HAMILTON BIOLOGICAL

December 10, 2009

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SUBJECT: REVIEW OF BIOLOGICAL RESOURCES ISSUES SUNSET RIDGE DRAFT EIR

Dear Ms. Brown,

On behalf of the Banning Ranch Conservancy, Hamilton Biological, Inc., has reviewed the Draft EIR for the proposed Sunset Ridge project, located in the City of Newport Beach (City). The City proposes to develop an active and passive public park on 13.7 acres of City-owned property and 5.2 acres on the adjacent Newport Banning Ranch property, for a total of 18.9 acres of impact. In addition, project implementation would involve export of approximately 34,000 cubic yards of fill from the proposed park site to two areas on the Newport Banning Ranch property that would cover 4.6 acres, plus an additional 3.3 acres of impacts for construction of a new haul road to provide access to the dumping sites on the Newport Banning Ranch property. The City is currently processing a DEIR for the proposed Newport Banning Ranch residential and commercial development project, and the City has hired BonTerra Consulting, Inc., to serve as the biological consultant for both projects.

This letter report provides my review comments on Appendix E to the Sunset Ridge DEIR (BonTerra's biological technical report). As part of this review, I visited the project site on the afternoons of November 4 and 6, 2009. All photos in this letter were taken on those two days. During the course of these two visits I walked the entire City parcel and looked out onto the Newport Banning Ranch parcel from public lands to the north and east. I took samples of some wetland plants to botanist David Bramlet for identification; some plants could not be identified at this time of year. The attached Curriculum Vitae provides my qualifications to conduct this review.

PLANT COMMUNITY MAPPING ERRORS

During my field visits I checked the mapping of plant communities on the City parcel. I was not able to effectively check mapping of communities on the Newport Banning Ranch property, which is not open to the public. I found the mapping to be incorrect in several areas, as show in Figures 1–11 on the following pages.

Figure 1. This photo shows groundwater seeping out of the slope along Superior Avenue, on the project site. Most of the plants visible in this photo are non-native Pampas Grass (*Cortaderia selloana*). The large, dark shrub evident toward the background is Mediterranean Tamarisk (*Tamarix ramosissima*). The DEIR erroneously classifies this area as "ornamental" and does not mention or evaluate the apparent wetland conditions shown here.

Figure 2. This photo, taken in the same area shown in Figure 1, shows obligate wetland indicator species Narrowleaf Cattail (*Typha angustifolia*), Marsh Fleabane (*Pluchea odorata*), and spike-rush (*Eleocharis* sp.) growing in mud and standing water. Also present is Spike Bentgrass (*Agrostis exarata*) and the same Mediterranean Tamarisk shown in Figure 1. Four of the plants shown here are not included in the DEIR's plant compendium.

Figure 3. The slope above West Coast Highway also shows evidence of wetland conditions. This photo shows moist soils, a conspicuous salt crust, and apparent oxidation stains on the side of the concrete ditch, all indications that the groundwater seepage above Superior Avenue, shown in Figures 1 and 2, also occurs on the slope above West Coast Highway.

Figure 4. This photo shows a stand of Salt Heliotrope (*Heliotropium curassavicum*) growing beneath Big Saltbush (*Atriplex lentiformis*) on the slope above West Coast Highway. Salt Heliotrope is classified as an obligate wetland indicator, although it occurs in a variety of wetland and non-wetland habitats. The DEIR's plant compendium does not include Salt Heliotrope. The DEIR erroneously classifies this area as encelia scrub.

Figure 5. This photo shows a stand of American Tules (*Scirpus americanus*), a native obligate wetland plant, growing in sediments that have accumulated in the bottom of a concrete drainage channel west of the proposed park's entry road. Adjacent vegetation includes additional native species, such as Coast Goldenbush (*Isocoma menziesii*) and Emory Baccharis (*Baccharis emoryi*). Narrowleaf Cattail also grows in this general area. The DEIR's plant compendium does not include the cattails, tules, or Emory Baccharis, and the DEIR erroneously classifies this area as "ornamental."

Figure 6. This large specimen of Big Saltbush, a native species, grows along the shoulder of West Coast Highway just west of Superior Avenue, in an area that the DEIR erroneously classifies as "ornamental." As discussed subsequently, I observed a pair of California Gnatcatchers foraging in this native shrub on November 6, 2009.

Figure 7. The DEIR erroneously classifies these native Big Saltbush plants, growing along the shoulder of West Coast Highway, as "ornamental."

Figure 8. This photo, taken at the location of the proposed entry to Sunset Ridge Park, off West Coast Highway, shows mature native scrub dominated by Big Saltbush and Coast Goldenbush. The DEIR erroneously classifies this area as ornamental.

Figure 9. This photo shows large shrubs of native California Buckwheat (*Eriogonum fasciculatum*) growing along the concrete-lined ditch near the park site's border with Newport Banning Ranch. The DEIR misclassifies this area as ruderal (weedy).

Figure 10. The DEIR erroneously classifies this substantial stand of native Mulefat (*Baccharis salicifolia*) as ruderal (weedy). As discussed subsequently, I observed a pair of California Gnatcatchers foraging in this Mulefat stand on November 4, 2009. In the foreground is non-native Highway Iceplant (*Carpobrotus edulis*) and growing beneath the Mulefat are numerous shrubs of California Encelia (*Encelia californica*) that have been mowed to within a few inches of the ground.

Figure 11. The DEIR classifies this expanse of green vegetation as "ornamental" because of the extensive growth of non-native Highway Iceplant evident in this photo, but examination of this area shows that native California Encelia, Mulefat, and Western Ragweed (*Ambrosia psilostachya*) co-occur in this area. It is not clear whether any of the native shrubs in this area are being mowed along with the rest of the "disturbed encelia scrub" that occurs across most of the flat portion of the City property.

