June 18, 2018

Subject: Correspondence for Planning Commission Meeting June 19, 2018
3300 Panorama Drive, Coastal Development Permit CPO-500, Conditional Use Permit UPO-440

Hello Planning Commissioners,

I have followed this project since August 2016. I live across the street from the ten-acre parcel. I have many concerns regarding the Public Health and Safety of the project along with the protection of the Environmental Sensitive Habitat on the north side of the property. There have been four Planning Commission hearings regarding this project. This is a one of a kind project for Morro Bay with many different issues that will affect the neighbors and our community. I appreciate all your time and attention to this important project.

Concerns:

Environmental Impact Report-*This project has adequate documentation from Department of Toxic Substances Control, December 20, 1996 and from Fluor Daniel GTI, September 23, 1996 to indicate that the site was contaminated with jet fuel and the remediation was too expensive so the 10-acre parcel at 300 Panorama Drive in Morro Bay. This project should have an Environment Impact Report. Please see attachment documents.*

Third Party Project Manager-A third party Project Manager should oversee the entire project. The applicant has appointed Michael Tiffany, Industrial Hygienist as the Project Manager. The applicant is paying him to over see all aspects of the project. This is a conflict of interest.

There is activity noted by Michael Tiffany to question his title as Project Manager. Michael Tiffany went inside one of the tanks, drilled a hole inside the tank and took a soil sample. The loud sound of the tool used to make a hole could be heard all though the neighborhood. This activity occurred in February 2017 during the Nesting Season. Did a biologist survey the property per City code to determine is there were any nesting birds? Did a Biologist provide a written report stating that there were no sightings of the Protected California Red Legged Frog in the ESH? This is a violation of the Nesting Season and City codes and guidelines. Please recommend a third party Project Manager to over see the entire project.

Tree Replacement: *On June 22, 2017 a group of workers were on the property doing weed abatement at the front of the property. The deadline for weed abatement was June 15th. There were five trees identified to be removed on the property per the 2016 Terra-Verde report. On June 24th and June 25' 2017 the gardeners cut down six trees and a seventh tree was cut to the stump in the ESHA. The Public Works Director and Planning Department Director were notified by me via email. The applicant did not have a permit from the City to do this and it was done during the Nesting Season another City violation. This is a blatant disregard for the City "Major Vegetation Removal, Replacement and Protection Guidelines", Resolution 39-07.*
A new Arborist Report-August 14, 2017 by Greenvale Tree Company documents seven trees for removal near the ESHA. In **"Mitigation Measure BR-7:** Non-diseased and non-hazardous mature trees removed in conjunction with the demolition project shall be replaced with 5- or

15-gallon trees". The applicant allowed the herd of goats to eat the bark off the trees which probably caused these trees to become weak and diseased. I phoned the applicant to inform him of this activity with the complaint that the goats are eating the bark off the trees in the ESHA. He said he would put fencing around these trees but fencing was never placed around these trees. Mitigation Measure BR-7 states only "Non-diseased" shall be replace. The ESHA provides a habitat for many species of birds. The ESHA is a protected habitat and should be respected.

1. The trees that were cut down should be replaced on the property not at a different location in the city of Morro Bay.
2. Is there a "Restoration Plan" for the Environmental Sensitive Habitat?
3. I would like to request that all trees removed near the ESHA be replaced in the same location they are removed from.

On another note, I would like to thank you for video taping the sewer and water lines along the truck route and the applicant providing a Performance Bond.

The neighbors and my family are not against the project. We feel strongly about our health and safety concerns and the ESHA. Let's all work together to keep North Morro Bay a safe place for the children, families and all the Wildlife that live in the ESHA.

Respectfully,
Don and Kristen Headland

ANALYSIS OF THE APRIL 16, 2018 LETTER WRITTEN BY ATTORNEY CHRISTOPHER NEUMEYER TO THE MORRO BAY STAKEHOLDERS

Concerning the Piecemealing of Environmental Review of Proposed Development on the 3300 Panorama Drive Superfund Site

Prepared by Cynthia Hawley, Attorney on behalf of the

MORRO BAY STAKEHOLDERS

June 14, 2018

This report is an analysis of the April 16, 2018 letter written by Assistant City Attorney Christopher Neumeyer to the Morro Bay Stakeholders. In this letter Mr. Neumeyer argues that separation of permitting and environmental review of site preparation from the permitting and environmental review of the following residential development of the 3300 Panorama Drive superfund site is not a violation of the California Environmental Quality Act. However, Mr. Neumeyer is wrong as this report shows. CEQA requires environmental review of the "whole project" and prohibits segmented, or piecemealed, environmental review of project impacts. This report includes the following topics:

I. Introduction and overview.

HOW MR. NEUMEYER HAS MISREPRESENTED THE LAWS.

II. Mr. Neumeyer changed words in the law to pervert its meaning and create the appearance that piecemealing does not exist in this case.

III. Mr. Neumeyer's invented "definitive plans" rule must be disregarded because it does not exist in CEQA.

IV. Other cases cited by Mr. Neumeyer are generally not applicable and text is cherry picked.

WHAT THE LAW ACTUALLY REQUIRES.

V. Environmental review of site preparation must include discussion of the effects of the residential development to satisfy CEQA's requirements.

VI. Clearing the site will induce growth and the City is required under CEQA to "...evaluate the environmental effects of the most probable development patterns".

VII. Site preparation including demolition is routinely reviewed as part of the "whole project" by the City of Morro Bay.

VIII. Piecemealing risks pre-commitment to the next phase of a project and loss of open-minded decision-making.

I. Introduction and overview.

Under the California Environmental Quality Act (CEQA) piecemealing occurs when a development project is divided into two or more parts for environmental review and the possible environmental effects – harms caused to people or the environment – are identified and analyzed separately. The effect is to evade disclosure and analysis of the cumulative effects of the whole project. CEQA prohibits piecemealing and requires identification and analysis of the environmental effects of a "whole project".

The City has, by definition, piecemealed this project. Even though the City routinely processes the permitting and environmental review of site preparation as part of a whole project (as shown below), the Planning Department has segmented this project into two parts: 1) site preparation by demolition and removal of the jet fuel infrastructure and 2) the residential development of the site.

Evasion of full environmental review of this project is of particular concern because it is a superfund site contaminate with jet fuel. In 1997 the California Department of Toxic Substance Control acknowledged "that when the site is converted to residential use it should be reassessed for the presence of contaminants and the need for additional remediation."[1]

In a March 27, 2018 letter, Morro Bay Stakeholder Ed Griggs asked City Attorney Joseph Pannone "Exactly how does the Community Development Department-Planning Division plan on reconciling the piecemealing violation of this project?" City Attorney Christopher Neumeyer's written response to Mr. Griggs's letter does not answer the question. As shown below, Mr. Neumeyer claims that no piecemealing exists in spite of the reality that the project has been separated into two parts for separate environmental review. Mr. Neumeyer attempts to support the claim based on:

- changing the text and meaning of laws;
- a nonexistent rule apparently of his own invention;
- misrepresenting the laws within CEQA that prohibit piecemealing; and,
- ignoring the facts that the site preparation will induce residential growth and that the City must evaluate effects of the "most probable development patterns" when a project is "growth inducing".

[1] 12-6-2016 Planning Commission staff report page 11

These misleading and false statements of law were sent to the Stakeholders, and to the Council members, Planning Commissioners, and staff members to whom the letter was copied.

According to the California Supreme Court, "Public entities have...a mandatory duty to obey legislative enactments of which the entities must conclusively presume to have knowledge."[2] The Planning Commission, the City Council and City staff have a mandatory duty to carry out the requirements of CEQA and it is presumed that the individuals in these positions have knowledge of these laws including the requirements for environmental review under CEQA.

II. Mr. Neumeyer changes words in the law to pervert its meaning and create the appearance that piecemealing does not exist in this case.

Mr. Neumeyer changes key words in the California Supreme Court's holding in the case of *Laurel Heights Improvement Assn. v. Regents of Univ. of California*[3] that defines what must be included in a CEQA analysis.

The Court held in this case that: "an EIR must include an analysis of the environmental effects of *future expansion or other action* if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will ***likely change*** the scope or nature of the initial project or its environmental effects." [4]

Mr. Neumeyer misrepresents the second prong of this law by *changing the words of the law* from "future expansion or action ... will ***likely change*** the scope or nature of the initial project" to "**has no impact**". Integrating the change of phrase into his discussion, Mr. Neumeyer claims that "any potential subsequent residential development of the project site ***has no impact*** on the scope or nature of the current project or it's environmental effects". The difference is significant as Mr. Neumeyer demonstrates.

What is the meaning of "will ***likely change*** the scope or nature of the initial project"? In *Laurel Heights* case, the future action that changed the scope or nature of the initial project was a physical change – an increase in space used from 100,000 square feet to 354,000 square feet and an increase in occupants from 460 to 860. The Court held that "...the EIR was inadequate because it fails to discuss the anticipated future uses of the

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[2] Ramos v County of Madera (1971) 4 C3d 685, 696.

[3] (1988) 47 Cal. 3d 376

[4] See page 4 of Mr. Neumeyer's letter.

