

CALIFORNIA COASTAL COMMISSION

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STAFF REPORT: REGULAR CALENDAR

Application No.: 5-18-1090

Applicant: Newport Mesa Unified School District

Agent: Travis Kegel, Environmental Intelligence

Location: Seaward of Whittier Ave, between 16th and 17th Street, Newport Beach, Orange County (APNs 114-170-51, 114-170-63, 114-170-64)

Project Description: Removal of 2,046 linear feet of unpermitted chain-link fencing, associated posts and concrete footings. Enhancement of on-site habitat through invasive vegetation removal and hydroseeding of native vegetation is also proposed.

Staff Recommendation: Approval with conditions.

SUMMARY OF STAFF RECOMMENDATION

The proposed project is removal of a chain-link fence that was constructed in 2012 without the benefit of a coastal development permit on mostly vacant land owned by the Newport Mesa Unified School District (NMUSD). The fence is considered development under Coastal Act section 30106, as the erection of any solid material or structure, and so is the proposed fence removal. The Commission's Enforcement staff sent a letter to the property owners on February 15, 2013, notifying them of the violation and of the potential impacts to sensitive areas. The subject site is adjacent to, and enveloped on three sides by, the Newport Banning Ranch (NBR) property. The subject site and surrounding area is known to have freshwater wetlands/vernal pools, some of which support an endangered species of fairy shrimp, grasslands (native and non-native) that support raptors including burrowing owl, and coastal sage scrub that supports the endangered California gnatcatcher, among other resources. Enforcement staff informed the property owner that removal of the fence was an appropriate path forward to remedy the Coastal Act violation. However, the

applicant applied for after-the-fact approval and retention of the fence in November 2013 (Coastal Development Permit Application No. 5-13-1100), and Commission staff recommended denial of that application in March of 2015 due to the project's close proximity of known resources on the Newport Banning Ranch property, and lack of sufficient information provided by the applicant about existing resources on the subject property. The applicant subsequently withdrew that application, and no Commission action was taken. Commission Enforcement staff continued to work with the applicant in an effort to resolve the violation, again informing the applicant that removal of the fence was an appropriate path forward to remedy the Coastal Act violation. The applicant is now proposing to remove the unpermitted fence utilizing appropriate minimization and avoidance measures to avoid a significant disruption of habitat values, and to mitigate for the impacts of the fence on habitat and resident species, proposing three seasons of on-site weeding to remove invasive plant species and to conduct three seasons of hydroseeding with native vegetation which directly benefits numerous plant and wildlife species as well as water quality for the benefit of wildlife onsite.

The proposed fence removal, including the extraction of approximately 170 fence posts, six associated concrete footings, as well as proposed weeding and hydroseeding of native vegetation, will directly impact some sensitive habitat areas that are designated and protected as environmentally sensitive habitat areas ("ESHA") under Section 30240 of the Coastal Act. Here, the designated ESHA primarily consists of California gnatcatcher and burrowing owl foraging habitat and seasonal wetlands/vernal pools. One of the fence posts will be extracted from a vernal pool known as SW2, and pole removal has been conditioned to occur during the dry season, ensuring that nearby soil is utilized to fill and compact the post hole as recommended by the U.S. Fish and Wildlife Service and memorialized in **Special Condition 3**. The removal of the fence will occur within and adjacent to designated ESHA, including disturbed non-native annual grassland interspersed with patches of degraded coastal sage scrub (CSS), and the proposed fence removal activities (temporary construction access, fence removal and post extraction) have been designed to prevent significant degradation of the primary habitat value. Although the proposed project includes invasive plant removal in ESHA and minimal fill in a wetland, the work is for restoration of the vernal pool and sensitive habitat, which is permitted under Section 30233 and 30240 of the Coastal Act.

In addition, to mitigate for the ongoing habitat impacts of the fence since it was installed in 2012, the applicant is proposing three years of weeding of invasive plants such as invasive black mustard (*Brassica nigra*), chrysanthemum (*Glebionis coronaria*), wild radish (*Raphanus sativus*), and tocalote (*Centaurea melitensis*); and hydroseeding native grasses, propagated from local sources to enhance native grassland to improve the foraging habitat suitable for coastal California gnatcatchers and burrowing owls. As part of the project, the applicant must monitor the area for three years to evaluate the success of the restoration project, which is addressed in **Special Condition 8**.

The proposed development has been conditioned to assure the project is consistent with the resource protection policies of the Coastal Act. Due to updates and revisions to the proposed project during staff review and any changes to site conditions, the Commission imposes **Special Condition 1 and 2**, which requires the submittal of an updated habitat map and final revised plans. The Commission imposes **Special Condition 4** which specifies construction timing constraints to avoid adverse impacts on sensitive avian species, and biological monitoring of the proposed development as conditioned by **Special Condition 6**. In addition, because the project site is on a coastal upland site

and in proximity to coastal waters, the Commission recommends construction-related requirements and best management practices under **Special Condition 5** to prevent pollution of coastal waters.

Thus, staff recommends that the Commission **approve** with conditions Coastal Development Permit Application No. 5-18-1090 as further discussed in this report. As conditioned herein, the project can be found consistent with Chapter 3 of the Coastal Act.

TABLE OF CONTENTS

I. MOTION AND RESOLUTION	5
II. STANDARD CONDITIONS.....	5
III. SPECIAL CONDITIONS.....	6
IV. FINDINGS AND DECLARATIONS.....	11
A. PROJECT LOCATION AND DESCRIPTION	11
B. STANDARD OF REVIEW	14
C. MARINE RESOURCES AND WETLANDS.....	14
D. ENVIRONMENTALLY SENSITIVE HABITAT AREAS.....	18
E. OTHER AGENCY APPROVALS	24
F. LOCAL COASTAL PROGRAM	25
G. UNPERMITTED DEVELOPMENT.....	25
H. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA).....	25

APPENDICES

Appendix A – Substantive File Documents

EXHIBITS

Exhibit 1 – Vicinity Map and Project Location

Exhibit 2 – Biological Conditions

Exhibit 3 – Fencing Location; Fence Posts to be Removed

Exhibit 4 – *Updated Assessment of the Biological Resources in the Vicinity of Newport-Mesa Unified School District Unpermitted Fence*, Memorandum addressed to Mandy Revell, Coastal Analyst, prepared by Dr. Jonna Engel, CCC Senior Ecologist, August 29, 2019.

Exhibit 5 – *Biological Resources in Vicinity of Newport-Mesa Unified School District Unpermitted Fence*. Memorandum addressed to Amber Dobson, Coastal Analyst, prepared by Dr. Jonna Engel, CCC Senior Ecologist, February 26, 2015.

Exhibit 6 – CCC Notice of Violation, V-5-13-003

I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** Coastal Development Permit Application No. 5-18-1090 pursuant to the staff recommendation.*

Staff recommends a **YES** vote. Passage of this motion will result in approval of the permit as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution:

The Commission hereby approves Coastal Development Permit Application No. 5-18-1090 for the proposed development and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.

