Correspondence to Planning Commission on PA120037 (October 26, 2016 hearing)

1. Chambers Group – Peer Review of GHG Mitigation Assessment)
2. Sean Matsler (Manatt) for North County BRS Project LLC
    a. Attached - Robert Garrett for North County BRS Project LLC
3. Yorba Linda Estates – Response to Matsler letter
    a. With 3 attachments
4. Kevin K. Johnson for Protect Our Homes and Hills, et al
    a. With 2 attachments
5. CAA Planning – Response to Kevin Johnson letter
6. City of Yorba Linda

MEMO

To: Brian Kurnow, Land Use Manager, OC Development Services

From: Joe O'Bannon, Senior Air Specialist; Lisa Louie, Project Manager

Date: September 16, 2016

RE: Review of Greenhouse Gas Mitigation Assessment for Esperanza Hills, County of Orange, Report #16-020C, September 14, 2016

Based on the review of the revised Greenhouse Gas (GHG) Mitigation Assessment for Esperanza Hills, County of Orange Report (Report) provided by Greve & Associates, LLC (G&A), dated September 14, 2016, Chambers Group provides the following comments as part of our third party technical peer review conducted by Joe O'Bannon, Senior Air Specialist.

Chambers Group understands that the purpose of the Report was to address the Orange County Superior Court's concerns regarding deferred mitigation of GHG in the Final Environmental Impact Report prepared in November 2013. The Report proposed to address the concerns by:

- Revising Table 5-6-8 of the FEIR to include the requirements that the County imposed on the project and
- Identifying and/or analyzing project specific measures in more detail.

General Comments:

- The current report is the second revision following the original submittal of the Greenhouse Gas Mitigation Assessment dated August 8, 2016. The first revision, dated August 30, 2016, was determined by Chambers Group to require additional revisions. Chambers Group provided recommendations for revision.

- The current Report #16-020C, September 14, 2016, is satisfactory to meet CEQA requirements.

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manatt
manatt | phelps | phillips

Sean Matsler
Manatt, Phelps & Phillips, LLP
Direct Dial: (714) 371-2534
E-mail: SMatsler@manatt.com

October 19, 2016

Client-Matter: 46984-030

VIA FEDERAL EXPRESS AND E-MAIL [KEVIN.CANNING@OCPW.OCGOV.COM]

Honorable Planning Commissioners
County of Orange
333 W. Santa Ana Blvd.
Santa Ana, CA 92701

Re: Discussion Item No. 1: Esperanza Hills Specific Plan (PA 160048)

Honorable Planning Commissioners:

Manatt, Phelps & Phillips, LLP represents North County BRS Project LLC in connection with its proposed Cielo Vista residential project, which abuts the Esperanza Hills Specific Plan to the west. The Cielo Vista project received a unanimous Planning Commission recommendation on March 9, 2016 and is awaiting a Board of Supervisors hearing. As this Planning Commission considers the Esperanza Hills Specific Plan, we respectfully ask that you keep two facts in mind:

1. **Board of Supervisors' Past Concerns** – The Esperanza Hills Specific Plan first went before the Board of Supervisors for approval on June 2, 2015. The Board approved the Specific Plan that day, but eliminated proposed "Option 1." With respect to Option 1, Supervisor Spitzer said as follows on June 2:

> *One of the things I will not support, and I said this before, but I'm going to be express about it today, is Option 1. Option l's off the table. And not only that. It's because people live on Stonehaven, and it was really unfair to dump all that traffic as a primary. When I drove through there, and I've been on the property many times, I would not want to live on Stone Haven and have that be the primary access to 300-plus homes. That's just not fair. ... So I'm purposefully eliminating and want to eliminate Option 1 from the Specific Plan.*

That "Option 1," along with a similar "Option 1" variation, are the only access alternatives currently before this Commission. Access Options 2B and 2 Modified, which were approved by the County in 2015, are no longer part of the Esperanza Hills Specific Plan. The staff report explains this omission by reference to an inability to secure necessary approvals from my clients, over whose property those access roads would pass. This Commission should be aware that my client participated in two mediation sessions with the Esperanza Hills' developer on January 7 and 22, 2016 in an effort to find a path forward on access Options 2B and 2 Modified. You should also be aware that an executed settlement agreement between my client and Protect Our Homes and Hills specifically contemplates and allows for the

Esperanza Hills project to implement Option 2 Modified, which would utilize an extension of Aspen Way as primary vehicle access. My client remains willing to find a mutually-beneficial solution with Esperanza Hills on access.

2. **No Legal Right to Overburden 50-foot Easement** – Both "Option 1" and "Option 1 Modified" rely exclusively upon a 50-foot easement that bisects the Cielo Vista property for emergency access. The staff report improperly states that the "[r]ights and permissions for these rights-of-way had previously been secured." The staff report cites to Orange County Superior Court and California Court of Appeals decisions dated October 2014 and December 2015, respectively, in support of that statement.

   Here is what the staff report does not mention: although the Court of Appeals confirmed the *existence* of the 50-foot easement, the *scope* of that easement remains unresolved. ***No court has determined that the entire 469-acre Esperanza Hills development has a right to put evacuation traffic on the 50 foot easement.*** Why? Because that 50-foot easement benefits only 33 of those 469-acres. Subjecting the 50 foot easement to impacts beyond those caused by the 33 acres owned by "OC 33" constitutes impermissible overburdening. These issues are thoroughly outlined in the attached letter from Garrett & Tully, P.C., outside counsel to my client's title insurer, First American.

   The Court of Appeals did not render an opinion on the question of scope. Instead, the Court said that "[w]hen the facts [concerning Esperanza Hills' intended use of the 50-foot easement] have become more concrete, obviously [my clients] have the right to file another declaratory relief action." ***This Commission should expect that approval of the Esperanza Hills project in its current configuration will lead to such an action.*** Alternatively, to avoid continued litigation, this Commission should encourage Esperanza Hills to reduce its density and rely only its single current legal access.

Thank you for your consideration.

Sincerely,

Sean Matsler

cc: Honorable Orange County Supervisors (via e-mail: response@ocgov.com)
Mr. Colby Cataldi (via e-mail: Colby.Cataldi@ocpw.ocgov.com)
Leon Page, Esq. (via e-mail: leon.page@coco.ocgov.com)
Nicole Walsh, Esq. (via e-mail: nicole.walsh@coco.ocgov.com)
Robert Smith (via e-mail: rsmith@sagecommunity.com)

GARRETT & TULLY, P.C.
ATTORNEYS AT LAW

AUTHOR'S E-MAIL
rgarrett@garrett-tully.com

REPLY TO:
Pasadena

OUR FILE NO.
91498-390

March 8, 2016

Via E-Mail and U.S. Mail

Laree Alonso
Orange County Development Services
300 N. Flower Street
Santa Ana, CA 92720
laree.alonso@ocpw.ocgov.com

Re: Cielo Vista Project –EIR 615

Dear Alonso:

I write on behalf of the owners of the property comprising the Cielo Vista development to address and clarify certain statements made by Mr. Wymore in his letter to you of February 16, 2016, pertaining to the 50 foot wide easement to which Mr. Wymore refers and related proposed construction by Cielo Vista. As counsel who handled the trial court litigation and the resulting appeal, I have particular knowledge of the status and permissible use of that easement.

Although the court confirmed the existence of a 50 foot easement over a portion of the Richards parcel, which is one of the parcels comprising the Cielo Vista project, it is important to note the significant limitations on the permissible use of that easement that remain. The court expressly declined to resolve these issues because it was not clear at the time of the lawsuit that Esperanza Hills intended to use the easement in connection with its development. The court noted that my client retains the right to sue in the event Esperanza Hills seeks to impermissibly use the easement, expressly stating, "When the facts [concerning Esperanza Hills' intended use of the easement] have become more concrete, obviously defendants [my clients] have the right to file another declaratory relief action."

Strict Limitation on Property Benefitted by the Easement.

The 469 acre Esperanza Hills development consists of the OC 33 Property (33 acres), the YLE Property (369 acres) and the Nicholas/Long Property (91 acres). The Esperanza Hills development contemplates use of the 50 foot easement over the Richards parcel to benefit the

entire 469 acre development. However, the easement is appurtenant to, or benefits, only the 33 acres owned by OC 33. Esperanza Hills has no right to use the easement to benefit the 369 acres owned by YLE, nor does it have any right to use the easement to benefit the 91 acres owned by Nicholas/Long.

The law has long been clear that an easement can only be used to benefit property to which the easement is appurtenant. "Use of an appurtenant easement for the benefit of any property other than the dominant tenement is a violation of the easement because it is an excessive use.....". *Wall v. Randolph* (1961) 198 Cal.App.2d 684, 695, citing *Myers vs. Berven* (1913) 166 Cal. 484, 489; *Buehler v. Reilly* (1958) 157 Cal.App.2d 338, 343-344.

The consequences of burdening a property with excessive use are dramatic. Where the owner of property benefitted by an appurtenant easement overburdens the easement by using it to benefit property other than the property to which the easement is appurtenant, he risks forfeiting the easement in its entirety. For example, In *Crimmins v. Gould* (1957) 149 Cal.App.2d 383, the court determined an easement had been extinguished where the dominant tenement owner merely "attempted" to allow owners of non-dominant tenements to use a roadway easement.

In affirming the trial court's determination that the easement had been forfeited and extinguished, the Court of Appeal explained, "The general rule is that misuse or excessive use is not sufficient for abandonment or forfeiture, but an injunction is the proper remedy." However, "where the burden of the servient estate is increased through changes in the dominant estate which increase the use and subject it to use of non-dominant property, a forfeiture will be justified if the unauthorized use may not be severed and prohibited.

The *Crimmins* court also cited *Knotts v. Summit Park Co.* (Md. 1924) 126 A. 280 as an "almost identical" case. There the court explained that by opening roads so as to give access to those outside the dominant estate, the easement was entirely forfeited and extinguished.

Similarly, here the easement is appurtenant only to property owned by OC 33, LLC and thus can be used to benefit only that property, i.e. the 18 homes planned homes planned to be constructed on that property. In the event OC 33 were to undertake to use the easement to benefit property other than the OC 33 property, it would likely forfeit any right to use the easement, even for the benefit of the OC 33 property. Thus, Esperanza Hills will not be able to use the 50 foot easement as it contemplates and any construction proposed by Cielo Vista in the easement area cannot impermissibly interfere with any proper use of the easement by OC 33.

The Easement Cannot be Used Exclusively by OC 33. – The easement in question is a non-exclusive easement. In other words, the party having the right to use the easement, OC 33 cannot use it in a manner that effectively excludes the owner of the underlying fee, my clients, from also using the property in a manner that is not inconsistent with the easement right. A

nonexclusive easement cannot be rendered exclusive by the dominant tenement. (*See Scruby v. Vintage Grapevine, Inc.*, 37 Cal.App.4th 697.) The *Scruby* court explained that the owner of a dominant estate must use the easement in a way so as to "impose as slight a burden as possible" on the servient property, and that "every incident of ownership not inconsistent with the easement and the enjoyment of same is reserved to the owner of the servient estate." (*Scruby*, supra, 37 Cal.App.4th at 702.)

The teaching of *Scruby* is significant here in two respects:

First, in addition to the fact that most of the property comprising the Esperanza Hills development cannot use the easement for any purpose, as explained above, the construction proposed to be undertaken on the easement cannot be allowed because it would effectively convert the easement to use solely and exclusively by OC 33, thereby depriving the fee owner, my client, from its proper use of the property.

Second, the grading on the easement proposed in connection with the Cielo Vista project is not inconsistent with OC 33's desired use of the easement for utility purposes and thus is legally permitted consistent with the respective rights of the parties. OC 33 cannot legally prohibit my clients from their use as owners of the property so long as OC 33 is also able to use the property consistent with the easement grant.

Construction Easement – As shown on the attached exhibit from Fuscoe Engineering, Cielo Vista's proposed grading activities are within the scope of an easement (also attached) for "landscaping, construction, utility, slope, and incidental purposes." This easement was conveyed to, and accepted by, the City of Yorba Linda. Wymore's position would render this construction easement virtually non-existent.

Very truly yours,

GARRETT & TULLY, P.C.

Robert Garrett /EWR

ROBERT GARRETT

RG:llb
Enclosure
217135.docx

Yorba Linda Estates, LLC

Esperanza Hills

7114 E. Stetson Dr. #350 Scottsdale, AZ. 85251
P: (480) 966-6900 F: (480) 994-9005

October 25, 2016

Planning Commission
County of Orange
300 N. Flower Street
Santa Ana, CA 92702

Re: Cielo Vista letter dated October 19, 2016

Dear Planning Commissioners;

Cielo Vista signed a Statement of Cooperation dated October 10, 2014 (Attachment 1) pledging to "support Esperanza Hills Option 1 as set forth in the Esperanza Hills DEIR." Notwithstanding that agreement, they sent you a letter dated October 19, 2016 opposing Option 1 Modified, which is an environmentally superior access option to Option 1, approved by you in January, 2015, and Option 2 Modified, approved by the Board on June 2, 2015. They attached a letter once again attacking the easement for roadway and easement purposes from the same attorney who lost his claims that the easement did not exist at both trial and on appeal. Finally, they claim that our project should have its density reduced even though our project is 27% less dense that their project, as they are seeking approval for 1 unit to the acre, while our current approvals are at .73 units per acre.

They claim that they want to find a "mutually beneficial solution" on page 2 of their letter, but they haven't contacted us in eight months and have known that we were returning to the County seeking approval for Option 1 since we were not able to reach an agreement for access back in January.

Despite their constant and continuing efforts to oppose our project, Option 1 Modified should be approved, as it is the environmentally superior option which creates the least grading on Cielo Vista. If the City of Yorba Linda, Yorba Linda Water District and our two projects work together then the Cielo Vista project can obtain access to Stonehaven/Via Del Agua as well as be served with utilities through our easement, as currently contemplated in our Water and Sewer Resources Agreement with YLWD.

