

January 28, 2016

Ms. Laura E. Horton  
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601 Gateway Boulevard, Suite 1000  
South San Francisco, CA 94080

**Subject: Comments on the Final Environmental Impact Report Prepared for the Phillips 66 Company Rail Spur Extension and Crude Unloading Project**

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Dear Ms. Horton:

On 19 November 2014 I submitted comments pertaining to the Revised Draft Environmental Impact Report (“RDEIR”) prepared by San Luis Obispo County (“County”) for the Phillips 66 Company Rail Spur Extension Project (“Project”). The comment letter established my professional qualifications and described the actions I took to evaluate the RDEIR and underlying analyses.

The County Department of Planning and Building recently issued a Staff Report for the 4 February 2016 Planning Commission hearing on the Project. County Staff determined the Project’s Final Environmental Impact Report (“FEIR”) provided evidence and information to support Staff’s recommendation for denying the application for a Development Plan/Coastal Development Permit. Among other reasons, Staff concluded: (a) the Project would permanently impact approximately 20 acres of an Environmentally Sensitive Habitat Area (“ESHA”); (b) there would be a significant negative impact on sensitive habitat; and (c) the proposed uses would be inconsistent with the biological continuance of the habitat. I have reviewed the Staff Report and associated appendices, and I concur with Staff’s conclusions pertaining to Project impacts to the ESHA and sensitive biological resources. The subsequent comments pertain to flaws in the FEIR.

## **EXISTING CONDITIONS**

### **New Information**

#### Dune Larkspur

Approximately 100 dune larkspur (*Delphinium parryi* ssp. *blochmaniae*), a California Rare Plant Rank 1B.2 species, were detected on the Project site after publication of the RDEIR.<sup>1</sup> These plants were not previously known to occur on the Project site, and thus their presence on the Project site constitutes new information pertaining to the significance of Project impacts.

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<sup>1</sup> FEIR, pp. C.7-2 and 4.4-36.

Dune larkspur is endemic (limited) to coastal California. There are only 16 documented populations of the species, many of which appear to be limited to a few plants. Only four of the populations have been verified extant during the past 20 years.<sup>2</sup> The presence of approximately 100 dune larkspur plants on the Project site constitutes one of the largest known populations of the species.<sup>3</sup>

The FEIR did not provide any specific analysis of Project impacts to dune larkspur, including how the Project might affect viability of the species. In addition, the FEIR did not map the plants or identify their location(s) in relation to the Project disturbance area. This precluded the public's ability to independently assess the number of dune larkspur plants that could be directly or indirectly impacted by the Project.

### ESHA

Although the RDEIR initially denied the presence of ESHA on the Project site, the FEIR concedes the Project area meets the definition of an ESHA as reported in the guidelines set forth by the California Coastal Commission, and that it also appears to qualify as an Unmapped ESHA as defined in the County's LCP.<sup>4</sup> County Staff subsequently concluded an ESHA is indeed present on the Project site.<sup>5</sup> Nevertheless, the FEIR states: "[i]t is important to also consider that the Rail Spur Project area has been highly disturbed and degraded from agricultural, industrial, and human activities for several decades and does not appear to contain features that have an equivalent characteristic or natural function as other mapped ESHA."<sup>6</sup> This statement is not supported by substantial evidence. As stated in the *Vegetation Verification Report* prepared by the County's EIR consultant (Leidos):

There is insufficient information in the document to support this conclusion. I agree that the *Lupinus chamissonis-Ericameria ericoides* Shrubland Alliance vegetation within the project area east of the railroad tracks supports lower diversity and cover of native species than it does on the west side. However, the *Salvia mellifera* Shrubland Alliance east of the tracks (in the project area) supports a high diversity and cover of native shrub species indicating this is high quality habitat. In addition, some of the areas that could be identified as degraded or low quality habitat are those that support special status plant species and therefore should not be considered low functioning habitat, absent compelling additional information to support this conclusion. Additionally, if the Addendum is providing an assessment of habitat function, it needs to consider more than the vegetation types and condition (such as wildlife use and the ability to support sensitive animal species).<sup>7</sup>

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<sup>2</sup> California Natural Diversity Database. 2016 Jan 6. RareFind 5 [Internet]. California Department of Fish and Wildlife.

