

# **ATTACHMENT "F"**



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**VIA FEDEX AND U.S. MAIL**

January 5, 2022

Orange County Sanitation District  
Clerk of the Board of Directors  
10844 Ellis Avenue  
Fountain Valley, CA 92708

**Re: Orange County Sanitation District's ("OC San") January 26, 2022, Resolution of Necessity (RON) Hearing: Demand to (i) Cancel the Improper RON Hearing, or if OC San Proceeds with the RON Hearing, (ii) Appear and Be Heard**

Dear Board Members:

This firm represents Bayside Village Marina LLC, a California limited liability company ("BVM"), owner of the property located at 300 E. Coast Highway and 100 N. Bayside Drive, Newport Beach, California 92660, bearing Assessor Parcel Number 440-132-60 ("Property").

This responds to the Orange County Sanitation District's notice of intent to adopt a resolution of necessity (RON), which notice was mailed to our client, BVM, on December 20, 2021, authorizing the condemnation of portions of the Property for expansion of the Bay Bridge Pump Station ("BBPS"). For the reasons set forth in this letter, BVM demands that OC San immediately cancel the improper RON hearing. If OC San proceeds with the RON hearing, BVM requests (i) the opportunity to appear and be heard at the RON hearing, and (ii) this letter be made a part of the record.

**Background**

By way of background, OC San began exploring options for replacement of the BBPS in 2016 and in June 2017 issued a Draft Environmental Impact Report entitled "Bay Bridge Pump Station and Force Mains Replacement Project EIR." A final environmental impact report was never prepared, in part, because it conflicted with the adjacent Back Bay Landing Project owned by BVM. Between 2017 and 2019, BVM engaged in negotiations with OC San and the City of Newport Beach ("City"), including meetings with Councilmembers serving on the OC San Board and District staff explaining the inherent conflict with BVM's recently City- and Coastal Commission-approved project and attempting to identify an alternative location or site plan to minimize the impacts of the BBPS. The south side of the E. Coast Highway Bridge was specifically suggested as an alternative location less impactful to the Back Bay Landing Coastal Project. OC San thereafter published a Recirculated Draft Environmental Impact Report in 2019 and again in 2020 with a Project Description that increased the BBPS footprint across BVM's property frontage on E. Coast Highway but omitted numerous project details. In addition, the City has recently informed BVM that OC San has now proposed a 2-story massive BBPS project design not

analyzed in the REIR. Ultimately, OC San published a final environmental impact report (“EIR”) in January 2021, but as the attached letter sent to OC San staff and CEQA consultants on September 21, 2020 pointed out there continued to be numerous deficiencies with that EIR, and litigation in Orange County Superior Court pertaining to such deficiencies and OC San’s failure to comply with CEQA was filed in May 2021 and is pending.

On September 7, 2021, OC San sent a formal offer to BVM to acquire portions of the Property for the BBPS project. On December 20, 2021, OC San sent BVM a Notice of Hearing on the RON set for January 26, 2022.

### **Objections**

BVM objects to the RON hearing, and to OC San’s adoption of the RON, on the following grounds:

#### **1. OC San’s Adoption of a Resolution of Necessity Will Violate CEQA.**

California law is clear that a public agency must comply with the California Environmental Quality Act (CEQA) before adopting a resolution of necessity to condemn property. (*City of Stockton v. Marina Towers* (2009) 171 Cal.App.4th 93, 108 [“Compliance with CEQA is mandatory before a public entity may condemn property for a proposed project.”].) Requiring CEQA-compliance before commencing condemnation proceedings makes perfect sense, as (i) an agency is prohibited from undertaking an action that would taint its consideration of project alternatives, and (ii) the acquisition of private property is considered a definite course of action which is prohibited prior to preparing, finalizing and considering an Environmental Impact Report (EIR). (See Cal. Code Regs., tit. 14, § 15004, subd. (b)(2); *City of San Jose v. Great Oaks Water Co.* (1987) 192 Cal.App.3d 1005, 1017 [compliance with CEQA is a precondition of the institution of eminent domain proceedings]; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 140-142). CEQA is the “environmental full disclosure act” to assess the environmental impact of all proposed “projects.”

Here, OC San has not complied with CEQA and is currently in litigation with BVM pertaining to the deficiencies in the EIR and failure to comply with CEQA. As clearly set forth in *Bayside Village Marina LLC vs. Orange County Sanitation District, et al.* (Case No. 30-2021-01194238-CU-WM-CXC), the EIR is deficient because (1) the project description is legally insufficient, (2) it fails to adequately describe the project setting and fails to assess the project’s impacts, (3) it fails to adequately analyze alternatives or alternative locations to the proposed project, (4) it fails to analyze the project’s consistency with the Coastal Commission-approved Back Bay Landing Planned Community Development Plan and the Newport Beach Local Coastal Program, and (5) it fails to adequately respond to comments from BVM, the City, the Irvine Company and California Fish and Wildlife. Until these and any other non-compliance issues are addressed and appropriately considered, OC San will be in violation of CEQA; if BVM’s pending CEQA action is successful, OC San’s eminent domain action will be dismissed, and OC San will be required to pay BVM’s legal and expert fees. (*Burbank-Glendale-Pasadena Airport v. Hensler* (1991) 233 Cal.App.3d 577, 599 [“[A] successful CEQA challenge to the adoption of a resolution of necessity would also constitute a defense to the eminent domain proceeding.”].)

**2. The Project Is Not Planned or Located in the Manner That Will Be Most Compatible With the Greatest Public Good and the Least Private Injury.**

A public agency may not exercise the power of eminent domain for a proposed project unless it establishes that “the project is planned or located in a manner that will be most compatible with the greatest public good and the least private injury.” (Code Civ. Proc., § 1240.030, subd. (b).)

