HAMILTON BIOLOGICAL

December 15, 2014

Karl Schwing, Coastal Program Manager
California Coastal Commission, South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302

SUBJECT: BIOLOGICAL IMPACTS OF UNPERMITTED ACTIONS
VIOLATION NO. V-5-11-005
CDP APPLICATION NO. 5-13-032
NEWPORT BANNING RANCH, NEWPORT BEACH, CA

Dear Mr. Schwing,

Robert Hamilton, President of Hamilton Biological, Inc., provides these comments on behalf of the Banning Ranch Conservancy regarding the California Coastal Commission's upcoming deliberations concerning extensive mowing and other removal of major vegetation at Newport Banning Ranch in Newport Beach, California. This property, which covers approximately 400 acres, is the last large expanse of undeveloped private land remaining on the coast of Orange County. Newport Banning Ranch supports a wider array of listed and otherwise "sensitive" wildlife species than does almost any area of comparable size on the coast of southern California.

In a letter dated 18 May 2012, Enforcement Officer Andrew Willis notified the West Newport Oil Company that vegetation removal had been occurring at Newport Banning Ranch in apparent violation of the California Coastal Act. This is because the impacts were not addressed under either a valid coastal development permit or the explicitly limited Resolution of Exemption (No. E-7-27-73-144) from 1973. Mr. Willis further observed that:

1. no application for vested rights to expand oil operations or to mow extensive areas of vegetation on the property, as required in Section 30608 of the Coastal Act, has ever been applied for by the land owner or the oil operator;

2. mowing of the property includes various areas outside of the mapped area of oil operations contained in the 2011 DEIR for the proposed Newport Banning Ranch residential/commercial/resort project at ; and

3. the DEIR mapped oil operations as occurring in areas that the Commission determined to be Environmentally Sensitive Habitat Areas (ESHA).

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In a letter dated 31 January 2014, Mr. Willis detailed numerous occasions upon which the Commission notified the oil operator that various oil operations impacting the site's plant communities and wildlife were not covered under either a valid coastal development permit or the 1973 Resolution of Exemption. Page 14 of Mr. Willis's letter stated:

> As evidenced by the permitting and enforcement history of the site, it has always been the Commission's intent to require coastal development permits for additional wells and other development not specifically covered by the Exemption [of 1973].

More recently, on 19 August 2014, Executive Director Charles Lester issued to West Newport Oil Company and Newport Banning Ranch LLC an 11-page Notification of Intent to Commence Cease and Desist Order and Restoration Order Proceedings and Notification of Intent to Record a Notice of Violation. On Page 2 of this document, Dr. Lester stated:

> Based upon the information that staff has reviewed to date, it has become abundantly clear to staff that a number of sensitive and native plant communities and wildlife species thrive on the properties. Accordingly, the potential that development activities on the site, particularly unpermitted development activities, could have impacted and could be continuing to impact sensitive habitats and species, including ecologically significant vegetation, became more salient.

Dr. Lester and Mr. Willis demonstrated that, over a period of decades, the owners of Newport Banning Ranch undertook various forms of development and removal of major vegetation, actions not authorized under the Coastal Act or any valid form of exemption. The Banning Ranch Conservancy is submitting separate comments regarding the applicant's attempts to reinterpret in their favor the plain wording of the Resolution of Exemption, the Coastal Act, fuel modification guidelines, and other documents. The purpose of this letter is to describe the sensitive coastal resources affected by the applicant's large-scale mowing operation and other removal of major vegetation.

COASTAL RESOURCES AFFECTED

The extraordinary ecological importance of Newport Banning Ranch has been documented by a variety of studies conducted by consultants working for the West Newport Oil Company and Newport Banning Ranch LLC over a period of more than two decades. Despite having this knowledge, the property owner and oil operator have contributed to the degradation, and in some cases loss, of various sensitive resources through various forms of unpermitted development, much of it focused in the upland areas they propose to convert to housing, commercial, and resort uses.

