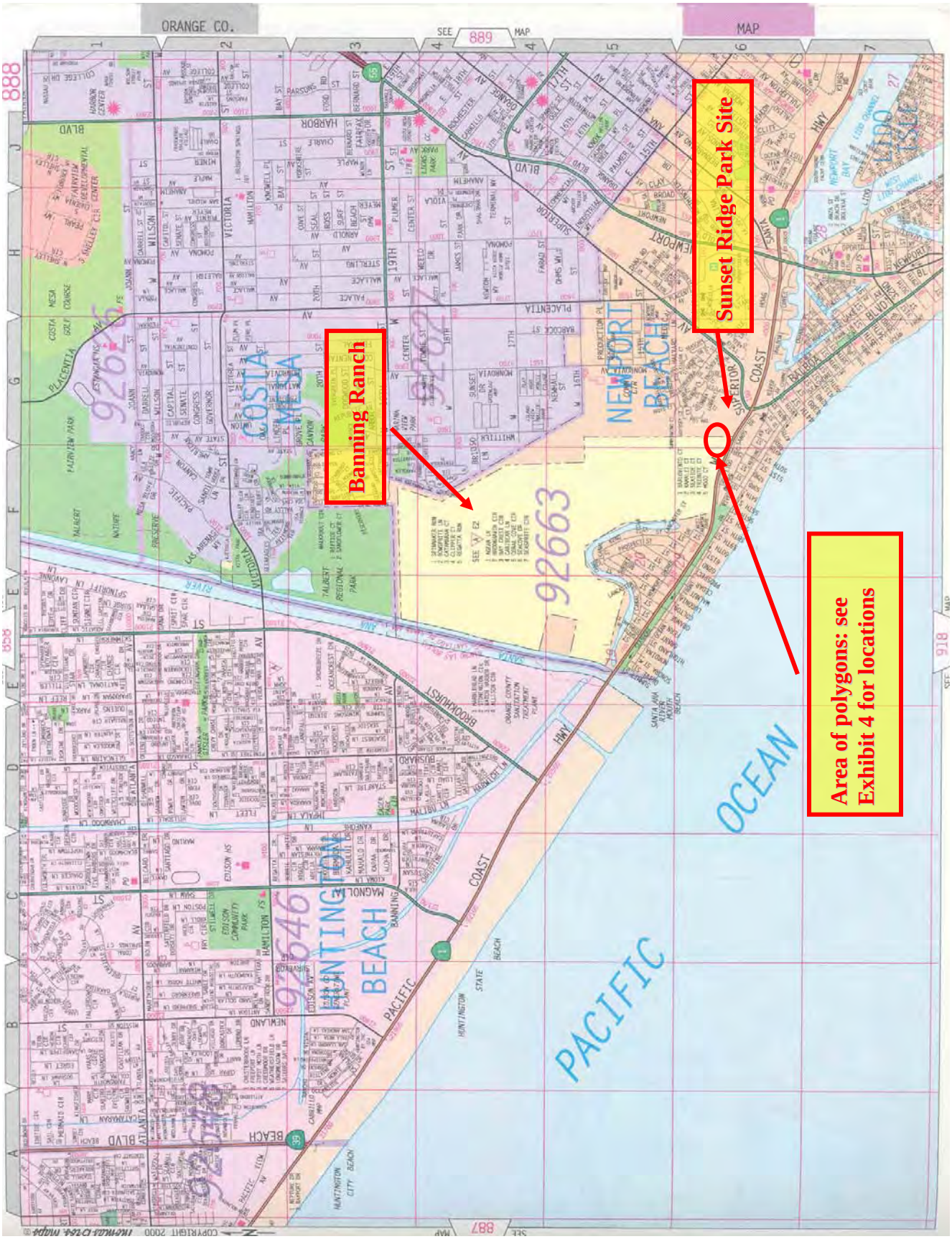


Exhibit 1
CCC-11-CD-03 (NBR)
CCC-11-RO-02
Page 1 of 1

NEWPORT BANNING RANCH

Context Map **Exhibit 2**

Legend
- Newport Banning Ranch Property
- NMUSD Property

FUSCOE ENGINEERING

1" = 600'
09-27-2007

Exhibit adapted from Newport Banning Ranch planning document

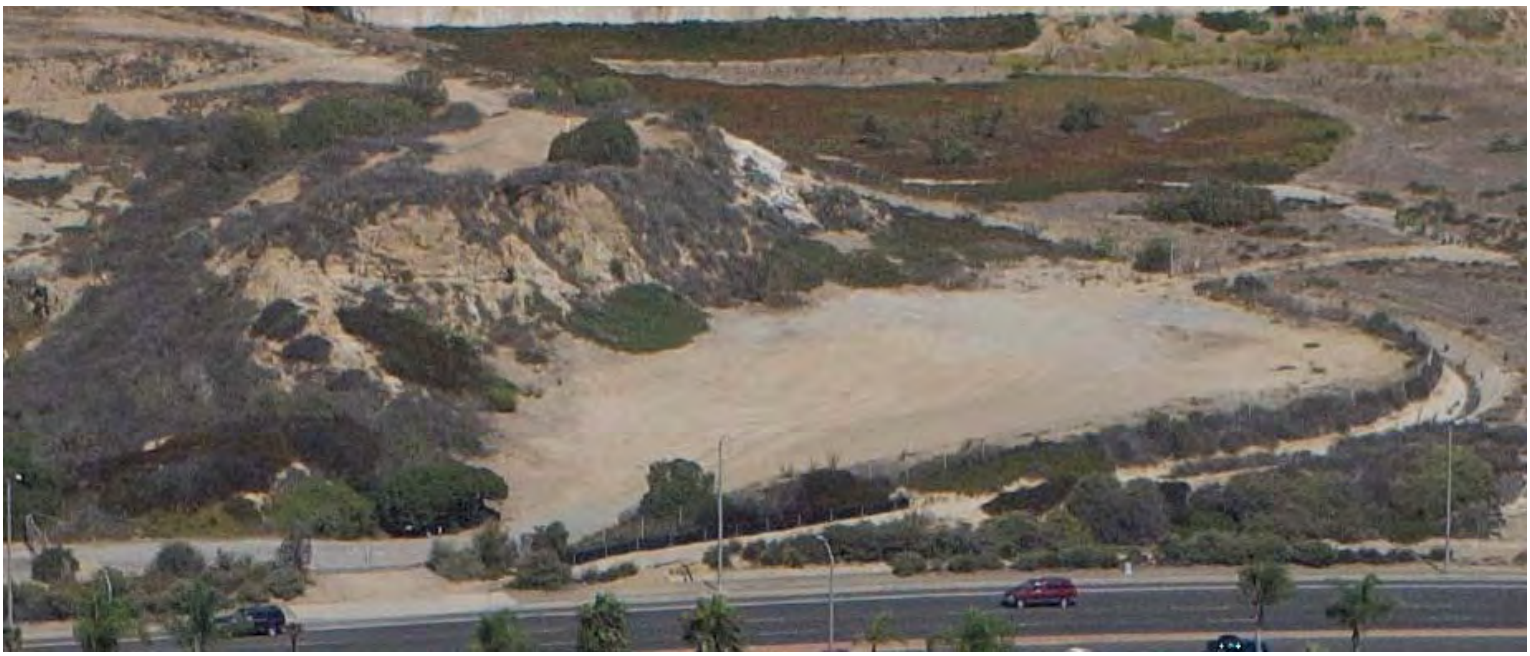
Exhibit 2
CCC-11-CD-03 (NBR)
CCC-11-RO-02
Page 1 of 2