Because OC San has failed to undertake an adequate environmental analysis of the impacts of the BBPS Expansion project and has failed to thoroughly analyze and compare whether such impacts could be lessened in alternative locations, OC San cannot make this requisite finding. BVM and the City have proposed alternative locations that are superior and less impactful, particularly the alternative location south of the E. Coast Highway bridge on the Irvine Company parking lot and/or the .62 acre BVM parcel, but OC San has ignored those superior alternatives. In summary, there are numerous issues with the design, location, LCP and Back Bay Landing PCDP inconsistency and land use and aesthetic incompatibility of OC San’s project, all of which must be adequately addressed to minimize impacts to the environment, coastal resources and BVM’s existing and proposed coastal dependent and residential development.

**3. OC San’s Temporary Construction Easement Encumbers the Property in Perpetuity.**

While OC San purports to acquire a temporary construction easement (“TCE”) on the Property, the terms of the TCE lack any definitive expiration date. Without an expiration date, the TCE will potentially encumber and cloud the Property in perpetuity. This encumbrance prevents any development of the Property and greatly impacts BVM’s use and development of its Property. Based on the current RON, OC San’s overbroad and massively damaging acquisition is not necessary for the Project and is not planned in the manner that will cause the least private injury, in violation of applicable law.

**4. OC San’s Post-REIR Pump Station Design Changes Further Adversely Impact the Property.**

Throughout the years of discussions between OC San and BVM, the design and height of the new pump station has always been a one-story building, as is the existing facility. Now, OC San has proposed a design and height change on BVM, provided through a series of design options shown to the City, thereby making the pump station two-stories in height. This is presented, despite the original representations to the public, that the pump station would be one-story. A two-story pump station eviscerates views from the proposed residential units on the Property and increases the damages to BVM, and is not necessary. BVM’s engineering consultants had identified an alternative design that would keep the pump station one-story in height, but OC San has refused to meet to consider this alternative. Therefore, OC San’s current design is once again not necessary for the Project and is not planned in the manner that will cause the least private injury.

**Conclusion**

For the reasons set forth in this letter, OC San’s Board members cannot validly adopt the proposed resolution of necessity. BVM therefore requests that the Board members not proceed with the hearing on that resolution or, if the Board does proceed, vote to reject said defective resolution.



January 5, 2022  
Page 4

Thank you for your consideration of this matter.

Regards,



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Attachment

**ATTACHMENTS TO  
LETTER DATED 1/5/2022**



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Refer To File # 400244-0001

**VIA E-MAIL AND U.S. MAIL**

*khadden@ocsd.com*

September 21, 2020

Kevin Hadden  
Principal Staff Analyst  
Orange County Sanitation District  
10844 Ellis Avenue  
Fountain Valley, CA 97208

**Re: 2020 Recirculated Draft Environmental Impact Report for the Bay Bridge Pump Station and Force Mains Replacement Project**

Dear Mr. Hadden:

Our firm represents Bayside Village Marina LLC (“BVM”) and provides the following comments with regard to the 2020 Recirculated Draft Environmental Impact Report (“REIR”) for the Bay Bridge Pump Station and Force Mains Replacement Project (“BBPS”) (“Project”) prepared by Lead Agency Orange County Sanitation District (“OCSD”)

We also incorporate, by reference, our prior September 3, 2019 (“2019 REIR”) comments as well as the technical comments provided by BVM’s engineering consultants, Fuscoe Engineering, in their letter of September 5, 2019, as additional background and support for our comments on this 2020 Draft REIR.

Our detailed comments are as follows:

**1. Project Description Issues**

**1.1 “Adjacent Pump Station” Project Description Omits Critical Information**

We appreciate that the Draft REIR improves on the prior 2019 REIR in that the Project Description can now clearly be ascertained from among the identified alternatives. However, the Project Description, contrary to the requirements of CEQA (see prior comment letter), remains somewhat imprecise and, particularly with respect to 3.1.2 Project Setting (Existing Conditions), fails to accurately describe the existing fully developed Bayside Village Marina site, throughout the various sections of the REIR. Moreover, the descriptions/exhibits that should set forth precise modes of access, maintenance, force main alignments, construction staging areas, etc., fail to do so.

Throughout the 2020 Draft REIR the “project setting/existing conditions” are described simply in terms of development of the expanded BBPS within, or impacts to, recreational vehicle (“RV”) storage area (see Section 3.1.1, 3.1.2, Table 3-1, Section 5.9.1, 5.9.4 and particularly

Tables 5.9-1, 5.9-2, 5.9-3 Land Use Consistency Analyses). This grossly understates the construction period and long-term impacts on the coastal dependent uses both existing on, and planned for the BVM site.

Because the Project Site boundaries and work areas (also known as Temporary Construction Easement areas, or "TCE's") (see Exhibit 3-2 on page 3-3 Site Vicinity, and Exhibit 3-6 on page 3-14 Adjacent Pump Station Work Areas) include or are immediately contiguous to existing coastal recreational marine commercial uses, including the existing 220-slip Bayside Village Marina and adjacent marina parking, Gondola Adventures, Southwind Kayaks and SUP rentals and the single access to these recreational and marine commercial uses, these existing uses should be identified and throughout the REIR described and impacts to and consistency with these uses need to be evaluated.

It is important to note that the City of Newport Beach ("City") and California Coastal Commission ("CCC"), in approving the Back Bay Landing Projects ("BBLP") currently under development on the Site, and the BBL Environmental Impact Report and 2016 Back Bay Landing Planned Community Development Plan (now adopted as part of the 2017 CCC Certified City Local Coastal Program ("LCP")), did not account for the Adjacent Pump Station/Expand-in-Place Option as OCSD did not identify the need to expand the BBPS until after the BBL project was approved and the PCDP incorporated into the Certified City LCP.

## **1.2 Key 2020 REIR Exhibits Need Revision to Reflect Omitted Project Description Details**

Exhibit 3-5 (page 3-10) should be revised to show how OCSD will access the pump station via N. Bayside Drive (both ingress and egress) through the existing Bayside property and planned BBLP site. The current Exhibit 3-5 is incomplete, omits critical information/graphics, and should be labeled "Shared Access."