Laurel Heights facility and the environmental effects of those uses."[5]

Physical changes to the environment are what CEQA is all about and it is to physical changes that this "likely change" refers.

Within the text and intent of this law, future expansion or action that will ***"likely change*** the scope or nature" of the initial demolition and site preparation at 3300 Panorama Drive would be the *physical change* of the residential development – changing the prepared empty site into a residential development. Under this law, the City must include discussions of this future residential development and the environmental effects of it within the environmental review of the initial site preparation.

But Mr. Neumeyer perverts the whole meaning of the law that applies to physical change by altering the words of it. As Mr. Neumeyer argues, subsequent residential development on the project site would have ***no impact*** *on the initial site preparation* because "existing environmental requirements for the project to proceed do not change whether there is future residential development. The same standards apply regardless of whether there is no subsequent development..."

This is a classic "straw man" argument – one that falsifies the law and gives the impression of arguing that the second prong does not apply while really arguing something that the second prong does not include at all. Mr. Neumeyer attempts to fool the Stakeholders, City Council Members, Planning Commissioners and staff (to whom the letter was copied) into believing that the second prong doesn't apply when in fact it does apply to require environmental review of the reasonably foreseeable residential development that will "likely change" the scope or nature of the site preparation into a residential development.

III. Mr. Neumeyer's invented "definitive plans" rule must be disregarded.

Mr. Neumeyer wrongly informed the Stakeholders, City decision-makers, and staff that site preparation at 3300 Panorama does not need to consider the environmental effects of the future residential development because the developer has produced no "*definitive plans* to develop the site for residential housing after the tanks are removed". As shown below and as Mr. Neumeyer knows, *no law* under CEQA requires consideration of the environmental effects of future plans and uses *only* where there are "definitive plans" for those future plans and uses. As discussed below, *CEQA requires that a project must consider the environmental effects of:*

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[5] Page 399.

- less-than-definite future plans,
- reasonably foreseeable future uses,
- future project elements that are within contemplation, part of the overall plan for the project, and conceded, and
- projects that are a crucial functional element of a larger project.

A search for the term "definitive plans" in the CEQA statute, the CEQA Guidelines and case law produced not one applicable hit for "definitive plans" and this fabricated rule is contradicted by well-established law. According to Mr. Neumeyer's "definitive plans" idea, any developer could get away with piecemealing environmental review of a project by applying for a separate development permit for part of the project and claiming that there are no "definitive plans" for what development might follow.

In his letter, Mr. Griggs stated that project applicant Chris Mathys disclosed at the January 3, 2017 Planning Commission hearing that "...he and his associates planned to develop the site for residential housing, after the tanks were removed." The direct quote is "The application I believe that we have with the health department is for residential purposes that's how it's specified by the health department."[6] Therefore, according to the developer's application to the Health Department, the demolition is site preparation for the residential development.

Mr. Neumeyer dismissed this candid public acknowledgment of the future residential development of the site based on his non-existent rule that "it is unclear where in the record the applicant stated *definitive plans* to develop the site for residential housing after the tanks were removed."

In addition, by citing the California Supreme Court case of *Laurel Heights Improvement Assn.*[7] in his "definitive plans" argument, Mr. Neumeyer implies that the case applies to prove his fabricated rule – which it does not. Again, Mr. Neumeyer manipulates and falsifies the California Supreme Court's language in the case to mischaracterize the Court's opinion.

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[6] At time 3:17;00

[7] (1988) 47 Cal. 3d 376, 395-396.

Mr. Neumeyer's false quotations	What the case actually says
"When 'future development is unspecified and uncertain,	"where future development is unspecified and uncertain,
the EIR is not required to include speculation about future environmental consequences of such development'"...	*no purpose can be served by requiring an EIR to engage in* ***sheer*** *speculation* as to future environmental consequences."
..."In fact, 'environmental analysis may be meaningless and financially wasteful'."	"The standard also gives due deference to the fact that ***premature*** environmental analysis may be meaningless and financially wasteful."

Among other changes, Mr. Neumeyer changed the language and meaning of the law as follows:

From: "***premature*** *environmental analysis* may be meaningless and financially wasteful."

To: "***When future development is unspecified and uncertain*** ... environmental analysis may be meaningless and financially wasteful."

Again, according to Mr. Neumeyer's rule, all a developer has to do to avoid environmental review of a whole project – to get away with piecemealing – and discount any statements as to future development plans, is to make sure that plans for future development are not "definitive".

Mr. Neumeyer also cites *Laurel Heights* to support his unanalyzed and legally and factually contradicted conclusions that the site clearance (which he describes as "tank removal")

- is not part of a larger project under CEQA, and
- that residential development of the site is not a reasonably foreseeable "consequence to tank removal".

IV. Other cases cited by Mr. Neumeyer are generally not applicable and text is cherry picked.

By choosing his particular quote from *Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners,*[8] Mr. Neumeyer implies that facts and or laws involved are similar and, in particular, that the residential development of the Panorama site is nothing more than a concept in long range plans that might be undertaken at some undefined point in the future. He omitted text showing that the case is not comparable because the demolition clearing of the site and the residential development are linked and are dependent on each other. The clearing of the site would not be done if the site were not to be developed and the development could not take place without the clearing of the site by demolition of existing structures.

Mr. Neumeyer's misleading cherry picked quotation	What Mr. Newmeyer left out
Projects existed only as concepts in long-range plans that were subject to constant revision. The record is silent with regard to any meaningful planning, decisionmaking, or any other activity by the Port moving forward with implementation of any such long-range plans. These are simply statements that at some undefined point in the future, the Port might try to undertake these projects.	The record reveals that the various runway projects are not similarly "linked" to the ADP either functionally or as part of the Port's concrete planning objectives for the airport. Thus, the ADP does not depend on a new runway and would be built whether or not runway capacity is ever expanded.

Neither of the cases cited by Mr. Neumeyer by footnote (*National Parks & Conservation Assn. v. City of Riverside*[9] and *Del Mar Terrace Conservancy, Inc. v. City Council*[10]) involve site preparation for future development and neither involve a project with growth inducing impacts.

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[8] (2001) 91 Cal. App. 4th 1344, 1361–62.

[9] (1996) 42 Cal. App. 4th 1505

[10] (1992) 10 Cal. App. 4th 712

V. *Environmental review of site preparation must include discussion of the effects of the residential development to satisfy CEQA's requirements.*

Even if residential development of the site could somehow be seen to be a second phase of the site preparation (which the City routinely does not do as discussed below), the law requires that the first phase of a project must consider the environmental effects of:

- less-than-definite future plans,
- reasonably foreseeable future uses,
- future project elements that are within contemplation, part of the overall plan for the project, and conceded, and
- projects that are a crucial functional element of a larger project.

Under the California Supreme Court case of *Laurel Heights*, consideration of "...the environmental effects of less-than-definite future plans..."[11] is the law, and the City is to evaluate "...the general affects of the reasonably foreseeable future uses, the environmental effects of those uses, and the currently anticipated measures for mitigating those effects."[12]

In a case cited in *Laurel Heights*, an oil company that applied for a permit to dig a well was required to discuss the environmental effects of a pipeline because the pipeline was part of the "overall plan for the project" that could have been discussed "in at least general terms" and was "within the contemplation" of the project proponent should its well prove productive.[13]

Likewise, in the case of *No Oil Inc. v. City of Los Angeles* the Court concluded that "In the case at bench, since it is conceded that any oil extracted for production will be transported by pipeline, the EIR must, at a minimum, contain some discussion of the pipeline's effects if it is to satisfy CEQA's requirements."[14] In this case Mr. Mathys conceded that the application to the Health Department is for residential purposes. Other examples include:

- A proposed project is part of a larger project for CEQA purposes if the proposed project is a crucial functional element of the larger project such that, without it, the larger project could not proceed.[15]

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[11] (1988) 47 Cal. 3d 376, 399

[12] (1988) 47 Cal. 3d 376, 398

[13] *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 415

[14] *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal. App. 3d 223, 233, 242

[15] *Communities for a Better Environment v. City of Richmond* (2010)184 Cal.App.4th 70, 99

- Where the expansion of the sewer system was a required or crucial element of a residential development without which the development could not go forward, the EIR had to consider the environmental effects of the sewer expansion.[16]

These cases demonstrate that a "whole project" that must be reviewed for environmental impacts is not defined by the "definitive plans" submitted by a developer. If this were true, developers could decide to evade CEQA review of the whole project by doing exactly what Mr. Mathys did – withhold "definitive plans" of part of the project as a future plan for later separate environmental review.

VI. Clearing the site would induce growth and the City is required in this case to "...evaluate the environmental effects of the most probable development patterns".

It is beyond a reasonable doubt that clearing of the site would be growth inducing. As noted above, the developer's application to the Health Department the project is for residential purposes. Preparation of the site for development will foster residential development for which it is zoned. In spite of this inevitable conclusion, Mr. Neumeyer omitted from his analysis the rule under CEQA that projects that will induce "changes in the pattern of land use, population density, or growth rate..." must be analyzed. (Guidelines §15358)

More specifically, §15126.2(d) requires that environmental review of the site clearing "Discuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment.