Option 1 Modified Avoids Sensitive Habitat and Grading On the Cielo Vista Property

Option 1 Modified is environmentally superior solution to our former Option 2 Modified because it avoids disturbing habitat on the Cielo Vista property currently occupied by gnatcatchers and Least Bell's Vireo, which is listed as endangered on both the state and federal level, and also eliminates temporary and permanent disturbance to areas under the jurisdiction of the Army Corps of Engineers and California Fish and Game on the Cielo Vista project. (see Attachment 2)

Option 1 Modified is also environmentally superior to Option 1, decreasing permanent impacts to ACOE jurisdiction from 0.91 acre to 0.87 acre and impacts to jurisdictional wetlands from .02 acre to 0.0 acre. Option 1 Modified reduces total permanent impacts to CDFW jurisdiction from 1.955 acres to 1.88 acres, and impacts to riparian habitat from 1.15 acres to 0.735 acre.

A report filed with US Fish and Wildlife in July, 2016 by Leopold Biological found several sitings of gnatcatchers along the proposed access roads for our project across the Cielo Vista project as shown on the map on page 3 of Attachment 2. That same map shows sitings of Least Bell's Vireo, a bird listed as endangered on both state and federal lists. Impacts will also be reduced to critical gnatcatcher habitat, black willow riparian habitat, California walnuts and Mexican elderberry. Drainage areas D and G will no longer be affected and impacts to Drainage area C will be reduced as set forth above. All of the offsite grading onto the Cielo Vista project to the west shown on page 4 of Attachment 2 will be eliminated. Option 1 Modified is a much less intrusive access option for Cielo Vista.

Past Efforts to Work with Cielo Vista Have Been Unsuccessful

For years, Cielo Vista claimed that our easement on their property, which was created in 1958, did not exist. After a judgment confirming the easement was entered on October 6, 2014, they entered into an agreement to cooperate on October 10, 2014. Within three weeks, they appealed the judgment instead of cooperating, only to lose on appeal in December, 2015. The same law firm sending the latest letter also sent a letter to the subdivision committee on October 6, 2015, unsuccessfully urging denial of our application for a VTTM, along with a letter from the owner of the property, Amos Travis. This followed a similar letter sent to the Board prior to its approvals for the project on June 2, 2015. North County BRS can't grant an easement on land it doesn't own, and Amos Travis won't, so we have an impasse.

The request that our density be decreased is a new request, and follows announcement of a settlement between the neighbors and Cielo Vista, which, according to the press release issued by the neighbors, created a "legal defense fund" for the group opposing our project so they could remain "100% focused on the Esperanza Hills project". (Attachment 3, page 2) That group, Protect Our Homes and Hills, filed litigation against the County, the City and our Project in July 2015. The City was dismissed on all counts in January, 2016. The neighbors lost of 29 on the 30 issues they raised against the County and our project, prevailing only on a GHG mitigation issue which we are attempting to fix in accordance in the judge's order. They appealed the judgment in its entirety yesterday, on October 24, 2016.

Our Easement Does Not Interfere With the Cielo Vista Project

Cielo Vista has no private right of access or easement from the southern border of its property to Stonehaven/Via Del Agua, as we pointed out in our letter to the Planning Commission in February, 2016. Their sole access relies on a 56-foot easement for a dedicated road which has never been built, and their current design calls for encroachments on our easement and two lots owned by property owners, as well as a city easement for road and utilities on Lot 3 of Tract 13800. This has been a matter of public record since 1988. Our easement has been a matter of public record since 1958 and is superior in right to all other easements and the road dedication.

Cielo Vista knows that it can't build a 56-foot road on a 56-foot easement, so the current road configuration shown for their project won't work. Cielo Vista needs permission from the City to encroach on its easement, permission from us to encroach on our easement, permission from the YLWD which will also have rights in our easement under a Water and Sewer Agreement we signed last week, and permission and approval from the City to construct the public road. Our water, sewer and other utilities will be coming into our property on our easement, and YLWD has the right to upsize the sewer

and water lines to serve the Cielo Vista property. If all parties work together, and Cielo Vista truly starts co-operating instead of just claiming that they will, then the issue can be solved.

Conclusion

We believe that Cielo Vista's current stance is directly related to their deal with Protect Our Homes and Hills, as they would have contacted sometime in the last eight months if they truly wanted cooperation. If they truly wish to move forward in a cooperative manner, they need to provide the County with the revised VTTM they promised in January, 2013, get WQMP approval, finish their fault study required by law, finish their alternate water supply agreement with YLWD since they have chosen not to obtain water storage in accordance with the NEAPS and have their engineers sit down with the City and our engineers to arrive at the "mutually beneficial" solution they claim they want. That solution will not include a return to Option 2 Modified, because the agencies will not support it in light of the recent gnatcatcher survey and Option 1 Modified Design.

For these reasons, we request that you approve the application currently before you, which is recommended by County Staff.

Sincerely;

Douglas G. Wymore

Attachment 1

October 10, 2014

Shane L. Silsby, P.E.
Director of OC Public Works
County of Orange
300 North Flower Street
Santa Ana, CA 92703-5000

Statement of Cooperation
Yorba Linda Estates, LLC (YLE)
North County BRS Project, LLC (NCBRS)

Dear Mr. Silsby:

This letter sets forth the understanding between YLE and North County regarding mutual issues affecting Cielo Vista and Yorba Linda Estates.

A. ACCESS.

1. Esperanza Hills Option 1

   YLE will request the County to approve and NCBRS will support Esperanza Hills Option 1 as set forth in the Esperanza Hills DEIR.

2. Esperanza Hills Alternative 2B

   YLE will also request the County to approve Alternative 2B as set forth in the Esperanza Hills DEIR. North County agrees to enter into discussions and meetings with YLE and the City of Yorba Linda to identify the means by which Alternative 2B can be legally and physically implemented. A condition precedent to YLE obtaining an easement or other property interest from NCBRS to construct the Alternative 2B access is the execution by the City of Yorba Linda of a memorandum of agreement, memorandum of understanding, or other form of agreement evidencing their intent to execute an easement or other property interest to YLE to construct a roadway through the property owned by the City

between San Antonio Road and Dorinda that would permit the implementation of Alternative 2B. The Parties agree that prior to the granting of an easement or other property interest by NCBRS to YLE to construct and operate the Alternative 2B access road, the Parties shall meet to negotiate, among other issues, the compensation to be paid by YLE to NCBRS for the easement or other property interest for the Alternative 2B access road.

B. WATER INFRASTRUCTURE

The Parties agree to enter into discussions with YLWD to identify the means by which the storage and distribution facilities identified in the Northeast Area Planning Study (NEAP) to address the future demands of both Esperanza Hills and Cielo Vista can be timely implemented. Implementation measures include, but are not limited to, execution of a funding agreement wherein NCBRS agrees to pay its pro rata share of the costs to increase the 1.1 MG storage capacity currently proposed to be constructed by YLE at Esperanza Hills to the 1.3 MG storage capacity identified in the NEAP, granting of easements or other property interests by YLE and/or NCBRS to construct the required infrastructure and distribution facilities within the Esperanza Hills and Cielo Vista project sites.

C. OTHER ISSUES

The Parties agree to reasonably cooperate with each other to entitle and develop their respective properties in order to entitle, develop and construct the Esperanza Hills Project and Cielo Vista Project. Such cooperation includes, but is not limited to: reciprocal grading easements; reciprocal access for geotechnical testing, installation of a traffic control device at Via Del Agua and Yorba Linda Boulevard; fuel modification easements; stormwater easements; and emergency access issues.

D. DISCUSSIONS WITH CITY OF YORBA LINDA

The parties agree to schedule joint meetings with the City of Yorba Linda in order to discuss pre-annexation agreements and other agreements related to the respective entitlement and development of their respective properties.

Very truly yours,

Robert Smith

North County BRS Project, LLC, a Delaware Limited Liability Company

Douglas Wymore

Yorba Linda Estates, LLC, an Arizona Limited Liability Company

D. DISCUSSIONS WITH CITY OF YORBA LINDA

The parties agree to schedule joint meetings with the City of Yorba Linda in order to discuss pre-annexation agreements and other agreements related to the respective entitlement and development of their respective properties.

Very truly yours,

Robert Smith

North County BRS Project, LLC, a Delaware Limited Liability Company

Douglas Wymore

Yorba Linda Estates, LLC, an Arizona Limited Liability Company

Attachment 2

MEMORANDUM

GLENN LUKOS ASSOCIATES
Regulatory Services

PROJECT NUMBER: 10500002ESPE

TO: Doug Wymore

FROM: Tony Bomkamp

DATE: October 24, 2016

SUBJECT: Alternative 4/Option 1 Modified for the Esperanza Hills Specific Plan Area Project, Located in Unincorporated Orange County, California

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The purpose of this memorandum is to provide a comparison of a new preferred alternative (Alternative 4/Option 1 Modified) [Exhibit 1] for the Esperanza Hills Specific Plan Area Project (Project) with the previously approved alternative (Alternative 3/Option 2 Modified)[1] [Exhibit 2]. Under the new Preferred Alternative - Span Bridge Access Alternative (Alternative 4/Option 1 Modified), a total of 340 single-family residential units would be constructed on approximately 112 to 114 acres of the Project Site. Nine public parks would be provided on 12-13 acres, and 35,856 to 39,111 linear feet of trails would be provided. Single-family residences would primarily be low density and clustered to maximize open space preservation and preserve the natural ridgelines and topography to the greatest degree possible, including all major ridgelines bordering Chino Hills State Park.

Under Alternative 4/Option 1 Modified, the primary roadway connection would be provided going south to Stonehaven Drive across a span bridge over Blue Mud Canyon (Drainage F) with a secondary access west of the span bridge, also spanning a tributary to Blue Mud Canyon and going south to Stonehaven Drive. Under Alternative 4/Option 1 Modified, the access from San Antonio Drive across the adjacent Cielo Vista project would be eliminated, resulting in avoidance or reduction of impacts to biological resources including avoidance of potential impacts to the federally listed coastal California gnatcatcher and reduction of impacts to the State and federally listed least Bell's vireo. Alternative 4/Option 1 Modified would also reduce potential impacts to Section 404 jurisdiction, including avoidance of permanent impacts to wetlands and reduction in impacts to area subject to CDFW jurisdiction pursuant to Section 1602 of the California Fish and Game Code. The reduction in impacts to the coastal California gnatcatcher and least Bell's vireo are addressed below. Reduction in impacts to Section 404 and 1602 Jurisdiction were addressed in my letter to Colby Cataldi at the County of Orange dated June 20, 2016.

[1] The terms Alternatives 3 and Alternative 4 are included as these reflect the designations in the Section 404 Permit Application and associated correspondence. Option 1 Modified and Option 2 Modified reflect the terminology used in processing documents with the County of Orange.

29 Orchard ▪ Lake Forest ▪ California 92630-8300
Telephone: (949) 837-0404 Facsimile: (949) 837-5834

Coastal California Gnatcatcher

While the coastal California gnatcatcher (CAGN) has not been identified on the Esperanza Hills project site, it was identified by GLA on the Cielo Vista project in 2014 and again in 2016 by Leopold Biological Services (Leopold) as set forth in a report dated July 2016.[2] Leopold identified two CAGN "Territories" west of Esperanza Hills within the previously proposed access roadway grading limits for Alternative 3/Option 2 Modified as depicted on Exhibit 2, over the land that is part of the Cielo Vista project. As depicted on Exhibit 3 Esperanza Hills Alternative 4/Option 1 Modified fully avoids impacts to CAGN including those detected in 2014 by GLA as well as the CAGN detected by Leopold in 2016. As such, Esperanza Alternative 4/Option 1 Modified is environmentally superior to the previously approved Alternative 3/Option 2 Modified.

