Correspondence
Item No. 0.0d
Public Comments
June 7, 2012

4/6/12

To Chris Medak of USFWS:

Introduction

Under the guise of "fuel modification and weed abatement" and "routine maintenance," excessive, unnecessary and unpermitted mowing is being performed on Banning Ranch, a USFWS-declared area of critical habitat for the California Gnatcatcher, for the purpose of preventing establishment of California Gnatcatcher nesting areas in the development footprint of the large residential project proposed by Newport Banning Ranch LLC (NBR).

The objective of the Endangered Species Act (16 USCS 1531 -1543) is to enable a listed species like the California Gnatcatcher not merely to survive, but to recover from their endangered or threatened status. Gifford Pinchot Task Force v. US Fish and Wildlife Service (9th Cir. 2004) 378 F.3d 1059; Sierra Club v. US Fish and Wildlife Service (5th Cir. 2001) 245 F. 3d 434; 50 CFR 402.02). Also, the Endangered Species Act requires that the USFWS cooperate with state agencies such as the California Coastal Commission in connection with the preservation of endangered species such as the California Gnatcatcher [16 USCS 1535(a)].

The Carlsbad office of the USFWS should be using its powers under the Endangered Species Act to stop this excessive, unnecessary and unpermitted mowing.

The Unpermitted Mowing is <u>Excessive</u> and <u>Unnecessary</u>

While it is recognized that some vegetation clearing/mowing is necessary on Banning Ranch for fire safety purposes, such mowing/clearing should be consistent with local municipal fire codes, such as those for Orange County and for the City of Newport Beach. Even the draft EIR for the proposed Banning Ranch development acknowledges the width of a reasonable "fire break."

"…a 100-foot-wide fuel modification area is provided between the oilfield and adjacent off-site development to minimize the risk of a wildfire spreading to the adjacent developed areas."

In fact, California State Code mandates that 100 feet be the maximum width:

"SEC. 4. Section 51182 of the Government Code is amended to read:

51182. (a) A person who owns, leases, controls, operates, or maintains an occupied dwelling or occupied structure in, upon, or adjoining any mountainous area, forest-covered land, brush-covered land, grass-covered land, or any land that is covered with flammable material, which area or land is within a very high fire hazard severity zone designated by the local agency pursuant to Section 51179, shall at all times do all of the following: (1) Maintain defensible space no greater than 100 feet from each side of the structure (emphasis added), but not beyond the property line unless allowed by state law, local ordinance, or regulation and as provided in paragraph….."

However, on Banning Ranch this excessive, unnecessary and unpermitted mowing is occurring over **1200** feet away from adjacent off-site development.

And while it is recognized that vegetation clearing is necessary to monitor, access and service the active wells on Banning Ranch, even the draft EIR for the proposed Banning Ranch development acknowledges such clearing should be limited to routine maintenance….

"…the immediate area surrounding these facilities are mowed or vegetation is hand-trimmed to create a fire break and provide visibility for oilfield personnel to monitor these facilities for potential spills or other equipment problem."

Again, the excessive, unnecessary and unpermitted mowing on Banning Ranch is occurring over **1000** feet from active wells.

A quick comparison with other relevant oil and gas fields in the Southern California area demonstrates that the mowing on Banning Ranch is indeed excessive and unnecessary.

NBR owns the surface development rights on Banning Ranch. AERA Energy LLC is one of the major partners of NBR. AERA Energy LLC operates numerous oil and gas fields in Southern California. One such field, the Ventura Oil Field, is located just north of Highway 101 in Ventura. Excessive, unnecessary and unpermitted mowing as seen on Banning Ranch is not evident at the Ventura Oil Field.

An aerial photo of the Ventura Oil Field demonstrating the limited clearing around wells, along with intactness of the vegetation between the wells

An oil field in Los Angeles County known as Montebello Hills is of roughly similar size as Banning Ranch. Like Banning Ranch, Montebello Hills is USFWS-declared critical habitat for the California Gnatcatcher, and like Banning Ranch, there is a planned residential development proposed for Montebello Hills. However, the clearing around the wells on Montebello Hills, like the Ventura Oil Field, is limited to the immediate area around the wells.

