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Letter No. 11

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March 3, 2008

Ms. Joan Wolf
Community Development Department
City of Fullerton
303 West Commonwealth Ave.
Fullerton, CA 92832

RE: Comments on Recirculated, Revised Draft EIR for the West Coyote Hills Specific Plan and Robert E. Ward Nature Preserve (Jan. 2008)

Dear Ms. Wolf:

On behalf of Friends of Coyote Hills, we have reviewed the Recirculated, Revised Draft Environmental Impact Report ("RRDEIR") for the West Coyote Hills Specific Plan Amendment ("Project"). Friends of Coyote Hills is dedicated to protecting and preserving the remaining open space in the West Coyote Hills of Orange County for threatened and endangered species and for public recreation.

As you know, this firm has submitted comments on the prior versions of the environmental documents for this Project.¹ While we recognize and appreciate that this document addresses several of the comments made by this firm and other commentators, it still falls far short of complying with the requirements of the California Environmental Quality Act ("CEQA"), Public Resources Code §§ 21000 *et seq.*, and the CEQA Guidelines, California Code of Regulations, title 14, §§ 15000 *et seq.*

¹ The letters submitted by this firm on behalf of the Friends of Coyote Hills on June 8, 2006 and November 26, 2003, together with any and all exhibits and attachments thereto, are hereby incorporated by reference.

1 ↑ This letter, along with the attached biological report from consulting biologists Catherine Rich and Travis Longcore of Land Protection Partners (attached hereto as Exhibit A), and the air quality analysis from Greg Gilbert of Autumn Wind Associates (attached hereto as Exhibit B), constitute Friends of Coyote Hills' comments on the four revised, recirculated sections of the RRDEIR.²

In sum, the RRDEIR is inadequate under CEQA because:

- 2
- *Biological Impacts.* The RRDEIR (1) improperly concludes that the Project will not cause significant impacts to the threatened California gnatcatcher, (2) improperly concludes that impacts to coastal sage scrub habitat will be less than significant by "double-counting" previously preserved habitat areas and other previously required mitigation measures, and (3) fails to adequately analyze impacts to riparian habitats and wetlands.
 - 3 • *Air Quality Impacts:* The RRDEIR fails to adequately and accurately analyze the air quality impacts of the project because it (1) completely overlooks its duty to analyze certain impacts, (2) takes a "worst-case" approach that fails to analyze the effectiveness of proposed mitigation measures, and (3) relies on infeasible mitigation measures. As a result, the Project will result in significant air quality impacts, including human health impacts from exposure to diesel particulate matter, that are not disclosed in the RRDEIR. Moreover, for the air quality impacts that the RRDEIR recognizes as significant and unavoidable, the RRDEIR fails to analyze and require implementation of all feasible mitigation measures.
 - 4 • *Public Health Impacts.* The RRDEIR fails to demonstrate that the current mitigation measures will reduce soil contamination to a less than significant level, because they would allow for total recoverable petroleum hydrocarbons ("TRPH") to remain in soil at levels above the level of significance.
 - 5 • *Water Quality Impacts.* The RRDEIR fails to provide substantial evidence for its conclusion that water quality impacts will be less than significant with implementation of the Stormwater Pollution Prevention Plan ("SWPPP"), and it fails to analyze the potential discharge of contaminated storm water during site remediation.

Each of these issues is addressed below.

² Several sections of the 2006 RDEIR were not revised and recirculated in this document. For the reasons stated in our previous letters, these sections remain inadequate.

I. BIOLOGICAL RESOURCES

A. The RRDEIR Improperly Concludes that Impacts to the California Gnatcatcher Will Be Less Than Significant.

6 Despite resulting in the “take” (i.e., injury or death) of an estimated 11-13 pairs of California gnatcatchers, a bird species listed as threatened under the federal Endangered Species Act, the RRDEIR concludes that the Project’s impacts to this species are not significant. This conclusion is based on an improper threshold of significance, and is not supported by substantial evidence. Pursuant to section 15065(a)(1) of the CEQA Guidelines, the Project will result in a significant impact to the California gnatcatcher, and additional mitigation measures must be implemented to reduce these impacts to a less than significant level.

