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September 6, 2016

Chair Kinsey and Commissioners
Coastal Commission
45 Fremont Street
San Francisco, CA 94105

Via Email
BanningRanchComments@coastal.ca.gov

Re: Application No. 5-15-2097 (Newport Banning Ranch, LLC, Newport Beach)
Opposition to Applicant's Proposed Development

Dear Chair Kinsey and Commissioners:

Please accept these comments on behalf of our clients, Coastal Environmental Rights Foundation (CERF) and the Banning Ranch Conservancy, in opposition to the Newport Banning Ranch (NBR) proposed development project ("Project"). CERF is a nonprofit environmental organization founded by surfers in Encinitas and active throughout California's coastal communities. CERF was established to aggressively advocate, including through litigation, for the protection and enhancement of coastal natural resources and the quality of life for coastal residents. Banning Ranch Conservancy's mission is to preserve, acquire, conserve and manage the entire Banning Ranch as permanent public open space, park and coastal nature preserve. As the largest parcel of unprotected coastal open space remaining in Orange County, Banning Ranch is truly unique in its rich history and natural biodiversity. From the beginning of the Banning Ranch planning process, the Conservancy has played an active role in order to ensure the site's natural resources are adequately protected.

On the other hand, after almost a year of negotiations with staff, NBR remains committed to a Project that violates numerous Coastal Act provisions. Wielding site remediation and public access as a sword, NBR attempts to shift the focus from its Project's fundamental and irreconcilable Coastal Act inconsistencies.[1] But the Project at its core remains a residential development within designated Environmentally Sensitive Habitat Areas ("ESHA") and wetlands. A straightforward application of the Coastal Act would preclude approval of the NBR Project. The Conservancy and CERF therefore urge the Commission to look beyond NBR's promises and focus instead on protection of Banning Ranch's natural coastal resources, as NBR has historically failed to do.

[1] Former Commissioner Steve Blank called this strategy "strapping hostages to the front of a tank": https://steveblank.com/2014/06/17/hostages-strapped-to-the-front-of-the-tank-coastal-commission-stories-lesson-2/

A. NBR's Unlawful Activities Undermine Proper Wetland Delineation Efforts

Just recently, in April 2016, staff presented the Coastal Commission's longstanding wetland definition and delineation process at a Wetland Workshop. Staff specifically contrasted the Army Corps of Engineers' wetland delineation approach – which requires all three parameters of vegetation, soil, and hydrology be satisfied – with the Commission's, U.S. Fish and Wildlife Service's and California Fish and Wildlife Service's approach, which requires only one parameter to identify wetlands. (Technical Wetland Delineation, April 2015, p. 19). Because parameters are rarely observed directly, parameter indicators[2] are typically used. (*Id*.). However, the reliability of indicators can be undermined in atypical situations, such as "where the vegetation has been removed or altered by human activities." (*Id*., p. 48).

The circumstances of NBR's Project constitute a textbook atypical situation. NBR has routinely altered the Project site through unlawful mowing and unpermitted development. (August 25, 2015 Staff Report ("Staff Report"), pp. 111-113). As detailed in the latest staff report, and depicted in Exhibit 4 to the Coastal Commission's March 10, 2015 Addendum, NBR's historic, unpermitted mowing activities have impacted a large portion of the site. NBR has also impermissibly filled sensitive wetland areas and unlawfully developed additional wells and supporting equipment within and adjacent to wetlands, directly undermining the reliability of typical wetland indicators. "Some of the areas impacted by the [unlawful] subject activities contained wetlands or vernal pools." (CCC-15-CD/RO-01, Exhibit 9, p. 7; see also, CCC-15-CD/RO-01, March 2015 Staff Report, p. 24 ["The Commission concurs with Dr. Engel's conclusion that at least some of the areas impacted by those Subject Activities that were clearly unauthorized constituted wetlands."]). These unlawful activities have frustrated and potentially impeded staff's wetland, vernal pool and ESHA determinations. Further, because NBR has failed to map the onsite watersheds, the full extent and impact of its unlawful activities is unknown. (Exhibit 13b, p. 20; see also, Staff Report, p. 35).

