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October 5, 2018

VIA U.S. MAIL & EMAIL
Hon. Kristin Gaspar, Third District Chair
San Diego County Board of Supervisors
County Administration Center
1600 Pacific Hwy., Room 335
San Diego, CA 92101
EMAIL: kristin.gaspar@sdcounty.ca.gov

Re: County of San Diego's Proposed Closure of BLM Lands for Recreational Shooting Near Donohoe Mountain

Dear Chairwoman Gaspar:

We write on behalf of our client the California Rifle & Pistol Association, Incorporated ("CRPA"), as well as the hundreds-of-thousands of their members in California, including numerous members in San Diego County ("County"), to oppose the San Diego County Board of Supervisor's ("Supervisors") proposed actions to close Bureau of Land Management ("BLM") lands around Donohoe Mountain to recreational shooting. The CRPA represents sportsmen and women, Second Amendment supporters, law enforcement, families and others that choose to lawfully own, possess and use firearms for sport and protection.

On June 26, 2018, Supervisor Dianne Jacob placed on the Supervisors' agenda, item No. 17 "Reducing the Fire Threat Near Donohoe Mountain." The title of agenda item No. 17, however, did not adequately depict Supervisor Jacob's intention to permanently close BLM lands to recreational shooting. In fact, the agenda item was so nondescript that only two people appeared for public comment, and those individuals did not bother to speak about the "fire threat" on BLM land.[1]

The real issue regarding the proposed closures is much broader and impacts many recreational users of public lands in San Diego County. Accordingly, the Supervisors should take adequate time to

[1] It should be noted that at the June 26, 2018 Supervisor's meeting, these two individuals supported the proposal stating that they had been working with Supervisor Jacob and their concern were public safety issues regarding recreational shooting near residential areas. The individuals testified that they have experienced wayward projectiles at and around their homes. To date, there has been no evidence submitted into the record to support these unsubstantiated claims (e.g., police report), and CRPA intends to address this issue should any evidence be offered in support their claims.

properly evaluate the proposed ordinance, consider public input in opposition to the Supervisor Jacob's proposal and consider the broader implications from proceeding forward with the proposed closures.

1. The BLM/San Diego County Sherriff MOU Does Not Provide the County Unlimited Authority Over Federal Lands

The Supervisors rely on a Memorandum of Understanding ("MOU") between the San Diego County Sheriff and BLM, which purports to allow the parties to collectively enforce federal, state and local laws on public lands managed by the BLM. (**EXHIBIT A**) The Supervisors contend that the MOU provides the County the "unlimited" authority to enforce state and local laws and ordinances on BLM lands. To the contrary, it does not give the County the "unlimited" authority to pre-empt federal law and regulations that change, modify or amend BLM's management of federal lands without going through the proper federal process and procedures discussed below. And the MOU expressly references limitations as to the scope of the County's authority. Further, it does not require the BLM to enforce any local law or ordinances that conflict with the authorized recreational uses under its Resource Management Plan (RMP).

While there is some precedent for giving states limited latitude in regulating environmental conditions on federal land, states and local governments do not have the right to determine the acceptable uses on federal lands. (*Norton v. SUWA*, 542 U.S. 55 (2004) (ruling that environmentalist could not seek to regulate off-roading on BLM lands, because Congress had not directed that action). Indeed, counties and local municipalities cannot prohibit certain uses on federal lands (see *Elliot v. Oregon International Mining Co.*, (Or. App. 1982) 654 P.2d 663; *Ventura v. Gulf Oil Corp.*, (9th Cir. 1979) 601 F.2d 1080; *Brubaker v. Board of County Commissioners of El Paso County*, (Colo. 1982) 652 P.2d 1050). Nor can a County regulate federal land use in such a way that is inconsistent with federal law. (*City and Cty. of Denver v. Bergland* (D. Colo. 1981) 517 F.Supp.155).

The County cites no legal authority that permits state or local assumption of administration or primacy for determining recreational uses on federal lands. In past administrative hearings, BLM has admitted that the Secretary of the Interior may not adopt the kind of approach contemplated by this MOU, by ceding BLM's own authority to local government. (See *Mining Claims Under the General Mining Laws; Surface Management*, 65 FR 69998-01, 2000 WL 1726390).

If the Supervisors are concerned about the threat of wildfires around the proposed closure areas, San Diego County already has an Ordinance (Section 33.101.5) entitled "No Shooting—Periods of High Fire Hazard." The current ordinance addresses potential fire threats allegedly involving recreational shooting during extreme and high-risk conditions, as declared by the California Department of Forestry. The BLM also has federal authority to *temporarily c*lose lands to certain activities if there are concerns such as fire danger (**EXHIBIT A**), therefore Section 33.101.5 only re-states BLM's existing authority to temporarily act when necessary.

Supervisor Jacob's proposed ordinance, however, would permanently impose restrictions banning all recreational shooting on BLM lands in the Donohoe Flats and Pink Gate areas. A permanent ban on recreational shooting would modify and amend the federal purpose and management of recreational uses permitted on BLM lands, without following the proper federal process and

procedures, thus violating federal law. Consequently, Supervisor Jacob's reliance on the MOU to pass a County ordinance banning recreational shooting on BLM lands is an attempted "end-around" of federal law that will not withstand judicial scrutiny.

2. Federal Purpose and Preemption

The Supremacy Clause of the United States Constitution states that "[t]his Constitution, and the laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Const. art VI, cl 2). State and local agencies are also prohibited from regulating land owned or leased by federal government under the Property Clause, which provides that Congress has the power to "dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." (U.S. Const. art IV section 3) Consequently, federal statutes and regulations—as well as the policies and objectives that they encompass—preempt conflicting state laws. (See e.g., *Hillsborough County v. Automated Med Labs* (1985) 471 U.S. 707, 712) (The Supremacy Clause invalidates local laws that "interfere with or are contrary to federal law.") (quoting *Gibbons v. Ogden*, 9 Wheat., 1, 211, 6 L.Ed. 23 (1924) (Marshall, C.J.)).

The Supreme Court has found preemption where . . . state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. (*English v. General Elec. Co.* (1990) 496 U.S. 72, 78-79 (internal quotations and citations omitted)). This is true whether the state or local law is an ordinance, policy, or other action. (See, e.g., *Toll v. Moreno*, (1982) 458 U.S. 1, 17 (state university's policy violated Supremacy Clause); *Bernhardt v. Los Angeles County*, (9th Cir. 2003) 339 F.3d 920, 926 (suggesting County policy could violate the Supremacy Clause).

The Property Clause provides Congress with plenary power over federal public lands. U.S. Const. art. IV, § 3, cl. 2. Accordingly, when Congress exercises its authority over federal public lands, federal statutes and regulations, orders, and decisions issued pursuant to those statutes and regulations—and the policies and objectives encompassed within those statutes and regulations—preempt any conflicting state or local laws, regulations, policies, or objectives. (See, e.g., *Wyoming v. United States* (10th Cir. 2002) 279 F.3d 1214, 1234) (federal management and regulation of federal wildlife refuges preempts state management and regulation . . . to the extent the two actually conflict").

For the foregoing reason, the federal government need not comply with zoning regulations on land owned or leased by the federal government. As applied here, since recreational shooting is a federal function, limitations by a county would burden or interfere with a lawful federal function.

Employing its power under the Property Clause, Congress enacted the Federal Land and Management Act of 1976 ("FLPMA"), 43 U.S.C. § 1701 et seq., delegating to the BLM the specific task of managing the public lands within its jurisdiction, including the lands upon what are known as Donohue Flats and Pink Gate. Through the powers granted by this enactment, BLM has promulgated regulations and issued RMPs to govern the management and use of these public lands within their jurisdiction, including recreational shooting privileges.

BLM land has stated federal purposes. One of the most significant purposes on BLM land is recreational shooting. The County is attempting to remove this federal purpose under the guise of "fire protection." It is unprecedented for a county to attempt to apply its zoning authority to federal lands. Congress sets the authorized use of federal lands and the BLM implements that authorized purpose. "The states and their subdivisions have no right to apply local regulations impermissibly conflicting with achievement of a congressionally approved use of federal lands. (See *Ventura County v. Gulf Oil Corp*., 601 F.2d 1080 (1979).) The federal government authorized a specific use of federal lands and San Diego County cannot prohibit that use. Indeed, federal preemption prohibits local land use regulations when applied to the federal government. (*U.S. v. Gardner,*107 F.3d 1314 (9th Cir 1997).)

Absent consent or cession, a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause. (*Klepp v. New Mexico*, (1976) 426 U.S. 529, 543) (See also *Wyoming v. United States*, (10th. Cir. 2002) 279 F.3d 1214, 1227).

Even absent the Supremacy Clause and the Property Clause, the federal government would be immune from state and local regulations, because there is an implied constitutional immunity of the federal government from state and local regulation (*Penn Dairies, Inc. v. Milk Control Comm'n* (1943) 318 U.S. 261, 269.). Additionally, the California Constitution prohibits local enforcement that is pre-empted where "A county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations *not in conflict with general laws*."(Cal. Const., art. XI, § 7, italics added.) "Local law in conflict with general law is void. Conflict exists is the ordinance duplicates…, contradicts…, or enters an area fully occupied by general law."

Simply, BLM has the authority to manage federal lands as proscribed by Congress under FLPMA, not the County.

3. Other Federal Statutes and Regulations

<u>FLPMA Process</u>

FLPMA allows the BLM to manage a wide range of multiple use activities on most public lands, FLPMA section 303(d), 43 U.S.C. § 1733(d) allows the Secretary of the Interior to "cooperate" with states and local authorities to assist in the administration and regulation of use and occupancy of the public lands. Cooperation does *not* imply or permit a delegation of Federal authority. At best, it is a recognition by BLM that in certain cases the Federal regulatory role may be exercised more efficiently with state assistance while still satisfying FLPMA's mandate to prevent unnecessary or undue degradation of public lands.

While it is good practice and common sense for federal, state and local authorities to develop a joint response plan for safety concerns, this newly proposed ordinance is very different. Supervisor Jacob's ordinance seeks the complete elimination of recreational shooting on large segments of BLM lands. Recreational shooting on BLM lands is a lawful and permitted activity. Attempting to shut down

lawful activity on federal lands without going through the proper process and procedures is both improper and unlawful.