The site preparation will foster population growth and construction of additional housing.

"Under California Environmental Quality Act (CEQA), when a lead agency evaluates the potential environmental impact of a project that has growth inducing effects, the agency is not excused from environmental review simply because it is unclear what future developments may take place; it must evaluate and consider the environmental effects of the most probable development patterns."[17]

Here are some examples of growth inducing projects:

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[16] *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729-731

[17] *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 292-293

- Annexation of land into a city so it could be rezoned for development.[18]
- Rezoning land is a commitment to expanded use of the property and the first step to approval of a specific development project.[19]
- Approval of road and sewer construction "to provide a catalyst for further development"; "....construction of the roadway and utilities cannot be considered in isolation from the development it presages."[20]

VII. Site preparation including demolition is routinely reviewed as part of the "whole project" in the City of Morro Bay.

Mr. Neumeyer's statement that site preparation (which he refers to as "demolition of tanks and associated structures) is not "...part of a larger project that is also subject to current CEQA review" is in direct contradiction to the City's practice, to the laws discussed above, and to the foundational rule under CEQA that: "(a) "Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment"[21].

The City routinely conducts permitting and environmental review of "whole projects" – with site preparation as an element of the development.

Here are some examples.

- "...grubbing, demolition, and excavation activities in the development area" is included in the environmental review of the Black Hills Villa project. See February 9, 2010 Planning Commission staff report.
- "...demolition, pavement removal, pot-holing or auguring, boring, drilling, grubbing, vegetation removal, brush clearance, weed abatement, grading, excavation, trenching, or any other activity that has potential to disturb soil" is part of the whole Water Reclamation Facility as reviewed in the Draft Environmental Impact Report.
- "...grading, earthwork or demolition" are included in environmental review of development of a Single Family Residence at 420 Island during October 2014.
- Impacts of "grading, earthwork or demolition" are included in 2016 environmental review of application for construction of new restaurant at 1840 Main Street.

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[18] *Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, footnote 21.

[19] *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 244).

[20] *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1337.

[21] CEQA Guidelines §15378.

Site preparation is part of the residential development project and it is unknown why the City is processing this project differently and why the City's attorney is defending it instead of informing the decision makers of the laws that require consideration of the environmental effects of a whole project and that prohibit piecemealing.

VIII. *Piecemealing risks pre-commitment to the next phase of a project and loss of open-minded decision-making.*

Because this project has been piecemealed into phases, the first phase of site preparation/demolition could be approved without any data related specifically to the phase 2 residential development of this contaminated site. The first phase of the development could be approved without, for example, identification and analyses of possible harms residential development of the site may cause to humans, and without analysis of alternatives and mitigation measures that could reduce those possible harms.

Planning Commissioners and the Council Members risk:

- a pre-commitment to the next phase of the project – the residential development phase;
- loss of an open mind for later review of data and analysis of the residential development of the site for which the first phase has already been approved, and that may contradict data and analysis related to the earlier site preparation;

Case law has linked "pre-commitment" to a lack of transparency.[22]

The City must broaden the scope of the environmental review and analysis of this superfund project to include the whole project as required by CEQA.

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[22] (Pugsley, Timing is Everything: Ensuring Meaningful CEQA Review by Avoiding Improper "Precommitment" to a Project, California Environmental Law Reporter, Matthew Bender, May 2009, p. 244.)

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April 16, 2018

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Re: Your March 27, 2018, and April 10, 2018, Letters Concerning UP0-440 and CP0-500, Draft Mitigated Negative Declaration

Dear Morro Bay Stakeholders:

Thank you for your above letter. We apologize for not responding within the ten days you requested and causing you to feel the need to send a follow-up letter. Your correspondence raised concerns regarding the Draft Initial Study / Mitigated Negative Declaration ("IS/MND"), for the proposed demolition of tanks and associated structures at 3300 Panorama Dr., Morro Bay pursuant to UP0-440 and CP0-500 (referred to herein as "project").

As a preliminary observation, we extend our appreciation and respect for the active role of the Morro Bay Stakeholders in the City's civic affairs. Participation by citizenry is key to a healthy and vibrant community.

1. After Removal of the Tanks There Are No Definitive Plans for Project Site

Your correspondence asks what are the plans of the applicant for the project site after the demolition project is complete. That question seems to imply there are definite plans that have already been made, prepared and settled upon for the use of the project site once the tanks are removed. The City is unaware of any such plans; and, the applicant has not indicated in any concrete fashion such plans are definitive.

We next address the following statement in your correspondence: "The applicant, Chris Mathys stated at the last Planning Commission Hearing on the application (January 3, 2017) that he and his associates planned to develop the site for residential housing, after the tanks were removed.

Furthermore in earlier documents, he referred to the various phases (Phase 1, Phase 2) of the project, once again alluding to the continued development of the project beyond the removal of the tanks."

City staff reviewed the video recording made of the January 3, 2017, Morro Bay Planning Commission hearing concerning the demolition project. After such review, it is unclear where in the record the applicant stated definitive plans to develop the site for residential housing after the tanks were removed. Review does reveal the applicant referred to the existing zoning designation of the subject site. The applicant also stated residential development purposes *could* be proposed for the project site *after* the project site is completely clean and cleared.

However, such a statement is not evidence the applicant (or any other specific third party) has definitive plans to develop the site for residential housing.

In regards to inquiry of applicant plans after the tanks are removed, as of the date of this letter we are unaware of the City having received any application from either the referenced applicant, or any other applicant, for proposed development at the project site subsequent to the conclusion of the project. If such applications are received in the future, then the City will proceed to conduct appropriate and applicable CEQA review of such an application.

The project site is within the R-1/PD/ESH (Single-Family Residential/Planned Development/Environmentally Sensitive Habitat [ESH]) zoning district and designated by the General Plan and Coastal Land Use Plan as Medium-Density Residential. As the R-1 designation indicates, the district is intended for single-family home development. Within that allowed use there is a wide range of possible developments that include factors such as lot size, building height, home size, and other standards.

No meaningful CEQA analysis can be done when there are no definitive plans for development of the project site. At the present, it simply is unknown what proposed development, if any, and by whom, may or may not be sought for the project site in the future.

In short, with no specific plans to actually develop the project site, there is no ability to prepare a project description, which would then be subject to CEQA analysis. Without that necessary first step, there is no proposed scope or details that can be subject to environmental analysis.

When "future development is unspecified and uncertain, the EIR is not required to include speculation about future environmental consequences of such development." In fact, "environmental analysis may be meaningless and financially wasteful." (*Laurel Heights Improvement Assn. v. Regents of Univ. of California,* (1988) 47 Cal. 3d 376, 395-396.) (Analysis equally applicable to an IS/MND.)

The seminal 1988 California Supreme Court decision in *Laurel Heights Improvement Assn. v. Regents of Univ. of California* established a two prong test for determining whether CEQA mandates environmental analysis of a potential future action. The test is "if:

> (1) it is a reasonably foreseeable consequence of the initial project; ***and***
>
> (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal. 3d 376, 396.) (Emphasis added.)

As concerns the first prong, the potential for residential development of the project site is a consequence of the *existing* zoning. The potential for residential development, however, is not a consequence of simply removing the tanks. While removing the tanks may be required before there is residential development, such development is not a consequence of tank removal.

More importantly, addressing the second prong, any potential subsequent residential development of the project site has no impact on the scope or nature of the current project or its environmental effects. The existing environmental requirements for the project to proceed do not change whether there is future residential development. The same standards apply regardless of whether there is no subsequent development, the applicant sells the property, or someone develops the property (whether the applicant or a third party).

The *Laurel Heights Improvement Assn.* court went on to hold without both of the two factors referenced above being present, potential future action need not be considered at the present time in CEQA analysis.

Because there is no identifiable "piecemealing" of the subject project, there is nothing for the Morro Bay Community Development Department-Planning Division to reconcile in that regard.

The *Laurel Heights Improvement Assn.* holding also pointed out, if potential future action is not considered at the present time, then it will need to be addressed in subsequent CEQA analysis performed on any potential future project. (*Laurel Heights Improvement Assn., supra*, at p. 285.)

As such, it should go without saying of course any potential future applications to develop the project site for single-family homes, or for any other use, will be subject to applicable CEQA analysis (just like any other project).

The concerns expressed by the Morro Bay Stakeholders may be addressed by the fact **any proposed future development of the project site for single-family residential units (or any other use) - being a separate project - will require its own submission to the applicable CEQA process.**

The present matter under review is similar to the situation reviewed in 2001 by an appellate court in *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs.* In that case, an EIR was certified for a proposed airport development. Petitioners then alleged (among other issues) the EIR did not properly address future developments that may occur concerning possible runways and taxiways.

