

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

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

29 Orchard
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Exhibit 10
CCC-CD-11-03 (NBR)
CCC-RO-11-02
Page 1 of 15

MEMORANDUM

August 26, 2010

Page 2

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 Bramlet¹, 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.

MEMORANDUM

August 26, 2010

Page 3

- 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

MEMORANDUM
August 26, 2010
Page 4

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 of 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,*

MEMORANDUM

August 26, 2010

Page 10

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).

MEMORANDUM

August 26, 2010

Page 12

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 Newman⁵ 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 disturbance 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 (*Centaurea 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 1964⁶ 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.

MEMORANDUM

August 26, 2010

Page 15

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 activities. 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
FAX (415) 904-5400



VIA CERTIFIED AND REGULAR MAIL

October 5, 2010

Newport Banning Ranch, LLC¹
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
CGC-RO-11-02 (NBR)
CGC-RO-11-02
Exhibit 11
Page 4 of 8

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 owners³ 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 Exhibit 11

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

Exhibit 11

CCG-CD-11-03 (NBR)

CCG-RO-11-02

Page 6 of 8

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

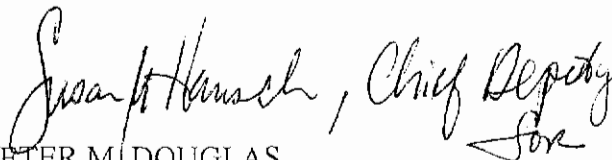
You should be aware that the Coastal Act includes a number of penalty provisions for unpermitted development. Section 30820(a)(1) provides for civil liability to be imposed on any person who performs or undertakes development without a CDP and/or that is inconsistent with any CDP previously issued by 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,


PETER M. DOUGLAS
Executive Director
California Coastal Commission

Newport Banning Ranch
October 5, 2010
Page 8 of 8

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

October 13, 2010

Page 2

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.

MEMORANDUM

October 13, 2010

Page 3

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.

MEMORANDUM

October 13, 2010

Page 4

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

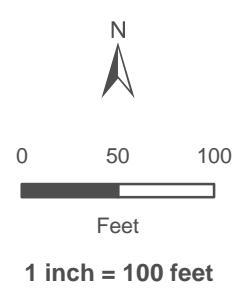
At the time of the activities addressed in the NOV were conducted, the three polygons exhibited substantially different levels of function for the CAGN.

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

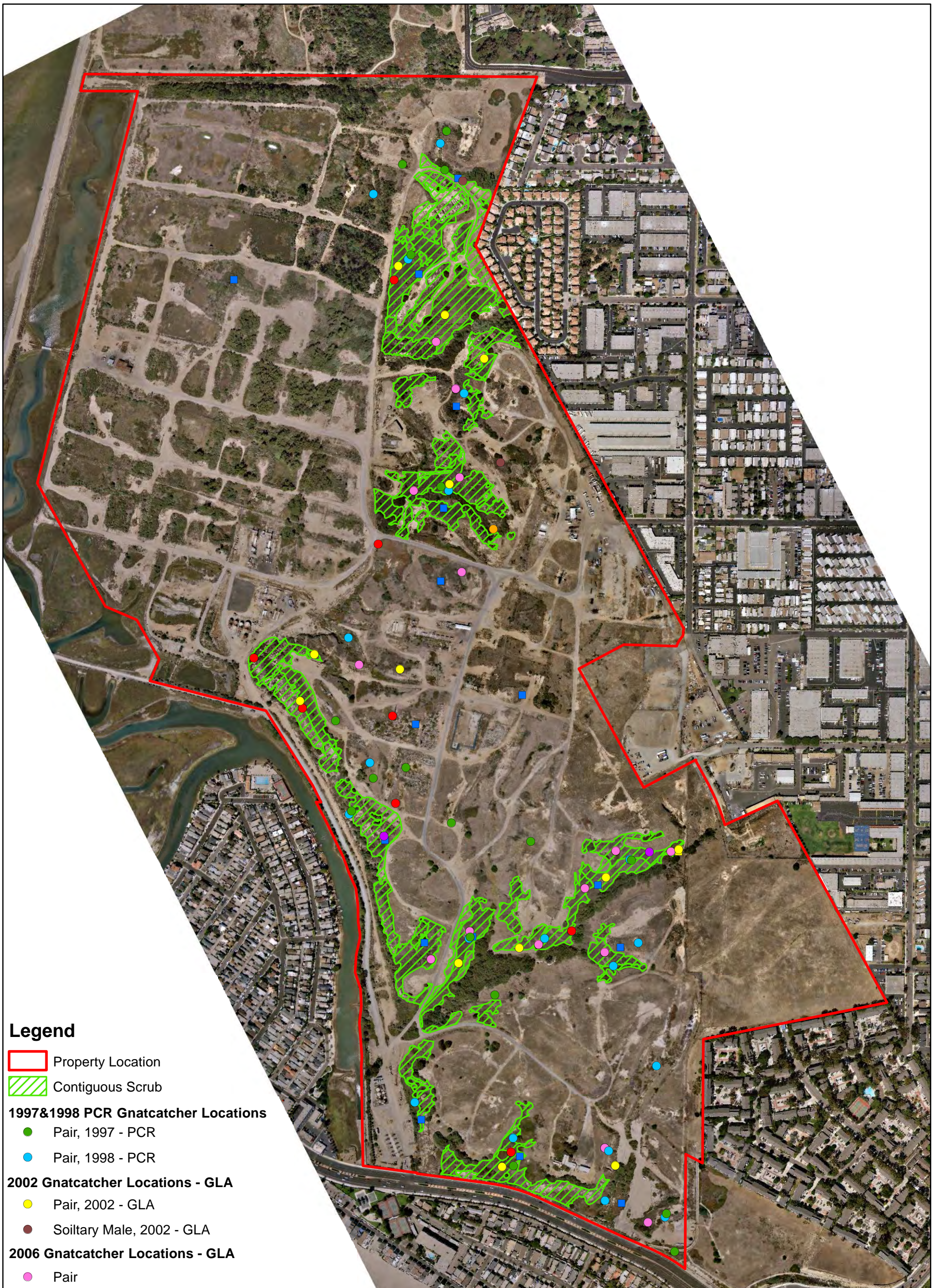


NEWPORT BANNING RANCH
 Areas Subject to NOV

GLENN LUKOS ASSOCIATES

Exhibit 1

Exhibit 12
 CCC-CD-11-03 (NBR)
 CCC-RO-11-02
 Page 5 of 6



Legend

Property Location

Contiguous Scrub

1997&1998 PCR Gnatcatcher Locations

Pair, 1997 - PCR

Pair, 1998 - PCR

2002 Gnatcatcher Locations - GLA

Pair, 2002 - GLA

Solitary 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



0 275 550



Feet

1 inch = 550 feet

NEWPORT BANNING RANCH

Coastal Scrub Habitat

GLENN LUKOS ASSOCIATES

Exhibit 2

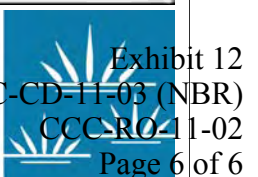


Exhibit 12
CCC-CD-11-03 (NBR)
CCC-RO-11-02
Page 6 of 6



LICENSE NO. 183556

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

October 18, 2010

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

Via Email and U.S. Mail

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,

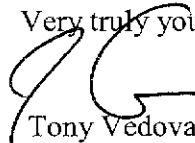

Tony Vedova
Sr. Vice President

Exhibit 13
CCC-CD-11-03 (NBR)
CCC-RO-11-02

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

Exhibit 14
CCC-CD-11-03 (NBR)
CCC-RO-11-02
Page 1 of 5

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**

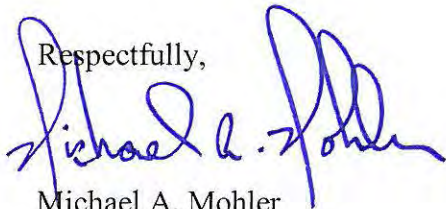
In light of the intent of the Parties to resolve this matter through a mutually-agreed upon settlement and development of a Consent CDRO, the Parties have not submitted a “Statement of Defense” form as provided for in Section 13181 and 13191 of Title 14 of the California Code of Regulations. Accordingly, 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



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,

A handwritten signature in black ink that reads "Tracey Alsobrook".

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

Exhibit 15
CCC-CD-11-03 (NBR)
CCC-RO-11-02
Page 2 of 2



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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Newport Beach California 92658-8915 • www.city.newport-beach.ca.us

Exhibit 16
CC-CD-11-03 (NBR)
CC-RO-11-02
Page 1 of 3

L. Haage
A. Willis
October 18, 2010
Page 2

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.

L. Haage
A. Willis
October 18, 2010
Page 3

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

A handwritten signature in black ink, consisting of a large, stylized 'L' followed by several vertical strokes and a long horizontal line extending to the right.

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

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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Exhibit 17
CCC-CD-11-03 (NBR)
CCC-RO-11-02
Page 1 of 4

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*.

Lisa Haage
Andrew Willis
October 27, 2010
Page 4

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

A handwritten signature in black ink, appearing to be 'LM', with a horizontal line underneath it.

Leonie Mulvihill,
Assistant City Attorney

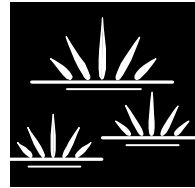
LM/cm

cc: Dave Kiff, City Manager
David R. Hunt, City Attorney
Dave Webb, Deputy Public Works Director
Mike Sinacori, Assistant City Engineer

MEMORANDUM

GLENN LUKOS ASSOCIATES

Regulatory Services



PROJECT NUMBER: 05320009NOV

TO: Dr. Jonna Engel
Dr. John Dixon

FROM: Tony Bomkamp

DATE: November 9, 2010

SUBJECT: 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

In previous documentation, I have stated that in my professional opinion, that while the Northwest Polygon and disturbed encelia scrub exhibited use by CAGN, that due to the level of disturbance, that the Northwest Polygon should not be considered ESHA. During a meeting on October 26, 2010 at the Coastal Commission Long Beach office, Mr. Andrew Willis indicated that the Coastal Commission believed that the slope immediately above the Northwest Polygon was ESHA due to the presence of the coastal California gnatcatcher during some years. During this discussion, I pointed out that substantial portions of the slope had been covered with an asphalt-like oil-based material that was intended to prevent erosion, which has substantially degraded the slope and limited the ability of the slope to exhibit high levels ecological function. Previously, GLA collected transect data on a portion of this slope, in order to account for the conditions that occurred prior to the activities addressed in the Notice of Violation.

On November 8, 2010, Biologists from Glenn Lukos conducted more detailed and extensive sampling on the subject slope (i.e., above the Northwest Polygon), extending along the slope to the south such that the entire slope area was sampled as depicted on Exhibit 1. The purpose of the sampling was to accurately characterize the habitat on this slope in order to provide additional information to the Coastal Commission regarding the Northwest Polygon. In addition, in order to provide a comparison with undisturbed habitat on the site, GLA sampled two areas that exhibit high quality maritime succulent scrub (MSS) and coastal bluff scrub (CBS). Because of the high density of the habitat in these areas and the significant cactus component, these areas were sampled using the Relevé method.¹

¹ Mueller-Dombois, D. and H. Ellenberg. 1974. *Aims and Methods of Vegetation Ecology*. John Wiley and Sons, New York. See Chapter 5, "Community Sampling: The Relevé Method".

Methodology

The slope above the Northwest Polygon was sampled using the point-intercept method with sampling points at every half meter along four transects that were placed approximately every four meters beginning at the bottom of the slope. This spacing allowed for four transects, evenly separated and sufficient for capturing the conditions on the slope [see Exhibit 1]. Each transect was approximately 125 meters in length. A summary of the sampling results is provided in Table 1.

Undisturbed MSS and CBS Areas

As noted, these areas were sampled using the Relevé method due to the dense habitat including local areas with up to 60-percent cover by cactus, making collection along transects infeasible (and potentially dangerous). In using this technique, two biologists experienced in vegetation sampling independently estimated the percent cover for all species on the subject slopes above and below transect lines [depicted on Exhibits 2 and 3]. The results of the two estimates were averaged to obtain the final cover for each species (the final average was determined by consensus and so does not always exactly equal the arithmetic average). A summary of the sampling results is provided in Tables 2 and 3.

Results

Slope Above Northwest Polygon

As noted, GLA previously collected data along transects on the portion of the slope immediately above the Northwest Polygon, extending from the northern edge of the disturbance to the southern edge of the disturbance. In that instance, data was collected along two transects, one near the top of the slope immediately above the area disturbed by the unpermitted activities and one transect approximately one-third of the way up the slope, where the native vegetation is the most dense. The expanded transect locations depicted on Exhibit 1, provide for a more comprehensive characterization of the slope. As already stated, it is important to note, that this slope has been impacted by previous treatments with oil/asphalt-like material, applied on the slope to limit erosion. This material is still evident on the surface of the slope, covering an estimated 25 to 30-percent of the surface (other areas are likely still impacted where the material is now covered by material that has sloughed off portions of the slope). In some areas the asphalt-like material precludes the growth of vegetation and would need to be removed prior to restoration.

