



**Santa Ana Regional Water Quality Control Board**

April 25, 2016

Mr. Michael A. Mohler  
Newport Banning Ranch, LLC  
1300 Quail Street, Suite 100  
Newport Beach, CA 92660

**CLEAN WATER ACT SECTION 401 WATER QUALITY STANDARDS  
CERTIFICATION FOR THE NEWPORT BANNING RANCH PROJECT, NEWPORT  
BEACH, COUNTY OF ORANGE, CALIFORNIA (USACE REFERENCE NO. SPL-  
2014-00645-SME) (SARWQCB PROJECT NO. 302014-15)**

Dear Mr. Mohler:

On August 20, 2014, we received from Newport Banning Ranch, LLC (Applicant) an application for Clean Water Act Section 401 Water Quality Standards Certification ("Certification") for a proposed mixed-use development project composed of a natural open space preserve, parklands, clustered development, public roadways, and existing oil facilities that are deemed restricted for future open space use. On January 5, 2016, Regional Board staff received an updated and revised Project description from Fuscoe Engineering, the Applicant's consultant. Acreages for each land use are provided in the Project Description below. The Applicant submitted a filing fee of \$75,071.00, which satisfies the Project fee requirement for consideration of a 401 Certification. This fee amount was determined using the Dredge and Fill Fee Calculator on the State Water Resources Control Board (SWRCB) web site, which is based on the most current iteration of California Code of Regulations, Division 3, Chapter 9, Article 1, Section 2200 (a) (3) in effect when the application was submitted.

This letter responds to your request for Certification that the proposed Project, described in your application and summarized below, will comply with State water quality standards outlined in the Water Quality Control Plan for the Santa Ana River Basin (1995) (Basin Plan) and subsequent Basin Plan amendments:

**Project Description:** The 385.6-acre Project involves a mixed-use development comprised of 51.6 acres of residential development, 9.9 acres of commercial public access and use that includes a 75-room coastal inn and 20-bed hostel, 286.3 acres of natural open space preserve and public interpretive trails, and approximately 23.9 acres of parklands. The Project also includes 13.9 acres of public roadways. An additional 15.1 acres of remaining oil facilities will be deed restricted for

future open space use, and are not included in the above totals.

The Newport Banning Land Trust (NBLT) will be designated to manage 280 acres of the natural open space preserve (73% of the Project) in perpetuity. Construction of the Project will result in temporary impacts to the 6.3 acres of scrub habitat not included in the designated natural open space preserve area; this habitat will be restored with in-kind seeding. The Project includes improvements to the Talbert Trailhead and a vernal pool interpretive area; these sites will also be managed by the NBLT.

170 acres of the 286.3 acre NBLT managed area designated as natural open space preserve will be subject to restoration, enhancement and conservation of seasonal features (e.g. vernal pools), wetlands, bluff, riparian and upland mesa habitat consistent with the proposed *Habitat Conservation and Conceptual Mitigation Plan (HCCMP)* prepared by Dudek (August 2014)<sup>1</sup>. In addition, diffuser basins are planned to be constructed on approximately 0.5 acre of the designated open space lowland area in order to reduce the velocity of concentrated peak flows traveling from the upland to the lowland area. No water quality treatment will occur within the lowlands. All proposed water quality treatment will occur within the development footprint on the mesa (upland) area.

Low Impact Development (LID) water quality enhancement facilities (hydrologic source controls, harvest and reuse systems; biotreatment basins, etc.) will be constructed in the development footprint to control and treat stormwater runoff from on- and off-site sources. Also, new infrastructure and utilities (water, sewer, storm drain, and water quality management facilities) will be constructed to serve the Project and runoff from adjacent existing development areas.

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<sup>1</sup>*Habitat Conservation and Conceptual Mitigation Plan (HCCMP) for the Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, California (August 2014)*. In the event final Coastal Commission approval results in reduced project impacts, an update to the HCCMP will be prepared and may require an addendum to the 401 Certification.

The work will take place within an unsectioned area of Township 6 South, Range 10 West, of the U.S. Geological Survey *Newport Beach* 7.5 minute topographic quadrangle map (33.634102° N, -117.943283° W).

Receiving water: Santa Ana River Tidal Prism and Newport Slough have designated beneficial uses (existing or potential) that include: contact recreation (REC1), non-contact recreation (REC2), rare/threatened/endangered species (RARE), wildlife habitat (WILD), commercial and sport fishing (COMM), and marine habitat (MAR).

