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October 14, 2011

Sent via US Mail and email

Patrick J. Alford, Planning Manager
City of Newport Beach, Community Development Department
3300 Newport Boulevard
P.O. Box 1768
Newport Beach, CA 92658-8915

Re: Newport Banning Ranch DEIR Comment 1

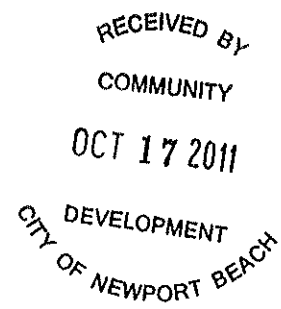
Dear Mr. Alford:

According to the Newport Banning Ranch draft Environmental Impact Report Sections 2.0 Introduction:

"This Environmental Impact Report (EIR) has been prepared to evaluate the potential environmental impacts associated with the construction and implementation of the proposed Newport Banning Ranch Project (Project). The EIR has been prepared in conformance with the California Environmental Quality Act (CEQA) (California Public Resources Code [PRC] Sections 21000 et seq.) and the State CEQA Guidelines (Title 14, California Code of Regulations (CCR), Chapter 3, Sections 15000 et seq.)...

The City of Newport Beach (City) is the "public agency which has the principal responsibility for carrying out or approving the project" and as such, is the "Lead Agency" for this Project under CEQA (14 CCR 15367). CEQA requires the Lead Agency to consider the information contained in an EIR prior to taking any discretionary action. This EIR is intended to provide information to the Lead Agency and other public agencies, the general public, and decision makers regarding the potential environmental impacts from the construction and operation of the proposed Project.

The City, as the Lead Agency, will review and consider this EIR in its decision to approve, revise, or deny the proposed Project... Pursuant to CEQA, "[t]he purpose of the environmental impact report is to identify the significant effects on the environment of a project,



to identify alternatives to the proposed project, and to indicate the manner in which significant environmental effects can be mitigated or avoided.(PRC 21002.1(a)." (Emphasis added)

PRC 21002.1 contains policies the State Legislature declares "shall apply to the use of environmental impact reports" prepared under CEQA. PRC 21002.1(b) contains another such mandated policy: "Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Emphasis added)

In the Newport Banning Ranch (NBR) draft Environmental Impact Report (DEIR) Section 4.1 Land Uses and Related Planning Programs states that CEQA and the State CEQA Guidelines require that land use issues be evaluated as part of the environmental impact analysis process." One such land use issue is the impact the California Coastal Act (PRC 30000 et seq.) will have on the Project. The California Coastal Act provides a comprehensive scheme to govern land use planning for the entire coastal zone of California. One of its goals is to protect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone. The Coastal Act creates a shared responsibility between local governments and the California Coastal Commission for the planning of coastal development.

The Coastal Act reflects a strong rule of policy, adopted for the benefit of the public that implicates matters of vital interest. The Act provides heightened protection for areas that are designated environmentally sensitive habitat areas (ESHA) and establishes strict preferences and priorities that guide development in them (PRC 30240). *Hines v. California Coastal Commission* (2010) 186 Cal. App. 4th 830; *McAlister v. California Coastal Commission* (2008) 169 Cal. App. 4th 912.

Public Resources Code 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.

Given the mandate under the Coastal Act regarding protections to environmentally sensitive habitat areas (ESHA) and the restrictions on development in and adjacent to them described above one should expect a detailed analysis regarding the presence, extent, project impacts on and mitigation measures concerning ESHA in the project site in the NBR DEIR. Instead, on Pg. 4.1-6 of the Land Use and related Planning Programs Section of the DEIR, it states as follows:

"California Coastal Act Environmentally Sensitive Habitat Areas and Guidelines

The California Coastal Act protects important coastal biological resources including wetlands, riparian habitats, and other areas defined as environmentally sensitive habitat areas (ESHAs) by the Coastal Commission. Section 30107.5 of the California Coastal Act defines ESHA as "any

area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Because the Project site is within the boundary of the Coastal Zone, the Coastal Commission would evaluate the proposed Project relative to (1) potential impacts to ESHAs (as defined under Section 30107.5 of the California Coastal Act and (2) guidance from the Newport Beach CLUP. The Coastal Commission determines whether a property contains ESHA." (Emphasis added)

The NBR DEIR, thus "defers" the determination of any ESHA on the Project and of any Project environmental impacts on such ESHA for another public agency -the Coastal Commission- to another environmental review proceeding- the requirement that the NBR Project obtain a coastal development permit (CDP) from the Commission under the Coastal Act. This ESHA avoidance position of the NBR DEIR is further confirmed NBR DEIR Biological Resources Section 4.6. As part of Section 4.6, Table 4.6-10 Summary on Pg. 4.6-102 lists the project's consistency with regarding biological resources with the Coastal Act specifically Section 30240. Once again, Section 30240 protects ESHA and restricts adjacent development. Not surprisingly, it finds the project consistent with the Coastal Act's Section 30240 ESHA protections. However, as you can see the key "qualifier/loophole" is stated at the end. It states:

"The determination of what areas would be regulated as ESHA would be made by the Coastal Commission as part of the CDP process for the Project." (Emphasis added)

The NBR DEIR's ESHA determination delegation to the Coastal Commission flies in the face of that state legislature mandated policy of PRC 21002.1(b) discussed above that "Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Emphasis added). Thus, the City of Newport Beach must consider the Project's potential environmental impacts on any ESHA areas in the project site as part of its review process. The NBR DEIR lack of any ESHA analysis violates PRC 21100 (b)(1) which states "[T]he environmental impact report shall include a detailed statement setting forth all of the following: (1) All significant effects on the environment of the proposed project." Additionally, it violates CEQA Guideline 151262(a) which states an "EIR shall identify and focus on the significant environmental effects of the proposed project."

The NBR DEIR's ESHA determination avoidance further violates long standing California court decisions regarding adequacy of EIR contents and the timing of environmental assessment under CEQA. In *Borzung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 282, the Supreme Court approved "the principle that the environmental impact should be assessed as early as possible in government planning." In short, "the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those measures, must occur *before* the project is approved."(Emphasis in the original) *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App 4th 603, 621.