Under the Federal Urban Land Use Act of 2002, new *local* decisions for management of federal lands should be consistent with local land use practices, however, the implementation of new local regulations *cannot be forced* upon the management of federal lands. This proposed ordinance looks like nothing more than an attempt to circumvent the more arduous, yet robust process of reviewing the current RMP for the area.

Thus, while BLM may enter into agreements with local authorities to help administer or enforce federal regulations on recreational uses, it may not enter into agreements with local authorities that cede the authority to promulgate regulations *that supersede or pre-empt its own federal purposes*. Accordingly, this proposed ordinance is federally pre-empted.

NEPA Process

Congress enacted the National Environmental Policy Act ("NEPA") to empower the federal government to use all practicable means to carry out the policies of protecting and preserving the environment. NEPA was implemented to ensure that environmental protections were considered for federal lands whenever the purpose of those lands is developed or changed.

The Supreme Court has recognized that one of the procedures is an Environmental Impact Statement (EIS) required under 42 U.S.C. 4332 (2)(C) (*Andrus v. Sierra Club*, 442 U.S. 347, 350 (1979).) In order for the BLM lands in San Diego County to have a change of purpose, federal law mandates EIS or an EA, and a process that must be followed under the Administrative Procedures Act ("APA").

While the BLM has the authority to issue temporary closures for safety concerns on lands, if a permanent closure or restriction is required, it must be addressed in a land use plan or plan amendment and requires compliance with NEPA in advance of such action. (**EXHIBIT B**) Further, "closure restriction orders that may affect hunting access, shooting sport activities, or the discharge of firearms must be in compliance with the Federal Land Hunting, Fishing and Shooting Sports Roundtable Memorandum of Understanding ("MOU") … which requires that BLM notify shooting organizations of such closures or restrictions and alert them to public comment opportunities." (See https://www.fs.fed.us/recreation/programs/trails/shooting_mou.pdf)

This proposed ordinance process is nothing but an "end-around" of the federally mandated process and procedures under NEPA and BLM's own management directives. Accordingly, the Supervisors proposed ordinance will be invalid if passed.

APA Process

Permanent closures of federal lands to managed and lawful activity must follow the rules of the APA, which calls for publication of amendments to the land management plan (RMP), notification, public comment periods, and official regulation rulings. The County is attempting to usurp this process

of transparency by moving the local ordinance forward without any concern for the procedural process that allows for proper public and agency input, and federal consideration. Any attempt to impose a local law on federal lands that would change the federal purpose outside of the proscribed process is invalid.

4. Conclusion

Supervisor Jacob's proposed ordinance is not legally valid due to reliance on the MOU, nor is it supported by federal law and regulations. This attempt to work outside of the federal process and procedures for amending federal land use is unlawful and will not withstand judicial scrutiny. On behalf of the CRPA and the thousands of recreational shooters and sportsmen and women in San Diego County we oppose the proposed closures on BLM lands and respectfully request that the Supervisors vote no on the proposed ordinance.

Sincerely,
Michel & Associates, P.C.

Tiffany D. Cheuvront

Cc: Douglas J. Herrema, BLM, Field Office Manager

Encl.

EXHIBIT A

MEMORANDUM OF
UNDERSTANDING BETWEEN THE

BUREAU OF LAND MANAGEMENT
CALIFORNIA STATE OFFICE

AND THE

SAN DIEGO COUNTY SHERIFF'S
DEPARTMENT

I. PURPOSE

This Memorandum of Understanding (MOU) provides for the increased protection of persons and property on the public lands and roads administered by the United States Department of the Interior, Bureau of Land Management (BLM), through cooperation between the San Diego County Sheriff's Department (SHERIFF) and the BLM, collectively the "PARTIES", by the granting and acceptance of authority for BLM law enforcement officers to enforce State and local laws and regulations pursuant to this MOU.

II. AUTHORITY

A. Bureau of Land Management

Section 303(d) of the Federal Land Policy and Management Act of 1976 (43 U.S.C. 1733(d)) provides that, in connection with the administration and regulation of the use and occupancy of the public lands, the Secretary is authorized to cooperate with the regulatory and law enforcement officials of any State or political subdivision thereof in the enforcement of the laws or ordinances of such State or subdivision.

B. San Diego County Sheriff's Department

California Penal Code Section 830.8(b) grants authority to the SHERIFF to give written consent to BLM law enforcement personnel to enforce laws of the State of California and ordinances of San Diego County on property owned or possessed by the United States Government or any street, sidewalk, or property adjacent thereto.

III. DEFINITIONS

A. Public Lands - Means any land and interest in land owned by the United States within the several States and administered by the Secretary of the Interior, through the BLM without regard to how the United States acquired ownership, except:
   1. Lands located on the outer Continental Shelf
   2. Lands held for the benefit of Indians, Aleuts, and Eskimos. 43 U.S.C, 1702 (e)

B. Law Enforcement Officer (LEO) - Law Enforcement Rangers and Special Agents employed by the BLM who have been delegated law enforcement authority by the Director, BLM.

C. State Director - The State Director, BLM, California State Office

D. Special Agent-in-Charge (SAC) - BLM Special Agent-in-Charge for the California State Office

IV. PROCEDURES

A. The SHERIFF has the authority to enforce the state and/or county laws on such public lands administered by the BLM that lie within the confines of San Diego County; and is limited as to the amount of protection, patrol, and investigation that can be provided on those public lands, waters, roads, and trails administered by the BLM within San Diego County.

B. The State Director, Special Agent-in-Charge, and the SHERIFF hereby mutually agree that it is desirable to cooperate and collaborate in better utilizing the resources of both agencies while providing for more adequate protection of persons and property on the public lands as follows:

1. The SHERIFF agrees to continue to enforce the civil and criminal laws of the state and/or county on the public lands waters, roads, and trails administered by the BLM within the normal scope of duty to the extent of current financial and manpower resources without reimbursement by the BLM.

2. The BLM agrees, within the availability of funds and established federal regulations and policies, to enforce the authorized federal laws and regulations pertaining to the public lands administered by the BLM and, state and local laws in connection with their duties in the administration and regulation of the use and occupancy of the public lands as defined herein.

3. The SHERIFF and the BLM mutually agree to provide the maximum cooperation, assistance, and coordination possible, within the availability of funds and established laws, regulations, and policies governing the respective agencies that will assure the protection of persons and property on the public lands, waters, roads, and trails administered by the BLM within the confines of San Diego County.

4. The SHERIFF further agrees that pursuant to section 830.8(b) of the California Penal Code of the State of California, the SHERIFF will designate BLM LEOs as peace officers of the State of California for enforcement of state and local laws and regulations in the County of San Diego. The SHERIFF further understands and agrees that the BLM LEOs so designated are limited by the BLM to exercise said enforcement authority only in connection with their duties in the administration and regulation of the use and occupancy of the public lands as defined herein. Prior to any such designation, the BLM agrees to provide any training required by state or local law or by the SHERIFF, to include courses of training prescribed by the commission on peace officer standards and training within section 832(a) of the California Penal Code.

   It is understood and agreed that the authority granted by the SHERIFF includes authority to execute any state or local warrant that the SHERIFF has the authority to execute and for which the state has the authority to grant. However, it is

understood that BLM limits its LEOs to exercise such authority only in connection with their duties in the administration and regulation of the use and occupancy of the public lands as defined herein, and, when feasible, upon the request of the SHERIFF.

5. The BLM further agrees to take the following mutually agreed upon actions related to violations of California State or San Diego County laws, regulations, or ordinances.

   a. To respond to requests for back-up services to each other in emergency "officer needs assistance" situations, as may be reasonable, prudent, and necessary under the circumstances. It is further understood and agreed that all officers will be instructed that BLM LEOs are limited to responding to those situations not on public lands where they are the closest available officer and are within reasonable proximity, considering all factors, to the situation requiring assistance.

   b. To issue citations, arrest, and/or release persons suspected of violations of California State or San Diego County laws, regulations, or ordinances related to the administration and regulation of the use, occupancy, and development of public lands.

   c. To detain persons suspected of violating California State or San Diego County laws, regulations, or ordinances, any witnesses to those violations, and to protect any related crime scene, pending arrival of the state or local agency having primary jurisdiction.

   d. To arrest, transport, and release to an available California State or San Diego County law enforcement officer any person having a valid state or local warrant for his/her arrest when requested by California State or San Diego County.

V. SCOPE AND CONDITIONS

A. INDEMNIFICATION RELATED TO WORKERS COMPENSATION, EMPLOYMENT AND CLAIMS, AND LIABILITY ISSUES

1. Workers Compensation and Employment

   1.1 Each PARTY shall fully indemnify and hold harmless the other PARTIES and their respective officers, employees, and agents, from any claims, losses, fines, expenses (including attorneys' fees, court costs, and/or arbitration costs), costs, damages or liabilities arising from or related to (1) any workers' compensation claim or demand or other workers' compensation proceeding arising from or related to, or claimed to arise from or relate to, employment which is brought by an employee of the PARTY or any contract labor provider retained by the PARTY, or (2) any claim, demand, suit, or other proceeding arising from or related to, or claimed to arise from or relate to, the status of employment (including without limitation, compensation, demotion, promotion, discipline, termination, hiring, work assignment, transfer, disability, leave or other such matters) which is brought by an employee of the PARTY or any contract labor provider retained by the PARTY.

2. Indemnification Related To Acts or Omissions; Negligence

2.1 Claims Arising From Sole Acts or Omissions of a PARTY

Each PARTY to this Agreement hereby agrees to defend and indemnify the other PARTIES to this Agreement, their agents, officers, and employees, from any claim, action, or proceeding against the other PARTIES, arising solely out of its own acts or omissions in the performance of this Agreement. At each PARTY's sole discretion, each PARTY may participate at its own expense in the defense of any claim, action or proceeding, but such participation shall not relieve any PARTY of any obligation imposed by this Agreement. PARTIES shall notify each other promptly of any claim, action, or proceeding and cooperate fully in the defense.

2.2 Claims Arising From Concurrent Acts or Omissions

PARTIES hereby agree to defend themselves from any claim, action, or proceeding arising solely out of the concurrent acts or omissions of the PARTIES. In such cases, PARTIES agree to retain their own legal counsel, bear their own defense costs, and waive their right to seek reimbursement of such costs, except as provided in paragraph 6.2.4 below.

