APPENDIX D

BMP MAINTENANCE SUPPLEMENT / O&M PLAN

RECORD OF BMP IMPLEMENTATION, MAINTENANCE, AND INSPECTION

Today's Date: _____

Name of Person Performing Activity (Printed): _____

Signature: _____

BMP NAME (AS SHOWN IN O&M PLAN)	BRIEF DESCRIPTION OF IMPLEMENTATION, MAINTENANCE, AND INSPECTION ACTIVITY PERFORMED

RECORD OF BMP IMPLEMENTATION, MAINTENANCE, AND INSPECTION

Today's Date: _____

Name of Person Performing Activity (Printed): _____

Signature: _____

BMP NAME (AS SHOWN IN O&M PLAN)	BRIEF DESCRIPTION OF IMPLEMENTATION, MAINTENANCE, AND INSPECTION ACTIVITY PERFORMED

OPERATIONS AND MAINTENANCE (O&M) PLAN

Water Quality Management Plan

For

Newport Banning Ranch

5200 West Coast Highway, Newport Beach CA 92663

Tentative Tract Map No. 17308

APN Nos. 114-170-24, 43, 49, 50, 52, 72, 75, 77, 79, 83 & 424-041-04

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX			
BMP Applicable? Yes/No	**BMP Name and BMP Implementation, Maintenance and Inspection Procedures**	**Implementation, Maintenance, and Inspection Frequency and Schedule**	**Person or Entity with Operation & Maintenance Responsibility**
NON-STRUCTURAL SOURCE CONTROL BMPs			
Yes	**N1. Education for Property Owners, Tenants and Occupants** Educational materials will be provided to residents/tenants, including education materials and restrictions to reduce pollutants from reaching the storm drain system. Examples include tips for pet care, proper waste oil disposal, and other household tips. Refer to Section VII for a list of educational materials to be provided.	Educational materials will be provided to tenants annually. Materials to be distributed are found in Appendix C of this PWQMP. Tenants will be provided these materials by the Property Management prior to occupancy and annually thereafter. Frequency: Annually	HOA
Yes	**N2. Activity Restrictions** The HOA shall restrict activities that have the potential to create adverse impacts on water quality. Activities include but are not limited to: prohibiting vehicle maintenance activities within parking areas and stalls, prohibiting long-term parking without prior authorization, and prohibiting outdoor vehicle washing. Restriction shall begin upon occupancy.	The Owner will prescribe activity restrictions to protect surface water quality, through lease terms or other equally effective measure, for the property. Restrictions include, but are not limited to, prohibiting vehicle maintenance or vehicle washing. Frequency: Ongoing	HOA

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX			
BMP Applicable? Yes/No	**BMP Name and BMP Implementation, Maintenance and Inspection Procedures**	**Implementation, Maintenance, and Inspection Frequency and Schedule**	**Person or Entity with Operation & Maintenance Responsibility**
Yes	N3. Common Area Landscape Management Common area landscape management that includes minimizing fertilizer and pesticide application, use of slow-release fertilizers, maintenance activities, providing education to homeowners and tenants (via project owner and/or HOA), and providing education and training for employees on management of landscape materials and storm water management.	Maintenance shall be consistent with City requirements. Fertilizer and/or pesticide usage shall be consistent with County Management Guidelines for Use of Fertilizers (OC DAMP Section 5.5) as well as City requirements. Maintenance includes mowing, weeding, and debris removal on a weekly basis. Trimming, replanting, and replacement of mulch shall be performed on an as-needed basis to prevent exposure of erodible surfaces. Trimmings, clippings, and other landscape wastes shall be properly disposed of in accordance with local regulations. Materials temporarily stockpiled during maintenance activities shall be placed away from water courses and storm drains inlets. Frequency: Monthly	Private Areas: HOA Public Areas: City of Newport Beach
Yes	N4. BMP Maintenance The HOA will be responsible for the implementation and maintenance of each applicable non-structural BMP, as well as scheduling inspections and maintenance of all applicable structural BMP facilities through its staff, landscape contractor, and/or any other necessary maintenance contractors. Details on BMP Maintenance are provided in Section V of this PWQMP.	Maintenance of structural BMPs implemented at the project site shall be performed at the frequency prescribed in this WQMP. Records of inspections and BMP maintenance shall be kept by the Owner and shall be available for review upon request. Frequency: Ongoing	Private Areas: HOA Public Areas: City of Newport Beach
No	N5. Title 22 CCR Compliance (How development will comply)	Not Applicable	
No	N6. Local Industrial Permit Compliance	Not Applicable	

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX			
BMP Applicable? Yes/No	**BMP Name and BMP Implementation, Maintenance and Inspection Procedures**	**Implementation, Maintenance, and Inspection Frequency and Schedule**	**Person or Entity with Operation & Maintenance Responsibility**
No	N7. Spill Contingency Plan	Not Applicable	
No	N8. Underground Storage Tank Compliance	Not Applicable	
No	N9. Hazardous Materials Disclosure Compliance	Not Applicable	
No	N10. Uniform Fire Code Implementation	Not Applicable	
Yes	N11. Common Area Litter Control The HOA will be responsible for performing trash pickup and sweeping of littered common areas as needed and weekly at a minimum. Any trash/debris waste collected shall be properly disposed of in accordance with local regulations. Responsibilities will also include noting improper disposal of materials by the public and reporting such violations for further investigation.	Litter patrol, violations investigations, reporting and other litter control activities shall be performed on a weekly basis and in conjunction with routine maintenance activities. Frequency: Weekly	Private Areas: HOA Public Areas: City of Newport Beach
Yes	N12. Employee Training All employees of the HOA and any contractors will require training to ensure that employees are aware of maintenance activities that may result in pollutants reaching the storm drain. Training will include, but not be limited to, spill cleanup procedures, proper waste disposal, housekeeping practices, etc.	Educate all new employees/ managers on storm water pollution prevention, particularly good housekeeping practices, prior to the start of the rainy season (October 1). Refresher courses shall be conducted on an as needed basis. Frequency: Annually	HOA

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX			
BMP Applicable? Yes/No	**BMP Name and BMP Implementation, Maintenance and Inspection Procedures**	**Implementation, Maintenance, and Inspection Frequency and Schedule**	**Person or Entity with Operation & Maintenance Responsibility**
Yes	N13. Housekeeping of Loading Docks No below-grade loading docks are proposed. Housekeeping measures will be implemented to keep any delivery areas clean and orderly condition. Includes sweeping, removal of trash & debris on a weekly basis, and use of dry methods for cleanup.	Sweep delivery areas weekly and remove any trash/debris. Keep area clean of trash and debris at all times. Spills shall be cleaned up immediately using dry methods. Frequency: Weekly	HOA
Yes	N14. Common Area Catch Basin Inspection All on-site storm drain inlets, curb and gutters and ribbon gutter systems shall be inspected and cleaned out by the HOA at least once a year, prior to the rainy season, no later than October 1st of each year. All public drainage facilities will be maintained by the City of Newport Beach.	Catch basin inlets and other drainage facilities shall be inspected after each storm event and once per year. Inlets and other facilities shall be cleaned prior to the rainy season, by October 1st each year. Frequency: Annually	Private Areas: HOA Public Areas: City of Newport Beach
Yes	N15. Street Sweeping Private Streets and Parking Lots The HOA shall be responsible for the street sweeping of all private street, drive aisles and parking areas within the project quarterly, and prior to the rainy season, no later than October 1st each year. The City of Newport Beach shall be responsible for sweeping of public streets.	Streets & parking lots must be swept at least quarterly (every 3 months), including prior to the start of the rainy season (October 1st). Frequency: Quarterly	Private Areas: HOA Public Areas: City of Newport Beach
No	N16. Retail Gasoline Outlets	Not Applicable	
STRUCTURAL SOURCE CONTROL BMPs			

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX			
BMP Applicable? Yes/No	**BMP Name and BMP Implementation, Maintenance and Inspection Procedures**	**Implementation, Maintenance, and Inspection Frequency and Schedule**	**Person or Entity with Operation & Maintenance Responsibility**
Yes	**S1. Provide storm drain system stenciling and signage** The phrase "NO DUMPING! DRAINS TO OCEAN" or an equally effective phrase approved by the City, will be stenciled on all major storm drain inlets within the project site to alert the public to the destination of pollutants discharged into storm water. Stencils shall be in place by completion of construction.	Storm drain stencils shall be inspected for legibility, at minimum, once prior to the storm season, no later than October 1st each year. Those determined to be illegible will be re-stenciled as soon as possible. Frequency: Annually	Private Areas: HOA Public Areas: City of Newport Beach
No	**S2. Design and construct outdoor material storage areas to reduce pollution introduction**	Not Applicable	
Yes	**S3. Design and construct trash and waste storage areas to reduce pollution introduction** All trash and waste shall be stored in containers that have lids or tarps to minimize direct precipitation into the containers. Any trash storage areas will be paved, covered, and either be sloped to landscaping areas or include a barrier to keep drainage out of the storm drain.	Sweep trash area at least once per week and before October 1st each year. Maintain area clean of trash and debris at all times. Frequency: Weekly	HOA

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX			
BMP Applicable? Yes/No	**BMP Name and BMP Implementation, Maintenance and Inspection Procedures**	**Implementation, Maintenance, and Inspection Frequency and Schedule**	**Person or Entity with Operation & Maintenance Responsibility**
Yes	**S4. Use efficient irrigation systems & landscape design, water conservation, smart controllers, and source control** Irrigation systems would be designed to meet City standards for water efficient landscaping, as applicable in accordance with Newport Beach Municipal Code Chapter 14.17 and Chapter 5 (Master Landscape Plan) of the Master Development Plan. Where feasible, includes incorporation of native tolerant species for landscaping, protection of slopes and efficient irrigation. May be used in conjunction with educational materials to homeowners/tenants as well as activity restrictions.	In conjunction with routine maintenance activities, verify that landscape design continues to function properly by adjusting properly to eliminate overspray to hardscape areas, and to verify that irrigation timing and cycle lengths are adjusted in accordance with water demands, given time of year, weather, and day or night time temperatures. Frequency: Monthly	Private Areas: HOA Public Areas: City of Newport Beach
Yes	**S5. Protect slopes and channels and provide energy dissipation** All disturbed slopes will be re-vegetated and stabilized to prevent erosion. A diffuser basin will be located downstream of the Southern Arroyo and Storm Drains B and C to provide channel stability, dissipate erosive energy before flows enter the Semeniuk Slough, and control sediment contributions to the Semeniuk Slough. A diffuser basin will also be installed downstream of Storm Drains D and Storm Drain E to reduce the momentum of the flows from the pipes and to spread the distribution of runoff to the Lowland in a manner that will enable future habitat restoration efforts.	To be performed in conjunction with maintenance activities. Maintain vegetative cover and/or mulch to eliminate exposed soils. Any eroded surfaces to be repaired immediately. Inspections to be performed twice each year (spring and fall) and after major storm events to check for signs of erosion, gullies, and sloughing. Frequency: Monthly	HOA

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX			
BMP Applicable? Yes/No	BMP Name and BMP Implementation, Maintenance and Inspection Procedures	Implementation, Maintenance, and Inspection Frequency and Schedule	Person or Entity with Operation & Maintenance Responsibility
No	S6. Dock areas	Not Applicable	
No	S7. Maintenance bays	Not Applicable	
No	S8. Vehicle wash areas	Not Applicable	
No	S9. Outdoor processing areas	Not Applicable	
No	S10. Equipment wash areas	Not Applicable	
No	S11. Fueling areas	Not Applicable	
No	S12. Hillside landscaping	Not Applicable	
Yes	S13. Wash water control for food preparation areas All wash water from food preparation areas will be conveyed to the site's sewer system. Food preparation facilities shall meet all health and safety, building and safety and any other applicable regulations, codes requirements. Grease interceptors will be located in the sewer lines were applicable.	Food preparation areas will be inspected on a regular basis to ensure proper waste disposal and water usage procedures. Any grease interceptors shall be inspected and maintained in accordance with manufacturer's recommendations (typically quarterly). Frequency: Quarterly	HOA / Resort Operator
No	S14. Community car wash racks	Not Applicable	

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX		
BMP Name and BMP Implementation, Maintenance and Inspection Procedures	Implementation, Maintenance, and Inspection Frequency and Schedule	Person or Entity with Operation & Maintenance Responsibility

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX		
BMP Name and BMP Implementation, Maintenance and Inspection Procedures	**Implementation, Maintenance, and Inspection Frequency and Schedule**	**Person or Entity with Operation & Maintenance Responsibility**
LOW IMPACT DEVELOPMENT BMPs		
Biotreatment BMP: Landscaped Biocells Landscaping biocells, which will be incorporated into select portions of the parkway bioswales identified in the arterial and collector street cross sections on TTM 17308. These features function as a soil and plant-based filtration device that removes pollutants through a variety of physical, biological, and chemical treatment processes.	Inspections should occur semi-annually or after major storm events to check for the following and remove accordingly: standing water, sediment, and trash & debris. Inspections should also look for potential clogging and clean planters or, if necessary, replace the entire filter bed. Inspect for weeds, and prune and/or replace plants in accordance with routine landscape maintenance activities. Replace mulch as necessary. Conduct routine mowing of grass in swale to maintain appropriate grass height. Frequency: 2x per year	Private Areas: HOA Public Areas: City of Newport Beach
Biotreatment BMP: Bioretention Cells The proposed project will incorporate water quality bioretention cells to provide the backbone treatment system for the majority of the project site. Bioretention cells (also known as rain gardens or biocells) are vegetated basins that promote filtration of storm water runoff. They combine shrubs, grasses, and flowering perennials in depressions (approximately 6 to 8 inches deep) that allow water to pool, infiltrate, evaporate and/or slowly drain out within 48 to 72 hours.	Inspections should occur semi-annually or after major storm events to check for the following and remove accordingly: standing water, sediment, and trash & debris. Inspections should also look for potential clogging and clean planters or, if necessary, replace the entire filter bed. Inspect for weeds, and prune and/or replace plants in accordance with routine landscape maintenance activities. Replace mulch and prune shrubs as necessary. Frequency: 2x per year	Private Areas: HOA Public Areas: City of Newport Beach

BMP INSPECTION & MAINTENANCE RESPONSIBILITY MATRIX		
BMP Name and BMP Implementation, Maintenance and Inspection Procedures	**Implementation, Maintenance, and Inspection Frequency and Schedule**	**Person or Entity with Operation & Maintenance Responsibility**
TREATMENT CONTROL BMPs		
Treatment Control BMP: Extended Detention Basin One water quality extended detention basin will be implemented to accommodate the off-site treatment of urban runoff from areas tributary to the Southern Arroyo. The basin will also provide detention capabilities to reduce peak flow runoff discharging into the Southern Arroyo. Extended detention basins are basins whose outlets have been designed to detain storm water runoff for some minimum time (e.g., 48-72 hours) to allow particles and associated pollutants to settle. They do not have a permanent pool and are designed to drain completely between storm events.	Inspections should occur for standing water, slope stability, sediment accumulation, trash & debris, and presence of burrows at the beginning and end of wet season at a minimum. Routine maintenance includes trash and debris removal in the basin and around the riser pipe. Inspect for weeds, and prune and/or replace plants in accordance with routine landscape maintenance activities. Remove accumulated sediment when volume exceeds 10% of the basin volume, typically every 10 years. Frequency: 2x per year	HOA

Any waste generated from maintenance activities will be disposed of properly. Wash water and other waste from maintenance activities is not to be discharged or disposed of into the storm drain system. Clippings from landscape maintenance (i.e. prunings) will be collected and disposed of properly off-site, and will not be washed into the streets, local area drains/conveyances, or catch basin inlets.

Required Permits

Pending – to be provided in the Final WQMP.

Forms to Record BMP Implementation, Maintenance, and Inspection

The form that will be used to record implementation, maintenance, and inspection of BMPs is attached.

Recordkeeping

All records must be maintained for at least five (5) years and must be made available for review upon request.

RECORD OF BMP IMPLEMENTATION, MAINTENANCE, AND INSPECTION

Today's Date: _____

Name of Person Performing Activity (Printed): _____

Signature: _____

BMP Name (As Shown in O&M Plan)	Brief Description of Implementation, Maintenance, and Inspection Activity Performed

APPENDIX E

CONDITIONS OF APPROVAL

(Placeholder – pending issuance)

APPENDIX F

MEMORANDUM ON LIMITATIONS FOR INFILTRATION

GMU GEOTECHNICAL, INC.

23241 Arroyo Vista
Rancho Santa Margarita
CA 92688

voice: 949.888.6513
fax: 949.888.1380
web: www.gmugeo.com

Memorandum

To: Ian Adam

Company: Fuscoe Engineering, Inc.

From: Greg Silver, GMU Geotechnical

Date: February 3, 2012

Subject: Newport Banning Ranch Infiltration Feasibility Assessment

GMU Project No.: 06-163-08

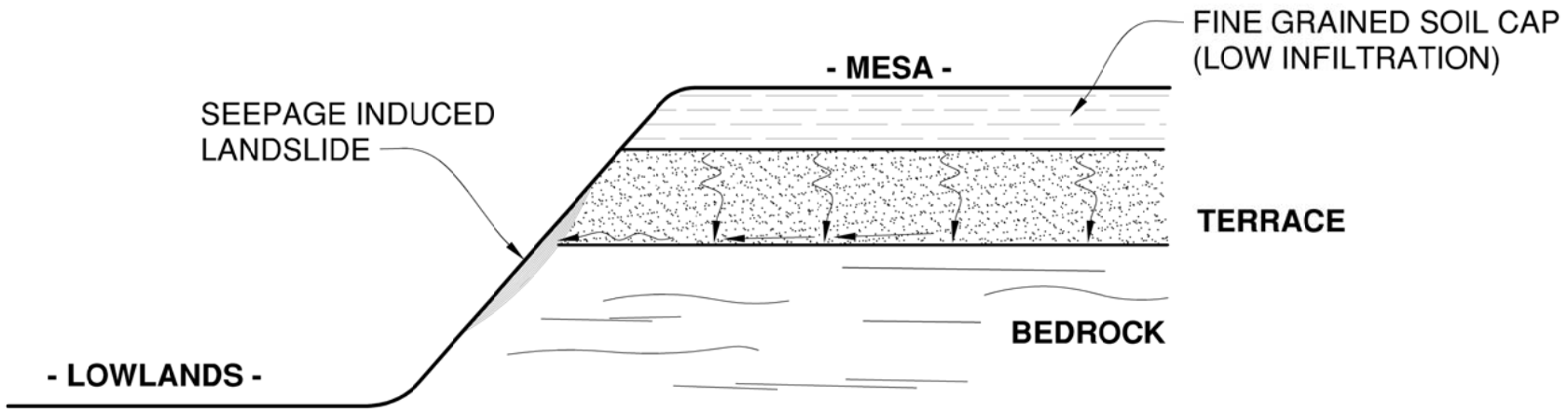
Newport Banning Ranch
Infiltration Feasibility Assessment

Infiltration within the upper Mesa will be either infeasible based on slope stability concerns and or limited due to soil type and future grading. The generalized soil stratigraphy of the upper Mesa consists of sandy marine terrace deposits (Group A soils) underlain by bedrock of the San Pedro formation and overlain by a well developed fine grained soil profile. The upper fine grained soil profile ranges from 1-2 feet to upwards of about 10 feet in thickness and generally consists of silty to sandy clays (Type D Soils) with low infiltration rates. The San Pedro formation generally consists of moderately indurated (i.e. cemented) siltstones and clayey siltstones which would be categorized as impermeable. Prior to development the upper 5 feet will be removed and re-compacted and placed as engineered fill (i.e. also impermeable).

Given the above soil stratigraphy, shallow infiltration would be precluded due to low infiltration of the upper soil zone and future engineered fills. Deep infiltration into the bedrock is likewise also not feasible. Infiltration below the upper fine grained zone into the Marine Terrace deposits is feasible from an infiltration perspective. However, seepage into this zone would "perch" on top of the bedrock and flow towards the bluff face (see exhibit A) causing local slope instability. The local bluff stability would also lead to increased rates of erosion potentially damaging proposed improvements. This phenomenon is recognized by the City of Newport Beach and is why the City limits infiltration on development areas adjacent to coastal bluffs.

Soils in the lowland area are composed of river alluvial deposits which are generally granular in nature (i.e. Group A soils) and coarsen downwards. However there are areas which are capped with a zone containing lenses of finer grained sandy silts to silty clays (Group B to Group D soils). The groundwater table is largely within a few of feet of mean sea level or roughly 5 to 10 feet below existing topographic grade. Infiltration rates for the granular soils in the lowland areas should be high.

Attachment: Mesa Seepage Exhibit



LEGEND

INFILTRATION SEEPAGE PATHS

EXHIBIT A - MESA SEEPAGE PATHS

NEWPORT BANNING RANCH		
GMU GEOTECHNICAL INC.	Date:	DECEMBER 13, 2011
	Project No.:	06-163-08

APPENDIX G

PLANNING-LEVEL WATER QUALITY MODELING

Geosyntec consultants

2100 Main Street, Suite 150
Huntington Beach, CA 92648
PH 714.969.0800
FAX 714.969.0820
www.geosyntec.com

TECHNICAL MEMORANDUM

Date: 03 February 2012

To: Michael Klancher, Aera Energy

Cc: Ian Adam, Fuscoe Engineering

From: Aaron Poresky and Eric Smalstig, Geosyntec Consultants

Subject: Newport Banning Ranch – Planning-Level Water Quality Modeling
Orange County, California
Geosyntec Project: HR1018B

EXECUTIVE SUMMARY

Geosyntec has conducted water quality modeling of the Newport Banning Ranch proposed development project (Project) as described in the Draft Environmental Impact Report (DEIR) [2011] to predict anticipated changes in stormwater runoff quality and quantity for proposed versus existing conditions. For the Project, stormwater runoff originates from both upland (i.e., mesa) and lowland areas of the Newport Banning Ranch site, as well as contributing runoff from a portion of already-developed surrounding properties. The runoff is discharged to the wetland canals adjacent to the mouth of the Santa Ana River, near its intersection with the Pacific Ocean. Details of the Project description and site setting are presented in the DEIR [2011]. This memorandum provides an overview of the modeling methodology, model inputs and assumptions, and provides model estimates of changes in runoff quantity and quality associated with the Project.

The results of planning-level water quality modeling demonstrate: (i) a calculated increase in stormwater runoff volume, (ii) limited calculated overall changes in pollutant loads (existing versus post-development condition), and (iii) improved calculated water quality (i.e., reduced concentrations) in the post-development condition given the change in land uses and implementation and maintenance of project design features (PDF). The water quality modeling should be considered preliminary, and if changes are contemplated in the development plan, the preliminary water quality results presented herein should be reviewed to reflect any modified Project plan. Additional detail regarding the modeling methodology, inputs, assumptions, and results can be provided upon request.

OVERVIEW OF MODELING METHODOLOGY

An empirical, stochastic, load-based water quality model was used to estimate pollutant loads and concentrations in stormwater runoff for certain pollutants of concern for three conditions: (1) existing conditions, (2) post-development conditions without best management practices (BMPs), and (3) post-development conditions with structural treatment BMPs. The water quality model is one of the few models that accounts for the observed variability in stormwater hydrology and water quality. This is accomplished by characterizing the probability distribution of observed rainfall event depths, the probability distribution of event mean concentrations, and the probability distribution of the number of storm events per year. These distributions are then sampled randomly using a Monte Carlo approach to develop estimates of calculated average annual loads and concentrations. This type of modeling methodology is appropriate for DEIR planning-level analyses in support of California Environmental Quality Act (CEQA) impact analyses.

OVERVIEW OF MODEL INPUTS

Inputs to the Monte Carlo model are derived from empirical sources (Los Angeles County Land Use Monitoring Program and the ASCE International BMP Database) and deterministic modeling of hydrology and hydraulics (EPA SWMM4.4h). This approach makes use of robust land use and BMP monitoring datasets applicable to the Project and incorporates important causal relationships in hydrologic and hydraulic response that can be reliably represented with deterministic methods. Table 1 summarizes the inputs to the model.

Table 1: Model Input Requirements and Assumptions

Model Input	Assumption/Source
Hourly long-term rainfall record	• National Climatic Data Center (NCDC) Laguna 2 Gage (COOP 044650), patched with scaled data from Trabuco Canyon (COOP 048992) and Santiago Dam (COOP 047987). Period of simulation: 1952 – 2001.
Long term average evapotranspiration	• Watershed Assessment Report, Fuscoe Engineering (2010)
Green-Ampt soil parameters	• Mesa and Upland Areas: C/D soils • Lowland Areas: A/B soils • Southern Arroyo: A/B soils (Correspondence, Greg Silver, GMU; James and James, 2000)
Land use acreages (See Tables 2 and 3)	• Existing conditions: GIS shapefiles provided by Fuscoe Engineering delineating oil activities and vacant land (received January 9, 2012) • Proposed conditions: EIR Table 3-1 and GIS shapefile, Fuscoe Engineering • Off-site drainage: GIS shapefiles, Fuscoe Engineering (received January 9, 2012)
Land use-based imperviousness	• Conceptual Drainage Exhibits (Watershed Assessment Report) and Tables (Fuscoe Engineering), with inspection of aerial photography

Model Input	Assumption/Source
Land use-based stormwater runoff event mean concentrations	• Los Angeles County 1994-2000 Integrated Receiving Water Impacts Report, 2000 • Los Angeles County 2000-2001 Stormwater Monitoring Report, 2001 • Ventura County Watershed Protection District • As analyzed for the Los Angeles Structural BMP Prioritization and Assessment Tool (LACDPW, City of Los Angeles, and Heal the Bay, 2008)
BMPs treatment program analyzed quantitatively[1]	• On-site developed land uses: generic biofiltration BMPs (Assumed to be sized to capture 80 percent of average annual runoff volume per Model WQMP performance standard; actual ultimate configurations may vary) • Off-site area plus 2.4 acres of on-site park land use: dry extended detention basin (Volume = 2.3 ac-ft, drawdown time = 48 hours)
BMP effluent quality	• ASCE/USEPA (American Society of Civil Engineers Urban Water Resources Research Council and United States Environmental Protection Agency) 2011, International Stormwater Best Management Practices Database (www.bmpdatabase.org); (Reanalysis of expanded database , December 2011) • Biofiltration BMP effluent quality estimated from Bioretention and Media Filter categories in BMP Database. • Extended detention BMP effluent quality estimated from Detention Basin category in BMP Database

[1] The Watershed Assessment Report [Fuscoe, 2010] describes several potential BMP options which may ultimately be used. For the purposes of modeling, a baseline generic biofiltration BMP was simulated to represent the anticipated lowest potential level of treatment consistent with the Watershed Assessment Report Project commitments and the Orange County Model Water Quality Management Plan [Orange County, 2011].

The land use areas analyzed for this analysis are listed in Table 2 and Table 3 below.

Table 2: Modeled Existing Conditions - Project including Off-Site Contribution

Land Use	Development Area (acres)
Vacant	226.9
Oil Operations[1]	174.2
On-site Total	*401.1*
Off-site Residential	11.7
Off-site Commercial	31.9
Off-site Industrial	1.8
Off-site Total	*45.4*

[1] Oil operations are as delineated by Fuscoe Engineering (shapefile, received January 9, 2012). Based on Geosyntec visual inspection of aerial photographs, oil operations areas delineated in the Fuscoe shapefile were modeled assuming 85 percent of area has vacant land use runoff quality characteristics and 15 percent has industrial land use runoff quality characteristics.

Table 3: **Modeled Developed Conditions – Project including Off- Site Contribution**

Land Use		Gross Acres	Modeled Acres[1]
L	Low Density Residential (up to 8 du/ac)	26.1	25.8
LM	Low-Med Density Residential (up to 16 du/ac)	11.8	11.8
M	Medium Density Residential (up to 24 du/ac)	27.3	24.3
MU/R	Mixed Use/Residential (up to 40 du/ac)	20.9	18.3
VSR	Visitor Serving Resort/Residential	11.3	11.1
PPR-B	Bluff Park	20.9	20.1
PPR-C	Community Park	26.8	21.7
PPR-I	Interpretive Park	3.7	3.0
UOS/PTF	Upland Open Space	105.2	99.7
LLOS/PTF	Lowland Open Space	130.6	130.6
OF[2]	Interim Oil Facilities	16.5	16.5
-	Arterials[1]	-	18.3
	On-site Total	*401.1*	*401.1*
Off-site Residential		11.7	11.7
Off-site Commercial		31.9	31.9
Off-site Industrial		1.8	1.8
	Off-site Total	*45.4*	*45.4*

Source: DEIR Table 3-1 and associated shapefiles received from Fuscoe Engineering (received January 9, 2012).

[1] Arterial streets were subtracted from gross land use acreages and modeled as a separate land use type for purposes of estimating impervious and runoff quality. Minor roads were modeled assuming the characteristics of their adjacent land use types.

[2] Interim Oil Operations land use was modeled assuming 50 percent of area has vacant land use runoff quality characteristics and 50 percent of area has industrial land use runoff quality characteristics. This assumption was based on visual inspection of current oil operations in parcels proposed to be Interim Oil Facilities, and input from Fuscoe Engineering [Personal Correspondence, Ian Adam, 2011 & 2012] that the uses of these parcels will not change significantly after development.

KEY MODEL ASSUMPTIONS AND RELIABILITY

Water quality modeling requires a number of assumptions to be made about the project conditions and the stormwater BMPs that are proposed to control stormwater volume and pollutant loads. The most significant assumptions related to the Project are summarized below.

- While no BMP is truly impervious, for the purposes of this modeling analysis, stormwater BMPs were assumed to be lined with impervious barriers, thereby greatly reducing the potential for volume losses from infiltration. This is based on preliminary geotechnical findings [Personal Correspondence, Fuscoe Engineering, 2011 & 2012] suggesting that infiltration may cause geotechnical hazards. Additionally, the plant palette in the BMPs was assumed to be drought-tolerant per current state water conservation mandates and therefore was estimated to provide a relatively low level of evapotranspiration losses. As a result, the modeled BMPs provide relatively little volume reduction and likely underestimate the stormwater runoff volume reductions that would

actually occur from management of runoff in biofiltration BMPs. This has the effect of producing somewhat conservative estimates of increases in volume and pollutant loads. This assumption is believed to be appropriate at this time at it provides a low estimate of BMP performance and allows flexibility for a wide variety of biofiltration BMPs to ultimately be used in final designs, as final designs are likely to result in reduced runoff volumes and pollutant loads when compared to the model results.

- As development improvements are focused on the upland areas of the Site, a potential water quality and/or infiltration basin may be located in the lowland area of the Project away from the bluffs, and could potentially address stormwater runoff from a major portion of the development. Because of uncertainty regarding potential restoration activities in the lowland area, this basin was not assumed to exist for the purpose of modeling. This has the effect of producing somewhat conservative estimates of increases in runoff volume and pollutant loads.

- Fuscoe Engineering provided delineation of areas in the existing condition of the site that currently support industrial oil and gas operations. Within these areas, land cover ranges from apparently minimally disturbed vacant area to apparently highly disturbed industrial areas. Based on a review of aerial photography and site photographs, the delineated oil operations areas were modeled assuming that 85 percent of this area has vacant land use runoff quality characteristics and 15 percent has industrial land use runoff quality characteristics. The vacant portions of the oil and gas operations areas were assumed to have an effective imperviousness of approximately 30 percent based on the presence of highly compacted dirt and gravel roads. The industrial portions of the oil operations areas were assumed to have an effective imperviousness of 50 percent based on the presence of highly compacted dirt and gravel roads and gravel pads. While not truly impervious, the assumption that compacted dirt and gravel areas will behave as partially impervious is intended to account for high runoff potential from compacted dirt and gravel roads. The same assumed effective imperviousness was applied to the existing and proposed conditions, thereby reducing the sensitivity of this assumption. The remaining vacant area in the existing condition was assumed to have no effective impervious surface. These estimates have not been verified with runoff monitoring data, but are believed to be generally reliable and perhaps conservatively low for estimating existing condition calculated average runoff quality and quantity.

- In the proposed condition, it was assumed that oil and gas operations will cease in all areas except the interim oil facility, and that soils in the restored areas will be remediated such that runoff quality would resemble vacant land use instead of industrial land use. Due to the uncertainty related to potential restoration activities, it was assumed that

effective impervious surfaces would not be remediated. For modeling of the developed condition, the same level of effective impervious surface was assumed to remain in the developed condition as was assumed to be present in the existing condition. This tends to result in greater runoff predicted in the proposed condition than would be calculated if compacted surfaces were assumed to be remediated by the Project.

- Runoff from the interim oil facility will be managed per the applicable industrial permit for that site. However, because of uncertainty regarding the level of treatment that will be provided, it was assumed that the interim oil facility will not be treated for the purpose of this analysis. This has the effect of resulting in a conservatively high estimate of developed condition runoff volume and pollutant loads.

- The appropriate form of data for use in water quality load modeling are flow composite storm event samples, which are a measure of the average water quality during the event. To obtain such data usually requires automatic samplers that collect data at a frequency that is proportionate to flow rate. Some pollutants of concern, such as pathogens, hydrocarbons, pesticides, and trash and debris, are not amenable to this type of sampling either because of short required holding times (e.g., pathogens), difficulties in obtaining a representative sample (e.g., hydrocarbons, trash and debris), or low detection levels (e.g., pesticides). Therefore, these pollutants were not modeled due to the lack of statistically reliable monitoring data for these pollutants.

Additionally, there are a number of assumptions that were made that are not included in this list. Additional documentation regarding model assumptions and reliability can be provided upon request.

WATER QUALITY MODEL RESULTS

Table 4 below shows the predicted changes in estimated mean annual stormwater runoff volume and pollutant loads for the modeled pollutants of concern for the Project area plus off-site areas draining to Project BMPs. Table 5 below shows the predicted changes in estimated mean annual concentration in stormwater runoff for the modeled pollutants of concern for the Project area plus off-site areas draining to Project BMPs. Table 6 below shows the predicted changes in estimated mean annual stormwater runoff volume and pollutant loads for the modeled pollutants of concern for the off-site areas draining to Project BMPs. Table 7 below shows the predicted changes in estimated mean annual concentration in stormwater runoff for the modeled pollutants of concern for the off-site areas draining to Project BMPs

Model estimates are intended to provide an indication of the central tendency of predicted stormwater runoff characteristics and the potential changes in these characteristics that are

predicted to result from development. Model estimates do not forecast runoff characteristics for specific storms or monitoring periods. Model estimates reported in Table 4 through Table 7 are intended for planning level evaluation of potential Project impacts as part of the CEQA process, and are highly dependent on proper BMP implementation and maintenance. In general, relative differences between existing and developed conditions are considered more reliable than absolute results.

Table 4: Predicted Calculated Average Annual Runoff Volume and Pollutant Loads, On-site plus Off-site

Parameter	Units	Existing Conditions	Developed Conditions w/o PDFs	Developed Conditions w/ PDFs	Change
Volume	acre-ft	108	155	154	46
TSS	tons/yr	25	25	16	-9
Total Phosphorous	lbs/yr	71	138	83	12
Dissolved Phosphorus	lbs/yr	52	107	64	12
Nitrate-N	lbs/yr	280	397	246	-34
Ammonia-N	lbs/yr	136	241	114	-22
Total Kjeldahl Nitrogen	lbs/yr	570	954	667	97
Dissolved Copper	lbs/yr	1.7	4.2	2.5	0.8
Total Copper	lbs/yr	5.6	9.5	5.2	-0.4
Total Lead	lbs/yr	2.2	3.5	2.0	-0.2
Dissolved Zinc	lbs/yr	31	41	26	-5
Total Zinc	lbs/yr	43	62	30	-13

Notes: Project design features (PDFs). Model results are rounded per the following convention: results are rounded to a uniform level of precision for each parameter such that at least one significant figure is reported for each value, or such that numbers are rounded to the nearest integer, whichever results in greater precision. The number of reported significant figures is intended to prevent introduction of rounding errors; it is not intended to imply model prediction certainty.

Table 5: **Predicted Calculated Average Annual Pollutant Concentrations, On-site plus Off-site**

Parameter	Units	Existing Conditions	Developed Conditions w/o PDFs	Developed Conditions w/ PDFs	Change
TSS	mg/L	171	117	72	-99
Total Phosphorous	mg/L	0.3	0.3	0.2	-0.1
Dissolved Phosphorus	mg/L	0.18	0.26	0.15	-0.03
Nitrate-N	mg/L	1.0	0.9	0.6	-0.4
Ammonia-N	mg/L	0.5	0.6	0.3	-0.2
Total Kjeldahl Nitrogen	mg/L	2.0	2.3	1.6	-0.4
Dissolved Copper	µg/L	6.1	10.1	5.9	-0.2
Total Copper	µg/L	20	23	12	-8
Total Lead	µg/L	8	8	5	-3
Dissolved Zinc	µg/L	111	100	60	-51
Total Zinc	µg/L	150	149	69	-81

Note: Model results are rounded per the following convention: results are rounded to a uniform level of precision for each parameter such that at least one significant figure is reported for each value, or such that numbers are rounded to the nearest integer, whichever results in greater precision. The number of reported significant figures is intended to prevent introduction of rounding errors; it is not intended to imply model prediction certainty.

Table 6: Predicted Calculated Average Annual Runoff Volume and Pollutant Loads, Off-site Only

Parameter	Units	Existing Conditions	Developed Conditions w/ PDFs	Change
Volume	acre-ft	36	35	-1
TSS	tons/yr	4	2	-2
Total Phosphorous	lbs/yr	38	27	-11
Nitrate-N	lbs/yr	99	50	-49
Dissolved Copper	lbs/yr	1.1	0.7	-0.4
Total Copper	lbs/yr	2.8	1.4	-1.4
Total Lead	lbs/yr	1.2	0.6	-0.6
Total Zinc	lbs/yr	20	10	-10

Notes: Project design features (PDFs). Model results are rounded per the following convention: results are rounded to a uniform level of precision for each parameter such that at least one significant figure is reported for each value, or such that numbers are rounded to the nearest integer, whichever results in greater precision. The number of reported significant figures is intended to prevent introduction of rounding errors; it is not intended to imply model prediction certainty. Results are not reported for dissolved phosphorus, ammonia, total Kjeldahl nitrogen, and dissolved zinc because dry extended detention basins have not been found to provide statistically significant removal for these constituents.

Table 7: **Predicted Calculated Average Annual Pollutant Concentrations, Off-site Only**

Parameter	Units	Existing Conditions	Developed Conditions w/ PDFs	Change
TSS	mg/L	87	45	-42
Total Phosphorous	mg/L	0.4	0.3	-0.1
Nitrate-N	mg/L	1.0	0.5	-0.5
Dissolved Copper	µg/L	12	7	-5
Total Copper	µg/L	28	14	-14
Total Lead	µg/L	12	6	-6
Total Zinc	µg/L	210	99	-111

Note: Model results are rounded per the following convention: results are rounded to a uniform level of precision for each parameter such that at least one significant figure is reported for each value, or such that numbers are rounded to the nearest integer, whichever results in greater precision. The number of reported significant figures is intended to prevent introduction of rounding errors; it is not intended to imply model prediction certainty. Results are not reported for dissolved phosphorus, ammonia, total Kjeldahl nitrogen, and dissolved zinc because dry extended detention basins have not been found to provide statistically significant removal for these constituents.

REFERENCES

American Society of Civil Engineers Urban Water Resources Research Council and United States Environmental Protection Agency) 2011, International Stormwater Best Management Practices Database (www.bmpdatabase.org)

Fuscoe Engineering. 2010 (January). Newport Banning Ranch Watershed Assessment Report, Design Applications for Hydrology, Flood Control, Water Quality, and Low Impact Development Features, City of Newport Beach, CA. Irvine, CA: Fuscoe. NBR DEIR Appendix C.

James, W. and R.C. James, 2000. Hydrology: A guide to the Rain, Runoff, and Temperature Modules of the USEPA SWMM4. CHI Publications, Guelph, Ontario.

Los Angeles County Department of Public Works (LACDPW), 2000. Los Angeles County 1994-2000 Integrated Receiving Water Impacts Report. Prepared by Los Angeles County Department of Public Works.

Los Angeles County Department of Public Works (LACDPW), 2001. Los Angeles County 2000-2001 Stormwater Monitoring Report.

Los Angeles County Department of Public Works (LACDPW), City of Los Angeles, and Heal the Bay, 2008. A User's Guide for the Structural BMP Prioritization and Analysis Tool (SBPAT v1.0). Prepared by Geosyntec Consultants for Heal the Bay, City of Los Angeles, and County of Los Angeles Department of Public Works. December 2008.

Orange County, 2011. Model Water Quality Management Plan. May 19, 2011.

Personal Correspondence, Ian Adam, Fuscoe Engineering. Various dates, December 2011 and January 2012.

Ventura County, 2005. Ventura County stormwater quality monitoring data, from various annual reports (http://www.vcstormwater.org/publications.htm)

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APPENDIX B

MATERIALS REFERENCED IN LETTERS O1b, O21b, O21c, O21d, O58c, O69a, O72, and O90e

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Items Th17.3 & 17.5

Staff: Andrew Willis-LB
Staff Report: April 1, 2011
Hearing Date: April 14, 2011

STAFF RECOMMENDATIONS AND FINDINGS FOR CONSENT CEASE AND DESIST AND RESTORATION ORDERS

CONSENT CEASE AND DESIST ORDER:	CCC-11-CD-03
CONSENT RESTORATION ORDER:	CCC-11-RO-02
RELATED VIOLATION FILE:	V-5-09-008
PROPERTY LOCATION:	Property identified by the Orange County Assessor's Office as Assessor Parcel Nos. (APNs) 424-041-04, 114-170-43, and 114-170-79 and adjacent City of Newport Beach property identified by the Orange County Assessor's Office as Assessor Parcel No. 424-041-10, all of which are located immediately inland of the 5000 block of W. Coast Highway
PROPERTY OWNERS:	Newport Banning Ranch, LLC,[1] as to the property described by the first three APNs and the City of Newport Beach as to the last.

[1] Newport Banning Ranch, LLC, manages planning and entitlement of the "Banning Ranch" surface rights for the property owners, Cherokee Newport Beach, LLC and Aera Energy, LLC. Hereinafter, all references to Newport Banning Ranch, LLC, (or "NBR") are to Newport Banning Ranch, LLC, Cherokee Newport Beach, LLC, and Aera Energy, LLC, jointly.

VIOLATION DESCRIPTION:	Unpermitted development, including removal of major vegetation, including vegetation comprising native plant communities and habitat for the federally threatened coastal California gnatcatcher; placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading.
PERSONS SUBJECT TO THESE ORDERS:	1. Newport Banning Ranch, LLC[2] 2. Southern California Edison 3. Herman Weissker, LLC 4. City of Newport Beach
SUBSTANTIVE FILE DOCUMENTS:	1. Newport Beach certified Land Use Plan 2. Public documents in Cease and Desist and Restoration Order files No. CCC-10-CD-09 and CCC-09-RO-08 3. Exhibits #1 through 24 of this staff report
CEQA STATUS:	Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308 and 15321).

I. SUMMARY OF STAFF RECOMMENDATION AND FINDINGS

The Proposed Orders

Staff recommends that the Commission approve Consent Cease and Desist No. CCC-11-CD-03 and Restoration Order No. CCC-11-RO-02, attached to this staff report ("Consent Orders"), addressing the unpermitted removal of major vegetation (including vegetation comprising native plant communities and habitat for the federally threatened coastal California gnatcatcher – a bird species) and the results thereof; and the unpermitted placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading (Exhibit #3), in violation of the Coastal Act.

The unpermitted development occurred in three areas totaling 1.01 acres (referred to by their relative locations as "Northwest Polygon," "Northeast Polygon," and "Southeast

[2] See fn1.

Polygon")(Exhibit #4) of portions of land owned by Newport Banning Ranch, LLC ("NBR") and the City of Newport Beach ("City"). [3] The NBR properties are located on "Banning Ranch," described below, and the City property is continuous to the southeast (Exhibits #1 and 2). The Orange County Assessor's office identifies the properties as Orange County Assessor's Parcel Nos. 424-041-04, 424-041-10, 114-170-43, and 114-170-79 (hereinafter referred to as the "Subject Properties"), all of which are located immediately inland of the 5000 block of W. Coast Highway, Orange County.

Banning Ranch is a Deferred Area of Certification in unincorporated Orange County, and therefore the Commission has sole permitting and enforcement jurisdiction in this area. Section 2.2.4 of the Commission-certified Newport Beach Land Use Plan ("LUP") describes the Banning Ranch property as follows:

> *Banning Ranch consists of 505 acres located north of the Semeniuk Slough and West Coast Highway and east of the Santa Ana River. Nearly all of Banning Ranch (454 acres) is located within the City's sphere of influence in unincorporated Orange County. Oil and gas operations are conducted throughout the County portion of the property (West Newport Oil Field) pursuant to California Coastal Commission Exemption E-144. These operations consist of 483 producing, idle, injection, and abandoned well sites and related service roads, pipelines, storage, and other facilities. The property contains a number of sensitive habitat types, including southern coastal bluff scrub, alkali meadow, southern coastal saltmarsh, southern black willow forest, coastal brackish marsh, and vernal pools. The property also contains steep coastal bluffs along the southern and western edges of the mesa. The bluff faces have been eroded in some areas to form a number of gullies and ravines. Future land uses for Banning Ranch are currently under review as part of a comprehensive update of the City of Newport Beach General Plan.*

The City has submitted an application for a coastal development permit ("CDP") to authorize the Sunset Ridge Park project on portions of the subject properties.[4]

Pursuant to the terms of the Consent Orders, NBR, Herman Weissker, LLC ("HWI"), Southern California Edison ("SCE"), and the City (collectively, "Respondents") have agreed to, among other things: 1) remove all materials described in Section IV.A, below, including, but not limited to, the following: gravel, concrete, and construction materials from the impacted Polygons; 2) restore the Northwest and Southeast Polygons on the subject properties by planting coastal sage scrub vegetation native to Orange County that will provide foraging and breeding habitat for the coastal California gnatcatcher; 3) conduct a mitigation project involving revegetation of no less than 2.5 acres with native coastal sage scrub plant species that will provide foraging and breeding habitat for the coastal California gnatcatcher, at a ratio of 3:1 restoration to the

[3] The City of Newport Beach purchased its respective portion of the subject properties in December 2006 from the California Department of Transportation.

[4] The proposed active and passive park would include one baseball field and two soccer fields, a playground and picnic area, a memorial garden and an overlook with seating and shade structure, pedestrian paths, restroom facilities, parking, and habitat enhancement. Commission staff will be evaluating the City's proposed park project at a subsequent hearing.

Environmentally Sensitive Habitat Areas ("ESHA") impacted by the unpermitted development; and 4) cease and desist from conducting any further unpermitted development on the subject properties.

Commission staff has worked closely with Respondents to reach an agreement on the following Consent Orders to resolve the alledged Cosatal Act violations. Respondents, through these Consent Orders, collectively have agreed to resolve all Coastal Act violation matters addressed herein, including resolving Coastal Act claims under Coastal Act Sections 30820 and 30822. To that end, NBR and the City have agreed to restore the impacted Polygons and undertake a mitigation project in accordance with the Consent Orders and HWI and SCE have agreed to pay $300,000 in monetary penalties.

Coastal California Gnatcatcher

Habitat for the federally threatened coastal California gnatcatcher constitutes the predominant coastal resource affected by the unpermitted development that is the subject of these proceedings. The United States Fish and Wildlife Service designated all of Banning Ranch as critical habitat for the gnatcatcher because the area was occupied by the gnatcatcher at the time of listing of the species in 1993 and at the time of designation of critical habitat in 2007, and the area "contains all of the features essential to the conservation of the coastal California gnatcatcher." Final Rule p. 72040. Due to its rarity and ecological significance, the Commission has identified coastal sage scrub ("CSS") areas that provide habitat for the California gnatcatcher as ESHA.

Commission staff ecologist Dr. Jonna Engel visited the site and reviewed available biological information pertaining to the site, including biological reports submitted by the Respondents and the Banning Ranch Conservancy (including, but not limited to Exhibits #7, 9, 10, 12, 18, 20, 21, and 22), peer reviewed literature, and aerial photographs of the site in order to conduct a site-specific analysis to determine whether the impacted Polygons met the definition of ESHA prior to the unpermitted development. The results of Dr. Engel's assessment are included in a memo to staff, dated March 31, 2011 (Exhibit #5). Dr. Engel concludes that the Northwest and Southeast Polygons, prior to the unpermitted activities, were ESHA as that term is defined in Section 30107.5 of the Coastal Act, based on the presence of coastal scrub habitat and the history of gnatcatcher use in, and/or around, the polygons. Vegetation, and consequently the gnatcatcher habitat, on the Northwest and Southeast Polygons were destroyed by the violations on the subject properties.

Commission's Jurisdiction

The Commission has jurisdiction over permit and enforcement matters on the subject properties; the subject properties are in a Deferred Area of Certification in unincorporated Orange County within the City of Newport Beach's sphere of influence. The Commission has approved the City of Newport Beach LUP, however, the City does not have a certified Local Coastal Program.

Although Chapter 3 of the Coastal Act is the standard of review, the City LUP policies provide guidance in regards to development and enforcement matters.[5]

Requirements for Issuance of Cease and Desist and Restoration Orders

The Commission can issue a Cease and Desist Order under Section 30810 of the Coastal Act in cases where it finds that the activity that is the subject of the order has occurred either without a required CDP or in violation of a previously granted CDP. The Commission can issue a Restoration Order under Section 30811 of the Coastal Act, if it finds that development 1) has occurred without a CDP, 2) is inconsistent with Chapter 3 of the Coastal Act, and 3) is causing continuing resource damage. These criteria are all met in this case, as summarized briefly, below.

As described in more detail in Section IV of this staff report, the unpermitted activity that has occurred on the subject properties meets the definition of "development" set forth in Coastal Act Section 30106. Coastal Act Section 30600 states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a CDP. No such permit was issued by the Commission nor has a permit application been submitted for the subject unpermitted activities.

As discussed below, not only do the unpermitted activities meet the definition of development, and therefore require but lack a CDP, but the unpermitted development and the ongoing maintenance of the unpermitted development is also inconsistent with the Chapter 3 policies of the Coastal Act, including Section 30231 (biological productivity and water quality), 30240 (environmentally sensitive habitat areas or ESHA, and ESHA adjacent development)[6], Section 30251 (scenic and visual qualities), Section 30253 (minimization of adverse impacts), and policies within the City's LUP, as fully discussed below.[7]

The unpermitted development has adversely impacted coastal resources. Such impacts meet the definition of damage provided in Section 13190(b) of Title 14 of the California Code of Regulations ("CCR"), which defines "damage" as, "any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development." If the unpermitted development, including, but not limited to construction materials and areas cleared of native vegetation, is allowed to remain unmitigated, its effects will lead to further adverse

[5] The Commission may issue orders to enforce any requirement of a certified Local Coastal Plan in certain circumstances enumerated in Coastal Act Sections 30810 and 30811.

[6] Respondents have agreed that the jurisdictional pre-requisites for issuance and enforcement of these orders have been satisfied, including that Chapter 3 grounds exist to support these Consent Orders, but they do not agree with the conclusion that the Northwest and Southeast Polygons constituted environmentally sensitive habitat areas as defined by Coastal Act Section 30107.5. In furtherance of the intent of the parties to resolve these matters in settlement, Respondents and the Commission agree that the findings set forth in the Staff Report are determinative only as to the Impacted Areas, and shall not be binding on any future coastal development permit or other proceeding before the Coastal Commission on property other than the Impacted Areas. A separate analysis will be done by the Coastal Commission for any future coastal development permit or other proceeding before the Coastal Commission on the subject properties other than the Impacted Areas.

