

California Native Plant Society

North Coast Chapter
P.O. Box 1067
Arcata, CA 95518
January 31, 2009

City of Eureka Community Development Department
Sidnie L. Olson, Principal Planner
531 K Street
Eureka, CA 95501-1165

Re: Marina Center Draft Environmental Impact Review

Dear Ms. Olson,

Below are comments on the Marina Center Draft Environmental Impact Report (DEIR) submitted on behalf of the North Coast Chapter of the California Native Plant Society (CNPS). CNPS is a statewide nonprofit organization of nearly 10,000 amateurs and professionals dedicated to the preservation of California's diverse native flora. CNPS conducts a variety of conservation efforts focused on long-term protection and preservation of native flora in its natural habitat, and is the foremost non-governmental organization working to protect rare, threatened, and endangered plants in California. The North Coast Chapter represents nearly 300 members in Humboldt, Trinity, Del Norte, and western Siskiyou Counties, with a majority in the Humboldt Bay area.

We have concerns related to impacts from inadequate botanical surveys, inadequate wetland delineation, unmitigated impacts to coastal wetlands, inadequate alternatives assessment, and invasive species. We believe that the DEIR is lacking in adequate disclosure of information necessary for the public to review and comment on the potential impacts of the proposed project, and that recirculation of the DEIR will be necessary to meet the

Inadequate Botanical Surveys

According to the DEIR (IV.D-5), surveys were conducted on April 28 and 29, 2006 by a qualified botanist. However, the species inventory includes species not known to occur in the region (Biological Assessment, Table 1). The Department of Fish & Game (DFG) *Guidelines for Assessing the Effects of Proposed Projects on Rare, Threatened, and*



Dedicated to the preservation of California native Flora

Endangered Plants and Natural Communities (DFG 2000) (“DFG Guidelines”) states that rare, threatened, or endangered plant surveys should be floristic in nature, and that a floristic survey requires that every plant observed be identified to the extent necessary to determine its rarity and listing status. In addition, a sufficient number of visits spaced throughout the growing season are necessary to accurately determine what plants exist on the site. In order to properly characterize the site and document the completeness of the survey, additional surveys throughout the blooming season should be conducted. Without this information, the DEIR cannot be regarded as full disclosure of the environmental setting as defined by CEQA.

The DFG *Guidelines* also specify that botanical consultants should have experience conducting floristic field surveys, knowledge of plant taxonomy and plant community ecology, and experience with analyzing impacts of development on native plant species and communities (DFG 2000). Yet the inventory of plant species present at the site includes species not known to occur in the region, such as Drummond’s willow (*Salix drummondiana*) which is only known from the central and southern High Sierra (Jepson Interchange, 2009). Such an error indicates lack of familiarity with the local flora, and raises questions regarding the qualifications of the botanical consultants.

The following statement also raises questions regarding the qualifications of the botanical consultants: “The project site is highly disturbed and lacks native soils that could support rare or native species.” (DEIR IV.D-5). On its face, this statement has little basis in fact since it follows several pages of vegetation community descriptions that include dozens of native plants (DEIR IV.D-1 to D-3). Such a statement reflects the lack of the botanical consultant’s experience with analyzing impacts of development on native plant species and communities, familiarity with the local flora, and conflicts with statements made within the DEIR itself regarding presence of native plant species.

Without seasonally-appropriate floristic surveys conducted by a qualified botanist with familiarity with the local flora and experience with analyzing impacts of development on native plant species and communities, as defined in the DFG Guidelines (DFG 2000), it cannot be determined whether there will be significant negative impacts to listed or non-listed sensitive species as defined in 14 CCR 15380(d), and the public does not have the opportunity to review and comment on the potential impacts of the proposed project.

Inadequate Wetland Delineation

According to the Coastal Commissions’ Allowable Use Analysis in the 1994 Procedural Guidance for the Review of Wetland Projects in California’s Coastal Zone (“Procedural Guidance document”), boundaries of degraded wetlands “should be based on the area the entire wetland occupied prior to degradation. This determination is most readily made from a review of historic information including aerial photographs.”

