

HAMILTON BIOLOGICAL

November 8, 2011

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SUBJECT: COMMENTS ON NEWPORT BANNING RANCH DEIR

Dear Mr. Alford,

On behalf of the Banning Ranch Conservancy (BRC) and Hamilton Biological, Inc., I provide these comments on the Draft EIR for the proposed Newport Banning Ranch Project (State Clearinghouse No. 2009031061) to the City of Newport Beach (City). The Project would allow for the development of the approximately 401.1-acre site with 1,375 residential dwelling units; 75,000 square feet of commercial uses, a 75-room resort inn with ancillary resort uses, and approximately 51.4 gross acres for active and passive park uses including a 26.8-gross-acre public Community Park. Project approvals required from the City include a General Plan Circulation Element Amendment, Pre-zoning, Zone Change, Planned Community Development Plan, Master Development Plan, Tentative Tract Map, Development Agreement, and Affordable Housing Implementation Plan. The Project would also require a Coastal Development Permit from the California Coastal Commission.

I submit these comments as a professional biological consultant with 23 years of experience working primarily in Orange County and surrounding jurisdictions. I am qualified to provide expert review, having prepared the biological resources section for numerous CEQA documents throughout Orange County and the wider region, and also having reviewed many such documents; my Curriculum Vitae is attached. In the early 1990s, as an employee of LSA Associates, I conducted numerous surveys of the Newport Banning Ranch property, then the West Newport Oil property. This included focused surveys for the Coastal California Gnatcatcher (*Polioptila californica californica*) under my federal permit (TE-799557), trapping for small mammals, nocturnal surveys for coyotes and other wildlife, and general biological surveys. From this work I have first-hand knowledge of the property and resources that were present there approximately 18-20 years ago. I am aware that the Banning Ranch Conservancy has collected large volumes of information on vernal pools/seasonal ponds on the Newport Banning Ranch property. As I have not had the opportunity to closely inspect the areas of the property where ponding is observed, I will allow others to make most of the comments pertaining to vernal pools and seasonal ponds.

The Newport Banning Ranch project site has been subject to numerous biological evaluations over the years, with reports prepared and submitted to the landowners. Yet if any historical reports were reviewed, this is not specified in the DEIR. None of the older reports is cited in Section 4.6 or Appendix E to the DEIR. A 2009 biological technical report on the property prepared by Glenn Lukos Associates (GLA) is not listed among the References used to prepare the DEIR (although the GLA report is cited in Section 4.6). Given that an EIR is required to base its analyses upon the best available information, failure to consult biological technical reports prepared by investigators dating back to the early 1990s represents a failure on the part of the EIR preparers to comply with an important mandate of CEQA.

The preparer of the Newport Banning Ranch DEIR, BonTerra Consulting, also prepared the Sunset Ridge EIR, which the City recently certified. Since Sunset Ridge was largely on public land, I was able to review BonTerra's plant community mapping, and I documented numerous mapping errors. As noted in my comments on the Sunset Ridge EIR, all of BonTerra's mapping errors were made in the direction of under-representing sensitive native communities and over-representing disturbed or non-native communities. The City was forced to have parts of the Sunset Ridge site re-mapped before it could apply for a Coastal Development Permit from the California Coastal Commission, and the project had to undergo costly major revisions in order to avoid coastal wetlands and other sensitive habitat areas identified in my EIR comments. Given these costly and ultimately failed results, it is interesting that the City and Newport Banning Ranch continue to rely on BonTerra to prepare the current CEQA document. Since the Ranch is private property, and the landowners have not granted access to critically review the mapping presented in the DEIR, I have not been able to evaluate BonTerra's mapping of plant communities in this case. I do note that Exhibit 4.6-1 (Parts a and b) fails to show numerous seasonal ponds that I am aware of on the property. Perhaps the most obvious example involves the large pool visible from the end of Ticonderoga Avenue, shown in Figure 1 on the following page.

Based upon very limited field-checking, accomplished from outside the property limits, it is my conclusion that BonTerra's mapping of Newport Banning Ranch requires thorough independent review before it can be relied upon as being objective and accurate. Figure 1 on the following page shows an obvious example of a major mapping error in the DEIR. Before the EIR is certified, I request to review BonTerra's plant community mapping during a single-day visit, accompanied by representatives of the City and/or landowner. In the absence of a credible independent review, and given the obvious mapping error shown on the following page, the public must assume that the DEIR inaccurately reflects the biological resources present on the project site, with the inaccuracies heavily weighted toward under-representing biologically sensitive resources (as in the Sunset Ridge EIR). Failure to accurately and credibly establish the existing conditions will invalidate this CEQA document's analyses and conclusions.



Figure 1. Photo taken on 10 January 2011, facing west from Ticonderoga Street, showing one of the larger seasonal pools not mapped by BonTerra Consulting. The pool covers approximately 18,000 square feet (0.41 acre). Exhibit 4.6-1b in the DEIR incorrectly depicts this area as “Non-native Grassland” and Exhibit 4.6-3c does not show this area as even a “single-parameter wetland” under Coastal Commission jurisdiction.

The project biologists consistently argue that any human action resulting in improved habitat conditions should be discounted as “artificial,” whereas avoidable habitat-degrading actions – such as the widespread mowing of scrub and grass far from any oil facility – represent existing conditions that cannot be avoided. In these ways, the DEIR shows bias in favor of project implementation. For example, the DEIR at Page 4.6-15 states, “The record rainfall in 2009–2010 and 2010–2011 created areas of ponding within artificial depressions.” The question of whether dozens of seasonal pools on the site were created artificially or naturally is *irrelevant* to the impact analysis, and how the project biologists purport to know the origins of all of the pools is not stated. Some pools were clearly created by human manipulations whereas others appear to be natural, as is typical of mesas on the coastal slope of southern California. Since CEQA requires analysis of the existing conditions, without regard for whether these types of existing features were created naturally or otherwise, the question is moot.

The Banning Ranch Conservancy possesses photographic evidence showing the intentional *filling* of one or more seasonal ponds that had developed in undeveloped portions of the project site. At least one of these ponds was not close to a road, and represented no possible impediment to oilfield operations. Consistent with its pattern of promoting the project by minimizing disclosure of relevant information to the public that may not

reflect well upon the project proponent, or further the City's interest in approving this project, the DEIR makes no mention of any pools having been filled without the required permits in recent years.

For the record, all mitigation sites identified in the DEIR must be specified. If habitat restoration is undertaken, this will entail changes to the existing environment, impacting some species even if others are possibly benefitted. CEQA requires that the project site be clearly defined, and the DEIR fails to meet this standard.

Authorizing a massive development project on Newport Banning Ranch, on the scale proposed in the DEIR, will have potentially significant cumulative and growth-inducing effects resulting from the likely revival of long-shelved plans for a 19th Street bridge across the Santa Ana River. A bridge at that location would have impacts on numerous biologically sensitive species found in that area, and would represent a major intrusion of noise into the Orange Coast River Park.