Least Bell's Vireo

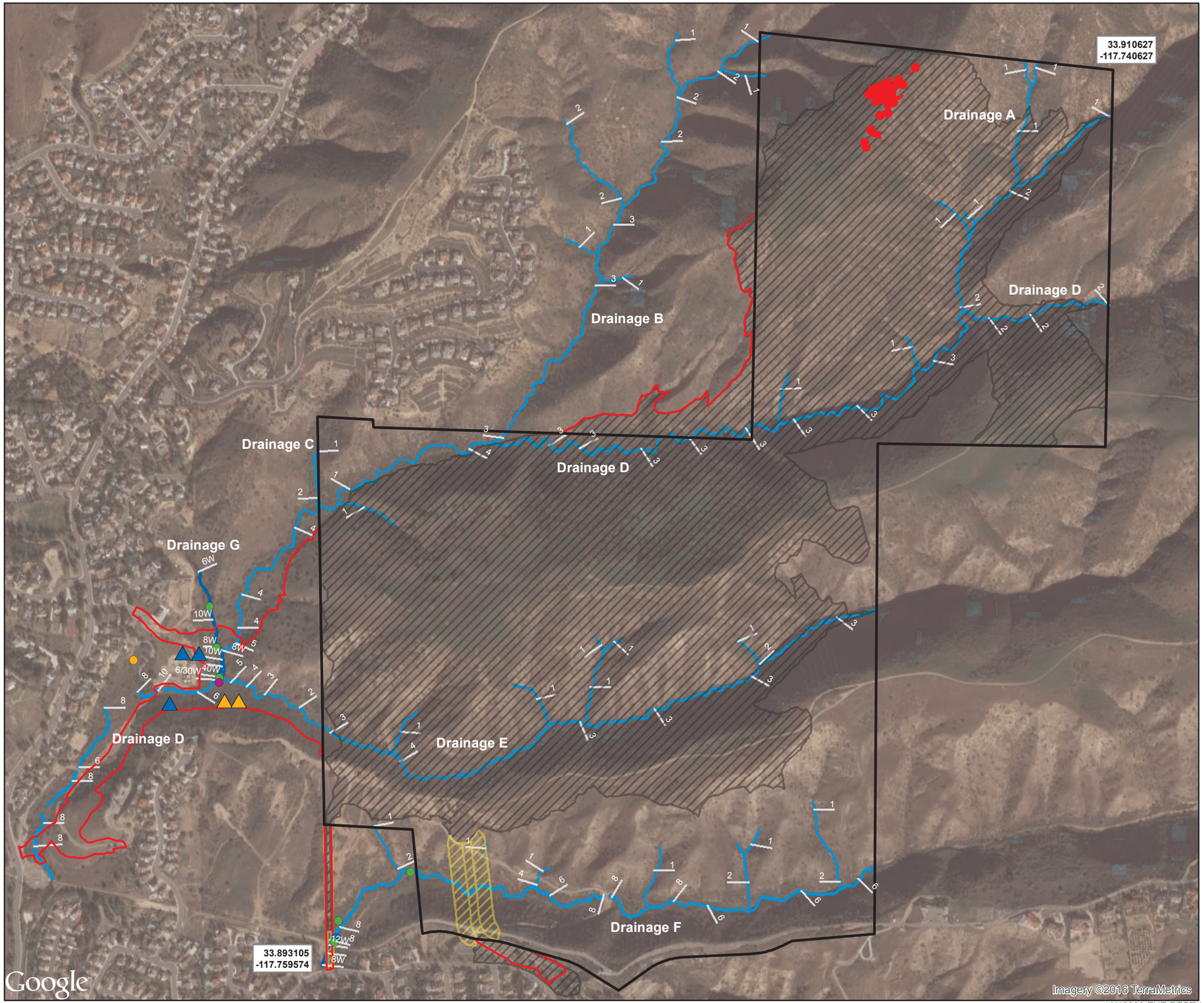
Least Bell's vireo (LBV) has been identified on the Cielo Vista site in multiple years [See Exhibit 2] including 2010 (GLA), 2012 (GLA and PCR), 2013 (GLA), and 2016 (Leopold). LBV were detected near the confluence of Drainages D and G, as well as near the terminus of Blue Mud Canyon immediately north of Stonehaven Drive. Under Option 2 Modified, riparian vegetation occupied by least Bell's vireo at the southern edge of the Study Area associated with Blue Mud Canyon and at the unnamed drainage on the western edge of the Study Area would be subject to off-site impacts for project construction totaling 0.065 acre of mulefat scrub. In addition, the road connection to Aspen Way would impact 0.19 acre of black willow riparian forest vegetation occupied by least Bell's vireo for a combined impacts of 0.255 acre of riparian habitat occupied by LBV. Esperanza Hills Alternative 4/Option 1 Modified results in more than a five-fold decrease to 0.05 acre of riparian habitat. As such, Esperanza Alternative 4/Option 1 Modified is environmentally superior to the previously approved Alternative 3/Option 2 Modified.

Other Biological Resources

In addition to the reduction in impacts to Waters of the U.S. (Section 404 jurisdiction) and Waters of the State (Section 1602 jurisdiction), Option 1 Modified will also reduce impacts to coastal sage scrub, chaparral, as well as native California walnuts and Mexican elderberry. As already noted for the CAGN and LBV, Esperanza Hills Alternative 4/Option 1 Modified is environmentally superior to the previously approved Alternative 3/Option 2 Modified.

s: 1050-2Option 1 Modified_Memo.docx

[2] Leopold Biological Services. July 2016. Coastal California Gnatcatcher Focused Survey Report: Sage Development Group Cielo Vista Orange County, California.



Legend

- Property Boundary
- Study Area Boundary
- Option 1 - Modified Permanent Footprint
- Option 1 - Modified Temporary Footprint
- Corps Non-Wetland Waters
- Corps Wetland
- Width in Feet (W indicates wetland jurisdiction)
- Braunton's Milkvetch Population
- Leopold Survey - CAGN Territory 1
- Leopold Survey - CAGN Territory 2
- Milkvetch
- Least Bell's Vireo - Observed by GLA on July 28, 2012
- Least Bell's Vireo - Observed by GLA on June 1, 2010
- Least Bell's Vireo - Observed by PCR 2012
- Least Bell's Vireo Nest - Observed by PCR 2012

N

0 350 700 1,400
Feet

1 inch = 700 feet

Aerial Photo: ESRI Basemaps Bing Hybrid
Reference Elevation Datum: State Plane 6 NAD 83
Map Prepared by: K. Kartunen, GLA
Date Prepared: October 19, 2016

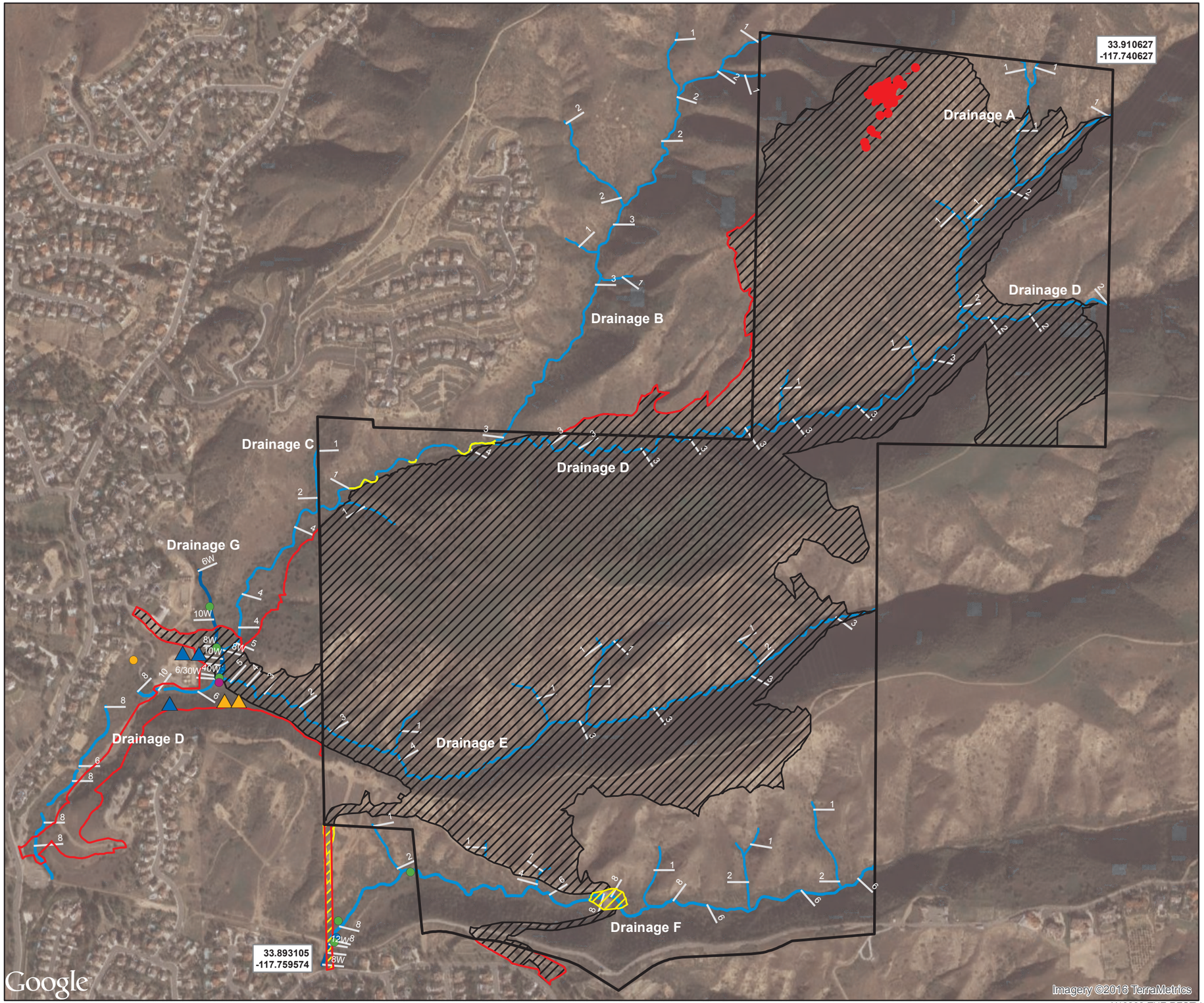
ESPERANZA HILLS SPECIFIC PLAN AREA

Option 1 - Modified

GLENN LUKOS ASSOCIATES

Exhibit 1

X:\0363-THE REST\1050-02ESPE\1050-02_GIS FINAL_USE THIS FOLDER\CountyGIS\1050-2 Alternative4.mxd



Legend

- Property Boundary
- Study Area Boundary
- Option 2 Modified Permanent Footprint
- Option 2 Modified Temporary Footprint
- Corps Non-Wetland Waters
- Corps Wetland
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- Braunton's Milkvetch Population
- Leopold Survey - CAGN Territory 1
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- Least Bell's Vireo - Observed by PCR 2012
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- Least Bell's Vireo - Observed by GLA on July 28, 2012
- Least Bell's Vireo - Observed by GLA on June 1, 2010

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0 350 700 1,400
Feet

1 inch = 700 feet

Aerial Photo: ESRI Basemaps Bing Hybrid
Reference Elevation Datum: State Plane 6 NAD 83
Map Prepared by: K. Kartunen, GLA
Date Prepared: October 19, 2016

ESPERANZA HILLS SPECIFIC PLAN AREA

Option 2 - Modified

GLENN LUKOS ASSOCIATES

Exhibit 2

X:\0363-THE REST\1050-02ESPE\1050-02_GIS FINAL_USE THIS FOLDER\CountyGIS\1050-2 Alternative2.mxd

Attachment 3

PRESS RELEASE

—FOR IMMEDIATE RELEASE—

Contact: Marlene Nelson
Marlene@ProtectYorbaLinda.com
Cell: (714) 365-7700

Landmark Agreement Reached On Hillside Project

Yorba Linda, CA August 31, 2016 – The citizen's group Protect Our Homes and Hills (POHAH) has reached a landmark settlement agreement with North County BRS—the applicant for the Cielo Vista project, the smaller of two housing projects proposed in the hills above Yorba Linda. Having faced gridlock evacuating from the devastating 2008 Freeway Complex Fire, residents were concerned about adding another 450 houses in the hills. They have been working diligently for four years fighting both the Cielo Vista project and the larger Esperanza Hills project next to Chino Hills State Park. Both projects are located in unincorporated Orange County.

The 340-unit Esperanza Hills project on 460 acres was approved by the Orange County Board of Supervisors in June 2015. POHAH litigated this project since it went through the approval process first. Along with four other co-petitioners, POHAH won a California Environmental Quality Act lawsuit in late June 2016 overturning the Esperanza Hills project approvals, entitlements, and Environmental Impact Report.

The 87-acre Cielo Vista project, originally proposed in 2012 as 112 units, lies immediately west and south of Esperanza Hills. Working in conjunction with North County BRS, an agreement was reached that further reduces development impacts, reduces housing density, improves fire safety, ensures gravity-fed water is used and air quality standards are met, reduces visual impacts, and makes the project more compatible with existing neighborhoods.

North County BRS will place a conservation easement over nearly 30 acres of the northern most region of its property—permanently restricting its use. Brian Gass, co-chair of POHAH states, "We secured a land manager, a management endowment, and a legal defense fund, so residents can rest assured that Esperanza Hills will never be able to use the city parkland in San Antonio Canyon as a roadway. Instead, Esperanza Hills is now restricted to a narrow corridor connecting to Aspen Way." The agreement, signed in August, precludes use of the

controversial San Antonio Canyon area, which residents vehemently opposed, but the County of Orange and City of Yorba Linda wanted to use as the Esperanza Hills' primary access.

Marlene Nelson, co-chair of POHAH, relayed, "Since our involvement in the Cielo Vista project, the density has been reduced 30%. It's down to 80 units to more closely align with existing neighborhood densities." She continues, "Several lots are deed restricted to single story. North County BRS has also agreed to incorporate a visual buffer to reduce impacts along its entire southern and western border." Specific plant materials have been incorporated into the agreement that keep the community more fire safe and account for the ongoing drought.

In addition, in an unprecedented arrangement, North County BRS is funding the creation of a Community Fire Protection Plan, Fire Safe Council, and has dedicated monthly funding from the future homeowners' association to implement the Plan. Residents are confident that with these measures and the required gravity-fed water systems, existing and future homeowners will be safer than with what had been previously proposed.

The POHAH Leadership Team, consisting of residents west and south of both projects, continue to fight the Esperanza Hills battle, but have agreed to not oppose Cielo Vista due to the concessions made by North County BRS. "At a minimum we've improved the Cielo Vista project," says Ms. Nelson. "And, we remain fully engaged and now 100% focused on the Esperanza Hills project."

***

Protect Our Homes and Hills is a community organization based in Yorba Linda. Learn more at ProtectYorbaLinda.com.

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October 25, 2016

SENT VIA EMAIL

Members of the Planning Commission
County of Orange
c/o Orange County Public Works
Kevin Canning
300 N. Flower St.
Santa Ana, CA 92702-4048

Re: Agenda Item #2 - Esperanza Hills
October 26, 2016 Planning Commission Meeting

Dear Members of the Planning Commission:

This firm represents Protect Our Homes and Hills, Hills for Everyone, Endangered Habitats League, Inc., California Native Plant Society, and Friends of Harbors, Beaches and Parks, Inc. We submit the following comments on the Revised Environmental Impact Report ("REIR") for the Esperanza Hills Project and the applicant's recent proposed specific plan amendment.