California Gnatcatcher

The U.S. Fish & Wildlife Service designates the entire Newport Banning Ranch parcel as designated as critical habitat for this federally threatened species. From 1992 to 2014, no fewer than 14 focused surveys have been conducted to determine this species' ongoing status on the property. Survey efforts prior to 2013 found an average of 19 territories during the nesting season (range 15–21, with an outlying high total of 29 in 1994). In 2013, Dudek Associates documented only 10 territories, and attributed this low number

to irregularities in the twelve previous survey efforts. As I discussed in the attached letter to Senior Deputy Director Jack Ainsworth, dated 21 January 2014, the 2013 results were consistent with the published literature concerning the response of California Gnatcatcher populations to prolonged drought conditions, and those same conditions were likely to result in further decline of the population in 2014:

> Dudek's 2013 survey results may be explained in the context of well-understood, weather-related, year-to-year population fluctuations of CAGN [California Gnatcatcher] populations in coastal Orange County and the wider region. Specifically, a drought-related drop in the CAGN population at Newport Banning Ranch represents the most parsimonious explanation for Dudek recording ten CAGN territories at Newport Banning Ranch in 2013 (a decline to 34–67% of the annual population levels recorded previously). Furthermore, rainfall of 0.62 inch during the February-to-April "egg-formation period" in 2013 was 88 percent below the average total of 5.02 inches, meaning that production of young was almost certainly extremely low in 2013. Thus, additional decline of the local CAGN population is very likely in 2014. Even more alarmingly, if the prolonged drought does not break in the next several weeks, 2014 will also be a resource-poor breeding season, meaning that the population is likely to be even smaller in 2015.

As predicted, Dudek's California Gnatcatcher surveys in spring 2014 found only eight territories — the lowest gnatcatcher population ever recorded at Newport Banning Ranch (Dudek. 2014. Focused California Gnatcatcher Survey, Newport Banning Ranch Project. Letter report dated 27 August 2014 from Brock Ortega and colleagues to the U.S. Fish & Wildlife Service, Carlsbad, CA).

Drought conditions persisted through the 2014 February-to-April "egg-formation period" (2.69 inches, 47 percent below average), and therefore it is likely that the local population reproduced poorly *again* last year. Notably, Dudek observed only 13 fledglings during six rounds of surveys in 2014 (12 survey-days total between early May and the end of June). This is an average of only 1.6 fledglings per pair, well below the mean for Orange County of 2.5 ± 0.48 SD (Atwood, J. L. and D. R. Bontrager. 2001. California Gnatcatcher *Polioptila californica* species account in A. Poole [editor] The Birds of North America Online. Cornell Lab of Ornithology, Ithaca, NY). If El Niño/Southern Oscillation conditions continue to materialize during winter 2014/2015, as generally predicted, and if one or more especially intense storms hits the area, it is my experience that overwinter gnatcatcher mortality is likely to be greater than normal. Therefore, while heavy winter/spring rainfall would likely lead to favorable breeding conditions at Newport Banning Ranch in spring 2015, the gnatcatcher population is likely to be rebounding from a very low number of pairs. The viability of the California Gnatcatcher population at Newport Banning Ranch is becoming tenuous.

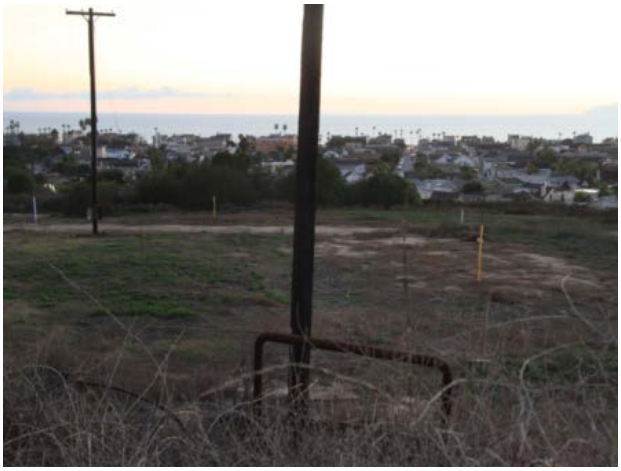
In a letter to Newport Banning Ranch LLC and West Newport Oil dated 9 October 2014 (attached), G. Mendel Stewart of the U.S. Fish & Wildlife Service observed that, between 1992 and 2012, the gnatcatcher's required coastal sage scrub habitat had been "reduced by approximately 7.31 acres," from 59.41 to 52.10 acre. Mr. Stewart also observed:

> Regular disturbance to vegetation from mowing has also increased the extent of invasive and ornamental vegetation and decreased available foraging habitat for the gnatcatcher.

Thus, the U.S. Fish & Wildlife Service is now on record (a) documenting the unauthorized destruction of 7.31 acres of designated critical habitat at Newport Banning Ranch, and (b) declaring that the mowing has degraded sensitive coastal scrub habitat that the gnatcatcher requires to avoid being extirpated from this part of its range.

Figures 1–4, below, show some of the habitat destruction that has taken place in recent years.

Figures 1 and 2, above, show the same patch of Coastal Prickly-Pear before and after clearing. Source: Banning Ranch Conservancy.



Figures 3 and 4, above, show the same patch of California Encelia scrub before and after clearing. Source: Banning Ranch Conservancy.

The Orange County Fire Authority's 2014 *Vegetation Management Guideline, Technical Design for New Construction Fuel Modification Plans and Maintenance Program* classifies Coastal Prickly-Pear and California Encelia as "Acceptable in all fuel modification wet and dry zones in all locations. " These scrub habitats provide the primary constituent elements of critical habitat for the California Gnatcatcher. The unnecessary destruction and degradation of cactus and encelia through large-scale mowing has contributed directly to the decline of the gnatcatcher population at Newport Banning Ranch.

Cactus Wren

Populations of the Cactus Wren on the coastal slope of southern California are recognized as a focal and/or covered species in all large-scale coastal sage scrub conservation planning processes in the region. Cactus Wren populations in the 37,000-acre Nature Reserve of Orange County have declined precipitously since the mid-1990s. Since Cactus Wrens, like California Gnatcatchers, are residents of coastal scrub, previous gnatcatcher surveys at Newport Banning Ranch typically reported on the numbers of Cactus Wrens detected.

During the 1990s, Newport Banning Ranch supported roughly a dozen Cactus Wren pairs (up to 14 pairs: LSA Associates, Inc. 1994. Results of 1994 gnatcatcher and wren surveys. Letter report dated 7 April 1994 prepared for Leonard Anderson, West Newport Oil Company). Page 4-6.37 of the 2011 Newport Banning Ranch DEIR stated:

> Two cactus wren territories were observed during focused surveys for the coastal California gnatcatcher in spring 2009. A breeding pair had an active nest in a large patch of prickly pear (Exhibits 4.6-2a and 4.6-2b). The first nesting attempt failed, apparently due to an infestation of Argentine ants (*Linepithema humile*); however, a subsequent nesting attempt produced at least one fledgling. In addition, a solitary male was observed in the northeastern portion of the Project site.

Dudek's 2013 and 2014 reports do not mention this species at all, and Cactus Wren is not listed among the wildlife species observed during Dudek's surveys in either 2013 or 2014. This suggests that the wren has quietly been eliminated from the site. Please refer back to Figures 1 and 2 on the previous page, which show the apparent removal of a patch of tall prickly-pear cactus — the required habitat of the Cactus Wren. It appears that the gratuitous destruction of this specialized habitat at Newport Banning Ranch contributed to the species' extirpation from the property within just the last few years. Given the fire-resistive qualities of cactus, and the Fire Authority's designation of Coastal Prickly-Pear as being "Acceptable in all fuel modification wet and dry zones in all locations," it must be difficult to construct a sincere argument that cactus removal was conducted in pursuit of legitimate fire safety objectives.