2.3 Joint Defense

Notwithstanding paragraph 6.2.2 above, in cases where PARTIES agree in writing to a joint defense, PARTIES may appoint joint defense counsel to defend the claim, action, or proceeding arising out of the concurrent acts or omissions of PARTIES. Joint defense counsel shall be selected by mutual agreement of PARTIES. PARTIES agree to share the costs of such joint defense and any agreed settlement in equal amounts, except as provided in paragraph 6.2.4 below. PARTIES further agree that neither PARTY may bind the other PARTIES to a settlement agreement without that PARTY'S written consent.

2.4 Reimbursement and/or Reallocation

Where a trial verdict or arbitration award allocates or determines the comparative fault of the PARTIES, PARTIES may seek reimbursement and/or reallocation of defense costs, settlement payments, judgments, and awards, consistent with such comparative fault.

B. No member of, or delegate to congress, or state official, shall be admitted to any share or part of this MOU, or any benefit that may arise there from.

C. BLM LEOs will remain under the supervision and responsibility of the BLM. BLM employees shall not be considered as coming within the scope of the SHERIFF'S employment and none of the benefits of San Diego County will be conferred under this MOU.

D. During the performance of this MOU, the participants agree to abide by the terms of Executive Order 11246 on nondiscrimination and will not discriminate against any person because of race, color, religion, sex, age, disability, or national origin. The participants will take affirmative action to ensure that applicants are employed without regard to their race, color, religion, sex, age, disability, or national origin.

E. Each PARTY will furnish written information necessary for mutual enforcement operations.

F. Any issues which cannot be reconciled between the local officers and individual BLM LEOs or any issue that affects either PARTY's performance under this MOU shall be referred to the SAC. The SAC will be responsible for coordinating with the appropriate officials to mutually resolve any issue.

G. Nothing in this MOU will be construed as affecting the authorities of either PARTY or as binding beyond their respective authorities.

H. Nothing in this MOU shall obligate the BLM to expend appropriation or to enter into any contract or other obligation. Specific work projects or activities that involve the transfer of funds, service, or property between the PARTIES to this MOU will require the execution of separate agreements or contracts, contingent upon the availability of funds as appropriated by Congress. Each subsequent agreement or arrangement involving the transfer of funds, service, or property shall be made in writing and shall be independently authorized by appropriate statutory authority and regulations, including those applicable to procurement activities.

I. Subject to availability of funds, each PARTY agrees to fund their own expenses associated with the implementation of this MOU. Nothing contained herein shall be construed as obligating the BLM to any expenditure or obligation of funds in excess or in advance of appropriations, in accordance with the Anti-Deficiency Act, 31 U.S.C. § 1341.

J. Any records or documents generated as a result of this MOU shall be part of the official BLM record maintained in accordance with applicable BLM Records Management policies. Any request for release of records associated with the implementation of this MOU to anyone outside the PARTIES must be determined based on applicable laws, including the Freedom of Information Act and the Privacy Act.

K. This MOU shall be effective from the date of execution and shall remain in effect for five years, unless terminated with a 60-day written notice from either PARTY to the other PARTY. This MOU may be modified or amended upon written request of either PARTY and written concurrence of the other PARTY.

VI. APPROVED

4/21/17

Joseph Stout, Acting State Director Date
Bureau of Land Management

4/19/17

Kynan Barrios, Special Agent-in-Charge Date
Bureau of Land Management

4-5-17

William D. Gore, Sheriff Date
San Diego County Sheriff's Department

Approved as to form and legality:
SAN DIEGO COUNTY COUNSEL

3/28/17

Mark Day Date
Senior Deputy

EXHIBIT B

In Reply Refer To:
8320 (250) P

EMS TRANSMISSION
Instruction Memorandum No. 2011-
Expires: 09/30/2012

To: All State and Field Office Officials
Attention: State, District and Field Office Program Leaders, including Recreation, National Landscape Conservation System, Planning, Lands and Realty, Wildlife, and Law Enforcement Officers

From: Director

Subject: Addressing and Managing Recreational Shooting on Public Lands

Program Area: Recreation, National Landscape Conservation System Lands, Planning, Wildlife, and Law Enforcement.

Purpose: This guidance clarifies policy and procedures for addressing and managing recreational shooting on the National System of Public Lands.

Policy/Action: All state and field offices must comply with the policies and procedures contained in this guidance. States may develop supplemental procedures to implement this guidance as necessary.

1. Requirement to Address Shooting Sports in Land Use Plans.

Land use plans or plan amendments should directly address recreational shooting. Plans should consider areas that may be suitable or open to dispersed shooting, as well as considering areas that may be more appropriately closed to shooting or areas where shooting may be restricted when recreational shooting is identified as an issue through internal or public scoping efforts. Addressing shooting issues specifically in land use plans will allow for the consideration of a range of alternatives and will provide opportunities for public involvement.

2. Laws and Policies Governing Recreational Shooting.

BLM Policy
Recreational shooting is one of many activities that the Bureau of Land Management (BLM) may allow on public lands as part of its discretion to manage for multiple uses. In accordance

with the Federal Land Policy and Management Act of 1976 (FLPMA), the BLM typically manages a wide range of multiple use activities on most public lands provided that they that do not impair the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, and archaeological values, and that they do not endanger human health, safety, or property.

BLM Regulations

Unless there is a relevant Federal law or regulation governing the use of firearms in effect, state and local laws and ordinances regulating the use and possession of firearms apply on BLM managed public lands and are typically enforced by local law enforcement officials (43 C.F.R. § 8365.1-7). With the exception that the "[d]ischarge or use [of] firearms, other weapons, or fireworks," is prohibited on developed recreation sites and areas, unless otherwise authorized, 43 C.F.R. § 8365.2-5(a), shooting and possession and use of firearms are allowed on public lands managed by the BLM. However, the specific shooting activity must not:

- Cause a public disturbance or create risk to other persons on public lands. 43 C.F.R. § 8365.1-4(a) (Public health, safety and comfort);
- Deface, remove or destroy natural features, native plants, cultural resources, historic structures or government and/or private property. 43 C.F.R. § 8365.1-5(a)(1);
- Facilitate and create a condition of littering, refuse accumulation and abandoned personal property. 43 C.F.R. Sec. 8365.1-1;
- Violate existing use restriction, a closure and restriction order, or supplementary rules notice. 43 C.F.R. §§ 8365.2-5(a), 8364.1, 8365.1-6.

Shooting Ranges

The BLM's policy prohibits the agency from directly operating shooting ranges, or from issuing new leases of public lands for shooting ranges, principally because of the agency's potential liability related to lead contamination of the environment. New shooting ranges cannot be authorized by any type of lease or other land use authorization that does not transfer fee title to the applicant.

In the expanding urban interface, community-operated shooting ranges are important shooting management tools, providing additional shooting options for the public, reducing social conflicts and safety concerns on adjacent public lands, and ensuring that expended lead ammunition will be periodically removed and recycled in a safe, legal manner. Managed shooting ranges can also provide urban youth with an attractive pathway into lifelong outdoor recreation activities, offering instruction in shooting skills, firearm safety and ethical land use practices and potentially creating a new generation of responsible public land advocates.

When identifying lands suitable for disposal in Land Use Plans, field offices are strongly encouraged to consider the use of some of these lands for community-operated shooting ranges and should facilitate the transfer of fee title ownership of suitable lands to interested local governments or organizations through direct sale when appropriate. Field offices can employ the patent provisions of the Recreation and Public Purposes (R&PP) Act, 43 U.S.C. § 1721, to convey ownership of lands for shooting ranges to non-profit organizations or local governments at less than fair market value (in some cases). Currently about 40 shooting ranges operate on

BLM-administered public lands under the discontinued lease provisions of the R&PP Act. Field offices are encouraged to convert previously leased shooting ranges to patent utilizing the provisions of H-2740-1 (Recreation and Public Purposes Handbook).

3. Management of Recreational Shooting, Identification of Shooting Areas, and Closures

Active management of recreational shooting by identifying areas of low risk or resource conflict that remain open for dispersed shooting activities, and closing areas that are identified as having high risks or conflicts through a temporary or permanent closure are effective ways to reduce risks while preserving recreational opportunities for the public. Decisions regarding recreational shooting require the BLM to balance safety and resource protection issues with its multiple-use mandate.

State or field offices must exercise due care in making the discretionary decision to allow or disallow recreational shooting in identified areas. Due care can be properly exercised by carefully evaluating risk factors and identifying shooting areas in places where risks and conflicts are low and shooting can be effectively and safely managed.

Factors for evaluating, identifying, and managing areas of low risk or resource conflict for dispersed shooting activities, as well as closing areas with high risks or conflicts for dispersed shooting are outlined in Attachment 1.

Closures and Restrictions

Safety or resource damage issues may require temporary or permanent closure or restriction of areas to recreational shooting. If a permanent closure or restriction is required, it must be addressed in a land use plan or plan amendment and requires compliance with the National Environmental Policy Act (NEPA) in advance of such action. For temporary closures or restrictions, field offices must follow the procedures detailed in WO IM-2010-028, "Requirements for Processing and Approving Temporary Public Lands Closure and Restriction Orders," including compliance with NEPA prior to the closure or restriction. Temporary closures or restrictions for shooting activities are permitted when the authorized officer finds such action is necessary to protect persons, property, and public lands and resources (43 CFR § 8364.1). In general, temporary closures cannot exceed 24 months in duration. The agency's NEPA analysis should identify alternative recreational shooting opportunities that are still available on public lands in the vicinity of the closed or restricted area.

Closure or restriction orders that may affect hunting access, shooting sport activities, or the discharge of firearms must be in compliance with the Federal Land Hunting, Fishing and Shooting Sports Roundtable Memorandum of Understanding (MOU). This MOU requires that the BLM notify shooting organizations of such closures or restrictions and alert them to public comment opportunities.

