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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.

20 *Third*, the RRDEIR improperly classifies habitat types. As detailed in the Land Protection Partners Report, the RRDEIR uses inappropriate habitat mapping methodology. Exhibit A at 4-7. Moreover, the document variously defines coastal sage scrub habitat as comprising 183.1 acres on the site, or 332.3 acres on the site, without explaining this huge discrepancy. Compare RRDEIR at Table 4.12-1 and Table 4.12-6 with *id.* at Table 4.12-11. It appears that this discrepancy results from the document utilizing "Scrub Habitat" for purposes of comparing the Project's habitat impacts, rather than coastal sage scrub habitat. See RRDEIR at 4.12-6 (Table 4.12-1, which shows that there are 183.1 acres of coastal sage scrub habitat and 332.3 acres of "Scrub Habitat"). The RRDEIR fails to explain or justify why scrub habitat, rather than coastal sage scrub habitat, is compared for this purpose, nor does it explain whether there are any important differences between the two types of habitat for particular species.⁷ In order to comply with CEQA, the RRDEIR must be revised to explain (1) why these different comparisons were made (2) whether and to what extent these other "Scrub habitats" provide good habitat for California gnatcatchers and (3) the extent of the different types of Scrub habitat that will be restored and revegetated as a result of the Project. Likewise, the RRDEIR provides little explanation for analyzing "disturbed" habitats differently from intact habitats. Exhibit A at 6-7.

21 Similarly, the RRDEIR has overestimated the area of "developed areas" on the site and has underestimated the Project's impacts on the California gnatcatcher and its sensitive habitats as a result. As the attached report from Land Protection Partners demonstrates, the RRDEIR includes any cleared or graded area as an already "developed area," even though buildings and paved roads appear to be a very small proportion of these areas. Exhibit A at 20-22. The RRDEIR asserts that such "[d]eveloped lands do not support any special status species," and does not require mitigation for impacts to these already developed areas. See RRDEIR at 4.12-9. However, the available data demonstrates that, to the contrary, most existing gnatcatcher habitat areas include some of these "developed areas" within them, and these cleared habitats are used by California gnatcatchers. Exhibit A at 20-22, 34. As a result, the RRDEIR underestimates the impacts on the gnatcatcher population caused by eliminating much of these habitats, and it does not require sufficient mitigation to ensure that gnatcatcher habitat are reduced to a less than significant level. See *id.*

⁷ For instance, the Biological Opinion indicates that gnatcatcher population success is dependent upon high quality habitat that includes (1) California sagebrush, California buckwheat, or California encelia dominated CSS habitat; and (2) moderate shrub canopy cover. BO at 8. The RRDEIR fails to explain whether Southern Cactus Shrub (which is included in its calculations of "coastal sage scrub" or "Scrub Habitat") is a good quality habitat for gnatcatchers. See RRDEIR at 4.12-7.

22 Moreover, the RRDEIR relies almost exclusively on the restoration / revegetation of coastal sage scrub habitat as mitigation to reduce the Project's impacts on this habitat type to a less than significant level. However, as discussed in the attached report from Land Protection Partners, restored/created habitats do not provide the same ecological benefits that natural habitats do. See Exhibit A at 18-19. Rather than requiring habitat restoration/revegetation at a 1:1 ratio to impacted habitat, the Project must require restoration of substantially greater habitat areas to provide similar ecological benefits. *Id.* In addition, where the Project relies on habitat restoration to mitigate impacts, detailed performance standards for the quality of the restored habitat must be required. See also *id.* at 19.

23 In addition, the vegetation mapping in the RRDEIR is based on surveys conducted in 1998, and has not been peer reviewed since 2003. RRDEIR at 4.12-4. The RRDEIR claims that "no substantive changes, either in habitat characteristics and/or species diversity, have occurred" between 1994 and 2007. *Id.* at 4.12-2. In contrast to this vague and unsupported statement, Land Protection Partners recently visited the site and found dramatic and substantial changes in the vegetation communities on the site, including the location and extent of Coastal Sage Scrub habitat, such that the current vegetation maps in the RRDEIR no longer provide accurate information about the location and extent of the various vegetation types. Exhibit A at 7-13, 30.⁸ As such, the RRDEIR fails to accurately disclose the extent and severity of the Project's impacts on these various vegetative communities, including sensitive habitats. *Id.* Therefore, the RRDEIR must be supplemented with a new, accurate habitat survey and map, so that the public and decision-makers be informed of the Project's true impacts. See Pub. Res. Code § 21166; CEQA Guidelines §§ 15162, 15163.