II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

1. **Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the permittees or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
2. **Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
3. **Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
4. **Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

5. **Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittees to bind all future owners and possessors of the subject property to the terms and conditions.

III. SPECIAL CONDITIONS

1. **Updated Habitat Map.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit an updated habitat map depicting existing vegetation, location of seasonal wetlands and vernal pools.
2. **Final Revised Plans.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit, for the review and written approval of the Executive Director, final detailed and revised plans consistent with the following:
 - A. A fence removal plan that substantially conforms with the plans submitted to the Commission on February 22, 2019, requiring that all remaining holes shall be filled with clean soil and returned to a level ground condition after the fence posts are removed. Filling of the holes will minimize changes in hydrology within potential habitat for federally listed invertebrates (i.e., San Diego fairy shrimp or Riverside fairy shrimp). Filling of the holes shall be limited to the fence posts and no natural burrowing owl burrows shall be backfilled. A biologist shall be present onsite to monitor the filling of the holes to ensure that there are no impacts to Burrowing Owl habitat.
 - B. All revised plans shall be prepared and certified by a licensed professional or professionals as applicable (e.g., biologist), based on current information and professional standards, and shall be certified to ensure that they are consistent with the Commission's approval and with the recommendations of any required technical reports.
 - C. The permittee shall undertake development in conformance with the approved final plans unless the Commission amends this permit or the Executive Director determines that no amendment is legally required for any proposed minor deviations.
3. **Habitat Protection Plan During Fence Removal.** PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicant shall submit a Habitat Protection plan to avoid impacts during the demolition/removal of the fence, consistent with the following:
 - A. Fence removal activities shall only occur during the dry season.
 - B. The plan shall require a qualified biologist to place flags around the seasonal wetlands and vernal pools, demarcating the 50 foot buffer, to ensure that contractors do not drive on or around the pools, or otherwise trample or disturb the pools while removing the fence. All vernal pools and seasonal wetlands onsite shall be fenced/flagged. In locations where there is not sufficient space to provide a 50 foot buffer around the pool because the existing unpermitted fence is located in the vernal pool, the biologist shall develop a protocol to ensure that the pool is subject to the minimal amount of disturbance during fence removal, including but not limited to:

1. The fence removal in this location shall be done by 1 or 2 individuals, or the minimum number of persons necessary to complete the work in this location. As soon as the chain-link and the post is removed, there shall be no other disturbances: no walking through the pool and all contractors shall be directed to walk/drive around the 50 foot flagged perimeter.
 2. There shall be no automobile access to areas that are flagged.
 3. The applicant shall avoid driving in basins when water is present to prevent the creation of tire ruts. If driving through the basins with heavy equipment is required to access non-native vegetation during weeding, the heavy equipment should be outfitted with low-tread rubber tires to limit disturbance to the soil surface.
 4. The permittee shall undertake development in accordance with the approved final plan. Any proposed changes to the approved final plan shall be reported to the Executive Director. No changes to the approved revised final plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.
- 4. Timing of Fence Removal.** The applicant shall remove the existing fence within 180 days of the issuance of the issuance of this permit. The Executive Director may grant additional time for good cause. By acceptance of this permit, the applicant agrees that:
- A. If construction activities, including but not limited to grading, construction, restoration activities, or other disturbance are to occur between February 1 and September 15, a pre-construction nesting bird survey shall be conducted to determine the presence of active nests within 500 feet of the construction activities. The nesting bird surveys shall be completed no more than 72 hours prior to any construction activities. All ground-disturbance activities within 500 feet of raptor nests or other active nests or as specified below shall be halted until that nesting effort is finished. Western burrowing owl surveys should be conducted between December 1 to January 31.
 - B. The monitor shall review and verify compliance with these nesting boundaries and shall verify when the nests have been naturally vacated for the season, with no human interference. Work may resume when no other active nests are found. Upon completion of the survey and any follow-up construction avoidance management, a report shall be prepared and submitted to the Executive Director.
 - C. Appropriate noise-abatement measures (e.g., sound walls) shall be implemented to ensure that noise levels are less than 60 A-weighted decibels (dBA) at the active nest of a listed species, as determined by the biological monitor. This shall be verified by weekly noise monitoring at an equivalent location conducted by a qualified

Acoustical Engineer during the breeding season (February 1 to September 15) or as otherwise determined by a qualified biological monitor based on nesting activity.

- D. Removal of the fence post from vernal pool SW2 shall only occur during the dry season outside of bird breeding season.

The applicant further agrees that:

- E. Construction during Breeding and Non-Breeding Seasons for Sensitive Species. Activities involving disturbance or removal of riparian vegetation shall be prohibited during the Gnatcatcher breeding season (February 15 through September 1) and overwintering season for the Western burrowing owl (November 1 to February 28).
- F. Vegetation impacts shall be monitored by a qualified Biologist. The Biological Monitor shall delineate (by the use of orange snow fencing or lath and ropes/flagging) all areas adjacent to the impact area that contain habitat suitable for sensitive bird occupation (i.e., California gnatcatcher, Belding savannah sparrow, light-footed clapper rail) and raptors.
- G. Prior to and during any disturbance of suitable gnatcatcher habitats outside the gnatcatcher breeding season, the biologist shall locate any individual gnatcatchers on-site and direct clearing to begin in an area a minimum of 300 feet away from the birds. No site disturbance shall occur until the individual birds have naturally vacated the area without human interference. It shall be the responsibility of the permittee to assure that gnatcatchers shall not be directly injured or killed by impacts to Coastal Sage Scrub or other Scrub communities.
- H. Prior to initiating vegetation impacts or project construction, the biological monitor shall meet on-site with the construction manager or other individual(s) with oversight and management responsibility for the day- to-day activities on the construction site to discuss implementation of the relevant avoidance and minimization mitigation measures for gnatcatchers. The biologist shall meet as needed with the construction manager (e.g., when new crews are employed) to discuss implementation of these measures.

5. Storage of Construction Materials, Mechanized Equipment and Removal of Construction Debris. The permittees shall comply with the following construction-related requirements:

- A. No demolition or construction materials, debris, or waste shall be placed or stored where it may enter sensitive habitat, receiving waters or a storm drain, or be subject to wave, wind, rain, or tidal erosion and dispersion.
- B. No demolition or construction equipment, materials, or activity shall be placed in or occur in any location that would result in impacts to environmentally sensitive habitat areas, streams, wetlands or their buffers.
- C. Any and all debris resulting from demolition or construction activities shall be removed from the project site within 24 hours of completion of the project.