4. Information, Education, and Outreach

- Each BLM state, field office, and special management area recreation website should contain a shooting sports section, which includes maps showing areas open to shooting, and

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October 29, 2018

VIA U.S. MAIL & EMAIL
Hon. Gregory Cox
Supervisor
San Diego County Board of Supervisors
County Administration Office
1600 Pacific Highway
San Diego, CA 92101
EMAIL: greg.cox@sdcounty.ca.gov

Re: Banning Recreational Shooting on Bureau of Land Management Land around Donahoe Flats and Pink Gate

Dear Supervisor Cox:

I write on behalf of our client the California Rifle & Pistol Association ("CRPA") and its thousands of members and supporters, many of whom are located in San Diego County.

On October 9, 2018 the San Diego County Board of Supervisors ("County") passed, on first reading, an ordinance that would permanently ban recreational shooting on Bureau of Land Management ("BLM") lands. Ignoring the fact that a *permanent* closure of federal lands for a recreational purpose, deemed proper for that area, is illegal without going through the proper federal processes. (**EXHIBIT A)**

After the October 9 County meeting, our office requested documentation detailing communication regarding the proposed ordinance, through a Public Records Act request. Strikingly, even though it was stated at the County meeting that BLM was in favor of the proposed ordinance, which would usurp federal authority, there was no official communication from BLM in support of the proposed ordinance.

Documents that were included in the response to our request included an invitation to county employees and the local BLM ranger to attend a meeting with the complaining neighbor, *at his home*, to draw the boundaries of the proposed closure. (**EXHIBIT B**) It is highly unusual, if not unethical, for government officials to hold a private meeting in the home of the primary proponent on the matter in order to develop a closure policy with that proponent, in lieu of holding an open meeting where all could participate. Sadly, this seems to be the *modus operandi* of those involved in passing this

proposed ordinance. Additionally, the responses noted that the South Bay Rod and Gun Club was "OK" with the proposal, however, correspondence to the County and Ms. Clock would seem to indicate something very different. (**EXHIBIT C**)

It is telling that the process to push this ordinance forward has been done mostly behind closed doors, through secret meetings and without real transparency. In fact, the description for this initial item on the County agenda was equally evasive, as it did not adequately describe what was actually being proposed.

There is a clear lack of evidence supporting the ordinance. As was discussed at the October 9 County meeting, fire danger provisions already exist as BLM has the option to temporarily close the areas to the public when there are times of high fire danger. The other complaint regarding the BLM lands, which comes from neighbors who have consistently attempted to shut down the South Bay Rod and Gun Club, allege that "bullets hit their homes" causing them to "hunker down" in their homes. Yet, when these comments were made at the meeting, it was inquired whether there are any law enforcement reports stating damage to dwelling or reporting of bullets hitting a structure, and none could be produced.

Our firm also asked for this law enforcement information from Ms. Clock one week before the October 9 County meeting. Thus, it is apparent that she obviously had no intention of even looking for this evidence to substantiate the claims, because it was not provided to the County when requested at the meeting. So, we ask again, why can't this evidence be provided for consideration by the County? Is it because it does not exist?

We have also learned of reports that the same complaining neighbors prefer to walk their dogs on the BLM lands in this same area that is open to recreational shooting. There is plenty of land in that area for them to walk their dogs, but because it is more convenient for them, they would rather push the lawful activity of recreational shooting from the area for their own benefit. This combined with the fact that these same people have become known to local law enforcement for filing the bulk of the reported complaints, while also attempting to shut down the local gun club next to their residences, speaks to the fact that there is another agenda here beyond the stated "safety" issues now raised. Again, these same neighboring land owners offer no proof of their claims that recreational shooting is a danger to them, or the community.

CRPA continues to stand in opposition of the proposed ordinance. There are many legal issues that are concerning regarding this ordinance. We would like to have the same opportunity as others to reach out to the Board concerning these issues.

We just recently contacted your office offering to come to San Diego for a meeting with you and your staff. We have scheduled a meeting on November 2, 2018, and we hope to speak with you while we are there regarding the BLM lands, and our concerns on the proposed ordinance.

Should you have any questions or comments before our November 2nd meeting at your office, please feel free to contact our office at any time.

Sincerely,
Michel & Associates, P.C.

Tiffany D. Cheuvront

Cc: Hon. Kristin Gaspar, Chair, Kristin.gaspar@sdcounty.ca.gov
Douglas J. Herrema, J.D., BLM, blm_ca_web_PS@blm.gov

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November 3, 2017

VIA U.S. Mail and E-mail
Mr. James Kay
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Van Nuys, California 91409
jameskay@buddycorp.com

Re: Mountainlands v. California Coastal Commission
Case No. BS 149063
October 31, 2017 Hearing on Petition for Writ of Mandate

Mr. Kay:

Our office appeared on October 31, 2017 in Department 85 of the Los Angeles County Superior Court in the above-referenced matter on the continued merits hearing on Mountainlands' Petition for Writ of Mandate. Judge Chalfant denied both the Petition for Writ of Mandate challenging the Coastal Commission's certification of the Santa Monica Mountains' Local Coastal Program and Petitioners' Motion to Augment the Administrative Record. We have enclosed a copy of Judge Chalfant's October 31, 2017 tentative ruling which became his final ruling.

Please be advised that you have **sixty (60) calendar days from October 31, 2017 to file a Notice of Appeal** to appeal Judge Chalfant's ruling denying the Petition for Writ of Mandate. This 60-day period cannot be extended and started running from October 31, 2017. Please be on notice that if you fail to file the Notice of Appeal prior to the end of the 60-day period, the Mountainlands' case will be over.

Please contact us if you have any comments or questions.

Sincerely,
Michel & Associates, P.C.

Eric M. Nakasu

EMN/cc
Enclosure

Mountainlands Conservancy, LLC, et al. v. California Coastal Commission, BS 149063

Tentative decision after continued hearing on petition for writ of mandate: denied

Petitioners Mountainlands Conservancy, LLC, Third District Parklands, LLC and Third District Meadowlands, LLC (collectively, Petitioners") and Respondent California Coastal Commission ("Commission") submit supplemental briefing on the issue of whether there is substantial evidence in the record to support the Santa Monica Mountains Local Coastal Program's ban on vineyards. Petitioners additionally move to augment the administrative record in this matter.

The court has read and considered the supplemental briefs and renders the following tentative decision.

A. Statement of the Case

1. Petition

Petitioners commenced this proceeding on June 9, 2014. The operative pleading is the First Amended Petition ("FAP"), filed December 9, 2014. The FAP alleges in pertinent part as follows.

In 2012 and 2013, the Commission and Los Angeles County ("County") engaged in conversations to draft a proposed LCP. On January 3, 2014, the County gave notice that a draft LCP would be made available to the public in advance of County hearings to be held on February 11 and 18, 2014. The draft LCP categorically prohibited all new agriculture in the coastal zone. At the February 11 and 18, 2014 hearings, the County Board of Supervisors ("Board") voted to submit the draft LCP to the Commission for certification.

On March 27, 2014, the Commission staff issued a report on the submission of the proposed LCP (the "Staff Report"). The Staff Report acknowledged that "[t]he biological resource protection approach proposed in the County's Land Use Plan ("LUP") designates three habitat categories: H1, H2, and H3 Habitat. H1 and H2 habitats are designated by the proposed LUP as Sensitive Environmental Resource Areas ("SERA"), but the LUP does not explicitly define these areas as Environmentally Sensitive Habitat Areas ("ESHA") as defined by the Coastal Act. The LUP considers H3 areas to be developed or legally disturbed areas that are not ESHA. Approximately 87.9% of the 50,000 acres subject to the LUP is designated either H1 or H2. Only about 12.1% of the 50,000 acres is designated H3.

The Staff Report's findings indicated that "there are very limited areas where agriculture is possible" and those areas "are limited to the one or two areas in active agricultural production." The Staff Report recommended that the Commission deny certification of the LUP as submitted by the County but approve the LUP subject to sixty suggested modifications. One of the changes recommended in the Staff Report reiterated the LUP's prohibition of new agricultural uses, but clarified that existing non-livestock agricultural uses would be allowed to continue but not expand.

On April 7, 2014, Petitioners submitted a letter to the Commission explaining why they believed the proposed LUP was not consistent with Chapter 3 of the Coastal Act. The letter presented evidence that large portions of the area governed by the proposed LUP were suitable for agriculture.

On April 9, 2014 — the day before the scheduled hearing on the LUP — the Commission's staff issued an addendum to its Staff Report ("Addendum"). The Addendum recommended new modifications to the previously categorical ban on new agriculture. The Addendum retained a categorical ban on new vineyards, but recommend that some new agricultural uses be permitted subject to a series of onerous conditions. The Addendum recommended that new agriculture would be allowed only if organic or biodynamic farming practices were followed. New agriculture would be allowed only in extremely restricted areas, including natural slopes of 3:1 or less in H3 habitat areas and slopes of 3:1 or less in the building site area allowed by Policy CO-51 and Fuel Modification Zones A and B.

On April 10, 2014 Petitioners submitted a letter to the Commission and appeared at the Commission hearing on the same date to state their opposition to the LUP. Petitioners indicated that various parties had raised substantial issues with respect to the proposed LUP's conformity to Chapter 3 of the Coastal Act and that certification of the LUP without an additional hearing before the full Commission would be premature and a violation of the Coastal Act. The Commission then approved and certified the proposed LUP subject to the modifications suggested in the Staff Report, the modifications suggested in the Addendum, and a few additional modifications developed at the hearing.

On June 26, 2014, the Commission Staff issued a report on the proposed Local Implementation Program ("LIP") for the LCP. This report recommended that the Commission reject the LIP as presented by the County and certify it with some mostly minor modifications.

On July 7, 2014, counsel for Petitioners submitted a letter to the Commission objecting to the proposed LIP. This letter contended that the proposed LIP was inadequate to carry out the provisions relating to agriculture because the proposed LIP provided no definition of "biodynamic farming" and was imprecise as to provisions such as its ban on the use of "synthetic" pesticides. The Commission subsequently approved the LIP subject to the recommended modifications.

On August 26, 2014, the County issued a resolution adopting the both the LUP and LIP portions of the LCP as modified by the Commission and directing the transmittal of the LCP to the Commission for final certification. On October 10, 2014, the Commission issued its final certification of the LCP.

Petitioners allege that the Commission's decision to certify the LCP was an abuse of discretion because it failed to proceed in the manner required by law. Even with the modifications suggested by the April 9, 2014 Addendum to the Staff Report, there were substantial issues raised as to the proposed LUP's conformity with the policies of Chapter 3 of the Coastal Act. As a result, the Commission was required to conduct a further hearing on those issues and failed to do so.