The appellate court held the project description in the EIR could exclude the construction of a new runway, new high speed taxiway, and the extension of a runway. That appellate court *reasoned those:*

> **Projects existed only as concepts in long-range plans that were subject to constant revision. The record is silent with regard to any meaningful planning, decisionmaking, or any other activity by the [lead agency] moving forward with implementation of any such long-range plans. These are simply statements that at some undefined point in the future, the [lead agency] might try to undertake these projects.**" (*Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs*, (2001) 91 Cal. App. 4th 1344, 1361–62.) (Emphasis added.)[1]

Similarly, any future development of the project site is speculative at present and is subject to revision; so, there has been no meaningful planning or decision making on the scope and breadth of any possible development. It remains unclear who will even hold title to the property if and when development is proposed.

2. No "Piecemealing" of CEQA Analysis

The correspondence asks how the City plans to address an alleged "piecemealing" violation of CEQA concerning CP0-500 and UP0-440. CEQA forbids "piecemeal" review of the significant environmental impacts of a project. (*Aptos Council v. Cty. of Santa Cruz* (2017) 10 Cal. App. 5th 266, 277.)

The issue is whether the project (as proposed by CP0-500 and UP0-440 for demolition of tanks and associated structures at 3300 Panorama Dr., Morro) is actually, for purposes of CEQA analysis, part of a larger project that is *also* subject to current CEQA review. The answer is no.

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[1] *See also Nat'l Parks & Conservation Assn. v. Cty. of Riverside* (1996) 42 Cal. App. 4th 1505, 1518, (landfill EIR could omit detailed analysis of processing plants because "it is not known where they will be situated and who will be operating them."); *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 736, disapproved on another ground in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, fn. 6, 38 Cal.Rptr.2d 139, 888 P.2d 1268 (highway EIR could omit detailed analysis of "anticipated," but "still contingent," expansion).

In closing, we would again like to express our appreciation for the civic engagement and activity of the Morro Bay Stakeholders. We believe this response fully addresses the concerns raised by your correspondence. Thank you for your continued interest in your community.

Sincerely,

ALESHIRE & WYNDER, LLP

Chris F. Neumeyer,
Morro Bay Assistant City Attorney

cc: Honorable Mayor and Council Members
Honorable Chair and Planning Commission Members
Scott Collins, City Manager
Scot Graham, Community Development Director
Nancy Hubbard, Planner

01181.0005/464995.8

Application of the California Environmental Quality Act to the proposed demolition of jet fuel infrastructure and residential development at 3300 Panorama Avenue in the City of Morro Bay.

What is the difference between a negative declaration and an environmental impact report (EIR)?

According to the California Resources Agency:[1]

> A Negative Declaration is a document that states, upon completion of an initial study, that there is no substantial evidence that the project may have a significant effect on the environment.
>
> An EIR is an informational document which will inform the public agency decision-makers and the public generally of:
>
> - the significant environmental effects of a project
> - possible ways to minimize significant effects
> - reasonable alternatives to the project

The negative declaration is required to provide a description of the proposed project and make findings related to environmental conditions. It includes a copy of the initial study, which provides enough environmental information to support the findings that there is no substantial evidence that the project may have a significant effect on the environment. A mitigated negative declaration includes *mitigation measures that are added to the project that purportedly avoid or* reduce potentially significant effects to a level of insignificance.

The EIR, on the other hand, is "the heart of CEQA." An EIR is prepared when a *project may cause a significant effect on the environment and serves to inform* the pubic and the agency of the environmental impacts a project *may* cause. *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795.

"The purpose of an environmental impact report is to identify the significant effects of a project on the environment, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided." The mitigation measures and alternatives are the core of the EIR. *Citizens of Goleta Valley v Board of Supervisors* (1990) 52 Cal.3d 553.

The only way to analyze the impacts of this project and to avoid and/or mitigate them is through an EIR.

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[1] http://resources.ca.gov/ceqa/flowchart/lead_agency/EIR-ND.html

Along with other alternatives, an EIR is required to consider the "no project" alternative – the cancellation of the project – and to identify the environmentally superior alternative. CEQA Guidelines Article 9, Contents of Environmental Impact Reports.

How does the agency decide between a negative declaration and an EIR?

According to the California Resources Agency as cited above:

> A Negative Declaration can be prepared only when there is no substantial evidence in light of the whole record before the lead agency that the project may have a significant effect on the environment. CEQA section 21080 and CEQA Guidelines section 15070.
>
> An EIR must be prepared when there is substantial evidence in the record that supports a fair argument that significant effects may occur. CEQA section 21080; Guidelines section 15384 (fair argument); *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68.

CEQA requires a specific sequence of steps.

The first step is a determination of whether CEQA applies to a project. Once a project application is accepted as complete, a preliminary environmental evaluation is required to determine whether a project is subject to CEQA. (Guidelines §15060)

If CEQA does apply, the next step is to determine whether an Environmental Impact Report is required. This determination is made "... either during preliminary review under §15060 or at the conclusion of an initial study..." (Guidelines §15081) In this case, the City of Morro Bay determined that an EIR was not required based on information in the Initial Study.

Under Guidelines §15064 "If there is substantial evidence, in light of the *whole* record before a lead agency, that a project may have a significant effect on the environment, the agency shall prepare a draft EIR." (According to the Public Resources Code, use of the word "shall" means an act is mandatory.)

If, for example, the Initial Study in the 3300 Panorama Project shows that there is substantial evidence that the proposed project *may* have a significant effect on the environmentally sensitive habitat area on the site, an EIR is required under CEQA. In this case, while the City admits that the demolition and removal of pipeline will occur in the ESHA setback area and may impact ESHA on the site, it did not prepare an EIR to analyze those possible impacts in violation of CEQA.

The City also did not consider substantial evidence in light of the whole record of the proposed project. It did not consider the fact that the property is a superfund site and that disturbance of the infrastructure and soil may cause harms to soil,

water, air, and humans. And, it did not consider the whole project including the second phase of residential development and whether the whole project may have an effect on the environment. More on the requirement for an EIR is in the report provided to the City.

The failure to include the whole Project in the environmental review results in serious violations of CEQA, denies the public its right to participate in an informed decisionmaking process, and threatens potential harms to public environmental resources and, in this case, to humans because the property is a superfund site.

What is piecemealing?

Piecemealing is the segmentation of the environmental review of a project for the purpose of evading environmental considerations of the project as a whole.

Is the City of Morro Bay piecemealing the environmental review of planned development of the 3300 Panorama site?

Yes. The demolition and removal of the jet fuel infrastructure is the first step toward residential development of the site and the City is reviewing the demolition in isolation from the residential development in order to evade consideration of the environmental impacts of the project as a whole.

What are the laws that back this up?

CEQA Guidelines (California Code of Regulations) Section 15003(h) states that:

> (h) The lead agency must consider the **whole** of an **action**, not simply its constituent parts, when determining whether it will have a significant environmental effect.

Case law is clear that piecemealing occurs when the project being reviewed is the first step toward future development. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 398)

Here are some examples:

- Annexation of land into a city so it could be rezoned for development. (California Supreme Court in Bozung v. Local Agency Formation Commission (1975) 13 Cal.3d 263, 269-270)
- Rezoning land as the first step to approval of a specific development project. (City of Carmel-by-the-Sea v. Board of Supervisors (1986)183 Cal.App.3d 229, 244)
- Approval of road and sewer construction "to provide a catalyst for further development". "....construction of the roadway and utilities cannot be considered in isolation from the development it presages." (City of Antioch v. City Council (1986) 187 Cal.App.3d 1325, 1337)

In the case of *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, the California Supreme Court set aside an EIR for failing to analyze the impacts of the reasonably foreseeable second phase of a multi- phased project.

How are the decision makers affected by piecemealing the whole project into two separate projects?

Because this project has been piecemealed into phases and the demolition phase is being analyzed separately for environmental impacts and project approval, the Planning Commissioners and the Council Members risk:

- a precommitment to the next phase of the project – the residential development phase;
- loss of an open mind for later review of data and analysis of the residential development of the site for which the first phase has already been approved;

Case law has linked "precommitment" to a lack of transparency. (Pugsley, Timing *is Everything: Ensuring Meaningful CEQA Review by Avoiding Improper* "Precommitment" to a Project, California Environmental Law Reporter, Matthew Bender, May 2009, p. 244.)

How do you determine what amounts to the whole project?

A *proposed project is part of a larger project for CEQA purposes if the proposed* project is a crucial functional element of the larger project such that, without it, the larger project could not proceed. *Communities for a Better Environment v. City of Richmond* (2010)184 Cal.App.4th 70, 99.

Where the expansion of the sewer system was a required or crucial element of a residential development without which the development could not go forward, the EIR had to consider the environmental effects of the sewer expansion. *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 729-731.

Clearing the site by demolition and removal of the jet fuel infrastructure is part of the residential development – the whole project – for purposes of CEQA review of environmental impacts because it is the first step toward the residential development and it is a required element of the residential development that could not go forward without it.

Should the project description in the Initial Study include a description of the foreseeable residential development for which the demolition of the jet fuel infrastructure is the first step?

Yes. The purpose of the Initial Study is to determine whether an environmental

impact report or a negative declaration is required by CEQA. Since a "project under CEQA means "... the whole of an action...." (CEQA Guidelines section 15378) a project description is required to include the whole action. A negative declaration is legally inadequate where it does not address the impacts of anticipated future plans. This is one reason why an EIR is required for this proposed project.