As can be readily observed from the DEIR’s cover replication of the 1946 aerial photograph from the Shuster Aerial Photograph Collection (Humboldt State University Library Special Collections), the entire area within the Balloon Track was formerly coastal wetlands or mudflats. This area is shown in the 1946 photo as recently diked

and in the process of being filled by a dredge pipe also shown in the photograph. Much of the area around the Balloon Track was evidently former coastal wetland, tidelands, or mud flats at one time before the 1946 photo, including the area to the west of the Balloon Track which would have connected Humboldt Bay to the mud flats evident in the photo.

A new wetland delineation should be conducted by qualified botanist familiar with the local flora, and should include a historical assessment of the extent of former wetlands, tidelands, and mud flats to determine the boundary of this degraded wetland as directed by the Coastal Commission Procedural Guidance document (1994).

Illegal Fill of Coastal Wetlands

According to the DEIR,

The proposed project would fill wetlands. Because the proposed project would create a net positive impact on the environment, however, there would be no need to seek a feasible "less environmentally damaging" alternative. The proposed project would undertake all feasible mitigation measures to minimize adverse environmental effects, and would enhance the functional capacity of the wetland. (IV.D-31).

This proposed wetland fill conflicts with the California Coastal Commission's Allowable Use Analysis, which states that: "To allow even partial filling of any wetland in exchange for restoration can result in a net loss of both wetland acreage and function." (California Coastal Commission 1994)

Furthermore, the claim that

The proposed project would provide the course of action most protective of coastal resources. In fact, the proposed project would significantly enhance and protect those resources. As a result, the project would be consistent with the General Plan/Local Coastal Program policies protecting biological resources and with the City's Coastal Zoning Regulations, which implement those policies. (IV.D-32)

is completely false and has no basis in fact. Simply making such claims with no data or evidence on which to base such a determination is contrary to the spirit and intent of CEQA, if not the letter of the law.

Unmitigated Impacts to Coastal Wetlands

The Cumulative Impacts Analysis on page IV.D-34 is inadequate. It simply states that future development would be required to comply with state, federal, and local requirements. The City of Eureka has failed to implement the Wetlands Management Plan as stated in General Plan, as stated in a letter from the Department of Fish & Game to the Humboldt County Community Development Department,

According to the GP implementation programs 6.3, the time frame for developing this program was fiscal year 1997-1998. The City has not developed this wetland management program. At the March 18, 2008 meeting, you informed DFG staff that due to City staff limitations and workload priorities, the City will not be developing a wetland management program any time soon. (DFG 2008).

The DEIR claims that "The proposed project would have a beneficial impact on wetland and other biological resources. Mitigation measures described in this section would reduce any potential adverse impacts to less-than-significant levels." (IV.D-34). Yet the DEIR fails to provide information that was used to make such a determination. According to the California Coastal Commission (1994), "A functional capacity analysis must be included as part of the application for a coastal development permit. Since the determination of functional capacity is a scientific one, it must be made by a qualified ecologist." Furthermore, the California Coastal Commission Procedural Guidance document (1994) contends that

Maintaining the functional capacity means maintaining the same level and number of species, maintaining the same level of biological productivity, and maintaining the same relative size and number of habitats. Functional capacity analysis is also an important part of the alternatives analysis discussed above. Finally, functional capacity analysis is one method available for determining the appropriateness of any proposed mitigation; however, compensatory mitigation is not a substitute for maintaining the functional capacity of the impacted wetland.

... Because of their transient nature, it is argued that seasonally wet wetlands are more limited in function, and therefore of lower value than perennially wet wetlands. While the transient hydrology of seasonally wetlands may reduce the time period of a function, the performance of that function and its overall value are not necessarily diminished relative to perennially wet wetlands. In fact, many of the same functions and values present in both types of wetlands. Additionally, seasonally wet wetlands can, during certain times of the year, provide greater value for certain functions (e.g., ground water recharge, floodwater storage, habitat for endangered species, or feeding and resting spots for migratory birds), relative to nearby perennially wet wetlands.

The DEIR (IV.D-11) states that "the Clark Slough remnant and on-site wetlands might provide some Nutrient Removal, Retention, and Transformation functions, but those functions are significantly constrained due to short contact times between the wetlands and stormwater runoff, the heavy nutrient loads already present, and the potential for pollutants entering the slough in stormwater runoff from the site and adjacent properties." This claim is purely speculative and no data is provided to assist agencies and the public in determining whether such a claim has a basis in science and/or fact.