Overall, as summarized in Table 1, the slope exhibits about 26-percent cover by native species, with California encelia (*Encelia californica*) accounting for 24-percent cover and coast goldenbush (*Isocoma menziesii*) at one percent. No other native shrubs were detected in the

MEMORANDUM

November 9, 2010

Page 3

transects and with the exception of two cactus plants, no other native shrubs were observed on the slope). The approximately 54-percent cover by non-native species includes fig marigold accounting for roughly 31 percent, along with a variety of other non-natives including tocalote (*Centaurea melitensis*), red brome (*Bromus rubens madritensis*), small-flowered iceplant (*Mesembryanthemum nodiflorum*), statice (*Limonium perezii*), Russian thistle (*Salsola tragus*), Australian saltbush (*Atriplex semibaccata*), and Bermuda buttercups (*Oxalis pes-caprae*). Bare areas account for about 20 percent of the slope.

My previous assertion that this slope is highly disturbed is confirmed by the data which show sparse native cover and low diversity of the natives, with non-native cover more than twice as much as the native cover.

Large Arroyo

Areas adjacent to the Large Arroyo are dominated by MSS and southern cactus scrub (SCS) that overall, exhibit a range of conditions from pristine to somewhat or moderately disturbed (mainly due to the presence of non-natives such as black mustard or fennel growing in the dense scrub).

The area sampled in along the Large Arroyo exhibited moderate diversity; however, the relative contribution of each species is high with three species contributing substantial cover. Overall, California encelia is the dominant species ranging from 48- to 79-percent cover in the areas sampled, with coast prickly pear (*Opuntia littoralis*) accounting for 9- to 28-percent cover and coast cholla (*Cylindropuntia prolifera*) ranging from 7 to 17-percent. The area sampled exhibited essentially no non-native species as reflected in the transect data. Overall, native cover was 100 percent.

Middle Arroyo

The south-facing slope, overlooking the Middle Arroyo exhibits two distinct communities, with coastal bluff scrub (CBS) covering the westerly one-third and SCS covering the easterly two-thirds. The CBS, which exhibits 100-percent cover by natives is in near pristine condition and exhibits a very high diversity relative to all of the other areas of scrub habitat on the site, as summarized in Table 3 below. California encelia is dominant accounting for 35 percent of the cover with coast prickly pear at 30 percent cover. California buckwheat is locally dominant and overall accounts for 18 percent cover. California boxthorn, a characteristic CBS species accounts for nine percent cover and bladderpod, another CBS species totals five percent cover.

The SCS also exhibits dense cover with 98 percent native and only two percent non-native. California encelia and coastal prickly pear are co-dominant with 40 and 42-percent respectively. Both the CBS and SCS regularly support coastal California gnatcatcher and the Coastal Cactus Wren.

Table 1. Transect Data for Slope Above Northwest Polygon

Species	Transect 1	Transect 2	Transect 3	Transect 4	Average
ENCA	23.3%	28.4%	20.6%	25.6%	24.4%
ISME	0.8%	0.8%	0.8%	1.8%	1.1%
DULA			0.4%		0.1%
CAED*	20.8%	41.6%	0.8%	62.6%	31.5%
ATSE*	2.9%				0.7%
BRRU*	19.2%	11.6%	12.9%	1.5%	11.3%
SATR*	1.7%		2.8%		1.1%
MENO*	0.8%		18.0%		4.7%
OXPE*	2.9%			0.4%	0.8%
BRNI*	0.8%	0.8%		0.4%	0.5%
ERCI*	4.2%	1.6%	1.2%		1.7%
CEME*	2.1%	0.8%	2.4%		1.3%
LIPE(1.6%		0.4%
Bare Ground	20.4%	14.4%	38.5%	7.8%	20.3%
Sub-Total Natives	24.2%	29.2%	21.8%	27.4%	25.6%
Sub-Total Non-Natives + Bare Ground	75.8%	70.8%	78.2%	72.6%	74.4%
Total	100%	100%	100%	100%	100%

Denotes non-native species

Table 2 – Large Arroyo

Large Arroyo – Transect 1 (Percent Cover)			
Species	R. Schanna	T. Bomkamp	Average
ENCA	50%	47%	48%
OPLI	30%	25%	28%
CYOP	12%	23%	17%
ISAR	8%	5%	7%
Native Cover	100%	100%	100%
Large Arroyo – Transect 2 (Percent Cover)			
ENCA	78%	80%	79%
OPLI	8%	10%	9%
CYOP	8%	5%	7%
ISAR	6%	5%	5%
Native Cover	100%	100%	100%

Table 3 – Middle Arroyo

Middle Arroyo – Transect 1 (Percent Cover)			
Species	R. Schanna	T. Bomkamp	Average
ENCA	34%	35%	35%
OPLI	31%	30%	30%
CYOP	1%	3%	2%
ISAR	5%	5%	5%
ERFA	20%	15%	18%
LYCA	8%	10%	9%
BAPI	1%	2%	1%
Native Cover	100%	100%	100%
Middle Arroyo – Transect 2 (Percent Cover)			
ENCA	40%	40%	40%
OPLI	45%	40%	42%
ISAR	7%	8%	8%
ERFA	3%	6%	5%
BASA	3%	2%	2%
Native Cover	98%	98%	98%
COSE*	2%	2%	2%

* Denotes non-native species

Conclusions

A number of important points derive from this data.

First, it is clear that the subject slope overlooking the Northwest Polygon, which was created by extensive grading in the mid 1960s, exhibits high levels of disturbance with cover by non-native species more than double that of the native species. While the area has been documented to support the CAGN, an ESHA designation is in my opinion not appropriate because of the very degraded character of the slope, including the impacts associated with asphalt-like material spread on the slope to limit erosion.

This conclusion is further supported when the disturbed slope is compared with areas on the site that exhibit high quality habitat that has not been subject to disturbance, which is typical of many areas on the site associated with legal oilfield operations. This comparison provides additional context relative to the value of the habitat immediately adjacent to the Northwest Polygon. It also provides a template for future restoration efforts that would be implemented on this slope.

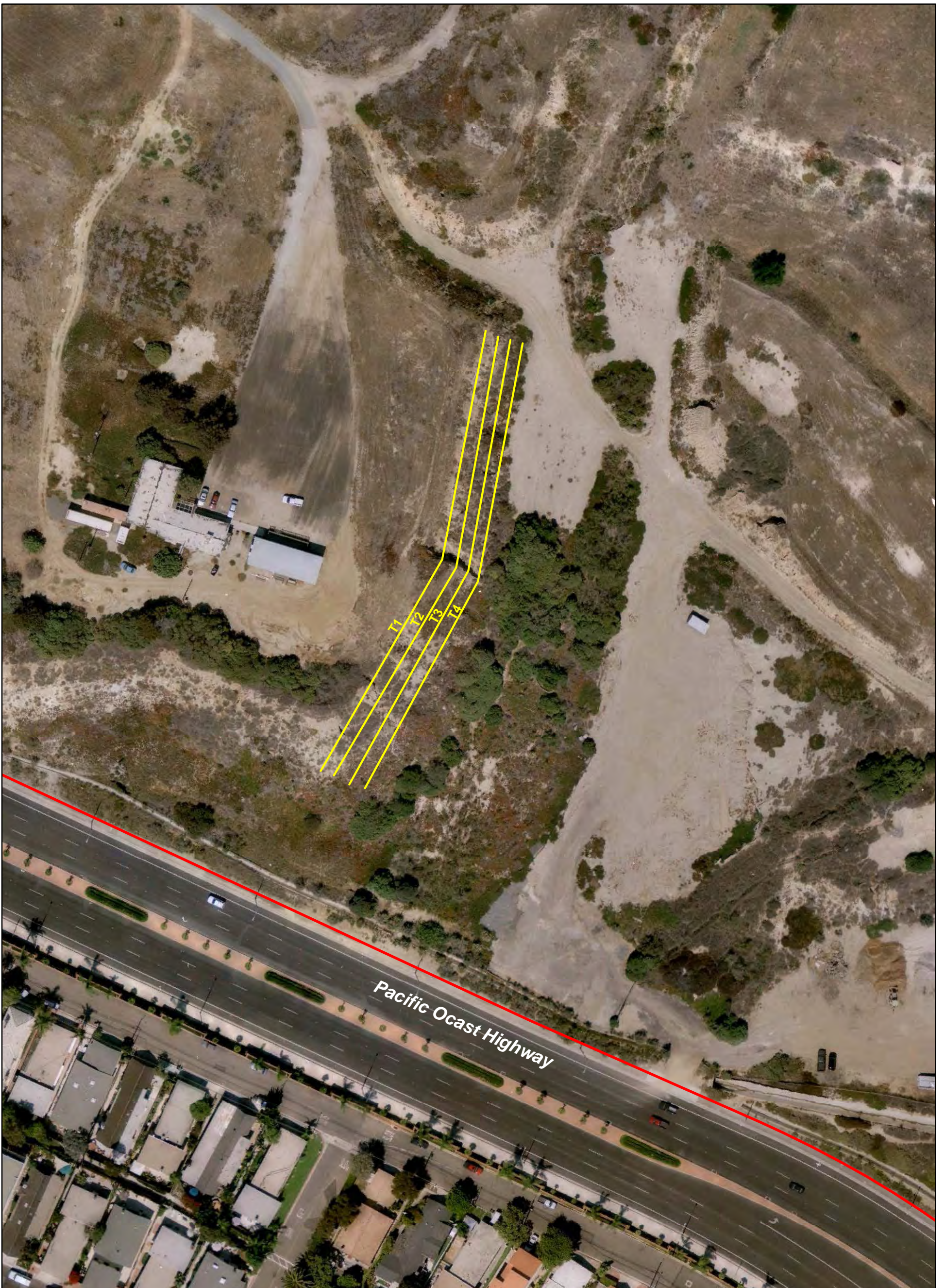
MEMORANDUM

November 9, 2010



Page 6

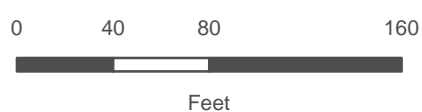
While 30-percent or more of the slope is still impacted by the asphalt-like material, it would not be difficult to remove most of the material which forms a thin veneer on the slope, generally a few millimeters thick. This could be removed using had tools (i.e., flat end shovels), without impacting much (if any) of the sparse native habitat on the slope).

Finally, it is important to note, as was done by Mr. Jeff Ahrens of GLA (see pages 1 and 2 of October 13, 2010 Memorandum by Mr. Ahrens) that the habitat on the Banning Ranch site is not easily characterized due to the long-standing disturbance by oilfield operations. Areas occasionally occupied by CAGN include highly disturbed areas, many of which will require removal or at least disturbance of habitat in order complete the oilfield cleanup operations that will be required by law. Evaluation of any area relative to habitat functions cannot be accurate accomplished without considering the overall context of the site and conditions associated with specific areas under consideration.



Legend

-  Property Location
-  Transect Location



NEWPORT BANNING RANCH

Transect Map

GLENN LUKOS ASSOCIATES

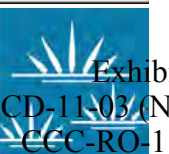
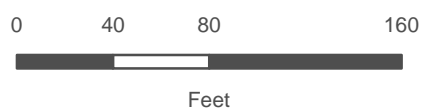


Exhibit 18
 CCC-CD-11-03 (NBR)
 CCC-RO-11-02
 Exhibit 1
 Page 7 of 10



Legend

- Property Location
- Transect Location



NEWPORT BANNING RANCH

Transect Map

GLENN LUKOS ASSOCIATES

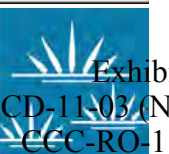
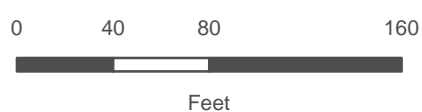


Exhibit 18
 CCC-CD-11-03 (NBR)
 Exhibit 2 CCC-RO-11-02
 Page 8 of 10



Legend

- Property Location
- Transect Location



NEWPORT BANNING RANCH

Transect Map

GLENN LUKOS ASSOCIATES



Exhibit 18
 CCC-CD-11-03 (NBR)
 Exhibit 3 CCC-RO-11-02
 Page 9 of 10



Photograph 1. CAGN & CAWR occupied MSS habitat on slope adjacent to the middle arroyo.



Photograph 2. Close-up view of CAGN & CAWR occupied MSS habitat on slope adjacent to the middle arroyo.



Photograph 3. CAGN & CAWR occupied MSS habitat on slope adjacent to the large arroyo.



Photograph 4. CAGN & CAWR occupied MSS habitat on slope adjacent to the large arroyo.



GLENN LUKOS ASSOCIATES

NEWPORT BANNING RANCH
Site Photographs

CALIFORNIA COASTAL COMMISSION

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

**VIA REGULAR MAIL AND EMAIL**

November 22, 2010

Leonie Mulvihill
City of Newport Beach
3300 Newport Boulevard
PO Box 1768
Newport Beach, CA 92658

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 coastal sage scrub; placement of solid material, including staging numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading

Dear Ms. Mulvihill:

Thank you for meeting with Commission staff on November 17, 2010 to discuss resolution of the Coastal Act violations described and identified in the Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings ("NOI") dated October 5, 2010. We're encouraged by your statement that the City takes resolution of these violations seriously and that your preference is, as ours certainly is, to resolve this issue consensually. We are very encouraged by our meeting and hope that we can work collaboratively to address the situation and greatly appreciate your assistance in achieving a resolution. You asked for some more detail about what a consent agreement, in other words, a consent order, would entail, and for more time to submit a Statement of Defense in response to our NOI letter. Therefore, the purpose of this letter is to explain further certain elements of a consent order to settle this matter that staff could propose to the Commission for its review, and also to address the response deadlines set in the October 5 NOI.