7 The California gnatcatcher is listed as a threatened species under the federal Endangered Species Act, 16 U.S.C. § 1531 *et seq.* RRDEIR at 4.12-7; U.S. Fish and Wildlife Service, Formal Section 7 Consultation for Pacific Coast Homes’ West Coyote Hills planned community, City of Fullerton, Orange County, California (May 7, 2004) (“Biological Opinion” or “BO”). The West Coyote Hills are the largest known population of California gnatcatchers in Northern Orange and Southern Los Angeles Counties. BO at 12. The gnatcatcher population on the Project site is estimated to be approximately 47 to 60 pairs of birds. RRDEIR at 4.12-56. Many of these birds were observed nesting in areas that are in, or will be affected by, the Project. Compare RRDEIR Exhibit 4.12-2 (map of nesting locations) with Exhibit 4.12-5 (map of development boundaries); see *id.* at 4.12-52, 4.12-56; BO at 13-14. The RRDEIR estimates that the Project will result in the take of between 11 and 13 pairs of birds, or between 22 and 23 percent of the birds that live on the Project site. RRDEIR at 4.12-56 (Table 4.12-7).

Section 15065(a)(1) of the CEQA Guidelines states that a project shall result in a mandatory finding of significance where it may “substantially reduce the number or restrict the range of an endangered, rare, or threatened species.”³ See *Defend the Bay v. City of Irvine (Irvine Co.)* (2004) 119 Cal.App.4th 1261, 1273-74; *Endangered Habitats League, Inc. v. County of Orange (Rutter Development Co., Inc.)* (2005) 131 Cal.App.4th 777, 792-93.

³ Although this section of the CEQA Guidelines provides an exception where “the project proponent is bound to implement mitigation measures” pursuant to an approved natural community conservation plan or habitat conservation plan, CEQA Guidelines § 15065(b)(2)(A), this Project is not covered by an HCP or NCCP, and is therefore not “bound” by it. See RRDEIR at 4.12-20.

↑ The Project will cause a substantial reduction in the number of a threatened species, as it will result in the take of, and likely result in the reduction of, 23 percent of the gnatcatcher population on the Project site. BO at 17; *see also Endangered Habitats League, Inc.*, 131 Cal.App.4th at 792-93 & n. 13 (discussion of section 15065(a) of the CEQA Guidelines). This impact is particularly important because the West Coyote Hills provide one of the most important habitats in the region for the California gnatcatcher. RRDEIR Exhibit 4.12-3; BO at 12; *see* Exhibit A. While the Biological Opinion acknowledges that the required phasing of Project construction will “increase the likelihood that some of the displaced gnatcatchers will persist,” BO at 18, and that the habitat creation and enhancement measures “could result in a larger gnatcatcher population in the future,” *id.*, the Biological Opinion provides no basis on which to conclude that the Project will not result in a substantial long term reduction of the species’ population.

8 Despite this, the RRDEIR seems to suggest that the Project will likely result in no long term reduction to the gnatcatcher population on the Project site. *See* RRDEIR at 4.12-51, 4.12-56. Yet the RRDEIR explicitly acknowledges that, after all construction and mitigation measures have been completed, the population potential for the site is between 33 to 69 pairs. *Id.* at 4.12-51. Clearly, the lower part of this range is a substantial decline from existing levels. *Id.* Moreover, because the RRDEIR improperly calculates the habitat benefits of the Project, the Project’s impacts on the gnatcatcher population would likely be far more significant than disclosed in the RRDEIR. *See* Part IV(B), *infra*.

9 ↓ To the extent the RRDEIR relies on the U.S. Fish and Wildlife Service’s preliminary 2005 Biological Opinion to conclude that the Project will not cause significant impacts to the gnatcatcher, such reliance is misplaced. The Biological Opinion determined whether the Project will not cause adverse modification of the species’ critical habitat or cause jeopardy to the continuing existence and recovery of the species.⁴ But this standard is not appropriate for determining whether the Project will

⁴ The Service’s 2005 Biological Opinion is preliminary because the Service has indicated that a new biological opinion is necessary due to the fact that the most recent analysis in the RRDEIR demonstrates that the Project will result in the take of more pairs of gnatcatchers than are authorized in that earlier biological opinion. RRDEIR at 4.12-3, 4.12-53; BO at 18, 20.