Failure to Detect Extensive Wetlands

The project biologists failed to detect up to a half-acre of wetlands on the site (see Figures 1–5 in this letter). The DEIR's Hydrology Section states on Page 4.10-20:

> Seepage was observed . . . at the drains near the toe of the slope along Superior Avenue and West Coast Highway. The direction of seepage flow is generally from north to south.

The actual extent of jurisdictional wetlands in this area will depend upon the delineation methods used. The California Coastal Commission's one-parameter methodology will likely yield a greater area of wetlands than will the U.S. Army Corps of Engineer's three-parameter methodology. Since the project will require a Coastal Development Permit, the EIR should report the area of wetlands on the site as delineated using the Coastal Commission's one-parameter method. Impacts to jurisdictional wetlands should be identified as significant and avoidance or specific mitigation measures should be identified to reduce those impacts to below a level of significance.

The seepage shown in Figures 1–3 is very similar to seepage from a cut-slope that formerly occurred directly across Superior Avenue from the project site, at an area referred to as "cattail cove." That site was developed into the lower campus of Hoag Hospital in the early 1990s. I worked on that project as a biologist for LSA Associates (the hospital's consultant). As part of our evaluation, I assisted LSA wetlands specialist Rick Harlacher in a complicated jurisdictional delineation that included the unusual step of completing a WET II Functional Analysis[1]. One complicating factor was the dominance of Pampas Grass, an invasive weed from South America that was growing in saturated, gleyed soils on the slopes of that site (just as Pampas Grass dominates seeping slopes on the Sunset Ridge site). The federal government has not graded Pampas Grass as to its wetland indicator status, but in its native range the species grows in damp soils along river margins[2]. In coastal southern California, it has escaped cultivation and spread along sandy, moist ditch banks[3]. Examination of 82 records of Pampas Grass in California showed that 32% were from wetlands[4]. This suggests that the proper indicator status for Pampas Grass in California lies on the border between "FACU" (occurring in wetlands 1–33% of the time) and "FAC" (occurring in wetlands 34–67% of the time). With roughly one-third of its documented occurrences in California being in wetlands, the species is clearly adapted to wetland conditions.

The delineation that LSA performed at the hospital site yielded a determination of jurisdictional wetlands for the seeping slopes dominated by Pampas Grass (under any applicable methodology). Until the City's biological consultant examines the seeping slopes at the Sunset Ridge site, there is no way of predicting the outcome of a delineation on this site.

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[1] Adamus, P. R. 1987. Wetland Evaluation Technique (WET II). U.S. Army Corps of Engineers, Waterways Experiment Station, Vicksburg, MS.

[2] Connor, H.E. and Charlesworth, D. 1989. Genetics of male-sterility in gynodioecious *Cortaderia* (Gramineae). *Heredity* 63, 373–382.

[3] Costas-Lippmann, M. and Baker, I. 1980. Isozyme variability in *Cortaderia selloana* and isozyme constancy in *C. jubata* (Poaceae). *Madroño* 27:186–187.

[4] Lambrinos, J. G. 2001. The expansion history of a sexual and asexual species of *Cortaderia* in California, USA. *Journal of Ecology* 89:88–98.

STATUS OF THE CALIFORNIA GNATCATCHER ON THE PROJECT SITE

Page 45 in Appendix E provides a terse discussion of the California Gnatcatcher's current status on the project site:

> A limited amount of suitable habitat for this subspecies occurs on the Project site. Focused surveys for the coastal California gnatcatcher were conducted in spring/summer 2009; this species was observed nesting on the Project site. A pair nested in a coastal goldenbush shrub in the disturbed mule fat scrub/goldenbush scrub vegetation type on the Project site. The pair fledged three to four chicks during the survey period.

Exhibit 6 in Appendix E represents the location of this on-site breeding pair using a single green dot.

The DEIR mentions that the entire project site is designated as critical habitat for the California Gnatcatcher, but fails to evaluate what this means. Section 3 (5)(A) of the federal Endangered Species Act defines critical habitat as:

> the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . .

Within areas broadly mapped as critical habitat, the U.S. Fish and Wildlife Service (USFWS) has specified Primary Constituent Elements (PCEs) that define the actual extent of habitats that may be useful to the listed species. PCEs for California Gnatcatcher critical habitat include not only intact sage scrub habitats, but also "non-sage scrub habitats such as chaparral, grassland, riparian areas, in proximity to sage scrub habitats . . . that provide space for dispersal, foraging, and nesting."[5] As summarized by Atwood and Bontrager (2001)[6]:

> Territories defended during nonbreeding season (Preston et al. 1998)[7]; 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[8], Preston et al. 1998). 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). In San Diego Co., established pairs (n = 11) in Dec spent about 62% of time outside boundaries of territory defended during previous breeding season (Preston et al. 1998).

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[5] Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018–AV38, endangered and threatened wildlife and plants; revised designation of critical habitat for the Coastal California Gnatcatcher (*Polioptila californica californica*). Federal Register 72:72069 (December 19, 2007).

[6] Atwood, 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.

[7] Preston, K. L., P. J. Mock, M. A. Grishaver, E. A. Bailey, and D. F. King. 1998b.*California Gnatcatcher territorial behavior*. Western Birds 29:242–257.

[8] Bontrager, D. R. 1991. *Habitat requirements, home range and breeding biology of the California Gnatcatcher (*Polioptila californica *) in south Orange County, California.* Report dated April 1991 prepared for Santa Margarita Co., Rancho Santa Margarita, CA.

I hold a current federal permit to conduct presence/absence surveys for the Coastal California Gnatcatcher (No. TE-799557). During my two field visits in November 2009, I observed at least one pair of California Gnatcatchers in the areas shown on Figure 12, below.

Figure 12. Locations where California Gnatcatchers were recorded on November 4 and 6, 2009, relative to the spot where California Gnatcatchers were mapped in the DEIR. The November records demonstrate that this species utilizes native scrub communities throughout the project site.

On the afternoon of November 4, 2009, I initially observed a pair of California Gnatcatchers at the northern location shown in Figure 12. The birds were foraging in a patch of Mulefat that the DEIR maps as "ruderal" (see Figure 10 in this letter). After several minutes, the birds flew off a short distance to the northwest, crossing the property fence between the City property and Newport Banning Ranch.