Fill area:

Permanent Impact to Non-Wetland Waters	0.005 acre	linear feet Not Available
Permanent Impact to Wetland Habitat	0.47 acre	linear feet Not Available
Temporary Impact to Wetland Habitat	7.01 acres	linear feet Not Available

Dredge/Fill volume: Not Available

Federal permit: U.S. Army Corps of Engineers (USACE) Nationwide Permit Nos. 27 and 29

You have proposed to mitigate water quality impacts as described in your Certification application. The proposed mitigation is summarized below:

Onsite Water Quality Standards Mitigation Proposed:

- Standard water quality related best management practices (BMPs) will be employed during construction activities.
- The Project will dedicate 280 acres of the Project footprint as part of a natural open space preserve. Portions of the preserve are currently disturbed by industrial infrastructure and associated pollutant sources resulting from historic oil field operations. Mitigation and restorative efforts will be conducted in accordance with the Project's HCCMP identified above and a Remedial Action Plan (RAP) prepared by Geosyntec (dated September 16, 2015 and associated addendum dated November 5, 2015). The RAP was received and reviewed by California Coastal Commission staff and subsequently reported upon in an October 6, 2015 Staff Report Addendum. Regional Board staff issued a conditional approval of the RAP on December 15, 2015.

- Permanent impacts to 0.005 acre non-wetland waters and 0.47 acre wetland in the proposed Project site will be mitigated through the establishment of 13.74 acres of waters of the U.S., including wetlands. Non-wetland waters will be mitigated at a 1:1 ratio; wetland waters of the U.S. will be mitigated at a greater than 3:1 ratio (Table 1 below illustrates the breakdown of mitigation).

**Table 1**  
**Summary of Proposed Mitigation by Impact and Habitat Types for Temporary and Permanent Impacts to Riparian and Wetland Habitat**

Impact Type	Impact Total (acres)	Mitigation Ratio	Mitigation Required (acres)	Mitigation Type	Mitigation Proposed (acres)	Mitigation Habitat Type
Temporary CDFW Only	0.43	1:1	0.43	In-kind riparian restoration	14.64	Southern willow scrub/mulefat scrub
Temporary USACE/RWQCB/ CDFW Wetland	7.01	1:1	7.01	In-kind wetland restoration	11.36	Salt marsh/alkali meadow
Permanent CDFW Only	0.42	3:1	1.26	Riparian establishment	1.04	Southern willow scrub/mulefat scrub
				Riparian enhancement	3.15	
Permanent USACE/RWQCB /CDFW	0.47	3:1	1.41	Wetland establishment	13.74	Salt marsh
Permanent USACE/RWQCB/ CDFW Non-Wetland Waters	0.005	1:1	0.005	Non-wetland establishment	0.005	Open channel

CDFW = CA Dept. of Fish and Wildlife  
 USACE = US Army Corps of Engineers  
 RWQCB = Regional Water Quality Control Board

**Offsite Water Quality Standards Mitigation Proposed:**

- None.

Should the proposed Project impact State- or federally-listed endangered species or their habitat, implementation of measures identified in consultation with U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Wildlife Lake or Streambed Alteration No. 1600-2014-0155-R5 (dated September 30, 2015), should ensure those impacts are mitigated to an acceptable level.

Appropriate BMPs will be implemented to reduce construction-related impacts to waters of the State according to the requirements of the State Water Resources Control Board General NPDES Permit for Storm Water Discharges Associated with Construction and Land Disturbance Activities, Order Number 2012-0006-DWQ.

Pursuant to California Code of Regulations, Title 14, Chapter 3, Section 15096, as a Responsible Agency, the Regional Board is required to consider an Environmental Impact Report (EIR) or Negative Declaration prepared by the lead agency in determining whether to approve an application submitted for a project to receive 401 Water Quality Certification. A responsible agency has responsibility to mitigate and avoid only the direct and indirect environmental effects of those parts of the project that it decides to carry out, finance, or approve. Further, the responsible agency must make findings as required by Sections 15091 and, if necessary, 15093, for each and every significant impact of the project.

As required by Section 15096, the Regional Board considered the EIR prepared for the proposed Project in approving this Certification. More specifically, the Regional Board has considered those sections of the EIR pertaining to impacts to water quality standards. Based on the mitigation proposed in the EIR, and the conditions set forth in this Certification, potentially adverse impacts to water quality should be reduced to a less than significant level and beneficial uses protected if all stated mitigation and conditions are performed. Thus, the Regional Board independently finds that changes or alterations have been required or incorporated into the Project that should avoid or mitigate impacts to water quality to a less than significant level.