October 19, 2006

September 23, 2002

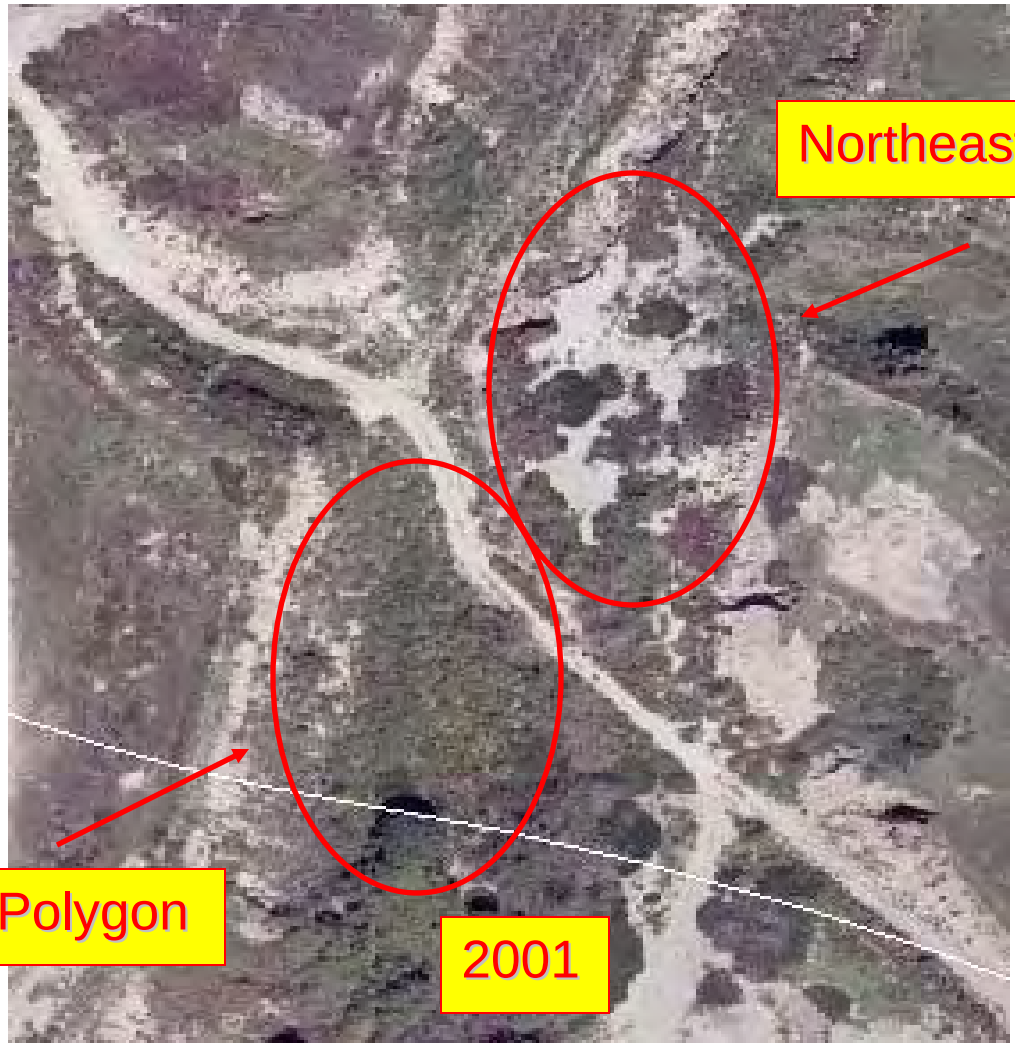
October 23, 2004

September 16, 2006

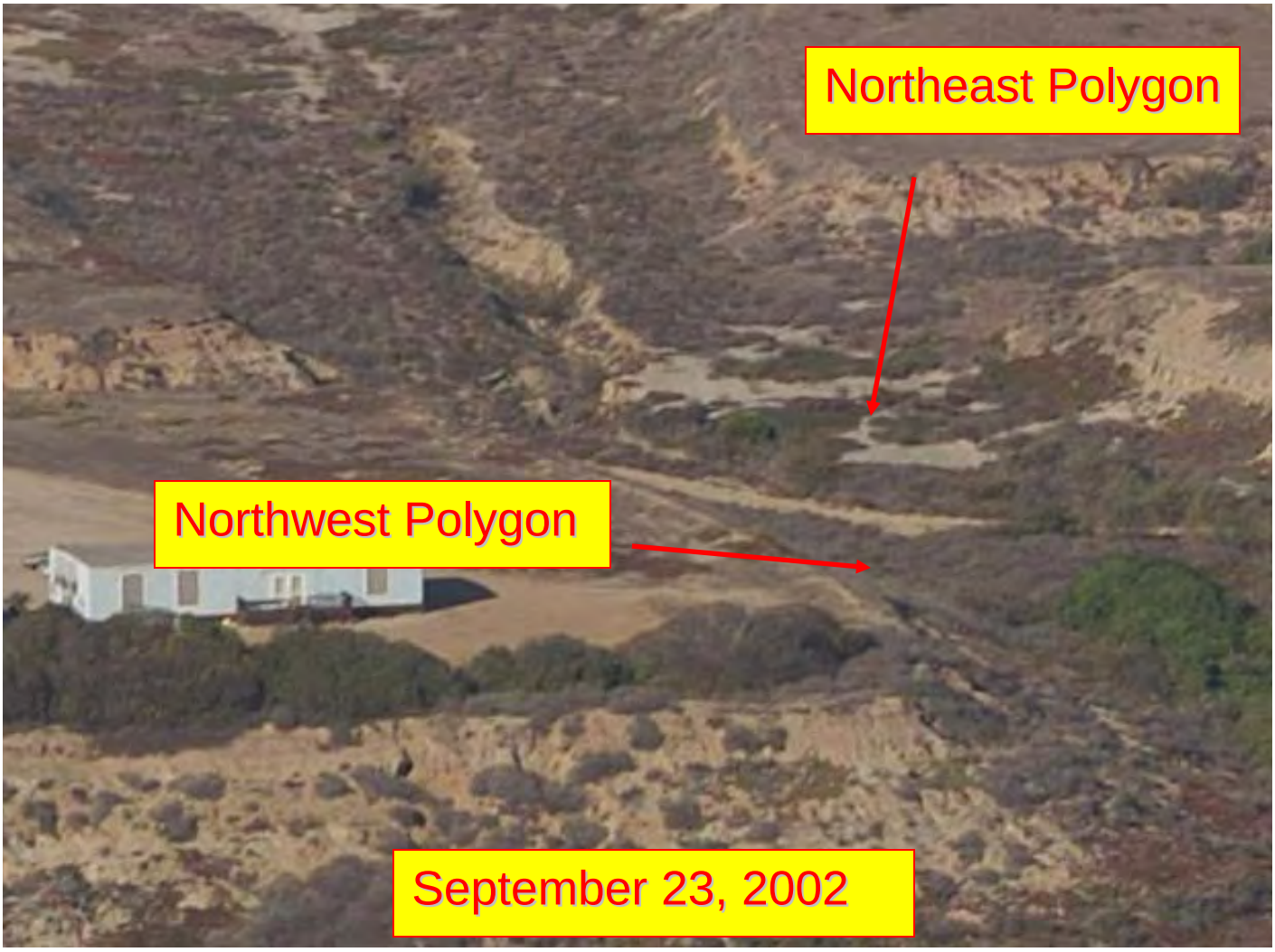


September 19, 2008

California Coastal Records Project photographs


Northeast Polygon
Northwest Polygon
2001


2006


Northeast Polygon
Northwest Polygon
September 23, 2002


Northeast Polygon
Northwest Polygon
2004 or 2005

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 1

DSM 12/10

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

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

M E M O R A N D U M

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

TO: Andrew Willis, Enforcement Analyst

SUBJECT: Newport Banning Ranch NOV Subject Development ESHA Determination

DATE: March 31, 2011

Documents Reviewed:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PCR Services. 1998. Gnatcatcher survey map.

PCR Services. 1997. Gnatcatcher survey map.

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

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

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

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

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

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

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

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

ESHA Definition

Section 30107.5 of the Coastal Act defines Environmentally Sensitive Habitat as:

> *Any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

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

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

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

The LUP Section 4.1.1 states that coastal sage scrub (CSS) is an especially important habitat and "where CSS occurs adjacent to coastal salt marsh or other wetlands, or where it is documented to support or known to have the potential to support rare species such as the coastal California gnatcatcher, it meets the definition of ESHA because of its especially valuable role in the ecosystem... CSS also provides essential nesting and foraging habitat for the coastal California gnatcatcher, a rare species designated threatened under the Federal Endangered Species Act."

Plant Communities

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

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

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

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

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

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

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

California Gnatcatcher

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

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

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

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

[12] Ibid.

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

[14] Ibid.

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

[16] Westman (1981) op. cit.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Aerial Photography and Vegetation and ESHA Mapping

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

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

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

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

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

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

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

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

ESHA Delineation

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

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

Southeast Polygon

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Northwest Polygon

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

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

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

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

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

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

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

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

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

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

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

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

Northeast Polygon

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

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

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

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

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

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

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

N

Figure 1

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

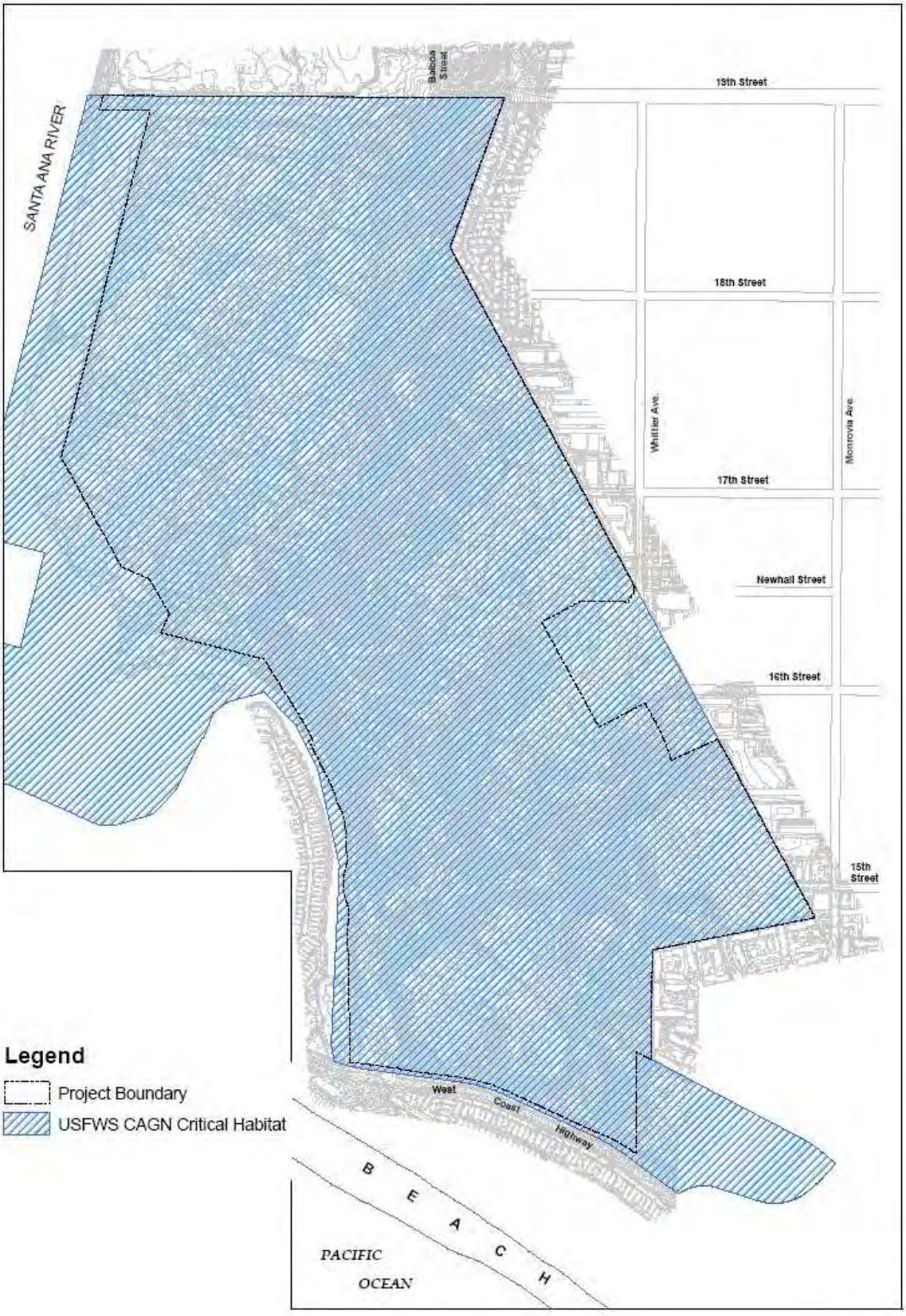


Exhibit 13

California Gnatcatcher Critical Habitat Unit Map

NEWPORT BANNING RANCH

0 300 600 1,200 N

Feet

March 25, 2008

X:\0363-THE REST\0472-08BANN\472-6.GIS\BioGIS\MXD\472-8CAGNDec2007_CriticalHabitat_SF.mxd

CALIFORNIA COASTAL COMMISSION

Figure 2

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

September 23, 2002

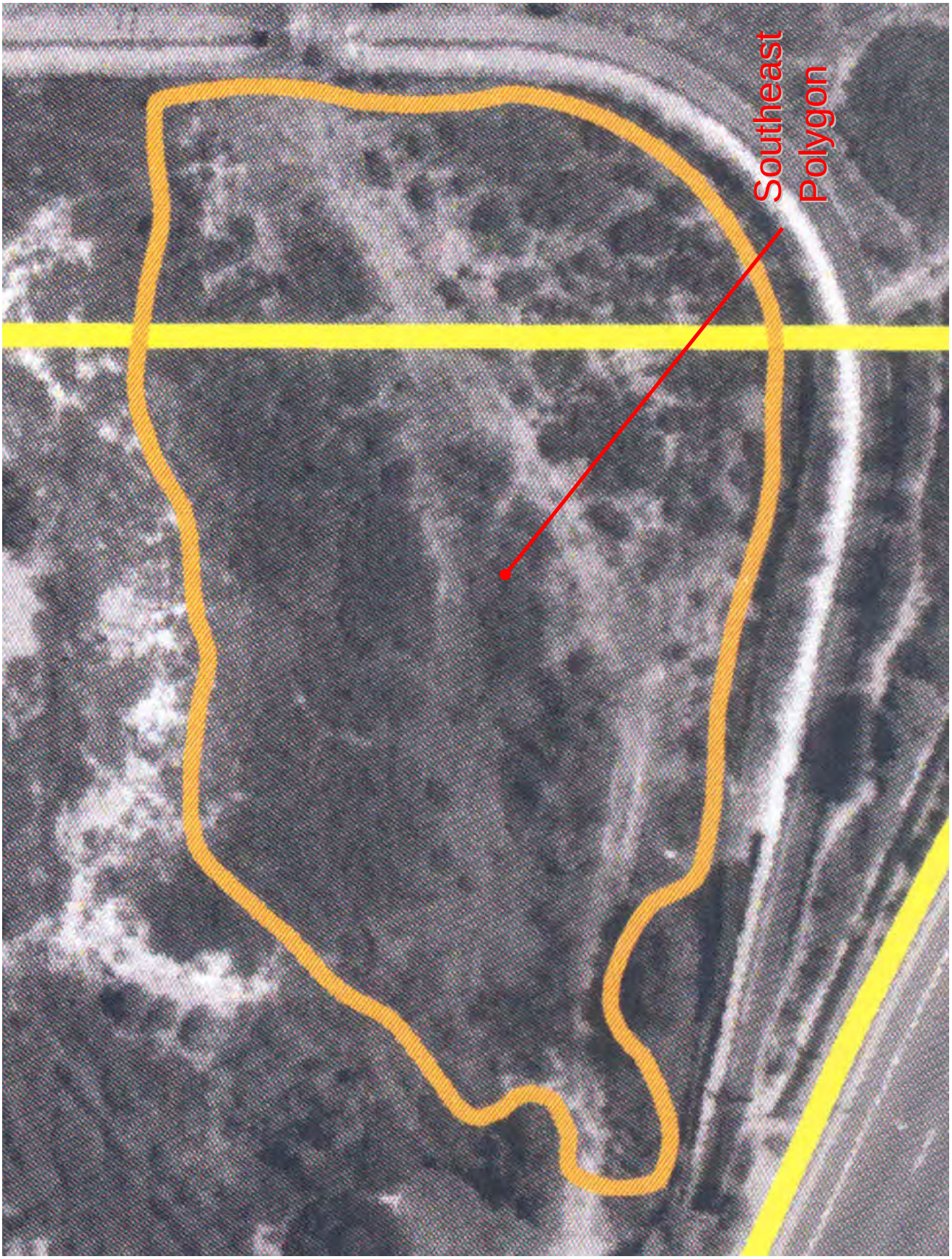
California Coastal Records Project photograph