The Burrowing Owl (*Athene cunicularia*), a California Species of Special Concern, is rare in Orange County due to large-scale development of nearly all of the county's suitable grasslands, especially near the coast. The project site's grasslands are among the most suitable habitats for Burrowing Owls remaining in Orange County or anywhere along the coast of southern California. In January 2008, Glenn Lukos Associates (GLA) found two Burrowing Owls in the site's southern grasslands and a third individual 212 feet west of the site. A map of their sightings was included in GLA's 2008 biological technical appendix, and because that report was posted to the City's web page I do have a copy of that report. Since GLA's 2008 sightings are not mapped on Exhibits 4.6-2a, 4.6-2b, 4.6-6a, or 4.6-6b, I will reproduce GLA's own map below, to make this relevant information part of the public record:

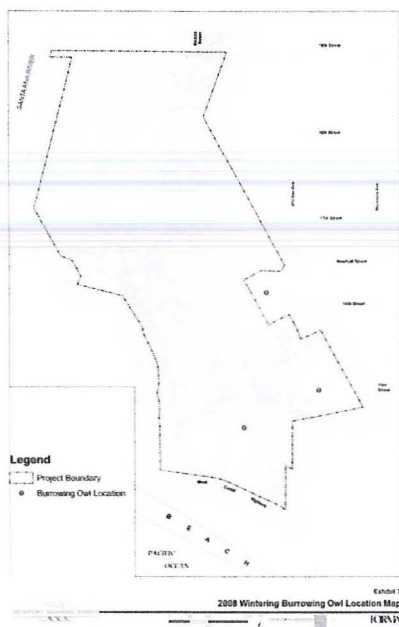


Figure 2. This map is Exhibit 7 in the 2008 draft biological report prepared by Glenn Lukos Associates for Newport Banning Ranch LLC. It shows the point locations where Glenn Lukos Associates documented the occurrence of three wintering Burrowing Owls in January 2008. The DEIR briefly mentions two of these records, but not the third, which was just outside the eastern edge of the property.

Numerous biological studies have been conducted on the project site over a period of nearly 20 years. Relevant data from those surveys should be incorporated into the EIR's analyses, not discarded. By omitting these observations, and the locations of other special-status species observed on the site before 2009, from the DEIR's exhibits, the EIR preparer creates a misleading impression of the environmental effects of the proposed project. Please provide revised exhibits that include all known sightings of special status species made on the project site (including all biological reports that have been prepared for the property in the past 20 years). Readers may evaluate the relative importance of a given sighting based, in part, upon the number of years that have elapsed since the sighting was made. What is gained by withholding this relevant information from the public?

Also, please include species observed during earlier studies in the plant and wildlife compendia, and distinguish those observed on previous survey efforts from those observed during the current studies by GLA and BonTerra Consulting.

The DEIR identifies permanent impacts to 97.3 acres of grasslands and ruderal vegetation that provide habitat for wintering Burrowing Owls, and for various other species that are now rare in the region due to loss of expansive open grasslands. The DEIR states:

These areas generally have low biological value for most species because they are vegetated with non-native species.

There is no biological justification for this statement. The fact that the grasslands consist mainly of non-native grass species has no logical or necessary connection to the DEIR's assertion that they "generally have low biological value for most species." In 2009, responding to a similar assertion in the DEIR for the Sunset Ridge project, which proposes to dump 69,000 cubic yards of fill on the grasslands of Newport Banning Ranch, I noted:

On November 6 I observed at least 80 California Ground Squirrels on and near the project site. By any objective measure, the project site's grasslands are among the most suitable habitats for Burrowing Owls in Orange County or anywhere along the coast of southern California, which is why three Burrowing Owls were documented wintering in this area during January 2008.

Later, in the same letter, I noted:

In just two brief visits I have seen large numbers of grassland bird species using the site's grasslands, including two Red-tailed Hawks, an American Kestrel, 14 Killdeers, 25 American Pipits, 70 Western Meadowlarks, 100 Mourning Doves, and 100 House Finches (minimum estimates provided for the last four species).

Clearly, various native wildlife species dependent upon grasslands utilize Newport Banning Ranch in large numbers, and do not appear to be substantially affected by the grass being non-native instead of native. Since the DEIR offers no justification for suggesting otherwise, its analyses and conclusions are flawed and unsupported by fact.



Figure 3. This photo shows the short-grass grasslands of Newport Banning Ranch, as seen from the terminus of 15th Street, on November 6, 2009. At least a dozen California Ground Squirrels are visible in this group.

Flat, open grasslands characterized much of Orange County and the greater Los Angeles Basin historically, but now very few such areas remain anywhere in the region, especially near the coast. The limited areas that remain have become very important for a dwindling suite of grassland-dependent wildlife species that persist in the area, some of which are federally listed or have other special status. It is appropriate that the DEIR identifies potentially significant impacts resulting from the proposed loss of 93% of the site's non-native grasslands and grassland/ruderal habitats, but the proposed mitigation – the restoration of 50.07 acres of grassland, either on the project site (“including native grassland areas within Zone C of the fuel modification areas”) or at some unspecified off-site location – would be of little or no value to the affected species. The species most dependent upon shortgrass coastal mesas, such as the Burrowing Owl and Loggerhead Shrike, need expanses of open ground; whether or not the mesa is dominated by native or non-native grasses is of little or no importance. Very few open, undeveloped mesas remain anywhere in the coastal zone, especially in Orange and Los Angeles Counties. The notion that “restoring” 50.07 of grasslands in some unspecified area is going to replace the loss of approximately 100 acres of non-native grasslands is misguided and unsupported by fact or logical inference.

About three-quarters of the 20.27 acres that are proposed for preservation are ruderal, and therefore not the type of open, short-grass mesa that is of value to Burrowing Owls,

Loggerhead Shrikes, or other special status grassland species. The DEIR fails to make this important distinction, treating all grassland and ruderal habitats as though they were interchangeable and of similar value to the species at greatest risk of extirpation from the project site and the wider region.

One grassland-dependent species that I observed at Newport Banning Ranch during the early 1990s is the San Diego Black-tailed Jackrabbit (*Lepus californicus bennettii*), a California Species of Special Concern that has all but disappeared from coastal Orange County and much of the coastal slope of southern California. I recall seeing them on the site only during nocturnal surveys that were conducted by LSA Associates for the West Newport Oil Company, although hares may also have been seen during the daytime. Given that this species is known to have occurred on the site within the past 20 years, I am surprised that it is not mentioned in the DEIR, and that potential impacts to this species are not identified. Unless this species is already extirpated from the site, it is one of several special-status species that would be adversely affected by the proposed loss of grasslands and other open habitats for implementation of the proposed project. Directed nocturnal surveys throughout the site would be required to determine the species' current status there; otherwise, its presence should be assumed.