<sup>3</sup> *Ibid.*

<sup>4</sup> FEIR, p. 4.4-31.

<sup>5</sup> County of San Luis Obispo. 2016 Jan 25. Department of Planning and Development Staff Report. Appendix A, p. 2.

<sup>6</sup> FEIR, p. 4.4-31.

<sup>7</sup> FEIR, p. C.7-15. Leidos. 2015 Nov 6. Phillips 66 Project, Peer Review of Arcadis July 2015 Sensitive Resources Report—Botanical Addendum. p. 2.

Although the dune habitats at the Project site have been disturbed and degraded, they still contain native vegetation and special-status plant species.<sup>8</sup> If the ecological health of the dune habitats is considered from a temporal perspective (i.e., since the time of European contact), the diversity of native vegetation and rare plants within the dune habitats is remarkable and worth conserving.

Therefore, any human activities that have occurred on the site have not lessened the importance of the ESHA. The FEIR's determination that an ESHA exists on the Project site, and that the ESAH will be permanently impacted by the Project, constitutes new information of substantial importance showing that the Project will result in new significant effects.

### **Other Rare Plant Species**

The Applicant's consultant surveyed the Project site for rare plant species on two days during the fall/winter of 2012, and an additional two days during the spring/summer of 2013.<sup>9</sup> Due to drought conditions, it is very likely that some potentially occurring rare plant species did not germinate in 2012 or 2013, and thus, the consultant would have been incapable of determining the presence (or absence) of those species on the Project site. This issue was confounded because the Applicant's consultant did not visit reference sites to confirm all potentially occurring rare plant species were evident and identifiable at the time of the surveys.

The recent detection of dune larkspur (a Rare Plant Rank 1B species) on the Project site provides additional evidence that the surveys conducted by the Applicant's consultant were inadequate. The Applicant's consultant failed to detect dune larkspur during its 2012/2013 surveys, or during the supplemental surveys it conducted between March 18 and April 10, 2015.<sup>10</sup> However, Leidos observed the species on the Project site during the survey it conducted on March 9, 2015—even though rare plant identification was not the primary objective of that survey.<sup>11</sup>

### **Burrowing Owl**

The FEIR states: "Arcadis conducted additional focused surveys for burrowing owl in 2013 to *confirm* whether the species was a year-round resident or overwintering individual. The results of this effort determined that the species was an overwintering individual."<sup>12</sup> This statement is misleading because Arcadis did not conduct the protocol-

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<sup>8</sup> FEIR, Appendix C.7.

<sup>9</sup> RDEIR, Appendix C.1, p. C.1-8.

<sup>10</sup> *Ibid*, Appendix C.1, Table 2 and Appendix C.8. Although the objective of the 2015 surveys was detection of Nipomo Mesa lupine, page 2 of the survey reports states: "[all plant species found to be in a recognizable condition during the ARCADIS surveys were recorded.]"

<sup>11</sup> FEIR, Appendix C.7, pp. C.7-1 and -2.

<sup>12</sup> FEIR, p. 4.4-12 [emphasis added]. Although the FEIR suggests a single burrowing owl was detected at the Project site, the Project survey reports indicate two burrowing owls were detected. *See* RDEIR, Appendix C.2-15 and Appendix C.4-8.

level surveys needed to “confirm” absence of nesting owls (i.e., overwintering birds only).<sup>13</sup>