As a preliminary matter, you should be aware that when accessing the links for the meeting at http://ocplanning.net/planning/projects/esperanza_hills, the reader sees a page in what appears to be Greek or Cyrillic letters and not English. We have attached a copy of the screenshot for your information and suggest that the public has not been provided with accessible information about what is proposed tomorrow and the matter should be continued and the website problem corrected.

Please consider the following comments regarding the REIR and amendments to the specific plan.

October 25, 2016

The Revised EIR Fails to Correct the Errors in the Original EIR Concerning Greenhouse Gas Mitigation

1. It is not permissible under CEQA for the revised EIR ("REIR") to base consistency determinations or the percentage of impact mitigation on statewide programs to achieve AB32 reduction goals.

A review of 14 Cal.Code Regs. ("CEQA Guidelines") §§15064.4, 15125, 15126.2, 15126.4, 15183.5 related to analysis and mitigation of Greenhouse Gases ("GHG") indicates there is no provision for the approach taken by the consultant and County in counting statewide reductions toward the necessary project level reductions. Guideline 15126.4(a)(2) states that "mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments." Consistent with this provision, Guideline 15126.4(c) requires that the lead agency "shall consider feasible means, supported by substantial evidence and subject to monitoring or reporting, of mitigating the significant effects of greenhouse gas emissions."

While the agency can rely upon an existing plan such as a Climate Action Plan ("CAP") duly adopted after certification of an EIR for the CAP, there is no provision for reliance upon statewide reductions already occurring in order to provide project level mitigation. Orange County does not have a duly adopted CAP; it does not follow that the County can in turn rely upon statewide reductions to meet this project's individual GHG mitigation requirements.

The County should review the Legislative History re: Amendments to CEQA Guidelines (§§15064.4, 15125, 15126.2, 15126.4, 15183.5) Addressing Analysis and Mitigation and Greenhouse Gas Emissions Pursuant to SB97 as found in California Natural Resources Agency Final Statement of Reasons for Regulatory Action:

http://resources.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf

This legislative history for the GHG CEQA Guidelines indicates that the approach taken in the EIR and the REIR and the accompanying appendices is improper. Specifically, at pp. 88-89 of the Resources Agency Final Statement of Reasons for Regulatory Action attached hereto, the Resources Agency, pursuant to the Legislature's directive in Public Resources Code section 21083.05 (which directs that the Resources Agency "certify and adopt guidelines prepared and developed by the Office of Planning and Research" "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions[]") indicates:

> **to be considered mitigation, the measure must be tied to the impacts resulting from the project.**
>
> and

> **emissions reductions that would occur without the project would not normally qualify as mitigation.**

This concept is known as "additionality" and the Resources Agency has indicated "greenhouse gas emission reductions that are otherwise required by law or regulation would appropriately be considered part of the baseline and pursuant to Guideline 15064.4(b)(1), a new project's emission should be compared against that existing baseline." The REIR continues to improperly account for GHG emissions reduction by reliance on statewide programs and, most seriously, continuing to treat measures having nothing to do with the Esperanza Hills project as mitigation for the project impacts.

The "additionality" reasoning is supported by Pub. Res. Code sec. 21002 and 21081(a)(1) both of which expressly link mitigation measures to the significant effects of the project.

This reasoning is also supported by *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 128-131. This linkage relates to the required "nexus" between a mitigation measure and a project impact; by reliance on statewide measures already in place, the Project does not provide this required "nexus" and is not consistent with the "additionality" concept.

The REIR and appendix V rely on the California Air Pollution Control Officers Association ("CAPCOA"), Quantifying Greenhouse Gas Mitigation Measures: A Resource for Local Government to Assess Emission Reductions from Greenhouse Gas Mitigation Measures at pp. 32 and A-3 (August 2010) found at http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf; and http://www.aqmd.gov/docs/default-source/ceqa/handbook/capcoa-quantifying-greenhouse-gas-mitigation-measures.pdf?sfvrsn=2, but fail to follow its directives at p. 32:

> In order for a project or measure that reduces emissions to count as mitigation of impacts, **the reductions have to be "additional." Greenhouse gas emission reductions that are otherwise required by law or regulation would appropriately be considered part of the existing baseline. Thus, any resulting emission reduction cannot be construed as appropriate (or additional) for purposes of mitigation under CEQA**. For example, in the draft regulation for cap-and-trade, ARB specifies that in order to be eligible for offset credit, "emission reductions must be in addition to any greenhouse gas reduction, avoidance or sequestration otherwise required by law or regulation, or any greenhouse gas reduction, avoidance or sequestration that would otherwise occur." What this means in practice is **that if there is a rule that requires, for example, increased energy efficiency in a new building, the project proponent cannot count that increased efficiency as a mitigation or credit unless the project goes beyond what the rule requires; and in that case, only the efficiency that is in excess of what is required can be counted**. It also means that if there is a rule that requires a boiler to be replaced with one that releases

> fewer smog-forming pollutants, and the new boiler is more efficient and also releases less CO2, the reduced CO2 can't be counted as mitigation or credit, because the reductions were going to happen anyway. But if the boiler were replaced with a solar-powered water heater, the difference in emissions between a typical new boiler and the solar water heater could be counted.
>
> From a practical standpoint, any reductions that are not additional have to be either included in the baseline or subtracted from the project, whichever is more appropriate. In preparing this Report, CAPCOA made determinations about requirements to include in or exclude from the baseline. A more complete discussion of those determinations is included in Appendix B.

These conclusions are also supported by the Court of Appeal's recent decision analyzing SB 375 in *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966. The court indicated that the only tenable interpretation of SB 375 is that it requires local boards to set targets for and agencies to strive to meet those targets by, "emissions reductions resulting from regionally developed land use and transportation strategies, and that [SB 375] **requires these emissions reductions be in addition to those expected from statewide mandates.**" Also, SB 375 "reflects the importance of achieving significant ***additional*** **reductions** of greenhouse gas emissions from changed land use patterns and improved transportation to help achieve the goals of AB 32."

2. <u>A greater degree of GHG reductions may be needed from new land use projects than from the economy as a whole.</u>

As stated by the California Supreme Court in *Center for Biological Diversity v. California Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 226:

> **a greater degree of reduction may be needed from new land use projects than from the economy as a whole**: Designing new buildings and infrastructure for maximum energy efficiency and renewable energy use is likely to be easier, and is more likely to occur, than achieving the same savings by retrofitting of older structures and systems. The California Attorney General's Office made this point while commenting on an air district's greenhouse gas emissions reduction plan, in a letter one of the plaintiffs brought to DFW's attention in a comment on the EIR: "The [air district] Staff Report seems to assume that if new development projects reduce emissions by 29 percent compared to 'business as usual,' the 2020 statewide target of 29 percent below 'business as usual' will also be achieved, but it does not supply evidence of this. Indeed, it seems that **new development must be more GHG-efficient than this average, given that past and current sources of emissions, which are substantially less efficient than this average, will continue to exist and emit."**

and at 231:

> **Local governments thus bear the primary burden of evaluating a land use project's impact on greenhouse gas emissions.**

3. The REIR does not reflect the County's independent judgment.

The County must independently analyze the project's GHG impacts and its consistency with CEQA and the GHG regulatory scheme, and cannot simply rely upon the inadequate and legally insufficient GHG evaluations provided by the project applicant. The EIR "must reflect the independent judgment of the lead agency. The lead agency is responsible for the adequacy and objectivity of the [ ] EIR." Pub. Res. Code §21082.1(c)(1)-(2); 14 Cal. Code Regs. §115084(e). When certifying an EIR, the County must make specific findings, including one that the EIR reflects its independent judgment. Pub. Res. Code §21082.1(c); *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1452-55. Given the REIR's failure to comply with foundational CEQA GHG mitigation requirements and procedures, the County cannot make the necessary findings and has not exercised its independent judgment on the issue of GHG impacts and mitigation.

4. Any Statement of Overriding Considerations is not supported by substantial evidence.

The REIR indicates that even with mitigation, GHG impacts remain significant and unavoidable and the County will need to adopt a Statement of Overriding Considerations and findings related thereto in connection with GHG impacts. However, the REIR begins its analysis of GHG mitigation from a legally unfounded starting point: "a number of statewide programs are in place to achieve GHG emissions reductions that will attain a very substantial fraction of the AB 32 goal, creating a 5% shortfall to be mitigated by measures specific to the Project." REIR p. 5-275. Per the California Supreme Court in *City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945, 967 and the authority cited at 1., *supra*, this legally unfounded assumption may be properly rejected. As stated by the California Supreme Court:

> The erroneous assumption invalidates the Board's finding of infeasibility because the use of an erroneous legal standard constitutes a failure to proceed in a manner required by law. [citations omitted] The error also invalidates the Board's statement of overriding considerations, because 'CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible.' [citation omitted].

61 Cal.4th at 965.

5. The REIR contains no discussion of project consistency with SB 32/AB 197 requirements, including how or if the project will meet emissions cuts of 40% below 1990 levels by 2030 and conclusions regarding Project consistency with other state and local plans, policies and regulations are unsupported.

The REIR at p. 5-274 contains some references to the GHG regulatory scheme and some discussion of SB 375 and RTP/SCS consistency at pp. 5-278-280. However, the REIR contains no mention of the recently enacted SB32/AB197, its requirements and in particular, whether the Project will or will not meet emissions cuts of 40% below 1900 levels by 2030.

Outside of SB375 and RTP/SCS Consistency, the REIR contains no specific discussion of Project consistency with the remainder of the applicable GHG regulatory scheme. The REIR makes vague reference to unidentified "[r]ecent studies [that] show the state's existing and proposed regulatory framework will allow the state to reduce its GHG emissions level to 40% below 1990 levels by 2050" but provides no specifics regarding these "recent studies" and acknowledges that "these studies did not provide an exact regulatory and technological roadmap to achieve the 2030 and 2050 goals". Preliminarily, this discussion fails to provide adequate information to the public or decision makers concerning these unnamed studies.

The REIR also uses contingent and tentative language such as "could allow", "suggesting", etc. This discussion regarding unidentified "recent studies" is followed by a recitation of statewide, not project specific, efforts to meet statewide goals. In the absence of examination and analysis of project specific measures, not statewide models encompassing "the entire California economy", the REIR's conclusions regarding the Project's consistency with state and local plans at p. 5-278 is unsupported.

With respect to the REIR's discussion of SB 375 and RTP/SCS consistency, the discussion appears to rely on an exhibit at 5-267 (Exhibit 5-24); however, the exhibit lacks any legend or explanation for the reader to discern its meaning or significance to the GHG discussion. The exhibit's relation and relevance to the discussion at 5-278-280 and its meaning should be clarified and explained.

6. The REIR contains unexplained inconsistencies concerning construction emissions CO_2e analysis as between the EIR and REIR which render the REIR conclusions unsupported by substantial evidence.

The EIR and REIR inexplicably contain different conclusions regarding total construction related CO_2e emissions at p. 5-273. The REIR must include some explanation for the disparity between the old and new figures in order to provide adequate information to the public and the decision makers. Was an appropriate and acceptable methodology for calculating emissions used? At present,

the public cannot provide meaningful comment for these unexplained changes and the REIR fails to serve its fundamental informational purpose.

Significant Changes to the EIR Require Circulation of the REIR

The REIR takes the position that none of the corrections made to the EIR and mandated by the court in *Protect Our Homes and Hills v. County of Orange* require circulation of the document for public review and comment under CEQA. This conclusion is incorrect.

The Court of Appeal, Fourth District, Division One, recently addressed the related issue of recirculation of a draft EIR in ways directly relevant to these revisions to the Esperanza Hills EIR. In *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91, the court found revisions to a draft EIR's air quality and greenhouse gas analysis and hydrology and water quality impact analysis required recirculation. In the case of the greenhouse gas analysis, recirculation was required because: "**the public never had a meaningful opportunity to comment on the information because the City omitted the information from the draft EIR**". Likewise, the County has now added a multitude of GHG mitigation measures to the REIR in response to deficiencies identified by the court in *Protect Our Homes and Hills v. County of Orange*.

Also, in *Spring Valley Lake Assn.*, in the case of hydrology and water quality analysis, recirculation for public comment was required because the revisions, "**deprived the public of a meaningful opportunity to comment on an ostensibly feasible way to mitigate a substantial adverse environmental effect**." The reasoning of the Fourth District is applicable here and the significant changes and additions to mitigation measures for GHG impacts without formal circulation of the REIR, in the rushed manner to comply with the writ of mandate issued by Judge Claster in *Protect Our Homes and Hills v. County of Orange*, deprives "the public of a meaningful opportunity to comment."

Other authorities are in agreement. Revision of an EIR to remedy CEQA violations identified by the Court necessarily requires circulation for public comment. *See e.g., Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1357-59 (City required to recirculate revised EIR section regarding inadequate alternative analysis even though court ruled against petitioner on initial recirculation claim) ("PAC"). As stated by the PAC court:

> The revision of the amended DEIR to remedy its inadequate analysis of the reduced-size alternative will necessarily require recirculation of this section of the amended DEIR.... The revised environmental document must be subjected to the same critical evaluation that occurs in the draft stage, so that the public is not denied an opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom....The City's CEQA violations can only be remedied by revising the amended DEIR to include an adequate analysis of the reduced-size alternative, recirculating the revised portion of the amended DEIR and adding to the administrative record evidence that will permit the City Council to make an informed, fact-based decision on the feasibility of the reduced-size alternative.

