TOPICAL RESPONSE NO. 2: BANKRUPTCY-RELATED COMMENTS

The following provides a comprehensive response to those comments received on the Draft EIS/EIR that generally question the financial viability of the project applicant, The Newhall Land and Farming Company (Newhall) and/or its ability to carry out the proposed Project and all required mitigation measures.

Legal Overview and Response Summary

As a threshold legal matter, under the National Environmental Policy Act (NEPA), financial information concerning a project applicant is not relevant to the adequacy of an environmental impact statement (EIS) or a federal agency's compliance with NEPA. Final approval of a project under NEPA is conditioned on both the development and implementation of mitigation measures as required by federal law and regulations. "NEPA does not require that an EIS include an economic study of the Project and its ability to generate the revenues necessary to comply with the required mitigation plan." (*County of San Diego v. Babbitt*, 847 F.Supp. 768, 773 (S.D. Cal. 1994).)

In addition, the California Environmental Quality Act (CEQA) does not require that economic data be included in an EIR. (State CEQA Guidelines, § 15131.) "[A]n EIR is an *environmental* impact report. As such, it is an informational document, not one that must include ultimate determinations of economic feasibility." (San Franciscans Upholding the Downtown Plan v. City and County of San Francisco (2002) 102 Cal.App.4th 656, 689, emphasis in original.) Nor is the financial status of a project applicant relevant evidence of a project's feasibility. (See Uphold Our Heritage v. County of Woodside (2007) 147 Cal.App.4th 587, 599-600 ["CEQA should not be interpreted to allow discrimination between project applicants for an identical project based upon the financial status of the applicant."].)

Nonetheless, the U.S. Army Corps of Engineers (Corps) and California Department of Fish and Game (CDFG) respond to such comments below. In summary, as discussed below, the applicant has emerged from bankruptcy as a reorganized entity with the resources and financial flexibility to move forward with implementation of the proposed Project (RMDP/SCP). The primary regulatory planning documents and associated EIS/EIR include financial security or bonding requirements to guarantee implementation of the adopted mitigation measures. Further, if the project is approved, CDFG would adopt a mitigation monitoring or reporting program, pursuant to Public Resources Code, section 21081.6, to ensure that the mitigation measures and project revisions it has adopted to mitigate or avoid significant impacts of the project are implemented, consistent with CDFG's regulatory jurisdiction under the California Endangered Species Act (CESA) and California Fish & Game Code, section 1600 et seq.

Bankruptcy Filing and Status

On June 8, 2008, LandSource Communities Development, LLC, owner of the applicant (Newhall), filed a voluntary petition for chapter 11 bankruptcy protection in the U.S. Bankruptcy Court for the District of Delaware in Wilmington. As a LandSource subsidiary, Newhall was included in the bankruptcy filing. The bankruptcy filing was brought about because LandSource was unable to reach agreement with its lenders on a plan to modify and restructure its debt, all of which occurred in

conjunction with a dramatic, precipitous decline in real estate values in California and throughout the nation.

As background, chapter 11 is the business reorganization chapter of the Bankruptcy Code. It promotes equal treatment for similarly situated holders of claims and equity interests, subject to the distribution priorities prescribed by the Bankruptcy Code. Commencement of a chapter 11 case creates an estate that comprises all of the legal and equitable interests of the debtor as of the commencement of the case. The Bankruptcy Code provides that a debtor may continue to operate its business and remain in possession of its property as a debtor in possession (DIP). Consummating a plan of reorganization is the principal objective of a chapter 11 case. A bankruptcy court's confirmation of a reorganization plan binds the debtor, any entity acquiring property under the plan, any holder of a claim or equity interest in a debtor, and all other entities as may be ordered by the bankruptcy court, to the terms and conditions of the confirmed reorganization plan.

Prior to soliciting acceptances of a proposed chapter 11 reorganization plan, the Bankruptcy Code requires a plan proponent to prepare a disclosure statement (Disclosure Statement). The statement is to contain information, in sufficient detail, to enable a hypothetical reasonable investor to make an informed judgment about acceptance of the chapter 11 reorganization plan. After a hearing, the bankruptcy court may approve, deny, or modify the disclosure statement as containing adequate information pursuant to the Bankruptcy Code. If approved, the proponent of the reorganization plan seeks bankruptcy court confirmation of the plan.

In early June 2009, Barclays Bank PLC, for itself and other banks and financial institutions, proposed amended joint chapter 11 plans for reorganization of LandSource and each of its affiliated debtors (Plan). Barclays also provided required disclosure statements, describing the Plan and providing creditors with the opportunity to review and vote on the proposed Plan. On July 20, 2009, after hearings, the Bankruptcy Court entered findings, conclusions, and an order confirming the Plan (Confirmation Order). This Confirmation Order confirmed the Plan as having satisfied the requirements of chapter 11 of the Bankruptcy Code, and authorized the debtors to implement the Plan effective July 31, 2009.