24 Finally, the mere fact that the 2004 Biological Opinion found that the Project would not cause adverse modification of critical habitat under the ESA does not mean that the Project will not have a significant impact on the environment under CEQA. The RRDEIR improperly conflates these two standards. Under CEQA, a significant impact occurs if the Project would "substantially reduce the habitat of a fish or wildlife species" or substantially "restrict the range of an endangered, rare or threatened species." CEQA Guidelines § 15065(a)(1). In addition, a significant impact would occur if the Project results in a "substantial adverse effect on any riparian habitat or other sensitive natural community." RRDEIR at 4.12-37. Rather than analyzing the particular habitat

⁸ Likewise, the 2003 peer review found that the habitat map was only "generally accurate in areas where no further disturbance from oil field abandonment has taken place since the 1998 surveys." RRDEIR at 4.12-4. Thus, even that peer review found that there were changes to the vegetation on the site since the 1998 surveys. The RRDEIR also fails to disclose the extent of such differences between 1998 and 2003.

24 ↑ impacts of the Project, the RRDEIR analyzes the impacts on gnatcatchers as a proxy, and relies on the Biological Opinion to conclude that such impacts are less than significant. See RRDEIR at 4.12-51 to 4.12-52. This is inappropriate. As discussed above, the Project will permanently impact significant acreage of riparian and sensitive habitats and communities, and the proposed mitigation measures are inadequate to reduce these impacts to a less than significant level. As a result, the RRDEIR fails to disclose a significant environmental impact, and to reduce that impact to a less than significant level, in violation of CEQA. CEQA Guidelines §§ 15126, 15126.2.

C. The RRDEIR Fails to Adequately Analyze Impacts to Other Wildlife Species and Habitats.

25 As discussed in more detail in the attached report from Land Protection Partners, the RRDEIR fails to adequately analyze and mitigate the Project's impacts on resident and migratory wildlife and habitats.

26 First, the previous animal surveys – particularly for mammals, amphibians, reptiles, and burrowing owls – are inadequate to accurately assess whether other special status species exist on the site. See Exhibit A at 13-16. Additional surveys, consistent with the methodologies described therein, should be conducted. *Id.*

27 Second, the RRDEIR fails to adequately analyze the Project's indirect effects on wildlife, particularly night lighting, roadkill, pesticides and polluted runoff, noise, and habitat fragmentation. Exhibit A at 33-34, 38-50. The RRDEIR wholly fails to analyze the Project's indirect impacts, except with respect to a short discussion related to gnatcatchers. See RRDEIR at 4.12-57 to -58.

28 Finally, the RRDEIR still fails to adequately analyze the Project's direct impacts on wildlife species other than the California gnatcatcher. See Exhibit A at 13-16, 26-29, 34-37. Virtually all of the problems identified in our prior comment letter, with respect to the analysis of impacts on other bird and wildlife species, still exist with respect to the RRDEIR. This is particularly troubling with respect to the cactus wren, which is listed as a State species of concern by DFG. See RRDEIR at 4.12-16. The RRDEIR concludes that despite the loss of 36 percent of the bird's habitat, the impacts on this species will not be significant. *Id.* at 4.12-43. The RRDEIR provides no analysis or substantial evidence to support this conclusion, nor does it even attempt to quantify the impact on the cactus wren population. This clearly violates CEQA. See *Santiago County Water District v. County of Orange*, 118 Cal. App. 3d at 831. Although the document provides slightly more analysis with respect to raptors, it fails to adequately consider and analyze many of the Project's impacts (such as the loss of foraging habitat and prey

18 ↑ species), which could create substantial sources of mortality for raptors. See Exhibit A at 20, 26-29.

19 Overall, the RRDEIR still fails to adequately analyze the Project's impacts on species and habitats. By failing to provide the public and decisionmakers with accurate and adequate information about the type and extent of the Project's biological impacts, the RRDEIR fails to comply with CEQA.

D. The RRDEIR Fails to Adequately Analyze Impacts to Wetlands and Riparian Habitats.

30 The RRDEIR properly recognizes that the Project would result in a significant environmental impact under CEQA if it causes a "substantial adverse impact on any riparian habitat." RRDEIR at 4.12-37. However, it wholly fails to analyze the Project against this threshold of significance, instead relying on the Corps' approval of the Project to conclude that impacts to wetlands and riparian habitats would be less than significant, and it dramatically underestimates the riparian habitat on the site. This clearly violates CEQA.

