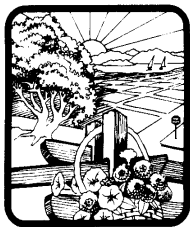


Aug 25, 2009



Friends
of the
Santa Clara
River

660 Randy Drive
Newbury Park, CA 91320
(805) 498-4323



SCOPE
Santa Clarita
Organization for
Planning and the
Environment

TO PROMOTE, PROTECT
AND PRESERVE THE
ENVIRONMENT, ECOLOGY
AND QUALITY OF LIFE IN
THE SANTA CLARITA
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U.S. Army Corps of Engineers, Los Angeles District
Regulatory Branch-Ventura Field Office
ATTN: CESPL-CO-200301264-AOA, Newhall Ranch EIS
2151 Alessandro Drive, Suite 110
Ventura, California 93001

Dear Sirs,

Friends of the Santa Clara River was formed as a 501c3 non-profit public interest organization in 1993. Our mission is to protect and restore the ecological integrity and biological diversity of Southern California's 1600 square mile Santa Clara River Watershed.

Santa Clarita Organization for Planning and the Environment is a California non-profit corporation founded in 1987 to monitor planning and conservation issues that affect the Santa Clarita Valley.

The mission of Ventura Coastkeeper, a program of the Wishtoyo Foundation, is to protect, preserve, and restore the ecological integrity and water quality of Ventura County's inland waterbodies, coastal waters, and watersheds, which are vital natural resources for the citizens and all inhabitants of Ventura County, and are the lifeblood of Chumash Native American culture.

We make the following comments jointly and include by reference the comments of others that may express concern about the significance of the impacts to the our region and our state.

All three of our organizations have sought protection for the Santa Clara River, its tributaries and floodplain for many years because we believe the community will be best served by leaving these resources in as natural a state as possible. A natural river system enhances ground water quality and ground water recharge, provides habitat for wildlife and recreational opportunities for families and children.

We urge you to consider these important beneficial qualities of natural waterways as you evaluate the legal and jurisdictional requirements, and the enormous impacts of this project on the entire watershed.

** Barbara Wampole **

Barbara Wampole
Friends of the SC River

Jason Weiner
Ventura Coastkeeper

Lynne Plambeck
SCOPE

The Public Notice

The Corps' public notice (PN) for Newhall Ranch, dated May 1, 2009, is inadequate. The PN fails to provide the basic information that is required see 33CFR325¹, the Corps own SOP² and the Mitigation Rule), and fails to provide a basis for meaningful public comment and review. As shown in the excerpts from the PN (see attachment B), the Corps has failed to provide a clearly defined basic project purpose (and its water dependency or lack thereof), a clear statement as to what the overall project purpose is (as defined by the Corps—not the project proponent—and including the geographic area in which to conduct an off-site alternatives analysis), a description of what the Corps has determined their NEPA scope of review is (for this undefined project purpose)—these are the basic items necessary for public review and comment as they are critical in establishing the scope of the 404b1 alternatives analysis.³ Additionally, the required information on how the applicant has avoided and minimized impacts to the aquatic environment is missing from the public notice as is a compensatory mitigation plan.

Is the project purpose to construct several bridges and fill several drainages, or is it to construct a large scale housing development with attenuated features within the greater Los Angeles area (with the basic project purpose shelter—a non water dependant activity)? The public should not have to guess at what the basic project purpose is, what the overall project purpose is and what the NEPA scope is—instead it is required that the Corps clearly define this in the public notice.

Additionally, the Corps was on-site with EPA to conduct initial jurisdictional determinations as early as the 1990s—over a decade ago—and as such they have had a great deal of time to be

¹ 33CFR325.3a The notice must, therefore, include sufficient information to give a clear understanding of the nature and magnitude of the activity to generate meaningful comment. The notice should include ...A brief description of the proposed activity, its purpose and intended use, so as to provide sufficient information concerning the nature of the activity to generate meaningful comments, including a description of the type, composition, and quantity of materials to be discharged... A plan and elevation drawing showing the general and specific Site location and character of all proposed activities, including the size relationship of the proposed structures to the size of the impacted waterway and depth of water in the area;

² The information that must be referenced in a PN is defined in 33 CFR 325.3(a). The PN should contain a concise description of the project, the overall project purpose, and its anticipated impacts on the aquatic environment. (USACE, 1999)

³ Defining the project purpose is critical to the evaluation of any project and in evaluating project compliance with the Section 404(b)(1) Guidelines. Defining the purpose of a project involves two determinations, the basic project purpose, and the overall project purpose. The overall project purpose is used for evaluating practicable alternatives under the Section 404(b)(1) Guidelines. The overall project purpose must be specific enough to define the applicant's needs, but not so restrictive as to preclude all discussion of alternatives. Defining the overall project purpose is the responsibility of the Corps, however, the applicant's needs must be considered in the context of the desired geographic area of the development, and the type of project being proposed. For example: "to construct a viable, upscale residential community with an associated regulation golf course in the south Dade County area." The basic purpose of the project must be known to determine if a given project is "water dependent." For example, the purpose of a residential development is to provide housing for people. Houses do not have to be located in a special aquatic site to fulfill the basic purpose of the project, i.e., providing shelter. Therefore, a residential development is not water dependent. Page 7 (USACE, 1999)

prepared to publish what should have been a thorough public notice that at least meets the minimum legal requirements. Yet the PN lacks the very basic information needed to enable meaningful public comment and review. In order to further illustrate the degree of inadequacy and of this particular PN, we have provided several complete PN's for comparison. The PN's attached which do provide the basic information required were approved of by the author of this PN and thus demonstrate that the Corps knowingly has failed to meet the information standards held of PN's. Please see appendix A.

The Corps' failure to meet the PN requirements has foreclosed the public's ability to provide meaningful public review and comments—of particular concern on practical alternatives that would avoid and minimize impacts to the aquatic environment. Thus we request the issues we have raised with respect to the PN be corrected and that a new PN be circulated to the public, so that the public can have the opportunity to provide meaningful review and comment.

Additional Comment on the PN

The PN states that the Specific Plan that would facilitate the development of Newhall Ranch has been certified by LA County. Although this is technically accurate, this description gives the incorrect impression that the project has already been approved. In fact, as a condition of the Specific Plan, each tract map must go through additional CEQA review to ensure that among other issues, an adequate water supply exists before it receives final approval. Much of the project cannot receive approval by the county until Newhall receives the Corps and CDFG approvals.

Compensatory mitigation and Jurisdictional Questions: We raise the following concerns with the level of accuracy in the jurisdictional determination:

- The impacts of under and miss identified JD on compensatory mitigation plans
- Miss classified wetland Waters of the U.S. (WOUS) as non-wetland WOUS
- Under delineated WOUS in the Santa Clara main stem
- Agricultural drainage ditches improperly excluded from jurisdiction
- Failure to address numerous first order streams in the jurisdictional analysis

Compensatory Mitigation

The mitigation rule requires that a compensatory mitigation plan be submitted with the application in order to deem the application complete. Additionally it is required that this information must be added to the public notice. In order to properly determine the amount of compensatory mitigation that may be required to compensate for the proposed impacts, it is first critical to properly define the extent and type of waters of the U.S. on-site. Without these basic prerequisites it is not possible to determine how to compensate for loss in functions and values and thus it is not possible to develop an appropriate compensatory mitigation plan.

Furthermore, the public notice must be issued by the Corps within 15 days upon receipt of a complete application. However, per the Mitigation Rule an application can't be deemed complete until a mitigation plan is in place. Yet there is no legitimate compensatory mitigation plan that would compensate for the proposed impacts to waters of the U.S.

Moreover, any mitigation plan that is generated must fully ensure that compensatory mitigation sites are self sustaining; must provide enough financial wherewithal to cover the cost of long term in-perpetuity protection; must ensure that in the event a compensatory mitigation site fails, adequate funds are available to pay for additional mitigation, must replace in-kind losses (for example impacts to ephemeral streams –compensated with increased functions and values in ephemeral streams,

impacts to wetlands of a certain class must be replaced with increased wetlands of that class within the watershed as close to the site as possible.)

Allowing invasive plant removal as a way to mitigate the effects of filling WOUS is emphatically unacceptable. This does not replace the lost of functions and values in the watershed-where WOUS are lost in one area the same type should be created near by. Furthermore, the mitigation rule mandates that if there are existing watershed planning documents to direct mitigation within the watershed, they shall be followed. Thus, any mitigation proposed must be consistent with the Nature Conservancy's Conservation Plan for the Lower Santa Clara River Watershed and Surrounding Areas 2008 and Santa Clara River Upper Watershed Conservation Plan 2006.

Wetland WOUS vs. non-wetland WOUS

In the past the 87 manual made it difficult to properly identify wetlands in the Arid South West Region of the Country because the 87 manual was designed to identify wetlands on the east coast of the U.S. that are vastly different for the wetlands in California. As such vegetated sand and gravel bars within floodplains were often misclassified as non-wetland waters of the WOUS because the soils often lacked hydric soil indicators due to seasonal or annual deposition of new soil material, low iron or manganese content, and low organic matter content. The Arid South West Supplement has addressed these issues so that these areas can be properly classified as wetlands. Please see Appendix E. for the applicable excerpt from the supplement.

We are concerned that the New Arid Southwest Manual was not properly applied to the Jurisdictional determinations resulting in several wetland areas which have been misclassified as non-wetland WOUS. We give examples below to illustrate the basis for our concern. Additionally, we are concerned about the type of compensatory mitigation. This will be described in greater detail below.

- Santa Clara River main stem

The wetland delineation by URS dated July 2007 focused on delineating the wetland areas on the Santa Clara River that would be impacted by the proposed bridge crossings.

- Potrero Canyon Bridge Alignment wetlands delineation map

Although it appears –for this study area- that the hydric soils and vegetation were properly identified, the wetlands boundaries appear inaccurate. See figure 5.

Page 2-21 of the document states:

“...most of the hydrophytic vegetation within the study location was associated with the current channel of the Santa Clara River, hydrophytic vegetation was also observed in a strip of agricultural land in the northern portion of the study location. In this area, the historic floodplain of Santa Clara River was evident as riparian scrub and forest bordered the narrow swath of agriculture. The area to the south of this hydrophytic vegetation is occupied by a fallow agriculture field.”

The wetland which surrounds sample point (PC) 5 appears to be arbitrarily chosen. This wetland's northern boarder bisects the fallowed farm field (including part, but not all of the farm field). There is no apparent reason for this choice in boundary, since the vegetation in the farm field appears homogeneous. No soil pits were taken in this excluded area to indicate a change from wetland to non-wetland, and there is a separate wetland to the north (containing PC2-4)—even further from the active channel than PC-5. When conducting a wetland delineation that shows breaks between wetlands and non-wetlands it is standard practice to do additional soil pits and vegetation transects to show the rationale for selecting a boundary. There is nothing in the document to explain why a large section of the fallowed agricultural field should not be included in the wetland boundary instead of the oddly chosen southern section of the fallowed field.

Furthermore, this delineation was added to the other delineations conducted for the entire property to create a composite by URS in 2009. In this composite the northern wetland identified in the historic floodplain (including pc-2-4) is shown as bound on the east and west sides by the cross section within the proposed bridge foot print. It seems unlikely that the wetland boundary would take on this unnatural linear shape-- especially considering that the type of vegetation within the wetlands extends to the west and the east, well beyond the straight lines of the proposed bridge impact.

- Long Canyon

URS's own document recognized sandy alluvial and riverwash are hydric soils.⁴

Yet data taken at LC-4 --in the middle of the river (surrounded by a the FACW indicator mulfat)— shows that the riverwash soil is not a hydric. Thus the entire middle of the river has been left out from being defined as a wetland. (See the enclosed figure 10.) Not only is this inconsistent with the approach taken by URS at the Potrero site, it is inconsistent with the Arid Southwest supplement. Additionally, LC-2 and LC-6 are on the edge of the active channel, contain a prevalence of wetland vegetation and yet these points Riverwash soils were also falsely marked as non-hydric. Furthermore, LC-2 containing riparian vegetation was incorrectly lumped with the agricultural in the vegetation map. See figure 11.