Other cases are in accord with this position. *See San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502 (Peremptory writ directed respondents to vacate certification of EIR, prepare a supplemental EIR (which requires circulation for public comment) and reconsider prior approval of the project in light of the supplemental EIR); *Poet, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681, 766-67 (Court directs writ include direction to allow public comment "to assure that any subsequent environmental review…occurs prior to the 'approval'" and "direct[s] that the issue of the land use changes…be reopened and the public allowed to comment on the issue"); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221 (Court directs issuance of orders that set a date by which City must certify new EIRs in accordance with CEQA, including provisions for public comment); *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 464 (after court decision finding EIR inadequate, City revised infirm sections and circulated EIR revisions for public comment); *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 266-67 ("Because the EIR certified…was inadequate in its analysis of energy impacts of the project, recirculation and consideration of public comments...will be necessary before the EIR may be certified and the project approved").

The approach taken by the County bypassing adequate public comment or review of the REIR invites the same type of *post hoc* rationalization found improper in multiple CEQA decisions and the Court's Statement of Decision in *Protect Our Homes and Hills v. County of Orange*. The public participation and informational policies underlying circulation of a revised EIR are even more important when the initial EIR has been found to be inadequate. *See Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 467. No presumption of CEQA compliance attaches to an EIR subjected to a legal challenge and found inadequate by the court. *Cf.* Pub. Res. Code §21167.2.

The Addition of Yet Another Access Alternative Requires Environmental Review and Circulation of an Addendum, or Subsequent or Supplemental EIR

The Project applicant is putting forward yet another access alternative, cutting procedural corners in an attempt to impermissibly avoid CEQA compliance and examination of environmental impacts of this new access alternative and requesting deletion of previous conditions of project approval.

With respect to the new access alternative, the staff report contains wholly illegible depictions of the new alternative at p. 9. The public and the decision makers have no ability to even determine the location or specifics of this new alternative. The report contains only conclusory statements concerning the necessity of subsequent environmental review which lack any evidence or support.

The applicant proposes amendment of the specific plan to build a new access route in a different location and with a different configuration than the serpentine, existing route examined in the EIR. The applicant's new route also includes a bridge over Blue Mud Canyon. The new route and the proposed bridge will entail construction impacts, construction and installation of supports and concomitant disturbance of habitat, none of which has been identified or analyzed. The County is simply not exercising any independent judgment in connection with this specific plan amendment

which should require, at a minimum, an addendum to the EIR. Once the County actually identifies the potential impacts of this new access route, a subsequent or supplemental EIR may be required under Public Resources Code section 21166. However, the present record is wholly inadequate to determine the impacts of this new route, whether they are significant, and whether further environmental review is required under CEQA.

Thank you for your attention to these comments. At present, the REIR remains inadequate under CEQA and should be formally circulated for public comment. The new access alternative should undergo some form of environmental review and amendment of the specific plan without additional environmental review is improper under CEQA.

Very truly yours,
KEVIN K. JOHNSON, APLC

Jeanne L. MacKinnon

Enc.
Attachment 1 – screenshot http://ocplanning.net/planning/projects/esperanza_hills
Attachment 2 – Excerpts California Natural Resources Agency Final Statement of Reasons for Regulatory Action

ATTACHMENT 1

CURRENT PROJECTS

PLANNING & DEVELOPMENT Home
Codes and Regulations
Community Plans
Current Projects
Hearings and Meetings
Public Notices
Applications and Forms
Subdivision
Land Development

POPULAR

Permit Applications
Schedule Permit Inspection
My Property Details
Encroachment Permits
Online Permitting
Community Plans
Planning Commission
Advisory Committees
Development Fees
Citation Payments
The Ranch PC

RESOURCES

Agricultural Commissioner / Sealer of Weights and Measures
Census Bureau Website
International Code Council (ICC)
Land Records
Orange County Fire Authority
My Property Details
Board of Professional Engineers, Land Surveyors, and Geologists
OC Stormwater Program
Graffiti Removal Forms
California Architects Board
Green Living
Contractors State License Board (CSLB)

Esperanza Hills

Public Notice Planning Commission Public Hearing October 26, 2016

October 26, 2016 Planning Commission Documents

Φιναλ Σταφφ Ρεπορτ ΠΧ Οχτοβερ 26, 2016 PEdISEA 10.24.16
Ποωερ Ποιντ Πρεσεντατιον – χομινγ σοον
Αττ. 1 – Αππλιχαντ'σ Λεττερ
Αττ. 2 – Πλαννινγ Χομμισσιον Σταφφ Ρεπορτ – Θανυαρψ 14, 2015
Αττ. 3 – Βοαρδ οφ Συπερϖισορσ Αγενδα Σταφφ Ρεπορτσ – Μαρχη 10, 2015 ανδ θυνε 2 , 2015
Αττ. 4 – Στατεμεντ οφ Λεχισιον – Θυλψ 22, 2016
Αττ. 5 – Ωριτ οφ Μανδατε – Αυγυστ 24, 2016
Αττ. 6 – Ρεϖισεδ Φιναλ ΕΙΡ 616 Σεχτιον 5-6 Γρεενηουσε Γασ Εμισσιονσ (τραχκ χηανγεσ ρεδλινεδ)
Αττ. 7 – Νεω Τεχηνιχαλ Αππενδιξ ς το Ρεϖισεδ Φιναλ ΕΙΡ 616 – Γρεενηουσε Γασ Μιτιγατιον
Αττ. 8 – Ρεϖισεδ Φιναλ ΕΙΡ 616 ((φυλλ δοχυμεντ ωιτη αππροσεδ ΦΕΙΡ 616 ερρατα)
Αττ. 9 – Ρεϖισεδ Φιναλ ΕΙΡ 616 Μιτιγατιον Μονιτορινγ ανδ Ρεπορτινγ Προγραμ (τραχκ χηανγεσ ρεδλινεδ)
Αττ. 10 – Ρεϖισεδ Φιναλ ΕΙΡ 616 Μιτιγατιον Μονιτορινγ ανδ Ρεπορτινγ Προγραμ
Αττ. 11 – Φινδινγσ ανδ Στατεμεντ οφ Οϖερριδινγ Χονσιδερατιονσ
Αττ. 12 – Συβσταντιαλ Χονφορμανχε Μεμορανδυμ δατεδ Σεπτεμβερ 28, 2016 φρομ ΧΑΑ Πλαννινγ
Αττ. 13 – Δραφτ Εσπεραντζα Ηιλλσ Σπεχιφιχ Πλαν (τραχκ χηανγεσ ρεδλινεδ)
Αττ. 14 – Δραφτ Εσπεραντζα Ηιλλσ Σπεχιφιχ Πλαν
Αττ. 15 – Εξηιβιτσ οφ Οπτιον 1 ανδ Οπτιον 1 Μοδιφιεδ
Αττ. 16 – Προποσεδ Ρεσολυτιον Νο. 16-08
Αττ. 17 – Χομμεντ Λεττερσ
Πυβλιχ Νοτιχε οφ τηε Πλαννινγ Χομμισσιον Οχτοβερ 26, 2016

Public Notice Subdivision Committee Public Hearing November 2, 2016

Subdivision Committee Staff Report - coming soon
Vesting Tentative Tract Map (VTTM) 17522

Public Notice Board of Supervisors Public Hearing March 10, 2015

Public Notice

Esperanza Hills

Esperanza Hills Specific Plan - as Adopted, June 2015
Notice of Preparation and Initial Study
Esperanza Hills - Draft Specific Plan
Esperanza Hills - Public Notice of Availability (NOA) DEIR 616

Public Notice Community Forum - March 5, 2015

Public Information Notice

Esperanza Hills Public Outreach - January 2014

ATTACHMENT 2

CALIFORNIA NATURAL RESOURCES AGENCY

FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

Amendments to the State CEQA Guidelines Addressing Analysis and Mitigation of Greenhouse Gas Emissions Pursuant to SB97

December 2009

CALIFORNIA NATURAL RESOURCES AGENCY
FINAL STATEMENT OF REASONS FOR REGULATORY ACTION

December 2009

INTRODUCTION

The California Natural Resources Agency ("the Resources Agency") has adopted certain amendments and additions to certain guidelines implementing the California Environmental Quality Act (Public Resources Code section 21000 *et seq.*) ("CEQA"). Specifically, these amendments implement the Legislature's directive in Public Resources Code section 21083.05 (enacted as part of SB97 (Chapter 185, Statutes 2007)). That section directs the Resources Agency to "certify and adopt guidelines prepared and developed by the Office of Planning and Research" "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions[.]" (Pub. Resources Code, § 21083.05(a)-(b).)

CEQA generally requires public agencies to review the environmental impacts of proposed projects, and, if those impacts may be significant, to consider feasible alternatives and mitigation measures that would substantially reduce significant adverse environmental effects. Section 21083 of the Public Resources Code requires the adoption of guidelines to provide public agencies and members of the public with guidance about the procedures and criteria for implementing CEQA. The guidelines required by section 21083 of the Public Resources Code are promulgated in the California Code of Regulations, title 14, sections 15000-15387 (the "Guidelines" or "State CEQA Guidelines"). Public agencies, project proponents, and third parties who wish to enforce the requirements of CEQA, rely on the Guidelines to provide a comprehensive guide on compliance with CEQA. Subdivision (f) of section 21083 requires the Resources Agency, in consultation with the Office of Planning and Research ("OPR"), to certify, adopt and amend the Guidelines at least once every two years.

Section 21083.05, as noted above, requires the promulgation of Guidelines specifically addressing analysis and mitigation of the effects of greenhouse gas emissions. The Resources Agency has adopted the following changes to the Guidelines ("Amendments") to implement that directive:

Add sections:	15064.4, 15183.5 and 15364.5.
Amend sections:	15064, 15064.7, 15065, 15086, 15093, 15125, 15126.2, 15126.4, 15130, 15150, 15183, Appendix F and Appendix G.

In addition to guidelines implementing SB97, some of the amendments listed above are non-substantive corrections.

The Resources Agency considered reasonable alternatives to the Amendments. The Resources Agency has determined that no reasonable alternative would be more effective in carrying out the purpose for which the action is proposed or would be as effective as, and less burdensome to affected private persons than, the Amendments. This conclusion is based on the Resources Agency's determination that the Amendments are necessary to implement the Legislature's directive in SB97 and to update the Guidelines to reflect recent case law. Thus, the Amendments add no additional substantive requirements; rather, the Guidelines merely assist lead agencies in complying with CEQA's existing requirements. The Resources Agency rejected the no action alternative because it would not respond to the Legislature's directive in SB97. There are no alternatives available that would lessen any adverse impacts on small businesses, as any impacts are due to existing requirements of CEQA and not the Amendments.

The Resources Agency also initially determined that the Amendments would not have a significant adverse economic impact on business. The Resources Agency has determined that this action would have no impacts on project proponents. However, the Resources Agency is aware that certain of the statutory changes enacted by the Legislature and judicial decisions, described in greater detail below, that are reflected in the Amendments could have an economic impact on project proponents, including businesses. Among other things, project proponents could incur additional costs in assisting lead agencies to comply with CEQA's requirement for analysis of greenhouse gas emissions. However, the Amendments to the Guidelines merely reflect these legislative and judicial requirements, and the Resources Agency knows of no less costly alternative. The Amendments clarify and update the Guidelines to be consistent with legislative enactments that have modified CEQA, and recent case law interpreting it, but does not impose any new requirements. Therefore, the Amendments would not have a significant, adverse economic impact on business.

Some comments were submitted during the public comment period and during the public hearings on the Proposed Amendments suggesting that the adverse economic impacts could result. For example, some suggested that the addition of forestry resources to the Appendix G checklist may increase the regulatory burden on the agricultural industry. Others suggested that application of the Guidelines to renewable energy projects or those implementing AB32 may be counterproductive. Despite those suggestions, no evidence was presented to the Resources Agency supporting those claims. Moreover, those comments did not provide any rationale challenging the Resources Agency's position that the Proposed Amendments implement existing requirements. Therefore, having considered all of the comments submitted on the Proposed Amendments, the Resources Agency concludes that its initial determination that the proposed action will not have a significant adverse economic impact remains correct.

The Amendments do not duplicate or conflict with any federal statutes or regulations. CEQA is similar in some respects to the National Environmental Policy Act ("NEPA"), 42 U.S.C. sections 4321-4343. Federal agencies are subject to NEPA, which

requires environmental review of federal actions. State and local agencies are subject to CEQA, which requires environmental review before state and local agencies may approve or decide to undertake discretionary actions and projects in California. Although both NEPA and CEQA require an analysis of environmental impacts, the substantive and procedural requirements of the two statutes differ. Most significantly, CEQA requirements for feasible mitigation of environmental impacts exceed NEPA's mitigation provisions. A state or local agency must complete a CEQA review even for those projects for which NEPA review is also applicable, although Guidelines sections 15220-15229 allow state, local and federal agencies to coordinate review when projects are subject to both CEQA and NEPA. Because state and local agencies are subject to CEQA unless exemptions apply, and because CEQA and NEPA are not identical, guidelines for CEQA are necessary to interpret and make specific provisions of SB97 and do not duplicate the Code of Federal Regulations.

FINAL STATEMENT OF REASONS

The Administrative Procedure Act requires that an agency prepare a final statement of reasons supporting its proposed regulation. The final statement of reasons updates the information contained in the initial statement of reasons, contains final determinations as to the economic impact of the regulations, and provides summaries and responses to all comments regarding the proposed action. The initial statement of reasons, as updated and revised, are contained in full in this final statement of reasons. The summaries and responses to comments are included in the Natural Resources Agency's file of this rulemaking proceeding.

Below is a brief background on the science relating to the effects of greenhouse gas emissions, as well as the various initiatives that California is implementing to reduce those emissions. Following that background, OPR's public engagement process and the Natural Resources Agency's rulemaking process is briefly described. Next, this Final Statement of Reasons explains the purpose and necessity of each proposed change to the Guidelines. Finally, Thematic Responses, addressing the major themes that were raised in public comments, are provided.

