing the underlying contaminated soil materials and restoring the emergent wetlands in place. Thus, the non-existence of other

feasible less environmentally damaging alternatives has not been established.² In rejecting all other alternatives to the wetlands filling and grading, the City concluded that no other legally feasible option to the approved remedial actions exists. The rationale for this determination was based on the City conflating the “concurrence” received from the North Coast Regional Water Quality Control Board staff for the subject “Supplemental Interim Remedial Action Plan” with the directive within the Regional Board’s 2001 Cleanup and Abatement Order No. R1-2001-26, erroneously recasting the tentative approval the SIRAP into a firm mandate of the one and only acceptable remedial action that the agency would consider as being consistent with the cleanup order.

The state water resources board and the regional water quality control boards set water quality objectives to which cleanup of a given contaminated site is to be brought into compliance; they do not dictate to responsible parties precisely which hazardous materials remediation logistics are to be employed. Thus, as Section 10-5.2942.6.b. of the City’s coastal zoning ordinance requires that, in approving the filling, diking, and dredging of wetlands that no feasible, less environmentally damaging alternative exist, and given that the City did not critically assess alternatives to the approved filling and grading of wetlands for purposes of controlling stormwater runoff, the nonexistence of a feasible less environmentally damaging alternative was not established. Thus, the public record for the project lacks substantive factual and legal support for the City’s decision to approve the development as being consistent with the requirements of the certified LCP that no feasible less environmentally damaging alternative to the authorized project exists. Moreover, the proposed grading and filling of wetlands involves potential adverse effects to Humboldt the substantial coastal resources of Humboldt Bay, comprising state waters of regional and statewide significance that would be affected by the decision. Additionally, the decision to approve such development without rigorous consideration of other feasible, less environmentally damaging alternatives could set a troublesome precedent with respect to how the City may interpret its LCP in future permitting actions. Therefore the Commission finds that the appeals raise a substantial issue regarding consistency of the development as approved by the City with LUP Natural Resources Policy No. 6.A.9. and CZR Section 10-5.2942.6 of the City’s certified LCP.

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The environmental impact report (EIR) prepared for the overall *Marina Center* development project, including the initial hazardous materials interim remedial actions as well as subsequent mixed-use commercial/industrial/residential phases, identified the “no project” alternative as the “environmentally superior alternative,” pursuant to the requirements of the California Environmental Quality Act (CEQA). In addition, the EIR noted that the approximately ¾-scale “reduced footprint” alternative would also have lessened impacts to certain aspects of the physical environment than would the preferred full-scale project. Nonetheless, development of the reduced footprint alternative would still be predicated upon the phase 1 grading and filling of the onsite emergent wetlands. Thus, the EIR concludes that the reduced footprint alternative would not represent the feasible least environmentally damaging alternative for purposes of compliance with LUP Natural Resources Policy No. 6.A.9., sub-section (b). The Commission notes that this orientation in the project environmental review of concentrating on the effects of various alternatives of the overall development project without differentiation between different possible options for achieving the first phase cleanup objectives, is further indication of a lack of a thorough investigation of feasible less environmentally damaging alternatives to the grading and filling wetlands associated with the preferred project alternative, as required by the LCP.

Consistency with ESHA Protection Policies: Third, the City did not adopt findings that establish that the approved grading and filling of wetlands ESHA is a resource-dependent use and that the development has been sited and designed to prevent impacts which would significantly degrade adjacent wetland ESHA as required by LUP Natural Resources Policy 6.A.4. and Coastal Zoning Regulations Section 10-5.2942.4. The approved development entails construction activities to be conducted both within and adjacent to environmentally sensitive habitat areas (ESHA) specifically enumerated within the LCP at LUP Natural Resources Policy 6.A.6 and CZR Section 1-5.2942.3(b), namely emergent and palustrine wetlands. “Environmentally sensitive habitat areas,” as defined within the policy document glossary of the City’s LUP, comprise “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, Policy 6.A.6(b) and CZR Section 1-5.2942.3(b) specifically declare that wetlands are environmentally sensitive habitat areas within the City’s coastal zone.

The LUP incorporates the intent of the Coastal Act to protect ESHAs through its paraphrasing and reiteration of Coastal Act Section 30240 in LUP Natural Resources Policy No. 6.A.7 and CZR Section 10-5.2942.4, respectively. LUP Natural Resources Policy No. 6.A.7. and CZR Section 10-5.2942.4 direct that environmentally sensitive habitat areas be protected against any significant disruption of habitat values, and only uses dependent on such resources be allowed within such areas. Additionally, development in areas adjacent to environmentally sensitive habitat areas must be sited and designed to prevent impacts which would significantly degrade such areas, and be compatible with the continuance of such habitat areas.

The stated purpose for the conversion of the emergent wetlands is to provide additional stormwater infiltration area and for greater drainage management so that entrained pollutants do not continue to be discharged into the environmentally sensitive waters of Humboldt Bay. The management of polluted stormwater does not functional necessitate, *per se*, the grading and filling of wetlands to be accomplished. In addition, the approved grading and filling of areas adjacent to ESHA wetlands designed have not been designed and sited to prevent significantly degrading impacts to such adjoining areas, or to be compatible with the continuance of nearby habitat areas. The development has not been sited and designed to prevent impacts which would significantly degrade the affected wetland ESHA and to be compatible with the continuance of the affected wetland ESHA. Thus, the public record for the project lacks substantive factual and legal support for the City’s decision to approve the development as being consistent with the requirements of the certified LCP that only resource dependent uses be allowed within ESHAs and that development adjacent to such environmentally sensitive areas be designed and sited to prevent to prevent impacts which would significantly degrade such areas, and be compatible with the continuance of such habitat areas. Moreover, the proposed grading and filling of wetlands involves potential adverse effects to Humboldt the substantial coastal resources of Humboldt Bay, comprising state waters of regional and statewide significance that would be affected by the decision. Additionally, the decision to approve such development that might adversely effect aquatic and water resources could set a troublesome precedent with respect to how the City may interpret its LCP in future

permitting actions. Therefore, for all of the above reasons, the Commission finds that the appeals raise a substantial issue regarding consistency of the approved project with LUP Natural Resources Policy No. 6.A.7. and CZR Section 10-5.2942.4.

Invocation of Conflict Resolution Provisions: Fourth, in numerous places throughout the findings for approval of the subject development, the City cites the so-called “conflict resolution” provisions of the Coastal Act and similar language in Section 10-5.2904 of the zoning ordinance as the appropriate mechanism to invoke for resolving the purported conflict between the policies and standards of the LCP which extend protections to ESHAs and wetlands and those which are intended to protect and enhance marine resources and water quality. The Coastal Act at Section 30200(b) contemplates that conflicts between Chapter 3 policies may occur, providing that, “Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, Section 30007.5 shall be utilized to resolve the conflict.” Coastal Act Section 30007.5 states that in “carrying out the provisions of this Division [i.e., the Coastal Act,] such conflicts [shall] be resolved in a manner which on balance is the most protective of significant coastal resources.” [Emphases added.] In contrast, the implementation plan portion of the City’s certified LCP contains Coastal Zoning Regulations Section 10-5.2904 which states in applicable part, “If any conflict occurs between one or more provisions of this article, such conflict shall be resolved in a manner which on balance is the most protective of significant coastal resources. If any provision of this article conflicts with any provision of any regulation contained in any previously adopted ordinance of the City, the provisions of this article shall control.”

The Commission finds, however, that Section 30007.5 only authorizes that conflicts between the various policies of Chapter 3 of the Coastal Act may be so resolved on a balance most protective of coastal resources. Consequently, this provision applies only to situations where, during the Commission’s administration of the Coastal Act in the review and approval of Land Use Plans and development within areas under its original or retained jurisdiction, policy conflicts arise. Insofar as Coastal Act Section 30519 provides for the delegation of permitting authority to local governments to authorize coastal development projects upon certification of a local coastal program (LCP), Section 30604 further requires that such development may only be authorized if found consistent with the policies and standards of that LCP. Section 30519 does not, however, delegate to local governments the ability to resolve conflicts between Coastal Act Chapter 3 policies: Local governments typically do not directly implement the Coastal Act (i.e., Division 20, California Public Resources Code) and the policies of Chapter 3, per se, but rather, the policies and standards of its own LCP. Thus, the primary mode of conflict resolution contemplated by the Coastal Act is where the Coastal Commission itself might be required to resolve policy conflicts in a manner that is most protective of coastal resources when it is implementing the various provisions of the Coastal Act. That said, Section 30200 does clearly indicate that local governments may invoke section 30007.5 also, but only when implementing the policies of the Coastal Act in instances where a conflict between Chapter 3 policies has been identified. This allowance is provided for those circumstances where a government may be implementing the policies of Chapter 3 directly; for example, prior to LCP certification and pursuant to section 30600(b) and 30620.5; or pursuant to Section 30520(a), which addresses circumstances where a court

may stay the implementation of an LCP but coastal development permits may nonetheless still issued by a local government. In such cases, the local government is issuing coastal development permits, but the standard of review is Chapter 3, not the provisions of an LCP. For example, the City of Los Angeles issues coastal development permits pursuant to Sections 30600(b) and 30620.5, but it does so with Chapter 3 as the standard of review, not under a certified LCP. Therefore, notwithstanding the paraphrased recitation of the conflict resolution provisions of Coastal Act within the City's coastal zoning regulations, and save for the limited situations discussed above, the conflict resolution authority provided under Coastal Act Section 30007.5 remains solely within the Commission before, during, and after certification of the City's LCP. Thus, despite the conclusion that could be drawn from the reference to Section 30007.5 within Section 30200(b), no authorization is afforded to local governments to directly resolve conflicts that arise in the application of policies of their LCPs.

The Commission acknowledges that in spite of efforts to provide for coordinated and internally consistent application of the policies and standards of the local coastal program during its drafting and certification, inevitably conflicts in the application of two or more policies do arise on occasion in considering particular development proposals where such disparate provisions are applicable. In such cases, the conflict or other unanticipated issue must be resolved by the Commission through an LCP amendment of the provisions which are at variance with one another.

Additionally, even if the City were authorized to resolve conflicting provisions, which it isn't, the scope of City coastal zoning code provision Section 10-5.2904 refers only to resolving policy conflicts between "provisions of *this article*" and "any provision of *this article* [that] conflicts with any provision of any regulation contained in *any previously adopted ordinance* of the City." Thus, the scope of the City's conflict resolution is limited to solving disagreements between provisions of its coastal zoning regulations and between the coastal regulations and other provisions of its municipal code's ordinances. Therefore, notwithstanding the perceived ability to resolve conflicts between provisions within the Implementation Program portion of its LCP, development would nonetheless be required to be found consistent with the policies of the Land Use Plan portion of the LCP, including Natural Resources Policies 6.A.1, 6.A.3., 6.A.7., 6.A.9., and 6.A.14.

Moreover, again setting aside the fact that the City is not so authorized to resolve conflicts between Coastal Act Chapter 3 (or LCP) policies and standards in some comprehensive balancing of their application to achieve maximized overall protection of coastal resources, as discussed further below, no actual conflict exists between any such provisions, including those seemingly at odds for protecting both the subject onsite emergent wetlands ESHA and the waters of Humboldt Bay: A denial of the subject supplemental interim remedial work plan activities would not, in itself, precipitate a policy conflict, as feasible alternatives exist to the approved remedial activities which could abate the polluted discharges into Humboldt Bay and not necessitate impermissible grading, filling, and conversion of wetlands ESHA into resource-independent stormwater storage and control facilities. Therefore, no alternative process venue is available to the City to allow for authorizing development which does not comport with all applicable policies and standards of its certified LCP. Therefore, the Commission finds that the appeals raise a substantial issue regarding consistency of the approved project with the provisions of Section 10-5.2904 of the certified zoning ordinance.

Protection and Maintenance of Biological Productivity and Water Quality: Fifth, the City did not adopt findings that establish how the approved filling and excavation grading of Clark Slough would ensure maintenance and protection of the biological productivity and water quality of the Clark Slough watercourse and Humboldt Bay. LUP Natural Resources Policy No. 6.A.1. directs that valuable aquatic resources shall be maintained, enhanced, and, where feasible, restored, with special protection given to areas and species of special biological or economic significance. In addition, uses of the marine environment are required to be carried out in the manner that will sustain the biological productivity of coastal waters and maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes. LUP Natural Resources Policy No. 6.A.1. requires that the biological productivity and the quality of coastal waters, streams, wetlands, and estuaries be maintained and, where feasible, restored to appropriately maintain optimum populations of aquatic organisms and for the protection of human health through, among other means, minimizing adverse effects of wastewater and stormwater discharges and entrainment, controlling the quantity and quality of runoff, preventing depletion of groundwater supplies and substantial interference with surface water flow, encouraging wastewater reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

As authorized, the creation of the compensatory wetland reserve mitigation area would entail extensive ground disturbance in the course of terra-forming new channels, overflow areas, and impounding levee berming. Although stockpile sampling protocols and procedures are identified prior to the reuse of and excavated materials onsite, the unearthing of heretofore subsurface material in an area that has been generally documented as contaminated with elevated levels of petroleum distillates, metals, and polychlorinated dibenzo-dioxins and furans, initiating the wetland reserve component before full characterization of the site has been undertaken, could result in exposing the aquatic resources within the slough and, in turn, Humboldt Bay, to toxics which could have deleterious impacts on the biological productivity of water quality of areas and species of special biological or economic significance, contrary to LUP Natural Resources Policy Nos. 6.A.1. and 6.A.3. Similarly, the record for the approval of the development did not include any analysis of the effects, if any, inputs of contaminants from up-gradient sources may have on aquatic resources and water quality. The project site lies directly downstream from the Schmidbauer Lumber Company, an industrial site which itself is under a NCRWQCB cleanup and abatement order (R1-2005-0040). Without such an evaluation the production and maintenance of biological productivity and water quality of lower Clark Slough has not been assured. Thus, the public record for the project lacks substantive factual and legal support for the City's decision to approve the development as being consistent with the requirements of the certified LCP that the biological productivity of aquatic resources and coastal water quality be protected and maintained. Additionally, the decision to approve such development within and adjacent to environmentally sensitive areas could set a troublesome precedent with respect to how the City may interpret its LCP in future permitting actions. Therefore, the Commission finds that the appeals raise a substantial issue regarding consistency of the

development as approved by the City is inconsistent with LUP Natural Resources Policy Nos. 6.A.1. and 6.A.3.

Overall, the City has not adopted findings that provide factual and legal support for determining that the approved filling, dredging, and diking of wetlands ESHA conforms with the pertinent LCP policies. Notwithstanding their anthropogenic origin and degraded condition, the approval of the filling, dredging, and diking of the subject estuarine and emergent wetlands for nonenumerated uses without such findings establishes an adverse precedent for allowing similar fill for other projects where there is a substantial issue of conformance with the LCP wetland fill, ESHA, and water quality policies. The protection of the biological productivity and quality of coastal waters, and environmentally sensitive wetlands is an issue of statewide concern addressed by Sections 30230, 30231, and 30233 of the Coastal Act, as it has been long established that coastal waters, and wetlands in particular, provide significant public benefits, such as fish and wildlife habitat, water quality filtration and recharge, flood control, and aesthetic values.

For the reasons stated above, the Commission finds that Appeal Number A-1-EUR-09-049 raises a substantial issue with respect to the grounds on which the appeal has been filed under Section 30603 of the Coastal Act regarding consistency of the approved development with the certified Local Coastal Program.

Information Needed for *De Novo* Review of Application:

Section 30621 of the Coastal Act instructs the Commission to provide for a *de novo* hearing on all appeals where it has determined that a substantial issue exists with respect to the grounds on which an appeal has been filed. If the Commission finds substantial issue as recommended above, staff also recommends that the Commission continue the *de novo* hearing to a subsequent date. The *de novo* portion of the appeal must be continued because the Commission does not have sufficient information to determine what, if any, development can be approved, consistent with the certified LCP.

Given that the project the Commission will be considering *de novo* has come to the Commission after an appeal of a local government action, the Commission has not previously been in the position to request information from the applicant needed to determine if the project can be found to be consistent with the certified LCP. Therefore, before the Commission can act on the proposed project *de novo*, the applicant must submit all of the information identified below.

Alternatives Analysis: As discussed above, to make the necessary findings that the proposed wetland fill is the least environmentally damaging feasible alternative pursuant to LUP natural Resources Policy 6.A.9.(b) and CZR Section 10-5.2942.6(b), an analysis of the feasibility and relative impact of alternative hazardous materials stormwater-entrained runoff control proposals is needed. The alternatives analysis should examine additional alternatives, either to be implemented independently or in conjunction with one another, such as: (1) the installation of at-grade runoff and sub-surface groundwater control berming and/or sheet pile, etc, to prevent

discharges from the site from entering Humboldt Bay; (2) grading the site to convey stormwater entrained polluted flows to interior retention/detention/infiltration basins; (3) inlet controls to prevent stormwater runoff from entering contaminated areas; (4) excavation and removal of contaminated soils and restoration of overlying wetlands in place; and (4) in-situ treatment of petroleum contaminated soils materials.

Hazardous Materials Contamination Assessment: In addition, to ensure that the biological productivity of aquatic resources and water quality are protected and maintained, full characterization of the presence and extent of constituents of concern is needed prior to approval of the Clark Slough wetland reserve component of the project. These assessments shall be performed pursuant to relevant protocols and standards as administered by appropriate oversight agencies, including as applicable, the North Coast Regional Water Quality Control Board, The Department of Toxic Substances Control, and the Humboldt County Department of Public Health.

Property Interest Information: Further, insofar as questions have been raised as to the extent that portions of the site may or may not be subject to public trust review by the State Lands Commission and/or the location of the boundary between public and private ownership, evidence of the extent and nature of the applicant's property interest is needed. This information is also necessary, if upon further evaluation of the proposed project it is determined that the project is not approvable consistent with the provisions of the certified LCP.

Application of the wetland filling, dredging, and diking policies of the City of Eureka LCP could result in the recommendation of denial of a coastal development permit for the project as proposed. However, Coastal Act Section 30010 prohibits the Commission from denying a permit in a manner which will take private property for public use without just compensation. Section 30010 states as follows:

30010. The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the commission, port governing body, or local government acting pursuant to this division to exercise their power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States.