"Where an agency fails to provide an accurate project description ... a negative declaration is inappropriate." (Lighthouse Field Beach Rescue v. City of Santa Cruz (2005) 131 Cal.App.4th 1170, 1202)

"...an EIR must include a analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects."*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376.

The law is clear that a failure to provide information required by CEQA – such as a project description of the whole project – is a violation of CEQA. The purposes of CEQA are subverted if material necessary for informed decisionmaking and informed public participation is omitted. *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892.

The environmental review within the Initial Study of the proposed 3300 Panorama project must include the future residential development because that second phase is a reasonably foreseeable consequence of the clearing of the property by demolition of the jet fuel infrastructure and the foreseeable residential development will change the scope and nature of the demolition and its environmental effects.

Therefore, it does not matter whether the property owners claim that they haven't decided yet whether they will build residences on the site or that they might sell the property to another owner or that the owners have not filed an application to develop the property with residences for which it is zoned. None of these are the test for whether the foreseeable future residential development must be included in the environmental review of the demolition phase of the whole project.

Should the City approve the Negative Declaration where the project description did not include the whole project?

No. The City of Morro Bay may legally decide whether a negative declaration or an EIR is required only after a description of the whole project is included in the initial study. And, as a practical matter, without a description of the whole project – the demolition and the residential development – it is impossible for the Planning Commission, the City Council and the public to decide whether an EIR is required.

COMMENTS ON THE PROPOSED APPROVAL OF CDP #CPO 500 AND CONDITIONAL USE PERMIT #UPO-4400

Demolition of military jet fuel tanks, piping and pump equipment at 3300 Panorama

Prepared by Cynthia Hawley, Attorney

January 3, 2016

The Planning Commission should deny the project application for the following reasons.

The whole project is being unlawfully piecemealed.

This project amounts to pre-construction preparation for residential development of the site. Under CEQA a "Project means the whole of an **action**" that has a potential for causing a direct or indirect change in the physical environment. CEQA forbids piecemealing environmental review of a project. It prohibits segmentation of the environmental review of a whole action for the purpose of evading environmental considerations of the project as a whole. In the case of *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, the California Supreme Court set aside an EIR for failing to analyze the impacts of the reasonably foreseeable second phase of a multi-phased project.

The demolition and removal of structures is not a stand-alone project. Rhine LP and Morro 94, LLC or CVI Group, LLC (see below) are not clearing the property of jet fuel tanks and delivery systems on soil known to be contaminated with toxic jet fuel for the benefit of the community. As a matter of law, the whole project that has the potential for causing direct or indirect changes in the environment includes the reasonably foreseeable next phase of residential development of the site for which the site is now being cleared.

In addition, the City staff's recommendation to unlawfully approve the proposed segment of the whole project is a denial of the public's right to participate in an informed decision making process - to know and deliberate information about the whole project including the potential environmental effects of the whole project and mitigation measures to reduce those effects.

For example, according to the staff report, in 1997 the Regional Water Quality Control Board indicated that no further action was identified, as no further development was proposed at that time and in the mid 1990s the California Department of Toxic Substance Control (DTSC) "... acknowledged that when the site is converted to residential use it should be reassessed for the presence of contaminants and the need for additional remediation (p.11) If the City approves the first phase of the project – preparation of the site for residential development as if clearing the property was not part of the conversion to residential use – the conversion will have occurred without

reassessment of the soil and water for the presence of contaminants and of the need for additional remediation / mitigation. By this piecemealing the City would evade environmental considerations of the project as a whole in violation of CEQA.

The City must, as a matter of law under CEQA step back and require the developers to prepare a permit application that contains information about the whole project including demolition of existing structures, reassessment of the site for the presence of contaminants, determination of potentially needed remediation, and the residential development.

The project requires an environmental impact report (EIR) under CEQA.

According to the California Supreme Court, "...since the preparation of an EIR is the key to environmental protection under CEQA, accomplishment of the high objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project **may** have significant environmental impact."[1]

In this case, the City's own Initial Study Mitigated Negative Declaration shows that the land in question was used for storage and pipeline transport of jet fuel and is currently a US EPA Superfund site. The land is presumed to be contaminated at this time with total petroleum hydrocarbons and a 1996 report identified hydrocarbons and benzene in soil and groundwater samples. As noted above, in 1997, "No further action was identified" because "...no further development was proposed at that time" and it is "... acknowledged that when the site is converted to residential use it should be reassessed for the presence of contaminants and the need for additional remediation" as noted above.

This substantial evidence in the record provides a fair argument that excavation and disturbance of the soil on this site may have a significant effect on the environment including air quality and water quality and an EIR is required. Even if the project could legally be segmented to allow permitting the demolition of above and below ground structures in isolation of the whole project (which it cannot), an EIR would be required based on the evidence in the record.

Current information, data, and analyses related to soil and water contamination and to the effects the disturbance of the soil and potential release of toxic materials may have on groundwater and air directly adjacent to existing residential development must be provided within an environmental impact report.

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[1] *Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75; CEQA Guidelines, California Code of Regulations §15064.

The Mitigated Negative Declaration is inadequate because it does not assess whether the project could exacerbate the contamination that is already present.

According to the California Supreme Court, CEQA requires an agency such as the City of Morro Bay to evaluate existing conditions in order to assess whether a project could exacerbate hazards that are already present.[2] Note that the law requires evaluation of existing conditions. In this case the City wrongly relies on the results of tests from two decades ago and on tests that may be carried out after project approval and outside of the informed public decision-making process required by CEQA. The law also requires an evaluation of the existing soil and water contamination; that is, collection and analyses of samples and assessments of whether disturbance of the site could exacerbate the hazards already posed by the contamination. No such evaluation of existing conditions has been carried out by the City. Accordingly, the City must require preparation of an EIR that includes evaluation and assessment of whether the whole project could exacerbate hazards that are already present.

The Mitigated Negative Declaration unlawfully precludes informed pubic decision-making and engages in deferred mitigation.

Fundamental purposes of CEQA are to provide informed public decision making processes that disclose and analyze potential harms that a project may cause to the environment and provide mitigation measures to reduce potential harms before a project is approved. The process the City describes violates these fundamental purposes.

For example, in the face of the admitted likelihood that the project will "disturb areas of previously documented hydrocarbon contamination" the City proposes to approve the project and then, after the project is approved and outside of the public decision-making process, require the applicant to test soils and "mitigate potential health and environmental hazards related to possible exposure" by way of adhering to the requirements of a permit issued by the Air Pollution Control District. (p.11-12)

In addition, the applicants have not submitted an application to County Environmental Health and there is no approved Aboveground Hazardous Materials Storage Tank and Piping Closure permit. Informed public decision making and development of effective mitigation measures depend on analysis of information contained in this application.

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[2] *California Building Industry Assn. v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, 388.

This post-approval gathering and analysis of information and data and post-approval development of mitigation measures precludes the fundamental requirement of CEQA for informed public decision-making prior to project approval and amounts to deferred mitigation.

The statement that the "project site is partially located in the Coastal Commission's Appeals Jurisdiction" is legally incorrect, misleading and should be corrected.

The City makes multiple statements that the "project site is partially located in the Coastal Commission's Appeals Jurisdiction." This claim is meaningless and serves only to cloud the fact that the demolition of the jet fuel infrastructure is appealable to the Coastal Commission.

According to Coastal Act §30603 "types of development" are appealable. Whether a project is appealable depends on whether that type of development is listed in section 30603. A development that is located within 100 feet of any stream is one type of development listed as appealable to the Coastal Commission in section 30603. The proposed development is within 100 feet of a stream and the City's approval of that development is therefore appealable to the Coastal Commission.

There is nothing "partial" about it and the claim that the "project site is partially located in the Coastal Commission's Appeals jurisdiction" without immediate clarification that the project is appealable to the Coastal Commission simply provides fodder for needless legal dispute. The City should change all of these false and misleading statements to the straightforward statement that "The project is appealable to the Coastal Commission because it is located within 100 feet of a stream."

The proposed development is in violation of the Coastal Act and the City's Local Coastal Program because it is not consistent with the City's policies for protection of environmentally sensitive habitats.

Policy 11.06 requires buffering setbacks of 100 feet from the boundary of the ESHA and prohibits development within this setback. "Development" for the purposes of the coastal act and issuance of a coastal development permit "...includes grading, removing, dredging, mining, or extraction of any materials; ... demolition, or alteration of the size of any structure ..." Extraction of materials and demolition of any structure are prohibited within the 100 foot setback by the City's LCP. Development that may be permitted within the setback is subject to review and comment by the California Department of Fish and Wildlife prior to commencement of the development.

The Initial Study admits that "Proposed actions within 100 feet of mapped ESHA [the setback area] include: removal of pumps and associated piping, pipeline(s), and use of equipment to remove one of the large Navy tanks." Review and comment by the

Department of Fish and Wildlife that might allow the development within the setback of the stream does not seem to exist. Mitigation of harms in this context is not relevant. The project is explicitly not consistent with Policy 11.06, yet the City does not make a finding to disclose this inconsistency. Instead, even though no new structures are proposed in this phase of the development, the City makes the irrelevant finding that "No new permanent structures are proposed within 100 feet of mapped ESHA, consistent with this policy" giving the false impression that the project is consistent with Policy 11.06.