[7] A description of the Chapter 3 policies of the Coastal Act and the City LUP policies that apply to the subject property is provided in Section IV of this staff report.

impacts (including the temporal continuation of the existing impacts) to sensitive habitat. Thus, the continued presence of the unpermitted development on the subject properties is causing continuing resource damage, as defined in 14 CCR Section 13190.

Staff Recommendation

Staff recommends that the Commission approve Consent Cease and Desist Order CCC-11-CD-03 and Consent Restoration Order CCC-11-RO-02 to address the unpermitted development, and the results thereof, described below.

II. HEARING PROCEDURES

The procedures for a hearing on a Cease and Desist Order and Restoration Order are outlined in 14 CCR Section 13185 and 14 CCR Section 13195.

For a Cease and Desist Order and Restoration Order hearing, the Chair shall announce the matter and request that all parties or their representatives present at the hearing identify themselves for the record, indicate what matters are already part of the record, and announce the rules of the proceeding including time limits for presentations. The Chair shall also announce the right of any speaker to propose to the Commission, before the close of the hearing, any question(s) for any Commissioner, at his or her discretion, to ask of any other party. Staff shall then present the report and recommendation to the Commission, after which the alleged violator(s) or their representative(s) may present their position(s) with particular attention to those areas where an actual controversy exists. The Chair may then recognize other interested persons after which time Staff typically responds to the testimony and to any new evidence introduced.

The Commission will receive, consider, and evaluate evidence in accordance with the same standards it uses in its other quasi-judicial proceedings, as specified in 14 CCR Section 13186, incorporating by reference Section 13065. The Chair will close the public hearing after the presentations are completed. The Commissioners may ask questions to any speaker at any time during the hearing or deliberations, including, if any Commissioner chooses, any questions proposed by any speaker in the manner noted above. Finally, the Commission shall determine, by a majority vote of those present and voting, whether to issue the Cease and Desist Order and Restoration Order, either in the form recommended by the Executive Director, or as amended by the Commission. Passage of the motion below, per the Staff recommendation or as amended by the Commission, will result in issuance of the Cease and Desist Order and Restoration Order.

III. STAFF RECOMMENDATIONS

Staff recommends that the Commission adopt the following two motions:

1. Motion

I move that the Commission issue Consent Cease and Desist Order No. CCC-11-CD-03 pursuant to the staff recommendation.

Staff Recommendation of Approval

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Consent Cease and Desist Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Cease and Desist Order

The Commission hereby issues Consent Cease and Desist Order No. CCC-11-CD-03, as set forth below, and adopts the findings set forth below on grounds that development has occurred without a coastal development permit, in violation of the Coastal Act.

2. Motion

I move that the Commission issue Consent Restoration Order No. CCC-11-RO-02 pursuant to the staff recommendation.

Staff Recommendation of Approval

Staff recommends a **YES** vote. Passage of this motion will result in issuance of the Consent Restoration Order. The motion passes only by an affirmative vote of a majority of Commissioners present.

Resolution to Issue Consent Restoration Order

The Commission hereby issues Consent Restoration Order No. CCC-11-RO-02, as set forth below, and adopts the findings set forth below on the grounds that 1) development has occurred on the subject properties without a coastal development permit, 2) the development is inconsistent with the Coastal Act, and 3) the development is causing continuing resource damage.

IV. FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-11-CD-03 AND RESTORATION ORDER CCC-11-RO-02[8]

A. Description of Unpermitted Development

The development that is the subject matter of these Consent Orders is the development, as that term is defined in the Coastal Act (PRC § 30106), on the subject properties that required a coastal development permit but for which no such permit was obtained and that is described in the "Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings" dated October 5, 2010 ("NOI"), generally including: 1) removal of major vegetation, including vegetation comprising

[8] These findings also hereby incorporate by reference Section I of the April 1, 2011 staff report ("Staff Recommendations and Findings") in which these findings appear, which section is entitled "Summary of Staff Recommendations and Findings."

rare native plant communities and habitat for the federally threatened coastal California gnatcatcher; 2) placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and 3) grading. The unpermitted development at issue in this matter was undertaken at three separate and distinct areas on the subject properties. The three areas are referred to by names based on their locations, as the Southeast, Northwest, and Northeast Polygons. The roadway bisecting the Southeast polygon is not a part of the Southeast polygon. The subject unpermitted development commenced in 2004, continued regularly into 2006, and both the effects of such development continue, and materials placed on the Southeast polygon without a coastal development permit persist in place. Regrowth of major vegetation removed from the Southeast polygon has been extremely limited. The vegetation that has grown within the Northwest polygon does not serve the same habitat function as the major vegetation that was removed from the polygon.

B. History of Violations

The unpermitted development activities commenced between April 16, 2004 and October 23, 2004. On April 1, 2003, West Newport Oil Company, the operator of the West Newport Oil Field on Banning Ranch, described above, initially leased NBR property for "vehicle parking and storage" to a construction contractor, Herman Weissker, Inc. ("HWI"), which undertook utility undergrounding for Southern California Edison ("SCE") in nearby locations off the subject properties. In September 2004, contemporaneously with the clearance of the polygons, which, through the review of historic aerial photographs staff has determined to have occurred between April 16, 2004 and October 23, 2004, HWI again leased NBR property after SCE contracted with HWI to perform utility undergrounding at a nearby locations off the subject properties. HWI acknowledges that it utilized the cleared areas as staging areas for the undergrounding project. HWI again leased NBR property in September 2005 for work related to another SCE utility undergrounding project. HWI's lease ended in February 2006 (See Exhibit #24).

In April 2009, staff became aware of the unpermitted development while reviewing aerial photographs during an investigation of a report of mowing on the subject properties and adjacent properties. Through comparative analysis of historic aerial photographs, and subsequent investigation, including on-site investigation, staff confirmed the presence of unpermitted development, including but not limited to: removal of major vegetation, including vegetation comprising native plant communities and habitat for the federally threatened coastal California gnatcatcher; placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading.

Staff met with NBR on the site on September 3, 2009 to view the areas impacted by the unpermitted development at issue. Staff confirmed that development, including removal of major vegetation, placement of construction material, and grading, had occurred. At the site, staff observed graded areas where native vegetation had been removed and destroyed. Staff informed NBR representatives that they would review available information related to the cleared vegetation and habitat to determine the appropriate resolution. Commission staff researched the matter and confirmed that no application for a CDP had been submitted, and no CDP had been obtained, for any such activities.

Staff ecologist Dr. Jonna Engel toured the site on September 15, 2010 with other Commission staff and representatives of NBR, City, and SCE, in order to observe the nature and extent of the unpermitted development and document the extent and species composition of vegetation both surrounding the cleared Polygons and that had re-grown in the areas. Staff observed native coastal sage scrub species in and around the cleared polygons. Dr. Engel visited the site again with other Commission staff on December 15, 2010, to review the biological resources at and around the three polygons as well as to discuss the history of gnatcatcher use, the nature of gnatcatcher survey collection on the subject properties, and staff's approach to making an ESHA determination. Representatives of NBR, the City, SCE and USFWS accompanied staff on the site visit.

Based upon her site specific analysis of the vegetative communities on and adjacent to the areas impacted by the unpermitted development at issue, Dr. Engel determined that the Northwest and Southeast Polygons met the definition of ESHA at the time the subject unpermitted development was undertaken. The results of Dr. Engels's assessment are included in a memo to staff, dated March 31, 2011 (Exhibit #5). NBR and the City subsequently submitted documents explaining why they do not agree with the conclusion that the Northwest and Southeast Polygons constituted ESHA. However, as is explained below, that disagreement does not bear on the validity of these orders, since, through the signing of these Consent Orders, the City and NBR (as well as SCE and HWI) are agreeing not to contest the issuance or enforceability of these Consent Orders and agree that the Commission has met the criteria for issuance of these Consent Orders.

On October 5, 2010, pursuant to 14 CCR Section 13181 and 13191, the Commission's Executive Director formally initiated enforcement proceedings by sending Respondents an NOI (Exhibit #11), notifying them of his intent to record a Notice of Violation of the Coastal Act against the properties where the violations occurred and to commence proceedings for issuance of cease and desist and restoration orders to address unpermitted development at the subject properties. The NOI sent to Respondents included a detailed explanation of why the subject violations are "development" under the Coastal Act and how such activities meet the criteria of Sections 30810 and 30811 of the Coastal Act to commence proceedings for issuance of a cease and desist order and restoration order. The NOI noted that staff desired to work with Respondents to resolve the violations amicably and remained willing and ready to discuss options that could involve agreeing to a consensual resolution to the Coastal Act violations on the properties at issue, such as consent cease and desist and restoration orders.

In accordance with Sections 13181(a) and 13191(a) of the Commission's regulations, Respondents were provided the opportunity to respond to the Commission staff's allegations as set forth in the NOI by completing a Statement of Defense form ("SOD").

Since June 2009, Commission staff and respondents have worked extensively and collaboratively towards an amicable resolution of the issues related to the NOI. On April 1, 2011, Respondents signed Consent Cease and Desist Order No. CCC-11-CD-03 and Consent Restoration Order No. CCC-11-RO-02.

In order to amicably resolve the violations through these Consent Orders, Respondents agreed not to contest the legal and factual bases for, or the terms and issuance of, these Consent Orders**,** and have elected to settle this matter rather than to submit an SOD form. Specifically, Respondents have agreed not to contest the issuance or enforcability of these Consent Orders at a public hearing or any other proceeding. Respondents do not dispute that the jurisdictional pre-requisites for issuance and enforcement of these Consent Orders have been satisfied, including that Chapter 3 grounds exist to support these Consent Orders, but they do not agree with any conclusion that the Northwest and Southeast Polygons constituted ESHA as defined by Coastal Act Section 30107.5.

C. Basis for Issuance of Cease and Desist and Restoration Orders

The following sections provide the bases for issuance of these Consent Orders. Staff notes that the standard of review in this matter is the Coastal Act. However, because the Commission has certified the City of Newport Beach LUP portion of its Local Coastal Program, that document is also considered for the purposes of guidance, and relevant portions of the LUP are discussed herein as appropriate.

1. Basis for Issuance of a Cease and Desist Order

The Commission may issue a Cease and Desist Order to address violations of the Coastal Act. Those Orders may be subject to terms and conditions as necessary to ensure compliance with the Coastal Act. The statutory authority for issuance of the proposed Consent Order is provided in Coastal Act Section 30810, which states, in relevant part:

> *(a) If the commission, after public hearing, determines that any person…has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit … the commission may issue an order directing that person … to cease and desist.*
>
> *(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.*

The unpermitted development detailed above in Section IV.A has occurred on the subject properties without a CDP. The unpermitted development that is the subject of these Consent Orders meets the definition of "development" contained in Section 30106 of the Coastal Act. "Development" is defined by Section 30106 of the Coastal Act as follows, in relevant part:

> *"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land... change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any*

> *facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes…* (emphasis added)

The activities conducted on the subject properties, including but not limited to: removal of major vegetation, including vegetation comprising native plant communities and habitat for the federally threatened coastal California gnatcatcher; placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading clearly constitute, individually and collectively, development as defined in Coastal Act. As such, these actions are subject to the following permit requirements provided in Coastal Act Section 30600(a):

> *(a) Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone… shall obtain a coastal development permit.*

The Commission has not issued coastal development permits for any of the development at issue in this matter.

Any person wishing to undertake non-exempt development within the Coastal Zone is required to first obtain a CDP, in addition to any other permits required by law, unless otherwise exempt. Based on the prior use of the area for oil production, on October 30, 1973, the Commission's predecessor agency approved Resolution of Exemption No. E-7-27-73-144 to allow oil production activities to continue without a CDP. This resolution does not extend to development that is unrelated to oil operations. The violations at issue involve development undertaken for an off-site utility undergrounding project that has no connection to oilfield operations, thus, clearly the resolution does not exempt this activity from CDP requirements. Therefore, the standard has been met under Section 30810(a) for the Commission's issuance of CCC-11-CD-03.

2. Basis for Issuance of a Restoration Order

The statutory authority for issuance of this Restoration Order is provided in Section 30811 of the Coastal Act, which states, in relevant part:

> *In addition to any other authority to order restoration, the commission… may, after a public hearing, order restoration of a site if it finds that [(a)] the development has occurred without a coastal development permit from the commission, local government, or port governing body, [(b)] the development is inconsistent with this division, and [(c)] the development is causing continuing resource damage.*

The following paragraphs set forth the basis for the issuance of the Restoration Order by providing substantial evidence that the development meets all of the required grounds listed in Section 30811 for the Commission to issue a Restoration Order.

a. Development has occurred without a Coastal Development Permit

As previously presented in Section IV.C.1 of this report, the activities at issue in this matter constitute "development" as defined in the Coastal Act and are therefore subject to Coastal Act permitting requirements. Staff has verified that the cited development on the subject properties was conducted without a CDP.

b. The Unpermitted Development at Issue is Inconsistent with the Coastal Act

As described below, the unpermitted development is not consistent with the resource policies of the Coastal Act, including Sections 30231 (water quality), 30240 (ESHA protection), 30251 (scenic and visual qualities) and Section 30253 (minimization of adverse impacts) of the Coastal Act, in addition to policies within the Newport Beach LUP.

i. Environmentally Sensitive Habitat Areas

The unpermitted development on the subject properties is inconsistent with Coastal Act Section 30240, which requires protection of all ESHA within the Coastal Zone subject to the Coastal Act. Environmentally sensitive habitat areas are defined in Coastal Act Section 30107.5, as follows:

> *"Environmentally sensitive area" means 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.*

Commission staff ecologist Dr. Jonna Engel, conducted a thorough and site-specific analysis to determine whether the vegetative communities upon the impacted Polygons met the definition of ESHA prior to the unpermitted development taking place. In conducting her assessment, Dr. Engel visited the site, reviewed historic aerial photographs and available biological information pertaining to the site, and confirmed that the Northwest and Southeast Polygons impacted by the unpermitted development contained approximately .83 acre of ESHA consisting of coastal sage scrub that functions as observed habitat for the federally threatened coastal California gnatcatcher (see March 31, 2011 memorandum from Jonna D. Engel, Ph.D, Commission staff ecologist (Exhibit #5)).

The Commission agrees with the analysis and conclusions listed in that memorandum and hereby incorporates it by reference. For the reasons stated in that memorandum, the Commission therefore finds that the Northwest and Southeast polygons were ESHA at the time of the unpermitted development.

Section 30240 of the Coastal Act states:

> *(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.*
> *(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would*

> *significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

The unpermitted development at issue, including vegetation removal, grading, and placement of construction materials, resulted in the elimination of vegetation from the impacted Polygons. Because the subject development significantly disrupted the ESHA in the Northwest and Southeast polygons (completely destroying/displacing it) and was not dependent on the resource (since the staging did not have to occur in sensitive habitat to be effective), the subject development was inconsistent with Section 30240 and of the Coastal Act, and this element of 30810 and 30811 has been met. [9]

As indicated above, the unpermitted activities at issue do not constitute a resource dependent use and caused significant disruption to the unique and fragile habitat of a sensitive bird species, in violation of Section 30240(a). Moreover, the maintenance of the unpermitted development, including through the substantial soil disturbance that has occurred in connection with placement and storage of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials on the impacted Polygons, has prevented the recovery of coastal sage vegetation that comprises ESHA on the Northwest and Southeast Polygons. The persistence of the disturbance on the site has degraded the habitat on the polygons, which may affect adjacent coastal sage scrub that functions as habitat for the gnatcatcher and adjacent maritime succulent scrub, also ESHA, in a way that is not compatible with the continuance of these habitats, in violation of Section 30240(b). Therefore, the unpermitted development is inconsistent with Section 30240 of the Coastal Act.

ii. Biological Productivity & Water Quality

The unpermitted development is inconsistent with Coastal Act Section 30231, which requires protection of water quality in the Coastal Zone. Section 30231 of the Coastal Act states:

> *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow,*

[9] As noted above in Section I of this staff report, NBR/City agree that the jurisdictional pre-requisites for issuance and enforcement of these Consent Orders have been satisfied, including that Chapter 3 grounds exist to support these Consent Orders, but they do not agree with the conclusion that the Northwest and Southeast Polygons constituted environmentally sensitive habitat areas as defined by Coastal Act Section 30107.5. NBR/City's contentions are generally presented in correspondence attached to this staff report as Exhibits #7, 10, 12, 18, 20, and 23. After a review of these assertions, along with historic, site, photographic and resource information and a biological analysis thereof, the Commission staff, including its biologist Dr. Engel, reached the conclusion that these areas were in fact ESHA. However, in light of the fact that a settlement has been reached here, we are not responding in more detail to these assertions beyond the analysis included in Dr. Engel's memo and in this staff report.

> *encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

The unpermitted development performed here involves extensive vegetation removal, thus exposing bare soil, increasing the likelihood of erosion; storage of vehicles and mechanized equipment that can leak fuel or other harmful substances; grading; and importation of construction materials, including dirt and gravel. The unpermitted development was undertaken and maintained during multiple rainy seasons without adequate best management practices for containing fuel leaks or controlling runoff and sediment discharge that are necessary to protect water quality.

The vegetation that existed on the subject properties prior to the unpermitted development helped to stabilize the soil, limit runoff and erosion, and facilitated infiltration. The removal of that vegetation, especially in the absence of adequate best management practices, has exposed the site and surrounding properties and water bodies to the effects of unregulated runoff. Unmanaged runoff across exposed dirt areas can increase the level of sediment entering water bodies, consequently also increasing the turbidity of receiving waters, which reduces the penetration of sunlight needed by aquatic vegetation that provides food and cover for aquatic species and disrupts the reproductive cycles of aquatic species, leading to adverse changes in reproduction and feeding behavior. These impacts reduce the biological productivity and the quality of coastal waters and reduce optimum populations of marine organisms. Similarly, sediment-laden stormwater runoff can increase sedimentation in coastal waters. Sedimentation of coastal waters impacts fish populations in part by burying aquatic vegetation that provides food and cover for aquatic species. For these reasons, the unpermitted development is inconsistent with Coastal Act Section 30231.

iii. Scenic Public Views and Visual Qualities of Coastal Areas

The unpermitted development is inconsistent with Section 30251 of the Coastal Act, which requires that the scenic and visual qualities of the coast be protected and any permitted development be visually compatible with the surrounding area. Section 30251 of the Coastal Act states:

> *The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas…*

The resources that must be protected in this area include views to and across the few remaining undeveloped coastal areas in heavily urbanized northern Orange County. The unpermitted development at issue was neither sited nor designed to protect views of this coastal area. Instead, the unpermitted actions degraded a fundamental and defining component of the coastal area's character – the native vegetation. Much of the unpermitted development has occurred on a slope that is visible from publicly accessible vantage points on heavily traveled Coast Highway.

Rather than seeking to ensure the unpermitted activities were visually compatible with the surrounding area, which consists of native coastal sage scrub, the impacted Polygons were cleared to bare earth and construction materials and construction equipment were stacked, stored and piled within the bare area. The resulting barren patch of earth, stacks and piles of construction materials, and construction equipment contrast sharply with the scenic and visual character of the adjacent naturally vegetated slope. The unpermitted development failed to protect, enhance, or ensure compatibility with the visual quality of the area. Therefore, the unpermitted development is inconsistent with Section 30251 of the Coastal Act.

iv. Minimization of Adverse Impacts/Avoiding Alteration of Natural Land Forms

The unpermitted development is inconsistent with Section 30253(b) of the Coastal Act, which requires new development to minimize erosion and associated impacts to the site. Section 30253(b) states:

> *New development shall... (b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs.*

The unpermitted development removed vegetation from slopes on the subject properties, resulting in barren patches of earth. Vegetation provides soil stabilization, especially on slopes, by intercepting water before it hits the ground, slowing the water's flow across the ground's surface, and reducing overall surface runoff by facilitation infiltration.

Removal of vegetation, especially on slopes, increases the risk of erosion. The unpermitted clearing of approximately 1.01 acres of vegetation from slopes on the subject properties has eliminated an important natural slope stabilization mechanism, leaving slopes exposed and vulnerable to erosion. Furthermore, clearing the impacted Polygons to bare earth without adequate erosion control measures has contributed to wind and water-related erosion across the subject properties. The unpermitted development activities have created and contributed significantly to erosion. For this reason, the unpermitted activities are inconsistent with Section 30253(b) of the Coastal Act.

c. Unpermitted Development is Causing Continuing Resource Damage

The unpermitted development is causing "continuing resource damage" as that term is defined by Section 13190 of the Commission's regulations.

Section 13190(a) of the Commission's regulations defines the term "resource" as it is used in Section 30811 of the Coastal Act as follows:

> *"'Resource' means any resource that is afforded protection under the policies of Chapter 3 of the Coastal Act, including but not limited to public access, marine and other aquatic resources, environmentally sensitive wildlife habitat, and the visual quality of coastal areas."*

The term "damage" in the context of restoration order proceedings is provided in Section 13190(b) as follows:

> *"'Damage' means any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development."*

The term "continuing" is defined by Section 13190(c) of the Commission's regulations as follows:

> *"'Continuing', when used to describe 'resource damage', means such damage, which continues to occur as of the date of issuance of the Restoration Order."*

The coastal sage scrub and associated habitat on the subject properties, in addition to the water quality protection and erosion control it provides; habitat for the coastal California gnatcatcher; and views of a scenic coastal are afforded protection under Coastal Act Sections 30231, 30240, 30251, and 30253(b), and are therefore "resources" as defined in Section 13190(a) of the Commission's regulations. The unpermitted development on the subject properties has destroyed native coastal sage scrub vegetation, caused significant disruption to the unique and fragile habitat of a sensitive bird species, exposed the site and surrounding properties and water bodies to the effects of unregulated runoff, and visually marred a coastal area by removing an essential component to area's scenery, its vegetation, thereby causing "damage" to a resource, as defined in Section 13190(b) of the Commission's regulations. Without restoration, revegetation, and careful monitoring, the foregoing impacts are continuing and will continue to occur, in addition to the temporal loss of habitat and loss of habitat fitness due to removal of native coastal sage scrub plants and disruption of soil that will continue during restoration and monitoring of the site. The persistence of these impacts constitutes "continuing" resource damage, as defined in Section 13190(c) of the Commission's regulations.

For the reasons stated above, the unpermitted actions are causing continuing resource damage. As a result, the third and final criterion for the Commission's issuance of the proposed Restoration Order pursuant to Coastal Act Section 30811 is therefore satisfied

d. Unpermitted Development is Inconsistent with the Certified Land Use Plan

The unpermitted development as issue in this matter is also inconsistent with numerous polices of the Newport Beach LUP. Until the City obtains certification of its Local Coastal Program ("LCP"), and incorporates the Banning Ranch into the LCP area, the Coastal Act remains the standard of review for permitting and enforcement matters in this area. However, because the City's LUP has been certified and Banning Ranch is within the City's sphere of influence, it serves as a valuable guidance document in such matters. The LUP policies with which the unpermitted development at issue is inconsistent include, but may not be limited to the policies cited below.

LUP Section 4.1.1 prefaces the policies pertaining to ESHA within the City:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. These include southern dune scrub, southern coastal bluff scrub, maritime succulent scrub, southern maritime chaparral, southern willow scrub, southern cottonwood willow riparian forest, southern arroyo willow forest, southern black willow forest, southern sycamore alder riparian woodland, and southern coastal purple needlegrass grassland.

…

Another important habitat within the City of Newport Beach is coastal sage scrub (CSS). Although CSS has suffered enormous losses in California (estimates are as high as 85%), there are still thousands of acres in existence and this community type is no longer listed as rare by CDFG. Nevertheless, 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, it meets the definition of ESHA because of its especially valuable role in the ecosystem. CSS is important transitional or edge habitat adjacent to saltmarsh, providing important functions such as supporting pollinators for wetland plants and essential habitat for edge-dependent animals like several species of butterflies that nectar on upland plants but whose caterpillars require wetland vegetation. CSS also provides essential nesting and foraging habitat for the coastal California gnatcatcher, a rare species designated threatened under the Federal Endangered Species Act.

…

Policies:

4.1.1-1. Define 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 as an environmentally sensitive habitat area (ESHA). Using a site-specific survey and analysis by a qualified biologist, evaluate the following attributes when determining whether a habitat area meets the definition of an ESHA:

> *A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.*
> *B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.*
> *C. The presence or potential presence of plant or animal species that are not listed under State or Federal law, but for which there is other compelling evidence of rarity, such as designation as a 1B or 2 species by the California Native Plant Society.*
> *D. The presence of coastal streams.*
> *E. The degree of habitat integrity and connectivity to other natural areas.*

Attributes to be evaluated when determining a habitat's integrity/connectivity include the habitat's patch size and connectivity, dominance by invasive/non-native species, the level of disturbance, the proximity to development, and the level of fragmentation and isolation. Existing developed areas and existing fuel modification areas required by the City of Newport Beach Fire Department or the Orange County Fire Authority for existing, legal structures do not meet the definition of ESHA.

4.1.1-4. Protect ESHAs against any significant disruption of habitat values.

4.1.1-6. Require development in areas adjacent to environmentally sensitive habitat areas to be sited and designed to prevent impacts that would significantly degrade those areas, and to be compatible with the continuance of those habitat areas.

4.1.1-7. Limit uses within ESHAs to only those uses that are dependent on such resources.

4.1.1-9. Where feasible, confine development adjacent to ESHAs to low impact land uses, such as open space and passive recreation.

4.1.1-10. Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible. Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance.

4.1.1-11. Provide buffer areas around ESHAs and maintain with exclusively native vegetation to serve as transitional habitat and provide distance and physical barriers to human and domestic pet intrusion.

As described above, the unpermitted development at issue in this matter is clearly inconsistent with the Chapter 3 resource protection policies of the Coastal Act, as well as numerous resource protection policies of the LUP.

D. Consent Orders are Consistent with Chapter 3 of the Coastal Act

The unpermitted development at issue significantly impacted ESHA on the subject properties and disrupted its functionality. The unpermitted development is therefore inconsistent with the resource protection policies of the Coastal Act and City LUP, and the resource damage caused by the unpermitted development will continue unless the unpermitted activities cease and the subject properties are properly restored. Issuance of the Consent Orders is essential to resolving the violations and to ensure compliance with the Coastal Act.

The Consent Cease and Desist Order and Consent Restoration Order attached to this staff report are consistent with and, in fact, are designed to further the resource protection policies found in Chapter 3 of the Coastal Act. The Consent Orders require Respondents 1) to remove all unpermitted development described in Section IV.B from the subject properties, 2) restore the subject properties by planting coastal sage scrub vegetation native to Orange County that will provide foraging and breeding habitat for the coastal California gnatcatcher, 3) conduct a mitigation project involving revegetation with native coastal sage scrub vegetation that will provide foraging and breeding habitat for the coastal California gnatcatcher at a ratio of 3:1 to the ESHA impacted by the unpermitted development, and 4) cease and desist from conducting any further unpermitted development on the subject properties.

Failure to restore the impacted Polygons would lead to the continued loss of sensitive habitat, including habitat for a threatened bird species, inconsistent with the resource protection policies of the Coastal Act. Therefore, the Consent Cease and Desist Order and Consent Restoration Order are consistent with the Chapter 3 policies of the Coastal Act.

E. California Environmental Quality Act (CEQA)

The Commission finds that issuance of these Consent Orders to compel the restoration of the subject properties is exempt from any applicable requirements of the California Environmental Quality Act of 1970 (CEQA), Cal. Pub. Res. Code §§ 21000 *et seq.*, and will not have significant adverse effects on the environment, within the meaning of CEQA. The Consent Orders are exempt from the requirement for the preparation of an Environmental Impact Report, based on Sections 15060(c)(2) and (3), 15061(b)(2), 15307, 15308 and 15321 of CEQA Guidelines, also in 14 CCR.

F. Consent Agreement: Settlement

Chapter 9, Article 2 of the Coastal Act provides that violators may be civilly liable for a variety of penalties for violations of the Coastal Act, including daily penalties for knowingly and intentionally undertaking development in violation of the Coastal Act. Respondents have clearly stated their willingness to completely resolve the violations, including any penalties, administratively and amicably, through a settlement process. To that end, Respondents have committed to comply with all terms and conditions of the Consent Orders, and not to contest the issuance and implementation of these Consent Orders. Additionally, in light of the intent of the parties to resolve these matters in a timely fashion and through settlement, Respondents have also agreed to pay a monetary settlement to resolve the violations fully without litigation.

G. Summary of Findings of Fact

1. Newport Banning Ranch, LLC is the owner of properties located immediately inland of the 5000 block of W. Coast Highway in Orange County. The properties are identified by the Orange County Assessor's Office as Assessor Parcel Nos. 424-041-04, 114-170-43, and 114-170-79.

2. The City of Newport Beach is the owner of property located immediately inland of the 5000 block of W. Coast Highway in Orange County. The property is identified by the Orange County Assessor's Office as Assessor Parcel No. 114-150-86.

3. HWI entered into a contract with SCE to construct underground utilities in the City of Newport Beach. HWI leased portions of the subject properties to use as a staging area for the SCE contract. HWI used the leased area as a staging area for construction materials.

4. Development, as defined in Coastal Section 30106, undertaken on the above-reference properties, includes: 1) removal of major vegetation, including vegetation comprising rare native plant communities and habitat for the federally threatened coastal California gnatcatcher; 2) placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and 3) grading.

5. The development described in point #4 commenced in 2004, continued regularly into 2006, and both the effects of such development continue, and materials placed on the Southeast Polygon without a CDP persist in place. Regrowth of major vegetation removed from the Southeast Polygon has been extremely limited. The vegetation that has regrown within the Northwest Polygon does not serve the same habitat function as the major vegetation that was removed from the polygon.

6. The development described in point #4 above was undertaken without obtaining a coastal development permit, in violation of the Coastal Act.

7. The Commission finds that the Northwest and Southeast Polygons impacted by the unpermitted development contained approximately .83 acre of ESHA consisting of coastal sage scrub that functions as observed habitat for the federally threatened coastal California gnatcatcher.

8. The unpermitted development described in point #4 above impacted Environmentally Sensitive Habitat Areas, the water quality of and biological productivity of coastal waters, the scenic and visual qualities of the coast, and has contributed to erosion of the site; therefore, the unpermitted development is inconsistent with Coastal Act Sections 30231, 30240, 30251, and 30253.

9. The unpermitted development described in point #4 is causing "continuing resource damage" within the meaning of Section 30811 of the Coastal Act and Section 13190, Title 14, California Code of Regulations.

10. The temporal loss of habitat and loss of habitat fitness incurred by the ESHA will continue until the requirements of the Consent Orders are carried out.

11. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order, and all elements of that section have been met herein.

12. Coastal Act Section 30811 authorizes the Commission to issue a restoration order, and all elements of that section have been met herein.

13. The work to be performed under these Consent Orders, if done in compliance with the Consent Orders and the plans approved therein, will be consistent with Chapter 3 of the Coastal Act.

14. On October 5, 2010, the Executive Director issued a "Notice of Intent to Record a Notice of Violation and to Commence Cease and Desist and Restoration Order Proceedings" to Respondents.

15. On April 1, 2010 authorized signatories for Respondents signed Consent Cease and Desist Order No. CCC-11-CD-03 and Consent Restoration Order No. CCC-11-RO-02, a copy of which is attached to this staff report.

Click on the links below to go to the exhibits and figures.

Exhibit List

Exhibit Number	**Description**
1.	Site map and location
2.	Aerial photograph of general location of impacted Polygons
3.	Aerial photographs of the impacted Polygons prior to and after the unpermitted development at issue
4.	Polygon location map
5.	March 31, 2011 memorandum from Jonna D. Engel, Ph.D, CCC staff ecologist and exhibits thereto
6.	July 29, 2009 letter from CCC staff to NBR
7.	September 25, 2009 letter from NBR to CCC staff with Glenn Lukos Associates memorandum entitled "Habitat Characteristics for Areas Affected by Alleged Clearing near Southeast Corner of Banning Ranch Referenced in July 29, 2009 Letter from California Coastal Commission" attached
8.	May 14, 2010 Notice of Violation letter from CCC staff to NBR, SCE, and HWI, cc to City
9.	May 25, 2010 Hamilton Biological memorandum on behalf of Banning Ranch Conservancy entitled "Review Of Biological Resources Issues Sunset Ridge Project Site"
10.	August 26, 2010 letter from NBR to CCC staff with Glenn Lukos Associates memorandum entitled "Response to Coastal Commission Notice of Violation dated May 14, 2010 for Vegetation Removal on Portions of Newport Banning Ranch and City of Newport Beach Properties" attached
11.	Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings, October 5, 2010
12.	October 13, 2010 Glenn Lukos Associates memorandum on behalf of NBR entitled "California Gnatcatcher Use of Polygons Addressed in Notice of Violation"
13.	October 18, 2010 letter from HWI to CCC staff
14.	October 18, 2010 letter from NBR to CCC staff

15. October 18, 2010 letter from SCE to CCC staff
16. October 18, 2010 letter from City to CCC staff
17. October 27, 2010 letter from City to CCC staff
18. November 9, 2010 Glenn Lukos Associates memorandum on behalf of NBR entitled "Comparison of Areas of Disturbed Encelia Scrub on Slope Above Northwest Polygon with Areas of Undisturbed Maritime Succulent Scrub and Coastal Bluff Scrub at Newport Banning Ranch
19. November 22, 2010 letter from CCC staff to City, cc to NBR, SCE, and HWI"
20. December 9, 2010 LSA Associates memorandum on behalf of City entitled "California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site"
21. December 11, 2010 Hamilton Biological memorandum on behalf of Banning Ranch Conservancy entitled **"**Review of Esha Issues Bluff Road/Sunset Ridge Park Entrance"
22. December 14, 2010 Hamilton Biological memorandum on behalf of Banning Ranch Conservancy entitled "Reply to LSA Memorandum Bluff Road/Sunset Ridge Park Entrance"
23. January 18, 2011 letter from City to CCC staff
24. January 20, 2011 letter from HWI to CCC staff

Staff recommends that the Commission issue the Consent Cease and Desist Order No. CCC-11-CD-03 and Consent Restoration Order No. CCC-11-RO-02 attached hereto with Figure 1 and Figure 2.

CONSENT CEASE AND DESIST ORDER CCC-11-CD-03
AND CONSENT RESTORATION ORDER CCC-11-RO-02

1 CONSENT CEASE AND DESIST ORDER CCC-11-CD-03

Pursuant to its authority under California Public Resources Code ("PRC") section 30810, the California Coastal Commission ("Commission") hereby authorizes and orders Newport Banning Ranch LLC[1]; Aera Energy LLC; Cherokee Newport Beach, LLC; Herman Weissker, Inc.; Southern California Edison; and the City of Newport Beach ("City"), all their successors, assigns, employees, agents, and contractors, and any persons acting in concert with any of the foregoing (hereinafter collectively referred to as "Respondents") to cease and desist from engaging in any further development, as that term is defined in PRC section 30106, on the properties identified in Section 6 below ("subject properties"), unless authorized pursuant to the Coastal Act, PRC sections 30000-30900, which is incorporated through these Consent Orders. Furthermore, NBR and the City shall remove from the Impacted Areas, as that term is described in Section 3.1.A.1, below in accordance with the procedures set forth in Section 3, below, all materials described in Section 7, below, including, but not limited to, the following: gravel, concrete, and construction materials. Through the execution of Consent Order CCC-11-CD-03, Respondents agree to comply with its terms and conditions.

2 CONSENT RESTORATION ORDER CCC-11-RO-02

Pursuant to its authority under PRC section 30811, the Commission hereby orders and authorizes 1) NBR and the City to restore their respective portions of the subject properties as described in Section 3 below, such restoration includes, but is not limited to, performing mitigation by creating new areas of coastal sage scrub at a 3:1 ratio to the areal extent of the Coastal Sage Scrub Revegetation Areas, as that term is defined below, that is located on their respective portions of the subject properties; and 2) Herman Weissker, Inc. and Southern California Edison to avoid taking any action inconsistent with the purpose of these orders or doing anything that would block impede, or otherwise invalidate or circumvent the goals or the terms and conditions of these orders or undermine or diminish their effect by any means, including, but not limited to impeding the ability of NBR and the City to perform and carry out the restoration of the subject properties. Through the execution of Consent Order CCC-11-RO-02, Respondents agree that they shall comply with its terms and conditions. NBR and the City of Newport Beach are referred to for the purposes of Sections 3, 4, and 5 of these orders as NBR/City.

[1] Newport Banning Ranch LLC manages planning and entitlement of the "Banning Ranch" surface rights for Cherokee Newport Beach, LLC and Aera Energy LLC. Hereinafter, all references to Newport Banning Ranch LLC ("NBR") are to Newport Banning Ranch LLC, Cherokee Newport Beach LLC, and Aera Energy, LLC, jointly.

PROVISIONS COMMON TO BOTH ORDERS

3 TERMS AND CONDITIONS

3.1 Within 90 days of issuance of these Consent Orders, NBR/City shall submit a Restoration Plan for the review and approval of the Commission's Executive Director ("Executive Director"). The Restoration Plan shall outline all removal, restoration, mitigation, and erosion control activities, sampling and analyzing procedures, monitoring and maintenance protocols, contingency plans, and any other activities related to the remediation of the Coastal Act violations on the subject properties undertaken pursuant to these Consent Orders. The Restoration Plan shall include the following requirements and include and discuss the following elements:

A. Definitions

1. Impacted Areas: All areas of the subject properties impacted by the subject unpermitted development listed in Section 7, consisting of the Northwest, Northeast, and Southeast Polygons, as those areas are generally identified in Figure 1 attached to these Consent Orders.

2. Coastal Sage Scrub Revegetation Areas ("CSSRA"): Those portions of the Impacted Areas on which these Consent Orders require restoration and revegetation of coastal sage scrub that provides foraging and breeding opportunities for the coastal California gnatcatcher, consisting of the Northwest and Southeast Polygons.

3. Mitigation Area: a mitigation site or sites ("Mitigation Area") totaling 2.5 acres, separate from and in addition to the CSSRA, in which coastal sage scrub that provides foraging and breeding opportunities for the coastal California gnatcatcher will be created and/or enhanced and permanently protected, except as may be permitted pursuant to Section 3.5, at a ratio of 3:1 to the CSSRA.

B. Goals

1. Removal of all unpermitted development, including but not necessarily limited to gravel, concrete, and construction material from the Impacted Areas.

2. Revegetation of the CSSRA, including but not limited to initial eradication of all non-native and invasive plant species from the CSSRA and further planting and adaptive management measures, if necessary, to ensure remediation and revegetation are successful.

3. Removal of non-native and invasive plant species and prevention of regrowth or establishment of other non-native and invasive species in the Impacted Areas during the monitoring and maintenance period described below.

4. Control of erosion across the Impacted Areas and prevention of sediments from entering the storm drain system and coastal waters by preserving existing native vegetation, limiting disturbance of native vegetation coverage and soils on the areas subject to the Restoration Plan, utilizing best management practices, and stabilizing and revegetating the CSSRA.

5. Creation and/or enhancement and protection of coastal sage scrub that provides foraging and breeding opportunities for the coastal California gnatcatcher within the Mitigation Area.

6. Monitoring and maintenance of the restoration of the Impacted and Mitigation Areas until such a time as the Executive Director determines the remediation is successful, but in no case less than five years.

C. General Provisions

1. The Restoration Plan shall include a map(s), drawn to scale, that shows the specific parameters, locations and extents of the following: (1) reference sites as defined in Section 3.1.E.4 of these Consent Orders, (2) the Impacted Areas, (3) the CSSRA, (4) any existing non-native and invasive plants that shall be removed pursuant to Section 3.1.F, (5) any existing native plants in the Impacted Areas that shall be avoided or salvaged pursuant to Section 3.1.E.5, and (5) the specific locations and directions from which photographs will be taken annually and included in the annual monitoring reports to demonstrate restoration progress, as discussed in Section 3.1.H.

2. The Restoration Plan, and any reports or revisions prepared pursuant to the Restoration Plan or the terms of these Consent Orders, shall be prepared by a qualified restoration ecologist(s) or resource specialist(s) ("Specialist") and shall include a description of the education, training, and experience of said Specialist. A qualified Specialist for this project shall have experience successfully completing restoration or revegetation (using California native plant species) of coastal sage scrub, preferably in coastal Orange County.

3. The Restoration Plan shall include a schedule/timeline of activities covered in the plan, the procedures to be used, and identification of the parties who will be conducting the restoration activities. The schedule/timeline of activities covered in the plan shall be consistent with the deadlines included in Section 3 of these orders.

4. The Restoration Plan shall include a detailed description of all equipment to be used. All tools utilized shall be hand tools unless the Specialist demonstrates to the satisfaction of the Executive Director that mechanized equipment is needed and will not have a significant adverse impact on resources protected under the Coastal Act, including, but not limited to: existing native vegetation and foraging and breeding areas of the coastal California gnatcatcher. The Restoration Plan shall designate areas for staging of any construction equipment and materials, including receptacles and temporary stockpiles of graded materials, all of which shall be covered, to the extent practicable, on a daily basis. The Restoration Plan shall

include limitations on the hours of operation for all equipment and a contingency plan that addresses: 1) impacts from equipment use, including disruption of areas where revegetation will occur, and responses thereto; 2) potential spills of fuel or other hazardous releases that may result from the use of mechanized equipment, if such equipment is authorized, and responses thereto; and 3) any water quality concerns.

5. The Restoration Plan shall identify the location of the disposal site(s) for the disposal of all materials removed from the site and all waste generated during restoration activities pursuant to the Consent Orders. If a disposal site is located in the Coastal Zone and is not an existing sanitary landfill, a Coastal Development Permit is required for such disposal. All hazardous waste must be disposed of at a suitable licensed disposal facility.

6. The Restoration Plan shall specify the methods to be used prior to, during, and after restoration to stabilize the soil and make it capable of supporting native vegetation. Such methods shall not include the placement of retaining walls or other permanent structures, grout, geogrid or similar materials. Any soil stabilizers identified for erosion control shall be compatible with native plant recruitment and establishment. The Restoration Plan shall specify the type and location of erosion control measures that will be installed on the Impacted Areas and maintained until the CSSRA has been revegetated to minimize erosion and transport of sediment. Such measures shall be provided at all times of the year for at least three years or until the plantings have been established, whichever occurs first, and then shall be removed or eliminated by NBR/City.

7. The Restoration Plan shall include an assessment of the possible impacts to sensitive resources on the subject properties including coastal California gnatcatcher foraging and breeding activities, from restoration and mitigation activities and procedures for both proactively and retroactively addressing these impacts. NBR/City shall conduct restoration and mitigation activities in a way that minimizes impacts to the subject properties. NBR/City shall monitor the Impacted Areas for gnatcatcher use prior to and during any of the activities undertaken pursuant to these orders, and shall include this information in the annual monitoring report described in Section 3.1.H.3.

Other than those areas subject to restoration and mitigation activities, the subject properties and surrounding areas shall not be disturbed by activities related to these Consent Orders and to the approved Restoration Plan to the greatest extent practicable. Impacts shall be addressed in the appropriate annual report and shall be remedied by NBR/City. Prior to the initiation of any restoration and mitigation activities, the boundaries of the affected area shall be physically delineated in the field using temporary measures such as fencing, stakes, colored flags, or colored tape.

8. Unless authorized pursuant to the Coastal Act, PRC sections 30000-30900, in order to avoid disturbance of the coastal California gnatcatcher, there shall be no grading or use of mechanized equipment during the gnatcatcher breeding season (February 15 through August 31), or any time that gnatcatcher courtship, breeding, or nesting is observed. If grading or use of mechanized equipment must be conducted during the gnatcatcher breeding

season, and is authorized pursuant to the Coastal Act, a biological monitor will conduct a survey to determine the presence of any nesting behaviors, nest building, egg incubation, or brood rearing activities within a minimum of 150 ft of proposed work limits. If nesting gnatcatchers are detected within 100 ft of proposed grading or construction areas, gnatcatcher nest monitoring will be initiated and use of mechanized equipment within 100 ft of active nests will be postponed until the nest(s) are determined to be inactive by the biological monitor. During the breeding season, nesting gnatcatchers shall be reasonably shielded from the sight and sound of restoration activities that do not involve the use of mechanized equipment and that are taking place within 50 feet, and from the use of any mechanized equipment associated with this project or any other Commission-authorized project, which should be taking place at least 100 feet away.

9. Removal of vegetation approved pursuant to these Consent Orders shall take place outside the coastal California gnatcatcher breeding season. Prior to and during removal of vegetation outside the coastal California gnatcatcher breeding season, a qualified monitoring biologist shall locate any individual gnatcatchers within the areas subject to the Restoration Plan on-site and direct vegetation removal to begin in an area away from coastal California gnatcatchers. In addition, the biologist shall walk ahead of vegetation removal equipment to flush any coastal California gnatcatchers towards areas of habitat that will be avoided.

D. Removal of Unpermitted Development

1. NBR/City's proposed Restoration Plan shall detail the methods that will be used to remove all unpermitted development in the Impacted Areas, including but not limited to gravel, concrete, and construction material.

2. The Restoration Plan shall include a site plan showing the location and identity of all unpermitted development to be removed and the existing Best Management Practices (BMPs) installed to address erosion control and water quality that are to remain in place.

3. Removal activities shall not disturb areas outside the area of the unpermitted development to be removed to the greatest extent practicable. Measures for the restoration of any area disturbed by the removal activities shall be included within the Restoration Plan, and these measures shall include the restoration of the area from which the unpermitted development was removed as well as any other areas disturbed by those removal activities.

4. NBR/City shall commence removal of the unpermitted development by no more than 15 days after the Executive Director's approval of the Restoration Plan. NBR/City shall complete removal of the unpermitted development within 15 days of commencing removal of the unpermitted development.

E. Coastal Sage Scrub Revegetation

1. The Restoration Plan shall demonstrate that the CSSRA will be restored with coastal sage scrub that provides foraging and breeding opportunities for the coastal California gnatcatcher using planting of species native to and appropriate for the subject site, including maritime succulent scrub species where appropriate. The Restoration Plan shall include detailed descriptions, including graphic representations, narrative reports, and photographic evidence if available, of the vegetation in the CSSRA prior to any unpermitted activities addressed in these Consent Orders, and the current state of the CSSRA.

2. The Restoration Plan shall identify all existing vegetation in the CSSRA. The vegetation planted in the CSSRA shall consist only of coastal sage scrub species native to coastal Orange County. All plantings used shall consist of native plants that were propagated from plants as close as possible to the subject properties, in order to preserve the genetic integrity of the flora in and adjacent to the planting area.

3. The Restoration Plan shall identify the natural habitat type that is the model for the restoration and describe the desired relative abundance of particular species in each vegetation layer. Based on these goals, the plan shall identify the species that are to be planted (plant "palette"), and provide a rationale for and describe the size and number of container plants and the rate and method of seed application. The Restoration Plan shall indicate that plant propagules must come from local native stock. If plants, cuttings, or seed are obtained from a nursery, the nursery must certify that they are of local origin and are not cultivars and the Restoration Plan shall provide specifications for preparation of nursery stock (e.g., container size & shape to develop proper root form, hardening techniques, watering regime, etc.). Technical details of planting methods (e.g., spacing, micorrhyzal inoculation, etc.) shall also be included.

4. The Restoration Plan shall include a detailed description of the methods that shall be utilized to restore coastal sage scrub on the CSSRA and demonstrate that these methods will result in coastal sage scrub suitable for coastal California gnatcatcher foraging and breeding on the CSSRA with a similar plant density, total cover and species composition to that typical of undisturbed coastal sage scrub, within five years from the initiation of revegetation activities. This section shall include a detailed description of reference site(s) including rationale for selection, location, and species composition. The reference sites shall be located as close as possible to the CSSRA, shall be similar in all relevant respects, and shall provide the standard for measuring success of the restoration under these Consent Orders.

5. The Restoration Plan shall include a map showing the type, size, and location of all plant materials that will be planted in the CSSRA; the location of all invasive and non-native plants to be removed from the CSSRA; the topography of all other landscape features on the site; the location of reference sites; and the location of photograph sites, which will provide reliable photographic evidence for monitoring reports. The Restoration Plan shall include procedures for salvage and/or replacement of native plants that are not coastal sage scrub species from the CSSRA and methods of installing salvaged plants in areas on the subject properties appropriate for those species.

6. The Restoration Plan shall include a schedule for installation of plants and removal of invasive and/or non-native plants and a detailed explanation of the performance standards that will be utilized to determine the success of the restoration. The performance standards shall identify that "x" native species appropriate to the habitat should be present, each with at least "y" percent cover or with a density of at least "z" individuals/ square meter. The description of restoration success analysis shall be described in sufficient detail to enable an independent specialist to duplicate it. If the planting schedule requires planting to occur at a certain time of year beyond the deadlines set forth herein, the Executive Director may, at the written request of NBR/City, extend the deadlines as set forth in Section 14 of the Consent Orders in order to achieve optimal growth of the vegetation.

7. The Restoration Plan shall demonstrate that consistent with the provisions of Section 3.1.F.2, non-native vegetation within the CSSRA and the Impacted Areas, will be eradicated. The removal of non-native species in these areas shall be completed as part of the Restoration Plan, and the Restoration Plan shall indicate that all non-native plant species will be removed from the CSSRA prior to any revegetation activities required by these Consent Orders. NBR/City shall not employ invasive plant species, which could supplant native plant species in the CSSRA.

8. The Restoration Plan shall describe the proposed use of artificial inputs, such as watering or fertilization, including the full range of amounts of the inputs that may be utilized. The minimum amount necessary to support the establishment of the plantings for successful restoration shall be utilized. No permanent irrigation system is allowed in the CSSRA. Temporary above ground irrigation to provide for the establishment of the plantings is allowed for a maximum of three years or until the revegetation has become established, whichever occurs first. If, after the three-year time limit, the revegetation has not established itself, the Executive Director may allow for the continued use of the temporary irrigation system until such time as the revegetation is established.

9. Revegetation of the CSSRA shall be undertaken using accepted planting procedures required by the restoration ecologist or resource specialist. Such planting procedures may suggest that planting would best occur during a certain time of the year. If so, and if this necessitates a change in the planting schedule, the deadline to implement the Restoration Plan may be extended by the Executive Director as provided for under the provisions of Section 14, herein.

10. NBR/City shall commence restoration of the CSSRA pursuant to the terms of these Consent Orders. NBR/City shall complete revegetation no more than 90 days after commencing revegetation.

F. Non-Native Plant Species Removal

1. The Restoration Plan shall detail the methods that will be used to initially remove non-native and invasive plant species from the Impacted Areas, including the CSSRA, and shall include a weeding schedule, information about the location of plants to be

removed, the equipment to be used in the removal activities, and disposal procedures. Weeding shall also occur on a monthly basis during the rainy season (i.e. January through April). A contingency plan, which sets forth maintenance activities and alternative eradication methods to prevent regrowth, shall be included in the monitoring section of the Restoration Plan as set forth in Section 3.1.H below.

2. Non-native and invasive plant species shall also be removed from the Impacted Areas during the maintenance and monitoring period. If, during the maintenance and monitoring period, non-native or invasive species are found in the Impacted Areas, they shall be removed according to the maintenance provisions included in the Restoration Plan pursuant to Section 3.1.F.1 above. At the end of each annual monitoring period and the end of the five-year monitoring period, an absolute success criteria shall be utilized to evaluate the success of non-native and invasive plant eradication: across the Impacted Areas, non-native plants shall make up less than 20% of the total vegetation cover.

G. Mitigation Project

1. The Restoration Plan shall submit for the review and approval of the Executive Director a proposed mitigation project for offsetting the continuing temporal loss of habitat and loss of habitat fitness that has resulted from the Coastal Act violations that are the subject of these Consent Orders.

