HAMILTON BIOLOGICAL

February 23, 2015

Dr. Jonna Engel
California Coastal Commission
200 Oceangate
Long Beach, CA 90802-4316

SUBJECT: APPLICATION NO. 5-13-1100
NMUSD UNPERMITTED FENCE, 975 WEST 16TH STREET
NEWPORT BEACH, CALIFORNIA

Dear Dr. Engel,

On behalf of the Banning Ranch Conservancy, this letter provides biological information relevant to the current application of Newport Mesa Unified School District (NMUSD) for after-the-fact approval for construction of a chain link fence separating NMUSD's property from that of Newport Banning Ranch, LLC.

REVIEW OF HABITAT ASSESSMENT

I have read the report dated 7 July 2014 that botanist David Bramlet prepared for NMUSD, entitled "Habitat Assessment for the Fencing Project, 975 W. 16th Street, Newport Beach, California." This report, prepared approximately two years after the fence was installed in 2012, identifies numerous adverse effects, and potential adverse effects, of the unpermitted fence on sensitive biological resources. I know Mr. Bramlet to be an excellent botanist and careful field observer, but in my opinion his assessment would have benefitted from having a wildlife biologist evaluate the project's potential effects upon wildlife species known to occur in the local area. The following comments highlight some of the most important findings and identifies additional issues concerning the fence's potential adverse effects on sensitive coastal resources.

Incomplete Evaluation of Coastal Wetland Resources

As noted in the Habitat Assessment, Mr. Bramlet's field study was conducted between 22 April and 6 June 2014, at the end of two years of severe drought in which vernal pools in the local area did not fill with water. As a result, his report repeatedly observed that additional study would be required before it would be possible to evaluate the effects of installing the fence. See, for example, statements on Page 20 (depressional features could not be evaluated due to lack of water), Page 21 (potential occurrence of Southern Tarweed could not be evaluated due to poor germination related to low rainfall), Page 37 (a jurisdictional delineation of all potential seasonal wetland resources on the project site would involve determining the duration of ponding during a normal

316 Monrovia Avenue — Long Beach, CA 90803 — 562-477-2181 — robb@hamiltonbiological.com

rainfall year), Pages 38 and 39 (boundaries of seasonal wetlands cannot be determined due to lack of precipitation).

The Banning Ranch Conservancy collaborated with model airplane enthusiasts to obtain oblique aerial photos in the area of the unpermitted fence on 24 December 2010, during a winter with above-average rainfall. Figures 1–4 show ponding of water within and near the border of the NMUSD property.