As noted above, the NBR DIER mentions that the City of Newport Beach's Coastal Land Use Plan (CLUP) is to provide "guidance" to the Coastal Commission regarding ESHA determination as part of NBR's CDP process. The weblink to the City's website containing its CLUP is as follows: <http://www.newportbeachca.gov/index.aspx?page=107>.

A review of the CLUP reveals it requires the City to conduct an ESHA determination of the NBR Project in this proceeding as part of its review. In Section 1.3 General Policies it states that "[T]he policies of Chapter 3 of the Coastal Act (PRC Sections 30200 - 30265.5) shall be the guiding policies of the Coastal Land Use Plan." Further, it states "[W]here there are conflicts between the policies set forth in this Coastal Land Use Plan and those set forth in any element of the City's General Plan, zoning, or any ordinance, the policies of the Coastal Land Use Plan shall take precedence."

In the CLUP's Section 4.1.1 states the following policies regarding Environmentally Sensitive Habitat Areas:

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

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

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

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

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

Under the City's CLUP Policies ESHA is entitled to such protections as:

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

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

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

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

In short, the City is required to make a determination of the presence ESHA in the NBR Project site under the City's own CLUP's Policies listed above in addition to such requirements under CEQA.

Lastly, what makes the NBR DEIR ESHA determination avoidance request so egregious is that both the NBR Project applicants Newport Banning Ranch, LLC (NBR) and the City of Newport Beach know that ESHA is present on the NBR Project site. Indeed, both know it is present on the adjoining City-owned property which is the site of the proposed Sunset Ridge Park Project. Both the City and NBR as property owners were the subjects of an enforcement action for violation of the California Coastal Act brought by the Commission. The violation involved the unpermitted removal of major vegetation including vegetation comprising native plant communities and habitat for the federally threatened California gnatcatcher; placement of solid material, including pipes, vehicles and construction equipment; and grading.

The above Coastal Act violation was the subject of a Coastal Commission hearing conducted on April 14, 2011 at the Santa Barbara Board of Supervisors 105 E. Anapamu Street. Santa Barbara, CA 93101. According to the Staff Report prepared for the hearing, the unpermitted development occurred in three areas totaling 1.01 acres (referred to by their relative locations as "Northwest Polygon," "Northeast Polygon," and "Southeast Polygon") (Exhibit #4 of the staff report for the Consent Cease and Desist Order and Consent Restoration Order) of portions of land owned by NBR and the City property (which is continuous to the southeast) (Exhibits #1 and #2 of the staff report for the Consent Cease and Desist Order and Consent Restoration Order), all of which are located immediately inland of the 5000 block of West Coast Highway, Orange County, California. A copy of the April 14, 2011 Staff Report with the aforementioned exhibits is attached.

At the April 14, 2011 hearing, the Coastal Commission approved Consent Cease and Desist Order No. CCC-11-CD-03 and Consent Restoration Order No. CCC-11-RO-02. Under the terms of the Consent Orders the City and NBR are, among other actions, to restore the Northwest and Southeast Polygons on the subject properties by planting coastal sage scrub vegetation native to Orange County that will provide foraging and breeding habitat for the coastal California gnatcatcher. As part of the Consent Orders the City and NBR agreed that for purposes of the enforcement action the Northwest and Southeast Polygons constituted environmentally sensitive habitat areas (ESHA) as defined by the Coastal Act.

As part the CCC Staff Report, attached is the Memorandum prepared for the Coastal Commission by Dr. Jonna Engels dated March 31, 2011. The Memorandum concerns "Newport Banning Ranch NOV (Notice of Violation) Subject Development ESHA Determination. On Pg.

7 of the Memorandum, Dr Engels indicates that the United States Fish and Wildlife Service (USFWS) in 2007 "designated all of Newport Banning Ranch as critical habitat for the California gnatcatcher", a federally protected endangered species under Endangered Species Act.

The Memorandum further states that [I]n designating Newport Banning Ranch as critical habitat, the USFWS noted that the area was occupied by gnatcatchers at the time of the listing and at the time of designation of critical habitat and the area "contains all of the features essential to the conservation of the coastal California gnatcatcher." A copy of the California Gnatcatcher Critical Habitat Map designating both Newport Banning Ranch and the City's Sunset Ridge Park properties is attached for your review.

The USFWS designation of all of Newport Banning Ranch as critical habitat certainly qualifies under the City's CLUP Policy 4.1.1-1(B) as "[T]he recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law." Thus, the City is bound by its own Coastal Land Use Plan and the statutory and case law regarding CEQA cited above to demand the NBR DEIR contain a full determination of ESHA present on the NBR Project site. As noted above, "[t]he purpose of the environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the proposed project, and to indicate the manner in which significant environmental effects can be mitigated or avoided.(PRC 21002.1(a)." (Emphasis added) In its deliberate avoidance in determining the presence of ESHA on the NBR Project site, the NBR DEIR fails in fulfilling the basic purpose of its preparation under CEQA.

Very truly yours,

A handwritten signature in cursive script that reads "Bruce Bartram".

Bruce Bartram

CALIFORNIA COASTAL COMMISSION

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Items Th17.3 & 17.5

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

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

**CONSENT CEASE AND DESIST
ORDER:** CCC-11-CD-03

**CONSENT RESTORATION
ORDER:** CCC-11-RO-02

RELATED VIOLATION FILE: V-5-09-008

PROPERTY LOCATION: Property identified by the Orange County Assessor's Office as Assessor Parcel Nos. (APNs) 424-041-04, 114-170-43, and 114-170-79 and adjacent City of Newport Beach property identified by the Orange County Assessor's Office as Assessor Parcel No. 424-041-10, all of which are located immediately inland of the 5000 block of W. Coast Highway

PROPERTY OWNERS: Newport Banning Ranch, LLC,¹ as to the property described by the first three APNs and the City of Newport Beach as to the last.

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

VIOLATION DESCRIPTION: Unpermitted development, including removal of major vegetation, including vegetation comprising native plant communities and habitat for the federally threatened coastal California gnatcatcher; placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading.