In March 2015, describing some of NBR's unlawful development, the Commission articulated exactly how NBR's fill undermined the wetlands' ability to function:

> As discussed above, the Subject Activities also included fill of wetlands. Any fill or alteration of wetland hydrology reduces a wetland's ability to function, and consequently, its biological productivity. Water is the main requirement for a functional wetland. If water is drained, displaced or removed, or isn't present in the wetland for as long, then wetland function will be degraded. Therefore, wetland function would be degraded by actions that disrupt water supply through direct fill of a wetland. Degradation of function will preclude the wetland plants that grow in a functional wetland from growing and thriving and thus the degraded wetland will

[2] Indicators "are the physical, chemical, or biological features of an area that can be easily observed or assayed and that are usually correlated with the presence of a wetland parameter." (Definition and Delineation of Wetlands in the Coastal Zone, October 5, 2011, p.3)

> not provide the same habitat functions, water filtration, percolation, and stormwater runoff storage function. The Subject Activities at issue that resulted in fill of wetlands disrupted water supply through direct fill from grading and placement of dirt and other materials. Consequently, the Subject Activities degraded the function of wetlands on the Properties. (CCC-15-CD-01, March 2015 Staff Report, p. 27).

NBR should not be rewarded for its unlawful behavior. Rather, NBR's activities necessitate placing greater weight on the hydrology parameter. (See 14 Cal. Code Regs §13577(b)). As noted by staff, "[u]nder 'atypical' circumstances where indicators of hydric soils or wetland vegetation have been removed by human activities or natural events, the Commission has identified wetlands based solely on hydrology (e.g., Shea Homes, CDP 5-11-068)." (Staff Report, Exhibit 13a, p. 10, fn 3). In light of NBR's unlawful disturbance of onsite wetlands, the hydrology parameter alone should create a presumption of wetland existence.[3]

B. All Onsite Wetlands Displaying At Least One Parameter Should Be Classified As Wetlands

Uninfluenced by outside pressures to re-analyze their findings, independent experts have been free to scrupulously follow both the Coastal Act and Commission regulations in characterizing onsite wetlands – finding 39 vernal pools/wetlands onsite. Specifically, one ICF scientist noted: "In my opinion, the available data indicate that the entire vernal pool/grassland complex satisfies the criteria for ESHA specified in Section 30107.5 of the Coastal Act." (January 12, 2016, ICF International Letter, p. 8). Likewise, the California Department of Fish and Wildlife ("CA DFW") "recommend[ed] all 39 vernal pools be delineated as ESHA," including "the entire watershed for each pool or a 100-foot buffer (whichever is greater)." (October 5, 2015, CA DFW Memo, p. 1). Notably, these recommendations are consistent with staff's original wetland findings.

> The presence of fairy shrimp of any species is considered an indicator of wetland hydrology, as water must pond long enough for the shrimp to complete their life-cycle, and although the common fairy shrimp, *Brachinecta lindahlii*, occurs in other seasonal ponds, it is the most common and characteristic fairy shrimp of southern California vernal pools. The Commission considers any vernal pool indicator species, whether it be animal or plant, to be indicative of a wetland that is also a vernal pool. However, in the context of the Coastal Act, whether a wetland is also a vernal pool in the strict sense is something of a red herring, because all wetlands are protected under Section 30233 of the Coastal Act and in many past actions the Commission has provided a 100-foot buffer regardless of their status as a vernal pool. All 39 pools identified as vernal pools are also Coastal Act wetlands.

[3] 40 originally-designated CCC wetlands displayed at least one hydrology indicator. (Staff Report, Exhibit 13a, pp. 9-10).

(October 6, 2015, Staff Report Addendum, p. 16, emphasis added).