According to the California Coastal Commission Procedural Guidance document (1994), buffers should have all of the following characteristics:

1) Buffer width should be a minimum of 100 feet. In some cases, such as when a species requires habitat adjacent to a wetland for part of its life or when nearby development poses increased hazards to a wetland or wetland species, larger buffer areas should be considered.

2) Buffers should work to minimize the disturbance to a wetland from adjacent development. If the adjacent development includes residential areas, the buffer must include a fence and/or a natural (e.g., vegetation or water) barrier to control the entry of domestic animals and humans into the wetland. The buffer should also provide for visual screening in those cases where resident or migratory wetland species are particularly sensitive to human impacts. The use of walls, berms and other barriers should be considered where excessive artificial light or noise is a problem.

3) Buffers should be designed, where necessary, to help minimize the effects of erosion, sedimentation, and pollution arising from urban, industrial, and agricultural activities. However, to the extent possible, erosion, sedimentation, and pollution control problems should be dealt with at the source not in the wetland or buffer area. Sources of pollution include point and non-point source discharges into the watershed and air, domestic and industrial garbage and debris, and biological pollution arising from the introduction of exotic organisms. Regular maintenance must be provided for any devices (e.g., silt or grease traps) built in the buffer zone.

4) Buffers should provide habitat for species residing in the transitional zone between wetlands and uplands. All project designs should consider the movement of food and energy between habitats as well as the life cycles of organisms that feed or reproduce in the wetland but generally reside outside the wetland. Any revegetation work in the buffer area should use native species from local sources.

5) Buffers should allow for passive recreational uses within the area, only if it can be shown that these uses will not adversely impact the wetland ecosystem or the buffer's function as described in the above criteria. These uses should be limited to bird watching, walking, jogging, and bike riding, and may include the construction of paths and interpretive signs and displays. All paths should be constructed to minimize impact to plants and animals.

The DEIR conflicts with this procedural guidance in numerous places, including the following inadequate mitigation measures:

IV.D-29: "Mitigation Measure D-3c: The project applicant shall create a buffer zone surrounding the restored wetland area. The buffer shall be adequate to avoid or minimize effects on wetland and slough resources from direct and indirect disturbances such as entry of sediment, oil, or grease into the preserve; trampling of vegetation; and movement, light, or noise impacts that might interfere with habitat values or wildlife use of the slough and marsh."

Simply stating that “the buffer shall be adequate to avoid or minimize effects” fails to meet the disclosure requirements of CEQA; it is impossible to determine whether the buffers will be adequate to reduce impacts to less than significant. The DEIR states that the buffer provided will be 50’ (DEIR III-14), yet provides no justification as to how this significantly reduced buffer zone will adequately protect wetlands.

IV.H-20: “Mitigation Measure H-5c: The applicant shall ensure that only USEPA-approved herbicides and pesticides are used on the site in any area that might drain to aquatic environments.”

In this case, following the federal and state laws in using only approved pesticides fails to address impacts to wetlands from runoff and inadequate buffer zones.

Environmentally Sensitive Habitat Area (ESHA)

According to the DEIR, “The project site likewise does not contain the essential elements of an ESHA as defined by the Coastal Act.” (IV.D-20). However, the City of Eureka Local Coastal Program (LCP) defines coastal wetland as ESHA. Does the City intend to amend its LCP to alter the definition of ESHA? If so, the resulting impacts to the environment must be assessed and mitigated in the DEIR.

Inadequate Alternatives Assessment

The DEIR fails to adequately assess a complete range of alternatives; in particular the Coastal Dependent Industrial zoning alternative is poorly addressed, even though it is the most appropriate zoning for most of the project area other than the current zoning for Public use. On VI-15, Table VI-4 simply states that the Coastal Dependent Industrial alternative does not avoid or substantially lessen at least one significant impact. Not only does this assessment fail to disclose enough information for agencies and the public to come to a conclusion, it makes no sense, since the significant impacts of the proposed project are transportation and air quality impacts related to the proposed zoning for Commercial Service Commercial, Professional Office, Office Residential, and other non-Coastal Dependent uses. More appropriate uses of the property might include Visitor-Serving or Coastal-Dependent uses as defined as priority uses in the Coastal Act §30255. CNPS would like to see priority uses as defined by the Coastal Act given higher priority, as well as a complete assessment under the project alternatives.