PERSONS SUBJECT TO THESE ORDERS:

1. Newport Banning Ranch, LLC²
2. Southern California Edison
3. Herman Weissker, LLC
4. City of Newport Beach

SUBSTANTIVE FILE DOCUMENTS:

1. Newport Beach certified Land Use Plan
2. Public documents in Cease and Desist and Restoration Order files No. CCC-10-CD-09 and CCC-09-RO-08
3. Exhibits #1 through 24 of this staff report

CEQA STATUS: Exempt (CEQA Guidelines (CG) §§ 15060(c)(2) and (3)) and Categorically Exempt (CG §§ 15061(b)(2), 15307, 15308 and 15321).

I. SUMMARY OF STAFF RECOMMENDATION AND FINDINGS

The Proposed Orders

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

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

² See fn1.

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

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

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

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

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

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

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

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

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

Coastal California Gnatcatcher

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

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

Commission’s Jurisdiction

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

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

Requirements for Issuance of Cease and Desist and Restoration Orders

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

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

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

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

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

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

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

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

Staff Recommendation

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

II. HEARING PROCEDURES

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

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

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

III. STAFF RECOMMENDATIONS

Staff recommends that the Commission adopt the following two motions:

I. Motion

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

Staff Recommendation of Approval

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

Resolution to Issue Cease and Desist Order

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

2. Motion

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

Staff Recommendation of Approval

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

Resolution to Issue Consent Restoration Order

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

IV. FINDINGS FOR CEASE AND DESIST ORDER NO. CCC-11-CD-03 AND RESTORATION ORDER CCC-11-RO-02⁸

A. Description of Unpermitted Development

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

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

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

B. History of Violations

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

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

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

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

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

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

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

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

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

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

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

1. Basis for Issuance of a Cease and Desist Order

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

(a) If the commission, after public hearing, determines that any person... has undertaken, or is threatening to undertake, any activity that (1) requires a permit from the commission without securing the permit ... the commission may issue an order directing that person ... to cease and desist.

(b) The cease and desist order may be subject to such terms and conditions as the commission may determine are necessary to ensure compliance with this division, including immediate removal of any development or material or the setting of a schedule within which steps shall be taken to obtain a permit pursuant to this division.

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

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

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

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

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

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

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

2. Basis for Issuance of a Restoration Order

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

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

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

a. Development has occurred without a Coastal Development Permit

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

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

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

i. Environmentally Sensitive Habitat Areas

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

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

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

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

Section 30240 of the Coastal Act states:

- (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would*

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

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

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

ii. Biological Productivity & Water Quality

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

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

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

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

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

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

iii. Scenic Public Views and Visual Qualities of Coastal Areas

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

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

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

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

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

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

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

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

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

c. Unpermitted Development is Causing Continuing Resource Damage

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

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

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

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

“‘Damage’ means any degradation or other reduction in quality, abundance, or other quantitative or qualitative characteristic of the resource as compared to the condition the resource was in before it was disturbed by unpermitted development.”

The term “continuing” is defined by Section 13190(c) of the Commission’s regulations as follows:

“‘Continuing’, when used to describe ‘resource damage’, means such damage, which continues to occur as of the date of issuance of the Restoration Order.”

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

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

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

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

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

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

...

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

...

Policies:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

E. California Environmental Quality Act (CEQA)

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

F. Consent Agreement: Settlement

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

G. Summary of Findings of Fact

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

2. The City of Newport Beach is the owner of property located immediately inland of the 5000 block of W. Coast Highway in Orange County. The property is identified by the Orange County Assessor's Office as Assessor Parcel No. 114-150-86.
3. HWI entered into a contract with SCE to construct underground utilities in the City of Newport Beach. HWI leased portions of the subject properties to use as a staging area for the SCE contract. HWI used the leased area as a staging area for construction materials.
4. Development, as defined in Coastal Section 30106, undertaken on the above-reference properties, includes: 1) removal of major vegetation, including vegetation comprising rare native plant communities and habitat for the federally threatened coastal California gnatcatcher; 2) placement of solid material, including placement of numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and 3) grading.
5. The development described in point #4 commenced in 2004, continued regularly into 2006, and both the effects of such development continue, and materials placed on the Southeast Polygon without a CDP persist in place. Regrowth of major vegetation removed from the Southeast Polygon has been extremely limited. The vegetation that has regrown within the Northwest Polygon does not serve the same habitat function as the major vegetation that was removed from the polygon.
6. The development described in point #4 above was undertaken without obtaining a coastal development permit, in violation of the Coastal Act.
7. The Commission finds that the Northwest and Southeast Polygons impacted by the unpermitted development contained approximately .83 acre of ESHA consisting of coastal sage scrub that functions as observed habitat for the federally threatened coastal California gnatcatcher.
8. The unpermitted development described in point #4 above impacted Environmentally Sensitive Habitat Areas, the water quality of and biological productivity of coastal waters, the scenic and visual qualities of the coast, and has contributed to erosion of the site; therefore, the unpermitted development is inconsistent with Coastal Act Sections 30231, 30240, 30251, and 30253.
9. The unpermitted development described in point #4 is causing "continuing resource damage" within the meaning of Section 30811 of the Coastal Act and Section 13190, Title 14, California Code of Regulations.
10. The temporal loss of habitat and loss of habitat fitness incurred by the ESHA will continue until the requirements of the Consent Orders are carried out.
11. Coastal Act Section 30810 authorizes the Commission to issue a cease and desist order, and all elements of that section have been met herein.

12. Coastal Act Section 30811 authorizes the Commission to issue a restoration order, and all elements of that section have been met herein.
13. The work to be performed under these Consent Orders, if done in compliance with the Consent Orders and the plans approved therein, will be consistent with Chapter 3 of the Coastal Act.
14. On October 5, 2010, the Executive Director issued a "Notice of Intent to Record a Notice of Violation and to Commence Cease and Desist and Restoration Order Proceedings" to Respondents.
15. On April 1, 2010 authorized signatories for Respondents signed Consent Cease and Desist Order No. CCC-11-CD-03 and Consent Restoration Order No. CCC-11-RO-02, a copy of which is attached to this staff report.