Approximately 30 minutes later, after walking around the rest of the City property, I encountered either the same pair or a second pair foraging in coastal scrub vegetation approximately 80 m south of the initial encounter. The second period of observation also lasted several minutes, during which I obtained photos of both the male and female as they flew back and forth across the property fence (see Figures 13 and 14 on the following page).

On the afternoon of November 6, 2009, I was inspecting the wetlands along Superior Avenue, at the location of the Mediterranean Tamarisk tree shown in Figures 1 and 2 in this letter, when I heard the mewing call of a California Gnatcatcher from the slope above. A few minutes later I found a pair of gnatcatchers on the slope directly north of the intersection of Superior Avenue and West Coast Highway, foraging in coastal scrub dominated by Big Saltbush. At that location I obtained the photos shown in Figures 15 and 16. The birds then flew to the Big Saltbush shown in Figure 6 of this letter and from there flew to the northwest, at which point I stopped following them.

Figure 13. I photographed this male California Gnatcatcher during my second encounter with this species at the site on November 4, 2009. It was perched on the fence between the City property and Newport Banning Ranch.

Figure 14. I photographed this female California Gnatcatcher, the mate of the bird in Figure 13, on November 4, 2009, as it perched on the property fence near the male shown in Figure 12.

Figure 15. I photographed this male California Gnatcatcher on November 6, 2009, as it foraged in Big Saltbush near the top of the slope above the intersection of Superior Avenue and West Coast Highway. This may be the same bird shown in Figure 13.

Figure 16. I photographed this female California Gnatcatcher, the mate of the bird in Figure 15, on November 6, 2009, as it foraged in a Big Saltbush plant near the top of the slope above intersection of Superior Avenue and West Coast Highway. This may be the same bird shown in Figure 14.

The DEIR's Impact section states:

> The Encelia scrub, Encelia scrub/ornamental, and disturbed Encelia scrub on the Project site would not be considered utilized by the gnatcatcher due to the periodic mowing and traffic/pedestrian edge effects in this area.

This finding is disproven by direct observation of a pair of California Gnatcatchers using areas that "would not be considered utilized by the gnatcatcher." As documented in these comments, native scrub communities along the southern and eastern edges of the project site were incorrectly mapped and classified by the project biologists, indicating that those areas were never subjected to careful, credible biological surveys. The superficiality and inadequacy of the survey effort is also indicated by the project biologists' failure to detect groundwater seepage supporting extensive areas of cat-tails and other conspicuous wetland plants along Superior Avenue and West Coast Highway.

In light of my observations, and given multiple lines of evidence demonstrating that the eastern part of the project site was not carefully surveyed by project biologists, the DEIR fails to support its assertion that California Gnatcatchers do not occur in that part of the site, either during the nesting season or during fall/winter. All of the site's scrub communities, and "scrub/ornamental" communities, should be considered to be occupied by the California Gnatcatcher, consistent with (1) the USFWS critical habitat designation, (2) the scientific literature describing the gnatcatcher's habitat requirements, (3) the direct observations of gnatcatchers documented in this letter, and (4) the DEIR's erroneous descriptions of plant communities that exist in areas claimed to have been thoroughly surveyed.

Recent Removal of Intact Sage Scrub

The DEIR fails to disclose that extensive areas of sage scrub were removed from the project site between December 31, 2003, and March 28, 2005 (Figures 16, 17).

Figures 17, 18. The aerial image at left, dated December 31, 2003, shows generally intact sage scrub habitat in the areas outlined in red, which had been cleared as of March 28, 2005. The DEIR makes no mention of this unauthorized clearing.

The areas shown in Figures 17 and 18 supported two pairs of California Gnatcatchers in 2000[9], and the clearing was done without consulting with the USFWS, apparently in violation of the federal Endangered Species Act. The EIR must quantify the area of sage scrub illegally cleared, discuss how this violation of federal law is being addressed, and describe how this impact will be mitigated.

MOWING OF ENCELIA SCRUB

California Encelia is a native plant that is dominant in biologically sensitive coastal sage scrub and coastal bluff scrub communities found on the project site and on Newport Banning Ranch. California Gnatcatchers commonly use scrub dominated by California Encelia for nesting and foraging, and this plant grows very fast, typically reaching waist-height when left undisturbed for a growing season.

All of the California Encelia plants growing on the flat portion of the City-owned property have been mowed nearly to ground level (Figure 19, below).

Figure 19. "Disturbed encelia scrub" growing on the City property. These native shrubs have been mowed to within a few inches of the ground. Note also the extensive area closest to the structures that is nearly barren.

[9] PCR Corporation. 2000. *Results of focused Coastal California Gnatcatcher Surveys for the Newport Banning Ranch property in Orange County, California.* Report dated November 1, 2000, prepared for the USFWS Carlsbad Office.

Disturbed encelia scrub covers 3.6 acres on the site, all of it proposed for grading impacts. Page 7 of Appendix E states that "Shrub cover of this area is approximately 50 to 60 percent overall." Page 14 of Appendix E states:

> The 3.64 acres of disturbed Encelia scrub is regularly mowed for fuel modification and weed abatement purposes and contains a high percentage of non-native weeds; therefore, it is not considered special status.

With regard to "weed abatement, " California Encelia is a native plant and dominant component of a biologically sensitive coastal scrub community that is occupied by the California Gnatcatcher. It is not a "weed" that can be legally mowed down without consulting with the USFWS, and the biologists at the Carlsbad Field Office have no knowledge of the City's mowing of encelia on this site.

With regard to "fuel modification," Page 28 of the Orange County Fire Authority's "Guideline for Fuel Modification Plans and Maintenance Program," dated January 1, 2008, *expressly allows* California Encelia to remain "in all fuel modification wet and dry zones in all locations."[10] Furthermore, the mowing appears to extend out across the entire mesa area, as far as 570 feet from the structures to the north. This is much farther than would be required for any legitimate fuel modification purpose, particularly given that the 100 feet closest to structures is maintained as essentially barren land. Therefore, the DEIR's suggestion that these plants had to be mowed down to meet fuel modification requirements is false.