Cactus Wrens have been successfully translocated from North Irvine to Upper Newport Bay (Kamada, D. 2008. Final Report: Cactus Wren *Campylorhynchus brunneicapillus* 2007 telemetry study and the 2007 monitoring results of the 2006 Cactus Wren translocation study in Orange County, California. Report dated February 2008 prepared for CDFG and the Nature Reserve of Orange County, Irvine). "The persistence and successful breeding of Cactus Wrens at Upper Newport Bay demonstrate that translocation may be helpful in managing wren populations in a fragmented landscape" (Hamilton, R. A., Proudfoot, G. A., Sherry, D. A., and Johnson, S. 2011. Cactus Wren *Campylorhynchus brunneicapillus* species account in The Birds of North America Online [A. Poole, ed.]. Cornell Lab of Ornithology, Ithaca, NY). To allow for the possibility of future translocations of this regionally imperiled species, it is important to maintain all cactus scrub historically occupied by Cactus Wrens at Newport Banning Ranch and elsewhere in the region. As Figures 1 and 2 show, this is not happening at Newport Banning Ranch.

Vernal Pools and Grasslands

It is estimated that over 95% of southern California's coastal vernal pools have been lost to development. The vernal pool complexes found in coastal grasslands at Banning Ranch and nearby Fairview Park represent the only remaining examples of this rare ecological community in coastal Orange County. Aerial and ground photos taken by the Banning Ranch Conservancy in 2009/2010 and 2010/2011 show that vernal pools and their watersheds occupy much of the Banning Ranch mesa. The U.S. Fish & Wildlife Service has designated 15 acres of the Banning Ranch mesa as critical habitat for the federally endangered San Diego Fairy Shrimp. Surveys conducted to date have documented fairy shrimp in at least 38 vernal pools/seasonal wetlands on Newport Banning Ranch, including 8 pools occupied by the listed San Diego Fairy Shrimp. Vernal pools that pond water for long enough and regularly enough to support branchiopods (fairy shrimp and allies, listed or non-listed) typically meet the California Coastal Commission's "one-parameter" definition of coastal wetlands. Thus, at least 38 vernal pools on Newport Banning Ranch appear to warrant designation as ESHA on that basis alone.

The Newport Banning Ranch mesa bears a striking similarity to More Mesa, located on the coast of southern Santa Barbara County:

Figure 4. The grasslands of Newport Banning Ranch are comparable to those at More Mesa, shown here. Most of More Mesa has been designated as an ESHA since 1993, even though the non-native grasslands and associated riparian habitats at More Mesa lack the federally listed species found at Newport Banning Ranch. Source: More Mesa Preservation Coalition.

It is the rarity of shortgrass coastal mesas across southern California, and the importance of these habitats to many declining plant and wildlife species, that make these landscapes biologically valuable. In addition to fairy shrimp, the grasslands at Newport Banning Ranch support such sensitive birds as the White-tailed Kite, Northern Harrier, Burrowing Owl, and Loggerhead Shrike. Rather than treating the vernal pool and grass-

land complex as a rare and sensitive resource, however, the land owner has subjected the mesa to extensive, repeated mowing:

Figure 1. Photo taken on 4 January 2011 showing a large vernal pool among grasslands on the east side of Newport Banning Ranch. Source: Banning Ranch Conservancy.

Figure 2. Photo taken on 1 May 2011 showing the same vernal pool and grasslands after the end of the rainy season. Source: Banning Ranch Conservancy.

Figure 3. Photo taken on 26 May 2011 showing the same vernal pool after the land owner mowed the pool and surrounding grasslands. Source: Banning Ranch Conservancy.