As you know, the October 5 NOI proposed consent and cease and desist and restoration orders as one option to resolve the issue of unpermitted development on the subject properties. Through the consent order process, all of the Commission's claims against the settling parties arising out of the Coastal Act violations at issue, and provided for in Chapter 9 of the Coastal Act (Judicial Review, Enforcement, and Penalties) would be resolved. The consent cease and desist and restoration orders would authorize and order the parties subject to the orders to restore the impacted areas of the subject properties and mitigate the resource damage caused by the unpermitted activities at a ratio consistent with the resource loss, and would resolve the issue of monetary penalties provided for in the Coastal Act for violations of the act.

Exhibit 19
CCC-CD-11-03 (NBR)
CCC-RO-11-02
Page 1 of 4

Restoration orders are site and resource specific remedies to Coastal Act violations authorized in Coastal Act Section 30811, which states: 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.” To achieve a resolution of this matter that is consistent with the terms of the Coastal Act, in part through issuance of a restoration order pursuant to Coastal Act Section 30811,¹ the habitat eliminated by the unpermitted development must be restored to the sites of the unpermitted development.

Restoration orders, pursuant to California Code of Regulations, Title 14, Section 13196(f), must provide the factual and legal basis for the Commission to issue a restoration order, which, as noted above, includes finding that the development is unpermitted or inconsistent with a permit issued under the Coastal Act, is inconsistent with the Coastal Act, and is causing continuing resource damage. Vegetation comprising rare native plant communities, including coastal sage scrub species and species of a very rare subset of coastal sage scrub, maritime succulent scrub, and habitat for the federally threatened coastal California gnatcatcher, constitute the predominant coastal resources affected by the unpermitted development in this case.

Commission staff ecologist Dr. Jonna Engel visited the subject properties, reviewed historic aerial photographs and available biological information pertaining to the site, and concluded, based on the information available, that two of the areas impacted by the unpermitted development, the northwest and southeast polygons², prior to the unpermitted activities, most likely would have met the definition of Environmentally Sensitive Habitat Areas (ESHA), as that term is defined in Section 30107.5 of the Coastal Act, due to the presence of a rare vegetation association (maritime succulent scrub) and by the presence and habitat requirements of the coastal California gnatcatcher.

Restoration specifically of the impacted areas is especially critical given the habitat characteristics of the impacted areas. The *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal. Ap.4th 493, 507-508] confirmed that the Coastal Act requires the protection of “the area of an ESHA” from development impacts and that habitat values are not “intangibles which can be moved from place to place.” *Id.* at 507 (emphasis in original). Thus, providing mitigation is not sufficient justification for allowing development with avoidable impacts to ESHA. For the Commission to approve a consent restoration order that fails to require restoration of the habitat within the impacted areas would in essence be authorizing removal of ESHA for the purpose of construction staging, which is clearly inconsistent with the Coastal Act 30240, which restricts development within ESHA to uses dependent upon ESHA, and the *Bolsa Chica* decision.

Staff would be happy to meet with you on site to further discuss ESHA on the subject properties, including, but not necessarily limited to documented and probable gnatcatcher use areas. To that end, as you know, we are arranging a site visit with our respective staffs and representatives of the parties involved in early December. To ensure that this meeting can be productive in the

¹ Such resolution would also involve issuance of Cease and Desist Order pursuant to Coastal Act Section 30810 and resolution of the Commission’s monetary claims for relief for those violations of the Coastal Act alleged in the October 5 NOI.

² As the locations of those areas are identified in the “Polygon Acreage Map” provided to staff by Newport Banning Ranch, LLC.

November 22, 2010

Page 3 of 3

context of negotiating towards a consensual resolution to this matter, I am again extending the deadline set in our October 5, 2010 "Notice of Intent" letter for submittal of a statement of defense, and the deadline to object to recordation of a Notice of Violation of the Coastal Act pursuant to Coastal Act Section 30812, both deadlines since extended by staff on October 21, 2010 and November 5, 2010, to **January 5, 2011**. I look forward to meeting with the parties on the site; please contact me at any time to continue our discussion of resolving this matter through consent orders.

Again, our goal is to resolve this situation amicably and as quickly as possible so that all parties can move forward. As you know, we invited permit staff to attend our meeting this week so that all parties, but especially the City, could consider the long term options at the site, and have a more full set of thoughts about the options and constraints we all are operating under. We greatly appreciate your time and input and look forward to discussing this matter further and working on consent orders to resolve the current NOI.

Sincerely,



Andrew Willis
District Enforcement Analyst

cc: Mike Mohler, Newport Banning Ranch, LLC
Marc Lusebrink, Southern California Edison
Herman Weissker, Inc., c.o. Tony Vedova, Meruelo Enterprises, Inc.
Sherilyn Sarb, Deputy Director, CCC
Lisa Haage, Chief of Enforcement, CCC
Karl Schwing, Orange County Planning Manger, CCC

MEMORANDUM

DATE: December 9, 2010

TO: Mike Sinacori, City of Newport Beach, Department of Public Works

FROM: Art Homrighausen and Richard Erickson

SUBJECT: California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site

At your request, this memo was prepared by LSA Associates, Inc. (LSA) in response to the California Coastal Commission's (CCC) Notice of Intent to Record a Notice of Violation (NOV) dated October, 5, 2010, for unpermitted development on portions of Newport Banning Ranch (NBR) and adjacent City of Newport Beach properties. In particular, discussed herein are issues relevant to the CCC Staff's suggestion that two impacted areas may constitute "environmentally sensitive habitat areas" (ESHA) under the Coastal Act because of observations of the coastal California gnatcatcher (*Poliophtila californica californica*), federally listed as threatened, and that a portion of the removed vegetation consisted of disturbed native scrub habitats.

SUMMARY OF RELEVANT DATA**Clarification of LSA's Gnatcatcher Data from 1992 to 1996**

LSA biologists conducted gnatcatcher surveys on NBR from 1992 through 1996. A table and maps prepared by Glenn Lukos Associates (GLA; memo addressed to Christine Medak dated February 10, 2010) summarize the results of those surveys, along with 6 additional years of surveys conducted by others. Figures 1–6 (attached) show information for the NOV area from those maps, along with information obtained from LSA's files. Survey efforts varied annually: nine person-mornings in 1992, three in 1993, and four each from 1994 through 1996.

Each year of the LSA surveys, composite maps were prepared that showed the distribution of approximate gnatcatcher territory boundaries at NBR. Normally, the maximum extent of area observed to be used by a gnatcatcher pair was illustrated. Because unmated gnatcatchers are rare early in the breeding season (when surveys were conducted) and surveys were necessarily brief, observations of single males or females were generally assumed to represent a pair. The composite maps were prepared from maps drawn in the field while birds were under observation and, when those were unavailable, the maps were based on recollections of gnatcatcher observations. 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 plant, barren or developed areas), and the territory maps do not distinguish suitable habitat from unsuitable habitat such as solid ice plant, roads, and structures.

The gnatcatcher polygon drawn in the southeast corner of NBR in 1993 is apparently of particular interest to the CCC at this time. This polygon straddles the boundary between NBR and the Sunset Ridge Park property and overlaps the southeast polygon identified in the NOV. 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 (LSA data on file; Figure 2). LSA has no more precise information on bird use of that polygon that year, but gnatcatcher use was not uniformly observed throughout the polygon and the appearance given by Figure 2 that the bird may have used denuded areas is not accurate (see Concerns discussed further below).

The southern portion of the northwest polygon identified in the NOV was included within gnatcatcher territories identified by LSA in 1992, 1994, and 1996 (Figures 1, 3, and 5). 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 that year.

Vegetation Within the NOV's Potential ESHAs

As shown in Figures 1–6, the area within the NOV's northwest polygon was mapped as Ruderal Scrub by LSA in about 1991. The entire area within the NOV's southeast polygon was mapped as Disturbed. Vegetation in these areas more recently was described in some detail in a GLA memo addressed to Michael Mohler dated August 26, 2010.

Gnatcatcher Use of the Southeast Corner of Newport Banning Ranch, 1992–2009

The February 2010 GLA memo provides details of gnatcatcher use of the entire NBR from 1992 through 2009. LSA's polygon data are compared with subsequent dot-location data provided by consultants PCR Services Corporation (PCR) in 1997 and 1998; GLA in 2002, 2006, and 2007; and BonTerra Consulting in 2009.

The GLA memo documents up to three gnatcatcher territories in the southeast corner of NBR, an area including two of the polygons (northwest and southeast) identified in the NOV, which CCC Staff is considering as potential ESHA. As shown in Table A, in 8 years of surveys prior to the vegetation removal discussed in the NOV, LSA, PCR, and GLA located an average of 1.25 territories per year in that area. Annual totals ranged from zero to three territories. Three years of surveys by GLA and BonTerra subsequent to the unpermitted development (vegetation removal) revealed a similar average of 1.33 territories per year with a range of one to two, and that despite the unpermitted development, the numbers of gnatcatchers using this area has remained essentially the same. (Note that GLA shape files show a 2007 dot in the exact spot as the 2006 dot, and thus obscured in Exhibit 4 of the GLA memo.) Survey results in excess of one territory were recorded in 2 of the 8 years prior to vegetation clearing and once in the 3 years following.

Concerns Associated with the Current Analysis

The effort to analyze California gnatcatcher use of specific locations within the NOV area over the past 20 years is a rather tortured process. To our knowledge, the emphasis of all of the NBR surveys conducted from 1992 through 2009 was to document the number and *approximate* locations of gnatcatcher territories over time. Territory polygons were drawn by LSA in the 1990s, but this was

not done by subsequent surveyors. None of LSA's surveys were done according to the multiple-visit survey protocol subsequently recommended by the United States Fish and Wildlife Service (USFWS), which are primarily designed to determine presence/absence. Although the locations of specific gnatcatcher observations were recorded during some LSA visits to the NOV area, there is no such record for many visits. Also, all direct recollection of events occurring >14 years ago are now lost. When specific locations were recorded in the field, their primary purpose was to aid in the determination of how many territories were represented. On top of all of this, the gnatcatcher mapping that was done in the 1990s was very crude compared with the tools and technology employed today to generate GIS shape files. LSA has done its best to accurately transfer those data, but a considerable amount of uncertainty remains.

CONSIDERATION OF ESHA DESIGNATION

LSA has several concerns about the evaluation of the NOV polygons with respect to an ESHA determination.

Application of the ESHA Definition to the NOV Polygons

There are two important aspects of the ESHA definition that both should be fulfilled to merit that classification: (1) "...rare or especially valuable..."; and (2) "...which could be easily disturbed or degraded by human activities or developments." The California gnatcatcher is undeniably a threatened species. However, the habitat that was likely present at the time of the alleged violation is by no means rare or especially valuable, even for the gnatcatchers that may utilize it from time to time. This disturbed type of habitat occurs throughout the NBR property; some years it is incorporated into spatial limits of a particular gnatcatcher territory, and some years it is not. More importantly, the value of this habitat is not easily disturbed or degraded. This disturbance and degradation have occurred for decades, and the particular disturbance cited in the NOV had no substantial effect on gnatcatcher utilization of the area, given the fact that gnatcatchers continued to use this area after the disturbance. It should also be noted that of the 5 years of LSA surveys in the 1990s, the northwest polygon was a relatively small portion of gnatcatcher territories in 3 years, and the southeast polygon was a portion of one territory in 1 year. This is additional evidence that the NOV polygons are not critically important to the persistence of gnatcatcher territories in this portion of the property.

Consideration of Facts

When ultimately making an ESHA determination, available facts should be carefully considered. For example, it is tempting to make an a priori assumption that if an area is utilized by the gnatcatcher, it must support essential habitat for that species. However, there are two facts that belie this assumption: (1) large portions of the NBR property and Sunset Ridge Park, including the southeast area that encompasses the NOV polygons, have been frequently disturbed for decades; and, (2) California gnatcatcher territories in this area have been variable, with one or two pairs in most years and a great deal of variability in the configuration of territories. Interestingly, in some years, the mapped territories have been relatively small and limited to various scrub habitats, and in other years, they have been larger and more inclusive of disturbed habitat areas that are typically not considered gnatcatcher habitat by the USFWS.

Timing

It is premature, unnecessary, and ill-advised to make an ESHA determination on these relatively small patches of ground identified in the NOV at this time. The consequences of such a determination on the important planning efforts for the NBR and Sunset Ridge Park are significant. As noted by the Court in *Bolsa Chica Land Trust v. Superior Court*, the CCC has substantial latitude in determining whether a particular area should be considered an ESHA, but once that determination has been made, the CCC does not have the power to alter its strict limitations. Given these circumstances, it seems that if an ESHA, by law, is so valuable that it cannot be altered, or that habitat values cannot be transferred elsewhere, then the ESHA threshold should be reserved for areas that likewise cannot be easily altered or transferred for biological reasons. For the NBR and Sunset Ridge Park properties, it seems best to make such judgments about the relative value of resources within the context of the entire area. Of course, the key aspects of the ESHA definition, which are discussed above, should be considered at that time.

REMEDY

The restoration remedy proposed by the City of Newport Beach, in association with the Sunset Ridge Park project, combined with the existing habitat in the vicinity of the NOV polygons, will almost certainly increase the habitat value in that area, compared to conditions observed by LSA in the 1990s, as well as the conditions that have existed over this past decade. The facts that such restoration efforts are entirely feasible and will enhance the persistence of gnatcatcher territories in this area obviate the need to make an ESHA determination at this time.