**This 401 Certification is contingent upon the execution of the following conditions:**

- 1) The Applicant must comply with the requirements of the applicable Clean Water Act Section 404 permit.
- 2) This Order for Water Quality Certification will remain valid until the USACE 2012 nationwide permits expire on March 18, 2017, or through an extended period beyond the expiration date that is authorized in writing by the USACE.
- 3) Vernal pools that have been identified as existing within any part of the Project area and subsequently confirmed by oversight agencies (i.e. California Coastal Commission, California Department of Fish & Wildlife and the Santa Ana Regional Water Quality Control Board) will be demarcated by the Project Biologist with brightly colored construction fencing to ensure avoidance during construction activities.

- 4) The Applicant shall complete wet season branchiopod and vernal pool vegetation surveys in areas of ponding identified in the May 2013 Dudek report entitled *Jurisdictional Determination of Seasonal Features for the Newport Banning Ranch*. These surveys shall be conducted during the 2016-17 wet season prior to commencing on-site construction activities. Annual wet season surveys shall continue in areas identified as vernal pools in the 2016-17 survey and where construction activities are ongoing and/or expected to commence. This information shall be reported to <http://www.californiawetlands.net/tracker/>.
- 5) Prior to any Project-related grading, functional assessments shall be conducted on the areas listed as 'Seasonal Features' in Table 8 of the Dudek May 2013 report (see Condition 4<sup>2</sup>) and that are identified to be impacted by project construction. The assessments shall utilize indicator vegetation and animal species surveys specific to vernal pool identification, and all identified 'Seasonal Features' shall be avoided. Avoided vernal pool habitat and vernal pool mitigation sites relocated to the vernal pool interpretive area shall be assessed annually using the same designed survey method. The first survey shall be performed at the end of the first growing season following creation of the first mitigation site using relocated vernal pool substrate material. This substrate material may contain federally endangered San Diego fairy shrimp larvae (*Branchinecta sandiegonensis*). Thereafter, mitigation site assessments shall be conducted annually, during the wet season, until success criteria noted within the HCCP are met for five (5) consecutive years. This information shall be reported to <http://www.californiawetlands.net/tracker/>
- 6) Construction materials, stockpiles, and wastes shall not be stored in waters of the U.S. during the wet season. During the dry season, construction materials, stockpiles, and wastes shall not be stored in waters of the U.S. during, or 48 hours prior to, a forecast storm event with a 10% or greater chance of occurrence.
- 7) The Project proponent shall utilize a series of erosion control, sediment control, perimeter controls, tracking controls, trash/debris controls, waste management and material pollution control and other related BMPs during Project construction to minimize the controllable discharges of sediment and other wastes to drainage systems or other waters of the State and of the United States.

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<sup>2</sup> Based upon the 2016 Final Jurisdictional Determination of Seasonal Features by USACE (presence of wetlands or "Waters of the US" pursuant to Section 404 of the Clean Water Act) and the CA Coastal Commission (presence of ESHA or wetlands pursuant to the Coastal Act).

- 8) Substances resulting from Project-related activities that could be harmful to aquatic life, including, but not limited to, petroleum lubricants and fuels, cured and uncured cements, epoxies, paints and other protective coating materials, portland cement concrete or asphalt concrete, and washings and cuttings thereof, shall not be discharged to soils or waters of the State. All waste concrete shall be removed from the Project site.
- 9) Motorized equipment shall not be maintained or parked within or near any stream crossing, channel or lake margin in such a manner that petroleum products or other pollutants from the equipment may enter these areas under any flow conditions. Vehicles shall not be driven or equipment operated in waters of the State on-site, except as necessary to complete the proposed project. No equipment shall be operated in areas of flowing water.
- 10) There shall be at all times appropriate types and sufficient materials onsite to contain any spill or inadvertent release of materials that may cause a condition of pollution or nuisance if materials reach waters of the US and/or State.
- 11) All active stockpiles shall include perimeter and sediment controls and located away from drain inlets and waterways. All inactive stockpiles shall be located away from drain inlets and waterways. These stockpiles shall be covered and surrounded with adequate perimeter controls.
- 12) At each major phase of mass grading, drainage areas and sediment basin sizing shall be updated to accurately reflect current runoff and field conditions to protect downstream receiving waters.
- 13) This Water Quality Certification is subject to the acquisition of all local, regional, State, and federal permits and approvals as required by law. Failure to meet any conditions contained herein or any the conditions contained in any other permit or approval for this Project issued by the State of California or any subdivision thereof may result in appropriate enforcement action, including the revocation of this Certification and imposition of administrative civil or criminal liability.
- 14) Best management practices to stabilize disturbed soils must include the use of native plant species whenever feasible.
- 15) Construction de-watering discharges, including temporary stream diversions necessary for project construction may be regulated under Regional Board Order No. R8-2015-0004, General Waste Discharge Requirements for Discharges to Surface Waters that Pose an Insignificant (De Minimus) Threat to Water Quality. For more information, please review Order No. R8-2015-0004 at [www.waterboards.ca.gov/santaana/](http://www.waterboards.ca.gov/santaana/)