Figure 3

September 23, 2002

California Coastal Records Project photograph

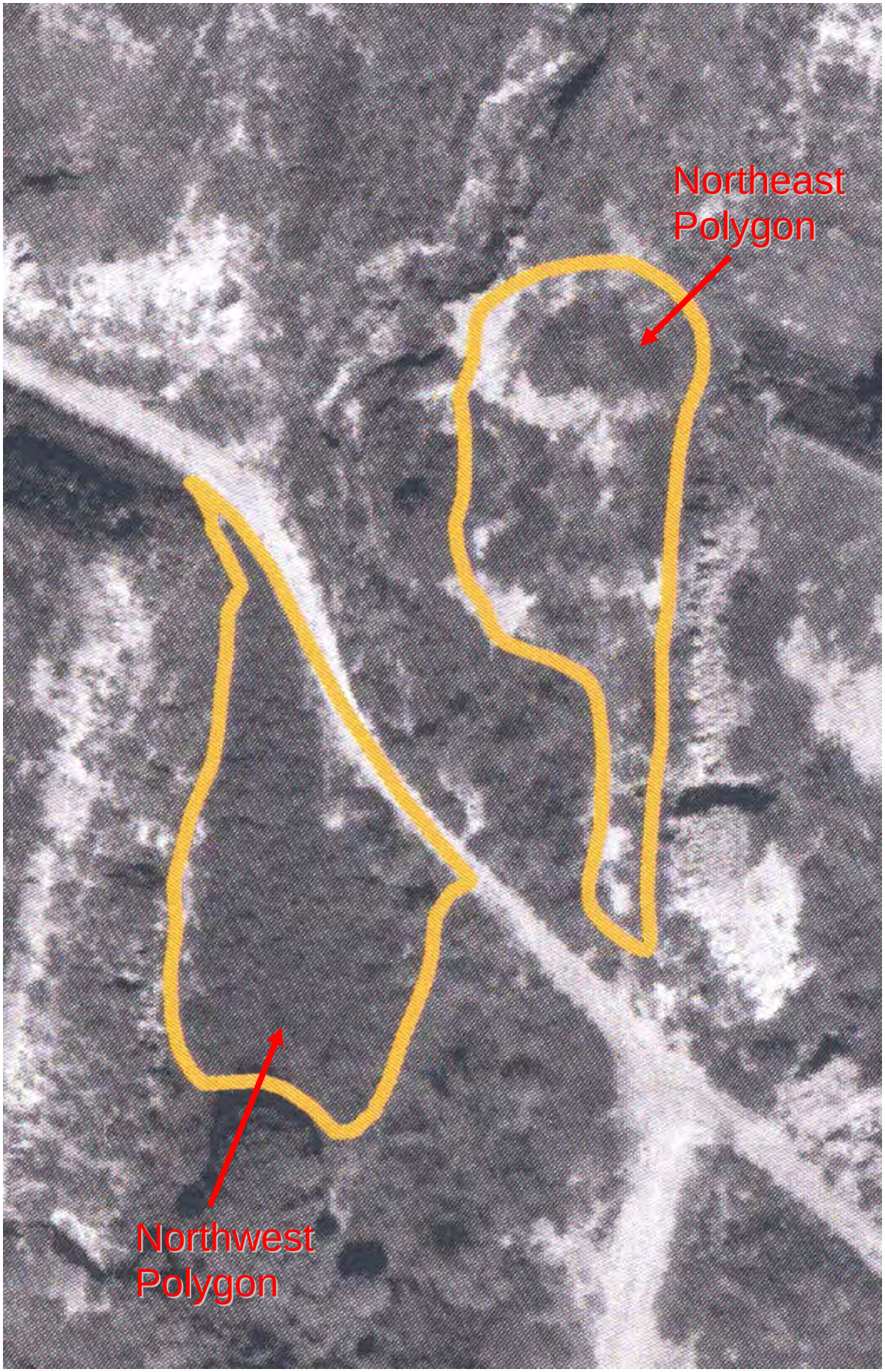
Figure 4



February 11, 2004

Photograph provided by Newport Banning Ranch

Figure 5

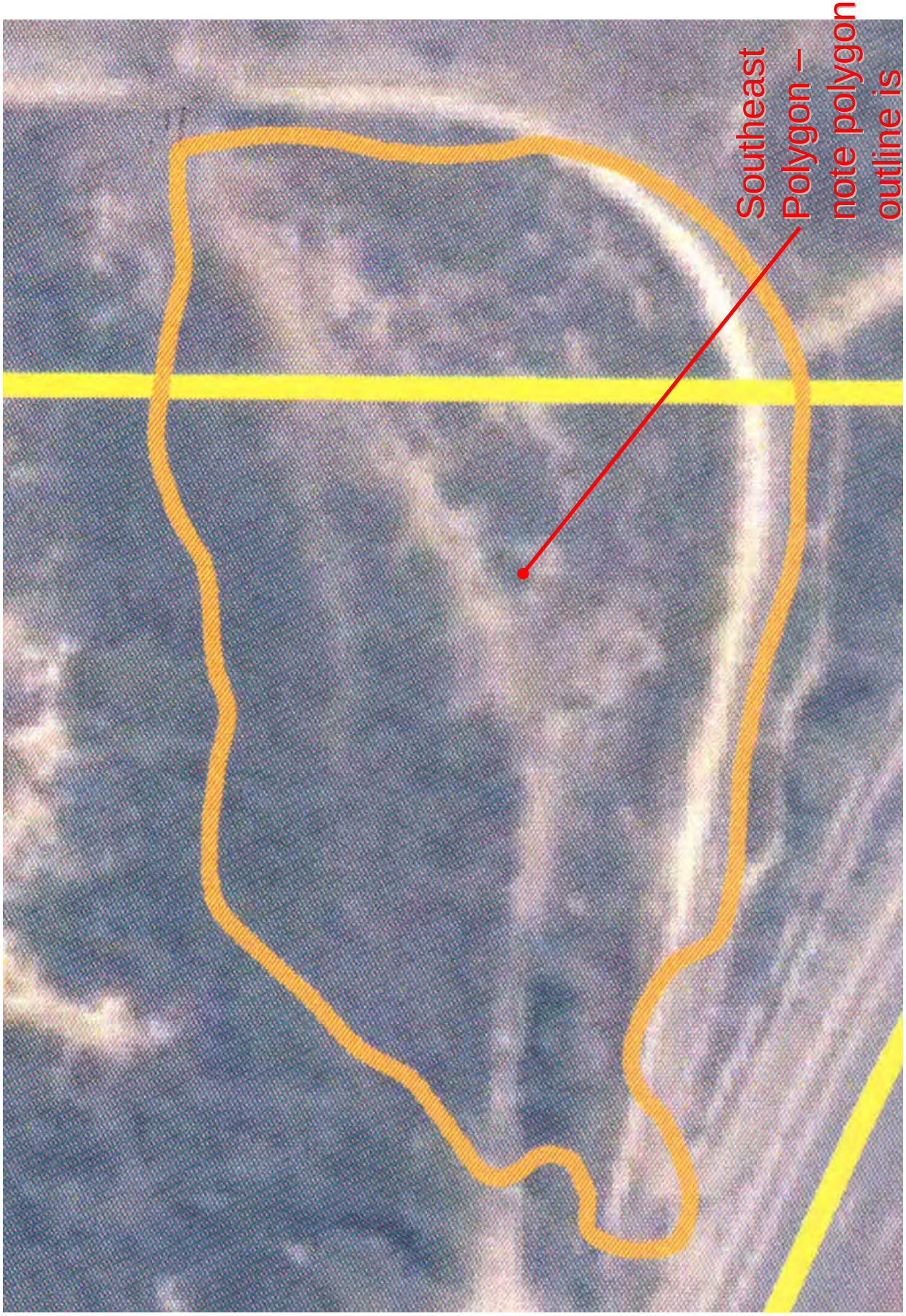


February 11, 2004

Photograph provided by Newport Banning Ranch

Figure 6

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

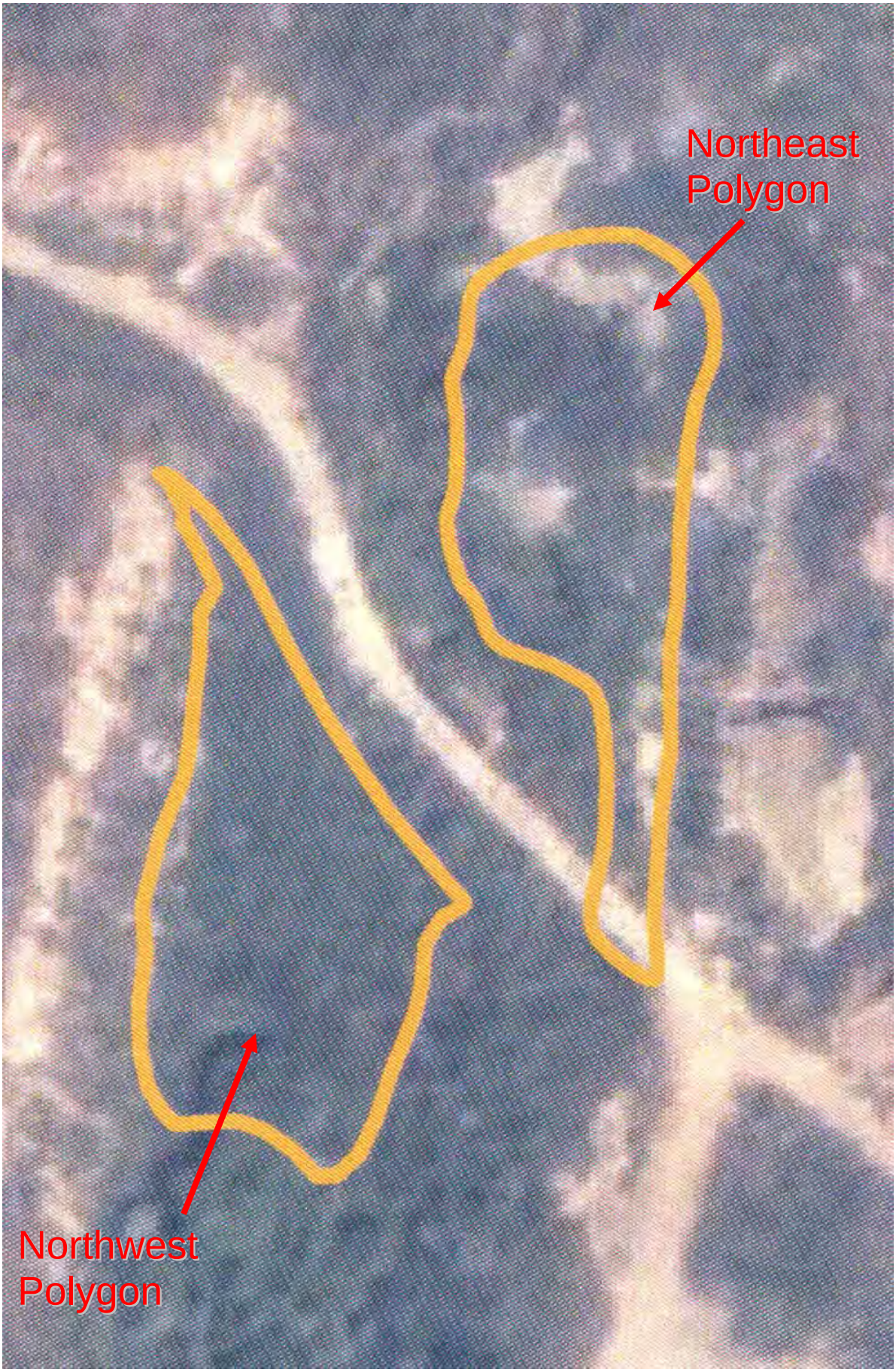


April 16, 2004

CALIFORNIA COASTAL COMMISSION

Photograph provided by Newport Banning Ranch

Figure 7



April 16, 2004

Photograph provided by Newport Banning Ranch

Figure 8

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

Habitat from LSA (c. 1991)

