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STAFF REPORT: REGULAR CALENDAR

Application No.:	**5-13-1100**
Applicant:	**Newport Mesa Unified School District**
Agent:	Tim Marsh
Location:	Seaward of Whittier Ave, between 16th and 17th Street, Newport Beach, Orange County (APNs 114-170-51, 114-170-63, 114-170-64)
Project Description:	After-the fact approval for construction of a 2,046 foot long, 6 foot high chain link fence near the property line.
Staff Recommendation:	Denial

SUMMARY OF STAFF RECOMMENDATION:

The proposed project is a request for after-the-fact approval of a fence constructed without a Coastal Development Permit in 2012 on mostly vacant land owned by the Newport Mesa Unified School District (NMUSD). The fence is considered development under Coastal Act section 30106 as *the erection of any solid material or structure*. The Commission's Enforcement staff sent a letter to the property owners on February 15, 2013, notifying them of the violation and of the potential impacts to sensitive areas. The subject site is adjacent to, and enveloped on three sides by the Newport Banning Ranch (NBR) property. The subject site and surrounding area is known to have freshwater wetlands/vernal pools some of which support an endangered species of fairy shrimp, grasslands (native and non-native) that support raptors including burrowing owl, coastal sage scrub that supports the endangered California gnatcatcher, among other resources. Enforcement staff informed the property owner that removal of the fence and restoration of the site was an appropriate path forward to remedy the Coastal Act violation. However, the applicant applied for after-the-fact approval and retention of the fence.

Since federally listed endangered species were known to be present, Commission staff consulted with the U.S. Fish and Wildlife Service which recommended postponing all construction or fence-removal activity in the area until further biological studies was performed. Subsequent biological surveys supplied by the applicant document the presence of several sensitive species and resources impacted by the fence, including sensitive vegetation, burrowing owl and California gnatcatcher habitat, and seasonal wetlands and vernal pools. The construction activities trampled the ground and compacted and disturbed approximately 0.47 acres of soil and grassland onsite, in some cases immediately next to patches of native grasslands, and resulted in construction of a fence directly through seasonal wetlands and habitat areas.

The fence was installed directly over an earthen berm likely containing burrows for Western Burrowing owls, an exceedingly rare species in California. Trampled soil and fence posts driven 2 feet deep into the soil negatively impact the habitat area. The presence of the fence also leads to fragmentation of the habitat and foraging area for sensitive wildlife.

The fence along the southwestern property line is immediately adjacent to patches of purple needlegrass, a rare grassland species native to California. Temporary impacts resulting from soil compaction have occurred, and continued fence maintenance activities would cause additional impacts in the future. The biological report submitted by the applicant did not provide a detailed vegetation study. It is possible that areas designated non-native grasses actually include patches of purple needlegrass. Lastly, the fence contributes to habitat fragmentation and limits the natural distribution of the seed bank, inhibiting the growth and spread of the native grassland.

The project area is largely vegetated by grasslands with patches of coastal sage scrub (CSS). These open grasslands provide dwelling habitat for burrowing animals and significant foraging habitat for numerous mammal, bird, and reptile species including burrowing owls and other raptors. The patches of CSS may provide valuable foraging area to California gnatcatchers (CAGN). The site was not surveyed by the applicant for CAGN, but other known surveys undertaken in the area have documented CAGN nests and foraging areas adjacent to the NMUSD property. The entire project area is designated as CAGN critical habitat area by the U.S. Fish and Wildlife Service.

Seasonal wetlands onsite were also impacted by the fence construction. Seasonal wetlands may or may not support plants or animals found in vernal pools, but they do meet one or more of the three wetland parameters required by the Coastal Act regulations to qualify as a wetland: hydrology, hydrophytic vegetation, and/or hydric soils parameter requirements. All wetlands documented by the biological report submitted by the applicant qualify as seasonal wetlands under the Coastal Act.

The fence was installed through Seasonal Wetland No. 2 (SW 2) and was partially routed around Seasonal Wetland No. 1 (SW 1) (Bramlet, 2014). The installation of the unpermitted fence constitutes fill of wetlands. In order to be consistent with Section 30233 of the Coastal Act, the project must be one of the uses specifically allowed, it must be the least environmentally damaging alternative, and it must provide adequate mitigation to offset any impacts created by the project. The project does not meet the list of limited approvable projects for fill of wetlands under section 30233, it is not the least environmentally damaging alternative, nor does the project propose any mitigation for the documented impacts. The project is inconsistent with section 30233 and must be denied.

The fence was installed directly through SW 2, a documented wetland containing invertebrates and wetland vegetation, which defines SW 2 as a vernal pool. Vernal pools are rare and unique habitats that support a number of plant and animal species only found in vernal pools. Also, because SW 2 has been occupied by a non-listed fairy shrimp species, Versatile Fairy Shrimp (VFS), it is considered a vernal pool. The fence may have altered the impermeable layer of soil in SW 2, affecting the retention of water in the pool and impacting the sensitive plant and wildlife species present in the pool. The fence was not placed with the minimum 100-foot buffer typically required by the Commission around wetlands (both SW 1 and SW 2). SW 1 was not surveyed by the applicant for the San Diego Fairy Shrimp (SDFS), a federally listed species under the Endangered Species Act, nor was it surveyed for VFS. SW 1 does contain wetland vegetation. Also, photographs of SW 1 were submitted showing the pool supported ostracods (seed shrimp) and pollywogs, which would define the wetland as a vernal pool.

Located immediately adjacent to the northwest fence on the neighboring NBR property is Seasonal Wetland Complex A (SWA), which was not explored through the applicant's biological report, but has been documented by known previous studies in the project area. SWA is occupied by the federally listed SDFS and is considered a vernal pool. Concrete footings installed near the wetland complex may have impacts to the complex and the connecting vernal swales in between the pools.

Other indirect impacts of the fence installation include the isolation of wildlife. Larger wildlife, such as coyotes, have dug under the fence in at least 2 documented locations, notably adjacent to SW2. Digging can alter the shape of the wetland and introduce loose soil that acts as fill, into the wetland. The loose soil can decrease the depth of the pool and increase the turbidity, having an impact on the invertebrates, VFS, and vegetation within the pool. This is also a reason that minimum 100-foot buffers are enforced for development occurring near and around wetlands. The applicant did not propose mitigation for the documented impacts due to the unpermitted development.

In a Memorandum dated February 26, 2015, the Commission's staff ecologist, Dr. Jonna Engel, determined that the burrowing owl and gnatcatcher habitat, coastal sage scrub, vernal pools, and the grasslands onsite all rise to the level of Environmentally Sensitive Habitat Areas (ESHA). Typical of after-the-fact applications, the site must be viewed as though the unpermitted development did not yet occur. The proposed project would have significant impacts on ESHA for the construction of a fence, a non-resource dependent use. Additional impacts to these resources in the future would be caused by the continued fence repair and maintenance and any potential development of the areas newly fenced in. The proposed project is inconsistent with Coastal Act Section 30240 and must be denied.

The purpose of the unpermitted fence has not been made clear by the applicant. Commission staff visited the site and documented existing property markers around the unpermitted fence. Since there are already property line markers, the fence could be removed and the property line will remain delineated.

The adjacent NBR property is completely fenced with no public access. These fences are continuous and completely enclose the NMUSD property inside of it, such that it provides existing security to newly fenced areas on the NMUSD property. Since there are existing fences on the

surrounding properties, the removal of the unpermitted fence would not make the subject site any less secure.

As is present elsewhere on the NMUSD property, it is probable that the applicant installed the fencing with the intent of leasing additional areas for equipment storage. However, this type of use would involve vegetation removal, grading, and possibly laying a substrate of gravel, which would destroy the sensitive resources for non-resource dependent uses, which is not approvable under the Coastal Act, Section 30240. Additionally, this type of use would result in the fill of wetlands for a non-allowable use, which is inconsistent with Section 30233 of the Coastal Act. Note that these other existing storage uses on the NMUSD property, which appear to have been established after passage of the Coastal Act, have not been approved by any coastal development permit known to Commission staff, and may also be unpermitted. This other development is not addressed by this application and will require further review by the Commission's enforcement division.

Several letters in opposition to the project were received. There were no letters of support.

The City of Newport Beach Coastal Land Use Plan (CLUP) was certified by the Commission in 1982. The current CLUP designation for the site remains "deferred certification." Because the City does not yet have a certified Local Coastal Program, the standard of review for the project is Chapter 3 of the Coastal Act, with the CLUP as guidance. The proposed project is inconsistent with the resource protection policies of the CLUP and is inconsistent with the environmental protection policies of the Coastal Act.

