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November 3, 2009

VIA U.S. MAIL AND E-MAIL

Kevin R. Hamblin, AICP
Director of Community Development
City of Eureka
531 K Street
Eureka, California 95501-1165

Re: Supplemental Interim Remedial Action Plan for the Balloon Track - Phase 1;
Conformity with the Coastal Act and Eureka's Local Coastal Program

Dear Mr. Hamblin:

I am writing on behalf of my client CUE VI, LLC, in support of its application to the City of Eureka for a coastal development permit to implement the remedial activities outlined in the Supplemental Interim Remedial Action Plan for the Balloon Track Property ("SIRAP"). This letter is meant to highlight some of the issues and analysis concerning the CDP's consistency with the City's Local Coastal Program and the Coastal Act. We ask that the City consider the information in this letter in conjunction with the information and analysis already contained in the City's administrative record, including the Marina Center EIR, responses to public and agency comments, staff reports, and resolutions of approval.

INTRODUCTION

The Coastal Act establishes a planning and regulatory program governing land use in California's coastal zone. It generally sets forth several statewide planning and management policies (largely found in Chapter 3) and two procedural means of implementing them—planning and permitting. The Act calls on local governments to develop "local coastal programs" (consisting of "land use plans" and "implementation plans") and submit them to the Coastal Commission to review and certify their "conformity with the policies of Chapter 3." Pub. Res. Code § 30512(a)(1). Anyone "wishing to perform or undertake any development in the coastal zone . . . shall obtain a coastal development permit." Pub. Res. Code § 30600(a). The local government or the Commission on appeal must issue a coastal development permit ("CDP") if it finds that the proposed development is "in conformity with the certified local coastal program"

("LCP") (Pub. Res. Code § 30604(b)) or, in areas without a certified LCP, "in conformity with Chapter 3" (Pub. Res. Code § 30604(a)).

CUE VI, owner of a 43-acre brownfield site known as the Balloon Track located in Eureka, California, has been directed by the Regional Water Quality Control Board ("RWQCB") to remediate contamination at the site by implementing a Supplemental Interim Remediation Action Plan ("SIRAP") that calls for excavating and removing soil from discrete areas of the site, covering and grading the surface of portions of the site, and creating and enhancing wetlands on approximately 11.89 acres in the southwest corner of the site. CUE VI has applied to the City of Eureka for a CDP for the actions necessary to implement the SIRAP, referred to as Phase 1. As reflected in the proposed Resolution approving the CDP, the City contemplates finding that the conditions on the site constitute a "nuisance" under the City's Municipal Code and calling for CUE VI to implement the SIRAP pursuant to a nuisance abatement order and CDP issued by the City in keeping with its Municipal Code and certified LCP.

Because the project site contains "wetlands" that, in the lexicon of the Coastal Act and the City's certified LCP, may also constitute "environmentally sensitive habitat areas" ("ESHA"), approval of any development on the site typically is constrained by two provisions of the Coastal Act (and corresponding provisions of the LCP): (1) Section 30233 essentially limits development in wetlands to certain specified uses; (2) Section 30240 provides that "[e]nvironmentally sensitive habitat areas ["ESHA"] shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas."

This letter briefly discusses how the City's issuance of the CDP is "in conformity" with its certified LCP and, further, how the City's action complies with the Coastal Act.

I. THE CDP CONFORMS WITH THE CITY'S CERTIFIED LCP

The conformity of the CDP with each of the policies in the City's certified LCP is discussed in the FEIR, the proposed Resolution, and the accompanying staff report, and I will not cover in this letter the ground already covered in those documents. I will simply elaborate on the explanation of the CDP's conformity with a couple of provisions.

The CDP is in conformity with General Plan Goal 6.A.7 (LCP Policy 5.6), which provides that "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 CDP implementing the SIRAP complies with this section inasmuch as it protects against significant disruption of habitat values on the site by avoiding impacts to the highest value wetlands on the site and limiting disruption to the maximum extent practicable to the low value wetlands on the site and, further, by creating and enhancing wetlands on the site, so that in the end the site will contain wetlands of equal or

greater size and of higher value than the wetlands currently found there. The purpose of the CDP and SIRAP is to protect birds, wildlife, and the public from contamination on the site, including the wetlands. That purpose cannot be accomplished anywhere else. Consequently, the activities associated with wetlands and habitats authorized in the CDP also are “dependent on those resources” within the meaning of Goal 6.A.7.