According to the approved Disclosure Statement, the Plan provides for the reorganization of LandSource and each of the debtor entities, with ownership of the reorganized debtors and their respective assets vesting in the applicable reorganized debtor, "free and clear of all claims, liens, charges, encumbrances, and interests of claims and interest holders," except as set forth in the Plan. As a result of the reorganization, LandSource has emerged from chapter 11 bankruptcy as "Newhall Land Development LLC."

Based on the approved Disclosure Statement and Plan, the new company (Newhall Land Development LLC) has working capital of more than \$90 million in cash and no debt on its beginning balance sheet, and it will have additional resources and financial flexibility necessary to focus on planning and developing the Newhall Ranch Specific Plan and the remainder of the existing Valencia community. Based on the bankruptcy-related documents, Newhall is backed by ownership consisting of a group of investment funds, along with Lennar Corp. (Lennar), and will be managed by Emile Haddad, the CEO of Five Point Communities Management, Inc. (Five Point), a newly formed management company jointly owned by Mr. Haddad and Lennar. Mr. Haddad resigned as Lennar's Chief Investment Officer to assume his new duties at Five Point. Five Point will augment Newhall

Land's existing management team, which has several years of combined real estate and land development experience. In summary, LandSource and Newhall are no longer in bankruptcy due to the successful reorganization.

The approved Disclosure Statement, the Plan, and the Bankruptcy Court's Confirmation Order provide additional technical information concerning the bankruptcy and the reorganization efforts. These documents are incorporated by reference and available for public review and inspection at the County of Los Angeles Public Library, Valencia Branch, 23743 West Valencia Blvd., Santa Clarita, California 91355-2191.

1998 Natural Resource Management Plan

Some comments have referenced the Natural River Management Plan (NRMP), approved by federal and state agencies in November 1998. The Natural River Management Plan is separate from the current proposed Project (RMDP/SCP); it is governed by its own federal and state permits and conditions, and, it is still ongoing. In summary, the 1998 Natural River Management Plan, which covers approximately 1,200 acres upstream of the Newhall Ranch Specific Plan/RMDP area, includes the main stem of the Santa Clara River, and portions of the South Fork of the River, Bouquet Creek, and San Francisquito Creek located in unincorporated areas of Los Angeles County and the City of Santa Clarita. The Natural River Management Plan allows for the construction of infrastructure (bank stabilization, bridges, utility crossings, storm drain outlets, *etc.*) on lands adjacent to the River and its tributaries in order to accommodate development while minimizing significant impacts to jurisdictional waters and other sensitive resources.

The Natural River Management Plan and associated EIS/EIR were approved by the Corps, CDFG, and California Regional Water Quality Control Board (RWQCB) in November 1998. Both the Corps and CDFG are responsible for monitoring the Natural River Management Plan's mitigation requirements to ensure implementation in accordance with federal and state permits, conditions, agreements, and authorizations. As a separate project, the Natural River Management Plan continues to be implemented and monitored by the Corps and CDFG pursuant to the plan's own regulatory structure and financial mechanisms. For further information regarding the Natural River Management Plan, please refer to **Topical Response No. 3: Natural River Management Plan Projects and Mitigation**.

Implementation and Enforcement of the Mitigation Measures of the Proposed Project

The proposed RMDP, SCP, Candidate Conservation Agreement (CCA), Master Streambed Alteration Agreement (MSAA), and Incidental Take Permit applications for the Newhall Ranch RMDP/SCP proposed Project all include financial security requirements to ensure that the proposed Project and the identified mitigation measures, if adopted, are implemented, enforced, and monitored by the Corps and CDFG.

Resource Management and Development Plan

As stated in the Draft EIS/EIR, the proposed RMDP is a conservation, mitigation, and permitting plan for the long-term management of sensitive biological resources within the 11,999-acre Newhall Ranch Specific Plan, approved by the County of Los Angeles on May 27, 2003. (Draft EIS/EIR, pp. ES-6-7, 1.0-1 - 1.0-5.) If approved, the final RMDP would be considered a regulatory document to

be implemented and enforced as part of the conditions issued by the Corps and CDFG in its permits, agreements, and authorizations for the proposed Project.