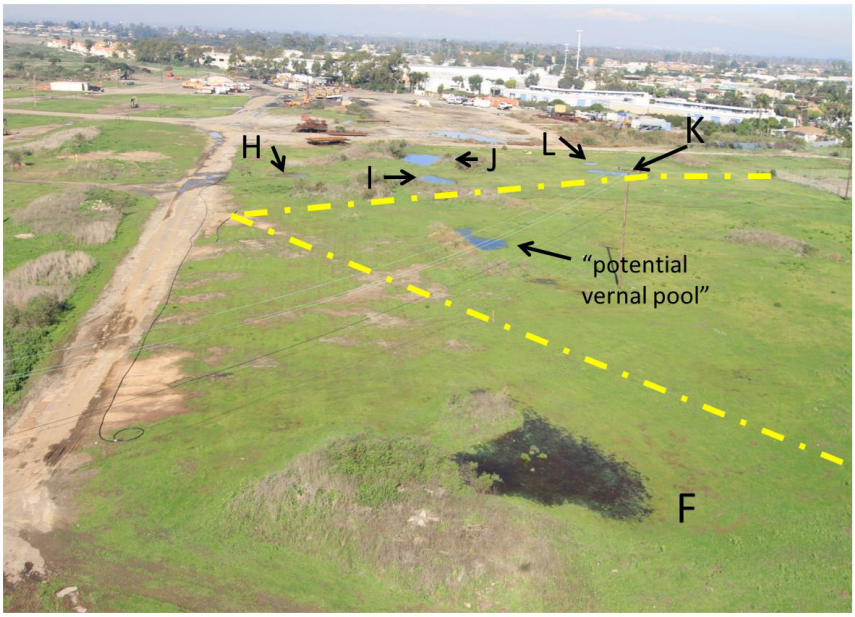

Figure 1. Oblique aerial image, facing north, showing the approximate limits of the unpermitted fence in yellow. Several areas of ponded water are visible in the vicinity of the fence. December 10, 2010. Source: Banning Ranch Conservancy.

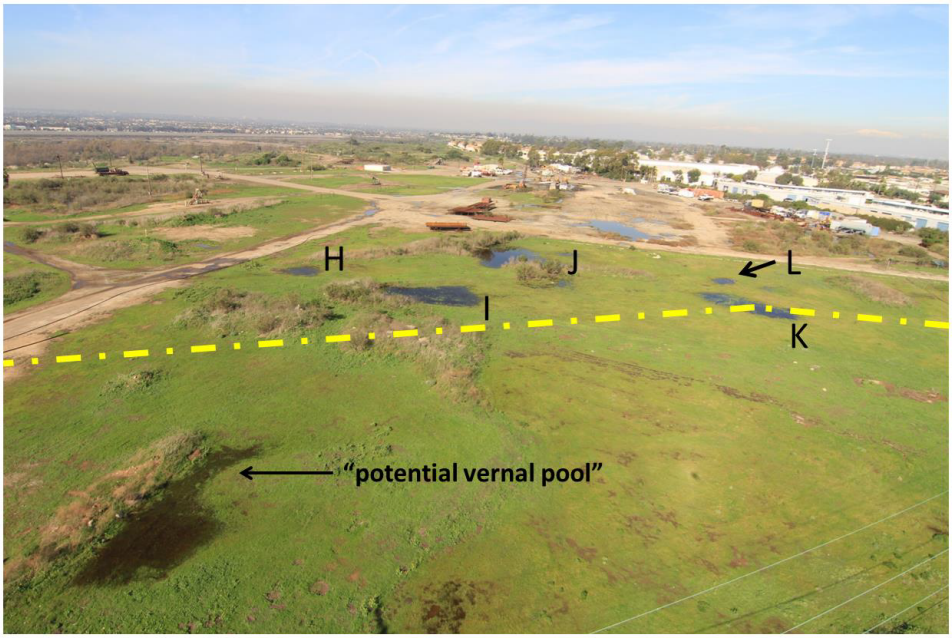

Figure 2. Oblique aerial image, facing northwest, showing the approximate limits of the unpermitted fence in yellow. Several areas of ponded water are visible in the vicinity of the fence. December 10, 2010. Source: Banning Ranch Conservancy.

Figure 3. Oblique aerial image, facing west, showing the approximate limits of the unpermitted fence in yellow. Note especially the ponded water at "BRC 6". December 10, 2010. Source: Banning Ranch Conservancy.

Figure 4. Ground-level close-up of seasonal pond "BRC 6." This is Bramlet's "Seasonal Wetland No. 1." February 23, 2010. Source: Banning Ranch Conservancy.

Mitigation measure MM-1 in the Habitat Assessment identifies the need for thorough "winter to spring" surveys of all seasonal wetland and depressional features, and MM-2 identifies a need for fairy shrimp surveys on the site. The file at the Coastal Commission's Long Beach office provides no evidence that these surveys are being conducted in 2014/2015 (if the studies are being conducted, rainfall continues to be sporadic and the rainy season is not yet complete). Based on incomplete baseline information on the project site's seasonal wetland resources, NMUSD's application for the after-the-fact permit should be deemed incomplete.