31 The RRDEIR asserts that the Project site includes 1.00 acres of riparian habitat (of which 0.91 occur outside of the existing Nature Preserve). RRDEIR at 4.12-32. The document concludes that the Project will permanently impact 0.43 acres of riparian habitat (all outside of the existing Nature Preserve), and temporarily impact 0.14 acres of riparian habitat. RRDEIR at 4.12-62. Thus, the Project will permanently or temporarily impact more than half of the riparian habitat on the site. However, the RRDEIR devotes barely a paragraph to these impacts, concluding that the realignment and restoration of Drainages 1 and 7 would mitigate this "potentially significant" impact. See RRDEIR at 4.12-63. The document wholly fails to identify where these drainages would be realigned to, and how much riparian habitat would be created as a result. It also fails to provide adequate performance standards for the quality of the riparian habitat that is created as a result of this mitigation measure. As noted by Land Protection Partners, created and restored riparian habitats do not provide the same ecological benefits of natural habitats; as a result, additional mitigation (beyond the 1:1 ratio proposed in Mitigation Measure 4.12-2a) should be required in order to reduce this impact to a less than significant level. Exhibit A at 23-24. The RRDEIR provides no evidence that the riparian habitats that will be created as mitigation will serve a similar role in the landscape as do the existing streams and riparian habitats. The RRDEIR thus fails to adequately analyze the impacts to riparian habitats, in violation of CEQA.

32 ↓ At the same time, however, the RRDEIR discloses that the Project will impact 14.9 acres (out of a total of 19.0 acres) of Mule Fat Scrub habitat, with 12.9 acres

32 permanently impacted. RRDEIR at 4.12-46 (Table 4.12-6); Exhibit A at 22-25. Similarly, the RRDEIR estimates that the Project will permanently impact 0.7 acres (out of a total of 1.1 acres) of Southern Willow Scrub habitat. RRDEIR at 4.12-46. Both Mule Fat Scrub and Willow Scrub habitats are riparian habitats. See RRDEIR at 4.12-8, 4.12-27 (Exhibit 4.12-4); Exhibit A at 24-25. The RRDEIR fails to explain the relationship between these habitat types and the much smaller estimate of riparian habitat discussed above; this data demonstrates that the RRDEIR's estimate of riparian habitat underestimates the total riparian habitat on the site.⁹ In addition, while the RRDEIR analyzes impacts to jurisdictional waters and "riparian streambed" acreage, the document wholly fails to analyze the impacts to these riparian habitat types. See RRDEIR at 4.12-45, 4.12-59 to 4.12-63. Without mitigation, these are obviously significant impacts, as this data indicates that the Project will cause the elimination of nearly three-quarters of these riparian habitat types on the site, most of which are permanent impacts. See RRDEIR at 4.12-37 (threshold of significance is whether the Project causes a "substantial adverse effect on any riparian habitat"). Because the Project wholly omits any mitigation for the Project's impacts to these riparian habitats, the RRDEIR fails to disclose a significant environmental impact, and fails to mitigate that impact to a less than significant level, in violation of CEQA.

33 In addition, the RRDEIR concludes that there are no jurisdictional wetlands on the site. See, e.g., RRDEIR at 4.12-59. However, the Biological Opinion concludes that the Project will impact 0.12 acres of jurisdictional wetlands. BO at 3. The RRDEIR must explain this discrepancy.

34 Finally, the RRDEIR wholly omits any analysis of the Project's impact on Drainage #2. Although it describes this drainage, which formerly contained jurisdictional wetlands, it does not analyze whether the Project will impact any riparian habitat or wetlands in this drainage. See RRDEIR at 4.12-1, 4.12-26, 4.12-28, 4.12-33, 4.12-62 to -63; see Exhibit A at 25-26. The RRDEIR fails to explain why this drainage was omitted from analysis. This is particularly troubling because: (a) it is clear that the Project will impact this drainage, as a new roadway is contemplated to be constructed in parts of this drainage, see RRDEIR Exhibit 4.12-8, and this will likely increase sedimentation and storm water runoff into this drainage; and (b) it appears that as a result, the Project may be inconsistent with the requirements of the prior permits, see RRDEIR at 4.12-1 ("Drainage 2 now consists of a series of desilting basins, which are maintained pursuant

⁹ In addition, for the most part the RRDEIR fails to disclose where these habitat types are located on the Site, lumping them together with "Developed Land." See RRDEIR Exhibit 4.12-1. The RRDEIR should clearly disclose where these riparian habitat types are located, in order to better understand the Project's impacts and design mitigation measures to reduce these impacts to a less than significant level.

