



November 18, 2009

*Hand Delivered to Address Below
with Enclosures in Electronic form
on attached CD*

The California Coastal Commission
Attention Mr. Robert Merrill
Coastal Manager, North Coast District Office
Delivered to 710 E Street, Suite 200
Eureka, California 95501

Re: Appeal to the California Coastal Commission by Humboldt Baykeeper, the Environmental Protection Information Center, and the Northcoast Environmental Center of the Coastal Development Permit granted by the City of Eureka for Phase 1 of the Marina Center Development located at 736 Broadway, Eureka, Local Agency file Number CDP-09-0004

Dear Commission and Staff:

On November 3, 2009 the City of Eureka held a hearing regarding approval of a coastal development permit ("CDP") for Phase I of the proposed Marina Center Mixed Use development project. Humboldt Baykeeper, the Environmental Protection Information Center ("EPIC"), and the Northcoast Environmental Center ("NEC") submitted the attached letter as comments in opposition to the City's approval of the CDP. We do not believe that the CDP meets the requirements of the City's approved LCP, nor do we believe that it meets the requirements of the Coastal Act. Based on the attached letter and the information included below, we hereby appeal the City's approval of the CDP and ask the Coastal Commission to deny the proposed CDP.

The CDP approved by the City does not meet the requirements of either the Coastal Act or the City's certified LCP regarding protection of environmentally sensitive habitat areas and wetlands. As our concerns are outlined in the attached letter to the City of Eureka¹, they will not be detailed here; however a few notable provisions should be emphasized.

¹ The letter to the City of Eureka is attached as Exhibit A. Attached to the letter to the City of Eureka are the comments of Humboldt Baykeeper to the North Coast Regional Water Quality Control Board regarding the proposed Supplemental Interim Remedial Action Plan. The letter to the Regional Board contains 9 exhibits which include reports prepared by Humboldt Baykeeper's experts in their federal litigation against CUE VI under the Clean Water Act and the Resource

The CDP approved by the City is for Phase I of the Marina Center mixed use development. The entirety of the project is for the construction of a “mixed-use” development including commercial and retail uses. Phase I is for the implementation of a Supplemental Interim Remedial Action Plan (“SIRAP”). The actions contemplated by the SIRAP include excavation of Clark Slough and fill of wetlands and Environmentally Sensitive Habitat Areas (“ESHA”) throughout the property with soils excavated from the Slough. Although the project proponent contends that this work is remediation of the property to comply with requirements of the Regional Water Quality Control Board, this is merely a pretext for its first step toward final development of the property, the eradication of the wetlands and ESHA. There is no evidence that filling of the wetlands on the property is required to satisfy the Regional Board’s request to reduce the level of pollutants contained in the site’s storm water discharges. *See* Letter dated February 23, 2009 from Regional Board to Brian Morrissey. Nor is the filling of the wetlands on the property required to comply with the provisions found within the Cleanup and Abatement Order issued for the property. In fact, the Regional Board cannot itself define what actions must be taken by a property owner, and must instead merely concur with their proposals on whether the work would comply with the Water Code. *See* Cal. Water Code § 13360.

Additionally, as discussed more fully in the attached letter to the City of Eureka, the wetlands on the Balloon Tract property that will be filled as a result of this CDP are ESHAs under the City’s certified LCP. Eureka Municipal Code § 156.052(C). As such, they must be protected against any significant destruction of habitat values. Pub. Res. Code § 30240. The City’s CDP for the SIRAP simply ignored these provisions, and allows for the complete destruction of these ESHAs. Moreover, even were these wetlands not considered ESHA in the certified LCP, they are undoubtedly wetlands, and the proper analysis that is required for development within a wetland must be conducted; the fill here is not for any of the allowable uses in Public Resources Code sec. 30233 (a), and thus cannot be permitted.

Although the CDP proponent’s stated intent of restoring Clark Slough and creating additional wetlands is a laudable goal this does not provide a proper basis for the granting of this CDP and does not exempt the project from a complete analysis under the City’s LCP or the Coastal Act. Further this proposed creation of wetlands cannot be considered mitigation for the fill that is proposed under the SIRAP since mitigation is only allowed to balance impacts caused by an action which is itself a permitted use under the LCP. Since the filling of the wetlands, ESHA under the City’s LCP, on the remainder of the site is not being done for a permitted purpose under the LCP or the Coastal Act, this is not the case. The only permitted use within ESHAs are uses dependent upon such resources, such as restoration or enhancement projects. Eureka Municipal Code § 156.052(D).

An additional critical failure of the SIRAP is its lack of process and inadequate protocols to characterize the contamination on the property prior to its implementation. Although the Regional Board has conditioned their approval on the delineation of the vertical and lateral extent of dioxin

Conservation and Recovery Act. Exhibit 3 of the letter to the Regional Board contains a wetland delineation at page 27 prepared on behalf of Humboldt Baykeeper and shows the pocket wetlands found on the site that will be filled as a result of the implementation of the SIRAP. Attached as exhibit 9 to the letter to the Regional Board are figures showing sampling locations where dioxins and furans were detected in site soils and sediments.

contamination, there is no requirement that this occur beyond the areas already identified as contaminated with dioxin. Even the proposal to address the known dioxin contaminated soil is wholly inadequate to ensure proper characterization and protection to the local community. To date there have been seven samples for dioxin taken and analyzed, (on a 40+ acre parcel) and all seven samples came back with elevated levels of dioxin. Since the SIRAP only calls for a composite sample of areas known to be contaminated, and fails to set forth a process to determine the extent of contamination, there is a strong likelihood that many contaminated soils and/or sediments will be overlooked. Since the SIRAP only calls for dioxin analysis in the stockpile or where visible evidence of staining or petroleum contamination has been found, the sediments excavated from Clark Slough could easily contain additional dioxins that would be ignored before being spread across the property, compounding the existing contamination.

Thank you for your consideration of this appeal.

_____/s/_____
Michelle D. Smith
Staff Attorney, Humboldt Baykeeper

On behalf of:
Humboldt Baykeeper,
The Environmental Protection Information Center,
The Northcoast Environmental Center

Cc: Pete Nichols, Humboldt Baykeeper
Scott Greacen, Environmental Protection Information Center
Jim Clark, Northcoast Environmental Center
Sharon Duggan, Law Offices of Sharon Duggan

Enclosures:

1. Letter to City of Eureka from Humboldt Baykeeper, EPIC, and the NEC Dated November 3, 2009 with attachments.

Attachments include letter from Humboldt Baykeeper to the North Coast Regional Water Quality Control Board, with attachments included in electronic format. Attachments to the Regional Board are as follows:

- 1) Letter from the Regional Board to CUE VI dated June 18, 2009.
- 2) Letter from Humboldt Baykeeper to the Regional Board dated June 21, 2009.
- 3) Expert Report of HT Harvey dated January 2008.
- 4) Soil sampling results from the Balloon Track dated July 2008.
- 5) Water sampling results from the Balloon Track dated January 2008.
- 6) Sediment sampling results from the Balloon Track dated January 2008.

- 7) Fish Tissue sampling results from Clark Slough dated January 2008.
 - 8) Expert Report of HT Harvey dated February 2009.
 - 9) Figures showing sampling locations for above soil, sediment, and water samples.
2. Letter to Brian Morrissey of CUE VI dated February 23, 2009.