In addition, the 2005 Biological Opinion, as a matter of law, fails to comply with the requirements of the Endangered Species Act insofar as it failed to analyze the Project’s effect on the recovery of the species. BO at 17 (“it is our opinion that the

9 result in a significant impact under CEQA. See *Endangered Habitats League, Inc.*, 131 Cal.App.4th at 792-93 and n. 13. Rather, CEQA requires that an EIR determine whether the Project will cause a substantial decrease in the population of a threatened species. Based on simple math, it is clear error for the RRDEIR to conclude that this impact is less than significant. The document's conclusion is all the more erroneous since the U.S. Fish and Wildlife Service used an incorrect legal standard under the Endangered Species Act and, in any event, will be preparing a new biological opinion for the Project. See note 12, *supra*.

10 In addition, the RRDEIR fails to adequately analyze the Project's indirect impacts on gnatcatchers. This analysis is unchanged from the 2003 document. See RRDEIR at 4.12-57. Yet as the attached report from Land Protection Partners discusses, the Project's indirect effects, including edge effects, lighting, noise, pesticides, other water quality impacts, and predation by domestic cats may significantly and adversely affect gnatcatchers and other species. Exhibit A at 33-34, 39-50. Many of these issues, such as the impact of polluted runoff in settling basins on gnatcatchers, are not analyzed or discussed at all in the RRDEIR. For other issues, the proposed mitigation measures are likely to be ineffective at mitigating these impacts to a less than significant level. For instance, CC&Rs are ineffective at controlling predation by domestic cats without significant enforcement measures, as has been demonstrated at the University of California's Valentine Reserve in Mammoth Lakes. See also Exhibit A at 50. The RRDEIR must be revised to adequately discuss and address these impacts, and to propose feasible mitigation to reduce these impacts to a less than significant level.

11 Because the Project will cause a substantial decline in the gnatcatcher population, it results in a mandatory finding of significance, unless mitigation measures can further reduce the impacts on the gnatcatcher population so that the Project causes less than a "substantial" decline in the species' population. Mitigation measures that should be considered include: (1) additional reductions in the numbers of homes

action, as proposed, will not jeopardize the continued existence of the gnatcatcher or adversely affect its critical habitat"); *National Wildlife Service v. National Marine Fisheries Service*, 481 F.3d 1224, 1236-38 (9th Cir. 2007) (biological opinion must expressly analyze a project's impacts on both the survival and recovery of the species, where survival and recovery are separate legal standards); see *Gifford Pinchot Task Force v. United States Fish and Wildlife Service*, 378 F.3d 1059, 1069-70 (9th Cir. 2004) (concluding that ESA requires that U.S. Fish and Wildlife Service expressly, and separately, analyze a project's impacts on the survival and recovery of the species in terms of assessing the project's effect on critical habitat). Any revised biological opinion must comply with this requirement of the ESA, and a revised biological opinion is necessary in light of this significant legal defect in the existing BO.

11 ↑ constructed as part of the Project; (2) locating these homes in areas that reduce impacts to known gnatcatcher breeding areas and habitats; and (3) additional construction phasing to reduce the acreage impacted during each phase of construction (which could result in a reduction in the take of species in later phases because revegetation and habitat enhancement might provide suitable habitat for impacted birds to move into).

12 The mitigation measures that are proposed are inadequate. MM 4.12-1d requires compliance with unspecified performance standards before construction of Phase I. RRDEIR at 4.12-69. Similarly, MM 4.12-1ff provides five year performance standards for restoration areas, but there is no requirement that these restoration areas meet these performance standards before construction of Phase I or later phases. *See id.* at 4.12-73. The revegetated areas must actually provide suitable habitat in order for them to be effective in minimizing and reducing the Project's impacts on gnatcatchers. The mitigation measures, as currently proposed, fail to require adequate revegetation and habitat enhancement before initiating Phase II, and this is likely to increase impacts to gnatcatchers. *See also* Exhibit A at 19. In order to minimize this impact, these measures should be revised to actually require compliance with the performance standard of MM 4.12-1ff prior to construction of Phase I and later phases.⁵

B. The RRDEIR Improperly Concludes that Impacts to Coastal Sage Scrub Habitat Will Be Less Than Significant.

13 Although the Project proposes to pave over and permanently disturb a substantial percentage of the coastal sage scrub habitat on the site, including 109.2 acres of critical habitat for the California gnatcatcher, *see* RRDEIR at 4.12-49, the RRDEIR concludes that this impact is mitigated to a less than significant level. However, this conclusion is not supported by substantial evidence because the RRDEIR effectively uses an improper environmental baseline with which to calculate the environmental impacts of the Project. As a result, the RRDEIR double-counts certain habitat areas to be preserved and takes credit for previously required protective measures, in violation of CEQA. *See generally* Exhibit A at 16-22.