- 16) The Applicant shall ensure that all fees associated with this Project shall be paid to each respective agency prior to conducting any on-site construction activities.
- 17) Prior to any Project-related grading, functional assessments of the riparian areas or wetlands slated to be impacted shall be conducted using the California Rapid Assessment Method, February 2012 (CRAM). Then, these same sites shall be assessed again using CRAM at the end of the first growing season that follows their initial planting. Thereafter, mitigation site assessments shall be conducted annually at the end of the growing season until success criteria are met for five consecutive years. This information shall be reported to <http://www.californiawetlands.net/tracker/>

Under California Water Code, Section 1058, and Pursuant to 23 CCR §3860, the following shall be included as conditions of all water quality certification actions:

- (a) Every certification action is subject to modification or revocation upon administrative or judicial review, including review and amendment pursuant to Section §13330 of the Water Code and Article 6 (commencing with Section 3867) of this Chapter.
- (b) Certification is not intended and shall not be construed to apply to any activity involving a hydroelectric facility and requiring a FERC license or an amendment to a FERC license unless the pertinent certification application was filed pursuant to Subsection §3855(b) of this Chapter and that application specifically identified that a FERC license or amendment to a FERC license for a hydroelectric facility was being sought.
- (c) Certification is conditioned upon total payment of any fee required under this Chapter and owed by the Applicant.

If the above-stated conditions are changed, any of the criteria or conditions as previously described are not met, or new information becomes available that indicates a water quality problem, the Regional Board may require that the Applicant submit a Report of Waste Discharge and obtain Waste Discharge Requirements.

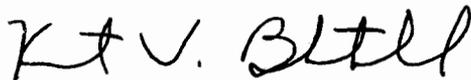
In the event of any violation or threatened violation of the conditions of this Certification, the holder of any permit or license subject to this Certification shall be subject to any remedies, penalties, process or sanctions as provided for under State law. For purposes of Section 401(d) of the Clean Water Act, the applicability of any State law authorizing remedies, penalties, process or sanctions for the violation or threatened violation constitutes a limitation necessary to assure compliance with the water quality standards and other pertinent requirements incorporated into this Certification.

Violations of the conditions of this Certification may subject the Applicant to civil liability pursuant to Water Code Section(s) 13350 and/or 13385.

This letter constitutes a Water Quality Standards Certification issued pursuant to Clean Water Act Section 401. I hereby certify that any discharge from the referenced Project will comply with the applicable provisions of Sections 301 (Effluent Limitations), 302 (Water Quality Related Effluent Limitations), 303 (Water Quality Standards and Implementation Plans), 306 (National Standards of Performance), and 307 (Toxic and Pretreatment Effluent Standards) of the Clean Water Act, and with other applicable requirements of State law. This discharge is also regulated under State Water Resources Control Board Order No. 2003-0017-DWQ (Order No. 2003-0017-DWQ), "General Waste Discharge Requirements for Dredge and Fill Discharges That Have Received Water Quality Certification" which requires compliance with all conditions of this Water Quality Standards Certification. Order No. 2003-0017-DWQ is available at: [www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/water\\_quality/2003/wqo/wqo\\_2003-0017.pdf](http://www.waterboards.ca.gov/board_decisions/adopted_orders/water_quality/2003/wqo/wqo_2003-0017.pdf)

Should there be any questions, please contact Marc Brown at (951) 321-4584 or [marc.brown@waterboards.ca.gov](mailto:marc.brown@waterboards.ca.gov), or Wanda Cross at (951) 782-4468 or [wanda.cross@waterboards.ca.gov](mailto:wanda.cross@waterboards.ca.gov).

Sincerely,



Kurt V. Berchtold  
Executive Officer

cc (via electronic mail):

U.S. Army Corps of Engineers, Los Angeles Office - Stephen Estes  
State Water Resources Control Board, OCC - David Rice  
California Department of Fish and Wildlife - Kevin Huph  
SWRCB, DWQ-Water Quality Certification Unit - Bill Orme  
US EPA Region 9- Jason A. Brush - [brush.jason@epa.gov](mailto:brush.jason@epa.gov)  
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