Exhibit List

Exhibit

Number

Description

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

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

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

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

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

Pursuant to its authority under California Public Resources Code (“PRC”) section 30810, the California Coastal Commission (“Commission”) hereby authorizes and orders Newport Banning Ranch LLC¹; Aera Energy LLC; Cherokee Newport Beach, LLC; Herman Weissker, Inc.; Southern California Edison; and the City of Newport Beach (“City”), all their successors, assigns, employees, agents, and contractors, and any persons acting in concert with any of the foregoing (hereinafter collectively referred to as “Respondents”) to cease and desist from engaging in any further development, as that term is defined in PRC section 30106, on the properties identified in Section 6 below (“subject properties”), unless authorized pursuant to the Coastal Act, PRC sections 30000-30900, which is incorporated through these Consent Orders. Furthermore, NBR and the City shall remove from the Impacted Areas, as that term is described in Section 3.1.A.1, below in accordance with the procedures set forth in Section 3, below, all materials described in Section 7, below, including, but not limited to, the following: gravel, concrete, and construction materials. Through the execution of Consent Order CCC-11-CD-03, Respondents agree to comply with its terms and conditions.

2 CONSENT RESTORATION ORDER CCC-11-RO-02

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

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

PROVISIONS COMMON TO BOTH ORDERS

3 TERMS AND CONDITIONS

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

A. Definitions

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

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

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

B. Goals

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

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

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

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

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

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

C. General Provisions

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

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

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

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

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

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

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

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

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

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

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

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

D. Removal of Unpermitted Development

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

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

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

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

E. Coastal Sage Scrub Revegetation

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

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

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

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

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

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

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

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

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

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

F. Non-Native Plant Species Removal

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

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

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

G. Mitigation Project

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

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

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

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

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

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

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

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

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

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

H. Monitoring and Maintenance

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

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

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

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

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

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

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

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

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

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

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

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

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

4 REVISIONS OF DELIVERABLES

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

5 PERSONS SUBJECT TO THE ORDERS

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

6 IDENTIFICATION OF THE PROPERTIES

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

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

7 DESCRIPTION OF ALLEGED COASTAL ACT VIOLATIONS

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

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

8 COMMISSION JURISDICTION

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

9 SETTLEMENT OF MATTER PRIOR TO HEARING

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

10 EFFECTIVE DATE AND TERMS OF THE ORDERS

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

11 FINDINGS

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

12 SETTLEMENT OF MONETARY CLAIMS

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

13 COMPLIANCE OBLIGATION

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

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

14 DEADLINES

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

15 SITE ACCESS

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

16 GOVERNMENT LIABILITIES

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

17 SETTLEMENT OF CLAIMS

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

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

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

18 SUCCESSORS AND ASSIGNS

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

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

19 MODIFICATIONS AND AMENDMENTS

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

20 GOVERNMENTAL JURISDICTION

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

21 LIMITATION OF AUTHORITY

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

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

22 INTEGRATION

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

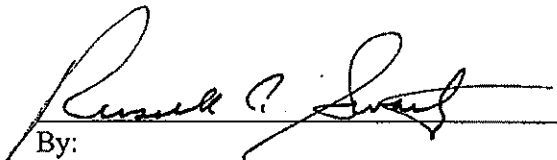
23 STIPULATION

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

IT IS SO STIPULATED AND AGREED:

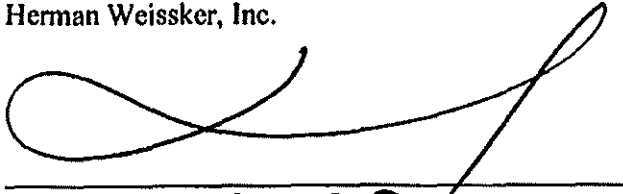
On behalf of Respondents:

Southern California Edison

By: 

4/1/2011
April 1, 2011

Herman Weissker, Inc.



By: ALEX MERUELO
CHAIRMAN

April 1, 2011

Newport Banning Ranch LLC

By:

April 1, 2011

City of Newport Beach

By:

April 1, 2011

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

Peter Douglas, Executive Director

April 14, 2011

Figures:

Figure 1: Polygon Location Map

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

April 1, 2011
DRAFT CCC-11-CD-03, CCC-11-RO-02
Page 18 of 18

Herman Weisker, Inc.

April 1, 2011

By:

Newport Banning Ranch LLC

George L. Bashe

By: *George L. Bashe* Manager NBRL LLC

4/1/2011

April 1, 2011

City of Newport Beach

By:

April 1, 2011

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

Peter Douglas, Executive Director

April 14, 2011

Figures:

Figure 1: Polygon Location Map

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Herman Weissker, Inc.

April 1, 2011

By:

Newport Banning Ranch LLC

By:

April 1, 2011

City of Newport Beach

By:

April 1, 2011

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

Peter Douglas, Executive Director

April 14, 2011

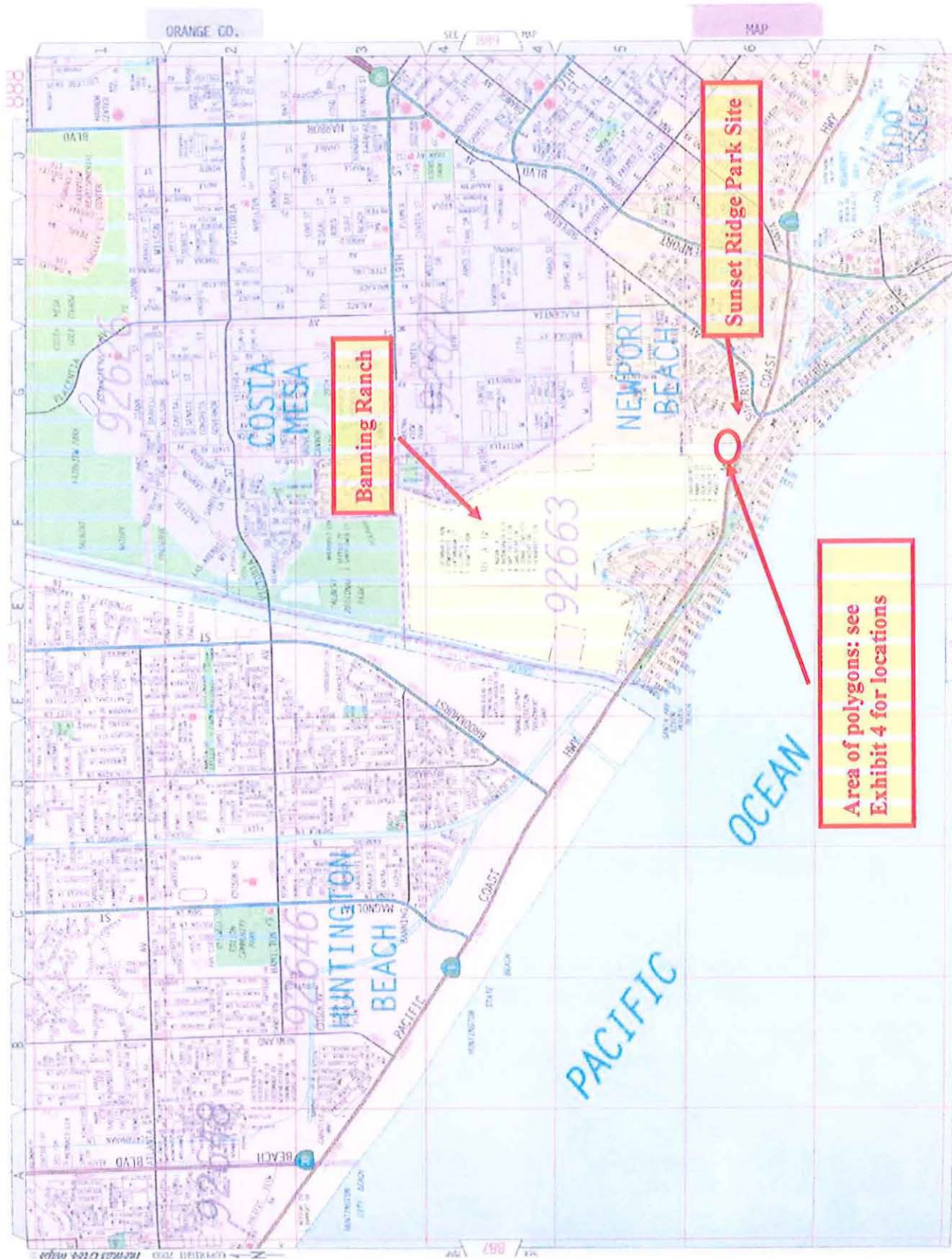
Figures:

Figure 1: Polygon Location Map

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

APPROVED AS TO FORM:

City Attorney
4/11/11



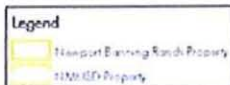
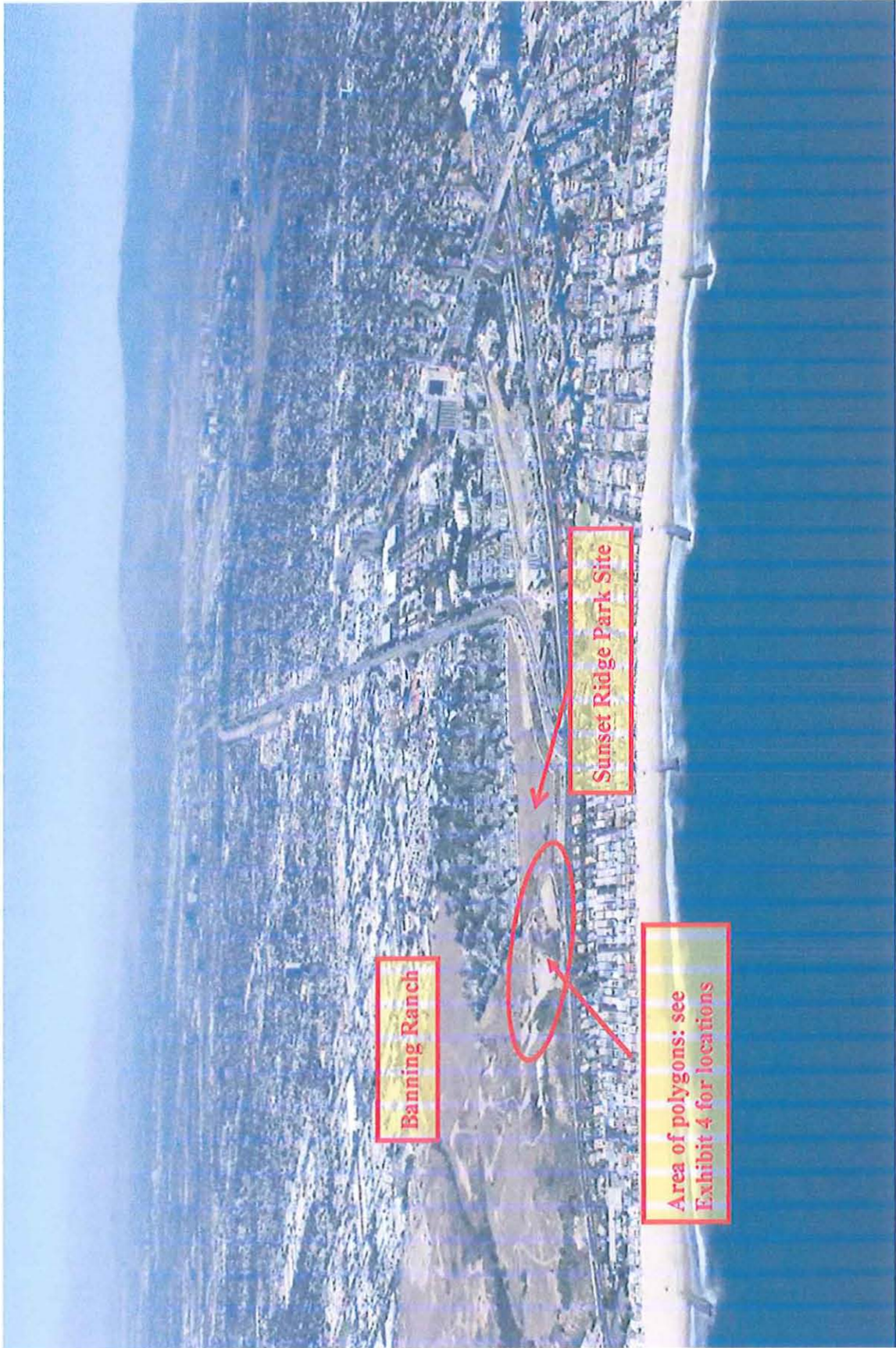