Attachments: Figures 1–6
Table A



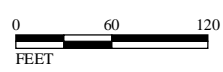
LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1992 CAGN Observations (LSA)
- 1992 Estimated CAGN Territories

- Habitat (c. 1991)
- Annual Grassland (AG)
 - Coastal Bluff Scrub (CBS)
 - Mixed AG/CBS
 - Disturbed Coastal Bluff Scrub (CBDSD)

- Disturbed (DIST)
- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)



SOURCE: Bing Maps (2008); LSA (c. 1991)

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FIGURE 1



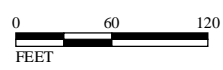
LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1993 CAGN Observations (LSA)
- 1993 Estimated CAGN Territories

- Habitat (c. 1991)
- Annual Grassland (AG)
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 - Mixed AG/CBS
 - Disturbed Coastal Bluff Scrub (CBSD)

- Disturbed (DIST)
- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)



SOURCE: Bing Maps (2008); LSA (c. 1991)

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FIGURE 2



FIGURE 3

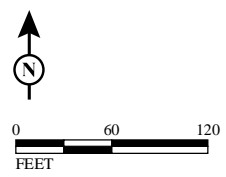
LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1994 CAGN Observations (LSA)
- 1994 Estimated CAGN Territories

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- Non-native Woodland (NNW)
 - Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
 - Ruderal Scrub (RS)



SOURCE: Bing Maps (2008); LSA (c. 1991)
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FIGURE 4

LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1995 Estimated CAGN Territories

Habitat (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)



SOURCE: Bing Maps (2008); LSA (c. 1991)

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FIGURE 5

LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1996 Estimated CAGN Territories

Habitat (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)



SOURCE: Bing Maps (2008); LSA (c. 1991)

F:\CNB1006\GIS\CAGN_Veg_Series.mxd (12/3/2010)



FIGURE 6

LSA

LEGEND

- Project Boundaries
- Areas of Violation
- CAGN Observations (GLA and others) (1997, 1998, 2002, 2006, 2007, 2009)

- Habitat (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)



SOURCE: Bing Maps (2008); LSA (c. 1991)

F:\CNB1006\GIS\CAGN_Veg_Series.mxd (12/3/2010)

Table A. History of California Gnatcatcher Use in the NOV Area.

Year (Observer)	Number of California Gnatcatcher Territories Identified
1992 (LSA)	1
1993 (LSA)	1
1994 (LSA)	1
1995 (LSA)	0
1996 (LSA)	1
1997 (PCR)	2
1998 (PCR)	3
2002 (GLA)	1
1992–2002 (n=8)	mean = 1.25
2006 (GLA)	2
2007 (GLA)	1
2009 (BonTerra)	1
2006–2009 (n=3)	mean = 1.33



HAMILTON BIOLOGICAL

December 11, 2010

Dr. Jonna Engel
California Coastal Commission
200 Ocean Gate
Long Beach, CA 90802-4316

**SUBJECT: REVIEW OF ESHA ISSUES
BLUFF ROAD/SUNSET RIDGE PARK ENTRANCE**

Dear Dr. Engel,

On behalf of the Banning Ranch Conservancy, Hamilton Biological, Inc. has reviewed biological issues related to the proposed Sunset Ridge project, located in Newport Beach at the corner of Superior Avenue and West Coast Highway, and including part of the adjacent Newport Banning Ranch property. We are aware that the California Coastal Commission is currently evaluating unpermitted habitat removal that took place in the southeastern part of Newport Banning Ranch starting in 2004. In a letter to Karl Schwing dated May 25, 2010 (copied to you and others), I provided biological information on the Sunset Ridge project. My current comments focus mainly upon the western portion of the project site (the area proposed for construction of the park's entry road), in the vicinity of your ongoing investigation (see Figure 1).

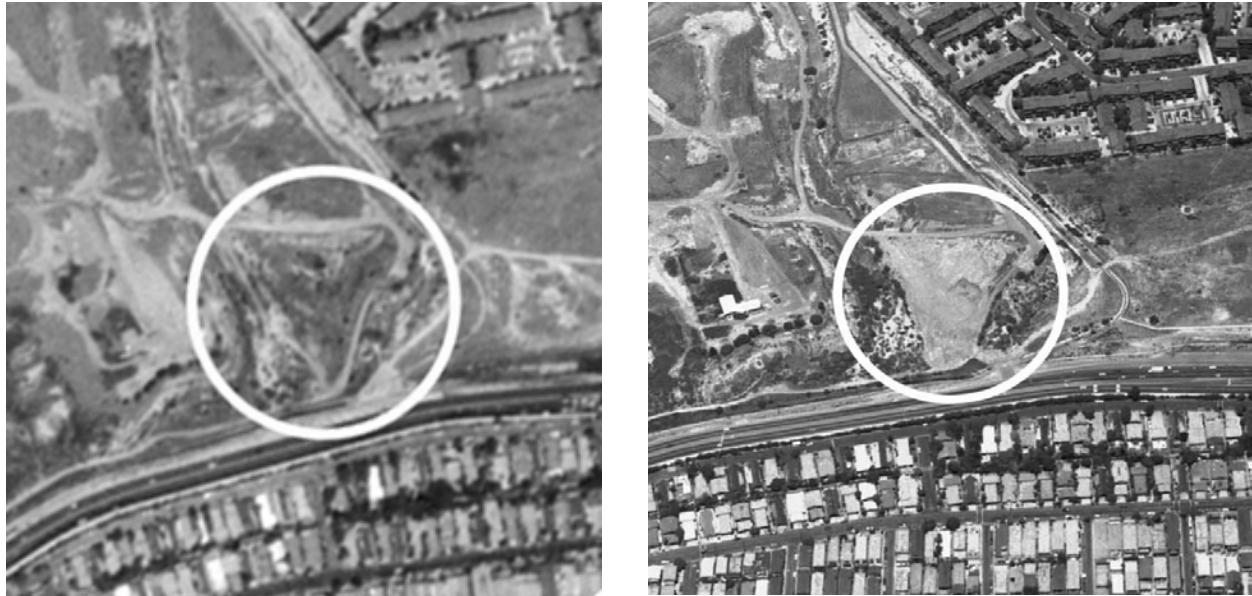


Figure 1. The yellow line represents the proposed limits of grading for the Sunset Ridge entrance road and parking lot; grading for the rest of the park would extend off to the southeast. Green screen shows an "island" of coastal scrub and grassland that would be preserved under the proposed grading plan. Pink screen shows three areas cleared in 2004 without a coastal development permit. Proposed grading overlaps entirely with the Southeastern Polygon, partially with the Northeastern Polygon, and is adjacent to the Northwestern Polygon.

Exhibit 21
CCC-CD-11-03 (NBR)
CCC-RO-11-02

CLEARING IN THE EARLY 1980S

Before discussing the issues surrounding the current Notice of Violation in the southeastern part of Newport Banning Ranch, let me bring to your attention another large area in the same general vicinity that was completely cleared between 1980 and 1984 (see Figures 2, 3). Was this clearing permissible under the California Coastal Act?



Figures 2, 3. As shown in these historical aerials, vegetation in the circled area was generally intact in 1980 (left) but completely cleared by 1985 (right). A largely barren scar remains visible in the area proposed for the park's entry road (see, for example, Figure 1).

ESHA DETERMINATION

A key issue to be resolved is whether some or all of the cleared areas, as well as other areas planned for impacts under the City's proposed grading plan, qualify as Environmentally Sensitive Habitat Areas (ESHA) under the California Coastal Act. Before addressing this question directly, I will discuss various relevant considerations.

Designated Critical Habitat

First, the entire project site is designated as critical habitat for the federally threatened Coastal California Gnatcatcher (*Polioptila californica californica*). 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 are

clude not only intact sage scrub habitats (i.e., PCE 1), 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”¹ (i.e., PCE 2).

The City has consistently argued that only limited portions of the Sunset Ridge/Newport Banning Ranch site provide the PCEs of gnatcatcher critical habitat. For example, one of the City’s responses to my comments on the DEIR reads:

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.

When I asked Chris Medak of the U.S. Fish & Wildlife Service (USFWS) whether this was true, she e-mailed the following response on March 23, 2010: “I have advised the City that the whole [Sunset Ridge] site would be considered critical habitat containing the primary constituent elements for the gnatcatcher (primarily PCE 2).”

Distribution of California Gnatcatchers on the Site

The City has consistently attempted to portray the occurrence of California Gnatcatchers as being largely or entirely outside the limits of grading for the Sunset Ridge project. For example, the Sunset Ridge DEIR’s Impact section states:

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.

My comments on the DEIR and my letter to Mr. Schwing include photos of at least one pair of gnatcatchers that I found foraging in three different “non-utilized” parts of the Sunset Ridge site in November 2009. The City replied, in part:

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.

To clarify, the birds were using patches of native scrub and the term “general territories” has no defined meaning, so this reply was non-responsive. I will address the gist of the City’s reply — that areas used outside of the breeding season are unimportant to the gnatcatcher — after discussing (a) updated information concerning the gnatcatcher’s status and distribution on the project site, and (b) the City’s repeated mischaracterizations of the site’s upland scrub communities.

On June 3, 2010, I photographed an adult male California Gnatcatcher (Figures 4–5), and on December 10, 2010, I photographed another California Gnatcatcher — probably a first-year male (Figures 6, 7). Both of these birds were using parts of the Sunset Ridge project site that the City claims to be unoccupied (Figure 8).

¹ 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 (*Poliophtila californica californica*). Federal Register 72:72069 (December 19, 2007).



Figures 4, 5. Photos taken on June 3, 2010, showing an adult male California Gnatcatcher using a portion of the Sunset Ridge project site that the City claims as being unoccupied by this species (see Figure 8, below).



Figures 6, 7. Photos taken on December 10, 2010, showing a California Gnatcatcher (probably a first-year male based upon the grayish brown back and faint black streak over the eye) using California Encelia in a portion of the Sunset Ridge project site that the City claims as being unoccupied by this species (see Figure 8, below).



Figure 8. Yellow polygons show four locations of California Gnatcatchers during the non-breeding seasons of 2009 and 2010. Green polygon shows one location of an adult male gnatcatcher during the breeding season in 2010. The City argues that these areas are not occupied by the gnatcatcher.

As documented in my letter to Mr. Schwing, various plant assemblages that include a strong native scrub component have been erroneously mapped as “ornamental” and “ruderal” by the City’s consultants. Figures 9 and 10 show mis-mapped areas located directly within the proposed alignment of the park’s entrance road and parking lot.



Figure 9. Photo taken on November 15, 2010, showing native scrub growing along West Coast Highway at the proposed entrance road to Sunset Ridge Park. The habitat contains native Big Saltbush, Mulefat, and Coast Goldenbush. Non-native Pampas Grass is also present, but this scrub clearly provides suitable habitat for California Gnatcatchers. In the DEIR, BonTerra Consulting mapped this scrub as “ornamental.” In the Coastal Commission’s file, a map by Glenn Lukos Associates classifies this area as “invasive/ornamental.”

Figure 10. This photo, taken on December 10, 2010, shows native Mulefat surrounded by re-sprouting California Encelia. In the DEIR for Sunset Ridge, this vegetation was erroneously mapped as “ruderal.” I observed a pair of California Gnatcatchers foraging in this Mulefat on November 4, 2009 (see the northernmost polygon on Figure 8). This stand of native scrub would be removed for the park’s parking lot.



The City’s consultants have erroneously mapped the vegetation in several other parts of the Sunset Ridge site, always in the direction of under-representing sensitive resources. The City has claimed that the mapping is adequate, and also that any possible errors should be ignored because some of the areas involved are too small to map. And yet, as shown in my letter to Mr. Schwing, the DEIR’s plant community map identifies “ornamental” and “disturbed” polygons as small as 0.01 acre. This prejudicial abuse of discretion by the City violates Section 21168.5 of CEQA.

Figure 11 shows locations in the vicinity of the proposed park entrance road where biologists have documented breeding pairs of California Gnatcatchers during nine survey efforts conducted during the last two decades.



Figure 11. Point locations for California Gnatcatcher pairs documented during the breeding season in 1992 (one pair), 1994 (one pair), 1996 (one pair), 1997 (two pairs), 1998 (three pairs), 2000 (two pairs), 2006 (two pairs), 2008 (one pair), and 2009 (one pair). The birds do move around to forage, and so the actual area of habitat usage during the breeding season is much more extensive than just the points shown here (see Figure 12).

To demonstrate that some patches of suitable scrub habitat in the southeastern corner of Newport Banning Ranch are not used by gnatcatchers during the breeding season, one would have to map the areas of habitat use and non-use throughout the breeding season, preferably over a period of years (since areas of habitat use may shift from year to year, and during some years multiple pairs occur in this area). At Newport Banning Ranch, such an effort has never been undertaken². Furthermore, since 1997, most surveys have simply mapped a point for each pair, with no effort made to graphically depict areas of habitat usage. Since the determination of use and non-use areas during breeding season cannot be made directly, from examining field data, the current effort by the Coastal Commission staff to evaluate habitat usage by gnatcatchers should consider the typical and minimum

² Having conducted some of these focused gnatcatcher surveys of the subject property for LSA Associates in the early 1990s, I am aware that they were mainly presence/absence surveys. It is my recollection that we typically spent 15-30 minutes per pair per day, for a maximum of two days, mapping the birds' movements. We did not follow pairs for extended periods throughout the course of the breeding season, as would have been necessary to determine which patches of habitat were and were not being used by the birds during the breeding season (much less the non-breeding season).

home range/territory size of gnatcatchers (as determined in studies designed to measure territory size) and the species' known habitat requirements.