Page 55 in Appendix E states:

> The proposed Project would impact approximately 0.26 acre of Encelia scrub, 0.21 acre of Encelia scrub/ornamental, and 3.64 acres of disturbed Encelia scrub. Impacts on these vegetation types are not considered significant because of their fragmentation from high value areas, presence of invasive non-native species, maintenance of concrete v-ditch under the shrubs, presence of trash, proximity to high foot/bicycle, and vehicle traffic, and are not expected to support gnatcatchers during the nesting season. Therefore, no mitigation would be required.

As reviewed previously, California Gnatcatchers have now been observed in three different patches of scrub habitat that the EIR preparer characterizes as not providing habitat for California Gnatcatchers. The disturbance to 3.64 acres of encelia scrub is from "fuel modification and weed abatement" that is being conducted without the approval of the USFWS, and that appears to be in violation of the federal Endangered Species Act. Note that Figure 20, on the next page, appears to show a more intact scrub community in February 2006 than occurs there now.

CEQA requires an EIR preparer to evaluate the existing conditions, but the EIR preparer must also disclose any existing conditions created by possibly illegal actions and modify its analyses and conclusions accordingly. Disturbed encelia scrub extends across most of the City-owned portion of the site, and in the absence of mowing this scrub would undoubtedly be utilized by the federally listed California Gnatcatcher (which I have documented as using scrub all around the mowed encelia). These facts, including the results of any previous biological studies completed on the project site, must be disclosed in the EIR. Appro-

[10] http://www.ocfa.org/_uploads/pdf/guidec05.pdf

priate compensatory mitigation must be proposed for the impacts to all native scrub habitats, including those that have been subjected to mowing without the needed regulatory approvals.

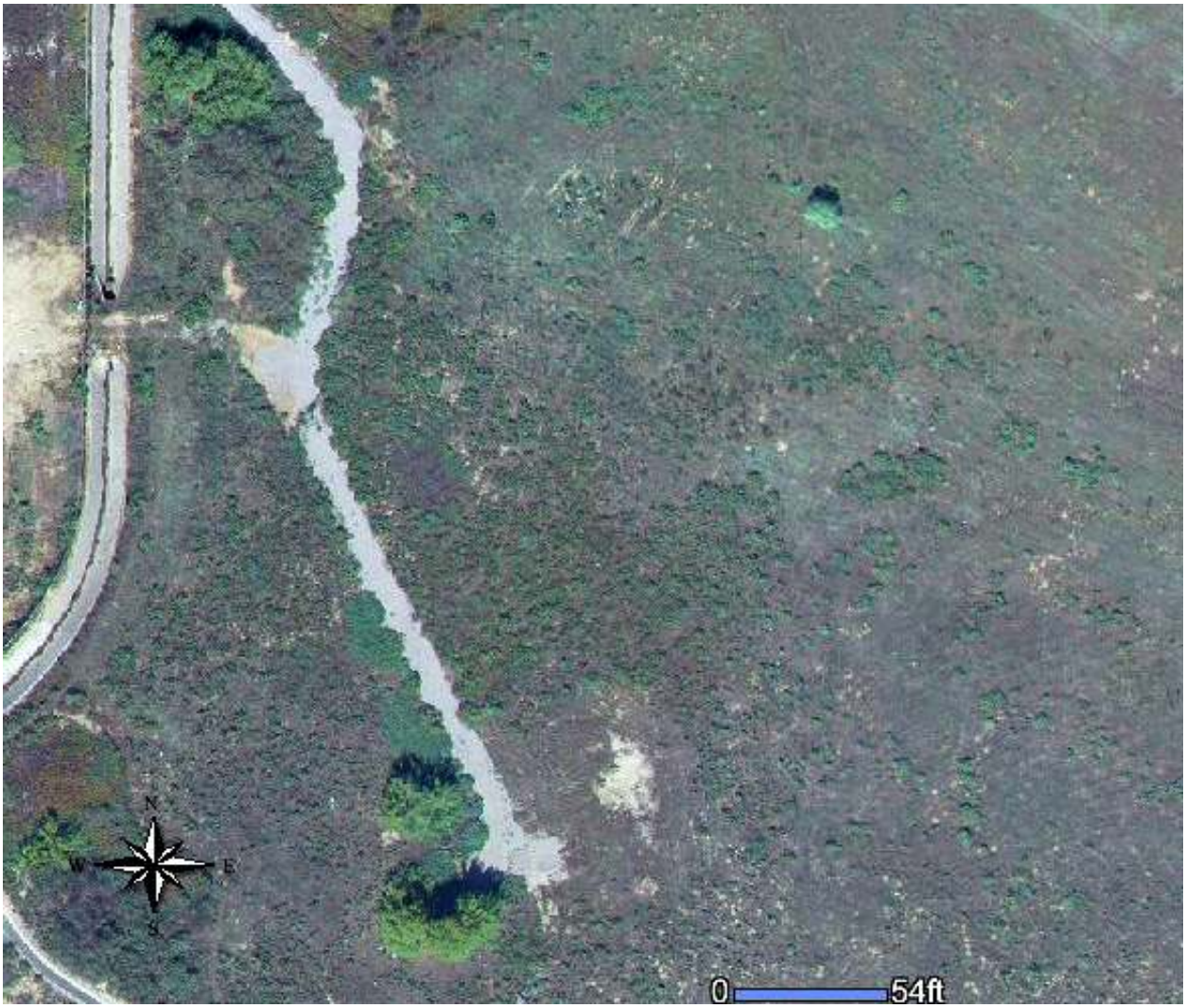

Figure 20. This aerial image from the City's web page[11], taken in February 2006, appears to show more extensive areas of relatively intact scrub on the lower mesa of project site than occurs there now.

