



EPI-Center, 1013 Monterey Street, Suite 207 San Luis Obispo, CA 93401

Phone: 805-781-9932 • Fax: 805-781-9384

San Luis Obispo **COASTKEEPER**[®]

Ron Skinner
Huasna Valley Association
P.O. Box 1164
Arroyo Grande, CA 93421

February 15, 2009

VIA EMAIL: ron@huasnavalley.com

Subject: Review of Proposed Ecelaron MND and CUP / Biology and Surface Water

Dear Ron,

San Luis Obispo **COASTKEEPER**[®], a program of Environment in the Public Interest, is organized for the purpose of ensuring that the public has a voice with agencies and official responsible for enforcing water quality, watershed protection, and environmental regulations.

In the position of San Luis Obispo Coastkeeper, I serve as Senior Ecologist for the organization. I hold a Masters degree in biology and am approved by the County of San Luis Obispo Planning Department as a biologist qualified to undertake environmental analysis and produce Environmental Impact Reports. I have provided professional wildlife and vegetation surveys in compliance with CEQA and NEPA since 1979 and I have conducted surveys to establish the presence/absence of rare, threatened, or endangered species in San Luis Obispo, Santa Barbara, and Kern Counties. I am familiar with the Huasna River watershed.

As such I submit the following comments for use by the Huasna Valley Association regarding the biological resources and surface water analysis provided in the Mitigated Negative Declaration (MND) proposed for the Excelaron LLC project in Huasna Valley:

Respectfully Submitted,

Gordon Hensley,
San Luis Obispo **COASTKEEPER**[®]



In general, the MND appears to inappropriately defer surveys and mitigation to uncertain dates in the future. The general nature of the biological surveys provide for limited impact assessment and more complete disclosure of likely impacts as well as the formulation of mitigation will not happen until after project approval. This is not consistent with the intent of the California Environmental Quality Act (CEQA) as a negative declaration cannot be based on the presumed success of mitigation measures not formulated at the time of approval of the project and renders the MND deficient (see CEQA Guidelines 15126.4(a)(1)(B); *Sundstrom v County of Mendocino* (1988) 202 Cal.App.3d.296; *Gentry v City of Murrietta* (1995) Cal App.4th 1359; *Endangered Habitat League, Inc. v County of Orange* (2005) 131 Cal.App 4th 777).

Specifically, the Excelaron MND proposes to defer consideration of impacts to the sensitive vegetation, wildlife, and habitat identified in the Initial Study until "pre-construction surveys" are completed (p 23, 24, and Exhibit B). In addition, the MND proposes to leave the identification of mitigation measures to other trustee agencies and/or consultants until after the project has already been approved.

Rather than deferring discussion of impacts to these future studies, analysis of likely impacts as well as requirements to avoid and/or mitigate such impacts should be part of the information considered by County decision makers and the public. Based on the Initial Study and studies supporting the MND, the County can not find that impacts have been mitigated to a level of less than significant. An EIR would more fully inform the County and the public regarding impacts which have not been characterized or for which mitigation has been deferred to a later date.

BIOLOGICAL SURVEYS: The biological surveys that have been provided in support of the MND are best characterized as presence/absence surveys providing a general assessment of the suitability of the habitat for each of the species noted as present. However, for the County to be able to adequately assess impacts likely to result from approval of this project information on abundance and distribution of each species would be needed.

NESTING BIRDS AND RAPTORS: Mitigation measure BR15 indicates that grading and tree trimming shall not be allowed during the nesting season (March to July). However the California Department of Fish and Game (DFG) typically recommend a prohibition from February 1 to August 31 to avoid impact to all nesting birds, including raptors.

In addition measure BR15 presents a conflict that will likely create confusion after the permit is issued. On the one hand the measure defines a period during which construction activities "shall not be allowed" but proposes to leave this permit condition up to the discretion of the on-site monitor. Not only is this the wording of this mitigation measure confusing and internally conflicted, it likely creates a violation of California Fish and Game Code prohibition of "take" or destruction of raptor eggs or nests.



CALIFORNIA RED-LEGGED FROG (*Rana aurora draytonii*): Excelaron consultant Sage Institute Inc. alerted the applicant in an October 16, 2008 report that the California Natural Diversity Data Base (CNDDDB) reports an occurrence of the federally listed threatened California red-legged frog (CRLF) in the vicinity of the proposed project. The Sage report also alerts Excelaron and the County that absence of this listed species, and therefore likely impacts from the proposed project cannot be assumed.

Mitigation Measure BR28 presents measures purporting to minimize impacts to CRLF. However, BR28 fails to address the requirement of CEQA to "avoid" impact if feasible. The MND also lacks an explanation of how posting signs actually mitigates possible impact. Recommendations resulting from a US Fish and Wildlife Service approved protocol level survey would likely generate more appropriate measures.

STREAM CROSSINGS: At page 33 of the MND three blue line stream crossings are identified however, the only Mitigation Measure that addresses stream crossing is Haz41. While keeping trucks out of storm swollen streams is a positive measure, it fails as "mitigation". Measures that avoid in-stream crossings (referred to as "Arizona" crossings), or if not feasible, compensate for the impact resulting from project traffic should be required.

SURFACE WATER: The Initial Study and the MND are both vague regarding impacts and mitigation of impacts to surface waters to be required. As noted above, analysis of impacts to surface water and mitigation proposals is improperly deferred to the production of a future Storm Water Pollution Prevention

Stormwater discharges from construction and development of the proposed oil extraction project likely contains toxic and non-conventional pollutants that must be disclosed in the environmental analysis and proper best available technology (BAT) standards should be included in permit requirements. Toxic and non-conventional pollutants subject to BAT standards that are routinely found in stormwater discharges from similar construction and development projects include zinc, copper, lead, cadmium, chromium, and poly-aromatic hydrocarbons (PAHs). In recent US EPA analysis found metals, PAHs, and pathogens to be in significant amounts in stormwater and to pose environmental and human health concerns at the levels at which they are found.

In addition, the Clean Water Act is clear that new sources of pollution, such as the project proposed by Excelaron, are subject to New Source Pollution Standards (NSPS) (see 33 U.S.C. § 1316(a)(2)(1982); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d at 568; *Natural Resources Defense Council, Inc., v. EPA*, 822 F.2d at 110.). The "new source" classification is designed to further the CWA's goal of reducing water pollution discharge by requiring that newly constructed sources meet the most stringent standard available. While the EPA has stated that new sources are subject to stricter standards because new facilities would have the opportunity to apply the best and most efficient processes from the start (49 Fed. Reg. 37998, Sept. 26, 1984), the



analysis provided in the MND does not provide sufficient detail regarding impact the proposed project will likely have on surface water quality in the Huasna Valley.

Rather than deferring discussion of impact to surface waters to future studies and proposed monitoring, an analysis of likely impacts as well as requirements to avoid and/or mitigate such impacts should be part of the information considered by County decision makers and the public. Based on the Initial Study and water impact information provided in the MND, the County can not find that impacts have been mitigated to a level of less than significant. An EIR would more fully inform the County and the public regarding impacts to water resources.



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