Section 7 of the Draft RMDP sets forth the mitigation and management activities based on the sensitive resources within and adjacent to the Specific Plan site. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft Newhall Ranch RMDP (October 2008), Section 7, and Appendix B, RMDP Mitigation Matrix.) To ensure implementation of these mitigation and management activities, Section 11 of the Draft RMDP addresses the applicant's funding commitments, and requires the following:

"Newhall Land, or a designee, will post bonds (or other CDFG-approved financial assurance mechanisms) for the management, monitoring, and reporting measures described in *Section 7.0*. Bonds shall be released by CDFG upon reaching identified milestones and/or upon receipt of verification of grants or special assessments obtained to implement this Plan." (*Id.*, Section 11, page 291.)

The above bond requirement ensures completion of the management, monitoring, and reporting measures described in Section 7.0 of the proposed Draft RMDP.

Spineflower Conservation Plan

The proposed SCP is the applicant's conservation and management plan to permanently protect and manage a system of preserves designed to maximize the long-term persistence of the San Fernando Valley spineflower (*Chorizanthe parryi* var. *fernandina*) (spineflower or SFVS) within portions of the Newhall Ranch Specific Plan area, the Valencia Commerce Center (VCC) planning area, and the Entrada planning area. (Draft EIS/EIR, p. 1.0-5.) The purpose of the SCP is to develop and implement a practicable/feasible spineflower conservation plan that provides for the long-term persistence of spineflower within the applicant's land holdings in Los Angeles County that contain known spineflower populations. (*Id.*) The Draft SCP describes a preserve system proposed by the applicant; however, the "management and monitoring components of the Draft SCP were developed in consultation with CDFG." (*Id.*) The spineflower is a federal-candidate and a state-listed endangered plant species. (Draft EIS/EIR, p. ES-8.) The Draft SCP is considered a regulatory document.

Section 9 of the Draft SCP sets forth mitigation measures that require both general and long-term management of spineflower population areas, all of which are based on the adopted Newhall Ranch Specific Plan EIR mitigation measures. Section 10 of the Draft SCP describes the programmatic approach to long-term adaptive management that takes into account the natural variability of the spineflower populations, used in order to maximize conservation success. Monitoring of the mitigation and adaptive conservation management will be performed in accordance with Section 11 of the Draft SCP. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft SCP (December 2007); and Final EIS/EIR, **Appendix F1.0**, Revised Draft SCP.)

To ensure implementation of the mitigation measures and the conservation strategies specified in the Draft SCP, funding requirements will be identified in the section 2081(b) Incidental Take Permit at the time of permit issuance. Funding will be implemented in accordance with the conditions required by the section 2081(b) Incidental Take Permit. The applicant, Newhall Land, or a designee, would

post bonds (or other CDFG-approved financial assurance mechanisms) for specific management, monitoring, and reporting measures. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft SCP, Section 13, p. 138; and Final EIS/EIR, **Appendix F1.0**, Revised Draft SCP, Section XX.)

The SCP also would provide a detailed accounting of the costs of the management measures for existing agricultural activities during and after construction, as well as costs associated with monitoring and reporting requirements. The short-term costs would include training, monitoring and management during construction, costs for fencing and signage to protect the preserves, and initial restoration and landscaping costs. Long-term costs would include the monitoring, management, and reporting of non-native plants, spineflower and preservation areas, and pests such as Argentine ants, as well as seed collection, storage and distribution. (*Id.*)

To ensure that these costs are covered, and the mitigation and management activities implemented, three bonds (or other CDFG-approved financial assurance mechanisms) would be posted: one for costs during construction and one-time start-up costs, one for initial restoration activities, and one for costs to be expended over the period specified in the SCP. The total bond amount required for implementation of the Final SCP would cover the estimated operational costs of the plan. The bonding mechanisms guarantee that implementation of the mitigation measures and management activities will occur over the long-term range of the plan. The bonding requirement also ensures completion of such measures and activities.

Candidate Conservation Agreement

As stated, the applicant also has applied to the U.S. Fish and Wildlife Service (USFWS) for a draft CCA for the spineflower. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft CCA.) Upon execution of the CCA, the applicant would commit to implement conservation, management, and monitoring measures for spineflower within the SCP study area as set forth in the SCP, which, when combined with the benefits achieved by conservation of the spineflower from the former Ahmanson Ranch property, would preclude the need to list spineflower in the future as threatened or endangered under the federal Endangered Species Act (ESA).

The proposed CCA sets forth conservation measures, which must be adopted and implemented in accordance with the CCA for the benefit of the spineflower. (*Id.*, Draft CCA, p. 11-19.) The applicant's proposed conservation measures are designed to provide for the long-term persistence of spineflower within the SCP study area while also allowing for take of spineflower outside of preserve areas. (*Id.*)

The proposed CCA imposes a funding obligation on the Project applicant. Section 7.0 of the proposed CCA states that the applicant "shall be responsible for funding the work described in the Conservation Measures set forth in **Section 5.2** of this Agreement, and the Spineflower Conservation Plan that is made part of this Agreement." (*Id.*, Draft CCA, p. 20.)