The uplands of Newport Banning Ranch, with their mosaic of non-native grasslands interspersed with vernal pools on a mesa surrounded by development near the coast, bear a striking similarity to More Mesa, located in southern Santa Barbara County:



Figure 4. The non-native grasslands of Newport Banning Ranch are comparable to the limited area of non-native grasslands at More Mesa, shown here. Most of the open space shown here has been designated as an Environmentally Sensitive Habitat Area since 1993, even though these non-native grasslands and associated riparian habitats lack the federally listed species found at Newport Banning Ranch.

The More Mesa Handbook (http://www.moremesa.org/mesa_handbook.html), Page 19, describes the species composition of the grasslands there:

As with most grassland along the South Coast, non-native species dominate More Mesa's grasslands. Species such as wild oat, ripgut grass, Italian rye grass, and Harding grass dominate these grasslands along with other invasive non-native species such as sweet fennel and wild radish.

Dominance of More Mesa by non-native grasses did not prevent that area from being identified as an Environmentally Sensitive Habitat Area under the Coastal Act. It is the regional rarity of shortgrass coastal mesas containing vernal pools, and the importance of these habitats to many declining and vulnerable wildlife species, that make these landscapes biologically valuable. Since it is the rarity of this habitat mosaic throughout the region that is limiting to wildlife populations, and not anything specific about the vegetative composition of the grasslands, restoration represents an ineffective and inappropriate form of mitigation for this impact. No form of restoration or minimal level of preservation, as the DEIR proposes, can effectively mitigate for the loss of the last hundred acres of shortgrass mesa remaining on the coast of Orange County. If the landowner is determined to destroy virtually all of this habitat on the Newport Banning Ranch property, this is a significant impact that cannot be mitigated to below a level of significance (meaning that a finding of overriding considerations would be appropriate). The project biologists should drop the unconvincing pretense that "restoring" native grasslands in fuel modification zones or in other unspecified areas could possibly have any meaningful mitigating effects upon local populations of numerous grassland-dependent wildlife species that would be permanently displaced, and possibly locally extirpated, through development of nearly all of the shortgrass mesa habitat on the Newport Banning Ranch.

It is my understanding that the Sunset Ridge and Newport Banning Ranch projects are seeking a combined permit from the U.S. Army Corps of Engineers (Corps), which includes a Section 7 consultation with the U.S. Fish and Wildlife Service (USFWS). During my review of the Sunset Ridge project, I reviewed materials that were submitted to the City and/or USFWS by the project biologists in support of the project's permit application. Supporting materials include a letter dated 29 June 2011 from Ann Johnston of BonTerra Consulting to Michael Sinacori, P.E., at the City of Newport Beach Public Works Department. In this letter, Ms. Johnston argued that a small canyon in the southeastern part of the Newport Banning Ranch site, vegetated with 0.08 acre of California Encelia mixed with Coastal Prickly-Pear, should not be considered ESHA due to the area having been "partially filled with large pieces of concrete and rebar," and because it is a small area of scrub separated from other areas of scrub by 55 feet of open ground. Finally, Ms. Johnston noted that, although GLA mapped a nesting pair of California Gnatcatchers in this small canyon in 2002, this "error" was later corrected. Since the area in question are within the area that would be graded for construction of Bluff Road, as specified in the DEIR and in a formal agreement between the City and Newport Banning Ranch, it is important to review this issue at this time. The original mapping of this pair in the small canyon is reproduced in Figures 5 and 6 on the following page.

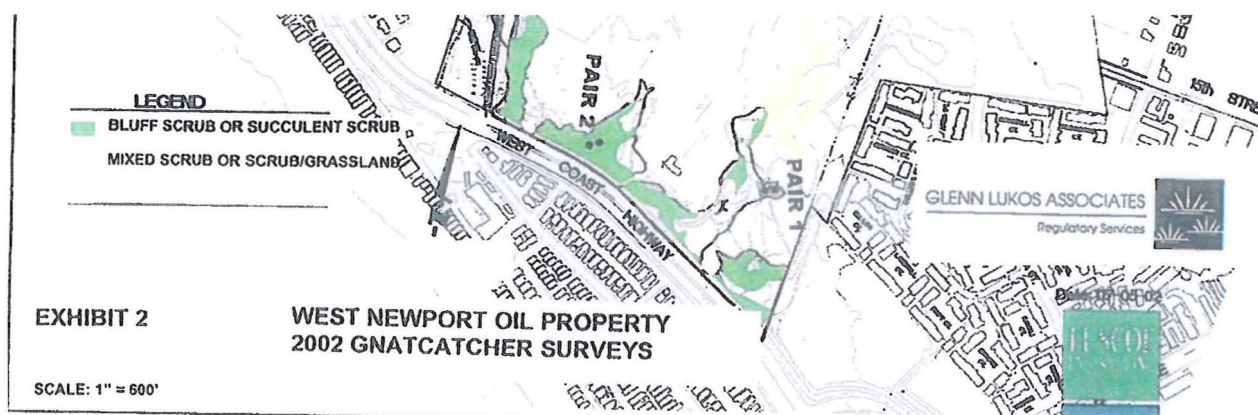


Figure 5. Scan of GLA's original 2002 mapping of California Gnatcatcher locations. The mapping of Pair 1 shows two dots, representing a gnatcatcher pair, in a small side-canyon within a much larger polygon that extends to the north, south, and west. Since the location of the side-canyon is aligned properly with the map's base topography, and its patch of native scrub is correctly mapped, it makes no sense to argue that mapping of the birds' location within the side-canyon was an error.

Figure 6 is a close-up of the gnatcatcher polygon in question (Pair 1), showing the original and "corrected" locations of the pair:

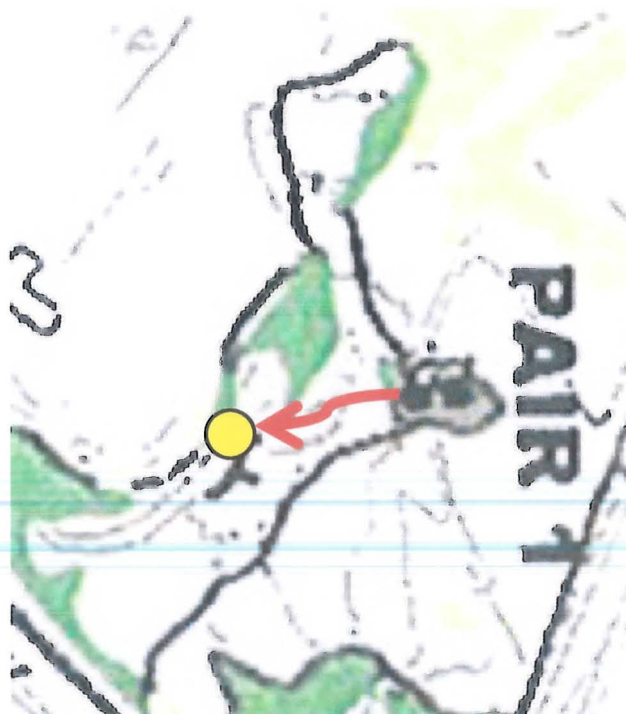


Figure 6. I do not have the report that explains what these dots were intended to represent, but their placement in this specific location suggests that this may have been a nest location. The red arrow and yellow dot show the "corrected" location of this pair, per Mr. Bomkamp's letter to the USFWS

Tony Bomkamp of GLA described his alteration of the 2002 map in a letter dated 14 June 2011 to Christine Medak of the USFWS (this letter is included as an appendix to Ms. Johnston's letter). Mr. Bomkamp stated the following:

During preparation of our submittal information to U.S. Fish and Wildlife Service for the Newport Banning Ranch Assessment, dated February 10, 2010, I noted that one of the [California Gnatcatcher] locations depicted in the year 2002 45-day report was incorrectly mapped. GLA corrected the error in our database such that the map in [our] February 10,

2010 submittal shows the corrected location; however, I did not notice you of the change at that time.