The project is also inconsistent with Policy 11.06 because this policy allows reduction of the setback only under certain conditions related to subdivisions that do not exist here and a "downward adjustment" of a setback must be established in consultation with the Department of Fish and Wildlife. Again, the Initial Study and MND appear to make no claim of such a consultation.

Policy 11.14

The Initial Study's analysis of consistency with Policy 11.14 – which also requires the minimum buffer setback from ESHA – admits that "... actions within 50-100 feet of the creek are limited to the demolition and removal of pumps, piping, and tanks and associated equipment use." The IS does not make a finding that the project is consistent with these requirements of Policy 11.14. It admits the inconsistency. Policy 11.14 also requires assessment of specific factors in relation to protection of biological productivity and water quality of streams including:

(a) Soil type and stability of stream corridors:

(b) How surface water filters into the ground:

(c) Slope of land on either side of the stream; and

(d) Location of the 100 year flood plain boundary.

The City does not claim to have assessed these factors and does not make a finding that the project is consistent with this requirement of Policy 11.14. The finding made is that "...the project appears consistent with the intent of this policy." The project is not consistent with the requirements of Policy 11.14.

The list of supporting documents and reports on the City's web site is incomplete as reports on contamination relied upon by the City are not included.

An informed public decision making process depends on access – by the public and decision makers – to all documents and reports relied upon by the City to prepare the Initial Study Mitigated Declaration, the staff report and the recommended actions. While the City's web site provides links to, for example, multiple biological reports,

multiple reports on birds, an arborist report, historic reports, a traffic impact analysis, a demolition site plan, and an air monitoring plan, reports related to jet fuel contamination of soil and groundwater on the site is conspicuously missing. The City should include digital access to the following on its web site along with all other supporting documents:

- *1996 Risk-Based Closure Report* prepared by Flour Daniel.
- *2016 Contingency Plan for Discovered Hazardous Waste by Bedford Contracting, Inc.*
- Documentation of the County of San Luis Obispo Environmental Health Services approval of the Aboveground Hazardous Materials Storage Tank and Piping Closure permit application.

There is a conflict between what is reported to the Governor's Office of Planning and Research (OPR) State Clearinghouse and the Initial Study.

The Planning Commission staff report at pages 5-6 states that "The MND identifies potentially significant impacts associated with Air Quality, Biological Resources, Cultural Resources, Hazards/Hazardous Materials, Hydrology/Water Quality, Noise, and Transportation/Circulation.

The "Project Issues" reported to the OPR State Clearinghouse are Aesthetic/Visual, Agricultural Land, Air Quality, Archaeologic-Historic, Biological Resources, Coastal Zone, Drainage/Absorption, Flood Plain/Flooding, Forest Land/Fire Hazard, Geologic/Seismic, Minerals, Noise, Population/Housing Balance, Public Services, Recreation/Parks, Schools/Universities, Sewer Capacity, Soil Erosion/Compaction/Grading, Solid Waste, Toxic/Hazardous, Traffic/Circulation, Vegetation, Water Quality, Water Supply, Wetland/Riparian, Growth Inducing, Landuse, Cumulative Effects

Claiming project "issues" related to inducing growth, landuse, cumulative effects, water supply, population/housing balance, etc. gives the Clearinghouse and any observer the impression that this negative declaration encompasses environmental review of a phase of the project – residential development of the site – that is not in fact addressed in this negative declaration. This kind of discrepancy creates unnecessary confusion in an already complex and highly contested area of law and municipal activity. The City should correct the list provided to the State Clearinghouse to match the list in the MND.

There is a contradiction in the documents as to who is the property owner / applicant that must be rectified.

The City's staff report states that the owner / applicant, which is represented by an agent, is Rhine L.P. and CVI Group, LLC. However, the application states that the owner / applicant is Rhine LP and Morro 94, LLC. The correct legal ownership of the property

must be provided for liability purposes. First, Standard Condition 5 requires the "applicant" to indemnify and hold harmless the City in the case of any claim or action as a result of the City's decision related to the project, etc. The correct applicant must be identified in order to enforce this condition. Second, the correct applicant / property owner must be identified for service of process as required by CEQA in the event that litigation under CEQA against the City results from the City's decision.

MND ON "GROWTH INDUCING"

Pages 68 & 69 of MND states "no impact"

13. POPULATION AND HOUSING Would the project:	Potentially Significant Impact	Less Than Significant with Mitigation Incorporated	Less Than Significant Impact	No Impact
a. Displace substantial numbers of people, necessitating the construction of replacement housing elsewhere?				X
b. Displace substantial numbers of existing housing, necessitating the construction of replacement housing elsewhere?				X
c. Induce substantial growth in an area either directly (for example, by proposing new homes and businesses) or indirectly (e.g., through extension of roads or other infrastructure)?				X

Environmental Setting

The City of Morro Bay has a population of 10,234 based on data from the 2010 Census. The population has remained relatively constant over the last decade, down approximately 1.1% from 10,350 in 2000 (California Department of Finance, Table E-4).

The San Luis Obispo County Council of Governments (SLOCOG) allocates housing production goals for the County and incorporated cities based on their fair share of the region's population and employment, which is outlined in the SLOCOG *2008 Regional Housing Needs Plan*. The plan designated a Regional Housing Needs Allocation (RHNA) of 180 of the total 4,885 housing units to the City over the 2007– 2014 planning period (SLOCOG 2008). The City's 2009 Housing Element showed the city's capacity to accommodate all 180 allocated units, and a remaining surplus of lands suitable to develop as many as 400 additional units.

Impact Discussion

1. Implementation of the proposed project would have no effect on existing housing and would not displace any people. No impacts would occur as a result of the proposed project.
2. Refer to a., above. No impacts would occur.

c. The project does not include any infrastructure or other growth-inducing elements. The project is limited to demolition of existing industrial structures. No new construction is proposed as part of this project. No impacts would occur.

Conclusion

Implementation of the proposed project would not result in significant impacts related to population and housing.

➢ **Hazardous Materials:**

The tanks and pipelines were cleared of jet fuel as part of the facility closure. Based on the *Risk-Based Closure Report* (Fluor Daniel GTI 1996) completed prior to the closure of the facility, hydrocarbons and benzene were identified in both soil and groundwater samples. The report notes that the "distribution of hydrocarbons in the impacted groundwater has been monitored since 1991" and "data from the installation and monitoring of the wells indicates a rapid decrease in dissolved hydrocarbon concentrations downgradient from source areas, and relatively stable dissolved hydrocarbon concentrations near source areas" (Fluor Daniel GTI 1996). The report concluded that the impacts to potential groundwater receptors of hydrocarbons in groundwater migrating from the project site are considered negligible. Based on this report, the Department of Toxic Substances Control (DTSC) and the Regional Water Quality Control Board concurred that contamination left at the site does not pose a threat to the public health or the environment, and the site was delisted in June 1997. No further action was identified, as no further development was proposed at that time. The DTSC acknowledged that when the site is converted to residential use it should be reassessed for the presence of contaminants and the need for any additional remediation. A full environmental site assessment will be required with any future site development proposal.

In addition to use permit and coastal development permit approval, the demolition project is subject to permitting from both the Air Pollution Control District (APCD) and San Luis Obispo County Environmental Health. The applicant is required to obtain an APCD Permit to Operate to address proper management of hydrocarbon contaminated soil before the start of any earthwork that may encounter subsurface contamination, in order to mitigate potential health and environmental hazards related to possible exposure. This permit will include conditions to minimize emissions from any excavation, disposal, or related process. The project must also comply with existing regulations regarding the handling and disposal of materials and soils containing, or potentially containing lead and asbestos (both naturally occuring and demolition related).

Prior to issuance of a demolition permit the project must also meet stringent requirements for a Tank System Closure Permit from County Environmental Health. Among other things, the applicant must provide approved certification documents indicating the tanks and pipelines have been properly cleaned and rendered safe. The applicant is also required to do environmental sampling and have an approved Hazardous Waste Management Plan and Site Safety Plan. Plans are subject to approval by both the County Environmental Health Department and the City of Morro Bay Fire Department. Before demolition activities begin, fuel pipelines to and from the property will be sealed and inspected by County Environmental Health and City Fire Department personnel.

NE - DFSP

Cal/EPA

Department of Toxic Substances Control

10151 Croydon Way Suite 3 Sacramento, CA 95827-2106

December 20, 1996

Pete Wilson Governor

James M. Strock Secretary for Environmental Protection

Mr. Jack O'Donovan
Defense Logistics Agency
Defense Fuel Supply Center
DFSC - FQ
8725 John J. Kingman Road, Suite 2941
Fort Belvoir, Virginia 22060-62222

Dear Mr. O'Donovan:

APPROVAL TO RISK-BASED CLOSURE REPORT, DEFENSE FUEL SUPPLY POINT - ESTERO BAY FACILITY, MORRO BAY, CALIFORNIA

The Department of Toxic Substances Control (DTSC) has completed its review of the Risk-Based Closure Report (September 23, 1996) for Defense Fuel Supply Point (DFSP) Estero Bay Facility. The Report presents a summary of the Remedial Investigation activities and proposes a risk-based approach for addressing the releases of jet fuel which have impacted the soil and ground water at the facility.