Burrowing owls can be difficult to detect due to their cryptic coloration, extensive use of burrows, and tendency to flush (fly away) when approached.<sup>14</sup> Conway et al. (2008) analyzed detection probabilities and concluded at least three surveys are required to reliably detect burrowing owls.<sup>15</sup> The California Department of Fish and Wildlife’s (“CDFW”) *Staff Report on Burrowing Owl Mitigation* indicates: (a) four independent surveys are necessary to provide reliable information on the presence of burrowing owls; (b) the surveys should be at least three weeks apart; and (c) data from the four surveys is essential to avoiding, minimizing, and properly mitigating the impacts of a project.<sup>16</sup> Arcadis conducted two surveys that were three days apart.<sup>17</sup>

## PROJECT IMPACTS AND MITIGATION

### Burrowing Owl

Mitigation incorporated into the FEIR includes the possible “translocation” of burrowing owls.<sup>18</sup> Translocation (or “passive relocation”) entails the installation of one-way doors in burrow openings to temporarily or permanently evict burrowing owls and prevent burrow re-occupation. CDFW’s *Staff Report on Burrowing Owl Mitigation* discourages passive relocation of owls and recommends consideration of all other possible avoidance and minimization measures before passive relocation is implemented.<sup>19</sup>

Although the CDFW has established protocols for passive relocation, there still may be a risk to burrowing owls, especially if passive relocation is not done properly. This conclusion is expressly supported by the CDFW, which has concluded passive relocation is a potentially significant impact under CEQA that must be analyzed.<sup>20</sup> According to the CDFW, temporary or permanent closure of burrows may result in: (a) significant loss of burrows and habitat for reproduction and other life history requirements; (b) increased stress on burrowing owls and reduced reproductive rates; (c) increased depredation; (d)

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<sup>13</sup> FEIR, response to comment ABJC-52.

<sup>14</sup> Klute DS, LW Ayers, MT Green, WH Howe, SL Jones, JA Shaffer, SR Sheffield, TS Zimmerman. 2003. Status assessment and conservation plan for the western Burrowing Owl in the United States. Bio Tech Pub FWS/BTP-R6001-2003. Washington: US Fish and Wildlife.

<sup>15</sup> Conway CJ, V Garcia, MD Smith, K Hughes. 2008. Factors Affecting Detection of Burrowing Owl Nests during Standardized Surveys. *Journal of Wildlife Management* 72(3):688-696.

<sup>16</sup> See *Appendix D In*: California Department of Fish and Game. 2012. *Staff Report on Burrowing Owl Mitigation*. Available at: <[www.dfg.ca.gov/wildlife/nongame/docs/BUOWStaffReport.pdf](http://www.dfg.ca.gov/wildlife/nongame/docs/BUOWStaffReport.pdf)>.

<sup>17</sup> RDEIR, Appendix C.3, p. C.3-6.

<sup>18</sup> FEIR, p. 4.4-50.

<sup>19</sup> California Department of Fish and Game. 2012. *Staff Report on Burrowing Owl Mitigation*. p. 10. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>>.

<sup>20</sup> *Ibid.*

increased energetic costs; and (e) risks posed by having to find and compete for available burrows.<sup>21</sup>

The FEIR did not disclose or analyze the effects of passively relocating burrowing owls from the Project site. The need for full analysis of potential impacts from passive relocation is supported by research that indicates most burrowing owl relocation projects fail.<sup>22</sup> Investigators attribute the limited success of translocation to: (a) strong site tenacity exhibited by burrowing owls, and (b) potential risks associated with forcing owls to move into unfamiliar and perhaps less preferable habitats.<sup>23</sup>

Research has shown that passive relocation is most likely to be successful when: (1) there are suitable replacement burrows within 100 meters of the destroyed burrow(s); (2) there is sufficient, protected foraging habitat adjacent to the replacement burrow(s); and (3) a Burrowing Owl Exclusion Plan has been developed and approved by the CDFW.<sup>24</sup> The likelihood that passive relocation would significantly impact burrowing owls at the Project site could not be evaluated because: (a) the Applicant has not prepared a Burrowing Owl Exclusion Plan; and (b) the FEIR did not describe the distribution and abundance of suitable replacement burrows and foraging habitat at the proposed mitigation site(s).