As summarized in the *Birds of North America Online*³, the minimum territory size for California Gnatcatchers in coastal areas during the breeding season is 1.0 hectare, and the mean territory size during the breeding season is 2.3 hectares:

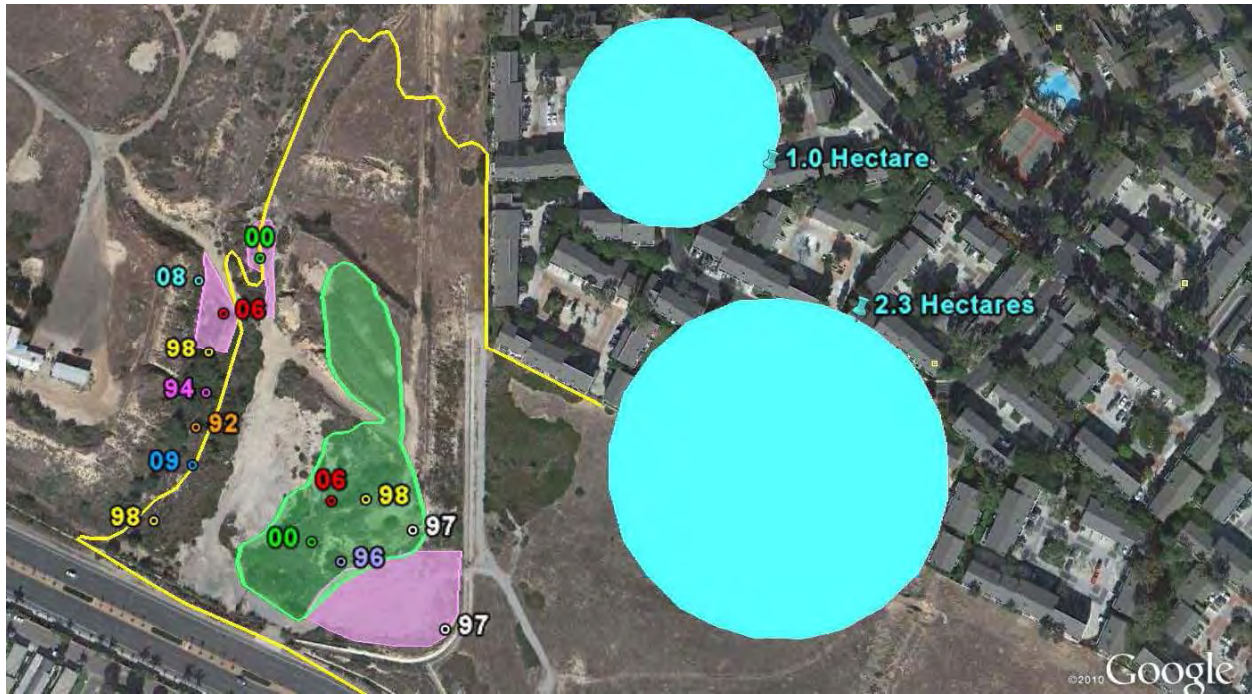


Figure 12. Blue circles help to visualize the minimum (1.0 ha) and mean (2.3 ha) breeding territory sizes for a pair of California Gnatcatchers in a coastal area (from Atwood and Bontrager 2001).

As shown in Figure 12, a breeding pair of gnatcatchers in the southeastern part of the Newport Banning Ranch property is likely to utilize all areas of scrub habitat in the local area. During years when more than one pair breeds in this area (as in 1997, 1998, 2000, and 2006), the effective territory sizes (excluding barren areas) may be even smaller than the 1.0-ha minimum reported in the literature.

With regard to patterns of habitat utilization outside of the breeding season, the species account in *Birds of North America* (Atwood and Bontrager 2001) explains that California Gnatcatchers utilize much more of the landscape during fall and winter:

Territories defended during nonbreeding season (Preston et al. 1998)⁴; wandering into adjacent territories or unoccupied habitat may result in up to 80% increase in home range size

³ Atwood, Jonathan L. and David R. Bontrager. 2001. California Gnatcatcher (*Poliioptila 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>

⁴ 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.

relative to area used during nesting (Bontrager 1991⁵, 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).

The City maintains that this increase in home range size during the winter is not important to the gnatcatcher, and that the birds could persist just as well by remaining in the same areas utilized during the breeding season. This position presents some important questions that its proponents have not attempted to answer. For example:

- If all needs can be met within the breeding territory, why would the birds expend extra energy, increase their exposure to predators, and increase their competition with other small insectivores (including other gnatcatchers) in order to forage over a much wider area during the colder months of the year?
- The above-quoted text mentions “regular movements of 25–100 m across grassland gaps.” Such movements by small, weak-flying species provide good predation opportunities for hawks. Would gnatcatchers undertake such risky flights for no reason at all?

It should be clear that this entire argument is speculative — a hypothetical exercise comparable to debating whether Arctic-breeding Baird’s Sandpipers *really need* to migrate all the way to South America (as they all do) when they could more easily satisfy their winter habitat needs in North America without having to fly so far. Scientific studies in the peer-reviewed literature have demonstrated that California Gnatcatchers utilize different parts of the landscape during different times of the year. My observations demonstrate that gnatcatchers also do this at the Sunset Ridge site. Unless the City provides credible scientific evidence showing that gnatcatchers on the Sunset Ridge project site *need not behave the way they do*, the default conclusion should be that the birds’ behavior reflects their own survival needs.

It is my personal observation that California Gnatcatchers utilize essentially all mature, scrub-containing communities on the Sunset Ridge project site, including areas of scrub intermixed with Pampas Grass and other exotic plants. For the reasons I have explained, I believe that all of these areas should be regarded as occupied habitat, consistent with (1) my documented observations in 2009 and 2010; (2) the scientific literature describing the gnatcatcher’s habitat requirements and patterns of landscape use during breeding and non-breeding periods; and (3) the USFWS critical habitat designation, including Christine Medak’s confirmation that “the whole site would be considered critical habitat containing the primary constituent elements for the gnatcatcher (primarily PCE 2).”

⁵ 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.

Unpermitted Mowing and Spraying of Encelia Scrub

If California Gnatcatchers are mainly restricted to the Newport Banning Ranch portion of the Sunset Ridge site during the breeding season, this may be largely or entirely attributable to the City's repeated, unpermitted mowing and spraying of several acres of encelia scrub on the lower mesa of Sunset Ridge:



Figures 13–15. Photos of the site's lower plateau, taken on November 6, 2009 (left), March 20, 2010 (right), and December 10, 2010 (below). In this area of several acres, the City routinely mows native California Encelia to within inches of the ground and sprays it with herbicide.



Southland Landscape Maintenance & Installation
P.O. Box 11437
Costa Mesa, CA. 92627
949-515-4588 Office
949-515-5733 Fax

05/19/09

Vendor #1065


Proposal

PA when in bill

FKI

PA

10



Customer Information:

City of Newport Beach
General Services
Attn: Dan Sereno
Park & Tree Superintendent

7412-C5100515

Sunset Park- Flat Area Growth Reduction

Work will begin inside the enclosed/fenced-in area bordered by the condominium development above the park. (The access road and surrounding area coming in from Pacific Coast Highway is not part of this bid). The work will conclude along the inside of the block wall adjacent to the upper portion of the park above Superior.

The work will consist of cutting down all vegetation excepting the Mule Fat and Ice plant, down to approximately six inches above soil level. The large debris resulting from this work will be loaded into company trucks on site, and be hauled away, some small cuttings will be left on site. All disposal fees are included in this proposal.

No slope areas are included in this proposal, a separate bid will be submitted for those areas. The above bid will be honored for seven days from the submittal date due to the very rapid flat area growth rate.

Apply one spraying of a general purpose herbicide to both the lower and upper flat areas within the park. The herbicide will be mixed with an adjuvant to assist the herbicide adhering to the plants/weeds and a color tracer. The herbicide will be mixed in a minimum of 5% active solution and all areas will be covered in the application as described above.

Total Bid Amount.....\$9440.00


Gina Parrella
Southland Landscape Maintenance

DSE 5/26/09
Approval

Figure 16. Copy of a proposal to the City dated May 19, 2009, for the mowing and spraying of encelia-dominated scrub across the City-owned portion of the Sunset Ridge project site (a.k.a. "Flat Area Growth Reduction"). See also Figure 17, on the next page.

PAYMENT AUTHORIZATION

CITY OF
**NEWPORT
BEACH**



COPY

Demand of: Southland Landscape

Address: P.O. Box 11437
Costa Mesa, Ca. 92627

Date: 07/02/2009

Dept. General Services

Amount: \$9,440.00

Item of Expenditure	Invoice No.	Budget No.	Amount
Park development clearing at Sunset Ridge Park.	GS10087	7412-C5100515	\$9,440.00
TOTAL			\$9,440.00

Comments/Special Instructions: FY 08/09
Work performed as per Mike Sinacori's request.

Department Approval: _____ **Date:** _____

Fiscal Svcs Manager Approval: _____ **Date:** _____

Admin Svc Director Approval: _____ **Date:** _____

Figure 17. This authorization of payment of \$9,440 to Southland Landscape for "Park development [sic] clearing at Sunset Ridge Park" indicates that the City itself views habitat removal as a preliminary step toward its planned development of Sunset Ridge Park, rather than as routine maintenance.

California Encelia is a fast-growing native shrub favored by California Gnatcatchers. For example, of the nine sage scrub associations studied by Weaver (1998), “encelia scrub” dominated by California Encelia and California Sagebrush (*Artemisia californica*) had the second-highest median density of gnatcatchers⁶. California Encelia can quickly form coastal scrub habitat, but the routine disturbance of this habitat decreases its functionality. Later in the season, when the encelia’s bloom fades, mustards and other weeds become more apparent within this chronically disturbed scrub. The City’s repeated mowing and spraying of this large area prevents mature coastal scrub habitat from developing across the main portion of the site.

The City’s repeated removal of encelia scrub (a.k.a. “Park development clearing at Sunset Ridge Park”) appears to represent a form of unpermitted “development,” as defined in Section 30106 of the Coastal Act:

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

Responding to comments on the DEIR, the City stated:

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

California Encelia is not a “weed,” it is a native shrub and an integral component of designated critical habitat for the California Gnatcatcher. In notes from an *ex parte* communication with City agent Donald Schmitz on August 3, 2010, Coastal Commissioner Bonnie Neely wrote, “the Fire Marshall continued to maintain the property [by removing all encelia scrub annually] for fire protection purposes.” One major problem with the City’s explanation is that California Encelia is not a fire hazard. 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.”⁷ Furthermore, removal of encelia scrub is carried 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.

Finally, it should go without saying that *all* vegetation is “combustible.” Many natural areas around Newport Beach, such areas as Upper Newport Bay and Buck Gully, support scrub dominated by native plant species known to be more combustible than California Encelia (by the Orange County Fire Authority’s standards). Yet in those areas, the City seems to understand that it would be illegal to remove, without any form of environmental review, native habitat up to a distance of 570 feet from existing structures. Thus it is bizarre for the City to claim, without further explanation, that these radical landscape alterations are required at Sunset Ridge in order to comply with the Fire Code.

⁶ Weaver, K. L. 1998. *Coastal sage scrub variations of San Diego County and their influence on the distribution of the California Gnatcatcher*. *Western Birds* 29:392–405. Exhibit 21
CCC-CD-11-03 (NBR)

⁷ http://www.ocfa.org/_uploads/pdf/guidec05.pdf

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 constitutes an acceptable maintenance practice for sensitive coastal open space. "Caltrans did it first," "Fire Marshall's orders," and "People have complained about dead-looking plants" are not adequate explanations. The City's current 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 actions may represent a form of unpermitted "development" per Section 30106 of the Coastal Act.

Finally, it should be obvious that, with its program of mowing and spraying, the City *has been contributing* to the disturbed and degraded conditions that it claims to be abating. After years of this practice, the City now claims that encelia scrub on the site is not biologically valuable. If one agrees with this conclusion, it is because the habitat has been "easily disturbed or degraded by human activities and developments." The annual cost of disturbing and degrading this habitat is a modest \$9,440.

Notice of Violation

Of three areas cleared without permits in 2004, only the Southeast Polygon is visible from adjacent public lands, and so I will focus most of my comments on this polygon.

In the Commission's file, communications from Newport Banning Ranch LLC and their consultants refer to biological work that has taken place on the property starting in the late 1990s, with no reference to work that was done by LSA Associates in the early and mid 1990s. The public files available at the U.S. Fish and Wildlife Service include a vegetation map dated February 13, 1993, which I helped to prepare when I was an employee of LSA. The copy obtained by the Banning Ranch Conservancy is too small and smudged to be completely legible, and this map would have been largely outdated by the time the violation took place in 2004, but it should be reviewed as part of any effort to evaluate the vegetation that was likely present in the three polygons at the time of their clearance.

I have not seen the vegetation map by PCR that is referred to in some documents, but given that there is no way of field-checking such a map I would have low confidence in its accuracy. This is based on my experience reviewing numerous biological reports by PCR, and also takes into consideration the many errors contained in the recent mapping of vegetation on the Sunset Ridge and Newport Banning Ranch properties by BonTerra Consulting and Glenn Lukos Associates (see, for example, Figures 9 and 10 in this letter and Figures 1-9 in my letter to Mr. Schwing).