And:

I would note that GLA did not have GIS technology in 2002 and the map was prepared using "sticky dots" to the base map, a technique that was not as accurate as using sub-meter GPS combined with highly accurate GIS technology.

The letter also explains that the change in the birds' location was based upon Mr. Bomkamp's "clear recollection" eight years later, and not on review of archived field maps or other verifiable evidence.

I have four questions:

1. As stated in Ms. Johnston's letter, "native species do not grow well on concrete and rebar." Under what authority has Newport Banning Ranch dumped construction materials into the small, scrub-filled side-canyon, as described in Ms. Johnston's letter, and why have the land owners not removed the debris from this area of designated critical habitat for the California Gnatcatcher?
2. Why did Mr. Bomkamp wait 15 months to notify anyone that he had changed the 2002 map?
3. Were the two dots placed in the 0.08-acre side-canyon on the 2002 map intended to represent the birds' nest location, and, if not, what were the dots intended to represent?
4. Given that GLA's mapped polygon accurately represents the location of the 0.08-acre side-canyon (in relation to base topography and surrounding landmarks), how is it possible that the dots representing the gnatcatcher pair in that side-canyon ought to have been placed 200 feet west, on the other side of the main-stem canyon?

GLA's method of representing gnatcatcher habitat usage is to map the location of a pair of gnatcatchers for an entire year using a single dot, and agency biologists seem to have accepted this method of depicting habitat use areas. GLA biologists have wide latitude in choosing where to place the dots, and these chosen locations greatly affect readers' perception of the value of each patch of scrub. For these reasons, movement of the dot on GLA's 2002 map appears to have had an outsized influence on how agency biologists perceive the relative value of the scrub-filled side-canyon in which Mr. Bomkamp originally mapped the gnatcatcher pair. Figure 7, on the following page, shows part of GLA's composite map of gnatcatcher locations from 1992 to 2009, with the 2002 dot in its original and "corrected" locations. In the absence of a coherent explanation of how the dot was placed erroneously in 2002 (as opposed to being placed in a spot that now appears inconvenient, given the proposed alignment of Bluff Road), this dot must remain in the spot where it was originally mapped.



Figure 7. In the absence of a credible explanation for the 200-foot westward shift of the yellow dot representing a pair of California Gnatcatchers in 2002, and in the absence of valid surveys demonstrating habitat usage by gnatcatchers in this area, we insist that this dot remain in its original location.

It should matter little that a dot was placed 200 feet one way or another, because, in the absence of a valid study of habitat usage showing otherwise, California Gnatcatchers should be assumed to make use of all suitable habitat available within their normal territory size, which for coastal areas is described in the scientific literature as covering at least 2.5 acres, mean 5.7 acres¹. Given that one, two, or even three pairs of California Gnatcatchers regularly breed in the southeastern corner of the project site, the default assumption should be that the birds regularly forage, and during some years may establish a nest, within the 0.08-acre, scrub-filled side-canyon where they were specifically mapped in 2002. Such use would be completely consistent with the known, typical patterns of habitat usage by California Gnatcatchers in the region.

Although Newport Banning Ranch is an area of deferred certification under the City's Coastal Land Use Plan (CLUP), Coastal Commission staff has indicated that the CLUP is a relevant document that will be used to provide staff with some form of guidance when it eventually evaluates an application for a Coastal Development Permit for the Newport Banning Ranch project. Section 4.1.1 of the CLUP states:

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

¹Atwood, J. L. and D. R. Bontrager. 2001. California Gnatcatcher (*Polioptila californica*). The Birds of North America Online (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology; Retrieved from the Birds of North America Online: <http://bna.birds.cornell.edu/bna/species/574>.

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

Also:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. These include . . . southern dune scrub, southern coastal bluff scrub, maritime succulent scrub . . .

Also (emphasis added):

Another important habitat within the City of Newport Beach is coastal sage scrub (CSS). Although CSS has suffered enormous losses in California (estimates are as high as 85%), there are still thousands of acres in existence and this community type is no longer listed as rare by CDFG. Nevertheless, where CSS occurs adjacent to coastal salt marsh or other wetlands, or where it is documented to support or known to have the potential to support rare species such as the coastal California gnatcatcher, it meets the definition of ESHA because of its especially valuable role in the ecosystem.

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

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

If these CLUP criteria and policies are at all relevant to the Newport Banning Ranch project, then all areas of native coastal scrub habitat known or likely to be routinely occupied by California Gnatcatchers satisfy the City's own definition of ESHA. This clearly includes the 0.08-acre side-canyon where GLA mapped a pair of California Gnatcatchers in 2002.

In a public hearing in Oceanside, California, on 2 November 2011, nearly every member of the California Coastal Commission indicated strong support for a staff recommendation that the proposed Sunset Ridge park entry road, which would pass through the Newport Banning Ranch property, be limited to the width necessary to serve the park. But there was no support among staff or the commissioners for a major highway (Bluff Road) passing through the southeastern part of Newport Banning Ranch. This was because two patches of ESHA have already been designated in the southeastern corner of the Newport Banning Ranch property as the result of a recent enforcement action and, even with a limited park road, only minimal buffers may be established between the road and adjacent ESHA. The Coastal Commission's staff ecologist recommends that the park road buffers be restored with high-quality coastal sage scrub and preserved

under a deed restriction, consistent with the City's CLUP and the California Coastal Act, and this recommendation seems to have broad support among the commissioners. Since there appears to be little chance for a major Bluff Road to be pushed through the southeastern corner of Newport Banning Ranch to West Coast Highway, and since all of the "build" alternatives considered in the DEIR include this southern segment of Bluff Road, how can the City and project proponent hope to obtain the required Coastal Development Permit for any version of this project?