This fact set brings into question the entire jurisdictional determination for the Santa Clara River boundary. It is likely that the jurisdictional area covers a larger area then what is indicated in the URS 2009 composite. We modified figure 5 to indicate areas that are likely jurisdictional but have been excluded from the determination-please see Appendix D.

- Agricultural ditches and other missing waterways

In the past, ditches excavated wholly in uplands were exempted from the Clean Water Act section 404 program. However, through Justice Scalia's 2006 Rapanos Opinion this class of waters has been recaptured when they have approximately three months of flow in them in a normal year. This site contains several such waterbodies, all of which have been excluded from the jurisdictional determination.

Additionally, by looking at detailed 1:1foot high resolution aerial photos, we have identified several first order streams and ditches which have been excluded from jurisdiction in the final composite JD map. See enclosed map. The DEIS documents fail to address these creeks either way—there is no explanation as to why they have been excluded.

- JD Summary

The applicant has submitted a request to use their 2009 composite JD as a preliminary JD while they defer doing a detailed assessment of the extent of jurisdictional area to a future date. However, a compensatory mitigation plan is required in order to deem an application complete. Yet a mitigation plan can't be created until the impact to jurisdictional waters is properly assessed. The Corps and USEPA must make clear what areas are and are not waters of the U.S. prior to the Corps releasing the public notice. **This can't be deferred to a later time.** The Corps should not have deemed the application complete until it was clear what the jurisdictional boundaries are correctly delineated on the site and thus what the compensatory mitigation acreage and type would need to be in order to mitigate the proposed impacts. Furthermore, the project should not have gone out on public notice until a mitigation plan was in place.

These issues must be addressed and the public notice must be corrected and recirculated for public comment.

⁴ "Sandy Alluvial Land and Riverwash land types are listed by the USDA as hydric soils under flooded conditions" page 2-20

Defining project purpose and the alternatives analysis

In accordance with the Clean Water Act and Federal Guidelines in 40CFR230 we are providing the following comments:

The 404b1 Guidelines state dredged or fill material should not be discharged into the aquatic ecosystem, unless it can be demonstrated that there is no less environmentally damaging practicable alternative that achieves an applicant's project purpose. In addition, no discharge can be permitted if it will cause or contribute to significant degradation of the waters of the US. The applicant is proposing to fill and impact major canyons and creeks, some of which contain special aquatic sites. Given the extent of the impacts associated with the proposed activities and the likely impacts to special aquatic sites, the applicant bears the burden of proof for clearly demonstrating that the preferred alternative is the Least Environmentally Damaging Practicable Alternative (LEDPA) that achieves the overall project purpose while not causing or contributing to significant degradation of the aquatic ecosystem.

The first step in the Corps' completion of an alternatives analysis is defining the overall and basic project purpose. Allowing Newhall to define the project purpose, as appears to have occurred, and/or determine whether practicable alternatives exist for this project is emphatically not an acceptable approach for conducting the alternatives analysis review under the 404(b)(1) guidelines. The Corps is responsible for controlling every aspect of the 404(b)(1) analysis. While the Corps should consider the views of the applicant regarding the project's purpose and the existence of (or lack of) practicable alternatives, the Corps must determine and evaluate these matters itself, with no control or direction from Newhall, and without undue deference to Newhall's wishes (Paragraph 7 of Plantations Landing Guidance April 21, 1989). The project purposes must be defined so that an applicant is not in the position to direct, or attempt to direct, or appear to direct, the Corps evaluation required under the guidelines (Old Cutler Bay guidance and reiterated in Twisted Oaks guidance)

"The Corps should consider the applicants views and information regarding the project purpose and existence of practicable alternatives, this must be undertaken without undue deference to the applicant's wishes...the project purpose can not be so narrowly defined as to preclude the existence of practicable alternatives on the other hand, the Corps has some discretion in defining the "basic project purpose" for each Section 404 permit application in a manner which seems reasonable and equitable for that particular case....but can not give to much deference to the applicant's narrowly defined project purpose. ...the Corps determines the minimum feasibility size, circumstances, etc., which characterized a viable project. "(Hartz Mountains Development Corporation Permit Elevation Case Guidance dated August 17, 1989.)

Furthermore the basic project purpose (housing) is not a water dependant activity. The definition of water dependent as stated in the Guidelines is limited to "activities requiring access or proximity to or sitting within a special aquatic site to fulfill the basic project purposes. There are many ways to meet the overall and basic project purpose that do not involve the discharge of fill material to special aquatic sites or to any waters of the U.S.

A reasonable range of alternatives that meet the stated project purpose while avoiding and minimizing damage to waters of the U.S. should be evaluated in the alternatives analysis. Careful consideration of non-structural alternatives to filling in waters of the US is essential in

completing an alternatives analysis and is sound planning for any floodplain area. Additionally, recognizing the function and economic value to society of active floodplains, Executive Order 11988 states that agencies proposing to allow an action to be located in a floodplain will consider alternatives that avoid adverse effects of incompatible development in the floodplain.

Notwithstanding the PN has no stated overall project purpose, we have attempted to deduce what the Corps may have intended to defined the overall project purpose to be. We have located the following list of project purposes found within the DEIS, all of which give deference to the applicant's narrowly defined stated purpose and goals and are used throughout the DEIS to preclude the existence of practicable alternatives.

- “1.6 PROJECT PURPOSE AND NEED/PROJECT OBJECTIVES

In summary, the Project's overall purpose/need and objectives are two-fold. First, the overall purpose/objective is to implement the approved Specific Plan, and thereby help to meet the regional demand for jobs and housing in Los Angeles County; and, at the same time, implement the RMDP component of the proposed Project to address long-term management of sensitive biological resources and establish preserve design principles in conjunction with the RMDP infrastructure needed to implement the approved Specific Plan in compliance with federal and state environmental protection requirements.

The second overall purpose/objective is to implement a practicable and feasible SCP that would protect and manage a system of preserves designed to maximize the long-term persistence of the spineflower within the applicant's land holdings in Los Angeles County, and to authorize the take of spineflower in areas located outside of designated preserves.

The applicant also has identified nine RMDP-specific purposes/objectives, and five SCP-specific purposes/objectives (see Project Description, Subsections 2.1.3.2 and 2.1.3.3, respectively). There also are four other important purposes/objectives that would be achieved with implementation of the proposed Project. **Subsection 2.1.3.4** sets forth these other important purposes/objectives.”

- “The applicant's overall purpose and need for the proposed Project under NEPA, and the objectives of the proposed Project under CEQA, are as follows:

To practicably and feasibly achieve the basic objectives of the Specific Plan, thereby helping to meet the regional demand for housing and jobs. Specifically, the RMDP component of the proposed Project would address the long-term management of sensitive biological resources in conjunction with the construction and maintenance of RMDP infrastructure needed to implement the approved Specific Plan in a manner that complies with federal and state environmental protection requirements; and to develop and implement a practicable and feasible SCP that would permanently protect and manage a system of preserves designed to maximize the long-term persistence of the spineflower within the applicant's land holdings containing known spineflower populations, and to authorize the take of spineflower in areas located outside of designated preserves.” DEIS-2.0-8

- “Entrada Objectives Summary-A portion of the Entrada planning area would include a mix of residential, commercial, nonresidential, open space, and public services in close proximity to the I-5 corridor and surrounding existing uses within the Santa Clarita Valley;” 3.0-43-
- “Potential sites were identified with the only parameters being that the sites had to be reasonably available for purchase, and they had to be located within the very broad geographic region of Ventura, southern Kern, and central to northern Los Angeles counties. 3.0-3”
- “Some sites were located outside the Santa Clarita Valley market and planning area, which is where the Specific Plan, VCC, and Entrada areas are located. The Project area’s market and planning area has been determined to be bound on the north by Pyramid Lake, on the west by eastern Ventura County (including areas generally east of the cities of Fillmore, Moorpark, and Camarillo), on the south by the central and northern portions of the city of Los Angeles, and on the east by the southwestern Antelope Valley.” 3.0-6

An overall project purpose for a proposal for Newhall should be at least as broad as the following statement: “A large scale mixed housing and commercial development, with attenuated features, within the greater Los Angeles Area (Southern Kern County, Ventura County and Los Angeles County)”.

Defining the project purpose is step on in preparing a decision making document and is critical to the evaluating project compliance with the Section 404(b)(1) Guidelines. The lack of a clearly defined overall project purpose constitutes a major flaw in the document because without a clearly defined overall project purpose, there is nothing to base the range of alternatives and LEDPA determination on. Identification of the LEDPA is achieved by performing an alternatives analysis that estimates the direct, secondary, and cumulative impacts to jurisdictional waters resulting from each alternative considered. Project alternatives that are not practicable and do not meet the overall project purpose are eliminated. The LEDPA is the remaining alternative with the fewest impacts to aquatic resources, so long as it does not have other significant adverse environmental consequences and is the only alternative that could be permitted.

Need for the proposed project The DEIS states that the need for the project is to provide housing and jobs for Los Angeles County. The need is questionable. Since the economic downturn the demand for housing has decreased . In fact, some new developments owned by Newhall in the Santa Clarita Valley (RiverPark and Soledad Townhomes, for example) stand vacant and are selling slowly. Newhall has permits to build 900 additional units at River Park, 400 at Soledad and 2000 in West Creek, only a few tracts of which have began construction. . There appears to be an over abundance of housing and undeveloped communities that have already been permitted (including the 3300 units listed above), that are planned and permitted to be constructed by Newhall within the Santa Clarita Area alone. Additionally, despite that the need for the project is stated for housing and jobs in Los Angeles County, the DEIS states that the jobs created by the development would support the people who would live in the proposed community. If this statement in the DEIS were correct, then it would be illogical to conclude there would be a net increase in jobs/residents for the

Santa Clarita Area. We find the assumption to be false, however we point this out to show inconsistency within the DEIS.

Affordable housing

For example, 20% of the total housing proposed for the Landmark Village part of the project is planned as low-income housing (296 units). 10% of all housing units planned for the entire Newhall Ranch development will be low-income (2200 units). The breakdown of this percentage into very low, low and moderate income affordable housing is not provided. However, looking at the projected need for the unincorporated area of Los Angeles County, low-income housing of all types is estimated to be just over 50% of the total need (26397 of the 52232 total projected need). By this account, the project would not providing low-income housing units consistent with the project area need. The project does not appear to serve the stated public need, instead the increased number of higher end homes demonstrates that the need for the project is largely private.

Preparation of the EIS

When the Corps determines that an EIS is required for a permit action, they are required to select a third party contractor to prepare the EIS --that is paid by the applicant but who is supervised directly by the Corps. Only in rare cases where a third party contractor can not be used is the Corps permitted to instead allow the applicant's hired consultant to furnish information required for an EIS. The Corps is responsible for all information in the EIS and must be especially vigilant in identifying and eliminating any bias that could exist in a draft NEPA document prepared by a contractor selected and supervised by an applicant. Where the Corps lacks the expertise to do so, they can (and should) require the applicant to hire a third party expert to ensure that the information and analysis is correct for their permit decision.⁵

Notwithstanding these clear requirements, the facts indicate that the applicant was allowed to direct and supervise their chosen consultants in preparation of their own EIS.⁶ We have

⁵ HQUSACE memorandum of 17 December 1997 and repeated in the Corps SOP: "... any Corps district preparing an EIS on a permit action will use a "third party contractor" as the primary method to prepare all or part of a project specific EIS or to obtain required information (40 CFR 1500-1508). "Third party contract" refers to the preparation of an EIS by a contractor paid by the applicant but who is selected and supervised directly by the district engineer 17 October 15, 1999 (Corps Regulatory Branch). (See 40 CFR 1506.5(c) and Council on Environmental Quality's (CEQ) Forty Most Asked Questions Concerning CEQ's NEPA Regulations, #16 and #17). ...The procedures outlined in 40 CFR 1500-1508 and CEQ's forty questions must be followed. Furthermore, the Corps is responsible for final acceptance of the draft and final EIS." (USACE, 1999)

Appendix B, 33 CFR Part 325, provides that the district engineer may require the applicant and/or his/her consultant to furnish information required for an EIS...however, ... this approach will be utilized ...only when for some reason the third party contracting cannot be used. If this method is used, .. The Corps is responsible for review and acceptance of required information, data, or drafts and must be especially vigilant in identifying and eliminating any bias that could exist in a draft NEPA document prepared by a contractor selected and supervised by an applicant. The district engineer (Corps Regulatory Branch) has the final determination for EISs prepared by the applicant and his consultant of whether the data provided is adequate and accurate. The Corps will carefully review the applicant's drafts to ensure they are technically adequate and not biased." (USACE, 1999)"

⁶ Evidence of this is clearly stated in the EIS states that "In general, the applicant prepared administrative draft analyses in consultation with both the Corps and CDFG, and with the assistance of various consultants under contract directly with applicant." The applicant's administrative drafts were then forwarded to and independently reviewed by the Corps, and

found numerous items detailed below that illustrate both the EIS's biased information to favor the applicant's desired outcome and that the Corps has abdicated its duty to maintain control and responsibility of this document. Deferring to the applicant to write the Corps' NEPA document and conduct the alternatives analysis for their proposed project is emphatically unacceptable.