Commission staff recommends **denial** of coastal development permit application 5-13-1100.

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APPENDICES

Appendix A - Substantive File Documents

EXHIBITS

Exhibit 1 -- Vicinity Map
Exhibit 2 – Site Plan
Exhibit 3 – Critical Habitat Areas
Exhibit 4 – Site Photographs
Exhibit 5 -- Biological Memorandum from Dr. Jonna Engel, Staff Ecologist
Exhibit 6 – Letter V-5-13-003
Exhibit 7 -- Letters in opposition to the project

I. MOTION AND RESOLUTION

Motion:

*I move that the Commission **approve** Coastal Development Permit No. 5-13-1100 for the development proposed by the applicant.*

Staff recommends a **NO** vote. Failure of this motion will result in denial of the permit and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

Resolution:

The Commission hereby denies a Coastal Development Permit for the proposed development on the ground that the development will not conform with the policies of Chapter 3 of the Coastal Act and will prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit would not comply with the California Environmental Quality Act because there are feasible mitigation measures or alternatives that would substantially lessen the significant adverse impacts of the development on the environment.

II. FINDINGS AND DECLARATIONS:

A. PROJECT LOCATION & DESCRIPTION

The project site is located at the western end of Newport Beach, north of Pacific Coast Highway, at the dead end of West 16th Street (**Exhibit 1**). The property is located on a coastal upland, immediately east of Newport Banning Ranch, and west of the City of Costa Mesa. The site is north of the Sunset Ridge Park site and the Newport Crest/Seawind Condominiums. The majority of the site is within the City of Newport Beach. The southern-most portion of the site is in the jurisdiction of the County of Orange, but under the "sphere of influence" of Newport Beach. Neither the County nor the City has a certified LCP for the subject area. The City of Newport Beach Coastal Land Use Plan certified by the Commission lists the site as "deferred certification." The site contains several water line easements held by the City.

The 11.5 acre site is largely divided into five areas, with several interior fences to separate these areas (**Exhibit 2**). The areas have been numbered for the purpose of this staff report only, as seen in **Exhibit 2**. These areas do not represent legal lots or separate parcels. Three of the fenced areas are currently used to store equipment: the two southern-most fenced area (area 1 and area 2) are currently leased to construction companies, while the northeastern fenced area (area 3) is used for storage of NMUSD obsolete equipment. The three fenced areas are currently used for storage (areas 1, 2, and 3) have been graded and are covered with a layer of gravel and are regularly compacted by the activity and use of the areas. However, none of these fences, the grading, vegetation removal, placement of gravel, or the storage uses onsite were permitted by the Commission and may also be unpermitted development.

The applicant is seeking authorization for fencing constructed in 2012. The applicant constructed a new 6 foot high chain link fence around a 2.97 acre area in the northwest corner of the property, joining the existing fence approximately half way through the west side of the property, and constructed a new fence around a small area of 0.22 acres in the southwest corner of the property. Total fence length is 2,046 feet and was installed roughly 2 feet inland of the property lines on the south and west side of the property, with an exception in the area of Seasonal Wetland 1, where the fence routes around the wetland and concrete debris to meet the property line. On the north side, the fence was installed on the property line. Concrete footings (2 feet deep and 18 inches in diameter) were used at the corner posts, while line posts (2 3/8 inch diameter) were hammered approximately 2 feet deep into the soil, without footings.

B. BACKGROUND

The 2.97 acre area (area 4) in the northwest corner of the property was fenced in 2012 without a CDP. This area was not previously used by NMUSD nor was it leased for storage. The only infrastructure appears to be oil well infrastructure including broken concrete debris and a belowground pump (**Exhibit 4**). A small strip along the southwest boundary of the site (area 5) was also fenced at the same time, enclosing 0.22 acres.

The applicant received a Violation letter (V-5-13-003) from Coastal Commission Enforcement staff in February 2013 regarding the unpermitted fence installation (**Exhibit 6**). The letter discusses working amicably on a 'consent order' to resolve the unpermitted development and restoration of the property, as preferable to a 'cease and desist order'. The letter, noting the sensitive species in the area, references the USFWS request to "postpone activity around the fence to a time of year that would have the least impact to sensitive species," while concluding that complete removal of the fence and restoration of the site (while being mindful of the time of year) would be an appropriate way to resolve the violation. In November 2013, the applicant submitted the CDP application 5-13-1100 for retention of the unpermitted fence.

Several letters in opposition to the project were received in 2013. The letters include photographs of the resources onsite and the fencing project. The letters also include additional claims of unpermitted development on site, beyond the newly constructed fence. A citizen-science report dated November 30, 2013 notes the presence of a "potential vernal pool" in the interior of area 4, away from the fence line. The biological report submitted by the applicants did not study this potential pool. Additional studies are needed to determine if this area is in fact, an additional seasonal wetland and if it may be occupied by Versatile Fairy Shrimp (VFS) (*Branchinecta lindahli*) or San Diego Fairy Shrimp (SDFS) (*Branchinecta sandiegonensis*) species.

C. STANDARD OF REVIEW

The City of Newport Beach Coastal Land Use Plan (CLUP) was certified by the Commission in 1982, and was updated in 2005 and 2009. The current CLUP designation for the site remains "deferred certification." The standard of review is Chapter 3 of the Coastal Act with the CLUP as guidance.

D. OTHER AGENCY APPROVALS

In the preparation of these findings, Commission staff consulted with the U.S. Fish and Wildlife Service's Carlsbad office (USFWS). USFWS approval was not sought by the applicant, because no mitigation for the impacts was proposed. USFWS may recommend mitigation measures for the impacts caused by the unpermitted development, and may make recommendations to limit disturbances during fence removal. Permits from other public agencies may also have been required (e.g. Water Board, California Dept. of Fish and Wildlife, U.S. Army Corps, etc.) but no evidence of such review has been provided to the Commission.

E. UNPERMITTED DEVELOPMENT

Coastal Act section 30106 states (in relevant part):

> *"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, and … the removal or harvesting of major vegetation other than for agricultural purposes…*

Coastal Act section 30600 states (in relevant part):

> *(a) Except as provided in subdivision (e), and in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, other than a facility subject to Section 25500, shall obtain a coastal development permit.*

Coastal Act Section 30600 states that development within the Coastal Zone requires a coastal development permit. Coastal Act Section 30106 states that development includes the erection of any solid material or structure, and any division of land. The installation of the fence does constitute development.

As stated earlier, the purpose of the fencing is unclear. The unpermitted fence may delineate an area intended to be used for equipment storage. However, this type of use would involve vegetation removal, grading, and changing the intensity of the use of the land. The possible change in use to equipment storage also constitutes development and would also require a coastal development permit. The applicants have not filed a vested rights claim, nor have they claimed that is a possibility on the site.

Unpermitted development, including installation of the fence that is the subject of this application, has occurred on the site. Installation of the fence constitutes development under the Coastal Act and, therefore, requires a coastal development permit. Any non-exempt development activity, which is the case here, conducted in the Coastal Zone without a valid coastal development permit, or which does not substantially conform to a previously issued permit, constitutes a violation of the Coastal Act.

The applicant is not proposing removal of the unpermitted fence, and this permit would not authorize its retention, thus the violation remains unaddressed, and enforcement action to address this violation of the Coastal Act will be considered.

Although unpermitted development has taken place prior to the submission of this permit application, consideration of this application by the Commission has been based solely upon the Chapter Three policies of the Coastal Act. Review of this permit application does not constitute a waiver of any legal action with regard to the alleged violations nor does it constitute an admission as to the legality of any development undertaken on the site without a coastal development permit.

F. MARINE RESOURCES AND WETLANDS

Section 30230 of the Coastal Act states:

> *Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.*

Section 30231 of the Coastal Act states:

> *The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface water flow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.*

Section 30233 of the Coastal Act states, in relevant part:

> *(a) The diking, filling or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following:*
>
> > *(l) New or expanded port, energy, and coastal-dependent industrial facilities, including commercial fishing facilities.*
> > *(2) Maintaining existing, or restoring previously dredged, depths in existing navigational channels, turning basins, vessel berthing and mooring areas, and boat launching ramps.*
> > *(3) In open coastal waters, other than wetlands, including streams, estuaries, and lakes, new or expanded boating facilities and the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
> > *(4) Incidental public service purposes, including but not limited to, burying cables and pipes or inspection of piers and maintenance of existing intake and outfall lines.*
> > *(5) Mineral extraction, including sand for restoring beaches, except in environmentally sensitive areas.*
> > *(6) Restoration purposes.*

(7) Nature study, aquaculture, or similar resource dependent activities.