Alternatively, a new exhibit should be created showing how the estimated 15 maintenance and service trucks per week will access the adjacent/expanded BBPS. This is an important component of the BBPS Project, and without access from N. Bayside Drive via the BBL site, OCSD will be required to utilize the existing and substantially less safe access off of East Coast Highway.

The Project Description notes several times throughout the REIR that access off N. Bayside Drive through a future shared driveway with the BBLP will be the primary access to the Adjacent Pump Station Project.

Exhibit 3-6 (page 3-14), "Adjacent Pump Station Work Areas," identifies construction staging areas required to be located on BVM's property during the implementation of the BBPS Project which, based on the discussion in Section 3.4 Construction, would occur over a 36-month period.

Exhibit 3-6 identifies both a significant portion of the BVM property, as well as the Castaways City property to the west of the Newport Harbor channel. Since it is not clear that the City has agreed or is willing to provide the Castaways site for construction staging, the REIR should identify alternative staging areas, either on or off the BVM property, for the three years of

planned construction. Moreover, the utilization of the existing narrow and long driveway lane into the fully developed BVM site will have foreseeable impacts on the existing BVM marina, marina parking, and, as discussed above, recreational and marine commercial uses on the BVM site. Construction period impacts will be even more significant if they occur during construction of the BBL project. The REIR should identify estimated dates for start and completion of all phases of construction, including demolition and removal of the existing BBPS. The square footage of the TCE areas needs to be specifically identified, including access areas, timing and duration of occupation of the TCE's, and the direct and indirect impacts of construction on adjoining recreational and marine commercial uses.

*Footage is considered conceptual and may be subject to downward refinement during final design.*

BVM requests that OCSD design the pump station (using the most current technology and efficient design to minimize the required expansion of the BBPS and therefore acquisition of the City and CCC-approved BBL mixed-use project site and replacement of coastal dependent/coastal related uses with industrial use expansion.

Such an otherwise unnecessary expansion will exacerbate the conflicts with and impacts to the baseline of existing recreational and marine commercial uses and the approved BBL Project as set forth in the approved BBL PCDP and the City's 2017 certified LCP. By characterizing the BBL site as nothing more than an RV storage facility, the Section 5.9 land use and Coastal Act consistency analysis underestimates the impacts on both the existing developed BVM site and the approved BBL land uses, and remains woefully inadequate (see also Comments 2 and 3, September 3, 2019 BVM REIR Comment Letter).

## **2. Force Mains Location Renders BBL South of East Coast Highway Site Unusable**

Exhibit 3-7 (page 3-15) depicts the OCSD dual 24' force mains alignment bisecting the BBL property south of the E. Coast Highway bridge essentially in half. This approximate .60 acre property is within BBL PCDP Planning Area 2 and allows 8,390 square feet of CM (recreational and marine commercial) uses. Due to indicated restrictions on permanent structures above the force mains and required setbacks, such an alignment would severely impact BVM's ability to develop anything on the site, consistent with its CM land use designation.

As previously discussed with OCSD staff, OCSD should identify an alternative alignment closer to the south edge of the BBL property, adjacent to the Irvine Co. parking lot, which will reduce impacts to this important CM-designated property.

## **3. OCSD Must Provide Greater Specificity Regarding Site Operations and Utilization of Shared Access**

Section 5.7.4 (page 5.7-20) briefly identifies "Operations" and notes a maximum of 15 trips for chemical deliveries, periodic maintenance and inspections per week (or 60 per month). BVM recognizes the size and type of truck differs for various maintenance requirements. OCSD must provide a more detailed breakdown of the anticipated maintenance frequency based on the size and type of truck and projected hours/time of access through the BBL site. OCSD must not

only acquire a permanent easement for this access, but must fund short- and long-term maintenance of the amenitized BBL project access.

#### 4. Consistency With Back Bay Landing Planned Community Development Plan

As set forth in our September 3, 2019 Comment Letter (page 7), Planning Area 1 of the BBL PCDP permits the BBPS with its current size and location (see the PCDP Table 2, Exhs. 3, 5, 9, 12). The PCDP does not contemplate any expansion or relocation of the BBPS (ibid).

Moreover, the LU-5 (2020 REIR, page 5.9-24) discussion in the REIR incorrectly infers that any pump station in any location within PA-1 is a permitted use as a matter of right, in stating, "Accordingly, the pump station is a permitted use as a matter of right." The BBPS Adjacent Pump Station expansion project is subject to all of the discretionary permits and regulatory approvals outlined in Section 3.6 Permits and Approvals (page 3-16 and 3-17 of the REIR), and during Site Development Review, this Adjacent Expand-in-Place must be shown to be consistent with all of the requirements of the BBL PCDP. Only the original Rehab-in-Place alternative is identified in the BBL PCDP.

In regards to the Site Development Review process, and consistency with the PCDP, Mitigation Measure AES-1 requiring engineering drawings and specifications prepared by the Project Engineer or their designee to be "submitted for review and approval by the OCSD Director of Engineering," and AES 2-4 requiring only a similar internal review process for assessment of visual and aesthetic impacts, are inadequate. These, and any other BBPS project drawings, plans, operational programs and improvement documents must be submitted to BVM at the earliest possible date, prior to any OCSD approval, and all mitigation measures must be revised to assure their occurs.

We look forward to working with OCSD to address these and other BBPS Adjacent Pump Station REIR and Project issues, and look forward to your agency's response to these and other comments.