Furthermore, the Corps SOP clearly state that Districts are not to conduct or document two separate alternative analyses. Instead the NEPA and 404b1 alternatives analyses are to be combined into one decision making document.⁷ Yet the EIS written does not contain a 404b1 alternatives analysis nor does the alternatives analysis conducted comply with the 404b1 guidelines.

Avoiding impacts, the mitigation sequence

From the Hartz Mountain Elevation Case guidance "The Army Corps of Engineers is serious about protecting waters of the United States, including wetlands, from unnecessary and avoidable loss...Corps should inform developers that special aquatic sites are not preferred sites for development and that non-water dependant activities will generally be discouraged in accordance with the guidelines." Notwithstanding that a pre-consultation process did occur, the applicant has proposed impacting the majority of ephemeral and intermittent streams on-site. What has the Corps done to comply with the above requirement? Within the DEIS, the Corps states it has been in control of the DEIS preparation. However, due to the large amount of proposed impacts to WOUS and other statements discussed in detail within this letter, it appears that the Corps has not made the applicant aware of their requirement to avoid impacting WOUS. In fact, the basic required statement of how the applicant has avoided impacts to waters of the U.S. is missing.

CDFG with the assistance of various consultants under contract with CDFG, including the Aspen Environmental Group and legal counsel. Both the Corps and CDFG then developed the Draft EIS/EIR in close coordination with the applicant and various consultants through an iterative process over a number of years, a process that involved numerous visits to the Project site and the surrounding area, and multiple meetings attended by the Corps, and CDFG personnel and its consultants. Over the course of the document preparation process, the Corps and CDFG utilized their respective staff expertise in providing extensive review, oversight, and independent judgment and analysis of the Draft EIS/EIR. In addition, CDFG retained Aspen Environmental Group and legal counsel as independent third-party reviewers of the entire Draft EIS/EIR." 1.0-27 and 28

⁷ "The analysis of alternatives, pursuant to the (404b1) Guidelines will also satisfy NEPA, which also requires the analysis of alternatives. Therefore, districts should not conduct or document separate alternatives analyses for NEPA and the(404b1) Guidelines."-page 11 (USACE, 1999)

Additionally, item 16. "Documentation - Environmental Assessment, Statement of Findings, 404(b)(1) Guidelines Compliance, EISs, and Standard Compliance Statements." (USACE, 1999)

"The documentation of this process is variously referred to as a SOF/EA or a combined decision document which incorporates both the EA and SOF(Statement of Findings). A combined decision document should be used to consolidate discussion on project impacts and alternatives. (USACE, 1999)

The decision document must also include an EA that supports the decision (a findings of no significant impact (FONSI) or a findings of significant impact necessitating the preparation of an EIS), and if the project involves a discharge of dredged or fill material into waters of the United States, analysis of compliance with the 404(b)(1) Guidelines. The decision document should discuss all relevant public interest review factors, incorporate the findings of this review, include the 404(b)(1) Guidelines review and conclude with a public interest determination. The decision document must include the items listed above." (USACE, 1999)

The Corps regulations require all applicants to demonstrate that they have avoided impacts to waters of the U.S., what can't be avoided must next be minimized and thirdly what impacts are remaining after the process must be mitigated for by replacing lost functions and values provided by the aquatic resource through compensatory mitigation. This mitigation sequence does not allow applicants to skip to the third step in the process regardless of the quality of the compensatory mitigation being offered without first demonstrating avoidance and minimization (33CFR320.4(r); 1990 DA-EPA Mitigation MOA). Yet it appears the Corps is willing to allow the applicant to skipping to the third step by proposing to impact the majority of ephemeral and intermittent streams on-site and reengineering them underground or to a location and size of the applicant's liking. Furthermore, even within the DEIS the likely motive for filling the creeks instead of avoiding impacts was revealed as a way to save on the cost and time involved to truck "cut" material off-site.

Clearly the level of impacts to the aquatic environment and wildlife from the proposed is significant. Thus in the on-site creeks and rivers, which act also as wildlife corridor areas, non-structural off-channel alternatives must be seriously considered. Yet the current NEPA document has failed to take a hard look at non-structural alternatives to the proposed impacts to WOUS. The current NEPA document fails to seriously consider numerous avoidance and minimization measure. Below we have listed some of the imperative items that must be considered:

- The amount of open space designated in the overall Newhall Ranch development is substantial, totaling over 50% of the entire land area. Furthermore, the proposed open space appears to be of good quality, seemingly undisturbed habitat in the more mountainous region of Newhall Ranch. However, considering the entire project area, the most sensitive areas do not appear to be protected from encroaching development. The Santa Clara River corridor is a critical riparian habitat zone, which is designated open space but has planned development abutting its banks (which are to be invasively stabilized in order to accommodate the development) with insufficient buffers to protect the degradation of the river and its habitat. The plan appears to ignore the fact that the river is a major habitat corridor and should be protected as such by limiting development near the river.
- For example, The Landmark Village project is designated as Low-Medium residential, Medium residential, Commercial and Mixed Use development. The proposed 1444 housing units on the 296 acre footprint of the proposed tract map equates to 4.87 units/acre. However, given the project's proximity to the Santa Clara River corridor, a higher housing density could reduce the overall footprint of the project and potentially lessen the impacts to the riparian system.
- Furthermore, although we do not sanction or promote any development at this site, we have offered another alternative to consider which would constitute less environmentally damaging impacts and is practicable. It may or may not be the more expensive to build and it may not maximized profitability on the site, however as stated above these factors are not to be considered in the 404b1 analysis-instead the analysis solely focuses on avoiding and minimizing impacts. Another alternative should be prepared and circulated for comment which has the following elements: (1) most of the floodplain avoidance elements of Alternative 7; (2) elimination of the Potrero Canyon Road Bridge; (3) adequate circulation that is in accordance with public safety requirements.
- The proposed project impinges upon the 100-year floodplain of the River. As shown in the DDEIS, large sections of the project are within the FEMA floodplain. There is absolutely no reason why housing needs to be placed in the 100-year floodplain, thus necessitating stream bank stabilization measures (i.e. stream bank hardening) to then protect those homes in the

floodplain. Any development in the Santa Clara River watershed must occur well outside the 100-year floodplain or outside of the 500 foot riparian buffer (whichever is greater) and as discussed below must maintain vegetated buffers in order to protect the water quality and ecosystem functions of the River.

- We have strongly urged that conservative approaches be adopted in permitting decisions for projects impacting the Santa Clara River. Two studies on the impacts of urbanization on nature reserves and riparian species are listed in References 2 and 3. Reference 3 shows that impacts of urbanization on riparian bird communities can extend up to 500 meters (1500 feet) from built sites. This demonstrates the complete inadequacy of the typical riparian setback of 100 feet, or even 200 feet. (Note: Friends submitted extensive written comments on this buffer zone issue at the 2000 Notice of Preparation public hearing, but these are not included in the proceedings of this hearing as listed in the DEIS/DEIR Appendix 1). **A 500 foot riparian buffer should be required for all development activities** The river is an important migration and genetic dispersion corridor for many wildlife species, including aquatic taxa, riparian obligate species (resident and migratory), and larger more terrestrial animals. Numerous riparian plant communities have been observed on the project site that are critical to supporting all or part of the life stage needs for listed species. For instance, there are documented populations of elderberry scrub, mulefat scrub, southern willow scrub, river wash, freshwater marsh, alluvial scrub, great basin scrub, and scalebroom scrub. In addition, there are numerous special-status riparian plant species on-site such as the late-flowering mariposa lily, Los Angeles sunflower, southwestern spiny rush, Davidson's bush mallow, California Muhly, mud nama, spreading navarretia, Gambel's watercress and Sonoran maiden fern documented in the project area. In addition, there are numerous animal communities that inhabit the riparian corridor. Many of these species inhabit the riparian zone such as the Lawrence's goldfinch, Northern harrier, Arroyo toad, Western spadefoot toad, and San Bernardino ringneck snake. There are also federally listed aquatic species present or that may be present at the project site or downstream.⁸ In addition, scientific evidence clearly demonstrates that buffer zones, or intact areas of natural vegetation, are crucial to the protection of water quality.⁹ Although the DEIR claims that an appropriate riparian buffer is being included in the project design to protect these species, the impact analysis in Section 4.4 refutes this assertion. Table 4.4-8 shows the acreage of each plant community/land use that would be developed or temporarily disturbed. A large

⁸ Dr. Philip Rundel stated in his written comments on the proposed Ahmanson Ranch Project that "[r]iparian ecosystems are keystone habitats in Southern California and play a critical role in a variety of ecosystem processes... these ecosystems act to buffer hydrologic and erosional cycles, control and regulate biogeochemical cycles of nitrogen and other key nutrients, limit fire movements, and create unique microclimates for animal species. Both terrestrial and aquatic wildlife depend on riparian ecosystems with their year-round availability of water, nutrients, food sources, and organic sediments ... It is not surprising, therefore, that riparian ecosystems are centers of high biodiversity."- Letter from Dr. Philip Rundel to Dennis Hawkins, dates April 26, 2002.

⁹ See these references: "National Management Measures to Control Nonpoint Source Pollution from Urban Areas" (<http://www.epa.gov/owow/nps/urbanmm/index.html>, last updated 8/8/2003); Herson-Jones et. al, 1995, cited in the aforementioned EPA document; Wenger, S. J. & Fowler, L. (2000) Protecting Stream and River Corridors. Creating Effective Local Riparian Buffer Ordinances. *Policy Notes*. Public Policy Research Series, Carl Vinson Institute of Governments, the University of Georgia. 1(1):1-2; Wegner, S. (1999) A Review of the Scientific Literature on Riparian Buffer Width, Extent and Vegetation. Office of Public Service & Outreach, Institute of Ecology, University of Georgia; Basnyat, P., Teeter, L. D., Flynn, K. M., & Graeme Lockaby, B. (1999). Relationships between Landscape Characteristics and Nonpoint Source Pollution Inputs to Coastal Estuaries. *Environmental Management* 23(4):539-549; and US EPA (2002) National Management Measures to Control Nonpoint Source Pollution From Urban Areas-Draft. Office of Wetlands, Oceans and Watersheds. Nonpoint Source Control Branch. Washington

percentage of the riparian plant communities described above would be completely destroyed or severely impacted by the project. For example of the 6.93 acres of scalebroom scrub currently on-site, 4.27 acres will be permanently destroyed and 2.67 acres will be temporarily impacted. This means that the entire community will be impacted. If a riparian buffer is proposed, how is this riparian community completely impacted? The DEIR acknowledges that the loss of habitat due to the project would be significant. "...[T]he loss of wildlife habitat would adversely affect numerous common and special-status wildlife species, including the silvery legless lizard, rosy boa, San Bernardino ringneck snake, coast horned lizard, coast patch-nosed snake, northern harrier, white-tailed kite, southern rufous-crowned sparrow, Bell's sage sparrow, western burrowing owl, San Diego desert woodrat, pallid bat, mountain lion, and San Diego black-tailed jackrabbit." Further, the document states that this loss is "unavoidable." DEIR at 4.4-59 and 60. This claim is completely unfounded, and the huge impact to wildlife species is unacceptable.