### **Translocation of Silvery Legless Lizards and Coast Horned Lizards**

Coast horned lizards have been observed on the Project site and silvery legless lizards are presumed to occur there.<sup>25</sup> Mitigation incorporated into the FEIR includes capturing these species and moving them off the Project site prior to grading.<sup>26</sup> The translocation of wildlife out of the Project area constitutes a significant impact that was not disclosed or analyzed in the FEIR.

Efforts to translocate (or relocate) animals often fail. Animals that are captured, handled, and/or forced to move from their territory often become stressed. This may lead to the increased production of lactic acid or “stress hormones” in the organism.<sup>27</sup> These physiological changes often cause a non-trivial amount of mortality. In addition, silvery legless lizards use tail autotomy (shedding of the tail) as an escape tactic when captured

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<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.* See also Smith BW, JR Belthoff. 2001. Burrowing owls and development: short-distance nest burrow relocation to minimize construction impacts. *J. Raptor Research* 35:385-391. See also Burrowing Owl Consortium. 2015. Presentation summaries from the 24 Oct 2015 Burrowing Owl Consortium Conference.

<sup>23</sup> *Ibid.*

<sup>24</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. pp. 10 and 11. Available at: <<https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83843>>.

<sup>25</sup> RDEIR, Appendix C.4 and FEIR, p. 4.4-37.

<sup>26</sup> FEIR, Mitigation Measure BIO-3.

<sup>27</sup> Tracy C.R., K. E. Nussear, T. C. Esque, K. Dean-Bradley, C. R. Tracy, L. A. DeFalco, K. T. Castle, L. C. Zimmerman, R. E. Espinoza, and A. M. Barber. 2006. The importance of physiological ecology in conservation biology. *Integrative and Comparative Biology*. pp. 1–15.

by a predator. Tail autotomy affects the lizard's physiology and behavior, which may reduce survival and reproductive output.<sup>28</sup> Dodd and Seigel (1991) reviewed projects involving relocation, repatriation, and translocation ("RRT") of amphibians and reptiles. The authors concluded "[m]ost RRT projects involving amphibians and reptiles have not demonstrated success as conservation techniques and should not be advocated as if they are acceptable management and mitigation practices."<sup>29</sup>

When an animal is moved to an unfamiliar location, it has no knowledge of the habitat resources essential for its survival (e.g., food, water, and cover). The lack of cover in an unfamiliar setting makes a prey species an easy target for predators. Moreover, many species exhibit an intrinsic homing response that is energetically taxing, and that may preclude procurement of food and cover.

Translocation can cause several other types of adverse effects to translocated individuals, and individuals at the recipient site. Even if the translocated animal is moved to an area with readily available resources, aggressive competitors may prevent the displaced animal from accessing the resources, and from mating. This often leads to detrimental effects on both the translocated and resident animals. In addition, translocation can spread disease by introducing diseased animals into a healthy population, or by translocating healthy animals into an afflicted area. Finally, if animals are moved into an area that is already at its carrying capacity the entire population can crash.

### **Special-status Plants**

The FEIR acknowledged the Project would impact Rare Plant Rank 1B species (e.g., dune larkspur and Blochman's leafy daisy), and that those impacts would be potentially significant.<sup>30</sup> However, it subsequently concluded: "given the estimated population and the relatively common occurrence of these species, with the implementation of mitigation measure BIO-2, residual impacts are considered to be *less than significant with mitigation (Class II)*."<sup>31</sup> There are two significant flaws with that conclusion.

First, dune larkspur and Blochman's leafy daisy *are not* relatively common or abundant species. As discussed above, there are only 16 occurrence records of dune larkspur in the California Natural Diversity Database ("CNDDDB"). Similarly, there are only 23 occurrence records of Blochman's leafy daisy, of which only 6 have been verified extant during the past 20 years.<sup>32</sup>

Second, implementation of mitigation measure BIO-2 would not mitigate Project impacts

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<sup>28</sup> Bateman PW, PA Fleming. 2009. To cut a long tail short: a review of lizard caudal autotomy studies carried out over the last 20 years. *Journal of Zoology* 277:1-14.