Sincerely,



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Refer To File #: 400244-0001

VIA EMAIL AND U.S. MAIL

September 3, 2019

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**CONFIDENTIAL; PRIVILEGED**

**Re: Recirculated Environmental Impact Report for the Bay Bridge Pump Station and Force Mains Replacement Project (Project No. 5-67)**

Dear Mr. Hadden:

Our firm represents Bayside Village Marina LLC ("BVM") and provides the following comments with regard to the Draft Recirculated Environmental Impact Report ("REIR") for the Orange County Sanitation District ("OCSD") Bay Bridge Pump Station ("BBPS") and Force Mains Replacement Project ("Project"). BVM owns the Back Bay Landing development site ("BBL" or "Development Site") and existing marina/dry storage facility at 300 East Coast Highway, Newport Beach, California. As you are aware, up until mid-2018 BVM had engaged in several years of discussions with the OCSD regarding the Project and its significant impacts on BVM's property, and upon coastal resources at the entrance to Upper Newport Bay. Over the course of several years, OCSD has gone from stating publicly that it had no need to modernize or expand the BBPS in any manner, to the current unstable, and ever evolving project description. The Planned Community Development Plan ("PCDP") for Back Bay Landing approved by the California Coastal Commission in 2016 shows the BBPS in its current location, without expansion. BVM's site planning and project design efforts have been significantly disrupted by OCSD's inconsistent and non-transparent project design process.

**Summary.**

The REIR does not comply with the requirements of the California Environmental Quality Act ("CEQA"). The deficiencies in the REIR are so severe that they cannot be addressed without redrafting and recirculating the EIR. CEQA requires the Orange County Sanitation District ("OCSD") to prepare a new draft EIR for public review and comment. BVM has engaged in several years of discussions with the Orange County Sanitation District ("OCSD") regarding the Project and its significant impacts on the Back Bay Landing property, the project, the existing marina, and the coastal dependent recreational and marine commercial uses long-existing on the site. The Project also conflicts with the City of Newport Beach ("City") LCP, the BBL PCDP, and the Coastal Act and may adversely affect various coastal resources. The REIR fails to adequately analyze any of the above land use impacts of the Project. The REIR also



does not accurately or completely describe the information provided to OCSD by BVM regarding the impacts of the Project on the Back Bay Landing project.

Among other deficiencies in the DRAFT REIR, the circulated document fails to comply with CEQA for the following reasons:

1. The Project Description is not stable, finite, or accurate. It fails to identify which of several alternatives is the proposed project as required by CEQA. Moreover, within the last week, OCSD staff has shared with BVM representatives that none of the alternatives that could serve as the proposed project accurately describe OCSD's latest Project plans.

2. The baseline for the impact analysis violates CEQA. The REIR is required to evaluate the impacts of the Project against a baseline of existing conditions and also against a baseline of the current land use plans and zoning (e.g., the BBL PCDP) approved by the City of Newport Beach and the California Coastal Commission.

3. The REIR fails to accurately evaluate the significant inconsistencies with the General Plan, Local Coastal Program or Planned Community Development Plan for the development site.

4. The evaluation of alternatives is inadequate. The DRAFT REIR fails to analyze adequately an expand-in-place alternative or a relocation alternative that is feasible and that would reduce the significant land use and coastal resource impacts of the Project.

## **Detailed Comments.**

### **1. Project Description Issues.**

#### **1.1 The REIR Does Not Contain An Accurate or Stable Project Description.**

The Project Description violates CEQA because the REIR does not contain an accurate, stable or finite Project Description. The REIR fails to identify a preferred alternative, instead describing three different "conceptual site plans." (REIR at p. 3-6.)

An EIR must contain an accurate, stable and finite project description. (CEQA Guidelines, § 15124; *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) CEQA requires an EIR to identify the project alternative proposed by the lead agency. (*Washoe Meadows Community v. Department of Parks & Recreation* ("Washoe Meadows"), 17 Cal.App.5th 277, 284.) In *Washoe Meadows*, the Court invalidated the approval of a river restoration project because the Draft EIR did not identify which of several alternatives evaluated in the EIR was the preferred project alternative. The Draft EIR analyzed five alternatives at an equal level of detail (including no project), without selecting a preferred alternative, and provided that the preferred alternative would be identified in the Final EIR based on public comments received on the Draft EIR. (*Id.* at p. 283.) The Court of Appeal found that EIR was inadequate because it did not contain an "accurate, stable, and finite" project description. (*Id.* at p. 285.) "The failure to identify or select any project at all impairs the public's right and ability to participate in the environmental review process. A description of a broad range of possible projects, rather than a preferred or actual project, presents the public with a moving target and



requires a commenter to offer input on a wide range of alternatives that may not be in any way germane to the project ultimately approved.” (*Id.* at p. 288.)

The Project Description provides:

OCSD has been in negotiations with Bayside Village Marina, LLC, to identify potential site plan alternatives to the Original Northeast Pump Station. As such, the project is proposing three conceptual site plans, one of which was previously analyzed in the 2017 Bay Bridge EIR. **Depending on negotiation outcomes with Bayside Village Marina, LLC, OCSD would identify one of the three conceptual site plans described below in Section 3.3, Project Characteristics.**

(REIR at p. 3-6).

The Project Description therefore is clearly inadequate under the *Washoe Meadows* holding that a project description must identify a preferred alternative, and that it is improper to defer identification of a preferred alternative to the Final EIR based on future contingencies — in this case, favorable negotiations with Bayside Village Marina. Like the Draft EIR in *Washoe Meadows*, the REIR fails to provide an accurate, stable and finite project description. The REIR’s description of three different “conceptual site plans” — essentially, three alternatives — without identifying a preferred alternative presents an obstacle to informed public participation, given that each option will create different impacts and require different mitigation measures.

For example, the mitigation measures proposed to reduce potentially significant impacts to Biological Resources, Hydrology and Water Quality, and for Vibration differ for each of the three conceptual site plans. (See REIR at pp. 1-9-1-11, 1-19, 1-21.). The REIR should be revised to identify a preferred alternative, and recirculated with the required detailed impact analysis for that preferred alternative. The failure to identify a preferred project alternative violates CEQA. (See CEQA Guidelines, § 15088.5 [recirculation is required when the Draft EIR is fundamentally inadequate such that meaningful public review and comment are precluded].)

## **1.2. The Project Description is Confusing and Omits Critical Information.**

The Project Description is also deficient because the discussion of “Project Characteristics” is confusing, extremely difficult to follow, and lacks critical information necessary to allow the public and reviewing agencies to evaluate and review its environmental impacts. (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26; see *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1045.) The Draft REIR is required to include sufficient information to allow the public to understand the environmental impacts of the proposed project. (CEQA Guidelines, § 15146, discussion). It does not.