STATUS OF THE BURROWING OWL ON THE SITE

The Burrowing Owl (*Athene cunicularia*), a California Species of Special Concern, is extremely rare in Orange County due to large-scale development of nearly all of the county's suitable grasslands, especially near the coast. In January 2008, Glenn Lukos Associates conducted winter-season surveys for the Burrowing Owl at Newport Banning Ranch and identified two Burrowing Owls in the site's southern grasslands and a third individual 212 feet west of the site (see Figure 21)[12].

[11] http://www6.city.newport-beach.ca.us/website/InteractiveMap/map.asp

[12] Glenn Lukos Associates. 2008. Biological Technical Report for the Newport Banning Ranch Property, Newport Beach, California. Report prepared for Mike Mohler, Newport Banning Ranch LLC.

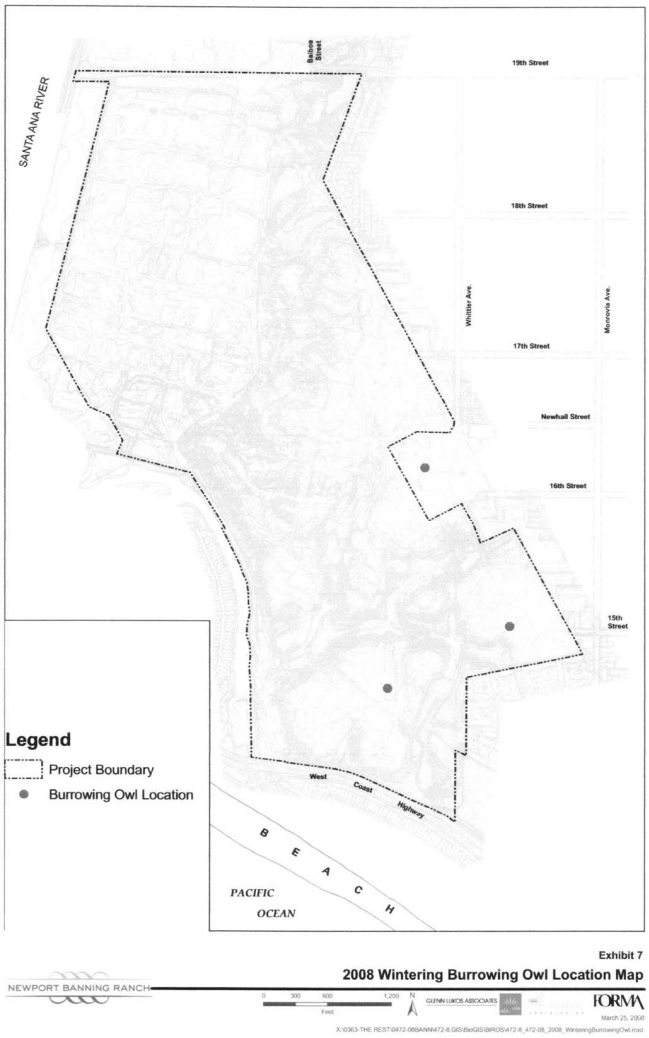

Figure 21. This map is Exhibit 7 in the 2008 draft biological report prepared by Glenn Lukos Associates for Newport Banning Ranch LLC. It shows the point locations where Glenn Lukos Associates documented the occurrence of three wintering Burrowing Owls in January 2008. Since birds do not remain in the same spot, but must move around the grasslands to forage, Burrowing Owls at any of these mapped point-locations could be impacted by project implementation.

As the City's biological consultant for both the Sunset Ridge DEIR and the pending Newport Banning Ranch DEIR, BonTerra Consulting has critically reviewed Glenn Lukos Associates' 2008 draft biological report. It is therefore surprising that the results of the 2008 surveys are suppressed in the Sunset Ridge DEIR, which states only, "In the vicinity of the Project site, this species has been reported from Fairview Park in Costa Mesa (CDFG 2009a)."

Burrowing Owls may be absent at a given site one winter and present the next, and surveyors do not always detect rare species they are searching for, even when individuals are present. As one example, the EIR preparer failed to detect California Gnatcatchers in various parts of the Sunset Ridge project site where the species has now been shown to occur.

Consider also that BonTerra Consulting failed to detect any Side-blotched Lizards (*Uta stansburiana*) on the project site during their numerous site visits, despite the species being abundant throughout the site. I stopped counting at 15 individuals on November 4, and I again easily found the species to photograph on November 6 (Figure 22).

Figure 22. I photographed this Side-blotched Lizard on the Sunset Ridge project site on November 6, 2009. This individual, like many others I encountered on the site, was in the burrow of a California Ground Squirrel (*Spermophilus beecheyi*).

How can the project biologists have conducted competent biological surveys, including the inspections of burrows that are one component of Burrowing Owl surveys, without repeatedly encountering this common and widespread lizard? If they could not detect this species, how could they have hoped to detect Burrowing Owls?

Having failed to disclose the known occurrence of three Burrowing Owls in January 2008, Page 42 of Appendix E downplays the site's potential value to the species:

> Limited suitable habitat and burrow sites for this species are present on the Project site. Focused surveys for the burrowing owl were conducted in winter 2008/2009 and in spring/summer 2009; the burrowing owl was not observed. Therefore, burrowing owl is not expected to occur on the Project site due to lack of detection during focused surveys. However, there is potential for the burrowing owl to occasionally occur on the Project site as a migrant or rare winter visitor.

Concerning the DEIR's deprecating remarks about "Limited suitable habitat and burrow sites" and the potential for only "occasional" or "rare" use by Burrowing Owls, consider that the *Birds of North America* species account[13] describes the Burrowing Owl's preferred habitat as "Dry, open, shortgrass, treeless plains, often associated with burrowing mammals." As shown in Figure 23 on the following page, the project site's shortgrass grasslands are expansive and riddled with rodent diggings.

[13] Haug, E. A., B. A. Millsap, and M. S. Martell. 1993. Burrowing Owl (*Athene cunicularia*), 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/06.