The City of Newport Beach's certified Land Use Plan Section 4.1.1 includes the following policies regarding wetlands (in relevant part):

> ***4.1.3-1.*** *Utilize the following mitigation measures to reduce the potential for adverse impacts to EHSA natural habitats from sources including, but not limited to, those identified in Table 4.1.1:*
> *A. Require removal of unauthorized structures… that impact wetlands or other sensitive habitat areas.*
> *E. Limit encroachments into wetlands to development that is consistent with Section 30233 of the Coastal Act and Policy 4.2.3-1 of the Coastal Land Use Plan.*
>
> ***4.2.1-1.*** *Recognize and protect wetlands for their commercial, recreational, water quality and habitat value.*
>
> ***4.2.1-2.*** *Protect, maintain, and where feasible, restore the biological productivity and the quality of coastal waters, streams, wetlands, and estuaries.*
>
> ***4.2.2-1.*** *Define wetlands as areas where the water table is al, near, or above the land surface long enough to bring about the formation of hydric soils or to support the growth of hydrophytes. Such wetlands can include areas where vegetation is lacking and soil is poorly developed or assent as a result of frequent drastic fluctuations of surface water levels, wave action, water flow, turbidity or high concentration of salts or other substances in the substrate…*
>
> ***4.2.2-3.*** *Require buffer areas around wetlands of a sufficient size to ensure the biological integrity and preservation of the wetland that they are designed to protect. Wetlands shall have a minimum buffer width of 100 feet wherever possible…*
>
> ***4.2.3-1.*** *Permit the diking, filling, or dredging of open coastal waters, wetlands, estuaries and lakes in accordance with other applicable provisions of the LCP, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects and limited to the following:*
> *A. Construction or expansion of port/marine facilities.*
> *B. Construction or expansion of coastal-dependent industrial facilities…*
> *C. In open coastal waters other than wetlands… the placement of structural pilings for public recreational piers that provide public access and recreational opportunities.*
> *D. Maintenance of existing and restoration of previously dredged depths…*
> *E. Incidental public service purposes which temporarily impact the resources of the area, such as burying cables and pipes…*
> *F. Sand extraction…*
> *G. restoration purposes.*
> *H. Nature study, aquaculture, or similar resource dependent use.*
> *I. In upper Newport Bay Marina Park…*

Seasonal Wetlands

Seasonal Wetlands often occur under Mediterranean climate conditions of the West coast. Seasonal wetlands have a natural lining of bedrock or a lining of hard clay that prevents water from infiltrating into the soil. During rain events, a shallow layer of water covers the depression in the soil and "awakens" the seeds, eggs, and/or cysts present. During a wet season, a seasonal pool may

fill and dry out several times and in years of drought, it may not fill at all. The seeds, eggs, and cysts can survive the drought conditions until the pool fills again.

If the seasonal wetlands contain species that are endemic to that habitat, they are called 'vernal pools' and may rise to the level of ESHA. Some seasonal wetlands in the project area are also vernal pools. Approximately 90% of vernal pools in California have already been lost.[1]

Title 14 California Code of Regulations ("CCR") section 13577(b) defines "wetlands":
Wetlands shall be defined as land where the water table is at, near or above the land surface long enough to promote the formation for hydric soils or to support the growth of hydrophytes.

Three seasonal wetlands were documented on the site in the biological report submitted by the applicant. Two seasonal wetlands (SW 1 and 2) are near the fence in the project area, while the third (SW 3) is in an existing storage yard on the far east of the site. Two depression features were located within area 4 south of SW 1, but did not contain wetland vegetation or soil, so they are not considered wetlands. There are 3 additional seasonal wetlands on the adjacent Newport Banning Ranch property within 100 feet of the unpermitted fence. A citizen-science report indicated that there may be another "potential vernal pool" in the interior of area 4, although this has not been confirmed by studies.

All seasonal wetlands within the project area (SW 1, SW 2, SW 3, and SW A) meet the hydrology criteria above, used to delineate wetlands under the Coastal Act, and therefore, must be protected.

Impacts to Wetlands
SW 1 on the western property line, approximately 14 feet long and 12 feet wide, and approximately 52 inches deep. The area contains an old pump and concrete debris. While the fence was routed around SW 1, it did not provide the Coastal Commission's recommended minimum 100-foot buffer. The fence has the potential to alter surface flows entering the wetland or adding sediment to the area. SW 1 was not subject to a protocol Fairy Shrimp survey, however it has been shown to contain ostacods[2]. SW 1 is considered a vernal pool.

SW 1 meets the criteria of the wetland criteria because it contains hydrophytic vegetation and has hydric soil. Pale spike rush (*Eleocharis palustris*), an obligate wetland species were found in the wetland.[3] Therefore, SW 1 is also considered a wetland under Title 14 CCR section 13577(b) and must be protected.

SW 2 is located on the northern property line. SW2 is 30 feet long (along the fence) and 16 feet wide. This wetland occupies space on both NMUSD and NBR property. According to the biological report submitted by the applicant, the wetland contains alkali heliotrope (*Heliotropium curassavicum*) and woolly marbles (*Psilocarphus Spp.*), both of which are found near water. Alkali heliotrope is an obligate wetland species[3] and woolly marbles are often found in wetland and could be an obligate wetland species, or a facultative wetland species[4] depending on the specific species,

[1] Vernal Pools. US EPA.
[2] Welsh, 2013.
[3] Obligate Wetland Species- probability is greater than 99% of this species occurring in natural wetland conditions
[4] Facultative wetland species- usually occur in wetlands, between 67-99% probability, and occasionally are found in non-wetlands.

which was not identified in the biological report. The fence was installed directly through SW 2. While no concrete footings were placed here, the fence posts driven 2 feet into the soil are fill and may also have altered the impermeable layer of soil, altering the duration of water held in the pool and likely impacting the VFS and vegetation found in the pool. SW 2 is a vernal pool.

SW 2 meets the criteria of the wetland criteria because it contains hydrophytic vegetation and has hydric soil. Therefore, SW 2 is also considered a wetland under Title 14 CCR section 13577(b) and must be protected.

SW 3 contains both hydrophytic vegetation (woolly marbles) and has hydric soil. Therefore, SW 3 is also considered a wetland under Title 14 CCR section 13577(b) and must be protected, despite its location away from the fence line. Wooly marbles are an indicator species for vernal pools. SW 3 is also a vernal pool.

Other indirect impacts include the isolation of wildlife due to the fencing. Larger wildlife, such as coyotes, have dug under the fence in at least 2 documented locations, notably adjacent to SW2. Digging can alter the shape of the wetland and introduce loose soil that acts as fill, into the wetland. The loose soil can decrease the depth of the pool and increase the turbidity, having an impact on the invertebrates and vegetation within the pool. This is also a reason that minimum 100-foot buffers are enforced for development occurring near and around wetlands.

Immediately on the fence line of area 4, in the northwest corner of the site, is an open stand on mulefat thicket growing on an earthen berm, along with other native vegetation: goldenbush, encelia and alkali heliotrope, and some non-native weed species as well. Mulefat and heliotrope are indicator species of water, which is present in and around the earthen berm of the adjacent Seasonal Wetland Complex A (SW A)[5]. The earthen berm and mulefat trees provide coverage and burrow locations for the burrowing owl. The newly constructed fence bisects this berm, and bisects the mulefat community (**Exhibit 4**).

The SW A complex represents three vernal pools (Glen Lukos and Dudek 2013 and 2014 reports). SWA may also have been impacted by the fence installation. This wetland complex was not explored through the biological report submitted by the applicant, but has been documented by known previous studies in the project area. The complex contains the federally-listed fairy shrimp species, SDFS, and has wetland vegetation. Concrete footings were installed near the wetland complex, which may have permanently impacted the complex, and/or the connecting vernal swales.

The “potential vernal pool” in the interior of area 4, identified by a member of the public was not documented in the submitted biological report, nor has it been explored by previous studies. The vegetation occurring in the depression has not been identified, nor has it been surveyed for SDFS. Additional studies are needed to determine if this depression meets the criteria of a seasonal wetland and if it may contain VFS or SDFS.