Impacts to Designated Critical Habitat, San Diego Fairy Shrimp

Page 37 of the Habitat Assessment notes that the project site includes part of Critical Habitat Subunit 1C for the San Diego Fairy Shrimp. As shown in Figure 5, below, Seasonal Wetlands 1 and 2, which were impacted by the project, lie within designated critical habitat. Fairy shrimp surveys have not been conducted on the site, to the presence or absence of San Diego Fairy Shrimp is unknown.

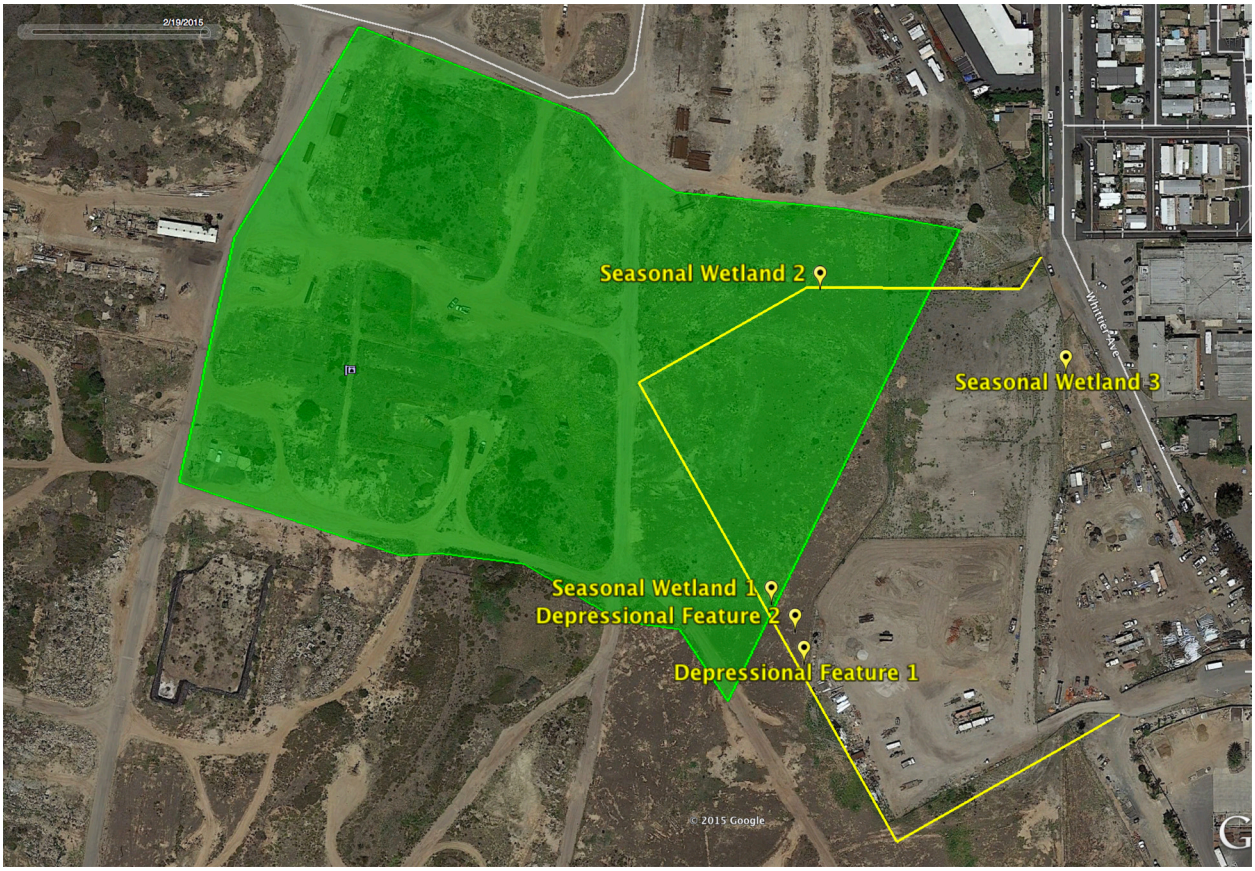

Figure 5. The green polygon shows critical habitat for the San Diego Fairy Shrimp (Subunit 1C). The unpermitted NMUSD fence is shown in yellow. Seasonal Wetland Nos. 1 and 2 are within designated critical habitat, while Seasonal Wetland 3 and the two Depressional Features are just outside the polygon. Limits of critical habitat extrapolated from UTM data in Federal Register 72 No. 238, Page 70694.