The CDP is in conformity as well with General Plan Goal 6.A.9 (LCP Policy 5.8), which provides: “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 uses 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.”

The purpose of the CDP is to remediate contamination on the site and abate the nuisance it creates. The CDP accomplishes this purpose by implementing actions described in the SIRAP which generally entail: (1) removing the most contaminated soils; (2) covering the remaining contaminated surface soils with a layer of clean material to eliminate exposure pathways to wildlife, people, and stormwater; and (3) grading the surface soils to retain stormwater on the site.

There is no feasible, less environmentally damaging alternative to accomplish the site remediation and stormwater controls that would avoid impacts to wetlands on the site. Site remediation is necessary to protect Humboldt Bay and its aquatic ecosystem. Contamination of surface soil is scattered across the site, and so remediation cannot be accomplished without impacting the wetlands scattered across the site. Further, remediation of this contamination cannot be accomplished in place by bacterial or other technical means, because those means are typically ineffective at addressing metals contamination in soils and stormwater as is the case here. Moreover, controlling stormwater on the site requires a comprehensive grading plan, so even if particular spots lacked contamination requiring the soil to be removed or covered, they would nonetheless need to be graded in order to control stormwater. Any potentially effective alternative means would be infeasible or would result in greater environmental harm. For example, some have argued for complete removal of all soils on the site, which would entail the removal and disposal of millions of cubic yards of material. In addition to going beyond what is necessary to properly remediate the site, such an alternative would have significant and probably unmitigable adverse environmental consequences well beyond what is contemplated under the SIRAP (e.g., environmental consequences associated with increased truck traffic and related exhaust emissions, as well as new water quality impacts associated with excavating the site to elevations that coincide with Humboldt Bay). Therefore, the remedial measures outlined in the CDP constitute the least environmentally damaging feasible alternative.

II. THE CDP CONFORMS WITH THE COASTAL ACT AND THE CITY'S LCP; ANY CONFLICT MAY BE RESOLVED SINCE, ON BALANCE, THE CLEANUP IS MOST PROTECTIVE OF COASTAL RESOURCES

The Legislature anticipated situations where strict adherence to any one section of the Coastal Act might impede attainment of the Act's broader goals and provided a mechanism for local governments and the Commission to resolve such conflicts. The Legislature declared that "in carrying out the provisions of this [Act] such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources." Pub. Res. Code § 30007.5. Offering an illustration pertinent here, the Legislature added that "[i]n this context . . . broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies." *Id.* Accordingly, the Legislature authorized local governments and the Commission to resolve such conflicts through this balancing process: "Where the commission or any local government in implementing the provisions of this [Act] identifies a conflict between the policies of [Chapter 3], 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." Pub. Res. Code § 30200(b).

The Marina Center FEIR, in discussing that project's conformity with the Coastal Act, notes that the mixed use project may not comply with certain aspects of Public Resources Code sections 30233 and 30240, which limit the types of development allowed in wetlands and ESHA. The FEIR discusses as well how the project is in conformity with the Coastal Act because on balance it is most protective of significant coastal resources.

While the conformity of the Marina Center mixed use project with section 30233 and corresponding provisions of the LCP is one thing, the conformity of the CDP implementing the SIRAP with those provisions is another. Section 30233 limits development in wetlands to certain specified purposes among which are "[i]ncidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall structures" and "[r]estoration purposes." The term "incidental public service purposes," on its face, may fairly be read to encompass the SIRAP, the purpose of which is to implement interim remediation measures to protect the public from existing contamination on the site. While the Commission's administrative interpretation of the term adds complexity to its meaning, the SIRAP is reasonably understood to serve "incidental public service purposes." Similarly, because implementation of the SIRAP entails filling some contaminated wetlands on site and creating an equal acreage of wetlands and enhancing other wetlands on another part of the site, it may reasonably be understood to serve "restoration purposes" within the meaning of section 30233 and the LCP.