[5] Mulefat is a Facultative species, equally likely to occur in wetlands or non-wetlands.
Alkali heliotrope is an Obligate Wetland Species- probability is greater than 99% of this species occurring in natural wetland conditions.

Lastly, the two identified depressional features do not contain wetland vegetation and were not surveyed for fairy shrimp.

Fill of Wetlands

The installation of the unpermitted fence directly through Seasonal Wetland 2 constitutes fill under section 30233 of the California Coastal Act and additional fill may have occurred to Seasonal Wetland 1. Thus, the project must be reviewed for conformance with Section 30233 of the Coastal Act. In order to be consistent with Section 30233, a project that involves filling or dredging in a wetland must meet the three-prong test. The use must be one of the uses specifically allowed, it must be the least environmentally damaging alternative, and it must provide adequate mitigation to offset any impacts created by the project. The project does not meet the list of limited approvable projects for fill of wetlands under section 30233, nor is it the least environmentally damaging alternative. Lastly the project does not propose any mitigation for the impacts.

1) Allowable Use

The intent of the fencing project, whether for security, property demarcation, or use of the fenced area, are not included in the uses listed above, No. 1-7 of section 30233. Thus, the proposed project is not an allowable use. Therefore, the proposed development is inconsistent with Section 30233 of the Coastal Act with regard to uses allowed within wetlands.

2) Alternatives

No other alternatives have been proposed for the fence project. Possible alternatives include: the use of property markers to mark the property line, an alternative open post and string fence design that avoid stakes in the wetland area, or no project alternative as the site is already completely secured from public access. In each of these alternatives, there would be no fill of the wetlands, and therefore each alternative constitutes a less environmentally damaging alternative than the proposed retention of the unpermitted fence. Therefore, the proposed alternative is inconsistent with Section 30233's requirement that fill of wetlands must be the least environmentally damaging alternative.

3) Mitigation

Section 30233 of the Coastal Act requires that wetland projects include feasible mitigation measures to minimize adverse environmental effects. The proposed project does not include any mitigation for temporary or long-term impacts caused by the construction of and the presence of the unpermitted fence.

The fence posts have the potential to alter surface flows entering the wetland or adding sediment to the area. Because a wetland delineation was not preformed the exact border of the seasonal wetlands are unknown. The fence was installed directly through a seasonal wetland containing VSF. While no concrete footings were placed here, the fence posts driven 2 feet into the soil may have altered the impermeable layer of soil, affecting the drainage and the endemic species there. Continued fence maintenance activities would result in additional direct impacts in the future.

Because the project is not an allowed use under 30233, the project has not been conditioned to include mitigation. Therefore, as proposed the project is inconsistent with Section 30233 of the Coastal Act with regard to the provision of adequate mitigation.

Despite the fact that not all the seasonal wetlands are within the project area, all need to be protected under the Coastal Act section 30233. The project does not meet the list of limited approvable projects for fill of wetlands, nor is it the least environmentally damaging alternative, nor does the project propose any mitigation for the impacts. The project is inconsistent with Coastal Act section 30233 and must be denied.

Wetland Buffers

Section 30231 states that the quality of wetlands shall be maintained without *interference with surface water flow*. The biological report submitted by the applicant indicated that the installation of the fence around seasonal wetland 1 has the potential to impact surface flows into and around the wetland.

Section 30231 also states that wetlands shall be maintained with natural vegetation buffer areas. The Commission has typically required buffers of at least 100 feet for development adjacent to wetlands. The project did not provide appropriate buffers around the seasonal wetlands onsite. The fence has the potential to alter surface flows entering the wetland or adding sediment to the area. Also, because a wetland delineation was not preformed the exact border of the seasonal wetland are unknown. It is for these reasons that a minimum 100-foot buffer is strongly enforced with development occurring in and around wetlands.

The project is inconsistent with the policies of the City of Newport Beach's Coastal Land Use Plan. Policy 4.1.3-1 E provides for the protection of habitat integrity and connectivity. The fence bisecting the seasonal wetlands does not provide for the integrated and connected habitat. Policy 4.2.2-3 states that buffer of 100 feet around wetlands are needed to protect integrity. Policy 4.2.3-1 states the uses approvable land uses for fill of wetlands, similar to section 30233 of the Coastal Act. Property delineation, storage yard use, nor fencing are uses listed under this policy.

Not only is the project inconsistent with the policies of the Coastal Act, it is also inconsistent with the above policies of the Coastal Land Use Plan and must be denied.

G. ENVIRONMENTALLY SENSITIVE HABITAT AREAS

Coastal Act Section 30107.5 states:

> *"Environmentally sensitive area" means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

Coastal Act Section 30240 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.*
> *(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.*

The City of Newport Beach's certified Land Use Plan Section 4.1.1 includes the following policies regarding Environmentally Sensitive Habitat Areas (in relevant part):

> ***4.1.1-1.*** *Define any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments as an environmentally sensitive habitat area (ESHA). Using a site-specific survey and analysis by a qualified biologist, evaluate the following attributes when determining whether a habitat area meets the definition of an ESHA:*
> *A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.*
> *B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.*
> *C. The presence or potential presence of plant or animal species that are not listed under State or Federal law, but for which there is other compelling evidence of rarity, such as designation as a 1B or 2 species by the California Native Plant Society.*
> *…*
> *E. The degree of habitat integrity and connectivity to other natural areas. Attributes to be evaluated when determining a habitat's integrity/connectivity include the habitat's patch size and connectivity, dominance by invasive/non-native species, the level of disturbance, the proximity to development, and the level of fragmentation and isolation. Existing developed areas and existing fuel modification areas required by the City of Newport Beach Fire Department or the Orange County Fire Authority for existing, legal structures do not meet the definition of ESHA.*
>
> ***4.1.1-2.*** *Require a site specific survey and analysis prepared by a qualified biologist as a filing requirement for coastal development permit applications where development would occur within or adjacent to areas identified as potential ESHA…*
>
> ***4.1.1-4.*** *Protect ESHAs against any significant disruption of habitat values.*
>
> ***4.1.1-5.*** *Design land divisions, including lot line adjustments, to preclude new development within and minimize impacts to ESHA.*

4.1.1-6. *Require development in areas adjacent to environmentally sensitive habitat areas to be sited and designed to prevent impacts that would significantly degrade those areas, and to be compatible with the continuance of those habitat areas.*

4.1.1-7. *Limit uses within ESHAs to only those uses that are dependent on such resources.*

4.1.1-9. *Where feasible, confine development adjacent to ESHAs to low impact land uses, such as open space and passive recreation.*

4.1.1-10. *Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible. Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance.*

4.1.1-11. *Provide buffer areas around ESHAs and maintain with exclusively native vegetation to serve as transitional habitat and provide distance and physical barriers to human and domestic pet intrusion.*

4.1.1-17. *In conjunction with new development, require that all preserved ESHA, buffers, and all mitigation areas, onsite and offsite, be conserved/dedicated (e.g. open space direct dedication, offer to dedicate (OTD), conservation easement, deed restriction) in such a manner as to ensure that the land is conserved in perpetuity. A management plan and funding shall be required to ensure appropriate management of the habitat area in perpetuity.*

4.1.3-1. *Utilize the following mitigation measures to reduce the potential for adverse impacts to EHSA natural habitats from sources including, but not limited to, those identified in Table 4.1.1:*
A. Require removal of unauthorized structures… that impact wetlands or other sensitive habitat areas.
D. Strictly control encroachments into natural habitats to prevent impacts that would significantly degrade the habitat.
E. Limit encroachments into wetlands to development that is consistent with Section 30233 of the Coastal Act and Policy 4.2.3-1 of the Coastal Land Use Plan.

4.2.2-3. *Require buffer areas around wetlands of a sufficient size to ensure the biological integrity and preservation of the wetland that they are designed to protect. Wetlands shall have a minimum buffer width of 100 feet wherever possible. Smaller wetland buffers may be allowed only where it can be demonstrated that 1) a 100-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the wetland given the site-specific characteristics of the resource and of the type and intensity of disturbance.*

Environmentally Sensitive Habitat Areas (ESHA) are areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities. Coastal Act Section 30240 states that ESHA shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

The City's certified LUP also contains policies regarding protection of ESHA. These include specifications on land divisions and preventing fragmentation (4.1.1-5), limitations on development areas adjacent to ESHA to low impact land uses (Policy 4.1.1-9), and requirements for buffers around ESHA (Policies 4.1.1-10, 4.1.1-12, 4.1.1-17).

