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October 29, 2024

Via Electronic Mail

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California Department of Fish and Wildlife
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Re: Application for Incidental Take Permit, The Irvine Company

Dear Mr. Gibson, Ms. Turner, and Ms. Portugal:

This firm represents No Orange Heights, an organization dedicated to preserving the natural and cultural integrity of the City of Orange. We understand that The Irvine Company has submitted an application for an incidental take permit (ITP) to the Department of Fish and Wildlife (CDFW or Department) for the anticipated take of Crotch's bumble bee in the development of the Orange Heights project (Project). As you have acknowledged, any issuance of an ITP would be discretionary, and thus requires CEQA compliance. We are writing to express our opinion that the existing 2005 supplemental environmental impact report (SEIR) for the Project is insufficient, and thus CDFW must prepare a supplemental or subsequent EIR prior to considering the ITP.

I. Background

The Irvine Company originally obtained approval of the Project from the City of Orange in 2005. At that time, the City certified the SEIR for the Project. In 2016, the City modified the Project approvals and prepared an Addendum to the SEIR. To our knowledge, no subsequent environmental review has been performed and there are no pending permit applications with the City.

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After that environmental review was conducted, numerous species for which the Project site provides actual or potential habitat have received heightened protection under state and federal law. In April 2020, the California Fish and Game Commission designated mountain lions as a candidate species under the California Endangered Species Act (CESA) within a proposed evolutionarily significant unit (ESU) located in Southern California and the central coast of California, which includes the Project area. The Department's website acknowledges that "[u]nder CESA, species classified as a candidate species are afforded the same protection as listed species. As a result, mountain lions in this proposed ESU are CESA-protected during the review period."¹ *See also* Fish & Game Code, § 2085. Subsequently, the Crotch's bumble bee (*Bombus crotchii*) (2022)² and western burrowing owl (*Athene cunicularia hypugaea*) (2024)³ have also been protected as a candidate for CESA listing and are thus entitled to the same protection. And the U.S. Fish and Wildlife Service has proposed to list the western spadefoot as threatened under the federal Endangered Species Act (FESA). *See* 88 Fed. Register 84252, December 5, 2023.

This year, the Irvine Company applied to CDFW for an ITP for the Crotch's bumble bee. In its application, the Company admitted that "an undetermined number of bees could be impacted by Project development." Application for Incidental Take Permit for Crotch's Bumble Bee on the Orange Heights Project Site, August 28, 2024 (Application) at 4. The Department may issue an ITP only where it finds that the applicant:

- "will minimize and fully mitigate the impacts of the take authorized under the permit" and
- "has ensured adequate funding to implement the measures required under the permit to minimize and fully mitigate the impacts of the taking, and to monitor compliance with, and the effectiveness of, the measures."

¹ <https://wildlife.ca.gov/Conservation/Mammals/Mountain-Lion>

² <https://wildlife.ca.gov/Data/CNDDDB/News/updates-to-the-legal-status-of-bumble-bees-in-california>

³ <https://wildlife.ca.gov/News/Archive/fish-and-game-commission-western-burrowing-owl-becomes-cesa-candidate-wildlife-prosecutor-of-the-year-named-waterfowlers-hall-of-fame-inductees-recognized>

Cal. Code Regs (CCR), tit. 14, § 783.4(a). These determinations must be “based on the best scientific and other information that is reasonably available” and address “adverse impacts of the taking on” their ability to survive and reproduce in light of population trends, threats to the species, and reasonably foreseeable impacts from other related projects and activities. *Id.* § 783.4(b); *see also* Fish & Game Code, § 2081(b). This includes an updated CEQA review.

II. Additional CEQA review is required.

The Department acknowledges that issuance of an ITP “is considered a discretionary action” under CEQA and thus “before CDFW can issue the permit the applicant must have completed the necessary steps under CEQA.”⁴ *See also* CCR, tit. 14, § 783.5(c) (“Director shall decide whether an incidental take permit can be issued under this article, in accordance with CEQA and the CEQA Guidelines, based on a review of the application; the environmental impact report” and other materials).