The Coastal Commission staff ecologist also identified a need for additional Burrowing Owl surveys and vernal pool/fairy shrimp surveys. Members of the Banning Ranch Conservancy have identified many more vernal pools/seasonal ponds than have the EIR consultants, and have documented them photographically. Under the Commission's one-parameter method for identifying wetlands, pools holding water for seven days may satisfy the Coastal Act's wetland criteria. As shown in Figure 1 of this comment letter, the DEIR's plant community map and wetlands map misrepresent even the massive pool near the end of Ticonderoga Street, so all of the pools identified by the Conservancy require careful inspection by credible specialists to determine their wetland status under the relevant federal and state criteria.

In analyzing impacts to "Grassland Depression Features" (a.k.a. vernal pools and seasonal ponds), Page 4.6-53 of the DEIR states:

The proposed Project is designed to avoid the two vernal pools (VP1 and VP2) that are occupied by San Diego fairy shrimp. In addition to avoidance of these areas, the vernal pool watershed that supports VP1 and VP2 would be enlarged and the entire pool complex would be restored (GLA 2010b).

Figure 8, on the following page, shows the context in which these two vernal pools would be "enlarged and the entire pool complex would be restored."

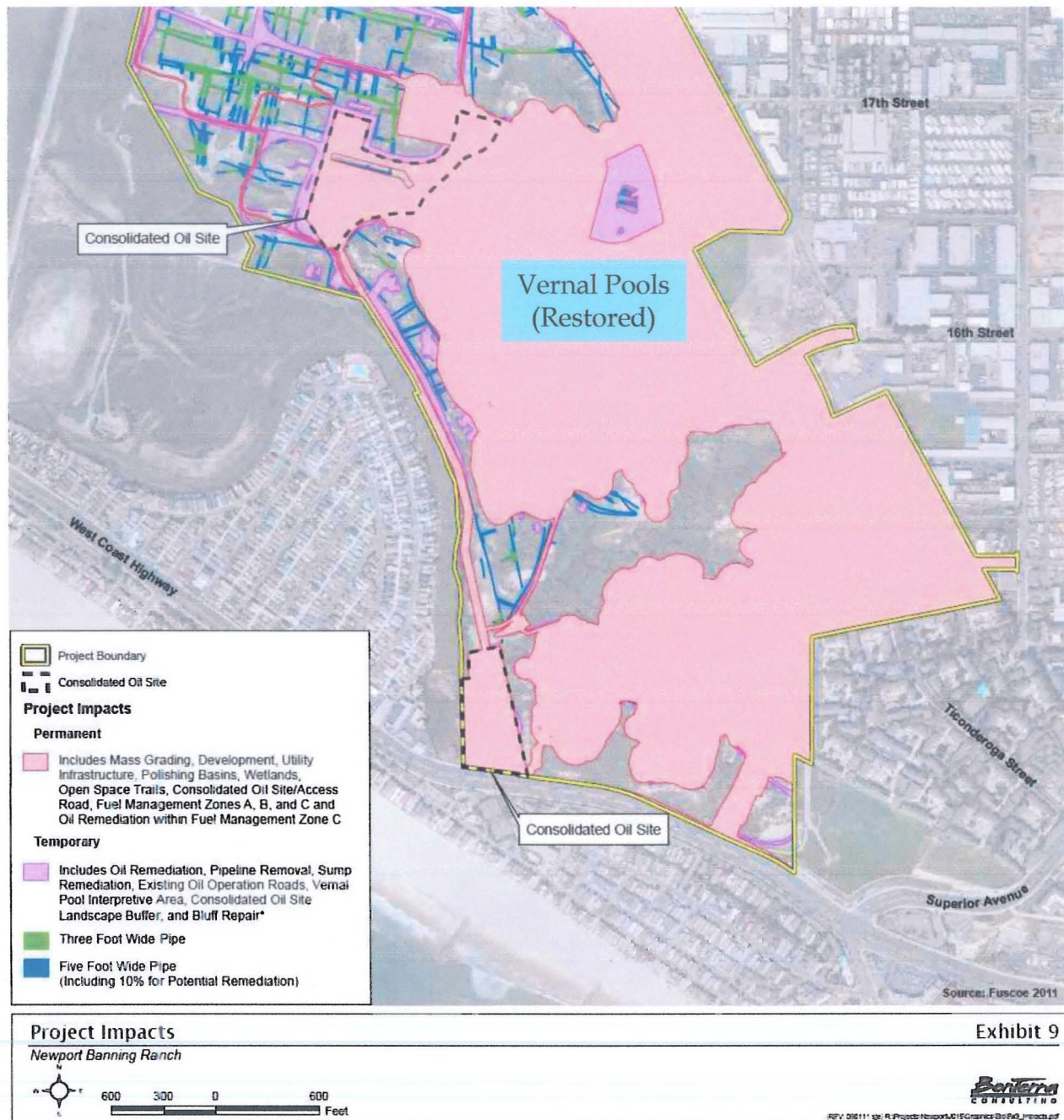


Figure 8. Exhibit 9 of Appendix E to the DEIR shows that two large vernal pools supporting San Diego Fairy Shrimp would technically be preserved and expanded, but surrounded by new development.

Preservation and “restoration” of these vernal pools in a bubble entirely isolated from the surrounding natural landscape might satisfy the narrowest federal requirement to preserve endangered San Diego Fairy Shrimp, but the ecological value of vernal pools is not limited to keeping invertebrates alive, as if in a giant petri dish. Conservation planning as outlined in the Newport Banning Ranch DEIR is anathema to the ecosystem-based approach that characterizes land planning under the California Coastal Act. It is possible that the City, project proponent, and consultants will be able to point to a letter

from the USFWS confirming that the project would not harm listed species. But the federal government is not required to consider other ecological values of vernal pools, such as providing a source of fresh water and foraging habitat for terrestrial wildlife species in surrounding uplands. Legitimate, ecosystem-based conservation planning, as required under the Coastal Act, would preserve and restore these vernal pools as part of a diverse and largely intact coastal landscape, not as a small, isolated “interpretive area” surrounded by intensive development.

Section 2.4.1 of the DEIR “Areas of Controversy and Unresolved Issues,” states:

Commenters noted that the analysis must be based on not only the City’s criteria but also California Coastal Act criteria, particularly with respect to Environmentally Sensitive Habitat Areas and the provision of buffers between development and sensitive biological areas. These issues are addressed primarily in Section 4.6, Biological Resources and Section 7.0, Alternatives to the Proposed Project.

The DEIR attempts to dismiss the “controversy” with the following statement in Table 4.6-10:

The Project is consistent with [Section 30240 of the Coastal Act – Environmentally sensitive habitat areas; adjacent developments]. Section 4.6.4 of this DEIR has identified and mapped the vegetation types and special status species occurrences known to occur within the Project Site. The Project and associated mitigation measures avoid, minimize, and compensate for the placement of development within these areas to prevent a substantial degradation of these areas or significantly disrupt habitat values. 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.