BACKGROUND ON THE EFFECTS OF GREENHOUSE GAS EMISSIONS AND CALIFORNIA'S EFFORTS TO REDUCE THOSE EMISSIONS

This section provides a brief background on the potential effects of greenhouse gas emissions and California's efforts to reduce those emissions.

What Are Greenhouse Gases?

Certain gases in Earth's atmosphere naturally trap solar energy to maintain global average temperatures within a range suitable for terrestrial life. Those gases – which primarily include carbon dioxide, methane, nitrous oxide, hydrofluorocarbons,

perfluorocarbons and sulfur hexafluoride – act as a greenhouse on a global scale. (Health and Safety Code, § 38505(g).) Thus, those heat-trapping gases are known as greenhouse gases ("GHG").

The Legislature defined "greenhouse gases" to include the six gases mentioned above in California's Global Warming Solutions Act. (Health & Saf. Code, § 38500 et seq.) Similarly, the U.S. EPA has found that those same six gases could be regulated under the authority of the Clean Air Act. According to the U.S. EPA:

> (1) These six greenhouse gas share common properties regarding their climate effects; (2) these six greenhouse gases have been estimated to be the primary cause of human-induced climate change, are the best understood drivers of climate change, and are expected to remain the key driver of future climate change; (3) these six greenhouse gases are the common focus of climate change science research and policy analyses and discussions; [and] (4) using the combined mix of these gases as the definition (versus an individual gas-by-gas approach) is consistent with the science, because risks and impacts associated with greenhouse gas-induced climate change are not assessed on an individual gas approach....

(EPA, Endangerment Finding, 74 Fed. Reg. 66496, 66517 (December 15, 2009).) The United Nations Framework Convention on Climate Change also addresses these six gases. (*Id.* at p. 66519.)

What Causes Greenhouse Gas Emissions?

The incremental contributions of GHGs from innumerable direct and indirect sources result in elevated atmospheric GHG levels. (EPA, Draft Endangerment Finding, 74 Fed. Reg. 18886, 18904 (April 24, 2009) ("cumulative emissions are responsible for the cumulative change in the stock of concentrations in the atmosphere"); see also 74 Fed. Reg. 66496, 66538 (same in Final Endangerment Finding).) Some GHG emissions occur through natural processes such as plant decomposition and wildfires. One large source of GHG emissions, for example, is wildfire on forestlands and rangelands, which release carbon as a result of material being burned. (California Board of Forestry and Fire Protection, *2008 Strategic Plan and Report to the CARB on Meeting AB32 Forestry Sector Targets* (October, 2008), at p. 2.)

Human activities, such as motor vehicle use, energy production and land development, also result in both direct and indirect emissions that contribute to highly elevated concentrations of GHGs in the atmosphere. (California Energy Commission, *Inventory of California Emissions and Sinks: 1990 to 2004* (2006).)[1] Transportation

[1] Multiple statewide emission inventories covering the same period of time may vary. This is largely due to inventories characterizing an emission source by sectors (e.g. agriculture, cement, transportation, etc.) which may not be treated the same depending on the methodology used and access to information. Thus,

alone is estimated to account for nearly 40 percent of California's GHG emissions. (California Air Resources Board, *Climate Change Proposed Scoping Plan* (2008), at p. 11 ("Scoping Plan"); California Energy Commission 2007, *2007 Integrated Energy Policy Report*, CEC-100-2007-008-CMF ("2007 IEPR") at p. 18, Figure 1-2.) Emissions attributable to transportation result largely from development that increases, rather than decreases, vehicle miles traveled: low density, unbalanced land uses separating jobs and housing, and a focus on single-occupancy vehicle travel. (California Energy Commission, The Role of Land Use In Meeting California's Energy and Climate Change Goals. (2007) at p. 9.) In approaching regulation of GHG emissions in California, for example, the California Air Resources Board ("ARB") proposes to regulate various economic sectors that are known to emit GHGs, including electric power, transportation, industrial sources, landfills, commercial and residential sectors, agriculture and forestry. (Scoping Plan, Appendix F.) With a growing population and economy, California's total GHG emissions continue to increase. As explained below, this rapid rate of increase in GHG emissions is causing a change in the composition of atmospheric gases that may cause life threatening adverse environmental consequences.

What Effects May Result from Increased Greenhouse Gas Emissions?

Several measurable effects, including, among others, an increase in global average temperatures have been attributed to increases in GHG emissions resulting from human activity. (Intergovernmental Panel on Climate Change, *Working Group 1 Report: The Physical Science Basis* (2001), at p. 101.) Evidence further indicates that a warmer planet may in turn lead to changes in rainfall patterns, a retreat of polar icecaps, a rise in sea level, and changes in ecosystems supporting human, animal and plant life. (U.S. Environmental Protection Agency, *Technical Support Document for Endangerment and Cause or Contribute Findings for Greenhouse Gases under Section 202(a) of the Clean Air Act,* April 17, 2009 ("Technical Support Document"), at pp. ES-1 to ES-3.) Climate change is not the only effect of increased GHG emissions. Impacts to human health and ocean acidification are also attributed to increasing concentrations of GHGs in the Earth's atmosphere. (*Id.* at p. 57.)

Globally elevated concentrations of GHGs have been observed to induce a range of associated effects. For example, the effects of atmospheric warming include, but are not limited to, increased likelihood of more frequent and intense natural disasters, increased drought, and harm to agriculture, wildlife, and ecological systems. (Technical Support Document at pp. ES-1, ES-6.) According to a report prepared for the California Climate Change Center:

> Climate change is likely to affect the abundance, production, distribution, and quality of ecosystem services throughout the State of California

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two statewide emissions inventories may be different depending on the agency that created them or its intended application. The CARB is in the process of updating its statewide data and methodologies to be consistent with international and national guidelines. The typical emissions inventory covers 1990 to 2004.

> including the delivery of abundant and clean water supplies to support human consumption and wildlife, climate stabilization through carbon sequestration, the supply of fish for commercial and recreational sport fishing. For example, as described in this report, areas of the state suitable for forage production to support cattle grazing in natural areas could shift as some parts of the state become too dry to support forage and others become wetter. The ability of the State's forests to sequester carbon and support climate stabilization could be hindered as productivity decreases and fires increase. And increased water temperatures in streams due to a decrease in provision of fresh water could seriously reduce salmon reproduction and subsequently reduce the number of salmon available for commercial and recreational harvest. Also, areas of the state suitable for forage production to support cattle grazing in natural areas could shift as some parts of the state become too dry to support forage and others become wetter. All of these ecosystem services have economic value and that value and its distribution is likely to changes under a changing climate.

(Rebecca Shaw, et al., for the California Climate Change Center, *The Impact of Climate Change on California's Ecosystem Services*, March 2009, CEC-500-2009-025-D, at p. 1.)

The effects of increased GHG concentrations are already being felt in California. For example, global atmospheric changes are causing sea levels to rise. An increase of approximately 8 inches has been recorded at the Golden Gate Bridge over the past 100 years. Such sea level rise threatens low coastal areas with inundation and increased erosion. (Scoping Plan, at p. 10.)

While sea levels continue to rise, the Sierra snowpack has been shrinking. Average annual runoff from spring snowmelt has decreased 10% in the last 100 years. Because snow in the Sierra acts as a reservoir, holding winter water for use later in the year, reduced snowpack creates greater potential for summer droughts and reduced hydroelectricity generation. (Office of Environmental Health and Hazard Assessment, April, 2009, Indicators of Climate Change in California, at p. 76.) Climate change is also thought to account for changes in the timing of California's major precipitation events. As explained in a report prepared for the California Climate Change Center:

> reservoirs were designed to store only a fraction of the state's entire yearly precipitation, under the assumption that the annual mountain snowpack would melt at roughly the same time every year. During anomalously high rain or snowmelt events, reservoirs must not only store water, but also discharge excess water to avoid flooding. Water must sometimes be discharged in anticipation of large events to reduce flood risk. The dual functions of storage and flood management require reservoir managers to carefully balance factors such as precipitation, snowmelt timing, reservoir storage capacity, and demand. Even if future precipitation remains

(a) Avoiding the impact altogether by not taking a certain action or parts of an action.

(b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment.

(d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(e) Compensating for the impact by replacing or providing substitute resources or environments.

(State CEQA Guidelines, § 15370.) As subdivision (e) implies, off-site measures may constitute mitigation under CEQA, and such measures have been upheld as adequate mitigation in CEQA case law. (See, e.g., *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App. 4th 603, 619-626.)

Whether on-site or off-site, to be considered mitigation, the measure must be tied to impacts resulting from the project. Section 21002 of the Public Resources Code, the source of the requirement to mitigate, states that "public agencies should not approve projects as proposed if there are ... feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects[.]" Similarly, section 21081(a)(1) specifies a finding by the lead agency in adopting a project that "[c]hanges or alterations have been required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment." Both statutory provisions expressly link the changes to be made (i.e., the "mitigation measures") to the significant effects of the project. Courts have similarly required a link between the mitigation measure and the adverse impacts of the project. (*Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal. App. 4th 99, 128-131 (EIR must discuss "the history of water pumping on [the off-site mitigation] property and its feasibility for providing an actual offset for increased pumping on the [project] property").) The text of sections 21002 and 21081, and case law requiring a "nexus" between a measure and a project impact, together indicate that "but for" causation is a necessary element of mitigation. In other words, mitigation should normally be an activity that occurs in order to minimize a particular significant effect. Or, stated another way and in the context of greenhouse gas emissions, emissions reductions that would occur without a project would not normally qualify as mitigation.

Notably, this interpretation of the CEQA statute and case law is consistent with the Legislature's directive in AB32 that reductions relied on as part of a market-based compliance mechanism must be "in addition to any greenhouse gas emission reduction otherwise required by law or regulation, and any other greenhouse gas emission

reduction that otherwise would occur." (Health and Safety Code, § 38562(d)(2).) While AB32 and CEQA are separate statutes, the additionality concept may be applied analytically in the latter as follows: greenhouse gas emission reductions that are otherwise required by law or regulation would appropriately be considered part of the existing baseline. Pursuant to section 15064.4(b)(1), a new project's emissions should be compared against that existing baseline.

Thus, in light of the above, and in response to concerns raised in the comments, the Natural Resources Agency has revised section 15126.4(c)(3) to state that mitigation includes: "Off-site measures, including offsets that are not otherwise required, to mitigate a project's emissions[.]" This provision is intended to be read in conjunction with the statutory mandate in Public Resources Code sections 21002 and 21081 that mitigation be tied to the effects of a project.

This provision would not limit the ability of a lead agency to create, or rely on the creation of, a mechanism, such as an offset bank, created prospectively in anticipation of future projects that will later rely on offsets created by those emissions reductions. The Initial Statement of Reasons referred, for example, to community energy conservation projects. (Initial Statement of Reasons, at p. 38.) Such a program could, for example, identify voluntary energy efficiency retrofits that would not occur absent implementation of the program, and then fund the retrofits through the sale of offsets that would occur as a result of the retrofit. Emissions reductions that occur as a result of a regulation requiring such reduction, on the other hand, would not constitute mitigation.

Some comments opined that offsets are highly uncertain and of questionable legitimacy. The Initial Statement of Reasons, however, cites several sources discussing examples of offsets being used in a CEQA context. Further, the ARB Scoping Plan describes offsets as way to "provide regulated entities a source of low-cost emission reductions, and ... encourage the spread of clean, efficient technology within and outside California." (Scoping Plan, Appendix C, at p. C-21.) The Natural Resources Agency finds that the offset concept is consistent with the existing CEQA Guidelines' definition of "mitigation," which includes "[r]ectifying the impact by repairing, rehabilitating, or restoring the impacted environment" and "[c]ompensating for the impact by replacing or providing substitute resources or environments." (State CEQA Guidelines, §§ 15370(c), (e).)

While the proposed amendments recognize offsets as a potential mitigation strategy, they do not imply that offsets are appropriate in every instance. The efficacy of any proposed mitigation measure is a matter for the lead agency to determine based on the substantial evidence before it. Use of the word "feasible" in proposed Section 15126.4(c) requires the lead agency to find that any measure, including offsets, would be "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (State CEQA Guidelines, § 15364.)

CAA PLANNING

Memorandum

To: Kevin Canning, Contract Planner, County of Orange

From: Shawna Schaffner, CAA Planning

Date: October 26, 2016

Subject: Response to October 25, 2016 Comment Letter from Kevin Johnson

I have reviewed Mr. Johnson's October 25, 2016 comment letter on Orange County Planning Commission Agenda Item #2, Esperanza Hills, and offer the following responses. The comments have been bracketed for ease of reference and the numbered responses correspond to the brackets. A copy of Mr. Johnson's letter is attached for reference.

1. The REIR includes 40 new, distinct mitigation measures. Each of the 40 new mitigation measures includes a responsible party, timing of implementation and a definition of the measure. The measures are specific to the proposed project and distinct from State-wide or regional measures. Each measure is fully enforceable by the County of Orange and is included in the Mitigation Monitoring and Reporting Program.

The analysis regarding potential GHG emissions reductions from statewide programs is to provide information regarding the project's consistency with AB 32. However, the project's mitigation is not based on consistency with AB 32, but rather on the significance threshold for the project, which is SCAQMD's 3,000 MTCO2e threshold. The 40 distinct mitigation measures incorporated into the REIR were drawn from the California Air Pollution Control Officers Association ("CAPCOA") manuals in order to attempt to mitigate the project's GHG emissions to a level below 3,000 MTCO2e per year. These mitigation measures are project-specific and "in addition" to any potential GHG emissions reductions from state, regional, and local programs. For informational purposes, the EIR also evaluated whether the project could reduce its GHG emissions level to below 3,000 MTCO2e even if taking into account GHG emissions reductions attributable to state, regional, and local programs. Because the project cannot reduce its GHG emissions level to below 3,000 MTCO2e per year even with the implementation of all feasible project-level mitigation measures (GHG-1 to GHG-40), the impact is considered significant and unavoidable and will require a statement of overriding considerations to approve.