Because the integrity of onsite wetlands has been negatively impacted by NBR's unlawful practices, pursuant to Commission regulations, hydrology becomes the determining factor. (14 Cal. Code Regs. §13577(b); see also, Technical Wetland Delineation, April 2015, p. 49 [In problem areas, "direct observations of hydrology during normal or unusually wet rainy seasons is most useful."]). All 39 originally-designated CCC wetlands displayed at least one hydrology indicator. They should therefore be classified as wetlands – as they were in October 2015. (Staff Report, Exhibit 13a, pp. 9-10).

1. NBR Has Failed to Accurately Assess Onsite Wetlands

In addition to unlawfully and negatively altering wetland functionality, NBR has also impeded robust wetland delineation by failing to provide adequate and accurate analysis. NBR's efforts border on incompetence and suggest an "intentional inclusion of inaccurate, erroneous or incomplete information." (14 Cal. Code Regs. 13105(a)[Coastal Commission standard for revocation of Coastal Development Permit]).

> When we examined the record, it appeared that many ponds were not sampled through the entire wet season, data sheets for ponds determined to have no fairy shrimp were missing, and most data sheets for ponds that were sampled had missing data, making it impossible to verify that the surveys were conducted in accordance with survey protocol. Therefore, while eight ponds have been determined to support San Diego fairy shrimp, the presence or absence of San Diego fairy shrimp in the other ponds remains inconclusive and an additional wet season vernal pool protocol level survey may be required by the Service. (Exhibit 13a, p. 39).

Additional information, such as watershed delineation and mapping seems to have been intentionally withheld. "While watershed delineations were requested for all the potential vernal pools, we only received one completed vernal pool watershed delineation (Figure 14)." (Exhibit 13b, p. 20; see also, Staff Report, p. 35 ["Mapping of the North-South Arroyo was not completed, nor was complete watershed mapping of the site."]). In the October 2015 staff report, the importance of watershed mapping is stressed:

> Unfortunately, the entire watershed on the site has not been mapped. Several agencies other than the Coastal Commission have requested mapping of the complete watershed of the site. Particularly the complete vernal pool watershed has not been mapped. Without this information, the review of the projects impacts are limited to impacts on individual pools and wetlands, rather than the review of the impacts to the entire watershed, which is afforded protection under the Coastal Act. (October 2015 Staff Report, p. 37, emphasis added).

Despite NBR's failures, and staff's refusal to apply the one parameter wetland delineation test (albeit reluctantly), what data is available undermines the new limited wetland determinations. Specifically, the wetlands described below highlight the absurdity of attempts to square the existing data and staff's new delineation approach with the Commission's longstanding wetland delineation framework.

2. Additional Wetlands Are Evident Despite NBR's Tactics

Though the full extent of NBR's unlawful activities (and the resultant damage) has not been adequately delineated, it is readily apparent NBR has directly impeded "typical" wetland delineation in many ways. For example, changing course after the October 2015 hearing, staff found wetlands R, T, and U were not wetlands after all because they were unvegetated at the time of the November 2015 site visit. (Exhibit 13a, p. 11). However, in a footnote, staff noted: "Area R is located along the edge of an unpaved roadway and supported wetland indicator species in June 2012. This vegetation is no longer present probably because of vehicular disturbance." (*Id.*, emphasis added). Confounding the issue, the R wetland is within the area impacted by NBR's unlawful mowing. (See, CCC-15-CD-01, March 2015 Staff Report, Exhibit 4). Thus, though the roadways or parking areas themselves may not be the result of any Coastal Act violation, *the lack of vegetation* likely is. (Exhibit 13a, p. 10, fn 9).