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

Figure 9

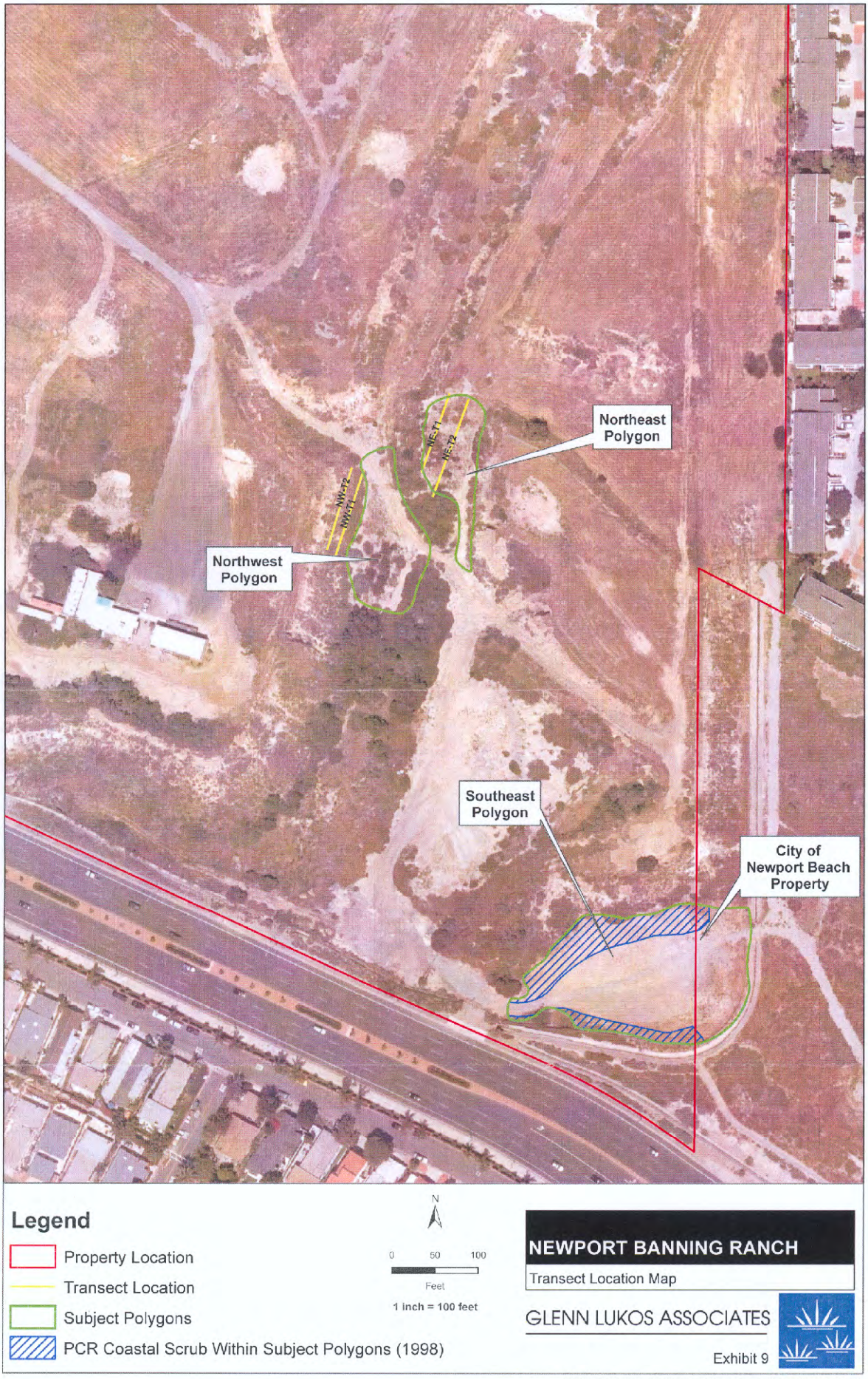

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Figure 10

DSM 1/11

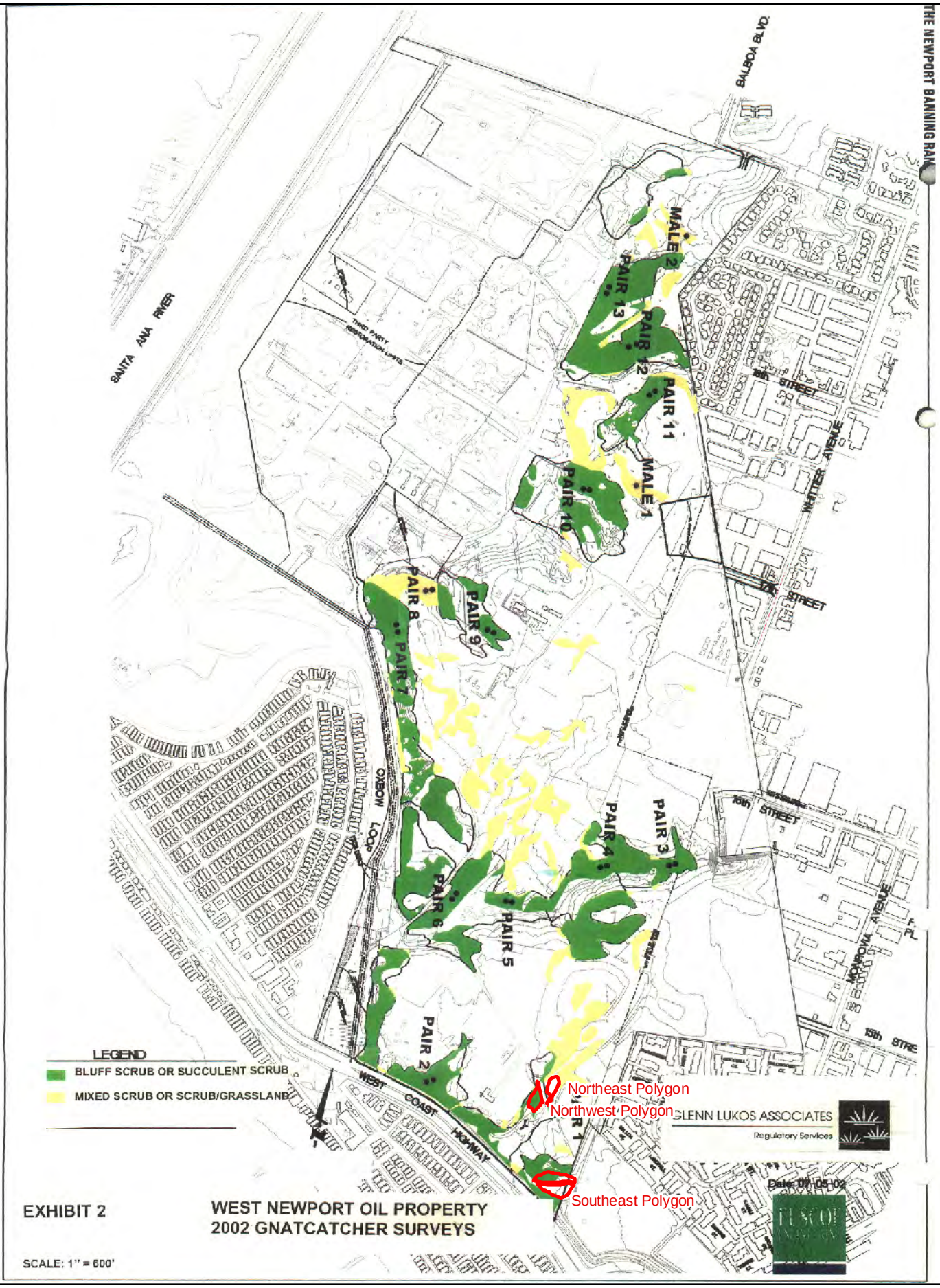

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Figure 11

DSM 1/11

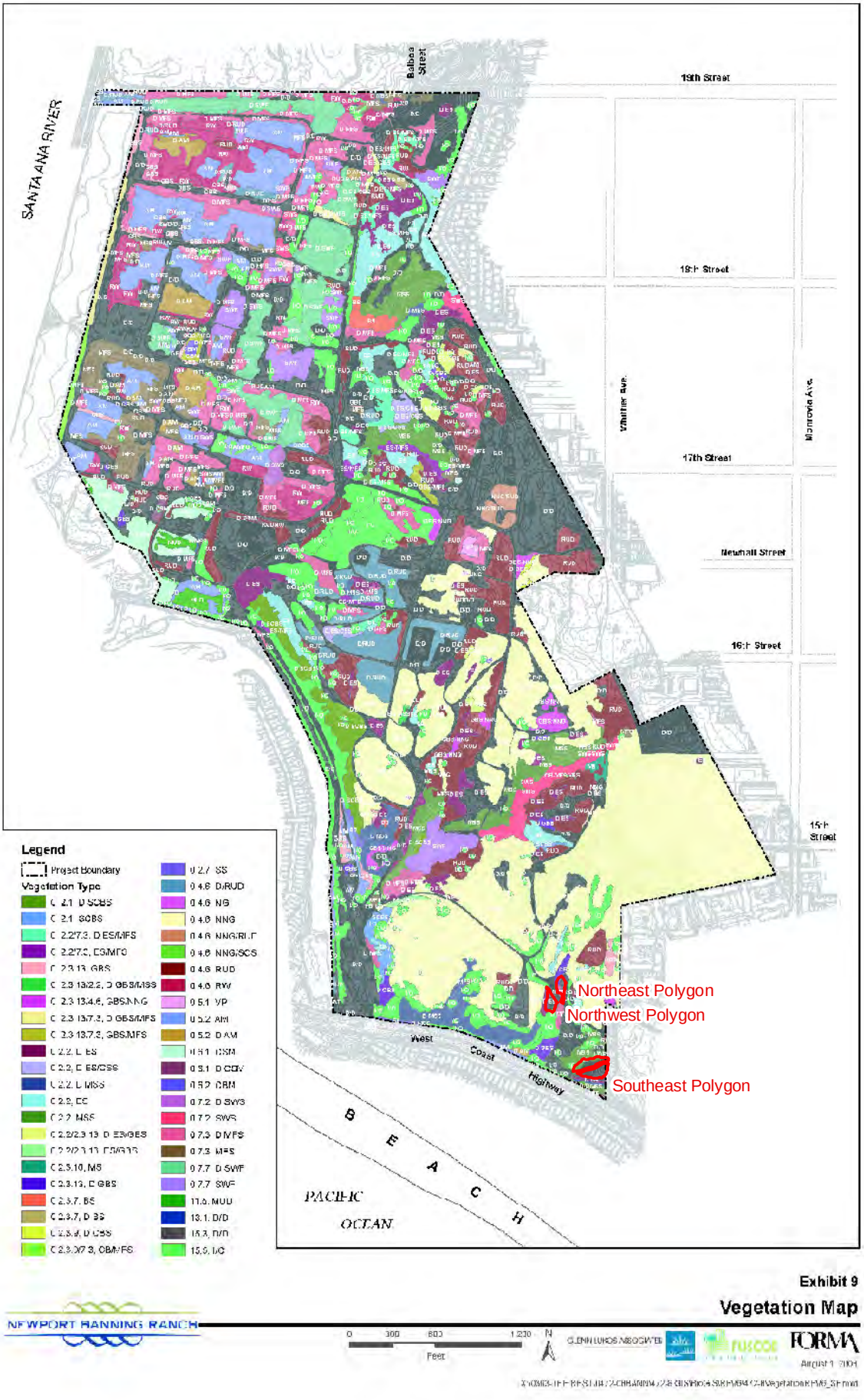

Exhibit 9

Vegetation Map

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Not To Scale.
All Locations Approximate.
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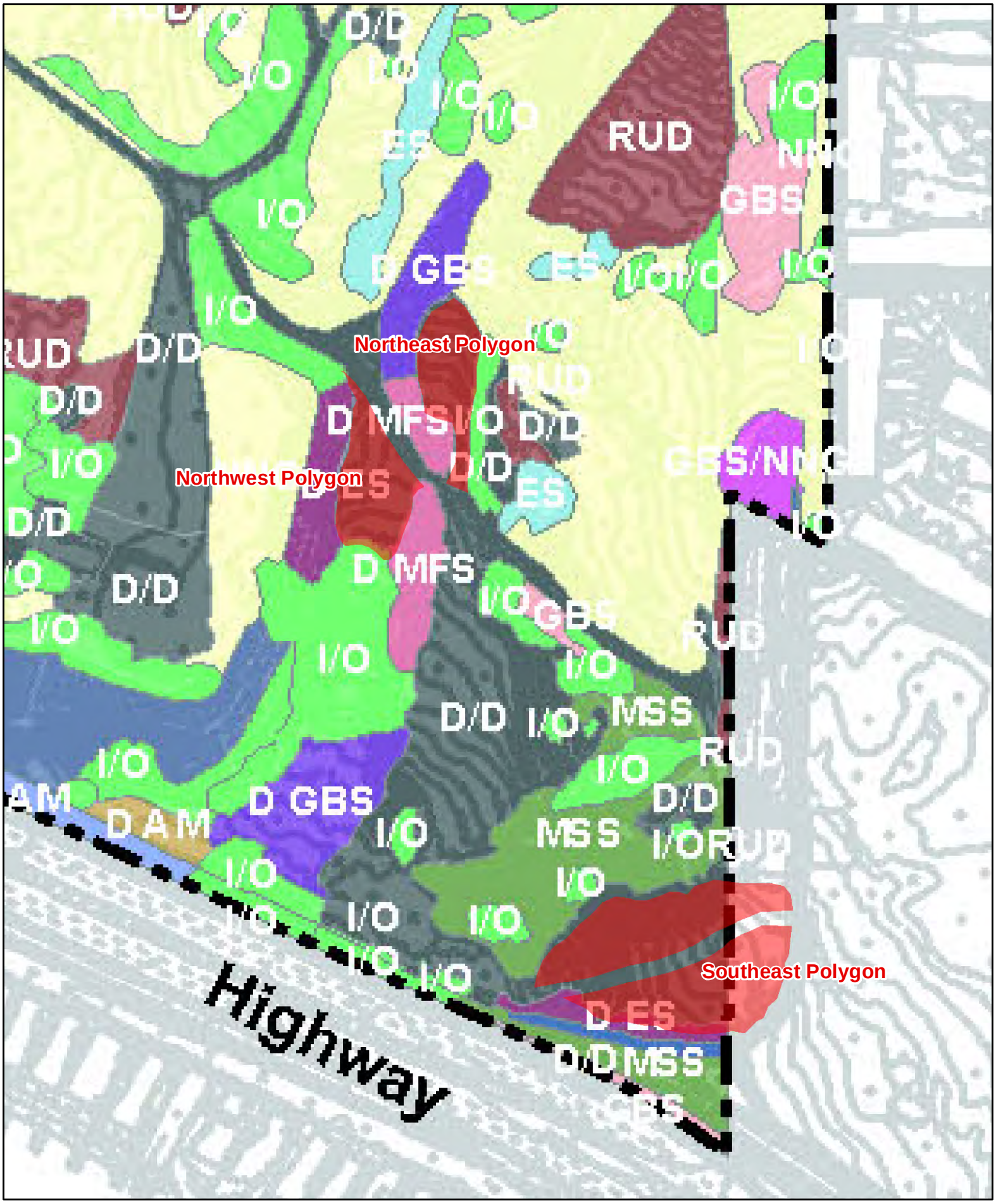
Figure 12a