It is relevant that GLA’s 2008 biological technical appendix, which was posted to the City’s web map, included a map of probable ESHA, whereas no such map is included in the current DEIR². The DEIR identifies permanent impacts to 97.3 acres of grasslands/vernal pools, 20.5 acres of coastal sage scrub, and 7.0 acres of riparian and marsh vegetation. Most or all of these impacts involve natural communities that the Coastal Commission has consistently identified as ESHA, indicating that the City, project proponent, and their consultants either misunderstand the Coastal Act and its requirements, or believe that these requirements do not pertain to them. The DEIR’s mitigation strategy relies upon impacting sensitive habitats and restoring them somewhere else, or preserving certain resources in place and developing closely around them, with little or no consideration given to conserving, in functional form, the mosaic of natural communities that make up this coastal ecosystem. Although the DEIR’s approach may allow the project to comply with the federal Endangered Species Act – a law that routinely allows habitats for listed species to be destroyed and then restored elsewhere – the Coastal Commission is required by law and legal precedent to protect ESHA in place. Although the project design calls for numerous direct, permanent impacts within ESHA

² If a reader conducts a search for the term “ESHA” within the PDF version of the current DEIR, numerous wetland polygons are highlighted within Exhibit 4.6-3c and 4.6-7c, indicating the EIR preparer’s opinion regarding the limits of wetland ESHA on the project site; many of these areas are proposed for permanent impacts, which is inconsistent with the Coastal Act.

and ESHA buffers, the EIR preparers blithely claim that their approach complies with Section 30240 of the Coastal Act. This appears to be a bizarre and unproductive approach to designing a project that can be found consistent with the Coastal Act.

The Newport Banning Ranch property includes all the elements of a diverse and important coastal ecosystem. Even in its somewhat degraded condition, this unique property supports numerous listed species and California Species of Special Concern in a mosaic of wetlands and uplands that truly has no parallel anywhere in Orange County. The notion that the Coastal Commission might possibly authorize the dismantling of this ecosystem in exchange for some form of restoration “within Zone C of the fuel modification areas,” or at some location to be identified at a later date, reflects a profound misunderstanding of the Coastal Act and relevant precedents, including the City’s own CLUP. Given the complete lack of support among Commissioners at last week’s hearing for permitting even a limited stretch of Bluff Road as part of an otherwise uncontroversial park project, and given that every project alternative evaluated in the DEIR includes establishing Bluff Road as a major thoroughfare, the Newport Banning Ranch project appears to be completely incompatible with the California Coastal Act. The City – acting both as a development partner with Newport Banning Ranch and as CEQA Lead Agency – may approve this project under CEQA, but would such an approval have any validity in a court of law where the facts of a case have import and meaning? Finally, if last week’s hearing on the Sunset Ridge project is any guide, the public may rest assured that this project will come under much closer scrutiny when it eventually must obtain the approval of the Coastal Commission.

I appreciate the opportunity to provide these comments on behalf of the Banning Ranch Conservancy.

Sincerely,



Robert A. Hamilton
President, Hamilton Biological, Inc.

Cc: Terry Welsh, Banning Ranch Conservancy
Jonna Engel and Karl Schwing, California Coastal Commission Staff
Christine Medak, USFWS

Attachment: Curriculum Vitae

Robert A. Hamilton

President, Hamilton Biological, Inc.

Expertise

Endangered Species Surveys
General Biological Surveys
CEQA Analysis
Population Monitoring
Bird Banding
Vegetation Mapping
Noise Monitoring
Open Space Planning
Natural Lands Management

Education

1988. Bachelor of Science degree
in Biological Sciences,
University of California,
Irvine

Professional Experience

1994 to Present. Independent
Biological Consultant,
Hamilton Biological, Inc.
1988 to 1994. Biologist, LSA
Associates, Inc.

Permits

Federal Permit No. TE-799557 to
survey for the Coastal
California Gnatcatcher and
Southwestern Willow
Flycatcher (expires 3/5/12)
Federal Bird Banding Subpermit
No. 20431 (expires 1/31/14)
MOUs with the California Dept.
of Fish and Game to survey
for the San Diego Cactus
Wren (expires 12/31/11), and
the Coastal California
Gnatcatcher and SW Willow
Flycatcher (expires 5/31/12)
California Scientific Collecting
Permit No. SC-001107 (expires
11/5/11)

Robert A. Hamilton has been providing biological consulting services in southern California since 1988. He spent the formative years of his career at the firm of LSA Associates in Irvine, where he was a staff biologist and project manager. He has worked as a full-time independent consultant since 1994, incorporating the enterprise as Hamilton Biological, Inc., in 2009. His consultancy specializes in the practical application of environmental policies and regulations to land management and land use decisions in southern California.

A recognized authority on the status, distribution, and identification of birds in California, Mr. Hamilton is the lead author of two standard references describing aspects of the state's avifauna: *The Birds of Orange County: Status & Distribution* and *Rare Birds of California*. Mr. Hamilton has also conducted extensive studies in Baja California, and for seven years edited the Baja California Peninsula regional reports for the journal *North American Birds*. He served ten years on the editorial board of *Western Birds* and regularly publishes in peer-reviewed journals. He is a founding member of the Coastal Cactus Wren Working Group and is presently updating the Cactus Wren species account for *The Birds of North America Online*. Mr. Hamilton's expertise includes floral identification and vegetation mapping. He served for a decade as Conservation Chair for the Orange County chapter of the California Native Plant Society and has a working knowledge of native plant restoration. He is a current member of the Los Angeles County Significant Ecological Areas Technical Advisory Committee (SEATAC).

Mr. Hamilton conducts general and focused biological surveys of small and large properties as necessary to obtain various local, state, and federal permits, agreements, and clearances. He also conducts landscape-level surveys needed by land managers to monitor songbird populations. Mr. Hamilton holds the federal and state permits and MOUs listed to the left, and he is recognized by federal and state resource agencies as being highly qualified to survey for the Least Bell's Vireo. He also provides nest-monitoring services in compliance with the federal Migratory Bird Treaty Act and California Fish & Game Code Sections 3503, 3503.5 and 3513. Mr. Hamilton has the capability of

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Curriculum Vitae, Page 2

Board Memberships, Advisory Positions, Etc.

Los Angeles County Significant
Ecological Areas Technical
Advisory Committee
(SEATAC) (2010–present)

Coastal Cactus Wren Working
Group (2008–present)

American Birding Association:
Baja Calif. Peninsula Regional
Editor, *North American Birds*
(2000–2006)

Western Field Ornithologists:
Associate Editor of *Western
Birds* (1999–2008)

California Bird Records
Committee (1998–2001)

Nature Reserve of Orange
County: Technical Advisory
Committee (1996–2001)

California Native Plant Society,
Orange County Chapter:
Conservation Chair
(1992–2003)

Professional Affiliations

American Ornithologists' Union
Cooper Ornithological Society
Institute for Bird Populations
California Native Plant Society
Southern California Academy of
Sciences
Western Foundation of
Vertebrate Zoology

Insurance

\$3,000,000 professional liability
policy (Axis)
\$2,000,000 general liability
policy (The Hartford)
\$1,000,000 auto liability policy
(State Farm)

monitoring noise as it relates to nesting or roosting birds using an advanced Quest SoundPro unit that can provide second-by-second logging of noise levels at the nest; this allows documentation of the varying sound pressure levels that nesting birds are exposed to during construction and evaluation of any effects associated with different levels. He is also an expert photographer, and typically provides photo-documentation and/or video documentation as part of his services.