- D. Demolition or construction debris and sediment shall be removed from work areas each day that demolition or construction occurs to prevent the accumulation of sediment and other debris that may be discharged into coastal waters.
- E. All trash and debris shall be disposed in the proper trash and recycling receptacles at the end of every construction day.
- F. The permittees shall provide adequate disposal facilities for solid waste, including excess concrete, produced during demolition or construction.
- G. Debris shall be disposed of at a legal disposal site or recycled at a recycling facility. If the disposal site is located in the coastal zone, a coastal development permit or an amendment to this permit shall be required before disposal can take place unless the Executive Director determines that no amendment or new permit is legally required.
- H. All stock piles and construction materials shall be covered, enclosed on all sides, shall be located as far away as possible from drain inlets and any waterway, and shall not be stored in contact with the soil.
- I. Machinery and equipment shall be maintained and washed in confined areas specifically designed to control runoff. Thinners or solvents shall not be discharged into sanitary or storm sewer systems.
- J. The discharge of any hazardous materials into any receiving waters shall be prohibited.
- K. Spill prevention and control measures shall be implemented to ensure the proper handling and storage of petroleum products and other construction materials. Measures shall include a designated fueling and vehicle maintenance area with appropriate berms and protection to prevent any spillage of gasoline or related petroleum products or contact with runoff. The area shall be located as far away from the receiving waters and storm drain inlets as possible.
- L. Best Management Practices (BMPs) and Good Housekeeping Practices (GHPs) designed to prevent spillage and/or runoff of demolition or construction-related materials, and to contain sediment or contaminants associated with demolition or construction activity, shall be implemented prior to the on-set of such activity.
- M. All BMPs shall be maintained in a functional condition throughout the duration of construction activity.

6. Biological Monitor. By acceptance of this permit, the applicant agrees that: An appropriately trained biologist shall monitor the proposed development for disturbance to sensitive species or habitat area. At minimum, monitoring shall occur once a week during any week in which construction occurs. Daily monitoring shall occur during development (fence removal) which could significantly impact biological resources such as the Raptors or sensitive species in the area. Based on field observations, the biologist shall advise the applicant regarding methods to minimize or avoid significant impacts, which could occur upon sensitive species or habitat areas. The applicant shall not undertake any activity, which would disturb habitat area unless specifically authorized and mitigated under this coastal

development permit or unless an amendment to this coastal development permit for such disturbance has been obtained from the Coastal Commission.

- 7. Construction Staging.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit, for the review and written approval of the Executive Director, a staging plan for the proposed fence removal activities. Development staging and storage of equipment is prohibited on sensitive habitat.

The permittees shall undertake development (fence removal) in accordance with the approved final plans. Any proposed changes to the approved final plans shall be reported to the Executive Director. No changes to the approved final plans shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

- 8. Final Habitat Mitigation and Monitoring Plan.** PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT, the applicants shall submit for review and written approval of the Executive Director, a final detailed habitat mitigation and monitoring plan to restore disturbed habitat in substantial conformance with the submitted *Mitigation and Monitoring Plan for the 11.5 Acre Newport Mesa School District Property Located in Orange County, California*, prepared by Environmental Intelligence, LLC, dated February 22, 2019). A biologist qualified in the preparation of ecological restoration plans shall design the revised mitigation and monitoring plan. The revised mitigation and monitoring plan shall be for three years of weed eradication and hydroseeding of native forbs and grasses and shall at a minimum include the following:

- A. A description of existing site conditions including an updated habitat map with existing site conditions including the location of all seasonal wetlands located onsite.
- B. Goals and objectives of the habitat mitigation.
- C. Weed eradication methods (e.g. grow-kill cycling, manual weed removal, mowing, herbicide use, etc.), weed eradication timing/schedule, and details for why the respective methods have been identified given the various invasive weed species targeted for removal.
- D. Provisions for overwintering burrowing owl and bird nesting season surveys conducted to ensure that weed eradication work does not disturb any burrowing owls or nesting birds.
- E. A list of native forb and grass seeds to be used for hydroseeding, seed weight planned for the respective species, and hydroseeding timing/schedule.
- F. Temporary irrigation may be used for weed grow-kill cycling and following hydroseeding for native seed establishment. -annual qualitative and quantitative monitoring including a description of the methods that will be employed.
- G. Plans for adaptive management because as the mitigation is implemented and results are analyzed, changes in approach may be warranted.-final success criteria- e.g. at the end of three years there shall be no more than 30% cover of invasive

non-native weeds (including, but not limited to *Brassica nigra* (black mustard) *Centaurea melitensis* (tocalote), and *Raphanus raphanistrum* (wild radish) in areas 4 & 5 and the hydroseeded native forbs and grasses have successfully established attaining 30% cover.

- H. Provisions for submission of annual reports of monitoring results to the Executive Director for the duration of the required three year monitoring period. Each report shall document the condition of the mitigation with photographs taken from the same fixed points in the same directions and report on the quantitative monitoring results. Each report shall also include a “Performance Evaluation” section where information and results from the monitoring program are used to evaluate the status of the mitigation project in relation to the performance criteria. The final report at the end of three years must evaluate whether the mitigation site conforms to the goals, objectives, and performance criteria set forth in the approved final mitigation and monitoring program.
- I. If the final report indicates that the mitigation project has been unsuccessful, in part, or in whole, based on the approved performance criteria, the applicant shall submit within 90 days a revised or supplemental mitigation program to compensate for those portions of the original program that were necessary to offset project impacts which did not meet the approved performance criteria. The revised mitigation program, if necessary, shall be processed as an amendment to this coastal development permit.
- J. The applicant shall implement the proposed HMMP, consistent with the terms and deadlines therein, within 90 days of its approval by the Executive Director. The Executive Director may grant additional time for good cause.
- K. The permittees shall monitor and manage the mitigation site in accordance with the approved mitigation and monitoring plan, including any revised mitigation program approved by the Commission or its staff. Any proposed changes to the approved mitigation and monitoring plan shall be reported to the Executive Director. No changes to the approved mitigation and monitoring plan shall occur without a Commission amendment to this coastal development permit unless the Executive Director determines that no amendment is legally required.

IV. FINDINGS AND DECLARATIONS

A. PROJECT LOCATION AND DESCRIPTION

Location and Site History

The project site is located at the western end of Newport Beach, north of Pacific Coast highway, at the western terminus of West 16th Street ([Exhibit 1](#)). The property is located on coastal upland, immediately east of Newport Banning Ranch and West of the City of Costa Mesa. The site is north of the Sunset Ridge Park site and the Newport Crest/Seawind Condominiums. The majority of the site is within the City of Newport Beach. The southern-most portion of the site is in the jurisdiction of the County of Orange, but under the “sphere of influence” of Newport Beach. Although the County does not have a certified Local Coastal Plan (LCP) for the subject area, the Commission

certified the City of Newport Beach's LCP on January 13, 2017, which lists the subject site as an area of "deferred certification". Therefore, the standard of review is Chapter 3 of the Coastal act with the certified LCP as guidance.