DSM 1/11



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Not To Scale.
All Locations Approximate.
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Figure 12b

DSM 1/11

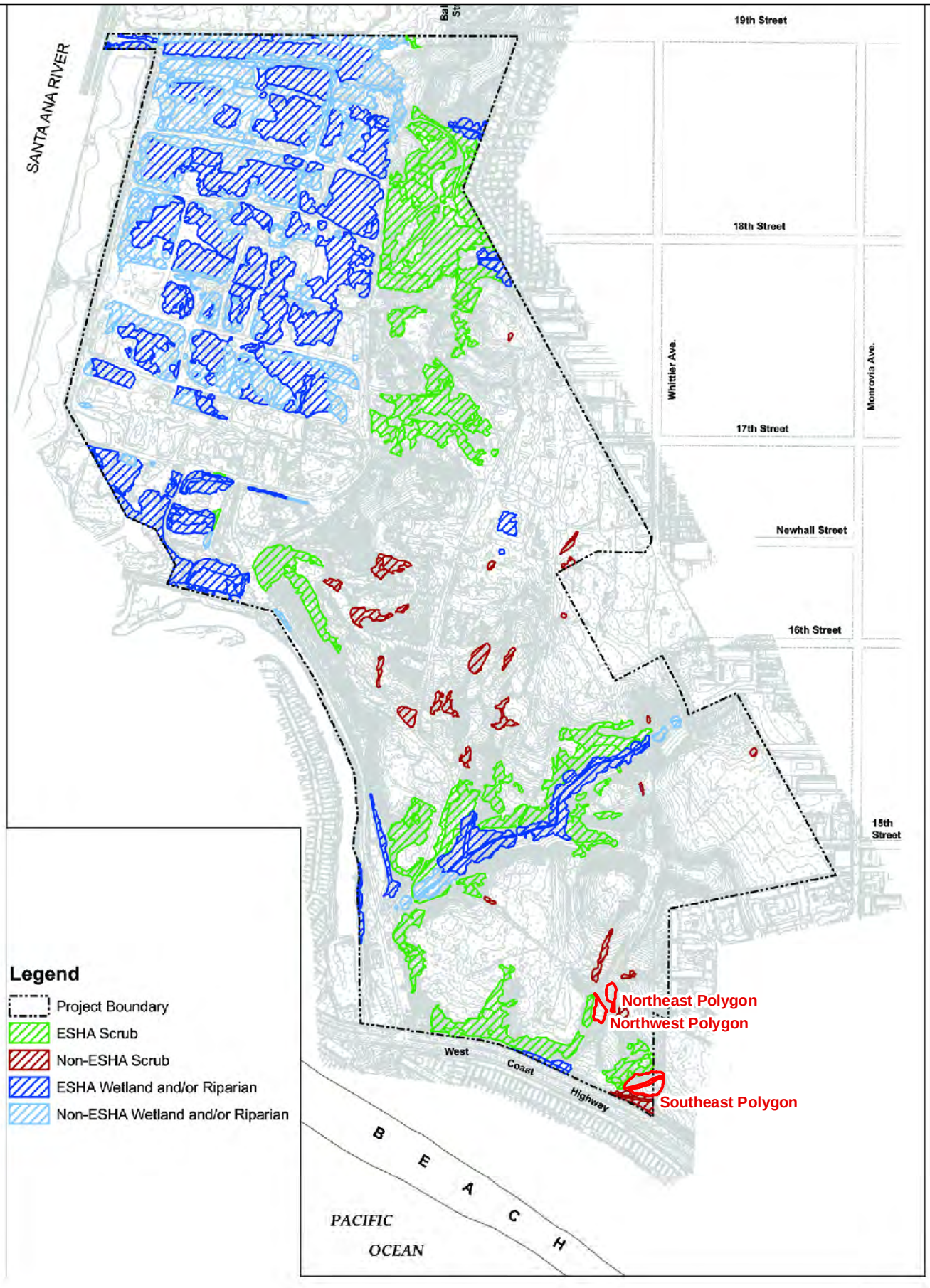

Exhibit 12

Environmentally Sensitive Habitat (ESHA) Map

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

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Figure 13

DSM 1/11

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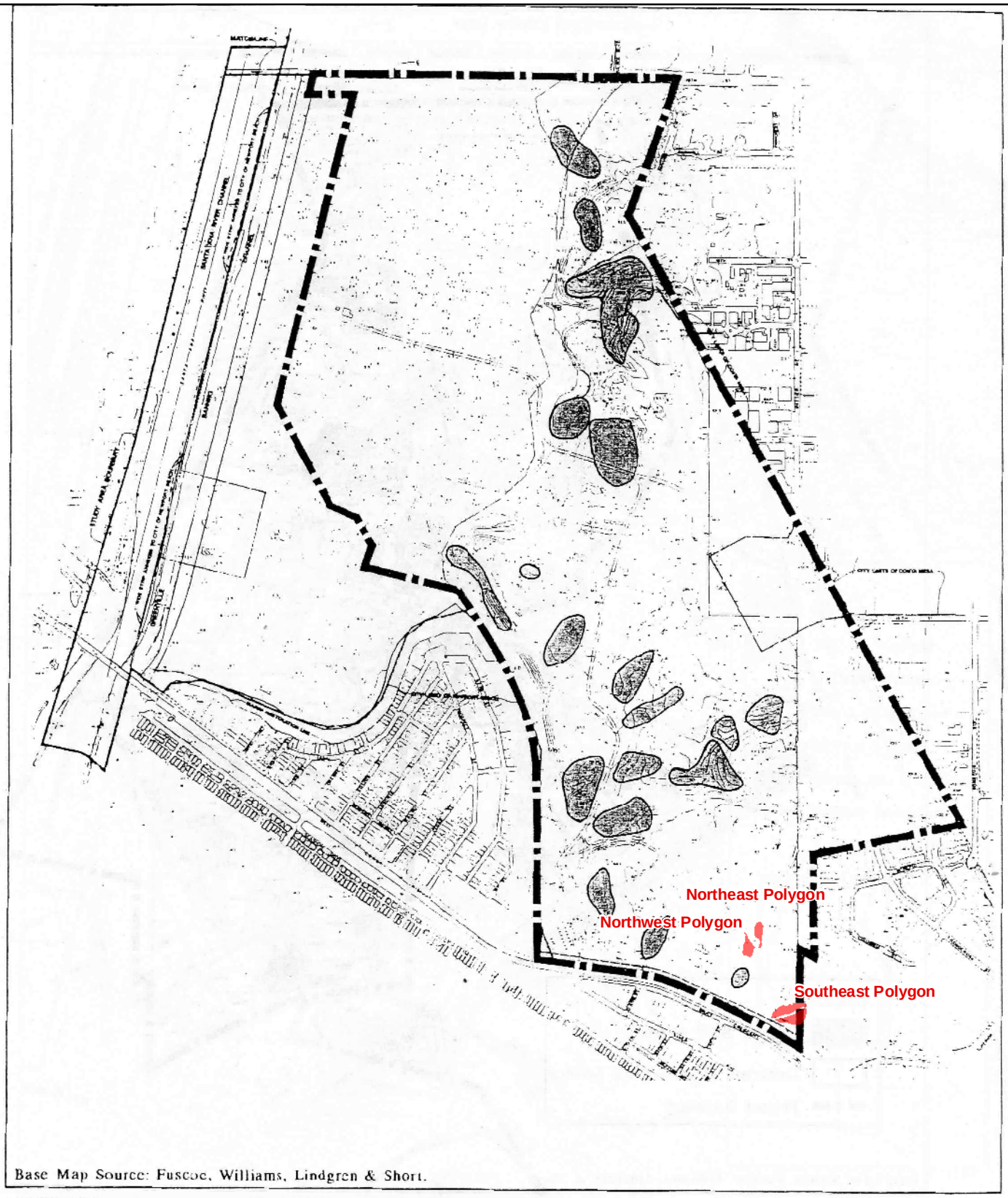
Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, LSA.