14 ↓ The RRDEIR concludes that as a result of the Project, 152.4 acres of coastal sage scrub vegetation (36 percent of this habitat type on the Project site) will be

⁵ Similarly, while the Biological Opinion requires Mitigation Measure MM 4.12-1i in an attempt to reduce the long-term impacts of the Project on the gnatcatcher, we are concerned that this measure fails to create sufficient habitat for a gnatcatcher pair to replace pair C28 (which is expected to be taken as a result of the Project, *see* BO at 14), because site grading will result in very steep slopes in much of this area, which would provide inadequate habitat, even after revegetation. *See* RRDEIR at Exhibit 4.12-7.

14 ↑ permanently or temporarily disturbed. RRDEIR at 4.12-45. However, this estimate and percentage calculation substantially understate the impact of the Project, because: (1) the acreage calculations include the 72.3 acre Robert E. Ward Nature Preserve, which is already protected from development; (2) the RRDEIR improperly takes credit for other previously required mitigation measures, treating them as new benefits of the Project rather than as part of the environmental baseline; and (3) the document improperly classifies habitat types.

15 First, by including the Robert E. Ward Nature Preserve (“Nature Preserve”) within the Project, the RRDEIR overstates the amount and percentage of coastal sage scrub (“CSS”) habitat that is unaffected by the Project, thereby making the Project appear more environmentally benign than it actually is. The Nature Preserve has already been transferred to the City of Fullerton and protected as a park. See City of Fullerton, West Coyote Hills Specific Plan and Robert E. Ward Nature Preserve, Draft Environmental Impact Report (Sept. 2003) at 3-8; RRDEIR at 4.12-53. The Nature Preserve includes high quality habitat for the California gnatcatcher and other species, and many of the gnatcatchers that were found on the site in 2002 were nesting in and around the Nature Preserve. RRDEIR Exhibit 4.12-2; BO at 14 (identifying 17 pairs of gnatcatchers that are expected to not be affected by the Project because they reside in or adjacent to the existing nature preserve).

The RRDEIR provides no clear explanation why the Nature Preserve, which is owned by the City and already protected from development, should be included in the Project. Likewise, there is little or no explanation of how the Project will enhance habitat in this already protected area. The Biological Opinion concludes that revegetation under the Project will have the greatest effect in already disturbed areas, like the central and northwest patches of the Property. BO at 14. It makes no mention of the Nature Preserve needing enhancement. Thus, neither the RRDEIR nor the BO provides substantial evidence that “enhancement” of the existing Nature Preserve will benefit the California gnatcatcher or other species. See RRDEIR at 4.12-65 and Exhibit 4.12-9 (describing revegetation of the Preserve as one of several “minor improvements” and showing that relatively small areas of the Preserve are proposed for revegetation). Rather than listing this area as already protected, the RRDEIR treats it as a new area to be protected. See, e.g., RRDEIR at Table 4.12-11 (listing only 36.7 acres of Previously Preserved Areas). This is clear error.

16 ↓ Second, prior governmental approvals have already required the protection and enhancement of CSS habitat on the Project site. The Section 4(d) permit for the abandonment of oil operations on the Project site required protection of 23.15 acres of contiguous CSS habitat through recordation of a conservation easement, and the revegetation of 15.9 acres of CSS habitat. BO at 11. According to the RRDEIR,

↑ approximately 64.4 acres of land on the Project site have been subject to prior permits that require protection or revegetation, including the oil field abandonment project mentioned above and the La Habra Hills Specific Plan. RRDEIR at 4.12-1, 4.12-49 & Exhibit 4.12-7.