2. The Restoration Plan shall identify, for the review and approval of the Executive Director, a proposed mitigation site or sites where NBR/City propose to conduct mitigation activities that total 2.5 acres, separate from and in addition to the CSSRA. Once approved, this site or sites shall constitute the Mitigation Area as defined in section 3.1.A.3. The areas that are considered appropriate for designation as Mitigation Area include, but are not limited to:

a. Within Area A of Figure 2 attached to these Consent Orders, NBR-owned land included in the City's Sunset Ridge Park pending coastal development permit application but that the City is not proposing in its existing application to: (i) use to construct an access road to the City's proposed Sunset Ridge Park or (ii) restore as coastal sage scrub or Gnatcatcher planting pocket, and that Glenn Lukos Associates, Inc., mapped in the August 2008 vegetation map as invasive/ornamental, ruderal, disturbed/developed, or nonnative grassland. If the City's park project is denied or withdrawn, NBR could request the Executive Director ("ED") to consider use of additional areas within Area A be considered for mitigation, and the ED shall have the authority to authorize the use of such additional areas for mitigation under this agreement.

b. Within Area of B of Figure 2 attached to these Consent Orders, an area generally south of the Northwest Polygon that the City is not proposing to restore in its existing application as coastal sage scrub or Gnatcatcher planting pocket as part of its current Sunset Ridge Park project application and that is mapped in the 2008 vegetation map prepared by Glenn Lukos Associates, Inc., as invasive/ornamental, ruderal, disturbed/developed,

or nonnative grassland, if determined in NBR's sole discretion to be in a location that will not be impacted by the City's proposed access road or NBR's proposed future development.

c. Up to 1.66 acres within Area C of Figure 2 attached to these Consent Orders of NBR-owned land located in the vicinity of the 19th Street end that is mapped as disturbed/developed, invasive/ornamental, or non-native grassland on the 2008 vegetation map prepared by Glenn Lukos Associates, Inc.

d. To satisfy the City's mitigation obligation, up to 0.48 acre within the City's proposed Sunset Ridge Park application that are not proposed to be restored with coastal sage scrub or Gnatcatcher planting pocket and that are mapped by Bonterra Consulting in the September 2009 Biological Technical Report for Sunset Ridge Park Project as ornamental, ruderal, disturbed, non-native grassland, encelia scrub/ornamental, or disturbed encelia scrub, unless the City demonstrates to the Executive Director's satisfaction that an off-site mitigation area is of superior biological value.

3. In the Mitigation Area, coastal sage scrub that provides foraging and breeding opportunities for the coastal California gnatcatcher will be created and/or enhanced and permanently protected, pursuant to the requirements of Section 3, at a ratio of 3:1 to the CSSRA. The mitigation project proposal shall include an analysis by a qualified Specialist that considers the specific condition of the site including soil, exposure, temperature, moisture, and wind, as well as restoration goals, methods, and monitoring schedule, including the requirements contained in Section 3.

4. The mitigation project shall be completed pursuant to the timeline pertaining to the mitigation project within the approved Restoration Plan, but no later than 90 days subsequent to completion of any development activities within the Southeast Polygon authorized pursuant to the Coastal Act, PRC sections 30000-30900, or within 24 months of issuance of these orders, whichever occurs first.

5. Respondents shall not use the mitigation project described in this section for the purpose of generating mitigation or restoration credits to satisfy any State or Coastal Commission requirement for restoration or mitigation. In addition, Respondents shall disclose to any federal agency, in connection with consideration of the Mitigation Area as mitigation or restoration credit, the requirement of these Consent Orders.

H. Monitoring and Maintenance

1. The Restoration Plan shall include maintenance and monitoring methodology, including sampling procedures and sampling frequency for the CCSSRA, Impacted, and Mitigation Areas, and contingency plans to address potential problems with restoration activities or unsuccessful restoration of the CSSRA, Impacted, and Mitigation Areas. Monitoring and maintenance activities shall be conducted in a way that does not impact the sensitive resources on the subject properties or on adjacent properties. Any impacts shall be remedied by the NBR/City to ensure successful restoration. At a minimum, long-term

maintenance requirements shall include periodic site inspections by the Specialist, at intervals specified in the Restoration Plan, eradication of non-native and invasive plant species, weed control, implementation and maintenance of erosion control measures as set forth in Section 3.1.C.6, trash and debris removal, and/or replacement plantings as necessary.

2. Within 30 days of the completion of that portion of the work required by the Restoration Plan (Section 3) that is to be completed within 90 days of approval of the Restoration Plan, NBR/City shall submit to the Executive Director, according to the procedure set forth under Section 3.3, a report describing and documenting the restoration work on the subject properties. This report shall include a summary of dates when work was performed and photographs that show full implementation of the Restoration Plan. Within 30 days of completion of the remainder of the work required by the Restoration Plan, NBR/City shall submit to the Executive Director, according to the procedure set forth under Section 3.3, a report describing and documenting the restoration work on the subject properties. This report shall include a summary of dates when work was performed and photographs that show full implementation of the Restoration Plan.

3. NBR/City shall submit, according to the procedure set forth under Section 3.3, on an annual basis for a period of five years commencing from the date the Commission receives the "completion reports" required under Section 3.1.H.2(no later than December 31st of each year), a written report, for the review and approval of the Executive Director, prepared by a qualified Specialist, evaluating compliance with the approved Restoration Plan. The annual reports shall include further recommendations and requirements for additional restoration activities, if any, in order for the project to meet the objectives of the Restoration Plan. These reports shall also include photographs taken of the Impacted Areas and Mitigation Areas annually from the same pre-designated locations (as identified on the map submitted pursuant to Section 3.1.C.1) indicating the progress of recovery in the Impacted and Mitigation Areas.

4. If the periodic inspections or the monitoring report indicate that the project or a portion thereof is not in conformance with the Restoration Plan or has failed to meet the goals and/or performance standards specified in the Restoration Plan, the duration of the monitoring period as set forth in Section 3.1.H.3 shall be extended for a period of time equal to that during which the project remained out of compliance, in no case less than one year, and NBR/City shall submit a revised or supplemental Restoration Plan for review for review and approval by the Executive Director. The revised Restoration Plan shall specify measures to correct those portions of the restoration that have failed or are not in conformance with the original approved Restoration Plan. These measures, and any subsequent measures necessary to carry out the original approved plan, shall be carried out by NBR/City in coordination with the Executive Director until the goals of the original approved Restoration Plan have been met.

5. At the end of the five-year monitoring period, NBR/City shall submit, according to the procedure set forth under Section 3.5, a final detailed report prepared by a qualified Specialist for the review and approval of the Executive Director. If this report indicates that the restoration and mitigation activities have in part, or in whole, been

unsuccessful, based on the requirements contained in the approved Restoration Plan, NBR/City shall submit, to the Executive Director, a revised or supplemental plan to bring the restoration activities into full compliance with these Consent Orders. The Executive Director shall determine if the revised or supplemental restoration plan must be processed as a coastal development permit, a new Cease and Desist and/or Restoration Order, or a modification of these Consent Orders. After the revised or supplemental restoration plan has been processed by the Commission, NBR/City shall implement the approved plan.

3.2 Upon approval of the Restoration Plan by the Executive Director, NBR/City shall fully implement the plan consistent with all of its terms. NBR/City shall complete implementation of the Restoration Plan within the schedule and by the deadlines included in Section 3 of these orders. NBR shall complete no less than 1.66 acres of revegetation or mitigation activities described in the Restoration Plan by no later than 90 days after the approval of the Restoration Plan. NBR/City shall complete the remainder of the revegetation and mitigation activities described in the Restoration Plan no later than 90 days subsequent to completion of any development activities within the Southeast Polygon authorized pursuant to the Coastal Act, PRC sections 30000-30900, or within 24 months of issuance of these orders, whichever occurs first. Any such remaining mitigation shall be located within those areas described in Section 3.1.G.2.a, b, and d. The Executive Director may extend these deadlines or modify the approved schedule for good cause pursuant to Section 14 of the Consent Orders.

3.3 All plans, reports, photographs and any other materials required by these Consent Orders shall be sent to:

California Coastal Commission
Attn: Andrew Willis
200 Oceangate, 10th Floor
Long Beach, CA 90802

With a copy sent to:
California Coastal Commission
Attn: Jonna Engel
89 S. California St., Ste 200
Ventura, CA 93001
Long Beach, CA 90802

3.4 All work to be performed under these Consent Orders shall be performed in compliance with all applicable laws.

3.5 Nothing in these Consent Orders shall preclude future proposals to develop or modify the CSSRA or Mitigation Areas if authorized pursuant to Coastal Act, PRC sections 30000-30900. Any future development proposed on the subject properties will need to comply with all relevant Coastal Act and any applicable City of Newport Beach Land Use Plan ("LUP") standards.

4 REVISIONS OF DELIVERABLES

The Executive Director may require revisions to deliverables required under these Consent Orders, and NBR/City shall revise any such deliverables consistent with the Executive Director's specifications, and resubmit them for further review and approval by the Executive Director, by the deadline established by the modification request from the Executive Director. The Executive Director may extend time for submittals upon a written request and a showing of good cause, pursuant to Section 14 of these Consent Orders.

5 PERSONS SUBJECT TO THE ORDERS

Newport Banning Ranch, LLC; Aera Energy, LLC; Cherokee Newport Beach, LLC; Herman Weissker, Inc.; Southern California Edison; and the City of Newport Beach, all their successors, assigns, employees, agents, and contractors, and any persons acting in concert with any of the foregoing agree to undertake the specific and individual obligations assigned to such party required herein and to comply with all the applicable requirements of these Consent Orders and therefore shall be subject to the requirements herein. Specifically, in addition to the general provisions in this order, NBR/City agree to be responsible for the requirements herein for the restoration and mitigation obligations set forth in the Consent Restoration Order, and Herman-Weissker, Inc. and Southern California Edison agree to be responsible for the monetary penalties provided for in Section 12.

6 IDENTIFICATION OF THE PROPERTIES

The properties that are the subject of these Consent Orders are described as follows:

Assessor's Parcel Nos. 424-041-04, 424-041-10, 114-170-43, and 114-170-79, all of which are located inland of the 5000 block of W. Coast Highway.

7 DESCRIPTION OF ALLEGED COASTAL ACT VIOLATIONS

The development that is the subject matter of these Consent Orders is the development, as that term is defined in the Coastal Act (PRC § 30106), on the subject properties that required a coastal development permit but for which no such permit was obtained and that is specifically alleged in the "Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings" dated October

5, 2010 ("NOI"), generally consisting of: 1) removal of major vegetation, including vegetation comprising rare native plant communities; 2) placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and 3) grading. The unpermitted development at issue in this matter was undertaken at three separate and distinct areas on the subject properties. The three areas are referred to by their locations as the Southeast, Northwest, and Northeast polygons (See Figure 1 attached to these Orders). The roadway bisecting the Southeast polygon is not a part of the Southeast polygon. The subject unpermitted development commenced in 2004, continued regularly into 2006, and both the effects of such development continue, and materials placed on the Southeast polygon without a coastal development permit persist in place. Regrowth of major vegetation removed from the Southeast polygon has been extremely limited. The vegetation that has grown within the Northwest polygon does not serve the same habitat function as the major vegetation that was removed from the polygon. Nothing in these Consent Orders shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, including the imposition of civil penalties and other remedies pursuant to PRC Sections 30821.6, 30822 and 30820 for Coastal Act violations on the subject properties, if any, that are not described in the NOI.

8 COMMISSION JURISDICTION

The Commission has jurisdiction over resolution of these Coastal Act violations pursuant to Public Resources Code sections 30810 and 30811. In light of the desire of the parties to settle these matters, Respondents agree to not contest the Commission's jurisdiction to issue or enforce these Consent Orders.

9 SETTLEMENT OF MATTER PRIOR TO HEARING

In light of the intent of the parties to resolve these matters in settlement, Respondents have agreed not to contest the legal and factual bases for, or the terms, issuance, or enforcement of, these Consent Orders, including the allegations of Coastal Act violations contained in the "Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings" dated October 5, 2010, and agree to comply with the terms of these Consent Orders. Specifically, Respondents have agreed not to contest the issuance or enforcement of these Consent Orders at a public hearing or any other proceeding. Respondents do not dispute that the jurisdictional pre-requisites for issuance and enforcement of these Consent Orders have been satisfied, including that Chapter 3 grounds exist to issue these Consent Orders, but they do not agree with any conclusion that the Northwest and Southeast Polygons constituted environmentally sensitive habitat areas as defined by PRC Section 30107.5, and in addition, specifically retain the right to present all facts and evidence relating to a finding that any other area other than the Northwest and Southeast Polygons constitute ESHA to the Commission in any other proceeding for any purpose by or before the Commission, or any other governmental agency, any administrative tribunal, or a court of law.

10 EFFECTIVE DATE AND TERMS OF THE ORDERS

The effective date of these Consent Orders is the date they are approved and issued by the Commission. These Consent Orders shall remain in effect in their current form permanently unless and until modified or rescinded by the Commission.

11 FINDINGS

These Consent Orders are issued on the basis of the findings adopted by the Commission, as set forth in the document entitled "Staff Report and Findings for Consent Cease and Desist and Restoration Orders [No. CCC-11-CD-03 and Consent Order No. CCC-11-RO-02]." The activities authorized and required in these Consent Orders are consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act. The Commission has authorized the activities required in these Consent Orders as being consistent with the resource protection policies set forth in Chapter 3 of the Coastal Act. In furtherance of the intent of the parties to resolve these matters in settlement, Respondents and the Commission agree that the findings set forth in the Staff Report are determinative only as to the Impacted Areas, and shall not be binding on any future coastal development permit or other proceeding before the Coastal Commission on property other than the Impacted Areas. A separate analysis will be done by the Coastal Commission for any future coastal development permit or other proceeding before the Coastal Commission on the subject properties other than the Impacted Areas.

12 SETTLEMENT OF MONETARY CLAIMS

In light of the intent of the parties to resolve these matters in settlement, Southern California Edison and Herman Weissker, Inc. have agreed to pay a monetary settlement in the aggregate amount of $300,000. Southern California Edison and Herman Weissker, Inc. shall submit the $300,000 aggregate settlement payment in four separate payments of $75,000 to the attention of Andrew Willis of the Commission, payable to the California Coastal Commission at the designated account, on or before the following dates: July 31, 2011; July 31, 2012; July 31, 2013; and July 31, 2014.. The settlement monies shall be deposited in the Violation Remediation Account of the California Coastal Conservancy Fund (see Public Resources Code section 30823) or into such other public account as authorized by applicable California law at the time of the payment, and as designated by the Executive Director.

13 COMPLIANCE OBLIGATION

Strict compliance with these Consent Orders by all parties subject thereto is required, and each party is required to perform work or make payments as required of them by these Consent Orders in strict conformance with the terms and conditions of these Consent Orders. Failure to comply with any term or condition of these Consent Orders required of such party, including any deadline contained in these Consent Orders, unless the Executive Director grants an extension under Section 14, will constitute a violation of these Consent Orders and shall result in the responsible part(ies) being liable for stipulated penalties in the amount of $750 per day per violation. The non-compliant party or parties shall pay stipulated penalties within 15 days of the

date of the written demand by the Commission for such penalties, regardless of whether the non-compliant party or parties have subsequently complied. If Respondents do not comply with the agreed-upon terms of these Consent Orders, nothing in this agreement shall be construed as prohibiting, altering, or in any way limiting the ability of the Commission to seek any other remedies available, including the imposition of civil penalties and other remedies pursuant to Public Resources Code Sections 30821.6, 30822 and 30820 as a result of the lack of compliance with these Consent Orders and for the underlying Coastal Act violations as described herein.

14 DEADLINES

Prior to the expiration of the deadlines established by these Consent Orders, Respondents may request from the Executive Director an extension of the deadlines. Such a request shall be made in writing 10 days in advance of the deadline and directed to the Executive Director in Commission's South Coast District office. The Executive Director may grant an extension of deadlines upon a showing of good cause, either if the Executive Director determines that Respondents have diligently worked to comply with their obligations under these Consent Orders, but cannot meet deadlines due to unforeseen circumstances beyond their control, or if the Executive Director determines that the Restoration Plan schedule should be extended to ensure an effective restoration.

15 SITE ACCESS

NBR and/or the City shall provide Commission staff and any agency having jurisdiction over the work being performed under these Consent Orders with access to the subject properties to inspect the restoration activities and areas potentially affected by the restoration activities at all reasonable times, upon 24 hours notice, when feasible, having been provided to the appropriate representative(s) of NBR and/or City, who shall be designated for this purpose in the Restoration Plan. Nothing in these Consent Orders is intended to limit in any way the right of entry or inspection that any agency may otherwise have by operation of any law. The Commission staff may enter and move freely about the portions of the subject properties on which the Impacted Areas are located, and on adjacent areas of the properties to view the areas where development is being performed pursuant to the requirements of the Consent Orders, for purposes including, but not limited to, ensuring compliance with the terms of these Consent Orders.

16 GOVERNMENT LIABILITIES

The California Coastal Commission, including its officers, employees, and agents, shall not be liable for injuries or damages to persons or property resulting from acts or omissions by Respondents in carrying out activities pursuant to these Consent Orders, nor shall the Coastal Commission, including its officers, employees, and agents, be held as a party to any contract entered into by Respondents or their agents in carrying out activities pursuant to these Consent Orders.

17 SETTLEMENT OF CLAIMS

17.1 In light of the desire to settle this matter and avoid litigation, pursuant to the agreement of the parties as set forth in these Consent Orders, Respondents hereby waive whatever right they may have to seek a stay or to challenge the issuance and enforceability of these Consent Orders in a court of law or equity, including pursuant to PRC sections 30803(b) and 30801.

17.2 The Commission and Respondents agree that these Consent Orders settle the Commission's monetary claims for relief against Respondents for those violations of the Coastal Act alleged in "NOI" occurring prior to the date of these Consent Orders, (specifically including claims for civil penalties, fines, or damages under the Coastal Act, including under Public Resources Code Sections 30805, 30820, and 30822), with the exception that, if Respondents fail to comply with any term or condition of these Consent Orders, the Commission may seek monetary or other claims for both the underlying violations of the Coastal Act and for the violation of these Consent Orders against the non-compliant party. In addition, these Consent Orders do not prevent the Commission from taking enforcement action due to Coastal Act violations, if any, at the subject properties other than those that are the subject of the NOI.

17.3 If the final report submitted pursuant to 3.1.H.5, above, indicates that the restoration and mitigation activities have been successful based on the requirements contained in the approved Restoration Plan (including the requirements to monitor and maintain the restoration/mitigation for a period of five years), and Respondents have fulfilled all other obligations under these Consent Orders, pursuant to PRC Section 30812(f), the Executive Director shall record a notice of rescission of the Notice of Violation described in the October 5, 2010 Notice of Intent to Record a Notice of Violation of the Coastal Act.

18 SUCCESSORS AND ASSIGNS

These Consent Orders shall run with the land and bind Respondents and all successors in interest, heirs, assigns, as well as future owners of the property subject to this order. Respondents shall provide notice to all successors, assigns, and potential purchasers of any remaining obligations under these Consent Orders.

These Consent Orders constitute both administrative orders issued to Respondents personally and a contractual obligation between Respondents and the Commission, and therefore shall remain in effect until all terms are fulfilled, regardless of whether Respondents own the subject properties upon which the violations exist.

19 MODIFICATIONS AND AMENDMENTS

Except as provided in Section 14, and for minor, immaterial matters upon mutual written agreement of the Executive Director and Respondents, these Consent Orders may be amended or modified only in accordance with the standards and procedures set forth in Section 13188(b) of the Commission's administrative regulations.

20 GOVERNMENTAL JURISDICTION

These Consent Orders shall be interpreted, construed, governed and enforced under and pursuant to the laws of the State of California.

21 LIMITATION OF AUTHORITY

21.1 Except as expressly provided herein, nothing in these Consent Orders shall limit or restrict the exercise of the Commission's enforcement authority pursuant to Chapter 9 of the Coastal Act, including the authority to require and enforce compliance with these Consent Orders.

21.2 Correspondingly, Respondents have entered into these Consent Orders and waived their right to contest the factual and legal bases for issuance of these Consent Orders, and the enforcement thereof according to its terms. Respondents have agreed not to contest the Commission's jurisdiction to issue and enforce these Consent Orders.

22 INTEGRATION

These Consent Orders constitute the entire agreement between the parties and may not be amended, supplemented, or modified except as provided in these Consent Orders.

23 STIPULATION

Respondents and their representatives attest that they have reviewed the terms of these Consent Orders and understand that their consent is final and stipulate to its issuance by the Commission.

IT IS SO STIPULATED AND AGREED:

On behalf of Respondents:

Southern California Edison

By: _____ 4/1/2011

April 1, 2011

Herman Weissker, Inc.

By: ALEX MERUELO
CHAIRMAN

April 1, 2011

Newport Banning Ranch LLC

By:

April 1, 2011

City of Newport Beach

By:

April 1, 2011

Executed in Santa Barbara, CA on behalf of the California Coastal Commission:

Peter Douglas, Executive Director

April 14, 2011

Figures:

Figure 1: Polygon Location Map

Figure 2: Map of Those Mitigation Areas Described in Section 3.1.G.2.a,b, and c

Herman Weissker, Inc.

April 1, 2011

By:

Newport Banning Ranch LLC

By: George L. Basye Manager NBR LLC April 1, 2011

City of Newport Beach

By: April 1, 2011

Executed in Santa Barbara, CA on behalf of the California Coastal Commission:

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By:

Newport Banning Ranch LLC

By: April 1, 2011

City of Newport Beach

By: April 1, 2011

Executed in Santa Barbara, CA on behalf of the California Coastal Commission:

Peter Douglas, Executive Director April 14, 2011

Figures:

Figure 1: Polygon Location Map

Figure 2: Map of Those Mitigation Areas Described in Section 3.1.G.2.a,b, and c

APPROVED AS TO FORM:

City Attorney 4/11/11

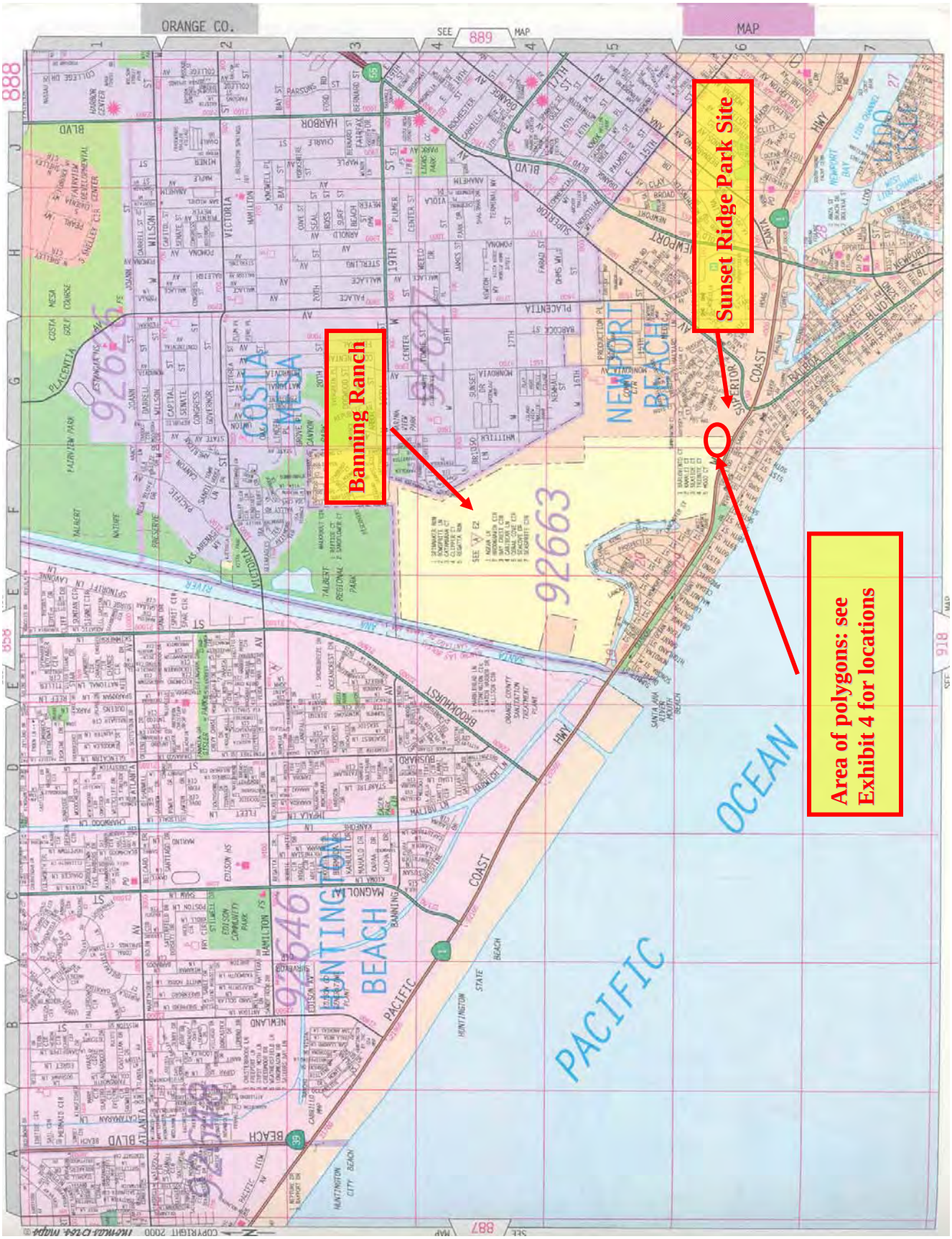


Exhibit 1
CCC-11-CD-03 (NBR)
CCC-11-RO-02
Page 1 of 1

NEWPORT BANNING RANCH

Context Map **Exhibit 2**

Legend
- Newport Banning Ranch Property
- NMUSD Property

FUSCOE ENGINEERING

1" = 600'
09-27-2007

Exhibit adapted from Newport Banning Ranch planning document

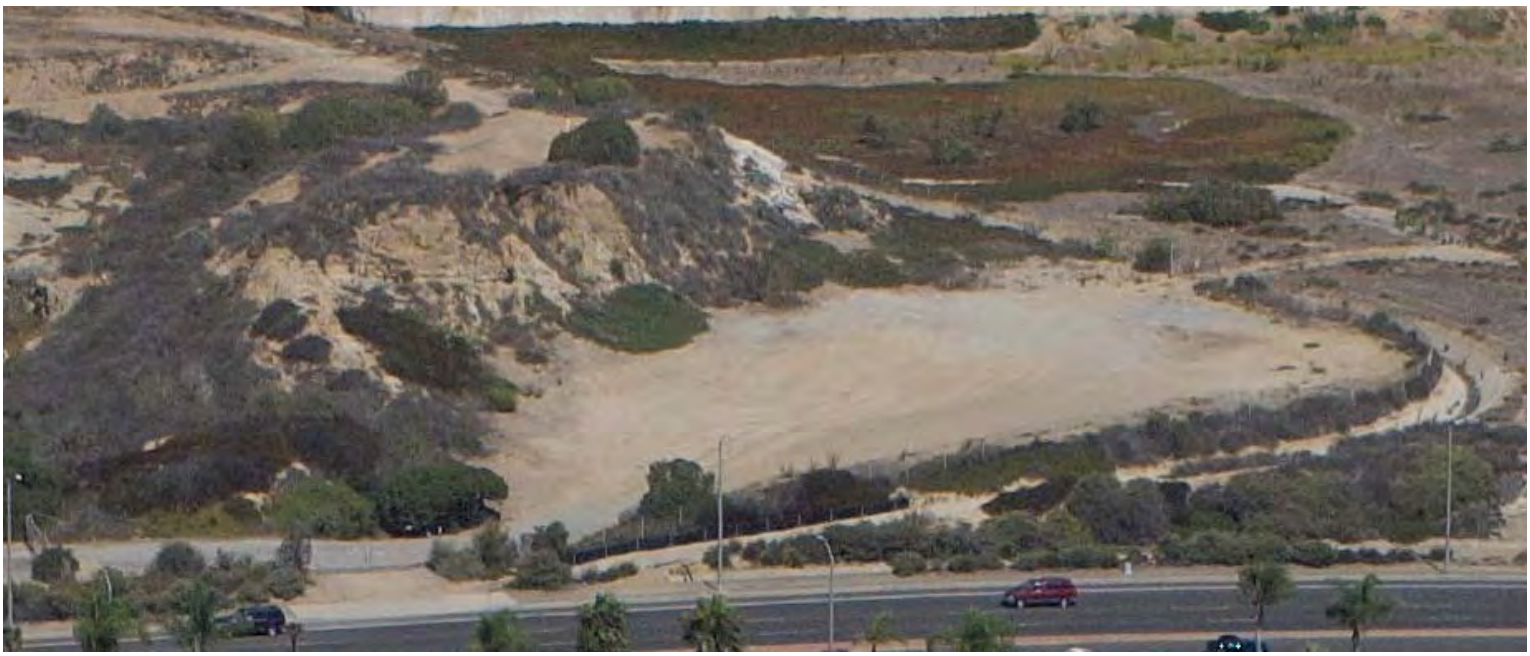
October 19, 2006

September 23, 2002

October 23, 2004

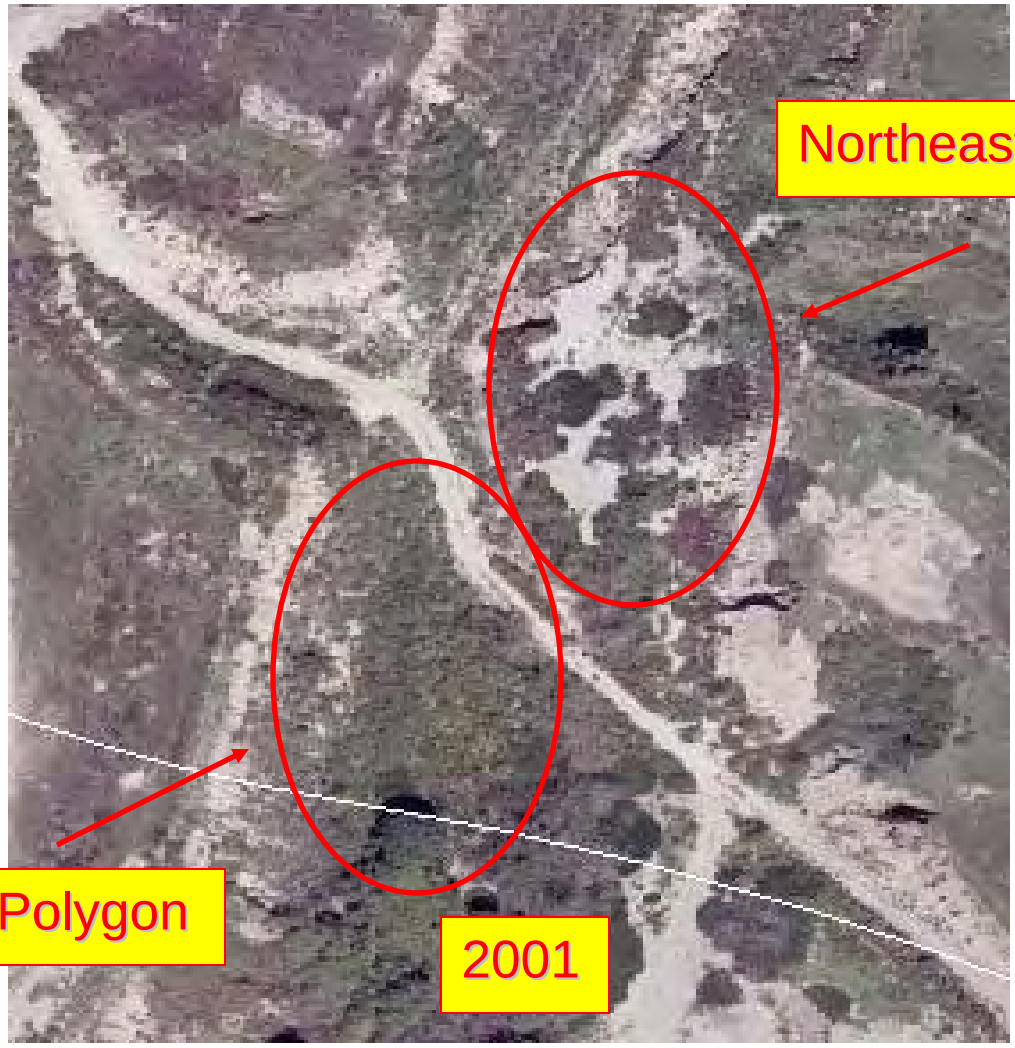
Exhibit 3
CCC-11-CD-03 (NBR)
CCC-11-RO-02
Page 1 of 4

September 16, 2006

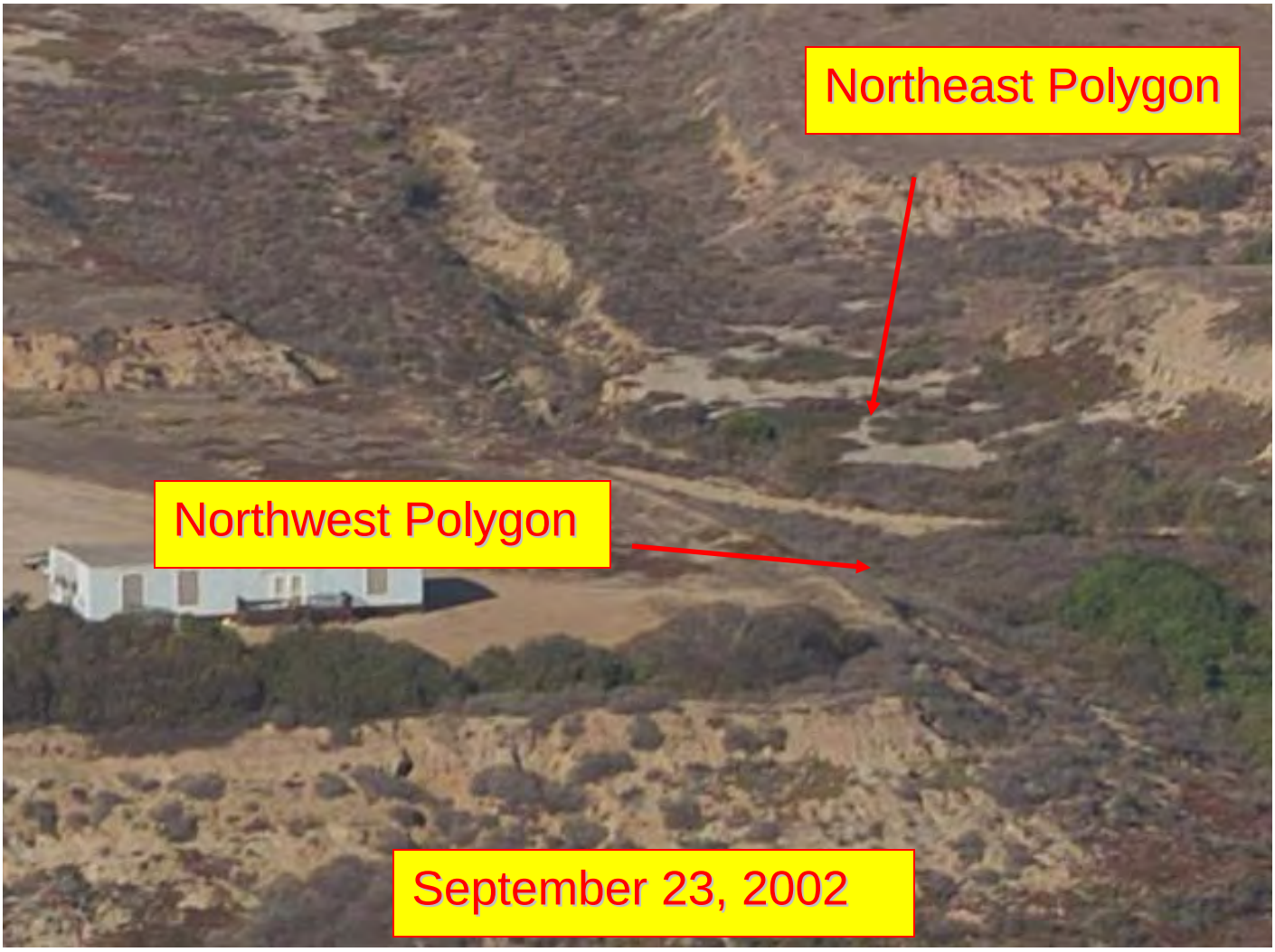


September 19, 2008

California Coastal Records Project photographs


Northeast Polygon
Northwest Polygon
2001


2006


Northeast Polygon
Northwest Polygon
September 23, 2002


Northeast Polygon
Northwest Polygon
2004 or 2005

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: AirPhotoUSA 2007.

N

Figure 1

DSM 12/10

Exhibit 4
CCC-11-CD-03 (NBR)
CCC-11-RO-02
Page 1 of 1

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

M E M O R A N D U M

FROM: Jonna D. Engel, Ph.D., Ecologist and Heather Rhee, Technical Services Graduate Student Intern

TO: Andrew Willis, Enforcement Analyst

SUBJECT: Newport Banning Ranch NOV Subject Development ESHA Determination

DATE: March 31, 2011

Documents Reviewed:

Hamilton, Robb (Hamilton Biological). December 14, 2010. Reply to LSA Memorandum; Bluff Road/Sunset Ridge Park Entrance. Memorandum from Hamilton Biological to Jonna Engel, California Coastal Commission.

Hamilton, Robb (Hamilton Biological). December 11, 2010. Review of ESHA Issues; Bluff Road/Sunset Ridge Park Entrance. Memorandum from Hamilton Biological to Jonna Engel, California Coastal Commission.

LSA Associates. December 9, 2010. California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site. Memorandum from Art Homrighausen and Richard Erickson, LSA Associates, to Mike Sinacori, City of Newport Beach, Department of Public Works. This memorandum includes LSA's 1991 vegetation map and LSA's annual gnatcatcher survey maps from 1992 through 1996.

Ahrens, Jeff. (Glenn Lukos Associates) October 13, 2010. California Gnatcatcher Use of Polygons Addressed in Notice of Violation. Memorandum to Jonna Engel, CCC.

Bomkamp, Tony. (Glenn Lukos Associates) August 26, 2010. Response to Coastal Commission Notice of Violation dated May 14, 2010 for Vegetation Removal on Portions of Newport Banning Ranch and City of Newport Beach Properties. Memorandum to Michael Mohler, Newport Banning Ranch, LLC.

Glenn Lukos Associates. September 24, 2009. Habitat Characterization for Areas Affected by Alleged Clearing near Southeast Corner of Banning Ranch Referenced in July 29, 2009 Letter from California Coastal Commission. Memorandum to Andrew Willis, CCC.

Hamilton, Robb (Hamilton Biological). December 10, 2009. Review of Biological Resource Issues, Sunset Ridge Draft EIR. Memorandum from Hamilton Biological to Janet Johnson Brown, City of Newport Beach.

BonTerra Consulting. June 25, 2009. Results of Coastal California Gnatcatcher Surveys for Newport Banning Ranch Project Site, Orange County, California. Letter addressed to Ms. Sandy Marquez, USFWS.

Forma Design Team, Fuscoe Engineering, Glenn Lukos Associates, CTG Energetics Inc., LSA Associates Inc., Geosyntec Consultants, Firesafe Planning. August 2008. The Newport Banning Ranch Technical Appendices Volume 2. Draft Environmental Impact Report prepared for Mike Mohler, managing Director for Newport Banning Ranch, LLC.

Glenn Lukos Associates. August 2008. The Newport Banning Ranch Biological Technical Report. Report prepared for Mike Mohler, Newport Banning Ranch, LLC.

Glenn Lukos Associates. July 19, 2007. Submittal of 45-Day Report for coastal California gnatcatcher Surveys for the 412.5 Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California. Survey report from Glenn Lukos Associates Biologist Ingrid Chlup to Sandra Marquez, USFWS.

Glenn Lukos Associates. July 25, 2006. Submittal of 45-Day Report for Coastal California Gnatcatcher Presence/Absence Surveys for the 412.5 Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California. Survey report from Glenn Lukos Associates Biologist Jeff Ahrens to Daniel Marquez, USFWS.

Glenn Lukos Associates. October 14, 2002. Protocol Surveys for the Coastal California Gnatcatcher; West Newport Oil Property, Orange County California. Survey report from Glenn Lukos Associates Biologist Tony Bompkamp to Leonard Anderson, West Newport Oil Property.

Gnatcatcher survey map. 2000. Unknown source (we believe the source is PCR Services).

PCR Services. 1998. Gnatcatcher survey map.

PCR Services. 1997. Gnatcatcher survey map.

LSA. 1996. Spring 1996 California Gnatcatcher Survey. Survey report from LSA Biologist Richard Erickson to Leonard Anderson.

LSA. 1995. Spring 1995 California Gnatcatcher Survey. Survey report from LSA Biologist Richard Erickson to Leonard Anderson.

LSA. 1994. Results of 1994 Gnatcatcher and Wren Surveys. Survey report from LSA Biologists Robb Hamilton and Richard Erickson to Leonard Anderson, West Newport Oil Company.

Newport Banning Ranch is located near the mouth of the Santa Ana River in Orange County, California. It is situated north of West Pacific Coast Highway, east of the Santa Ana River channel, south of Talbert Nature Preserve, and west of Superior Avenue. The ranch is one of the last large (over 400 acres) open spaces near the coast in Orange County. The property supports a number of important and sensitive plant communities and plant and animal species. Starting in 2004, development[1] was undertaken at three separate and distinct areas on the southeast portion of Newport Banning Ranch and a small portion of the City of Newport Beach's adjacent property to the east. For the purpose of evaluation and discussion, the three areas are referred to by their location as the southeast, northwest, and northeast polygons (Figure 1[2]). The subject development commenced in 2004, continued regularly into 2006, and materials placed on the southeast polygon as part of that development persist in place as of the writing of this memo. The subject development involved, among other things, placement of solid material and grading on the Newport Banning Ranch property and adjacent City of Newport Beach property, which resulted in removal of major vegetation in the form of native coastal sage scrub and maritime succulent scrub.

On September 15, 2010, we and other Coastal Commission staff made a site visit to observe and study the biological resources at and around the three polygons where the subject development occurred. At issue is the current nature of the plant communities, the nature of the plant communities at the time the subject development commenced (2004), history of gnatcatcher use, and the potential of one or more of the polygons having supported environmentally sensitive habitat prior to the subject development. Representatives of Newport Banning Ranch and the City of Newport Beach, Newport Banning Ranch's biological consultant (Tony Bomkamp, Glenn Lukos Associates), and Southern California Edison's biologist (Tracy Alsobrook) accompanied us on the site visit.

We and other Coastal Commission staff visited the site again on December 15, 2010 to review the biological resources at and around the three polygons as well as to discuss the history of gnatcatcher use, the nature of gnatcatcher survey collection on the southeast corner of Newport Banning Ranch, and our approach to making an ESHA determination. Representatives of Newport Banning Ranch, the City of Newport Beach, and Southern California Edison; Newport Banning Ranch's biological consultant (Tony Bomkamp, Glenn Lukos Associates); the City of Newport Beach's biological consultant's (Art Homrighausen and Richard Erickson, LSA & Ann Johnston, BonTerra) and a USFWS biologist (Christine Medak), accompanied us on the site visit. On both

[1] As alleged in the Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings dated October 5, 2010.
[2] Figure created from "Polygon Acreage Map" provided to staff by Newport Banning Ranch, LLC that approximates the areal extent of the areas impacted by the subject development.

site visits we spent several hours walking and talking; looking at each polygon and the surrounding environment. In addition to our site visits, we have reviewed the documents listed above (presented in chronological order), peer reviewed literature, and aerial photographs to determine the history of gnatcatcher use and the nature of the habitat at each polygon prior to the subject development and to determine if any of the three polygons met the definition of Environmentally Sensitive Habitat Area (ESHA) at the time the subject development commenced.

ESHA Definition

Section 30107.5 of the Coastal Act defines Environmentally Sensitive Habitat 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.*

Plants and animals and habitats that meet this definition may include rare plant communities identified by the California Department of Fish and Game (CDFG), federal and state listed species, California Native Plant Society "1B" and "2" plant species, California species of special concern, and habitats that support the type of species listed above.

The City of Newport Beach LUP also provides guidance for determining what constitutes ESHA. LUP policy 4.1.1-1 states that the following site attributes are among those characteristics that are determinative of whether an area constitutes ESHA:

- The presence of natural communities that have been identified as rare by the California Department of Fish and Game.
- The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.

The LUP Section 4.1.1 states that coastal sage scrub (CSS) is an especially important habitat and "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, it meets the definition of ESHA because of its especially valuable role in the ecosystem... CSS also provides essential nesting and foraging habitat for the coastal California gnatcatcher, a rare species designated threatened under the Federal Endangered Species Act."

Plant Communities

During our site visit to the southeast portion of Newport Banning Ranch we viewed several types of coastal scrub communities including coastal sage scrub, coastal bluff scrub, and maritime succulent scrub within and surrounding the affected polygons. All the coastal scrub communities we observed were invaded by non-native plants to a greater or lesser extent. Coastal bluff scrub and maritime succulent scrub are identified as rare plant communities in CDFG's Natural Diversity Data Base. Coastal sage scrub

is increasingly rare in the coastal zone and provides an especially valuable ecosystem service when occupied by the coastal California gnatcatcher or other rare species.

Coastal sage scrub is comprised of dominant species that are semi-woody and low-growing, with shallow, dense roots that enable them to respond quickly to rainfall[3]. The species composition and structure of individual stands of coastal sage scrub depend on moisture conditions that derive from slope, aspect, elevation and soil type. Sawyer & Keeler-Wolf (1995) divide coastal scrub communities into series including California sunflower (*Encelia californica*), California buckwheat (*Eriogonum fasciculatum*), and coast prickly-pear, (*Opuntia litteralis*) series[4]. Where coastal sage scrub is found on the southeast corner of Newport Banning Ranch, it is best characterized as California sunflower series; however, there are also patches of California buckwheat and coast prickly-pear series.

Coastal bluff scrub is found in localized areas along the coast below Point Conception [5]. It often intergrades with other scrub community types, as is the case on the southeast corner of Newport Banning Ranch. Coastal bluff scrub is comprised of small stature woody or succulent plants including dwarf shrubs, herbaceous perennials, and annuals[6]. Dominant species include California sunflower, live-forever (*Dudleya sp.*), and prickly pear[7].

Maritime succulent scrub is a low growing, open (25%-75% ground cover) scrub community dominated by drought deciduous, semi-woody shrubs that grow on rocky or sandy soils of coastal headlands and bluffs[8]. This community type has a very limited distribution along the coast between southern California and northern Baja California and on the Channel Islands. Characteristic species include California sunflower, prickly pear, and boxthorn (*Lycium californicum*)[9].

The coastal scrub communities on the southeast corner of Newport Banning Ranch tend to be dominated by California sunflower and distinguished by those species which are diagnostic of the particular coastal scrub community types. All of the coastal scrub communities on and surrounding the polygons are invaded by non-native and invasive species, such as highway iceplant (*Carpobrotus edulis*), crystalline iceplant (*Mesembryanthemum crystallinum*), castor bean (*Ricinus communis*), myoporum (*Myoporum laetum*), tree tobacco (*Nicotiana glauca*), fennel (*Foeniculum vulgare*), black mustard (*Brassica nigra*), tocalote (*Centaurea melitensis*), and European annual grasses (*Bromus diandrus, B. madritensis, B. hordeaceus, Lolium multiflorum*).

[3] Holland, R.F. 1986. Preliminary Descriptions of the Terrestrial Natural Communities of California. State of California, The Resources Agency, Department of Fish and Game.
[4] Sawyer, J. & T. Keeler-Wolf. 1995. A manual of California vegetation. California Native Plant Society.
[5] Holland (1986) op cit.
[6] Ibid.
[7] Ibid.
[8] Ibid.
[9] Ibid.

California Gnatcatcher

Coastal sage scrub in southern California provides habitat for about 100 rare species, many of which are also endemic to limited geographic regions[10]. One such species is the coastal California gnatcatcher (*Polioptila californica)*. The California gnatcatcher is an obligate, year-round resident of coastal sage scrub communities[11]. California gnatcatchers typically live a total of 4 to 6 years. They primarily feed on insects, which are eaten directly off coastal scrub vegetation. California gnatcatchers range from Baja California north to Ventura and San Bernadino Counties in southern California. Gnatcatchers in southern California preferentially nest and feed in coastal scrub vegetation characterized by varying abundances of California sagebrush (*Artemesia californica*), California sunflower; and California buckwheat[12]. Where these species are in low abundance, California gnatcatchers will forage on other species, including some non-natives such as black mustard[13]. They also use grassland, chaparral, and riparian habitats in proximity to sage scrub for dispersal and foraging[14].

In the last 60 years extensive southern California suburban sprawl has reduced and fragmented coastal scrub habitats, resulting in a significant decline in California gnatcatcher populations. In addition, the majority of remaining coastal scrub habitats are disturbed to a greater or lesser extent by non-native and invasive plant species. In response to the drop in gnatcatcher numbers in southern California, the northernmost subspecies (*Polioptila californica californica*) was listed as federally threatened in 1993[15]. The California gnatcatcher is also a California Species of Special Concern. Loss of gnatcatcher coastal scrub habitat in southern California is estimated to be 70 to 90 percent[16,17] and, in 1999, the United States Fish and Wildlife Service (USFWS), estimated the number of gnatcatcher breeding pairs in Los Angeles, Orange and San Diego Counties at only 144, 643, and 1,917, respectively[18].

[10] Westman, W.E. 1981. Diversity relations and succession in Californian coastal sage scrub. Ecology 62:170-184

[11] Atwood, J.L. and D.R. Bontrager. 2001. California Gnatcatcher (*Polioptila californica). In* The Birds of North America, No. 574 (A. Poole and F. Gill, eds.). The Birds of North America, Inc. Philadelphia, PA.

[12] Ibid.

[13] Dixon, J. Dec. 18, 2002. ESHA Determination for the Marblehead Property. Memorandum to Karl Schwing

[14] Ibid.

[15] Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018–AV38, Endangered and threatened wildlife and plants; Notice of determination to retain the threatened status for the coastal California gnatcatcher under the endangered species act. Federal Register 60:72069. (March 1993).

[16] Westman (1981) op. cit.

[17] Michael Brandman Associates. 1991. Unpubl. Report. Unpubl. Report. A rangewide assessment of the California Gnatcacher (Polioptila californica). Prepared for Building Industry Assoc. of Southern California; July 23.

[18] Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018–AV38, Endangered and threatened wildlife and plants; Revised designation of critical habitat for the Coastal California Gnatcatcher (*Polioptila californica californica*). 50; Federal Register 72:72069. (December 19, 2007).

In 2007, the USFWS identified and mapped critical gnatcatcher habitat in southern California[19]. In determining areas to designate they "consider the physical and biological features (primary constituent elements (PCEs)), that are essential to the conservation of the species". Primary constituent elements define the actual extent of habitats that may be useful to the listed species. Primary constituent elements for California Gnatcatcher critical habitat include not only intact sage scrub habitats, but also "non-sage scrub habitats such as chaparral, grassland, riparian areas, in proximity to sage scrub habitats . . . that provide space for dispersal, foraging, and nesting." The USFWS defines sage scrub as a broad category of vegetation that includes coastal sage scrub, coastal bluff scrub, and maritime succulent scrub in their extensive list of the various sage scrub plant communities. The USFWS designated all of Newport Banning Ranch as critical habitat for California gnatcatchers in 2007[20] (Figure 2). In designating Newport Banning Ranch as critical habitat, USFWS noted that the area was occupied by gnatcatchers at the time of listing and at the time of designation of critical habitat and the area "contains all the features essential to the conservation of the coastal California gnatcatcher."[21] Newport Banning Ranch is the only immediately coastal land mapped as critical gnatcatcher habitat in Orange County[22]. USFWS pointed out in the final rule that the critical habitats in northern Orange County "may require special management considerations or protection to minimize impacts associated with habitat type conversion and degradation occurring in conjunction with urban and agricultural development."