Figure 14

DSM 1/11



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

N

Figure 15a

DSM 1/11

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

N

Figure 15b

DSM 1/11

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

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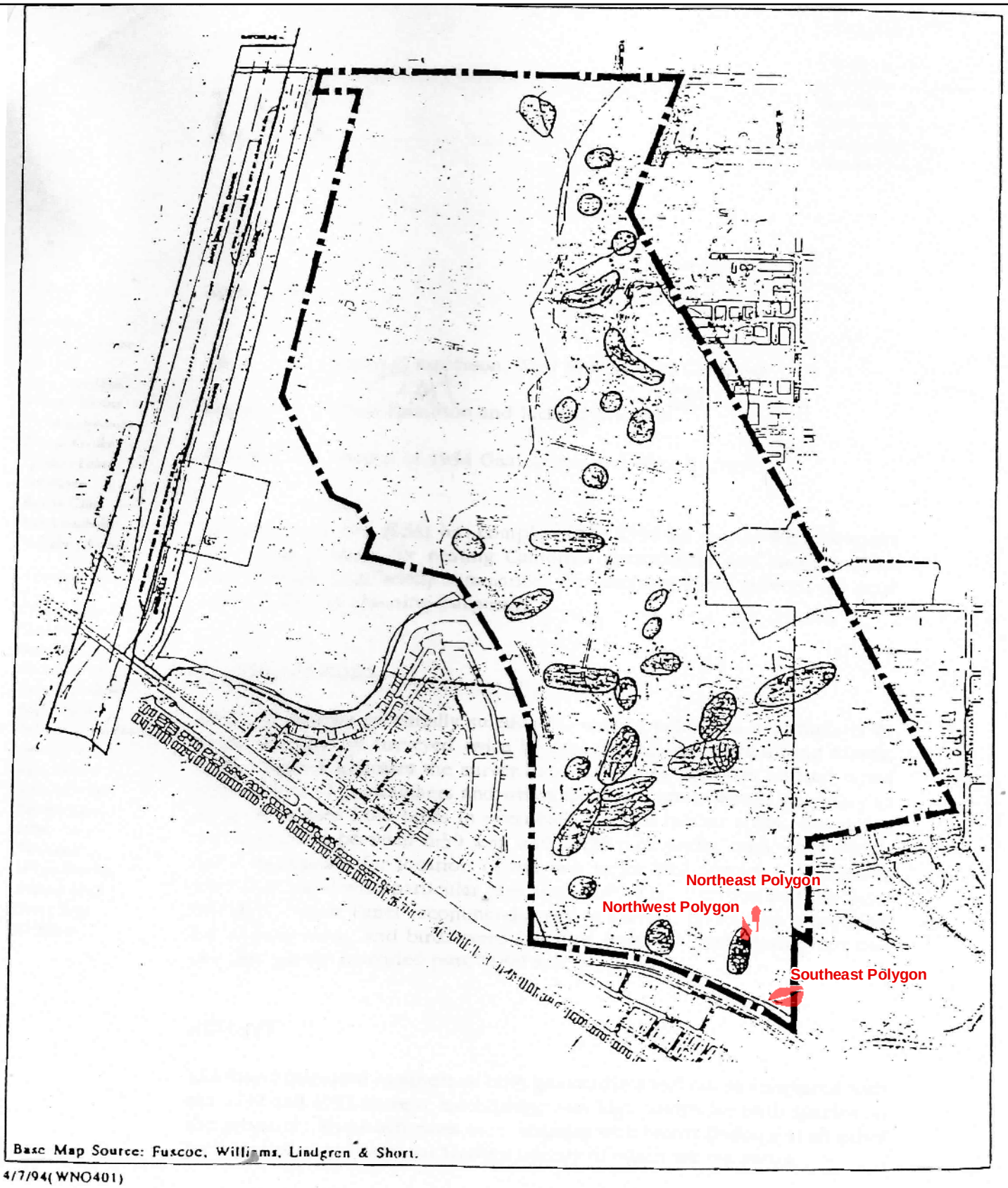
Figure 16

DSM 1/11



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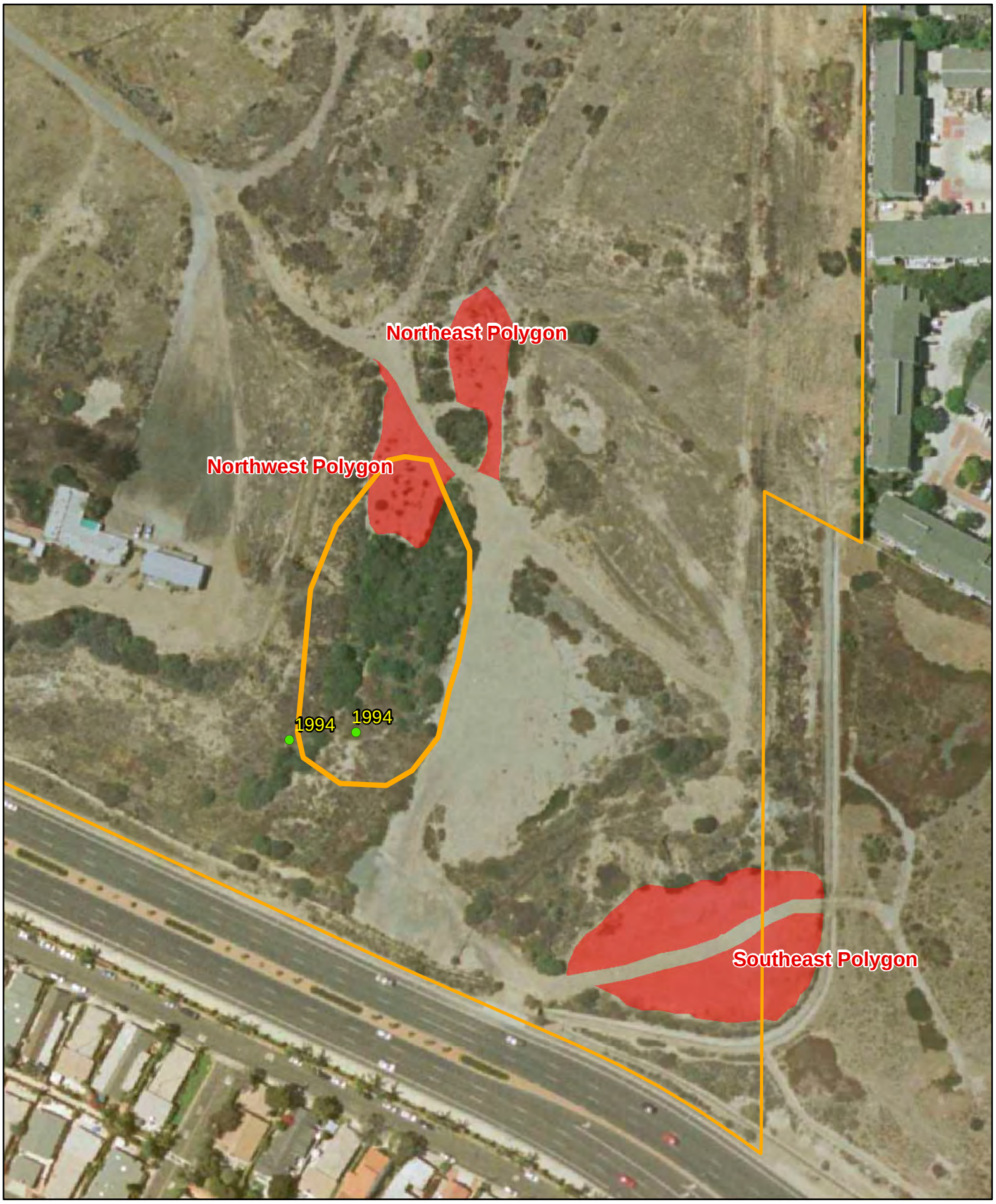
Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: LSA 1994.

N

Figure 17a

DSM 1/11



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

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Figure 17b

DSM 1/11

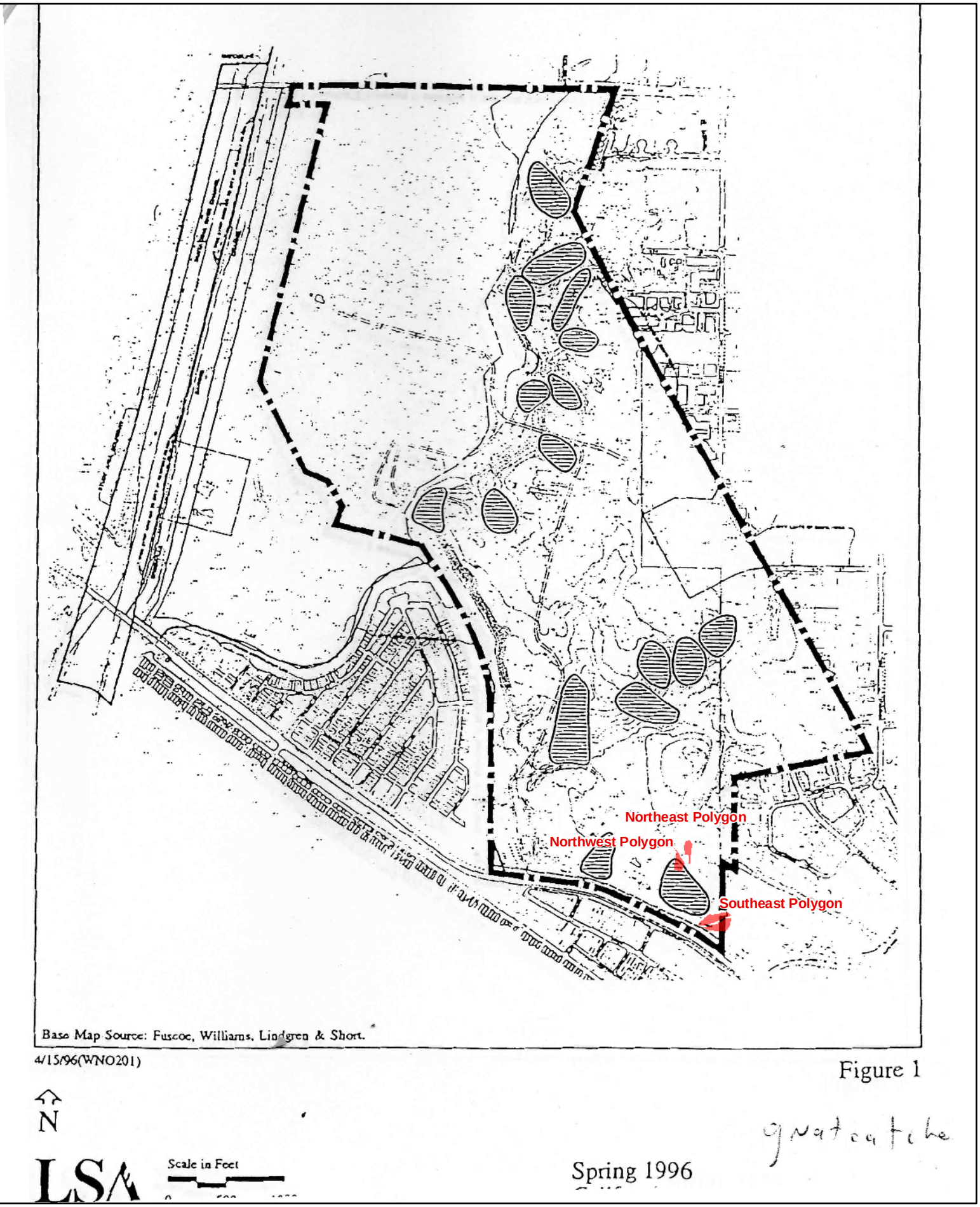

Figure 1

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

N

Figure 18a

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 18b

DSM 1/11

Figure 3
Newport Banning Ranch -
California Gnatcatcher Sightings
and Territories