Figure 23. This photo shows the shortgrass grasslands of Newport Banning Ranch (part of the Sunset Ridge project site), as seen from the southern terminus of 15th Street, on November 6, 2009. More than a dozen California Ground Squirrels can be seen in just this one group.

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.

This episode recalls the "Whispering Hills Final Biological Technical Report" dated March 2, 2000, also prepared by BonTerra Consulting. That report was incorporated into the DEIR for the Whispering Hills project in the City of San Juan Capistrano. The following excerpt is from Page 9 of my comments on that DEIR, provided in a letter dated June 9, 2000:

> Page 39 of the DEIR states, "Marginal suitable habitat for the least Bell's vireo is present on the site. This species was not observed during focused surveys in 1999." Biologist Kurt Campbell, who conducted surveys on the project site in 1998, reports[14] that a pair of Least Bell's Vireos raised young in riparian habitat on the project site in 1998, information that was well known to the EIR preparer. It appears that the EIR preparer (a) suppressed Mr. Campbell's observations, (b) characterized successfully utilized nesting habitat as "marginal," and (c) failed to identify significant project effects on the vireo.

In both cases, BonTerra Consulting knowingly withheld the positive results of an earlier focused bird survey and then characterized the habitat as only marginally suitable for the species in question, citing their own negative survey results the following year. The Whispering Hills DEIR ultimately had to be recirculated, and the project has been mired in controversy to this day[15].

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[14] Campbell, K.F. Telephone conversation on 5 May 2000.

[15] See http://capistranoinsider.typepad.com/capistrano_insider/2009/10/no-surprise-whispering-hills-sues-school-district.html

Potential Effects of Dumping Fill at Newport Banning Ranch

The proposed dumping of 34,000 cubic yards of fill from the park site into 4.6 acres of shortgrass grassland habitat at Newport Banning Ranch, as well as the associated construction of a new haul road to the dumping sites, would have significant adverse effects upon the Burrowing Owl and other grassland species. A short distance north of the project site, the City of Costa Mesa dumped soil on the mesa at Fairview Park in the early 1990s. This act resulted in the conversion of that shortgrass mesa/vernal pool complex into expansive stands of tall mustard and other non-native weeds, which grow out of the fill piles. The extensive ecological damage resulting from that dumping of fill shows no sign of improving over time (see Figure 24).

Figure 24. This photo, taken at Fairview Park on November 6, 2009, shows dried vernal pool habitat in front of tall, dense, dried mustard growing out of fill dirt that was placed there approximately 20 years ago. Unlike the vernal pools and shortgrass mesa that formerly occupied the filled area (which is much bigger than the area shown here), the dense mustard provides poor-quality habitat for most native wildlife species, including Burrowing Owls.

The proposed dumping of fill at Newport Banning Ranch would be expected to result in similar establishment of tall weeds where currently the vegetation is short and sparse. This would degrade habitat suitability for Burrowing Owls and for other grassland species, such as Killdeers (*Charadrius vociferus*), Red-tailed Hawks (*Buteo jamaicensis*), American Kestrels (*Falco sparverius*), Loggerhead Shrikes (*Lanius ludovicianus*), American Pipits (*Anthus rubescens*), and Western Meadowlarks (*Sturnella neglecta*).

Concerning the site's grassland, ruderal, ornamental, flood control channel, and disturbed communities, the DEIR's impact analysis states:

> These areas generally have low biological value because they are composed of unvegetated areas or are vegetated with non-native species. These areas generally provide limited habitat for native plant and wildlife species although they may occasionally be used by native species. Therefore, impacts on these areas would not be considered significant, and no mitigation would be required.

The DEIR's suggestion that the site's grassland areas "may occasionally be used by native species" is baseless. In just two brief visits I have seen large numbers of grassland bird spe-

cies using the site's grasslands, including two Red-tailed Hawks, an American Kestrel, 14 Killdeers (see Figure 25), 25 American Pipits, 70 Western Meadowlarks, 100 Mourning Doves, and 100 House Finches (minimum estimates provided for the last four species). As discussed previously, these grasslands are known to have supported three Burrowing Owls in January 2008.

Figure 25. Nine out of a flock of 14 Killdeers encountered on the upper (eastern) mesa of the City-owned parcel on November 4, 2009.

If the Sunset Ridge project is implemented, fill should be exported elsewhere and disposed of in a responsible manner. Under no circumstances should fill dirt be dumped on the shortgrass grasslands of Newport Banning Ranch, as this would represent a significant adverse effect upon various species that thrive in this regionally rare habitat.

Status of the Cactus Wren on the Project Site

In the 1990s, working for LSA Associates, Richard Erickson and I conducted focused surveys of Newport Banning Ranch for California Gnatcatchers and Cactus Wrens. Some of the resulting maps of Cactus Wren territories are provided as Figures 26–29:

Figure 26. In 1992, one or two Cactus Wren territories existed in the northerly area now being proposed as a haul road and dump for fill dirt. Map provided by the USFWS Carlsbad Office.

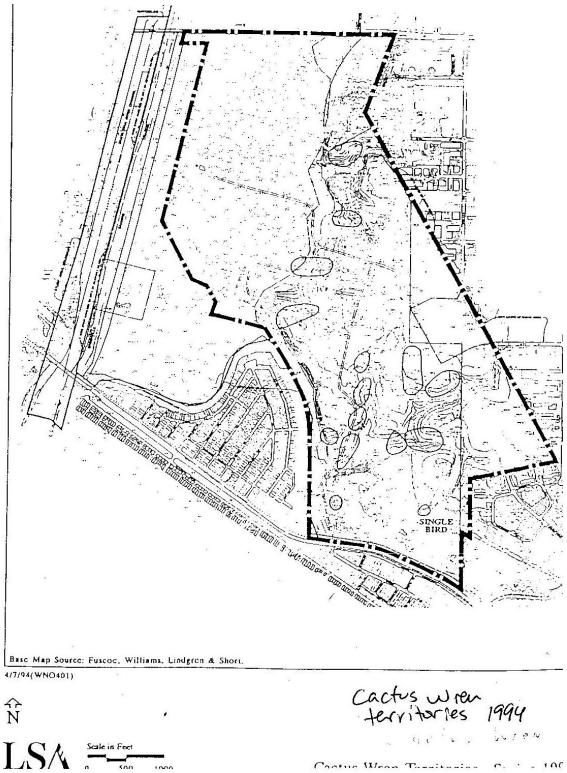

Figure 27. At least two of the Cactus Wren territories mapped by LSA Associates in 1994 overlap with, or closely border, areas that would be directly affected by implementation of the Sunset Ridge project. Map provided by the USFWS Carlsbad Office.