The following Figures 18 and 19 show the Southeast Polygon as it appeared in 2003 and 2009. Figures 20-22 are photos of this polygon taken on December 10, 2010. When evaluating the arguments set forth by Glenn Lukos Associates in a series of memoranda prepared on behalf of Newport Banning Ranch, LLC, it is important to bear in mind the obvious loss and degradation of the habitat that was present in this area, adverse effects on the environment that persist to this day.



Figure 18. Aerial image dated December 30, 2003, showing the vegetative cover present in the Southeast Polygon several months prior to the start of clearing in 2004.



Figure 19. Aerial image dated November 14, 2009, showing the vegetative cover present in the Southeast Polygon *several years* after the start of clearing in 2004. The scrub vegetation that was present in this area before the clearing took place showed little sign of recovery as of the date of this photo. Figures 20–22 on the next page show this polygon as it appears now.



Figure 20. Photo of the Southeast Polygon, view to the northeast, taken on December 10, 2010. Some California Encelia is growing back along the margins, but much of the vegetation shown here is Castor Bean, a non-native, invasive weed typical of disturbed areas.

Figure 21. Photo of the Southeast Polygon, view to the north, taken on December 10, 2010. Only limited recruitment of California Encelia is visible throughout most of the cleared area.



Figure 22. Photo of the Southeast Polygon, view to the northwest, taken on December 10, 2010. Most of the cleared area remains barren.

Tony Bomkamp of Glenn Lukos Associates prepared a memorandum to Michael Mohler dated August 26, 2010, that was submitted to the Coastal Commission staff. In the memo, Mr. Bomkamp does not claim to know with certainty the composition of the vegetation that existed in the violation areas prior to their clearing, but on Page 5 he suggests:

... the Southeast Polygon likely supported areas of fig marigold (*Carpobrotus edulis*), small-flowered ice plant (*Mesembrianthemum nodiflorum*) and non-native grasses (*Bromus madritensis rubens* and *Bromus diandrus*) as well as moderately to highly disturbed MSS [maritime succulent scrub], dominated by California encelia (*Encelia californica*) and limited amounts of California buckwheat (*Eriogonum fasciculatum*).

He is stating a belief that disturbances conducted in years prior to 2004 degraded the vegetation in the Southeast Polygon. Nevertheless, it appears (from Mr. Bomkamp's description and the December 2003 aerial image) that this polygon was being successfully colonized by pioneering native scrub species, such as California Encelia and California Buckwheat. As shown in Figure 18 in this letter, the habitat had clearly recovered to a point where it was providing suitable habitat for the California Gnatcatchers known to occupy this area. Through natural succession, the scrub likely would have become more complex and more fully developed during the past several years (had it not been cleared).

As of December 2010, several years after being cleared, the scrub in the Southeast Polygon has yet to recover (see Figures 20–22 in this letter). I have not been able to see the other two violation polygons from public lands. If the Southeast Polygon did support a mix of non-native plants and "moderately to highly disturbed MSS" in 2003/2004, several years later the area supports even more weeds, more bare areas, and *extremely* disturbed MSS. There has also been temporal loss of functional upland scrub habitat. The habitat present now is severely degraded compared to conditions in 2003/2004. Furthermore, had this area not been cleared, the scrub that would have existed there now presumably would have been of higher quality than it was at the time of clearing.

On Page 5 of his memorandum, Mr. Bomkamp asserts that clearing of scrub dominated by California Encelia (with some California Buckwheat) would not constitute a loss of ESHA, in part because California Encelia is neither rare nor easily disturbed. It is not the rarity of the plant species themselves that is at issue, but the rarity of the habitat those plants provide for the a listed species, the California Gnatcatcher, due to the structure of the habitat and its position on the landscape.

Also on Page 5, Mr. Bomkamp states, "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." Please refer to Figures 19–22 in this letter. California Encelia can recover quickly from disturbance that does not remove its roots, but there is obviously a big difference between mowing this plant and grading it, a fact omitted from Mr. Bomkamp's analysis.

In a follow-up memorandum to you dated October 13, 2010, Jeff Ahrens of Glenn Lukos Associates provides additional opinions concerning gnatcatcher use of the cleared areas, and about the extent of ESHA on the Newport Banning Ranch/Sunset Ridge site. Please

recall that, in 2009, Mr. Ahrens argued that the Belding's Savannah Sparrow did not occur on the Cabrillo Mobile Home violation site in Huntington Beach, until I provided photos documenting the species' presence there. Page 1 of his memorandum states:

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.

In yet another analysis, this one dated November 9, 2010, Mr. Bomkamp makes a similar argument about the scrub on the slope above the Northwest Polygon (comparing that scrub to the most pristine patches of scrub on the property). Despite all this hand-waving, the relevant question is not whether the cleared scrub was the most pristine scrub in the area, but whether it satisfied the criteria of ESHA prior to its clearing.

In their analyses of whether gnatcatcher use of the cleared areas could provide a valid reason to make an ESHA designation, I find it remarkable that both Mr. Bomkamp and Mr. Ahrens fail to so much as *mention* that the habitat in question is designated as critical habitat for the California Gnatcatcher. Furthermore, it seems clear that at least some, if not all, of the violation areas contained the Primary Constituent Elements required for nesting and foraging (PCE 1). The federal Endangered Species Act makes it clear that areas of critical habitat are considered to be especially valuable to listed species; "PCE 1" lands with a legacy of occupancy by the species in question are regarded as the most valuable of all.

A heading on Page 7 proclaims "No Effects on the California Gnatcatcher by the 2004 Activities." Mr. Bomkamp cannot know whether additional birds might have occupied this area if more habitat was present, or whether the reproductive success of birds that nested in this area would have been greater with additional habitat available to them. As such, the proclamation of "no effects" is completely speculative and contrary to common sense. Not even his colleague, Mr. Ahrens, makes this claim.

At the bottom of Page 7, Mr. Bomkamp suggests that the cleared areas were not "mapped as consistently occupied" by gnatcatchers, and that scrub growing on the hill formation north of the Southeast Polygon provides the truly valuable habitat in this area. Mr. Ahrens makes similar statements in his memo of October 13, 2010, and Mr. Bomkamp promotes a similar position in his November 9, 2010, memorandum. As discussed previously in this letter, no surveys of Newport Banning Ranch have ever attempted to define areas of habitat usage/non-usage by the gnatcatcher using standard, accepted methods; furthermore, most surveys since 1997 have represented gnatcatcher pairs by placing single dots on a map. It is not valid to use the results of presence/absence surveys to suggest that specific areas of suitable habitat were not regularly used by gnatcatchers prior to clearing.

Consider also that, in the limited time I have spent on the City-owned portion of the site in 2009 and 2010, I have *three times* photographed California Gnatcatchers perched on the fence bordering the *south* side of the Southeast Polygon (see Figure 4 in this letter and Figures 13 and 14 in my earlier letter to Mr. Schwing). And yet, Mr. Bomkamp claims the species is basically limited to scrub on the hillside *north* of this polygon (again, Mr. Ahrens is more circumspect, offering tepid suggestions that the birds probably stayed mostly on the north side of the Southeast Polygon). The use of presence/absence surveys to make arguments that gnatcatchers have used (or have likely used) certain areas of scrub, but not others in the nearby vicinity, is speculative and highly inappropriate.

Finally, I note that both Mr. Bomkamp and Mr. Ahrens chose to ignore the observations of gnatcatchers on the site that I reported in my comments on the DEIR.

On Pages 9 through 14 of his memo of August 26, 2010, Mr. Bomkamp engages in lengthy discussion of issues related to patch size and connectivity, invasive plants, and proximity to development. Each of these discussions is taken straight from the City's Coastal Land Use Plan (CLUP), which does not apply to the area in question (because it is an area of deferred certification)⁸. This discussion is irrelevant, at least with reference to the Southeast Polygon, since this area is not isolated, dominated by non-native plants (at the time of clearing), or located in close proximity to forms of development that would render it incapable of supporting ESHA.

With regard to the CLUP, I wish to state clearly that there are very good reasons why Newport Banning Ranch was left as an area of deferred certification: Many people, myself included, believe that this area of extremely high biological diversity warrants a higher degree of protection than is afforded those parts of Newport Beach covered under the CLUP. I consider it inappropriate to apply the CLUP anywhere on Newport Banning Ranch, especially in light of the plans that are being set forth to intensively develop this area (starting with the current effort to establish a signalized intersection at West Coast Highway and to construct the first leg of Bluff Road as the entrance to Sunset Ridge Park).

Let me also address the City's argument, expressed in a letter to Commission staff dated October 27, 2010, that any restoration of the cleared areas must be to the conditions that would have existed without the unpermitted clearing. Even if someone is able to determine what the conditions actually were in the first part of 2004, we are left with the question of what the habitat would have developed into by now. We should also consider the temporal loss of habitat that resulted from the apparent violation. Whatever the case, suggestions that the most reasonable solution is to consolidate scrub restoration off in some tucked-away corner that won't bother anyone's development plans is transparently self-serving.

⁸ One interesting twist, also seen in a draft biological report for the upcoming Newport Banning Ranch development project (posted on the City's web page in 2008), is that Glenn Lukos Associates consistently refers to the City's "Coastal Land Use *Policies* (CLUP)" rather than the Coastal Land Use Plan. This appears to be an attempt to set forth the concept that these are stand-alone City policies, applicable to any City project, rather than items taken directly out of the Coastal Land Use Plan (i.e., policies not applicable to areas of deferred certification).

Satisfaction of ESHA Criteria

The criteria for ESHA are given in Section 30107.5 of the Coastal Act:

... 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.

Habitats designated as critical habitat for a listed species, and that have a documented legacy of supporting that listed species over a period of many years, are generally considered to be rare and especially valuable. As discussed at length in this letter, the upland scrub habitats that support gnatcatchers on the Sunset Ridge and Newport Banning Ranch sites can be, and have been, easily disturbed or degraded by human activities and developments. Nevertheless, areas that are not severely impacted by clearing continue to function as habitat for the gnatcatcher during both breeding and non-breeding periods. Therefore, it seems clear that all areas of upland scrub, including scrub intermixed with non-native species, meet the criteria defining ESHA. Finally, as Andrew Willis has discussed in correspondence with the respondents, the Coastal Commission has established precedence for determining breeding areas for the gnatcatcher, as well as probable and observed gnatcatcher use areas, to be ESHA.

Several acres of encelia scrub on the flat portion of the Sunset Ridge site that have been repeatedly mowed and sprayed with herbicides may also qualify as ESHA. This determination may hinge upon a secondary consideration of whether the City is justified in routinely disturbing and degrading this habitat without any regulatory approvals. The fact that clearing of this vegetation in 2009 was conducted as "Park development clearing at Sunset Ridge Park" suggests a clear connection between the habitat removal and the City's development plans.

The three areas cleared without a permit in 2004 are designated as critical habitat for the California Gnatcatcher. Based upon the survey data, my own observations, and the gnatcatcher's minimum and mean territory sizes (see Figure 12), I believe the default assumption should be that gnatcatchers regularly use all areas of suitable habitat in the southeastern corner of Newport Banning Ranch. In the absence of credible, verifiable information indicating that the cleared areas did *not* support scrub and/or gnatcatchers prior to their clearing, I believe that these areas should be regarded as satisfying ESHA criteria. If designated as ESHA, these areas must be restored in place rather than in a "consolidated" area that poses no constraints to proposed development.

ESHA BUFFER FOR UPLAND SCRUB

Whatever is decided concerning buffers, all areas identified as ESHA must be protected and adequately set back from the intensive development that is being proposed at Sunset Ridge Park and at Newport Banning Ranch. Under no circumstances should the minimal buffer standards contained in the City of Newport Beach CLUP be applied to these areas. Newport Banning Ranch is a deferred certification area precisely because of its high resource values, which warrant greater protections than those specified in the City's CLUP.

The Brightwater project at the Bolsa Chica Mesa (with resource values truly comparable to those present at Newport Banning Ranch/Sunset Ridge) 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 feet⁹.

At Marblehead in San Clemente, the recommended upland buffers were 100 feet, where feasible, and a minimum of 50 feet¹⁰. Given that the Marblehead site did not have nearly the ecological values present on the Sunset Ridge/Newport Banning Ranch site, it is my opinion that this level of buffer would be inadequate for either the Sunset Ridge project or the upcoming Newport Banning Ranch project (which would share the same entry road off West Coast Highway).

IN CONCLUSION

I appreciate the opportunity to provide input into the process of evaluating potential violations of the Coastal Act identified to date at the Newport Banning Ranch/Sunset Ridge site. If and when the Sunset Ridge and/or Newport Banning Ranch projects continue to move forward through the process of applying for Coastal Development Permits, I anticipate providing additional information for your consideration.

If you have any questions or would like clarification of any items, please call me at 562-477-2181 or send e-mail to robb@hamiltonbiological.com.

Sincerely,



Robert A. Hamilton
President, Hamilton Biological, Inc.

cc: Andrew Willis, Enforcement Officer
Karl Schwing, Orange County Area Supervisor
Sherilyn Sarb, South Coast Deputy Director
Dr. John Dixon, Ecologist, Environmental Program Manager
Dr. Terry Welsh, President, Banning Ranch Conservancy

⁹ <http://www.coastal.ca.gov/lb/Th11a-10-2005.pdf>.

¹⁰ <http://www.coastal.ca.gov/lb/5-03-013.pdf>.