The 11.5-acre site is immediately adjacent to the 401 acre Newport Banning Ranch, which is the largest remaining undeveloped coastal property in southern California. The subject parcel is divided into five areas, with several interior fences to separate them. These five fenced areas were numbered in the staff report for Coastal Development Permit No. 5-13-1100, which do not represent legal lots or separate parcels. For consistency, the five fenced areas were referenced by the applicant, and are utilized in this staff report for comparison purposes ([Exhibit 3](#)). Three of the fenced areas are currently used to store equipment: the two southern-most fenced areas (area 1 and area 2) were leased to construction companies, while the northeastern fenced area (area 3) is used for storage of NMUSD obsolete equipment and occasionally the space is rented for other large/heavy equipment storage. The three fenced areas are currently used for storage (areas 1, 2, and 3), have been graded, and are covered with a layer of gravel and are regularly compacted by the activity and use of the areas. The 2.97-acre area (area 4) in the northwest corner of the property was fenced in 2012 without a CDP, which is the primary focus of this staff report. This area was not previously used by NMUSD nor was it leased for storage. A small strip along the southwest boundary of the site (area 5) was also fenced at the same time, enclosing 0.22 areas.

The applicant received a Violation letter (V-5-13-003, [See Exhibit 6](#)) from Coastal Commission Enforcement staff in February 2013 regarding the unpermitted fence installation in Area 4 ([Exhibit 6](#)). The letter discusses working amicably on a 'consent order' to resolve the unpermitted development and restoration of the property, as preferable to a 'cease and desist order'. The letter, noting the sensitive species in the area, references the USFWS request to "postpone activity around the fence to a time of year that would have the least impact to sensitive species," while concluding that complete removal of the fence and restoration of the site (while being mindful of the time of year) would be an appropriate way to resolve the violation. In November 2013, the applicant submitted the CDP application 5-13-1100 for retention of the unpermitted fence, and Commission staff recommended denial of that application in March of 2015 due to the project's close proximity to known resources on the Newport Banning Ranch property, and lack of sufficient information provided by the applicant about existing resources on the subject property. The applicant subsequently withdrew that application, and no Commission action was taken.

Project Description

The applicant proposes to remove 2,046 linear feet of unpermitted 6-foot high perimeter chain-link fencing, approximately 170 posts and 6 associated concrete footings in the 2.97 acre area known as Area 4. Fasteners securing the chain-link fencing to posts will be clipped and chain-link fencing will be rolled and removed. Posts that had been pounded approximately 2-feet deep into the soil or that include concrete foundations will be removed utilizing leverage blocks and/or small mechanical or hydraulic jacks to eliminate the need for excavation. Any soil spoils that are attached to the extracted posts shall be placed back at the post location and soils will be levelled to preexisting contours as necessary. Voids left from the removal of the corner posts with concrete footings will be filled with clean soil comparable to the surrounding area. To mitigate for the temporal impacts of the fence, which has been in place since 2012, the applicant proposes to conduct three seasons of weeding to remove invasive plant species from the site and hydroseeding of native vegetation to improve habitat.

The purpose of the proposed project is to remove the unpermitted fence, restoring habitat function and connectivity to the site for the benefit of the existing wildlife and vegetation that occupy the site. Biological surveys supplied by the applicant document the presence of several sensitive species and resources impacted by the installation of the fence, including sensitive vegetation, burrowing owl and California gnatcatcher habitat, and seasonal wetlands and vernal pools. The fence was installed immediately adjacent to an earthen berm likely containing burrows for Western Burrowing owls, an exceedingly rare species in California. Trampled soil and fence posts driven two feet deep into the soil negatively impacted the habitat area. The construction activities trampled the ground and compacted and disturbed approximately 0.47 acres of soil and grassland onsite, in some cases immediately next to patches of native grasslands, and resulted in construction of a fence directly through seasonal wetlands and habitat areas. One of the fence posts (without a concrete footing) was installed directly into one of the vernal pools onsite, which is located on the northern perimeter of Area 4 ([Exhibit 5 pg. 9](#)).

In addition to the direct impacts of the installation of the fence, the presence of the fence in this location since 2012 also negatively impacted the habitat. Such temporal impacts include habitat fragmentation and isolation of wildlife resulting from the placement of a physical barrier in an otherwise unobstructed swath of open space. The presence of the fence prevented herbivores like rabbits from being able to enter into the space to forage on the property, which may be partially responsible for the expansion of non-native weeds within the site. The project site has experienced an increase in the annual grassland, especially the taller invasive weeds, which has degraded the site for burrowing owl and coastal California gnatcatcher foraging habitat. Furthermore, the presence of the fence provided a structure for raptors to perch and prey upon smaller birds such as burrowing owls and gnatcatchers. Larger wildlife, such as coyotes, have dug under the fence in at least 2 documented locations, notably adjacent to a seasonal wetland ([Exhibit 4, pg. 10](#)). Digging can alter the shape of the wetland and introduce loose soil that acts as fill into the wetland. The loose soil can decrease the depth of the pool and increase the turbidity, having an impact on the invertebrates, such as the versatile fairy shrimp (VFS), and vegetation within the pool.

Since the proposed project includes removal of the fence, the focus of this staff report is limited to analyzing the impacts associated with the proposed fence removal, invasive vegetation removal, and hydroseeding. Direct impacts of fence removal will include minimal soil disturbance associated with removal of the 170 fence posts and approximately 7 concrete footings located within disturbed habitat areas and a minimal amount of wetland fill from re-compaction of soil after the fence post is removed from a vernal pool.

The project includes three seasons of invasive non-native vegetation removal combined with hydroseeding of native forbs and grasses, which will include a monitoring plan to measure the effectiveness and success of the invasive weeding and hydroseeding native forbs and grasses retrieved from local sources to establish native grassland habitat suitable for coastal California Gnatcatcher and Western burrowing owl. No permanent irrigation system will be installed; hand watering will be conducted as needed to augment natural precipitation.

B. STANDARD OF REVIEW

The City of Newport Beach LCP was effectively certified on January 13, 2017. The standard of review for development within the City's permit jurisdiction is the City's certified LCP. The entire subject property is depicted on the post-certification map as within an area of "deferred certification", and a portion of the property lies in the City of Newport Beach and a portion of the property lies within the County of Orange. The standard of review is Chapter 3 of the Coastal Act, although the City's certified LCP is advisory in nature and may provide guidance.

C. MARINE RESOURCES AND WETLANDS

Section 30230 of the Coastal Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Section 30231 of the Coastal Act states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Section 30233 of the Coastal Act states, in relevant part:

(a) The diking, filling or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:

(1) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.

(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.

(3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

(4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.

(5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.

- (6) Restoration purposes.*
- (7) Nature study, aquaculture, or similar resource dependent activities.*

The City of Newport Beach's certified Land Use Plan Section 4.1.1 includes the following policies regarding wetlands (in relevant part):

4.1.3-1. Utilize the following mitigation measures to reduce the potential for adverse impacts to ESA natural habitats from sources including, but not limited to, those identified in Table 4.1.1:

A. Require removal of unauthorized structures... that impact wetlands or other sensitive habitat areas.

E. Limit encroachments into wetlands to development that is consistent with Section 30233 of the Coastal Act and Policy 4.2.3-1 of the Coastal Land Use Plan.