34 ↑ to the conditions of the relevant Storm Water Pollution Prevention Plan (SWPPP) approved by the State Water Resources Control Board (SWRCB).”) The failure to analyze the Project’s impacts on this drainage, including riparian habitat and any wetlands, as well as to explain why such analysis was omitted from the RRDEIR and whether the Project is consistent with these prior permits, violates CEQA because the RRDEIR fails to quantify the Project’s impacts and provide the public and decisionmakers with sufficient information on which to reach their own conclusions. *See Santiago County Water District v. County of Orange*, 118 Cal. App. 3d 818, 831 (1981); *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal. App. 4th 99, 130 (2001).

II. AIR QUALITY

35 The RRDEIR concludes that the Project will have significant and unavoidable air quality impacts resulting from both the construction and operation of the Project. However, the RRDEIR improperly relies on infeasible mitigation measures to reduce certain air quality impacts to a less than significant level, omits significant sources of emissions from the construction air quality analysis, and fails to require implementation of all feasible mitigation measures to reduce significant unavoidable impacts. In addition, the RRDEIR’s failure to accurately analyze the air quality impacts of the Project fails to comply with CEQA. Each of these points is addressed below.

A. The RRDEIR Improperly Relies on Infeasible Mitigation Measures, Understating the Project’s Air Quality Impacts and Human Health Impacts.

36 The RRDEIR concludes that emissions of CO, NO_x, PM₁₀, PM_{2.5}, and diesel particulate matter from construction of the Project will be reduced, in some cases to a less than significant level, largely as a result of requiring diesel particulate filters and exhaust gas recirculation systems (“EGR”) on all off-road diesel equipment. RRDEIR at 1-7, 4.4-24 to 4.4-32; *id.* at Appendix 4.15 §§ AQ-1 to AQ-4 (air quality model assumptions that the use of diesel particulate filters will reduce PM₁₀ emissions by 80%, and that the use of cooled exhaust gas recirculation will reduce ROG by 90%, NO_x by 40%, CO by 90%, and PM₁₀ by 85%). These two measures are the only mitigation measures in the emissions model that reduce ROG, NO_x, and CO emissions, and with respect to PM₁₀, these two measures are far and away more effective than the other proposed mitigation measures. *See* RRDEIR Appendix 4.15 §§ AQ-1 to AQ-4; Exhibit B at 5.

37 ↓ In theory, the use of EGRs and filters could substantially reduce emissions, as the model shows. However, there is one fundamental problem with reliance on these measures: they are not feasible. As Mr. Gilbert’s report demonstrates, there are no

37 CARB-certified systems on the market that include both EGR and diesel particulate filters for off-road diesel equipment and vehicles, which would be capable of reducing emissions to the extent assumed in the RRDEIR. See Exhibit B at 5-7; California Air Resources Board, Verification Procedure – Currently Verified, <http://www.arb.ca.gov/diesel/verdev/vt/cvt.htm> (last reviewed Jan. 24, 2008). If both of these mitigation measures cannot be implemented, then the Project's air quality impacts during construction will be substantially worse than estimated in the RRDEIR and will result in significant air quality impacts from PM₁₀, PM_{2.5}, ROG, NOx, and CO emissions that are not disclosed in the RRDEIR.

38 Even if CARB-certified EGRs and diesel particulate filters were available on the market, it appears that the RRDEIR's emissions model has significantly over-estimated the potential PM₁₀ reduction benefits of using these systems. None of the CARB-certified systems reduce PM₁₀ by greater than 85%, yet the air quality model assumes that PM₁₀ emissions would be reduced 80% by use of diesel particulate filters and an additional 85% from use of EGR. RRDEIR Appendix 4.15 §§ AQ-2, AQ-4. The RRDEIR provides no evidence to support these estimated emissions reductions. The air quality modeling must be revised to accurately assess the effect of all feasible mitigation measures. See Exhibit B at 2-5, 8.