The survey report submitted by the applicant, prepared by David Bramlet on July 7, 2014, was the first such known report on the NMUSD site. However, several other biological surveys have been conducted on the neighboring site, Newport Banning Ranch, including BonTerra 2011, and Glen Lukos 2008, as well as more recent surveys conducted by Dudek. These surveys combined, offer information on the presence of vernal pools, sensitive species, and habitat in the project area.

Field surveys were conducted by D. Bramlet on April 22, May 2, May 21, and June, 6 2014. The lower than average rain levels of 2014 left no ponding onsite during the surveys. The vegetation onsite consist of non-native grasslands, with scattered patches of native scrub toward the interior of the fenced area. Native scrub species are typical of coastal sage scrub and include coyote brush (*Baxxharis pilularis*), deerweed (*Acmispon glaber*), encelia (*Encelia californica*), coastal goldenbush (*Isocoma menziesii*), and mulefat (*Baccharis salicifolia*).

Burrowing Owl

Two large earthen berms in this area likely provide habitat for the burrowing owls documented onsite. Commission staff confirmed the presence of burrowing owls in this location at a site visit on January 28, 2015. Western burrowing owls (*Athene cunicularia*) are a California Species of Special Concern that are rare in Orange County due to loss of suitable grasslands to development, especially near the coast. Western burrowing owls are often found in burrows created by ground squirrels, of which there are countless in the project location. Most Western burrowing owls nesting in California remain at their breeding grounds throughout the winter, sometimes staying in the same burrows and sometimes wandering within the region.[6]

Purple Needlegrass Native Grassland

The fence along the southwestern property line (area 5) is immediately adjacent to patches of purple needlegrass. The memo from Dr. Engle states that purple needlegrass grasslands have become increasingly rare in California. This presence of purple needlegrass was not explored through the biological report submitted by the applicant, but has been documented by known previous studies in the project area. Purple needlegrass (*Nassella pulchra*), as a native perennial grassland, is now exceedingly rare in California.

Annual Grasslands

The annual grassland on the NMUSD property, although dominated by non-native species, provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species of mammals, birds, and reptiles including burrowing owls and many species of raptors. The annual grasslands contain small, widely spread patches of native Coastal Sage Scrub (CSS).

Coastal Sage Scrub and California Gnatcatcher

Although the CSS on the property does not contain CSS signature species, such as California sunflower, California buckwheat, and California sagebrush, the vegetation is still within the area

[6] Henderson, 2013.

designated as critical habitat for California Gnatcatchers (CAGN) and provides them with valuable foraging area and offers connectivity with the CSS vegetation on the adjacent property. While a protocol level CAGN survey was not submitted by the applicant, known biological surveys of the project area have documented CAGN nests and foraging areas adjacent to the NMUSD property.

Vernal Pools
Wetlands that provide habitat to plants and wildlife only found in vernal pools are wetlands that may rise to the level of ESHA. Environmentally sensitive habitat area means any area 1) in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and 2) which could be easily disturbed or degraded by human activities and developments.

SW 1, SW 2, SW 3 and SW A are all vernal pools. SW 2, bisected by the unpermitted fence, contained versatile VSF. The complex of vernal pools (SW A) near the fence contains the federally-listed SDFS. SW 1 and SW 3 were not surveyed for SDFS however, photographs of SW 1 submitted show the pool supported ostracods (seed shrimp), a vernal pool indicator species, and pollywogs[7]. SW 3 contains wooly marbles, a vernal pool indicator species. These vernal pools contain species that are endemic to wetland habitats.

Wetlands that contain endemic aquatic invertebrate (such as fairy shrimp or ostracods) or endemic vegetation (such as wooly marbles) are defined as ESHA under section 30107.5, above because they provide habitat for rare and especially valuable plant and animal life and they are easily disturbed by human activity and development. SW 1, SW 2, SW 3 and SW A all support species endemic to vernal pools and are easily degraded by development. Therefore, SW 1, SW 2, SW 3 and SW A are considered ESHA under the Coastal Act Section 30240 and must be protected.

ESHA Determination
The Commission's staff ecologist, Dr. Jonna Engel, visited the site on January 28, 2015. In a memo dated February 26, 2015, Dr. Engel determined that areas of the site do rise to the level of environmentally sensitive habitat areas:

The annual grassland, degraded CSS, purple needlegrass grassland, California gnatcatchers and burrowing owls on and in the vicinity of the NMUSD are 1) rare primarily from habitat loss due to development, and/or 2) provide especially valuable ecosystem services for rare species (e.g. coastal California gnatcatcher, burrowing owl), and 3) are easily degraded and disturbed by human activities and development. Therefore, these areas meet the Coastal Act definition of ESHA and are protected under section 30240 of the Coastal Act.

The adjacent property, Newport Banning Ranch, provides documented habitat for CAGN in the form of sage scrub communities, grasslands, and riparian areas. The grassland on the NMUSD property is an extension of the grasslands found on the NBR property. Together, the connected communities of CSS provide foraging and habitat areas for CAGN. The CAGN, a federally listed species which must be protected under the Endangered Species Act, relies on the habitat provided by grasslands and CSS in the project site. Because both the patches of CSS and the non-native grasslands provide habitat for CAGN and can easily be disturbed by development, they are both are

[7] Welsh, 2013.

considered ESHA. While a CAGN protocol survey was not performed on the NMUSD property, any CAGN that may be found on the property in future surveys is also ESHA. The CLUP defines ESHA under policy 4.1.1-1 noting the ESHA definition extends to: *The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.* The recorded or potential presence of CAGN in the CSS and grassland habitat area defines the federally listed species as ESHA by the CLUP.

The purple needlegrass grasslands are identified as a rare (G3, S3.1) habitat type in need of priority monitoring and restoration by the California Department of Fish and Wildlife's (CDFW) Natural Diversity Database (CNDDB). The memo states: *The CNDDB considers grasslands with 10 percent or more cover by purple needlegrass to be significant, and recommends that these be protected as remnants of original California prairie. Large patches of purple needlegrass in the project area, in aggregate form purple needlegrass grasslands.* The purple needlegrass grasslands rise to the level of ESHA because they are rare, and they provide a rare habitat for burrowing animals and significant foraging habitat for numerous species, in this case, both CAGN and Burrowing Owl, and because they can easily be disturbed by development. The CLUP defines ESHA under policy 4.1.1-1: *The presence of natural communities that have been identified as rare by the California Department of Fish and Game (CDFW).* Purple needlegrass is identified as rare by CDFW, and therefore is defined as ESHA by the CLUP, as well as the Coastal Act.

The ESHA memo. states that Burrowing Owls are listed by the CNDDB as a rare species (S2), and a CDFW species of special concern, and as a bird of special concern by the United States Fish and Wildlife Service (USFWS), and as a sensitive species by the Bureau of Land management (BLM). Burrowing owls were thought to have been extirpated in all of Orange County (and most of coastal Southern California), except for a small breeding population in Seal Beach. The Burrowing owls on the site are rare, and therefore, rise to the level of ESHA. Additionally, the areas on the project site that provide habitat and foraging area for the Burrowing owls are also ESHA, because they provide habitat for a rare species and can easily be disturbed by development. The CLUP defines ESHA under policy 4.1.1-1: *The presence of natural communities that have been identified as rare by the California Department of Fish and Game.* Burrowing Owl is identified as a species of special concern by CDFW, and therefore is defined as ESHA by the CLUP, as well as the Coastal Act.

All of the documented ESHA on the site are easily disturbed or degraded by human activities and development. As discussed earlier, vernal pools depend greatly on undisturbed and consistent hydrology patterns to sustain their habitat. When development occurs that changes this hydrology, the vernal pools can be easily degraded by that development and potentially lost depending on the extent of the disturbance. Additionally, the annual grassland, degraded CSS and purple needlegrass grassland are easily disturbed by development because the process of removing or damaging those species through trampling or site preparation for development purposes affects their growing season and ability to grow into the stage of seed development and dispersal, which is imperative for species survival. In concert with the impacts on the process of mature plant species, the California gnatcatchers greatly depends on mature CSS and grassland species for foraging and nesting. When those plant species are impacted, the range of potential habitat for the California gnatcatcher diminishes which directly affects its survival. Finally, burrowing owls on and in the vicinity of the NMUSD are easily disturbed or degraded by development because the burrows can be easily trampled during development which may cause mortality of owlets that are seeking refuge in existing burrows.

Therefore, for the foregoing reasons, the NMUSD site contains valuable ESHA resources that can only be disturbed if the proposed use on the site is resource dependent and does not have a significant disruption of habitat values of ESHA. The proposed use is not resource dependent and even if it was, the proposed use would have a significant disruption on the habitat values of ESHA.