Impacts to Designated Critical Habitat, California Gnatcatcher

Page 37 of the Habitat Assessment notes that the site lies within Critical Habitat Unit 7 for the federally threatened California Gnatcatcher, but suggests that the site "lacks the primary constituent elements for this species." This is because the coastal sage scrub/grassland ecotone on the site has an open scrub cover. The USFWS identified the following Primary Constituent Elements (PCEs) for the Coastal California Gnatcatcher in Federal Register 72, No. 243, Page 72035:

> Based on the above needs and our current knowledge of the life history, biology, and ecology of the species and the requirements of the habitat to sustain the essential life history

> functions of the species, we have determined the PCEs for the coastal California gnatcatcher are:
>
> (1) Dynamic and successional sage scrub habitats: Venturan coastal sage scrub, Diegan coastal sage scrub, Riversidean sage scrub, maritime succulent scrub, Riversidean alluvial fan scrub, southern coastal bluff scrub, and coastal sage-chaparral scrub in Ventura, Los Angeles, Orange, Riverside, San Bernardino, and San Diego Counties that provide space for individual and population growth, normal behavior, breeding, reproduction, nesting, dispersal and foraging; and (2) **Non-sage scrub habitats such as chaparral, grassland, riparian areas, in proximity to sage scrub habitats** as described for PCE 1 above that provide space for dispersal, foraging, and nesting. [Emphasis added.]

The NMUSD property is characterized by disturbed annual grassland with patches of scattered native shrubs, including Coastal Goldenbush (*Isocoma menziesii*), Coyote Brush (*Baccharis pilularis*), and Deerweed (*Acmispon glaber*). No focused surveys have been conducted for the California Gnatcatcher on the NMUSD property, and Mr. Bramlet is not permitted to conduct such surveys. California Gnatcatchers have been observed within 200–300 feet of the NMUSD property during surveys conducted of the adjacent Newport Banning Ranch property, and no studies have ever attempted to determine the actual extent of California Gnatcatcher territories at Newport Banning Ranch or the adjacent NMUSD property.

My own experience conducting focused surveys for this species for 25 years leads me to conclude that California Gnatcatchers almost certainly forage within grassland/scrub ecotone habitat on the NMUSD property, at least during fall and winter when the birds wander widely outside of the coastal sage scrub areas where they typically nest in spring and summer. As reported in the Birds of North America Online species account:

> Territories defended during nonbreeding season (Preston et al. 1998b); wandering into adjacent territories or unoccupied habitat may result in up to 80% increase in home range size relative to area used during nesting (Bontrager 1991, Preston et al. 1998b). Small, disjunct patches of coastal sage scrub, distributed within grassland matrices, may be incorporated into nonbreeding season home range even if too small to support a breeding pair; use of such patches may require regular movements of 25–100 m across grassland gaps (DRB).

Erecting a six-foot tall chain-link fence for more than 2,000 linear feet within California Gnatcatcher critical habitat establishes a physical and visual barrier in an otherwise open area. It is a form of habitat fragmentation that increases the area of perching habitat available for Cooper's Hawks, Loggerhead Shrikes, and other potential predators upon the gnatcatcher. These potential impacts to the California Gnatcatcher and to its designated critical habitat are not recognized in the Habitat Assessment's impact analysis.