The Commission further failed to proceed in a manner required by law when it considered the Addendum, which was made available to the public less than 24 hours prior to the April 10, 2014 hearing. Petitioners allege that this action by the Commission deprived the public of a meaningful opportunity to address the new findings and policies in the Addendum.

Petitioners further allege that the Commission's decision to certify the LUP also was invalid because the findings are not supported by the evidence. The Staff Report's findings indicate that "there are very limited areas where agriculture is possible" and that those areas "are limited to the one or two areas in active agricultural production." Petitioners and others submitted evidence that large areas other than areas in current agricultural production are suitable for agriculture. Moreover, the Commission was not presented with sufficient evidence on which to

allow only organic or biodynamic farming and prohibit conventional forms of agriculture. The Commission also was not been presented with sufficient evidence to justify a categorical prohibition of vineyards as opposed to other types of agriculture.

2. Course of Proceedings

The hearing on the FAP was held on September 5, 2017. At the hearing, the court found as follows. The Addendum satisfied the procedural requirements of 14 CCR section 13533 and was not subject to the seven day notice requirement of 14 CCR section 13532. The Commission was not required under the Coastal Act to hold a separate hearing on any substantial issues alleged by Petitioners. The Commission did not fail to proceed in the manner required by law by certifying the LCP with a ban on pesticides. Substantial evidence supported the Commission's findings that a large percentage of the plan area was not suitable for agricultural use and not subject to section 30242's restriction on the conversion of lands suitable for agricultural use. Finally, the Commission did not err in approving the LUP prior to the development of the detailed definitions of organic and biodynamic farming in the LIP.

The court continued the hearing to the instant date for further briefing on the question of whether the LCP's total ban on vineyards is supported by substantial evidence.

B. Standard of Review

Code of Civil Procedure ("CCP") section 1094.5 is the administrative mandamus provision which structures the procedure for judicial review of adjudicatory decisions rendered by administrative agencies. Topanga Ass'n for a Scenic Community v. County of Los Angeles, ("Topanga") (1974) 11 Cal.3d 506, 514-15.

CCP section 1094.5 does not in its face specify which cases are subject to independent review, leaving that issue to the courts. Fukuda v. City of Angels, (1999)20 Cal.4th 805, 811. In cases reviewing decisions which affect a vested, fundamental right the trial court exercises independent judgment on the evidence. Bixby v. Pierno, (1971) 4 Cal.3d 130, 143. See CCP §1094.5(c). In other cases, the substantial evidence test applies. Mann v. Department of Motor Vehicles, (1999) 76 Cal.App.4th 312, 320; Clerici v. Department of Motor Vehicles, (1990) 224 Cal.App.3d 1016, 1023. Decisions of the Coastal Commission are governed by the substantial evidence standard. Ross v. California Coastal Comm., ("Ross") (2011) 199 Cal.App.4th 900, 921.

"Substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, ("California Youth Authority") (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The petitioner has the burden of demonstrating that the agency's findings are not supported by substantial evidence in light of the whole record. Young v. Gannon, (2002) 97 Cal.App.4th 209, 225. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585.

The agency's decision must be based on the evidence presented at the hearing. Board of Medical Quality Assurance v. Superior Court, (1977) 73 Cal.App.3d 860, 862. The Commission is only required to issue findings that give enough explanation so that parties may determine whether, and upon what basis, to review the decision. Topanga, *supra*, 11 Cal.3d at 514-15.

Implicit in CCP section 1094.5 is a requirement that the agency set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. Topanga, 11 Cal.3d at 515.

The court may reverse the Commission's fact decision only if, based on the evidence before it, a reasonable person could not have reached the Commission's conclusion. Ross, *supra*, 199 Cal.App.4th at 922; Bolsa Chica Land Trust v. Superior Court, ("Bolsa Chica") (1999) 71 Cal.App.4th 493, 503. The court may not disregard or overturn an administrative finding of fact simply because it considers that a contrary finding would have been equally or more reasonable. Boreta Enterprises, Inc. v. Department of Alcoholic Bev. Control, (1970) 2 Cal.3d 85, 94. Any reasonable doubts must be resolved in favor of the Commission. Paoli v. California Coastal Comm., (1986) 178 Cal.App.3d 544, 550; City of San Diego v. California Coastal Comm., (1981) 119 CalApp.3d 228, 232.

The court independently reviews questions of law, including statutory interpretation. McAllister v. California Coastal Commission, ("McAllister") (3008) 169 CalApp.4th 912, 921-22. Given its Commission's special familiarity with the regulatory and legal issues, the Commission's interpretation of the statutes and regulations under which it operates is entitled to deference. Ross v. California Coastal Comm., *supra*, 199 Cal.App.4th at 938; Hines v. California Coastal Comm., (2010) 186 Cal.App.4th 830, 849.

An agency is presumed to have regularly performed its official duties (Evid. Code §664), and the petitioner therefore has the burden of proof. Steele v. Los Angeles County Civil Service Commission, (1958) 166 Cal.App.2d 129, 137. "[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion. Afford v. Pierno, (1972) 27 Cal.App.3d 682, 691.

C. Coastal Act

1. Purpose

The Coastal Act of 1976 (Pub. Res. Code[1] §30000 *et seq.*,) (the "Coastal Act" or the "Act") is the legislative continuation of the coastal protection efforts commenced when the People passed Proposition 20, the 1972 initiative that created the Coastal Commission. *See* Ibarra v. California Coastal Comm., ("Ibarra") (1986) 182 Cal.App.3d 687, 693. One of the primary purposes of the Coastal Act is the avoidance of deleterious consequences of development on coastal resources. Pacific Legal Foundation v. California Coastal Comm., (1982) 33 Cal.3d 158, 163. The Supreme Court described the Coastal Act as a comprehensive scheme to govern land use planning for the entire coastal zone of California. Yost v. Thomas, (1984) 36 Cal.3d 561, 565. The Act must be liberally construed to accomplish its purposes and objectives. §30009.

The Coastal Act's goals are binding on both the Commission and local government and include: (1) maximizing, expanding and maintaining public access (§§ 30210-14); (2) expanding and protecting public recreation opportunities (§§ 30220-24); 3) protecting and enhancing marine resources including biotic life (§§ 30230-37); and (4) protecting and enhancing land resources (§§ 30240-44). The supremacy of these statewide policies over local, parochial concerns is a primary purpose of the Coastal Act, and the Commission is therefore given the ultimate authority under the Act and its interpretation. Pratt Construction Co. v. California Coastal Comm., (2008) 162

[1] All further statutory references are to the Public Resources Code unless otherwise stated.

Cal.App.4th 1068, 1075-76.

2. Chapter 3 Policies

The Coastal Act includes a number of coastal protection policies, commonly referred to as "Chapter 3 policies," which are the standards by which the permissibility of proposed development is determined. §30200(a). The Coastal Act must be liberally construed to accomplish its purposes (§30009), and any conflict between the Chapter 3 policies should be resolved in a manner which on balance is the most protective of significant coastal resources. §30007.5.

The Coastal Act provides for heightened protection of ESHAs, defined as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." §30107.5. ESHAs "shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas. §30240(a). Development in areas adjacent to EHSAs shall be sited and designed to prevent impacts which would significant degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas. Id. Thus, the Coastal Act places strict limits on the uses which may occur in an ESHA and carefully controls the manner in which uses around the ESHA are developed. Bolsa Chica, *supra,* 71 Cal.App.4th at 506-08. *See also* Feduniak v. California Coastal Commission, (2007) 148 Cal.App.4th 1346, 1376.

Other pertinent Chapter 3 policies include the protection of marine life (§30230), the biological productivity and quality of coastal waters, streams, lands, and estuaries (§30231), and the scenic and visual qualities of coastal areas. §30251. Where conflicts occur between one or more Chapter 3 policies of the Coastal Act, the conflict shall be resolved in a manner which on balance is the most protective of significant coastal resources. §30007.5.

3. The LCP

Because local areas within the coastal zone may have unique issues not amenable to centralized administration, the Coastal Act "encourage[s] state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development" in the coastal zone. §30001.5; Ibarra, *supra*, 182 Cal.App.3d at 694-96. To that end, the Act requires that "each local government lying, in whole or in part, within the coastal zone" prepare a LCP. §30500(a). The Coastal Act defines a LCP as:

> "a local government's (a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coast resource areas, other implementing actions, which, when taken together, meet the requirements of, and implement the provisions and policies of this division [the Coastal Act] at the local level." §30108.6.

Similar to a local government's general plan, the LCP provides a comprehensive plan for development within the coastal zone with a focus on preserving and enhancing the overall quality of the coastal zone environment as well as expanding and enhancing public access. Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal.3d 553, 571. A local government must prepare its LCP in consultation with the Commission and with full public participation. §§

30500(a), (c), 30503; McAllister, *supra,* 169 Cal.App.4th at 930, 953. The LCP consists of a LUP[2] and the implementing actions of zoning ordinances, district maps, and other implementing actions (LIP). Yost v. Thomas, *supra*, 36 Cal.3d at 571-72. These may be prepared together or sequentially, and may be prepared separately for separate geographical areas or "segments" of a local coastal zone. §30511.

When a local government completes its draft LCP, it is submitted to the Commission for certification. §30510. The Coastal Commission reviews the LUP for consistency with the Chapter 3 Coastal Act policies, §§ 30512(c), 30512.2. The Commission determines whether to certify the proposed LUP as submitted, or whether it raises "substantial issues" that necessitate further hearing. §30512(a). For any aspects of the LUP that are not certified as submitted, the Commission may certify them conditioned upon the incorporation of suggested modifications. §30512(b). Where amendments are made to an already-certified LUP, the Commission proceeds in nearly the same manner except that the Commission shall make no determination whether a proposed LUP amendment raises a substantial issue of conformance with Chapter 3 policies. §30514(b).

The Coastal Commission reviews the LIP, and any amendments to a certified-LIP, for conformity with the LUP. §30513. It may reject an LIP only if it does not conform with or is inadequate to carry out the LUP. §§ 30513, 30514.

Once the Commission has certified the LCP, the Commission delegates its permit-issuing authority to the local government. §30519.