Significant Disruption on the Habitat Values of ESHA
Burrowing owls have been documented wintering on and immediately adjacent to a portion of the NMUSD property, in the area of the unpermitted fence. Burrowing owls require large expanses of open space and open grassland for foraging. On the NMUSD property there is approximately three acres of annual grassland in area 4, with more contiguous grasslands on the adjacent property (400+ acres of varied vegetation). The installation of the fence dividing the grassland likely disturbed both burrow habitat and foraging habitat.

Construction activities associated with the fence project trampled the ground and adjacent vegetation. The installation of the fence resulted in trampling the ground, which has negative impacts on the underground burrows. Impacts have also been caused by the presence of fence posts 2 feet deep into the soil. Additionally, the fence installed over the earthen berm habitat area likely disturbed burrow habitat. These posts remove area for burrows and render any current burrows under or near the fence posts unusable.

The presence of purple needlegrass was not explored through the biological report submitted by the applicant, but has been documented by known previous studies in the project area. Although native vegetation removal wasn't reported in the applicant's biological analysis, the construction activities associated with installing the fence trampled the ground and vegetation, and compacted and disturbed approximately 0.47 acres of soil and grasslands. Whether the impact was to non-native grassland or native grassland (both support foraging of CAGN), the installation of the fence disturbed approximately 0.47 acres of ESHA grasslands. Lastly, the location of the fence within the grasslands disrupts the seed bank and hinders the ability of the grasses to grow and spread as they normally would, exacerbating the habitat fragmentation.

The installation of the fence did not directly impact CSS, however it did fragment the foraging habitat that the CSS and grasslands provides for both CAGN and Burrowing owl. CAGN specifically prefers to nest and feed in CSS on mesas and gentle slopes. CAGN on the adjacent property are known to occupy (breed, nest, and forage) year-round in various locations of CSS and have been observed within 200 feet of the NMUSD property. The fence also prevents the natural passage and movement patterns of native animals (as evidenced by digging under the fence), acting as an artificial barrier in an otherwise open expanse of hundreds of acres.

SW 2, bisected by the unpermitted fence, contained VFS. SW A complex near the fence all contain the federally-listed SDFS. SW 1 likely supports ostracods (seed shrimp), and possibly other invertebrates. SW 3 supports wooly marbles, a rare vernal pool species. The installation of the fence directly through SW 2 did contribute to fill in the wetland, which removed a portion of the wetland habitat area for VSF and vegetation. While no concrete footings were placed here, the fence posts driven 2 feet into the soil may have altered the impermeable layer of soil, and altering the duration of water held in the pool, and impacting the species. Additionally, the wildlife digging around and under the fence near SW 2 likely altered the shape of the wetland and introduced loose soil that acts

as fill, into the wetland. The loose soil can decrease the depth of the pool and increase the turbidity, having an impact on the invertebrates and vegetation within the pool.

While the fence was routed around SW 1, it did not provide the Coastal Commission's recommended minimum 100-foot buffer. The fence has the potential to alter surface flows entering the wetland or adding sediment to the area. Also, because a wetland delineation was not preformed the exact border of the seasonal wetland are unknown. SW 1 was not subject to a protocol Fairy Shrimp survey, however it has been shown to contain ostacods.

The memo concludes: *The installation of the fence, as documented above has impacted, or potentially impacted, various natural resources identified as ESHA including gnatcatcher and burrowing owl habitat, including vernal pools/seasonal wetlands, critical habitat for two federally listed species (California gnatcatchers and San Diego fairy shrimp), and habitat regularly occupied by wintering Burrowing Owls. These areas of ESHA require buffers where development is not permitted.*

Potential Impacts from Development Adjacent to ESHA

Coastal Act Section 30240 requires that development in areas adjacent to ESHA shall be sited and designed to prevent impacts which would significantly degrade ESHA, and shall be compatible with the continuance of ESHA. The proposed project would reduce the ability of the ESHA onsite and in surrounding areas to serve as habitat, through both direct and indirect, as well as temporary and long-terms impacts, as described above. As stated earlier, the purpose of the fencing is unclear. The unpermitted fence may delineate a site intended to be used for equipment storage. The use of the areas as equipment storage would not allow for appropriate buffers and any equipment activity or other associated development immediately next to the fence line could cause high-noise levels that would negatively impact the burrowing owl and CAGN habitat.

The project may result in a significant change in the type of use and the level of human activity on the site, which have the potential to cause significant impacts to ESHA. Development that may occur on the newly fenced site could result in grading, removal of vegetation, the placement of gravel on the land, etc. The occupation of the site by mechanical equipment may create other impacts caused by maintenance vehicles, etc. Activities on the site that result in additional noise or disturbance impacts would negatively impact the sensitive avian species, habitat areas, the water quality of the wetlands, and the presence of rare native vegetation.

Any equipment stored near the fence line would not provide an appropriate, minimum 100-foot buffer for the protection of the wetlands and equipment maintenance activities could have detrimental impacts on the water quality of the seasonal pools. Lastly, the regular fence maintenance would further compact the soil and impact the sensitive vegetation, habitat areas, and seasonal wetlands.

Buffers

To ensure compliance with Section 30240 of the Coastal Act, development (aside from resource dependent uses) must be located outside of all environmentally sensitive habitat areas and must not cause significant disruption of the habitat values within those areas. Further, development adjacent to an ESHA must be sited to prevent impacts to the ESHA that would significantly degrade those areas, in part through the provision of a setback or buffer between the ESHA and the development.

A buffer, in the context of the Coastal Commission, is a barrier, "safe zone", or bordering strip of natural habitat or land between ESHA and development or human disturbance. Buffers and development setbacks protect biological productivity by providing the horizontal spatial separation necessary to preserve habitat values and transitional terrestrial habitat area. Spatial separation minimizes the adverse effects of human use and urban development on wildlife habitat value through physical partitioning. Buffers are important for preserving the integrity and natural function of individual species and habitats. The purpose of a buffer is to create a zone where there will be little or no human activity. The purpose of a buffer is to "cushion" species and habitats from disturbance and allow native species to go about their "business as usual." Buffers may also provide ecological functions essential for species in the ESHA. The width buffers vary depending on the type of ESHA and on the type of development, topography of the site, and the sensitivity of the resources to the particular kind of disturbance. The Commission has typically imposed buffers of 100 feet for ESHA, with reduced buffers under certain limited circumstances.

The applicant proposes to retain a 6 foot high fence in, around, and in some cases, directly through ESHA. The majority of the unpermitted fence has direct impacts on ESHA and therefore, does not provide any buffers for the sensitive resources. The current location of the fence is inconsistent with Coastal Act Section 30240, which requires development adjacent to ESHA to be consistent with the continuance of ESHA areas. A minimum of 100-foot buffers around the designated ESHA on the site is strongly recommended.

The unpermitted fence had direct impacts on wetlands, including fill, and therefore did not provide appropriate buffers. The current location of the fence is inconsistent with Coastal Act Section 30233, requiring the protection of wetlands. A minimum of 100-foot buffers around the designated wetlands on the site is strongly recommended.

The information furnishing data regarding the purple needlegrass patches was done some years ago, and it is possible that patches of native grass could be much more extensive today. Because of the lack of detailed vegetation mapping on the NMUSD property, it is also probable that the areas designated as annual grasslands also contain patches of purple needlegrass. The retention of the fence in the proposed location disrupts the seed bank and inhibits the spread of grasslands. A buffer zone would ensure that neither the fence nor the development occurring near the fence would hinder the ability of the grasslands to grow and spread. Temporary impacts resulting from the compaction of the soil have occurred, and continued fence maintenance activities may result in direct impacts to the grassland in the future. Due to these factors, a 100-foot minimum buffer is recommended for Purple needlegrass patches.

The CLUP contains policies for relevant for buffering ESHA. Policy 4.1.1-10 and 4.1.1-11 both require buffers around areas of ESHA of sufficient size. Policy 4.2.2-3 requires minimum 100 foot buffers around wetlands to preserve and protect the wetlands. The project is inconsistent with these CLUP policies because it does not provide buffers between the ESHA and the development.

Any impact to the recommended minimum 100-foot buffers would result in the degradation of the ability of the buffers to mitigate impacts to ESHA. The Commission has typically required buffers to be protected in perpetuity to prevent future development from impacting the ability of the buffer

to protect adjacent ESHA. Without adequate protection of buffers, future development may impact the ability of the buffer to protect ESHA from impacts associated with adjacent development. Such impacts would be inconsistent with Coastal Act Section 30240 regarding protection of environmentally sensitive habitat areas.