California gnatcatcher breeding season territories range in size from less than 2.5 acres to 25 acres[23,24], with a mean territory size generally greater for inland populations than coastal populations[25]. In a 1989 to 1992 study of two sites in San Diego County, breeding season territories averaged 20 acres; non-breeding season territories were larger[26]. In studies by Bontrager (1991)[27] and Preston et al. (1998)[28], territory size during the non-breeding season increased 82 percent and 78 percent, respectively. Increase in non-breeding season territory size is thought to serve two purposes; to allow gnatcatchers to acquire more habitat resources and to obtain information about potential mates.

California gnatcatchers are known to occupy (i.e., to breed, nest, and forage in) year round various locations of coastal scrub habitat on Newport Banning Ranch. Numerous gnatcatcher surveys have been conducted on the property. The USFWS California

[19] Ibid.
[20] Ibid. See also Exhibit 13, Banning Ranch DEIR.
[21] USFWS (Dec. 19, 2007) op. cit.
[22] See Map 7, Federal Register 72:72069.
[23] Atwood, J.L., S.H. Tsai, C.H. Reynolds, J.C. Luttrell, and M.R. Fugagli. 1998. Factors affecting estimates of California Gnatcatcher territory size. Western Birds, 29: 269-279.
[24] Preston, K.L., P.J. Mock, M.A. Grishaver, E.A. Bailey, and D.F. King. 1998. Calfornia Gnatcatcher territorial behavior. Western Birds, 29: 242-257.
[25] Ibid.
[26] Atwood and Bontrager (2001) op. cit.
[27] Bontrager, D.R. 1991. Unpublished Report: Habitat requirements, home range and breeding biology of the California Gnatcatcher (Polioptila californica) in south Orange County. Prepared for Santa Margarita Co., Rancho Santa Margarita, CA; April.
[28] Preston et. al. 1998. op. cit.

gnatcatcher survey protocols, published in 1997, require a minimum of six or more surveys conducted in the morning to all potentially occupied habitat areas during the gnatcatcher breeding season which extends from March 15 to June 30[29,30]. All surveys must take place during the morning hours and no more than 80 acres of suitable habitat may be surveyed per visit. Typically gnatcatcher survey reports include a compilation of gnatcatcher observations (dot/point locations) in the form of a map of gnatcatcher breeding pair use areas (breeding territories).

The gnatcatcher survey data for the southeast corner of Newport Banning Ranch, made available to us from Newport Banning Ranch, City of Newport Beach, and Newport Banning Ranch Conservancy (via USFWS), includes the following: gnatcatcher use areas and gnatcatcher observations collected by LSA from 1992 through 1994, gnatcatcher use areas collected by LSA in 1995 and 1996, gnatcatcher use areas and gnatcatcher observations collected by PCR in 1997, gnatcatcher observations collected by PCR in 1998, gnatcatcher use areas in 2000 (collector unknown, we believe it may have been PCR), gnatcatcher observations collected by GLA in 2002, 2006, and 2007, and gnatcatcher observations collected by BonTerra in 2009. For some years we have the reports associated with the data maps (1994 - 1996, 2002, 2006, 2007, and 2009) and for other years we do not (1992, 1993, 1997, 1998, and 2000).

We also have breeding season and non-breeding season gnatcatcher observations collected by Robb Hamilton in 2009 and 2010[31]. Mr. Hamilton was one of the biologists who collected gnatcatcher data for LSA in the early 90's. Mr. Hamilton currently runs his own environmental consulting firm, Hamilton Biological, and holds a permit to conduct gnatcatcher presence/absence surveys (No. TE-799557).

The Newport Banning Ranch gnatcatcher survey efforts (number of days per annual survey), methodology (timing, areal coverage, etc.), and data presentation vary among the biological consulting firms. LSA surveyed for nine days in 1992, three in 1993, and four each from 1994 through 1996. Regarding the presentation of their data LSA states that:

> *Each year of the LSA surveys, composite maps were prepared that showed the distribution of approximate gnatcatcher territory boundaries at NBR. …The composite territories thus identified generally represented the most conservative polygons possible that combined all observation points. Notions of what might constitute gnatcatcher habitat were put aside; only those areas where gnatcatchers were observed were mapped. However, because polygons were mapped by combining all outlying observation points, on a finer scale many areas within polygons never were actually used by gnatcatchers. Most of the polygons depicted include suitable habitat as well as unused pockets (e.g., ice*

[29] U.S. Fish and Wildlife (USFWS). 1997a (February 28). Coastal California Gnatcatcher (Polioptila californica californica) Presence/Absence Survey Protocol. Washington, D.C.:USFWS.

[30] U.S. Fish and Wildlife (USFWS). 1997b (July 28). Coastal California Gnatcatcher (Polioptila californica californica) Presence/Absence Survey Protocol. Washington, D.C.:USFWS.

[31] Mr. Hamilton did not have access to Newport Banning Ranch so his observations are limited to those areas of the southeastern corner of Newport Banning Ranch that he could survey from the property boundary.

plant, barren of developed areas), and the territory maps do not distinguish suitable habitat from unsuitable habitat such as solid ice plant, roads, and structures.[32]

PCR conducted surveys in 1997 and 1998 and we believe in 2000. We do not have any information regarding these surveys other than the survey maps.

Glenn Lukos Associates and BonTerra present gnatcatcher sightings for individuals and breeding pairs as dot/point observations on their annual survey maps. We asked Glenn Lukos Associates to interpret their dot/point observations and they said they represent an interpolation of a few to multiple individual gnatcatchers and/or a gnatcatcher pair within a use area (pers. comm. Tony Bomkamp, January 3, 2011). We asked BonTerra the same question and they said their dot/point observations were their best approximation or estimation of the center point of observed gnatcatcher activity (pers. comm. Ann Johnston, December 15, 2010).

The USFWS California gnatcatcher survey protocols, published in 1997[33], require a minimum of six surveys conducted in the morning during the gnatcatcher breeding season. Surveys conducted in the early '90's did not always meet the six-day minimum however they did take place in the morning during the breeding season. We are assuming that surveys conducted from 1997 on followed the USFWS gnatcatcher survey protocols. We are also assuming that gnatcatcher survey data presented as dot/point observations have associated use polygons subject to gnatcatcher habitat requirements. Our conclusions are based on the data we have and our assumptions regarding these data. The gnatcatcher survey results are reported below in the subject development individual area (southeast, northwest, and northeast polygon) discussions.

Aerial Photography and Vegetation and ESHA Mapping

We have reviewed aerial photographs of the southeast portion of Newport Banning Ranch and vegetation and ESHA mapping performed on this section of Newport Banning Ranch. Newport Banning Ranch's biological consultant Glenn Lukos Associates (August 26, 2010 memorandum) present a series of historic aerial photographs (Exhibits 2 through 7 of the August 26, 2010 memorandum) depicting the southeast portion of Newport Banning Ranch with outlines of the polygons superimposed. As described below, we studied California Coastal Records Project aerial photos and aerial photos provided by Newport Banning Ranch, taken before the subject development commenced, in our efforts to make an ESHA determination.

[32] Quote from December 9, 2010 "California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site" letter to Mick Sinacori, City of Newport Beach, Department of Public Works from Art Homrighausen and Richard Erickson of LSA

[33] USFWS. February 28, 1997. Coastal California Gnatcatcher (*Polioptila californica californica*) Presence/Absence Survey Guidelines. Carlsbad Fish and Wildlife Office, 2730 Loker Avenue West, Carlsbad, California 92008

An oblique aerial photograph taken in September 2002 by the California Coastal Records Project, prior to the subject development, shows that the southeast polygon supported low profile coastal scrub habitat except for a road bisecting the polygon (Figure 3). Another oblique aerial photograph, taken in September 2002 by the California Coastal Records Project, shows that the northwest polygon supported nearly 100 percent vegetative cover of a mixture of small and larger shrubs and that the northeast polygon supported patches of low lying vegetation and a few scattered shrubs interspersed with small bare patches (Figure 4). Aerial photos provided by Newport Banning Ranch dated February 11, 2004 (Figures 5 & 6) and April 16, 2004 (Figures 7 & 8), reveal nearly identical vegetation patterns as those described above for the three polygons.

According to the photographs we have reviewed, the polygons supported significant vegetative cover at the time the subject development commenced. The photographic record, while not suitable for identifying specific habitat types or individual species, does enable us to ascribe coastal scrub habitat comprised of small and larger shrubs to the southeast and northwest polygons. The coastal scrub habitat was most likely a mixture of native and non-native species given the abundance of non-natives that we observed on and around the polygons during our site visit. From aerial photos depicting the northeast polygon, the dominant vegetative layer appears to be a low lying mat (most likely highway iceplant) interspersed with a few large shrubs. To better estimate the type of habitat disturbed by the subject development we reviewed the southeast section of Newport Banning Ranch vegetation mapping created before and after the subject development and the ESHA map created after the subject development. We also reviewed the habitat information provided by Newport Banning Ranch's biological consultant (Glenn Lukos Associates) in the reports listed above. And we visited the site twice after the subject development (September 15, 2010 & December 15, 2010) because the currently existing vegetation within and surrounding the polygons is indicative of the conditions prior to the subject development.

Four vegetation maps and one ESHA map are available to us for the southeast portion of Newport Banning Ranch: vegetation maps created by LSA, PCR Services, and Glenn Lukos Associates prior to the subject development and a vegetation and ESHA map created as part of the Newport Banning Ranch Technical Appendices[34] after the subject development commenced. In 1991 LSA, currently the City of Newport Beach's biological consultant, mapped various habitat types including coastal bluff scrub on the southeast corner of Newport Banning Ranch (Figure 9; from Figure 1, LSA December 9, 2010 letter). In 1998 PCR Services mapped coastal sage scrub habitat on and around

[34] Glenn Lukos Associates, Inc. August 2008. Draft Biological Technical Report for the Newport Banning Ranch.
This document was a part of the "Banning Ranch, Planned Community Development Plan, Technical Appendices Volume II" that was posted on the City of Newport Beach website and downloaded in August 2009; it has since been removed. While the report text is marked draft, the exhibits and appendices are not. Given that the vegetation (Exhibit 9) and ESHA (Exhibit 12) exhibits portray the expert opinion of Glenn Lukos Associates, Inc., at the time they were developed, we believe it is appropriate to consider this information, along with other sources, in our ESHA determination. We note that these data support our ESHA conclusions and we are awaiting the revised analysis, but in the interim, we continue to note the significance of the data presented in draft form.

the southeast polygon (Figure 10; from Exhibit 9, Glenn Lukos Associates, August 26, 2010 memorandum). We do not have PCR's 1998 mapping of the remainder of the polygons. In 2002 Glenn Lukos Associates mapped "bluff scrub or succulent scrub" around and partially within the southeast polygon, on the bluff to the west of and partially within the northwest polygon, and just south/southeast of the northeast polygon (Figure 11; From Exhibit 2, Glenn Lukos Associates, "West Newport Oil Property 2002 Gnatcatcher surveys"). The vegetation map created after the subject development commenced (Figure 12a and 12b; from Exhibit 9, Glenn Lukos Associates, August 2008, "Draft Biological Technical Report for the Newport Banning Ranch"), mapped all three polygons as disturbed/developed. The majority of the areas surrounding the southeast and northwest polygons are mapped as native plant communities including maritime succulent scrub, disturbed encelia scrub, disturbed mule-fat scrub, goldenbush scrub, and disturbed goldenbush scrub. A little less than 50 percent of the area surrounding the northeast polygon was mapped as native plant communities following the subject development; the remainder was mapped as non-native plant communities. The ESHA map (Figure 13; from Exhibit 12, Glenn Lukos Associates, August 2008, "Draft Biological Technical Report for the Newport Banning Ranch") identifies two areas of ESHA near the subject development; the maritime succulent scrub adjacent to the southeast polygon and the disturbed encelia scrub adjacent to the northwest polygon.

ESHA Delineation

Areas of coastal scrub habitat with significant gnatcatcher use perform an important ecosystem function, are increasingly rare, and are easily disturbed, and therefore meet the definition of ESHA under the Coastal Act and the City of Newport Beach LUP.

In general, relatively pristine coastal sage scrub that is part of a large, contiguous stand, coastal sage scrub vegetation with significant coastal California gnatcatcher use, and appropriate gnatcatcher coastal sage scrub habitat in "occupied" areas[35] are increasingly rare in coastal California and meet the definition of ESHA. However, all ESHA determinations are based on an analysis of site-specific conditions. Since the entire Banning Ranch is occupied by gnatcatchers, the determination of ESHA is appropriately based on both observations of gnatcatcher use and on the presence of vegetation that constitutes suitable habitat.

Southeast Polygon

Glenn Lukos Associates (September 24, 2009) estimated the areal extent of the southeast polygon at approximately 1.01 acres, of which approximately 0.113 acre was not vegetated due to the presence of a road that predates the Coastal Act. In their August 26, 2010 memorandum Glenn Lukos Associates state that "the amount of California encelia on the site at the time the contractor undertook the activities in question is estimated at 0.62 acres…" and that the adjacent slope north of the polygon

[35] An area is considered "occupied" by gnatcatchers if they have been observed nearby in easy flight distance regardless of whether gnatcatchers have been observed to use a particular plot of ground.

supported approximately 1.15 acres of maritime succulent scrub, for a combined acreage of 1.77 acres of California sunflower series scrub and maritime succulent scrub. They go on to state that:

> *Based upon a review of photos provided by the Coastal Commission and the condition of the adjacent vegetation on the adjacent hill formation [see Exhibit 1 for location], the Southeast Polygon likely supported areas of fig marigold (Carpobrotus edulis), small-flowered ice plant (Mesembryanthemum nodiflorum) and non-native annual grasses (Bromus madritensis rubens, and Bromus diandrus) as well as moderately to highly disturbed MSS, dominated by California encelia (Encelia californica) and limited amounts of California buckwheat (Eriogonum fasciculatum) as the only diagnostic species. California encelia was the predominat component of MSS in this Polygon……The vegetation coverage within the Southeast Polygon is estimated for native species as ranging from 30 to 40-percent in the central disturbed portions of the polygon and as high as 75-percent along the margins where disturbance was less.*

In a memorandum dated October 13, 2010, Jeff Ahrens, Glenn Lukos Associates biologist, states that:

> *At the time of the activities addressed in the NOV, the Southeast Polygon supported disturbed scrub habitat that was most likely dominated by California encelia (Encelia californica)……..While CAGN were not mapped in this area [southeast polygon] during protocol surveys (dating back to 1997), and while nesting was not documented in this area [southeast polygon], it is my professional opinion that this area [southeast polygon] would have been used by CAGN for foraging on at least an occasional basis and potentially on a regular basis.*

In 1991 LSA mapped the bluff above the southeast polygon as disturbed coastal bluff scrub and the polygon itself as disturbed (Figure 9) and in 1998 PCR Services mapped coastal sage scrub habitat on and around the southeast polygon (Figure 10). In 2002 Glenn Lukos Associates mapped "bluff scrub or succulent scrub" around and partially within the southeast polygon (Figure 11) and in 2008, subsequent to the subject development, Glenn Lukos Associates mapped the bluff above the southeast polygon as maritime succulent scrub ESHA, the southeast polygon itself as disturbed/degraded, and the slope below the southeast polygon as disturbed encelia scrub (Figures 12 & 13).

The southeast polygon currently consists of bare ground interspersed with patches of native California sunflower, coast goldenbush (*Isocoma menziesii ssp. vernonioides*), telegraph weed (*Heterotheca grandiflora*), and non-native and invasive highway iceplant, black mustard, and Russian thistle (*Salsola sp.*). The vegetation encircling the polygon is denser and less invaded by non-natives. The most common native plant is California sunflower. Among the sunflower we observed other natives including coast goldenbush, tarweed, (*Centromadia, sp.),* California buckwheat, deerweed (*Lotus scoparius*), and California everlasting (*Gnaphalium californica*). Non-natives included highway iceplant, black mustard, Russian thistle, and castor bean. The vegetation

communities on the bluff above and the slope below the southeast polygon are integrated with and influence the vegetation community on the southeast polygon. On the bluff above the polygon, California sunflower is dominant to the east and a large patch of California buckwheat and smaller patches of prickly pear and quail bush (*Atriplex lentiformis)* are dominant to the west. We also observed a few individual boxthorn, black sage (*Salvia mellifera*) and live-forever among the more abundant native species*,* indicative of a mixture of maritime succulent scrub and coastal bluff scrub within the coastal sage scrub series. The slope is invaded by highway and crystalline iceplant. The slope below the southeast polygon is dominated by disturbed California sunflower scrub.

There have been multiple gnatcatcher observations and mapped use areas in close proximity to and within, the southeast polygon over the course of seventeen years (prior to and after the subject development commenced) (Figure 14, compilation of gnatcatcher use areas and observations prepared by the CCC Mapping Group). In 1993 LSA mapped a large gnatcatcher use area that contains the entire southeast polygon (Figure 16; from Figure 2, December 9, 2010 LSA memorandum). Regarding this gnatcatcher use area, LSA states "It is one of the largest polygons identified in the 5 years of LSA surveys and is based primarily upon observations of a male that was observed at the far east and west ends of the polygon on March 22, 1993."[36] In 1996, LSA mapped a large gnatcatcher use area that includes most of the bluff above the southeast polygon (Figures 18a and 18b; from Figure 5, December 9, 2010 LSA memorandum). In 1997 PCR Services mapped a gnatcatcher use area that covers the entire bluff immediately above the southeast polygon (Figure 19a; from PCR use area map submitted by the Newport Banning Ranch Conservancy). In 1997 PCR also mapped point observations for two breeding pairs; one of the breeding pairs was located on the bluff above the southeast polygon in maritime succulent scrub while the second pair was located on the slope below the southeast polygon in disturbed California sunflower scrub (Figures 19b and 19c; from Glenn Lukos Associates map submitted by the Newport Banning Ranch Conservancy). PCR Services conducted another survey in 1998 and mapped an observation of a gnatcatcher pair in maritime succulent scrub on the bluff above the southeast polygon (Figures 20a and 20b; from Glenn Lukos Associates map submitted by the Newport Banning Ranch Conservancy).

In 2000, a gnatcatcher use area was mapped on the bluff above the southeast polygon (Figure 21; from gnatcatcher use map we believe was created by PCR that was submitted by the Newport Banning Ranch Conservancy). In 2006, subsequent to the subject development, Glenn Lukos Associates mapped a gnatcatcher breeding pair observation in maritime succulent scrub on the bluff above the southeast polygon (Figure 23; from Exhibit 3 July 26 2006 Glenn Lukos Associates memorandum). In addition to Newport Banning Ranch's and the City of Newport Beach's biological consultant's surveys, Mr. Hamilton mapped gnatcatcher use areas in 2009 and 2010. He mapped two gnatcatcher pair use areas outside the breeding season on November 4, 2009; one in the disturbed California sunflower scrub below the southeast polygon

[36] Quote from December 9, 2010 "California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site" letter to Mick Sinacori, City of Newport Beach, Department of Public Works from Art Homrighausen and Richard Erickson of LSA

and one northeast of the southeast polygon (Figure 26; from Figure 8, December 11, 2010 Hamilton Biological letter). Mr. Hamilton also mapped a gnatcatcher male use area during the breeding season below the southeast polygon in the disturbed California sunflower scrub on June 3, 2010 (Figure 26; from Figure 8, December 11, 2010 Hamilton Biological letter). Mr. Hamilton's 2009 gnatcatcher observations indicate that the area around the southeast polygon continues to be utilized by gnatcatchers outside the breeding season.

Based on the 2002 California Coastal Records Project aerial photographs and the 2004 aerial photographs from Newport Banning Ranch; LSA's (1991), PCR's (1998) and Glenn Lukos Associate's (2002) vegetation maps, the Glenn Lukos Associates 2008 vegetation and ESHA maps; the vegetation observations in the Glenn Lukos Associates memoranda; and the vegetation we observed during our site visits, we believe that the entire southeast polygon supported disturbed coastal sage scrub dominated by California sunflower prior to the subject development. Between 1993 and 2009, seven gnatcatcher use areas and four dot/point gnatcatcher observations were mapped near, immediately adjacent to, or overlapping the southeast polygon (Figure 14). It is our professional opinion that had gnatcatcher use areas been mapped for the gnatcatcher dot/point observations, they would encompass some, or all, of the southeast polygon. We base this on the documented minimum gnatcatcher breeding territory size (2.5 acres)[37] (Figure 27), the coastal scrub vegetation supported by the polygon prior to and after the subject development, and the documented gnatcatcher use of the area. As noted above, Newport Banning Ranch's biological consultant Glenn Lukos Associates concurs in their October 13, 2010 memorandum that the southeast polygon "would have been used by CAGN for foraging on at least an occasional basis and potentially on a regular basis."

From the extensive history of gnatcatcher survey data it is clear that the disturbed California sunflower series scrub within the southeast polygon and the maritime succulent scrub and the disturbed California sunflower series scrub on the bluff above and slope below the southeast polygon, prior to and following the subject development, provided and continue to provide an especially valuable ecosystem service by furnishing critical habitat utilized by the California gnatcatcher for nesting, breeding, foraging, and dispersal; the critical habitat is also easily disturbed by human activities, as evidenced by bare areas (road), imported fill, and the effects of the subject development, and therefore meets, and met in 2004, the definition of ESHA in the Coastal Act[38]. For these reasons we conclude that the southeast polygon (excluding the road as it is depicted within the southeast polygon on Figure 1) supported habitat that rose to the level of ESHA prior to the subject development.

[37] Atwood et al. (1998) op. cit. and Preston et. al. (1998) op. cit.

[38] Glenn Lukos Associates (August 26, 2010) asserts that the habitat is "suboptimal" for California gnatcatchers and erroneously concludes that the southeast polygon is not ESHA. "Optimality" is not a required characteristic of ESHA.

Northwest Polygon

In 2009 Glenn Lukos Associates reported (September 24, 2009) that:

> *The Northwest Polygon supported disturbed MSS dominated by California sunflower (Encelia californica), with areas of hottentot fig (Carpobrotus edulis), similar to the habitat on the adjacent slope. Based on historic aerial photographs, it is estimated that 0.21 acre of disturbed MSS was affected by the contractor's activities.*

In 2010 Glenn Lukos Associates (August 26, 2010) used the lower portion of the bluff west of the northwest polygon to extrapolate the character of the vegetation in the polygon prior to the subject development. Glenn Lukos Associates state that "This area was selected for collection of transect data because, based upon personal observations during 2002 by GLA Biologist Tony Bomkamp, the slope and subject area were very similar." They used the bluff as a surrogate for conditions on the northwest polygon before the subject development and measured 39-percent cover of California sunflower and 81-percent absolute cover of non-native species dominated by highway iceplant. While the 2010 transect data suggests that the lower bluff is highly invaded, in 2002 Glenn Lukos Associates mapped the bluff "bluff scrub or succulent scrub" (Figure 11) and in 2008 Glenn Lukos Associates mapped the bluff "disturbed encelia scrub" ESHA (Figures 12b and 13).

In 1991 LSA mapped the bluff west of the northwest polygon as disturbed coastal bluff scrub and the northwest polygon within a swath of ruderal scrub (Figure 9). In 2002 Glenn Lukos Associates mapped "bluff scrub or succulent scrub" on the bluff to the west of and partially within the northwest polygon (Figure 11). In 2008, subsequent to the subject development, Glenn Lukos Associates mapped the bluff west of the northwest polygon as disturbed encelia scrub ESHA, the northwest polygon itself as disturbed/ degraded, and the area just east of the northwest polygon as disturbed mule-fat scrub (Figures 12 & 13).

During our site visits we found that the northwest polygon currently supports a mixture of native and non-native plants. The most dominant native is California sunflower; other natives include mule-fat (*Baccharis salicifolia*), quail bush, coast goldenbush, tarweed, and coyote bush (*Baccharis pilularis*). In Glenn Lukos Associate's 2002 (October 14, 2002) gnatcatcher survey report, Tony Bomkamp states "The non-lowland areas also support isolated patches of mulefat (*Baccharis salicifolia*) as well as areas of southern willow scrub that is often located adjacent to or in proximity with patches of coastal scrub habitats and therefore represent suitable foraging areas for the coastal California gnatcatcher." The non-natives in the northwest polygon include highway iceplant, black mustard, myoporum, castor bean, pampas grass and fennel.

The bluff above and west of the northwest polygon is disturbed California sage scrub dominated by California sunflower. In addition to the sunflower we observed a few other native species including a few clumps of prickly pear, a few bladderpod (*Isomeris arborea*) individuals, and a few live-forever individuals such that the habitat is an integration of sage scrub, bluff scrub, and maritime succulent scrub. The bluff supports

a significant amount of highway iceplant and European annual grasses. Like the southeast polygon, the vegetation community on the northwest polygon intergrades with and is influenced by the vegetation community on the bluff above it.

Between 1992 and 2007 gnatcatchers have been documented during eight surveys within or in the vicinity of the northwest polygon (Figure 14). Six surveys (1992-1994, 1996, 2000, 2002) occurred prior to and two surveys (2006 and 2007) occurred following the subject development. In 1992 LSA mapped a gnatcatcher use area containing two gnatcatcher observations just below the northwest polygon. On the same map three gnatcatcher observations are documented within the northwest polygon but a gnatcatcher use area was not drawn around them (Figure 15a and 15b; from Figure 1, December 9, 2010 LSA memorandum and from LSA map submitted by the Newport Banning Ranch Conservancy, respectively). Regarding this LSA states "Note that in spite of the small size of the territory polygon drawn in 1992, LSA field notes on file indicate that gnatcatchers were observed in that area [northwest polygon] that year."[39] In 1993 LSA mapped a very large gnatcatcher use area that contains the entire southeast polygon and a wide swath to the west including all the habitat just below the northwest polygon to Pacific Coast Highway (Figure 16; from Figure 2, December 9, 2010 LSA memorandum). In 1994 LSA mapped a large gnatcatcher use area that includes the entire northwest polygon (Figure 17a and 17b; from LSA map submitted by the Newport Banning Ranch Conservancy). In 1996, LSA mapped a gnatcatcher use area that covers the southern portion of the northwest polygon (Figures 18a and 18b; from LSA map submitted by the Newport Banning Ranch Conservancy).

In 2000 a gnatcatcher use area was mapped that covers nearly the entire northwest polygon (Figure 21; from gnatcatcher use map we believe was created by PCR that was submitted by the Newport Banning Ranch Conservancy). In 2002 a breeding pair observation was mapped within the boundary of the northwest polygon and another breeding pair observation was mapped just east of the northwest polygon (Figure 22a; from Exhibit 3, September 24, 2009 Glenn Lukos Associates memorandum & Figure 22b; from Exhibit 2, October 14, 2002 Glenn Lukos Associates memorandum). In 2006 and 2007, gnatcatcher observations for breeding pair and an unpaired male sightings, respectively, were mapped by Glenn Lukos Associates to the west and adjacent to the northwest polygon in the area mapped as disturbed encelia scrub in the Glenn Lukos Associates 2008 vegetation map and identified as ESHA in the Glenn Lukos Associates 2008 ESHA map (Figures 23 and 24; from Exhibit 3, July 19, 2007 Glenn Lukos Associates memo). In 2009 BonTerra mapped a gnatcatcher breeding pair observation just south of the polygon in disturbed goldenbush scrub (Figure 25; from Exhibit 3b, July 25, 2009 BonTerra memorandum).

Based on the 2002 California Coastal Records Project aerial photos and the 2004 Newport Banning Ranch aerial photographs; LSA's (1991) and Glenn Lukos Associate's (2002) vegetation maps; the Glenn Lukos Associates 2008 vegetation and ESHA maps; the vegetation observations in the Glenn Lukos Associates memoranda;

[39] Quote from December 9, 2010 "California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site" letter to Mick Sinacori, City of Newport Beach, Department of Public Works from Art Homrighausen and Richard Erickson of LSA

and the vegetation we observed during our site visits, we conclude that the northwest polygon supported a mixture of disturbed mule-fat scrub and disturbed coastal sage scrub dominated by California sunflower prior to the subject development. Based on the gnatcatcher survey data we also find that the disturbed scrub within the northwest polygon and on the western slope adjacent to the polygon, prior to and following the subject development, provided and continues to provide an especially valuable ecosystem service by providing critical habitat that is utilized by the California gnatcatcher for nesting, breeding, foraging and dispersal; the critical habitat is also easily disturbed by human activities as evidenced by the effects of the subject development and therefore meets, and met in 2004, the definition of ESHA in the Coastal Act[40]. For these reasons, we conclude that the entire northwest polygon supported habitat that rose to the level of ESHA prior to the subject development

Northeast Polygon

The northeast polygon is the most disturbed polygon, with a very low percentage of native vegetative cover. Glenn Lukos Associates estimated that over 80% of the ground cover is non-native species (August 26, 2010). The polygon is currently characterized by a few native shrubs (mule-fat and coyote bush) amongst large patches of highway iceplant. The perimeter of the polygon supports scattered California sunflower and coast goldenbush individuals interspersed with black mustard and large patches of highway iceplant. Newport Banning Ranch estimates that the areal extent of the northeast polygon amounts to 0.177 acres[41].

LSA (1991) mapped the northeast polygon within a large swath of ruderal scrub. The bluff adjacent and east of the northeast polygon is mapped as disturbed coastal bluff scrub (Figure 9). The Glenn Lukos Associates 2002 vegetation map identifies the vegetation immediately south of the polygon as "bluff scrub or succulent scrub" (Figure 11). Glenn Lukos Associates (2008) maps the southeast polygon as disturbed/ degraded and identifies more than 50 percent of the habitat surrounding the northeast polygon as invasive/ornamental, non-native grassland, and disturbed goldenbush scrub (Figure 12). The Glenn Lukos Associates 2008 ESHA map does not identify any habitat around or near this polygon as ESHA (Figure 13). While numerous gnatcatcher surveys have been conducted on Newport Banning Ranch between1992 and 2009 (Exhibit 14), the only gnatcatcher breeding activity in this area occurred in 2000 when a gnatcatcher use area was mapped that included approximately two-thirds of the northeast polygon (Figure 21; from gnatcatcher use map we believe was created by PCR that was submitted by the Newport Banning Ranch Conservancy).

[40] Glenn Lukos Associates (August 26, 2010) again erroneously concludes that the habitat that supports California gnatcatchers is not ESHA. In this case, the argument is based on the relatively high cover of non-native species, the small size of the polygon, and the ability of gnatcatchers to "tolerate high levels of noise and other disturbance." All the disturbed ESHA at Banning Ranch, both large patches and small, is easily accessible to gnatcatchers and although the birds may be tolerant of noise and some other disturbances, their habitat is quite easily disturbed as evidenced by the effects of the subject development.

[41] Newport Banning Ranch provided the 0.177 acres estimate for the areal extent of the subject development at the northeast polygon.

Based on the 2002 California Coastal Records Project aerial photographs and 2004 Newport Banning Ranch aerial photographs; LSA's (1991) and Glenn Lukos Associate's (2002) vegetation maps; the Glenn Lukos Associates 2008 vegetation and ESHA maps; the vegetation observations in the Glenn Lukos Associates memoranda; the vegetation we observed during our site visits; and the fact that gnatcatcher surveys were conducted numerous years between 1992 and 2009 and during only one year did a gnatcatcher use area encompass the northeast polygon, we believe that the northeast polygon supported highly disturbed vegetation that did not provide habitat suitable for California gnatcatchers prior to the subject development. For these reasons we believe that the northeast polygon did not support habitat that rose to the level of ESHA prior to the subject development.

In summary, areas of coastal scrub with significant gnatcatcher use perform an important ecosystem function, are increasingly rare, and are easily disturbed and therefore meet the definition of ESHA under the Coastal Act and the City of Newport Beach LUP. Coastal Bluff Scrub and Maritime Succulent Scrub rise to the level of ESHA, whether occupied by gnatcatchers or not, because they are identified as rare plant communities by CDFG. We would also identify pristine coastal sage scrub as ESHA, whether occupied by gnatcatchers or not, because of its increasing rarity along the coast. The entire southeast and northwest polygons constituted ESHA prior to commencement of the subject development based on the historic and current presence of disturbed coastal scrub habitat and the history of gnatcatcher use in and/or around the polygons. The northeast polygon did not rise to the level of ESHA prior to commencement of the subject development because of the highly disturbed character of its vegetative cover prior to and after the subject development and because of the paucity of evidence of gnatcatcher use of this polygon.

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Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: AirPhotoUSA 2007.

N

Figure 1

Exhibit 5
CCC-CD-11-03 (NBR)
CCC-BO-11-02
DSM 1/11

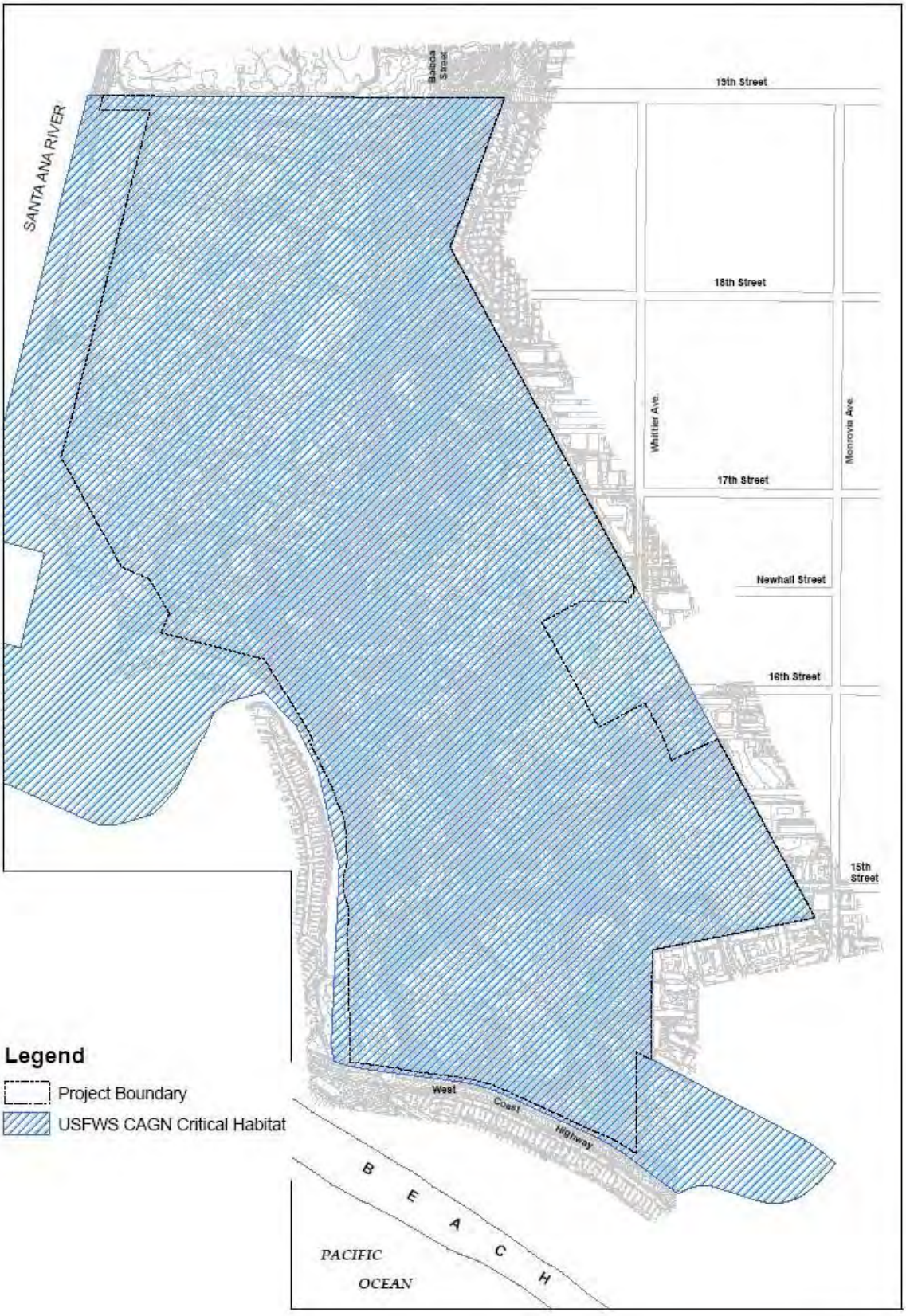


Exhibit 13

California Gnatcatcher Critical Habitat Unit Map

CALIFORNIA COASTAL COMMISSION

Figure 2

Exhibit 5
CCC-CD-11-03 (NBR)
CCC-RO-11-02

September 23, 2002

California Coastal Records Project photograph

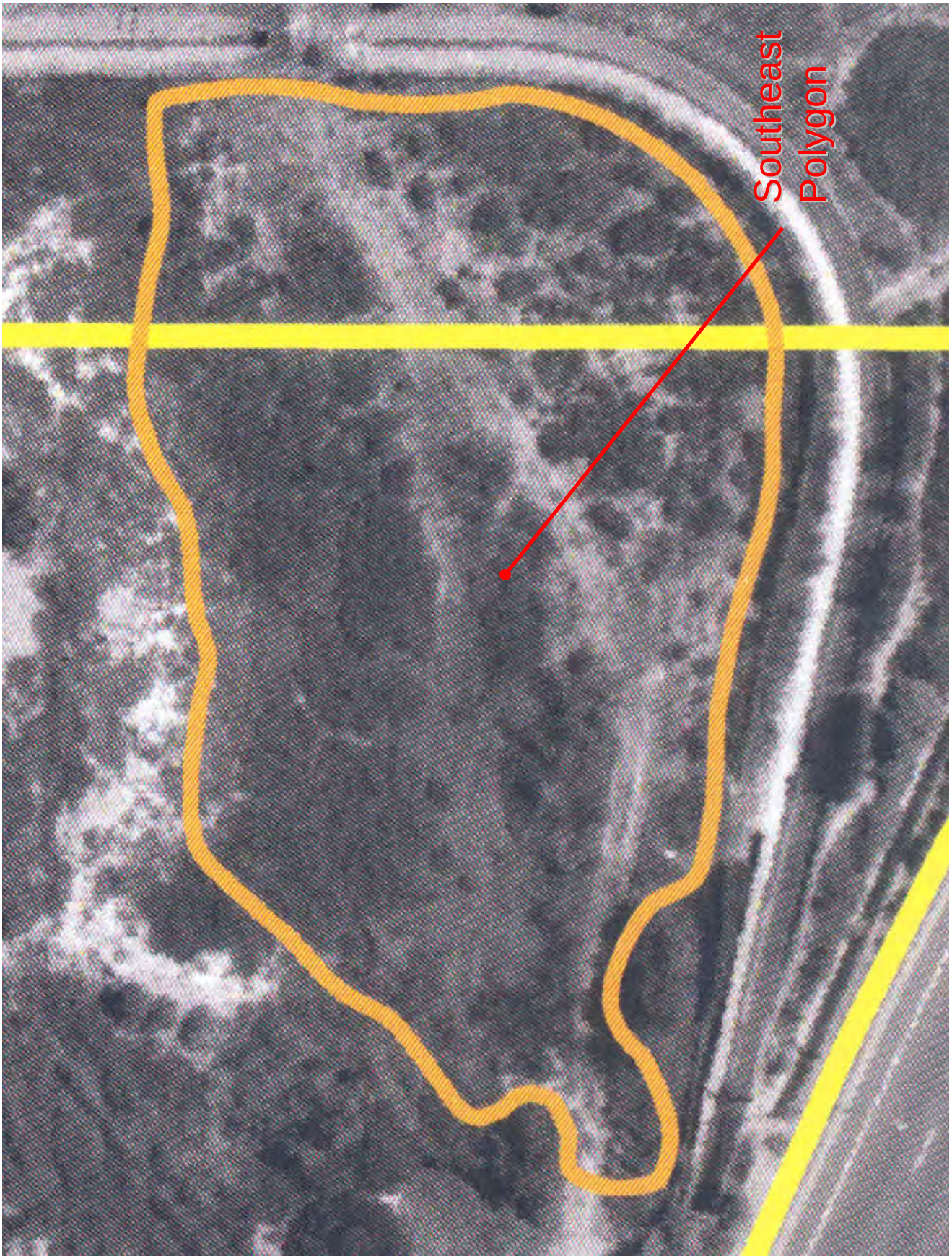
Figure 3

California Coastal Records Project photograph

September 23, 2002

Figure 4

Exhibit 5
CCC-CD-11-03 (NBR)
CCC-RO-11-02

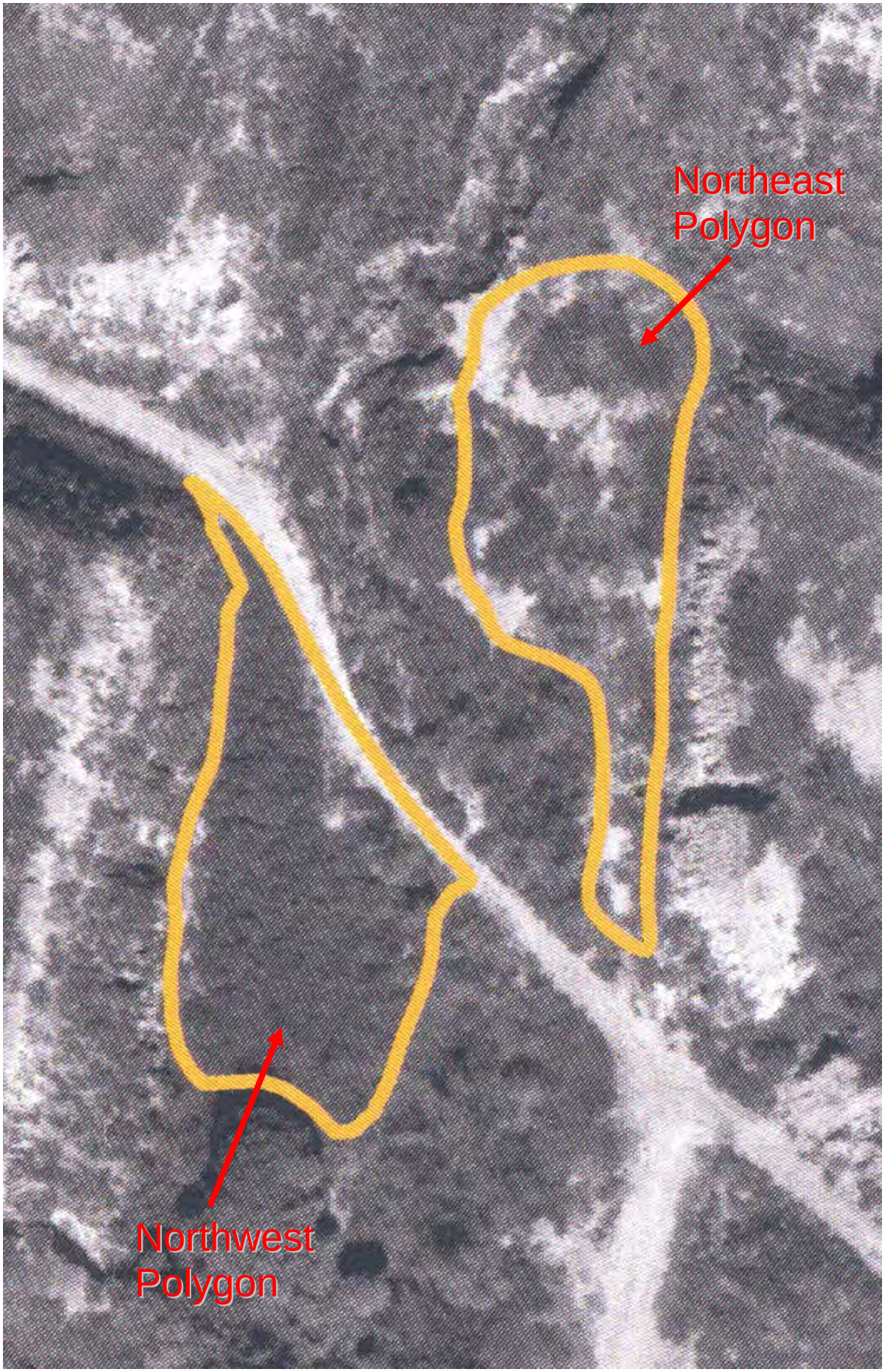


February 11, 2004

CALIFORNIA COASTAL COMMISSION

Photograph provided by Newport Banning Ranch

Figure 5

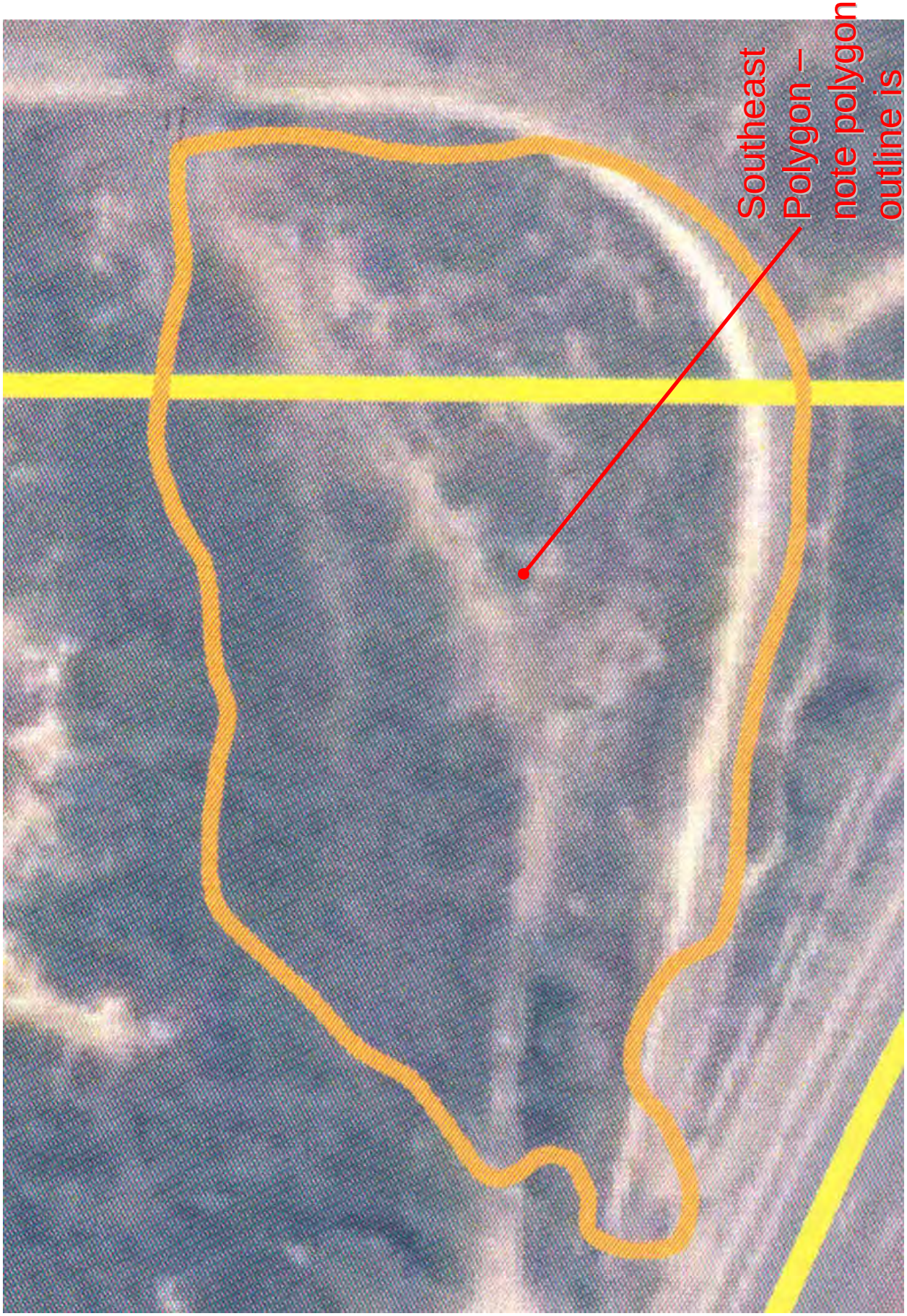


February 11, 2004

Photograph provided by Newport Banning Ranch

Figure 6

Exhibit 5
CCC-CD-11-03 (NBR)
CCC-RO-11-02

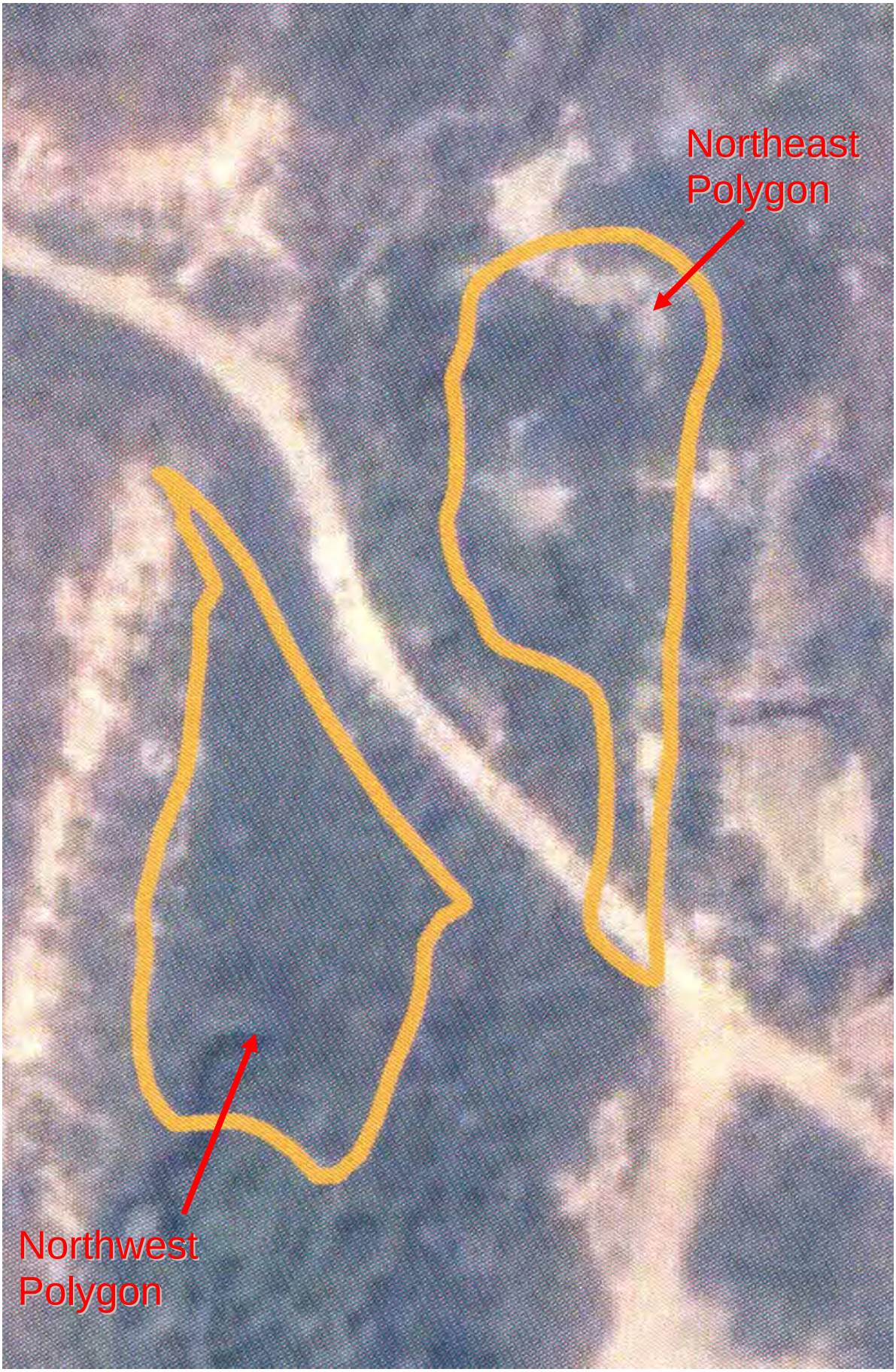


April 16, 2004

CALIFORNIA COASTAL COMMISSION

Photograph provided by Newport Banning Ranch

Figure 7



April 16, 2004

Photograph provided by Newport Banning Ranch

Figure 8

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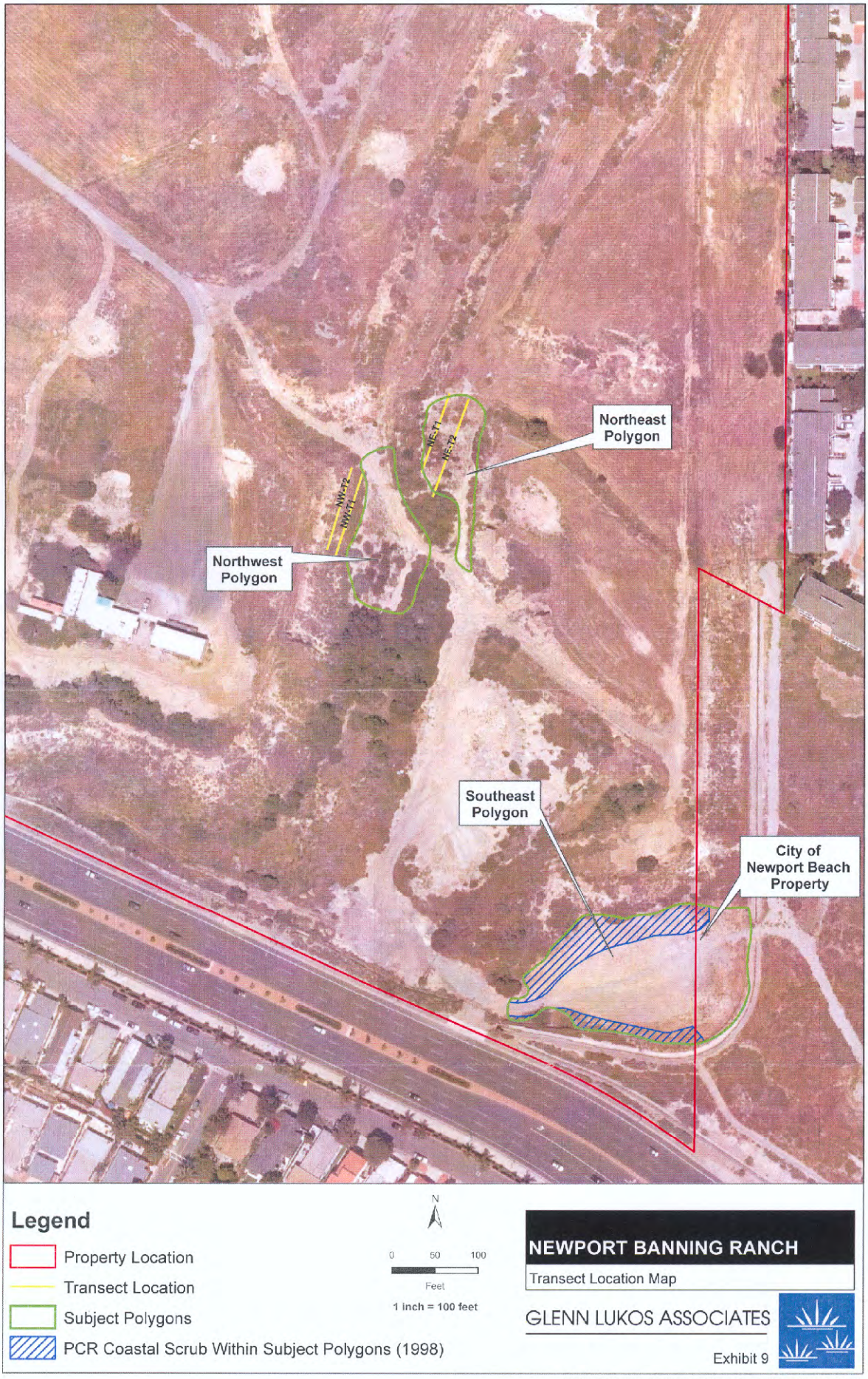
Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1991.