D. Motion to Augment

Petitioners move to augment the record in this action with the Malibu Coast's application and supporting documents for designation as an American Viticulture Area, submitted in July 2013 to the U.S. Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau ("TTB").[3]

CCP section 1094.5(e) provides: "[w]here the court finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case."

Petitioners argue that, at all times relevant to the issues in dispute here, the Administrative Record shows that the Commission was on notice that an application had been made to the TTB to have the Santa Monica Mountain coastal area designated as an American Viticulture Area ("AVA"). Mot. at 7. On April 8, 2014, the Commission received two emails referring to the

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[2]The LUP is defined in section 30108.5 as: "[T]he relevant portions of a local government's general plan, or local coastal element which are sufficiently detailed to indicate the kinds, location, and intensity of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions."

[3] Petitioner asks the court to judicially notice all of its exhibits in support of the motion. The mere fact that a document was downloaded from a government cite does not authenticate it and the request is denied. *See* Evid. Code §452(c).

TTB's publication of a proposed rule designating the Santa Monica Mountain Coastal area as an AVA. AR 9017, 9022. At the April 10, 2014 hearing, a member of the Coastal Coalition of Family Farmers mentioned that the AVA application has been approved and the TTB is designating the Santa Monica Mountains coastal area as a fine wine growing region. AR 12998-99. Petitioners admit that many of the documents they seek to add to the Administrative Record existed at the time of the Commission's April 10, 2014 hearing, they contend that they could not have identified and submitted these documents in the short, 24 hour period between the issuance of the Addendum proposing to ban only vineyards and the April 10 hearing. Mot. at 9. Moreover, the TTB's approval of the Santa Monica Mountain coastal area as a designated AVA actually occurred after the April 10, 2014 hearing, as did an August 25, 2014 letter from Koutnik to the County contending that there is no credible scientific study that vineyards cause greater environmental harm than any other agriculture crop. Mot. at 10-11.

Petitioners' attempt to augment the record is improper. The Commission is correct that Petitioners' motion to augment is unauthorized. Opp. at 8. The court's September 5 order continued the hearing solely for supplemental briefing on the issue of whether there is substantial evidence in the Administrative Record to support the vineyard ban. Petitioners did not ask, and the court did not authorize, a motion to augment the record. Therefore, the motion is outside the scope of permissible briefing.

Petitioners' belated attempt to augment the record also is untimely. A motion to augment should normally be calendared for hearing concurrently with the hearing on the writ. Mejia v. City of Los Angeles, ("Mejia") (2005) 130 Cal.App.4th 322, 336, n. 5. The Petition was filed on June 9, 2014. The Commission sent a draft index of the Administrative Record to Petitioners, who determined "that all documents pertaining to [the] case" had been included and therefore Petitioners had no objection to it. Opp. at 2, Ex. B. Petitioners filed their opening brief on July 15, 2016, and the hearing occurred on September 5, 2017. Petitioners raised the vineyard ban in their briefs, and yet failed to file a motion to augment the record to add the AVA application documents for the September 5, hearing.

In reply, Petitioners assert that the motion to augment was timely filed and calendared prior to the continued hearing, and that there was no delay. Reply at 7-8. Petitioners argue that Mejia, *supra*, 130 Cal.App.4th at 336, n. 5, merely states that motions to augment should normally be calendared for hearing concurrent with the writ, but does not hold that a motion filed after the writ hearing is untimely. Reply at 8. While this is true, that does not mean that a petitioner may file a motion to augment after the hearing without good reason. Petitioners provide no excuse for their failure to bring this motion at the original writ hearing. The issue of the vineyard ban was briefed and argued at that hearing, and the evidence Petitioners now seek to introduce would have been relevant at that hearing. Petitioners' attempt to augment the record now is untimely. Petitioners also fail to address the fact that the motion is beyond the scope of permissible supplemental briefing.

Even if *arguendo* the court were to consider the motion, Petitioners have not shown that they could not, in the exercise of reasonable diligence, have presented the AVA application and supporting documents for the Commission's April 10, 2014 hearing. As the Commission correctly points out, Petitioners were on notice at least as of January 6, 2014 that vineyards and grape growing were expressly restricted in the draft LUP. AR 68. The County's February 19, 2014 submission to the Commission further stated that the proposed regulations would cause the

"elimination of new vineyards". AR 808, 817. Written comments referencing the AVA application were submitted to the Commission at least two days before the hearing. AR 9017, 9022. Had Petitioners exercised reasonable diligence, they could have obtained the AVA application in the time between February 2014 and April 2014.

Petitioners' contend that they had only 24 hours in which to develop their strategy of opposing the vineyard ban because they initially chose to fight the general agriculture ban and not focus on vineyard uses. Mot. at 8; Reply at 5. This is not sufficient to meet the standard under CCP section 1094.5(e). Petitioners knew about the AVA application prior to the hearing. They knew that the County was expressly targeting vineyards in the draft LUP. Had Petitioners exercised reasonable diligence, they could have submitted the AVA application at the hearing.[4]

The motion to augment is denied.

E. Statement of Facts[5]

The Draft LUP dated January 6, 2014 states that "new crop, orchard, vineyard, or other agricultural use is prohibited." AR 68. LU-11 in this same document states that the LUP will "prohibit new agricultural uses, and limit existing commercial or "hobby" agricultural uses such as vineyards, orchards, and field or row crops in order to preserve natural topography and locally-indigenous vegetation, and to prevent the loading of soil and chemicals into drainage courses." AR 124.

1. Scientific Studies

a. Biota Study

The Biota Study included as part of the County's submission to the Commission on February 19, 2014 was conducted in order to determine and delineate environmentally sensitive habitat areas ("ESHA"). AR 582-83. The Biota Study states that there are no scientific studies conducted in Mediterranean ecosystems to determine the range and magnitude of effects that vineyards may have on local ecology. AR 616. Resource agencies in other states have recommended placing a buffer radius around the habitat of certain sensitive species in which pesticides are not used, which could impact vineyard development. AR 617.

The Biota Study states that the increased use of pesticides, herbicides, and fungicides for certain development, especially viticulture, has "inevitably led to various forms of degradation of natural communities in adjacent areas." AR 645-46. The Biota Study warns against the increased use of pesticides, especially for viticulture, which is becoming an important land use in the Santa Monica Mountains. AR 646.

b. UCLA Study

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[4] The TTB's approval of the Santa Monica Mountains coastal area as a designated AVA occurred, and the August 25, 2014 Koutnik letter was written, after the April 10, 2014 hearing. The court might have augmented the Administrative Record with the TTB approval, but not the Koutnik letter, had the motion been timely presented.

[5] The court instructed the parties to attach all relevant pages regarding the vineyard ban from the Administrative Record to their supplemental briefs. The following statement of facts addresses only the vineyard ban that is the subject of the supplemental briefing.

A June 2012 study from the UCLA Institute of the Environment & Sustainability, titled "Potential Extent of Vineyard Development in the Santa Monica Mountain National Recreation Area" ("UCLA Study") states that additional vineyard development has the potential to severely disturb natural areas. AR 8940. 62.5% of the land in the Santa Monica Mountains is "favorable" for vineyard development. AR 8940. In the unincorporated section of the Santa Monica Mountains, the land suitable for vineyard development increases to 68%. AR 8959. There are 38 existing vineyards in the Santa Monica Mountains, and 6 of them have land whose slopes exceed 33%. AR 8960-62.

As an increasing number of private landowners in the Santa Monica Mountains plan area explore hobby vineyards, the consequences for habitat disturbance and improved land use policy should be understood. AR 8941. Vineyards displace native vegetation, which is a direct cause of habitat loss and is disruptive to ecosystem health. AR 8942. Other studies have also shown that vineyards have adverse effects on ecosystems due to displacement and fragmentation of natural vegetation, effects on local hydrology, water pollution, soil erosion, and air pollution. AR 8942 (citations omitted). Unprotected areas in the Santa Monica Mountains are at risk of being disturbed by new vineyards, and 74.5% of the native vegetation is at risk. AR 8940.

c. Koutnik Report

The Koutnik report, submitted by Petitioners, states that none of the soil types for the Malibu-Newton vineyard area match the soil mapping units listed by DOC. AR 7266. Vineyards can be successfully grown in Solstice Canyon, which has Cotharin clay loam and 30 to 75 percent slopes. AR 7267. They can also be grown in Malibu Canyon, which has a Chumash-Boades-Malibu association, and 30 to 75 percent slopes. AR 7267. Thus, the Commission report dismissing agricultural uses based on soil type and soils too steeply sloping does not correspond to current successful agricultural operations in the area. AR 7267.

d. Hogrefe Report

The report by Scott J. Hogrefe ("Hogrefe"), submitted by Petitioners, states that the Mediterranean climate of the Santa Monica Mountains region is ideally suited to agriculture, and that the soil conditions and topographic conditions allow sustainable agricultural use. AR 8730.

2. The County's Submissions

The County's submission to the Commission proposes the ban on vineyards, stating that there will be no new vineyards in the Coastal Zone following approval of the LCP. AR 808. The elimination of new vineyards and new crop areas would reduce the demand on the scarce water supply in the Santa Monica Mountains. AR 817. It would also improve water quality and visual resources. AR 808. The County acknowledged that many residents of the Santa Monica Mountains have planted grape vines on their property in the fuel modification area. AR 818. The vines from these vineyards have escaped into natural areas where they interfere with native plants, and are consumed by native animals, which then spread the vines even further. AR 818. Wine grapes have been observed growing wild in Encinal Creek, some distance from the nearest vineyard. AR 818.

In an April 8, 2014 email, the County further stated that the spread of invasive plants in the Santa Monica Mountains is a serious problem that threatens the biological diversity of the unique

biome. AR 8707. Grapevines have been found in areas outside of established vineyards, and pose a serious threat to the riparian vegetation found along the region's streams. Id. The fact that grapevines are already spreading outside established vineyards, when such vineyards have existed for less than 20 years, is an indicator that the plat will become invasive. Id. Where grapevines grow, native vegetation does not. Id. Establishing new vineyards would require a number of activities that unavoidably adversely impact the Coastal Zone resources, such as water quality, riparian area, water availability, and scenic views. AR 9407.