Similarly, while the conformity of the Marina Center mixed use project with section 30240 and corresponding provisions of the LCP is one thing, the conformity of the CDP

implementing the SIRAP with those provisions is another. Section 30240 provides that “[e]nvironmentally sensitive habitat areas [“ESHA”] shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.” The CDP implementing the SIRAP complies with this section inasmuch as it protects against significant disruption of habitat values on the site by avoiding impacts to the highest value wetlands on the site and limiting disruption to the maximum extent practicable to the low value wetlands on the site and, further, by creating and enhancing wetlands on the site, so that in the end the site will contain wetlands of equal or greater size and of higher value than the wetlands currently found there. As the purpose of the SIRAP is to protect birds, wildlife, and the public from contamination on the site, including the wetlands, and that purpose cannot be accomplished anywhere else, implementation of the SIRAP also is “dependent on those resources” within the meaning of section 30240 and the LCP.

To the extent nonetheless that the CDP may be regarded not to comply with either section 30233 or 30240 or corresponding provisions of the LCP, the questions arise whether that poses a conflict between the policies of those sections and other Coastal Act or LCP policies and, if so, how that conflict should be resolved under sections 30007.5 and 30200.

The Commission has employed balancing under section 30007.5 to approve projects in circumstances analogous to those presented here. For instance, in 2002, the Commission approved a local coastal plan amendment of the City of Oxnard to annex a 91-acre site to the City and authorize a project providing remediation of contamination on the site, development of residential uses, and open space and habitat areas. The site was contaminated as a result of thirty years of use as an oil field waste disposal facility. The project would remediate the contamination and pay for it from the proceeds of the residential development. Because the project required filling about 4.2 acres of wetlands, it was inconsistent with section 30233, which limits development in wetlands to certain uses that do not include residential use. The Commission found a conflict between this policy and the policies of sections 30230, 30231, and 30240 calling for maintenance and improvement of the quality of sensitive coastal resources and water quality. The Commission resolved the conflict by finding that remediation of the site contamination together with mitigation of impacts on wetlands and sensitive resources was most protective of coastal resources.

The Commission’s explanation of its decision is instructive and so is presented here at length:

In order for the Commission to utilize the conflict resolution provision of Section 30007.5, the Commission must first establish that there exists a substantial conflict between two statutory directives contained in Chapter 3 of the Coastal Act. The fact that an amendment is consistent with one policy and inconsistent with another policy does not necessarily result in a conflict. Rather, the Commission must find that to deny the amendment based on the inconsistency

with one policy will result in coastal zone effects that are inconsistent with another policy.

In this case . . . the proposed amendment is inconsistent with the wetland protection policies of the Coastal Act because it is not an allowable wetland fill activity as identified by Section 30233(a)(1-8). However, to deny the project based on this inconsistency with Section 30233(a)(1-8) would result in significant adverse impacts inconsistent with Coastal Act water quality and sensitive resource policies, specifically Sections 30230, 30231, and 30240. The soil and groundwater remediation activities proposed under this LCP amendment will prevent adverse impacts to surface and ground water quality and sensitive coastal resources due to contamination. As such the project is consistent with Section 30230, 30231 and 30240 of the Coastal Act. Without the project, significant adverse impacts on water quality and sensitive coastal resources will occur.

If the Commission were to deny the amendment based on its nonconformity to the wetland fill provisions of Section 30233, the water quality would be threatened and sensitive resources would suffer worsened health and loss of native habitat, including the potential loss of a previously thought to be extinct plant species, thus resulting in adverse impacts on these resources and directly contradicting Sections 30230, 30231, and 30240, which mandate protection of said resources. Therefore, the no project alternative would have unavoidable significant adverse impacts on coastal resources. The second alternative presented does not eliminate the need for wetland fill that is not an allowable use, and in addition, this alternative is not feasible or environmentally preferable.