<sup>29</sup> Dodd CK Jr., RA Seigel. 1991. Relocation, repatriation, and translocation of amphibians and reptiles: Are they conservation strategies that work? *Herpetologica* 47(3):336-350.

<sup>30</sup> FEIR, p. 4.4-36.

<sup>31</sup> FEIR, p. 4.4-36.

<sup>32</sup> California Natural Diversity Database. 2016 Jan 6. RareFind 5 [Internet]. California Department of Fish and Wildlife.

to a less than significant level. BIO-2 simply requires population estimates “as the basis for the in-kind replacement of these species described in Mitigation Measure BIO-5e.”<sup>33</sup> Mitigation Measure BIO-5e requires replacement of Nipomo Mesa lupine at a 3:1 ratio (based on square feet cover) within the designated restoration area with 100% success in 5 years.<sup>34</sup> Nowhere, however, did the FEIR identify the replacement ratio and performance standards for dune larkspur, Blochman’s leafy daisy, and other rare plants that could be affected by the Project. As a result, mitigation for Project impacts to those species would be uncertain and unenforceable.

### **Nipomo Mesa Lupine**

Nipomo Mesa lupine is federally and state listed as endangered. The FEIR indicated the presence of Nipomo Mesa lupine at the Project site is “unlikely due to the distance from historically mapped populations.”<sup>35</sup> This conclusion contradicts evidence. The disturbance area for the entire Project is within approximately 3,200 feet of a documented occurrence of the species (a portion of the Project disturbance area is located within 500 feet of a documented occurrence).<sup>36</sup> Historically and currently, the species is known only from the southwestern corner of San Luis Obispo County, where it is scattered over an area of approximately 2 miles wide and 2 miles long.<sup>37</sup> The Project site is located within that area. Indeed, almost all habitat for the species is located in the immediate Project area on land owned by the Applicant.<sup>38</sup>

The FEIR concluded: “[s]hould this species be identified within the Rail Spur Project area, direct impacts to Nipomo Mesa lupine would be *less than significant* with mitigation (Class II). Implementation of a Dune Scrub Habitat Restoration Plan would mitigate any significant impacts to the Nipomo Mesa lupine.”<sup>39</sup> This conclusion is not supported by evidence. Specifically, the FEIR’s conclusion is based on the assumption that restoration efforts would be successful in establishing Nipomo Mesa lupine at the mitigation site (at a ratio of three new plants for every plant that is removed or damaged by the Project).<sup>40</sup> However, the FEIR provided no evidence that restoration efforts have ever been successful for this species. According to the U.S. Fish and Wildlife Service (“USFWS”), a successful restoration effort for Nipomo Mesa lupine has not yet been achieved.<sup>41</sup> This issue is exacerbated by the FEIR’s failure to include contingency measures that would be required if the Applicant’s restoration effort is unsuccessful.

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<sup>33</sup> FEIR, p. 4.4-36.

<sup>34</sup> FEIR, p. 4.4-41.

<sup>35</sup> FEIR, p. 4.4-34.

<sup>36</sup> RDEIR, Appendix C.1, Figure 6.

<sup>37</sup> U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation.

<sup>38</sup> *Ibid.*

<sup>39</sup> FEIR, p. 4.4-35.

<sup>40</sup> FEIR, pp. 4.4-40 and -41.

<sup>41</sup> FEIR, comment USF&W-02 from the U.S. Fish and Wildlife Service.

The only information the FEIR provided regarding the Applicant's proposed habitat restoration efforts was that they would consist of removing invasive species and planting appropriate native species.<sup>42</sup> The FEIR failed to identify any other measures that would be implemented to restore the specific habitat conditions required by Nipomo Mesa lupine and other rare plants impacted by the Project.