4.2.1-1. Recognize and protect wetlands for their commercial, recreational, water quality and habitat value.

4.2.1-2. Protect, maintain, and where feasible, restore the biological productivity and the quality of coastal waters, streams, wetlands, and estuaries.

4.2.2-1. Define wetlands as areas where the water table is at, near, or above the land surface long enough to bring about the formation of hydric soils or to support the growth of hydrophytes. Such wetlands can include areas where vegetation is lacking and soil is poorly developed or assent as a result of frequent drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentration of salts or other substances in the substrate...

4.2.2-3. Require buffer areas around wetlands of a sufficient size to ensure the biological integrity and preservation of the wetland that they are designed to protect. Wetlands shall have a minimum buffer width of 100 feet wherever possible...

4.2.3-1. Permit the diking, filling, or dredging of open coastal waters, wetlands, estuaries and lakes in accordance with other applicable provisions of the LCP, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects and limited to the following:

A. Construction or expansion of port/marine facilities.

B. Construction or expansion of coastal-dependent industrial facilities...

C. In open coastal waters other than wetlands... the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.

D. Maintenance of existing and restoration of previously dredged depths...

E. Incidental public service purposes which temporarily impact the resources of the area, such as burying cables and pipes...

F. Sand extraction...

G. restoration purposes.

H. Nature study, aquaculture, or similar resource dependent use.

I. In upper Newport Bay Marina Park...

Seasonal Wetlands

Seasonal wetlands often occur under Mediterranean climate conditions of the west coast. Seasonal wetlands have a natural lining of bedrock or a lining of hard clay that prevents water from infiltrating into the soil. Seasonal wetlands may or may not support plants or animals found in

vernal pools, but they do meet one or more of the three wetland parameters required by the Coastal Act regulations to qualify as a wetland: hydrology, hydrophytic vegetation, and/or hydric soils parameter requirements. All wetlands documented by the biological report submitted by the applicant qualify as seasonal wetlands under the Coastal Act.

Vernal pools are depressional wetlands that fill with rain water in the winter and spring and are dry at other points of the year and often house endangered species such as San Diego fairy shrimp (*Branchinecta sandiegonensis*), which are protected under the federal Endangered Species Act. Vernal pools are rare and unique habitats that support a number of plant and animal species found only in vernal pools. Plant species indicative of vernal pools, including brass buttons (*Cotula coronopifolia*) and woolly marbles (*Psilocarphus sp.*), occur in several of the vernal pools on the adjacent NBR property; and woolly marbles have been documented in the vernal pools that occur on the subject site. Fairy shrimp are vernal pool indicator species and there are two species present in the vernal pools on NBR in the vicinity of the subject site (on the other side of the subject fence); the federally endangered San Diego fairy shrimp and the versatile fairy shrimp (*Branchinecta lindahli*). Vernal pool protocol level surveys in the past have documented fairy shrimp in at least 37 vernal pools on the adjacent NBR property including eight pools occupied by the San Diego fairy shrimp. Fifteen acres on NBR and portions of the subject NMUSD property have been identified as San Diego fairy shrimp critical habitat by the USFWS. This area is the only designated critical habitat for this species in Orange County.

During rain events, a shallow layer of water covers the depression in the soil and “awakens” the seeds, eggs, and/or cysts present. During a wet season, a seasonal pool may fill and dry out several times and in years of drought, it may not fill at all. The seeds, eggs, and cysts can survive the drought conditions until the pool fills again. If the seasonal wetlands contain species that are endemic to that habitat (such as ostracods “seed shrimp” or fairy shrimp), they are called ‘vernal pools’ and may rise to the level of ESHA. Some seasonal wetlands in the project area are also vernal pools. Approximately 90% of vernal pools in California have already been lost.¹ Title 14 California Code of Regulations (“CCR”) section 13577(b) defines wetlands as land where the water table is at, near or above the land surface long enough to promote the formation for hydric soils or to support the growth of hydrophytic vegetation. A seasonal wetland is protected pursuant to the marine resource protection policies of the Coastal Act, however, if a seasonal wetland is also a vernal pool, it rises to the level of ESHA and is also afforded protection pursuant to the land resource protection policies of the Coastal Act.

The project site has been assessed for wetlands several times, and three seasonal wetlands have been documented on the site in the biological reports submitted by the applicant (Exhibit 4, 5). Two recorded seasonal wetlands (SW 1 and SW 2) are along the fence in the project area, while the third (SW 3) is in an existing storage yard on the eastern portion of the site. Additionally, there are 3 seasonal wetlands on the adjacent Newport Banning Ranch property (SW A) within 100 feet of the unpermitted fence. Although the most recent survey conducted of the area submitted by the applicant did not clearly identify SW1 and SW2 as vernal pools, biological surveys of the seasonal wetlands on the project site over the past five years indicate that both would likely be identified as vernal pools by formal protocol surveys (EXHIBIT 4). All seasonal wetlands within the project area

¹ Vernal Pools. US EPA.

(SW 1, SW 2, SW 3, and SW A) meet the hydrology criteria above, used to delineate wetlands under the Coastal Act, and must be protected.

Impacts to Wetlands

Of the four seasonal wetlands within the project area noted above, the proposed fence removal will impact SW2, which is located on the northern property line and was installed directly through SW2. SW2 is approximately 30 feet long (along the fence) and 16 feet wide and has been found to support versatile fairy shrimp and woolly marbles, a vernal pool indicator plant species, and has therefore been determined to be a vernal pool (EXHIBIT 4, 5). This wetland occupies space on both NMUSD and NBR property. While no concrete footing was installed here, the fence posts driven 2 feet into the soil may have altered the impermeable layer of soil, altering the duration of water held in the pool and likely impacting the VFS and vegetation found in the pool.

The “potential vernal pool” in the interior of area 4, identified by a member of the public, was not documented in the submitted biological report, nor has it been explored by previous studies. The vegetation occurring in the depression has not been identified, nor has it been surveyed for SDFS. However, Commission staff did note a potential vernal pool in the same vicinity during a site visit on January 24 2019 and identified the vernal pool indicator species woolly marbles (*Psilocarphus brevissimus*) in that location.

Fill of Wetlands

The removal of the fence post that was installed directly into Seasonal Wetland 2 will require less than one cubic foot of soil to be replaced in the hole, but still constitutes fill under section 30233 of the California Coastal Act. Thus, the project must be reviewed for conformance with Section 30233 of the Coastal Act. In order to be consistent with Section 30233, a project that involves filling or dredging in a wetland must meet the three-prong test—1) the use must be one of the uses specifically allowed, 2) it must be the least environmentally damaging alternative, and 3) it must provide adequate mitigation to offset any impacts created by the project.