The proposed amendment involves fill in degraded wetland areas that have been created as a result of past disturbance by the operation and closure of an oil waste disposal facility, nevertheless, fill in a wetland for the purpose of the proposed amendment to include residential development is inconsistent with the wetland policies of the Coastal Act. However, this amendment will preserve water quality, protect a previously thought to be extinct plant community and restore highly degraded sensitive habitats. Much of the sensitive habitat onsite is dying back and appears generally unhealthy. Because of the contaminated condition of the site, Dr. Allen [of the Commission staff] does not believe that over time this site would regenerate to a healthy due habitat representative of the area. The existence of very contaminated materials just beneath the surface prevents deep-rooted plants from growing to maturity over most of the site, and this will not allow this site to regenerate naturally without soil remediation. The amendment will also serve to enhance habitat values of the wetland created offsite. Therefore, the Commission finds that the proposed amendment creates a conflict among Coastal Act policies.

After establishing a conflict among Coastal Act policies, Section 30007.5 mandates that the Commission resolve the conflict in a manner that is on balance most protective of coastal resources. In this case the proposed amendment would result in the fill of approximately 4.2 acres of wetland. The critical factors in the Commission's assessment of the conflict resolution are the following: that the soils onsite are highly contaminated and pose a threat to human health and the environment; soil remediation is required to eliminate these threats; the soil remediation will impact 4.2 acres of wetlands that have formed due to past industrial uses that modified the site; and following the soil remediation, these areas will no longer exhibit the conditions that are required to support wetland habitat. In addition, approval of the proposed project, as opposed to denial, will result in more healthy functional wetland habitat areas through relocation and restoration offsite in more suitable locations, which will in turn benefit sensitive wildlife species. The amendment incorporating the suggested modifications will result in the creation of 4:1 wetland habitat as mitigation for impacted wetland area which will be located offsite at a more suitable location creating a more diverse and larger wetland habitat than those existing onsite and will also serve to enhance surrounding resources.

Therefore, the Commission concludes that impacts on coastal resources that would result from denial of the amendment would be more significant than the impact on wetland habitat allowed under the amendment. Therefore, the Commission finds that approving the amendment is, on balance, most protective of coastal resources and is consistent with Section 30007.5 of the Coastal Act.

California Coastal Commission, Revised Findings on City of Oxnard LCP Amendment No. OXN-MAJ-1-00, North Shore at Mandalay Bay (May 22, 2002; approved June 10, 2002), pp. 54-55.

The CDP to implement the SIRAP presents a similar policy conflict in that the site's contamination, resulting from years of use of the site as a railroad yard, calls for remediation to benefit human health, wildlife, and the environment and, without remediation, the existing degraded conditions will persist. Remediation of the site contamination entails filling approximately 5.54 acres of wetlands as delineated under the Coastal Act. To the extent that this remediation, though, is considered not to comply with section 30233 or 30240 or the LCP, the City and Commission may resolve this policy conflict by determining that on balance it is more protective of significant coastal resources to remediate the site contamination as proposed in the CDP while mitigating resulting impacts on wetlands, rather than leave the low value wetlands—and the contamination—in place.

The Commission has employed balancing under section 30007.5 to resolve policy conflicts in other analogous circumstances, as illustrated by the following examples.