Nipomo Mesa lupine requires open habitat to persist.<sup>43</sup> Open habitat for this species is maintained by natural disturbance from coastal winds and from the activity of wildlife.<sup>44</sup> Therefore, any attempt to "restore" habitat for the species must incorporate measures to promote natural disturbance regimes. The FEIR does not include any mitigation measures that require the Applicant to promote natural disturbance regimes at the mitigation site (which would be fenced).<sup>45</sup> Furthermore, although removing invasive species would temporarily enhance habitat for Nipomo Mesa lupine (and other special-status plants), the invasive species control program described in the FEIR provides no long-term benefit to rare plants because it would be implemented for only five years (or less).<sup>46</sup> Thereafter, veldt grass and other invasive species present in the Project area would recolonize the restoration site(s) and eliminate the habitat conditions needed to sustain rare plants.<sup>47</sup>

### **Invasive Species Control Program**

The FEIR requires the Applicant to implement a Dune Habitat Restoration Program that incorporates an invasive species control program.<sup>48</sup> In my previous comment letter I stated the invasive species control program should include quantifiable goals based on the reduction of cover and abundance of specific weed species to ensure that tangible and meaningful performance standards are met. The FEIR provided the following response to my comment:

No revisions or additions to the RDEIR have been made. Mitigation Measure BIO-5a is intended to set quantifiable success criteria for native plant species. Control of invasive species is intended to assist the applicant in reaching that goal. Any reduction in non-native species would be a beneficial impact.<sup>49</sup>

As the FEIR acknowledged: (a) proposed construction activities could result in the introduction or spread of invasive plant species; (b) the Project could facilitate the spread of invasive species in and out of the Rail Spur Project area; and (c) mitigation is required

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<sup>42</sup> FEIR, p. 4.4-40.

<sup>43</sup> U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation. p. 6.

<sup>44</sup> *Ibid.*

<sup>45</sup> FEIR, response to comment ABJC-51.

<sup>46</sup> FEIR, pp. IST-30, -31, and 4.4-43.

<sup>47</sup> U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation.

<sup>48</sup> FEIR, p. 4.4-51.

<sup>49</sup> FEIR, Response to comment ABJC-51.

to reduce those impacts to a less than significant level.<sup>50</sup> The measures incorporated into the FEIR are insufficient to mitigate the significant, adverse impacts from invasive plant species. I have three reasons for this conclusion:

First, quantifiable performance standards assigned to specific invasive species are required to ensure the success of the Applicant's invasive species control program. Because the FEIR does not include performance standards, the County has no basis for concluding the invasive species control program would achieve the intended outcome, and thus, that impacts due to invasive plants would be reduced to a less than significant level.

Second, the FEIR suggests the invasive species control program would be limited to the construction phase of the Project, or at most, for five years following habitat restoration efforts.<sup>51</sup> Five years (or less) of invasive species control is insufficient to ensure impacts associated with the introduction or spread of invasive plant species would be less than significant. The presence of veldt grass is considered the greatest long-term threat to Nipomo Mesa lupine and its habitat.<sup>52</sup> Because veldt grass (an invasive species) is abundant in portions of the Project area, it is likely to colonize (or recolonize) the habitat restoration area(s) incorporated as mitigation.<sup>53</sup> Mitigating that threat requires a long-term invasive species control program.<sup>54</sup> For example, the Land Conservancy of San Luis Obispo County has been actively removing veldt grass from Nipomo Mesa lupine habitat since 2000.<sup>55</sup> However, according to the USFWS: “[w]hile these efforts may have slowed the conversion to a monoculture of veldt grass, it is likely that the habitat will have to be managed *in perpetuity* to maintain the open patches that is required by *L. nipomensis* [Nipomo Mesa lupine].”<sup>56</sup>

Third, the FEIR requires the Applicant to implement the invasive species control program on the 41.76 acres within the dune habitat restoration area.<sup>57</sup> Limiting the invasive species control program to the dune habitat restoration area does not comport with the County's conclusion that the Project could facilitate the spread of invasive species in *and out* of the Rail Spur Project area.<sup>58</sup>

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<sup>50</sup> FEIR, pp. 4.4-50 and -51.