Habitat from LSA (c. 1991)

- Annual Grassland (AG)
- Coastal Bluff Scrub (CBS)
- Mixed AG/CBS
- Disturbed Coastal Bluff Scrub (CBSD)
- Disturbed (DIST)
- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)

Figure 9



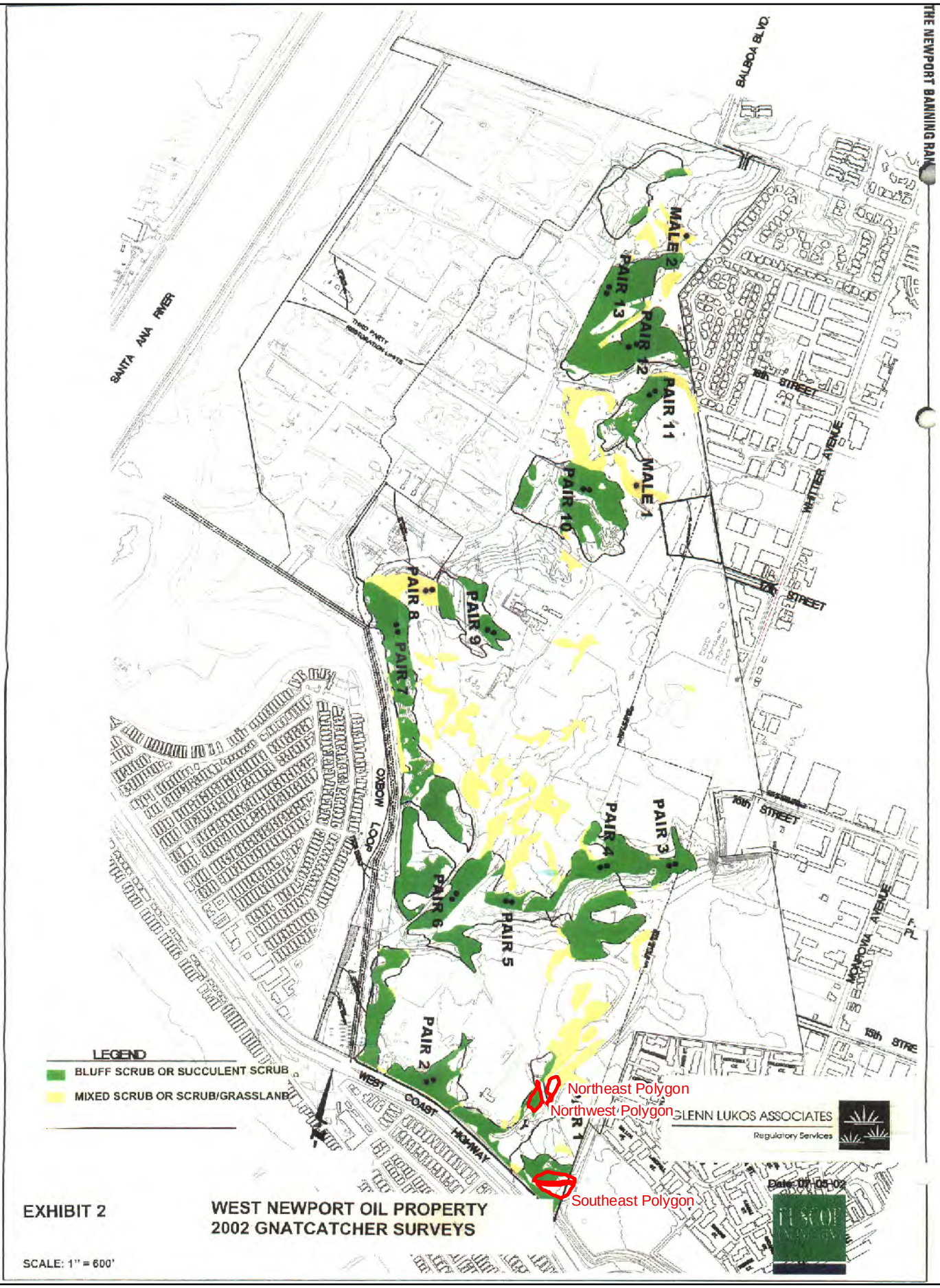
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.

N

Figure 10

DSM 1/11



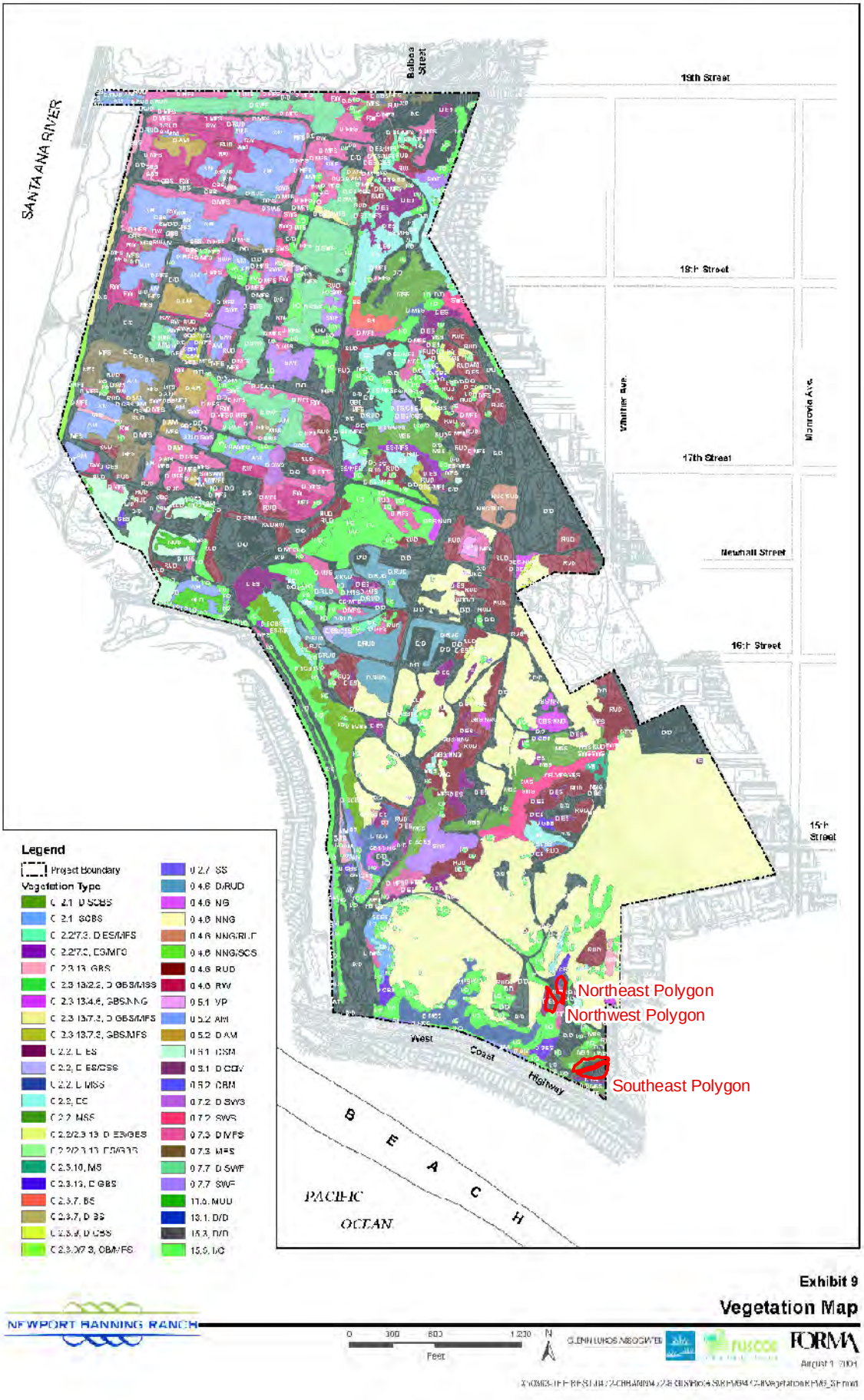
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.

N

Figure 11

DSM 1/11



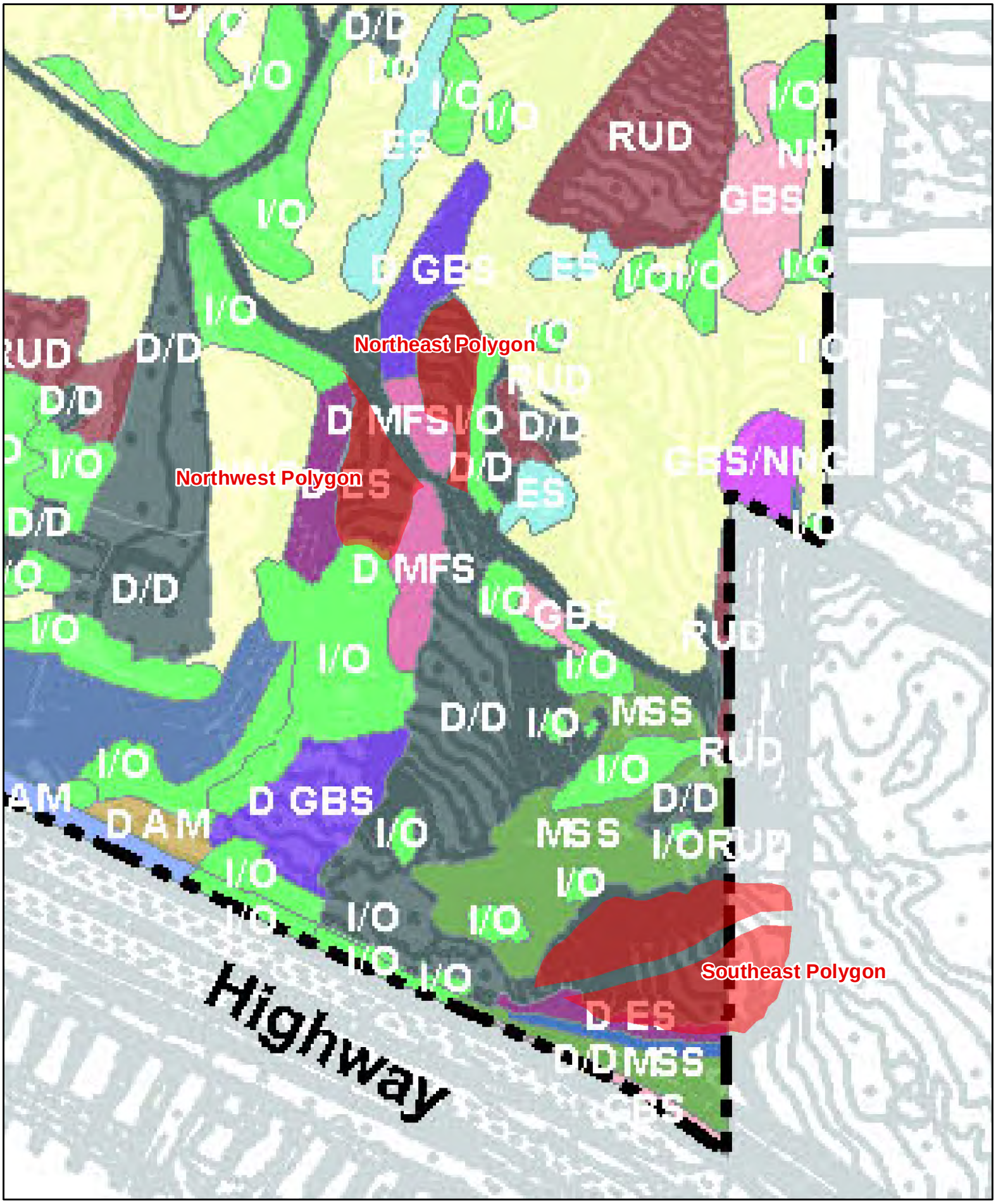
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.

N

Figure 12a

DSM 1/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.

N

Figure 12b

DSM 1/11

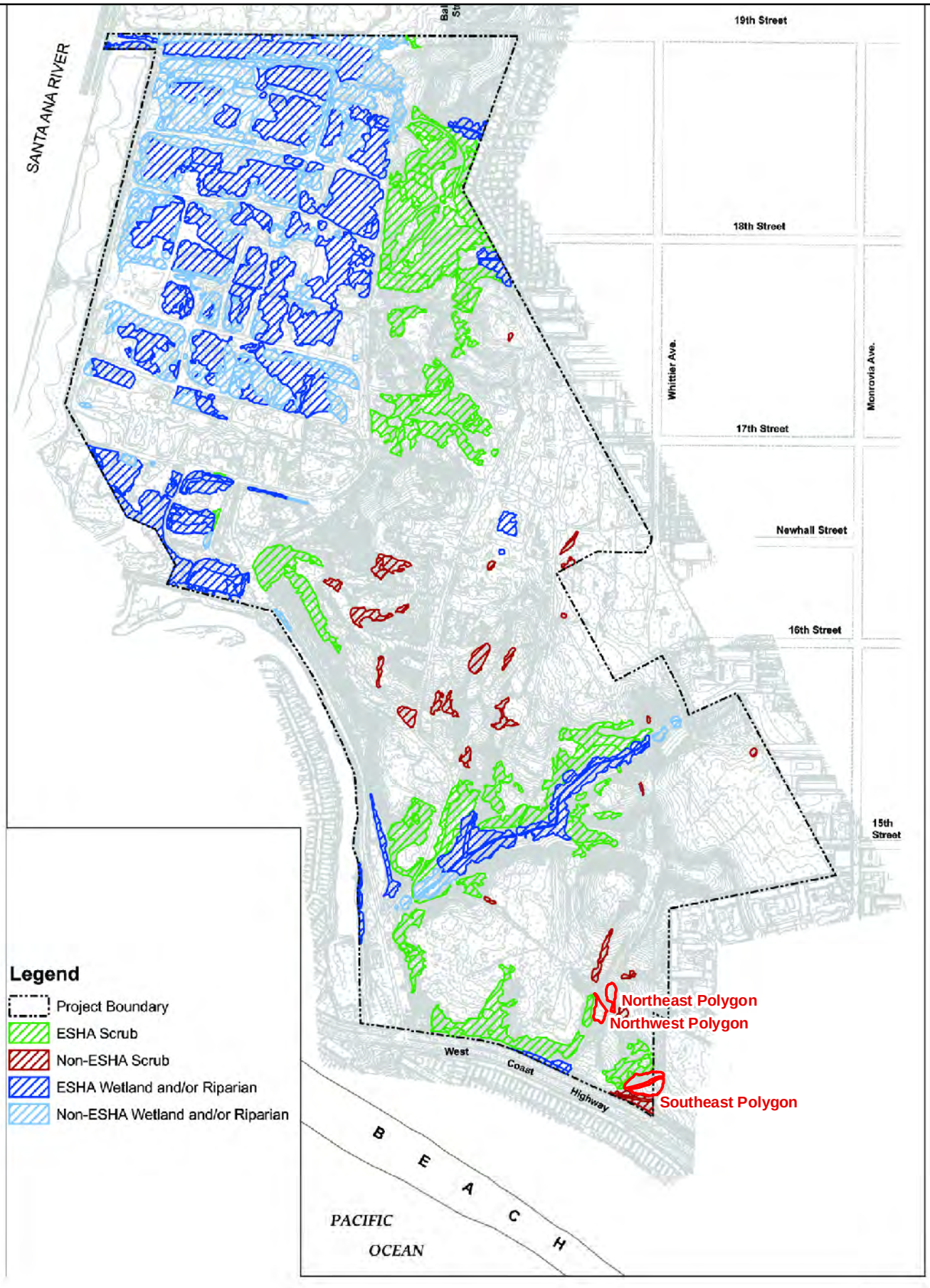


Exhibit 12

Environmentally Sensitive Habitat (ESHA) Map

CALIFORNIA COASTAL COMMISSION

Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.

N

Figure 13

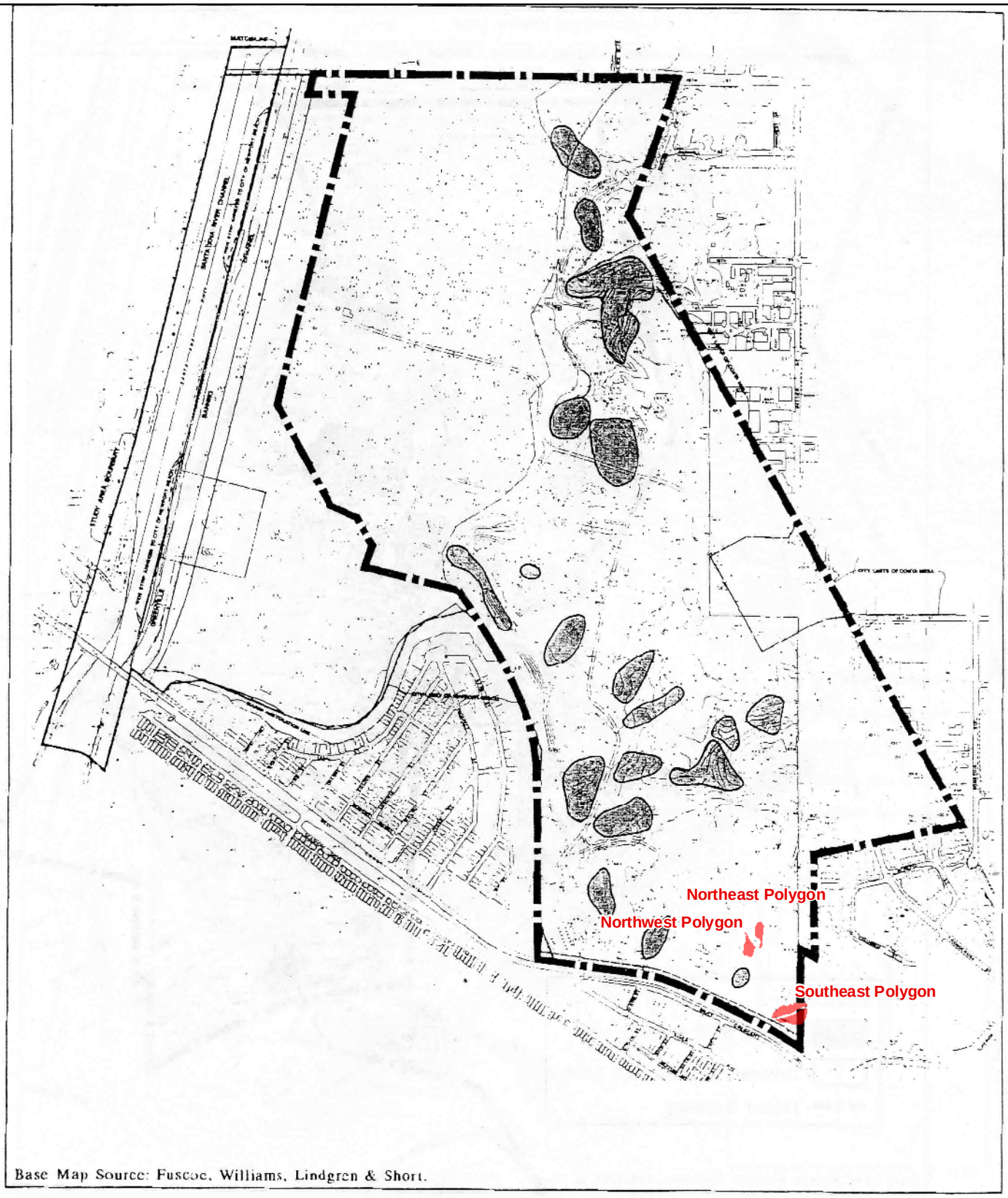
DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, LSA.

Figure 14

DSM 1/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: LSA 1992.

N

Figure 15a

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1992.

N

Figure 15b

DSM 1/11

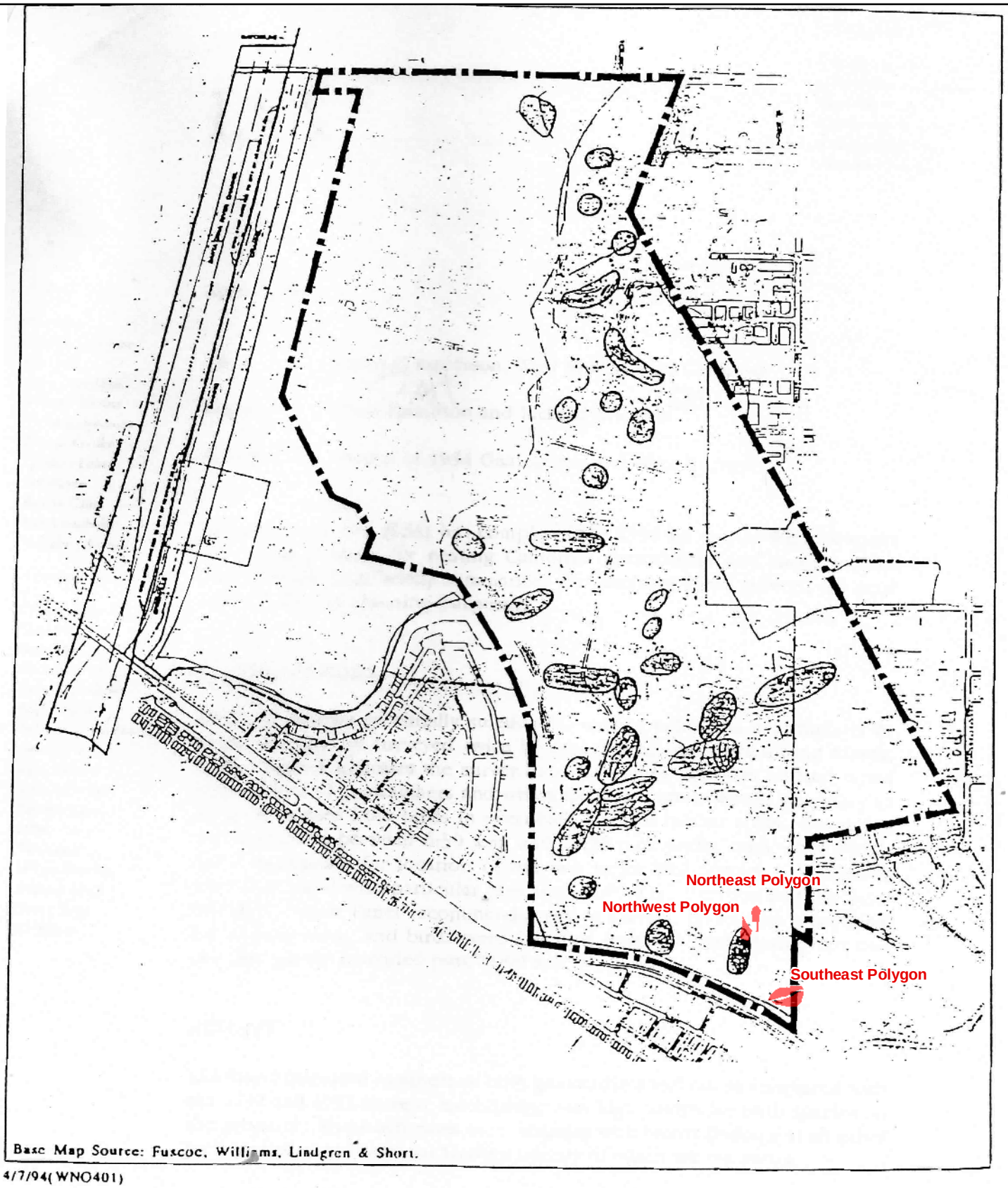
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1993.

N

Figure 16

DSM 1/11



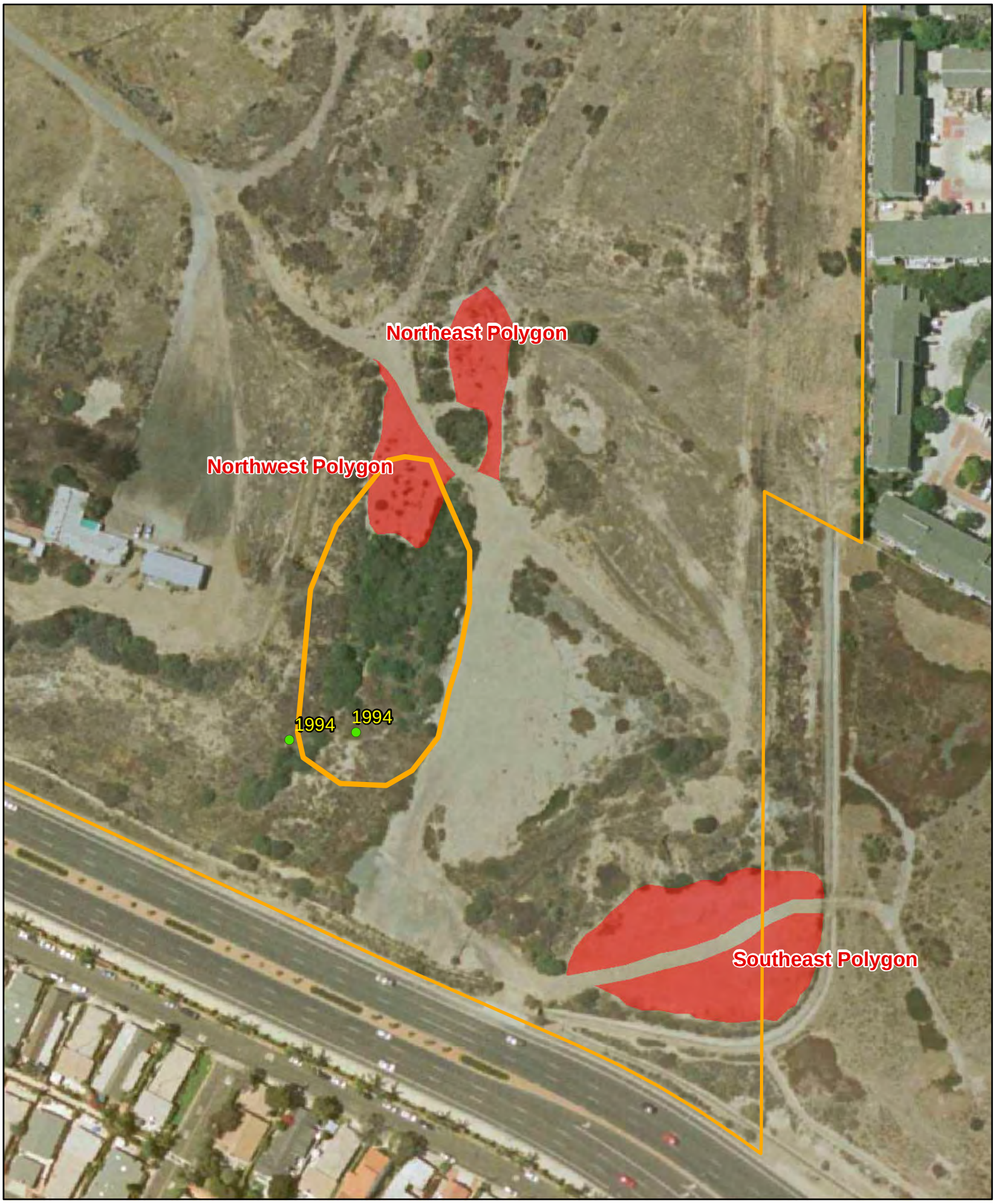
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: LSA 1994.

N

Figure 17a

DSM 1/11



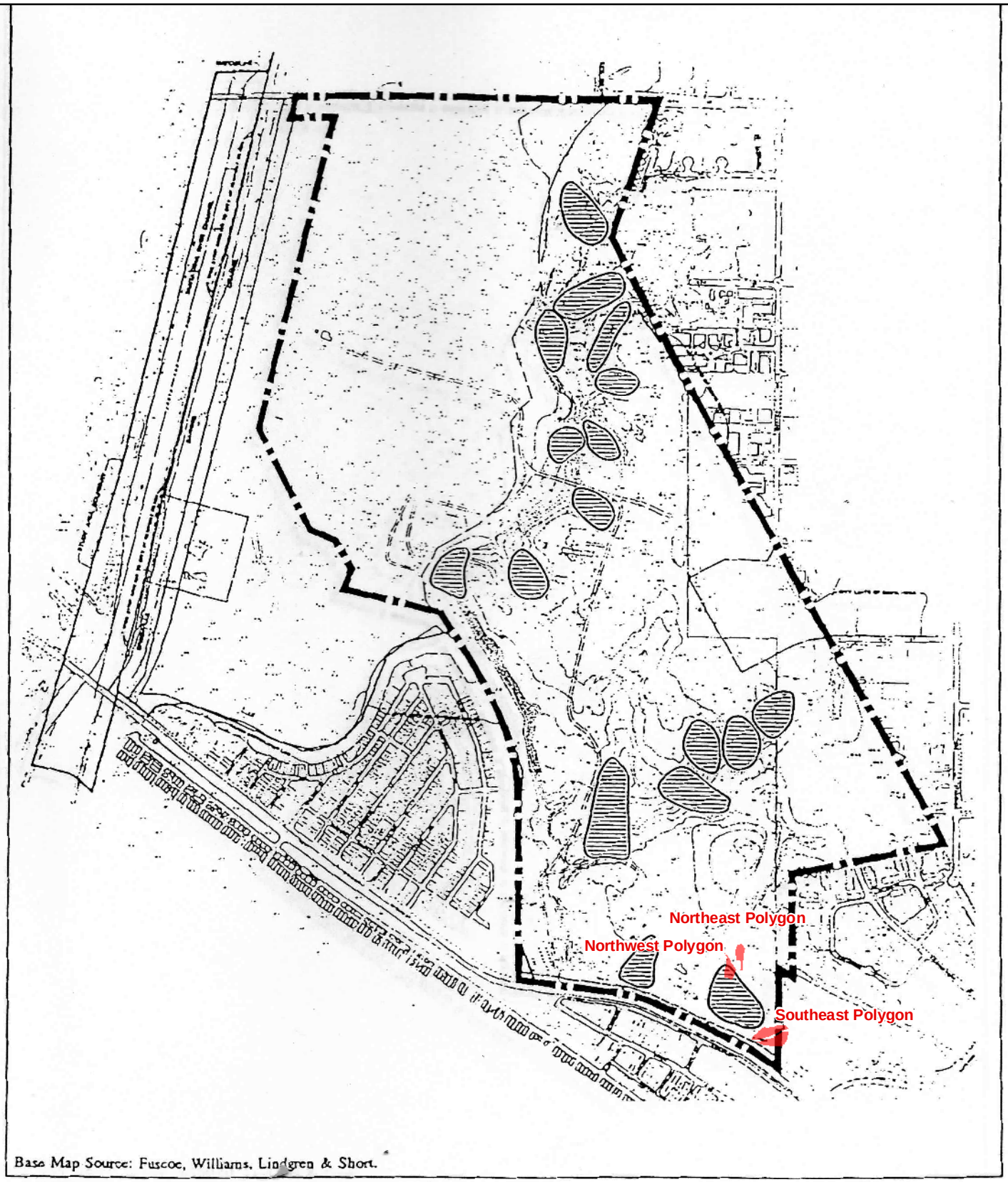
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1994.

N

Figure 17b

DSM 1/11



Base Map Source: Fuscoe, Williams, Lindgren & Short.

4/15/96(WNO201)

Figure 1

N

LSA

Scale in Feet

Spring 1996

gnatcatche

CALIFORNIA COASTAL COMMISSION

Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: LSA 1996.

N

Figure 18a

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1996.

N

Figure 18b

DSM 1/11

Figure 3
Newport Banning Ranch -
California Gnatcatcher Sightings
and Territories

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: PCR 1997.

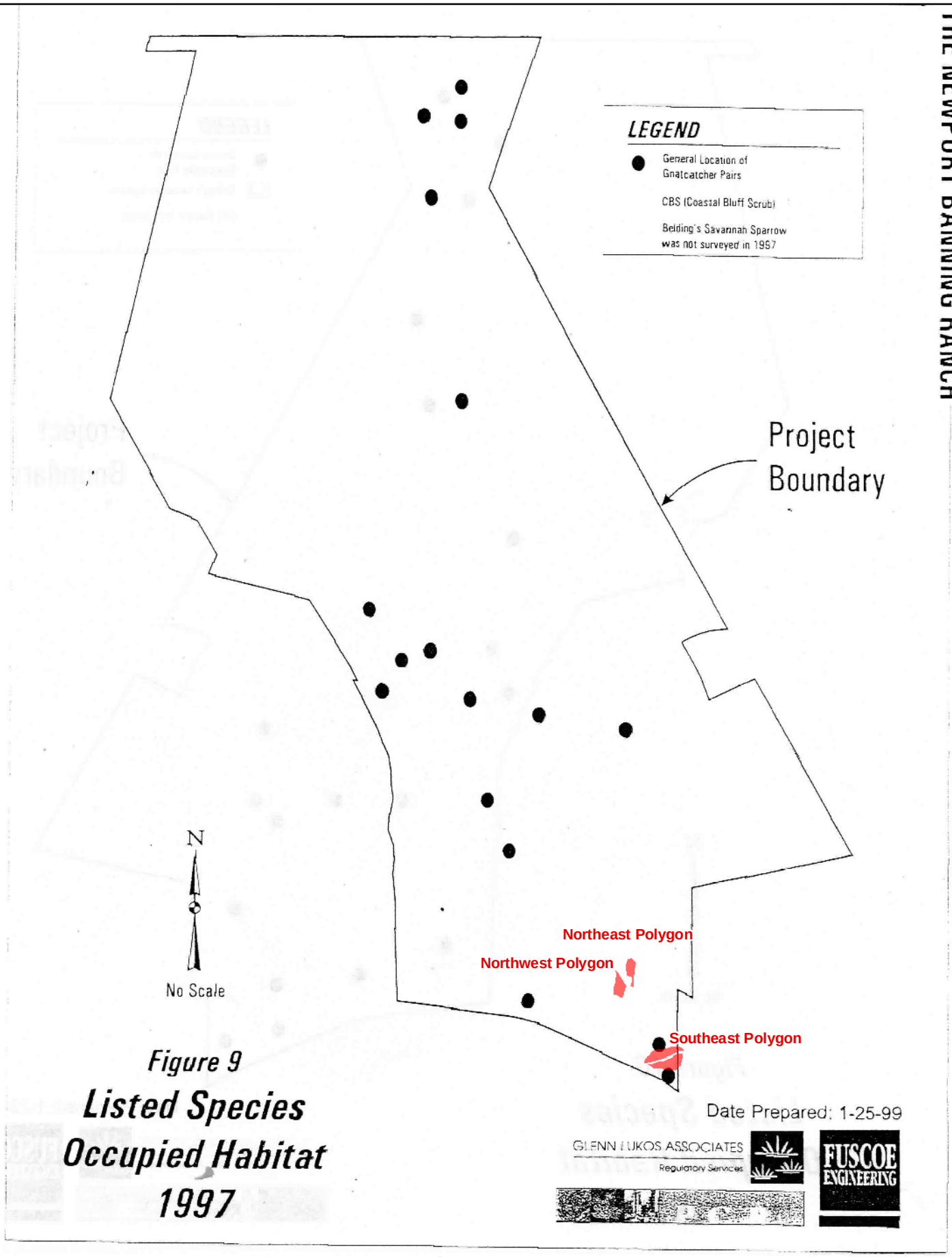
N

Figure 19a

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

DSM 1/11

THE NEWPORT BANNING RANCH



Preliminary Draft For Discussion Purposes Only

Integrated Resource Conservation Plan

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: GLA 1997.

N

Figure 19b

DSM 1/11

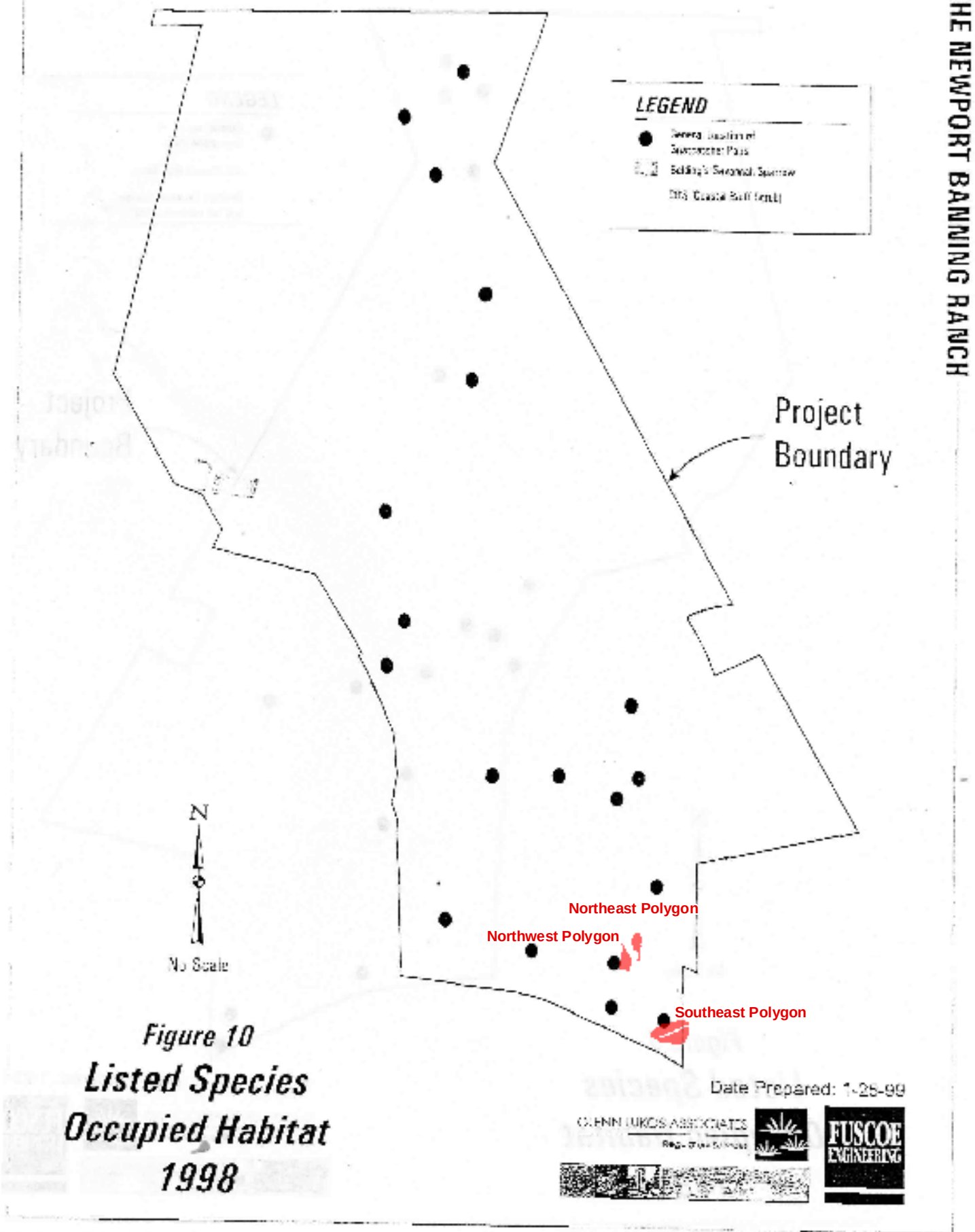
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, 1997.

N

Figure 19c

DSM 1/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: GLA 1998.

N

Figure 20a

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, 1998.

N

Figure 20b

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: GLA 2000.

N

Figure 21

DSM 1/11

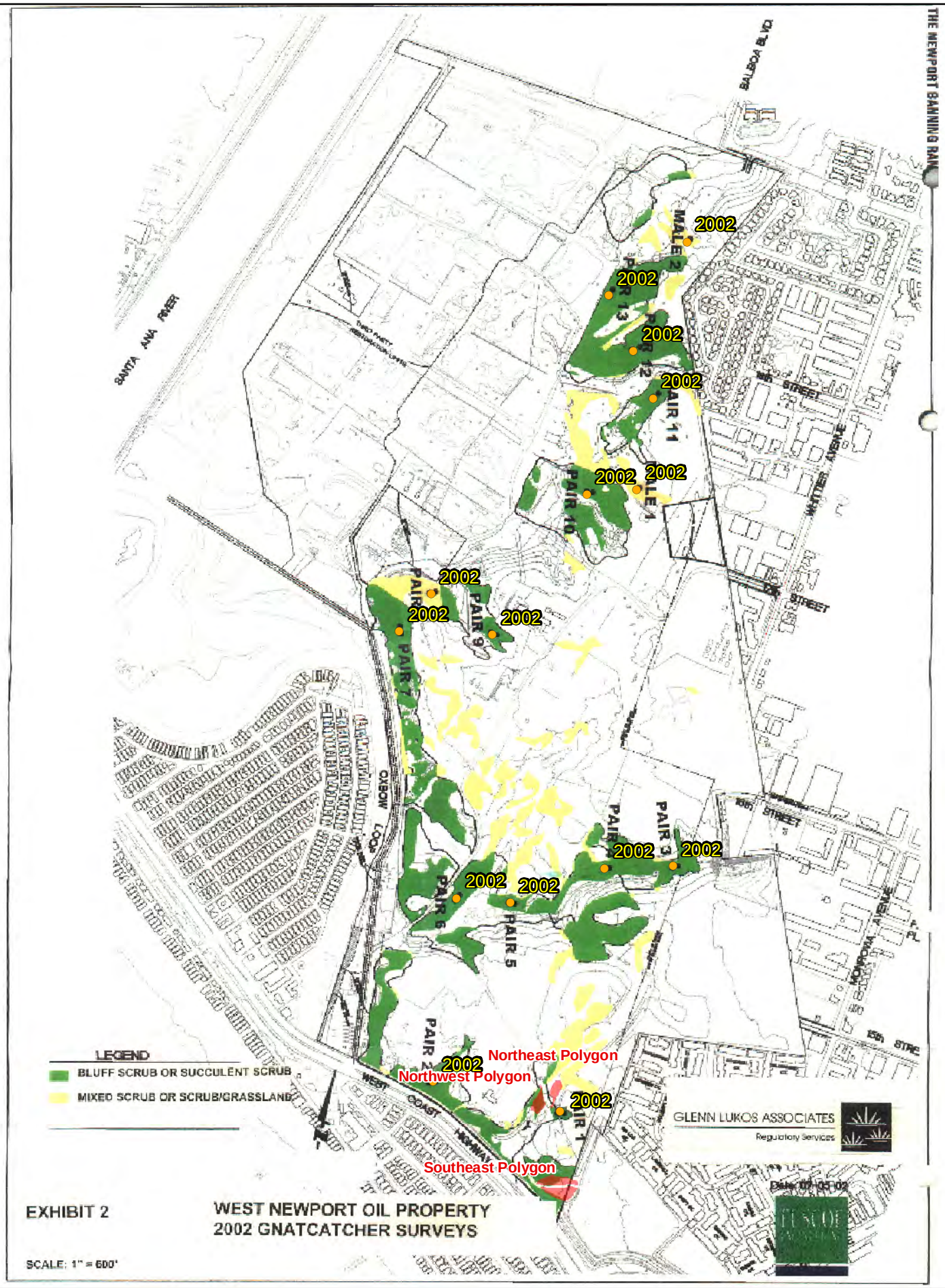
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, 2002.

N

Figure 22a

DSM 1/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: GLA 2002.

N

Figure 22b

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, 2006.

N

Gnatcatcher Occurances 2006

- Pair
- Single

Figure 23

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, 2007.

N

Figure 24

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: Bon Terra, 2009.

N

Figure 25

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: Robb Hamilton 2010.

N

Figure 26

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.

N

Figure 27

DSM 1/11

CALIFORNIA COASTAL COMMISSION
South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

July 29, 2009

Michael A Mohler
Newport Banning Ranch
1300 Quail Street, Suite 100
Newport Beach, CA 92660

RE: Alleged unpermitted removal of major vegetation from the Newport Banning Ranch property, including, but not limited to Assessor Parcel No.s 114-170-83, 424-041-04, 424-041-10 (City of Newport Beach property), and 114-170-43.

Dear Mr. Mohler:

As staff noted to you at a June 9 meeting with Newport Banning Ranch representatives, during the course of review of photographs of the Newport Banning Ranch site, staff viewed evidence of what appears to be unpermitted development activity on the site. The development in question consists of removal of major vegetation, including coastal bluff and riparian scrub species, and native grass, as well as placement of solid material (staging of construction materials) within areas cleared of major vegetation.

"Development" is defined in the Coastal Act Section 30106, in relevant part, as follows:

> "Development" means, on land, in or under water, the placement or erection of any solid material or structure...the removal of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations...

In addition to supporting coastal bluff and riparian scrub plant communities – communities of native plants that are significant both as collections of native plant species and for the wildlife habitat they provide – the three areas described below and depicted on Exhibits 1 and 2 are in close proximity to documented Coastal California Gnatcatcher nesting sites, a federally threatened bird species, and thus the ecological function of these three vegetation areas, in addition to their species make-up, justifies the designation of major vegetation. The removal of coastal bluff and riparian scrub species, and native grass, constitutes removal of major vegetation, and as such, meets the definition of development.

I've attached several photographs to illustrate some areas of major vegetation removal staff has identified. Please note that the attached photographs are only representative of the major vegetation removal on the site and are not a complete catalog of major vegetation removal on the site. Exhibit 1 shows an area of coastal bluff scrub near the southwest corner of the property that was cleared without a coastal development permit between December 31, 2003 and October 23, 2004. Exhibit 2 shows two areas of riparian scrub that were cleared without a coastal development permit between December 31, 2003 and March 27, 2005.

Exhibit 3 shows the locations of two of the numerous areas of native grass (tentatively identified as *Nasella pulchra*) that were cut without a coastal development permit during mowing in 2009

that spanned much of the upland portion of the site. Also on Exhibit 3 is a ground-level photograph of the mower's swath and a close-up of native grass just outside the mower's swath. The development described above occurred within the coastal zone in an area subject to the Commission's original coastal development permit jurisdiction. Section 30600(a) of the Act requires that any person wishing to perform or undertake development in the coastal zone must obtain a coastal development permit, in addition to any other permit required by law. Our records do not indicate that a coastal development permit has been issued for the above-referenced development. Any development activity conducted in the coastal zone without a valid coastal development permit constitutes a violation of the Coastal Act.

If the subject development is authorized by a valid coastal development permit, or if you have any other information related to the unpermitted development described above, please let us know as soon as possible. Please contact me at our Long Beach office, either in writing at the above address, or at (562) 590-5071, to discuss resolution of this matter and to schedule a site inspection by no later than August 13, 2009.

Thank you for your cooperation.

Sincerely,

Andrew Willis
District Enforcement Analyst

cc: Debby Linn, City of Newport Beach
Sherilyn Sarb, Deputy Director, CCC
Teresa Henry, South Coast District Manager, CCC
Karl Schwing, Orange County Planning Supervisor, CCC
Pat Veesart, Southern California Enforcement Supervisor, CCC

NEWPORT BANNING RANCH

September 25, 2009

Andrew Willis
District Enforcement Analyst
California Coastal Commission
200 Oceangate, Suite 1000
Long Beach, CA 90802

Re: Additional Responses to inquiry regarding alleged clearing of vegetation from Newport Banning Ranch property

Dear Mr. Willis:

Thank you and Liliana for the time invested on September 3, 2009 in meeting with us and touring the Banning Ranch. We believe we were successful in getting you to the locations where it appears City contractor activities were likely behind the vegetation clearing concerns expressed in your letter of July 29, 2009. Additionally, we located the probable point where your photo related to mowing was taken and identified for you the non-native grassland character of this area. At the meeting we provided to each of you a "timeline" entitled *Banning Ranch – Relevant Background and Historical Dates* which highlighted much of the significant history of ownership and management related to the property.