1) Allowable Use

Section 30233 of the Coastal Act limits development within wetlands, such as at the subject site, to seven specific uses. One of the uses under Section 30233 for which development within wetlands is allowed, is restoration. The proposed project will result in removing the barrier that is currently causing habitat fragmentation and potentially altering the site hydrology, thereby restoring the habitat. Thus, the proposed project is an allowable use. Therefore, the proposed development is consistent with Section 30233 of the Coastal Act with regard to uses allowed within wetlands.

2) Alternatives

The applicant originally proposed to remove the fence while leaving the concrete footings in place by cutting off the posts at the base which would have resulted in fill that could not be easily justified as an allowable use. Possible other alternatives include: the use of property markers to mark the property line outside of seasonal wetlands, an alternative open post and cable fence design that avoid stakes in the wetland area and allow wildlife movement on and offsite, or no project alternative as the site is already completely secured from public access. In the last three of these alternatives, there would be no fill of the wetlands, and therefore each alternative constitutes a less environmentally damaging alternative. However, the proposed project as conditioned will repair the

vernal pool and will result in the removal of the fence which has caused habitat fragmentation that has resulted in several negative impacts that have been discussed above. Therefore, the proposed alternative is consistent with Section 30233's requirement that fill of wetlands must be the least environmentally damaging alternative.

3) Mitigation

Section 30233 of the Coastal Act requires that wetland projects include feasible mitigation measures to minimize adverse environmental effects. The proposed project does include mitigation for temporary impacts caused by the presence of the unpermitted fence by proposing invasive plant removal and hydroseeding. In addition, the proposed fill, which is intended to restore the soft bottom habitat affected by the unpermitted fence, will not result in any loss of wetland habitat; rather, the proposal would improve the overall functioning of the existing vernal pool by removing a structure (the fence post) that interferes with the natural function of the wetland and hydrology. Thus, the proposed development will adequately off-set any minor impacts of the proposed fill, which overall will improve the wetland habitat.

Commission staff consulted with vernal pool experts from USFWS, who recommended that the least damaging action, given that the pole placed in SW2 did not have a concrete footing and that SW2 did not contain listed species, was to remove the fence post in the dry season and to use nearby soil to fill and compact the post hole. Such removal is conditioned by Special Condition 2, 3, and 4.

The project is consistent with the policies of the City of Newport Beach's Certified Local Coastal Plan Policy 4.1.3-1 E provides for the protection of habitat integrity and connectivity, and removal of the fence will restore habitat connectivity. Policy 4.2.3-1 states the uses approvable for fill of wetlands, similar to section 30233 of the Coastal Act, include restoration purposes. For the forgoing reasons, the proposed project is consistent with the wetlands protection policies of the Coastal Act, as well as the related policies in the City's certified LCP.

D. ENVIRONMENTALLY SENSITIVE HABITAT AREAS

Coastal Act Section 30107.5 states:

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

Coastal Act Section 30240 states:

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

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

The City of Newport Beach's certified Land Use Plan Section 4.1.1 includes the following policies regarding Environmentally Sensitive Habitat Areas (in relevant part):

4.1.1-1. Define any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments as an environmentally sensitive habitat area (ESHA). Using a site-specific survey and analysis by a qualified biologist, evaluate the following attributes when determining whether a habitat area meets the definition of an ESHA:

A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.

B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.

C. The presence or potential presence of plant or animal species that are not listed under State or Federal law, but for which there is other compelling evidence of rarity, such as designation as a 1B or 2 species by the California Native Plant Society.

...

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

4.1.1-2. Require a site specific survey and analysis prepared by a qualified biologist as a filing requirement for coastal development permit applications where development would occur within or adjacent to areas identified as potential ESHA...

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

4.1.1-5. Design land divisions, including lot line adjustments, to preclude new development within and minimize impacts to ESHA.

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

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

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

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

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

4.1.1-17. In conjunction with new development, require that all preserved ESHA, buffers, and all mitigation areas, onsite and offsite, be conserved/dedicated (e.g. open space direct dedication, offer to dedicate (OTD), conservation easement, deed restriction) in such a manner as to ensure that the land is conserved in perpetuity. A management plan and funding shall be required to ensure appropriate management of the habitat area in perpetuity.

4.1.3-1. Utilize the following mitigation measures to reduce the potential for adverse impacts to ESHA natural habitats from sources including, but not limited to, those identified in Table 4.1.1:

A. Require removal of unauthorized structures... that impact wetlands or other sensitive habitat areas.

D. Strictly control encroachments into natural habitats to prevent impacts that would significantly degrade the habitat.

E. Limit encroachments into wetlands to development that is consistent with Section 30233 of the Coastal Act and Policy 4.2.3-1 of the Coastal Land Use Plan.

4.2.2-3. Require buffer areas around wetlands of a sufficient size to ensure the biological integrity and preservation of the wetland that they are designed to protect. Wetlands shall have a minimum buffer width of 100 feet wherever possible. Smaller wetland buffers may be allowed only where it can be demonstrated that 1) a 100-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the wetland given the site-specific characteristics of the resource and of the type and intensity of disturbance.

Environmentally Sensitive Habitat Areas (ESHA) are areas 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. Coastal Act Section 30240 states that ESHA shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

The City's certified LUP also contains policies regarding protection of ESHA. These include specifications on land divisions and preventing fragmentation (4.1.1-5), limitations on development areas adjacent to ESHA to low impact land uses (Policy 4.1.1-9), and requirements for buffers around ESHA (Policies 4.1.1-10, 4.1.1-12, 4.1.1-17).

The project area is largely vegetated by grasslands with patches of coastal sage scrub (CSS). These open grasslands provide dwelling habitat for burrowing animals and significant foraging habitat for numerous mammal, bird, and reptile species including burrowing owls and other raptors. The patches of CSS provide valuable foraging area to California gnatcatchers (CAGN). The site was surveyed by the applicant for CAGN in 2016, and although no gnatcatchers were observed utilizing the limited habitat on-site, they were heard approximately 200 feet off-site to the southwest on the adjacent NBR property during protocol surveys. Other known surveys undertaken in the area have documented CAGN nests and foraging areas adjacent to the NMUSD property. The entire project area is designated as CAGN critical habitat area by the U.S. Fish and Wildlife Service.

In 2015, the Commission staff ecologist was asked to examine the biological resources on and adjacent to the NMUSD property to determine whether the area supported environmentally

sensitive habitat. The result of that review was the memorandum *Biological Resources in Vicinity of Newport-Mesa Unified School District Unpermitted Fence*, dated February 26, 2015 ([Exhibit 4](#)).

Burrowing Owl

Two large earthen berms in this area likely provide habitat for the burrowing owls documented onsite. Commission staff confirmed the presence of burrowing owls in this location at a site visit on January 28, 2015. Western burrowing owls (*Athene cunicularia*) are a California Species of Special Concern that are rare in Orange County due to loss of suitable grasslands to development, especially near the coast. Western burrowing owls are often found in burrows created by ground squirrels, of which many occupy the project location. Most Western burrowing owls nesting in California remain at their breeding grounds throughout the winter, sometimes staying in the same burrows and sometimes wandering within the region. Although Burrowing owls have not been seen in the area since approximately 2016.