- CDP No. 1-08-017 (Wiyot Tribe) (Staff report June 27, 2008; approved July 11, 2008), balancing conflict between policies on protecting wetlands and policies on protecting water quality with respect to remediation of site contamination.
- LCP Amendment No. 2-06B (City of San Diego, Creekside Villas) (Staff Report June 5, 2007; approved Jan. 9, 2008), balancing conflict between policies on protecting ESHA and policies on concentrating development with respect to residential uses.
- Consistency Certification No. CC-008-07 (North County Transit District, San Diego County) (Approved June 15, 2007), balancing conflict between policies on protecting wetlands and policies on protecting water quality and air quality, promoting energy conservation, maximizing public access, and reducing vehicle miles traveled with respect to extension of a railroad line.
- CDP No. 6-03-098 (Pardee Homes) (Staff Report Sept. 27, 2006; approved Oct. 11, 2006; Staff Report on Revised Findings Mar. 28, 2007; approved Apr. 10, 2007), balancing conflict between policies on protecting ESHA and policies on concentrating development with respect to residential uses.
- LRDP Amendment No. 1-06 and CDP No. 4-06-097 (U.C. at Santa Barbara) (Staff Report Nov. 3, 2006; approved Nov. 17, 2006), balancing conflict between policies on protecting wetlands and ESHA and policies on protecting water quality, maximizing public access, and concentrating development with respect to university residential uses.
- CDP No. 1-06-033 (Tilch) (Staff Report Sept. 22, 2006; approved Oct. 13, 2006), balancing conflict between policies on protecting wetlands and policies on protecting water quality.
- Consistency Certification No. CC-004-05 (North County Transit District, San Diego County) (Approved Nov. 16, 2005), balancing conflict between policies on protecting wetlands and ESHA and policies on protecting water quality and air quality, promoting energy conservation, and reducing vehicle miles traveled with respect to adding a second railroad line within an existing right of way.
- LCP Amendment No. 3-03B (City of San Diego, Crescent Heights) (Staff Report Feb. 16, 2005; approved Mar. 16, 2005), balancing conflict between policies on protecting ESHA and policies on concentrating development with respect to residential uses.
- LCP Amendment No. 1-03 (City of Dana Point) (Staff Report Dec. 20, 2003; approved Jan 15, 2004), in a context “close to the point of presenting a conflict,” using a “balancing approach” to reach a “trade off” between policies on protecting ESHA and policies on maximizing public access, protecting water quality, and concentrating development with respect to residential and commercial uses.
- LCP Amendment No. 3-01 (San Luis Obispo) (Staff Report July 24, 2002; approved Aug. 8, 2002), balancing conflict between policies on protecting ESHA and policies on

protecting water quality with respect to land use designation to accommodate future wastewater treatment facility.

- Appeal No. A5-IRC-99-301 of CDP No. 97-0152 (Irvine Community Development District) (Staff Report Feb. 22, 2001; approved Mar. 12, 2001), balancing conflict between policies on protecting wetlands and ESHA and policies on protecting water quality with respect to mass grading and installation of backbone infrastructure for future residential and recreational development.
- CDP 6-98-127 (City of San Diego, State Route 56) (Staff Report Apr. 25, 2000; approved May 10, 2000), balancing conflict between policies on protecting wetlands and policies on protecting water quality with respect to construction of segment of freeway.
- CDP No. 1-98-103 (O'Neil) (Approved July 16, 1999), balancing conflict between policies on protecting wetlands and policies on protecting water quality with respect to construction of a cattle barn.

In considering the project and any inconsistency with the policies of section 30233, the City and the Commission are guided as well by the policies of sections 30512.2 and 30001.5 of the Coastal Act. *See Douda v. Cal. Coastal Comm.* (2008) 159 Cal.App.4th 1181. Section 30512.2 provides:

The following provisions shall apply to the commission's decision to certify or refuse certification of a land use plan pursuant to Section 30512:

- (a) The commission's review of a land use plan shall be limited to its administrative determination that the land use plan submitted by the local government does, or does not, conform with the requirements of Chapter 3 (commencing with Section 30200). In making this review, the commission is not authorized by any provision of this division to diminish or abridge the authority of a local government to adopt and establish, by ordinance, the precise content of its land use plan.
- (b) The commission shall require conformance with the policies and requirements of Chapter 3 (commencing with Section 30200) *only to the extent necessary to achieve the basic state goals* specified in Section 30001.5.

Emphasis added. As set forth in section 30001.5, those goals are:

- (a) Protect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.

- (b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.
- (c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound conservation principles and constitutionally protected rights of private property owners.
- (d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.

Again, the CDP would not impede these goals. Indeed, the CDP would help conserve, protect, maintain, enhance, and restore the coastal environment and coastal resources.

III. THE COASTAL ACT IS NOT A LIMIT ON THE CITY'S POWER TO DECLARE AND ABATE A NUISANCE ON THE BALLOON TRACK

Mindful of the backdrop of other state and local laws pertaining to land use and environmental protection, in enacting the Coastal Act, the Legislature accorded various authority and roles to the Coastal Commission, local governments, ports, and other agencies, such as the RWQCBs. In doing so, the Legislature preserved the ability of cities to abate nuisances without limitation under the Coastal Act: "No provision of the [Coastal Act] is a limitation . . . on the power of any city or county . . . to declare, prohibit and abate nuisances." Pub. Res. Code § 30005. Section 30005 establishes that when exercising its power to declare and abate nuisances, the City is not constrained by any limitation of the Coastal Act.