Therefore, to the extent that the proposed project cannot be approved in a manner consistent with the provisions of the certified LCP, the Commission will need to evaluate whether denial of the proposed project would result in an unconstitutional taking of private property for public use. In order to make that evaluation, the Commission requires additional information from the applicant and the landowner concerning both the economic impact of the regulation on the applicant/landowner and the nature of the applicant's/landowner's property interest prior to holding a *de novo* hearing on the project. Specifically, the landowners of the property that is the subject of Appeal No. A-1-EUR-09-049 must provide the following information for the property that is subject to Appeal No. A-1-EUR-09-049, as well as all property in common contiguous ownership, i.e. any immediately adjacent property also owned by the applicant, including APNS 001-014-002; 003-021-009; 003-031-008; 003-041-005, -006, & -007; and 003-051-001.

1. When the property was acquired, and from whom;
2. The purchase price paid for the property;
3. The fair market value of the property at the time it was acquired and the basis upon which fair market value was derived;
4. Whether a general plan, zoning, or similar land use designations applicable to the property changed since the time the property was purchased. If so, identify the particular designation(s) and applicable change(s);
5. At the time the property was purchased, or at any subsequent time, whether the project been subject to any development restriction(s) (e.g., restrictive covenants, open space easements, etc.), other than the land use designations referred to in the preceding question;
6. Whether the size or use of the property changed in any way since it was purchased. If so, identify the nature of the change, the circumstances and the relative date(s);
7. Whether a portion of, or interest in, the property was sold or leased since the time the applicants purchased it, and the relevant date(s), sales price(s), rent assessed, and the nature of the portion or interest sold or leased;
8. A copy of any title report, litigation guarantee or similar document that might have been prepared in connection with all or a portion of the property, together with a statement of when the document was prepared and for what purpose (e.g., refinancing, sale, purchase, etc.);
9. The approximate date and offered price of any offers to buy all or a portion of the property since the time the applicants purchased the property;
10. The costs associated with ownership of the property on an annualized basis for the last five calendar years. These costs should include, but not necessarily be limited to, the following:
 - property taxes
 - property assessments
 - debt service, including mortgage and interest costs; and
 - operation and management costs;
11. Whether apart from any rent received from leasing all or a portion of the property (see question #7 above), current or past use of the property generates any income. If the answer is yes, the amount of generated income on an annualized basis for the past five calendar years and a description of the use(s) that generates or has generated such income;

12. The historic chain of title for all property, both on and adjacent to the site, held by the landowner in common contiguous ownership, including APNS 001-014-002; 003-021-009; 003-031-008; 003-041-005, -006, & -007; and 003-051-001;
13. Information to establish lot legality for all APNs both on and adjacent to the site, held by the landowner in common contiguous ownership, including APNS 001-014-002; 003-021-009; 003-031-008; 003-041-005, -006, & -007; and 003-051-001. Such information shall include copies of Certificates of Compliance and information demonstrating whether the real property in question complies with the provisions of the Subdivision Map Act and the local ordinances enacted pursuant thereto; and
14. For all property owned by the applicant, including all property on and adjacent to the site in common contiguous ownership, please indicate by overlay on a legal parcel map the location of all wetlands located on site as well as the location of all areas of soil and groundwater contamination.

Exhibits:

1. Location Map
2. Vicinity Map
3. Site Aerial
4. Site Oblique Aerial
5. Appeal Filed by Commissioners Mark Stone and Ross Mirkarimi, November 19, 2009
6. Appeal Filed by Humboldt Baykeeper / Environmental Protection Information Center / Northcoast Environmental Center, November, 18, 2009
7. Appeal Filed by Ralph Faust, November 19, 2009
8. *Notice of Final Local Action*, Coastal Development Permit No. CDP-09-004
9. Excerpts, *Supplemental Interim Remedial Action Plan (SIRAP)*
10. Excerpts, Wetland Delineation
11. Correspondence

ATTACHMENT A:

LCP POLICIES AND STANDARDS CITED IN APPEAL

Land Use Plan Policies

- 6.A.1. The City shall maintain, enhance, and, where feasible, restore valuable aquatic resources, with special protection given to areas and species of special biological or economic significance. The City shall require that uses of the marine environment are carried out in the manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.
- 6.A.3. The City shall maintain and, where feasible, restore biological productivity and the quality of coastal waters, streams, wetlands, and estuaries appropriate to maintain optimum populations of aquatic organisms and for the protection of human health through, among other means, minimizing adverse effects of wastewater and stormwater discharges and entrainment, controlling the quantity and quality of runoff, preventing depletion of groundwater supplies and substantial interference with surface water flow, encouraging wastewater reclamation, maintaining natural vegetation buffer areas that
- 6.A.4. The City shall require that channelizations or other substantial alterations that could significantly disrupt the habitat values of rivers and streams incorporate the best mitigation measures feasible.

Such channelizations and alterations shall be limited to the following:

- a. Flood control projects where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development;
 - b. Developments where the primary function is the improvement of fish and wildlife habitat.
- 6.A.6. The City declares the following to be environmentally sensitive habitat areas within the Coastal Zone:
- a. Rivers, creeks, sloughs, gulches and associated riparian habitats, including, but not limited to Eureka Slough, Fay Slough, Cut-Off Slough, Freshwater Slough, Cooper Slough, Second Slough, Third Slough, Martin Slough, Ryan Slough, Swain Slough, and Elk River.
 - b. Wetlands and estuaries, including that portion of Humboldt Bay within the City's jurisdiction, riparian areas, and vegetated dunes.
 - c. Indian Island, Daby Island, and the Woodley Island wildlife area.
 - d. Other unique habitat areas, such as waterbird rookeries, and habitat for all rare or endangered species on state or federal lists.
 - e. Grazed or farmed wetlands (i.e., diked former tidelands).

The areas are shown on 1:500 scale maps that are available for review at the City of Eureka Community Development Department. These maps are incorporated by reference into this General Plan and are a formal part of it. However, all environmentally sensitive habitat areas may not be shown on these maps and shall, if they exist, be identified as part of any project application.

6.A.7. Within the Coastal Zone, the City shall ensure that environmentally sensitive habitat areas are protected against any significant disruption of habitat values, and that only uses dependent on such resources shall be allowed within such areas. The City shall require that development in areas adjacent to environmentally sensitive habitat areas be sited and designed to prevent impacts which would significantly degrade such areas, and be compatible with the continuance of such habitat areas.

6.A.9. The City shall permit the diking, filling, or dredging of open coastal waters, wetlands, or estuaries only under the following conditions:

- a. The diking, filling or dredging is for a permitted use in that resource area;
- b. There is no feasible, less environmentally damaging alternative;
- c. Feasible mitigation measures have been provided to minimize adverse environmental effects;
- d. The functional capacity of the resource area is maintained or enhanced.

6.A.14. Consistent with all other applicable policies of this General Plan, the City shall limit development or uses within wetlands that are neither farmed nor grazed, or within estuaries, to the following:

- a. Port facilities.
- b. Energy facilities.
- c. Coastal-dependent industrial facilities, including commercial fishing facilities.
- d. Maintenance of existing or restoration of previously dredged depths in navigation channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
- e. Incidental public service purposes which temporarily impact the resources of the area, such as burying cables or pipes, inspection of piers, and maintenance of existing intake and outfall lines.
- f. Restoration projects.
- g. Nature study, aquaculture, or similar resource-dependent activities.
- h. New or expanded boating facilities in estuaries, consistent with the demand for such facilities.
- i. Placement of structural piling for public recreational piers that provide public access and recreational opportunities.

Sec. 10-5.2942. Environmental resource standards.

10-5.2942.1 Mitigation.

Channelizations or other substantial alterations that could significantly disrupt the habitat values of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat.

10-5.2942.2 Permitted shoreline construction.

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.

10-5.2942.3 Environmentally sensitive habitat areas.

Environmentally sensitive habitat areas within the City of Eureka's coastal zone shall include:

- (a) Rivers, creeks, sloughs, gulches and associated riparian habitats, including Eureka Slough, Fay Slough, Cut-Off Slough, Freshwater Slough, Cooper Slough, Second Sloughs, Third Slough, and Elk River.
- (b) Wetlands and estuaries, including that portion of Humboldt Bay within the City's jurisdiction, riparian areas, and vegetated dunes.
- (c) Indian Island, Daby Island, and Woodley Island wildlife area.
- (d) Other habitat areas, such as rookeries, and rare or endangered species on state or federal lists.
- (e) Grazed or farmed wetlands.

These areas are generally portrayed on the Resources Maps, where they are designated as wetlands or other natural communities.

10-5.2942.4 Protection of environmentally sensitive habitat areas.

Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources, including restoration and enhancement projects, shall be allowed within such areas. Development in areas adjacent to environmentally sensitive habitat areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

10-5.2942.5 Development in or near natural resource areas.

Prior to the approval of a development permit, all developments on lots or parcels shown on the land use plan and/or resource maps with a natural resource designation or within two hundred fifty (250') feet of such designation, or development affecting an environmentally sensitive habitat area, shall be found to be in conformity with the applicable habitat protection policies of the LCP. All development plans and grading plans shall show the precise location of the habitat(s) potentially affected by the proposed project and the manner in which they will be protected, enhanced, or restored. 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 City and the applicant. Where mitigation, restoration, or enhancement activities are required to be performed pursuant to other applicable portions of this LCP, they shall be required to be performed on City-owned lands on the Elk River Spit or on other available and suitable mitigation, restoration, or enhancement sites.

10-5.2942.6 Diking, filling, or dredging.

The diking, filling or dredging of open coastal waters, wetlands, or estuaries shall be permitted only where all of the following exist:

- (a) The diking, filling or dredging is for a permitted use in that resource area as provided in Land Use Plan Policies 5.12 through 5.16;
- (b) There is no feasible, less environmentally damaging alternative;
- (c) Feasible mitigation measures have been provided to minimize adverse environmental effects, consistent with the Land Use Plan Policy 5.10; and,
- (d) The functional capacity of the resources area is maintained or enhanced, consistent with the Land Use Plan Policy 5.10.

10-5.2942.7 Dredging and spoils disposal.

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

10-5.2942.8 Wetland or estuary development.

Diking, filling or dredging of a wetland or estuary shall maintain or enhance its functional capacity.

Functional capacity, the ability of the wetland or estuary to be self-sustaining and to maintain natural species diversity. In order to establish that the functional capacity is being maintained, all of the following must be demonstrated:

- (a) That presently occurring plant and animal populations in the ecosystem will not be altered in a manner that would impair the long-term stability of the ecosystem, i.e., natural species diversity, abundance and composition are essentially unchanged as a result of the project,
- (b) That a species that is rare or endangered will not be significantly adversely affected,
- (c) That a species or habitat essential to the natural biological functioning of the wetland or estuary will not be significantly adversely affected,
- (d) That consumptive (e.g., fishing, aquaculture and hunting) or nonconsumptive (e.g., water quality and research opportunity) values of the wetland or estuaries ecosystem will not be significantly reduced.

10-5.2942.9 Conditions.

(a) Dredging, when consistent with these provisions and where necessary for the maintenance of the tidal flow and continued viability of the wetland habitat or for flood control purposes, shall be subject to the following conditions:

- (1) Dredging shall be prohibited in breeding and nursery areas and during periods of fish migration and spawning.
- (2) Dredging shall be limited to the smallest area feasible.
- (3) Designs for dredging and excavation projects shall include protective measures such as silt curtains, weirs, etc, to protect water quality in adjacent areas during construction by preventing the discharge of refuse, petroleum spills, and unnecessary dispersal of silt materials.

(b) Diking or filling of a wetland shall at a minimum, require the following mitigation, restoration, or enhancement measures:

- (1) A detailed restoration or enhancement plan shall be required for each specific restoration or enhancement site prior to commencement of any development that is permitted as part of such a restoration or enhancement project. The restoration or enhancement plans shall include provisions for purchase, if required, and restoration or enhancement, as determined in consultation with the Department of Fish and Game, Coastal Commission, and Coastal Conservancy, of an equivalent area of equal or greater productivity, and dedication of the land to a public agency or other method which permanently restricts the use of the site to habitat and open space purposes. The restoration or enhancement site shall be purchased or otherwise made available prior to any diking or filling activity.
- (2) Equivalent areas shall be opened to tidal action or other sources of surface water shall be provided. This provision applies to diked or filled areas which themselves are not environmentally sensitive habitat areas, but would become so if they were opened to tidal action or provided with other sources of surface water. All of the provisions for restoration, purchase (if necessary), and dedication contained in paragraph (b)(1), above, shall apply to any program or activity performed pursuant to this paragraph.
- (3) Mitigation or restoration activities shall, to the maximum extent feasible, be of the same type as the wetland to be filled (i.e., freshwater marsh for freshwater marsh, saltwater marsh for saltwater marsh, etc.).
- (4) An applicant who is required to participate in a restoration or mitigation program may avail himself or herself of restoration or enhancement sites on City-owned lands on the Elk River Spit, consistent with all other applicable policies of Land Use Plan Chapter 5 and this article, and at a cost not to exceed Twenty-five (\$.25) Cents for each square foot of affected marsh or other wetland.
- (5) For permissible wetland restoration projects identified in the Land Use Plan Policy 5.12(b), any coastal development permit issued for one or a combination of projects shall be part of one or more wetland restoration programs consistent with all other applicable provisions of this LCP. Such wetlands restoration or enhancement program(s) shall be prepared and implemented in consultation with the Department of Fish and Game, Coastal Commission, and Coastal Conservancy. Preparation of the program(s) shall occur prior to commencement of any development governed by this subdivision; however, implementation of

the program(s) may occur concurrently with or subsequently to any approved development. If an in-lieu fee is required to be paid by the applicant, it shall not exceed \$0.25 for each square foot of affected marsh or other wetland, except as provided in permit CP-10-80. For the area south of Hilfiker Lane identified in the LUP Policy 5.12(b), the restoration program may, at any one time, include one or more of the affected properties, provided that when an application for development pursuant to this subdivision is made, the affected property shall participate in the wetlands restoration program.

10-5.2942.10. Permitted development and uses in non-farmed wetlands and estuaries.

Permitted development or uses within nonfarmed wetlands and estuaries shall be limited to the following:

- (a) Port facilities.
- (b) Energy facilities.
- (c) Coastal development industrial facilities including commercial fishing facilities.
- (d) Maintenance of existing or restoration of previously dredged depths in navigation channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
- (e) Incidental public service purposes which temporarily impact the resources of the area, such as burying cables and pipes, inspection of piers, and maintenance of existing intake and outfall lines.
- (f) Restoration projects.
- (g) Nature study, aquaculture, or similar resource-dependent activities.
- (h) New or expanded boating facilities in estuaries.
- (i) Placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

10-2.2942.11. Permitted uses in open coastal waters.

Permitted uses within open coastal waters shall be limited to the following:

- (a) Port facilities.
- (b) Energy facilities.
- (c) Coastal-dependent industrial facilities, including commercial fishing facilities.
- (d) Maintenance of existing or restoration of previously dredged depths in navigation channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
- (e) Incidental public service purposes which temporarily impact the resources of the area, such as burying cables and pipes, inspection of piers, and maintenance of existing intake and outfall lines.
- (f) Restoration projects.
- (g) Nature study, aquaculture, or similar resource-dependent activities.
- (h) New or expanded boating facilities.
- (i) Sand or gravel mineral extraction in portions of open coastal waters that are not environmentally sensitive habitat areas.
- (j) Placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

10-5.2942.12. Permitted uses involving alterations of streams and rivers.

Permitted uses that involve substantial alterations of streams and rivers shall incorporate the best mitigation measures feasible and shall be limited to the following:

- (a) Necessary water supply projects.
- (b) Flood control projects where no other method of protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development.
- (c) Development where the primary function is the improvement of fish and wildlife habitat.

10-5.2942.13. Permitted uses and development in grazed or farmed wetlands.

Permitted uses and development in grazed or farmed wetlands shall be limited to the following:

- (a) Agricultural operations limited to apiaries, field and truck crops, livestock raising, greenhouses (provided they are not located on slab foundations and crops are grown in the existing soils on site), and orchards.
- (b) Farm-related structures (including barns, sheds, and farmer-occupied housing) necessary for the performance of agricultural operations. Such structures may be located on an existing farmed wetland parcel only if no alternative upland location is available for such purpose and the structures are sited and designed to minimize adverse environmental effects on the farmed wetland. No more than one permanent residential structure per parcel shall be allowed.
- (c) Restoration projects.
- (d) Nature study, aquaculture, and similar resource-dependent activities.
- (e) Incidental public service purposes which may temporarily impact the resources of the area, such as burying cable and pipes.

10-5.2942.14. Fill for repair and maintenance.

New fill for repair and maintenance purposes may be permitted on lands adjacent to the northern waterfront provided that is consistent with other LUP policies and where:

- (a) The fill will be placed in previously filled areas which have been subject to erosion;
- (b) The fill will not be placed beyond the existing bulkhead line;
- (c) The fill is necessary to protect existing development from erosion;
- (d) The fill will not interfere with commercial fishing activities and facilities; and
- (e) Placement of the fill is consistent with the public access policies of the LCP in that public access will not be adversely affected, or public access has been provided.

10-5.2942.15. Buffers.

A buffer shall be established for permitted development adjacent to all environmentally sensitive areas. The width of a buffer shall be one hundred (100') feet, unless the applicant for the development demonstrates on the basis of information, the type and size of the proposed development, and/or proposed mitigation (such as planting of vegetation) that will achieve the purposes of the buffer, that a smaller buffer will protect the resources of the habitat area. For a wetland, the buffer should be measured from the landward edge of the wetland. For a stream or river, the buffer should be measured landward from the landward edge of riparian vegetation or from the top edge of the bank (such as, in channelized streams). Maps and supplemental information submitted as part of the application should be used to specifically determine these boundaries.

10-5.2942.16. Barriers.

To protect wetlands against physical intrusion, wetland buffer areas shall incorporate attractively designed and strategically located barriers and informational signs.

10-5.2942.17. Uses adjacent to gulches.

All coastal zone land use activities adjacent to gulches shall be carried out in a manner which avoids vegetative removal below the break in slope, (usually those areas with a slope of twenty (20%) percent or greater) and which does not alter natural landforms and drainage patterns.

10-5.2942.18. Disagreement over boundary.