Aerial photo of Montebello Hills demonstrating the limited clearing around wells, along with intactness of the vegetation between the wells

It should also be noted that while being of roughly similar size, Montebello Hills supports a California Gnatcatcher population nearly four times as large as Banning Ranch, presumably because the vegetation is not routinely mowed between the wells and sage scrub has become more established.

Another oil field owned by AERA Energy LLC and planned for development is located near Brea.

Oilfield owned by AERA Energy LLC (top of photo). Note the limited clearing around wells, along with intactness of the vegetation between the wells

Active oil well near Brea demonstrating the limited clearing around well, along with intactness of the vegetation surrounding the well.

On Banning Ranch, excessive, unnecessary and unpermitted mowing occurs around wells that are abandoned, and also in areas where there are no wells. The majority of the oil wells on Banning Ranch are abandoned, and there is every indication that they will never become active again. The City of Newport Beach's priority for Banning Ranch, as stated in the General Plan, is the preservation of the entire Banning Ranch as open space:

"Prioritize the acquisition of Banning Ranch as an open space amenity for the community and region, <u>consolidating oil operations</u>," (emphasis added)

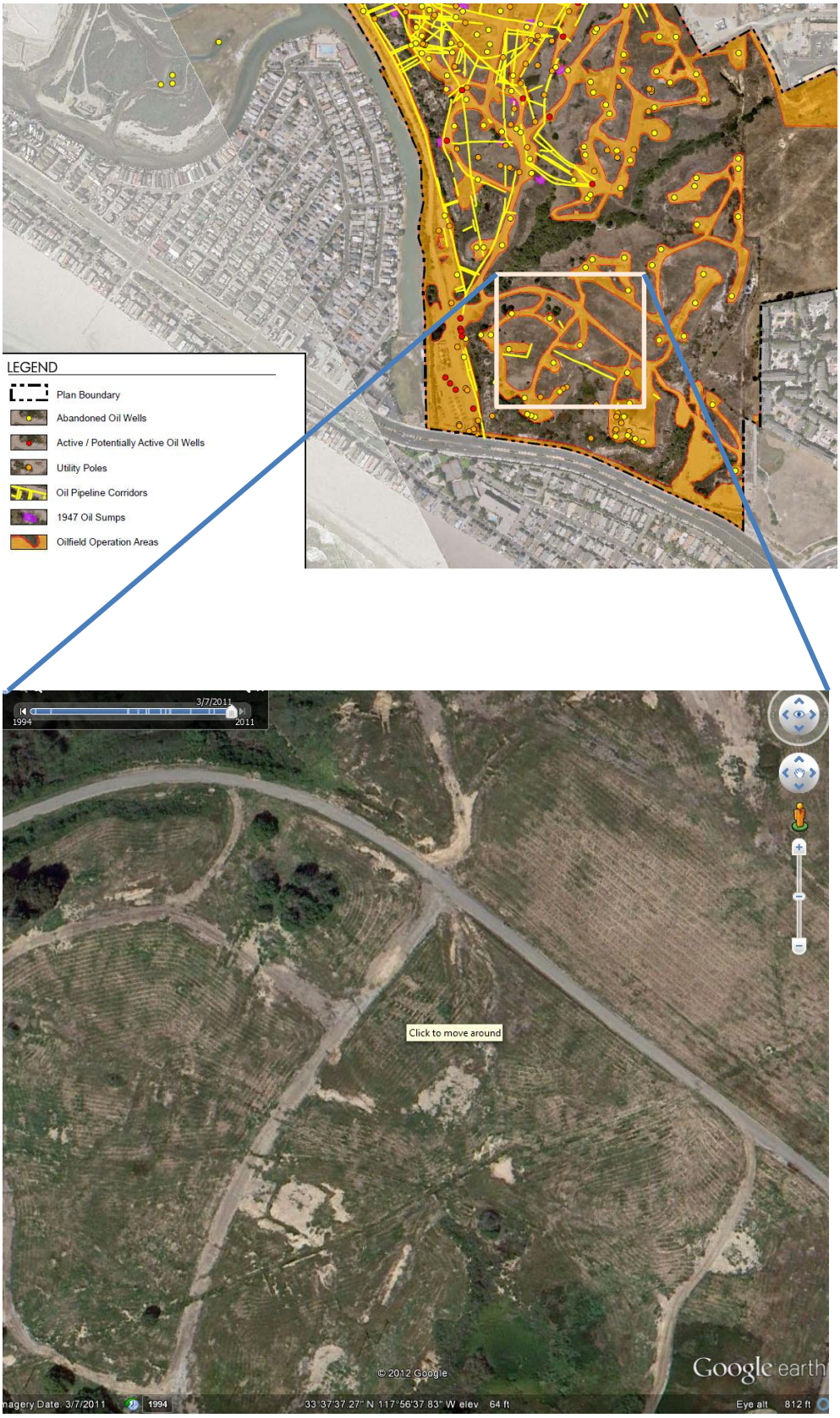
In addition, NBR's proposed development plan envisions the phasing out of the vast majority of the existing wells, including all wells on the mesa.