Master Streambed Alteration Agreement

The proposed Draft MSAA was included as an appendix to the Draft EIS/EIR. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft MSAA and related documents (June 12, 2008).) The Draft MSAA includes the project-specific section 1602-1605 "Subnotification Forms" and project-level graphics

with related impact and mitigation data. (*Id.*) If approved, the MSAA would be entered into between CDFG and the applicant pursuant to Fish & Game Code sections 1605. The purpose of the MSAA is to establish measures to protect and conserve fish and wildlife resources that could be substantially adversely affected by the applicant's construction, operation, maintenance, and repair of proposed infrastructure and facilities in or near the Santa Clara River and its tributary drainages, which are needed to implement the Specific Plan, as described in the Draft RMDP. (*Id.*, Draft MSAA, p. 1.)

Prior to initiating any of the activities otherwise authorized by the MSAA, the applicant is required to provide notification to CDFG, utilizing the Subnotification Form. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft MSAA (June 12, 2008), pp. 10-11.) The Subnotification Form must include, among other things, the applicant's submittal of a cost estimate for "performance and monitoring of compensatory mitigation measures, and a *financial security* in a form approved by the Department's Legal Affair's Division." (*Id.*, Draft MSAA, p. 11.) This required showing of financial security ensures that funding to complete the activities described in the MSAA and Subnotification Forms is obtained before any streambed alteration activity can be commenced in the RMDP study area.

Incidental Take Permits

The Draft EIS/EIR includes the applicant's applications for two Incidental Take Permits under Public Resources Code section 2081 of the California Endangered Species Act. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft Section 2081 Incidental Take Permits. (May and June 2008).) The first Incidental Take Permit application is related to the RMDP, and covers all activities within the Specific Plan area that could adversely impact any of the species covered by the proposed 2081 permit in the RMDP study area, including the southwestern willow flycatcher, western yellow-billed cuckoo, least Bell's vireo, arroyo toad, western burrowing owl, tricolored blackbird, sunflower, everlasting, and spring snail. The proposed infrastructure in or adjacent to the Santa Clara River will affect waters, riverbeds, or banks, and, therefore, potentially affect listed threatened or endangered species. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft Section 2081 Incidental Take Permit Application for Multiple Species -- RMDP, May 9, 2008.) To minimize the proposed potential impacts to listed species, the permit application includes 81 mitigation measures, some of which were adopted for the Specific Plan, and some of which that are new and supplement the previously incorporated measures. (*Id.*, Draft ITP, Section 8, pp. 45-67.) Further, a monitoring plan is proposed to ensure compliance with the mitigation measures. (*Id.*, Draft ITP, Section 9, pp. 67-69.)

The second Incidental Take Permit application is related to the spineflower. The permit application is requested for anticipated take of spineflower resulting from project activities outside of designated preserves within the Specific Plan and VCC and Entrada planning areas. To minimize potential impacts to spineflower, the permit application includes 16 mitigation measures that were previously adopted by the Specific Plan, and 18 newly proposed mitigation measures that supplement the previously incorporated measures. (*Id.*, ITP, Section 8, pp. 23-42.) Further, a monitoring plan is in place to ensure compliance with the mitigation measures. (*Id.*, ITP, Section 9, pp. 42-46.)

Each permit application includes a section of proposed funding obligations on the applicant for implementation of the minimization and mitigation activities described in each application. This proposed funding provision (Section 10 in both documents), contains extensive funding commitments, secured by bonds and other financing mechanisms. (See Draft EIS/EIR, Volume VI, **Appendix 1.0**, Draft ITPs, Section 10.) Such funding commitments are legally required components

of CDFG's Incidental Take Permit process. (See California Code Regulations, tit. 14, § 783.2, subd. (a)(10).) Once finalized, these funding commitments would ensure implementation of the required minimization and mitigation measures, including monitoring for compliance.

Conclusion

As demonstrated above, Newhall Land Development, LLC has emerged from chapter 11 bankruptcy with the resources and financial flexibility necessary to move forward with development of the proposed Project (RMDP/SCP). The primary regulatory planning documents and associated EIS/EIR include financial security or bonding requirements to guarantee implementation of the mitigation measures and management activities called for by the proposed Project. Further, the Mitigation Monitoring and Reporting Program (MMRP), if ultimately adopted, would ensure the monitoring and enforcement of the adopted mitigation measures. In addition, final project approval would be conditioned on implementation of the adopted mitigation measures in accordance with the MMRP. Such provisions provide the Corps and CDFG with adequate assurances that the applicant will be able to fund implementation of the mitigation, management, and monitoring provisions encompassed in the proposed Project's regulatory planning documents.