Drawing upon a robust, multidisciplinary understanding of the natural history and ecology of his home region, Mr. Hamilton works with private and public land owners, as well as governmental agencies and interested third parties, to apply the local, state, and federal land use policies and regulations applicable to each particular situation. Mr. Hamilton has amassed extensive experience in the preparation and critical review of CEQA documents, from relatively simple Negative Declarations to complex supplemental and recirculated Environmental Impact Reports. In addition to his knowledge of CEQA and its Guidelines, Mr. Hamilton understands how each Lead Agency brings its own interpretive variations to the CEQA review process.

Representative Project Experience

From 2007 to 2010, reviewed biological resources sections of CEQA documents submitted to the County of Los Angeles Department of Regional Planning. Work included evaluating the accuracy and adequacy of consultants' biological reports, developing impact analyses and mitigation measures, and recommending findings of significance. Under the same contract, prepared a list of drought-tolerant native plants, hyperlinked to web-based information, for use in landscaping in Los Angeles County. The County later revised the list, with some loss of information, but the original list and accompanying map of seven planting zones in the county are available for free download at: <http://hamiltonbiological.com/resources-publications.html>.

In 2009, under contract to the Palos Verdes Peninsula Land Conservancy, surveyed for the California Gnatcatcher and Cactus Wren across nine habitat reserves that constitute nearly all of the Portuguese Bend Natural Preserve in coastal Los Angeles County. The services provided included mapping and classifying all cactus scrub resources in the areas surveyed.

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Curriculum Vitae, Page 3

Other Relevant Experience

Field Ornithologist, San Diego Natural History Museum Scientific Collecting Expedition to Central and Southern Baja California, October/November 1997 and November 2003.

Field Ornithologist, Island Conservation and Ecology Group Expedition to the Tres Marias Islands, Nayarit, Mexico, 23 January to 8 February 2002.

Field Ornithologist, Algalita Marine Research Foundation neustonic plastic research voyages in the Pacific Ocean, 15 August to 4 September 1999 and 14 to 28 July 2000.

Field Assistant, Bird Banding Study, Río Nambí Reserve, Colombia, January to March 1997.

References

Provided upon request.

Under contract to the Conservation Biology Institute in San Diego County, conducted 2008 reconnaissance of those portions of the San Dieguito River Valley that were unburned or only partially burned during the massive Witch Fire, which consumed nearly 200,000 acres in October 2007. Three-pass surveys conducted at 14 sites between Lake Hodges and the San Pasqual Valley determined the presence or absence of Cactus Wrens and California Gnatcatchers. Work products included maps of all unburned and partially burned scrub communities, maps of weed infestations, and complete lists documenting the numbers of each vertebrate wildlife species detected during the surveys.

Under contract to the City of Orange, prepared the Biological Resources section of a hybrid Supplemental EIR/Draft EIR for the 6,900-acre Santiago Hills II/East Orange Planned Community project in central Orange County. This complicated document covered one proposed development area that already had CEQA clearance, but that required updating for alterations to the previously approved plan, and a much larger area that was covered under an existing Natural Communities Conservation Plan (NCCP). The SEIR/EIR was certified in November 2005.

During the 1990s and 2000s, worked with study-design specialists and resource agency representatives to develop the long-term passerine bird monitoring program for the 37,000-acre Nature Reserve of Orange County, and directed its implementation from 1996 to 2001 with additional contract work since then. Tasks have included 1) annual monitoring of 40 California Gnatcatcher and Cactus Wren study sites, 2) oversight of up to 10 constant-effort bird banding stations from 1998 to 2003 under the Monitoring Avian Productivity and Survivorship (MAPS) program, and 3) focused surveys for the Cactus Wren, and detailed mapping of cactus scrub habitat, across the NROC's coastal reserve in 2006 and 2007.

Third-Party CEQA Review

Under contract to cities, conservation groups, homeowners' associations, and other interested parties, have reviewed EIRs and other project documentation for the following projects:

- ▶ The Ranch Plan (residential/commercial, County of Orange)

Robert A. Hamilton

Curriculum Vitae, Page 4

- ▶ Southern Orange County Transportation Infrastructure Improvement Project (Foothill South Toll Road, County of Orange)
- ▶ Sunset Ridge Park (proposed city park, City of Newport Beach)
- ▶ Gregory Canyon Landfill Restoration Plan (proposed mitigation, County of San Diego)
- ▶ Montebello Hills Specific Plan EIR (residential, City of Montebello)
- ▶ Cabrillo Mobile Home Park Violations (illegal wetland filling, City of Huntington Beach)
- ▶ Newport Hyatt Regency (timeshare conversion project, City of Newport Beach)
- ▶ Lower San Diego Creek "Emergency Repair Project" (flood control, County of Orange)
- ▶ Tonner Hills (residential, City of Brea)
- ▶ The Bridges at Santa Fe Units 6 and 7 (residential, County of San Diego)
- ▶ Villages of La Costa Master Plan (residential/commercial, City of Carlsbad)
- ▶ Whispering Hills (residential, City of San Juan Capistrano)
- ▶ Santiago Hills II (residential/commercial, City of Orange)
- ▶ Rancho Potrero Leadership Academy (youth detention facility/road, County of Orange)
- ▶ Saddle Creek/Saddle Crest (residential, County of Orange)
- ▶ Frank G. Bonelli Regional County Park Master Plan (County of Los Angeles)

Contact Information

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Selected Presentations

- Hamilton, R. A., and Cooper, D. S. 2009-2010. Conservation & Management Plan for Marina del Rey. Twenty-minute Powerpoint presentation given to different governmental agencies and interest groups.
- Hamilton, R. A. 2008. Cactus Wren Conservation Issues, Nature Reserve of Orange County. One-hour Powerpoint presentation for Sea & Sage Audubon Society, Irvine, California, 25 November 2008.
- Hamilton, R. A., Miller, W. B., Mitrovich, M. J. 2008. Cactus Wren Study, Nature Reserve of Orange County. Twenty-minute Powerpoint presentation given at the Nature Reserve of Orange County's Cactus Wren Symposium, Irvine, California, 30 April 2008.
- Hamilton, R. A. and K. Messer. 1999-2004 Results of Annual California Gnatcatcher and Cactus Wren Monitoring in the Nature Reserve of Orange County. Twenty-minute Powerpoint presentation given at the Partners In Flight meeting: Conservation and Management of Coastal Scrub and Chaparral Birds and Habitats, Starr Ranch Audubon Sanctuary, 21 August 2004; and at the Nature Reserve of Orange County 10th Anniversary Symposium, Irvine, California, 21 November 2006.
- Hamilton, R.A. Preliminary results of reserve-wide monitoring of California Gnatcatchers in the Nature Reserve of Orange County. Twenty-minute Powerpoint presentation given at the Southern California Academy of Sciences annual meeting at California State University, Los Angeles, 5 May 2001.