<sup>51</sup> FEIR, pp. IST-30, -31, and 4.4-43.

<sup>52</sup> U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation. p. 9.

<sup>53</sup> FEIR, Vol III, comment CNPS-04.

<sup>54</sup> *Ibid.*

<sup>55</sup> U.S. Fish and Wildlife Service. 2009. *Lupinus nipomensis* (Nipomo Lupine), 5-Year Review: Summary and Evaluation. p. 8.

<sup>56</sup> *Ibid.* [emphasis added].

<sup>57</sup> FEIR, p. 4.4-51.

<sup>58</sup> *Ibid.*

## Maintenance and Management of Mitigation Lands

The FEIR requires implementation of an open space or conservation easement to protect the restoration area (mitigation site) in perpetuity.<sup>59</sup> An easement over the Dune Habitat Restoration area is the only measure incorporated into the FEIR for mitigating residual Project impacts to special-status plants, sensitive natural communities, and burrowing owls. However, the FEIR did not establish the legal conditions associated with the easement, and thus there is insufficient evidence to conclude the easement would mitigate Project impacts to a less than significant level. If the easement is used to justify the conclusion that Project impacts would be less than significant, the County first must establish: (a) the rights of the grantee and grantor, (b) restrictions of undesirable activities, and (c) a general restriction of all uses inconsistent with the purposes of the easement.<sup>60</sup>

Project construction would be completed before mitigation is fully implemented (i.e., before habitat restoration efforts can be deemed successful). As a result, the County must establish a mechanism that guarantees the mitigation commitment. Typically, this entails a performance security that is large enough to complete the mitigation or purchase other habitat in the event the Applicant fails to successfully complete the work in accordance with the approved mitigation agreement.<sup>61</sup>

Ensuring success of the proposed mitigation site requires a management plan that addresses the long-term ecological sustainability and maintenance of the site.<sup>62</sup> For example, burrowing owl mitigation sites typically require management actions to keep the sites free of tall vegetation, excessive human and human-related disturbance, and loose (or feral) pets that make the environment uninhabitable for burrowing owls.<sup>63</sup> To ensure the durability of the proposed mitigation, the County must establish a funding mechanism (e.g., endowment) that ensures long-term monitoring, protection, and management of the mitigation land.<sup>64</sup>

The FEIR did not include a mitigation management plan or a funding mechanism that ensures the long-term success of the mitigation land. To the contrary, the FEIR indicated: (a) long-term maintenance of the mitigation site would be the responsibility of a non-profit organization, and (b) funding for any future long-term maintenance activities at the mitigation site shall be facilitated by the non-profit organization.<sup>65</sup> However, there are no assurances that either activity would occur. Indeed, the Applicant has indicated it

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<sup>59</sup> FEIR, p. 4.4-41.

<sup>60</sup> See California Native Plant Society. 1998 (revised). Policy on Mitigation Guidelines Regarding Impacts to Rare, Threatened, and Endangered Plants. Appendix C.

<sup>61</sup> *Ibid.*

<sup>62</sup> California Department of Fish and Game. 2012. Staff Report on Burrowing Owl Mitigation. p. 12.

<sup>63</sup> *Ibid.*, p. 13 and Appendix F.

<sup>64</sup> *Ibid.*, p. 12. See also Department of the Interior, Office of Policy Analysis. 2015. Department Manual, Part 600 (Public Land Policy), Chapter 6 (Implementing Mitigation at the Landscape-scale).