Wetland delineations and vernal pool surveys also found wetlands R and T contained versatile fairy shrimp – a wetland hydrology indicator. (See Exhibit 13b, p. 33). Wetlands R, T, and U are all within the area of historical mima mounds. (See Exhibit 13a, Figure 3.B). Therefore, because these wetlands contain at least one wetland parameter, R and T should be properly designated wetland. (See, CCC-15-CD-01, March 2015 Staff Report, p. 24 ["The Coastal Commission's regulations regarding wetlands establish a 'one parameter definition,' meaning that they only require evidence of a single parameter to designate an area as a wetland conditions [sic]."]). Likewise, because wetland P had "strong wetland vegetation," it too should be classified as wetland. (Exhibit 13a, p. 11). Staff's new position that wetlands P and T should not be classified as such because they "are unable to support the normal processes that promote the formation of hydric soils" is not only speculative, but contrary to the Commission's wetland regulations.

> …[E]vidence of wetlands hydrology or hydric soils is not per se required for property to be classified as wetlands. Rather, "[w]etland shall be defined as land where the water table is at, near, or above the land surface long enough to promote the formation of hydric soils or to support the growth of hydrophytes...." (Cal.Code Regs., tit. 14, § 13577(b)(1), italics added.) Consequently, evidence that hydrophytes exist on a property to a degree permitting jurisdictional wetland determination renders unnecessary any additional evidence of wetland hydrology *or* hydric soils. (*Kirkorowicz v. California Coastal Com.* (2000) 83 Cal.App.4th 980, 990, emphasis in original).

Moreover, though some of the onsite wetlands, such as P and T, may currently be functioning poorly – whether due to NBR's unlawful activities or not – habitat quality is irrelevant to wetland determinations. "Thus, under the Coastal Act, poorly functioning or degraded areas that meet the definition of wetlands are subject to wetland protection policies." (LUP Guide, ESHA, July 2013, p. 4).

> To the contrary, the Coastal Act by its definition of wetland (§ 30121) does not distinguish between wetlands according to their quality. Indeed, section 30233 limits development in all wetlands without reference to their quality. This is so because of the dramatic loss of over 90 percent of historical wetlands in California and their critical function in the ecosystem. (*Kirkorowicz v. California Coastal Com*. (2000) 83 Cal.App.4th 980, 994).

"Simply stated, in determining whether a wetland is protected under the Coastal Act and the LCP, the quality of the wetland is essentially legally irrelevant." (*Kirkorowicz v. California Coastal Com.* (2000) 83 Cal.App.4th 980, 994).

NBR has admittedly impacted wetland functionality and quality, and as a result made wetland delineation more difficult under the Commission's more stringent second pass. Under these circumstances, and consistent with Section 30121 and the Commission's regulations Section 13577(b), the presence of hydrology indicators is enough to satisfy the wetland delineation test. As a result, all 39 onsite wetlands[4] should properly be designated as such, and only uses consistent with Section 30233 should be permitted therein.

C. Despite NBR's Unlawful Mowing, Banning Ranch Supports Significant Gnatcatcher ESHA

In its July 11, 2016 submission, NBR ignores the express provisions of the Coastal Act governing wetlands and ESHA, the Commission's guidelines, caselaw and *its role in disturbing ESHA habitat*. For example, NBR states "with respect to Staff's recommendation on ESHA, NBR and its biologists have struggled with some of the ESHA calls – given the fact that they include many areas that are *heavily disturbed* with invasive plants and oil facilities - or bare dirt." (NBR July 11, 2016, p. 1, emphasis added). According to NBR, the "fragmented" and "degraded" condition of ESHA, as well as the existing level of ongoing disturbance from oil field operations,[5] precludes a determination that these habitats constitute ESHA and their current

[4] Most of these wetlands "did have one or more field indicators of wetland hydrology" and originally mapped as periodically ponded following rainstorms. (Exhibit 13a, pp. 9-10).
[5] Many oil field operations are unlawful because existing wells are either subject to removal or future permitting – and therefore likely to cease with or without Project approval. (See CCC-15_CD/RO-01, Exhibit 6). Additionally, continuing oil field operations near ESHA would clearly cease upon Project approval.

modified condition no longer fits "the definition of their natural habitat structure or function." (July 11, 2016 NBR Letter, p. 5).