2. See response to comment 1 above. As clearly stated in the REIR, the Project will achieve a reduction of 7.93% related to greenhouse gas emissions in addition to those expected from statewide mandates. Again, the Project goal is to reduce emissions to a level below the SCAQMD threshold of 3,000 MTCO2e for purposes of CEQA. It is unclear why the commentor indicates that the REIR includes "measures having nothing to do with the Esperanza Hills project." There are 40 project specific mitigation measures included within the REIR. The 40 mitigation measures are in addition to reductions in GHG emissions associated with State-wide plans.

3. The CAPCOA was the basis for the list of mitigation measures incorporated into the Project. As noted in Chapter 5.6 of the REIR, the current CalEEMod computer model was used to calculate construction emissions and operational emissions. The Baseline Project Scenario Emission Calculation consists of unmitigated project emissions reflecting only rules adopted as of 2006, which is the assumption under the AB 32 scoping plan and the CAPCOA Quantification Report dated August 2010, which selected a baseline period to correspond to average GHG emissions from 2002 to 2004 inclusive. The Esperanza Hills Specific Plan has design features included and required, such as low water use and Energy Star construction and appliances, but those design features were not incorporated as part of the baseline calculation for the CalEEMod runs. As detailed throughout the REIR, the final GHG emissions reduction of 7.93% is above and beyond the anticipated reductions resulting from statewide and local emissions reduction mandates.

4. Comment noted with regarding statement that a greater degree of GHG reductions may be needed from new land use projects. While the commenter quotes from a recent court decision, there is no specific information about why this relates to the proposed Project. The local government's burden in evaluating land use and greenhouse gas emissions has been met through the evaluation of the project's greenhouse gas emissions and incorporation of 40 project specific mitigation measures into the REIR.

5. The County is within its discretion to retain a consultant to prepare environmental documentation and may consider information provided by the applicant. The REIR includes a supplemental analysis on the project's greenhouse gas emissions completed by Fred Greve, Professional Engineer. County Staff reviewed the Greve analysis and also retained a third-party consultant, Chambers Group, to review the Greve analysis. This third-party review is included within the Planning Commission Staff Report under Attachment 17. The Chamber Group memorandum, dated September 16, 2016 indicates that the Greve analysis is adequate to express results of the project specific GHG mitigation measures and is consistent with CEQA. The memorandum further describes that drafts of the Greve analysis were reviewed and several detailed comments were provided which were subsequently addressed and incorporated into the final Greve analysis dated September 14, 2016. The County and its Staff have and will continue to exercise its independent judgment on the project and its environmental impacts.

6. The analysis regarding potential GHG emissions reductions from statewide programs is to provide information regarding the project's consistency with AB 32. However, the project's mitigation is not based on consistency with AB 32, but rather on the significance threshold for the project, which is SCAQMD's 3,000 MTCO2e threshold. Mitigation

measures were drawn from the CAPCOA manuals in order to attempt to mitigate the project's GHG emissions to a level below 3,000 MTCO2e per year. For informational purposes, the EIR also evaluated whether the project could reduce its GHG emissions level to below 3,000 MTCO2e even if taking into account GHG emissions reductions attributable to state, regional, and local programs. Because the project cannot reduce its GHG emissions level to below 3,000 MTCO2e per year even with the implementation of all feasible project-level mitigation measures (GHG-1 to GHG-40), the impact is considered significant and unavoidable and will require a statement of overriding considerations to approve.

7. The recent studies referred to by the REIR include, for example, Energy and Environmental Economics (E3), "Summary of the California State Agencies' PATHWAYS Project: Long-term Greenhouse Gas Reduction Scenarios" (April 2015); Jeffrey Greenblatt, Energy Policy, "Modeling California Impacts on Greenhouse Gas Emissions" (Vol. 78); and California Air Resources Board (May 2014) First Update to the Climate Change Scoping Plan. The analysis regarding potential GHG emissions reductions from statewide programs is to provide information regarding the project's consistency with AB 32. However, the project's mitigation is not based on consistency with AB 32, but rather on the significance threshold for the project, which is SCAQMD's 3,000 MTCO2e threshold. Mitigation measures were drawn from the CAPCOA manuals in order to attempt to mitigate the project's GHG emissions to a level below 3,000 MTCO2e per year. For informational purposes, the original EIR and the REIR also evaluated whether the project could reduce its GHG emissions level to below 3,000 MTCO2e even if taking into account GHG emissions reductions attributable to state, regional, and local programs. Because the project cannot reduce its GHG emissions level to below 3,000 MTCO2e per year even with the implementation of all feasible project-level mitigation measures (GHG-1 to GHG-40), the impact is considered significant and unavoidable and will require a statement of overriding considerations to approve.

8. The letter comments on an inconsistency in Project construction emissions. The DEIR analysis was based on an analysis dated July 13, 2013 which estimated an amortized construction emission scenario of 198.1 MTCO2e and used CalEEMod version 2011.1.1. In response to a comment received during the public review of the DEIR, an updated analysis was prepared using the updated CalEEMod version 13.2.2. The difference between the July 2013 analysis and the April 2014 analysis was determined to be insignificant and in some cases, emissions were less using the CalEEMod 13.2.2 model run and was fully discussed in the Project Responses to Comments document. Therefore, the inconsistency has been previously analyzed and described and the public has had ample opportunity to review the analysis. The DEIR analysis was based on a total of 378 residential units. The updated REIR analysis used the actual 340 unit scenario which further reduced project specific construction emissions. The analysis included in the REIR is based on the most up to date CalEEMod version, which is 13.2.2.

9. CEQA Guidelines section 15088.5 states that recirculation of an EIR is required only where "significant new information" is added to the 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." Section 15088.5 provides that "'Significant new information' requiring recirculation include, for example,

a disclosure showing that: (1) A new significant environmental impact would result from the project or from a new mitigation measure proposed to be implemented. (2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to a level of insignificance. (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." None of these examples of significant new information have been met in this instance, because 1., the REIR does not identify a new significant environmental impact either from the project or a new mitigation measure, 2., there is no substantial increase in the severity of an environmental impact and in fact 40 new project specific mitigation measures were incorporated into the REIR which result in a greater GHG emissions reduction of 7.93% compared to the 5% provided in the DEIR, and 3., the project applicant has agreed to implement the 40 new mitigation measures, which will further reduce the project impacts.

10. The original Esperanza Hills Specific Plan, included two access options - the San Antonio Road Access Configuration (analyzed in the EIR as Option 2B) and the Aspen Way Drive Access Configuration (Option 2 - Modified Aspen Way). The DEIR analyzed two main project access options and several additional access options within the Alternatives analysis. The San Antonio Road Access Configuration would provide primary access to San Antonio Road south of Aspen Way and a secondary access to Stonehaven Drive. The Project applicant has now provided an access alternative (Option 1 Modified) which proposes to reconfigure the main access alignment and emergency access connection point.

The Option 1 Modified alternative realigns the entry street from Stonehaven Drive to limit steep grades, turns and reduce biological impacts and grading quantities. The access would include a lengthened bridge compared to that analyzed in the DEIR with a more direct orientation into the gated project entry on a wider road. In addition, the connection point of emergency access would be relocated northeasterly in order to further separate the main project entry from the emergency access. The emergency access would originate from the same location along an access easement through the adjacent Property owned by the Richards Trust behind lots 1-30 and connecting to Esperanza Hills Parkway closer to the Orange County Fire Authority (OCFA) Emergency Fire Staging Area. The emergency access road would also provide a separate connection point to Esperanza Hills Parkway southerly of the gated entrance, resulting in a secondary emergency connection for use at the discretion of OCFA. All legal entitlements for access to public roads are in place. An Addendum, Subsequent or Supplemental EIR is not required because the Option 1 Modified is essentially an access alternative already analyzed within the DEIR, which will result in fewer environmental impacts and provide for an improved emergency access plan. The Option 1 Modified alternative does not require additional analysis or mitigation because there are no new or more significant impacts resulting from the alternative. To the contrary, several impacts are reduced because this modified access results in less grading and disturbance near and within Blue Mud Creek.

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October 25, 2016

SENT VIA EMAIL

Members of the Planning Commission
County of Orange
c/o Orange County Public Works
Kevin Canning
300 N. Flower St.
Santa Ana, CA 92702-4048

Re: Agenda Item #2 - Esperanza Hills
October 26, 2016 Planning Commission Meeting

Dear Members of the Planning Commission:

This firm represents Protect Our Homes and Hills, Hills for Everyone, Endangered Habitats League, Inc., California Native Plant Society, and Friends of Harbors, Beaches and Parks, Inc. We submit the following comments on the Revised Environmental Impact Report ("REIR") for the Esperanza Hills Project and the applicant's recent proposed specific plan amendment.

As a preliminary matter, you should be aware that when accessing the links for the meeting at http://ocplanning.net/planning/projects/esperanza_hills, the reader sees a page in what appears to be Greek or Cyrillic letters and not English. We have attached a copy of the screenshot for your information and suggest that the public has not been provided with accessible information about what is proposed tomorrow and the matter should be continued and the website problem corrected.

Please consider the following comments regarding the REIR and amendments to the specific plan.

October 25, 2016

The Revised EIR Fails to Correct the Errors in the Original EIR Concerning Greenhouse Gas Mitigation

1. It is not permissible under CEQA for the revised EIR ("REIR") to base consistency determinations or the percentage of impact mitigation on statewide programs to achieve AB32 reduction goals.

A review of 14 Cal.Code Regs. ("CEQA Guidelines") §§15064.4, 15125, 15126.2, 15126.4, 15183.5 related to analysis and mitigation of Greenhouse Gases ("GHG") indicates there is no provision for the approach taken by the consultant and County in counting statewide reductions toward the necessary project level reductions. Guideline 15126.4(a)(2) states that "mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding instruments." Consistent with this provision, Guideline 15126.4(c) requires that the lead agency "shall consider feasible means, supported by substantial evidence and subject to monitoring or reporting, of mitigating the significant effects of greenhouse gas emissions."

1

While the agency can rely upon an existing plan such as a Climate Action Plan ("CAP") duly adopted after certification of an EIR for the CAP, there is no provision for reliance upon statewide reductions already occurring in order to provide project level mitigation. Orange County does not have a duly adopted CAP; it does not follow that the County can in turn rely upon statewide reductions to meet this project's individual GHG mitigation requirements.

2

The County should review the Legislative History re: Amendments to CEQA Guidelines (§§15064.4, 15125, 15126.2, 15126.4, 15183.5) Addressing Analysis and Mitigation and Greenhouse Gas Emissions Pursuant to SB97 as found in California Natural Resources Agency Final Statement of Reasons for Regulatory Action:

http://resources.ca.gov/ceqa/docs/Final_Statement_of_Reasons.pdf

This legislative history for the GHG CEQA Guidelines indicates that the approach taken in the EIR and the REIR and the accompanying appendices is improper. Specifically, at pp. 88-89 of the Resources Agency Final Statement of Reasons for Regulatory Action attached hereto, the Resources Agency, pursuant to the Legislature's directive in Public Resources Code section 21083.05 (which directs that the Resources Agency "certify and adopt guidelines prepared and developed by the Office of Planning and Research" "for the mitigation of greenhouse gas emissions or the effects of greenhouse gas emissions[]") indicates:

> **to be considered mitigation, the measure must be tied to the impacts resulting from the project.**
>
> and

emissions reductions that would occur without the project would not normally qualify as mitigation.

This concept is known as "additionality" and the Resources Agency has indicated "greenhouse gas emission reductions that are otherwise required by law or regulation would appropriately be considered part of the baseline and pursuant to Guideline 15064.4(b)(1), a new project's emission should be compared against that existing baseline." The REIR continues to improperly account for GHG emissions reduction by reliance on statewide programs and, most seriously, continuing to treat measures having nothing to do with the Esperanza Hills project as mitigation for the project impacts. 2 cont'd

The "additionality" reasoning is supported by Pub. Res. Code sec. 21002 and 21081(a)(1) both of which expressly link mitigation measures to the significant effects of the project.

This reasoning is also supported by *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 128-131. This linkage relates to the required "nexus" between a mitigation measure and a project impact; by reliance on statewide measures already in place, the Project does not provide this required "nexus" and is not consistent with the "additionality" concept.

The REIR and appendix V rely on the California Air Pollution Control Officers Association ("CAPCOA"), Quantifying Greenhouse Gas Mitigation Measures: A Resource for Local Government to Assess Emission Reductions from Greenhouse Gas Mitigation Measures at pp. 32 and A-3 (August 2010) found at http://www.capcoa.org/wp-content/uploads/2010/11/CAPCOA-Quantification-Report-9-14-Final.pdf; and http://www.aqmd.gov/docs/default-source/ceqa/handbook/capcoa-quantifying-greenhouse-gas-mitigation-measures.pdf?sfvrsn=2, but fail to follow its directives at p. 32: 3

> In order for a project or measure that reduces emissions to count as mitigation of impacts, **the reductions have to be "additional." Greenhouse gas emission reductions that are otherwise required by law or regulation would appropriately be considered part of the existing baseline. Thus, any resulting emission reduction cannot be construed as appropriate (or additional) for purposes of mitigation under CEQA.** For example, in the draft regulation for cap-and-trade, ARB specifies that in order to be eligible for offset credit, "emission reductions must be in addition to any greenhouse gas reduction, avoidance or sequestration otherwise required by law or regulation, or any greenhouse gas reduction, avoidance or sequestration that would otherwise occur." What this means in practice is **that if there is a rule that requires, for example, increased energy efficiency in a new building, the project proponent cannot count that increased efficiency as a mitigation or credit unless the project goes beyond what the rule requires; and in that case, only the efficiency that is in excess of what is required can be counted.** It also means that if there is a rule that requires a boiler to be replaced with one that releases

> fewer smog-forming pollutants, and the new boiler is more efficient and also releases less CO2, the reduced CO2 can't be counted as mitigation or credit, because the reductions were going to happen anyway. But if the boiler were replaced with a solar-powered water heater, the difference in emissions between a typical new boiler and the solar water heater could be counted.
>
> From a practical standpoint, any reductions that are not additional have to be either included in the baseline or subtracted from the project, whichever is more appropriate. In preparing this Report, CAPCOA made determinations about requirements to include in or exclude from the baseline. A more complete discussion of those determinations is included in Appendix B.