16 Yet somehow the RRDEIR concludes that there are only 36.7 acres of "Previously Preserved Areas" on the Project site. RRDEIR at Table 4.12-11; *id.* at 4.12-68 (Mitigation Measure 4.12-1 a, stating that there are 36.7 acres of previously permitted mitigation). The RRDEIR apparently counts implementation of some of these previously required measures as new mitigation and protection, making the Project appear more environmental beneficial than it actually is. There is no explanation for the discrepancy, and no justification for the approach taken in the RRDEIR. See Exhibit A at 16.

h When the existing Nature Preserve (72.3 acres) and the 64.4 acres of previously required mitigation are properly accounted for as Previously Preserved Areas, rather than as new areas that the Project has protected or enhanced, the error of the RRDEIR's calculations are evident. This failure to properly account for previously required mitigation and previously protected areas permeates the RRDEIR and taints its analysis. For instance, the RRDEIR asserts that the impacts to coastal sage scrub habitat are not significant after mitigation because the Project will result in "greater CAGN habitat containing primary constituent habitat elements in these units than before the Project," RRDEIR at 4.12-51, will create "more coastal sage scrub habitat (143.9 acres) than was impacted (101.5 acres) by the project," *id.*, and "will result in more gnatcatcher habitat than exists on the site currently." *Id.* at 4.12-52, 4.12-67. However, this is true only because the RRDEIR includes the existing Nature Preserve and nearly half of the previously required mitigation as part of the Project. Table 4.12-11 unquestionably shows that if the 36.7 acres of Previously Preserved Areas are excluded from the Project, Total Project Mitigation is less than the existing Coastal Sage Scrub Habitat.⁶ Excluding the existing Nature Preserve and the other areas that were previously required to be protected substantially increases the amount of coastal sage scrub habitat loss caused by the Project.

⁶ In addition, this Table also shows that 14.9 acres of other types of native habitats were included in the analysis, even though the RRDEIR states that this Table "reflects how implementation of the proposed project will maintain slightly more coastal sage scrub habitat on the property than currently exists as a result of extensive revegetation that is proposed." RRDEIR at 4.12-67. Table 4.12-11 does not show total project mitigation because it includes previously protected areas. Table 4.12-11 also fails to demonstrate that the Project will restore or protect as much CSS habitat as is impacted by the Project, as it includes other habitat types beyond CSS in its analysis.

18 CEQA requires that a Project's impacts be measured against an environmental baseline in order to determine whether those impacts are significant. *County of Amador v. El Dorado Water Agency*, 76 Cal.App.4th 931, 952 (1999); *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 658-59. The CEQA Guidelines state that the existing environmental conditions when an environmental document is prepared are "normally" the environmental baseline, but there are situations when this is not the case. CEQA Guidelines § 15125(a). Numerous cases have invalidated EIRs or other environmental documents because they used an improper environmental baseline. See, e.g., *Communities for a Better Environment v. South Coast Air Quality Management Dist.*, ___ Cal.App.4th ___ (2007) (collecting cases).

Unquestionably, the present case is one in which CEQA demands that the environmental baseline not be the environmental conditions as they currently exist on the ground, but rather must include the likely effects of Previously Preserved Areas and other previously required mitigation measures that will be implemented regardless of whether the Project is approved. Only by including these prior regulatory activities can the environmental document accurately assess the impacts of the Project. In contrast, as demonstrated above, because the RRDEIR fails to include all of these prior actions in the environmental baseline, it understates the Project's environmental impacts and overstates the Project's environmental benefits. By failing to include previously required mitigation measures and protected areas as part of the environmental baseline, the RRDEIR fails to provide accurate information to the public about the Project's actual environmental impacts, in violation of CEQA. CEQA Guidelines §§ 15126, 15151.

19 Making matters worse, the proposed Project is not even consistent with these prior permits and approvals, insofar as the Project requires construction of three homes, portions of a road, and associated development in areas that are off-limits to construction as a result of the prior mitigation measures. RRDEIR Exhibit 4.12-7 (locating three homes at the end of a cul de sac on mitigation area). This is a significant impact under CEQA. See RRDEIR at 4.12-37 (threshold of significance includes the Project conflicting with provisions of a NCCP, HCP, or other approved habitat conservation plan). In addition, Mitigation Measure 4.12-1h requires that the protective measures that were imposed pursuant to those prior permits and approvals be implemented. RRDEIR at 4.12-69. The 2004 Biological Opinion also requires implementation of those prior measures. BO at 5. However, contrary to Exhibit 4.12-7, Mitigation Measure 4.12-1h states that these two areas "will not be impacted by the proposed development." RRDEIR at 4.12-69. As currently proposed, therefore, the Project's mitigation measures are inconsistent and contradictory, and the Project conflicts with previously-agreed upon habitat protections. Therefore, the Project must be revised to actually be consistent with these previously-agreed upon habitat protections.