Impacts to the Burrowing Owl

The Burrowing Owl is a California Species of Special Concern that has declined dramatically in the state, especially along the southern coast. Due to loss and fragmentation of grassy, open landscapes, very few wintering locations remain for this species in Orange

County. Page 35 of the Habitat Assessment discusses the status of the Burrowing Owl on the site, noting that the species is known to regularly winter on and around the NMUSD property. Erecting a six-foot tall chain-link fence for more than 2,000 linear feet establishes a physical and visual barrier in an otherwise open landscape occupied by wintering owls. This form of habitat fragmentation is likely to reduce the attractiveness and functionality of this area for Burrowing Owls, a potential impact not recognized in the Habitat Assessment's impact analysis. Rather, the impact analysis concludes that the area of impact for the fence is on the order of 0.05 acre. This is analogous to building a fence through the middle of someone's backyard but reassuring them that the fence takes up only a very small area. The Biological Assessment fails to account for any reduction of Burrowing Owl habitat quality extending away from the fence.

At nearby Bolsa Chica Mesa, upland habitat regularly used by migrant and wintering Burrowing Owls was determined to be Environmentally Sensitive Habitat Area (ESHA) by the Coastal Commission in 2004. In evaluating the Brightwater project, proposed to occupy disturbed annual grasslands comparable to those on and adjacent to the NMUSD property, Page 36 of the Coastal Commission Staff Report[1] stated:

> One or two wintering birds are thought to use the Bolsa Chica Mesa, as evidenced by repeated observations of a one owl or two owls in the winters of 2001-2002 and 2002-2003 by the applicant's biologists (Exhibit 17a). However, it is believed that the Bolsa Chica Mesa is used by an unknown number of migrant burrowing owls as a stop-over foraging area, according to Dr. Dixon's communications with other raptor biologists. It is raptor biologist Peter Bloom's professional opinion that migrant and wintering burrowing owls use the Bolsa Chica Mesa during most years. The Bolsa Chica Mesa is one of the few areas in the region that still has the potential for nesting by this species in the future. Additionally, the burrowing owl is one of three species of raptors at Bolsa Chica that DFG biologist Ron Jurek thinks is most in need of habitat protection. **Based on this information, Dr. Dixon has determined that the area on the Bolsa Chica Mesa as mapped by the applicant's biologist as burrowing owl habitat constitute an ESHA as defined by the Coastal Act, and therefore also should be protected as required by the Coastal Act. The Commission agrees.** Additionally, the DFG, in its January 16, 2002 comments on the project EIR, recommended that the burrowing owl habitat on the upper bench be retained, if feasible. [Emphasis added.]

Given that the Burrowing Owl's rarity in Orange County and elsewhere in the region has only increased since the Coastal Commission established this ESHA precedent at Bolsa Chica Mesa, the NMUSD property and adjacent open areas regularly occupied by wintering and migrating Burrowing Owls also warrant designation as ESHA.

Impacts to Coastal Wetlands

Despite conducting surveys in late spring following two years of drought, Mr. Bramlet was able to positively identify three seasonal wetlands on the NMUSD property, two of which were directly impacted by construction of the fence. The Biological Assessment also noted the potential for additional wetland areas to be identified. Page 38 of the as-

[1] http://www.coastal.ca.gov/lb/W12g-10-2004.pdf

[2] http://www.coastal.ca.gov/lb/Th11a-10-2005.pdf

[3] Dudek. 2013. Summary of Protocol Surveys for Federally-Listed Vernal Pool Branchiopods

sessment noted that construction of the fence entailed punching three post-holes into Seasonal Wetland No. 2, previously identified as a Coastal Commission jurisdictional wetland. Mr. Bramlet noted that this action may have altered the duration that water would pond there, "a potentially significant impact to this ephemeral wetland."

The Biological Assessment also reports evidence of wildlife digging under the fence at two locations, "but especially in Seasonal Wetland No. 2," resulting in "potentially significant impacts to this feature."

At Seasonal Wetland No. 1, "the exact boundaries of this wetland are not known, and impacts could be more severe than anticipated."

The potential for additional wetland areas within the area affected by construction of the fence was also acknowledged in the Biological Assessment.