The SEIR for this Project was prepared nearly 20 years ago, in 2005. Application at 11. The only CEQA review since that time was an Addendum prepared in 2016 outlining project changes. *Id.* While some updated surveys were performed in 2015-2016, there is no mention of the Crotch’s bumblebee, burrowing owl, or western spadefoot in the Addendum, and only passing mention of mountain lion. *See* Addendum 3D-3-5. Because the existing CEQA review is clearly outdated for these and all other potential plant and animal species on the Project site, new CEQA analysis is required, both to comply with CEQA and to determine whether there is the potential for a take of any additional protected species.

A. CDFW has authority to require additional CEQA review.

As a responsible agency, CDFW is responsible for determining whether new information triggers the need to supplement the analysis in the 2005 SEIR. *See* Pub. Resources Code § 21166; CEQA Guidelines⁵ §§ 15050(c)(2), 15162. If current information shows that there have been substantial changes “with respect to the circumstances under which the project is undertaken,” that the Project will have new

⁴ <https://wildlife.ca.gov/Conservation/CESA/Permitting/Incidental-Take-Permits#ceqa>

⁵ The CEQA Guidelines, Cal. Code Regs., tit. 14, section 15000 et seq., are referred to herein as “CEQA Guidelines.”

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impacts that were not addressed in the prior EIR, or that there are additional mitigation measures or alternatives that would reduce impacts, additional CEQA review is required. CEQA Guidelines § 15162(a).

Because CDFW is granting a new discretionary approval, it is the agency responsible for making this determination and preparing any necessary supplemental review.

If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall [] be prepared by the public agency which grants the next discretionary approval for the project....

CEQA Guidelines § 15162(c); *California Coastkeeper Alliance v. State Lands Commission* (2021) 64 Cal.App.5th 36, 43, 61 (upholding State Lands Commission’s decision to prepare a supplemental EIR based on the City of Huntington Beach EIR).

Where additional review is required, the Department may take on the role of lead agency and prepare a subsequent EIR or it may prepare a supplement to an EIR if it determines that only “minor additions or changes would be necessary to make the previous EIR adequat[e].” CEQA Guidelines §§ 15163(a), 15096(e); *California Coastkeeper Alliance*, 64 Cal.App.5th at 65.

The Department’s own regulations lay out the same process as these CEQA Guidelines. *See* CCR, tit. 14, § 783.5(c)(1) (Department can approve ITP application only if it “determines that it will not proceed with any of the actions specified in [CEQA Guidelines] section 15096(e)); *id.* § 783.5(d) (Department may take on the role as lead agency).

Even in the role of responsible agency, CDFW’s duties under CEQA are substantial. Before it can issue the ITP, CDFW must ensure appropriate mitigation for impacts within its jurisdiction and identify overriding considerations for any impacts that are not mitigated. *See* CEQA Guidelines § 15096(g)(1) (responsible agency must mitigate or avoid “the direct or indirect environmental effects of those parts of the project which it decides to carry out, finance, or approve”); *see also id.* § 15096(g)(2) (responsible agency “shall not approve a project as proposed if the agency finds any feasible alternative or

feasible mitigation measures within its powers that would substantially lessen or avoid any significant effect the project would have on the environment”).

CDFW must also adopt findings pursuant to Guidelines section 15091 for significant environmental impacts identified in an EIR which it relies upon. *Id.* § 15096(h). In addition, CDFW must adopt a statement of overriding considerations for any significant and unavoidable impacts and a mitigation monitoring plan setting forth mitigation that is “fully enforceable through permit conditions, agreements, or other measures.” *Id.* §§ 15093, 15091(d). In making these findings, CDFW is not bound by the findings of the lead agency, but rather “must...issue its *own* findings.” *Riverwatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1201.

B. The Project has new significant impacts that were not previously identified.

1. The CEQA review must be updated to include new surveys of sensitive plant and wildlife communities and new analysis that reflects their current regulatory status.

Since 2005, the mountain lion, Crotch’s bumble bee, and burrowing owl have all been listed as candidate species under CESA, and the western spadefoot has been proposed for as a threatened species under federal law. These listings recognize the serious threats faced by the species and the need for additional protection. Numerous sightings of some of these species have occurred on or near the Project site and the site provides potential habitat for all of them. In addition to the sightings of mountain lion and Crotch’s bumble bee at the site, there was a sighting of the burrowing owl near the site in 2017.⁶ In light of this significant new information, CDFW must require a subsequent or supplemental EIR to assess the impacts of Project development on these and other sensitive species.