In light of its repeated destruction and degradation of onsite ESHA, NBR's position is completely disingenuous.[6] More importantly, its arguments are directly at odds with the Coastal Act. At the Coastal Commission ESHA Workshop, staff presented the framework used to designate ESHA in past permitting decisions and which the Commission uniformly applies. (Coastal Commission ESHA Workshop, April 14, 2016). There, staff specifically noted the absence of a species and degraded status of habitat is not determinative and that habitat dominated by non-native species can still be ESHA. This is also reflected in caselaw.

> Likewise, "[t]here is simply no reference in section 30240 which can be interpreted as diminishing the level of protection an ESHA receives based on its viability. Rather, under the statutory scheme, ESHA's, whether they are pristine and growing or fouled and threatened, receive uniform treatment and protection." (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 508).

As the court found in *McAllister*, there is no authority for the proposition that the destruction of a protected or endangered plant species in one section of a habitat area either precludes a finding that that particular section is a habitat area, is within a habitat area, or exempts that section from development restrictions.

> Moreover, we reject this view because it would hasten the piecemeal shrinkage of a habitat area by encouraging the covert destruction of developmentally desirable areas in habitat areas to render them subject to less restrictive habitat policies. Such a consequence is inconsistent with a fundamental goal of the Coastal Act to "[p]rotect, maintain, and, where feasible, enhance *and restore* the overall quality of the coastal zone environment and its natural and artificial resources." (§ 30001.5, subd. (a), italics added.)

(*McAllister v. California Coastal Com'n* (2008) 169 Cal.App.4th 912, 927, emphasis in original). NBR's mowing activities, as well as its development of unpermitted "Additional Wells" within ESHA habitat, embody the "covert destruction" condemned in *McAllister*. Failure to acknowledge Banning Ranch's valuable gnatcatcher ESHA or to implement staff's recommended buffers would simply reward NBR's attempted piecemeal shrinkage and destruction of habitat, in direct conflict with the letter and spirit of the Coastal Act.

[6] To the extent NBR posits that "one must consider why these areas have not and are not being used by gnatcatcher," it need look no further than its historical unauthorized activities. (July 11, 2016 NBR Letter, p. 6). Moreover, "failure to observe [protected species] during surveys at site does not, standing alone, mean that the area is not [protected species] habitat or potential habitat." (*McAllister v. California Coastal Com'n* (2008) 169 Cal.App.4th 912, 927).

Adoption of NBR's view would also be entirely inconsistent with the Commission's longstanding position on ESHA. Indeed, at the April 2016 ESHA workshop, staff noted that *most* ESHA is disturbed and that it is very rare to find ESHA that is pristine. (April 14, 2016 ESHA Workshop, "Delineating ESHA," Dr. Jonna Engel). Staff further explained that where unpermitted development has taken place, the Commission considers what the site supported in the absence of unpermitted development to be the "on the ground conditions." (*Id*.).

While it may be impossible to determine the full scope and impact of NBR's unlawful activities, the site's historical significance as gnatcatcher habitat may fill in some of the blanks. The U.S. Fish and Wildlife Service ("FWS") findings regarding gnatcatcher habitat are helpful in this regard.[7] FWS biologists believe gnatcatchers utilize most of the upland areas at one time or another and all of Banning Ranch is mapped as "critical habitat" under the Endangered Species Act. (Exhibit 13a, p. 4). FWS notes, "review of oilfield operations and maintenance activities on the site indicate that, over time, there appears to have been a reduction in habitat for the gnatcatcher and a reduction in the number of gnatcatcher territories." (October 9, 2014, US FWS Letter to NBR, p.1). FWS further estimates coastal sage scrub declined by 7.31 acres, from 59.41 acres in 1992 to 52.10 acres in 2012. (*Id*. at pp. 1-2). This decrease was not accidental. "Regular disturbance to vegetation from mowing has also increased the extent of invasive and ornamental vegetation and decreased available foraging habitat for the gnatcatcher." (*Id*. at p. 2, emphasis added).