Based on the risk calculations in the report, the site will not pose a risk to any receptors under the current use scenario. The approach for calculating potential risks to future receptors in the Risk-Based Closure Report was to compare carcinogenic chemicals of potential concern (COPCs) to an excess cancer risk of 10^{-5}. The only COPC that fell in this category for this site was benzene. DTSC compared this value for benzene to the value contained in U.S. Environmental Protection Agency's, Region IX Preliminary Remediation Goals (PRGs). There is a small discrepancy in the value. However, DTSC is aware of the fact that benzene will continue to naturally biodegrade. Non-carcinogenic COPCs were compared to conservative values of hazard indices and do not appear to be a problem.

The site is a Total Petroleum Hydrocarbon (TPH) for which the Regional Water Quality Control Board (RWQCB) has jurisdiction. The attached RWQCB comments indicate there are no threats to future water quality. DTSC concurs with RWQCB in the belief that natural biodegradation will continue to effectively reduce TPH concentration in the soil and groundwater. Therefore, the approach is approved by DTSC.

DTSC understands the site will be transferred to civilian use after closure. If the site were to be converted to typical residential use, DTSC recommends reassessing the potential benzene contamination in the soil. Values should be compared to the PRGs.

If you have any questions regarding this letter, please contact me at (916)255-3741.

Sincerely,

Jose E. Salcedo
Remedial Project Manager
Office of Military Facilities

Enclosure

cc: Mr. Hector Hernandez
California Regional Quality Control Board
Central Coast Region
81 Higuera Street, Suite 200
San Luis Obispo, California 93401-5414

Mr. Redwan Hassan
Fluor Daniel GTI
20000/200 Mariner Avenue
Torrance, California 90503

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E-DFLP

FLUOR DANIEL GTI

RISK-BASED CLOSURE REPORT
DFSP ESTERO BAY FACILITY
CONTRACT #DLA600-93-C-5306
TASK ORDER ACO-0019
MORRO BAY, CALIFORNIA

GSI Project 871196

September 23, 1996

Prepared for:

Defense Fuel Supply Center
DFSC-FPA
8725 John J. Kingman Road, Suite 2941
Fort Belvoir, VA 22060-6222

Groundwater Technology Government Services, Inc.
Submitted by:

Paul T. for Ri S.
Loveriza Sarmeinto, Ph.D.
Senior Toxicologist

Richard Orens
Project Engineer

Patrick Gates
Patrick Gates
Geologist

Groundwater Technology Government Services, Inc.
Approved by:

Redwan Hassan
Redwan Hassan
Project Manager
DFSP Estero Bay

Paul Parmentier
Paul Parmentier
California Registered Geologist
No. 3915

Larry Higinbotham, R.G. Fax
Neil Irish
DFSC Program Manager, R.G.

20000-200 Mariner Avenue / Torrance, CA 90503 USA (310) 371-1394 FAX (310) 371-4782

B2.0 Non-Treatment Remediation Options

No action is the remedial alternative against which the other remedial techniques are measured. The no action alternative serves as the baseline to judge cost and remedial effectiveness. Long term monitoring and risk analysis of existing contaminant levels are also considered as non-treatment remediation alternatives and are included in table C-1. The screening analysis indicates risk analysis should be considered when evaluating remediation alternatives.

B3.0 *Ex Situ* Soil Treatment Options

For all soil excavation treatment options, the excavation would need to extend to approximately 45 feet below grade. The site would probably require dewatering during excavation to remove the soil in and just below the capillary fringe. Critical elements restricting the use of excavation are the cost of excavating to 45 feet over a large area, the cost of the dewatering operation, and the impact to the surrounding community. Once the soil is excavated, it must be treated either on- or off-site. A discussion of those alternatives is included below. The screening matrix for the excavated soil treatment technologies is included in table C-2.

B3.1 On-Site Treatment

B3.1.1 Solidification

Solidification is the process by which hazardous wastes are excavated, homogenized, and blended

TABLE B-4
Estimated Excavation and Treatment Costs

DFSP Estero Bay Facility
Morro Bay, California

Treatment Option Cost	Excavation with Treatment Cells	Excavation with Off-site Treatment	Excavation with Off-site Disposal
Excavation Base Cost	$ 830,000	$ 830,000	$ 830,000
Soil Handling Cost	40,000	30,000	30,000
Treatment Cost	760,000	1,140,000	950,000
Backfill Material Cost	--	--	200,000
Soil Sampling Cost	40,000	10,000	10,000
TOTAL ESTIMATED COST	$ 1,670,000	$ 2,010,000	$ 2,020,000

Note: Excavation base costs include placing and compacting fill.

LEGEND

PROJECT INFORMATION (DATA PULLED FROM GEOTRACKER) - MAP THIS SITE

SITE NAME / ADDRESS	STATUS	STATUS DATE	RELEASE REPORT DATE	AGE OF CASE	CLEANUP OVERSIGHT AGENCIES
Defense Fuel Supply Point (DFSP) Estero Bay Tank Farm (Global ID: T10000009417) 3300 Panorama Drive MORRO BAY, CA 93442	Completed - Case Closed	6/30/1997		23	CENTRAL COAST RWQCB (REGION 3) *(LEAD)* DEPARTMENT OF TOXIC SUBSTANCES CONTROL *(LEAD)*

SITE HISTORY

The US Defense Logistics Agency (DLA) operated, maintained, and owns a 98-mile, 6-in-diameter steel pipeline used to transport JP-5 jet fuel from a Morro Bay tank farm to the Lemoore Naval Air Station. The pipeline was operated from the 1950s thru 1991 and transverses both private and public lands, including the Cardiff Stud Farm property. In March 1992, the pipeline was emptied, cleaned, and filled with pressurized nitrogen gas.

In June 1982, the Cardiff Stud Farm property owners (Sahadi Family) employed Roho Construction and the construction contractor ruptured the DLA jet fuel pipeline. Approximately 50,000 gallons of JP-5 fuel was released, polluting soil and underlying groundwater. Initial cleanup included removal of the ponded JP-5 fuel. In September 1989, the US government filed a negligence complaint against the Sahadis' and Roho Construction to recover cost for pipeline damages and the parties settled out of court. From 1991 through 1994, the DLA investigated the pipeline segment and the 1992 spill area, drilling numerous borings, and installing a groundwater monitoring well network. In October 1994, the DLA proposed a remediation strategy for the Cardiff Stud Farm property and the Water Board agreed DLA should implement the plan. In November 1994, the DLA indicated that it was not responsible for the pollution on the Sahadi Family property and that the Sahadi's should share site remediation responsibility. Each party disputed responsibility, and the Central Coast Water Board issued Cleanup & Abatement Order No. 95-092 on October 20, 1995 to both the Sahadi Family and the DLA.

The parties conducted additional site assessment, performed an aquifer test, performed a bio-vent technology test, and performed routine groundwater monitoring until 1996. In *February and September 1996, the parties submitted a Risk-Based Closure Report to both DTSC and the Central Coast Water Board. The agencies found this approach to be* acceptable and the DLA circulated a Fact Sheet notifying interested parties that the case would be closed. In June 1997, the DLA submitted a well abandonment report and the case was officially closed by DTSC in June 1997 with Water Board concurrence.

CLEANUP ACTION INFO

NO CLEANUP ACTIONS HAVE BEEN REPORTED

RISK INFORMATION VIEW CASE REVIEWS

CONTAMINANTS OF CONCERN	CURRENT LAND USE	BENEFICIAL USE	DISCHARGE SOURCE	DATE REPORTED	STOP METHOD	NEARBY / IMPACTED WELLS
Other Petroleum, Total Petroleum Hydrocarbons (TPH)	Vacant	GW - Agricultural Supply, GW - Industrial Service Water Supply (IND), GW - Municipal and Domestic Supply				0

FREE PRODUCT	OTHER CONSTITUENTS	NAME OF WATER SYSTEM	LAST REGULATORY ACTIVITY	LAST ESI UPLOAD	LAST EDF UPLOAD	EXPECTED CLOSURE DATE	MOST RECENT CLOSURE REQUEST
			2/21/1997				

CDPH WELLS WITHIN 1500 FEET OF THIS SITE

NONE

CALCULATED FIELDS (BASED ON LATITUDE / LONGITUDE)

APN

GW BASIN NAME

WATERSHED NAME

Estero Bay - Point Buchon - Morro (310.21)

COUNTY

San Luis Obispo

PUBLIC WATER SYSTEM(S)