Under CEQA, a project may have significant impacts on a species either directly or by destroying its habitat. Before even making a significance determination, however, current baseline information is required. Where, as here, baseline information on protected species is missing or outdated, the CEQA review is inadequate. *See, e.g., Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1225, 1236 (if a project “could”

⁶ <https://www.inaturalist.org/observations/14794729>

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adversely affect wildlife habitat for protected species, the lead agency must collect “site-specific data regarding [their] presence”); *Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 692 (updated surveys required). As the Supreme Court has recognized, accurate information on sensitive habitat areas is essential to analysis and mitigation and the establishment of development footprints. *See Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 939, 931 (EIR invalid for deferring identification of environmentally sensitive habitat areas).

Therefore, no Project approvals should even be considered until new surveys are undertaken to obtain current and accurate baseline data for the entire site. Updated surveys are required for the mountain lion, Crotch’s bumble bee, burrowing owl, and western spadefoot—as well as other sensitive and protected species that are known to occur on the site or for which the site provides potential habitat. These species include the least Bell’s vireo, grasshopper sparrow, southwestern willow flycatcher, loggerhead shrike, northern harrier, Blainville’s horned lizard, western spadefoot, Quino checkerspot butterfly, many-stemmed dudleya or intermediate mariposa lily, western spadefoot toad, white-tailed kites, coastal California gnatcatchers, coastal cactus wrens, and other species addressed in the 2005 SEIR and 2016 Addendum. Revised analysis is needed to then evaluate how the proposed Project would impact these species both by directly disturbing the species and their habitats, and by dividing the wildlife corridor between Irvine Regional Park and Peters Canyon. *See* SEIR 3D-32 (stating that mountain lion, mule deer, coyote, and bobcat are “target species” with regard to fragmentation effects). Updated surveys must also be prepared for protected plant species.

Impacts may be significant under CEQA where a project will directly or through habitat modifications, adversely impact a “candidate, sensitive, or special status species” or interfere with the movement of wildlife species or with migratory wildlife corridors. *Id.* App. G(IV)(a)&(d). And a project’s impacts are necessarily significant where it will “substantially reduce the number or restrict the range of an endangered, rare or threatened species.” CEQA Guidelines § 15065(a)(1).

Here, the impacts on the mountain lion, Crotch’s bumble bee, and western spadefoot are unquestionably significant under CEQA. Mountain lions roam on the Project site and throughout the area and the western spadefoot is located on the site. *See*

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SEIR 3D-16-17, 31, 74.⁷ The Project will destroy hundreds of acres of habitat and the Application itself recognizes that a take of the Crotch's bumble bee is inevitable. The 2005 EIR also recognized that western burrowing owls could potentially occur on the site. *Id.* 3D-23.

New CEQA analysis is therefore required to update baseline information on these and other sensitive species and address impacts in light of current protected status. *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1046, 1065-67 (updated CEQA analysis required where new information showed creek impacted by proposed subdivision was suitable habitat for the Coastal Cutthroat Trout, a species of special concern); *Mira Monte Homeowners Association v. County of Ventura* (1985) 165 Cal.App.3d 357, 360-64 (new evidence that project would pave over additional wetlands and potentially impact protected species was a substantial change in circumstances that required supplemental analysis).

The Department must also ensure adequate mitigation. Although the ITP approval process itself requires the Department to impose mitigation, the mitigation must *also* be analyzed via the CEQA process to ensure that it receives adequate public and agency review. As the October 7, 2024 letter of submitted to the Department by Leif Richardson, Ph.D., demonstrates, the mitigation for the Crotch's bumblebee proposed in the ITP Application is inadequate to ensure its protection. Moreover, no new mitigation is proposed for other protected species.

CEQA mitigation must be established *before* any approval by CDFW is in place and the analysis must provide substantial evidence that the proposed measures will be effective. *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 280 ("post-approval formulation of habitat plan's provisions for active management" of protected species violates CEQA); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 727. The Department must also consider whether any additional mitigation is necessary to protect other protected and sensitive plant and wildlife species.

⁷ See, e.g., <https://abc7.com/newport-beach-mountain-lion-m317-orange-county/11886637/>; <https://www.latimes.com/california/story/2024-01-23/orange-county-mountain-lion-uno-killed-by-car> (also attached as Exhibit A to this letter).