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

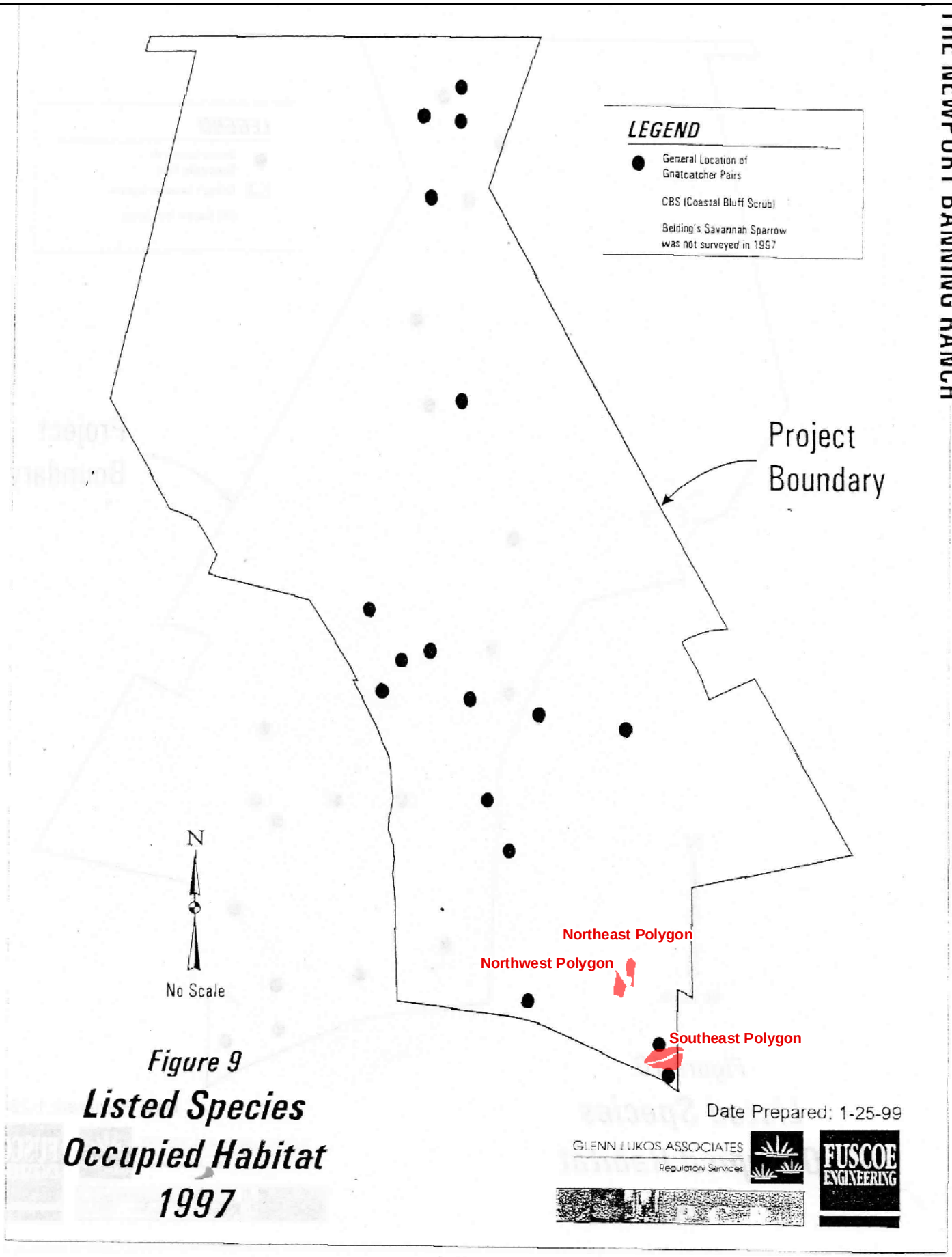
Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: PCR 1997.

N

Figure 19a

DSM 1/11

THE NEWPORT BANNING RANCH



Preliminary Draft For Discussion Purposes Only

Integrated Resource Conservation Plan

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 19b

DSM 1/11

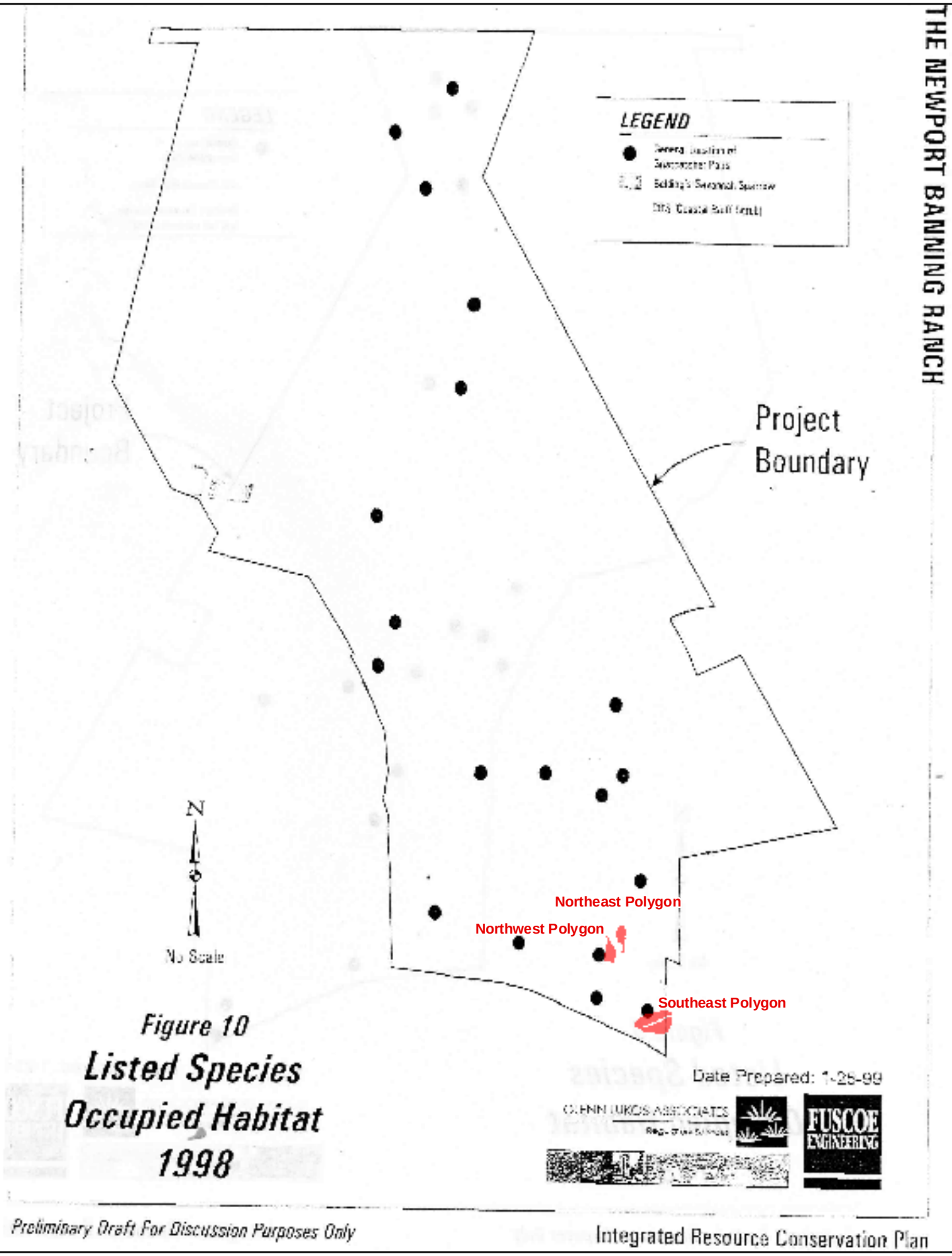
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 19c

DSM 1/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 20a

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 20b

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 21

DSM 1/11

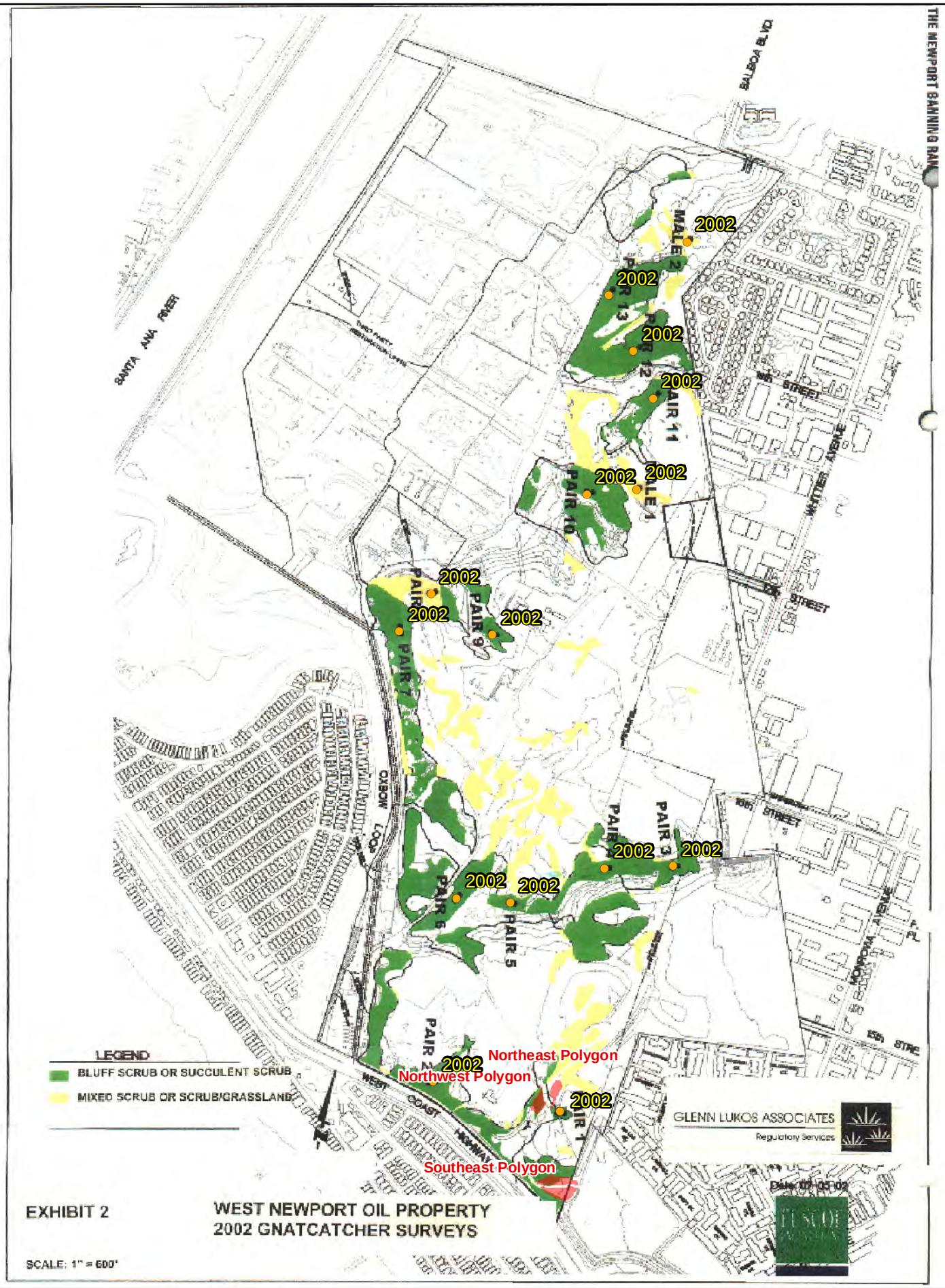
CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 22a

DSM 1/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 22b

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Gnatcatcher Occurances 2006

- Pair
- Single

Figure 23

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 24

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 25

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 26

DSM 1/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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

N

Figure 27

DSM 1/11

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

July 29, 2009

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

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

Dear Mr. Mohler:

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

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

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

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

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

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

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

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

Thank you for your cooperation.