The purpose of this letter is to transmit to you additional information we determined would assist you with your work. As we recall (and you have reconfirmed in your 9/21/09 email), the identified information includes:

1. Information regarding prior biological surveys of the site including the PCR survey that was conducted prior to the alleged vegetation clearing at issue;
2. Well abandonment dates for the nearby wells;
3. A copy of the lease between West Newport Oil and the City's contractor; and
4. Any correspondence we might have between the fire department and previous owners or the operator.

PCR (and other Biological consultants) Data

Attached to this letter is a memorandum from Glenn Lukos Associates entitled *Habitat Characterization for Areas Affected by Alleged Clearing near Southeast Corner of Banning Ranch Referenced in July 29, 2009 Letter from California Coastal Commission* which addresses the types of vegetation affected, the occurrence of the coastal California gnatcatcher (CAGN) in the vicinity, and the potential effects on the CAGN. This memo was prepared from what limited PCR information we were able to locate as well as our first-hand knowledge from recent years' surveys.

Well Abandonment
The two wells in the vicinity of the area in question are identified as Well #313 and Well #320R. Well # 313 was abandoned in March 1992 and Well #320R was abandoned in May 1993. With respect to the roads that remain in place to access these wells, please note that the oil operator, in accordance with normal operating procedures, maintains access to all wells on the property – abandoned or otherwise in the event further work may be necessary. Additionally, given the fact that the property is now undergoing a planning process that may result in either 1) acquisition by public or non-profit entities – which will require extensive clean-up of the property and verification studies of the site, or 2) development of a large open space reserve, parks and a mixed-use community, this same access to all facilities remains critical as additional work may be required as a part of the clean-up or any topography alterations.

WNOC/Weisker Lease
Attached to this letter is a copy of the lease.

Fire Department Correspondence
We believe we have finally located the possible source for this information and will follow-up on this within the next week and will transmit that information to you separately when we obtain it.

In closing, we would like to renew our offer to visit you at your office to further brief you on the open space treatment contemplated in the Newport Banning Ranch development plan proposal. Although it appears activities you've identified were caused by others prior to our current management and site planning efforts, please let us know how we can assist facilitate a final resolution to this matter.

Respectfully,

Michael A. Mohler
Newport Banning Ranch LLC

Attachments

Cc Coastal Commission:
Sharilyn Sarb
Teresa Henry
Karl Schwing
Pat Veesart

Cc City of Newport Beach:
Debby Linn
Sharon Wood

Newport Banning Ranch LLC
1300 Quail Street, Suite 100 | Newport Beach, CA 92660 | T 949.833.0222 | F 949.833.1960
3030 Saturn Street, Suite 101 | Brea, CA 92821 | T 714.577.9154 | F 714.577.9149
newportbanningranch.com

MEMORANDUM

GLENN LUKOS ASSOCIATES
Regulatory Services

PROJECT NUMBER: 04720008BANN

TO: Andrew Willis

FROM: Glenn Lukos Associates

DATE: September 24, 2009

SUBJECT: Habitat Characterization for Areas Affected by Alleged Clearing near Southeast Corner of Banning Ranch Referenced in July 29, 2009 Letter from California Coastal Commission

---

In the above referenced July 29, 2009 letter, it is alleged that vegetation was removed from portions of the Banning Ranch site, specifically from areas depicted on Exhibits 1 and 2 that were attached to your letter [attached to this Memorandum as Exhibits 1 and 2]. As documented under separate cover and transmitted to you concurrently, it appears a City of Newport Beach contractor, who was leasing the subject areas to store and stage construction materials and equipment, impacted the subject vegetation. The purpose of this Memorandum is, as discussed during our site visit on September 3, 2009, to address the types of vegetation affected, the occurrence of the coastal California gnatcatcher (CAGN) in the vicinity, and the potential effects on the CAGN.

For purposes of addressing these issues, the subject areas are designated Southeast Polygon, Northwest Polygon and Northeast Polygon as depicted on Exhibit 3.

Vegetation Associations

Southeast Polygon

The Southeast Polygon is located the extreme southeast portion of the Banning Ranch site and also includes a portion of property currently owned by the City of Newport Beach (and previously owned by Caltrans at the time of the contractor's activities). The area affected by the contractor's activities covers approximately 1.01 acre of which 0.85 acre is on Banning Ranch and 0.16 acre is owned by the City of Newport Beach. A review of historic aerial photographs shows that portions of this area supported maritime succulent scrub (MSS) dominated by California sunflower (*Encelia californica*). The area was traversed by a long-standing access road used to access the area now proposed as park by the City. The amount of MSS on the site at the time the contractor undertook the activities in question is estimated at 0.62 acre of which 0.46 acre occurred on Banning Ranch and 0.16 acre was on property currently owned by the City.

29 Orchard ▪ Lake Forest ▪ California 92630-8300
Telephone: (949) 837-0404 Facsimile: (949) 837-5834

Northwest Polygon

The Northwest Polygon is located at the base of an artificial slope that was created when "borrow" material was excavated from the site in the 1960s creating a canyon-like feature. The Northwest Polygon supported disturbed MSS dominated by California sunflower (*Encelia californica*), with areas of hottentot fig (*Carpobrotus edulis*), similar to the habitat on the adjacent slope. Based on the historic aerial photographs, it is estimated that 0.21 acre of disturbed MSS was affected by the contractor's activities.

Northeast Polygon

The Northeast Polygon is located within the former "borrow area." Previous vegetation mapping did not show MSS in this area, which is consistent with disturbed conditions associated with this polygon, which supports a substantial component of hottentot fig (*Carpobrotus edulis*) and non-native grasses and forbs. A limited area of disturbed California sunflower (*Encelia californica*) occurs at the northern end of the polygon; however, as noted, this area was either not present or was too small to be mapped as MSS during the previous vegetation mapping.

California Gnatcatcher Locations

Exhibit 3 depicts the locations of CAGN based on surveys conducted by PCR in 1997 and 1998, GLA in 2002, 2006 and 2007, and BonTerra in 2009. Based on the combined survey data, it appears that CAGN use can be summarized as follows

The Southeast Polygon supported one pair of CAGN in 1997 as detected and mapped by PCR.

The hillform immediately northwest of the Southeast Polygon, which was not affected by the contractor's activities was occupied by CAGN during the 1997, 1998, and 2006 Surveys.

The Northwest Polygon did not support CAGN in 1997 or 1998. The area was occupied by a pair of CAGN during three surveys in 2002; however during the final three surveys, these CAGN appeared to relocate to the west. The adjacent slope, between the West Newport Oil offices and the Northwest Polygon supported a CAGN pair in 2006 and 2009 and a single individual in 2007. Based 2002 surveys and on the proximity of the Northwest Polygon to the adjacent slope, it is likely that the Northwest Polygon was at least occasionally part of a CAGN use area prior to the subject activities.

The Northeast Polygon did not support habitat for the CAGN and CAGN use of this area would have been minimal due to the lack of significant vegetation.

Potential Impacts of the Clearing Activities

It is estimated that approximately 0.83 acre of MSS, portions of which are occasionally occupied by the CAGN was impacted by the contractor's activities beginning in 2004. It is noteworthy that the 0.62-acre Southeast quadrant was only occupied during one of three surveys prior to the contractor's activities, indicating that this area was not used by the CAGN on a consistent basis. In order to determine the potential impacts to the CAGN, a comparison was performed of CAGN use for the period before the impact occurred with the CAGN use following the impact. The comparison considers CAGN use over the entire Banning Ranch site as well as the southeast corner, where the impacts occurred. Table 1 provides a summary of CAGN use for three survey seasons before the impacts and three survey seasons following the impacts.

Table 1
Summary of CAGN Survey Data: Pre- and Post-Impacts

Survey Year	CAGN Locations on NBR	CAGN at SE Corner
1997	17	2
1998	19	1
2002	15	1
Average	**17**	**1.3**
PERIOD DURING WHICH IMPACTS OCCUR		
2006	21	2
2007	17	1
2009	17	1
Average	**18.3**	**1.3**

What is evident from the survey data is that CAGN use at the site did not measurably change following the contractor's activities and it is particularly noteworthy that CAGN use of the southeast corner was not adversely affected by the contractor's activities based on the survey data. At least part of the explanation for this lack of measurable impacts at the southeast corner, where the work was performed, is that the areas exhibiting the highest use (i.e., the hill form immediately northwest of the Southeast Polygon and the slope between the mesa top and the Northwest Polygon) were not affected by the contractor's activities. The areas affected were not essential for persistence of the CAGN based on their continued persistence following the contractor's activities.

2002

2006

NEWPORT BANNING RANCH

GLENN LUKOS ASSOCIATES

Exhibit 1

Source: California Coastal Commission

NEWPORT BANNING RANCH

GLENN LUKOS ASSOCIATES

Exhibit 2

Source: California Coastal Commission

February 2006

December 2003


Northeast Polygon
Northwest Polygon
City of Newport Beach Property
Southeast Polygon
Legend
Property Location
Vegetation
Historic CAGN
Bon Terra 2009 Pair
GLA 2002 Pair
GLA 2006 Pair
GLA 2007 Unpaired Male
PCR 1997 Pair
PCR 1998 Pair
N
0 50 100 200
Feet
NEWPORT BANNING RANCH
Historic CAGN Location Map
GLENN LUKOS ASSOCIATES
Exhibit 3

CALIFORNIA COASTAL COMMISSION
South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT

May 14, 2010

Newport Banning Ranch
Attn: Michael Mohler
1300 Quail Street, Suite 100
Newport Beach, CA 92660

Southern California Edison
Attn: Tony Mathis
1325 So. Grand Ave.
Santa Ana, CA 92705

Herman Weissker, Inc
Attn: Pat Jeffries
2631 S. Riverside Ave.
Bloomington, CA 92316

Violation File Number:	V-5-09-008
Property Location:	Newport Banning Ranch property, including, but not limited to Assessor Parcel Nos. 424-041-04, 424-041-10 (City of Newport Beach property), 114-170-43, and 114-170-79
Unpermitted Development:	Removal of major vegetation, including maritime succulent scrub, as well as placement of solid material (staging of construction materials) within areas cleared of major vegetation

Dear Newport Banning Ranch, Southern California Edison, and Herman Weissker:

The California Coastal Commission ("Commission") is the state agency created by, and charged with administering, the Coastal Act of 1976. The California Coastal Act[1] was enacted by the State Legislature in 1976 to provide long-term protection of California's 1,100-mile coastline through implementation of a comprehensive planning and regulatory program designed to manage conservation and development of coastal resources. In making its permit and land use planning decisions, the Commission carries out Coastal Act policies, which, amongst other goals,

[1] The Coastal Act is codified in sections 30000 to 30900 of the California Public Resources Code. All further section references are to that code, and thus, to the Coastal Act, unless otherwise indicated.

seek to protect and restore sensitive habitats such as native plant communities and habitat for endangered species.

Commission staff has confirmed that development consisting of removal of major vegetation, including vegetation comprising a rare native plant community - maritime succulent scrub ("MSS"), as well as placement of solid material (staging of construction materials) within areas cleared of major vegetation, has occurred in two locations on property located within the Coastal Zone at Orange County Assessor Parcel Nos. 424-041-04, 424-041-10 (City of Newport Beach property), 114-170-43, and 114-170-79 (please find attached two exhibits depicting the areas of vegetation removal). "Development" is defined by Section 30106 of the Coastal Act as:

> ***"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....*** **[underlining added]**

The vegetation removed from the site is characterized by a Newport Banning Ranch ("NBR") biological consultant in a September 24, 2009 document entitled "Habitat Characterization for Areas Affected by Alleged Clearing near Southeast Corner of Banning Ranch Referenced in July 29, 2009 Letter from California Coastal Commission," as an estimated 0.83 acres of MSS that has provided habitat for the coastal California gnatcatcher, a federally-listed threatened bird species. According to NBR, the bases for this characterization were historical site biological information, aerial photographs, and information gathered during recent biological surveys of the site. Due to its rarity and ecological significance, the Commission has found, in previous actions, areas of MSS to be Environmentally Sensitive Habitat Areas ("ESHA"). Furthermore, the Commission has found gnatcatcher breeding areas, as well as probable and observed gnatcatcher use areas, to be ESHA. The MSS removed from the subject site would certainly then qualify as major vegetation – by Commission practice, vegetation is major vegetation for the purposes of the Coastal Act if it performs an important ecological function. Thus, removal of MSS, as well as staging of construction materials in the cleared areas, constitutes development under the Coastal Act.

An aerial photograph dated December 30, 2003, and numerous previous aerials, show the subject areas of the site as vegetated. Aerials dated October 23, 2004, March 27, 2005, and December 30, 2005 show the subject areas of the site cleared of vegetation and construction materials staged in the cleared areas. Numerous subsequent aerials show that as of today's date, one of the two cleared areas remains entirely cleared of MSS, and the second partially cleared of MSS. NBR attests to the use of these areas by a contractor in the employ of Southern California Edison, Herman Weissker, Inc., from April 2003 to April 2006 in the course of undergrounding Southern California Edison utilities and has provided staff with information supporting that claim. The subject areas of vegetation removal overlap the portion of the subject properties that

West Newport Oil, the operator of the oil field at the subject properties, leased to Herman Weissker, Inc for vehicle parking and staging purposes via an April 1, 2003 lease agreement. Southern California Edison contracted with Herman Weissker, Inc to underground its utilities pursuant to City of Newport Beach utility underground assessment districts, including Assessment District 68, which was formed on July 27, 2004 to underground utilities at a residential community in close proximity to the subject site.

Pursuant to Section 30600 (a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a coastal development permit, in addition to any other permit required by law. Commission staff has researched our permit files and concluded that no coastal development permits have been issued for any of the development described above. Any development activity conducted in the coastal zone without a valid coastal development permit, with limited exceptions not applicable here, constitutes a violation of the Coastal Act. Furthermore, the unpermitted removal of major vegetation remains unaddressed and the resulting resource impacts persist, thus constituting a continuing violation

Please be aware that pursuant to the Coastal Act Section 30811, the Commission may order restoration of a site if development occurred without a coastal development permit, is inconsistent with the Coastal Act, and continues to affect the resources at the site. In addition, Coastal Act Section 30809 states that if the Executive Director of the Commission determines that any person has undertaken, or is threatening to undertake, any activity that requires a permit from the Coastal Commission without first securing a permit, the Executive Director may issue an order directing that person to cease and desist. Coastal Act Sections 30810 also authorizes the Coastal Commission to issue a cease and desist order. A violation of a cease and desist or restoration order can result in civil fines of up to $6,000 for each day in which the violation persists.

In addition, we note that Sections 30803 and 30805 of the Coastal Act authorize the Commission to initiate litigation to seek injunctive relief and an award of civil fines in response to any violation of the Coastal Act. Section 30820(a)(1) of the Coastal Act provides that any person who performs development in violation of any provision of the Coastal Act may be subject to a penalty amount that shall not exceed $30,000 and shall not be less than $500. Coastal Act section 30820(b) states that, in addition to any other penalties, any person who "knowingly and intentionally" performs or undertakes any development in violation of the Coastal Act can be subject to a civil penalty of not less than $1,000 nor more than $15,000 for each day in which the violation persists.

Finally, the Executive Director is authorized, after providing notice and the opportunity for a hearing before the Commission as provided for in Section 30812 of the Coastal Act, to record a Notice of Violation against the properties.

We would like to work with the parties involved to resolve these issues amicably. One option that you may consider is agreeing to a "consent order". A consent order is similar to a settlement agreement. A consent order would provide an opportunity to resolve this matter consensually and to have input into the process and timing of restoration of the subject properties, and would allow for negotiation of a penalty amount with Commission staff. If you are interested in negotiating a consent order, please contact me at (562) 590-5071 or send correspondence to my attention at the address listed on the letterhead when you receive this letter to discuss options to

resolve this case. In order to resolve this matter in a timely manner, please contact me by no later than **June 1, 2010.**

Commission staff appreciates NBR's efforts to assist staff during the investigation of this matter, and we are hopeful that all parties involved can work cooperatively towards a resolution of this violation. Thank you for your attention to this matter. If you have any questions regarding this letter or the pending enforcement case, please feel free to contact me at (562) 590-5071.

Sincerely,

Andrew Willis
District Enforcement Analyst

cc: Debby Linn, City of Newport Beach
Sherilyn Sarb, Deputy Director, CCC
Lisa Haage, Chief of Enforcement, CCC
Teresa Henry, South Coast District Manager, CCC
Karl Schwing, Orange County Planning Manger, CCC

HAMILTON BIOLOGICAL

May 25, 2010

Mr. Karl Schwing
California Coastal Commission
200 Oceangate
Long Beach, CA 90802-4316

SUBJECT: REVIEW OF BIOLOGICAL RESOURCES ISSUES SUNSET RIDGE PROJECT SITE

Dear Mr. Schwing,

On behalf of the Banning Ranch Conservancy, Hamilton Biological, Inc. reviewed the EIR prepared by the City of Newport Beach (City) for the proposed Sunset Ridge project, located at the corner of Superior Avenue and West Coast Highway. The City proposes to develop an active and passive public park on 13.7 acres of City-owned property and 5.2 acres on the adjacent Newport Banning Ranch property, for a total of 18.9 acres of impact. In addition, project implementation would involve export of approximately 34,000 cubic yards of fill from the proposed park site to two areas on the Newport Banning Ranch property that would cover 4.6 acres, plus an additional 3.3 acres of impacts for construction of a new haul road to provide access to the dumping sites on the Newport Banning Ranch property. The City retained BonTerra Consulting, Inc., to serve as the biological consultant for both this project and the adjacent Newport Banning Ranch project, which will soon be undergoing its own CEQA review and permitting processes.

I visited those portions of the project site open to the public on November 4 and 6, 2009, and on March 20 and 25, 2010. I submitted written comments on the Sunset Ridge DEIR in a letter to the City dated December 10, 2009. I was allowed three minutes to testify to the City Council on March 23, 2010, regarding inadequate and incorrect information in the City's Response to Comments document. No Councilmember asked me or their consultants in attendance any follow-up questions regarding any of these issues. I am taking this opportunity to provide the Coastal Commission and its professional staff with relevant biological information on the Sunset Ridge project that will supplement information that will be provided to you by the City and its consultants.

PLANT COMMUNITY MAPPING ERRORS

During March 2010 I mapped the City's parcel in the field, using aerial imagery from Google Earth. I could not access those portions of the site located on the Newport Banning Ranch property. BonTerra's plant communities map (Exhibit 6 in the DEIR's biological technical appendix) is provided on the following page, and my own mapping of the City-owned portion of the project site follows that (Figure 1). Site photos depict some of the areas that BonTerra and I mapped differently.

316 Monrovia Avenue ~ Long Beach, CA 90803 ~ 562-477-2181 ~ Fax 562-433-5292

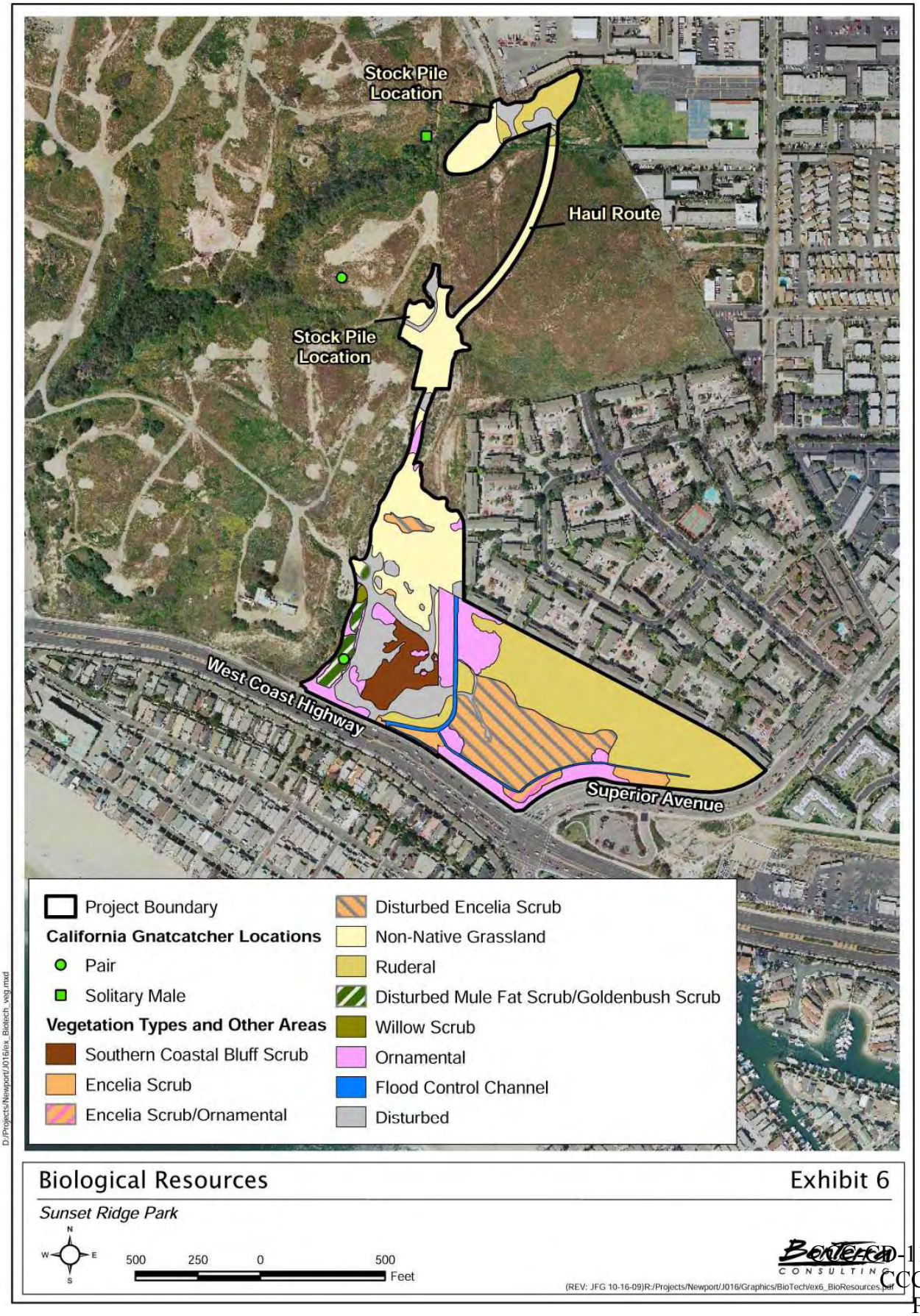

Stock Pile Location
Haul Route
Stock Pile Location
West Coast Highway
Superior Avenue
Project Boundary
California Gnatcatcher Locations
Pair
Solitary Male
Vegetation Types and Other Areas
Southern Coastal Bluff Scrub
Encelia Scrub
Encelia Scrub/Ornamental
Disturbed Encelia Scrub
Non-Native Grassland
Ruderal
Disturbed Mule Fat Scrub/Goldenbush Scrub
Willow Scrub
Ornamental
Flood Control Channel
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Exhibit 6
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Figure 1. Plant communities mapped by Robert Hamilton on the City-owned portion of the project site during spring 2010. On-site areas not labeled on this map are not defined or ruderal/disturbed. The area outlined in green could not be mapped because it is private land.

Note especially:

- The area labeled **Calandrinia 70-80%**, which is dominated by Fringed Redmaids (*Calandrinia ciliata*; see Figures 2, 3), a native wildflower that BonTerra did not record on the site. BonTerra mapped this entire area as **ruderal**.
- The **Wetland Seep**, which covers approximately 0.1 acre, and features standing water and several obligate wetland plants that BonTerra did not record on the site (see Figures 4-5). BonTerra mapped this area as **ornamental**. Additional areas on the project site, such as the area labeled **Coastal Scrub/Wetland**, may also qualify as wetlands under the Coastal Commission's one-parameter delineation system (see Figures 6-8).
- The area labeled **Encelia/Coastal Bluff Scrub**, which covers approximately 0.2 acre (see Figure 9). BonTerra mapped this area as **ornamental**.

Figure 2. I found Fringed Redmaids (*Calandrinia ciliata*) to be dominant on the project site's upper (eastern) plateau. When flowering during March 2010, this native annual wildflower provided 70-80% cover on the western part of the plateau and 20-30% cover on the eastern part of the plateau. The DEIR classifies the eastern plateau as "ruderal." Photo taken on March 25, 2010.

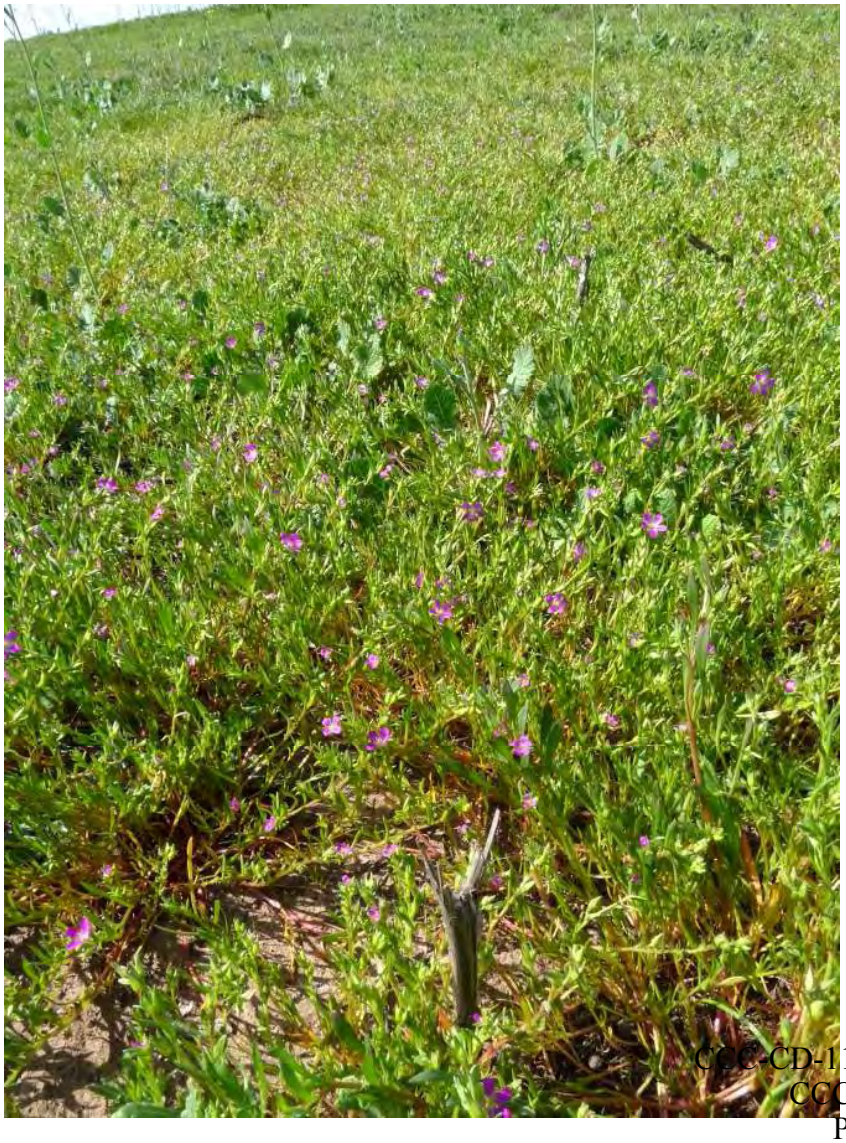

Figure 3. This photo shows the western portion of the upper plateau on March 25, 2010, where Fringed Redmaids provided 70-80% cover, with only scattered non-native Shortpod Mustard (*Hirschfeldia incana*). The view is to the west and slightly askew, with the edge of the plateau visible in the upper left corner. As spring progresses and these showy annual wildflowers die off, the mustard plants become larger and more obvious. Even still, it is remarkable that BonTerra field personnel failed to detect this native plant—a dominant species across a substantial portion of the site—during any of their biological surveys.

Figure 4. This photo shows groundwater seeping out of the slope along Superior Avenue, on the project site. Most of the plants visible in this photo are non-native Pampas Grass (*Cortaderia selloana*). The large, dark shrub evident toward the background is Mediterranean Tamarisk (*Tamarix ramosissima*). The DEIR classifies this area as "ornamental" and does not mention or evaluate the apparent wetland conditions shown here.

Figure 5. This photo, taken in the same area shown in Figure 4, shows obligate wetland indicator species Narrowleaf Cattail (*Typha angustifolia*), Marsh Fleabane (*Pluchea odorata*), and spike-rush (*Eleocharis* sp.) growing in mud and standing water. Also present is Spike Bentgrass (*Agrostis exarata*) and the same Mediterranean Tamarisk shown in Figure 4. Four of the plants shown here are not included in the DEIR's plant compendium.

Figure 6. The slope above West Coast Highway also shows evidence of wetland conditions. This photo shows moist soils, a conspicuous salt crust, and apparent oxidation stains on the side of the concrete ditch, all indications that the groundwater seepage above Superior Avenue, shown in Figures 4 and 5, also occurs on the slope above West Coast Highway.

Figure 7. This photo shows a stand of Salt Heliotrope (*Heliotropium curassavicum*) growing beneath Big Saltbush (*Atriplex lentiformis*) on the slope above West Coast Highway. Salt Heliotrope is classified as an obligate wetland indicator, although it occurs in a variety of wetland and non-wetland habitats. The DEIR's plant compendium does not include Salt Heliotrope.

Figure 8. This photo shows American Tules (*Scirpus americanus*), a native obligate wetland plant, growing in sediments accumulated in the bottom of a concrete drainage channel west of the proposed park's entry road. Adjacent vegetation includes additional native species, such as Coast Goldenbush (*Isocoma menziesii*) and Emory Baccharis (*Baccharis emoryi*). Narrowleaf Cattail also grows in this general area. The DEIR's plant compendium does not include the cattails, tules, or Emory Baccharis, and the DEIR erroneously classifies this area as "ornamental."

Figure 9. This photo shows California Encelia (*Encelia californica*) and other native shrubs growing along the park site's border with Newport Banning Ranch. The view is to the west, with West Coast Highway in the background. The DEIR classifies this native scrub as "ruderal."

Figure 10. Photo of the site's lower plateau, taken on November 6, 2009. In this area, extending as far as 570 feet from any structure, the City routinely mows native California Encelia to within inches of the ground for "weed abatement." In addition to this mowing, the City maintains a swath of essentially barren land closer to the condominiums (see, for example, Figure 2). The effect is to essentially prevent high-value coastal scrub habitat from becoming developed across the main portion of the site.

Figure 11. Photo taken on March 20, 2010, showing the same area depicted in Figure 10. All of the yellow flowers in this photo are California Encelia. California Encelia is a fast-growing native shrub that can quickly form coastal scrub habitat, but the routine disturbance of this habitat does decrease its functionality. Later in the season, when the encelia's bloom fades, mustards and other weeds become more apparent within this chronically disturbed scrub. I mapped 4.1 acres disturbed encelia scrub on the site compared with BonTerra's 3.6 acres.

The City's response to the mapping discrepancies I documented was:

> BonTerra Consulting has reviewed the site conditions and has determined that the vegetation map in the Draft EIR is adequate.

The tone of this response speaks for itself. The practical effect of mis-mapping parts of the project site—uniformly in the direction of identifying high-value habitats as low-value habitats—is to understate magnitude of adverse biological effects and to give an impression that project implementation would avoid more Environmentally Sensitive Habitat Areas (ESHA) than it actually would.

WETLAND ISSUES

The DEIR's Hydrology Section states on Page 4.10-20:

> Seepage was observed . . . at the drains near the toe of the slope along Superior Avenue and West Coast Highway. The direction of seepage flow is generally from north to south.

But the issue of groundwater seepage was not mentioned in the biological resources section of the DEIR, so I was surprised in November 2009 to find several wetland plant species growing in wet areas resulting from groundwater seepage along Superior Avenue. Noting that the project would require a Coastal Development Permit, I requested that the City report the area of wetlands on the site as delineated using the Coastal Commission's one-parameter method, and to report the results in the FEIR. The City refused this request.

I observed that the seepage shown in Figures 4–8 is similar to seepage from a cut-slope that formerly occurred directly across Superior Avenue from the project site, at an area referred to as "cattail cove." That site was developed into the lower campus of Hoag Hospital in the early 1990s. I worked on that project as a biologist for LSA Associates (the hospital's consultant). As part of our evaluation, I assisted LSA wetlands specialist Rick Harlacher in a complicated jurisdictional delineation that included the unusual step of completing a WET II Functional Analysis[1]. One complicating factor was the dominance of Pampas Grass, an invasive weed from South America that was growing in saturated, gleyed soils on the slopes of that site (just as Pampas Grass dominates seeping slopes on the Sunset Ridge site). The federal government has not graded Pampas Grass as to its wetland indicator status, but in its native range the species grows in damp soils along river margins[2]. In coastal southern California, it has escaped cultivation and spread along sandy, moist ditch banks[3]. Examination of 82 records of Pampas Grass in California showed that 32% were from wetlands[4]. This suggests that the proper indicator status for Pampas Grass in California lies on

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[1] Adamus, P. R. 1987. Wetland Evaluation Technique (WET II). U.S. Army Corps of Engineers, Waterways Experiment Station, Vicksburg, MS.

[2] Connor, H.E. and Charlesworth, D. 1989. Genetics of male-sterility in gynodioecious *Cortaderia* (Gramineae). *Heredity* 63, 373–382.

[3] Costas-Lippmann, M. and Baker, I. 1980. Isozyme variability in *Cortaderia selloana* and isozyme constancy in *C. jubata* (Poaceae). *Madroño* 27:186–187.

[4] Lambrinos, J. G. 2001. The expansion history of a sexual and asexual species of *Cortaderia* in California, USA. *Journal of Ecology* 89:88–98.

the border between "FACU" (occurring in wetlands 1–33% of the time) and "FAC" (occurring in wetlands 34–67% of the time). With roughly one-third of its documented occurrences in California being in wetlands, the species is clearly adapted to wetland conditions.

The delineation that we performed at the hospital site in the early 1990s yielded a determination of jurisdictional wetlands for the seeping slopes dominated by Pampas Grass (under three-parameter or one-parameter methodologies). The City's wetland delineation at Sunset Ridge reached a finding that no three-parameter wetlands are present, despite the permanent presence of standing water and several obligate wetland plants. Apparently, dominance of Pampas Grass on the slopes in question was considered to negate all other considerations, despite the fact that Pampas Grass is known to frequently grow in wetlands.

My December 2009 comments noted that the project biologists failed to note numerous plant species that are conspicuous on the site, most of which are wetland indicator species. These include Emory Baccharis (*Baccharis emoryi*), Marsh Fleabane (*Pluchea odorata*), Salt Heliotrope (*Heliotropium curassavicum*), Spike Bentgrass (*Agrostis exarata*), spike-rush (*Eleocharis* sp.), Rabbitfoot Grass (*Polypogon monspeliensis*), Narrowleaf Cattail (*Typha angustifolia*), and American Tule (*Scirpus americanus*). The City responded, in part:

> BonTerra Consulting conducted a site visit on March 11, 2010. Salt heliotrope, marsh fleabane, and spike bentgrass were not observed. Very small amounts of Typha and spike-rush are present. Due to their minor representation within the Project site, no changes to the plant compendium are necessary.

The determination that certain plants acknowledged to occur on the site shall be excluded from the EIR's "plant compendium" represents a non-sequitur. The compendium is a list of the species observed on the site, regardless of abundance. It makes no sense to argue that species with "minor representation within the Project site" should be left off this list. I will be happy to meet with anyone and show them these plants and several others that are present on the site, but that BonTerra failed to detect. This letter contains photos of some of them, taken on the site.

The second part of the City's response was:

> There was not enough of these plant species present to be considered a separate vegetation type and the area containing these species was well below what would be considered a reasonable mapping unit.

Note, however, that BonTerra mapped several extremely small "disturbed" and "ornamental" areas within the broader outlines of sensitive habitats (see Page 2 of this letter). This reduced the project's claimed area of impact to sensitive habitats/ESHA. Since some of these mapped polygons are 0.01 acre, or even smaller, the City's claim that much larger wetland areas would be "well below what would be considered a reasonable mapping unit" represents another example of the City's bias in favor of its own project.

The area that I mapped as "wetland seep" on Figure 1 represents the area that clearly meets wetland criteria for both hydrology (standing water is present continuously) and plants (all plants in this area show wetland adaptations); I have not evaluated soils. As noted previously, additional areas along the southern and eastern edge of the project site may also meet the Coastal Commission's one-parameter definition of jurisdictional wetlands.

California Gnatcatcher Issues

Page 45 in the DEIR's Appendix E (BonTerra's technical report) provides a terse discussion of the California Gnatcatcher's current status on the project site:

> A limited amount of suitable habitat for this subspecies occurs on the Project site. Focused surveys for the coastal California gnatcatcher were conducted in spring/summer 2009; this species was observed nesting on the Project site. A pair nested in a coastal goldenbush shrub in the disturbed mule fat scrub/goldenbush scrub vegetation type on the Project site. The pair fledged three to four chicks during the survey period.

Exhibit 6 in Appendix E (see Page 2 of this letter) represents the location of this on-site breeding pair using a single green dot, and the EIR did not provide any indication of the family group's observed home range.

The DEIR mentioned that the entire project site is designated as critical habitat for the California Gnatcatcher, but failed to evaluate what this means. Section 3 (5)(A) of the federal Endangered Species Act defines critical habitat as:

> the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . .

Within areas broadly mapped as critical habitat, the U.S. Fish and Wildlife Service (USFWS) has specified Primary Constituent Elements (PCEs) that define the actual extent of habitats that may be useful to the listed species. PCEs for California Gnatcatcher critical habitat include not only intact sage scrub habitats, but also "non-sage scrub habitats such as chaparral, grassland, riparian areas, in proximity to sage scrub habitats . . . that provide space for dispersal, foraging, and nesting."[5] As summarized by Atwood and Bontrager (2001)[6]:

> Territories defended during nonbreeding season (Preston et al. 1998)[7]; wandering into adjacent territories or unoccupied habitat may result in up to 80% increase in home range size relative to area used during nesting (Bontrager 1991[8], Preston et al. 1998). Small, disjunct patches of coastal sage scrub, distributed within grassland matrices, may be incorporated into nonbreeding season home range even if too small to support a breeding pair; use of such patches may require regular movements of 25–100 m across grassland gaps (DRB). In San Diego Co., established pairs (n = 11) in Dec spent about 62% of time outside boundaries of territory defended during previous breeding season (Preston et al. 1998).

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[5] Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018–AV38, endangered and threatened wildlife and plants; revised designation of critical habitat for the Coastal California Gnatcatcher (*Polioptila californica californica*). Federal Register 72:72069 (December 19, 2007).

[6] Atwood, J. L. and D. R. Bontrager. 2001. California Gnatcatcher (*Polioptila californica*). The Birds of North America Online (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology; Retrieved from the Birds of North America Online: http://bna.birds.cornell.edu/bna/species/574.

[7] Preston, K. L., P. J. Mock, M. A. Grishaver, E. A. Bailey, and D. F. King. 1998b.*California Gnatcatcher territorial behavior*. Western Birds 29:242–257.

[8] Bontrager, D. R. 1991. *Habitat requirements, home range and breeding biology of the California Gnatcatcher (*Polioptila californica *) in south Orange County, California.* Report dated April 1991 prepared for Santa Margarita Co., Rancho Santa Margarita, CA.

I hold a current federal permit to conduct presence/absence surveys for the Coastal California Gnatcatcher (No. TE-799557). During my two field visits in November 2009, I observed at least one pair of California Gnatcatchers in the areas shown on Figure 12, below.

Figure 12. Locations where California Gnatcatchers were recorded on November 4 and 6, 2009, relative to the spot where California Gnatcatchers were mapped in the DEIR. The November records demonstrate that gnatcatchers utilize native scrub communities throughout the project site.

On the afternoon of November 4, 2009, I initially observed a pair of California Gnatcatchers at the northern location shown in Figure 12. The birds were foraging in a patch of Mulefat that BonTerra mapped as "ruderal." After several minutes, the birds flew off a short distance to the northwest, crossing the property fence between the City property and Newport Banning Ranch. Approximately 30 minutes later, after walking around the rest of the City property, I encountered either the same pair or a second pair foraging in coastal scrub vegetation approximately 80 m south of the initial encounter. The second period of observation also lasted several minutes, during which I obtained photos of both the male and female as they flew back and forth across the property fence (see Figures 13 and 14 on the following page).

On the afternoon of November 6, 2009, I was inspecting the wetlands along Superior Avenue, at the location of the Mediterranean Tamarisk tree shown in Figures 4 and 5 in this letter, when I heard the mewing call of a California Gnatcatcher from the slope above. A few minutes later I found a pair of gnatcatchers on the slope directly north of the intersection of Superior Avenue and West Coast Highway, foraging in coastal scrub dominated by Big Saltbush. At that location I obtained the photos shown in Figures 15 and 16. The birds then moved to the northwest, at which point I stopped following them.

The DEIR's Impact section stated:

> The Encelia scrub, Encelia scrub/ornamental, and disturbed Encelia scrub on the Project site would not be considered utilized by the gnatcatcher due to the periodic mowing and traffic/pedestrian edge effects in this area.

This finding is disproven by observation of gnatcatchers using areas that "would not be considered utilized by the gnatcatcher." As I have documented, native scrub communities along the southern and eastern edges of the project site were incorrectly mapped and classified by BonTerra, indicating that those areas were never subjected to credible biological surveys. The superficiality and inadequacy of the survey effort is also indicated by the project biologists' failure to detect (a) the presence of Fringed Redmaids, a species that is dominant on the site's upper plateau, or (b) groundwater seepage supporting extensive areas of conspicuous wetland plants along Superior Avenue and West Coast Highway.

Figure 13. I photographed this male California Gnatcatcher during my second encounter with this species at the site on November 4, 2009. It was perched on the fence between the City property and Newport Banning Ranch.

Figure 14. I photographed this female California Gnatcatcher, the mate of the bird in Figure 13, on November 4, 2009, as it perched on the property fence near the male shown in Figure 12.

Figure 15. I photographed this male California Gnatcatcher on November 6, 2009, as it foraged in Big Saltbush near the top of the slope above the intersection of Superior Avenue and West Coast Highway. This may be the same bird shown in Figure 13.

Figure 16. I photographed this female California Gnatcatcher, the mate of the bird in Figure 15, on November 6, 2009, as it foraged in a Big Saltbush plant near the top of the slope above intersection of Superior Avenue and West Coast Highway. This may be the same bird shown in Figure 14.

In light of my observations, and given multiple lines of evidence demonstrating that the project site was not carefully surveyed by project biologists, the DEIR failed to support its assertion that California Gnatcatchers do not occur in that part of the site, either during the nesting season or during fall/winter. All of the site's scrub communities, including those that the City and others have disturbed over the years, should be considered to be occupied by the California Gnatcatcher, consistent with (1) the USFWS critical habitat designation, (2) the scientific literature describing the gnatcatcher's habitat requirements, (3) the direct observations of gnatcatchers documented in this letter.

The City responded to my comments about the gnatcatcher in two parts. First:

> In the winter, California gnatcatchers are known to forage in a variety of habitat types including single coastal sage scrub plants as well as ornamental habitats outside of their general territories.

This was not responsive to my comments, since the areas in question are not "single coastal sage scrub plants or ornamental habitats." BonTerra mapped native scrub communities as ruderal and ornamental habitats and, when presented with photos demonstrating their error, the City determined that BonTerra's mapping was "adequate."

Second:

> As stated in the Draft EIR, the entire Project site is located in gnatcatcher critical habitat. Only limited areas on the Project site exhibit Primary Constituent Elements (PCEs) for the gnatcatcher.

I asked Chris Medak of the U.S. Fish & Wildlife Service (USFWS) about this statement, and she e-mailed me the following response on March 23, 2010: "I have advised the City that the whole site would be considered critical habitat containing the primary constituent elements for the gnatcatcher."

RECENT REMOVAL OF INTACT SAGE SCRUB

The DEIR failed to disclose that extensive areas of sage scrub were removed from the project site between December 31, 2003, and March 28, 2005 (see Figures 17 and 18 on the following page). The areas shown supported two pairs of California Gnatcatchers in 2000[9], and the clearing was done without consulting with the USFWS, apparently in violation of the federal Endangered Species Act. The EIR failed quantify the area of sage scrub illegally cleared, discuss how this violation of federal law is being addressed, or describe how this impact will be mitigated.

[9] PCR Corporation. 2000. *Results of focused Coastal California Gnatcatcher Surveys for the Newport Banning Ranch property in Orange County, California.* Report dated November 1, 2000, prepared for the USFWS Carlsbad Office.

Figures 17, 18. The aerial image at left, dated December 31, 2003, shows generally intact sage scrub habitat in the areas outlined in red, which had been cleared as of March 28, 2005. The DEIR made no mention of this unauthorized clearing.

The City responded:

> The City of Newport Beach took ownership of the city-owned portion of the Project site in 2006, which is subsequent to the disturbance of the area noted by the commenter. Resolution of this issue will be handled through the administrative processes by the responsible parties. Consistent with CEQA Guidelines Section 15125, the EIR describes the physical environmental conditions of the project site and vicinity at the time the Notice of Preparation was published. "This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant".

This was non-responsive on two levels. First, my comment concerned unauthorized habitat removal *on the Newport Banning Ranch portion of the project site*, not the City-owned portion, which makes irrelevant the first part of the City's response. The second part of the City's response observes that a CEQA document will *normally* describe the existing physical environmental conditions, and yet the unauthorized removal of sensitive habitats from a project site is an *abnormal* situation. CEQA requires an EIR preparer to disclose any existing conditions created by possibly illegal actions and modify its analyses and conclusions accordingly. Clearing of sensitive habitats in 2004/2005 would be expected to affect the current distribution of sensitive plant and wildlife resources on the project site, which is relevant to the EIR's findings. Therefore, the unauthorized action should have been disclosed and discussed in the EIR. The Commission's determinations of the limits of ESHA on the project site must take into account the unauthorized clearing of coastal scrub documented here.

MOWING OF ENCELIA SCRUB

All of the California Encelia plants growing on the flat portion of the City-owned property are routinely mowed nearly to ground level, probably annually (see Figure 10 on Page 7 of this letter). California Encelia is a native plant that is dominant in biologically sensitive

coastal sage scrub and coastal bluff scrub communities found on the project site and on Newport Banning Ranch. California Gnatcatchers commonly use scrub dominated by California Encelia for nesting and foraging, and this plant grows very fast, typically reaching waist-height when left undisturbed for a growing season (see Figure 11 on Page 7 of this letter).

Disturbed encelia scrub covers between 3.6 and 4.1 acres on the site, all of it proposed for grading impacts. Page 14 of Appendix E states:

> The 3.64 acres of disturbed Encelia scrub is regularly mowed for fuel modification and weed abatement purposes and contains a high percentage of non-native weeds; therefore, it is not considered special status.

With regard to "weed abatement," California Encelia is a native plant and dominant component of a biologically sensitive coastal scrub community that is occupied by the California Gnatcatcher. Coastal scrub dominated by California Encelia is typically classified as ESHA. California Encelia is not a "weed" that can be legally mowed down without consulting with the USFWS, and the biologists at the Carlsbad Field Office have not authorized the City to mow encelia on this site.

With regard to "fuel modification," Page 28 of the Orange County Fire Authority's "Guideline for Fuel Modification Plans and Maintenance Program," dated January 1, 2008, *expressly allows* California Encelia to remain "in all fuel modification wet and dry zones in all locations."[10] Furthermore, the mowing appears to extend out across the entire mesa area, as far as 570 feet from the structures to the north. This is much farther than would be required for any legitimate fuel modification purpose, particularly given that the 100 feet closest to structures is maintained as essentially barren land. Therefore, the DEIR's suggestion that these plants must be mowed down to meet fuel modification requirements is false.

Page 55 in Appendix E states:

> The proposed Project would impact approximately 0.26 acre of Encelia scrub, 0.21 acre of Encelia scrub/ornamental, and 3.64 acres of disturbed Encelia scrub. Impacts on these vegetation types are not considered significant because of their fragmentation from high value areas, presence of invasive non-native species, maintenance of concrete v-ditch under the shrubs, presence of trash, proximity to high foot/bicycle, and vehicle traffic, and are not expected to support gnatcatchers during the nesting season. Therefore, no mitigation would be required.

As reviewed previously, California Gnatcatchers have been observed in three different patches of scrub habitat that the EIR preparer characterized as not providing habitat for California Gnatcatchers. As shown in Figure 11 in this letter, encelia scrub is capable of bouncing back quickly after mowing, and this habitat would clearly become more suitable for nesting gnatcatchers if the City allowed it to remain in place for more than a few months at a time.

Following is the City's response to these points:

> The requirement to clear the property of all weeds, grass, vines, and other vegetation comes from Fire Code Section 1103.2.4, Combustible Vegetation.

[10] http://www.ocfa.org/_uploads/pdf/guidec05.pdf

All vegetation is "combustible," so why not mow everything around Upper Newport Bay? Most of that vegetation is more flammable than California Encelia, and there are many houses closer than 570 feet to that habitat. The City has been mowing designated critical habitat for a federally listed species without any environmental review or oversight, and without providing any plausible rationale for why this is needed for proper maintenance of the land. This practice is inconsistent with the Coastal Act's requirements to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.

Furthermore, the City's mowing of native scrub is promoting growth and expansion of the noxious and invasive weeds that these actions are supposed to be controlling. Specifically, the mowed area is becoming infested with Devil's Thorn (*Emex spinosa*), a noxious weed that the California Invasive Plant Council describes as follows:

> *Emex spinosa* (spiny emex, devil's-thorn) is an annual (family Polygonaceae) found on California's south coast. This Mediterranean native is not yet common in California, but it is spreading rapidly and is known to crowd out native species. It frequently infests disturbed areas, especially in coastal habitats. *Emex spinosa*'s spiny seed pods stick to people and animals, so it spreads quickly along trails and then into undisturbed areas.[11]

The EIR makes no mention of this problem, in part because BonTerra failed to detect this weed on the project site.

All portions of the Sunset Ridge site that include California Encelia as a co-dominant—including those that have been subjected to mowing and other disturbances without the needed regulatory approvals—should be classified as ESHA. All normal protections for these coastal scrub habitats should be provided at the Sunset Ridge site, just as they are elsewhere in the City of Newport Beach.

STATUS OF THE BURROWING OWL ON THE SITE

The Burrowing Owl (*Athene cunicularia*), a California Species of Special Concern, is extremely rare in Orange County due to large-scale development of nearly all of the county's suitable grasslands, especially near the coast. Burrowing Owls may be absent at a given site one winter and present the next, and surveyors do not always detect rare species they are searching for, even when individuals are present. This letter provides numerous examples of conspicuous species known to occur on the Sunset Ridge site that BonTerra's field personnel failed to detect. For one more example, consider that BonTerra failed to detect any Side-blotched Lizards (*Uta stansburiana*) on the project site, despite the species being abundant throughout. I stopped counting at 15 individuals on November 4, and I again easily found the species to photograph on November 6 (Figure 19).

Figure 19. I photographed this Side-blotched Lizard on the Sunset Ridge project site on November 6, 2009. This individual, like many others I encountered on the site, was in the burrow of a California Ground Squirrel. BonTerra reportedly conducted protocol surveys for the Burrowing Owl, including close inspection of all burrows on the site. So how could they have missed all these lizards?