HAMILTON BIOLOGICAL

December 14, 2010

Dr. Jonna Engel
California Coastal Commission
200 Oceangate
Long Beach, CA 90802-4316

**SUBJECT: REPLY TO LSA MEMORANDUM
BLUFF ROAD/SUNSET RIDGE PARK ENTRANCE**

Dear Dr. Engel,

On behalf of the Banning Ranch Conservancy, Hamilton Biological, Inc. has reviewed a memorandum dated December 9, 2010, from Art Homrighausen and Richard Erickson of LSA Associates (LSA) to Mike Sinacori of the City of Newport Beach (City) concerning the California Coastal Commission staff's ongoing evaluation of unpermitted habitat removal that took place in the southeastern part of Newport Banning Ranch starting in 2004. I have already provided extensive input to you in a letter dated December 11, 2010, but I wanted to take this opportunity to address LSA's memo.

Omission of PCR (2000) Gnatcatcher Data

LSA biologists were apparently unaware of gnatcatcher surveys that PCR Services conducted in 2000. In that breeding season, PCR mapped two gnatcatcher territories in the southeastern part of Newport Banning Ranch. Territory 1 was adjacent to the Southeast Polygon, and Territory 2 overlapped both the Northwest and Northeast Polygons.



Figure 1. Partial map showing that, in 2000, PCR biologists mapped California Gnatcatchers as using habitats located within or immediately adjacent to the Southeast Polygon (Territory 1) and the Northeast and Northwest Polygons (Territory 2). Discussions by LSA and Glenn Lukos Associates of known habitat usage by gnatcatchers have not mentioned the data shown here.

Exhibit 22
CCC-CD-11-03 (NBR)
CCC-RO-11-02

More Visits Needed to Map Complete Territories

The discussion of LSA's efforts to map gnatcatcher territories in the 1990s is accurate, but I must emphasize that we generally did not follow birds for extended periods throughout the breeding season. Therefore, the territory boundaries that were mapped almost certainly left out many habitat patches that the birds actually used during the breeding season (just not during those limited periods when biologists were present).

On Page 3, LSA states:

It should also be noted that of the 5 years of LSA surveys in the 1990s, the northwest polygon was a relatively small portion of gnatcatcher territories in 3 years, and the southeast polygon was a portion of one territory in 1 year. This is additional evidence that the NOV polygons are not critically important to the persistence of gnatcatcher territories in this portion of the property.

To reiterate, nobody has conducted surveys in such a way that the resulting maps can be used to determine which patches of scrub habitat in the southeastern corner of Newport Banning Ranch were and were not used during a given year. During most surveys since 1997, no effort at all has been made to map territory boundaries/habitat use areas.

Application of ESHA Definition

On Page 3, LSA states:

The California gnatcatcher is undeniably a threatened species. However, the habitat that was likely present at the time of the alleged violation is by no means rare or especially valuable, even for the gnatcatchers that may utilize it from time to time. This disturbed type of habitat occurs throughout the NBR property; some years it is incorporated into spatial limits of a particular gnatcatcher territory, and some years it is not.

Why do both Glenn Lukos Associates and LSA refuse to mention that the cleared habitat is designated as critical habitat for the California Gnatcatcher? 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 . . .

The southeastern part of Newport Banning Ranch has been occupied by breeding pairs of California Gnatcatchers on a nearly annual basis for many years, so the scrub habitats in this area are clearly suitable for nesting. If this part of Newport Banning Ranch did not satisfy the criteria for critical habitat, the U.S. Fish and Wildlife Service would have excluded it when critical habitat was re-designated in December 2007. The status of this occupied scrub as critical habitat should be highly relevant to the Coastal Commission's consideration of whether the cleared scrub warrants designation as ESHA.

Although Newport Banning Ranch is an area of deferred certification under the City's Coastal Land Use Plan (CLUP), City-owned land does extend into the Southeast Polygon of the City's CCC-CD-11-03 (NBR) and CCC-RO-11-02.

furthermore, Coastal Commission staff has indicated that the CLUP is a relevant document that will be used to provide staff with some form of guidance as it considers the issuance of a Coastal Development Permit for the Sunset Ridge Park project. Section 4.1.1 of the CLUP states:

In determining whether a habitat area meets the statutory definition of ESHA contained in Section 30107.5 of the Coastal Act and should be designated as an ESHA, the following attributes need to be taken into consideration:

- 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.

Also:

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 . . .

Also (emphasis added):

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.**

Policy 4.1.1-1 in the CLUP directs an applicant to evaluate various attributes when determining whether a habitat area meets the definition of an ESHA, including "The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law."

Policy 4.1.1-2 in the CLUP states that the City shall "Identify ESHA as habitats or natural communities listed in Section 4.1.1 that possess any of the attributes listed in Policy 4.1.1-1."

If these CLUP criteria and policies are at all relevant to the Sunset Ridge Park project, we should all be prepared to acknowledge that areas of scrub habitat known to be routinely occupied by California Gnatcatchers satisfy the City's own definition of ESHA.

Finally, independent of the City's CLUP, the Coastal Commission has well-established precedent for designating as ESHA scrub habitats known to support nesting California Gnatcatchers. I am unaware of any precedent for requiring the scrub to be pristine; certainly this was not the case at the Marblehead site in San Clemente, where the Commission designated coastal scrub as ESHA based upon the occurrence of nesting California Gnatcatchers.

For all of these reasons, it would be quite remarkable for the Coastal Commission to refrain from identifying as ESHA any area of coastal scrub that is known to support nesting California Gnatcatchers, especially when the scrub has been designated as critical habitat for the species.

“Timing”

Toward the end of the memorandum, under this heading, Mr. Homrighausen and Mr. Erickson suggest that it is “premature, unnecessary, and ill-advised to make an ESHA determination” at this time. It is in no way “premature” or “unnecessary” to make an ESHA determination now. The violation occurred years ago, and the habitat that was cleared has yet to recover. To sidestep an ESHA determination in favor of restoring habitat somewhere else would require Commission staff to ignore the area’s well-documented history of occupation by gnatcatchers, the critical habitat designation, the relevant language from the City’s own CLUP, and all the applicable Coastal Commission precedents for identifying such areas as ESHA.

In my view, Commission staff would be “ill-advised” to take LSA’s recommended approach, as it would establish terrible new precedents. First, it would pave the way for great swaths of ecologically functional, if not pristine, habitats on Newport Banning Ranch and Sunset Ridge to be declared “disturbed” or “degraded” and therefore “non-ESHA.” Failing to make an ESHA determination in this instance would also encourage other land owners to wipe out their own sensitive habitat areas, in hopes that such a determination might never be made, thereby allowing them to mitigate damages in a more convenient location.

“Remedy”

LSA’s memo concludes with an endorsement of the City’s proposal to undertake restoration at an out-of-the-way location as mitigation for the unpermitted clearance:

The facts that such restoration efforts are entirely feasible and will enhance the persistence of gnatcatcher territories in this area obviate the need to make an ESHA determination at this time.

Bolsa Chica Land Trust v. Superior Court established the legal principle that ESHA cannot be destroyed and then recreated somewhere else. At least some, if not all, of the cleared areas appear to have satisfied ESHA criteria before they were cleared without a permit. The only way this remedy makes sense is if the City can somehow succeed in convincing the Commission staff to make no ESHA determination in the cleared areas.

Conclusion

The last page of LSA’s memorandum warns that making an ESHA determination at the three areas of unauthorized clearing would have “significant” consequences for “the important planning efforts for the NBR and Sunset Ridge Park.” Had LSA biologists been involved in CEQA review of Sunset Ridge Park, they would be more aware of how the City and their former consultant, BonTerra, completely botched “the important planning efforts” in this area, cutting backroom deals with Newport Banning Ranch (over the entry

road and dumping of fill on grasslands) and basically stonewalling every effort to examine and address the relevant planning issues. The three areas of unpermitted clearing are only the tip of the iceberg. There are obvious coastal wetlands that the City and their consultants have refused to recognize, areas of coastal scrub mis-mapped as ruderal or ornamental vegetation, several acres of California Encelia that are routinely mowed and sprayed with herbicide, highly productive grasslands on Newport Banning Ranch that would become dumping grounds for 34,000 cubic yards of fill from the park project, etc. At what point in the "important planning efforts" will all of these other serious biological issues be addressed in a forthright manner?

All three cleared polygons have a documented history of having been utilized by California Gnatcatchers during the nesting season, and therefore appear to satisfy ESHA criteria. The ESHA determination must be made immediately, not only to remedy the unauthorized impacts but also to avoid establishing some very bad precedents.

If you have any questions or would like clarification of any items, please call me at 562-477-2181 or send e-mail to robb@hamiltonbiological.com.

Sincerely,



Robert A. Hamilton
President, Hamilton Biological, Inc.

cc: Andrew Willis, Enforcement Officer
Karl Schwing, Orange County Area Supervisor
Sherilyn Sarb, South Coast Deputy Director
Dr. John Dixon, Ecologist, Environmental Program Manager
Dr. Terry Welsh, President, Banning Ranch Conservancy



CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY

David R. Hunt, City Attorney

January 18, 2011

**Via Email awillis@coastal.ca.gov,
Facsimile (562) 590-5084 & U.S. Mail**

Andrew Willis
District Enforcement Analyst
California Coastal Commission
200 Oceangate, 10th Floor
Long Beach, CA 90802

RECEIVED
South Coast Region

JAN 21 2011

CALIFORNIA
COASTAL COMMISSION

**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 Mr. Willis:

This letter is submitted on behalf of the City of Newport Beach ("City") in regard to the letter from Executive Director 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"). Since receipt of the NOI, the City has repeatedly expressed its desire to quickly resolve this matter and avoid litigation over the allegations described in the NOI. On behalf of the City, we want to express our appreciation of your significant efforts towards resolution of the NOI via a mutually-agreeable consent and restoration order. The purpose of this letter is to explain our concern that any of the property identified in the NOI and owned by the City is considered environmentally sensitive habitat area ("ESHA") as that term is defined by Public Resources Code Section 30107.5.

Although the NOI described unpermitted development that included removal of major vegetation, it is significant that the NOI did not state whether ESHA was impacted by the alleged unpermitted development. Over the course of the past three months, you have declared the impacted area to be ESHA. In contrast, the City has maintained that none of the vegetation in the approximately .16 acre portion of the southeast polygon ("SE polygon") owned by the City removed by the unpermitted development, if any, was

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Exhibit 23
CCC-CD-11-03 (NBR)

CCC-RO-11-02

Page 1 of 6

Andrew Willis
January 18, 2011
Page 2

ESHA. Following our office's repeated requests for information supporting your ESHA determination, you provided that the basis for the ESHA identification in the SE polygon is an "estimation" of the native vegetation existing prior to the unpermitted development based on the following: (1) reports of Glenn Lukos and Associates ("GLA") dated August 26, 2010 and October 13, 2010; (2) 1998 PCR mapping of vegetation within the SE polygon; (3) historical aerial photos; and (4) evidence of use by the California gnatcatcher ("CAGN"). In turn, the determination of CAGN use of the City's portion of the SE polygon is based upon: (1) a 1993 siting of a gnatcatcher within the SE polygon; and (2) point location surveys completed in 1997 and 1998; and (3) the 2006 point location siting of a gnatcatcher outside of the SE polygon.

We have reviewed the above-referenced materials and consider these materials to be insufficient to support an ESHA finding. In fact, as more fully set forth below, we believe that an ESHA finding based on the above-cited materials would be inconsistent with the Coastal Act as these materials evidence that the vegetation on the City-owned property, does not satisfy the definition of ESHA set forth in Public Resources Code Section 30107.5.

By way of background, on March 23, 2010, the City certified Environment Impact Report ("EIR") No. 2009051036, which analyzed the biological impacts of the proposed Sunset Ridge Park project. The City circulated and certified EIR No. 2009051036 which concluded that the impacted areas were not ESHA. During the EIR review process, the City did not receive any comments from the California Coastal Commission ("CCC") relating to the adequacy of EIR No. 2009051036 prior to certification. As a responsible agency, the CCC was required to advise the City, and pursue a court action if necessary, if it believed that this ESHA determination made as part of its certification of the EIR, was inadequate. (See Public Resources Code §§ 21083, 21080.4, 21002.1(d); 14 CCR §§ 15050, 15096.)¹ Notwithstanding this clear mandate, subsequent to certification of Sunset Ridge EIR and in a letter dated September 1, 2010, CCC Program Analyst John Del Arroz advised that a precise ESHA delineation would be made as part of the processing of CDP No. 5-10-168. Because the CCC has taken the position that an ESHA determination will be analyzed as part of the processing of CDP No. 5-10-168, any ESHA finding at this time would seem premature at best.

Putting aside the procedural difficulties of an ESHA determination prior to CCC's consideration of CDP No. 5-10-168, we now address the sufficiency of the evidence you rely on to support an ESHA finding.

¹ It should be noted that CCC has a practice of submitting written comments during EIR review periods i.e. Recirculated EIR No. 2008051096 (Marina Park) which was subject to review contemporaneously.

Coastal Act Definition of ESHA

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.

Section 30107.5 of the Coastal Act defines environmentally sensitive areas (a.k.a. Environmentally Sensitive Habitat Areas) 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.