The Project Description is unclear with regard to the actual size (square footage) of the various alternatives’ project area and the dimensions and location of the anticipated permanent driveway access easement that OCSD purportedly intends to obtain on the Back Bay Landing property. For example, the REIR states only that the Original Northeast Pump Station alternative would be approximately 10,000 square feet in area, would include a 620 square foot

odor control facility, a backup generator, and would require a 4,100 permanent driveway access easement from BBL. (REIR at pp. 3-7, 3-10.) No building footprint for the pump station itself is provided for any of the three alternatives' conceptual site plans. (REIR at p. 3-11 [the pump station improvements for the "Modified Northeast Pump Station" alternative "would be the same" as those proposed for the Original Northeast Pump Station, alternative, "with some changes to the layout."] Of even greater concern, the description of the South Pump Station alternative fails entirely to provide the square footage of the site, again indicating only that the pump station improvements would be the same as those proposed under the Original Northeast Pump Station and Modified Northeast Pump Station, including a permanent driveway access easement of unspecified size. (REIR at p. 3-14.) The 10,000 square foot dimensions indicated for the Original Northeast Pump Station is inconsistent with the 9,500 square foot figure provided in the Notice of Preparation for the REIR, and for the preferred alternative in the 2017 EIR (which the REIR describes as identical to the proposed Original Northeast Pump Station).

CEQA requires OCSD to revise and recirculate the Draft REIR to state explicitly for each alternative the total project footprint by acreage, the area of the buildings, the location and dimensions of the driveway access easement, the location and dimensions of the vaguely described other "areas of disturbance," and the location as well as the use and ingress and egress points for the temporary construction easements. This information is necessary to allow the public and OCSD to evaluate the environmental impacts of the Project and the availability of potentially feasible alternatives and mitigation measures, as illustrated below, in the comment on the Project's inconsistency with the Coastal Act and the City of Newport Beach's Local Coastal Program Land Use Plan ("LUP").

### **1.3. The Description of Project Construction Is Inadequate.**

The REIR's description of construction timelines and the periods of use of the temporary construction easements on the BBL property are also unclear and inconsistent. While the total time for construction of the Original Northeast Pump Station and force main improvements is indicated to be 44 months, the REIR fails to disclose the anticipated duration of construction for the Pump Station improvements for the Original Northeast Pump Station plan. If the Original and Modified Northeast Pump Station improvements will take 24 months to complete (REIR at p. 3-22), how can the fairly massive 80,000 square foot temporary construction easement on the BBL property (the "East Work Area") only be needed for 9-12 months (REIR at pp. 3-16, 3-21, Figure 3-8)?

How large are the temporary construction easements required by the Modified Northeast Pump Station and the South Pump Station alternatives, which would apparently differ from the Work Area for the Original Northeast Pump Station (compare Figure 3-8 to Exhibits 3-11, 3-14). This difference belies the REIR's statement that "Pump station construction activities for the South Pump Station would be similar to that of the Original Northeast Pump Station and Modified Northeast Pump Station"? (REIR at p. 3-26.) CEQA requires OCSD to clarify these critical construction timelines and the gross square footage of any temporary construction easements, to enable the public and decision-makers to evaluate resulting environmental impacts and the feasibility of mitigation and alternatives. The size and configuration of the staging areas and the timeline for construction will directly affect the Project's environmental impacts, particularly with regard to noise and vibration impacts on adjacent uses, and the



significant land use conflicts with the coastal-dependent and recreational / marine commercial land uses on the BBL property.

#### **1.4. The REIR is Inconsistent with Regard to Whether the Project will Increase Capacity.**

The Project Description states that “The proposed project is not designed to increase capacity of the facility and is not expected to result in increases in peak flows.” (REIR at p. 3-10.) Elsewhere, the REIR states that the Project is “needed for future demand peak wet weather flows.” (REIR at p. 7-4.)

These statements contradict each other. Representatives of BVM also learned at the July 29 public review meeting that during the Dover-to-Newport Boulevard force main extension project, the BBPS capacity was upgraded from 16 to 18.5 MGD; the environmental documentation for that upgraded capacity (previously identified in the 2017 BBPS EIR as a reason for the BBPS expansion project) should be set forth in the new REIR. The REIR should also be revised to eliminate inconsistencies and explain whether the Project will further increase the sewage-carrying capacity of the BBPS, and, if so, whether significant growth-inducing impacts, requiring revision to the REIR’s conclusion that the Project “would not increase the capacity of the facility,” are present. Thus, the Project would not induce growth either directly or indirectly. The Project would not result in the removal of an impediment to growth.” (REIR at p. 6-3.)

#### **2. The REIR Baseline for Evaluating the Significance of Project Impacts Violates CEQA.**

The baseline for analyzing environmental impacts is normally existing conditions at the time the Notice of Preparation is published. (. (CEQA Guidelines, § 15125, subd. (a); *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (“*Smart Rail*”) (2013) 57 Cal.4<sup>th</sup> 439.) Where, as here, existing land use conditions are anticipated to change as a result of approved land use plans, the EIR is also required to measure the significance of impacts against a baseline of conditions under the approved land use plans. (CEQA Guidelines, § 15125, subd. (e); *Smart Rail, supra*.) EIR The REIR fails to clearly identify the baseline, uses inconsistent baselines, and appears to use improperly an alternative as the baseline for measuring impacts.