[11] http://www.cal-ipc.org/ip/management/plant_profiles/Emex_spinosa.php

Figure 20 shows that, in January 2008, Glenn Lukos Associates identified two Burrowing Owls in the southern grasslands of Newport Banning Ranch and a third individual 212 feet west of the site[12].

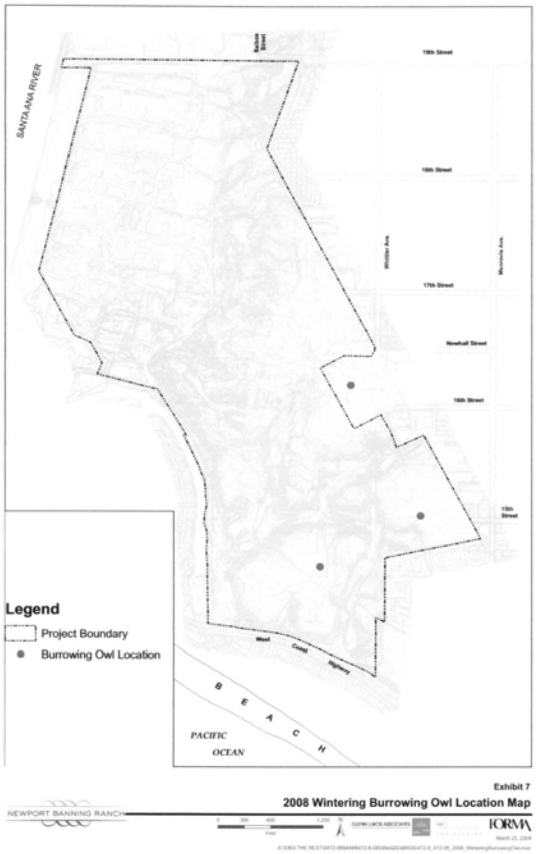

Figure 20. This map is Exhibit 7 in the 2008 draft biological report prepared by Glenn Lukos Associates for Newport Banning Ranch LLC. It shows the point locations where Glenn Lukos Associates documented the occurrence of three wintering Burrowing Owls in January 2008. Since birds do not remain in the same spot, but must move around the grasslands to forage, Burrowing Owls at any of these mapped point-locations could be impacted by project implementation.

As the City's biological consultant for both the Sunset Ridge DEIR and the pending Newport Banning Ranch EIR, BonTerra Consulting has been working closely with Glenn Lukos Associates, and has critically reviewed their 2008 draft biological report. It was therefore of special interest that the positive results of the 2008 surveys were not mentioned in the Sunset Ridge DEIR, which stated only, "In the vicinity of the Project site, this species has been reported from Fairview Park in Costa Mesa (CDFG 2009a)."

When I pointed out in written comments that BonTerra had suppressed these relevant survey results from Newport Banning Ranch, the City responded, in part: "The results were not suppressed, only occurrences reported in the CNDDB were included." CEQA findings must be based upon the best available scientific information. There is no allowance to withhold recent, relevant, credible scientific information collected on the project site on the basis that it was not "reported in the CNDDB." And, since the City raised this issue, why didn't Glenn Lukos Associates report these important 2008 Burrowing Owl sightings to the CNDDB? How can the public have any confidence in a CEQA review process that is so transparently self-serving for both the CEQA lead agency and its consultants?

[12] Glenn Lukos Associates. 2008. Biological Technical Report for the Newport Banning Ranch Property, Newport Beach, California. Report prepared for Mike Mohler, Newport Banning Ranch LLC.

Page 42 of Appendix E downplays the site's potential value to the species:

> Limited suitable habitat and burrow sites for this species are present on the Project site. Focused surveys for the burrowing owl were conducted in winter 2008/2009 and in spring/summer 2009; the burrowing owl was not observed. Therefore, burrowing owl is not expected to occur on the Project site due to lack of detection during focused surveys. However, there is potential for the burrowing owl to occasionally occur on the Project site as a migrant or rare winter visitor.

Glenn Lukos Associates found three Burrowing Owls wintering in this "limited suitable habitat" in January 2008. Figure 21, below, shows that the project site's shortgrass grasslands are expansive and riddled with rodent diggings.

Figure 21. This photo shows the shortgrass grasslands of Newport Banning Ranch (part of the Sunset Ridge project site), as seen from the southern terminus of 15th Street, on November 6, 2009. More than a dozen California Ground Squirrels can be seen in just this one group.

The *Birds of North America* species account[13] describes the Burrowing Owl's preferred habitat as "Dry, open, shortgrass, treeless plains, often associated with burrowing mammals." On November 6 I observed at least 80 California Ground Squirrels on and near the project site. By any objective measure, the project site's grasslands are among the most suitable habitats for Burrowing Owls in Orange County or anywhere along the coast of southern California, which is why three Burrowing Owls were documented wintering in this area during January 2008.

This episode recalls the "Whispering Hills Final Biological Technical Report" dated March 2, 2000, also prepared by BonTerra. That report was incorporated into the DEIR for the Whispering Hills project in the City of San Juan Capistrano. The following excerpt is from Page 9 of my comments on that DEIR, provided in a letter dated June 9, 2000:

> Page 39 of the DEIR states, "Marginal suitable habitat for the least Bell's vireo is present on the site. This species was not observed during focused surveys in 1999." Biologist Kurt

[13] Haug, E. A., B. A. Millsap, and M. S. Martell. 1993. Burrowing Owl (*Athene cunicularia*), The Birds of North America Online (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology; Retrieved from the Birds of North America Online: http://bna.birds.cornell.edu/bna/species/06.

> Campbell, who conducted surveys on the project site in 1998, reports[14] that a pair of Least Bell's Vireos raised young in riparian habitat on the project site in 1998, information that was well known to the EIR preparer. It appears that the EIR preparer (a) suppressed Mr. Campbell's observations, (b) characterized successfully utilized nesting habitat as "marginal," and (c) failed to identify significant project effects on the vireo.

In both of these cases, BonTerra Consulting knowingly withheld the positive results of an earlier focused bird survey of a site they were investigating, and then characterized the habitat as only marginally suitable for the species in question, citing only their own negative survey results the following year. If such a pattern of outright deception does not destroy a firm's credibility with decision-makers, what possibly could?

Likely Effects of Dumping Fill at Newport Banning Ranch

The proposed dumping of 34,000 cubic yards of fill from the park site into 4.6 acres of shortgrass grassland habitat at Newport Banning Ranch, as well as the associated construction of a new haul road to the dumping sites, would have significant adverse effects upon the Burrowing Owl and other grassland species. A short distance north of the project site, the City of Costa Mesa dumped soil on the mesa at Fairview Park in the early 1990s. This act resulted in the conversion of that shortgrass mesa/vernal pool complex into expansive stands of dense, tall mustard and other non-native weeds, which grow out of the fill piles. The extensive ecological damage resulting from that dumping of fill shows no sign of improving over time (Figure 22).

Figure 22. This photo, taken at Fairview Park on November 6, 2009, shows dried vernal pool habitat in front of tall, dense, dried mustard growing out of fill dirt that was placed there approximately 20 years ago. Unlike the vernal pools and shortgrass mesa that formerly occupied the filled area (which is much bigger than the area shown here), the dense mustard provides poor-quality habitat for most native wildlife species, including Burrowing Owls.

The proposed dumping of fill at Newport Banning Ranch would be expected to result in similar establishment of tall weeds where currently the vegetation is short and sparse (see Figure 21 on the previous page). This would degrade habitat suitability for Burrowing Owls and for other grassland species, such as Killdeers (*Charadrius vociferus*), Red-tailed Hawks (*Buteo jamaicensis*), American Kestrels (*Falco sparverius*), Loggerhead Shrikes (*Lanius ludovicianus*), American Pipits (*Anthus rubescens*), and Western Meadowlarks (*Sturnella ne-*

[14] Campbell, K.F. Telephone conversation on 5 May 2000.

glecta). The City's response to this comment completely ignored the factual information that I provided concerning the known adverse environmental effects of dumping thousands of yards of fill on grasslands.

Concerning the site's grassland, ruderal, ornamental, flood control channel, and disturbed communities, the DEIR's impact analysis states:

> These areas generally have low biological value because they are composed of unvegetated areas or are vegetated with non-native species. These areas generally provide limited habitat for native plant and wildlife species although they may occasionally be used by native species. Therefore, impacts on these areas would not be considered significant, and no mitigation would be required.

The DEIR's suggestion that the grassland areas proposed for the large-scale dumping of fill "may occasionally be used by native species" is not based in fact. I have seen large numbers of grassland bird species using the site's grasslands, including herons and egrets (Figure 23), two Red-tailed Hawks, an American Kestrel, 14 Killdeers (Figure 24), 25 American Pipits, 70 Western Meadowlarks, 100 Mourning Doves, and 100 House Finches (minimum estimates provided for the last four species). As discussed previously, these grasslands are known to have supported three wintering Burrowing Owls as recently as 2008.

Figure 23. A Great Blue Heron (*Ardea herodias*) and Great Egret (*Ardea alba*) forage in grasslands on the Newport Banning Ranch portion of the project site on March 25, 2010. The fence defining the western boundary of the City property is in the foreground.

Figure 24. Nine out of a flock of 14 Killdeers encountered on the upper (eastern) mesa of the City-owned parcel on November 4, 2009.

Use of non-native annual grasslands on the Bolsa Chica Mesa by Burrowing Owls and other grassland specialists was among the reasons given by the staff of the Coastal Commission for recommending that those grasslands be identified as ESHA when they evaluated the Brightwater project on the Bolsa Chica Mesa (Warner Mesa) in 2004[15]:

> **Elimination of 75 Acres of Raptor Foraging Habitat.** The 105.3-acre project site is primarily vegetated with annual grasslands and ruderal vegetation along with several environmentally sensitive habitat areas. Although annual grassland/ruderal vegetation type is non-native, it nevertheless provides foraging habitat for many species of raptors, including white-tailed kites (a Fully Protected Species) and several California Species of Special Concern (CSC) such as northern harriers and the burrowing owls. The loss of this vegetation is also considered significant because it represents one of the last significant grasslands adjacent to a coastal wetland, making it an integral part of the wetland/upland ecosystem.

The grasslands of Newport Banning Ranch are more extensive than those present at the Brightwater project site, and represent one of the last significant grasslands adjacent to a coastal wetland (the lower Santa Ana River/Newport Slough). If the Sunset Ridge project is implemented, the 34,000 cubic yards of excess fill should be exported elsewhere and disposed of in a responsible manner. Under no circumstances should fill dirt be dumped on the shortgrass grasslands of Newport Banning Ranch, as this would result in significant adverse effects upon numerous native species that thrive in this regionally rare habitat.

Environmentally Sensitive Habitat Areas

No ESHA boundaries or buffer standards have yet been identified at the Sunset Ridge project site or on the Newport Banning Ranch, but these areas include several plant communities that the Coastal Commission and/or City of Newport Beach normally regard as ESHA: coastal scrub, wildflower field, coastal wetlands, and annual grasslands adjacent to coastal wetlands.

[15] http://www.coastal.ca.gov/lb/W12g-10-2004.pdf

Impacts to ESHA require authorization under Section 30007.5 of the Coastal Act, known as the "balancing provision." This provision may be invoked only in specific situations in which ESHA policy conflicts with other resource-protection policies of the Coastal Act. In such circumstances, the Coastal Commission is required to resolve any conflict between different policies of the Coastal Act in a manner "which on balance is the most protective of significant coastal resources."

At Sunset Ridge, the proposed project would increase public recreational opportunities in the Coastal Zone, satisfying one aspect of the Coastal Act, but it would do so in a manner that would *maximize* impacts to significant coastal resources. For example, the City proposes to establish a four-lane entry road off West Coast Highway into the proposed park that would destroy large expanses of ESHA while simultaneously creating the new entry road and traffic signal into the massive residential and commercial development that is being planned for the Newport Banning Ranch. Furthermore, the City would dump 34,000 cubic yards of fill into Newport Banning Ranch, converting highly productive shortgrass grasslands into mustard-dominated ruderal habitat.

With regard to ESHA buffers, the Brightwater project at the Bolsa Chica Mesa (very similar to the Newport Banning Ranch mesa) provides a relevant benchmark. At Brightwater, ESHA buffers range in width from 150 to 382 feet, with the Coastal Commission staff biologist having recommended a minimum buffer width of 164 feet[16].

One can imagine many ways in which the City could meet its objective of increasing public use of the Sunset Ridge site while providing a much higher level of protection for significant coastal resources than is being proposed. For example, the City could make use of the existing public parking lot located directly across Superior Avenue from the project site. Unfortunately, the City appears to have made no effort to protect significant coastal resources, or to provide adequate buffers around any such areas.

SUMMARY & CONCLUSION

The standard under which CEQA operates is that impact analyses must be made using the best available scientific information, including consideration of the results of other biological surveys conducted at the project site and in nearby areas. The Sunset Ridge DEIR fell far short of this minimal standard. As documented herein, the biological resources section of the Sunset Ridge DEIR is severely deficient in many ways:

- The DEIR's map of plant communities incorrectly classifies numerous plant communities. All of the DEIR's errors in plant community mapping are made in the direction of under-representing biologically sensitive native communities and overstating the extent of ruderal or other communities that BonTerra considers to be of low biological sensitivity. Given that BonTerra mapped "disturbed" polygons 0.01 acre in size, this appears to be the minimum polygon size that BonTerra considers appropriate for mapping of this site.

[16] http://www.coastal.ca.gov/lb/Th11a-10-2005.pdf.

- BonTerra personnel failed to note numerous plant species that are conspicuous on the site. Many of these are wetland indicator species, including Emory Baccharis (*Baccharis emoryi*), Marsh Fleabane (*Pluchea odorata*), Salt Heliotrope (*Heliotropium curassavicum*), Spike Bentgrass (*Agrostis exarata*), spike-rush (*Eleocharis* sp.), Rabbitfoot Grass (*Polypogon monspeliensis*), Narrowleaf Cattail (*Typha angustifolia*), and American Tule (*Scirpus americanus*). Upland species missed by BonTerra include Fringed Redmaids (*Calandrinia ciliata*), Dotseed Plantain (*Plantago erecta*), and Devil's Thorn (*Emex spinosa*). BonTerra also failed to detect the ubiquitous Side-blotched Lizard (*Uta stansburiana*) on the site. Failure to identify these species during the many biological surveys reported by the EIR preparer represents a strong line of evidence demonstrating the superficiality and inadequacy of the biological survey effort.
- The City in its EIR refused requests to provide the results of a wetland delineation using the Coastal Commission's one-parameter methodology. The delineation must now be completed and the project redesigned to avoid any impacts to coastal wetlands, which are normally regarded as ESHA, as well as an appropriate buffer area around any wetland areas identified as ESHA.
- The DEIR stated that various scrub communities on the project "would not be considered utilized by the gnatcatcher" despite their containing the Primary Constituent Elements of California Gnatcatcher critical habitat. I documented the occurrence of California Gnatcatchers foraging within three areas of coastal scrub on the project site that the DEIR characterizes as being unsuitable for this species. The DEIR's evaluations and findings about the California Gnatcatcher and its habitat usage on the project site are inconsistent with the substantial body of scientific literature concerning this federally listed species and its habitat requirements. The response to comments document reiterated erroneous information concerning the supposedly limited extent of Primary Constituent Elements of critical habitat on the site. As reviewed on Page 13 of this letter, the EIR's position on this topic has been directly refuted by the USFWS biologist assigned to this project.
- The DEIR failed to disclose that coastal sage scrub was removed from the project site, apparently illegally, some time around 2004. The affected area was documented as supporting two pairs of California Gnatcatchers in 2000 but only one pair in 2009. Any coastal scrub cleared without appropriate authorizations should be treated as the ESHA it was before being removed.
- The DEIR states that 3.6 to 4.1 acres of disturbed encelia scrub that lies within designated critical habitat for the California Gnatcatcher is "regularly mowed for fuel modification and weed abatement purposes," but fails to note (a) that California Encelia is not a "weed;" (b) that the Orange County Fire Authority expressly allows California Encelia to remain "in all fuel modification wet and dry zones in all locations;" (c) that mowing extends 570 feet away from structures; and (d) that the City has not consulted with the USFWS to determine whether this mowing of native sage scrub violates the federal Endangered Species Act. Ignoring all of these relevant facts, the DEIR concludes that disturbed encelia scrub may be graded for project implement-

tation without resulting in any significant biological impacts. An EIR cannot simply assume that all existing conditions are legal and appropriate, ignoring all evidence to the contrary. The disturbed encelia scrub should be identified as ESHA and this scrub should be preserved, along with an appropriate buffer.

- BonTerra failed to disclose Glenn Lukos Associates' observations of three Burrowing Owls at Newport Banning Ranch in 2008. BonTerra also erroneously characterized the project site's shortgrass grasslands as being only marginally suitable for Burrowing Owls, citing only their own negative survey results in 2009. Burrowing Owls may not be present every winter, or BonTerra's surveys may simply have been incompetent. In any case, the 2008 survey results are relevant and must be taken into account when evaluating the likely effects of implementing this project.
- Dumping 34,000 cubic yards of fill from the park site into 4.6 acres of shortgrass grassland habitat, together with the associated construction of a new haul road through the grasslands to provide access to the dumping sites, would degrade habitat suitability for numerous grassland-dependent species that currently use these grasslands in abundance. During the late 1980s, severe habitat degradation of precisely this type occurred at nearby Fairview Park, and those grasslands will never be the same. The same mistake must not be allowed to occur at Newport Banning Ranch.
- The DEIR's characterization of the site's grasslands as having "low biological value," and the DEIR's conclusion that "they may occasionally be used by native species" are not based in fact. It is plain to see that the grasslands in question are teeming with native wildlife of many different species. Less extensive grasslands at the Bolsa Chica Mesa (Warner Mesa) were identified as ESHA based upon sightings of Burrowing Owls and other raptors there, and upon the relationship of those grasslands to nearby coastal wetlands.
- The City has made no apparent effort to avoid impacts to any significant coastal resources, and instead seems to have gone out of its way to *maximize* impacts to ESHA and associated buffers. Not only would the Sunset Ridge project be highly damaging to natural resources in its own right, but the design and placement of the park's oversized entry road would explicitly encourage large-scale development of Newport Banning Ranch.

In cases like this, where the project proponent is also the CEQA Lead Agency, the public needs to be assured that the Lead Agency and its consultants have not violated the public trust to serve their own, narrowly defined interests. Unfortunately, the errors and distorted analyses in the Biological Resources section of the Sunset Ridge DEIR demonstrate clear and consistent bias in favor of the project proponent/Lead Agency. The dismissive, non-responsive, and often erroneous responses that the City and BonTerra provided to my comments on the DEIR provide additional evidence of bias. Errors in the EIR's descriptions of baseline conditions continue through to its impact analyses, proposed mitigation measures, and findings of significance, all of which fail to reflect the actual conditions on the ground or the applicable regulations protecting sensitive biological resources. Thus, the EIR for this project lacks credibility both as a CEQA planning document and as the basis for the City's application for a Coastal Development Permit.

The Coastal Commission has a well-earned reputation for demanding credible, accurate baseline information, as well as project planning that employs the best available science to avoid or minimize impacts to sensitive biological resources. I urge the Commission and its professional staff to take a very hard look at the City of Newport Beach's CEQA documentation and its application for a Coastal Development Permit for the Sunset Ridge project. Although relatively small, Sunset Ridge would literally serve as the "gateway" for the much larger Newport Banning Ranch proposed residential/commercial project.

I believe it is important that Coastal Commission personnel visit the Sunset Ridge project site to review items that I have discussed in this letter, and I will make room in my schedule to visit the site with any Commissioners or staff members. It would be most productive to meet at the site with biologists Jonna Engel and/or John Dixon, to review the technical issues I have raised.

Thank you for your time and consideration. Please feel free to call me any time at 562-477-2181; you may send e-mail to robb@hamiltonbiological.com.

Sincerely,

Robert A. Hamilton
President, Hamilton Biological, Inc.

cc: Dr. John Dixon, Ecologist, Environmental Program Manager
Dr. Jonna Engel, Ecologist
Sherilyn Sarb, Deputy Director for Orange County
Terry Welsh, Banning Ranch Conservancy

MEMORANDUM

GLENN LUKOS ASSOCIATES
Regulatory Services

PROJECT NUMBER: 04720008BANN

TO: Michael Mohler, Newport Banning Ranch, LLC

FROM: Tony Bomkamp

DATE: August 26, 2010

SUBJECT: Response to Coastal Commission Notice of Violation dated May 14, 2010 for Vegetation Removal on Portions of Newport Banning Ranch and City of Newport Beach Properties

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Pursuant to your request, we reviewed the Notice of Violation (NOV), dated May 14, 2010. The NOV indicates that development activities occurred in two locations on the Newport Banning Ranch property; however, a closer analysis of the areas in question results in actually three small separate and distinct areas (hereinafter "Polygon" or "Polygons") on the southeast portion of the Newport Banning Ranch (NBR) and adjacent City of Newport Beach properties. The NOV further describes the development activities as the removal of "major vegetation" consisting of maritime succulent scrub, the characterization of which was based on information contained in a September 24, 2009 memorandum prepared by Glenn Lukos Associates titled, "Habitat Characterization for Areas Affected by Alleged Clearing near Southeast Corner of Banning Ranch Referenced in July 29, 2009 Letter from California Coastal Commission" ("September Memo"). The NOV notes that certain aspects of the Polygons could be environmentally sensitive habitat areas ("ESHA"). This memorandum provides additional detail with respect to the vegetation characteristics -- past and present -- of the Polygons, and responds to the question as to whether the site characteristics would support a determination that the work affected major vegetation or ESHA, based upon application of the Coastal Act definition of ESHA, criteria set forth in the City of Newport Beach's certified Land Use Plan ("CLUP") regarding ESHA determinations, and the physical characteristics and habitat value of the Polygons.

For purposes of evaluation and discussion in this memorandum, the three distinct Polygons are referred to by their location as the Southeast Polygon, Northwest Polygon, and the Northeast Polygon (together, the "Subject Areas"). The Subject Areas are depicted on Exhibit 1.

OVERVIEW/INTRODUCTION

The conclusions in this report are based on a review of the photographs attached to the NOV, site surveys conducted in the mid-1990s to August 2010, and review of additional historic photographs of the Subject Area, obtained from public sources and provided by the landowner to Coastal Commission staff. As a result of this review, it appears that vegetation consisting of

some non-native invasive species interspersed with local areas of California encelia (*Encelia californica*) was removed by a third-party contractor as part of a utility undergrounding project in a nearby Newport Beach neighborhood from two of the Polygons, specifically the Southeast Polygon and Northwest Polygon. The third Polygon (Northeast Polygon) in which clearing activities occurred by the same third-party contractor, consisted primarily of non-native invasive species (the dominant vegetation) which also supported minimal areas of disturbed California encelia.

Each of the Polygons was previously briefly described in the September Memo, which was submitted to Coastal Commission staff. More detailed descriptions are provided in Sections II and IV below.

In the NOV, Coastal Commission staff asserts that all three Polygons supported maritime succulent scrub (MSS). Furthermore, it is asserted that this MSS constituted "major vegetation" and that in previous actions (not cited or otherwise referenced), the Commission has, with proper foundation, found MSS to be Environmentally Sensitive Habitat Areas ("ESHA"). There are two problems with these assertions. First, the statement does not acknowledge the fact that there are distinct differences between each of the three Polygons with respect to the vegetation that is present there and was most likely present at the time of the activities. This memorandum provides a detailed breakdown of the characteristics of each Polygon. Second, the statement assumes that the presence of only one indicator species, California encelia, represents a MSS community without reference to the surrounding vegetation. MSS is a vegetation community that can consist of a number of different scrub species and which grows in a coastal environment and can withstand the climatic (e.g., damp) characteristics of the coastal environment. According to Gray and Bramlet[1], in Orange County, species diagnostic of the MSS vegetation community include California encelia (*Encelia californica*), California sagebrush (*Artemisia californica*), prickly pear (*Opuntia littoralis*), coast cholla (*Opuntia prolifera*), California boxthorn (*Lycium californica*), lemonade berry (*Rhus integrifolia*), California buckwheat (*Eriogonum fasciculatum*), and bladderpod (*Isomeris arborea*). Additionally, with respect to the assertions set forth in the NOV, the Commission staff did not consider or address a number of important facts, all of which are relevant in assessing the characteristics of each Polygon in which the events occurred. These facts, which are discussed in more detail in the following sections, are:

[1] Gray, J. and D. Bramlet. 1992. *Habitat Classification System: Natural Resources Geographic Information System (GIS) Project.* Environmental Management Agency. County of Orange, Santa Ana, California.

- History of the Subject Areas; Effects of prior pre-Coastal Act grading and clearing activities; ongoing oil operations on the Subject Areas; and Road Construction, Grading and Borrow Activities;
- Character of the Vegetation (e.g., California encelia is highly opportunistic and disturbance tolerant);
- Use of the Subject Area by sensitive species, specifically the California gnatcatcher, and the effects of the activities on the gnatcatcher; and
- Guidance from the City of Newport Coastal Land Use Policies (CLUP)

I. HISTORY OF THE SUBJECT AREAS

In assessing the habitat characteristics of the Subject Areas, it is important to consider the level of historic activities that occurred on these areas and how those activities may have contributed to the current site conditions. In this case, as evidenced by the review of historical photographs, the Subject Areas have since the 1940's to the present been use for oil exploration and production. In addition to oil field work, the Subject Areas (including topography and vegetation) were substantially altered by grading for haul roads and road construction (West Coast Highway), borrow site activities, road cuts, and grading and borrow activities to support adjacent development (Newport Crest).

A. EFFECTS OF ONGOING OIL OPERATIONS ON THE SUBJECT AREAS

The Banning Ranch property has been the subject of ongoing oil production activities since the 1940s. After passage of Proposition 20, the oil field applied for and was granted a Coastal Act Exemption, in November 1973 under which it currently operates. The Subject Areas are part of a much larger oil production field and are adjacent to two oil well sites. Although the wells have been abandoned, regular maintenance of these areas has been conducted per Department of Oil and Gas and Geothermal Resources ("DOGGR") requirements, and access roads to the wells are maintained to facilitate clean-up and final remediation of impacted soils related to prior operations.

B. ROAD CONSTRUCTION, GRADING AND BORROW ACTIVITIES

Beginning in the early 1960s, the area where the Polygons are located was graded to their current elevation as part of a larger 40-50 acre area that was originally used as a borrow site for nearby road and freeway construction. An aerial photograph from February 11, 1965 [Exhibit 2] shows the site completely graded and denuded with conditions largely unchanged on an aerial photograph dated August 28, 1968 [Exhibit 3]. In the 1970s (prior to enactment of the Coastal Act), the Polygons were again graded for use as a borrow site and to provide access and haul roads associated with the development of the immediately adjacent Newport Crest residential

community. The two northernmost Polygons are located entirely within these road cut and borrow site areas. These areas were also subject to grading at the same time in order to prepare the subject portion of the site for construction of a future proposed roadway across the Subject Areas. Aerial photographs also show that for the Southeast Polygon, additional work, including grading, was conducted between the 1972 [Exhibit 4] and the January 6, 1973 aerial photograph [Exhibit 5]. The latter photo shows either road or slope construction occurring in this area. During this period, the Northwest and Northeast Polygon continue to show signs of disturbance from the grading activities. (Unfortunately, the quality of the aerial photograph makes it difficult to determine the type and extent of vegetation present in these areas.) Transects performed in August 2010 in the Polygons as well as adjacent areas have produced reliable information as to the current character of the vegetation. The results of these transects are described in Section II, below. By 1983, conditions associated with the Southeast Polygon do not appear to have changed and the photos show this Polygon with little or no vegetation present [Exhibit 6]. The Northwest and Northeast Polygons appear to support vegetation; however, due to the scale of the aerial photograph it is difficult to determine the type of vegetation. As noted above, transects performed in August of 2010 in or adjacent to the Polygons have produced reliable information as to the current character of the vegetation. The results of these transects is described in Section II, below.

The 1994 Aerial Photograph [Exhibit 7] continues to show the Southeast Polygon in a fairly disturbed condition with little or no vegetation present. The Northwest Polygon appears to support vegetation. Although it is difficult to determine the type of vegetation that was present solely by examining the 1994 photo, information regarding the vegetation was obtained from observations made by GLA and PCR, consulting firms who were both engaged to conduct biological site survey work during the late 1990's by the then-landowner of the Banning Ranch property, which included the majority of the Subject Areas. Specific to the subject areas, it is noteworthy that PCR mapped coastal scrub in only one of the three polygons, the Southeast Polygon, which had approximately 0.23 acre of coastal scrub, mostly on the edges of the polygon. Exhibit 9 depicts with cross-hatching the scrub habitat mapped by PCR in 1998 within the Southeast Polygon. Also noteworthy is that neither the Northwest nor Northeast Polygons were mapped as coastal bluff or coastal sage scrub (the categories used by PCR) in 1998.[2]

Again, it is our understanding that these aerials from public sources dating back to the 1960s were provided to Coastal Commission staff in Long Beach at the August 17, 2010 meeting.

[2] Because of the disturbed and/or monocultural character of the vegetation (i.e., California encelia is the only scrub species component where coastal scrub occurs on the site) it has been mapped in various ways including as coastal bluff scrub or coastal sage scrub by PCR or as MSS or more accurately "Encelia Scrub" by GLA. For purposes o this analysis, these designations refer to the same vegetation cover.

II. CHARACTER OF THE VEGETATION

This section and the following section describe the character of the vegetation within the Subject Areas, based upon site observation and the analysis of adjacent vegetation, which is considered to be representative of the prior condition of the Subject Areas. Based upon that analysis, we conclude that the Subject Areas do not meet the definitional requirements of ESHA under Coastal Act Section 30107.5. Section 30107.5 of the Coastal Act defines ESHA 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."*

This section addresses whether the vegetation in the three Polygons would be "easily disturbed or degraded by human activities and developments".

A. SOUTHEAST POLYGON

Based upon a review of photos provided by the Coastal Commission and the condition of the adjacent vegetation on the adjacent hill formation [see Exhibit 1 for location], the Southeast Polygon likely supported areas of fig marigold (*Carpobrotus edulis*), small-flowered ice plant (*Mesembryanthemum nodiflorum*) and non-native annual grasses (*Bromus madritensis rubens*, and *Bromus diandrus*) as well as moderately to highly disturbed MSS, dominated by California encelia (*Encelia californica)* and limited amounts of California buckwheat (*Eriogonum fasciculatum*) as the only diagnostic species. California encelia was the predominant component of MSS in this Polygon. It is important to note that California encelia is a highly opportunistic species, capable of colonizing areas following periods of substantial disturbance such as the clearing that occurred beginning in 1964. Further, this species occurs in a wide range of habitats throughout southern California and cannot be considered rare under any definition. This species is not easily disturbed; rather it is both highly tolerant of disturbance and in cases such as the Subject Areas may actually benefit from moderate disturbance such as oil operations and grading as such activities open the habitat for this aggressive colonizer.

The vegetation coverage within the Southeast Polygon is estimated for native species as ranging from 30 to 40-percent in the central disturbed portions of the polygon and as high as 75-percent along the margins where disturbance was less. This is consistent with the where the 1998 PCR vegetation mapping, shown on Exhibit 9, depicts scrub habitat within the Southeast Polygon. Based on the results of the transects performed in the Northwest and Northeast Polygons it is most likely that cover by invasive, non-native species ranged from 50- to 75-percent. It is important to note that oblique aerial photographs, such as the photograph provided by the Coastal Commission does not accurately show gaps in the shrub canopy leading to an overestimate of the actual shrub cover. The above estimates account for this potential for

overestimating cover. Rather than being an area that could be "easily disturbed", the area gained its character through the ongoing history of disturbance and would not be consistent with the characteristics typically associated with ESHA.

B. NORTHWEST POLYGON

The Northwest Polygon supported areas of dense mats of fig marigold interspersed with highly disturbed scrub, and in this instance, with California encelia as the only diagnostic species. [as depicted on Exhibit 8, Photographs 1, 2 and 3]. For the reasons discussed in more detail in Section IV below, the presence of California encelia is not definitive or diagnostic of major vegetation or ESHA. Rather, the relative conservation value in light of the Coastal Act criteria for ESHA (Rare or Especially Valuable, and Easily Disturbed) must be considered.

In order to accurately characterize the condition of the vegetation within this Polygon prior to the events in 2004, GLA collected cover data using point intercept transects on the slope immediately adjacent to the cleared area [Exhibit 9 depicts the location of the transects immediately adjacent to the subject polygon]. This area was selected for collection of transect data because, based upon personal observations during 2002 by GLA Biologist Tony Bomkamp, the slope and subject area were very similar. Using the transect data from August 2010 as a surrogate for the conditions at the time of the 2004 events, the area exhibited 39-percent "cover" by California encelia; however, of this 36 percent of the California encelia occurrences were growing through fig marigold (*Carpobrotus edulis*), a non-native invasive species or with red brome (*Bromus madritensis rubens*), a non-native invasive grass species. Absolute cover for non-native species in this area, based on the transect data totals 81 percent with fig marigold contributing 45 percent and red brome contributing 36 percent of the cover.[3]

Given the relatively low density of California encelia and much higher density of non-native invasive species, particularly the fig marigold, and the absence of definable scrub habitat in 1998, it is reasonable to conclude that the area exhibited a high degree of disturbance at the time of the activities and. Based on the character of the vegetation, past and present, this Polygon clearly did not exhibit habitat characteristics consistent with ESHA because the vegetation cover was sparse, did not consist of rare species, nor should these species be considered easily disturbed, and would be considered highly disturbed and not especially valuable due to the extensive amount of invasives.

[3] The cover totals exceed 100 percent because as noted, nearly all of the encelia is growing on top of or through fig marigold or with red brome as understory.

C. NORTHEAST POLYGON

The Northeast Polygon did not support a predominance of California encelia at the time of the clearing. This was confirmed through the use of recent transects and previous observations. During 2002 site work by GLA biologist Tony Bomkamp, the Northeast Polygon did not support scrub habitat. The area exhibited a predominance of fig marigold with scattered individuals of coast goldenbush (*Isocoma menziesii*). Transect data collected in August 2010 found this area to exhibit a predominance of non-native species accounting for 83 percent relative cover with fig marigold accounting for 69 percent of the total. California encelia accounted for only nine percent of which most was growing through the fig marigold. Scattered individuals of mulefat accounted for the majority of the native cover at 12 percent, much of which was also growing through the fig marigold.

Based on these data and previous observations, this area did not support native scrub habitat in 2004, currently does not support native scrub habitat, and does not constitute ESHA.

III. NO EFFECTS ON THE CALIFORNIA GNATCATCHER BY THE 2004 ACTIVITIES

In order to determine whether property can be designated "ESHA," it must meet the Coastal Act definition of ESHA and exhibit those characteristics. For the reasons discussed above, the vegetation that was present in the Subject Areas is not considered especially rare or easily disturbed given the amount of disturbance and dominance of non-native vegetation. In addition to those factors, this section addresses whether the vegetation within the Polygons should be considered ESHA because they are considered "especially valuable because of their special nature or role in an ecosystem." The primary function and value of these areas is their association with the California gnatcatcher ("CAGN"), and the following analysis examines whether the Polygons should be considered "especially valuable" because of their role in relationship to the CAGN.

In the materials submitted to the Coastal Commission by Newport Banning Ranch in October, 2009, GLA included an analysis of potential impacts to the California gnatcatcher associated with the activities. Consistent with that analysis, a more detailed analysis is provided below for each of the three Polygons.

Potential Impacts of the Clearing Activities

It is estimated that approximately 0.83 acre of vegetation, none of which were mapped as consistently occupied by the CAGN, was impacted by the contractor's activities beginning in 2004.

A. SOUTHEAST POLYGON

The 0.62-acre Southeast Polygon was not occupied or used by any CAGN on a consistent basis during the historical observation period prior to the 2004 events. Based upon the three surveys that were conducted closest in time to the activities, CAGN were never mapped in the area of the activities. Any speculation of potential CAGN presence in this Polygon can only be based on mapped occurrences of the CAGN on the hill formation immediately adjacent and to the north of this Polygon. It is important to note that since the 2004 events, CAGN have been mapped on this adjacent hill formation, thus indicating that despite the clearing, this Polygon is not necessary for the persistence of the CAGN in this area, and further supporting the conclusion that the 0.62-acre area of disturbance did not represent especially valuable habitat for the CAGN as they have continued to persist in adjacent areas despite the absence of vegetation on this Polygon.

B. NORTHWEST POLYGON

At the time of the activities, the 0.21 acre Northwest Polygon consisted of an understory of fig marigold and other invasive non-natives accounting for 81-percent cover of the ground surface interspersed with highly disturbed patches of *Encelia californica* totaling only 39-percent, out of which 36-percent was growing on top of fig marigold or non-native grasses. This area had only one CAGN occurrence before the 2004 events. That one occurrence was in 2002. Since then, and based upon annual CAGN survey work from 2002 to the present, no other CAGN occurrence has been reported or observed in this Polygon. Because no CAGN has been observed in this Polygon over the last 8 years, and in the prior years only one reported occurrence has been noted, work in the Northwest Polygon has had no ongoing measurable impact on the CAGN. Similarly, because CAGN have continued to use highly disturbed adjacent areas to the south and west, impacts to the 0.21 acre area have not contributed to the decline of CAGN fitness on the site, and the Northwest Polygon should not be considered ESHA because it was not especially valuable to the ecosystem supporting the CAGN in this area at the time the work was performed.

C. NORTHEAST POLYGON

The Northeast Polygon did not support a predominance of scrub habitat at the time of the activity and no CAGN have ever been sighted there over the course of numerous surveys. Therefore, work in the Northeast Polygon would have had no impact on the CAGN, and should not be considered ESHA with respect to the criteria of being “especially valuable” in relationship to the role it plays for the CAGN.

IV. GUIDANCE FROM THE CITY OF NEWPORT COASTAL LAND USE POLICIES

The City of Newport Beach has developed Coastal Land Use Protection policies (CLUP), which have a clear focus on coastal scrub habitats (MSS, coastal bluff scrub (CBS), and coastal sage scrub (CSS)) that are utilized by the California gnatcatcher. The CLUP also recognize that in certain instances, and based on site-specific conditions, that some areas that support coastal scrub habitats do not constitute ESHA. GLA noted in the introduction to this memorandum that CCC staff had not adequately distinguished between or among the three areas, as each area has distinct characteristics that need to be evaluated on a site-specific basis in order to accurately evaluate whether each area exhibited biological functions consistent with an ESHA determination at the time the clearing was performed. Each of the three subject areas are addressed in detail below relative to following guidelines from the CLUP:

> *Areas within the City of Newport Beach that are dominated by one of the habitats discussed above are presumed to be ESHA, unless there are strong site-specific reasons to rebut that presumption. Factors that should be considered when making site-specific assessments include:*
>
> - *Patch size and connectivity. Very small patches of habitat that are effectively isolated from other natural areas may lose many of their natural ecological functions. Functional patch size is dependent upon both the ecological needs of the species of importance supported by the habitat and the spatial scale of the habitat. For example, what is isolated for a small mammal may not be for a bird and what is small for a coyote may not be for some insects.*
>
> - *Dominance by invasive, non-native species. Non-native species often provide poorer habitat for wildlife than native vegetation and proliferation of exotic plant species alters ecosystem processes and may threaten certain native species with extirpation. However, there are probably no habitats in southern California that have not been invaded by exotic species, and the remaining stands of native grassland are almost always dominated by nonnative annual species. Only where exotic species are so overwhelmingly dominant that the native community can no longer perform its functions in the ecosystem should the presence of exotic species rebut the presumption of ESHA.*
>
> - *Disturbance and proximity to development. Disturbance is the negative effect of human activities such as dumping, vegetation removal, development, pollution, etc. Habitat areas bordering development may be subject to impacts from negative edge effects, such as lighting, non-native invasive plant species, domestic animals, and human activity. The negative effects of disturbance are strongest immediately adjacent to development and decline with distance from the edge. However, where very small patches of habitat are effectively surrounded by development, these impacts may be severe. In general,*

> *disturbance by itself is not enough to rebut the finding of ESHA. Disturbance that is clearly reversible (e.g., presence of trash or illegal dumping) is not determinative.*
>
> - *Fragmentation and isolation. Where there are large areas of more-or-less continuous development, native communities may be reduced to small islands of habitat that are distant from other natural habitats. This fragmentation and isolation can create barriers to migration, reduce wildlife food and water resources and generally compress territory size to reduce existing wildlife populations to non-viability. The smaller a particular habitat patch is, the greater the proportion of its area that experiences negative edge effects. Where the habitats discussed above occur in the City of Newport Beach the presumption is that they are ESHA and the burden of proof is on the property owner or project proponent to demonstrate that that presumption is rebutted by site-specific evidence. However, if quantitative data gathered by a qualified biologist demonstrates that a habitat area is degraded beyond the point of restoration, or that it is not rare and is so small and isolated that it no longer has habitat value or a special nature or role in the ecosystem, the habitat area does not meet the statutory definition of ESHA contained in Section 30107.5 of the Coastal Act. Therefore, such habitat areas do not warrant the special land use and development restrictions established for ESHA in this Coastal Land Use Plan. [CLUP at pages 4-4 and 4-5]*

Application of these guidelines requires careful weighing of each guideline component in the context of each distinct Polygon. For example, "patch size" may be large enough that an ESHA determination would not be precluded; however, "dominance by non-native species" could result in loss of substantial habitat functions, such that an ESHA determination would be inappropriate. As such, each factor is considered separately with a final determination provided only after each component of the guidelines has been carefully considered.

A. SOUTHEAST POLYGON

The area affected by the contractor's activities in the Southeast Polygon covers approximately 1.01 acre, of which 0.85 acre is on property owned by Newport Banning Ranch LLC, and 0.16 acre is owned by the City of Newport Beach (and previously owned by Caltrans at the time of the contractor's activities). As noted above, review of historic aerial photographs shows that this Polygon had been significantly modified by prior pre-Coastal Act work on the site, including disturbance due to the presence of a roadway, which bisected the area. As noted, the amount of California encelia on the site at the time the contractor undertook the activities in question is estimated at 0.62 acre of which 0.46 acre occurred on Newport Banning Ranch LLC property, and 0.16 acre was on the CalTrans/City-owned property.

Patch Size and Connectivity

Prior to the activities in 2004, the California encelia within the Southeast Polygon covered approximately 0.62 acre portions of which the vegetation would be best characterized as disturbed, and which was not directly connected to other large blocks of MSS or CSS (the closest area was the 1.15 acre of MSS on the adjacent hill formation). As previously noted, CAGN have never been mapped as occurring within the 0.62-acre area, though CAGN was mapped on a single occasion (1997) immediately to the south of the 0.62-acre area immediately adjacent to West Coast Highway or Pacific Coast Highway ("PCH") as well as on the hill formation to the north. Given the surrounding disturbed and developed areas, even when the Southeast Polygon is considered in combination with the adjacent 1.15 acres of MSS on the hill formation, the combined acreage accounts for a 1.77-acre area. Minimum size required for viable CAGN territories are difficult to determine, but in a recent Biological Opinion issued by the U.S. Fish and Wildlife Service, territory sizes ranged from between 2.8 and 3.2 acres in areas of more-or-less undisturbed scrub to between 5.6 and 6.7 acres in areas with higher levels of disturbance (e.g., more non-native vegetation).[4] Given that the combined area of 1.77 acres is clearly suboptimal for CAGN, the area represented suboptimal habitat prior to clearing, a condition that was not substantially changed by the work. Given the small size of the patch, the subject area would not be considered ESHA as it was not part of a larger patch of suitable habitat.

Dominance by Invasive, Non-Native Species

Due to years of disturbance, the Southeast Polygon likely included a high percentage of non-native species including tocalote (*Centaurea melitensis*), small-flowered ice plant (*Mesembryanthemum nodiflorum*) and non-native grasses such as red brome (*Bromus madritensis rubens*). Photographs do not indicate that the area was dominated by fig marigold, as is the case of adjacent areas, including the Northwest and Northeast Polygons discussed below. Nevertheless, given the small patch size, the ongoing degradation associated with the presence of a number of non-native species, contributed to the suboptimal character of the habitat and would also preclude an ESHA determination.

Disturbance and Proximity to Development

As noted, the site has a long history of disturbance, most of which precluded the growth of native habitat on this area between 1965 and the late 1980s. Although, the site was able to develop at least marginal scrub habitat, even with continuing disturbance, it was not documented as supporting CAGN, and therefore should not be considered ESHA. The best explanation for its lack of habitat value for the CAGN is long-term ongoing disturbance, which has limited the

[4] U.S. Department of the Interior. April 2, 2009. Formal Section 7 Consultation for Montebello Hills Development and Conservation Project, City of Montebello, Los Angeles California. Biological Opinion transmitted to Colonel Thomas H. Magness, IV, U.S. Army Corps of Engineers (File No. Spl-2008-212-PHT).

suitability of this area for CAGN use. As noted above, CAGN were never documented in the 0.62-acre of disturbed scrub.

CAGN use on one occasion of the adjacent hill formation area presents an important related question: Is the very occasional presence of the CAGN sufficient for a making an ESHA determination? It is important to note that the CAGN's ability to tolerate disturbance ranges from moderate to very high. For example, along the I-5 and I-15 freeways in San Diego County, Famolaro and Newman[5] found three CAGN nest locations on revegetated slopes at 6, 15, and 24 meters from the freeway edge. It is doubtful that an area within 6 meters of the I-5 or I-15 would be considered ESHA. Given the ability of the CAGN to tolerate high levels of noise and other types of disturbance, the occasional presence of CAGN, is not an adequate criterion for making an ESHA determination on the Southeast Polygon.

Fragmentation and Isolation

The Southeast Polygon is located at the extreme southeast corner of the project site, immediately adjacent to PCH. As previously noted, the Southeast corner of the site has been heavily modified in conjunction with the grading performed in 1964 as well as by ongoing oil operations (two active, unremediated wells remain in this area). Also, the proximity of adjacent development along with the active unremediated oil wells results in the need for fuel modification activities in this area. As discussed above, the area does not exhibit optimal value for long-term conservation of the CAGN and applying the CLUP guidelines, the Southeast Polygon does not meet the minimum threshold for ESHA based on this criterion or the others addressed above.

B. NORTHWEST POLYGON

The Northwest Polygon is located at the base of an artificial slope that was created when "borrow" material was excavated from the site in 1964 creating a canyon-like feature. The Northwest Polygon supported highly disturbed scrub that included low density California sunflower (*Encelia californica*), growing through dense areas of hottentot fig (*Carpobrotus edulis*), similar to the habitat that now occurs at the base of the slope [Exhibit 8, Photographs 1-3 depict the highly disturbed character of the scrub vegetation]. Given the history of the site and extensive disturbance, use of the lower portion of the adjacent slope (which was not disturbed by the 2004 activities), as a surrogate/reference site for the conditions that were present at the time of the clearing is the most accurate approach. Based on the historic aerial photographs, it is estimated that 0.21 acre of highly disturbed scrub vegetation that exhibited an estimated 39-percent cover by California encelia and 83-percent cover by non-native species, was affected by the contractor's activities.

[5] Famolaro, Peter and Jeff Newman. 1998. Occurrence and Management Considerations of California Gnatcatchers Along San Diego County Highways. *Western Birds,* Vol. 29, No 4.

Patch Size and Connectivity

Habitat affected by clearing covered approximately 0.21 acre consisting of highly disturbed California encelia that exhibited a substantial component of non-native species (i.e., 83-percent cover), based on transects on the adjacent slope. The area affected was part of a narrow strip of disturbed encelia that included disturbed areas immediately to the west (parking areas of the offices of the oil field operator, West Newport Oil), disturbed areas immediately to the east, a predominance of non-native invasive species to the south dominated by myporum (*Myoporum laetum*) and fig marigold. The 0.21-acre area is very small and functionally less than 0.09 acre based on the relative 39-percent cover of California encelia. While the area is connected to larger areas of similarly disturbed scrub, the functional small patch size is such that regardless of connectivity, an ESHA determination is not appropriate.

Dominance by Invasive, Non-Native Species

As noted above, the 0.21 acre of disturbed California encelia exhibited a substantial component of non-native species (ground cover by non-natives is 83-percent) with fig marigold as the dominant plant. Exhibit 8, Photographs 1-3 depict the high level of disturbance that is characteristic of the area. The high density of the fig marigold and other non-native species precludes an ESHA determination for the 0.21-acre Northwest Polygon.

Disturbance and Proximity to Development

As noted, the 0.21-acre area that was subject to the contractor's activities is located in a portion of the site that has been subject to ongoing disturbance for well over 40 years, including the significant grading that occurred in 1964. The historical use of and disturbacne that has occurred in this Polygon and the surrounding area resulted in colonization by high densities of non-native species such as fig marigold, small-flowered ice plant which resulted in substantial degradation of the 0.21 acre area limiting the use of the area by the CAGN to one observed occurrence eight years ago, and none before or since that one sighting in 2002. Consequently, the disturbed nature of the Polygon has reduced its value as habitat and again would argue against characterizing this 0.21 acre area as ESHA.

Fragmentation and Isolation

As noted, the 0.21 acre area was part of a narrow strip surrounded on all sides by disturbed areas, developed areas or areas dominated by non-native invasive species. Although this area is connected by a narrow strip of scrub vegetation to an area of MSS overlooking PCH to the south, the highly disturbed character of this area resulted in very limited resource values.

C. NORTHEAST POLYGON

The Northeast Polygon is located within the former "borrow area." Previous vegetation mapping did not show MSS in this area, which is consistent with the highly disturbed conditions associated with this Polygon, which is dominated by non-native species that account for 83-percent of the total cover [see Exhibit 8, Photographs 4-6]. Specifically fig marigold comprises about 69-percent cover, small-flowered ice plant covers about 5-percent of the area, summer mustard (*Brassica geniculata*) accounts for 12-percent as does semi-bare areas that support low densities of tocalote (*Centaure melitensis*). Mulefat (*Baccharis salicifolia*) and coyote brush (*Baccharis pilularis*) account for about 10-percent combined and California encelia mostly growing on top of fig marigold makes up 7-percent of the area.

The CLUP guidelines state:

> *Areas within the City of Newport Beach* ***that are dominated by one of the habitats discussed above are presumed to be ESHA****, unless there are strong site-specific reasons to rebut that presumption.* [Emphasis Added]

Given that the Northeast Polygon did not support a dominance of or even substantial presence of California encelia, the area does not exhibit the characteristics that could lead to a potential ESHA determination. As such, no further analysis is necessary. This area clearly did not constitute ESHA or "major vegetation". Moreover, this area has never supported CAGN use.

SUMMARY OF POLYGON CHARACTERISTICS AND RECOMMENDATIONS

Southeast Polygon: Between 1964[6] and as recently as 2002, the Southeast Polygon was subject to substantial disturbance associated with pre-Coastal Act legal grading and CCC exempt oil field activities. During the mid to late 1990s, portions of the Southeast Polygon were colonized by disturbed scrub vegetation dominated by California encelia totaling approximately 0.62 acre (PCR mapped 0.23 acre of scrub in 1998). Between 1997 and 2002 CAGN were not detected in the Subject Area during the three breeding seasons closest in time to the activity. While occasional use by CAGN of the adjacent MSS on the hill formation occurred, the size of the area is suboptimal as described above. Based on the long period of disturbance (1964 – late 1980s), likely due to a number of factors (past disturbance, small patch size combined with limited areas of adjacent scrub habitat), the area is not "important"[7] for the long-term persistence of the CAGN

[6] Based on the extensive grading depicted in the February 1965 aerial photograph, it is estimated that the grading started no later than 1964.
[7] "Important" is not defined in the Coastal Act definition of ESHA; as used here, important is defined by CAGN use that occurs in a majority of years, either for breeding or part of a breeding season territory/use area.

on the site. Given ongoing sources of disturbance the area does not exhibit long-term conservation value and is not ESHA.