The developer has obviously not considered reasonable alternatives to lessen this impact such as increasing the riparian buffer, increasing the density of homes, and/or building fewer homes. If there is an appropriate riparian buffer, then the risk to these species - many of which are endangered or special-status - is greatly reduced. A minimum 500 foot buffer, as measured from the outside edge of the riparian canopy (not from the edge of the bank stabilization), or a restriction to not build in the floodplain whichever is greater, should be required for this project due to its size and the nature of the River. This sizable buffer is necessary for many reasons including that a number of studies have found that even the more riparian-dependent wildlife species also require adjacent upland habitats and arroyo toads have been found in agricultural fields and occur within portions of the site outside of the proposed riparian setback zones. In general, the purpose of the buffer is to protect the riparian areas from filling, devegetation and encroachment by human development. Grading, development, and BMPs should not be allowed in the buffer. Also, the fuel modification zone should not interfere with the buffer zone. Further, mitigation must occur on-site and in-kind as a first priority and around removal is not an acceptable compensation for filling waters of the U.S. The mitigation proposed to date is completely inadequate and should be dramatically increased.

- There should be no grading within 500 feet of the River or any tributary or on steep slopes (steeper than 4:1). Also, there should be no grading activity during the rainy season (November through April). On many occasions we have witnessed the disastrous effect of grading, even at much smaller projects, when a rainstorm occurs. For instance, there were disastrous sediment discharges from the much smaller Shea Homes project in Agora Hills that were documented by the Regional Water Board and Fish and Game in 2003/2004. The basic best management practices ("BMPs") are not sufficient to prevent massive sediment inputs to creeks when hillsides are graded and exposed to rainfall. These restrictions should be specified in the DEIR.
- Some of the proposed water quality BMPs will be maintained by homeowner associations. This does not ensure ongoing water quality protection because there is no regulatory oversight of these associations. All water quality protection measures should be the responsibility of the developer. Alternatively the homeowners associations should at least be required to sign binding agreements with such government agencies requiring the homeowners associations to perform specific maintenance, monitoring and reporting requirements, depending on the BMP. Without maintenance, monitoring and reporting follow-up, there is no point in using BMPs

since there will be no way of determining whether a given BMP is effective in mitigating water quality impacts.

- The DEIS indicated a significant increase in runoff, despite proposed mitigation measures. (The actual runoff and pollutant loading estimate would be greater if the applicant would use more appropriate models and not bulk and burn calculations.) Small increases in flow can result in massive erosion problems over time. In order to “mitigate” the impacts of these flows, the DEIR proposes the use of buried cement bank stabilization, bridge piers and abutments, rip-rap, and energy dissipaters and grade control structures. Any of these structures or modifications will affect the hydrology of the stream even if only in localized areas. Anytime natural processes are altered, there are substantial downstream impacts. The long-term effects of stream bank/bed modifications include increased scouring, increased erosion, and increased downstream deposition of eroded material, which degrades downstream habitat. As a result native vegetation are often washed out, eliminating the ability for pollutant removal. Also, eroding stream banks contribute fine sediment to streams. Fine sediments carry historic and current pesticides with them; contribute nutrients, bacteria, and bury important spawning habitat for steelhead trout.¹⁰ The best ways to avoid increased erosion/deposition effects are to (1) keep all structures and utilities outside the 100-year floodplain or the 500 foot riparian buffer of the River (whichever is greater); (2) use only soft bioengineering techniques to stabilize stream banks. (No armoring of stream banks). Bioengineering is preferable because it allows the river to maintain a natural dynamic balance. It also requires less maintenance over time as there are no concrete or other hard structures to eventually fail and be replaced. Bioengineering also provides natural riparian habitat that maintains water quality and wildlife habitat;
- We strongly urge that the recommendations in Chapter III of the California Floodplain Management Task Force (December, 2002) be evaluated and adopted in this DEIS/EIR. In particular, the recommendations relating to Multi-Objective Management of Section 15 and the ecosystem protection approaches, including non-structural approaches, of Sections 16 and 17 should be incorporated as part of overall project floodplain management objectives. Section 17 ends with this language: "In planning new or upgraded floodwater management programs and projects, including structural projects, local and State agencies should, where appropriate, encourage nonstructural approaches and conservation of the beneficial uses and functions of floodplains.
- There are numerous items lists below that would severely reduce direct and indirect impacts to WOUS caused by the hydro modification effects anticipated from the proposed project— instead they plan for the effects of hydro modification they would cause by proposing to re-engineer the creeks on-site to be capable of handling increase flow volumes and speeds. There are numerous LIDs and BMPs (such as green streets, recessed roadside planters, bio-swales, the use of pervious pavement, cisterns etc.) that would severely reduce direct and indirect impacts to WOUS caused by development. Properly designed LIDs and BMPs would maintain a pre-development hydrograph while reducing pollutant loads contributed from the site to the receiving waters. LIDs and BMPs can be designed for larger storm events such that

¹⁰ Heal the Bay's Stream Team mapped 70 miles of stream in Malibu Creek Watershed between 2001 and 2003. They found that 19.8 (28%) linear stream miles of armoring resulted in 18.7 (27%) linear miles of eroding stream banks

the amount of water discharge in streams during and immediately proceeding large storms matches the amount it would under native virgin landscape conditions.

- A key factor in the degradation of stream water quality is the proportion of impervious surfaces versus pervious surfaces in the watershed.¹¹ Heal the Bay's State of the Watershed concluded that "[o]ur imperviousness data and BMI data indicate a trend of increasing imperviousness associated with decreasing mean IBI scores." Further, the State of the Watershed Report finds that there is serious degradation to BMI with effective impervious surfaces as low as 5%. Hollis (1995) states that even "low levels of impervious cover (5 to 10 percent) are capable of increasing the peak discharge rate by a factor of 5 to 10 for storms smaller than the one year storm." While Schueler (1995) comments that "more impervious cover directly translates into higher peak discharge rates, greater runoff volumes, and higher floodplain elevations," detention ponds are most commonly constructed to mitigate these effects. The primary goal of stormwater detention ponds is to reduce the peak discharge rate by slowly releasing water over a longer period of time. Therefore, the total volume of runoff is the same with or without the detention pond, the only difference is that discharge lasts for a longer amount of time. Thus, the proposed BMPs will not solve many of the problems created by increased runoff volumes from the development. The DEIS should consider alternatives such as increasing the density of the housing or reducing the number of houses so that the % impervious is decreased below 5%. Maintaining 5% or less effective impervious area will help protect the Corps meet its requirements to protect viable biological communities supporting listed species, water quality and comply with the Mitigation Rule and Guidelines.
- The 19.9 million cubic yards of fill is planned to be excavated from the site along the Santa Clara River corridor are significant. This material would be used to raise the elevation of the project site for flood protection. This will pose serious risk of excessive sedimentation within the river corridor and create tremendous particulate matter air pollution.
- Recent aquatic invertebrate surveys in the Malibu Creek watershed have confirmed the presence of the New Zealand mudsnail, an insidious exotic invasive species that could potentially wreak havoc on the watershed's native organisms. The mudsnail has also been found in Piru Creek in the Santa Clara River watershed. The DEIS describes various construction activities that will take place in the River. In order to avoid the spread of this exotic species, the developer should include a strict protocol that will be implemented to prevent its spread. Anyone having contact with the River due to this project should complete a HACCP to prevent the spread of the mudsnail further into the watershed.
- We strongly recommend that the space between vertical support columns be increased to the maximum extent possible to provide for less obstruction and less impact on wildlife migration. Additionally we believe that the bridge height should be designed to minimize noise and light impacts that could deter aquatic and terrestrial wildlife migration. A light-penetrating surface should also be used to provide light for the organisms below. Plant growth below the bridge will provide for migrating wildlife and enhance stabilization. In sum, the Santa Clara River supports numerous endangered, threatened and rare aquatic species that must be protected from the deleterious erosion and deposition effects of stream bank/bed modifications. Therefore, the project must be modified to avoid all armoring.
- Where will the sewer lines and water supply lines be placed and how will this impact aquatic and riparian resources onsite and downstream? Without further details regarding discharges of

¹¹ Center for Watershed Protection, 2003. Impacts of impervious cover on aquatic systems. Watershed Protection Research Monograph 1, 158 pp. <http://www.cwp.org/Downloads/>

wastewater and its impacts to water quality, there is not sufficient information for decision makers to evaluate impacts of this project.

Instead of avoiding and minimizing impacts to the creeks on-site, the DEIS disregards and inadequate excuses significantly high level impacts proposed to creeks by proposing to fill (and in some case re-engineer them underlined with concrete which will likely be exposed in a the first large storm event) and then they claim they can replace the functions and values lost on-site by conducting invasive plant remove else where in the watershed. We find this to simply be unacceptable disregard for environmental laws and policies designed to protect our natural resources. The applicant's preferred alternative is clearly is not the LEDPA. We recommend taking a hard look at the avoidance and minimization measures listed above to create a reduced project with setbacks for housing near streams, hauling cut material off-site instead of disposing it in WOUS, increasing density to reduce project footprint, completely removing all impacts from Potrero Creek (as this would greatly reduce proposed impacts to waters of the U.S), including at least removing at the Santa Clara-Potrero bridge option, and avoid the "need" to physically modify the creeks on-site by using off channel non-structural alternatives such as BMP/LIDs to avoid the hydro modification effect from the proposed development (this would also help recharge ground water supplies, meet water quality, protect habitat for listed species, and protect public safety by reducing the potential of the project to increase flooding on downstream residents.).

Flaws in the Total Avoidance Alternative Analysis:

We raise the following concerns with respect to the assessment of the Total Avoidance Alternative Analysis:

In earlier sections of these comments, we have established citing that an alternative does not meet the applicant's objectives and/or is not feasible to meet the applicant's narrowly defined project purpose (to development the Specific Plan on-site) fails to be a legitimate bases for eliminating an alternative. The Corps is fully aware of this and thus the following statement within the DEIS demonstrates a vagrant disregard for the requirements in 404b1 Guidelines, the Corps SOP, and elevation case guidance and regulations:

"As to the Total Avoidance alternative, it is likely to result in fewer environmental impacts relative to the proposed Project; however, the alternative does not meet a number of the applicant's primary objectives/purpose and need associated with the proposed Project. In addition, under this alternative, development of the Specific Plan site is rendered infeasible. For all these reasons, the Total Avoidance alternative has been eliminated from further consideration in this DEIS/EIR." Page 3.0-46

While we commend the agencies for considering the preservation of spine flower important in their analysis, it is inappropriate for the Corps to include the statement below as part of the overall project purpose.

"As to the SCP component of the proposed Project, the Total Avoidance alternative also would not satisfy the objective/purpose and need set forth in the SCP, because the alternative would not allow a comprehensive approach to preserving and protecting the spineflower populations not only on the Specific Plan site, but also in a portion of the Entrada planning area. The majority of the proposed spineflower preserves are located in upland areas outside of the Corps' jurisdiction. However, by

restricting all Specific Plan development to non-jurisdictional areas under the Total Avoidance alternative, the alternative may have the effect of reducing the spineflower preserve acreage within the Specific Plan site in order to accommodate Specific Plan infrastructure and development that could not be constructed in the Corps' jurisdictional areas. In addition, by excluding Specific Plan development in the Corps' jurisdiction, the Total Avoidance alternative would not allow for development of spineflower preserves connected to open space areas within the entire Project area; thus, impeding the basic objectives/purpose and need of the SCP component of the proposed Project."3.0-42

The document does not explain why or how excluding Specific Plan development in the Corps' jurisdiction, under the total avoidance alternative, would prohibit development of spineflower preserves connected to open space areas within the entire Project area. Moreover, the concept that impacts to waters of the U.S. or any development on-site is required to preserve the spine flower defies logic. In fact, if the site was not developed then there would be infinite opportunity to meet the applicants claim desire to protect the spine flower. Furthermore, if the applicant was sincere about their desire to protect the spineflower they would not have purposely destroyed areas of it.