Where there is a disagreement over the boundary, location, or current status of an environmentally sensitive area identified in LCP Policy 5.5 or which is designated on the Resources Maps, the applicant shall be required to provide the city with:

- (a) A base map delineating topographic lines, adjacent roads, location of dikes, levees, or flood control channels and tide gates, as applicable;
- (b) A vegetation map, including species that may indicate the existence or non-existence of the sensitive environmental habitat area;
- (c) A soils map delineating hydric and non-hydric soils; and,
- (d) A census of animal species that may indicate the existence or non-existence of the sensitive environmental habitat area.

The city shall transmit the information provided by the applicant to the Department of Fish and Game for review and comment. Any comments and recommendations provided by the Department shall be immediately sent to the applicant for his or her response. The city shall make its decision concerning the boundary, location, or current status of the environmentally sensitive habitat area in question based on the substantial evidence in the record and shall adopt findings to support its actions.

ATTACHMENT B

COASTAL ACT POLICIES CITED IN SUBSTANTIAL ISSUE ANALYSIS

Section 30007 Housing; local government

Nothing in this division shall exempt local governments from meeting the requirements of state and federal law with respect to providing low- and moderate-income housing, replacement housing, relocation benefits, or any other obligation related to housing imposed by existing law or any law hereafter enacted.

Section 30200 Policies as standards; resolution of policy conflicts

...(b) Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, Section 30007.5 shall be utilized to resolve the conflict and the resolution of such conflicts shall be supported by appropriate findings setting forth the basis for the resolution of identified policy conflicts.

Section 30233 Diking, filling or dredging; continued movement of sediment and nutrients

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

(6) Restoration purposes.

(7) Nature study, aquaculture, or similar resource dependent activities.

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

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. Any alteration of coastal wetlands identified by the Department of Fish and Game, including, but not limited to, the 19 coastal wetlands identified in its report entitled, "Acquisition Priorities for the Coastal Wetlands of California", shall be limited to very minor incidental public facilities, restorative measures, nature study, commercial fishing facilities in Bodega Bay, and development in already developed parts of south San Diego Bay, if otherwise in accordance with this division.

For the purposes of this section, "commercial fishing facilities in Bodega Bay" means that not less than 80 percent of all boating facilities proposed to be developed or improved, where such improvement would create additional berths in Bodega Bay, shall be designed and used for commercial fishing activities.

(d) Erosion control and flood control facilities constructed on watercourses can impede the movement of sediment and nutrients which would otherwise be carried by storm runoff into coastal waters. To facilitate the continued delivery of these sediments to the littoral zone, whenever feasible, the material removed from these facilities may be placed at appropriate points on the shoreline in accordance with other applicable provisions of this division, where feasible mitigation measures have been provided to minimize adverse environmental effects. Aspects that shall be considered before issuing a coastal development permit for such purposes are the method of placement, time of year of placement, and sensitivity of the placement area.

Section 30519 Delegation of development review authority; recommendation of amendments to program

(a) Except for appeals to the commission, as provided in Section 30603, after a local coastal program, or any portion thereof, has been certified and all implementing actions within the area affected have become effective, the development review authority provided for in Chapter 7 (commencing with Section 30600) shall no longer be exercised by the commission over any new development proposed within the area to which the certified local coastal program, or any portion thereof, applies and shall at that time be delegated to the local government that is implementing the local coastal program or any portion thereof...

Section 30520 Judicial prohibition or stay; exercise and reinstatement of permit authority; issuance of coastal development permit

(a) If the application of any certified local coastal program, or any portion thereof, is prohibited or stayed by any court, the permit authority provided for in Chapter 7 (commencing with Section 30600) shall be exercised pursuant to the provisions of this section until a final court order has withdrawn such prohibition or stay. A coastal development permit shall be

issued by the affected local government or the commission on appeal, if that local government or the commission on appeal finds that the proposed development is in conformity with the provisions of Chapter 3 (commencing with Section 30200) or the applicable certified land use plan if the court-ordered prohibition or stay applies only to the zoning ordinances, zoning district maps, or, where necessary, the other implementing actions which are required pursuant to this chapter. Any development approved by a local government pursuant to this subdivision may be appealed to the commission by any person, including the executive director or any commissioner during the period the permit provisions of this section are in effect...

Section 30600 Coastal development permit; procedures prior to certification of local coastal program

...(b) (1) Prior to certification of its local coastal program, a local government may, with respect to any development within its area of jurisdiction in the coastal zone and consistent with the provisions of Sections 30604, 30620, and 30620.5, establish procedures for the filing, processing, review, modification, approval, or denial of a coastal development permit. Those procedures may be incorporated and made a part of the procedures relating to any other appropriate land use development permit issued by the local government.

Section 30603 Appeal of actions taken after certification of local program; types of developments; grounds; finality of actions; notification to Commission

(a) After certification of its local coastal program, an action taken by a local government on a coastal development permit application may be appealed to the commission for only the following types of developments:

(1) Developments approved by the local government between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tideline of the sea where there is no beach, whichever is the greater distance.

(2) Developments approved by the local government not included within paragraph (1) that are located on tidelands, submerged lands, public trust lands, within 100 feet of any wetland, estuary, or stream, or within 300 feet of the top of the seaward face of any coastal bluff.

(3) Developments approved by the local government not included within paragraph (1) or (2) that are located in a sensitive coastal resource area.

(4) Any development approved by a coastal county that is not designated as the principal permitted use under the zoning ordinance or zoning district map approved pursuant to Chapter 6 (commencing with Section 30500).

(5) Any development which constitutes a major public works project or a major energy facility.

(b) (1) The grounds for an appeal pursuant to subdivision (a) shall be limited to an allegation that the development does not conform to the standards set forth in the certified local coastal program or the public access policies set forth in this division.

(2) The grounds for an appeal of a denial of a permit pursuant to paragraph (5) of subdivision (a) shall be limited to an allegation that the development conforms to the standards set forth in the certified local coastal program and the public access policies set forth in this division.

(c) Any action described in subdivision (a) shall become final at the close of business on the 10th working day from the date of receipt by the commission of the notice of the local government's final action, unless an appeal is submitted within that time. Regardless of whether an appeal is submitted, the local government's action shall become final if an appeal fee is imposed pursuant to subdivision (d) of Section 30620 and is not deposited with the commission within the time prescribed.

(d) A local government taking an action on a coastal development permit shall send notification of its final action to the commission by certified mail within seven calendar days from the date of taking the action.

Section 30613 Lands subject to public trust which are filled, developed and committed to urban uses; coastal development permits; local coastal programs; categorical or urban exclusions

(a) The provisions of subdivision (b) of Section 30519, subdivision (b) of Section 30600, and subdivision (b) of Section 30610.5, which apply to lands subject to the public trust shall not apply to any lands which may be subject to the public trust but which the commission, after consultation with the State Lands Commission, determines are (1) filled and developed and are (2) located within an area which is committed to urban uses.

(b) No later than 120 days after receiving a request from a local government, the commission shall determine the lands within the jurisdiction of that local government to which the provisions of subdivision (a) apply.

(c) The provisions of this section shall apply to lands which have been the subject of coastal development permits, local coastal program, categorical exclusions or urban exclusions, which have previously been approved, authorized, or certified by the commission.

Section 30620.5 Local government exercising option under section 30600 subdivison(b)

(a) A local government may exercise the option provided in subdivision (b) of Section 30600, if it does so for the entire area of its jurisdiction within the coastal zone and after it establishes procedures for the issuance of coastal development permits. Such procedures shall incorporate, where applicable, the interpretive guidelines issued by the commission pursuant to Section 30620.

(b) If a local government elects to exercise the option provided in subdivision (b) of Section 30600, the local government shall, by resolution adopted by the governing body of such local government, notify the commission and shall take appropriate steps to assure that the public is properly notified of such action. The provisions of subdivision (b) of Section 30600 shall take effect and shall be exercised by the local government on the 10th working day after the date on which the resolution required by this subdivision is adopted.

(c) Every local government exercising the option provided in subdivision (b) of Section 30600 or acting on coastal development permits prior to certification of its local coastal program pursuant to Sections 30520, 30600.5, and 30624, shall within five working days notify the commission and any person who, in writing, has requested such notification, in the manner prescribed by the commission pursuant to Section 30600.5 or 30620, of any coastal development permit it issues.

(d) Within five working days of receipt of the notice required by subdivision (c), the executive director of the commission shall post, at a conspicuous location in the commission's office, a description of the coastal development permit issued by the local government. Within 15 working days of receipt of such notice, the executive director shall, in the manner prescribed by the commission pursuant to subdivision (a) of Section 30620, provide notice of the locally issued coastal development permit to members of the commission.

Section 30625 Persons who may appeal; powers of reviewing body; effect of decisions

(a) Except as otherwise specifically provided in subdivision (a) of Section 30602, any appealable action on a coastal development permit or claim of exemption for any development by a local government or port governing body 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, and if no action is taken within the time limit specified in Sections 30621 and 30622, the decision of the local government or port governing body, as the case may be, shall become final, unless the time limit in Section 30621 or 30622 is waived by the applicant.

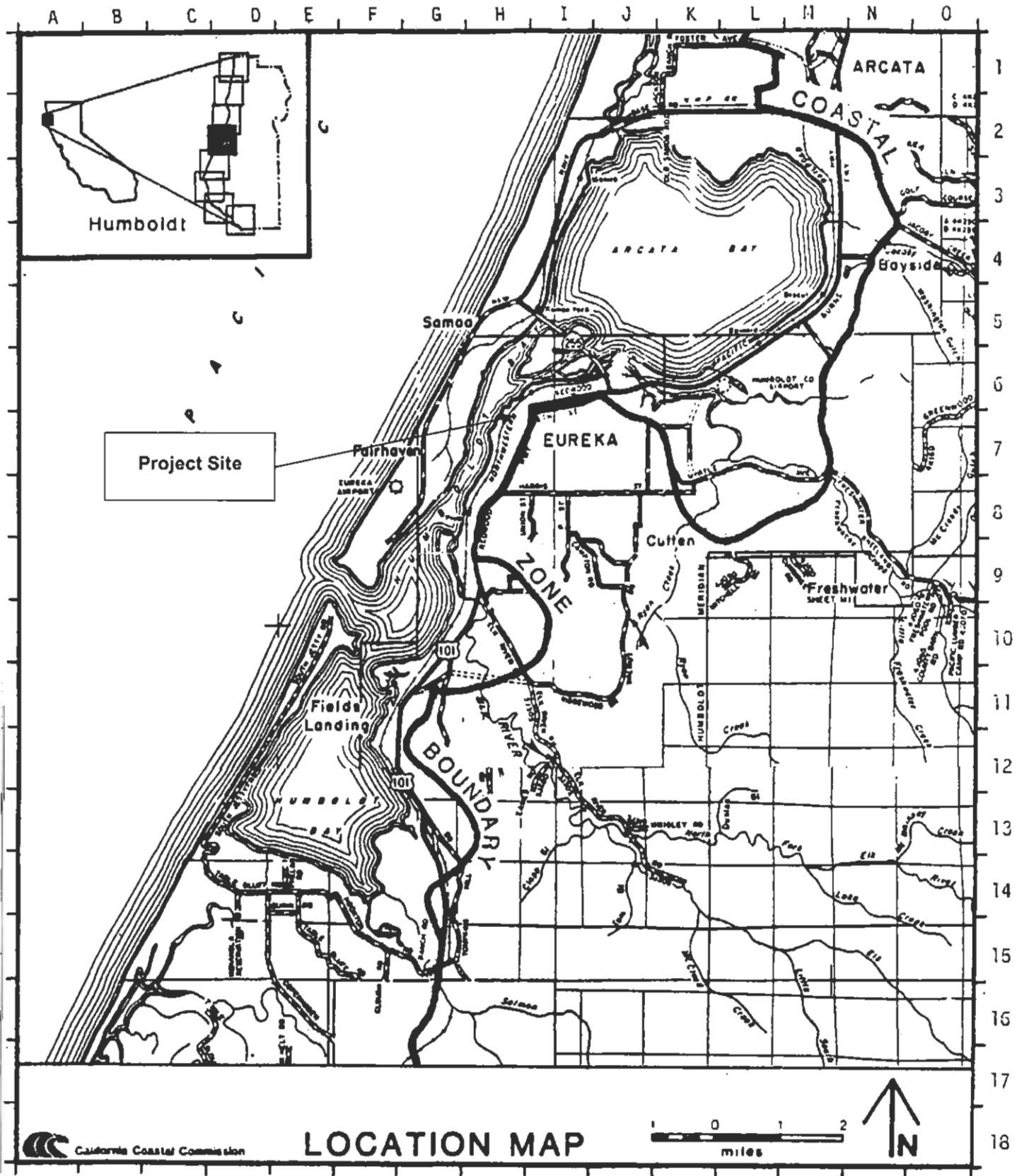
(b) The commission shall hear an appeal unless it determines the following:

(1) With respect to appeals pursuant to subdivision (a) of Section 30602, that no substantial issue exists as to conformity with Chapter 3 (commencing with Section 30200).

(2) With respect to appeals to the commission after certification of a local coastal program, that no substantial issue exists with respect to the grounds on which an appeal has been filed pursuant to Section 30603.

(3) With respect to appeals to the commission after certification of a port master plan, that no substantial issue exists as to conformity with the certified port master plan.

(c) Decisions of the commission, where applicable, shall guide local governments or port governing bodies in their future actions under this division.



County of Humboldt

EXHIBIT NO. 1

APPLICATION NO.

A-1-EUR-09-049

CUE, VI, LLC

LOCATION MAP

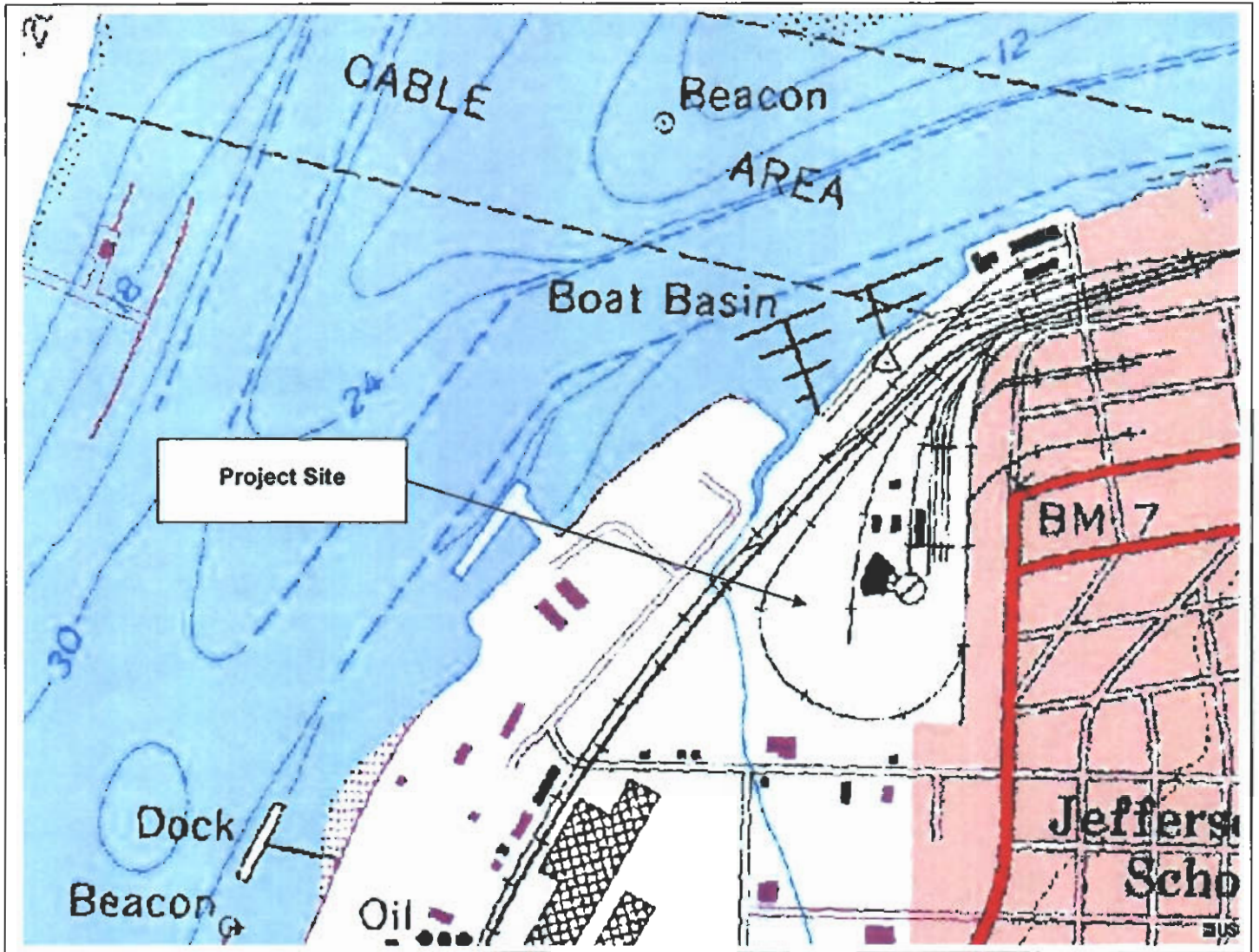


EXHIBIT NO. 2

APPLICATION NO.

A-1-EUR-09-049

CUE, VI, LLC

VICINITY MAP



EXHIBIT NO. 3

APPLICATION NO.