Exhibit adapted from Newport Banning Ranch planning document



Exhibit 2
CCC-11-CD-03 (NBR)
CCC-11-RO-02
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October 19, 2006

California Coastal Records Project photograph
Copyright © 2002-2010 Kenneth & Gabrielle
Adelman - Adelman@Adelman.COM

Exhibit 2
CCC-11-CD-03 (NBR)
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September 23, 2002



October 23, 2004

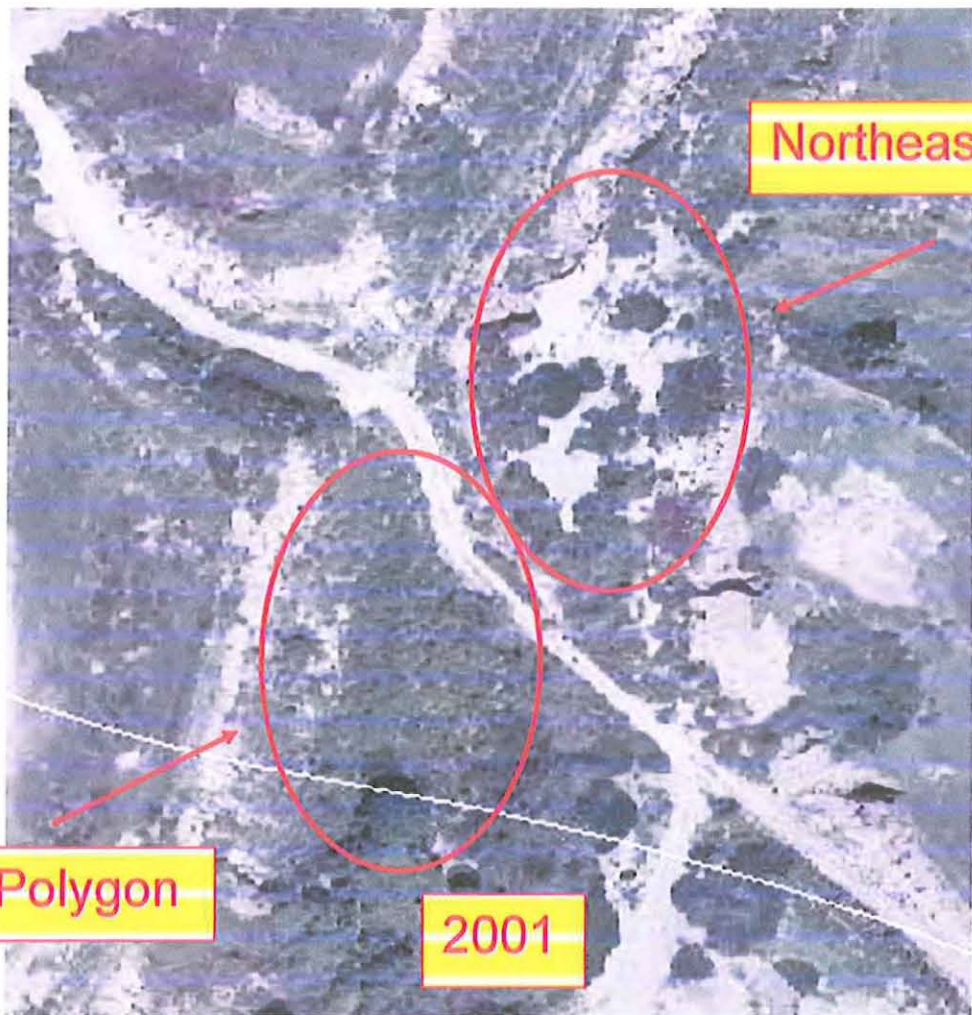


Southeast Polygon

September 16, 2006



September 19, 2008



Northwest Polygon

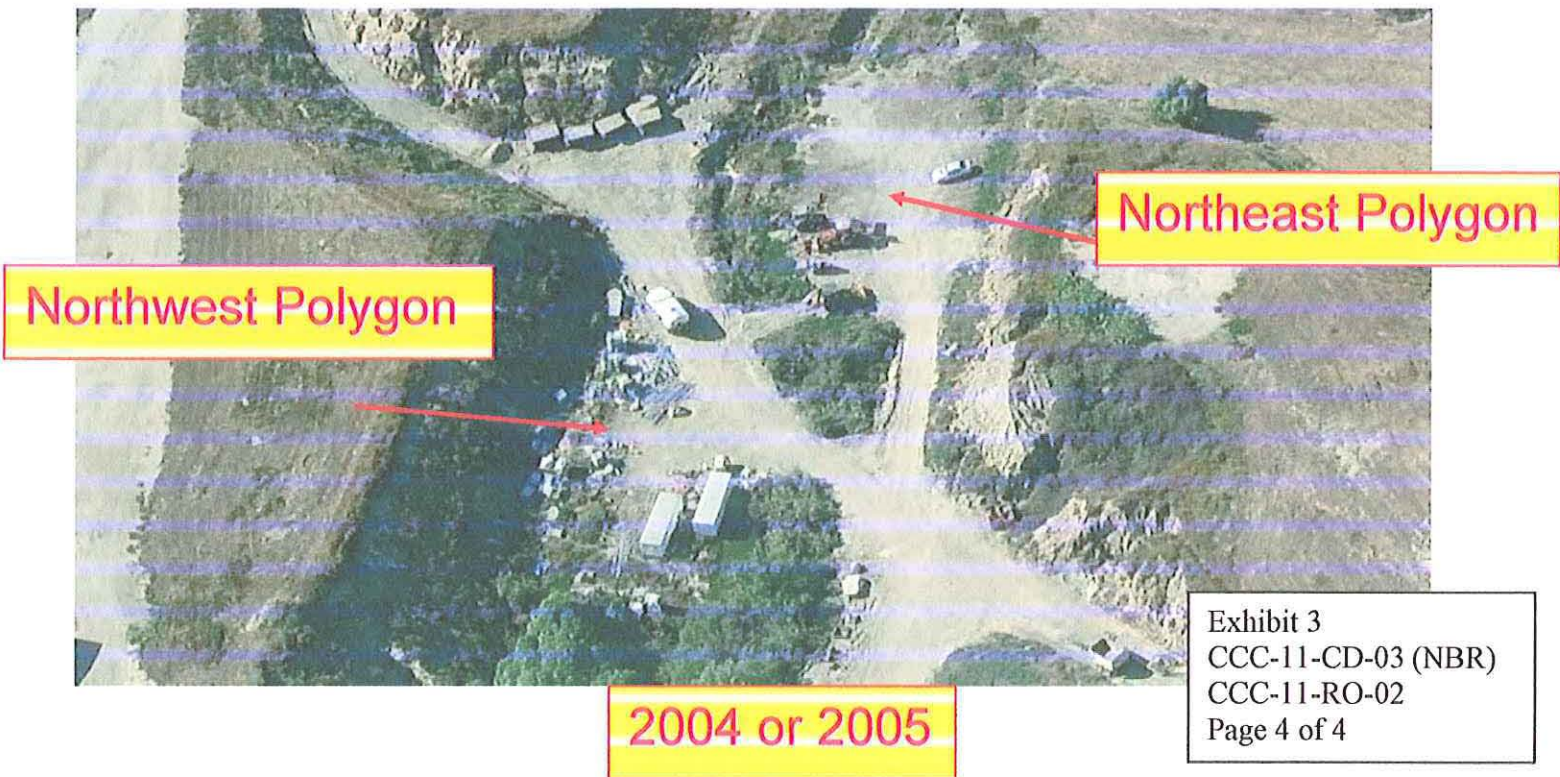
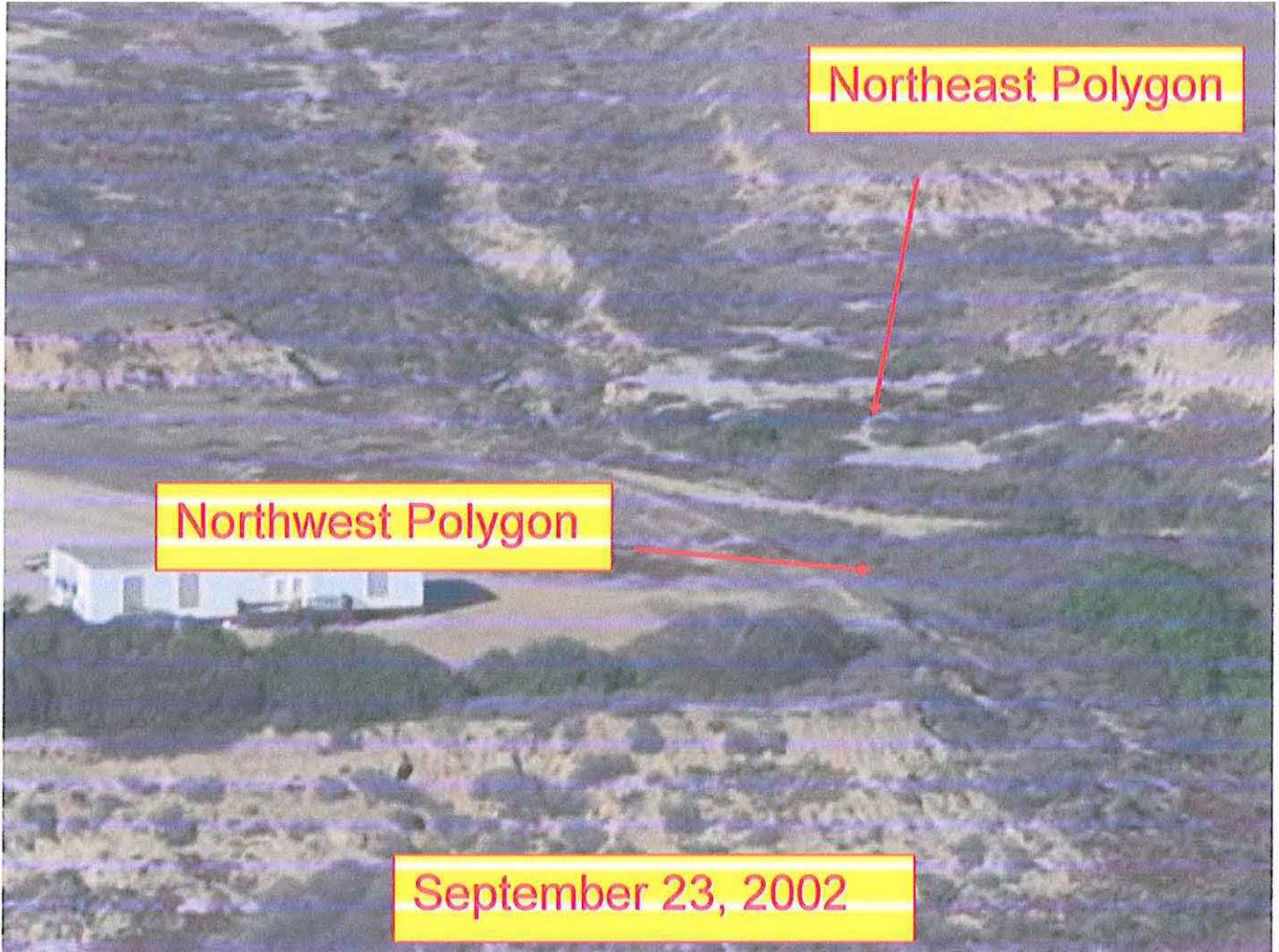
Northeast Polygon

2001



2006

Exhibit 3
CCC-11-CD-03 (NBR)
CCC-11-RO-02
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Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: AirPhotoUSA 2007.