For example, the REIR appears to use the Original Northeast Pump Station alternative as the baseline for measuring land use impacts of the Modified Northeast Pump Station and South Pump Station alternatives. (See, e.g., 5.9-15.) The use of hypothetical conditions (in this case, the Original Northeast Pump Station) is not appropriate and masks the Project’s true impacts. (See *Communities for a Better Environment, supra*, 48 Cal.4<sup>th</sup> at p. 322.) The issue is not whether significant impacts will result from changing the Project from the Original Northeast Pump Station to the Modified Northeast or South Pump Station, but whether the relocation **and expansion** of the existing pump station site on the BBL property would have a significant impact on existing conditions, on approved land uses in the City’s LUP, and compliance with the visitor-serving policies of the Coastal Act as implemented by the City’s LUP. The significance of environmental impacts of the project should be measured against two baselines: (1) existing conditions, and (2) future site conditions under LUP including Back Bay Landing development

project, with the BBPS in its current location, as anticipated under the PCDP. The future site conditions baseline will allow the public and decision-makers to understand the incremental effects of expanding and relocating the BBPS. The REIR should clearly identify the baseline for each category of environmental impacts and explain why it is using that baseline.

### **3. The REIR Fails to Evaluate Adequately The Land Use and Coastal Resources Impacts of the Project.**

An EIR is required to discuss any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans (CEQA Guidelines, § 15126, subd. (d)), or, as in this case, Local Coastal Programs and the California Coastal Act. Such plans include, but are not limited to, regional land use plans for the protection of the coastal zone. (*Ibid.*) The purpose of the required analysis is to identify inconsistencies that the lead agency should address, and modify a project to avoid any inconsistencies. (Kostka & Zischke, Practice under the Environmental Quality Act (Cont. Ed. Bar. 2019) § 12.28.) Inconsistency with land use regulations is a factor to consider when determining whether a project may cause a significant effect. (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170.)

When a project site is within the coastal zone and governed by the Coastal Act, the EIR is required to discuss any inconsistencies with the Coastal Act. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1233.) In *Banning Ranch Conservancy*, the court of appeal upheld an EIR that “adequately flagged potential inconsistencies [with the Coastal Act] and addressed them in advance through proposed mitigation.” (*Ibid.*) The California Supreme Court has specifically held that an EIR on a proposed project in the coastal zone was required to identify areas that might be designated as ESHA under the Coastal Act. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918.) The Coastal Act provides for the approval of Local Coastal Programs adopted pursuant to section 30500 of the Public Resources Code. Local Coastal Programs apply and implement the policies of the Coastal Act, and establish enforceable regulations governing development within the area of the approved LCP.

As acknowledged in the REIR, the project is within the coastal zone and governed by the Coastal Act. The REIR must therefore address any inconsistencies with the Coastal Act’s recreation and visitor serving policies and the access and resource protection policies of the Newport Beach LUP. The REIR fails to discuss the inconsistencies between the proposed location of the BBPS and the policies in the Coastal Act and the City’s LUP, to maximize visitor-serving and coastal dependent and related uses at the proposed Project site, including:

#### **Coastal Act (Public Resources Code)**

##### Section 30213

Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.



### Section 30221

Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.

### Section 30222

The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal-dependent industry.

### Section 30224

Increased recreational boating use of coastal waters shall be encouraged, in accordance with this division, by developing dry storage areas, increasing public launching facilities, providing additional berthing space in existing harbors, limiting non-water-dependent land uses that congest access corridors and preclude boating support facilities, providing harbors of refuge, and by providing for new boating facilities in natural harbors, new protected water areas, and in areas dredged from dry land.

## **Newport Beach Land Use Plan**

### Policy 3.2.1-1

Protect, and where feasible, expand and enhance recreational opportunities in the coastal zone.

## **Back Bay Landing Planned Community Development Plan**

The REIR Project Description would site the BBPS in Planning Area 1 of the PCDP. Planning Area 1 allows “commercial development on or near the bay in a manner that will encourage the continuation of coastal-dependent and coastal-related land uses and visitor-serving uses, as well as allow for the development of mixed-use structures with residential uses above the ground floor . . . Priority uses include retail, restaurants, boat storage, marine and boat sales, boat rentals, boat service/repair, and recreational commercial uses such as kayak and paddle board rentals.” (PCDP, at p. 4.) Planning Area 1 permits the BBPS with its current size and location. (See PCDP, Table 2, Exhs. 3, 5, 9, 12.) The PCDP does not contemplate any expansion or relocation of the BBPS. (*Ibid.*)

As the Project is inconsistent with the foregoing coastal land use policies and regulations, CEQA requires the REIR to evaluate and address those inconsistencies, including the evaluation of alternatives and mitigation measures that may reduce the significance of the Project on coastal land use policies and regulations.

The REIR also fails to discuss the Project's inconsistency with Coastal Act section 30253, subdivision (e) of the Coastal Act, which provides that new development shall, where appropriate, "protect special communities and neighborhoods that, because of their unique characteristics, are popular visitor destination points for recreational uses" (REIR at p. 5.9-10.) Given that Newport Beach is a major recreational center and tourist destination, and the project vicinity provides a multitude of coastal recreational activities, including beach going, sport fishing, kayaking, diving, wind surfing, sailboat racing, excursion, and entertainment boat activities, as well as visitor-serving commercial and recreational uses and waterfront residences (See REIR at p. 3-1), the REIR must discuss the inconsistency of the proposed BBPS locations, and potential expansion (including proposed permanent easements) with these unique characteristics of the Upper Newport Bay area.

The REIR's sole, cursory discussion of the Project's conflicts with these visitor-serving land use policies provide:

The proposed pump station site is designated "Mixed-Use Water Related" (MU-W2) [by the City's Land Use Plan]. The MU-W2 category is intended to provide for commercial development on or near the bay in a manner that will encourage the continuation of coastal-dependent and coastal-related uses and visitor-serving uses, as well as allow for the development of mixed-use structures with residential uses above the ground floor. The REIR states that "the proposed project would either relocate the pump station approximately 200 feet to the northeast or approximately 200 feet to the west within the existing RV storage facility." This relocation would not create an inconsistency with the MU-W designation for the site.

(REIR, p. 5.9-11.)