As reflected in the proposed Resolution approving the CDP, exercising its power to declare and abate nuisances in keeping with section 30005 of the Coastal Act, the City has in the past and again anticipates declaring the foregoing conditions of the Balloon Track to be a nuisance and ordering CUE VI to abate the nuisance by implementing the supplemental interim remedial measures approved by the RWQCB under its CAO.

Under section 30005, the City need not issue a CDP to authorize actions necessary to comply with its nuisance abatement order since a CDP is a creature of the Coastal Act and even the procedural step of issuing a CDP may be regarded a "limitation" on the City's power to declare and abate nuisances. The City may nonetheless employ a CDP as a procedural vehicle under its Municipal Code for exercising its nuisance abatement power without its action being limited by any Coastal Act provision. Exercising its prerogative in this regard, the City anticipates issuing a CDP (also a creature of the City's Municipal Code) authorizing the actions comprising "development" necessary to comply with the City's nuisance abatement order.

As issuance of the CDP is integral to the City's exercise of its nuisance abatement power, section 30005 serves to prevent any provision of the Coastal Act from operating as "a limitation" on the CDP. Or, put differently, section 30005 effectively renders the City's exercise of its nuisance abatement power in conformity with the Act and its LCP.¹ In exercising its nuisance abatement power, thus, the City is not limited by section 30604(b), which generally calls for a finding that a CDP is in conformity with a certified LCP.² Similarly, under section 30005, the City's exercise of its nuisance abatement power is not limited by sections 30233 and 30240, which generally limit development in wetlands and ESHA. Nor is the City limited by section 30603, which generally provides for appeal of some CDPs to the Coastal Commission; in exercising its power to abate nuisances, the City may give immediate effect to its CDP.

IV. AS A DETERMINATION ON WATER QUALITY BY THE RWQCB, THE CDP CONFORMS WITH THE COASTAL ACT AND LCP

In enacting the Coastal Act, the Legislature recognized that "[t]he State Water Resources Control Board and the California regional water quality control boards are the state agencies with primary responsibility for the coordination and control of water quality." Pub. Res. Code § 30412(b). Accordingly, the Legislature prohibited the Coastal Commission from "modify[ing], adopt[ing] conditions, or tak[ing] any action in conflict with any determination by the State Water Resources Control Board or any California regional water quality control board in matters relating to water quality" *Id.*

As reflected in the proposed Resolution, the City has found that the RWQCB issued the CAO ordering that the land owner of the Balloon Track "cleanup and abate the discharges and threatened discharges" from the site to protect water quality, that pursuant to its authority under sections 13267 and 13304 of the California Water Code, the RWQCB obligated CUE VI to implement the SIRAP to comply with the CAO and address identified stormwater quality issues, and that, by these actions, the RWQCB has made a determination in matters relating to water quality within the meaning of section 30412 of the Coastal Act.

Because the RWQCB's approval of the SIRAP is a "determination . . . in matters relating to water quality" and the CDP authorizes actions necessary to implement the SIRAP, section 30412 effectively precludes the modification, adoption of conditions, or taking of any other

¹ The City has provided in its Municipal Code for exercising its power to declare and abate nuisances on real property in the City, including in the area governed by its certified LCP. EMC § 150.140 *et seq.* In issuing the CDP as part of its exercise of that power, the City acted in conformity with its Municipal Code and the certified LCP and the Coastal Act in keeping with Public Resources Code section 30005, which confirms that no provision of the Coastal Act is a limitation on the City's power to declare and abate nuisances

² Nonetheless, as discussed above, the City has found that the CDP conforms with its certified LCP.