In light of the site's historical use and designation as critical gnatcatcher habitat, NBR's unlawful degradation and destruction of such habitat, and clear Coastal Act policies rejecting such covert destruction of ESHA, adoption of NBR's characterization of gnatcatcher ESHA would constitute an abuse of discretion. As further explained below, in order to protect remaining gnatcatcher ESHA, NBR's proposed "buffers" should likewise be rejected.

D. NBR's Proposed ESHA "Buffers" Would Exacerbate the Threat to Gnatcatchers

NBR's proposal to reduce gnatcatcher ESHA buffers and conduct development activities within these buffers is completely inconsistent with the clear mandate of Section 30240, which 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.

[7] The NBR EIR also finds the project site is within an area "designated as an Existing Use Area because 'it provides existing gnatcatcher habitat; it is located adjacent to Talbert Nature Preserve and has significant potential to contribute to the long-term biological function of the Reserve System; and it would be inappropriate to authorize Incidental Take of what could be a significant population of coastal California gnatcatcher without being able to review available biological data (County of Orange 1996a).' " (EIR, p. 4.6-5).

> (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. (emphasis added)

First, NBR proposes 25 feet of grading within the proposed 50-foot buffer, essentially reducing the buffer to 25 feet. (Staff Report, p. 46). The remaining 25-foot buffer closest to ESHA is slated to "serve as a Fuel Modification zone and be planted with native plant palettes and actively managed in perpetuity." (*Id.*). As Commission staff determined, these proposed uses conflict "with the function and purpose of a true buffer." (*Id*.). Because fuel modification zones are subject to regular maintenance activities, including vegetation removal, they do not prevent (or buffer) human activity from disturbing gnatcatchers or sensitive vegetation. (*Id*.). Essentially NBR proposes "development" within the entire 50-foot buffer. (Pub. Res. Code Section 30106 [Under Coastal Act "Development" includes grading or removal of any materials and removal or harvesting of major vegetation]).

Notwithstanding the clear language of Section 30240, NBR urges approval of 50-foot buffers, once again relying on the "degraded conditions" of the ESHA. (July 11, 2016 NBR Letter, pp. 6-9). Based on its subjective view that the quality of the gnatcatcher ESHA is paramount in setting appropriate buffers, NBR notes that ESHA "along the Urban Colony and North Family consists largely of monoculture, disturbed scrub vegetation patches (less than 50% cover) that are disjointed from each other by existing roads, well pads and pipelines, utility poles/lines and comprised largely by extensive stands of invasive vegetation." (July 11, 2016 NBR Letter, p. 6).

As explained above, it is not only extremely rare to find pristine ESHA, but the Coastal Act makes no distinction between pristine or degraded ESHA. All ESHA receives "uniform treatment and protection." (*Bolsa Chica Land Trust, supra,* 71 Cal.App.4th at 508, emphasis added). Here again, NBR also fails to acknowledge its active role in degrading the ESHA habitat through unlawful mowing and unpermitted development. (October 9, 2014, US FWS Letter to NBR, p.2 ["Regular disturbance to vegetation from mowing has also increased the extent of invasive and ornamental vegetation and decreased available foraging habitat for the gnatcatcher."], emphasis added).

NBR's unlawful mowing is exactly the type of disturbance which threatens gnatcatcher viability. In its recent decision, refusing to delist the California Coastal Gnatcatcher, the FWS found:

> The presence of invasive, nonnative plant species, in combination with one or more stressors, such as severe physical disturbance (for example, clearing by heavy machinery), livestock activity, wildland fire, and anthropogenic atmospheric pollutants (particularly nitrogen compounds) can cause a shift from native plants towards a nonnative plant community and result in vegetation type conversion. In

> the 2010 5-year review, we found that vegetation type conversion of coastal sage scrub to nonnative grasses was an ongoing threat to the coastal California gnatcatcher, given that nonnative grasses do not support breeding for the subspecies (Service 2010, pp. 18-21). (81 FR 59966, emphasis added).