Conclusion

The applicants did not propose mitigation for any of the documented impacts due to the unpermitted development and have not changed the proposal to reflect the removal of the unpermitted development.

Not only is the project inconsistent with section 30240, it is also inconsistent with several CLUP policies. The project is inconsistent with policy 4.1.1-4 protects ESHA against significant disruption of habitats. The project is inconsistent with policy 4.1.1-5 in which land divisions should minimize impacts to ESHA. Lastly, the project is inconsistent with policy 4.1.3-1 (A, D and E) which require the removal of unauthorized structures in wetlands and ESHA, controls encroachments into habitat areas and limits encroachments into wetlands.

Dr. Engel determined that the burrowing owl and CAGN habitat, the vernal pools, and the CSS and grasslands all rise to the level of ESHA. The site must be viewed as though the unpermitted development did not yet occur. (See, e.g., *LT-WR v. California Coastal Commission* (2007) Cal.App.4th 770, 796-797.) The proposed project would have significant impacts on ESHA for the construction of a fence, a non-resource dependent use, with impacts to burrowing owl and CAGN habitat, the vernal pools, and the CSS and grasslands. The proposed retention of the unpermitted fence cannot be approved under Coastal Act Section 30240 and must be denied.

H. ALTERNATIVES TO PROPOSED PROJECT

Alternatives must be considered to determine if there are any different projects that would lessen or avoid significant environmental impacts to coastal resources, in this case ESHA and wetlands. An alternative is a description of another activity or project that responds to the major environmental impacts of the project identified through the Commission's analysis. In this case, as discussed above, the unpermitted fence has resulted in significant disruption of habitat values within ESHA and wetlands and is not a use that is dependent on the resource. Therefore, the proposed project is inconsistent with Section 30240 of the Coastal Act and the applicable ESHA protection policies of the LUP, used by the Commission as guidance. The project is also inconsistent with the Wetland protection policies in Section 30233 of the Coastal Act. Each alternative below represents an alternative that is significantly less environmentally damaging that the unpermitted fence currently onsite.

Property Markers

As documented by **Exhibit 4**, property stakes and flags are already present onsite clearly marking the property lines. The fence, as a way to demarcate the property line, is not the least environmentally damaging alternative. It appears that the property markers had little to no impact on the sensitive resources of the site (with the exception of 1 stake located in SW2, which could easily be relocated either slightly east or slightly west and remain on the property line).

Alternative Fence Design
An alternative fence design that had openings large enough for coyotes and other such wildlife may be a suitable alternative, depending on the specific installation methods. The fence could be a post and string-type fence. The fence posts could be secured in the ground without the use of concrete footings. The fence and posts would need to be aligned in such a way as to avoid impacting wetlands, sensitive vegetation, burrows and the other sensitive resources onsite. In fact, and open-type alternative fencing could be used around the buffers of ESHA (similar to the type of fencing used around restoration sites) to protect the area from further disturbances.

No Project Alternative
If the intent of the fence was to delineate additional property to be used for equipment storage, the development of the change in use to a storage yard and the associated storage activities, could not be approved under Coastal Act Section 30240, nor under 30233. In this case, the fence is superfluous and there is inherently no need for a fence in this location. The site is secured by the fencing around the adjacent properties, which prevents public access to both areas 4 and 5. Because of this, removal of the fence would not have any detrimental effects on the security of the site.

I. LOCAL COASTAL PROGRAM (LCP)

Section 30604(a) of the Coastal Act provides that the Commission shall issue a coastal development permit only if the project will not prejudice the ability of the local government having jurisdiction to prepare a Local Coastal Program that conforms with the Chapter 3 policies of the Coastal Act.

The City of Newport Beach's Coastal Land Use Plan (LUP) was certified on May 19, 1982 and has been updated since then. The LUP did not designate a Land Use for the subject site, but instead listed it as an Area of 'Deferred Certification.' Since the City only has an LUP, the policies of the LUP are used only as guidance. The following Newport Beach LUP policies: 4.1.1-1 through 4.2.2-3, and the other resource protection policies of the LUP, relate to development at the subject site.

The policies of the LUP are applicable to all properties, no matter the LUP designation. Applicable ESHA protection policies in the LUP apply to this site. Because the City of Newport Beach does not have a certified Local Coastal Program (LCP), but is currently in the process of developing it, Commission action has the potential to prejudice the LCP.

The preceding sections provide findings that the proposed project will not be in conformity with the provisions of Chapter 3. The proposed development will create adverse impacts and is found to be inconsistent with the applicable policies contained in Chapter 3. There are equivalent policies in the City's certified land use plan with which the proposed development would be inconsistent. Therefore, the Commission finds that approval of the proposed development would prejudice the City of Newport Beach's ability to prepare a Local Coastal Program for this area consistent with the policies of Chapter 3 of the Coastal Act, as required by Section 30604(a).

J. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of coastal development permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

In this case, the City of Newport Beach Planning Department is the lead agency and the Commission is a responsible agency for the purposes of CEQA. The City of Newport Beach has not reviewed the project, to date.

As proposed, the project does not represent the least environmentally damaging alternative and cannot be approved and is inconsistent with Section 21080.5(d)(2)(A) of CEQA, and therefore is inconsistent with Section 13096 of Title 14 of the California Code of Regulations. The project must be denied. The property line markers existing on the site constitute the least environmentally damaging alternative if the purpose of the fence is strictly property demarcation. Alternative fence designs with no impacts to wetlands, vegetation and wildlife may be explored as the least environmentally damaging alternative in a future permit application. The site is secured by the fencing around the adjacent property which prevents public access to the site. Because of this, the security of the site is not in jeopardy, and the "no project" alternative would constitute the least environmentally damaging alternative for securing the site. Additionally, because Section 30240 of the Coastal Act does not recognize the proposed fence as an allowed-use in environmentally sensitive habitat areas, there are no mitigation measures available. Therefore, given the foregoing, there are feasible alternatives or mitigation measures available that would substantially lessen or avoid significant adverse impacts the proposed development would have on the environment and, for these reasons, the project is not consistent with CEQA and must be denied.

Appendix A. Substantive File Documents

City of Newport Beach certified Coastal Land Use Plan.

Bomkamp, T (Glenn Lukos Associates) and J. H. Davis IV (Dudek). January 29, 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 addressed to Christine Medak, U.S. Fish and Wildlife Service.

Bramlet, D. July 7, 2014. Habitat Assessment for the Fencing at 975 W. 16th Street, Newport Beach, California. Prepared For: Newport-Mesa Unified School District.

Dudek. October 24, 2013. Review and Comparison of California Gnatcatcher Surveys Results for the Newport Banning Ranch Property, Orange County, California. Memorandum addressed to Newport Banning Ranch, LLC.

Glenn Lukos Associates. August 2008. The Newport Banning Ranch Biological Technical Report. Report prepared for Mike Mohler, Newport Banning Ranch, LLC.

Hamilton, Robb. February 23, 2015. Letter report: Application No. 5-13-1100; NMUSD Unpermitted Fence, 975 West 16th Street, Newport Beach, California. Submitted To: Dr. Jonna Engel, California Coastal Commission.

Henderson, Lisa Anne, Western Burrowing Owl Predation in an Urban Setting in California: Do California Ground Squirrel Calls Reduce Risk? 2013. Paper 4387.

J.H. IV (Dudek). February 2013. Grassland Assessment and Vegetation Mapping Survey Report for the Newport Banning Ranch. Prepared for Newport Banning Ranch LLC.

Memorandum. ESHA Biological Resources in Vicinity of Newport-Mesa Unified School District Unpermitted Fence. February 25, 2015.

Ortega, B.A. (Dudek). March 7, 2014. 2014 Focused Non-Breeding Season Burrowing Owl Surveys, Newport Banning Ranch Project, Orange County, California. Report addressed to Michael Mohler, Newport Banning Ranch, LLC.

United States Environmental Protection Agency, "Vernal Pools." 1995. *America's Wetlands: Our Vital Link Between Land and Water***.** EPA843-K-95-001.