Northwest Polygon: Between 1964 and as recent as the late 1980s, the Northwest Polygon was subject to substantial disturbance associated with legal grading and CCC exempt oil field activities. During the early 1990s, portions of the Northwest Polygon supported a predominance of non-native species and at best, highly disturbed scrub of *Encelia californica* growing on top of locally dense patches of fig marigold totaling approximately 0.21 acre (in 1998, PCR did not find sufficient scrub in this area to map it as coastal scrub). Cover by encelia during the activity is estimated at 39 percent based on transect data collected on the adjacent slope that was not disturbed by the activites. Between 1997 and 2002 CAGN was detected in this area during one season (2002). Based on the long period of disturbance (1964 – late 1980s) and the very limited use of the area by CAGN, likely due to a number of factors, most notably the highly disturbed character of the habitat resulting in limited function, the area is not "important" for the long-term persistence of the CAGN on the site. The area is not ESHA and is not "major vegetation."

Northeast Polygon: Between 1964 and as recent as the late 1990s, the Northeast Polygon was subject to substantial disturbance associated with legal grading and CCC exempt oil field activities. No CAGN have ever been observed in the Northeast Polygon and this Polygon does not support a predominance of *Encelia californica.* Therefore, the area does not meet the minimum threshold as ESHA under the CLUP. This area is neither ESHA nor "major vegetation."

S: 0472-8/GLA Memorandum on Polygons.DOC

CALIFORNIA COASTAL COMMISSION
45 FREMONT, SUITE 2000
SAN FRANCISCO, CA 94105- 2219
VOICE AND TDD (415) 904- 5200
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VIA CERTIFIED AND REGULAR MAIL

October 5, 2010

Newport Banning Ranch, LLC[1]
Attn: Michael Mohler
1300 Quail Street, Suite 100
Newport Beach, CA 92660

Cherokee Newport Beach, LLC
111 E. Hargett Street, Ste. 300
Raleigh, NC 27601

Aera Energy, LLC
P.O. Box 11164
Bakersfield, CA 93389

Southern California Edison
Attn: David W. Kay
P.O. Box 800
Walnut Grove Ave.
Rosemead, CA 91700

Herman Weissker, Inc
c/o Ron Politte
1645 Brown Ave.
Riverside, CA 92509

City of Newport Beach
Attn: Mike Sinacori
3300 Newport Blvd.
Newport Beach, CA 92663

Subject:	**Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings**
Property Location:	Newport Banning Ranch property, including, but not limited to Assessor Parcel Nos. 424-041-04, 424-041-10 (City of Newport Beach property), 114-170-43, and 114-170-79

[1] Newport Banning Ranch, LLC manages planning and entitlement of the "Banning Ranch" surface rights for Cherokee Newport Beach, LLC and Aera Energy, LLC. Hereinafter, all references to Newport Banning Ranch, LLC ("NBR") are to Newport Banning Ranch, LLC, Cherokee Newport Beach, LLC, and Aera Energy, LLC, jointly.

Unpermitted Development:	Removal of major vegetation, including coastal sage scrub; placement of solid material, including staging numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading

Dear NBR, Southern California Edison, Herman Weissker, and City of Newport Beach:

Staff appreciates the efforts of the parties involved to work cooperatively towards a resolution of the unpermitted development undertaken on the properties described above. As we have stated in previous correspondence and communications, we would like to work with you to resolve these issues amicably and remain willing and ready to discuss options that could involve agreeing to a consensual resolution to the Coastal Act violations on the properties at issue, such as consent cease and desist and restoration orders. In order to resolve the violations through formal enforcement actions, either as a consent or regular order proceeding, the purpose of this letter is to notify you of my intent, as the Executive Director of the California Coastal Commission ("Commission"), to record a Notice of Violation of the Coastal Act against the properties where the violations occurred and to commence proceedings for issuance of cease and desist and restoration orders to address unpermitted development at the site.

Commission staff has confirmed that development including, but not limited to, removal of major vegetation, including vegetation comprising rare native plant communities; placement of solid material, including staging of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading has occurred on properties located within the Coastal Zone identified as Orange County Assessor Parcel Nos. 424-041-04, 424-041-10 (City of Newport Beach property), 114-170-43, and 114-170-79 ("Subject Properties").

The unpermitted development occurred in three areas ("northwest polygon," "northeast polygon," and "southeast polygon")[2] on properties owned by NBR and the City of Newport Beach. The NBR properties are located on "Banning Ranch," and the City property is immediately adjacent to the southeast. Banning Ranch is a Deferred Area of Certification in unincorporated Orange County. Section 2.2.4 of the Commission-certified Newport Beach Local Coastal Program describes the ranch:

> *Banning Ranch consists of 505 acres located north of the Semeniuk Slough and Coast Highway West and east of the Santa Ana River. Nearly all of Banning Ranch (454 acres) is located within the City's sphere of influence in unincorporated Orange County. Oil and gas operations are conducted throughout the County portion of the property (West Newport Oil Field) pursuant to California Coastal Commission Exemption E-144. These operations consist of 483 producing, idle, injection, and abandoned well sites and related service roads, pipelines, storage, and other facilities. The property contains a number of sensitive habitat types, including southern coastal bluff scrub, alkali meadow, southern coastal saltmarsh, southern black willow forest, coastal brackish marsh, and vernal pools. The property also contains steep coastal bluffs along the southern and western edges of the*

[2] The locations of the polygons are approximated in Exhibit 1 of the August 26, 2010 document prepared by NBR's biological consultant, Glenn Lukos Associates, entitled "Response to Coastal Commission Notice of Violation dated May 14, 2010 for Vegetation Removal on Portions of Newport Banning Ranch and City of Newport Beach Properties."

> *mesa. The bluff faces have been eroded in some areas to form a number of gullies and ravines. Future land uses for Banning Ranch are currently under review as part of a comprehensive update of the City of Newport Beach General Plan.*

The unpermitted development removed native coastal sage scrub vegetation, including a rare subset – maritime succulent scrub ("MSS"), and coastal California gnatcatcher breeding and foraging habitat. The coastal California gnatcatcher is a federally-listed threatened bird species. Due to its rarity and ecological significance, the Commission has found, in previous actions, areas of MSS to be Environmentally Sensitive Habitat Areas ("ESHA"). Furthermore, the Commission has found gnatcatcher breeding areas, as well as probable and observed gnatcatcher use areas, to be ESHA. Staff is currently reviewing available information to finalize its determination of the extent of the ESHA impacted by the subject unpermitted development.

The purpose of these enforcement proceedings is to address development on the Subject Properties that was not authorized with the necessary coastal development permit ("CDP"). The proceedings will propose to address that unpermitted development through the issuance of Cease and Desist and Restoration Orders ("Orders") that will direct you to: 1) cease from performing any additional unpermitted development activity (development not authorized pursuant to, or exempt from, the Coastal Act), 2) remove all unpermitted development according to an approved removal plan, and 3) restore the impacted area pursuant to an approved restoration plan. In addition, the Commission seeks to record a Notice of Violation in this matter to protect prospective purchasers until the Coastal Act violations on the Subject Properties have been resolved.

1. Violation History

As further described below, the unpermitted development activities were undertaken in furtherance of a Southern California Edison ("SCE") utility undergrounding project. The unpermitted development activities at issue commenced between April 16, 2004 and October 23, 2004, and include, but may not be limited to, removal of major vegetation, including native coastal sage scrub vegetation; placement of solid material (including staging of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials); and grading. Vegetation removal, storage of construction materials, and grading continued into 2006. Sporadic unpermitted dumping of materials and gravel occurred on the southeast polygon until at least November 2009.

West Newport Oil Company, the operator of the West Newport Oil Field on Banning Ranch, described above, initially leased NBR property for "vehicle parking and storage" to a construction contractor, Herman Weissker, Inc. ("HWI"), on April 1, 2003. Contemporaneously with the clearance of the polygons between April 16, 2004 and October 23, 2004, in September 2004, HWI again leased NBR property when SCE contracted HWI to perform utility undergrounding at a nearby location off the Banning Ranch. The leased property partially overlaps the cleared polygons. HWI utilized the three cleared areas as staging areas for the undergrounding project. HWI again leased NBR property in September 2005 for work related to another SCE utility undergrounding project. HWI's lease ended in February 2006.

Staff became aware of the unpermitted development while reviewing aerial photographs of the site in early 2009. At a June 9, 2009 meeting at Commission staff's Long Beach office, staff discussed the unpermitted development with NBR representatives. Staff followed up this meeting with a July 29, 2009 letter to NBR. Staff noted in the letter the significant coastal resources at stake, including

coastal California gnatcatcher habitat and communities of native plants, and requested more information related to the unpermitted development and a site visit.

Staff met with NBR on the site on September 3, 2009 to view the impacted areas. Staff confirmed that development, including removal of major vegetation, placement of construction material, and grading, had occurred. At the site, staff observed graded areas where native vegetation had been removed and destroyed. Staff informed NBR representatives that they would review available information related to the cleared vegetation and habitat to determine the appropriate resolution to the violations. Commission staff researched the matter and confirmed that no application for a CDP had been submitted, and no CDP had been obtained, for any such activities.

On May 14, 2010 staff sent Notice of Violation letters to NBR, SCE, HWI, and a copy to the City. The letters explained the subject unpermitted activities are "development" under the Coastal Act, development without a CDP is a violation of the Coastal Act, and requested the parties contact Commission staff to discuss their willingness to resolve the violations, including through agreeing to consent orders. On June 1, 2010 staff received a letter from SCE indicating its willingness to meet and discuss resolution of the issue with staff. Staff discussed resolution of the violations with a representative of HWI on June 7, June 17, and July 29, 2010. Staff also discussed resolution of the matter with representatives of SCE and NBR on July 29, 2010. On Aug 17, 2010 staff met with representatives of SCE, HWI, the City, and NBR to discuss options to resolve the violations on the Subject Properties, including the possibility of addressing the violations through consent orders.

Staff ecologist Dr. Jonna Engel toured the site on September 15, 2010 with representatives of NBR and the City, and a SCE biologist in order to observe the nature and extent of the unpermitted development and document the extent and species composition of vegetation surrounding the cleared areas, and that had re-grown in the areas. Staff observed native coastal sage scrub species in and around the cleared areas. As noted above, staff is currently reviewing available information to finalize its determination of the extent of the ESHA impacted by the subject unpermitted development.

2. Notice of Violation

The Commission's authority to record a Notice of Violation is set forth in Section 30812 of the Coastal Act, which states the following:

> *(a) Whenever the executive director of the commission has determined, based on substantial evidence, that real property has been developed in violation of this division, the executive director may cause a notification of intention to record a notice of violation to be mailed by regular and certified mail to the owner of the real property at issue, describing the real property, identifying the nature of the violation, naming the owners thereof, and stating that if the owner objects to the filing of a notice of violation, an opportunity will be given to the owner to present evidence on the issue of whether a violation has occurred.*

I am issuing this notice of intent to record a Notice of Violation because the unpermitted development described above has occurred in violation of the Coastal Act at the Subject Properties. This determination is based on information available to staff including, but not limited to, information provided by the parties involved, publicly available documents relating to the

properties, a comparative analysis of historic aerial photographs, a review of the Commission's permit records, and staff visits to the properties.

In our letter dated May 14, 2010, in accordance with Coastal Act Section 30812(g), we notified the property owners, NBR and the City of Newport Beach, of the potential for the recordation of a Notice of Violation against the Subject Properties. If the property owners[3] object to the recordation of a Notice of Violation in this matter and wish to present evidence to the Coastal Commission at a public hearing on the issue of whether a violation has occurred, the property owner **must specifically object, in writing, within 20 days of the postmarked mailing of this notification.** The objection should be sent to Andrew Willis in the Commission's Long Beach Office at 200 Oceangate, 10th Floor, Long Beach, CA 90802. Please include the evidence you wish to present to the Coastal Commission in your written response and identify any issues you would like us to consider.

3. Cease and Desist Order

The Commission's authority to issue Cease and Desist Orders is set forth in Section 30810(a) of the Coastal Act, which states the following:

> *If the commission, after public hearing, determines that any person or governmental agency has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit or (2) is inconsistent with any permit previously issued by the commission, the commission may issue an order directing that person or governmental agency to cease and desist.*

Section 30810(b) of the Coastal Act states that the Cease and Desist Order may be subject to such terms and conditions as the Commission may determine are necessary to ensure compliance with the Coastal Act – including removal of any unpermitted development or material.

Section 30600(a) of the Coastal Act states that, in addition to obtaining any other permit required by law, any person wishing to perform or undertake any development in the Coastal Zone must obtain a CDP. "Development" is defined by Section 30106 of the Coastal Act as follows:

> *"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land…change in the intensity of use of water, or of access thereto…and the removal or harvesting of major vegetation other than for agricultural purposes…*

The unpermitted development described herein clearly constitutes "development" within the meaning of the above-quoted definition and therefore is subject to the permit requirement of Section 30600(a). A CDP was not issued to authorize the subject unpermitted development. For these reasons, the criteria of Section 30810(a) of the Coastal Act have been met. For these reasons, I am issuing this Notice of Intent to commence Cease and Desist Order proceedings. The procedures for

[3] Please note that pursuant to Coastal Act Section 30812, only property owners may object to recordation of a Notice of Violation.

the issuance of cease and desist orders are described in Sections 13180 through 13188 of the Commission's regulations, which are codified in Title 14 of the California Code of Regulations.

The proposed Cease and Desist Order will direct you to 1) cease and desist from maintaining any development on the Subject properties not authorized pursuant to the Coastal Act; 2) cease and desist from engaging in any further development on the Subject Properties unless authorized pursuant to the Coastal Act; and 3) take all steps necessary to comply with the Coastal Act.

4. Restoration Order

Section 30811 authorizes the Commission to order restoration of a site in the following terms:

> *In addition to any other authority to order restoration, the commission…may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission…, the development is inconsistent with this division, and the development is causing continuing resource damage.*

Pursuant to Section 13191 of the Commission's regulations, I have determined that the specified activities meet the criteria of Section 30811 of the Coastal Act, based on the following:

1) Unpermitted development including, but not limited to, removal of major vegetation, including vegetation comprising rare native plant communities; placement of solid material, including staging of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading has occurred on the Subject Properties.

2) This development is inconsistent with the resource protection policies of the Coastal Act, including, but not limited to the following:

   a) 30240 (environmentally sensitive habitat areas or ESHA, and ESHA adjacent development)
   b) 30251 (scenic and visual qualities).

3) The unpermitted development remains in place and is thereby causing continuing resource damage, as defined by Section 13190 of the Commission's regulations. The impacts from the unpermitted development remain unmitigated; therefore, the damage to resources protected by the Coastal Act is continuing.

For the reasons stated above, I have decided to commence proceedings for the Commission's issuance of a Restoration Order in order to restore the Property. The procedures for the issuance of Restoration Orders are described in Sections 13190 through 13197 of the Commission's regulations, which are codified in Title 14 of the California Code of Regulations.

5. Response Procedure

In accordance with Sections 13181(a) and 13191(a) of the Commission's Regulations, you have the opportunity to respond to the Commission staff's allegations as set forth in this notice of intent to commence Cease and Desist and Restoration Order proceedings by completing the enclosed

Statement of Defense (SOD) form. **The SOD form must be returned to the Commission's Long Beach office, directed to the attention of Andrew Willis, no later than October 25, 2010.**

Commission staff intends to schedule the hearings for the Cease and Desist and Restoration Order during the Commission's November 17-19, 2010 meeting in LA/Orange County.

6. Civil Liability/Exemplary Damages

You should be aware that the Coastal Act includes a number of penalty provisions for unpermitted development. Section 30820(a)(1) provides for civil liability to be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission in an amount that shall not exceed $30,000 and shall not be less than $500 for each instance of development that is in violation of the Coastal Act. Section 30820(b) provides that additional civil liability may be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by the Commission when the person intentionally and knowingly performs or undertakes such development, in an amount not less than $1,000 and not more than $15,000 per day for each day in which each violation persists. Section 30821.6 provides that a violation of a cease and desist order, including an EDCDO, or a restoration order can result in civil fines of up to $6,000 for each day in which the violation persists. Section 30822 provides for additional exemplary damages.

7. Resolution

As we have stated in previous correspondence and communications, we would like to work with you to resolve these issues amicably. One option that you may consider is agreeing to consent orders. Consent cease and desist and restoration orders would provide you with an opportunity to have more input into the process and timing of restoration of the Subject Properties and mitigation of the damages caused by the unpermitted activity, and could potentially allow you to negotiate a penalty amount with Commission staff in order to resolve the complete violation without any further formal legal action. Consent cease and desist and restoration orders would provide for a permanent resolution of this matter and restoration of the Subject Properties. If you are interested in discussing the possibility of agreeing to consent orders, please contact or send correspondence to the attention of Andrew Willis in the Commission's Long Beach office by no later than October 18, 2010 to discuss options to resolve this case.

Should you have any questions regarding any of the above items, please contact Andrew Willis at (562) 590-5071.

Sincerely yours,

Susan M. Hansch, Chief Deputy
for

PETER M. DOUGLAS
Executive Director
California Coastal Commission

Enclosure: Statement of Defense form

cc: Sherilyn Sarb, Deputy Director, CCC
Teresa Henry, South Coast District Manager, CCC
Karl Schwing, Orange County Planning Supervisor, CCC
Lisa Haage, Chief of Enforcement, CCC
Alex Helperin, Staff Counsel, CCC
Andrew Willis, South Coast District Enforcement Analyst, CCC

MEMORANDUM

GLENN LUKOS ASSOCIATES
Regulatory Services

PROJECT NUMBER: 04720008BANN

TO: Dr. Jonna Engel, California Coastal Commission

FROM: Jeff Ahrens

DATE: October 13, 2010

SUBJECT: California Gnatcatcher Use of Polygons Addressed in Notice of Violation

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During our telephone conversation on September 16, 2010 we briefly discussed the above referenced areas on Banning Ranch and the City of Newport Beach properties relative to their ESHA status. In reading between the lines it seemed to me that you had questions regarding Tony Bomkamp's analysis that concluded that the subject areas should not be considered ESHA. Assuming that I understood you correctly, I thought it might be of help for you if I were to provide my observations of the coastal California gnatcatcher on the Banning Ranch site, with a focus on the use patterns and the relative importance of the subject areas for the CAGN. In offering these observations I would note that I have been a Section 10(a)(1)(A) Permit holder for the CAGN since 2002 and my graduate project at CSU, Fullerton focused on CAGN use of habitat fragments in Central Orange County).

I am quite familiar with the Banning Ranch site, having performed surveys for the CAGN during 2006 and 2007 (though Ingrid Chlup was the project manager for these surveys) as well as other avian surveys (e.g., burrowing owl, southwestern willow flycatcher, and least Bell's vireo) on the site.

BANNING RANCH SITE CHARACTERISTICS

While the focus of the Notice of Violation (NOV) is on the three polygons designated as the Southeast Polygon, Northwest Polygon, and the Northeast Polygon [depicted on Exhibit 1], it is important to note that portions of the Banning Ranch site contain fairly large blocks of undisturbed or relatively undisturbed maritime succulent scrub (MSS) or coastal bluff scrub (CBS), with the best examples associated with the large arroyo and middle arroyo [see Exhibit 2 for areas of high quality CAGN habitat with CAGN locations]. Any evaluation of the relative importance of these three polygons in my opinion should be made in the context of the larger Banning Ranch site.

I would also note that the Banning Ranch site is different than any site I have worked on because of the high levels of disturbance inherent in the oil field operations and that the areas that exhibit moderate to high levels of function occur in relatively large blocks. The site contains a number

29 Orchard ▪ Lake Forest ▪ California 92630-8300
Telephone: (949) 837-0404 Facsimile: (949) 837-5834

of small fragments of scrub that may be visited very occasionally by CAGN during periods of dispersal and the non-breeding season; however, such patches most likely exhibit only marginal functions when compared with the functions of the larger contiguous areas of scrub.

Based on the survey data from 1997, 1998, 2002, 2006, 2007 and 2009, the Banning Ranch site supports an average of 17.7 CAGN use areas or territories, generally concentrated along the large arroyo and in the north-central portion of the site [Exhibit 2]. CAGN also occur within the larger Santa Ana River Corridor with additional areas that support the CAGN including Talbert Regional Park and Fairview Park. I believe that this context is important when considering the relative importance of the NOV polygons for the CAGN.

Southeast Polygon

At the time of the activities addressed in the NOV, the Southeast Polygon supported disturbed scrub habitat that was most likely dominated by California encelia (*Encelia californica*). GLA has calculated that the area of disturbed scrub including areas on Banning Ranch and the City of Newport Beach property covered approximately 0.62 acre, making it far and away the largest area affected of the three. While CAGN were not mapped in this area during protocol surveys (dating back to 1997), and while nesting was not documented in this area, it is my professional opinion that this area would have been used by CAGN for foraging on at least an occasional basis and potentially on a regular basis.

CAGN territories in coastal areas are generally smaller in size than inland areas, with published and unpublished data suggesting territories as small as 2.5 acres, meaning that when combined with the adjacent habitat on the hill form, that the Southeast Polygon would approach the minimum territory size for the CAGN. Although it might be assumed that removal of 0.62 acre of disturbed habitat could have the potential to affect CAGN use in this area, this is not necessarily the case. In 2006, during protocol surveys, GLA identified/mapped a CAGN pair in the scrub on the adjacent hill form (immediately to the north) indicating that the area continued to be suitable for CAGN, suggesting that the 0.62 acre area, while part of the use area was not necessarily "critical" for the CAGN. Although, surveys in some of the subsequent years did not detect CAGN on the adjacent hill form possibly suggesting the opposite; however, prior to the clearing in 2004, CAGN were not detected on the hill form in 2002.[1] In my opinion, the most that can be concluded is that CAGN use of this area is sporadic and that conclusions regarding the overall importance of this area to the CAGN are at best ambiguous. Nevertheless, given the relative amount of disturbed scrub removed and the use of adjacent areas by CAGN, the Southeast Polygon, relative to the Northwest and Northwest Polygons has more potential function. The question of how important this area was for the CAGN is difficult to determine because CAGN use on the entire Banning Ranch site as a whole did not decrease in the years

[1] Prior to 2004, CAGN were documented on the hill form in 1997 and 1998 as depicted in Exhibit 2.

after the clearing suggesting that the loss of 0.62 acre was not measurably detrimental for the CAGN. While the loss of 0.62 acre of disturbed scrub is likely to have exhibited some adverse effect on the CAGN, it does not appear to have been "critical" when considered in the context of the site or certainly within the region, though as noted above, when compared with the potential impacts within the polygons addressed below, this impact was by far the most substantial due to the amount of habitat that was affected, i.e., 0.62 acre. In summary, of the three polygons, impacts to the Southeast Polygon are the most substantial and exhibited the greatest potential impacts on CAGN, which do not appear to be measurable at the local or regional level.

Table 1: Summary of CAGN Data

Year of Survey	Surveying Consultant	Type of Data Available	Total CAGN Territories/Occurrences
1997	PCR	Points	17
1998	PCR	Points	19
2002	GLA	Points	15
Subtotal (Average CAGN Before Clearing)			**17.0**
2006	GLA	Points	21
2007	GLA	Points	17
2009	BonTerra[2]	Points	17
Subtotal (Average CAGN Before Clearing)			**18.3**
			Average 17.7/Year

Northwest Polygon

At the time of the activities addressed by the NOV, the Northwest Polygon supported disturbed scrub habitat that was dominated by California encelia (*Encelia californica*) with a substantial component of fig marigold in the understory. GLA previously calculated that the area of disturbed scrub within this polygon accounted for 0.21 acre, however, based on transects conducted by GLA in 2010, the area likely supported less than 0.10 acre of actual scrub habitat. Tony Bomkamp mapped a CAGN occurrence during protocol surveys 2002 within the area affected by the clearing and while it may have been marginally suitable for foraging or nesting, it was part of a larger use area contiguous with additional CAGN habitat. In 2006, during protocol surveys, GLA identified/mapped a CAGN pair in the scrub on the adjacent slope and in 2007, a solitary male was detected on the adjacent slope.

[2] The BonTerra dataset was provided to GLA at the request of the City of Newport Beach.

When compared with the Southeast Polygon above, the area affected was small and the habitat exhibited even higher levels of disturbance. Given typical CAGN territory sizes in coastal areas, ranging upward from a minimum of about 2.5 acres, the work affected about four percent of a CAGN territory and would not have had a substantial impact. The potential effects on the CAGN by the activities addressed in the NOV were substantially less than the potential impacts associated with the Southeast Polygon.

Northeast Polygon

At the time of the activities addressed in the NOV, the Northeast Polygon supported a predominance of non-native species and scrub habitat was essentially absent. Relative to the Southeast Polygon which exhibited at least some level of function for the CAGN and the Northwest Polygon, which exhibited at least minimal potential for CAGN foraging, the Northeast Polygon would not have exhibited measurable functions for the CAGN due to the lack of scrub habitat at the time of the subject work.

SUMMARY

At the time of the activities addressed in the NOV were conducted, the three polygons exhibited substantially different levels of function for the CAGN.

The data associated with the Southeast Polygon do not show that the activities addressed in the NOV had a significant effect on the CAGN use area when considered in the context of the larger Banning Ranch site or in the larger region that includes adjacent areas such as Talbert Park, Fairview Park and County of Orange parkland that has been restored to coastal scrub habitat. Nevertheless, relative to the other two polygons, the Southeast Polygon exhibited the highest level of function for CAGN. Because of its small size and higher level of disturbance, the Northwest Polygon exhibited substantially less function than the Southeast Polygon but clearly exhibited more function than the Northeast Polygon, which most likely exhibited very little to no function for the CAGN due to the lack of suitable habitat.

Legend

- Property Location
- Subject Polygons

N

0 50 100

Feet

1 inch = 100 feet

NEWPORT BANNING RANCH

Areas Subject to NOV

GLENN LUKOS ASSOCIATES

Exhibit 1

X:\0363-THE REST\0472-08BANN\472-8.GIS\NoticeofViolationGIS\472-8NOV_Exhibit1.mxd
August 5, 2010

Legend

- Property Location
- Contiguous Scrub

1997&1998 PCR Gnatcatcher Locations

- Pair, 1997 - PCR
- Pair, 1998 - PCR

2002 Gnatcatcher Locations - GLA

- Pair, 2002 - GLA
- Soiltary Male, 2002 - GLA

2006 Gnatcatcher Locations - GLA

- Pair
- Single

2007CAGN - GLA

- CAGN Pair Observed
- CAGN Single Observation of Unpaired Male
- CAGN Multiple Observations of Unpaired Male

BonTerra 2009

- Pair
- Solitary Male

N

0 275 550

Feet

1 inch = 550 feet

NEWPORT BANNING RANCH

Coastal Scrub Habitat

GLENN LUKOS ASSOCIATES

Exhibit 2

X:\0363-THE REST\0532-09NOV\532-9.GIS\BioGIS\532-9_CAGN_ESHA.mxd
October 5, 2010

HERMAN WEISSKER, INC.
SINCE 1959
LICENSE NO. 183556

1645 Brown Avenue
Riverside, CA 92509
Ph: 951.826.8800 Fax: 951.321.4780
www.hermanweissker.com

October 18, 2010

Via Email and U.S. Mail

Lisa Haage
Chief of Enforcement
California Coastal Commission
45 Fremont
San Francisco, CA 94105

Andrew Willis
District Enforcement Analyst
California Coastal Commission
200 Oceangate, Suite 1000
Long Beach, CA 90802

Re: V-5-09-008

Dear Ms. Haage and Mr. Willis:

Herman Weissker, Inc. ("HWI"), pursuant to the letter from Peter Douglas, dated October 5, 2010 regarding "Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings" ("NOI"), requests that the Commission Staff initiate discussion to develop a Consent Cease and Desist and Restoration Orders ("Consent").

By separate cover, the other recipients of the NOI (Southern California Edison, Newport Banning Ranch LLC, and the City of Newport Beach) are providing you with their own requests to initiate discussion on the Consent and outlining the primary components of a proposed Restoration Plan. HWI generally supports the framework of the Restoration Plan, subject to further negotiation of the specific details, both as between the parties themselves and with the Commission.

In light of the above and the intent to resolve this matter through mutual settlement and the Consent, HWI has not submitted a "Statement of Defense" form. HWI reserves its right to submit a Statement of Defense and contest the allegations of the Coastal Act violations set forth in the NOI. Although, the NOI requests submittal of a Statement of Defense by October 25, 2010, HWI requests the deadline be tolled pending the development of a Consent.

HWI looks forward to meeting with you to discuss the Consent and Restoration Plan.

Very truly yours,

Tony Vedova
Sr. Vice President

Purchasing Fax: 951.321.4785 Accounting Fax: 951.321.4779 Supt./Estimator Fax: 951.321.4786

NEWPORT BANNING RANCH

VIA ELECTRONIC MAIL AND U.S. MAIL

October 18, 2010

Lisa Haage
Chief of Enforcement
California Coastal Commission
45 Fremont
San Francisco, CA 94105

Andrew Willis
District Enforcement Analyst
California Coastal Commission
200 Oceangate, Suite 1000
Long Beach, CA 90802

Re: V-5-09-008

Dear Ms. Haage and Mr. Willis:

This letter is submitted on behalf of Newport Banning Ranch LLC, Cherokee Newport Beach LLC and Aera Energy LLC (collectively "NBR") in response to the letter from Peter Douglas, dated October 5, 2010 regarding "Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings" ("NOI Letter"). The NOI Letter requests the recipients to notify Commission enforcement staff analyst Andrew Willis by no later than October 18, 2010 if they are interested in discussing the possibility of agreeing to a Consent Cease and Desist and Restoration Orders ("Consent CDRO"). The purpose of this letter is to provide written notification on behalf of NBR that it would like to pursue discussions to develop a Consent CDRO.

- **NBR Requests That the Commission Staff Initiate Discussions to Develop a Consent CDRO**

Since receipt of the NOI Letter on October 7, 2010, NBR arranged a meeting on October 12 with representatives of the other recipients of the NOI Letter: Southern California Edison ("SCE"), Herman Weissker, Inc. ("Weissker"), and the City of Newport Beach (City) (collectively with NBR, referred to as "the Parties"), to discuss their position with respect to the possibility of a Consent CDRO. It is the general consensus of NBR and the representatives of the other named entities that they would like to initiate discussions with Coastal enforcement staff to develop a Consent CDRO to address resolution of the alleged unpermitted development. This letter provides NBR's written notice to initiate

Newport Banning Ranch LLC
1300 Quail Street, Suite 100 | Newport Beach, CA 92660 | T 949.833.0222 | F 949.833.1960
3030 Saturn Street, Suite 101 | Brea, CA 92821 | T 714.577.9154 | F 714.577.9149
newportbanningranch.com

discussions to develop a Consent CDRO. NBR understands that the City, SCE and Weissker intend to submit their own notification expressing their desire to commence discussions with Coastal staff regarding a Consent CDRO.

With that goal in mind, the Parties have expressed a general agreement to be proactive and want to focus our efforts on addressing the coastal resources at issue. The Parties have met to discuss several potential components of a Restoration Plan that would provide for replacement, mitigation, and enhancement of the coastal resources affected by the alleged unpermitted activity. Outlined below are the primary components and goals and objectives of a proposed Restoration Plan; however, before finalizing a proposal, we believe that it would be more efficient to achieving resolution if the Parties can meet with both of you as soon as possible to discuss the development of a Consent CDRO, and specifically the details of the Restoration Plan components. Jared Ficker will be calling you on behalf of the Parties to set up a meeting.

- **Timing of a Resolution Must Take Into Consideration Parties' Approval Process**

We understand the Coastal Commission staff's desire to resolve this matter in an expeditious manner, and the Parties have made considerable efforts to work together to develop a proposal that would accomplish timely resolution. Nevertheless, as you are aware, one of the named parties is a governmental entity, and all final decisions and final actions with respect to the Consent CDRO can only be made with the approval of its City Council. The City will no doubt apprise of you the time constraints that they are working under in order to address the NOI Letter as well as the constraints imposed by the CEQA litigation filed by the Banning Ranch Conservancy it is currently defending, but Commission staff should note that since the City's receipt of the NOI Letter, it has had only one opportunity (City Council meeting of October 12, 2010) to inform the City Council of the receipt of the NOI Letter and to apprise them of the consequences of the NOI Letter as it pertains to its Sunset Ridge Park property and the City's pending project CDP application. While City staff will continue to keep its Council informed of the progress towards developing a mutually agreeable Consent CDRO, any final approval of the Consent CDRO will require Council approval in light of the substantial commitment of resources that may result. Because it is in all of our interests to have all Parties at the table, and to not bifurcate resolution, we appreciate Coastal staff's consideration of the timing constraints imposed by the City's decision making and approval process and would request the Coastal staff be sensitive to this issue.

In addition, NBR, Southern California Edison and Herman Weissker, Inc. are all corporate entities for which Board approval of the obligations contemplated under the Consent CDRO will be required. While the Parties' representatives will work expeditiously with the Commission staff on the Consent CDRO, please recognize that each will require approval by their respective Board or City Council.

- **The Parties' Restoration Plan Goals and Objectives**

Understanding that the goal of a Restoration Plan is to mitigate the impacts to coastal resources resulting from unpermitted development, the Parties have identified a number of key components, goal and objectives to provide a framework for development of a Restoration Plan in concert with Coastal staff. A considerable amount of biological work has been conducted on the site by several environmental consulting firms over the past decade. These studies have been provided to Coastal Commission staff and describe the vegetation that was present in the three Polygons and whether these areas are considered "use areas" for the threatened California gnatcatcher that is present elsewhere on the Banning Ranch property. Based upon the biological studies, the vegetation that was present with the three Polygons were comprised of non-native species, such as ice plant and fig marigold, interspersed with isolated native species, primarily California encelia, and in some cases remnants of historic oil field development, such as abandoned oil roads. In addition to the vegetation surveys provided to Commission staff, information regarding the presence and/or use of these Polygons by the CAGN were provided. None of the three Polygons were ever used as CAGN nesting areas. Although CAGN were reportedly observed in two of the Polygons on isolated occasions, no continuous use of the Polygons has been documented nor are these Polygons considered part of the essential "use area" for the CAGN as recognized by the U.S. Fish and Wildlife Service.[1]

In light of these biological considerations, while these portions of these Polygons supported native vegetation, which for purposes of resolving this matter through a Consent CDRO included impacts to "major vegetation," none of the Polygons contain sufficient components to be described as "environmentally sensitive habitat areas" as that term is defined in Section 30107.5 of the Coastal Act.

In recognition of the highly disturbed nature of the vegetation that was present in the Polygons, the Parties have identified the following framework for a proposed Restoration Plan:

- The Restoration Plan should provide for the establishment and long-term protection and preservation of a Consolidated Restoration Area consisting of a minimum of 2.55 acres. This acreage is based upon the delineation of the native vegetation that was removed from the Polygons. The total gross acreage of the Polygons is 1.01, and within those Polygons the amount of invasive, non-native vegetation was approximately 0.50 acre and the native vegetation was approximately 0.51 acre (0.51 acre x 5 = 2.55 acres). Given the fragmented and disturbed quality of the vegetation on the three separate Polygons – each of which is separated by roads and other unvegetated areas – restoration should provide for

[1] Glenn Lukos Associates, Letter to Sandra Marquez, U.S. Fish and Wildlife Service re: Submittal of 45-day report for coastal California gnatcatcher Surveys for the 412.5- acre Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California, dated July 19, 2007; Glenn Lukos Associates, Letter to Daniel Marquez, U.S. Fish and Wildlife Service re: Submittal of 45-day report for coastal California gnatcatcher Presence/Absence Surveys for the 412.5- acre Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California, dated July 25, 2006.

a consolidated block of high quality native vegetation, as opposed to replacement of the mix of native and non-native vegetation that was there before in their isolated Polygons.

- The Consolidated Restoration Area should be in a location that (1) is adjacent to areas of functioning habitat; (2) can be protected from future disturbance; and (3) could be integrated with future development proposed on NBR and City properties as protected natural community areas, or other ongoing and proposed restoration efforts. The location of the Consolidated Restoration Area could be on-site in the area of the Polygons, on-site elsewhere on the Banning Ranch property, or off-site on a City-owned parcel elsewhere in the City. The location and acreage of the Consolidated Restoration Area shall be acceptable to the Coastal Commission and the Parties.

- The goal of the Restoration Plan is: Restoration and revegetation of the Consolidated Restoration Area beyond the pre-development conditions of the impacted Polygons with native vegetation including coastal sage scrub and maritime succulent scrub.

- The components of a Restoration Plan shall address: Schedule/Timeline; Physical and Biological Parameters; Plant Palette; Equipment Utilization; Non-Native Plant Species Removal, Erosion Control, Solid Material Removal; Assessment of Possible Impact on Subject Property; Artificial Inputs (water, fertilizer, pesticide); and Long-Term Monitoring.

The Parties believe that the creation, enhancement and protection of 2.55 acres of a coastal sage scrub vegetation community that is not heavily populated or invaded by non-native species, would provide far greater long-term habitat value than restoration of the Polygons to their pre-2003/2004 conditions consisting of a mix of non-native and native species and would provide mitigation for the removal of the "major vegetation" that was present in portions of these three Polygons.

- **Reservation of Right to Submit a Statement of Defense**

In light of the intent of the Parties to resolve this matter through a mutually-agreed upon settlement and development of a Consent CDRO, the Parties have not submitted a "Statement of Defense" form as provided for in Section 13181 and 13191 of Title 14 of the California Code of Regulations. Accordingly, the Parties at present have agreed not to contest the issuance or enforcement of a Consent CDRO at a public hearing or any other proceeding and to comply with the terms of an agreed upon Commission-approved Consent CDRO. Nevertheless, should the Parties and Coastal staff not be able to agree upon a Consent CDRO after good faith negotiations to achieve that goal, the Parties reserve the right to submit a Statement of Defense and to assert all rights to contest the legal and factual bases of the Commission to adopt a Cease and Desist Order, including the allegations of Coastal Act violations contained in the NOI Letter. The NOI Letter requests that the Parties submit a Statement of Defense by October 25, 2010. We request

that the deadline to submit the Statement be tolled while the Parties are working with Commission staff develop a Consent CDRO, and that a new deadline to submit a Statement of Defense be agreed upon by the Parties and Commission staff only after all efforts to develop a Consent CDRO have been exhausted.

- **Conclusion**

In conclusion, we would like to meet with both of you as soon as possible to discuss the development of a Consent CDRO that incorporates a Restoration Plan proposal such as that described above. NBR has made considerable effort to work with the other entities to develop a proposal that addresses the impacts to coastal resources and provides for long-term habitat protection. Despite each of the Parties unique interest and position, we have felt that it was in the best interests of the coastal resources to work together to arrive at a proposal that all of the Parties could support and would request to meet with you at your earliest opportunity to develop a Consent CDRO that all could support.

Respectfully,

Michael A. Mohler
Newport Banning Ranch

Cc: George L. Basye, Newport Banning Ranch
Susan K. Hori, Manatt Phelps & Phillips
Jared Ficker, California Strategies

SOUTHERN CALIFORNIA EDISON
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October 18, 2010

Lisa Haage
Chief of Enforcement
California Coastal Commission
45 Fremont St.
San Francisco, CA 94105
FAX: (415) 904-5400

Andrew Willis
District Enforcement Officer
California Coastal Commission
200 Oceangate, Suite 1000
Long Beach, CA 90802
FAX: (562) 590-5084

Re: V-5-09-008

Dear Ms. Haage and Mr. Willis:

Southern California Edison Company (SCE) submits this letter in response to the letter from Peter Douglas, dated October 5, 2010, regarding the "Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings" (NOI letter). The NOI letter requests that recipients notify Coastal Commission (Commission) enforcement staff analyst Andrew Willis by no later than October 18, 2010 to indicate whether or not they are interested in discussing the possibility of agreeing to consent cease and desist and restoration orders (Consent CDRO).

Through this letter, SCE is expressing its interest in discussing with the Commission the possibility of agreeing to a Consent CDRO.

SCE has met with representatives of the Newport Banning Ranch parties (NBR), the City of Newport Beach (City), and Herman Weissker, Inc. (HWI), collectively "the Parties," on several occasions regarding the Commission's May 14, 2010 letter and the NOI letter. SCE understands that NBR intends to submit a letter (NBR letter) to the Commission indicating an interest in discussing the possibility of agreeing to a CDRO, and that NBR will include in its letter a framework for developing a Consent CDRO. SCE has reviewed the components of the framework proposed by NBR, is in general agreement with the framework, and believes that it provides a solid foundation for further discussions.

With respect to the alleged unpermitted development that is the basis for the NOI letter, SCE specifically concurs with the statement in the NBR letter that the Parties are unaware of any grading activity that occurred within the Polygons between 2004-2006

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and 2009. Additionally, SCE joins NBR in its request that the deadline to submit a Statement of Defense by October 25, 2010 be tolled while the Parties are working with Commission staff to develop a Consent CDRO and that a new deadline to submit a Statement of Defense be agreed upon by the Parties and Commission staff only after all efforts to develop a Consent CDRO have been exhausted.

As noted in the NBR letter, SCE will have to approve a Consent CDRO consistent with its corporate procedures.

SCE joins NBR in expressing a desire to be proactive and move forward expeditiously. SCE would like to meet regarding the potential for a Consent CDRO as soon as possible.

Please contact either myself at 626 302-2149 or david.kay@sce.com, or Tracey Alsobrook at 626 302-7547 or tracey.alsobrook@sce.com if you have any questions regarding this letter.

Sincerely,

Tracey Alsobrook for
David Kay
Southern California Edison Company

cc:
Mike Moehler and George Basye, NBR
Mike Sinacori, City of Newport Beach
Tony Vedova, Herman Weissker, Inc.

2131 Walnut Grove Avenue
Rosemead, CA 91770

CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

David R. Hunt, City Attorney

October 18, 2010

Via Electronic Mail and U.S. Mail

Lisa Haage
Chief of Enforcement
California Coastal Commission
45 Fremont
San Francisco, CA 94105

Andrew Willis
District Enforcement Analyst
California Coastal Commission
200 Oceangate, 10th Floor
Long Beach, CA 90802

RE: October 5, 2010 Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings
Assessor Parcel No. 424-041-10
City Matter No.: A10-00433

Dear Ms. Haage and Mr. Willis:

This letter is submitted on behalf of the City of Newport Beach ("City") in response to the letter from Peter M. Douglas, dated October 5, 2010 entitled "Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings" ("NOI"). The NOI requests the recipients to notify Commission enforcement staff analyst Andrew Willis by no later than October 18, 2010 if they are interested in discussing the possibility of agreeing to a Consent Cease and Desist and Restoration Orders ("Consent CDRO"). Pursuant to this request, please be advised that the City is interested in discussing development of a Consent CDRO.

According to the NOI, unpermitted development occurred in three areas identified as the "northwest polygon," "northeast polygon," and the "southeast polygon." Approximately 0.2 acres of the "southeast polygon" is located on Assessor Parcel No. 421-041-10, which the City acquired from the California Department of Transportation in December 2006. In response to the NOI, the City has met with the owners of the Newport Banning Ranch parcels (collectively, "NBR"), Southern California Edison Company ("SCE"), and

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Herman Weissker, Inc. ("HWI") and understand that it is the general consensus of the other named entities that they would like to initiate discussions with Coastal enforcement staff to develop a Consent CDRO to address resolution of the alleged unpermitted development. We further understand that NBR intends to submit a more detailed discussion of the primary components of any such resolution. We agree in concept with NBR's proposal and believe it represents an efficient effort of the parties to respond to the NOI as expeditiously as possible.

Specifically, we agree that NBR's proposal will focus efforts on addressing the coastal resources at issue and will provide for replacement, mitigation, and enhancement of the coastal resources affected by the alleged unpermitted activity. As previously discussed with Commission staff, the City did not own the property at the time the alleged unpermitted activity occurred and it was not advised of the alleged unpermitted development until approximately five years after the alleged violation. Notwithstanding the limited factual basis included in the NOI in support of the Notice of Violation, we believe that this approach is worth exploring if it resolves this matter expeditiously.

It must be noted that any City decision or action is dependent upon obtaining the appropriate approvals of the City Council. Since receipt of the NOI, City staff has had only limited opportunity to confer with the City Council. The NOI states that the City is required to provide written notification of its objection to the NOI and submit a "Statement of Defense" on or before October 25, 2010. However, please note that the next regularly scheduled meeting of the City Council is October 26, 2010, at which time we will confer with City Council on the consequences of the NOI to the proposed Sunset Ridge Park. We bring this to your attention and request that the deadlines included in the NOI be tolled during the discussion period given the apparent willingness of all parties to commence discussions to resolve this matter through a mutually-agreed upon settlement and development of a Consent CDRO. We respectfully request that a new deadline to submit a Statement of Defense be agreed upon by the City and Commission staff only after all efforts to develop a Consent CDRO have been exhausted. Further, should the City and Commission staff not be able achieve the goal of addressing the coastal resources at issue with respect to the alleged unpermitted development that is the basis of the NOI, the City reserves the right to contest the legal and factual bases for the allegations of the Coastal Act contained in the NOI and the Notice of Violation dated October 5, 2010.

In conclusion, the City looks forward to meeting with both of you as soon as possible in an effort to proactively explore whether all of the named parties can continue to work together to develop a proposal that addresses the impacts to coastal resources and provides for long-term habitat protection. Please contact the undersigned if you have any questions or comments, and to arrange a mutually convenient time to confer.

Sincerely,

OFFICE OF THE CITY ATTORNEY

Leonie Mulvihill
Assistant City Attorney

LM/cm

cc: Dave Kiff, City Manager
David R. Hunt, City Attorney
David Webb, Deputy Public Works Director
Michael J. Sinacori, Assistant City Engineer

[A10-00433] Haage/Willis from LM 10.18.10 re: NOV

CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY
David R. Hunt, City Attorney

October 27, 2010

Via Electronic Mail and U.S. Mail

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South Coast Region

NOV 1 - 2010

CALIFORNIA
COASTAL COMMISSION

Lisa Haage
Chief of Enforcement
California Coastal Commission
45 Fremont
San Francisco, CA 94105

Andrew Willis
District Enforcement Analyst
California Coastal Commission
200 Oceangate, 10th Floor
Long Beach, CA 90802

RE: October 5, 2010 Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings
Assessor Parcel No. 424-041-10
City Matter No. A10-00433

Dear Ms. Haage and Mr. Willis:

On behalf of the City of Newport Beach ("City"), we appreciate you taking the time yesterday to discuss resolution of the above-referenced enforcement matter. We believe that it is apparent that all parties are committed to reaching a solution that best preserves and enhances the subject biological resources. To that end, we continue to maintain that the City's proposed Sunset Ridge Park project's ("Park") habitat enhancement program achieves this goal.

Based on yesterday's discussion, it is our understanding that a Coastal Commission Restoration Order is the likely course that your office will be pursuing. We also understand that it is your office's position that a Restoration Order may yield a superior outcome over the Park's proposed and pending restoration plan. We disagree as to the scope of restoration permissible under a Restoration Order. As we reviewed yesterday during our meeting, the California Code of Regulations is clear on this issue. Specifically, the definition of "damage" in the context of resource damages in enforcement matters is provided for in 14 CCR Section 13190, which highlights the

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appropriate reference point (i.e. pre-violation condition):

> (b) "Damage" means any degradation or other reduction in quality, abundance or other quantitative or qualitative characteristic of the resource **as compared to the condition the resource was in before it was disturbed by unpermitted development."** (emphasis added)

This comparative standard is similarly reflected in 14 CCR Section 13196 which provides that Restoration Orders signed by the executive director shall contain:

> (e) any terms, conditions, or other provisions authorized by section 30811 of the Public Resources Code. Any term or condition that the commission may impose which requires removal of any development or material **shall be for the purpose of restoring the property affected by the violation to the condition it was in before the violation occurred;** (emphasis added)

In addition, recent unrelated Restoration Orders for unpermitted vegetation removal illustrate the Coastal Commission's practice of requiring impacted areas to be restored to the condition it was in prior to the occurrence of the subject violation. One example is as follows:

- CCC-06-RO-03 and CCC-06-NOV-02:
  The Consent Order will direct Driftwood and Athens, as an agent of Driftwood, to fully restore the vegetation that was removed and to mitigate for the temporal loss and loss of fitness incurred, in order to return the property ***to the condition that it would have been in had the violation not occurred.*** (pg. 7 of CCC Staff Report; emphasis added)

This standard is further illuminated in an article entitled *Restoration of Unpermitted Development within the California Coastal Zone* (Doss & Friend, 1995) which can be found on the Commission's website.

- In a section entitled *Enforcement Changes*, this article notes that "Beginning in the late 1980's the CCC put an emphasis on controlling unpermitted development, **restoring sites to their pre-violation condition**, and seeking compliance with permits issued." Also, in the context of matters where an after-the-fact permit is not feasible, the article goes on to note "then the CCC can approve a restoration order prepared by staff which directs the violator to **restore the site to its pre-violation condition**." (emphasis added)

- In a section entitled *Habitat Restoration & Monitoring Program,* the article notes that "Whereas previously one simple landscape condition was typically used in all restoration cases, in 1994 a new condition was drafted as a shell for most permits involved with restoration ecology. This condition, drafted by CCC staff under the guidance of restoration specialist Ted St. John, is included in all CDPs in the South Central Coast District for site restoration. This includes CDPs for **to return a violation site to its pre-development condition.**" (emphasis added)

Thus, the governing administrative regulations and the Coastal Commission's practice demonstrates that the appropriate standard is for restoration efforts to return the impacted area(s) to the condition it was in before the violation occurred. In this instance, the impacted areas were comprised of mostly non-native species and thus any restoration of these subject areas pursuant to a Restoration Order would be inferior to the Park's planting and habitat enhancement proposal which calls for 3.8 acres of native coastal sage scrub for gnatcatcher habitat (plus 0.90 acre of additional gnatcatcher habitat around the perimeter of the Park site).

Additionally, as we discussed yesterday, any Statement of Defense from the City must be presented to and considered by the City of Newport Beach City Council. As previously advised in our correspondence dated October 18, 2010 to you, yesterday evening was our first opportunity to brief the Council on the recently issued CCC Notice of Intent. The next City Council meeting is scheduled for November 9, 2010. As such, providing a Statement of Defense to your office was not feasible by the October 25, 2010 deadline referenced in your October 5, 2010 correspondence. 14 CCR Section 13191(b) provides that:

> "The executive director may at his or her discretion extend the time limit for submittal of the statement of defense form imposed by any notice of intent issued pursuant to subsection (a) of this section upon receipt within the time limit of a written request for such extension and a written demonstration of good cause. The extension shall be valid only to those specific items or matters that the executive director identifies to the requesting party as being exempt from the submittal deadline and shall be valid only for such additional time as the executive director allows."

Pursuant to Section 13191(b) and as communicated yesterday during our meeting, we respectfully request additional time to prepare and submit to you a Statement of Defense.

Finally, your October 5, 2010 correspondence requests that the City inform of our objection to a recordation of a Notice of Violation against the City's property. We object to this recordation and look forward to continuing to work with your office to expeditiously resolve this enforcement matter.

Sincerely,

OFFICE OF THE CITY ATTORNEY

Leonie Mulvihill,
Assistant City Attorney

LM/cm

cc: Dave Kiff, City Manager
David R. Hunt, City Attorney
Dave Webb, Deputy Public Works Director
Mike Sinacori, Assistant City Engineer