A-1-EUR-09-049

CUE, VI, LLC

SITE AERIAL

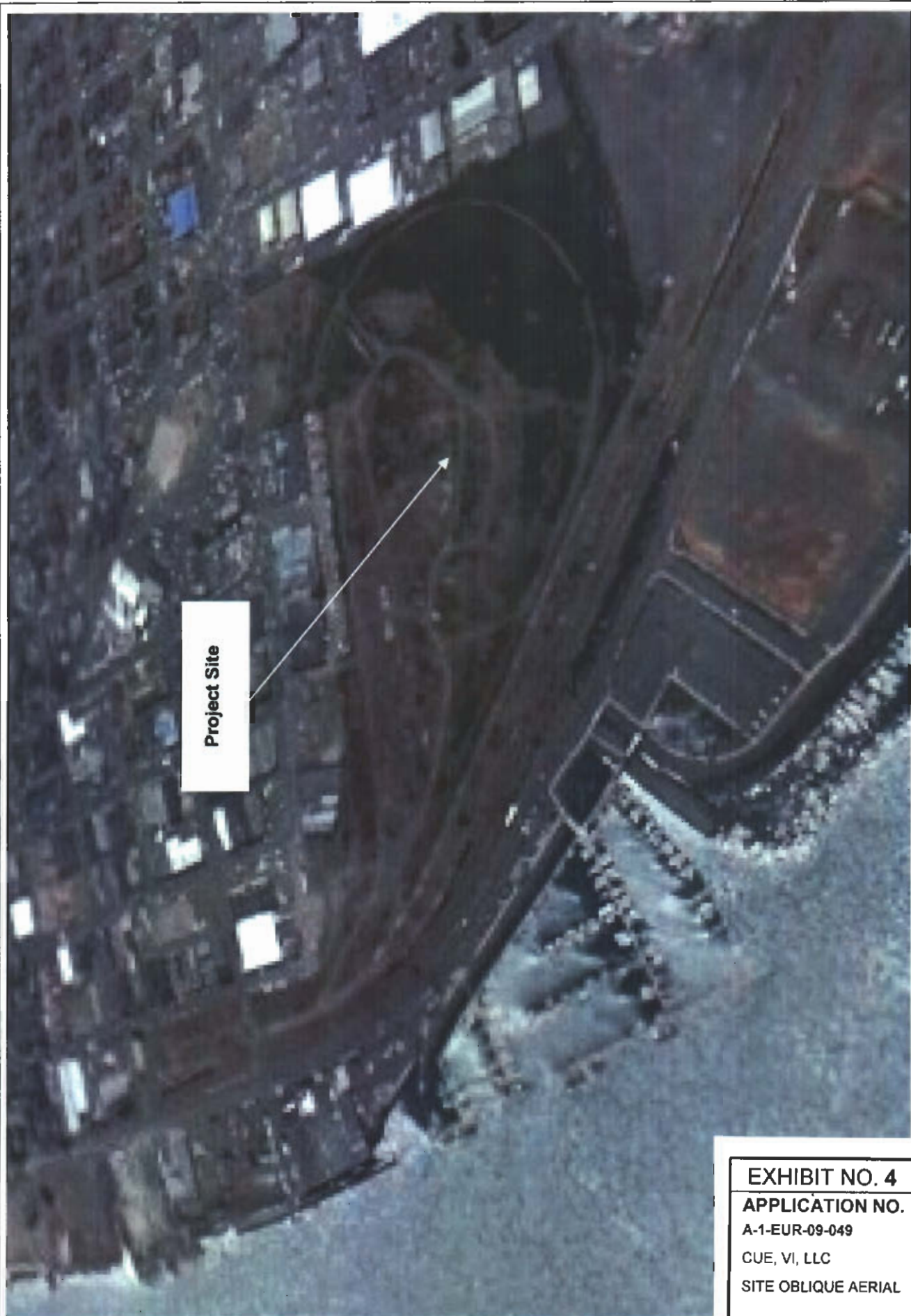


EXHIBIT NO. 4

APPLICATION NO.

A-1-EUR-09-049

CUE, VI, LLC

SITE OBLIQUE AERIAL

CALIFORNIA COASTAL COMMISSION

NORTH COAST DISTRICT OFFICE
710 E STREET, SUITE 200
EUREKA, CA 95501
VOICE (707) 445-7833 FAX (707) 445-7877

**APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT**

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: SEE ATTACHMENT A

Mailing Address:

City:

Zip Code:

Phone:

SECTION II. Decision Being Appealed

1. Name of local/port government:

City of Eureka

2. Brief description of development being appealed:

Marina Center Commercial-Industrial-Residential Mixed Use Project Phase 1 Supplemental Interim Remedial Action Plan: (a) removal of various debris piles, old foundations and other structures and remnants associated with past use of the site as a railroad maintenance facility; (2) focused remediation in five areas through excavating contaminated soils and back-filling with clean material; (3) grading and filling approximately 30 acres of the site with an approximately two-foot thickness of cover materials to provide additional storm water infiltration capacity at the site and eliminate potential pathways between the existing site soils and human and environmental sensitive receptors; and (4) creation of an 11.89-acre "wetlands reserve."

3. Development's location (street address, assessor's parcel no., cross street, etc.):

Within approximately 43-acre "brownfields" project area generally bounded by Waterfront Drive to the north and west, Washington Street to the south, and Broadway (Highway 101) to the east, comprising the former Union Pacific Railroad Yard. Assessor Parcel Numbers: 001-014-002; 003-021-009; 003-031-008; 003-041-005, -006, & -007; and 003-051-001.

4. Description of decision being appealed (check one.):

- ☐ Approval; no special conditions
☒ Approval with special conditions:
☐ Denial

EXHIBIT NO. 5**APPLICATION NO.**

A-1-EUR-09-049

CUE, VI, LLC

APPEAL FILED BY
COMMISSIONERS STONE &
MIRKARIMI, 11/19/09 (1 of 18)

Note: For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:

APPEAL NO: A-1-EUR-09-049

DATE FILED: November 19, 2009

CALIFORNIA COASTAL COMMISSION

NORTH COAST DISTRICT OFFICE

710 E STREET, SUITE 200

EUREKA, CA 95501

VOICE (707) 445-7833 FAX (707) 445-7877



DISTRICT:

North Coast

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 2)

5. Decision being appealed was made by (check one):

- ☐ Planning Director/Zoning Administrator
☒ City Council/Board of Supervisors
☐ Planning Commission
☐ Other

6. Date of local government's decision: November 3, 2009

7. Local government's file number (if any): CDP-09-0004

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

a. Name and mailing address of permit applicant:

CUE IV, LLC
Randy Gans, Agent-of-Record
Security National Properties
323 Fifth Street
Eureka, CA 95501

b. Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

(1) David Ivester
Briscoe, Ivester, & Bazel, LLP
155 Sansome Street, Seventh Floor
San Francisco, CA 94104

(2) Pete Nichols, Executive Director
Humboldt Baykeeper
217 E Street
Eureka, CA 95501

(3) Jennifer Kalt, Secretary
Northcoast Environmental Center
P.O. Box 4259
Arcata, CA 95518-4259

(4) Scott Greacen, Executive Director
Environmental Protection Information Center
P.O. Box 397
Garberville, CA 95542

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 4)

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Signature on File

Signature of Appellant(s) or Authorized Agent

Date: 11/19/09

Note: If signed by agent, appellant(s) must also sign below.

Section VI. Agent Authorization

I/We hereby authorize _____
to act as my/our representative and to bind me/us in all matters concerning this appeal.

Signature of Appellant(s)

Date: _____

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Page 3

State briefly your reasons for this appeal. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)

Note: The above description need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

Signed: Signature on File
Appellant or Agent

Dated: 11-15-09

Agent Authorization: I designate the above identified person(s) to act as my agent in all matters pertaining to this appeal.

Signed: _____

Dated: _____

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 3)

SECTION IV. Reasons Supporting This Appeal

PLEASE NOTE:

- Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section.
- State briefly **your reasons for this appeal**. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)
- This need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

The approved development is inconsistent with the certified LCP, including but not limited to the policies contained in the Aquatic Resources and Marine, Wetland, and Riparian Habitat sub-section of Section 6: Natural Resources of the Land Use Plan, and the development regulations and standards of Section 10-5.2942 of the Zoning Regulations for the City for the Coastal Zone (herein "Coastal Zoning Regulations" or "CZR") (see attachment containing cited LCP policies and standards), for the following reasons:

A. Inconsistencies with LUP Aquatic Resources and Marine, Wetland, and Riparian Habitat Policies and Coastal Zoning Regulations Regarding Permissible Uses for, and Less Environmentally Damaging Feasible Alternatives to, the Filling, Diking, and Dredging of Wetlands

LUP Natural Resources Policy No. 6.A.9 and CZR Section 10-5.2942.6(a) state that the diking, filling, or dredging of wetlands shall be permitted where: (1) the diking, dredging, and/or filling is for a permitted use enumerated in Policy 6.A.14.; (2) there is no feasible less environmentally damaging alternative; and (3) feasible mitigation measures have been provided to minimize adverse environmental effects. LUP Policy No. 6.A.14 and CZR Section 10-5.2942.10 paraphrase the permissible uses enumerated in identified in Section 30233 of the Coastal Act, namely:

- Port facilities.
- Energy facilities.
- Coastal-dependent industrial facilities, including commercial fishing facilities.
- Maintenance of existing or restoration of previously dredged depths in navigation channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
- Incidental public service purposes which temporarily impact the resources of the area, such as burying cables or pipes, inspection of piers, and maintenance of existing intake and outfall lines.
- Restoration projects.
- Nature study, aquaculture, or similar resource-dependent activities.
- New or expanded boating facilities in estuaries, consistent with the demand for such facilities.
- Placement of structural piling for public recreational piers that provide public access and recreational opportunities.

The development conditionally approved by the City is inconsistent with the above cited LUP Natural Resources policies and Coastal Zoning Regulation standards from two perspectives: (1) the wetlands grading and filling development is not for a permissible use either under the wetlands fill and dredging provisions of LUP Natural Resources Policy 6.A.14.f. and CZR Section 10-5.2942.10(f) that apply to the wetlands on the site; and (2) feasible environmentally less damaging alternatives to the filling, and dredging (i.e., excavation) of the project site wetlands exist.

1. Permissible Uses for Development within Wetlands. The project record for the approved development identifies the project purpose for the grading and filling of wetlands for stormwater management as being a form of "restoration purposes," as identified in LUP Natural Resources Policy 6.A.14.f. and CZR Section 10-5.2942.10(f). "Restoration" comprises actions that result in returning an article "back to a former position or condition," especially to "an unimpaired or improved condition." Accordingly, the primary impetus for the restorative actions being undertaken must be to reestablish and possibly enhance former habitat conditions rather than to compensate for habitat areas being simultaneously converted or lost to another use. In addition, recent case law has clarified that filling wetlands and replacing the wetlands lost with wetlands creation in other locations is not a legitimate form of "restoration purposes" pursuant to Section 30233 of the Coastal Act (see *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.Ap. 4th. 493, 506.)

The stated reason for the approved wetlands grading and filling is to control site stormwater drainage such that entrained pollutants do not continue to be released into the environmentally sensitive receiving waters of Humboldt Bay. These modifications are not being undertaken for the betterment of the onsite dispersed emergent wetlands resources, but instead to control hazardous materials releases associated with the site's former uses as a rail switching and maintenance yard, and petroleum bulk storage terminal. Moreover, considering that the authorized interim remediation work is but an initial phase of a larger general commercial / light industrial / residential mixed-use development project envisioned for construction directly atop the areas graded and filled for stormwater management purposes, the assertion that the filling and grading is for "restoration purposes" is questionable. The intended end use of the wetlands area to be filled and graded must be considered with respect to compliance with the permissible use requirements of LUP Natural Resources Policy Nos. 6.A.4., 6.A.9 and 6.A.14, and CZR Sections 10-5.2942.6, 10-5.2942.10, and 10-5.2942.12.

Therefore, as the wetlands area approved for grading and filling is not reasonably intended for the purpose of restoring the wetlands specifically being modified, and given that the subsequent phase mixed-use development would not be for one of the other uses enumerated within LUP Natural Resources Policy Nos. 6.A.4. and 6.A.14., and CZR Sections 10-5.2942.10 and 10-5.2942.12, the project as approved by the City is inconsistent with the LCP provisions regarding permissible uses for the filling, diking, and dredging of wetlands.

2. Alternatives. Other than an abbreviated, inconclusive review of the comparative effects the "no project" alternative would have on the environment, no alternatives to the proposed wetlands fill and grading project components were substantively considered in approving the development. Instead, interim remedial options that would also achieve the project objectives of preventing further releases of stormwater entrained pollutants into Humboldt Bay were summarily dismissed, notwithstanding the reduction in impacts on other biological resources

that would be lessened or avoided. For example, some combination of: (a) impounding surface drainage and groundwater flows through the installation of perimeter berms; (b) grading the site to drain into an interior retention basin; (c) intercepting surface water before it enters contaminated areas; and (d) onsite remedial treatment are less environmentally damaging feasible alternatives.

In rejecting all other alternatives to the wetlands filling and grading, the City concluded that no other legally feasible option to the approved remedial actions exists. The rationale for this determination was based on the City conflating the "concurrence" received from the North Coast Regional Water Quality Control Board staff for the subject "Supplemental Interim Remedial Action Plan" with the directive within the Regional Board's 2001 Cleanup and Abatement Order No. R1-2001-26, erroneously recasting the tentative approval the SIRAP into a firm mandate of the one and only acceptable remedial action that the agency would consider as being consistent with the cleanup order.

The state water resources board and the regional water quality control boards set water quality objectives to which cleanup of a given contaminated site is to be brought into compliance; they do not dictate to responsible parties precisely which hazardous materials remediation logistics are to be employed. Thus, as Section 10-5.2942.6.b. of the City's coastal zoning ordinance requires that, in approving the filling, diking, and dredging of wetlands that no feasible, less environmentally damaging alternative exist, and given that the City did not critically assess alternatives to the approved filling and grading of wetlands for purposes of controlling stormwater runoff, the nonexistence of a feasible less environmentally damaging alternative was not established. Therefore the development as approved by the City is inconsistent with LUP Natural Resources Policy No. 6.A.9. and CZR Section 10-5.2942.6 of the City's certified LCP.

B. Inconsistencies with LUP Aquatic Resources and Marine, Wetland, and Riparian Habitat Policies and Coastal Zoning Regulations for the Protection of Environmentally Sensitive Habitat Areas (ESHAs)

The approved development entails construction activities to be conducted both within and adjacent to environmentally sensitive habitat areas (ESHA) specifically enumerated within the LCP at LUP Natural Resources Policy 6.A.6 and CZR Section 1-5.2942.3(b), namely emergent and paustrine wetlands. "Environmentally sensitive habitat areas," as defined within the policy document glossary of the City's LUP, comprise "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, Policy 6.A.6(b) and CZR Section 1-5.2942.3(b) specifically declare that wetlands are environmentally sensitive habitat areas within the City's coastal zone.

The LUP incorporates the intent of the Coastal Act to protect ESHAs through its paraphrasing and reiteration of Coastal Act Section 30240 in LUP Natural Resources Policy No. 6.A.7 and CZR Section 10-5.2942.4, respectively. LUP Natural Resources Policy No. 6.A.7. and CZR Section 10-5.2942.4 direct that environmentally sensitive habitat areas be protected against any significant disruption of habitat values, and only uses dependent on such resources be allowed within such areas. Additionally, development in areas adjacent to environmentally sensitive habitat areas must be sited and designed to prevent impacts which would significantly

degrade such areas, and be compatible with the continuance of such habitat areas.

The approved grading and filling of areas adjacent to ESHA wetlands designed have not been designed and sited to prevent significantly degrading impacts to such adjoining areas, or to be compatible with the continuance of nearby habitat areas. The development has not been sited and designed to prevent impacts which would significantly degrade the affected wetland ESHA and to be compatible with the continuance of the affected wetland ESHA. Therefore, for all of the above reasons, the approved project is inconsistent with LUP Natural Resources Policy No. 6.A.7. and CZR Section 10-5.2942.4.

C. Inconsistencies with LUP Aquatic Resources and Marine, Wetland, and Riparian Habitat Policies for Protection of Marine Resources, Biological Productivity, and Water Quality

LUP Natural Resources Policy No. 6.A.1. directs that valuable aquatic resources shall be maintained, enhanced, and, where feasible, restored, with special protection given to areas and species of special biological or economic significance. In addition, uses of the marine environment are required to be carried out in the manner that will sustain the biological productivity of coastal waters and maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes. LUP Natural Resources Policy No. 6.A.1. requires that the biological productivity and the quality of coastal waters, streams, wetlands, and estuaries be maintained and, where feasible, restored to appropriately maintain optimum populations of aquatic organisms and for the protection of human health through, among other means, minimizing adverse effects of wastewater and stormwater discharges and entrainment, controlling the quantity and quality of runoff, preventing depletion of groundwater supplies and substantial interference with surface water flow, encouraging wastewater reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

The development conditionally approved by the City, especially as it relates to the creation of the Clark Slough wetlands reserve is inconsistent with the above cited LUP Natural Resources policies insofar as protection and maintenance of the biological productivity of the aquatic resources residing therein and the water quality have not been addressed with respect to: (1) the potential release, mobilization, or exposure of hazardous materials during excavation of the slough and its margins during construction of the proposed compensatory wetlands replacement mitigation project component; and (2) contaminant inputs fluvially transported onto the site from upstream sites (i.e., Schmidbauer Lumber Company).

The approved development entails, in part, the construction of an 11.89-acre "wetlands reserve" within and along the portion of Clark Slough which traverses through the western third of the site. Although the presence of volatile organic compounds, indicating soil materials contaminated with petroleum distillates, would be monitored during excavation around and in the slough, with contingencies identified for stockpiling and removing such tainted materials if encountered, this area has also been established as being contaminated by metal and chlorinated-biphenol based constituents which would not necessarily be revealed by the use of organ vapor analysis. As a complete characterization of this area has not as yet been developed, the ultimate extent and concentration of contamination is not known. Accordingly, the ground disturbance associated with excavating this former coastal stream outwash plain has

not been assessed for its potential to introduce heretofore buried toxic contaminants into the aquatic environment of Clark Slough, and, in turn, into Humboldt Bay either through direct releases into these waterways or from pollutant-entrained sedimentation. Without such an evaluation the production and maintenance of biological productivity and water quality of lower Clark Slough has not been assured.

Similarly, the record for the approval of the development did not include any analysis of the effects, if any, inputs of contaminants from upgradient sources may have on aquatic resources and water quality. The project site lies directly downstream from the Schmidbauer Lumber Company, an industrial site which itself is under a NCRWQCB cleanup and abatement order (R1-2005-0040). Without such an evaluation the production and maintenance of biological productivity and water quality of lower Clark Slough has not been assured. Accordingly, from the two aspects discussed above, the development as approved by the City is inconsistent with LUP Natural Resources Policy Nos. 6.A.1. and 6.A.3.