Mowing of major vegetation on

the mesa top, within the footprint of the proposed residential/commercial/resort development, has occurred up to 1,200 feet from adjacent residences. Thus, the area of clearing vastly exceeds the 100-foot fire safety buffer required by the Orange County Fire Authority, and appears to serve no legitimate purpose (beyond facilitating the ultimate development of the mesa, as now proposed). Needless to say, this type of extensive, unpermitted, and unregulated mowing of sensitive resources does not take place at More Mesa in Santa Barbara County, even though that coastal mesa lacks the listed wildlife species that have been documented as being resident on the Newport Banning Ranch mesa.

DETERMINATION OF ESHA

Section 30107.5 of the Coastal Act defines an Environmentally Sensitive Area 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.

Through repeated mowing, the land owner has subjected the grasslands and vernal pools to repeated disturbance. Although the exact repercussions of this form of disturbance cannot be precisely known, because the area was never studied in an undisturbed state, it is well known that repeated disturbance of natural landscapes tends to degrade them by (a) facilitating invasion by weedy, disturbance-adapted, non-native plant species, and (b) disrupting the ability of these areas to support various forms of wildlife. For example, mowing in spring has likely eliminated or greatly reduced nesting opportunities for various grassland-dependent bird species, such as Northern Harriers, Burrowing Owls, and Western Meadowlarks. And, as discussed previously, the mowing and related actions are known to have removed native coastal sage scrub and cactus scrub resources on the edges of the mesa, thereby impacting populations of the California Gnatcatcher, Cactus Wren, and other scrub-requiring species. Thus, the habitats of the Newport Banning Ranch mesa could be, and have been, "easily disturbed or degraded by human activities and developments."

Fortunately, much of the mesa's ecological value relates to its very existence — that is, so few coastal mesas supporting grasslands with vernal pools remain in coastal southern California that any example is inherently rare and biologically valuable. The mowing of the Newport Banning Ranch mesa has certainly reduced this area's habitat value for a variety of plant and wildlife species, and therefore should not be allowed to resume outside of legitimate fire-safety zones, but there is no question that virtually the entire mesa must be regarded as "rare or especially valuable." Furthermore, the scrub, grasslands, and vernal pools on the mesa clearly play a "special nature or role" in the local ecosystem, as they remain occupied by various listed and otherwise sensitive wildlife species, and other species dependent on the specialized habitats found there.

Therefore, despite having been subjected to mowing over a period of many years, the coastal mesa of Newport Banning Ranch represents a classic example of an Environ-

mentally Sensitive Area as defined in Section 30107.5 of the Coastal Act.

CONCLUSION

As discussed in this letter, it is my opinion that the Coastal Commission staff have clearly demonstrated that, over a period of decades, the owners of Newport Banning Ranch have undertaken various forms of development and removal of major vegetation that was not authorized under the Coastal Act or any valid form of exemption. The main area affected by these actions — a coastal mesa supporting vernal pools, grasslands, and coastal scrub, including a number of listed and otherwise sensitive species— unambiguously satisfies the Coastal Act's definition of "Environmentally Sensitive Area." For these reasons, the Banning Ranch Conservancy urges the Coastal Commission to follow through on the recommendations of staff to undertake an Enforcement Action that will (a) permanently halt the unauthorized destruction and degradation of resources that satisfy all ESHA criteria, (b) reassure the public that the Commission will not allow the land owner and oil operator to creatively misinterpret the plain language of Resolution of Exemption No. E-7-27-73-144 and other relevant documents and statutes, and (c) allow the applicant's outstanding "threshold issues" to finally be resolved consistent with the sound resources conservation principles of the Coastal Act.

Sincerely,

Robert A. Hamilton, President
Hamilton Biological, Inc.

Attached: Letter dated 21 January 2014 from Robert A. Hamilton to Senior Deputy Director Jack Ainsworth evaluating Dudek's 2013 California Gnatcatcher survey report for Newport Banning Ranch.

Letter dated 9 October 2014 from the U.S. Fish & Wildlife Service to Newport Banning Ranch LLC and West Newport Oil documenting the loss and degradation of 7.31 acres of coastal sage scrub from Newport Banning Ranch between 1992 and 2012.

cc: _____

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