In 1996, after I had left LSA, Mr. Erickson again surveyed Newport Banning Ranch and produced the following map of Cactus Wren territories.

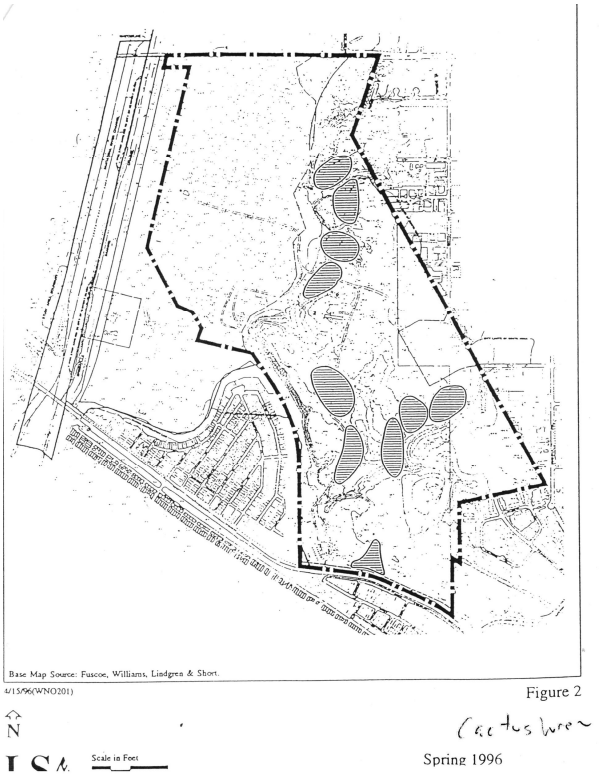

Figure 28. In 1996, the southeastern area previously occupied by a single Cactus Wren was no longer occupied, but in that year two Cactus Wren territories existed in the northerly area now being proposed as a dump for fill dirt. Map provided by the USFWS Carlsbad Office.

Page 45 of Appendix E states:

> In the vicinity of the Project site, this species has been reported from the Newport Banning Ranch property. Suitable habitat for this subspecies (i.e., cactus) is not present on the Project site. Therefore, coastal cactus wren is not expected to occur on the Project site.

I was not able to verify the DEIR's mapping on most of the Newport Banning Ranch portion of the project site, but cactus does occur on and near the site. Figure 29 shows Coast Cholla (*Cylindropuntia prolifera*) and Coastal Prickly-Pear (*Opuntia littoralis*) within several meters of the southwestern corner of the site, next to the "disturbed mulefat scrub/goldenbush scrub" community, where the new entry road is proposed off West Coast Highway. This is the general area that was occupied by a Cactus Wren in 1994, and the where sage scrub habitat was illegally cleared in 2004/2005.

Figure 29. The large Coast Cholla plant in the upper left-hand corner of this photo is located just off the project site, near the southwestern project boundary. A smaller Coastal Prickly-Pear plant is partially visible. This Coast Cholla plant is large enough to provide suitable nesting habitat for Cactus Wrens.

Figure 30 shows a large patch of Coastal Prickly-Pear growing near the northern area on Newport Banning Ranch that would be subject to dumping of fill.

Figure 30. Photo taken from the southern terminus of 16th Street showing a stand of Coastal Prickly-Pear large enough to constitute suitable nesting habitat for Cactus Wrens. This stand is growing within approximately 150 feet of the northern area that would be filled as part of project implementation. Additional cactus resources may occur on or adjacent to this area.

Since the Cactus Wren was documented using the areas shown in Figures 29 and 30 during the 1990s, and since suitable nesting and foraging habitats remain in these areas, it is erroneous for the DEIR to conclude that "Suitable habitat for this subspecies (i.e., cactus) is not present on the Project site." Project implementation would, in fact, impact areas documented as being occupied by Cactus Wrens in 1992, 1994, and 1996.

SUMMARY & CONCLUSION

As documented herein, the biological resources section of the Sunset Ridge DEIR does not reflect the best available science and is severely deficient in many ways:

- The DEIR's map of plant communities (Exhibit 4.6-1) incorrectly classifies numerous plant communities. All of the DEIR's errors in plant community mapping are made in the direction of under-representing biologically sensitive native communities and overstating the extent of ruderal or other communities that the EIR preparer considers to be of low biological sensitivity. Exhibit 4.6-1 includes "disturbed" polygons as small as 0.01 acre in size, making this the minimum polygon size applicable to all of the site's communities. The EIR's plant community mapping must be corrected and the EIR's analyses must accurately reflect the existing conditions.
- The DEIR indicates that project biologists failed to note numerous plant species that are conspicuous on the site, most of which are wetland indicator species. These include Emory Baccharis (*Baccharis emoryi*), Marsh Fleabane (*Pluchea odorata*), Salt Heliotrope (*Heliotropium curassavicum*), Spike Bentgrass (*Agrostis exarata*), spike-rush (*Eleocharis* sp.), Rabbitfoot Grass (*Polypogon monspeliensis*), Narrowleaf Cattail (*Typha angustifolia*), and American Tule (*Scirpus americanus*).
- An adequate EIR would include the results of wetland delineations conducted using both three-parameter (Corps) and one-parameter (Coastal Commission) methods, would seek to avoid any impacts to jurisdictional wetlands, and would proposed specific measures to mitigate any unavoidable impacts to jurisdictional wetlands and associated native plant and wildlife species.
- The occurrence on the site of Broom Baccharis (*Baccharis sarothroides*), reported in the DEIR, is of potential scientific interest since the species is not known to naturally occur in this part of Orange County. A voucher specimen should be obtained and deposited at an appropriate herbarium.
- The DEIR indicates that the Side-blotched Lizard was not observed on the site. Failure to identify this ubiquitous species during the many biological surveys reported by the EIR preparer provides one of several lines of evidence demonstrating the superficiality and inadequacy of the biological survey effort.
- The DEIR states that various scrub communities on the project "would not be considered utilized by the gnatcatcher" despite their containing the Primary Constituent Elements of California Gnatcatcher critical habitat. I documented the occurrence of at least one pair of California Gnatcatchers foraging within three areas of coastal scrub on the project site that the DEIR characterizes as being unsuitable for this species. The