RELEVANT LCP POLICIES AND STANDARDS CITED IN APPEAL

Land Use Plan Policies

- 6.A.1. The City shall maintain, enhance, and, where feasible, restore valuable aquatic resources, with special protection given to areas and species of special biological or economic significance. The City shall require that **uses** of the marine environment are carried out in the manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.
- 6.A.3. The City shall maintain and, where feasible, restore biological productivity and the quality of coastal waters, streams, wetlands, and estuaries appropriate to maintain optimum populations of aquatic organisms and for the protection of human health through, among other means, minimizing adverse effects of wastewater and stormwater discharges and entrainment, controlling the quantity and quality of runoff, preventing depletion of groundwater supplies and substantial interference with surface water flow, encouraging wastewater reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.
- 6.A.4. The City shall require that channelizations or other substantial alterations that could significantly disrupt the habitat values of rivers and streams incorporate the best mitigation measures feasible.

Such channelizations and alterations shall be limited to the following:

- a. Flood control projects where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development;
 - b. Developments where the primary function is the improvement of fish and wildlife habitat.
- 6.A.6. The City declares the following to be environmentally sensitive habitat areas within the Coastal Zone:
- a. Rivers, creeks, sloughs, gulches and associated riparian habitats, including, but not limited to Eureka Slough, Fay Slough, Cut-Off Slough, Freshwater Slough, Cooper Slough, Second Slough, Third Slough, Martin Slough, Ryan Slough, Swain Slough, and Elk River.
 - b. Wetlands and estuaries, including that portion of Humboldt Bay within the City's jurisdiction, riparian areas, and vegetated dunes.
 - c. Indian Island, Daby Island, and the Woodley Island wildlife area.
 - d. Other unique habitat areas, such as waterbird rookeries, and habitat for all rare or endangered species on state or federal lists.
 - e. Grazed or farmed wetlands (i.e., diked former tidelands).

The areas are shown on 1:500 scale maps that are available for review at the City of Eureka Community Development Department. These maps are incorporated by reference into this General Plan and are a formal part of it. However, all environmentally sensitive habitat areas may not be shown on these maps and shall, if they exist, be identified as part of any project application.

6.A.7. Within the Coastal Zone, the City shall ensure that environmentally sensitive habitat areas are protected against any significant disruption of habitat values, and that only uses dependent on such resources shall be allowed within such areas. The City shall require that development in areas adjacent to environmentally sensitive habitat areas be sited and designed to prevent impacts which would significantly degrade such areas, and be compatible with the continuance of such habitat areas.

6.A.9. The City shall permit the diking, filling, or dredging of open coastal waters, wetlands, or estuaries only under the following conditions:

- a. The diking, filling or dredging is for a permitted use in that resource area;
- b. There is no feasible, less environmentally damaging alternative;
- c. Feasible mitigation measures have been provided to minimize adverse environmental effects;
- d. The functional capacity of the resource area is maintained or enhanced.

6.A.14. Consistent with all other applicable policies of this General Plan, the City shall limit development or uses within wetlands that are neither farmed nor grazed, or within estuaries, to the following:

- a. Port facilities.
- b. Energy facilities.
- c. Coastal-dependent industrial facilities, including commercial fishing facilities.
- d. Maintenance of existing or restoration of previously dredged depths in navigation channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
- e. Incidental public service purposes which temporarily impact the resources of the area, such as burying cables or pipes, inspection of piers, and maintenance of existing intake and outfall lines.
- f. Restoration projects.
- g. Nature study, aquaculture, or similar resource-dependent activities.
- h. New or expanded boating facilities in estuaries, consistent with the demand for such facilities.
- i. Placement of structural piling for public recreational piers that provide public access and recreational opportunities.

Coastal Zoning Regulations

Sec. 10-5.2942. Environmental resource standards.

10-5.2942.1 Mitigation.

Channelizations or other substantial alterations that could significantly disrupt the habitat values of rivers and streams shall incorporate the best mitigation measures feasible, and be limited to (1) necessary water supply projects, (2) flood control projects where no other method for protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development, or (3) developments where the primary function is the improvement of fish and wildlife habitat.

10-5.2942.2 Permitted shoreline construction.

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. Existing marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.

10-5.2942.3 Environmentally sensitive habitat areas.

Environmentally sensitive habitat areas within the City of Eureka's coastal zone shall include:

- (a) Rivers, creeks, sloughs, gulches and associated riparian habitats, including Eureka Slough, Fay Slough, Cut-Off Slough, Freshwater Slough, Cooper Slough, Second Sloughs, Third Slough, and Elk River.
- (b) Wetlands and estuaries, including that portion of Humboldt Bay within the City's jurisdiction, riparian areas, and vegetated dunes.
- (c) Indian Island, Daby Island, and Woodley Island wildlife area.
- (d) Other habitat areas, such as rookeries, and rare or endangered species on state or federal lists.
- (e) Grazed or farmed wetlands.

These areas are generally portrayed on the Resources Maps, where they are designated as wetlands or other natural communities.

10-5.2942.4 Protection of environmentally sensitive habitat areas.

Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources, including restoration and enhancement projects, shall be allowed within such areas. Development in areas adjacent to environmentally sensitive habitat areas shall be sited and designed to prevent impacts which would significantly degrade such areas, and shall be compatible with the continuance of such habitat areas.

10-5.2942.5 Development in or near natural resource areas.

Prior to the approval of a development permit, all developments on lots or parcels shown on the land use plan and/or resource maps with a natural resource designation or within two

hundred fifty (250') feet of such designation, or development affecting an environmentally sensitive habitat area, shall be found to be in conformity with the applicable habitat protection policies of the LCP. All development plans and grading plans shall show the precise location of the habitat(s) potentially affected by the proposed project and the manner in which they will be protected, enhanced, or restored. 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 City and the applicant. Where mitigation, restoration, or enhancement activities are required to be performed pursuant to other applicable portions of this LCP, they shall be required to be performed on City-owned lands on the Elk River Spit or on other available and suitable mitigation, restoration, or enhancement sites.

10-5.2942.6 Diking, filling, or dredging.

The diking, filling or dredging of open coastal waters, wetlands, or estuaries shall be permitted only where all of the following exist:

- (a) The diking, filling or dredging is for a permitted use in that resource area as provided in Land Use Plan Policies 5.12 through 5.16;
- (b) There is no feasible, less environmentally damaging alternative;
- (c) Feasible mitigation measures have been provided to minimize adverse environmental effects, consistent with the Land Use Plan Policy 5.10; and,
- (d) The functional capacity of the resources area is maintained or enhanced, consistent with the Land Use Plan Policy 5.10.

10-5.2942.7 Dredging and spoils disposal.

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

10-5.2942.8 Wetland or estuary development.

Diking, filling or dredging of a wetland or estuary shall maintain or enhance its functional capacity.

Functional capacity, the ability of the wetland or estuary to be self-sustaining and to maintain natural species diversity. In order to establish that the functional capacity is being maintained, all of the following must be demonstrated:

- (a) That presently occurring plant and animal populations in the ecosystem will not be altered in a manner that would impair the long-term stability of the ecosystem, i.e., natural species diversity, abundance and composition are essentially unchanged as a result of the project,
- (b) That a species that is rare or endangered will not be significantly adversely affected,
- (c) That a species or habitat essential to the natural biological functioning of the wetland or estuary will not be significantly adversely affected,
- (d) That consumptive (e.g., fishing, aquaculture and hunting) or nonconsumptive (e.g., water quality and research opportunity) values of the wetland or estuaries ecosystem will not be significantly reduced.

10-5.2942.9 Conditions.

(a) Dredging, when consistent with these provisions and where necessary for the maintenance of the tidal flow and continued viability of the wetland habitat or for flood control purposes, shall be subject to the following conditions:

- (1) Dredging shall be prohibited in breeding and nursery areas and during periods of fish migration and spawning.
- (2) Dredging shall be limited to the smallest area feasible.
- (3) Designs for dredging and excavation projects shall include protective measures such as silt curtains, weirs, etc, to protect water quality in adjacent areas during construction by preventing the discharge of refuse, petroleum spills, and unnecessary dispersal of silt materials.

(b) Diking or filling of a wetland shall at a minimum, require the following mitigation, restoration, or enhancement measures:

- (1) A detailed restoration or enhancement plan shall be required for each specific restoration or enhancement site prior to commencement of any development that is permitted as part of such a restoration or enhancement project. The restoration or enhancement plans shall include provisions for purchase, if required, and restoration or enhancement, as determined in consultation with the Department of Fish and Game, Coastal Commission, and Coastal Conservancy, of an equivalent area of equal or greater productivity, and dedication of the land to a public agency or other method which permanently restricts the use of the site to habitat and open space purposes. The restoration or enhancement site shall be purchased or otherwise made available prior to any diking or filling activity.
- (2) Equivalent areas shall be opened to tidal action or other sources of surface water shall be provided. This provision applies to diked or filled areas which themselves are not environmentally sensitive habitat areas, but would become so if they were opened to tidal action or provided with other sources of surface water. All of the provisions for restoration, purchase (if necessary), and dedication contained in paragraph (b)(1), above, shall apply to any program or activity performed pursuant to this paragraph.
- (3) Mitigation or restoration activities shall, to the maximum extent feasible, be of the same type as the wetland to be filled (i.e., freshwater marsh for freshwater marsh, saltwater marsh for saltwater marsh, etc.).
- (4) An applicant who is required to participate in a restoration or mitigation program may avail himself or herself of restoration or enhancement sites on City-owned lands on the Elk River Spit, consistent with all other applicable policies of Land Use Plan Chapter 5 and this article, and at a cost not to exceed Twenty-five (\$.25) Cents for each square foot of affected marsh or other wetland.
- (5) For permissible wetland restoration projects identified in the Land Use Plan Policy 5.12(b), any coastal development permit issued for one or a combination of projects shall be part of one or more wetland restoration programs consistent with all other applicable provisions of this LCP. Such wetlands restoration or enhancement program(s) shall be prepared and implemented in consultation with the Department of Fish and Game, Coastal Commission, and Coastal Conservancy. Preparation of the program(s) shall occur prior to commencement of any development governed by this subdivision; however, implementation of the program(s) may occur concurrently with or subsequently to any approved

development. If an in-lieu fee is required to be paid by the applicant, it shall not exceed \$0.25 for each square foot of affected marsh or other wetland, except as provided in permit CP-10-80. For the area south of Hilfiker Lane identified in the LUP Policy 5.12(b), the restoration program may, at any one time, include one or more of the affected properties, provided that when an application for development pursuant to this subdivision is made, the affected property shall participate in the wetlands restoration program.

10-5.2942.10. Permitted development and uses in non-farmed wetlands and estuaries.

Permitted development or uses within nonfarmed wetlands and estuaries shall be limited to the following:

- (a) Port facilities.
- (b) Energy facilities.
- (c) Coastal development industrial facilities including commercial fishing facilities.
- (d) Maintenance of existing or restoration of previously dredged depths in navigation channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
- (e) Incidental public service purposes which temporarily impact the resources of the area, such as burying cables and pipes, inspection of piers, and maintenance of existing intake and outfall lines.
- (f) Restoration projects.
- (g) Nature study, aquaculture, or similar resource-dependent activities.
- (h) New or expanded boating facilities in estuaries.
- (i) Placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

10-2.2942.11. Permitted uses in open coastal waters.

Permitted uses within open coastal waters shall be limited to the following:

- (a) Port facilities.
- (b) Energy facilities.
- (c) Coastal-dependent industrial facilities, including commercial fishing facilities.
- (d) Maintenance of existing or restoration of previously dredged depths in navigation channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.
- (e) Incidental public service purposes which temporarily impact the resources of the area, such as burying cables and pipes, inspection of piers, and maintenance of existing intake and outfall lines.
- (f) Restoration projects.
- (g) Nature study, aquaculture, or similar resource-dependent activities.
- (h) New or expanded boating facilities.
- (i) Sand or gravel mineral extraction in portions of open coastal waters that are not environmentally sensitive habitat areas.
- (j) Placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

10-5.2942.12. Permitted uses involving alterations of streams and rivers.

Permitted uses that involve substantial alterations of streams and rivers shall incorporate the best mitigation measures feasible and shall be limited to the following:

- (a) Necessary water supply projects.
- (b) Flood control projects where no other method of protecting existing structures in the floodplain is feasible and where such protection is necessary for public safety or to protect existing development.
- (c) Development where the primary function is the improvement of fish and wildlife habitat.

10-5.2942.13. Permitted uses and development in grazed or farmed wetlands.

Permitted uses and development in grazed or farmed wetlands shall be limited to the following:

- (a) Agricultural operations limited to apiaries, field and truck crops, livestock raising, greenhouses (provided they are not located on slab foundations and crops are grown in the existing soils on site), and orchards.
- (b) Farm-related structures (including barns, sheds, and farmer-occupied housing) necessary for the performance of agricultural operations. Such structures may be located on an existing farmed wetland parcel only if no alternative upland location is available for such purpose and the structures are sited and designed to minimize adverse environmental effects on the farmed wetland. No more than one permanent residential structure per parcel shall be allowed.
- (c) Restoration projects.
- (d) Nature study, aquaculture, and similar resource-dependent activities.
- (e) Incidental public service purposes which may temporarily impact the resources of the area, such as burying cable and pipes.

10-5.2942.14. Fill for repair and maintenance.

New fill for repair and maintenance purposes may be permitted on lands adjacent to the northern waterfront provided that is consistent with other LUP policies and where:

- (a) The fill will be placed in previously filled areas which have been subject to erosion;
- (b) The fill will not be placed beyond the existing bulkhead line;
- (c) The fill is necessary to protect existing development from erosion;
- (d) The fill will not interfere with commercial fishing activities and facilities; and
- (e) Placement of the fill is consistent with the public access policies of the LCP in that public access will not be adversely affected, or public access has been provided.

10-5.2942.15. Buffers.

A buffer shall be established for permitted development adjacent to all environmentally sensitive areas. The width of a buffer shall be one hundred (100') feet, unless the applicant for the development demonstrates on the basis of information, the type and size of the proposed development, and/or proposed mitigation (such as planting of vegetation) that will achieve the purposes of the buffer, that a smaller buffer will protect the resources of the habitat area. For a wetland, the buffer should be measured from the landward edge of the wetland. For a stream or river, the buffer should be measured landward from the landward edge of riparian vegetation or from the top edge of the bank (such as, in channelized streams). Maps and supplemental information submitted as part of the application should be used to specifically determine these boundaries.

10-5.2942.16. Barriers.

To protect wetlands against physical intrusion, wetland buffer areas shall incorporate attractively designed and strategically located barriers and informational signs.

10-5.2942.17. Uses adjacent to gulches.

All coastal zone land use activities adjacent to gulches shall be carried out in a manner which avoids vegetative removal below the break in slope, (usually those areas with a slope of twenty (20%) percent or greater) and which does not alter natural landforms and drainage patterns.

10-5.2942.18. Disagreement over boundary.

Where there is a disagreement over the boundary, location, or current status of an environmentally sensitive area identified in LCP Policy 5.5 or which is designated on the Resources Maps, the applicant shall be required to provide the city with:

- (a) A base map delineating topographic lines, adjacent roads, location of dikes, levees, or flood control channels and tide gates, as applicable;
- (b) A vegetation map, including species that may indicate the existence or non-existence of the sensitive environmental habitat area;
- (c) A soils map delineating hydric and non-hydric soils; and,
- (d) A census of animal species that may indicate the existence or non-existence of the sensitive environmental habitat area.

The city shall transmit the information provided by the applicant to the Department of Fish and Game for review and comment. Any comments and recommendations provided by the Department shall be immediately sent to the applicant for his or her response. The city shall make its decision concerning the boundary, location, or current status of the environmentally sensitive habitat area in question based on the substantial evidence in the record and shall adopt findings to support its actions.

ATTACHMENT A

SECTION I. Appellant(s)

1. Mark W. Stone, Dist. 5 Supervisor
County Government Center
701 Ocean Street, Suite 500
Santa Cruz, CA 95060

(831) 454-2200
2. Ross Mirkarimi, Supervisor
City of County of San Francisco – City Hall
1 Dr. Carlton B. Goodlett Place, Room 282
San Francisco, CA 94102

(415) 554-7630

CALIFORNIA COASTAL COMMISSION

NORTH COAST DISTRICT OFFICE

710 E STREET, SUITE 200

EUREKA, CA 95501

VOICE (707) 445-7833 FAX (707) 445-7877



APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: Humboldt Baykeeper, Environmental Protection Information Center, NEC

Mailing Address: 217 E Street

City: Eureka

Zip Code: 95501

Phone: 707-268-0665

SECTION II. Decision Being Appealed

1. Name of local/port government:

City of Eureka

2. Brief description of development being appealed:

Implementation of Phase 1 of mixed use development, including implementation of a Supplemental Interim Remedial Action Plan that includes filling of wetlands.

3. Development's location (street address, assessor's parcel no., cross street, etc.):

736 Broadway, Eureka, CA, APNs 001-014-002; 003-021-009; 003-031-008; 003-041-005; 003-041-006; 003-041-007; and 003-051-001.

4. Description of decision being appealed (check one.):

- ☐ Approval; no special conditions
- ☒ Approval with special conditions:
- ☐ Denial

EXHIBIT NO. 6

APPLICATION NO.

A-1-EUR-09-049

CUE, VI, LLC

APPEAL FILED BY HUMBOLDT
BAYKEEPER, EPIC & NEC
(1 of 28)

RECEIVED

NOV 18 2009

CALIFORNIA
COASTAL COMMISSION

Note: For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:

APPEAL NO:

A-1-EUR-09-049

DATE FILED:

11/18/09

DISTRICT:

North Coast

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 2)

5. Decision being appealed was made by (check one):

- ☐ Planning Director/Zoning Administrator
- ☒ City Council/Board of Supervisors
- ☐ Planning Commission
- ☐ Other

6. Date of local government's decision: November 4, 2009

7. Local government's file number (if any): CDP-09-0004

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

a. Name and mailing address of permit applicant:

Randy Gans, Security National Properties, 323 Fifth Street, Eureka, CA 95501

b. Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

(1)

(2)

(3)

(4)

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 3)

SECTION IV. Reasons Supporting This Appeal

PLEASE NOTE:

- Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section.
- State briefly **your reasons for this appeal**. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)
- This need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

See attached.

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 4)

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

MR Signature on File
Signature of Appellant(s) or Authorized Agent

Date: 11.17.09

Note: If signed by agent, appellant(s) must also sign below.