The 2005 SEIR recognized that updated CEQA analysis was required because *five* years had lapsed since the prior analysis:

For the Santiago Hills II Planned Community study area, certain plant and wildlife species have seen their regulatory status change since 2000, and some additional species have been recorded on the project site or in nearby area. In light of these changes, this Draft SEIR/EIR includes revised and updated sensitive species tables and analyses.

SEIR 3D-20. It has now been nearly *twenty* years since this analysis. The Project cannot be approved until new surveys of sensitive plant and wildlife species are undertaken and impacts are considered in light of their current regulatory status and current conditions. This includes the impacts of cumulative development in the area that has further destroyed and fragmented habitat since 2005.

2. The CEQA review must be updated to address cultural resources in consultation with Native American tribes.

Supplemental review is also necessary to address cultural resources. In 2005, the Gabrieleno/Tongva San Gabriel Band of Mission Indians raised concerns to the City of Orange about the cultural sensitivity of this area, noting that most of the Tribe's traditional lands and important locations have been destroyed as the City grew. At that time, AB 52 (2014), which requires consultation with California Native American tribes on CEQA projects (*see* Pub. Resources Code, § 21080.3.1), had not yet been enacted. On February 5, 2024, the Tribe informed the City that no good faith consultation has occurred between the Tribe and the City for this Project and requested a new and updated EIR and a Traditional Cultural Property (TCP) study. No further Project approvals should be granted until these concerns are addressed.

III. Conclusion

Before taking any action on the ITP Application submitted by The Irvine Company, CDFW must prepare either a subsequent or supplemental EIR updating the 2005 SEIR's analysis with new surveys and setting forth relevant new information since the 2005 SEIR. This includes the designation of the mountain lion, Crotch's bumble bee, and burrowing owl as candidate species under the CESA and proposed threatened status of the western spadefoot under the FESA. These changes are unquestionably significant

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given that these protected species are either known to occur, or suspected to occur, on the Project site. Moreover, it is incumbent on the Department, given its substantial expertise in this area, to assess the potential for any additional sensitive plant and wildlife species on the Site, update their regulatory status, and assess Project impacts in light of current conditions, current habitat locations, and any other new information that could show new or more severe significant impacts than previously analyzed. The Department must also ensure that the required analysis of Tribal Cultural Resources under AB 52 is undertaken.

The public must be allowed to participate in that process as CEQA requires.

Thank you for considering these comments. If you have any questions, please do not hesitate to contact me at king@smwlaw.com.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Winter King

Enclosure: Exhibit A

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EXHIBIT A

CALIFORNIA

Orange County mountain lion Uno is killed by a car. Her insouciance brought her fame



Uno, a female mountain lion often seen patrolling Orange County mountains, died last week after being struck by a vehicle near Santiago Canyon Road. (Mark Girardeau / Orange County Outdoors)

By Christian Martinez
Staff Writer

Jan. 23, 2024 6 AM PT

Uno, a female mountain lion often seen patrolling the mountains in Orange County, died last week after being struck by a vehicle near Santiago Canyon Road.

The puma "was somewhat famous for her seeming laissez-faire demeanor around people at times - often paying little attention to hikers or others she might encounter," said the UC Davis California Mountain Lion Project.

The school, which reported her death Friday, had been studying Uno since 2021.

"She was crossing Santiago Canyon Road, a highway in Orange County that she has crossed successfully many times, but she failed to get across safely on this occasion," the Mountain Lion Project said on Instagram.

"Valiant efforts to save her life were undertaken...but she succumbed to massive head and chest injuries before significant treatment could be started."

The cougar, identified by the study as F312, had been tagged by researchers in 2021 when she was about 2 years old.

In the ensuing years, she was captured many times by wildlife cameras and photographers, who dubbed her "Uno" because of an injury she had suffered to one eye.

Last summer, wildlife photographer Mark Girardeau captured footage of Uno as she ambled past him on a hiking trail, coming within a few feet of Girardeau.

[In the video, Uno can be seen](#) peeking over the crest of a hill at Girardeau before walking down the hill.

"Oh s-, she's coming toward me," Girardeau says in the video.

The lion walks down the hill, seemingly nonchalant, then breaks into a jog while passing Girardeau.

During her time under observation, Uno probably denned more than once; she produced at least one litter, with four kittens.