Publications

- Hamilton, R. A. 2008. Cactus Wrens in central & coastal Orange County: How will a worst-case scenario play out under the NCCP? *Western Tanager* 75:2-7.
- Erickson, R. A., R. A. Hamilton, R. Carmona, G. Ruiz-Campos, and Z. A. Henderson. 2008. Value of perennial archiving of data received through the North American Birds regional reporting system: Examples from the Baja California Peninsula. *North American Birds* 62:2-9.
- Erickson, R. A., R. A. Hamilton, and S. G. Mlodinow. 2008. Status review of Belding's Yellowthroat *Geothlypis beldingi*, and implications for its conservation. *Bird Conservation International* 18:219-228.
- Hamilton, R. A. 2008. Fulvous Whistling-Duck (*Dendrocygna bicolor*). Pp. 68-73 in Shuford, W. D. and T. Gardali, eds. 2008. California Bird Species of Special Concern: A ranked assessment of species, subspecies, and distinct populations of birds of immediate

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- conservation concern in California. *Studies of Western Birds* 1. Western Field Ornithologists, Camarillo, CA, and California Department of Fish and Game, Sacramento, CA.
- California Bird Records Committee (R. A. Hamilton, M. A. Patten, and R. A. Erickson, editors.). 2007. *Rare Birds of California*. Western Field Ornithologists, Camarillo, CA.
- Hamilton, R. A., R. A. Erickson, E. Palacios, and R. Carmona. 2001–2007. *North American Birds* quarterly reports for the Baja California Peninsula Region, Fall 2000 through Winter 2006/2007.
- Hamilton, R. A. and P. A. Gaede. 2005. Pink-sided × Gray-headed Juncos. *Western Birds* 36:150–152.
- Mlodinow, S. G. and R. A. Hamilton. 2005. Vagrancy of Painted Bunting (*Passerina ciris*) in the United States, Canada, and Bermuda. *North American Birds* 59:172–183.
- Erickson, R. A., R. A. Hamilton, S. González-Guzmán, G. Ruiz-Campos. 2002. Primeros registros de anidación del Pato Friso (*Anas strepera*) en México. *Anales del Instituto de Biología, Universidad Nacional Autónoma de México, Serie Zoología* 73(1): 67–71.
- Hamilton, R. A. and J. L. Dunn. 2002. Red-naped and Red-breasted sapsuckers. *Western Birds* 33:128–130.
- Hamilton, R. A. and S. N. G. Howell. 2002. Gnatcatcher sympatry near San Felipe, Baja California, with notes on other species. *Western Birds* 33:123–124.
- Hamilton, R. A. 2001. Book review: The Sibley Guide to Birds. *Western Birds* 32:95–96.
- Hamilton, R. A. and R. A. Erickson. 2001. Noteworthy breeding bird records from the Vizcaíno Desert, Baja California Peninsula. Pp. 102–105 in *Monographs in Field Ornithology* No. 3. American Birding Association, Colorado Springs, CO.
- Hamilton, R. A. 2001. Log of bird record documentation from the Baja California Peninsula archived at the San Diego Natural History Museum. Pp. 242–253 in *Monographs in Field Ornithology* No. 3. American Birding Association, Colorado Springs, CO.
- Hamilton, R. A. 2001. Records of caged birds in Baja California. Pp. 254–257 in *Monographs in Field Ornithology* No. 3. American Birding Association, Colorado Springs, CO.
- Erickson, R. A., R. A. Hamilton, and S. N. G. Howell. 2001. New information on migrant birds in northern and central portions of the Baja California Peninsula, including species new to Mexico. Pp. 112–170 in *Monographs in Field Ornithology* No. 3. American Birding Association, Colorado Springs, CO.
- Howell, S. N. G., R. A. Erickson, R. A. Hamilton, and M. A. Patten. 2001. An annotated checklist of the birds of Baja California and Baja California Sur. Pp. 171–203 in *Monographs in Field Ornithology* No. 3. American Birding Association, Colorado Springs, CO.
- Ruiz-Campos, G., González-Guzmán, S., Erickson, R. A., and Hamilton, R. A. 2001. Notable bird specimen records from the Baja California Peninsula. Pp. 238–241 in *Monographs in Field Ornithology* No. 3. American Birding Association, Colorado Springs, CO.

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- Wurster, T. E., R. A. Erickson, R. A. Hamilton, and S. N. G. Howell. 2001. Database of selected observations: an augment to new information on migrant birds in northern and central portions of the Baja California Peninsula. Pp. 204–237 in *Monographs in Field Ornithology* No. 3. American Birding Association, Colorado Springs, CO.
- Erickson, R. A. and R. A. Hamilton, 2001. Report of the California Bird Records Committee: 1998 records. *Western Birds* 32:13–49.
- Hamilton, R. A., J. E. Pike, T. E. Wurster, and K. Rademaker. 2000. First record of an Olive-backed Pipit in Mexico. *Western Birds* 31:117–119.
- Hamilton, R. A. and N. J. Schmitt. 2000. Identification of Taiga and Black Merlins. *Western Birds* 31:65–67.
- Hamilton, R. A. 1998. Book review: Atlas of Breeding Birds, Orange County, California. *Western Birds* 29:129–130.
- Hamilton, R. A. and D. R. Willick. 1996. The Birds of Orange County, California: Status and Distribution. Sea & Sage Press, Sea & Sage Audubon Society, Irvine.
- Hamilton, R. A. 1996–98. Photo Quizzes. *Birding* 27(4):298–301, 28(1):46–50, 28(4):309–313, 29(1):59–64, 30(1):55–59.
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- Bontrager, D. R., R. A. Erickson, and R. A. Hamilton. 1995. Impacts of the October 1993 Laguna fire on California Gnatcatchers and Cactus Wrens. in J. E. Keeley and T. A. Scott (editors). *Wildfires in California Brushlands: Ecology and Resource Management*. International Association of Wildland Fire, Fairfield, Washington.
- Erickson, R. A., R. A. Hamilton, S. N. G. Howell, M. A. Patten, and P. Pyle. 1995. First record of Marbled Murrelet and third record of Ancient Murrelet for Mexico. *Western Birds* 26: 39–45.
- Erickson, R. A., and R. A. Hamilton. 1993. Additional summer bird records for southern Mexico. *Euphonia* 2(4): 81–91.
- Erickson, R. A., A. D. Barron, and R. A. Hamilton. 1992. A recent Black Rail record for Baja California. *Euphonia* 1(1): 19–21.