Section VI. Agent Authorization

I/We hereby authorize Michelle D. Smith
to act as my/our representative and to bind me/us in all matters concerning this appeal.

Signature on File
Signature of Appellant(s)
Robert C. ... accn. for EPIC
Date: 11.17.09
Signature on File
... FOR NEC

Signature on File
Peter C. Nicholas, for Humboldt
Baykeeper



November 18, 2009

*Hand Delivered to Address Below
with Enclosures in Electronic form
on attached CD*

The California Coastal Commission
Attention Mr. Robert Merrill
Coastal Manager, North Coast District Office
Delivered to 710 E Street, Suite 200
Eureka, California 95501

Re: Appeal to the California Coastal Commission by Humboldt Baykeeper, the Environmental Protection Information Center, and the Northcoast Environmental Center of the Coastal Development Permit granted by the City of Eureka for Phase 1 of the Marina Center Development located at 736 Broadway, Eureka, Local Agency file Number CDP-09-0004

Dear Commission and Staff:

On November 3, 2009 the City of Eureka held a hearing regarding approval of a coastal development permit ("CDP") for Phase I of the proposed Marina Center Mixed Use development project. Humboldt Baykeeper, the Environmental Protection Information Center ("EPIC"), and the Northcoast Environmental Center ("NEC") submitted the attached letter as comments in opposition to the City's approval of the CDP. We do not believe that the CDP meets the requirements of the City's approved LCP, nor do we believe that it meets the requirements of the Coastal Act. Based on the attached letter and the information included below, we hereby appeal the City's approval of the CDP and ask the Coastal Commission to deny the proposed CDP.

The CDP approved by the City does not meet the requirements of either the Coastal Act or the City's certified LCP regarding protection of environmentally sensitive habitat areas and wetlands. As our concerns are outlined in the attached letter to the City of Eureka¹, they will not be detailed here; however a few notable provisions should be emphasized.

¹ The letter to the City of Eureka is attached as Exhibit A. Attached to the letter to the City of Eureka are the comments of Humboldt Baykeeper to the North Coast Regional Water Quality Control Board regarding the proposed Supplemental Interim Remedial Action Plan. The letter to the Regional Board contains 9 exhibits which include reports prepared by Humboldt Baykeeper's experts in their federal litigation against CUE VI under the Clean Water Act and the Resource

The CDP approved by the City is for Phase I of the Marina Center mixed use development. The entirety of the project is for the construction of a "mixed-use" development including commercial and retail uses. Phase I is for the implementation of a Supplemental Interim Remedial Action Plan ("SIRAP"). The actions contemplated by the SIRAP include excavation of Clark Slough and fill of wetlands and Environmentally Sensitive Habitat Areas ("ESHA") throughout the property with soils excavated from the Slough. Although the project proponent contends that this work is remediation of the property to comply with requirements of the Regional Water Quality Control Board, this is merely a pretext for its first step toward final development of the property, the eradication of the wetlands and ESHA. There is no evidence that filling of the wetlands on the property is required to satisfy the Regional Board's request to reduce the level of pollutants contained in the site's storm water discharges. *See* Letter dated February 23, 2009 from Regional Board to Brian Morrissey. Nor is the filling of the wetlands on the property required to comply with the provisions found within the Cleanup and Abatement Order issued for the property. In fact, the Regional Board cannot itself define what actions must be taken by a property owner, and must instead merely concur with their proposals on whether the work would comply with the Water Code. *See* Cal. Water Code § 13360.

Additionally, as discussed more fully in the attached letter to the City of Eureka, the wetlands on the Balloon Tract property that will be filled as a result of this CDP are ESHAs under the City's certified LCP. Eureka Municipal Code § 156.052(C). As such, they must be protected against any significant destruction of habitat values. Pub. Res. Code § 30240. The City's CDP for the SIRAP simply ignored these provisions, and allows for the complete destruction of these ESHAs. Moreover, even were these wetlands not considered ESHA in the certified LCP, they are undoubtedly wetlands, and the proper analysis that is required for development within a wetland must be conducted; the fill here is not for any of the allowable uses in Public Resources Code sec. 30233 (a), and thus cannot be permitted.

Although the CDP proponent's stated intent of restoring Clark Slough and creating additional wetlands is a laudable goal this does not provide a proper basis for the granting of this CDP and does not exempt the project from a complete analysis under the City's LCP or the Coastal Act. Further this proposed creation of wetlands cannot be considered mitigation for the fill that is proposed under the SIRAP since mitigation is only allowed to balance impacts caused by an action which is itself a permitted use under the LCP. Since the filling of the wetlands, ESHA under the City's LCP, on the remainder of the site is not being done for a permitted purpose under the LCP or the Coastal Act, this is not the case. The only permitted use within ESHAs are uses dependent upon such resources, such as restoration or enhancement projects. Eureka Municipal Code § 156.052(D).

An additional critical failure of the SIRAP is its lack of process and inadequate protocols to characterize the contamination on the property prior to its implementation. Although the Regional Board has conditioned their approval on the delineation of the vertical and lateral extent of dioxin

Conservation and Recovery Act. Exhibit 3 of the letter to the Regional Board contains a wetland delineation at page 27 prepared on behalf of Humboldt Baykeeper and shows the pocket wetlands found on the site that will be filled as a result of the implementation of the SIRAP. Attached as exhibit 9 to the letter to the Regional Board are figures showing sampling locations where dioxins and furans were detected in site soils and sediments.

contamination, there is no requirement that this occur beyond the areas already identified as contaminated with dioxin. Even the proposal to address the known dioxin contaminated soil is wholly inadequate to ensure proper characterization and protection to the local community. To date there have been seven samples for dioxin taken and analyzed, (on a 40+ acre parcel) and all seven samples came back with elevated levels of dioxin. Since the SIRAP only calls for a composite sample of areas known to be contaminated, and fails to set forth a process to determine the extent of contamination, there is a strong likelihood that many contaminated soils and/or sediments will be overlooked. Since the SIRAP only calls for dioxin analysis in the stockpile or where visible evidence of staining or petroleum contamination has been found, the sediments excavated from Clark Slough could easily contain additional dioxins that would be ignored before being spread across the property, compounding the existing contamination.

Thank you for your consideration of this appeal.

_____/s/_____
Michelle D. Smith
Staff Attorney, Humboldt Baykeeper

On behalf of:
Humboldt Baykeeper,
The Environmental Protection Information Center,
The Northcoast Environmental Center

Cc: Pete Nichols, Humboldt Baykeeper
Scott Greacen, Environmental Protection Information Center
Jim Clark, Northcoast Environmental Center
Sharon Duggan, Law Offices of Sharon Duggan

Enclosures:

1. Letter to City of Eureka from Humboldt Baykeeper, EPIC, and the NEC Dated November 3, 2009 with attachments.

Attachments include letter from Humboldt Baykeeper to the North Coast Regional Water Quality Control Board, with attachments included in electronic format. Attachments to the Regional Board are as follows:

- 1) Letter from the Regional Board to CUE VI dated June 18, 2009.
- 2) Letter from Humboldt Baykeeper to the Regional Board dated June 21, 2009.
- 3) Expert Report of HT Harvey dated January 2008.
- 4) Soil sampling results from the Balloon Track dated July 2008.
- 5) Water sampling results from the Balloon Track dated January 2008.
- 6) Sediment sampling results from the Balloon Track dated January 2008.

- 7) Fish Tissue sampling results from Clark Slough dated January 2008.
 - 8) Expert Report of HT Harvey dated February 2009.
 - 9) Figures showing sampling locations for above soil, sediment, and water samples.
2. Letter to Brian Morrissey of CUE VI dated February 23, 2009.



November 3, 2009

City Council
City of Eureka
531 K Street
Eureka, CA 95501

Re: Coastal Development Permit Application for Phase 1 of the Marina Center Development

Mayor and Council:

Humboldt Baykeeper, the Environmental Protection Information Center ("EPIC"), and the Northcoast Environmental Center ("NEC") submit the following comments on the Coastal Development Permit ("CDP") application for Phase 1 of the Marina Center Development. All of our groups work for the protection and restoration of the North Coast environment, and believe that the granting of this permit will have a detrimental impact on the environment and is contrary to local, state, and federal law and will have a detrimental impact on the environment.. We do not believe that Phase 1 of the Marina Center development meets the standards found within the City of Eureka's Local Coastal Plan ("LCP") or within the California Coastal Act ("Act"), and therefore ask that you deny the permit application.

Phase 1 of the Marina Center Project consists solely of implementation of the Supplemental Interim Remedial Action Plan ("SIRAP") on the property. Of specific concern to our groups are the impacts on wetlands and environmentally sensitive habitat areas that would result from implementation of the SIRAP, as well as the failure to fully analyze and disclose those impacts.

In 1984 the City of Eureka's LCP was first certified by the Coastal Commission, and the City was granted permitting authority for development occurring within the Coastal Zone. This LCP was revised and recertified in 1999. Pursuant to this grant of authority for any development occurring in the City's coastal zone, the City is required to apply the standards and policies contained within the City's certified LCP.

Standards applicable to development within wetlands and Environmentally Sensitive Habitat Areas are contained within the Environmental Resource Standards Section of the Eureka Municipal Code. The City has incorrectly or inadequately applied these standards to the CDP application before it and the CDP should be denied.

Environmentally Sensitive Habitat Areas

The City incorrectly states that Environmentally Sensitive Habitat Areas (“ESHA”) are not found on the project site. ESHAs are defined within the City’s LCP as rivers, creeks, sloughs, gulches and associated riparian habitats, wetlands and estuaries, and riparian areas within the City’s coastal zone. Eureka Municipal Code § 156.052(C). This includes Clark Slough as well as all other wetlands found on the property. The Staff Report prepared by the City of Eureka for the CDP incorrectly states that “(t)he project site does not contain the essential elements of an ‘environmentally sensitive habitat area’ as those areas are defined by the Coastal Act.” Staff Report at 13. Instead of applying the standards found within the City’s LCP, the report then goes on to summarize the requirements for ESHA determination found within the Coastal Act and states: “The project site does not satisfy these criteria. Neither the plant nor the animal species under existing conditions at the project site are rare or valuable; there is no potentially suitable habitat for special-status species on the project site; and much of the existing vegetation is non-native and invasive.” *Id.* This is a misapplication of Coastal Act policies. The City’s LCP requires that LCP policies approved by the Coastal Commission be applied when reviewing project proposals. Even were this not the case, the City’s assertion that the wetlands and Clark Slough do not meet the standards for ESHAs within the Coastal Act is incorrect.

Furthermore, Clark Slough and a large portion of the project site are identified on the City’s LCP resource maps as being mapped ESHA. Nothing within the City’s LCP or the maps depicting natural resource areas that eliminates this ESHA determination made by the City and approved by the Coastal Commission when they certified the City’s LCP. Therefore, all policies pertaining to ESHAs must be applied to Clark Slough.

The City has not met the Environmental Resource Standards of the City’s LCP, and the CDP application should be denied.

ESHA Development Standards

Because the City improperly determined that ESHAs do not exist on the project site the City failed to apply the requirements for ESHAs found within their LCP and the Coastal Act. “Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on such resources, including restoration and enhancement projects, shall be allowed within such areas.” Eureka Municipal Code § 156.052(D).

The Supplemental Remedial Action Plan (“SIRAP”) does not fit within the narrow scope of activities that are permitted within ESHAs. Phase 1 is not dependent upon the resources of the ESHA, nor is it a restoration or enhancement project. Instead it is a poorly-designed remediation project. Actual plans for restoration or enhancement are not included with the SIRAP or any documents submitted with the CDP application. Further, actual restoration or enhancement cannot properly happen until after remediation is completed, and in order for that remediation to occur, proper characterization of the contamination must be completed. This has not been done.

Although the North Coast Regional Water Quality Control Board ("Regional Board") did provide concurrence upon the SIRAP, they did not analyze it for consistency with Coastal Act requirements, but instead merely for compliance with the California Water Code¹ – the area that properly falls within their mandate. The determination by the Regional Board that the SIRAP complies with the Water Code does nothing to determine whether Coastal Act standards are being met. Determination of compliance with Coastal Act policies is vested in the City of Eureka and the Coastal Commission.

Wetland Development Standards

The site currently contains Clark Slough and associated wetlands as well as palustrine wetlands – also known as pocket wetlands – that are proposed to be filled as part of Phase 1 of the Marina Center Development. These wetlands are properly subject to both the requirements for ESHAs as well as to the requirements for wetlands found within the City's LCP. According to the City's Municipal Code, the filling of wetlands, as proposed by the CDP application, is only permitted where:

- (1) The diking, filling or dredging is for a permitted use in that resource area as provided in Land Use Plan Policies 5.12 through 5.16;
- (2) There is no feasible, less environmentally damaging alternative;
- (3) Feasible mitigation measures have been provided to minimize adverse environmental effects, consistent with Land Use Plan Policy 5.10; and,
- (4) The functional capacity of the resources area is maintained or enhanced, consistent with Land Use Plan Policy 5.10.

§ 156.052(F)

Implementation of the SIRAP does not fit within these requirements. Although "remediation" is not the final use proposed for the property, the final proposed use is currently known – development of a project that would be comprised primarily of commercial, retail and office uses. This is not a permitted use as contemplated by § 156.052(J). The wetlands that are proposed to be filled as part of implementation of the SIRAP are being filled in anticipation of that final development, not as a means of restoring them to a productive wetland state. It is not even clear that the work that will be done that will fill these wetlands can be considered remediation. Instead of fully characterizing contamination at the site and then conducting complete remediation, the SIRAP will involve limited soils excavation in areas of known contamination, and then will grade and fill the remainder of the property.

Furthermore, the neither the SIRAP nor the CDP application contain a detailed restoration plan as required by the City's LCP.

¹ Humboldt Baykeeper does not believe that the Regional Board followed proper procedures in their review and consideration of the SIRAP. Furthermore, Humboldt Baykeeper does not believe that the SIRAP is adequate in addressing the contamination or need for characterization of the site. Humboldt Baykeepers comments to the Regional Board on the SIRAP are attached.

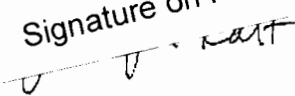
This grading and filling of the wetlands on the site is especially disturbing since a portion of the material used as fill will be sediment excavated from Clark Slough. This material will only have undergone field screening for petroleum hydrocarbons and their co-contaminants, despite the fact that sediment in Clark Slough is known to be contaminated with dioxins and furans.² The SIRAP contains no provisions for analyzing material for dioxins and furans prior to its use as cover soil on the property if the field screening does not identify it as potentially contaminated by petroleum hydrocarbons. For any soils that have been identified as potentially contaminated with petroleum hydrocarbons, there will only be one sample taken from the entire soil stockpile that will be analyzed for dioxins and furans. Furthermore, by grading the site to eliminate storm water runoff without a complete characterization and cleanup there is the possibility of forcing contaminants that are already found on the site, as well as those in the fill removed from Clark Slough, into the groundwater beneath the site and into Humboldt Bay.

The City has not properly applied and analyzed the provisions found in their LCP or the Coastal Act for issuance of a CDP for this project. Humboldt Baykeeper, EPIC, and the NEC urge you to deny this permit.


Thank you for your consideration of our comments,


Signature on File

Pete Nichols, Executive Director
Humboldt Baykeeper


Signature on File

Jennifer Kalt, Secretary
Northcoast Environmental Center


Signature on File

Scott Greacen, Executive Director
Environmental Protection Information Center

² Only one sample has been taken from Clark Slough and analyzed for dioxin, and that one sample came back with elevated levels.



Via electronic mail and U.S. Mail

Catherine Kuhlman
Executive Officer
North Coast Regional Water Quality Control Board
5550 Skylane Blvd, Suite A
Santa Rosa, CA 95403-1072
CKuhlman@waterboards.ca.gov

September 10, 2009

Re: Humboldt Baykeeper's Comments on CUE VI, LLC's June 2009 Action Plan

Ms. Kuhlman:

Humboldt Baykeeper submits the following comments on the June 2009 plan CUE VI, LLC submitted to the Regional Water Quality Control Board entitled *Supplemental Interim Remedial Action Plan* ("Action Plan" or "Plan"). This Action Plan was submitted pursuant to the Cleanup and Abatement Order for 736 Broadway in Eureka, California, which is commonly known as the Balloon Track.¹ Baykeeper provides these comments notwithstanding the fact that the Regional Board already approved the Action Plan, and refuses to withdraw that approval until the public can be heard.

Humboldt Baykeeper is a non-profit organization made up of concerned citizens in and around Humboldt Bay. Baykeeper was launched in October 2004 with a mission to safeguard our coastal resources for the health, enjoyment, and economic strength of the Humboldt Bay community. Baykeeper accomplishes its mission through education, scientific research, and enforcement of environmental laws. The proper characterization and cleanup of the Balloon Track is of considerable concern not only for Baykeeper, but for those who live in the Humboldt area or come here to enjoy the Bay.

As explained below, the process surrounding the Regional Board's negotiation and

1. Humboldt Baykeeper is also submitting supporting exhibits and a compact disc with the complete lab results from the soil, sediment, and water sampling it conducted at the Balloon Track, as well as reports prepared by Humboldt Baykeeper consultants regarding the ecology of the Balloon Track and Clark Slough.

approval of the Action Plan without any public notice or participation is both illegal and against public policy. The Balloon Track is heavily contaminated and sits just a few hundred feet from Humboldt Bay, which is a significant environmental and economic resource for the Humboldt community. Although the sampling to date demonstrates that pollutants are continually being discharged to the Bay, there is insufficient information to know with adequate certainty the full extent of this contamination at the site. Moreover, a significant data gap exists, undermining a sufficient basis for approval. Despite the Regional Board's refusal to withdraw its premature approval of the Plan, Baykeeper provides substantive comments on the proposed remedial measures which are not only flawed, but also based on insufficient information and an incomplete site conceptual model.

I. The Process Leading to the Approval of the Action Plan Involved an Illegal and Indefensible Exclusion of Public and Agency Participation.