Annual Grasslands

The annual grassland on the NMUSD property, although dominated by non-native species, provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species of mammals, birds, and reptiles including burrowing owls and many species of raptors. The annual grasslands contain small, widely spread patches of native Coastal Sage Scrub (CSS). Since the time that the applicant's biological report was written (*A Biological Constraints Assessment of the Newport Mesa Unified School District Site Located in Orange County*, Prepared by Environmental Intelligence, LLC, dated July 28, 2016) habitat onsite has shifted. Annual grasslands are not as prevalent on the site or in the area today, likely due in part to the non-native habitat outcompeting grassland habitat as the presence of the fence prevented herbivores such as rabbits to forage on the property.

Coastal Sage Scrub and California Gnatcatcher

Although the CSS on the property does not contain CSS signature species, such as California sunflower, California buckwheat, and California sagebrush, the vegetation is still within the area designated as critical habitat for California Gnatcatchers (CAGN) and provides them with valuable foraging area and offers connectivity with the CSS vegetation on the adjacent property. While a protocol level CAGN survey was not submitted by the applicant, known biological surveys of the project area have documented CAGN nests and foraging areas adjacent to the NMUSD property.

Vernal Pools

Wetlands that provide habitat to plants and wildlife only found in vernal pools are wetlands that may qualify as ESHA. Environmentally sensitive habitat area means any area 1) 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 2) which could be easily disturbed or degraded by human activities and developments. Vernal pools are therefore ESHA.

SW 1, SW 2, SW 3 and SW A are all vernal pools. SW 2, bisected by the unpermitted fence, contained Versatile Fairy Shrimp. The complex of vernal pools (SW A) near the fence contains the federally-listed SDFS. SW 1 and SW 3 were not surveyed for SDFS, however, photographs of SW 1 submitted show the pool supported ostracods (seed shrimp), a vernal pool indicator species, and

pollywogs. SW 3 contains woolly marbles, a vernal pool indicator species. These vernal pools contain species that are endemic to wetland habitats.

Wetlands that contain endemic aquatic invertebrates (such as fairy shrimp or ostracods) or endemic vegetation (such as woolly marbles) qualify as ESHA under section 30107.5 because they provide habitat for rare and especially valuable plant and animal life and they are easily disturbed by human activity and development. SW 1, SW 2, SW 3 and SW A all support species endemic to vernal pools and are easily degraded by development. Therefore, SW 1, SW 2, SW 3 and SW A are considered ESHA under Coastal Act Section 30240 and must be protected. Even though these vernal pools occur across the two neighboring properties, and not exclusively on the subject site, they are still afforded protection in the form of habitat buffers, consistent with Section 30240(b).

ESHA Determination

The Commission's staff ecologist, Dr. Jonna Engel, visited the site on January 28, 2015, and again on June 24, 2019. In a memo dated February 26, 2015, and in her supplemental memo dated August 29, 2019, Dr. Engel determined that areas of the site do qualify as environmentally sensitive habitat areas.

The annual grassland, degraded CSS, California gnatcatchers and burrowing owls on and in the vicinity of the NMUSD are 1) rare primarily from habitat loss due to development, and/or 2) provide especially valuable ecosystem services for rare species (e.g. coastal California gnatcatcher, burrowing owl), and 3) are easily degraded and disturbed by human activities and development. Therefore, these areas meet the Coastal Act definition of ESHA and are protected under section 30240 of the Coastal Act.

The adjacent property, Newport Banning Ranch, provides documented habitat for CAGN in the form of sage scrub communities, grasslands, and riparian areas. The grassland on the NMUSD property is an extension of the grasslands found on the NBR property. Together, the connected communities of CSS provide foraging and habitat areas for CAGN. The CAGN, a federally listed species which must be protected under the Endangered Species Act, relies on the habitat provided by grasslands and CSS in the project site. Because both the patches of CSS and the non-native grasslands provide habitat for CAGN and can easily be disturbed by development, they are both are considered ESHA.

While focused coastal California Gnatcatcher surveys were performed by the applicant on the NMUSD property in 2016 in accordance with guidelines issued by the USFWS did not confirm any CAGN utilizing the onsite habitat, CAGN were heard approximately 200-feet off-site to the southwest on the adjacent NBR property during protocol surveys. The CLUP defines ESHA under policy 4.1.1-1 noting the ESHA definition extends to: The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law. The recorded or potential presence of CAGN in the CSS and grassland habitat area defines the federally listed species as ESHA by the CLUP.

The 2015 ESHA memo states that Burrowing Owls are listed by the CNDDDB as a rare species (S2), and a CDFW species of special concern, and as a bird of special concern by the United States Fish and Wildlife Service (USFWS), and as a sensitive species by the Bureau of Land management (BLM). Burrowing owls were thought to have been extirpated in all of Orange County (and most of

coastal Southern California), except for a small breeding population in Seal Beach. The applicant's biologists conducted four focused surveys for burrowing owls between December 22, 2015 and January 26, 2016, and no owls were observed during the 2015/2016 wintering surveys. The last reported observance of the burrowing owl was January 29, 2015 within NBR property north of the Site ([Exhibit 4](#)). However, despite the lack of observances, active burrows, or indicative sign during 2015-2016 focused surveys, that is not an indication that the owls are not using the site, and therefore the Commission staff ecologist still considers the project site to be foraging habitat for burrowing owls, which will improve through invasive plant removal and hydroseeding as required by **Special Condition 1**.

The Burrowing owls that use the site for foraging are rare, and therefore, rise to the level of ESHA. Additionally, the areas on the project site that provide habitat and foraging area for the Burrowing owls are also ESHA, because they provide habitat for a rare species and can easily be disturbed by development. The CLUP defines ESHA under policy 4.1.1-1: The presence of natural communities that have been identified as rare by the California Department of Fish and Game. Burrowing Owl is identified as a species of special concern by CDFW, and therefore is defined as ESHA by the CLUP, as well as the Coastal Act.

As discussed earlier, vernal pools depend greatly on undisturbed and consistent hydrology patterns to sustain their habitat. When development occurs that changes this hydrology, the vernal pools can be easily degraded by that development and potentially lost depending on the extent of the disturbance. Additionally, the annual grassland and degraded CSS are easily disturbed by development because the process of removing or damaging those species through trampling or stage of seed development and dispersal, which is imperative for species survival. In concert with the impacts on the process of mature plant species, the California gnatcatchers greatly depends on mature CSS and grassland species for foraging and nesting. When those plant species are impacted, the range of potential habitat for the California gnatcatcher diminishes which directly affects its survival. Finally, burrowing owls on and in the vicinity of the NMUSD are easily disturbed or degraded by development because the burrows can be easily trampled during development which may cause mortality of owlets that may seek refuge in existing burrows.