39 Equally important, the RRDEIR relies almost exclusively on the use of EGRs and diesel particulate filters to conclude that the Project's emissions of diesel particulate matter will not cause significant health impacts (either an Excess Cancer Risk of 10 in 1 million or a Chronic Hazard Index greater than 1.0). RRDEIR at 4.4-30 to 4.4-32 (stating that although unmitigated diesel particulate matter emissions would result in a significant excess cancer risk, the use of diesel particulate traps and EGR would reduce such emissions to a less than significant level); *id.* at Appendix 4.15 § AQ-13 (stating that use of these two mitigation measures would reduce diesel particulate associated with Phase I construction from 29.3 pounds per day to 0.9 pounds per day); Exhibit B at 7-8. However, even if such mitigation measures were feasible—which they are not—this estimate vastly overstates the potential mitigation benefits of EGR and diesel particulate filters. See Exhibit B at 7-9. Thus, contrary to the RRDEIR's conclusion, construction of the Project would result in a significant excess cancer risk. See *id.* As a result, the RRDEIR fails to disclose a significant, and substantial, human health risk.

40 Because the RRDEIR relies on infeasible mitigation measures to reduce construction emissions, the document fails to accurately assess the air quality impacts of the Project's construction, and it erroneously concludes that these impacts will not be significant. By failing to disclose the Project's true environmental impacts, and by failing to reduce these impacts to a less than significant level (or comply with CEQA's

do ↑ requirements with respect to significant and unavoidable impacts, *see* CEQA Guidelines §§ 15091, 15092(b)(2), 15093, the RRDEIR fails to comply with CEQA.

B. The RRDEIR Fails to Accurately Assess the Air Quality Impacts of Site Remediation.

↓ In addition to relying on infeasible mitigation measures, the RRDEIR dramatically understates the duration and extent of the air quality impacts from remediation of the site's contaminated soils. The RRDEIR assumes that haul trucks would be required to carry approximately 27,000 cubic yards of soil off-site for remediation, resulting in approximately 1,500 haul trips (23 trips per day) of a round trip distance of 200 miles. RRDEIR at 4.4-22; *id.* at Appendix 4.15 § AQ-2 (assuming on-road truck travel of 4,540 vehicle miles traveled ("VMT") during the site grading phase). The air quality analysis for Phases II and III assumes that all remediation will be performed in Phase I, since Phases II and III include zero VMT by, and zero emissions from, haul trucks. RRDEIR Table 4.4-8; *id.* at Appendix 4.15 § AQ-4. The document estimates that remediation of the site will take three months. RRDEIR at 4.4-22.

↓ However, the actual amount of soil that needs to be hauled off-site as part of site remediation efforts is approximately three times that estimated and analyzed in the RRDEIR. Indeed, in contrast to the RRDEIR's assertion in the air quality analysis that only 27,000 cubic yards of soil will require remediation (RRDEIR at 4.4-22), the hazards section of the document estimates that the site contains 77,000 cubic yards of soil in excess of OCHCA guidelines located at 166 separate areas, as well as 4,000 cubic yards of PCB-impacted soil. RRDEIR at 4.9-2. The document further states that contaminated soil will be excavated and transported to landfills certified to accept crude oil impacted soils located in Lancaster and Palmdale. *Id.* at 4.9-26. As a result, air quality impacts from haul trucks would be nearly three times the estimate in the RRDEIR. Moreover, given the extensive soil contamination across the Project site, *see* RRDEIR Exhibit 4.9-2, it appears that remediation of the entire site cannot be performed in Phase I without conflicting with the mitigation measures designed to minimize the biological impacts resulting from construction of the Project. *See* MM 4.12-1d (RRDEIR at 4.12-68) (requiring phasing of construction to reduce impacts to gnatcatchers).

As a result, the RRDEIR dramatically understates the air quality impacts caused by remediation of the site, and by failing to accurately analyze and mitigate these impacts, it violates CEQA. CEQA Guidelines §§ 15151, 15126, 15126.2.

C. The RRDEIR Fails to Provide Substantial Evidence that Cumulative Carbon Monoxide Emissions from Traffic Will Be Less than Significant

42 The RRDEIR concludes that carbon monoxide ("CO") concentrations, as a result of traffic in 2025 with the Project and all other cumulative projects, would not result in one- or eight-hour CO concentrations in excess of the thresholds of significance. RRDEIR at 4.4-16 and Table 4.4-5. However, the year 2025 CO data presented in Table 4.4-5 apparently assumes that background concentrations will actually improve over the next 20 years, and that vehicles will emit more than three times less CO per mile driven in 2025 than in 2007. Compare RRDEIR Appendix 4.15 § AQ-11 (estimating 5.72 or 5.34 grams per mile at 35 mph in year 2007) with *id.* at § AQ-12 (estimating 1.54 or 1.42 grams per mile at 35 mph in year 2025). These assumptions are questionable at best, given that the Coyote Project, together with other projects in the area, will exacerbate the air quality problems in the area. The document must provide evidentiary support for its optimistic CO assumptions.