3 cont'd

These conclusions are also supported by the Court of Appeal's recent decision analyzing SB 375 in *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966. The court indicated that the only tenable interpretation of SB 375 is that it requires local boards to set targets for and agencies to strive to meet those targets by, "emissions reductions resulting from regionally developed land use and transportation strategies, and that [SB 375] **requires these emissions reductions be in addition to those expected from statewide mandates**." Also, SB 375 "reflects the importance of achieving significant ***additional*** **reductions** of greenhouse gas emissions from changed land use patterns and improved transportation to help achieve the goals of AB 32."

2. <u>A greater degree of GHG reductions may be needed from new land use projects than from the economy as a whole.</u>

4

As stated by the California Supreme Court in *Center for Biological Diversity v. California Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 226:

> **a greater degree of reduction may be needed from new land use projects than from the economy as a whole**: Designing new buildings and infrastructure for maximum energy efficiency and renewable energy use is likely to be easier, and is more likely to occur, than achieving the same savings by retrofitting of older structures and systems. The California Attorney General's Office made this point while commenting on an air district's greenhouse gas emissions reduction plan, in a letter one of the plaintiffs brought to DFW's attention in a comment on the EIR: "The [air district] Staff Report seems to assume that if new development projects reduce emissions by 29 percent compared to 'business as usual,' the 2020 statewide target of 29 percent below 'business as usual' will also be achieved, but it does not supply evidence of this. Indeed, it seems that **new development must be more GHG-efficient than this average, given that past and current sources of emissions, which are substantially less efficient than this average, will continue to exist and emit.**"

and at 231:

> **Local governments thus bear the primary burden of evaluating a land use project's impact on greenhouse gas emissions.**

4 cont'd

3. The REIR does not reflect the County's independent judgment.

The County must independently analyze the project's GHG impacts and its consistency with CEQA and the GHG regulatory scheme, and cannot simply rely upon the inadequate and legally insufficient GHG evaluations provided by the project applicant. The EIR "must reflect the independent judgment of the lead agency. The lead agency is responsible for the adequacy and objectivity of the [ ] EIR." Pub. Res. Code §21082.1(c)(1)-(2); 14 Cal. Code Regs. §115084(e). When certifying an EIR, the County must make specific findings, including one that the EIR reflects its independent judgment. Pub. Res. Code §21082.1(c); *Friends of La Vina v. County of Los Angeles* (1991) 232 Cal.App.3d 1446, 1452-55. Given the REIR's failure to comply with foundational CEQA GHG mitigation requirements and procedures, the County cannot make the necessary findings and has not exercised its independent judgment on the issue of GHG impacts and mitigation.

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4. Any Statement of Overriding Considerations is not supported by substantial evidence.

The REIR indicates that even with mitigation, GHG impacts remain significant and unavoidable and the County will need to adopt a Statement of Overriding Considerations and findings related thereto in connection with GHG impacts. However, the REIR begins its analysis of GHG mitigation from a legally unfounded starting point: "a number of statewide programs are in place to achieve GHG emissions reductions that will attain a very substantial fraction of the AB 32 goal, creating a 5% shortfall to be mitigated by measures specific to the Project." REIR p. 5-275. Per the California Supreme Court in *City of San Diego v. Board of Trustees of the California State University* (2015) 61 Cal.4th 945, 967 and the authority cited at 1., *supra*, this legally unfounded assumption may be properly rejected. As stated by the California Supreme Court:

> The erroneous assumption invalidates the Board's finding of infeasibility because the use of an erroneous legal standard constitutes a failure to proceed in a manner required by law. [citations omitted] The error also invalidates the Board's statement of overriding considerations, because 'CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible.' [citation omitted].
>
> 61 Cal.4th at 965.

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5. The REIR contains no discussion of project consistency with SB 32/AB 197 requirements, including how or if the project will meet emissions cuts of 40% below 1990 levels by 2030 and conclusions regarding Project consistency with other state and local plans, policies and regulations are unsupported.

The REIR at p. 5-274 contains some references to the GHG regulatory scheme and some discussion of SB 375 and RTP/SCS consistency at pp. 5-278-280. However, the REIR contains no mention of the recently enacted SB32/AB197, its requirements and in particular, whether the Project will or will not meet emissions cuts of 40% below 1900 levels by 2030.

Outside of SB375 and RTP/SCS Consistency, the REIR contains no specific discussion of Project consistency with the remainder of the applicable GHG regulatory scheme. The REIR makes vague reference to unidentified "[r]ecent studies [that] show the state's existing and proposed regulatory framework will allow the state to reduce its GHG emissions level to 40% below 1990 levels by 2050" but provides no specifics regarding these "recent studies" and acknowledges that "these studies did not provide an exact regulatory and technological roadmap to achieve the 2030 and 2050 goals". Preliminarily, this discussion fails to provide adequate information to the public or decision makers concerning these unnamed studies.

The REIR also uses contingent and tentative language such as "could allow", "suggesting", etc. This discussion regarding unidentified "recent studies" is followed by a recitation of statewide, not project specific, efforts to meet statewide goals. In the absence of examination and analysis of project specific measures, not statewide models encompassing "the entire California economy", the REIR's conclusions regarding the Project's consistency with state and local plans at p. 5-278 is unsupported.

With respect to the REIR's discussion of SB 375 and RTP/SCS consistency, the discussion appears to rely on an exhibit at 5-267 (Exhibit 5-24); however, the exhibit lacks any legend or explanation for the reader to discern its meaning or significance to the GHG discussion. The exhibit's relation and relevance to the discussion at 5-278-280 and its meaning should be clarified and explained.

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6. The REIR contains unexplained inconsistencies concerning construction emissions CO_2e analysis as between the EIR and REIR which render the REIR conclusions unsupported by substantial evidence.

The EIR and REIR inexplicably contain different conclusions regarding total construction related CO_2e emissions at p. 5-273. The REIR must include some explanation for the disparity between the old and new figures in order to provide adequate information to the public and the decision makers. Was an appropriate and acceptable methodology for calculating emissions used? At present,

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the public cannot provide meaningful comment for these unexplained changes and the REIR fails to serve its fundamental informational purpose.

Significant Changes to the EIR Require Circulation of the REIR

The REIR takes the position that none of the corrections made to the EIR and mandated by the court in *Protect Our Homes and Hills v. County of Orange* require circulation of the document for public review and comment under CEQA. This conclusion is incorrect.

9

The Court of Appeal, Fourth District, Division One, recently addressed the related issue of recirculation of a draft EIR in ways directly relevant to these revisions to the Esperanza Hills EIR. In *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91, the court found revisions to a draft EIR's air quality and greenhouse gas analysis and hydrology and water quality impact analysis required recirculation. In the case of the greenhouse gas analysis, recirculation was required because: "**the public never had a meaningful opportunity to comment on the information because the City omitted the information from the draft EIR**". Likewise, the County has now added a multitude of GHG mitigation measures to the REIR in response to deficiencies identified by the court in *Protect Our Homes and Hills v. County of Orange*.

Also, in *Spring Valley Lake Assn.*, in the case of hydrology and water quality analysis, recirculation for public comment was required because the revisions, "**deprived the public of a meaningful opportunity to comment on an ostensibly feasible way to mitigate a substantial adverse environmental effect**." The reasoning of the Fourth District is applicable here and the significant changes and additions to mitigation measures for GHG impacts without formal circulation of the REIR, in the rushed manner to comply with the writ of mandate issued by Judge Claster in *Protect Our Homes and Hills v. County of Orange*, deprives "the public of a meaningful opportunity to comment."

Other authorities are in agreement. Revision of an EIR to remedy CEQA violations identified by the Court necessarily requires circulation for public comment. *See e.g., Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1357-59 (City required to recirculate revised EIR section regarding inadequate alternative analysis even though court ruled against petitioner on initial recirculation claim) ("PAC"). As stated by the PAC court:

> The revision of the amended DEIR to remedy its inadequate analysis of the reduced-size alternative will necessarily require recirculation of this section of the amended DEIR.... The revised environmental document must be subjected to the same critical evaluation that occurs in the draft stage, so that the public is not denied an opportunity to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn therefrom....The City's CEQA violations can only be remedied by revising the amended DEIR to include an adequate analysis of the reduced-size alternative, recirculating the revised portion of the amended DEIR and adding to the administrative record evidence that will permit the City Council to make an informed, fact-based decision on the feasibility of the reduced-size alternative.

Other cases are in accord with this position. *See San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502 (Peremptory writ directed respondents to vacate certification of EIR, prepare a supplemental EIR (which requires circulation for public comment) and reconsider prior approval of the project in light of the supplemental EIR); *Poet, LLC v. State Air Resources Board* (2013) 218 Cal.App.4th 681, 766-67 (Court directs writ include direction to allow public comment "to assure that any subsequent environmental review…occurs prior to the 'approval'" and "direct[s] that the issue of the land use changes…be reopened and the public allowed to comment on the issue"); *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1221 (Court directs issuance of orders that set a date by which City must certify new EIRs in accordance with CEQA, including provisions for public comment); *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 464 (after court decision finding EIR inadequate, City revised infirm sections and circulated EIR revisions for public comment); *Ukiah Citizens for Safety First v. City of Ukiah* (2016) 248 Cal.App.4th 256, 266-67 ("Because the EIR certified…was inadequate in its analysis of energy impacts of the project, recirculation and consideration of public comments...will be necessary before the EIR may be certified and the project approved").

9 cont'd

The approach taken by the County bypassing adequate public comment or review of the REIR invites the same type of *post hoc* rationalization found improper in multiple CEQA decisions and the Court's Statement of Decision in *Protect Our Homes and Hills v. County of Orange*. The public participation and informational policies underlying circulation of a revised EIR are even more important when the initial EIR has been found to be inadequate. *See Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 467. No presumption of CEQA compliance attaches to an EIR subjected to a legal challenge and found inadequate by the court. *Cf.* Pub. Res. Code §21167.2.

The Addition of Yet Another Access Alternative Requires Environmental Review and Circulation of an Addendum, or Subsequent or Supplemental EIR

The Project applicant is putting forward yet another access alternative, cutting procedural corners in an attempt to impermissibly avoid CEQA compliance and examination of environmental impacts of this new access alternative and requesting deletion of previous conditions of project approval.

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With respect to the new access alternative, the staff report contains wholly illegible depictions of the new alternative at p. 9. The public and the decision makers have no ability to even determine the location or specifics of this new alternative. The report contains only conclusory statements concerning the necessity of subsequent environmental review which lack any evidence or support.

The applicant proposes amendment of the specific plan to build a new access route in a different location and with a different configuration than the serpentine, existing route examined in the EIR. The applicant's new route also includes a bridge over Blue Mud Canyon. The new route and the proposed bridge will entail construction impacts, construction and installation of supports and concomitant disturbance of habitat, none of which has been identified or analyzed. The County is simply not exercising any independent judgment in connection with this specific plan amendment

which should require, at a minimum, an addendum to the EIR. Once the County actually identifies the potential impacts of this new access route, a subsequent or supplemental EIR may be required under Public Resources Code section 21166. However, the present record is wholly inadequate to determine the impacts of this new route, whether they are significant, and whether further environmental review is required under CEQA.

10 cont'd

Thank you for your attention to these comments. At present, the REIR remains inadequate under CEQA and should be formally circulated for public comment. The new access alternative should undergo some form of environmental review and amendment of the specific plan without additional environmental review is improper under CEQA.

Very truly yours,
KEVIN K. JOHNSON, APLC

Jeanne L. MacKinnon

Enc.
Attachment 1 – screenshot http://ocplanning.net/planning/projects/esperanza_hills
Attachment 2 – Excerpts California Natural Resources Agency Final Statement of Reasons for Regulatory Action

CITY OF YORBA LINDA

P.O. BOX 87014 CALIFORNIA 92885-8714

October 26, 2016

Planning Commission Orange County
300 North Flower
PO Box 4048
Santa Ana, CA 92702-4048

SUBJECT: YORBA LINDA ESTATES PROJECT (PROJECT NO. PA120037)

Dear Chairman and Members of the Planning Commission Orange County:

The City of Yorba Linda recently received the notice of public hearing and associated materials related to proposed revisions to the above referenced project (Esperanza Hills) and has not been able to fully review the impact upon the City. However, to correct the record, the City has not withdrawn its request for a preannexation agreement. Also, for Option 1 Modified, the City has rights in Lot A of Tract 12850 and Lot A of Tract 12877. Additionally, for the proposed emergency secondary access point, the City has rights in both Lot A of Tract 10455 and Lot A of Tract 13800. As such, the County should require the applicant to prove and show all documentation that it has legal access to all property needed (including grading rights) for the primary and emergency access points prior to approving the project and provide the exact locations for any proposed streets be presented and acceptable to the City before the County issues any permits for this project

Thank you for your consideration in this matter. If you have any questions, or wish to discuss this matter further, I may be reached at 714-961-7110.

Respectfully submitted,

David Christian

for Mark Pulone
City Manager

C: Yorba Linda City Council
Todd Litfin, City Attorney