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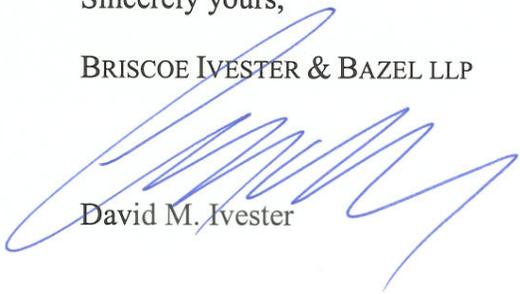
action on the CDP that would be "in conflict" with the RWQCB's determination on the SIRAP. Or, put differently, section 30412 effectively renders the CDP implementing the RWQCB's determination on the SIRAP in conformity with the Act and the LCP.

CONCLUSION

For the foregoing reasons, in addition to the others presented in the FEIR, proposed Resolution, staff report, and other documents in the record, the CDP conforms with the City's certified LCP and complies with the Coastal Act.

Sincerely yours,

BRISCOE IVESTER & BAZEL LLP



David M. Ivester



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,



Pete Nichols, Executive Director
Humboldt Baykeeper



Jennifer Kalt, Secretary
Northcoast Environmental Center



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

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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.

CALIFORNIA STATE LANDS COMMISSION

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November 3, 2009

File Ref: W25560 / G04-02

SENT VIA ELECTRONIC MAIL AND U.S. MAIL

Mr. David Tyson
City Manager, City of Eureka
531 K Street
Eureka, CA 95501

RE: City of Eureka City Council/Redevelopment Agency Regular Meeting,
November 3, 2009 – Agenda Item #1: Marina Center Phase 1 Coastal
Development Permit

Dear Mr. Tyson:

It has been brought to the attention of the staff of the California State Lands Commission (CSLC or Commission) that Eureka's City Council will be holding a public hearing this evening and will be considering the approval of a Coastal Development Permit for Phase 1 of the Marina Center Project (Project). For the reasons detailed below, staff of the Commission believes this action is premature. The boundaries and title to the property has been the subject of dispute and negotiations between the City, the Project proponent and the State of California for several years. Given the extensive research and work that has gone into resolving the title issues to the property, we were surprised to learn that this action is being considered now without any coordination or contact from the City. The last meeting with the City, Project proponent staff of the Commission and Attorney General's office was on April 2, 2009. Prior to that, in January 2009 we submitted comments on the Draft EIR and on June 15, 2009 our staff met with City staff and that of the Project proponent to discuss appraisal instructions and on September 2nd, our office submitted appraisal instructions to the Project proponent's representative and appraiser to facilitate a title settlement agreement. We have not received a response to date.

According to the City's staff report, the Project proposal consists of a mixed use development on a 43-acre brownfield site, including approximately 313,500 sq. ft. of Retail/Service/Furniture including 28,000 sq. ft. of Nurseries/Garden; 104,000 sq. ft. of Office; 72,000 sq. ft. of Multi-Family Residential (54 dwelling units); 70,000 sq. ft. of

Light Industrial use; 14,000 sq. ft. of Restaurant; and a 12,500 sq. ft. Museum. Also included, as part of the entire project, would be the development of approximately 1,590 parking spaces, including a four-level parking structure. Additional phases are proposed to incorporate pedestrian, roadway improvements, and landscaping.

It is the understanding of Commission staff that Phase 1 of the Project proposes a site soils remediation and creation of a wetland reserve. Both remediation of soils and wetlands creation are obviously ones supported by staff of the Commission and we would expect all concerned parties. However, whether the specific details of this Phase are appropriate, given the unresolved title issues, cannot be determined at this time. According to the City's staff report, "Approval of the coastal development permit for Phase 1 would not authorize the future phase(s) of the Marina Center Project, nor would approval of the coastal development permit for Phase 1 vest any rights or entitlements to the property owner for construction of the Marina Center project that are not otherwise due the property owner under law." What that statement is intended to convey is not only unclear and does nothing to clarify the pending situation, but rather muddies the water by the oblique references to "rights or entitlements... due the property owner under law." Phasing of development does not obviate the need for compliance with CEQA or the need to fully determine what governmental entity or private property owner is vested with what respective property interest in the subject property. Has the City reviewed evidence of title issued by a title insurance company to the Project proponent? If the City does not know where it owns fee title or holds a public trust easement or where the State owns the minerals in the proposed development, how can it determine what impact will occur to public trust resources it holds in trust for the statewide public? Again the proposed action by the City appears to be premature until these issues are resolved.