Additionally, the protection of spine flower can not be found to be part of the project purpose as a) no 404 permit is needed to do this, and b) it would lead to an overly narrow overall project purpose which would foreclose consideration of off-site alternatives.

Furthermore, the time to consider reducing impacts to spine flower and other environmental resources is during the 404b1 LEPDA alternatives analysis which takes into consideration the full range of environmental impacts from the different alternatives. Meaning there is no benefit lost in the 404process to protection of the spineflower by not including it in the Corps overall project purpose.

Moreover, the rationale used above is clearly not justification for eliminating the totally avoidance alternative per the 404b1 guidelines. The Corps analysis is out of compliance with their Guidelines indicating that they likely did not vigilantly oversee the preparation of this document.

Moreover we raise serious concerns with respect to the following statement within the DEIS:

“3.3.3.3 Logistical Infeasibility-In addition, if the Total Avoidance alternative was implemented, it would cause an imbalance in on-site grading, in that the cut needed would far exceed the available locations for fill; and, thus, result in a need for a net off-site export of over 19.9 million cubic yards. This, in turn, would greatly increase truck trips (approximately 1.5 million truck trips or approximately 3,320 days of truck traffic) to and from the Specific Plan site, increasing air emissions, noise impacts, and traffic impacts from the increased truck trips, all of which is inconsistent with the approved Specific Plan's provisions calling for a balanced on-site cut and fill grading operation. For all the above planning/economic and logistical reasons, the Total Avoidance alternative is considered infeasible and not analyzed further in this DEIS/EIR.”

We find the following flaws the above rationale:

- . The statement above strongly indicates that the reason for the proposed filling of creeks on-site is for the purpose of disposing waste and that avoidance and minimization of impacts to waters of the U.S. is being placed as a second priority to reducing the amount of cut material to be removed in order to save money, time and comply with a perverse local zoning requirement. The disposing of “cut” material as a waste into WOUS --instead of having to properly truck the cut material off-site-- to save money (and/or be consistent with local zoning) is inconsistent with the 404b1 guidelines and the Mitigation Rule. To disposal of waste “cut” material into waters of the U.S. to save money is simply not a valid justification and fails to demonstrate a sincere honest effort to avoid of impacting WOUS. Furthermore, the Corps shall not give deference to local zoning. Thus any local requirement with respect to on-site cut/fill balancing shall not be taken into consideration with respect to the Corps deciding what is and is not a practicable alternative. The applicant is still required to fully avoid and minimize impacts to the aquatic environment despite what local zoning may state.
- . Citing the Specific Plan provisions calling for an on-site balance of cut and fill as justification for dumping the cut material into waters of the U.S. clearly is catering to the applicants desired project purpose and gives deference to local zoning¹²—both of which are inconsistent with the Corps regulation, guidelines and elevation cases. The fact that the above statement made it’s way into the Corps DEIS document illustrates that the Corps has eliminated an alternative based on deferral to the applicant’s narrowly defined project purpose (to implement the Specific Plan on Newhall Ranch) and local zoning—the Corps is fully aware that this is in contravention with the 404b1 guidelines and the elevation case guidance

Additional on page 2.0-96 the DEIS states:

“Tributary Drainages: The Specific Plan incorporated various treatments of tributary drainages to accommodate approved land uses within the Project area. In order to optimize the location of development within portions of the RMDP study area, mass grading would occur in portions of the northern and southern tributary watersheds. Generally, there would be some higher areas that would be graded or "cut" and lower valley areas that would be elevated with fill material, balancing the distribution of cut and fill soil material throughout the RMDP area.”-2.0-96

¹² Local Zoning- Federal concerns over the environment, health and /or safety will often result in decisions that are inconsistent with local land use approvals; local zoning requirements cannot override the 404b1 Guidelines requirement’s to select the LEDPA; and the Corps shall not give undue deference to local zoning (Hearts Mt. Elevation case guidance dated August 17, 1989). However, in addition to satisfying the Clean Water Act 404(b)(1) Guidelines, the project must also be evaluated to ensure that it is not contrary to the public interests (33CFR320.4). If large inconsistencies with local zoning in combination with one or more of the 20 public interest factors in 33CFR320.4 a potential location for the project may rendered impractical if a local zoning change could generate substantial public controversy from neighborhood communities to the extent obtaining a zoning entitlement is unlikely. In other words public interest factors may effect the rational of a site selection if zoning designation in such a way that precludes the proposed project from being suitability located at an otherwise available piece of land--thus rendering the site impracticable with respect to the alternatives analysis. An example of this would be a public safety issues such as locating a housing project on or immediately adjacent to a geologically unstable area such as the San Andres Fault line. Another example would be a clear incompatible use with adjacent properties for example locating an elementary school next to a jail or incinerator.

Reconstructed drainage areas would integrate flood control and grade stabilizing measures (*i.e.*, a combination of drop structures/grade stabilizers and bank protection) to maintain sediment equilibrium and protect the channel bed and banks from hydro modification impacts

With respect to the 404b1 guidelines, it is unacceptable to allow the applicant to optimize development at the expense of impacts to WOUS. Furthermore, as discussed above disposing of cut material in WOUS clearly fails to meet the Guidelines standards of demonstrating avoidance to impacting WOUS. Moreover, as discussed early, if proper Low Impact Development (LID) measures (such as using permeable pavement, installing green streets with recessed bio-swales instead of storm drains, installing cisterns on houses and business, installing green roofs on larger buildings etc.) were required then the hydro-modification would be eliminated and the "need" for impacting creeks on site in the manner described above would be eliminated.

The above fact set indicates that the Corps has allowed applicant to maintain control of what is contained in the DEIS analysis (including defining their own project purpose, their alternatives analysis and what grounds to eliminate otherwise viable alternatives). This just one example of how the Corps has failed to vigilantly eliminate bias and maintain control and responsibility of their DEIS document--instead it appears they have deferred to the applicant's hired consultants to write their own self-serving decision document. The fact that above statements cited made its way into the Corps DEIS brings into question the level of scrutiny this entire document is likely receiving from the Corps. We request that the costs for all alternatives be itemized, be made available to the public, and be scrutinized vigilantly to remove the applicants' self-serving biased conclusions.

Alternatives Analysis-off site

Market Entry Test

An alternative is only practicable if it is "available" to the project applicant. An alternative is available to a project applicant where the property is obtainable for meeting the project's purpose. Sites owned by the applicant, sites that can be obtained by the applicant, and even sites that were available to the applicant when they started project planning (not when they applied for a permit) are considered available. "If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded, or managed in order to fulfill the basic purpose of the proposed activity may be considered." A site that can be expanded, converted, modified, or renovated to meet the project's basic purpose may also be considered available.

Technically, under the "market entry" theory, land that was available to the project proponent at the time of "market entry" that is not available when the proponent applies for a permit, may still be considered available as an alternative. Newhall has owned the property for a long period of time, for over a hundred years, what other alternatives were available at the time of market entry and what has the Corps done to comply with the requirement to asses this? Nothing in the DEIS addresses this requirement.

Deferral to the applicants defined purpose and geographic scope for alternatives analysis

Projects have been eliminated based on two sets of geographic standards (since there is no Corps defined project purpose, apparently these standards were improperly given to the applicant to define). The Corps must define the overall project purpose and require an

independent off-site analysis for potential properties be conducted. First “Potential sites were identified with the only parameters being that the sites had to be reasonably available for purchase, and they had to be located within the very broad geographic region of Ventura, southern Kern, and central to northern Los Angeles counties. 3.0-3” It should be noted that the methodology for conducting this off-site search is not included in the document. It does not necessarily include the properties already owned by Newhall, Lennar or their subsidiaries as it should have. Next, the DEIS (and this is the only place in the document it does so) switches to state the service area for the proposed project is within the much narrower area of the Santa Clarita Valley market and planning area. “Some sites were located outside the Santa Clarita Valley market and planning area [*and thus were eliminated*], which is where the Specific Plan, VCC, and Entrada areas are located. The Project area's market and planning area has been determined to be bound on the north by Pyramid Lake, on the west by eastern Ventura County (including areas generally east of the cities of Fillmore, Moorpark, and Camarillo), on the south by the central and northern portions of the city of Los Angeles, and on the east by the southwestern Antelope Valley.” Page 3.0-6

How, and by who, was this area is defined, as the Santa Clarita Valley market and planning area? Is this part of the Corps intended overall project purpose? If so then why were properties located well outside this area considered and why is this the only time this geographic scope has been mentioned in the DEIS?

Additionally, the statement below indicates that the assessment and elimination of otherwise viable potential off-site alternatives has been based on meeting the applicant's objectives/purpose and need under the RMDP and SCP components of the proposed Project (including the applicant's objectives associated with the Specific Plan, VCC, and Entrada developments).

“Alternative Off-Site Locations Considered: The proposed RMDP would provide habitat conservation and management, and infrastructure improvements to facilitate development of the previously approved Specific Plan. The proposed SCP would implement a conservation and management plan for the applicant's land holdings in Los Angeles County that contain known spineflower populations, and facilitate development in the Specific Plan, VCC, and a portion of the Entrada planning area. Implementation of the RMDP and SCP at an off-site alternative location without also implementing the same or similar development projects as the Specific Plan, VCC, and Entrada would not meet any of the applicant's project objectives/purpose and need.” --3.3.1 of the DEIS/EIR

This example of the Corps deferring to the applicants to narrowly defined project purpose and range geographic alternatives is a vagrant disregard for the regulations, Guidelines and Corps SOPs. .

Moreover, off-site locations that were eliminated from consideration based on either local zoning, the applicants overly narrow project purpose, and/or other factors which are not relevant to the Corps 404b1 Analysis must be reconsidered in accordance with the Guidelines.

From the available information within the DEIS, it appears that the off-site alternatives analysis was conducted on 1999 (see DEIS figure 3.0-1) over the last ten years many large developments that were planned have been placed on hold, or have been sold. Due to the recent economic and real-estate crisis many previously proposed development sites have been sold or foreclosed on—meaning an updated off-site alternatives analysis is likely to

uncover available sites that may even have even gotten partway or completely through the development approval process.

Infill

The stated need for the project is to provide housing and jobs within the Los Angeles County area. Notwithstanding, the questionable project need discussed earlier, in-fill opportunities exist within the existing developed greater Los Angeles County area that can accomplish this purpose without impacting open space or agriculture resources. Additionally, existing infrastructure already exists in in-fill opportunity areas that would make developing housing and jobs much more practicable. Moreover, we have been made aware that there were several projects sites (some of which were owned by Lennar and or its subsidiaries/partners) that had gone through or nearly completed permitting within the greater Los Angeles Area but have since been sold. These all should be researched and considered as potential off-site project locations yet only undeveloped land was analyzed in the off-site alternatives analysis.

The following two sites were considered and then eliminated as potentially practicable alternative based on deferral to the applicants project purpose, local zoning, the applicants defined scope and other erroneous factors which are not part of the 404b1 off-site alternatives analysis.

- Hathaway:

The EIS document skews the comparison between the environmental impacts anticipated at off-site location in a manner that favors the applicants preferred project site-Newhall Ranch in lieu of providing a neutral comparison. This is accomplished by adding the number of increased negative environmental impacts on the off-site location to the number of environmental categories that have no clear difference at either site See the following citations from the EIS below.