Given this regulatory framework, there is insufficient evidence to establish that the unpermitted development resulted in the removal of ESHA in the City-owned portion of the SE polygon. First and foremost is the fact that the SE polygon is bisected by a road that has been used for vehicular access to the City property for the past several decades. Second, vegetation in the impacted area includes a significant amount of non-native plants and invasive species, which do not meet the definition of ESHA set forth in the Coastal Act. Third, CAGN were not observed in the SE polygon for most of the years for which there is data, which is in contrast to other areas for which CAGN has been observed nearly every year for which there is data. In fact, there has been no effect on CAGN by the alleged unpermitted development. Thus, the SE polygon, and especially the City-owned portion, is not especially valuable, or sensitive under the definitions provided by the Coastal Act.

Any Vegetation Removed from the SE Polygon was not ESHA

The reports dated August 26, 2010, and October 13, 2010 submitted by GLA's document via aerial photographs that the SE polygon was used for as an access road resulting in a disturbed area with little or no vegetation present as far back as the 1960's. Based on the condition of the adjacent hill formation, which is outside the SE polygon, GLA concluded that a portion of the SE polygon supported areas of fig marigold, ice plant, non-native grasses and California encelia. However, as noted by

Exhibit 23

CCC-CD-11-03 (NBR)

CCC-RO-11-02

Page 3 of 6

GLA, this vegetation in the SE polygon was disturbed and of a monocultural character. In other words, at most, there was one coastal sage scrub indicator species identified, the highly opportunistic *California encelia*. As noted by GLA, the *California encelia* is capable of colonizing areas of substantial disturbance and is not considered rare under any definition. In terms of the significance or sensitivity of this vegetation, the historic activities lawfully occurring on this site are critical in assessing the vegetation habitat characteristics of the SE polygon. As to the City-owned parcel, these activities include semi-annual mowing, an access road, and other activities undertaken by, or at the direction of, the State of California, which owned the property prior to selling to the City. Not only is it well established that *California encelia*, is not easily disturbed, it is in fact present notwithstanding disturbance. Thus, it does not meet the definition of ESHA set forth in Section 30107.5 of the Coastal Act. The 1998 PCR mapping further supports this conclusion. The depiction of the 1998 PCR mapping included as Exhibit 9 to the GLA memorandum dated August 26, 2010, shows that to the extent any coastal scrub was mapped in the SE polygon, most if not all, was not City-owned property. A copy of this mapping is attached hereto for your reference.

The Documented CAGN Use does not Establish that the SE Polygon is ESHA

You rely on observations of CAGN in 1993 and 1997 and point-location surveys completed in 1998 and 2006 to evidence CAGN use in the SE polygon. Quite simply, these observations fall woefully short of substantial evidence of CAGN use in the City-owned portion of SE polygon.

CAGN were not observed in the SE polygon for most of the years for which there are at least some data and there is no evidence that the City's portion of the SE polygon was used or occupied by CAGN on a consistent basis prior to the unpermitted development alleged in the NOI. At most, it may be that this area was used by CAGN for foraging on an occasional basis.

The CCC has previously found areas that are isolated segments of coastal scrub used for foraging and that are not considered attractive as nesting areas due to the presence of automobile traffic and vegetation having low plant height and density did not meet the definition of ESHA. (See, CCC Staff Report, April 19, 2007, Application No. 5-06-300; CCC Staff Report, March 26, 2003, Application No. 5-3-013.) The standards employed by the CCC are consistent with the findings issued on September 29, 2010 by the United States Fish and Wildlife ("USFW") in its 2010 Coastal Gnatcatcher 5-Year Review wherein USFW confirmed that all coastal scrub is not equal with respects to CAGN and, more importantly, notes that not all coastal scrub vegetation supports CAGN. (2010 Coastal Gnatcatcher 5-Year Review, September 29, 2010, p. 9, 13.) We recommend that you review the findings included in the USFW 5-Year Review including

Exhibit 23

CCC-CD-11-03 (NBR)

CCC-RO-11-02

Page 4 of 6

the conclusion that CAGN density depends on the quality of the habitat. (2010 Coastal Gnatcatcher 5-Year Review, September 29, 2010, p. 17 *citing* Winchell, C.S. and Doharty, P.F. *Using California Gnatcatcher to Test Underlying Models of Habitat Conservation Plans* (2008), *Journal of Wildlife Management*, 72:1322-1327.) Based on the past CCC determinations, the quality of the vegetation of the SE polygon documented by GLA indicate that the vegetation removed, if any, was not ESHA.

Finally, the evidence clearly establishes that impacts to vegetation if any, was not critical to CAGN use. The subsequent protocol surveys completed in 2006 that mapped a CAGN pair in the scrub on the adjacent hill form (immediately to the north of the SE polygon) indicate that the area continued to be suitable for CAGN, suggesting that the SE polygon was not necessarily critical for the CAGN.

Thus, CAGN use of the SE polygon, and especially the City-owned portion of the SE polygon, is sporadic at best and that conclusions regarding the overall importance of this area to the CAGN are ambiguous. As noted by the Court in *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, the CCC has substantial latitude in determining whether a particular area should be considered an ESHA, but once that determination has been made, the CCC has no the power to alter its strict limitations. Given these circumstances, it seems that if an ESHA, by law, is so valuable that it cannot be altered, or that habitat values cannot be transferred elsewhere, then the ESHA threshold should be reserved for areas that likewise cannot be easily altered or transferred for biological reasons. It seems prudent, and in furtherance of the Coastal Act, to make judgments about the relative value of resources within the context of the entire area such as during the CCC's consideration of CDP No. 5-10-168.

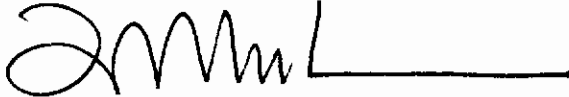
In closing, and to reiterate the City's desire to avoid a lengthy dispute as to whether there is sufficient evidence that the Coastal Act definition of ESHA is met, we believe it more efficient for the parties to enter into a mutually-agreeable consent and restoration order. A litigious dispute between two public agencies, relating to a relatively small area (.16 acre) is neither cost effective nor in public's interest. This is especially true given that the City is currently processing Coastal Development Permit Application No. 5-10-168 for the proposed Sunset Ridge Park ("CDP No. 5-10-168), which will include an ESHA delineation and proposes to not only restoration but enhance the entire SE polygon at the sole cost of the City. Also, the Coastal Act does not require an ESHA determination to effectuate the proposed consent or a restoration order. A mutually-agreeable consent order would require the parties to agree not to contest issues they would otherwise pursue in a court of law. From the City's perspective, these issues relate to what constitutes ESHA under the Coastal Act, and whether the Coastal Act requires enhanced restoration replacement of the vegetation in place at the time of the alleged unpermitted development. Therefore we believe it unproductive to suggest that a consent order will encompass a determination by the CCC that the City-owned portion

Andrew Willis
January 18, 2011
Page 6

of the SE polygon is ESHA.

We look forward to working with you towards a mutually agreeable consent and restoration order.

OFFICE OF THE CITY ATTORNEY

A handwritten signature in black ink, appearing to read 'LM', with a horizontal line extending to the right from the end of the signature.

Leonie Mulvihill,
Assistant City Attorney

LM/cm

Enclosure

cc: Alex Helperin, California Coastal Commission
Dave Kiff, City Manager
David R. Hunt, City Attorney
Dave Webb, Deputy Public Works Director
Mike Sinacori, Assistant City Engineer

[A10-00433] Willis from LM 01.18.11 re: NOV

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January 20, 2011

Mr. Andrew Willis
Enforcement Analyst
California Coastal Commission
South Coast District Office
200 Oceangate, Suite 1000
Long Beach, CA 90802

Re:V-5-09-008

Project 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

Un-permitted 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 Andrew:

As you know this office represents Herman Weissker, Inc. ("HWI") with regard to the above captioned violation. The purpose of this correspondence is to confirm our meeting of Tuesday morning and the monetary offer made to the Commission to resolve the civil penalty portion of the violation as well as to set forth the facts as they relate to my clients use of the subject property during a portion of the time in question

HWI is a licensed building contractor who entered into a contract with Southern California Edison ("SCE") to construct underground utilities in the City of Newport Beach ("City"). HWI, pursuant to recommendations from the City, leased the subject property in the City from West Newport Oil Company ("WNOC") to use as a staging area for the SCE contract. HWI believed that all applicable building permits to perform the contract, as well as necessary to use the leasehold premises as a staging area, had been issued. At no time was HWI advised by any party, including the City, WNOC, or Newport Banning Ranch ("NBR"), a subsequent purchaser of the property, that a Coastal Development Permit ("CDP") was necessary in order to use the leasehold premises as a

Exhibit 24
CCC-CD-11-03 (NBR)
CCC-RO-11-02
Page 1 of 4

Mr. Andrew Willis
Re:V-5-09-008
January 20, 2011

Page 2

staging area for materials in order to perform the contract. Possibly no party believed a CDP was necessary because WNOG had a previously issued Coastal Commission Exemption for its long standing oil producing and related business activities which had taken place on the property for decades prior to the effective date of the Coastal Act. It was a matter of common knowledge in the City that the subject site was the site of numerous oil wells, that its existing vegetation was greatly disturbed, and that the property had previously been proposed as the location for a future freeway access.

HWI was in possession of the leasehold property from April 2003 through November 2003, and then again in mid September 2004 through mid February 2006. As stated above, the leased area was used by my client as a staging area for construction materials. HWI readily admits that it drove vehicles and staged materials and equipment on the property. HWI denies that it removed major vegetation and/or performed grading. The aerial photographs that accompanied the initial notice of violation letter, dated May 14, 2010, reveal that the subject areas were vegetated in December 2003 after HWI first vacated the property in November 2003. The Commission's second violation letter, dated October 5, 2010, further provides that the un-permitted development activities, including the removal of major vegetation, commenced between April 16, 2004 and October 23, 2004, and continued through November 2009. HWI steadfastly contends that the major vegetation was cleared before it re-entered the property in mid September 2004 and that its employees did not remove the vegetation and/or perform grading. Declarations and time sheet records from HWI employees, prepared in the normal course of business, support these assertions.

After notice of the alleged violation was received, the alleged violators, NBR, City, SCE and HWI, agreed that NBR and the City would take the lead in preparing a restoration and mitigation plan, and that SCE and HWI would attempt to resolve the civil penalty portion of the alleged violation. In that HWI had accepted a demand by SCE to indemnify SCE for any prospective liability and/or damages which might incur under the contract, HWI has accepted the responsibility to attempt to resolve the monetary aspects of the violation. HWI has agreed to do so, despite its vigorous contention that its actual culpability was limited. HWI is informed that NBR leased the subject premises to other companies who also used the property for staging equipment during the alleged violation period, and that Coastal Act violations run with the land. HWI has made a business decision that it is in the best interests of all parties to resolve the violation, and desperately desires to preserve its long standing business relationship with SCE.

Mr. Andrew Willis
Re:V-5-09-008
January 20, 2011

Page 3

In a good faith attempt to resolve the monetary aspects of the violation, HWI makes a settlement offer in the amount of \$200,000 conditioned on NBR and the City both agreeing to waive any claims each may have against SCE and/or HWI to fund the cost of the proposed restoration of the property and/or acquisition costs, if any, for off-site mitigation property, and SCE and HWI being released from any further obligation under the consent order and removed as parties to the same. As you are well aware, NBR has made recent, continued, demands that SCE and HWI agree to indemnify it for any and all costs it incurs as a result of the violation. These demands, which we have been advised total in excess of \$650,000 at this time, not including acquisition costs for the purchase of off-site mitigation properties, if necessary, make it impossible for HWI to offer a meaningful settlement amount to the Commission without a waiver of any indemnification claims and agree to execute mutual releases pertaining to any and all aspects of the violation. As you know, HWI's biological expert, Dr. Edith Read, has estimated the cost of remediation, including monitoring costs, but not including the cost for off-site mitigation property, at \$101,000.

In light of the fact that the cleared vegetation has substantially grown back in the northwest and northeast polygons, and that the south polygon has shown re-vegetation, HWI believes the conditional offer is sufficient to resolve the monetary aspects of the violation. If the offer is not accepted, or if NBR and the City will not agree to waive any indemnification claims against SCE and/or HWI, my client will have no alternative except to contest the consent order. I don't see how the consent order can be approved without an amount of civil penalties agreed to and referenced in the consent order.

On a personal level, the aerial photographs you provided this office evidenced only minor clearance of vegetation while HWI occupied the leasehold premises from mid September 2004 to mid February 2006 in the northeast polygon near the entrance to the leasehold property which has not been delineated as ESHA by the Commission. The minor clearance of vegetation, driving of vehicles and storage of equipment on the leased property by HWI hardly relates to the major civil penalties the Commission is seeking in the notice of violation.

If HWI resolves the civil penalty portion of the violation with the Commission it must be removed from the proposed order and know that mutual releases will be executed releasing it from any future claims by NBR and/or the City for indemnification for restoration and/or mitigation costs for the acquisition of off-site properties.

Mr. Andrew Willis
Re:V-5-09-008
January 20, 2011

Page 4

I look forward to the Commission's favorable response to this offer and your discussions with NBR and the City with regard to the waiver demands.

Thank you for your continued courtesy and anticipated cooperation.

Very truly yours,

**LAW OFFICES OF
BLOCK & BLOCK**
A Professional Corporation



ALAN ROBERT BLOCK

ARB:sp

cc: Tony Vedova
Mario Tapanes, Esq.
Rick Zbur, Esq.
Laura Godfrey, Esq.
George Soneff, Esq.
Susan Hori, Esq.
City of Newport Beach