As previously mentioned in our January 30, 2009 letter to the City (copy enclosed), the Project area falls within lands granted to the City pursuant to Chapter 82, Statutes of 1857 and Chapter 225, Statutes of 1945, as amended, with minerals reserved to the State. Any proposed uses involving granted tidelands and submerged lands must be consistent with the common law public trust and with the applicable statutory trust. Any and all proposed uses necessitate a clear understanding of the respective property rights of the City, State and Project proponent. There has been disagreement between the Project proponent and the CSLC staff over the extent of the State's sovereign interests within the Project boundaries. Discussions to resolve this title dispute have been ongoing for some time. As such, Commission staff recommends that the City consult and coordinate with Commission staff in advance so that any action proposed to be taken by the City will not adversely impact the negotiations for a resolution of the title issues currently being discussed by City staff, the Project proponent and CSLC staff, including a potential title settlement agreement. While the development of a wetland reserve has been offered by the Project proponent as a potential site to be impressed with the public trust in exchange for the terminating any public trust interest at the Property site, this proposal has not been agreed to by CSLC staff or approved by the Commission. Neither has resolution of the Commission's mineral interest in the Project site been reached.

Additionally, pursuant to Chapter 225, Statutes of 1945, minerals are reserved to and owned by the State. Therefore, if any grading is planned as part of this Project that

involves the State's mineral rights, pursuant to Chapter 225, Statutes of 1945, a lease will be required from the Commission. A lease application may be found on our website at www.slc.ca.gov.

The City's staff report also assumes the City has jurisdiction to issue a Coastal Development Permit. Public Resources Code section 30519 (b) clearly sets forth that the delegation to local governments for development review of projects "...shall not apply to any development proposed or undertaken on any tidelands, submerged lands, or on public trust lands, whether filled or unfilled, lying within the coastal zone...." Therefore, should the City consider approving a Coastal Development Permit, prior to resolution of title issues, that act may be without legal authority.

Given the above issues involving property interests and jurisdiction related to those interests we respectfully suggest postponing the matter until title and boundary issues and hence jurisdictional issues have been resolved. In the alternative, should the City decide to act we suggest that the City expressly condition the issuance of any permit upon prior resolution of title and boundary issues with the City of Eureka, as trustee pursuant to Chapter 82, Statutes of 1857 and Chapter 225, Statutes of 1945, as amended, and the State of California, acting by and through the State Lands Commission, including the state's reserved mineral rights.

Thank you for considering our comments. If you have any questions regarding this letter, please contact me at (916) 574-1828. For issues regarding the CSLC's jurisdiction, please contact Grace Kato, Public Land Management Specialist, at (916) 574-1227 or at katog@slc.ca.gov. Thank you.

Sincerely,



Curtis Fossum
Chief Counsel

cc: City Council, City of Eureka
Virginia Bass, Mayor, City of Eureka
Sheryl Schaffner, City Attorney
Kevin Hamblin, Director of Community Development
John Briscoe, Esq.
Joseph Rusconi, Deputy Attorney General
Jim Frey, Senior Staff Counsel
Grace Kato, Public Land Management Specialist

Public Comment, hearing before city council
Tues. Nov. 3, 2009

We oppose the Marina Center project. It will be an obnoxious corporate monstrosity on the bay, but that's not our main reason. It will take away from local businesses and is a death sentence for Pierson's, but that's not our main reason either.

They are planning on building on a brownfield. You have not spent enough time going over the Environmental Impact Report. The city has signed an indemnification agreement so that the developers and not they will be liable if they are sued. This sounds suspiciously like you are blasting ahead without due concern for the environmental impact because it is the developers and not the city who will get sued. How about being decent human beings and making sure that the site is actually safe to put shops and RESIDENCES on? We don't believe that paving over the dioxins actually protects us. Make sure a proper clean up is done. We will be watching you.

Leila Binder

Leila Binder
Carol Binder
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Eureka, CA
95501
707 268 1385

Carol Binder

RECEIVED
OCT 28 2008
DEPARTMENT OF
COMMUNITY DEVELOPMENT