“Specifically, development on the Hathaway Ranch alternative site would be expected to result in potentially equal or greater impacts in 13 environmental categories (hydrology and water quality, flood control, groundwater, air quality, traffic, noise, cultural resources, paleontological resources, geology and geologic hazards, land use, parks/recreation/trails, public services, socioeconomics/environmental justice). Conversely, when compared to the proposed Project, the Hathaway Ranch site would result in fewer impacts in only seven environmental categories (geomorphic and riparian resources, biological resources, jurisdictional streams and wetlands, agriculture and soils, visual resources, public safety, and hazards and hazardous materials)” -3.0-

For an objective comparison between the applicants preferred location and off-site locations each category of impact should only be counted once, and the types that would increase impacts should be compared to the number of types that would decrease impacts--without adding the number of environmental factors excepted to have no net difference in level of impact at either location to either group. For example when comparing the impacts of implementing the project at Newhall Ranch vs. the Hathaway Ranch, the Hathaway Ranch alternative would likely have a total of 6 types of increase impacts (these factors are Air Quality, Traffic, Geology and Geologic Hazards, Landuse, Parks Recreation and Trails, Fire

and Police Protection, Energy Use and Solid Waste Disposal, Water Availability) and 9 types of decreased impacts to (factors Geomorphic and Riparian Resources, Flood Control, Biological Resources, Jurisdictional Waters and Streams, Agriculture and Soils, Visual Resources, Socioeconomics/Environmental Justice, Hazards and Hazardous Materials.) and no net difference for the rest of the factors (Surface Water Hydrology and Water Quality, Groundwater, Noise, Cultural/Paleontological Resources, Schools and Libraries).

Additionally, the comparison is further skewed by double counting items that had early been lumped into one category for analysis. For example “hydrology and water quality” is being counted as two items in this skewed comparison instead of one. Furthermore traffic increases is counted twice-once in increased air emissions caused by increased traffic and a second time in the traffic category.

Moreover, as we have detailed below, several of these estimated impact increases or decreases are simply not based on data. Additionally, in at one case discussed below it appears the analysis assumes a higher level of mitigation at the Newhall Ranch site to reach the conclusion of less impacts at the applicants preferred on-site location.

Furthermore, with respect to this 404b1 alternatives analysis the purpose of the comparisons between site impacts is to determine if an off site location may have less environmental impacts (impacts to water, air, and biological resources) then the proposed site –this does not include all factors considered in the NEPA or public interest review section. Landuse (zoning), Schools and Libraries, Socioeconomics, recreation, traffic (more over increased traffic impacts are indirectly accounted for in air and should not be double counted here), flood control (this is indirectly accounted for in impacts to riparian resources) and geological hazards are not to be considered. Additionally, air impacts to waste disposal should not be triple or double counted by including this impact in the solid waste disposal, traffic and air impact categories as this has resulted in skewing the environmental impact comparison. These factors are not related directly to environmental impact and should not be included or double counted to reach the applicants self-serving conclusion to eliminate the off-site location from the list of alternatives to be analyzed per the 404b1 guidelines. However, it should be noted that once it is determined an off-site location will under go analysis these other factors (other then local zoning) can effect the process of determining if the alternative is practicable.

Below we have provided some of the details of the flaws in the Temescal Ranch alternative. This analysis is provided merely to demonstrate that an adequate discussion of alternatives did not occur. It is not our intention to make any recommendation regarding this site. The above discussion focused on the flaws in how the Hathway Alternative was eliminated, these same skewed methods were applied to the Temescal site as well.

Temescal Ranch

We raise the following concerns with respect to rationale used in the EIS to justify removing the Temescal Ranch Alternative:

- Page 3.0-22 states:“Development of the Temescal Ranch site would have the potential to result in urban runoff water quality and sedimentation impacts to Lake Piru and Piru Creek. From a water quality perspective, development of the Temescal Ranch

alternative site would not be expected to avoid or substantially lessen impacts compared to development facilitated by the proposed Project.”

What is this based on, is it assumed that the same level of Stormwater BMP's proposed on Newhall Ranch would not be used here? The same assumptions must be used at both sites to provide for a valid comparison of impacts—not a self-serving comparison that is biased towards the applicants desired outcome of developing Newhall Ranch.

- Page 3.0-23 states “Development of the Temescal Ranch site would have the potential to impact percolation and potentially water quality in the upper portions of the Piru Groundwater Basin below Lake Piru.”

There is a preponderance of scientific data to support that post development infiltration and recharge of ground water are decreased while peak flows and energy heads in the river channels during and immediately following a storm event are increased. However, that applicants have stated (and it appears that the agencies have not questioned the validity of) that ground water recharge post development will improve. Either way, it is unlikely there would be a notable difference on the impact to ground water recharge at either site location if the amount of hydro modification caused by increased impervious surface is the same at both locations.

- On page 3.0-2 “In addition, as to the Specific Plan site within the Project area, the applicant's groundwater supplies from the Alluvial aquifer, which are presently used for agricultural purposes, would be converted to potable supply uses, resulting in no net increase in groundwater usage. Consequently, the Temescal Ranch alternative site is not likely to lessen impacts to groundwater when compared to the Project area.”

What is the current usage of groundwater at this alternative site? Given there is no analysis, it is unclear how the above conclusion was reached.

- Page 3.0-26 includes “Land Use.” Local zoning land use was improperly included in the analysis as an environmental factor and contributed to eliminating sites that may have less environmentally damaging impacts. Furthermore, zoning is not a consideration with respect to the Corps 404 permit process and thus is not a valid reason for eliminating an alternative-see Hearts Mt.
- Page 3.0-28 states “groundwater supplies are likely not of sufficient quantity or quality to serve the development facilitated by the proposed Project.” What is this based on?
- The off-site alternatives analysis within the EIS concludes with the following statement: “Based on the above analysis, none of the three off-site alternatives would clearly result in fewer overall impacts than the proposed Project. In addition, none of the alternative sites are considered to be capable of meeting the applicant's primary objectives/purpose and need associated with the proposed Project. Therefore, the three off-site alternatives have been eliminated from further consideration in this EIS/EIR.”

As reiterated several times in our letter, using an overly narrow applicant defined project purpose is emphatically not an acceptable justification for eliminating project alternatives and is a vagrant disregard of the Guidelines. Additionally as pointed out above, several of the conclusions reached on the level of impact at this off-site location are not based on any apparent data or analysis, and it appears (at least in one case) mitigation measures were inconsistently applied in a manner that skews the findings in favor the applicants preferred site. Furthermore, the types of categories in the analysis don't all apply to determination of what site would have less environmental impacts and the way the categories were tallied is misleading. As a result, the document appears biased in favor of the applicant's preferred alternative.

Again, It should be noted that we are not promoting either of these sites as places to develop, we are simply pointing out flaws in the analysis.

Independent off-site analysis needed

As illustrated by the fatal flaws in the EIS we have discussed, it is evident that the Corps has failed to remove bias from information submitted by the applicant's hired consults. Moreover, the Corps project managers lack training required to be able to independently search for all available real-estate opportunities and holding of the applicant and its subsidiaries, and verify itemized project costs are accurate and consistently applied to all alternatives. When this is the case, the Corps needs to look to EPA, and their non-regulatory internal expertise that can assist obtain a third party contractor to assist with the assessment.

The Corps should conducted it's own up-to-date off-site real-estate assessment to independently look at other possible sites by selecting a third party expert that would report directly to the Corps, have no confidentiality agreements signed, have no contact with the applicant and collect all available information on off-site alternatives (including but not limited to the current and past holdings of Lennar, Newhall and their subsidiaries/partners and including in-fill opportunities) within the Greater Los Angeles Area (including Kern, Ventura and Los Angeles Counties).

Compensatory Mitigation

The Mitigation Rule requires that the applicant demonstrate how they have first avoided, then minimized impacts to waters of the U.S. The Mitigation Rule further requires that a compensatory mitigation plan be submitted-- that would compensate for all unavoidable proposed impacts-- in order to deem an application complete. Given that there is no compensatory mitigation plan proposed, nor a statement of avoidance, the application can't be considered complete. This requirement must be met and a complete PN must be re-circulated for public review and comment.

Additionally, any compensatory mitigation should be in-kind and as close to the impact on-site as possible. Moreover, invasive plant removal does not compensate for lost functions and values caused by hydro-modification or filling of WOUS --this should not be accepted as mitigation.

Costs, logistics and technology

The (Corps is to define the) project purpose of the proposed activity and to apply the aforementioned practicability factors with the intent of avoiding significant impacts to aquatic environment resources and not necessarily providing either the optimal project location or the highest and best property use. Conducting an alternatives analysis by assessing economic

viability based upon a specific project purpose does not serve this intent. Of course, an applicant can attempt to demonstrate that the alternatives are not practicable for reasons of logistics, technology, cost or other elements of project viability. (Old Cutler Bay Guidance)

The mere fact that an alternative may cost somewhat more does not necessarily mean it is not practicable (45 Fed Reg at 85339, Dec 24, 1980). This is an important point, because often wetland properties may be less expensive to a developer than comparably situated upland property. The guidelines obviously are not designed to facilitate a shift of development activities from upland to wetlands, so the fact that an applicant can sometimes reduce his costs by developing wetland property is not a factor which can be used to justify permit issuance under the Guidelines (Plantations Landing Guidance).

On the other had, the 404(b)(1) guidelines address the factor of cost to an applicant in the concept of the "practicability" of alternatives, defined at 40CFR230.10(a)(2). An alternative is only practicable if it is capable of being done. An alternative is capable of being done where it will accomplish the project's overall purpose taking into account cost, existing technology, and logistics. For example, the construction of a dam in an area that is seismically is not capable of being done, even though it may be physically possible to construct the dam in that location.

The Corps-not the applicant- must develop criteria to evaluate and eliminate alternatives based on cost. Where an alternative is "unreasonably expensive to the applicant" the alternative is not practicable. (45 Fed. Reg. at page 85343, Dec 24, 1980) The applicant's financial standing is not a factor in determining whether an alternative is practicable; costs will usually be examined from the perspective of what are reasonable costs for the proposed project (i.e., what the reasonable cost of a bridge, house construction etc.), not whether the applicant can afford the cost of the alternative. For example, a developer with insufficient funds to purchase other available land, where the project could practicably be constructed, may be unable to obtain a discharge permit for the developer's proposed site. That the applicant's financial standing is not to be considered is evidenced by the Guidelines reference to "cost" instead of "economic" concerns. "Economic" was not used because it suggests a "consideration of the applicant's financial standing, or investment, or market share, a cumbersome inquiry which is not necessarily material to the objective of the guidelines."

If it is otherwise a practicable alternative, an area not presently owned by the applicant which could reasonably be obtained, utilized, expanded or managed in order to fulfill the basic purpose of the proposed activity may be considered. (40 CFR 230.10(a)(2).

What is the minimum impact to the environment that still constitutes a viable project? When comparing development costs (grading, infrastructure, roads, mitigation fees et. ct.) to the overall revenues and comparisons of cost/revenue ratios a detailed breakdown of how the numbers were generated shall be included with the sources of information and % error typically expected with each of these categories. For estimates of prices for materials, labor et ct. that fall in a cost range a consistence method shall be applied for each site and the rationale for choosing the method shall be justified. For example was the median, average, maximum, minimum price chosen? What was the rationale behind the choice and how would choosing a different method effect the results of the analysis?

We request that the Corps conduct an independent itemized review of on-site and off-site alternatives that consider the cost of the following items. Without this the decision maker does not have the information needed to properly assess which project alternative is the LEPDA.

Freeway lane expansion, Hwy 126 expansion, Off ramp improvements, Interior roads and streetlights, Bridges, Roads, Sanitation plant with RO capability, Sewage pipelines, Brine disposal system (either oil well injection pumps or a brine line to the ocean), Levies, Water wells, Water pipelines and storage tanks, Garbage disposal facilities, 5 elementary schools, 1 high school, fire station, sheriff sub station, library, electric lines (and all associated features that would be needed to support the development), gas lines, the cost of building business and homes (by size and location-not no average-- as believe the homes proposed in the Potrero Canyon watershed are impracticable with respect the steeper terrain, the significant channel recreation and the bridge needed to cross the Santa Clara), cost of both purchasing the water rights, building infrastructure to deliver the water to the site and treatment facilities (it should be noted that the Kern water contract ends in 35 years, costs 800/acre feet for the right alone and would need large scale infrastructure to deliver the water), and the cost of properly dealing with the cut material instead of using it to fill in creeks.

Given the high cost of the developing needed infrastructure we anticipate as a result of this analysis it is hard to imagine that any development on the site is practicable, but certainly we expect that the Corps will find the development of the Petrero Canyon watershed are impracticable.