Indeed, the City of Newport Beach has amended section 1401 of the City's Charter so that all oil and gas operations on Banning Ranch, within 10 years of annexation, will be limited to two relatively small platforms comprising about 20 acres.

To conclude, the abandoned wells on Banning Ranch will not become active again.

The vegetation around these idled, abandoned and plugged wells on Banning Ranch should be allowed to grow, as suggested by the California Code of Regulations:

"1776. Well Site and Lease Restoration.
(a) In conjunction with well plugging and abandonment operations, any auxiliary holes, such as rat holes, shall be filled with earth and compacted properly; all construction materials, cellars, production pads, and piers shall be removed and the resulting excavations filled with earth and compacted properly to prevent settling; well locations shall be graded and cleared of equipment, trash, or other waste materials, <u>and returned to as near a natural state as practicable</u>" (Emphasis added)



Aerial photo showing the excessive unpermitted mowing occurring on the Banning Ranch mesa.
Note: The wells in this photo are abandoned, yet wide areas are mowed around them.

The Excessive and Unnecessary Mowing is not Permitted

As the entire Banning Ranch is within the Coastal Zone, all development on Banning Ranch is subject to the California Coastal Act. The California Coastal Act is especially relevant to the mowing on Banning Ranch in two areas: 1) authorization of development (mowing) and 2) protection afforded to endangered species.

On October 30, 1973, the *Coastal Zone Conservation Commission* (a precursor to the Coastal Commission) issued: Resolution of Exemption No. E-7-27-73-144 which allowed for the operation of a limited number of wells on Banning Ranch. A review of the conditions of the exemption reveals no specific mention of mowing. The general rule is the rights that vest through reliance on a government permit are only those rights specifically granted by the permit itself (Briarwood Properties v. City of Los Angeles (1985) 171 Cal. App. 3d 1020).

The Coastal Act recognizes, and offers its highest protections to, Environmentally Sensitive Habitat Areas (ESHAs),

"30240. (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas."

Coastal Sage Scrub (CSS), of which *Encelia* is a dominant component, is present on the Banning Ranch mesa, and nascent and early *Encelia* growth is common in the areas of mowing. Banning Ranch is considered within the sphere of influence of the City of Newport Beach. While the City of Newport Beach does not have a certified Local Coastal Program, the City of Newport Beach does have a certified Coastal Land Use Plan (CLUP), which provides guidance for development on Banning Ranch. Under the City of Newport Beach's CLUP:

"…where CSS occurs adjacent to coastal salt marsh or other wetlands, or where it is documented to support or known to have the potential to support rare species such as the coastal California gnatcatcher (emphasis added), it meets the definition of ESHA because of its especially valuable role in the ecosystem."

Photo of nascent and early *Encelia* scrub on Banning Ranch mesa <u>before</u> mowing

Photo of same area of Banning Ranch mesa <u>after</u> mowing

To summarize, the excessive, unnecessary and mowing is not permitted, and the areas of the excessive, unnecessary and unpermitted mowing, especially where they contain *Encelia*, should be considered Environmentally Sensitive Habitat Areas.

The Excessive, Unnecessary and Unpermitted mowing is not for fire safety, but rather designed to prevent establishment of Coastal Sage Scrub (CSS) and to prevent Gnatcatcher nesting.

As described above, much of the excessive, unnecessary and unpermitted mowing is occurring on areas of nascent and early *Encelia* growth, a predominant component of CSS. The City of Newport Beach Urban Wildland Interface Area Standard for Hazard Reduction Fire Resistive Plant List contains *Encelia californica.* Furthermore, section 4903.2 of the City of Newport Beach fire code says that fire resistant plants can remain even within 100 feet of structures, so it would seem reasonable that such plants can remain 1000 feet from such structures.