CUE VI first submitted the Action Plan to the Regional Board in or around May 2009. Regional Board staff engaged CUE VI in substantive discussions on the draft.² The Regional Board received a revised Action Plan in June 2009. On June 18, 2009, the Regional Board sent CUE VI a letter approving the Plan.³ The Regional Board sent Baykeeper, and other select individuals, a copy of the June 18 Letter. The Regional Board did not notify the public that it had received, and was commenting on, the Action Plan and did not even make the Action Plan available to the public. Five days **after** the Regional Board issued the June 18 Letter, the Action Plan was posted on Geotracker. Not only is the Regional Board required to engage the public in the review of the Action Plan, it is inexcusable that staff never notified Baykeeper that it received the Plan.⁴

A. The Water Code requires that the Regional Board Allow Public Participation in the review and comment of the Action Plan.

After Baykeeper became aware of the Regional Board's unilateral review and approval of the Action Plan it demanded a public review and comment period and compliance with all other requirements set forth in section 13307.5 of the Water Code. Baykeeper specifically set forth this request and the legal basis for it in a July 21, 2009 letter.⁵ The Regional Board denied Baykeeper's request despite the clear directive under Water Code section 13307.5 that,

2. Evidence of these discussions and comments is provided on page one of the June 18 letter from the Regional Board staff to CUE VI, LLC approving the Plan. The June 18 Letter is attached hereto as Exhibit 1.

3. See Exhibit 1, June 18 Letter.

4. This is astonishing given that Regional Board staff and CUE discussed sampling conducted by Baykeeper, and because staff is aware that Baykeeper initiated a citizen enforcement suit against CUE and others almost four years ago to resolve the pollution problems at the site.

5. See July 21, 2009 letter from Humboldt Baykeeper to Regional Board attached as Exhibit 2.

the regional board shall take all the [enumerated] actions when reviewing or approving a cleanup proposal ... with respect to a site issued a cleanup and abatement order.

The actions enumerated in Section 13307.5 specifically include subjecting the Plan to public and agency review and comment before it is reviewed or approved by the Regional Board. Only after receiving a request from Baykeeper to circulate the Action Plan for public and agency review and comment did the Regional Board agree to release the Plan to the public. Specifically, on August 11, 2009, almost two months after the Regional Board approved the Action Plan, the Regional Board issued a *Notice of Proposed Interim Remedial Action*.⁶ The Regional Board did not issue the notice pursuant with the requirements of Water Code section 13307.5 as required, however. As a result, the limited availability to comment that was provided still fails to meet the Regional Board's legal obligations, including ensuring the appropriate government entities receive notice of the comment period and an opportunity for a public meeting in the affected community.

B. The Regional Board's Limited Post-Approval Public Review Fails to Facilitate Adequate Agency or Public Input and Results in Improper Piecemeal Approach to Removing the Contamination at the Balloon Track.

Because the Regional Board has failed to comply with section 13307.5 it has effectively shielded the Action Plan from review by relevant public and regulatory agencies such as the Department of Toxic Substances Control ("DTSC"), the Department of Fish and Game, the Coastal Commission, and the City of Eureka. Even after the Regional Board agreed to post a public review and comment notice, there was not a widespread circulation of the notice as required by the Water Code. Instead, notice was quietly posted in a corner of the Regional Board website, and the letter announcing the opportunity to comment was sent only to the same select individuals as the June 18 Letter. The failure to involve the public and sister agencies is inexcusable, especially considering the widespread public interest in the cleanup and appropriate reutilization of the Balloon Track.

Moreover, the Regional Board's approval results in a piecemeal approach to addressing the widespread contamination at the Balloon Track. The June 18 Letter begins by stating "the Plan was reviewed for compliance with the [CAO], **other applicable laws, regulations, plans, and policies.**" However, this is not the case as the Regional Board acknowledged that actions approved under the Plan require permits (such as a 401 water quality certification from the Regional Board). However, the June 18 Letter is silent as to the additional permits and approval

6. Baykeeper hereby specifically requests the opportunity to comment on any revised drafts of this Plan or any future cleanup plans for the Balloon Track.

needed, even those which the Regional Board itself must issue before any work under the Action Plan can begin. There appears to have been no effort by the Regional Board to gather the information necessary to evaluate whether the Plan's proposed actions will in fact be in compliance with all "applicable laws, regulations, plans, and policies." Had the Regional Board engaged the public and sister agencies in this process as required, a more robust review, including by agencies responsible for implementing those "applicable laws, regulations, plans, and policies," would have resulted before the Action Plan was approved. The Regional Board's action ensures the review and oversight of the cleanup of the Balloon Track will be conducted in a piecemeal fashion, which will make it even more difficult for the public and regulatory agencies to participate effectively in the development of an appropriate and effective cleanup plan for the site.

The Regional Board should return to square one, including by requiring resubmission of a plan for public review and comment that addresses the issues raised in the remainder of this comment letter and other concerns raised by commenters on the Plan.

II. Clark Slough Runs Through the Balloon Track, Both of Which Drain to Humboldt Bay, Which is a Valued and Important Public Resource to the Community.

Humboldt Bay is widely used for commercial, recreational, and subsistence fishing. Humboldt Bay's fragile ecology provides over 90% of the oysters commercially produced in California and maintains a vibrant Dungeness crab fishery. Clark Slough, which runs through the Balloon Track and would be subject to CUE VI's remedial work under the Action Plan, is an ecologically-sensitive Dungeness crab nursery, as evidenced by the 243 juvenile Dungeness crab counted within Clark Slough by Humboldt Baykeeper's consultants during a site inspection on January 10, 2008.⁷

The Balloon Track is located within a few hundred feet of Humboldt Bay and was an open tidal marsh prior to being developed into a railroad maintenance yard some time in the late 1800s. Throughout the operational history of the Balloon Track, substances used in the maintenance of rail cars have been allowed to leak, spill, or be poured onto the ground, contaminating the soil, groundwater, and surface waters. Soils, sediments, and water at the Balloon Track are contaminated with heavy metals, petroleum-related compounds, PCBs, and dioxins and furans. The pollutants located throughout the Balloon Track discharge to Humboldt Bay, to Clark Slough, to on-site wetlands, and to groundwater. The wetlands throughout the site and groundwater beneath the site are subject to tidal flows so with each ebb and flow of the tide and/or during wet months, polluted groundwater is discharged from the Balloon Track to ditches, wetlands, Clark Slough and/or Humboldt Bay. The Regional Board issued the Cleanup and Abatement Order ("CAO") because the site is contaminated as a result of its long history as an

7. See January 29, 2008 Expert Report of H.T. Harvey and Associates at 8, attached as Exhibit 3.

industrial facility.

Site investigations and sampling undertaken by Humboldt Baykeeper resulted in the discovery of previously unidentified contamination at the site, such as dioxins, furans, and PCBs in soils and sediments, and dioxins and furans in fish tissues from samples taken in Clark Slough.⁸ Specifically, dioxins and furans were detected in every sample analyzed, at locations in several areas of the site.⁹ The dioxin levels at the site exceed relevant ecological and public health screening levels, often by several orders of magnitude. The dioxins and furans contaminating the site are carcinogens that disrupt the human endocrine system. They also bioaccumulate in the tissues of shellfish and fish such as salmon, steelhead, and shark, and cause a health hazard to people and wildlife that consume them.

Unfortunately, to date there has been no effort by CUE VI to disclose or adequately assess the extent of this contamination in connection with its request to approve the Plan. Data submitted by Baykeeper with its present comments - and in CUE VI's possession by virtue of the ongoing federal lawsuit - establish that samples from fish collected in Clark Slough contained elevated levels of dioxins and furans well-beyond action levels.¹⁰ These fish tissue samples demonstrate that the pollutants and contamination at the Balloon Track are travelling through the Humboldt Bay area food web. Thus, there can be no doubt that the Balloon Track is contaminated with very toxic compounds and extreme and thorough care must be taken before any remedial work begins

III. The Regional Board Must Review All Known Information Regarding Site Conditions and Essential Information that Is Currently Lacking Must Be Obtained Before Any Remedial Action Is Taken.

The Regional Board's approval was not based on a full and thorough review of all data available on the contamination at the site. Additionally, the Regional Board acknowledges that the extent of contamination should be, but is not, known.¹¹ Thus, the limited assessment of site conditions contained within the Plan is seriously flawed and inadequate to evaluate the site sufficiently to allow for approval of the Plan or the completion of an interim remedial measure. Specific inadequacies are outlined below.

8. The CAO does not require that the discharges from the site be analyzed for these pollutants and the Regional Board has not amended the CAO to require this or require it as part of their approval of the Action Plan.

9. Humboldt Baykeeper has attached the laboratory results from these sampling events here. Exhibit 4 is soil sampling results from July 2007, Exhibit 5 is water sampling results from January of 2008, and Exhibit 6 is soil and sediment sampling results from January 2008. Maps showing the locations of Humboldt Baykeeper's samples are attached as Exhibit 9.

10. January 2008 Fish Tissue laboratory analytical results are attached as Exhibit 7, and the Expert Rebuttal Report of HT Harvey and Associates is attached as Exhibit 8.

11. Exhibit 1, June 18 letter at 2.

A. CUE VI Has Not Presented All Information and Data About the Site.

The Action Plan fails to present all the information about site conditions known to CUE VI. For example, during Humboldt Baykeeper's site inspection on January 10, 2008, fish were collected from Clark Slough and their tissues subsequently analyzed for dioxins and furans. Baykeeper is including this data with this comment letter, showing elevated fish tissue concentrations of dioxins and furans - all of which are above screening levels.¹² Though CUE VI has been in possession of this same information, it was not presented to the Regional Board with its Plan. Further, as the June 18 Letter to CUE VI notes, the lab reports and other supporting documentation for the samples collected by Baykeeper and CUE VI at the site were not provided to the Board.¹³ Additionally, CUE VI did not provide any sample analysis laboratory reports. Instead, CUE VI merely gave the Board raw number values, and then disputed the validity of those samples in its effort to have the Regional Board disregard samples showing high dioxin levels in on-site sediments. Thus, while withholding information critical to the proper evaluation of the Plan and eventual remediation of the site, CUE VI submitted its Plan and received Regional Board approval. CUE VI's failure to disclose all known information regarding the site in its possession completely undermines the basis for approving Plan. Indeed, by deliberately withholding relevant site information, CUE VI has prevented the Regional Board from reaching a fully-informed decision.

B. The Vertical and Lateral Extent of Site Contamination Must Be Defined Before Remedial Action Is Proposed or Taken.

There is no doubt that the Balloon Track is contaminated from industrial operations but as the Regional Board itself acknowledges in the June 18 Letter, the extent of the contamination is not known.¹⁴ Although limited sampling by both CUE VI and Baykeeper detected dioxin and furans in sediment in the ditches and in Clark Slough, additional sampling has not been conducted to determine the extent of the contamination and hot spot areas. The Action Plan does not require adequate sampling and thus the Plan's section on Nature and Extent of Contamination is incomplete.¹⁵ The Action Plan is not accompanied by plume contour maps, graphics or other visual aids to demonstrate determination of vertical and lateral extent to background or risk-based levels. The failure to provide the vertical and lateral extent of known contamination is a fundamental flaw in the Action Plan. Without it, an adequate site conceptual model and protective remediation strategy cannot be prepared, precluding approval of the Plan.

Prior to Humboldt Baykeeper's sampling, there had not been any analysis for dioxins and

12. Exhibit 7, January 2008 Fish Tissue analytical results.

13. Exhibit A, June 18 Letter at 2.

14. Exhibit A, June 18 Letter, at 2.

15. See Plan, Section 3, p.10.

furans at the Balloon Track, and no recent sampling for PCBs, despite the fact that each of these pollutants has been detected at the site. Humboldt Baykeeper's samples were taken only at the surface (0-6 inches). Dioxins and furans were detected at elevated levels in each of the samples, indicating a significant contamination problem.¹⁶ But while these sample results demonstrate site contamination with these pollutants, the results are insufficient to identify the vertical and lateral extent of contamination. Cross-sectional transects with surface and subsurface sampling throughout Clark Slough, the ditches, and upland areas are necessary to determine hot spots and the extent of contamination and its migration across the site. Contaminant movement through sensitive habitats such as on-site wetlands, Clark Slough, and ultimately to Humboldt Bay must also be determined prior to deciding upon appropriate remedial measures. This is particularly important in areas of sediment accumulation, such as Clark Slough, where, because of CUE VI's activities and the historic operations and chemical use at the site, contaminant levels are likely much higher at depth than at surface. It is likely that without proper site characterization the Action Plan may actually uncover and expose receptors to contaminant levels much higher than indicated in the surface samples. Based on CUE VI's statement that these contaminants will be retained for long periods of time in the sediments, the likelihood that sediments washed from the site during site operations, and the accumulation of those sediments in Clark Slough, the actual concentrations found in Slough sediments would be of much higher concentrations than the current overlying sediments - which themselves exceed all screening levels.

Sampling results to date demonstrate that site hazards exist, but cannot be used by themselves to establish cleanup levels. According to the EPA typically, and at a minimum, you need ten samples within a contaminated area to estimate the cleanup or risk-based concentration.¹⁷ Sampling data from Superfund sites have shown that data sets with fewer than 10 samples per exposure area provide inadequate estimates of the mean concentration, and in fact sampling strategies that contain 20-30 samples per exposure area provide somewhat better estimates of the exposure.¹⁸ Please note that these sample sizes are for a single exposure area and that the Balloon Track site has multiple exposure areas and the current sample set of 4 samples is woefully inadequate to characterize the site at even a screening level. The samples analyzed for dioxin and furans, which are currently being used to attempt to justify cleanup strategies, are insufficient for those purposes under recognized methods. Since inadequate and incomplete sampling has been conducted, there is no way to know if these samples represent the least contaminated or most contaminated soils and sediments at the site.

The sampling and analysis performed at the former Simpson Timber Company plywood mill on Waterfront Drive in Eureka ("Simpson Site") provides a useful guide for the type of data collection and analysis that must be performed at the Balloon Track. At the Simpson Site, the

16. See Exhibit 4, July 2007 soil analytical results; Exhibit 6, January 2008 soil and sediment analytical results.

17. Publication 9285.7-081, May 1992, Supplemental Guidance to RAGS: Calculating the Concentration Term

18 *Id.*

site owner collected sediment samples from six separate locations within a drainage swale that had identified dioxin contamination.¹⁹ At four of the six sampling locations, consultant Geomatrix collected transectional data in order to assess the cross-sectional vertical and longitudinal extent of dioxin contamination. At each of these locations samples were collected from the western bank slope from above high water, from the western high water line, from the center of the channel, from the eastern high water line, and from the eastern bank slope from above the high water line. At the two sampling locations where the transectional data was not collected, Geomatrix collected continuous core samples from the western high water line, the center channel, and the eastern high water line. This sampling event resulted in the collection of twenty-six separate samples for a drainage swale that is approximately 1,050 feet long.²⁰

Appropriate characterization of site contamination, including establishing the vertical and lateral extent of dioxin, furan, and PCB contamination, must be completed before remedial work can be proposed and approved. This information is necessary for the agencies and public to determine the appropriate remedial measures for each of the contaminated areas at the site. Premature determinations, designed specifically to keep remedial costs low, may do more harm than good, by exposing and mobilizing contaminants, and possibly precluding more effective and appropriate corrective measures. Without appropriate characterization, hasty remedial action without proper planning and understanding of the contaminant distribution at the site is not going to address actual conditions or all contamination, and could make matters worse.

IV. The Site Conceptual Model Is Flawed and Must Be Revised.

The Plan's "Site Conceptual Model" is inadequate, particularly with respect to dioxins and furans. This section consists of two sentences merely stating,

dioxins were detected in shallow soil samples collected from four ditch areas from the site and in locations in Clark Slough. Dioxins are considered insoluble, therefore, the mobility of dioxins is limited to the mobility of sediment.²¹

Not only is this "conceptual model" insufficient, but it is also wrong. It is based on incomplete information regarding site contamination, and it does not consider viable transport mechanisms such as sediment transport, biological transport and direct ingestion of sediment by receptors as discussed below.

A vital element of a site conceptual model for the Balloon Tract and Clark Slough is the

19. Geomatrix, Eastern Drainage Swale Sediment Sampling Workplan, dated October 2006.

20. Geomatrix, Eastern Drainage Swale Sediment Investigation Report dated April 2007 at 23.

21. Plan at 18.

evidence of significant bioaccumulation of dioxins, furans and PCBs in organisms that reside and feed in Clark Slough. The Action Plan fails to discuss, or even mention, the analytical results of tissue samples collected by Humboldt Baykeeper consultants on January 10, 2008 which showed dioxins and furans in prickly sculpins (*Cottus asper*) at 2.635 pg/g TEQ and in staghorn sculpins (*Leptocottus armatus*) at 4.288 pg/g TEQ.²² These numbers far exceed the Office of Environmental Health Hazard Assessment screening levels of 0.3 pg/g. CUE VI failed to present this critical sampling data to the Regional Board for its use in assessing the relative merit of their Action Plan.

Lacking a site conceptual model based on a complete understanding of the contaminants distribution and mobility, it is likely that the Action Plan will exacerbate the exposure of receptors to these highly toxic contaminants, posing an increased endangerment to the organisms in Clark Slough and the potential for mobilization of significant amounts of contaminated sediments to Humboldt Bay. The proposed physical excavation of sediments may re-suspend and expose high levels of subsurface contaminants, increasing exposure to the site receptors and increasing concentrations flowing into Clark Slough and ultimately Humboldt Bay via exposure, re-suspension, and flow.

As explained above, Humboldt Bay and Clark Slough provide important habitat for species, including biologically sensitive juvenile Dungeness crab, that support the commercial, recreational, and subsistence fisheries of the region. Allowing remedial action with an insufficient site conceptual model could have drastic, negative consequences. Until the needed information is collected and analyzed, and a full discussion of various viable transport mechanisms for pollutants known to be present is completed, the Action Plan will be inadequate with the potential for disastrous results.

Baykeeper strongly urges the Board to consider the potential harm arising from an ill-conceived remedial action and the benefit of receiving complete information to consider and craft an effective site cleanup.