Invasive Species

The southwest corner of the project area is dominated by *Phragmites australis*, an invasive wetland plant that is known to respond to mechanical disturbance with vigorous vegetative growth; integrated herbicide and burning treatments by the City of Eureka at the Palco Marsh have failed to prevent the spread of this species. Aerial photographs taken over time suggest that the population in the project areas has also expanded in response to mechanical disturbance. The DEIR must address specific methods for

management and control of this species, including specific performance criteria, to be considered a mitigation measure.

Lack of Sufficient Information to Make a Determination

According to 14 Cal. Code Regs §15064 (b), the determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. According to Public Res. Code §21160, whenever any person applies to any public agency for a lease, permit, license, certificate, or other entitlement for use, the public agency may require that person to submit data and information which may be necessary to enable the public agency to determine whether the proposed project may have a significant effect on the environment or to prepare an environmental impact report.

CEQA is clear that the information used to assess potentially adverse effects shall not consist of speculation, unsubstantiated opinion or narrative, or information that is clearly erroneous or inaccurate (14 Cal Code Regs § 15384).

Furthermore, CEQA requires that sufficient information be provided to allow the lead agency, trustee agencies, and the public to evaluate potentially significant adverse effects and to disclose to the public the reasons why the action was approved [14 Cal Code Regs § 15003, 15091, 15126.2, 15126.4; Public Resources Code § 21082.2]. This is most clearly stated in 14 Cal Code Regs § 15002, which lists the basic purposes of CEQA. Two of these basic purposes are 1) to inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities and 2) disclose to the public the reasons why a governmental agency approved the project in the manner chosen.

Recirculation of the DEIR

According to 14 Cal Code Regs §15088.5, A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is given of the availability of the draft EIR for public review under Section 15087 but before certification. As used in this section, the term "information" can include changes in the project or environmental setting as well as additional data or other information.

New information added to an EIR is "significant" if the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement. We believe that the threshold for recirculation has been met due to the lack of completeness of information, the need for additional mitigation measures, the lack of evidence for determination of less than significant impacts to biological resources, and the failure to adequately address feasible alternatives that would avoid or minimize impacts to the environment.

According to 14 Cal Code Regs §15088.5, "Significant new information" requiring recirculation includes, for example, a disclosure showing that:

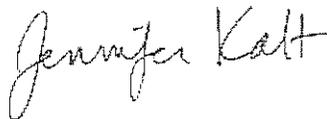
(3) A feasible project alternative or mitigation measure considerably different from others previously analyzed would clearly lessen the environmental impacts of the project, but the project's proponents decline to adopt it.

(4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. (*Mountain Lion Coalition v. Fish and Game Com.* (1989) 214 Cal.App.3d 1043)

(e) A decision not to recirculate an EIR must be supported by substantial evidence in the administrative record.

We appreciate the opportunity to review and comment on the Marina Center Draft Environmental Impact Report. Please keep us informed of future opportunities to review and comment the proposed project.

For the North Coast Chapter,



Jennifer Kalt
Conservation Chair

References:

California Coastal Commission 1994. Procedural Guidance for the Review of Wetland Projects in California's Coastal Zone. <http://www.coastal.ca.gov/wetrev/wettc.html>

California Department of Fish and Game, Guidelines for Assessing the Effects of Proposed Projects on Rare, Threatened, and Endangered Plants and Natural Communities. May, 2000.

California Department of Fish and Game letter to Humboldt County Community Development Department, re: Draft Eureka Greenways and Gulches Ordinance. May 19, 2008.

Humboldt State University Library Special Collections, Shuster Aerial Photograph Collection.
http://dscholar.humboldt.edu/humco/holdings/shuster/Access_Jpg/2001010075.jpg

Jepson Online Interchange: California Floristics. 2009. University of California, Berkeley. http://ucjeps.berkeley.edu/cgi-bin/get_JM_treatment.pl?7038.7045.7054