NBR's proposal to conduct continuous vegetation clearing and maintenance within the 25-foot buffer closest to gnatcatcher ESHA would only exacerbate this existing threat to onsite gnatcatchers. As a result, NBR's proposed "buffers" are not designed to prevent impacts to ESHA. (Section 30240(a) and (b)). Rather, because the buffers constitute "development" themselves, they are clearly incompatible with ESHA and must be rejected.

E. The Coastal Act Prohibits NBR's Proposed Relocation of Burrowing Owl ESHA

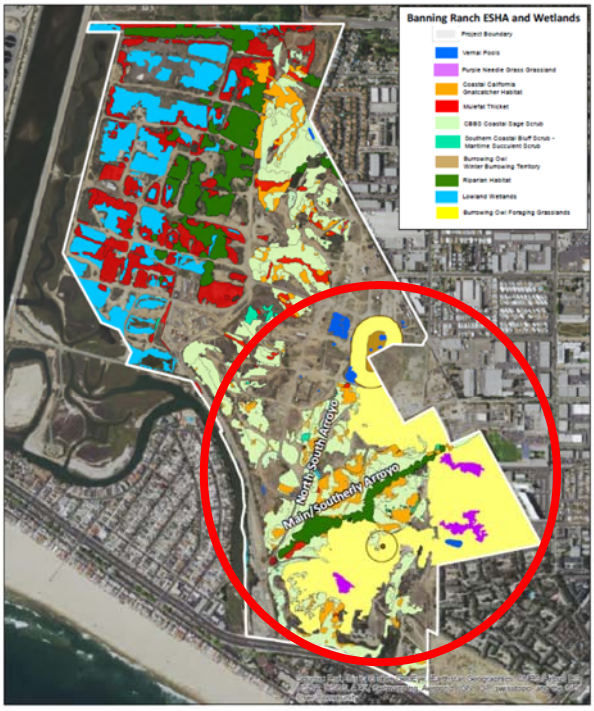
In a (failed) attempt to influence the California Department of Fish and Wildlife's ("CDFW") position on suitable Banning Ranch burrowing owl foraging habitat, NBR focused on its preservation and enhancement of replacement habitat onsite, supplemented by offsite foraging habitat. (NBR August 19, 2016 Input to CDFW, pp. 1-3). Without admitting as much, NBR essentially offered to mitigate impacts to existing burrowing owl ESHA, in violation of Section 30240 and well-established Coastal Act caselaw.

It is undisputed the site contains significant burrowing owl habitat. The 2011 EIR acknowledged as much. (DEIR, p. 4.6-30). Specifically, the EIR stated "onsite grassland and ruderal vegetation, including areas mapped as non-native grassland, non-native grassland/ruderal, and ruderal" may "provide suitable foraging habitat for a variety of raptor species, *including wintering burrowing owls*." (EIR, p. 4.6-53, emphasis added). Because the Project's impacts to burrowing owls foraging habitat (native and non-native grasslands) would be significant, mitigation was required. (EIR, p. 4.6-53, 4.6-76-77, 4.6-89; EIR Appendix E, Biological Technical Report, p. 91 ["suitable foraging and nesting habitat is present on the Project site for the burrowing owl…" and "The proposed Project would impact approximately 100.13 acres (97.26 acres permanent, 2.87 acres temporary) of grasslands and ruderal habitat on the Project site."]).