In reality, CO concentrations are likely to exceed the thresholds of significance, resulting in a significant air quality impact that is not disclosed in the RRDEIR. As a result, the RRDEIR violates CEQA. CEQA Guidelines §§ 15121, 15126, 15126.2.

D. The RRDEIR Fails to Analyze and Require "All Feasible Mitigation Measures" to Reduce the Project's Significant, Unavoidable Air Quality Impacts.

43 The RRDEIR concludes that several of the Project's air quality impacts, resulting from both the construction of the Project and its operation, will be significant and unavoidable. See RRDEIR at 1-8 to 1-9, 4.4-41 to 4.4-42. The RRDEIR may not avoid the imposition of mitigation measures simply by labeling impacts as significant and unavoidable. Rather, the document must impose any feasible mitigation measure that would lessen the Project's environmental impacts, even if those impacts are not mitigated to a less than significant level.

Under CEQA, if feasible mitigation measures exist that would reduce or avoid a project's significant environmental impacts, the project may not be approved unless that mitigation is adopted. Pub. Res. Code § 21002. In order to certify an EIR that includes significant and unavoidable environmental impacts, the City must find that all feasible mitigation measures have been implemented to reduce such impacts. CEQA Guidelines §§ 15091, 15092(b)(2), 15093. Unfortunately, the RRDEIR fails to analyze, let alone require implementation of, all feasible mitigation measures.

1. Construction Emissions

44 ↓ With respect to construction impacts, the RRDEIR concludes that NOx, ROG, PM₁₀, and PM_{2.5} emissions will be significant, even with the adoption of mitigation

44 ↑ measures, for all or part of the construction period. See RRDEIR at Tables 4.4-8, 4.4-10; *id.* at 4.4-27, 4.4-29 to 4.4-30. The Project proposes to adopt the measures required by SCAQMD Rule 403, as well as additional mitigation measures to reduce fugitive dust and construction emissions. RRDEIR at 4.4-24, 4.4-38 to 4.4-40 (MM 4.4-1). However, additional feasible mitigation measures exist that the document fails to consider, let alone require, to further reduce these significant air quality impacts. Chief among these are requirements to further limit the area to be graded each day, to further restrict the number and types of construction equipment operating on the site each day, to require the use of EGR and/or diesel particulate filters for on-road diesel vehicles (trucks hauling contaminated dirt off-site for remediation purposes), and to limit the number of haul truck trips during site remediation.

45 ↓ The amount of area to be graded each day is directly related to the Project's PM₁₀ and PM_{2.5} emissions. The Project proposes to mitigate construction emission impacts by limiting grading to 14 acres per day, although the analysis assumes that approximately 38 to 39 acres are graded per day. See MM 4.4-1 (RRDEIR at 4.4-39).¹⁰ Further limiting the area to be graded each day could significantly reduce PM₁₀ and PM_{2.5} emissions, particularly during Phases II and III, which the RRDEIR concludes will result in significant impacts from particulate emissions.

46 ↓ Likewise, the number and type of equipment operating on the site at any one time affects NO_x, PM₁₀, and PM_{2.5} emissions. The RRDEIR analysis is based on two scenarios: the first involves 20 Rubber Tired Dozers and 20 Tractor/Loaders/Backhoes; the second involves 20 dozers, 22 tractors, and 1 "other equipment." See RRDEIR Appendix 14.15. Yet by limiting the number and type of equipment used during each day of construction, construction-related emissions can be reduced to a less than significant level. See Exhibit B at 2-5. Inasmuch as it is feasible to reduce construction-related air emissions by restricting grading acreage and limiting on-site equipment, the RRDEIR must be revised to incorporate and analyze such a measure.

47 ↓ In addition, the RRDEIR requires the use of EGR and diesel particulate filters for off-road construction equipment, but it does not require either or both types of equipment for on-road diesel vehicles. Indeed, it does not require any mitigation for on-road diesel emissions during construction. As discussed above, on-road diesel emissions from haul trucks are significant and are substantially, and unreasonably, understated in the RRDEIR. See discussion in Part I(B), *supra*; RRDEIR at 4.4-26 (showing that emissions from haul trucks alone exceed the threshold of significance for NO_x

¹⁰ As discussed in Part I(E), *infra*, the RRDEIR wholly fails to analyze the air quality impacts that result with implementation of this mitigation measure, making it difficult, if not impossible, to accurately quantify the air quality impacts of the Project.