To the contrary, the relocation *and/or expansion* of the BBPS, a non-visitor-serving use, would be entirely inconsistent with the MU-W2 category. In addition to the limited residential component, the Back Bay Landing site, as approved by the City and Coastal Commission, is intended to provide for expansion of recreational and marine commercial (CM) uses. As the foregoing visitor-serving policies of the Coastal Act and the City's LUP were adopted to preserve and expand coastal-dependent and coastal-related uses, this inconsistency indicates a significant impact that should be mitigated. (See REIR, section 6.9). CEQA requires an EIR to discuss feasible mitigation measures or alternatives to mitigate significant impacts. (CEQA Guidelines, §§ 15126.4, subd. (a)(1), 15126.6, subd. (a).) The REIR should be revised to discuss feasible alternatives to mitigate this impact, including 1) the possibility of relocating the BBPS to a site that is *not* reserved for visitor serving uses, and 2) siting the BBPS on a smaller footprint that will be less disruptive to visitor-serving uses, to minimize the inconsistency. (*Banning Ranch Conservancy, supra*, 211 Cal.App.4th at p. 1233.)

Therefore, the EIR must discuss the inconsistency and the feasibility of avoiding or minimizing the inconsistency through mitigation measures and/or alternatives. CEQA requires OCSD to analyze those alternatives and alternative locations that will minimize the significant coastal land use impacts of the Project in the REIR and recirculate the REIR for public review and comments. (See CEQA Guidelines, § 15088.5, subd. (a)(3) [recirculation is required when a feasible project alternative or mitigation measure considerably different from others previously



analyzed would clearly lessen the environmental impacts of the Project, but the Project's proponents decline to adopt it].)

### **The Evaluation of Alternatives is Inadequate.**

CEQA requires an EIR to evaluate alternatives that may reduce the significant impacts of the proposed project. (Pub. Resources Code, §§ 21002 [public agencies should not approve projects as proposed if there are feasible alternatives that would substantially lessen the significant environmental effects of such projects] 21002.1, subd. (a) [the purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided], 21100, subd. (b)(4) [EIR must include detailed statement of alternatives to the proposed project].) The CEQA Guidelines require an EIR to describe a reasonable range of alternatives to the proposed project, or to its location, that would feasibly attain most of the project's basic objectives while reducing or avoiding any of its significant effects. (CEQA Guidelines, § 15126.6, subd. (a).) The discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly. (*Id.* at § 15126.6, subd. (b).) An alternative that would substantially reduce significant environmental impacts should not be discarded simply because it does not fully achieve the project objectives. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1059, 1087.) An EIR that omits analysis of a feasible alternative that would achieve most project objectives without a reasonable explanation of the decision to exclude it will not withstand judicial scrutiny. (See, e.g., *Cleveland Nat'l Forest Found. v. San Diego Ass'n of Gov'ts* (2017) 17 Cal.App.5th 412, 426.)

#### **3.1 The REIR Must Analyze an Expand In Place Alternative.**

The REIR does not evaluate a reasonable range of alternatives because it improperly omits, with no explanation, an analysis of rehabilitation and limited expansion of the existing pump station to 9,500 square feet ("Expand in Place") or less, which would achieve most or all Project objectives. (See 2017 Draft EIR at pp. 7-11-7-18 [concluding that an Expand in Place alternative, labeled the "Existing Pump Station Site Rehabilitation Alternative," would attain the Project objectives].) The 2017 Existing Pump Station Site Rehabilitation Alternative would involve a limited expansion of the existing site to 9,500 square feet, which would contain a new pump station building and electrical building to the west of the existing structures and a new generator building and odor control facility. (*Id.* at p. 7-11.) The Pump Station would be accessed via a driveway on the west side of Bayside Drive. (*Ibid.*) The 2017 Draft EIR concluded that the Existing Pump Station Site Rehabilitation Alternative would achieve the Project objectives because "the pump station and force mains would be replaced to meet current structural and maintenance standards and would increase conveyance capacity to accommodate anticipated growth and wet weather flows. Access to the pump station site would be provided via Bayside Drive under this Alternative, resulting in safety improvements for OCSO Operations & Maintenance personnel." (*Id.* at p. 7-18.) The Existing Pump Station Site Rehabilitation Alternative would reduce environmental impacts by minimizing conflict with the land use regulations described above. Because the Existing Pump Station Site Rehabilitation Alternative would apparently be feasible (as indicated by its inclusion in the 2017 Draft EIR

alternatives analysis), achieve the Project objectives, and reduce environmental impacts, the REIR violates CEQA by failing to analyze this or a similar Expand in Place alternative. CEQA requires OCSD to recirculate the EIR with an analysis of Expand in Place, or a reasonable explanation of why an Expand in Place alternative is excluded from the alternatives analysis.

### **3.2 An Alternative South of East Coast Highway Location Must Be Analyzed**

The REIR has, inexplicably, identified only those alternative locations that are within the BBL development site and acreage holdings, including the Pump Station South Relocation Alternative.

Not only is this alternative identified as the “Environmentally Superior” Alternative, but it would “attain all of the Project’s objectives, including the ability to meet current structural and maintenance standards, increase safety with regard to project access, and construct new on-site odor control infrastructure.” (REIR, Section 7.2.)

However, the site plan and design of this alternative, problematically, purportedly requires retention of the existing BBPS site north of East Coast Highway for a back-up generator and odor control facility due to “space constraints” at the new pump station site south of East Coast Highway. Adding to this unnecessary “split” project design is a further problematic retaining wall that would ostensibly be needed along the Newport Bay Channel.

Yet, even a cursory glance at REIR Exhibit 7-1 (South Relocation Alternative – Conceptual Site Plan), reveals extensive additional space within an empty parking lot located south and east of BVM’s property south of the East Coast Highway bridge. This area is proposed for a City-approved, but as yet unconstructed, restaurant parking lot, and would potentially avoid some of the force main extensions under Coast Highway.

### **3.3 The REIR Should Analyze Alternatives With a 20-Year Life.**

As explained above, CEQA requires an EIR to evaluate alternatives that may reduce the significant impacts of the proposed Project – even where the alternative will not achieve all of the project objectives. The REIR improperly dismisses “PASR Alternative 1B” (Rehabilitation) for the reason that it would only provide for a 20- to 30-year design service life:

*PASR Alternative 1B.* PASR Alternative 1B was rejected from further consideration. Rehabilitation of the existing pump station within its current boundaries would only provide for a 20- to 30-year design service life, and expansion of this facility would most likely be needed for future demand peak wet weather flows (which is represented by Alternative 1A discussed above and considered as part of this alternatives analysis). Since this Alternative would not meet a critical objective of the project, it has been rejected from further consideration by OCSD.