3. Comments on the LUP

a. Heal the Bay Letter

A letter from Heal the Bay stated that Heal the Bay's science monitoring program has collected data to assess the health of the Malibu Creek Watershed, since 1998. AR 1934. A March 2013 report found that local pollution sources include runoff from vineyards and equestrian facilities, and expressed concern regarding the recent increase in viticulture. AR 1935-36. Heal the Bay stated that it was particularly concerned that vineyards are associated with excess water use, sedimentation, polluted runoff, and habitat loss and damage. AR 1936. The letter also cited amphibian studies conducted since the early 1990s by professors at Pepperdine University, which showed that in-stream habitat has declined in Newton Creek, which is downstream from several vineyards. Id. The amphibian studies attributed the increase in sediment in one of the study pools to an upstream vineyard. AR 1936-37. Finally, three sites downstream from vineyards showed high levels of phosphate and nitrate, as compared to reference sites located downstream from open land. AR 1938. ~ 8 ~

The Heal the Bay letter acknowledged that 62.5% of the land in the Santa Monica Mountains is suitable for vineyard development. AR 1939. Much of the potential for vineyard development is on private land, and such development would be in direct contradiction to the goals of the Santa Monica Mountains Natural Recreation Area, which includes the preservation and protection of the natural resources and assets of the park. AR 1939.

b. Other Public Comments

County Supervisor Zev Yaroslavsky submitted a letter in support of the LUP, stating that it would protect coastal resources by prohibiting new vineyards. AR 2082, 2414. Yaroslavsky stated that vineyards lead to soil erosion, stream and beach pollution, the spread of invasive species, the removal of natural habitat, and the introduction of highly visible changes to the landforms and natural landscape of the Santa Monica Mountains. Id.

Representatives from Heal the Bay met with Commissioner Jana Zimmer and stated that they were particularly concerned about the adverse effects of vineyards. AR 1918. Yaroslavsky met with Commissioners and stated that the vineyard ban was responsive to demonstrated damage to resources caused by existing vineyards, especially on steep slopes. AR 1919. These include water quality and air quality impacts from pesticides, erosion, visual impacts, and over use of well water. AR 1919.

California State Senator Fran Pavley wrote a letter in support of the vineyard ban on April 1, 2014, stating that the increase in agricultural uses, including vineyards, was of concern due to the use of pesticides, terracing and grading, runoff of polluted soil, and consumption of water. AR 1924-25.

A letter dated February 10, 2014 by the Resource Conservation District of the Santa Monica Mountains supports the vineyard ban. AR 869. On April 8, 2014, the Surfrider Foundation submitted comments stating that expanded viticulture would be destructive to the environment and habitat in the Santa Monica Mountains. AR 1928. Other members of the public submitted comments complaining about the adverse effects of vineyards, such as visually harmful effects (AR 1962, 9010), concern for wildlife habitat (AR 1969) and concerns over the impacts on native chaparral and sage scrub (AR 1977).

4. Staff Reports

The Commission Staff Report on March 27, 2014 stated that there are approximately 50 acres of vineyards planted within the Coastal Zone. AR 1536. The only areas in the Santa Monica Mountains that are currently in agricultural use are the vineyard areas. AR 1619. There are two large commercial vineyards, and several small hobby vineyards of less than two acres. AR 1619. The steep slopes, poor soils, limited water availability, and other constraints make the cultivation of vineyards infeasible or extremely difficult and costly. AR 1620.

The Staff Report found that vineyards have significant adverse impacts on the biological integrity of the surrounding mountain environment and receiving bodies of water. AR 1620. Clearing land in order to plant crops requires native vegetation removal, soil disturbance, irrigation, and chemical and fertilizer application. AR 1622-23. The areas between grapes are bare, and since grapes replace the evergreen cover of native chaparral vegetation, even more bare ground is exposed in the winter. AR 1623. The prohibition against any new crops will avoid potential adverse impacts, such as increase soil exposure, chemical/fertilizer and irrigation requirements, erosion, sedimentation, pollution, and loss of habitat. AR 1623.

In the April 9, 2014 Addendum, staff explained that vineyards require both the removal of all vegetation and scarification of the soils. AR 1910. This results in increased erosion and sedimentation. AR 1910. Vineyards typically require the application of pesticides that can adversely impact coast streams and riparian habitat. AR 1910. Vineyards also require large amounts of water, which draws down ground water and impacts streams and seeps. AR 1910. Further, grapevines can be an invasive type of vegetation in riparian areas. AR 1910-11. Finally, the trellises necessary to support the vines adversely impact scenic views. AR 1911.

5. Hearing Testimony

Supervisor Yaroslavsky spoke at the hearing, and stated that the Santa Monica Mountains are not the right place for new vineyards. AR 12983. Vineyards visually change the landscape in a way that is incompatible with the Santa Monica Mountains Recreation area. AR 12983. There are other issues with vineyards, such as pesticide use and water issues. AR 12983. Vineyards use excessive water, which prevents neighboring farms from having sufficient water. AR 12983.

Representatives of Heal the Bay testified that open space in the Santa Monica Mountains has been increasingly replaced with monoculture vineyards. AR 12993. There is no permanent ground water basin in the Santa Monica Mountains, which means that viticulture uses compete with residential wells for water. AR 12993. Vineyards also scar the hillside, exposing sediment which erodes into the streams. AR 12993.

Don Schmitz ("Schmitz") appeared at the hearing on behalf of the Coalition of Family Farmers, and testified that an application had been made to have the Santa Monica Mountains

certified as an American Viticultural Area. AR 12998-99. Grapevines hold the slopes better than any other type of agriculture and prevent erosion. AR 12999. Schmitz also stated that grapevines go down to an average of 21 feet, and can be as deep as 40 feet. AR 12999. 85% of California soil is moisture rich enough to need no irrigation. AR 12999.

Coastal Commission Staff Ecologist Dr. Jonna Engel ("Engel") testified about the adverse impacts specific to vineyards, which include habitat loss, habitat fragmentation, and a reduction in biodiversity. AR 13052. Dr. Engel stated that "peer reviewed research has demonstrated that the insect community associated with vineyards tends to support more non-native species..." AR 13052. Moreover, the biology of grapevines introduces significant negative changes to the soil chemistry from the perspective of Mediterranean plant communities. AR 13052.

While vineyards do not require much fertilization, they do require pesticides and fungicides which are introduced into the surrounding creeks and streams, and watersheds. AR 13052. Although vineyards do increase soil fertility, this is not a positive, as the Santa Monica Mountains plant communities are ill adapted to nutrient rich soils. AR 13052. Finally, while grape vines may have deep roots, native species have a variety of root depth that provides natural soil stability. AR 13052. Overall, vineyards have long-lasting impacts on habitat quality. AR 13053.

F. Analysis

Petitioners argue that the LCP's vineyard ban is not based on concerns about erosion, steep slopes, sediment, or runoff in grape farming, but rather is a land grab so that the County can create public parkland using private property. Pet. Supp. Br. at 10. The Commission's decision to distinguish vineyards from other agricultural crops in revised Policy CO-102/LU-11 is not based on scientific evidence or studies in the Administrative Record. Pet. Supp. Br. at 2. There are no studies on farming in the coastal zone, the feasibility of vineyards, the impact of agriculture on soil erosion, or any discussion of how these concerns can be mitigated. Pet. Supp. Br. at 3. In fact, the evidence demonstrates that vineyards are viable in the Santa Monica Mountains. Pet. Supp. Br. at 7-8.

The Commission asserts that it banned new vineyards in the LCP because vineyards have unique, harmful impacts on coastal resources. Although vineyards are clearly feasible in the Santa Monica Mountains, as indicated by the presence of several hobby vineyards and two commercial vineyards, the presence of a vineyard is uniquely harmful due to the clearing and scarification of the land, the biological makeup of the grapevines, sedimentation caused by increased soil erosion, and other impacts. Resp. Supp. Br. at 3.

In support of this argument, the Commission cites to the Biota Study, the Heal the Bay letter, and the UCLA Study. Resp. Supp. Br. at 3-4. The Biota Study includes increased viticulture use on a list of items having "inevitably led to various forms of degradation of natural communities in adjacent areas." AR 645-46. The Biota Study also warns against the increased use of pesticides, especially for viticulture. AR 646. The Heal the Bay letter cites to a study it performed, but which is not attached. AR 1934. The letter only summarizes some of the findings from that study, which showed that vineyards contribute to local pollution, sedimentation, and habitat loss. AR 1935-36.

The UCLA Study, however, directly supports the Commission's concerns about permitting new vineyards in the Santa Monica Mountains. The UCLA Study states that new vineyard development has the potential to severely disturb natural areas. AR 8940. Vineyards displace native vegetation, which is a direct cause of habitat loss and is disruptive to ecosystem health. AR

8942. Other studies have also shown that vineyards have adverse effects on ecosystems due to displacement of natural vegetation and fragmentation of habitat, effects on local hydrology, water pollution, soil erosion, and air pollution. AR 8942 (citations omitted). Unprotected areas in the Santa Monica Mountains are at risk of being disturbed by new vineyards, and 74.5% of the native vegetation is at risk. AR 8940.

Testimony at the hearing supports the Commission's decision to ban vineyards. Coastal Commission Staff Ecologist Dr. Engel testified about the harmful effects of vineyards in the Santa Monica Mountains. AR 13052-53. Vineyards create imbalanced insect populations, impacting native vegetation. AR 13052. The biology of grapevines significantly changes the nutrient balance in the soil, also negatively impacting native vegetation. Id. The pesticides used on vineyards negatively impact habitat quality. AR 13053. Representatives from Heal the Bay testified that there is no permanent ground water basin in the Santa Monica Mountains, which means that viticulture uses compete with residential wells for water. AR 12993. Vineyards also scar the hillside, exposing sediment which erodes into the streams. AR 12993.

The Commission also cites to several letters, statements, and analysis performed by the Commission staff. These documents are not particularly persuasive, as they primarily consist of conclusions by groups in favor of the vineyard ban without any discussion of the evidence underlying those conclusions. County Supervisor Yaroslavsky, for example, submitted a letter in support of the LUP, stating that vineyards lead to soil erosion, stream and beach pollution, the spread of invasive species, the removal of natural habitat, and the introduction of highly visible changes to the landforms and natural landscape of the Santa Monica Mountains. AR 2082, 2414. However, he does not address how he came to those conclusions. Similarly, California State Senator Pavley wrote an on April 1, 2014 letter in support of the vineyard ban, stating without any citation or support that the increase in agricultural uses, including vineyards, was of concern due to the use of pesticides, terracing and grading, runoff of polluted soil, and consumption of water. AR 1924-25. As with the Heal the Bay letter, such conclusory statements are not sufficient on their own to constitute substantial evidence.