We request that the costs for all alternatives be itemized, be made available to the public, and be scrutinized vigilantly to remove the applicants' self-serving biased conclusions.

Past Illegal Actions

In 2000 the USFW Service and the Calif. Dept of Fish and Game joined in asking Newhall Land to remove noise hazing machines placed along the Santa Clara River in known nesting areas of endangered migrating birds. Newhall stated that the hazing machines were erected in an effort to ensure that no nesting activities would take place. Although they removed the noise hazing machines when asked to do so by the wildlife agencies, conservation groups wondered whether these machines were active during the original biological surveys for the bird species, thus invalidating the data.

In May of 2002 representatives of the CFGD served a Warrant to Search on Newhall Land and Farming to investigate illegal take of the endangered San Fernando Valley Spine Flower (SFVSF). The warrant noted recent unauthorized grading in the area of spine flower habitat on the Newhall Ranch project. It also described a meeting between Fish and Game biologists and officials of the Newhall Land and Farming Co. regarding the SFVSF. The DFG biologists stated "it was highly unusual that a consulting biologist was not present at the meeting to discuss the discovery of this endangered plant species".

We bring these actions to your attention because it is a well-known fact that Newhall Land requires its hired biological consultants to sign confidentiality agreements with Newhall that prohibit these biologists from reporting what they find on site. Such consultants can then be threatened with lawsuits when they have attempted to report the sensitive resources they have seen on site.

Due to the destruction of the endangered SFVSF, the confidentiality agreements required of resource consultants by Newhall was also an issue. During the approval of the Newhall

Ranch Specific Plan. Concern was expressed that the extent and structure of confidentiality agreements would interfere with the accuracy of data pertaining to biological resources.

Such problems illustrate that information provided by consultants hired and controlled by Newhall may not be totally unbiased and truthful. It raises the level of vigilance required by the Corps to do everything possible to eliminate biased information and ensure that a thorough independent analysis is conducted by third party sources when they lack the expertise to verify the technical information received.

Due to such questionable past activity on the part of the applicant, we request that a list of individuals who have acted as consultants to assist in information contained within this EIS/EIR and associated supporting documents, and who have signed confidential agreements be disclosed in the DEIR/DEIS. This knowledge is key for both the public and the Corps in identifying which information may need extra scrutiny to ensure that bias does not exist.

Below we have explained why the water supply for this proposed project is extremely tenuous, biased, contrary to the public interest and impracticable. Additionally, we have explained our concerns about the alternatives analysis. This includes the need for an independent expert to provide the Corps with a) unbiased real-estate information for offsite locations and b) an itemized project costs for each alternative. We have serious concerns about the permitting process to date given the number of flaws in the public notice and in the EIS. Furthermore, we are concerned by the fact that the project managers at the Corps do not receive training on how to verify the accuracy of water supply assessments, on conducting an independent search for off-site alternative locations, and on how to verify the accuracy of itemized project costs received from the applicant's hired consultants. Thus we request that the Corps ensure at least the water supply and project costs are verified by unbiased experts and that the concerns we have raised are thoroughly addressed. We also request that the Corps seek unbiased technical assistance in obtaining accurate off-site alternative locations for the project and itemized costs of on-site alternatives as we have detailed below. This information is key in determining compliance with the Guidelines.

Cause or Contribute to Water Quality Violations-Significant Degradation:

The CWA guidelines prohibit granting of a CWA Section 404 permit if project activities will cause or contribute to the significant degradation of the Nation's waters including degradation to: 1) human health and welfare; 2) aquatic life and other wildlife; 3) aquatic ecosystem diversity, productivity, and stability; and 4) recreation, aesthetic, and economic values. This standard applies to the LEDPA, meaning that if the LEDPA caused or contributes to the significant degradation, the Corps is prohibited from granting a permit under CWA Section 404.

EIS methodology of determining if the Project may have a significant impact on water quality, is that if the loads or concentrations resulting from the development are predicted to stay the same or be reduced when compared to existing conditions, then the Project or alternatives would not cause a significant adverse impact to water quality. (EIS page 4.4-4) This approach is flawed because not only is a comparison to natural non developed conditions more appropriate to determine the environmental footprint of the project, but at least a comparison to existing conditions should require the existing conditions (existing land uses) to comply with all applicable water quality regulations. Thus, comparison to "existing conditions", which

are mainly agricultural properties that are not using BMPs, not complying with water quality standards, and/or not complying the Waste Load Allocations prescribed by the TMDLs for the Santa Clara River Watershed detailed in Section III below as required by the Clean Water Act, California Toxics Rule, Porter-Cologne Water Quality Control Act, Basin Plan, and Endangered Species Act to mitigate and prevent the discharge of sediment, pathogen, metals, pesticide, and nutrients into the Santa Clara River is inadequate for determining the significant effect of the project, because the existing conditions are illegal under State and Federal regulations. Therefore, the DEIS/DEIR methodology for determining if the Project may have a significant impact, as required under CEQA and NEPA, must instead read: "if the loads or concentrations resulting from the development are predicted to stay the same or be reduced when compared to existing conditions in compliance with all applicable state and federal laws, it is concluded that the proposed Project or alternatives would not cause a significant adverse impact to the ambient water quality of the receiving waters for the pollutant." Accordingly, the impacts from the proposed Project's urban runoff and WRP discharge must be re-evaluated using this correct and legal baseline criteria for existing conditions to determine if they will be significant.

The California Toxics Rule (40 C.F.R. § 131.38) provides water quality criteria for toxic pollutants in inland surface waters, enclosed bay, and estuaries with human health or aquatic life designated uses in California. The CTR also establishes two types of aquatic life criteria: acute and chronic. Acute criteria represent the highest concentration of a pollutant to which aquatic life can be exposed for a short period of time without deleterious effects; chronic criteria equal the highest concentration to which aquatic life can be exposed for an extended period of time (four days) without deleterious effects. The DEIR/DEIS states that acute criteria, rather than chronic criteria, are used as benchmarks in assessing the project runoff because acute criteria are considered to be more applicable to stormwater conditions. Furthermore, the DEIR/DEIS only uses freshwater criteria for acute toxicity benchmarks in assessing the project runoff.

During and after storm events, stormwater discharges from the Proposed Project's urban runoff and WRP effluent discharges will pass over the dry gap in the Santa Clara River and end up and or settle for four days or longer in the Ventura County's coastal saline marine waters, the Santa Clara River estuary, and in pools adjacent to the main channel of the Santa Clara River that serve as habitat for aquatic life identified in the DEIS/DEIR. Some of these aquatic life species include endangered species protected under the Federal Endangered Species Act such the Southern California Steelhead, unarmored threespine stickleback, the arroyo toad, and the California red-legged frog. Additionally, during periods of dry weather, discharges of urban runoff and WRP effluent discharges may at times pass over the dry gap and end up in off channel pools, the Santa Clara River Estuary, or Ventura County's coastal marine waters for a prolonged period of more than four days, especially during the winter months were baseflow contributions to the Santa Clara River are of greater magnitude and are more consistent. Furthermore, even if dry weather urban runoff from the Project pass through the dry gap during non storm events, the subsurface flow of the Santa Clara River provides hydrological connectivity between the Santa Clara River reach upstream and downstream of the dry gap, so it is probable that contaminants from urban runoff and WRP effluent discharges will end up in the Santa Clara River Estuary and off channel or in channel pools for longer than four days.

Moreover, the Water Quality Control Plan for the Los Angeles Region ("Basin Plan") (Los Angeles Regional Water Quality Control Board, 1994, as amended), designated WARM (warm freshwater habitat to support warm water ecosystems) and WILD (wild habitat waters that support wildlife habitats) beneficial uses for the Santa Clara River, Santa Clara River Estuary, and coastal waters at the mouth of the Santa Clara river (see Basin Plan Chapter 2: Beneficial Uses, Table 2.1 pages 2-6 to 2-8, Table 2.3 page 2-18).

Therefore, the DEIS/DEIR must evaluate the chronic toxicity impacts from the Project's dry weather and wet weather urban runoff, and effluent discharges from the WRP on aquatic life, using the criteria set forth under the California Toxics Rule ("CTR"). For instance the CTR chronic criteria for copper, lead, and zinc is 9.38 micrograms per liter, 3.16-4.24 micrograms per liter, and 121.7 micrograms per liter respectively, which would result in lead discharges from urban runoff from the Project with PDFs violating the CTR.

Additionally, the DEIS/DEIR must evaluate both the acute and chronic toxicity impacts of the Project to aquatic life in the saline Coastal waters around the mouth of the Santa Clara River using the salt water acute and chronic toxicity criteria. Furthermore, the DEIS/DEIR must set forth adequate mitigation measures to mitigate these impacts to a less than significant effect.

Los Angeles County's ("County's") violations of water quality standards at mass emission stations from urban runoff, as reported in Stormwater Monitoring Reports ("SMRs") submitted in compliance with the Los Angeles County MS4 Permit demonstrate that the DEIR/DEIS projections for the concentration and loading of pollutants from the Project developed without PDFs is critically flawed and severely underestimated. For the ease of reference, a list of the County's violations at the mass emission stations as detailed in its SMRs is included the Water Quality Appendix. These SMRs indicate the Los Angeles County MS4 urban runoff discharges violated water quality standards for: total aluminum, fecal coliform, total copper, total cadmium, total antimony, total cyanide, total zinc, total lead, total silver, sulfite, total dissolved solids, dissolved aluminum, dissolved copper, total boron, pH, chloride, dissolved oxygen, and nitrite. Assuming all of these violations were MS4 runoffs without PDFs or BMPs set forth by the Project, these violations were in excess of all projected concentrations of the discharges set forth by the DEIR/DEIS for urban runoff. Thus, the Regional Board cannot grant a CWA Section 401 Water Quality Certification ("401 Certification") or waste discharge requirement to a new source or new discharger if runoff or direct discharge from the new discharge adds any pollutant to discharges from the MS4 or adds any pollutant directly to a waterbody that "will cause or contribute to the violation of water quality standards" for a waterbody listed on the CWA 303(d) list as specifically impaired for that pollutant.¹³ The only exception to this rule is when a TMDL has been finalized and then approved by the USEPA, and the "new source can demonstrate that, under the TMDL, the plan is designed to bring the waters into compliance with applicable water quality standards." 26

Therefore, if a TMDL has not been completed and approved by the U.S. EPA for a specified water body and pollutant listed as impaired on the CWA 303(d) list, new discharges that add pollutants that will cause or contribute to the 303(d) impairment violate water quality standards, and thus are absolutely prohibited. Additionally, unless a TMDL explicitly provides that existing discharges into the impaired water body are "subject to compliance schedules designed to bring the segment into compliance with applicable water quality standards," issuance of a permit or water quality certification for the new discharge of the pollutant listed on the CWA 303(d) list as impaired to the 303(d) waterbody listed for that impairment, is also prohibited under 40 C.F.R. § 122.4(i).

Thus, the Regional Board is prohibited from approving a permit or water quality certification that allows new sources or discharges of any pollutant to waterbodies already impaired by that pollutant, unless the permit application or a DEIS/DEIR can show that an existing TMDL specifically provides sufficient waste load allocations for the discharge, and the TMDL provides a compliance schedule designed to bring the segment into compliance with applicable water quality standards.

Urban runoff from dry and wet weather events, sewage effluent from the WRP, and runoff of pesticide contaminated sediment from the Project Construction will discharge from the project either directly to an existing MS4 or directly to the Santa Clara River or one of its tributaries, and because the DEIS/DEIR, and comments referenced herein demonstrates that these discharges will cause or

¹³ 25 Friends of Pinto Creek v. U.S. E.P.A., 504 F.3d 1007, 1011 (2007).

contribute to impairments for Indicator Bacteria, ChemA, Coliform Bacteria, Nitrogen Nitrate, Toxicity, Toxaphene, total dissolved solids, Chlorodibromomethane, Dichlorobromomethane, Iron, and Specific Conductivity from Santa Clara River Reach 5 to the Santa Clara River Estuary and into the Santa Clara River Estuary Beach-Surfers Knoll Coastal & Bay Shoreline, the Regional Board is prohibited from approving a permit or water quality certification for the Project to discharge into an MS4 or discharge directly into the Santa Clara River. Therefore, because the Project as proposed in the DEIR/DEIS cannot meet water quality standards and cannot receive a CWA Section 401 a Certification or NPDES discharge permit, and because the project would cause or contribute to a significant degradation of waters of the U.S. a 404 permit can not be issued.