Requirement for ESHA Buffers

As detailed in this letter, and in the Biological Assessment, installation of the fence has impacted, or potentially impacted, various natural resources normally identified as ESHA by the Coastal Commission. This includes coastal wetlands, critical habitat for two federally listed species, and habitat regularly occupied by wintering Burrowing Owls. Where ESHA is identified, the Commission typically identifies buffers in which development is not permitted. The vernal pool/grassland ecosystem is characterized by an open landscape that wildlife species can move through freely to forage and obtain seasonal fresh water. Placement of a chain-link fence through this ecosystem has fundamentally changed its character and degraded its value as a habitat for various wildlife species that require open landscapes. Clearly, the vernal pool/grassland ecosystem warrants an adequate protective buffer to preserve its essential character and value as a wildlife habitat.

For the Brightwater project on the Bolsa Chica Mesa, buffers established around ESHA range in width from 150 to 382 feet, with the Coastal Commission staff biologist having recommended a minimum buffer width of 164 feet[2]. The Banning Ranch Conservancy believes that the coastal resources in the vicinity of the unpermitted fence are, if anything, more sensitive than those identified at the Brightwater site (where, for example, no listed species or critical habitat were identified). In addition to the potential for the fence to have directly impacted San Diego Fairy Shrimp in pools that have not been sampled, this endangered species has been documented in three vernal pools within 100 feet of the fence (Dudek's Seasonal Features H, I, and J[3]). In order to conform to the Coastal Act, and to avoid violating relevant precedents set elsewhere in coastal Orange County, the seasonal wetlands in the vicinity of the unpermitted fence should be desig-

[2] http://www.coastal.ca.gov/lb/Th11a-10-2005.pdf

[3] Dudek. 2013. Summary of Protocol Surveys for Federally-Listed Vernal Pool Branchiopods Conducted on Newport Banning Ranch, City of Newport Beach and Unincorporated Orange County, California. Report to USFWS Carlsbad Field Office dated 29 January 2013.

nated as ESHA, with buffers adequate to protect the vernal pool/grassland ecosystem from potentially damaging actions, such as that undertaken by NMUSD.

SUMMARY & CONCLUSION

The installation of more than 2,000 linear feet of chain-link fence through a highly sensitive coastal vernal pool/grassland ecosystem without any pre-project environmental review has adversely affected various resources that warrant ESHA designation. The fence is much more environmentally damaging than necessary to fulfill its purpose as a demarcation of NMUSD's property boundary. There is virtually no chance that this type of barrier would have gained the Commission's approved had the project undergone the required environmental review process.

As documented in the Biological Assessment, and as further discussed in this letter, the fence continues to impact, fragment, and degrade sensitive coastal resources. For this reason, the fence must be removed. If some form of property demarcation is necessary, alternative methods exist that may be acceptable. One common method is to install metal "T-posts" (outside of vernal pools or other sensitive habitat areas) and string yellow rope between them. This approach may be suitable for a situation such as this, where the public is already being kept out of the area by exterior fencing and the security apparatus of Newport Banning Ranch, LLC. This form of demarcation would provide much lower and less inviting perches for predators, would allow wildlife to continue to move through the area, and would maintain the open landscape that appears to be an important component of habitat suitability for Burrowing Owls and other wildlife species found in the local area.

I appreciate the opportunity to provide this information and analysis. If you have any questions or would like clarification of any items, please call me at 562-477-2181 or send e-mail to robb@hamiltonbiological.com.

Sincerely,

Robert A. Hamilton
President, Hamilton Biological, Inc.

cc: Andrew Willis, Enforcement Officer
Karl Schwing, Orange County Area Supervisor
Sherilyn Sarb, South Coast Deputy Director
Dr. John Dixon, Ecologist, Environmental Program Manager
Christine Medak, USFWS
Erinn Wilson, CDFW
Dr. Terry Welsh, President, Banning Ranch Conservancy