Petitioners' supplemental brief does not address in detail the potential harms caused by new vineyards -- soil erosion, stream sedimentation, habitat loss, displacement of natural vegetation, water pollution from pesticides, the spread of non-native species, and the visual impact to landforms. Instead, Petitioners dispute the draft LUP's initial ban in the Santa Monica Mountains of all agriculture, including vineyards, as infeasible. Petitioners contend that vineyards can be successfully grown in the Santa Monica Mountains. Petitioner's expert, Koutnik, expressly stated that vineyards are successfully grown on the clay loam soil and steep slopes of the area. AR 7267. Petitioners cite to the UCLA Study, which they characterize as unbiased, which states that 62.5% of the land in the Santa Monica Mountains is suitable for vineyards. AR 8940. Even Heal the Bay, which is prejudiced against vineyards, concludes that 62.5% of the land is suitable for vineyard development. AR 1938. Pet. Supp. Br. at 7.

For protection under section 30250, land must be both suitable for an agricultural use and feasible for that use. The steep topography, poor soils, abundant ESHA, sensitive watersheds, scenic considerations, and lot size limitations render the majority of the Santa Monica Mountains plan area unusable for agriculture. However, the UCLA Study indicates that 62.5% of the plan area is suitable for vineyard development, making such development an exception to the plan area's general unsuitability for agriculture.

But suitability does not make vineyard development feasible. "Feasibility" requires an evaluation of environmental, social, and economic factors. It is not enough to show that vineyards are suitable, Petitioners must also show that the record lacks substantial evidence to support Commission's claim that vineyards are harmful to the plan area. The record contains evidence that new vineyard development would negatively impact the Santa Monica Mountains plan area. In this regard, Petitioners completely ignore the UCLA Study's statement that vineyards have the potential to severely disturb up to 74.5% of native vegetation in the Santa Monica Mountains. AR 8940.

Petitioners address the water supply and soil erosion issues associated with vineyard development by pointing to statements in the record (author unstated) that dry farming a limited irrigation practices can encourage roots to grow deeper to search for groundwater, grapevines use 70% less water than citrus and avocado trees (AR 9150), and "cover cropping" (term not explained) reduces top soil erosion. AR 9151.

Petitioners' representative, Schmitz, also testified that grapevines hold the slopes better than any other type of agriculture and prevent erosion. AR 12999. Schmitz stated that grapevines go down to an average of 21 feet, and therefore hold the slopes better than any other type of agriculture and prevent erosion. AR 12999. He also argued that 85% of California soil is moisture rich enough to need no irrigation for grapevines. AR 12999.

Schmitz's testimony was countered by Engel's testimony. AR 13052. She stated that vineyards do not provide as much soil stability as native vegetation, and that, even if irrigation is not always necessary, vineyards still require pesticides, which pollute the air and water. AR 13052.

Petitioners also argue that the application for, and proposed designation of, the Santa Monica Mountains as an AVA constitutes substantial evidence that vineyards are feasible in the Santa Monica Mountains. Pet. Supp. Br. at 9-10. However, an AVA designation is merely a descriptive classification that an area has features such as climate, geology, or soil that make it distinctive for viticulture. 27 CFR §4.25(e)(2). The designation makes no findings about the environmental harms caused by vineyards or the appropriateness of their use. The AVA application and proposed designation does not support Petitioners' claim that viticulture is feasible because it does not counter Commission's evidence that viticulture is harmful to the ecosystem and coastal resources of the Santa Monica Mountains.

There is substantial evidence that vineyards are harmful to the Santa Monica Mountains ecology because they require clearing and scarification, increase erosion and sedimentation, require pesticide use, and constitute an invasive monoculture. Of these harms, many are inherent to the nature of viticulture, and there is no evidence that they could be mitigated. Vineyards increase erosion because the hillsides are planted with grapes where the hillsides are bare during winter months and lack the root stratification of native vegetation. AR 13052. They create air pollution from dust. Grapevines are an invasive monoculture species that impact all of the surrounding vegetation and harm riparian habitat. AR 818, 8707. They create water runoff and sedimentation of streams. The only impacts that could be mitigated is the use of pesticides, which is already banned under the LCP, and water usage. Under these circumstances, substantial evidence supports the Commission's decision to ban new vineyards.

The Commission has provided scientific studies and the testimony of experts from the hearing to support its conclusion that vineyards pose a threat to coastal resources and should be prohibited as part of the LCP. Petitioners provide evidence demonstrating that vineyards are

suitable in the plan area, but fail to counter the evidence of environmental harm. Substantial evidence supports the LCP's ban on new vineyard uses within the plan area, and there is no evidence that would compel the Commission to impose mitigation as a lesser alternative.

G. Conclusion

The FAP is denied. Respondent Commission's counsel is ordered to prepare a proposed judgment, serve it on Petitioners' counsel for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for November 28, 2017 at 1:30 p.m.

November 9, 2018

VIA U.S. MAIL & EMAIL
Hon. Kristin Gaspar, Third District Chair
San Diego County Board of Supervisors
County Administration Center
1600 Pacific Hwy., Room 335
San Diego, CA 92101
EMAIL:Teresa.Zurita@sdcounty.ca.gov
Kristin.gaspar@sdcounty.ca.gov

Re: Opposition - County of San Diego's Proposed Closure of BLM Lands for Recreational Shooting Near Donohoe Mountain

Dear Hon. Chairwoman Gaspar:

On behalf of the California Rifle & Pistol Association, Incorporated ("CRPA") and our hundreds of thousands of members and supporters statewide, we write to express our continuing opposition regarding the San Diego County Board of Supervisors ("Board") proposed ordinance to permanently ban recreational shooting in the Pink Gate and Donohoe Flats areas. CRPA has over 140 years of experience operating in California to protect lands used for hunting and shooting and protecting Californians' Second Amendment right to use firearms.

Since the last Board meeting on October 9, 2018, our attorneys have attempted to follow up on significant and important information that was discussed at the Board meeting including: police reports regarding incidents in the areas in question, final reports on the Pink Gate fire, and the clear lack of comment or engagement by the Bureau of Land Management ("BLM"). As of this date, we have yet to receive a response to these issue, or other public records requests. Consequently, we have conducted our own research as follows.

Police Reports and Damage to Dwellings

At the October 9th Board meeting, proponents for the proposed ordinance spoke about bullets flying around their residence, requiring them to "hunker down" inside their homes for fear of being hit by a stray bullet. While a general briefing was provided to the Board regarding the number of complaints to law enforcement concerning shooting in the area, no evidence regarding specific instances of a bullet hitting a dwelling, or police reports of bullets impacting any property was presented. CRPA attorneys inquired about this information and evidence prior to the October 9th meeting in hopes that it would at least be provided to the Board, but nothing was produced.

In follow up to our previous requests for evidence, CRPA attorneys submitted a Public Records Act request for any complaints or reports filed with law enforcement on this issue. None have been produced to date. If someone's residence was impacted by bullets, as stated by proponents to the proposed ordinance, certainly they would file a police report or take pictures of the damage to their property. It is understandable that someone may have some concern about hearing gun fire in the proximity of their residence, however, the shooting in the area pre-dated their moving into the area and their claims of bullets impacting their home have not been substantiated.

The residence along the BLM lands knew that this BLM land allowed recreational shooting and hunting when they moved there. Without proof of their claims, this appears to be nothing but an attempt to shut down a lawful activity on federal lands, simply because they do not like shooting occurring in the proximity of their home. Indeed, the home they chose to purchase with full knowledge of the activity they now seek to ban.

Pink Gate Fire

At the last meeting it was reported by Supervisor Jacob that the 2017 Pink Gate Fire was started by target shooters. This is perhaps a misleading statement, as it does not actually claim, nor verify that the fire was literally started by a projectile from a target shooter shooting at a target. After the October Board meeting, CRPA attorneys requested the final report regarding the cause of this fire. Again, we have received no such report detailing the official cause of the fire.

This is problematic because the fire could have been started by many activities, including horseback riders, campers, off road vehicles, or hikers. The fact that there were target shooters in the area does not address the actual *cause* of the fire. To state that the fire was caused by the act of target shooting, where there is no final determination or element of proof, is irresponsible. It has been over a year since the fire and yet no official report regarding the cause of the fire has been produced.

Lack of BLM Engagement

At the October 9th Board meeting, the involvement of BLM and its position on the proposed ordinance was seriously questioned by Supervisor Cox. If BLM supports the proposed action by the Board, as Supervisor Jacob stated, why was BLM not present at the meeting and why was nothing officially submitted to support the proposed ordinance?

The reality is that the local BLM field agent has been involved with County employees and the complaining neighbors to map out the proposed boundaries of the closures, thus participating in skirting the proper federal processes. In our previous opposition letter to the Board, we noted that there are specific federal regulations that must be followed when there is a significant change to a federal purpose (i.e., recreational uses) on federal lands.

That process requires notification and public comment through the Administrative Procedure Act ("APA"), and perhaps an evaluation of the proposed change under National Environmental Policy Act ("NEPA"). The process protects federal lands and recreational uses, while the Boards proposed ordinance would circumvent that process and prohibit lawful activity on federal lands. If the Board moves forward with this proposed ordinance, a federal challenge may be likely, especially considering recent California cases adjudicated in favor of the supremacy of the federal government.

Conclusion

CRPA's members are very concerned about the lack of evidence to support the proposed actions to permanently close public shooting areas. They note that the comments from those in opposition to the proposed ordinance are significantly more than those who support these actions. To date, BLM has not supported the proposed ordinance, as was stated at the last Board meeting. Indeed, BLM does not have the authority to permanently change the authorized use on federal lands without going through the proper processes.

CRPA and their members continue to oppose the proposed ordinance tolimit lawful activity in these areas and we ask the Board to vote "no" on this unnecessary and illegal proposed action.

Sincerely,

Tiffany D. Cheuvront
Assistant Corporate Counsel