(REIR at p. 7-4.)

The REIR is required to evaluate an alternative with an estimated life of 20 years that may minimize the Project’s significant land use impacts. Although the REIR indicates that one of



the Project objectives is to achieve a service life of 50 years, 20-30 years is a very typical and normal design life for an infrastructure project. Indeed, the REIR itself assumes the standard design life of 30 years for its analysis of the environmental impacts of the Project with respect to greenhouse gas emissions. (REIR at p. 5.6-13.) While the REIR need not consider alternatives that do not implement basic Project Objectives, the 50-year design life objective is abnormal and appears to serve as a pretext for the improper rejection of the Rehabilitation alternative, which is both feasible and will avoid or substantially lessen environmental impacts by minimizing inconsistencies with the Coastal recreation and marine commercial visitor-serving land use policies discussed above. (See CEQA Guidelines, § 15126.6, subd. (a).) This violates the CEQA requirement that Project Objectives must be reasonable, and should not be so narrowly defined that they preclude consideration of reasonable alternatives for achieving the Project's underlying purpose. (*North Coast Rivers Alliance v. Kawamura* (2015O 243 Cal.App.4th, 647, 688.)) Therefore, CEQA does not permit the REIR to reject alternatives on the basis that they would not provide a 50-year design life.

For clarity, the REIR should also use consistent terminology to refer to the alternatives considered in the 2017 EIR and the REIR.

### **Conclusion.**

CEQA requires an EIR to be recirculated for public review and comment when "significant new information" is added. (CEQA Guidelines, § 15088.5.) Significant new information includes the disclosure of a new significant environmental impact, substantial increases in the severity of an environmental impact; and feasible alternatives or mitigation measures that are considerably different from others previously analyzed that would clearly lessen the significant environmental impact where the project's proponents decline to adopt them. (*Ibid.*) Recirculation is also required in cases where the draft EIR "was so fundamentally and basically inadequate that meaningful public review and comment were precluded." (*Ibid.*)

As set forth in this comment letter, the REIR is fatally flawed. To restate, CEQA requires revisions to the Draft REIR including a stable, accurate and finite Project Description; the disclosure of new and more severe significant environmental impacts (particularly land use impacts); a full evaluation of the Expand In Place alternative, and South Relocation alternative not confined only to BVM property, that would reduce the significant coastal and land use impacts of the Project. Therefore, recirculation of the Draft REIR will be required prior to certification. BVM therefore objects to OCSD's approval of the Project as described in the Draft REIR.

We would also ask that the revised REIR include all prior environmental documents prepared in advance of the 2017 BBPS EIR (PASR, etc.), and, the 2017 BBPS EIR. Technical comments in support of this comment letter from BVM's civil engineers, Fuscoe Engineering, will be provided under separate cover.

Thank you for your review and response on these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "John P. Erskine". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

John P. Erskine  
Nossaman LLP

JPE:cc4

cc: Valeria Ratto, OCSD  
Vicky Francis, OCSD  
Harmik Aghanian, Arcadis

## References

The following documents are incorporated by reference.

### **Back Bay Landing Project CEQA Documents**

City of Newport Beach, Final Environmental Impact Report for the Back Bay Landing Project (Feb. 2014)

<[https://www.newportbeachca.gov/pln/CEQA\\_REVIEW/Back%20Bay%20Landing/Final%20EIR\\_Complete\\_February%202014.pdf](https://www.newportbeachca.gov/pln/CEQA_REVIEW/Back%20Bay%20Landing/Final%20EIR_Complete_February%202014.pdf)> (as of Sept. 3, 2019).

City of Newport Beach, Draft Environmental Impact Report for the Back Bay Landing Project (Oct. 2013)

<[https://www.newportbeachca.gov/pln/CEQA\\_DOCS.asp?path=/Back%20Bay%20Landing/DEIR-Newport%20Back%20Bay-October%202013](https://www.newportbeachca.gov/pln/CEQA_DOCS.asp?path=/Back%20Bay%20Landing/DEIR-Newport%20Back%20Bay-October%202013)> (as of Sept. 3, 2019).

City of Newport Beach, Addendum to Final Environmental Impact Report for the Back Bay Landing Project (Mar. 2016)

<[https://www.newportbeachca.gov/pln/CEQA\\_REVIEW/Back%20Bay%20Landing/BBL%20Addendum%20-%20Final%203-16-16%20complete.pdf](https://www.newportbeachca.gov/pln/CEQA_REVIEW/Back%20Bay%20Landing/BBL%20Addendum%20-%20Final%203-16-16%20complete.pdf)> (as of Sept. 3, 2019).

### **Newport Beach Local Coastal Program**

City of Newport Beach, Coastal Land Use Plan (as amended July 26, 2016)

<<https://www.newportbeachca.gov/government/departments/community-development/planning-division/general-plan-codes-and-regulations/local-coastal-program/coastal-land-use-plan>> (as of Sept. 3, 2019)

Newport Beach Municipal Code, tit. 21, Local Coastal Implementation Plan

<<https://www.codepublishing.com/CA/NewportBeach/html/NewportBeach21/NewportBeach21.html>> (as of Sept. 3, 2019).

City of Newport Beach, Back Bay Landing Planned Community Development Plan (PC-9) (as amended Apr. 26, 2016)

<[https://www.newportbeachca.gov/PLN/MAP\\_DOCUMENTS/PC\\_TEXT/PC\\_09\\_Back\\_Bay\\_Landing.pdf](https://www.newportbeachca.gov/PLN/MAP_DOCUMENTS/PC_TEXT/PC_09_Back_Bay_Landing.pdf)> (as of Sept. 3, 2019).