Now, however, NBR attempts to downplay the full extent of impacts to burrowing owl ESHA through piecemealing and characterizing impacts from grading and a pedestrian trail as "temporary." (NBR August 19, 2016 Input to CDFW, pp. 2-3). Cumulatively, NBR's Project will negatively impact 72 acres of burrowing owl ESHA. Rather, than articulating how its development Project would be consistent with Section 30240 – because it cannot – NBR simply claims it will create suitable burrowing owl habitat elsewhere through mitigation. (NBR August 19, 2016 Input to CDFW, p. 7 ["…the proposed HCCMP adequately provides habitat for the occasional wintering burrowing owl" and "[t]o mitigate for impacts to non-native and annual grassland impacts on site, restoration in ruderal, disturbed or developed habitats (some of which occur in areas that will be temporarily impacted through oil remediation activities) will occur."];

Staff Report, p. 43 ["The applicant proposes to offset most of these impacts, as opposed to restoring the resources in place, by creating habitat elsewhere, as a form of mitigation. The applicant's proposal for the mitigation is the Habitat Conservation and Conceptual Mitigation Plan (HCCMP)."]).

The Project's impacts to burrowing owl ESHA are perhaps best evidenced by comparing the existing burrowing owl foraging areas (yellow habitat in Exhibit 3a, left) to NBR's proposed development footprint (Exhibit 2, p. 1, right):



As evidenced above, the Project would impact virtually all burrowing owl ESHA in the southern mesa and attempt to recreate it elsewhere. (See also, EIR Exhibits 4.6-1a and 4.6-1b [Vegetation Types and Other Areas], enclosed). This approach is completely inconsistent with the Coastal Act and has routinely been struck down by the courts.

> Importantly, while the obvious goal of section 30240 is to protect habitat values, the express terms of the statute do not provide that protection by treating those values as intangibles which can be moved from place to place to suit the needs of

> development. Rather, the terms of the statute protect habitat values by placing strict limits on the uses which may occur in an ESHA and by carefully controlling the manner uses in the area around the ESHA are developed.

(*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 507, emphasis added). Further, as the court found in *Bolsa Chica Land Trust*, the habitat values of an ESHA cannot be "isolated and then recreated in another location. Rather, a literal reading of the statute protects *the area* of an ESHA from uses which threaten the habitat values which exist in the ESHA." (*Id*.). The onsite burrowing owl ESHA must be protected in place. Therefore, NBR's proposal to recreate burrowing owl ESHA elsewhere is impermissible.

NBR's additional argument that existing native and non-native grasslands are threatened and that "it is possible that much of the existing burrowing owl habitat onsite is currently transitioning to less suitable or unsuitable habitat types" is likewise misplaced. (NBR August 19, 2106 Input to CDFW, p. 2). "Section 30240 does not permit its restrictions to be ignored based on the threatened or deteriorating condition of a particular ESHA." (*Bolsa Chica Land Trust, supra*, 71 Cal.App.4th at pp. 507-508). And "ESHA's, whether they are pristine and growing or fouled and threatened, receive uniform treatment and protection." (*Id*. at p. 508). Because NBR's development proposes significant impacts to burrowing owl ESHA, in violation of Section 30240, it must be rejected as proposed.

F. Conclusion

In light of the Project's significant and irreconcilable conflicts with the letter and spirit of the Coastal Act, coupled with the applicant's seemingly routine disregard for Coastal Act requirements, CERF and Banning Ranch Conservancy urge the Commission to reject NBR's proposed Project. Further, because NBR's covert mowing operations and unlawful development have negatively impacted onsite wetlands, vernal pools, gnatcatcher and burrowing owl ESHA, the Commission should reject NBR's arguments regarding their degraded status. In summary, the Commission should deny the Project as proposed. Thank you in advance for your consideration.

Sincerely,

COAST LAW GROUP, LLP

Marco A. Gonzalez
Livia Borak
Attorneys for Banning Ranch Conservancy and
Coastal Environmental Rights Foundation

cc: clients

Enclosures: 1) Newport Banning Ranch EIR Figures 4.6-1a and 4.6-1b
2) Exhibit 6 to March 2015 Commission Staff Report for CCC-15-CD/RO-01