<sup>65</sup> FEIR, p. 4.4-42.

would only *consider* providing a non-profit organization with access to the mitigation site, and that long-term maintenance activities would occur only if permitted by the Applicant.<sup>66</sup> As a result, the fate of the mitigation site remains unresolved and there is no evidence that it would benefit sensitive biological resources after the Applicant's 5-year Dune Habitat Restoration Program terminates.

The FEIR argues:

A five year program is a reasonable span of time in which the applicant may successfully implement the Dune Habitat Restoration Program. Five years is also the typical monitoring period that has been required by resource agencies on past projects.<sup>67</sup>

These statements are incorrect. Dune environments are extremely dynamic and complex. As reported by the California Coastal Commission ("CCC"):

The dunes present a rather harsh and difficult growing environment, where the wind keeps shifting the shape of the ground, rainfall rapidly percolates out of reach, and, lacking a distinct topsoil horizon, nutrients are quickly exhausted. Thus, a [dune plant] may, over a year or two, use up the available moisture and nutrients at a particular site, and by means of wind-blown seed "move" to a neighboring area. In this simplified model, the original site remains a bare sand surface until life's necessities again accumulate at the original site, thereby allowing recolonization and repeating of the cycle. Therefore, the overall growing area ("habitat") needed over the long run is vastly larger than the area occupied by the plants at any one "snapshot" in time.<sup>68</sup>

As a result, the CCC, which is the agency with jurisdiction over most projects in coastal dune environments, has required project proponents to: (a) ensure the permanent preservation *and maintenance* of the restored habitat, and (b) assess restoration performance standards every year for the first five years, and then every 10 years henceforth.<sup>69</sup> In addition, projects permitted by the CCC are required to incorporate performance standards (success criteria) for biodiversity and vegetative cover for each vegetation type.<sup>70</sup> The FEIR failed to include performance standards for biodiversity and vegetative cover for each vegetation type. Indeed, the only performance standard specified in the FEIR pertains to Nipomo Mesa lupine.<sup>71</sup> The FEIR failed to provide *any* performance standards for the other sensitive resources requiring mitigation (e.g., Rare Plant Rank 1B species, burrowing owl, etc.).

Due to the issues described above, the County does not have the basis to conclude the mitigation (restoration) site would mitigate Project impacts to special-status plants, sensitive natural communities, and burrowing owls.

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<sup>66</sup> *Ibid.*

<sup>67</sup> FEIR, Response to comment CNPS-04.

<sup>68</sup> California Coastal Commission. 2014. Staff Report Addendum for W10a Application A-3-SNC-98-114 (Monterey Bay Shores Resort). Prepared March 21, 2014. p. 91.

<sup>69</sup> *Ibid.*, p. 99.

<sup>70</sup> *Ibid.*

<sup>71</sup> FEIR, p. 4.4-41.

### **Mitigation Measure BIO-4 (American Badger)**

The FEIR requires a pre-construction survey for American badgers 14 to 30 days prior to construction activities.<sup>72</sup> Badgers may construct new burrows or immigrate onto the Project site immediately before construction activities.<sup>73</sup> Badgers have relatively large home ranges, and some badgers dig a new den each night.<sup>74</sup> As a result, a survey conducted 14 to 30 days before ground disturbance is insufficient to avoid take of badgers. Consequently, the County must require pre-construction surveys for badgers immediately before all ground disturbance activities.

### **CONCLUSION**

Due to the issues discussed above, in conjunction with those discussed in the County Staff Report, it is my professional opinion that the Project would cause significant, unmitigated impacts to several sensitive biological resources. As a result, I concur with County Staff that the Planning Commission should deny the Applicant's request for a Development Plan/Coastal Development Permit.

Sincerely,



Scott Cashen, M.S.  
Senior Biologist

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<sup>72</sup> FEIR, p. 4.4-38.

<sup>73</sup> Messick JP, MG Hornocker. 1981. Ecology of the badger in southwestern Idaho. Wildl. Monogr. No.76. 53pp.

<sup>74</sup> *Ibid.*