Figure 1

DCM 12/10

Exhibit 4
CCC-11-CD-03 (NBR)
CCC-11-RO-02
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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, development¹ 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 1²). 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 rainfall³. 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 littoralis*) series⁴. 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 Conception⁵. 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 annuals⁶. Dominant species include California sunflower, live-forever (*Dudleya sp.*), and prickly pear⁷.

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 bluffs⁸. 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*), totalote (*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 regions¹⁰. One such species is the coastal California gnatcatcher (*Polioptila californica*). The California gnatcatcher is an obligate, year-round resident of coastal sage scrub communities¹¹. 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 buckwheat¹². Where these species are in low abundance, California gnatcatchers will forage on other species, including some non-natives such as black mustard¹³. They also use grassland, chaparral, and riparian habitats in proximity to sage scrub for dispersal and foraging¹⁴.

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 1993¹⁵. 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, respectively¹⁸.

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 Gnatcatcher (*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 California¹⁹. 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 2007²⁰ (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 County²². 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 populations²⁵. In a 1989 to 1992 study of two sites in San Diego County, breeding season territories averaged 20 acres; non-breeding season territories were larger²⁶. 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. California 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 (*Poliioptila 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 2010³¹. 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 (*Poliophtila californica californica*) Presence/Absence Survey Protocol. Washington, D.C.:USFWS.

³⁰ U.S. Fish and Wildlife (USFWS). 1997b (July 28). Coastal California Gnatcatcher (*Poliophtila 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 1997³³, 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 Appendices³⁴ 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" areas³⁵ 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 predominant 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 Act³⁸. 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 Act⁴⁰. 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 acres⁴¹.

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 between 1992 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.



Northwest
Polygon

Northeast
Polygon

Southeast
Polygon



Figure 1

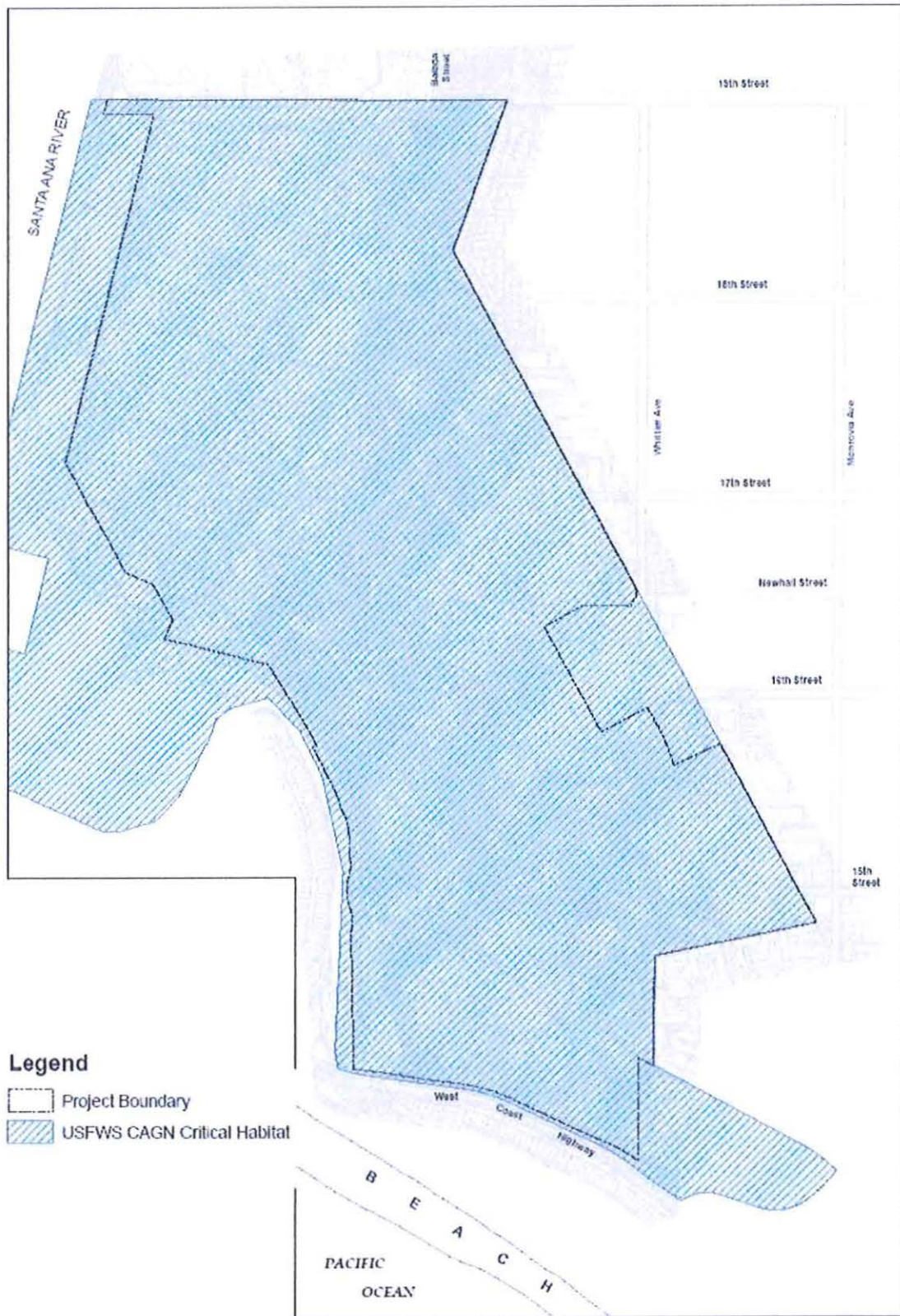
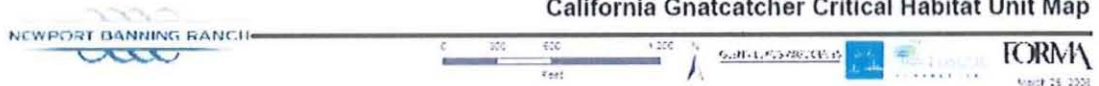


Exhibit 13

California Gnatcatcher Critical Habitat Unit Map



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Figure 2 Exhibit 5
CCC-CD-11-03 (NBR)
CCC-RO-11-02