But the kittens did not survive long enough to leave their mother, the Mountain Lion Project said. Two kittens were killed by cars, one was killed by disease, and one "simply disappeared."

Uno is just the latest mountain lion to be killed on Southern California roadways.

Vehicles pose a significant threat to the big cats. Between 2015 and 2022, 535 mountain lions were killed on California highways, according to [a UC Davis study](#).

"Fencing projects that our team has helped design in the area have dramatically reduced mountain lion and other wildlife deaths on the roads," the Mountain Lion Project said,

"but as this shows us these improvements are needed in many more places."




Christian Martinez

Christian Martinez is a former reporter for the Los Angeles Times. He previously wrote for the USA Today network of newspapers including the Ventura County Star, where he covered the Thomas and Woolsey wildfires and the Borderline mass shooting, the Spectrum & Daily News in Utah and the Lansing State Journal in Michigan. He was born and raised in Southern California and attended Saint Mary's College of California.

PETS & ANIMALS

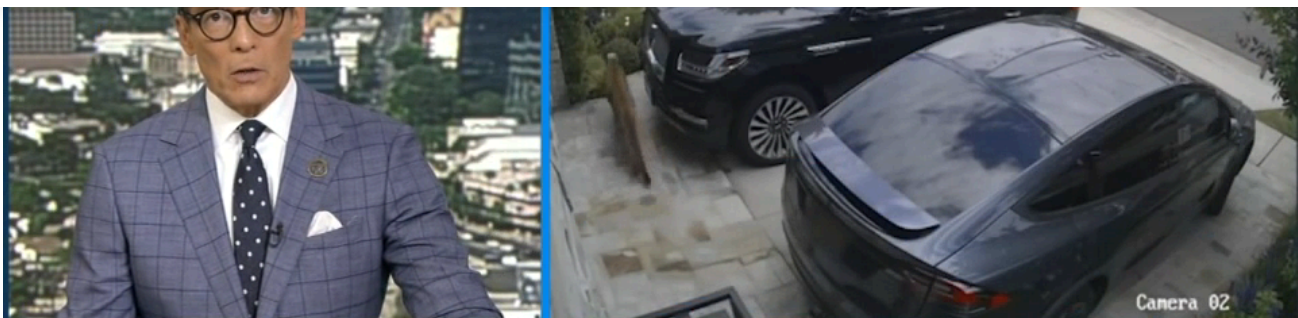
Young mountain lion caught in Newport Beach released in Santa Ana Mountains



By [David González](#) 
Monday, May 23, 2022



24/7 Live



ORANGE COUNTY MOUNTAIN LION
EYEWITNESS NEWS



#abc7eyewitness

Mountain lion caught in Newport Beach released in Santa Ana Mountains A mountain lion spotted in the streets of Newport Beach just days ago is on the go again. One wildlife expert tracking the cougar explains why its odd... [Show more](#) ▾

NEWPORT BEACH, Calif. (KABC) -- Since being collared in March, a young mountain lion known as M317 has been tracked across Orange County.

Most recently, he was spotted roaming a Newport Beach community on Friday.

"They tend to stay on the move and M317 was like that. He was constantly on the move after we collared him," said Dr. Winston Vickers, a veterinarian with UC Davis Wildlife Health Center.

M317 was eventually tranquilized by animal control and moved to a more suitable habitat near the top crest of the Santa Ana mountains.

Vickers is monitoring the big cat.

[RELATED: Mountain lion captured after roaming Newport Beach neighborhood](#)



A mountain lion spotted roaming around a Newport Beach neighborhood Friday afternoon was finally captured by authorities, but not before putting residents on high alert.

He said M317 appears to be healthy despite all his recent adventures.

"They're almost always traveling through unfamiliar terrain as well, which raises the risk for the animal when they encounter highways like the interstates he's crossed," Vickers said.

He said it is not uncommon for the species to travel long distances.

He said in the last two months M317 has traversed more 100 miles and encountered a lot of roadblocks.

"The 91 freeway, he's crossed the 241 toll road, he's crossed Interstate 5, plus innumerable other roads and busy streets," Vickers said.

Vickers said unfortunately the survival rate for these type of animals in Southern California is low because of the hazards they face.

"He's got the odds a bit against him or at least more in the 50/50 range," he said.

Vickers said mountain lions can live up to 13 years in the wild.

He hopes M317 can find a territory out in the mountains to call home.