V. The Action Plan's Proposed Measures Are Improper, Incomplete and/or Inadequate.

A. The Action Plan's Sole Focus on *Interim* Remedial Measures Is Improper.

22. See January 2008 Fish Tissue Data attached as Exhibit 7.

The Action Plan improperly focuses exclusively on interim remedial efforts, at the expense of long-term remedial needs. While interim measures to address immediate dangers may be appropriate in certain circumstances, the most important corrective measures needed at the site are those that will provide an actual, permanent solution to the long-term threats posed by pollutants at the Balloon Track and in Clark Slough. Rather than thoroughly and comprehensively provide for measures to address the widespread contamination at the site, the Action Plan appears to be an effort to get away with minimal cleanup efforts and to avoid the expense of conducting an informed and thorough characterization of the pollution at the site and in Clark Slough.

Any interim measure must be consistent with, and contribute to, the performance of any corrective measure conducted as part of the long-term corrective-action strategy. Here, no long-term corrective strategy has been identified. The Action Plan does not contribute to the successful completion of a long-term cleanup of the property and could in fact hinder its eventual accomplishment. For example, the Action Plan calls for grading the site and placement of new fill material, which will likely smear the site's surface, concealing – but not remedying – some contaminated areas. Some of the materials proposed for use as fill for grading are the uncharacterized and potentially contaminated soils and/or sediments to be excavated from Clark Slough. If CUE VI is allowed to blindly begin digging up and potentially spreading contamination, it may likely compromise site integrity making it more difficult to identify the extent of contamination. Specifically missing from the Action Plan are contaminant gradients in order to identify the extent of the contamination, and corresponding contaminant plume maps as required for proper identification of protective cleanup remedial actions. Additionally, grading the site and mixing potentially clean fill materials with the site's existing contaminated soils and sediments would violate the prohibition on mixing wastes. 40 C.F.R. § 261.3(a); 22 C.C.R. § 66261.3(a). Finally, diluting the contaminated soils and sediments at the site with potentially clean materials is contrary to law and is not an appropriate corrective measure. 22 C.C.R. § 66268.3(a); 40 C.F.R. § 268.3(a).

B. The Use of Commercial/Industrial Dioxin Screening Values Is Improper.

The Action Plan improperly relies on the commercial/industrial level proposed by the DTSC for dioxins and furans as the only applicable cleanup level for the site. The use of industrial site levels is totally inappropriate for Clark Slough and the on-site ditches and wetlands at the site. As the Action Plan itself states, "Current plans for the site include the restoration of some of the filled in areas to their former wetlands state."²³ As such, neither the current nor proposed conditions after site wetlands are remediated is as a commercial or industrial facility. If the plans for the property are to restore the wetlands to wetlands, how can a

23. Plan at 24.

commercial or industrial cleanup level be used to determine whether they are clean enough for their final use? The Action Plan must, at a minimum, establish and commit to achieve cleanup levels commensurate and consistent with the actual proposed uses of the site. For areas that will be restored wetlands, this means cleanup levels for dioxin that will be protective of the wetlands as fish and wildlife habitat, and as potential conduits to human exposure through direct contact (and possible ingestion of) sediments, or through the consumption of other fish and wildlife in the food web that has been exposed to those sediments.

C. The Action Plan Fails to Properly Account for Groundwater Impacts.

The Action Plan fails to address known groundwater contamination, and in fact the proposed remedial actions could make the groundwater contamination worse. Specifically, in the Action Plan, CUE VI proposes to regrade the site in order to “alter the flow of storm water on the site to promote natural infiltration of storm water and reduce or eliminate storm water from leaving the site.”²⁴ Driving on-site surface water and storm water to infiltrate through the contaminated soils on-site will very likely result in further degradation exacerbating the groundwater contamination already present. Further, both the shallow (A-zone) and deep (B-zone) aquifers below the site are in communication with Humboldt Bay and/or Clark Slough. Thus, encouraging infiltration of polluted storm water through contaminated soil when it will discharge to Clark Slough and Humboldt Bay appears to be an ill-advised and improper method for addressing contaminated sediments. Further compounding the problem is the fact that the groundwater below the site is currently being insufficiently sampled and analyzed, and has not been adequately characterized, making it likely that this downward migration would be overlooked in future sampling. CUE VI’s Action Plan contains no provisions for adequate groundwater monitoring, nor does it call for the installation of additional monitoring wells to fill existing gaps, let alone to ensure that additional groundwater problems are quickly identified and addressed. The Action Plan must be revised to address these issues.

D. The Field Screen Methodology Proposed by the Action Plan Is Improper and Inadequate.

The Action Plan calls only for field screening of excavated soils, using an Organic Vapor Analyzer (“OVA”) for monitoring field activities and for the detection of petroleum related compounds.²⁵ The Action Plan states “Shallow sediment that has accumulated in this area will be excavated and screened in the field using an OVA for the presence of petroleum related compounds, and will be visually inspected for the presence of visible contamination.”²⁶ Although an OVA cannot detect dioxins, furans or PCBs, this is the only field screening or

24. Plan at 26.

25. Plan at 25.

26. *Id.*

monitoring that will be performed, with potential analysis conducted for petroleum hydrocarbons only.²⁷

Notwithstanding the known contamination with dioxins, furans, and PCBs, there is absolutely no proposal for appropriate testing for any of these contaminants during remediation efforts. The proposal to use field observations to detect visible staining will be completely ineffective in the detection of dioxins, furans, or PCBs as none of these substances result in the visible staining of soils or sediments. The collection of one single sample from the excavated soil stockpiles for dioxin analysis will not provide any indication of either the true extent of dioxin contamination within the stockpile or the extent of dioxin contamination at the site.²⁸ As there is no approved field sampling or analytical method for dioxins and furans, the failure to conduct any additional dioxin sampling at the site prior to commencing remediation is further evidence of the attempt to speed the "remediation" of the property without close or careful attention to actual site conditions.

As the Action Plan acknowledges, "excavated soil that has not been identified as potentially contaminated by the field screening methods (visual observation or OVA) will be used as fill material within the proposed grading area..."²⁹ The complete lack of analysis of the sediments proposed for excavation from Clark Slough and the ditches is especially egregious since these sediments will then be used as cover for the remainder of the site. Since these sediments are known to be contaminated with dioxins, yet no analysis is being conducted of them for dioxin, there is a strong and alarming possibility that the remedial measure will in fact result in covering the site with dioxin contaminated sediments as a "cap."³⁰

E. The Action Plan Proposes Improper Handling of Excavated Materials.

The Action Plan's proposal for handling and disposal of solid and hazardous wastes is completely illegal. In assessing the proper means for disposing the excavated soils and sediments, CUE VI must meet all the requirements of both the Resource Conservation and Recovery Act ("RCRA") and the California Hazardous Waste Control Act ("HWCA"). Both laws have strict requirements for the handling of solid waste and hazardous waste. Both statutes require each facility that treats, stores, or disposes of its generated solid waste to test such waste to determine whether the waste is either a Listed Hazardous Waste or a Characteristic Hazardous waste. 42 U.S.C. § 6921; 40 C.F.R. § 262.11; 22 C.C.R. § 66262.11. A solid waste is any material that is discarded, abandoned, recycled or inherently waste like. 40 C.F.R. § 261.2; 22 C.C.R. § 66261.2. Under both statutes, a solid waste is a hazardous waste if it exhibits certain

27. Plan at 24-25.

28. Plan at 23, 25.

29. Plan at 24.

30. Plan at 24, 26, 27.

characteristics, if it is listed as a hazardous waste in relevant regulations, or if it is a mixture of a hazardous waste and a solid waste. 40 C.F.R. § 261.3(a); 22 C.C.R. § 66261.3(a).

The soils and/or sediments to be excavated from the Balloon Track under the Action Plan are solid waste, and are intended either for off-site disposal or for on-site recycling. The Action Plan states that the soils that are excavated from the ditches will be stockpiled and analyzed as required by the facility where they will be disposed.³¹ In contrast, the soils or sediments that are excavated from the wetlands will be used as fill on the property if they meet the field screening of visual observation and OVA analysis.³² The Action Plan contradicts itself regarding material excavated from wetlands when it later states, "(o)ne composite soil sample of the stockpiled soil will be collected for submittal to an analytical laboratory and will be analyzed for dioxins and furans.... The laboratory analytical results will be used to assess the final disposal of this material."³³ Regardless of whether the excavated soils are reused on-site or disposed of off-site, they must first be properly analyzed and characterized. The Action Plan must be revised to ensure proper handling of solid waste.

Under California regulations, both PCBs and dioxins are presumed to be extremely hazardous wastes. 22 C.C.R. Chapter 11, Appendix X. Thus, any of the excavated soils or sediments that are mixed with other excavated soils or sediments that contain dioxins and furans or PCBs are all hazardous waste. 40 C.F.R. § 261.3(a); 22 C.C.R. § 66261.3(a). The determination of whether this soil or sediment is a hazardous waste must be made prior to mixing soils or sediments with unknown status with soils or sediments known to contain dioxins and furans or PCBs. 40 C.F.R. § 262.11; 22 C.C.R. § 66261.11. Both RCRA and the HWCA prohibit the dilution of hazardous waste as a substitute for adequate testing of the hazardous waste. 22 C.C.R. § 66268.3(a); 40 C.F.R. § 268.3(a). A hazardous waste remains a hazardous waste unless and until it has been excluded from regulation by petition to the Administrator of the EPA and it no longer exhibits any of the characteristics of hazardous waste. 40 C.F.R. § 261.3(c) and (d); 22 C.C.R. § 66261.3(c) and (d). The Action Plan does not call for the required testing and analysis of excavated soils and/or sediments before they are mixed with soils and/or sediments known to contain dioxins, furans, and/or PCBs. The Action Plan must be modified to incorporate these requirements.

VI. Conclusion.

Baykeeper thanks the Regional Board for the opportunity to provide comments and the Board's consideration of these comments. As demonstrated above, the Balloon Track's history

31. Plan at 23.

32. Plan at 24.

33. Plan at 25.

Catherine Kuhlman
Comments on Action Plan
September 10, 2009
Page 14 of 14

has resulted in an extremely contaminated site that sits just a couple hundred feet from Humboldt Bay. CUE VI has not determined the extent of contamination at the site or adequately set forth a process to do so. The Action Plan as approved by the Regional Board is premature and will not adequately protect the local resources or affected community. Because it is required by law, and is the right thing to do, the Regional Board must rescind their approval and require additional characterization and then a complete and comprehensive cleanup plan be submitted.

Sincerely,

/s/
Michelle D. Smith
Staff Attorney
Humboldt Baykeeper

cc: Pete Nichols, Humboldt Baykeeper
Layne Friedrich and Drev Hunt, Lawyers for Clean Water
Fred Evenson, Law Offices of Frederic Evenson
Jeffrey Lee, GCA Law Partners, LLP



California Regional Water Quality Control Board North Coast Region

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Arnold
Schwarzenegger
Governor

February 23, 2009

Brian Morrissey
CUE VI, Security National Properties
P.O. Box 1028
Eureka, CA 95502

Dear Mr. Morrissey:

Subject: Comments on the December 2008 Storm Water Monitoring Report

File: Southern Pacific Transportation Co., 736 Broadway, Eureka, California,
Case No. 1NHU064

Regional Water Quality Control Board staff reviewed the December 2008 Storm Water Monitoring Report for the former railyard facility in Eureka and have the following comments.

The data in Table 1 regarding copper at Monitoring Station A do not agree with the data in Table 2-1 (historical site data) or to the laboratory analytical report. There appears to be a typographic error in Table 1. Please correct the information and submit corrected pages for the Storm Water Monitoring Report no later than March 16, 2009.

Additionally, the storm water sample results for Monitoring Stations A and D indicate that copper is present at levels above the water quality objectives for Humboldt Bay. This is an ongoing issue, as described in previous letters from this agency. You have implemented best management practices, but, based on this Monitoring Report, more work needs to be done. You need to submit a proposal for additional best management practices to be implemented in order to reduce the level of copper in storm water runoff. Please submit the proposal for additional best management practices to this agency no later than March 31, 2009.

Section 13267 of the California Water Code contains the authority for these requests. Please contact me at (707) 576-2701 if you have any comments or questions about this letter.

Sincerely,

Caryn Woodhouse
Staff Scientist

California Environmental Protection Agency

cc: Tom Hannah, 2142 Hodgson Street, Eureka, CA 95501
Mary Shively-Boughton, 814 J Street, Eureka, CA 95501
David Tyson, Eureka City Manager, 531 K Street, CA 95501
Lisa Shikany, City of Eureka, 531 K Street, Eureka, CA 95501
Patty Clary, CATS, 315 P Street, Eureka, CA 95501
City Engineer, City of Eureka, 531 K Street, Eureka, CA 95501
Humboldt Bay Harbor, Recreation, and Conservation District, P.O. Box 1030,
Eureka, CA 95502
Vicki Frey, California Department of Fish and Game, 619 Second Street, Eureka,
CA 95501
Frans Lowman, ERM, 5909 Hampton Oaks Prkway, Suite D, Tampa, FL 33610
Erik Nielsen, SHN Consulting Engineers & Geologists, 812 W. Wabash, Eureka,
CA 95501
Fred Evenson, Law Offices of Fredric Evenson, 424 First Street, Eureka, CA
95501
Michelle Smith, Humboldt Baykeeper, 217 E Street, Eureka, CA 95501
James Diel, Union Pacific Railroad Company, 9451 Atkinson Street, Roseville, CA
95747

CALIFORNIA COASTAL COMMISSION

NORTH COAST DISTRICT OFFICE

710 E STREET, SUITE 200

EUREKA, CA 95501

VOICE (707) 445-7833 FAX (707) 445-7877

EXHIBIT NO. 7

APPLICATION NO.

A-1-EUR-09-049

CUE, VI, LLC

APPEAL FILED BY RALPH

FAUST, 11/19/09 (1 of 4)

ARNOLD SCHWARZENEGGER, Governor



APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT

Please Review Attached Appeal Information Sheet Prior To Completing This Form.

SECTION I. Appellant(s)

Name: RALPH FAUST

Mailing Address: P.O. BOX 135

City: BAYSIDE CA Zip Code: 95524 Phone: 707/407-7435

SECTION II. Decision Being Appealed

1. Name of local/port government: CITY OF EUREKA
2. Brief description of development being appealed:
APPLICANT DESCRIBED AS A SUPPLEMENTAL
INTERIM REMEDIAL ACTION PLAN (SIAP). IT WOULD
DREDGE AND FILL WETLANDS AND ESHA ON SITE
3. Development's location (street address, assessor's parcel no., cross street, etc.):
BALLOON TRACK; WATERFRONT DRIVE
4. Description of decision being appealed (check one.):
☐ Approval; no special conditions
☒ Approval with special conditions:
☐ Denial

RECEIVED

NOV 19 2009

CALIFORNIA
COASTAL COMMISSION

Note: For jurisdictions with a total LCP, denial decisions by a local government cannot be appealed unless the development is a major energy or public works project. Denial decisions by port governments are not appealable.

TO BE COMPLETED BY COMMISSION:

APPEAL NO: A-1-EUR-09-049

DATE FILED: 11/19/09

DISTRICT: North Coast

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 2)

5. Decision being appealed was made by (check one):

- ☐ Planning Director/Zoning Administrator
☒ City Council/Board of Supervisors
☐ Planning Commission
☐ Other

6. Date of local government's decision:

Nov. 3, 2009

7. Local government's file number (if any):

CDP-09-0004

SECTION III. Identification of Other Interested Persons

Give the names and addresses of the following parties. (Use additional paper as necessary.)

a. Name and mailing address of permit applicant:

CUE VI, LLC

ATTN. RANDY GANS
SECURITY NATIONAL PROPERTIES
323 FIFTH ST.
EUREKA CA 95501

b. Names and mailing addresses as available of those who testified (either verbally or in writing) at the city/county/port hearing(s). Include other parties which you know to be interested and should receive notice of this appeal.

(1) MANY INDIVIDUALS TESTIFIED; IDENTITIES
UNKNOWN TO ME; CITY OF EUREKA HAS
COMPLETE LIST

(2)

(3)

(4)

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 3)

SECTION IV. Reasons Supporting This Appeal

PLEASE NOTE:

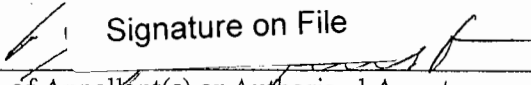
- Appeals of local government coastal permit decisions are limited by a variety of factors and requirements of the Coastal Act. Please review the appeal information sheet for assistance in completing this section.
- State briefly **your reasons for this appeal**. Include a summary description of Local Coastal Program, Land Use Plan, or Port Master Plan policies and requirements in which you believe the project is inconsistent and the reasons the decision warrants a new hearing. (Use additional paper as necessary.)
- This need not be a complete or exhaustive statement of your reasons of appeal; however, there must be sufficient discussion for staff to determine that the appeal is allowed by law. The appellant, subsequent to filing the appeal, may submit additional information to the staff and/or Commission to support the appeal request.

- 1) THE DEVELOPMENT WOULD DREDGE AND FILL WETLANDS IN VIOLATION OF EUREKA CITY CODE § 156.052, AND PRC § 30233, WHICH STANDARDS ARE INCORPORATED INTO THE CITY'S LCP.
- 2) THE DEVELOPMENT WOULD FILL, COVER AND DESTROY ESHA IN VIOLATION OF EUREKA CITY CODE § 156.052, AND PRC § 30240, WHICH STANDARDS ARE INCORPORATED INTO THE CITY'S LCP.
- 3) THE CITY ACKNOWLEDGED THAT THE PROJECT WAS INCONSISTENT WITH THE ABOVE CITED SECTIONS, BUT PURPORTED TO APPROVE THE PROJECT USING COASTAL ACT BALANCING, BUT
 - A) THE CITY HAS NO APPARENT AUTHORITY IN ITS LCP TO APPROVE BY BALANCING;
 - B) EVEN IF IT DID HAVE SUCH AUTHORITY, APPROVAL OF THIS DEVELOPMENT DOES NOT ADVANCE ANY COASTAL ACT RESOURCE POLICY

APPEAL FROM COASTAL PERMIT DECISION OF LOCAL GOVERNMENT (Page 4)

SECTION V. Certification

The information and facts stated above are correct to the best of my/our knowledge.

 Signature on File

Signature of Appellant(s) or Authorized Agent

Date:

Nov. 19, 2009

Note: If signed by agent, appellant(s) must also sign below.

Section VI. Agent Authorization

I/We hereby
authorize _____

to act as my/our representative and to bind me/us in all matters concerning this appeal.

Signature of Appellant(s)

Date: _____