Sincerely,

Andrew Willis
District Enforcement Analyst

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

NEWPORT BANNING RANCH

September 25, 2009

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

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

Dear Mr. Willis:

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

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

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

PCR (and other Biological consultants) Data

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

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

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

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

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

Respectfully,

Michael A. Mohler
Newport Banning Ranch LLC

Attachments

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

Cc City of Newport Beach:
Debby Linn
Sharon Wood

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

MEMORANDUM

GLENN LUKOS ASSOCIATES
Regulatory Services

PROJECT NUMBER: 04720008BANN

TO: Andrew Willis

FROM: Glenn Lukos Associates

DATE: September 24, 2009

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

---

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

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

Vegetation Associations

Southeast Polygon

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

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

Northwest Polygon

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

Northeast Polygon

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

California Gnatcatcher Locations

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

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

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

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

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

Potential Impacts of the Clearing Activities

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

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

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

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

2002

2006

NEWPORT BANNING RANCH

GLENN LUKOS ASSOCIATES

Exhibit 1

Source: California Coastal Commission

NEWPORT BANNING RANCH

GLENN LUKOS ASSOCIATES

Exhibit 2

Source: California Coastal Commission

February 2006

December 2003


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

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

NOTICE OF VIOLATION OF THE CALIFORNIA COASTAL ACT

May 14, 2010

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Andrew Willis
District Enforcement Analyst

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

HAMILTON BIOLOGICAL

May 25, 2010

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

SUBJECT: REVIEW OF BIOLOGICAL RESOURCES ISSUES SUNSET RIDGE PROJECT SITE

Dear Mr. Schwing,

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

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

PLANT COMMUNITY MAPPING ERRORS

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

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

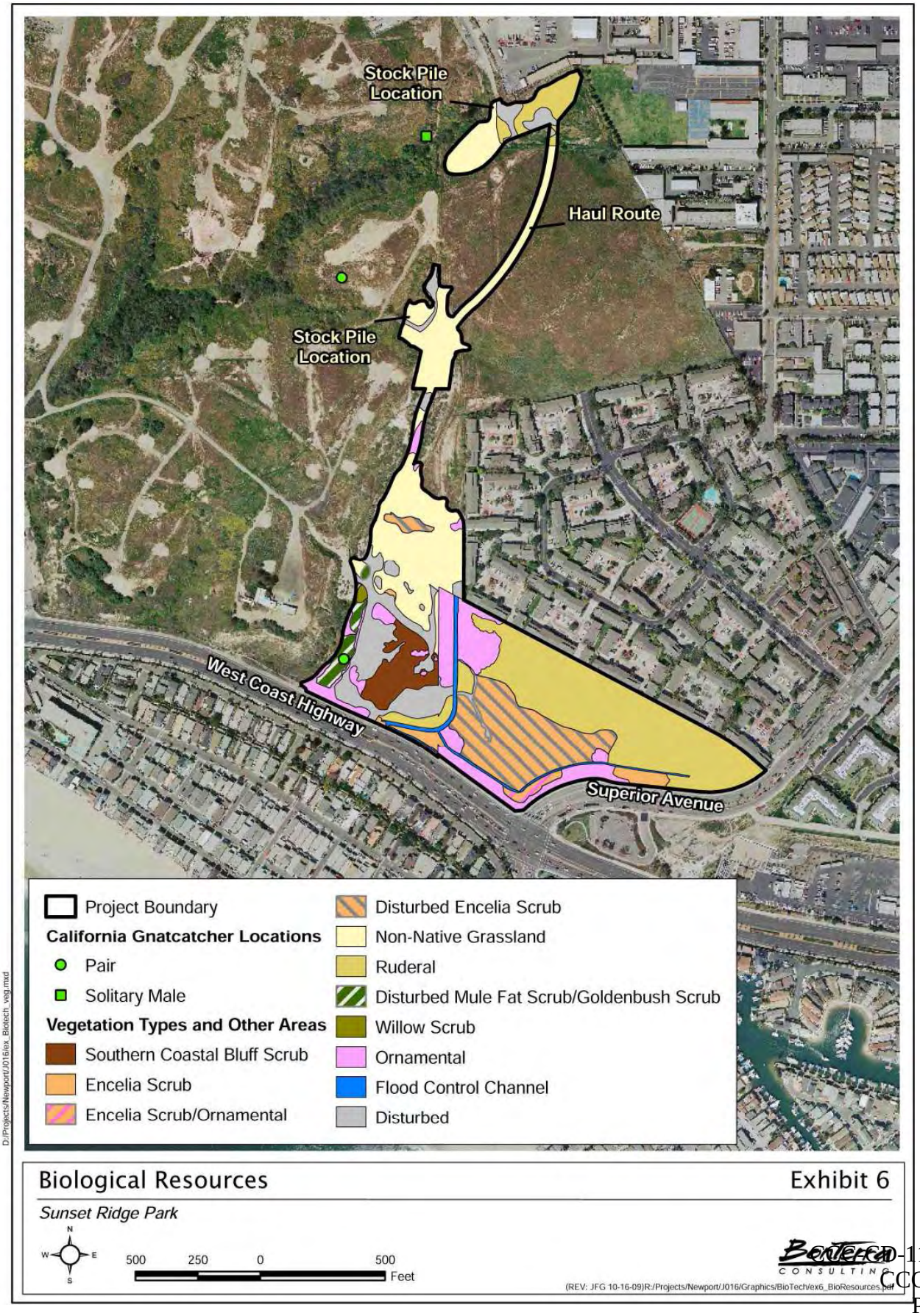

Stock Pile Location
Haul Route
Stock Pile Location
West Coast Highway
Superior Avenue
Project Boundary
California Gnatcatcher Locations
Pair
Solitary Male
Vegetation Types and Other Areas
Southern Coastal Bluff Scrub
Encelia Scrub
Encelia Scrub/Ornamental
Disturbed Encelia Scrub
Non-Native Grassland
Ruderal
Disturbed Mule Fat Scrub/Goldenbush Scrub
Willow Scrub
Ornamental
Flood Control Channel
Disturbed
D:/Projects/Newport/J016/ex_Biotech_veg.mxd
Biological Resources
Exhibit 6
Sunset Ridge Park
N
W
E
S
500
250
0
500
Feet
BonTerra CONSULTING
(REV: JFG 10-16-09)R:/Projects/Newport/J016/Graphics/BioTech/ex6_BioResources.pdf

Figure 1. Plant communities mapped by Robert Hamilton on the City-owned portion of the project site during spring 2010. On-site areas not labeled on this map are not defined or ruderal/disturbed. The area outlined in green could not be mapped because it is private land.

Note especially:

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

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

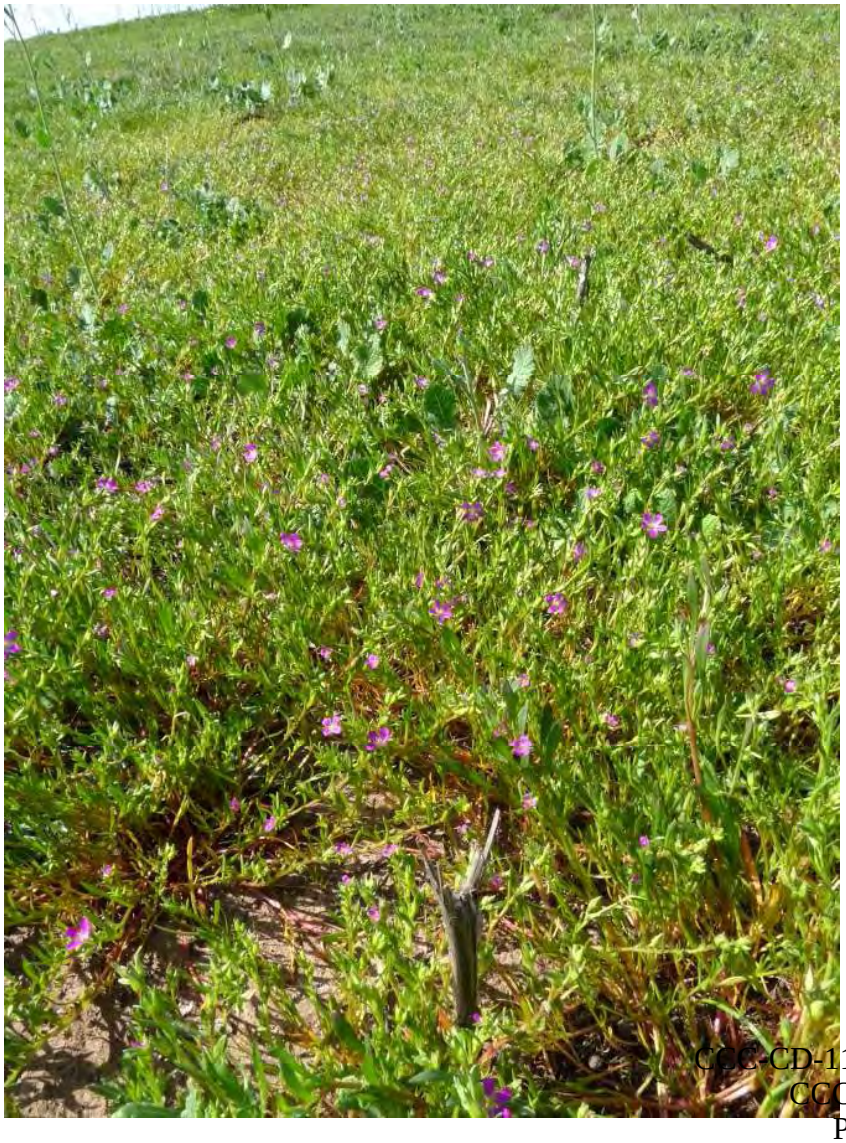


Figure 3. This photo shows the western portion of the upper plateau on March 25, 2010, where Fringed Redmaids provided 70-80% cover, with only scattered non-native Shortpod Mustard (*Hirschfeldia incana*). The view is to the west and slightly askew, with the edge of the plateau visible in the upper left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

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

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

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

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

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

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

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

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

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

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

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

WETLAND ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

The second part of the City's response was:

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

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

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

CALIFORNIA GNATCATCHER ISSUES

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The DEIR's Impact section stated:

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

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

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

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

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

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

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

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

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

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

Second:

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

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

RECENT REMOVAL OF INTACT SAGE SCRUB

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

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

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

The City responded:

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

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

MOWING OF ENCELIA SCRUB

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

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

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

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

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

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

Page 55 in Appendix E states:

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

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

Following is the City's response to these points:

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

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

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

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

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

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

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

STATUS OF THE BURROWING OWL ON THE SITE

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

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

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

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

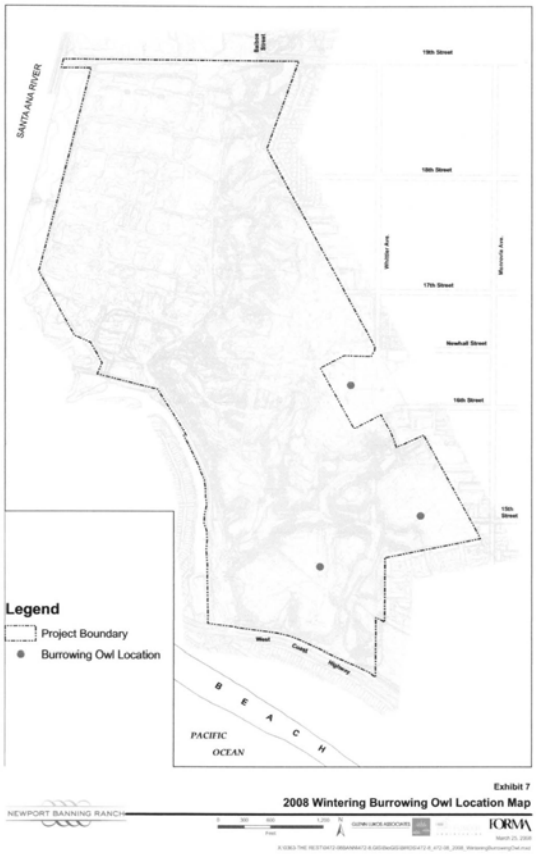

Figure 20. This map is Exhibit 7 in the 2008 draft biological report prepared by Glenn Lukos Associates for Newport Banning Ranch LLC. It shows the point locations where Glenn Lukos Associates documented the occurrence of three wintering Burrowing Owls in January 2008. Since birds do not remain in the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

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

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

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

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

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

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

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

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

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

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

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

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

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

Likely Effects of Dumping Fill at Newport Banning Ranch

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

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

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

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

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

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

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

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

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

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

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

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

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

Environmentally Sensitive Habitat Areas

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

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

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

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

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

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

SUMMARY & CONCLUSION

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

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

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

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

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

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

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

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

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

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

Sincerely,

Robert A. Hamilton
President, Hamilton Biological, Inc.

cc: Dr. John Dixon, Ecologist, Environmental Program Manager
Dr. Jonna Engel, Ecologist
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Terry Welsh, Banning Ranch Conservancy