The Commission's staff ecologist's most recent ESHA memorandum states:

The CAGN CSS foraging habitat is ESHA because it is used by and supports CAGN which are Federally Threatened, have a state rarity ranking of S2, and are a CDFW Species of Special Concern. Furthermore, the NMUSD site is within designated CAGN critical habitat. The CAGN CSS foraging habitat is easily disturbed or degraded by invasive non-native species and human development such as habitat fragmentation or removal. The burrowing owl annual grassland foraging habitat is ESHA because it is used by and supports the burrowing owls which have a state rarity designation of S3, are a CDFW Species of Special Concern, and a USFWS Bird of Conservation Concern. The burrowing owl annual grassland foraging habitat is easily disturbed or degraded by invasive non-native species and human development such as habitat fragmentation or removal. Southern California vernal pool habitat is very rare with a state rarity ranking of G2S2. Vernal pool habitat is easily disturbed or degraded by invasive non-native species and human development such as habitat fragmentation or fence posts.

Therefore, the NMUSD site contains valuable ESHA resources. Under section 30240(a), development in ESHA can only be approved if it is: 1) a use dependent on the resource, and 2) will not significantly disrupt habitat values of the ESHA. Similarly, under section 30240(b), development adjacent to ESHA must not significantly degrade the habitat and must be compatible with the continued existence of the ESHA.

ESHA Analysis

The proposed activities, including fence removal from the vernal pool and invasive non-native vegetation removal, will occur in ESHA. However, the project is intended to remove the unpermitted fence and to restore the habitat to its natural condition; thus, the project is a restoration project that is a use dependent on the resource because it is designed to protect and improve the sensitive habitat areas.

During fence removal, impacts to native vegetation will be avoided as much as practical, and a wildlife biologist will be present during all invasive vegetation removal efforts to identify and flag native and non-native plant species to ensure focused treatment of non-native species and to avoid adverse impacts to wildlife. On-site personnel will comply with the directions of qualified biologists, whose role it is to help personnel avoid and minimize impacts to biological resources. Biologists have the authority to temporarily halt construction activities that could harm sensitive biological resources, including nests and burrows. To avoid impacts to avian species, all invasive vegetation removal efforts must adhere to **Special Condition 4**, which requires the applicant to conduct a pre-construction nesting bird survey to determine the presence of active nests within 500 feet of the vegetation removal activities. During fence post removal within vernal pool SW2, such activities must be conducted during the dry season, utilizing nearby soil to fill and compact the post hole as recommended by USFWS and required by **Special Condition 8**.

In addition, as the project is a restoration project, the proposed development will not significantly disrupt habitat values and, instead, will result in improved habitat functioning and wetland ecology. Thus, as conditioned, the proposal satisfies section 30240(a)'s requirement that proposed development not significantly disrupt habitat values of ESHA.

For similar reasons, the proposed fence removal and restoration work will not significantly degrade adjacent sensitive habitat and is compatible with the continued existence of the vernal pools and other sensitive habitats on site. The proposed fence removal and habitat restoration is consistent with section 30240 of the Coastal Act, as well as the certified policies of the LCP that protect environmentally sensitive habitat areas.

E. OTHER AGENCY APPROVALS

In the preparation of these findings, Commission staff consulted with the U.S. Fish and Wildlife Service's Carlsbad office (USFWS). USFWS approval was not sought by the applicant, because at the time of application submittal, no mitigation for the impacts was proposed. USFWS may recommend mitigation measures for the impacts caused by the unpermitted development, and may make recommendations to limit disturbances during fence removal. Permits from other public agencies may be required, including the U.S. Fish and Wildlife Service (federally-protected endangered species), State Water Resources Control Board, California Dept. of Fish and Wildlife, (state-listed endangered species), U.S. Army Corps (wetlands fill), and County of Orange. The

applicant must provide evidence to the Executive Director that all necessary approvals from related state and federal agencies have been obtained, or proof that no other approvals are required.

F. LOCAL COASTAL PROGRAM

The City of Newport Beach LCP was effectively certified on January 13, 2017. The standard of review for development within the City's permit jurisdiction is the City's certified LCP. The entire subject property is depicted on the post-certification map as within an area of "deferred certification", and a portion of the property lies in the City of Newport Beach and a portion of the property lies within the County of Orange. The standard of review is Chapter 3 of the Coastal Act, although the City's certified LCP is advisory in nature and may provide guidance.

G. UNPERMITTED DEVELOPMENT

Unpermitted development, including installation of the fence that is the subject of this application, has occurred on the site. Installation of the fence constitutes development under the Coastal Act and, therefore, requires a coastal development permit. Any non-exempt development activity, which is the case here, conducted in the Coastal Zone without a valid coastal development permit, or which does not substantially conform to a previously issued permit, constitutes a violation of the Coastal Act.

The applicant is proposing to remove the unpermitted fence and fully mitigate for the habitat impacts resulting from the installation of the fence and its persistence on the site. Approval of this application pursuant to the staff recommendation, issuance of the permit, and the applicant's subsequent compliance with all terms and conditions of the permit will result in resolution of the above described violations.

Although unpermitted development has taken place prior to the submission of this permit application, consideration of this application by the Commission has been based solely upon the Chapter Three policies of the Coastal Act. Review of this permit application does not constitute a waiver of any legal action with regard to the alleged violations nor does it constitute an admission as to the legality of development, other than the development addressed herein, undertaken on the site without a coastal development permit.

H. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of coastal development permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment. In this case, the City of Newport Beach Planning Department is the lead agency and the Commission is a responsible agency for the purposes of CEQA. The City of Newport Beach has not reviewed the project, to date.

The Commission incorporates its findings on Coastal Act consistency at this point as if set forth in full. As discussed above, the proposed development, as conditioned, is consistent with the Chapter 3

5-18-1090 (Newport Mesa Unified School District)

policies of the Coastal Act. Special Conditions imposed will mitigate adverse impacts to coastal resources and public access. The **Special Conditions** address the following issues: **1)** updated habitat map; **2)** final revised plans; **3)** habitat protection plan during fence removal; **4)** timing of fence removal; **5)** best management practices; **6)** biological monitoring; **7)** conformance with final habitat mitigation and monitoring plan.

Appendix A. Substantive File Documents

City of Newport Beach certified Coastal Land Use Plan.

Environmental Intelligence, LLC. July 28, 2016. A Biological Constraints Assessment of the Newport Mesa Unified School District Site Located in Orange County, California. Report prepared for Newport-Mesa Unified School District.

Bomkamp, T (Glenn Lukos Associates) and J. H. Davis IV (Dudek). January 29, 2013. Summary of Protocol Surveys for Federally-Listed Vernal Pool Branchiopods Conducted on Newport Banning Ranch, City of Newport Beach and Unincorporated Orange County, California. Report addressed to Christine Medak, U.S. Fish and Wildlife Service.

Bramlet, D. July 7, 2014. Habitat Assessment for the Fencing at 975 W. 16th Street, Newport Beach, California. Prepared For: Newport-Mesa Unified School District.

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