The vegetation map included in the draft EIR has many areas of *Encelia* listed as non-native grasslands, ruderal, ornamental, or disturbed. There are at least 24 separate areas that were mapped as either *Encelia* or CSS in the vegetation map prepared by Jan Vandersloot that are listed as non-native grasslands, ruderal, ornamental, or disturbed in the draft EIR Vegetation Map.

The draft EIR freely admits that,

"… there are pockets of native species that were not mapped because they were mowed to a height of less than six inches and could not be delineated."

This is a self-fulfilling prophecy. The mowing is described in the draft EIR as occurring in ***"open grass and weedy areas"*** *(emphasis added)* yet it is the excessive, unnecessary and unpermitted mowing itself that reduces the native vegetation to such a low height that it is not included in vegetation mapping and the area ends up mapped as non-native grasslands, ruderal, ornamental, or disturbed.

Furthermore, it is obvious that invasive and ornamental plants that do not provide nesting habitat for the California Gnatcatcher, such as iceplant, are conspicuously spared the excessive unnecessary unpermitted mower's blade.

Area of mowing in northeast corner of Banning Ranch mesa showing avoidance of iceplant.

This excessive, unnecessary and unpermitted mowing represents destruction, or adverse modification of critical habitat as defined in the Code Federal Regulations, Title 50, 402.02:

"Destruction or adverse modification means a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical."

Though a decision by the 9th Circuit has resulted in the USFWS relying on language other than the above definition (*Gifford Pinchot Task Force v. U.S. Fish and Wildlife*

Service, 378 F.3d 1059 (9th Cir. 2004)), it remains the goal of the USFWS to recognize and stop activities that hinder the recovery of a listed species.

To conclude, much of the excessive, unnecessary and unpermitted mowing is preventing establishment of Coastal Sage Scrub and impairing the recovery of the California Gnatcatcher.

Coordination with the California Coastal Commission and California Department of Fish and Game is strongly recommended.

The Endangered Species Act requires that the USFWS cooperate with state agencies such as the California Coastal Commission in connection with the preservation of endangered species such as the gnatcatcher [16 USCS 1535(a)]. As Banning Ranch is entirely within the Coastal Zone, the California Coastal Commission will be intimately involved with any development plans for Banning Ranch, including mowing. Indeed, a review of comments made by the California Coastal Commission staff in the Sunset Ridge Park staff report made it clear that areas of *Encelia* mowing, that would otherwise support nesting of the California Gnatcatcher should they be left undisturbed, would be considered ESHA if the mowing were unpermitted or if vested rights could not be established. Obviously the declaration of ESHA would preclude any future development.

In addition to the Endangered Species Act, the Migratory Bird Act is applicable as the excessive, unnecessary and unpermitted mowing occurs in areas used by wintering Burrowing Owls on the Banning Ranch mesa. Studies to determine the effects of the excessive, unnecessary and unpermitted mowing on the wintering Burrowing Owls are indicated.

The same general type of scrub habitat on the Banning Ranch mesa utilized by the California Gnatcatcher is also utilized by the Cactus Wren, a California Species of Special Concern. The population of Cactus Wrens in coastal Orange County, including the Banning Ranch mesa, has seen sharp decreases in recent years. The reason for this is not known, but the preservation of, and further establishment of nesting areas for the Cactus Wren on Banning Ranch should be a goal of the California Department of Fish and Game.

Area of cactus scrub on Banning Ranch mesa <u>before</u> mowing

Same area of cactus scrub on Banning Ranch mesa <u>after</u> mowing

Conclusion

Under the guise of “fuel modification and weed abatement” and “routine maintenance” excessive, unnecessary and unpermitted mowing is being performed on Banning Ranch, a USFWS-declared area of critical habitat for the California Gnatcatcher, for the purpose of preventing establishment of California Gnatcatcher nesting areas in the development footprint of the large residential project proposed by Newport Banning Ranch LLC.

The Carlsbad office of the USFWS, in coordination with the California Department of Fish and Game and the California Coastal Commission, should be using its powers under the Endangered Species Act and other applicable statutes to stop this excessive, unnecessary and unpermitted mowing.

Terry Welsh

Banning Ranch Conservancy