DEIR's evaluations and findings about the California Gnatcatcher and its habitat usage on the project site are inconsistent with the substantial body of scientific literature concerning this federally listed species and its habitat requirements. These findings must be revised to accurately reflect the existing conditions.

- The DEIR fails to disclose that coastal sage scrub was removed from the project site, apparently illegally, some time around 2004. The affected area was documented as supporting two pairs of California Gnatcatchers in 2000 but only one pair in 2009.
- The DEIR states that 3.64 acres of disturbed encelia scrub that lies within designated critical habitat for the California Gnatcatcher is "regularly mowed for fuel modification and weed abatement purposes," but fails to note (a) that California Encelia is not a "weed;" (b) that the Orange County Fire Authority expressly allows California Encelia to remain "in all fuel modification wet and dry zones in all locations;" (c) that mowing extends as much as 570 feet away from structures; (d) that encelia scrub was apparently more intact at this location in 2005; and (e) that the City has not consulted with the USFWS to determine whether this mowing of native sage scrub violates the federal Endangered Species Act. Ignoring all of these relevant facts, the DEIR concludes that 3.64 acres of disturbed encelia scrub may be graded for project implementation without resulting in any significant biological impacts. An EIR cannot simply assume that all existing conditions are legal and appropriate when there is ample evidence to the contrary.
- While failing to disclose the positive results of 2008 surveys for the Burrowing Owl at Newport Banning Ranch, the EIR preparer characterizes the project site's shortgrass grasslands as being only marginally suitable for Burrowing Owls, citing only their own negative survey results in 2009. Applying the DEIR's logic, a project proponent could simply keep hiring consultants to conduct surveys until negative results were achieved, either by the consultant's negligence or by the species occurring on the site only during certain years or seasons. By ignoring all previous survey results, the desired finding of no significant impact could be made. This is not sound science.
- The EIR preparer fails to recognize that dumping 34,000 cubic yards of fill from the park site into 4.6 acres of shortgrass grassland habitat, together with the associated construction of a new haul road to the dumping sites, would degrade habitat suitability for numerous grassland-dependent species that currently use these grasslands in abundance. In the project vicinity during the late 1980s, severe habitat degradation of precisely this type occurred at nearby Fairview Park.
- The DEIR's characterization of the site's grasslands as having "low biological value," and the DEIR's conclusion that "they may occasionally be used by native species" are not based in fact. It is plain to see that the grasslands in question are teaming with native wildlife of many different species.
- Cactus Wrens have been documented using habitats on the project site during three years that I am aware of, and some large cactus remains in these areas, so it is erroneous for the DEIR to conclude that "Suitable habitat for this subspecies (i.e., cactus) is not present on the Project site."

The standard under which CEQA operates is that impact analyses must be made using the best available scientific information, including consideration of the results of other biological surveys conducted at the project site and in nearby areas. The Sunset Ridge DEIR falls far short of this minimal standard, to the point where members of the public are having to document the existence of extensive wetlands, document and explain the apparent illegality of mowing native plant communities that are designated as critical habitat for a listed species, document the occurrence of a listed species in areas the DEIR deems unoccupied, find and publish the results of previous survey efforts on the project site, and generally bring to light numerous highly relevant, factual items that the EIR preparer has overlooked, ignored, suppressed, or misinterpreted.

In cases where the project proponent also serves as CEQA Lead Agency, it is especially important that the public be assured that the Lead Agency and its consultants are not violating the public trust to serve their own, narrowly defined interests. The errors and distorted analyses in the Biological Resources section of the Sunset Ridge DEIR demonstrate clear and consistent bias in favor of the project proponent/Lead Agency, and they are of sufficient scope and magnitude to call into question the impartiality and even the basic competence of the EIR preparer. The pervasive errors in describing the baseline conditions on the site follow through to the DEIR's impact analyses, proposed mitigation measures, and findings of significance, which fail to reflect the actual conditions on the ground or the applicable regulations protecting sensitive biological resources. Thus, the entire Biological Resources section of the DEIR lacks validity as a CEQA planning document.

In my opinion, the DEIR's biological surveys, impact analyses, mitigation program, and findings of significance after mitigation must be thoroughly re-evaluated by a third-party consultant (other than me) acceptable to the Banning Ranch Conservancy. A revised DEIR should then be prepared and recirculated for another round of public review and comment.

I appreciate the opportunity to review the Sunset Ridge Draft EIR on behalf of the Banning Ranch Conservancy. Please provide any responses to these comments to me at the address specified on my letterhead. You may send e-mail to robb@hamiltonbiological.com.

Sincerely,

Robert A. Hamilton
President, Hamilton Biological, Inc.

cc: Christine Medak, U.S. Fish & Wildlife Service
Jae Chung, U.S. Army Corps of Engineers
Matthew Chirdon, California Department of Fish & Game
Jonna Engel, California Coastal Commission
Terry Welsh, Banning Ranch Conservancy

attachment: Curriculum Vitae