- **MORRO BAY WATER DEPARTMENT** - 955 SHASTA AVENUE, MORRO BAY, CA 93442

MOST RECENT CONCENTRATIONS OF PETROLEUM CONSTITUENTS IN GROUNDWATER VIEW ESI SUBMITTALS

NO GROUNDWATER DATA HAS BEEN SUBMITTED TO GEOTRACKER ESI FOR THIS SITE

MOST RECENT CONCENTRATIONS OF PETROLEUM CONSTITUENTS IN SOIL VIEW ESI SUBMITTALS

NO SOIL DATA HAS BEEN SUBMITTED TO GEOTRACKER ESI FOR THIS SITE

MOST RECENT GEO_WELL DATA VIEW ESI SUBMITTALS

NO GEO_WELL DATA HAS BEEN SUBMITTED TO GEOTRACKER ESI FOR THIS SITE

City of Morro Bay
Community Development Department
955 Shasta
Morro Bay CA. 93442

Nancy Hubbard – Contract Planner
Scott Graham – Community Development Direct
Dana Swanson-City Clerk Michael Lucas

Planning Commissioners:
Richard Sadowski
Gerald Luhr
Jessie Barron
Joseph Ingraffin

Regarding: Comments and Concerns
CASE NO: CPO-500, UPO-440
3300 Panorama Drive

To: The Morro Bay Planning Commissioners and Community Development Staff

We need a neighborhood park, not a high density residential development. The tank demolition is a consequence of the existing zone not the other way around (1). This is one project not two independent projects. The environmental impact report (EIR) must address mitigation measures for tank demolition and residential development. A Mitigated Negative Declaration of Environmental Impact (MND) is not a substitute for an EIR.

The City of Morro Bay is in the process of updating the general plan including the zoning code. This is an opportunity to revisit the zoning of the Navy Jet Fuel Tank property. It is also an opportunity to correct short-sighted planning decision that changed the property zoning from industrial to high density residential development (2).

Tank demolition for the sake of tank demolition does not make economic sense. Approving the tank demolition project could make it difficult to require mitigation measures for residential development or re-zoning of the property. A separate tank demolition project allows the property owner to over-invest in capital improvements that could be rendered obsolete by city actions or regulations. Consequently, the city becomes vulnerable to an expensive claim of uncompensated taking of property.

<u>The Mitigated Negative Declaration and Resolution 15-18 should not be adopted.</u> This property should be evaluated as part of the general plan update and the general plan environmental impact report. The general plan update allows us to explore outright purchase of the existing property or including a neighborhood park as a mitigation measure.

I am not able to attend the June 18, 2018 meeting.

Please enter these comments into the meeting and project record.

I appreciate your time and consideration in this matter.

Sincerely,

Deborah L.K. Barker

Please address correspondence to:
P.O. Box 223
Cayucos, CA 93430
dbarker

Notes:

(1). As concerns the first prong, the potential for residential development of the project site is a consequence of the existing zoning. The potential for residential development, however, is not a consequence of simply removing the tanks. While removing the tanks may be required before there is residential development, such development is not a consequence of tank removal.
I disagree with this conclusion.
EXHIBIT D – page 34
MND 18.PC 9.
RESPONSE TO COMMENTS ON THE
CIRCULATED INITIAL STUDY/MITIGATED
NEGATIVE DECLARATION

(2)The U.S. Navy offered to sell the property to the city for $1.00. The residents in the surrounding neighborhood viewed this offer as an opportunity to develop a much needed park in an area of high density of postage-stamp lots (generally 40ft by 60 ft). The city turned down the Navy's offer and re-zoned the property from industrial to high-density development. This was short-sighted and not in the interests of residents. *Per D. Barker since 1976*

Nancy Hubbard

From: betty winholtz <winholtz@sbcglobal.net>
Sent: Tuesday, June 19, 2018 2:20 AM
To: Gerald Luhr; Joseph Ingraffia; Michael Lucas; Richard Sadowski; Jesse Barron
Cc: Nancy Hubbard
Subject: panorama public hearing

Dear Planning Commissioners,

i want to identify concerns with the staff report for tonight's meeting:

First, none of the pages are numbered. This makes it difficult to reference sections of the report.
Second, the link provided to the 2018 MND is actually a link to the 2016 MND, as listed on the top of each page.
Third, the staff report refers to the second MND as the February 2018 MND, yet the document has the date June 2018 on each page.
Fourth, project phasing is addressed--metal materials removed, soil testing, concrete removal, site condition review, grading/planting-- but omits the final phase: housing development, as first identified in the "Risk-Based Closure Report," 1996, stated at a Planning Commission meeting as filed with the County Health Department, as is its zoning, and as stated in the staff Report's CONCLUSION.
Fifth, any tree over a decade old in Morro Bay can be labeled by an arborist as "diseased or dying." No tree in an ESHA should be cut down. An ESHA is for animal habitat not humans.
Sixth, the serious nature of contamination is downplayed. "The objective of a RBC [risk-based closure] approach is to enable risk managers to determine what chemical concentrations can remain in the environmental media without posing potential adverse effects on an exposed individual [through skin, injection, inhalation]." The standards the RBC used were based on superfund guidelines. Fortunately, "The maximum concentration of TPH [total petroleum hydrocarbons] detected from surface to 10 feet below grade...is also lower than the risk-based action level that is protective of a construction worker." However, the report stopped at a depth of 10 feet for being safe.

Also, please be aware of the difference between the two labels I italicized from the staff report: "The environmentally sensitive habitat area is comprised of the *stream channel* and areas of adjacent riparian vegetation, collectively called the *"stream corridor"* and referred to as ESHA in the Mitigated Negative Declaration." The buffer is adjacent to that. I believe the Planning Commission should decide if this is an urban or non-urban area in order to identify the buffer width. As taken from the Zoning Ordinance, "Streams. The minimum buffer for streams shall be one hundred feet in non-urban areas and fifty feet in urban areas." 17.40.040.4b

Respectfully submitted,
Betty Winholtz

Nancy Hubbard

From: Scot Graham
Sent: Monday, June 18, 2018 8:00 AM
To: Nancy Hubbard
Subject: FW: 3300 Panorama Project Slope Stability

FYI

-----Original Message-----
From: Carole Truesdale [mailto:carole_truesdale@hotmail.com]
Sent: Friday, June 15, 2018 2:24 PM
To: PlanningCommission <PlanningCommission@morrobayca.gov>
Cc: Annie Pivarski <annie@pivarski.com>; donkris@charter.net; Ed Grigg <sabaied@msn.com>
Subject: 3300 Panorama Project Slope Stability

I am out of town and cannot attend the June 19, 2018 when this project comes before you and you will be setting a precedent on various issues surrounding this project.

This is a critical project and slope stability is a concern to me and other residents. I understand that the applicant will have the slopes hydro seeded, which is an excellent solution for erosion control.

Hydroseeding requires irrigation to keep the slopes moist so the seeds germinate to help foster slope stability after the removal of such volume of material.
That the applicant proposes to remove from this site.

I did not see irrigation as part of the applicant's plan; what method has the applicant set in place since he is not onsite 24/7? We are in a drought period and anticipating natural waterfall from rain to provide moisture to these slopes is not predictable.
If the applicant does not ave a monitored irrigation plan, I feel it needs to be added before any continuation/permit is issued.
Thank you,
Carole Truesdale

Sent from my iPad

June 11, 2018

Hello Mr. LaBarre and Ms. Atkins,

The City of Morro Bay has presented the Notice of Public Hearing for Coastal Development Permit CPO-500 and Conditional Use Permit UPO-440 application for the project at 3300 Panorama Street, APN:065-038-001.

A Public Hearing is scheduled on Tuesday, June 19,2018, at 6:00p.m. at the Veteran's Memorial Building, located at 209 Surf Street in the City of Morro Bay. Attached is the Public Notice I received in the mail with information regarding the project description.

At previous Planning Commission meetings many questions were asked about the demolition work plan, ESHA, soil testing, pipe removal, permit process, soil contamination assessment, soil remediation plan, along with many other questions from the Planning Commissioners. Many of these questions can only be answered by your department.

I would like to request that a representative from San Luis Obispo County Environmental Health be present at the June 19th meeting to assist the Planning Commissioners with making their decisions regarding this application.

This project presents concerns for me and my neighbors. We're not against the project; we want this project complete according to City and State guidelines. We want guidelines to protect the health and safety of the neighbors that will be impacted by this three-month demolition project.

Can you attend the June 19th Planning Commission meeting? The neighbors and I would be very grateful as you play an important role in the public safety of this project.

Your time in this important matter has been appreciated as you have worked closely with the City of Morro Bay and Morro Bay residents.

Respectively,

Donald and Kristen Headland
498 Yerba Buena Street
Morro Bay, CA., 93442

June 14, 2018

Dana Swanson, City Clerk

Correspondence Case No: CPO-500, UPO-440, 3300 Panorama Drive

The project at 3300 Panorama is not about tank removal; it is about building dwellings – a lot of dwellings and all the additional additional services that they would require.

Such a project violates a Guiding Principle of the Morro Bay Planning Division which states that "A guiding principle is that all new and remodeled development fit in to the small town scale of the community while preserving and strengthening the unique small coastal town image and character of Morro Bay." We want to see this principle upheld.

Richard and Marcy Dorflinger
340 Tahiti St.