For more detail please see both the Water Supply Appendix and the Ventura Coast Keeper's letter which we here by incorporate in full by reference.

The proposed project would cause or contribute to the existing water quality violations and constitute a significant degradation of waters of the U.S. There is not enough evidence to demonstrate that the project will not cause a significant degradation to Waters of the U.S.- instead the issues we raised show that the proposed impacts to waters of the US and wildlife linkages would represent a significant degradation and therefore the Corps, the Los Angeles Regional Water Quality Control Board and EPA are prohibited from granting or allowing permit approval for this project.

Traffic, Air, and Global Warming Impacts

The air impacts are under estimated because they are based upon incorrect assumptions taken from underestimated traffic assumptions.

A. The EIS Understates Project Emissions

In calculating emissions from the transportation sector, the Project depends on the EIS Traffic Analysis (December 2008). The analysis assumes that the Project will generate an internal daily trip capture of 47 percent (EIS, Figure 11, p. 22) yet fails to provide any substantial evidence that this assumption has any empirical validity. Forty-seven percent is an extremely high number for internal trip capture and serves as a gross overestimation. Because internal and external capture rates are a foundation component of the traffic, air, and greenhouse gas emissions (GHG) analyses, they too are based on pure speculation.

The most commonly used method for estimating multi-use trip generation is the Institute of Transportation Engineers' (ITE) *Trip Generation Handbook* (ITE, 2001).¹⁴ Under the optimal circumstances a mixed use development would probably only get an internal capture rate of 10-20 percent. Also, in the next couple months, the U.S. Environmental Protection Agency will release the newest models on how to accurately estimate trip generation for mixed use developments: this methodology should be used in the final EIS.

Based on the inflated internal trip capture rate, the RMDP EIR assumes "trip lengths for home-work, home-shop, and home-other of 10.7 miles, 5.2 miles, and 7 miles." (EIR at 8.0-40.) While the project contemplates both commercial and residential development, it is located far from other major job and commercial centers. In calculating transportation-related emissions, the EIS erroneously assumes a completely autonomous development, one in which residents do not leave in order to shop or work. Experts have found a maximum

¹⁴ Institute of Transportation Engineers. 2001. *Trip Generation Handbook*. Washington, DC.

internal home-work capture rate of 38 percent.¹⁵ This means that at least 62 percent of all other home-work trips are external to the development. Also, the increased number of multiple-worker households decreases the likelihood that people can both live and work within the same community.¹⁶ The EIR also fails to recognize that commercial and maintenance jobs at the Project site will attract workers who do not live there and must commute. These assumptions have no basis in reality and serve to grossly understate Project impacts.

The EIS also repeatedly refers to the applicant's purported commitment to ensure that dwelling units are 15 percent above Title 24 standards. However, this refers to 2005 standards while any dwelling unit will already be required to comply with more recently enacted and stringent Title 24 standards. Accordingly, claiming a 15 percent increase is illusory and misleading to decision makers and the public.

B The Project's Impact on Global Warming is Significant Under NEPA

The U.S. Army Corps of Engineers ("USACE") refuses to acknowledge the significance of the Project's GHG contribution under NEPA on the grounds that there are no adopted GHG significance thresholds. (EIS at 8.0-29). USACE's failure to find that the Project's GHG emissions are a significant impact is fundamentally flawed. Neither NEPA, CEQA guidelines, nor USACE NEPA Regulations require quantitative thresholds of significance in order to discuss the environmental impacts of a proposed project. The Ninth Circuit in *Center for Biological Diversity v. National Highway Traffic Safety Administration* recognized the legal necessity of evaluating the cumulative significance of GHG emissions under NEPA, despite the absence of a quantitative threshold, stating "[t]he impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct."¹⁷ "Thus, the fact that climate change is largely a global phenomenon that includes actions that are outside of [the agency's] control . . . does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming. The cumulative impacts regulation specifically provides that the agency must assess the impact of the action when added to other past, present, and reasonably foreseeable future actions *regardless of what agency (Federal or non-Federal) or person undertakes such other actions.*"¹⁸

In addition, "it is reasonable to anticipate a cumulatively significant impact on the environment" from increased GHG emissions.¹⁹ The EIS recognizes that there will be an "appreciable impact on global climate change" resulting from a Project's emission combined with other anthropogenic GHG sources.²⁰ Therefore, the failure to analyze the indisputable significance of the Project's GHG emissions violates NEPA because the EIS misrepresents the environmental impact of the proposed actions.²¹

Furthermore, by substantially increasing California's existing emission levels, the Project threatens the successful implementation of the California Global Warming Solutions Act (AB 32, 2006) and

¹⁵ Ewing, Reid. 1991. "Developing Successful New Communities" Urban Land Institute. Washington DC and Personal Communication with Ewing.

¹⁶ Wachs, Martin; Taylor, Brian; Levine, Ned; and Ong, Paul. 1993. The Changing Commute: A Case-study of the Jobs-Housing Relationship over Time. In *Urban Studies Journal Limited*. 30(10), pp.1712.

¹⁷ 508 F.3d 508, 550 (9th Cir. 2007) (holding an EA inadequate for inadequate cumulative impacts analysis).

¹⁸ *Id.* (internal citations and quotations omitted; emphasis in original).

¹⁹ CEQ Reg. 40 C.F.R. § 1508.27(7)

²⁰ DEIS/R at ES-22.

²¹ 42 U.S.C. § 4332 (C)

Executive Order S-3-05, which require deep reductions in current levels of GHGs in California.²² Accordingly, a revised EIS must be prepared that adequately analyzes the cumulative significance of the Project's GHG emissions on global warming under NEPA.

The draft EIS is so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded. . The opportunity for meaningful public review of significant new information is essential to test, assess, and evaluate the data and make an informed judgment as to the validity of the conclusions to be drawn there from. An agency cannot simply release a draft report that hedges on important environmental issues while deferring a more detailed analysis to the final EIS that is insulated from public review.

In order to cure the panoply of defects identified in this letter, including the failure to recognize the significance of the Project's greenhouse gas emissions, the County will have to obtain substantial new information to adequately assess the proposed Project's environmental impacts, and to identify effective mitigation capable of alleviating the Project's significant impacts.

Furthermore, it can not be determined if the federal action of issuing a permit for this project will be or will not be accounted for in the SIP until these impacts are properly assessed. Air impacts from construction would not be de minimis impacts; instead they would possess increased health risks to the surrounding public that already suffers from an air attainment zone that fails to meet national air quality standards. Additionally, the Corps must consider cumulative air impacts from the foreseeable operation and maintenance of the project (from the emissions of the power plant it would take to support the buildings power needs, to the car emissions likely to occur from the development within the Los Angeles Air Basin)—not just the installation of the project.. Lastly, the air impacts should weigh heavily against issuance of a permit for the project in public interest review per 33CFR320.4.

ESA

The Endangered Species Act (ESA) states that all Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this act.

Additionally, Sec 7(a)(1) (ESA, 1973) Section 2(b) Purposes: The purpose of the Act are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and connections set forth in subsection a of this section. (c) policy –(1) It is further declared to be the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act. (2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State

²² See 40 C.F.R. § 1508.27(10) (factor in significance determination includes whether action threatens to violate federal, state, or local law or requirements); see also Executive Order S-3-05 (June 1, 2005) (setting greenhouse gas emissions reduction targets for California); Control of Emissions From New Highway Vehicles and Engines, 68 FR 52922 (September 8, 2003) (affirming EPA's recognition of climate change and the need to reduce greenhouse gases).

and local agencies to resolve water resource issues in concert with conservation of endangered species.

Federal agencies must fulfill their responsibilities under the ESA. Thus, Federal agencies should use their resources in an effort to further the biologically related beneficial uses designated to support, protect and enhance these canyons. Regulatory agencies responsible for implementing provision under the Federal Clean Water Act have an increased obligation in implementing their program to recover these waters from impairments to the beneficial uses of these water bodies that support federally listed species, and designated critical habitat.

The fact that a species becomes listed as endangered or threatened officially recognizes that their population declined has already reach the level of cumulative significant impacts. A future population decline would therefore be considered significant, and if large enough, could threaten the continued existence of this listed species. In the Arid Southwest the recovery of many endangered and threatened species hinges on the overall health of the riparian, wetland and estuarine ecosystems in which some or all of their life cycle needs are meet (including foraging, spawning, nesting and or breeding).

Therefore the Corps has an obligation to avoid impacting federally listed species and their critical habitat. This further supports a basis for following our previous recommendation for a proper alternatives analysis that avoids filling and/or any construction in sensitive wildlife areas and WOUS.

Water Supply

We also believe that the water supply analysis is extremely flawed. See the enclosed Flaws in the Water Supply Analysis Appendix for the detailed discussion.

We therefore make several recommendations towards providing a more balanced and thorough document:

- 1) Require a water analysis to be prepared by an unrelated third party chosen by, for example, the US EPA or USGS.
- 2) Wait until the most recent Water Reliability Report from the Dept. of Water Resources is released (release projected for late 2009 early 2010) so that it can be included in this document.
- 3) Re-circulate the document with all reference materials included on disc and on-line so that they are available to all reviewers.
- 4) Re-circulate the DEIR/EIS making available the Revised Water Supply Assessment for the Landmark Village Re-circulated EIR, prepared by Valencia Water Company, April 2009. which was cited in the text²³ but not included in the appendices.
- 5) Re-circulate and include the April 2009 Ground Water Monitoring Report and the Memorandum of Understanding for Implementation of an Alternative Water Resources Management Plan, Oct. 2008
- 6) Require that Ventura County be included on the ground water monitoring MOU and receive their evaluation.

²³ EIR/EIS pg. 4.3-10

Water supply is a critical factor in the EIS/EIR document. It is also a critical component of assessing the practicability of the applicants preferred project alternative in comparison to other alternatives in the 404b1 alterative analysis and is a critically important public interest review factor that must be considered per 33CFR320.4. The facts we present in the Water Supply Appendix will show the water supply analysis is flawed, the available water for the proposed project is extremely tenuous and that much more additional information is yet needed. Furthermore, the costs logistics and technology with respect to infrastructure and (associated permits) and deals/contracts that must be made to acquire the water and deliver it to the future residents of the proposed project (including the price of the water itself), even if it were secured and truly verified, render the project purpose impracticable. Additionally, given the fatal flaws in the water supply for this project, it is not possible for the Corps to reach a conclusion that the project "is not contrary to the public's interest". For the above and appendixes reasons-- based on the water supply issues associated with this project alone-- a permit can not be authorized.

Public Interest Review

In accordance with the 33CFR320.4 we are providing the following comments:

As discussed in detail above, this project would negatively impact the following public interest factors: Aesthetics, Conservation, General environmental concerns, Wetlands, Historic and cultural resources, Fish and wildlife values, Flood hazards, Floodplain values Water supply, Water quality Energy needs Safety, and Food and fiber production. Thus, it would be capricious of the Corps to conclude at this time that the project is not contrary to the public interest.

Summary

In summary, the proposed project would cause and or contribute to existing water quality violations and therefore could result in significant degradation of the aquatic environment. All steps to first avoid and the minimize impacts to the aquatic environment have not been demonstrated. No compensatory mitigation to off-set proposed losses of aquatic functions and values has been submitted. In fact the applicant's application isn't even complete due to the lack of compliance with the mitigation rule as discussed above. However, it is clear that the proposed project is not the LEPDA. Thus, the proposed project does not comply with the 404b1 Guidelines. Additionally, it can not be determined that the federal action of issuing a permit for this proposed project would be accounted for in the SIP or not. Furthermore, the project is contrary to the public's interest. Thus, a permit for the project can not be issued.