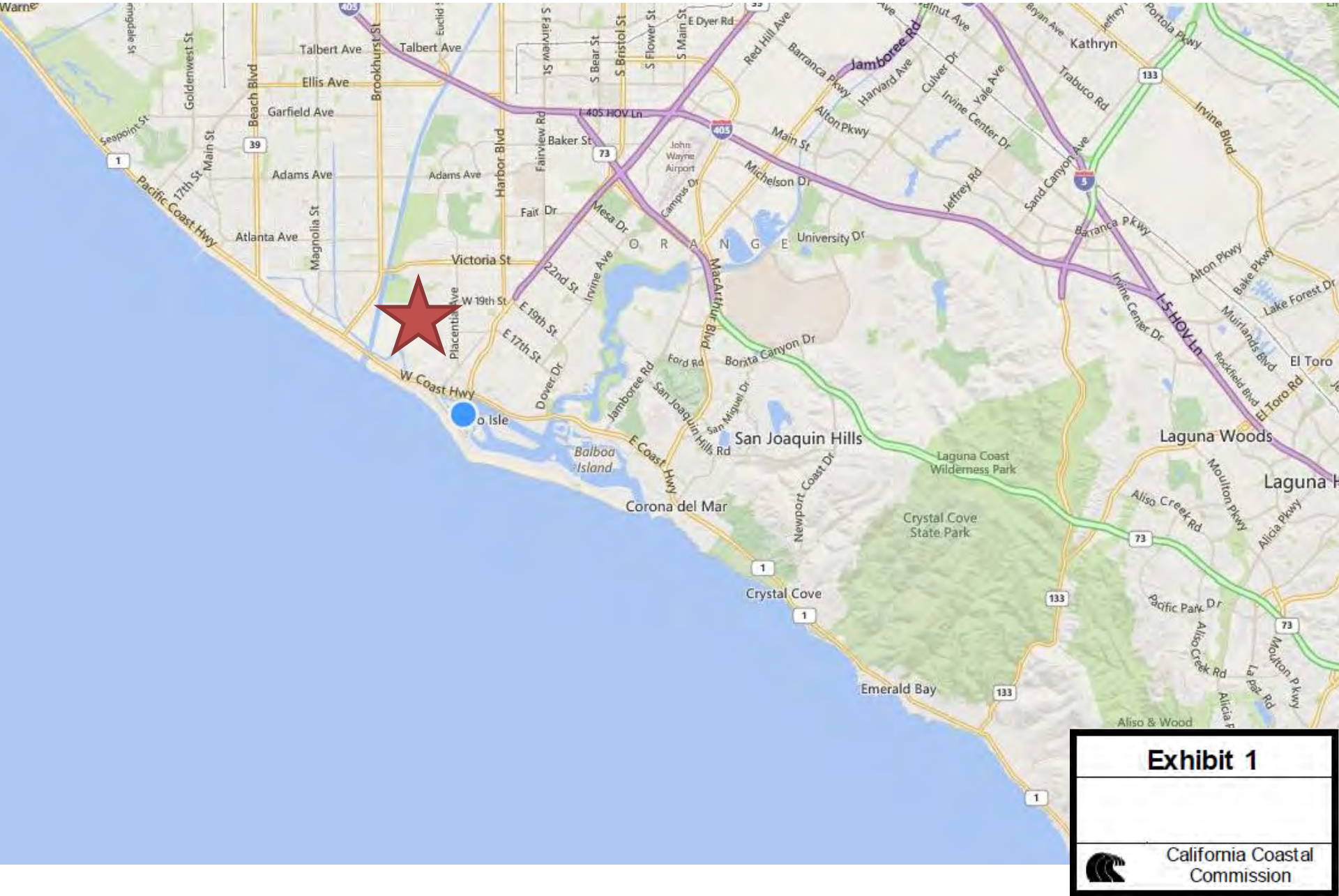
United States Fish and Wildlife Service.Gnatcatcher Critical Habitat designation, 2007.

United States Fish and Wildlife Service. San Diego Fairy Shrimp Critical Habitat designation, 2007.

United States Fish and Wildlife Service. National Wetlands Inventory. 2014.

Welsh, Terry. Vernal pools, wetlands, Fairy Shrimp and the unpermitted Newport Mesa Unified School District Fence. 2013. Submitted To: Dr. Jonna Engel, California Coastal Commission.

Project Site



NMUSD Fence

- Existing Fence
- New Fence
- Seasonal Wetlands
- Wetland 100ft. Buffer
- Purple Needle Grass Grassland
- PNGG 100 ft. Buffer
- Disturbed Mulefat Thicket

Documented Burrowing Owls

- 2008 GLA
- 2009 BonTerra
- 2009 GLA
- 2010 GLA

COASTAL

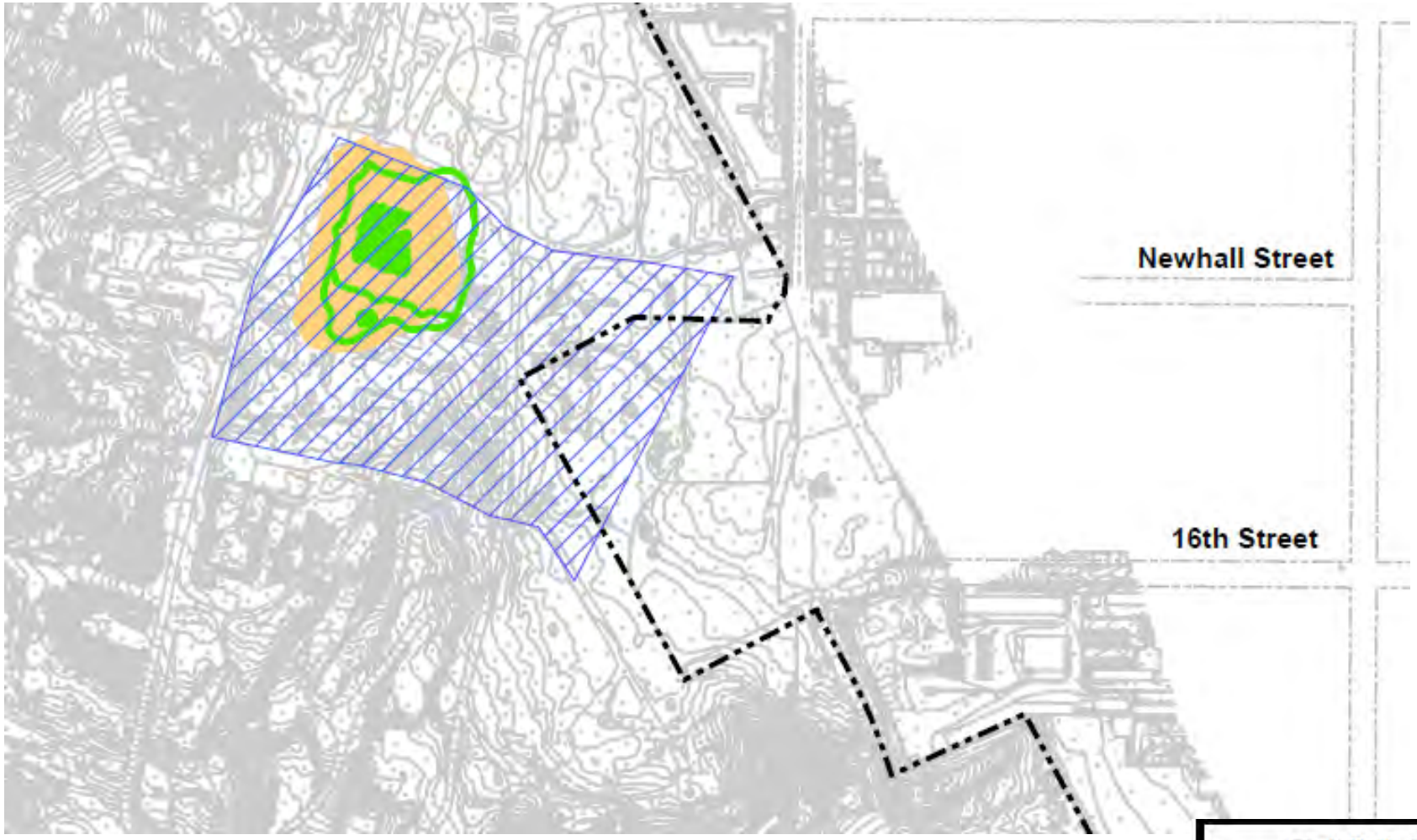
For Illustrative Purposes Only.
Locations Approximate.
Sources: ESRI, CCC, Bonterra, GLA, Dudek.

N

0 50 100 200 Feet

Exhibit 2

SDFS Critical Habitat

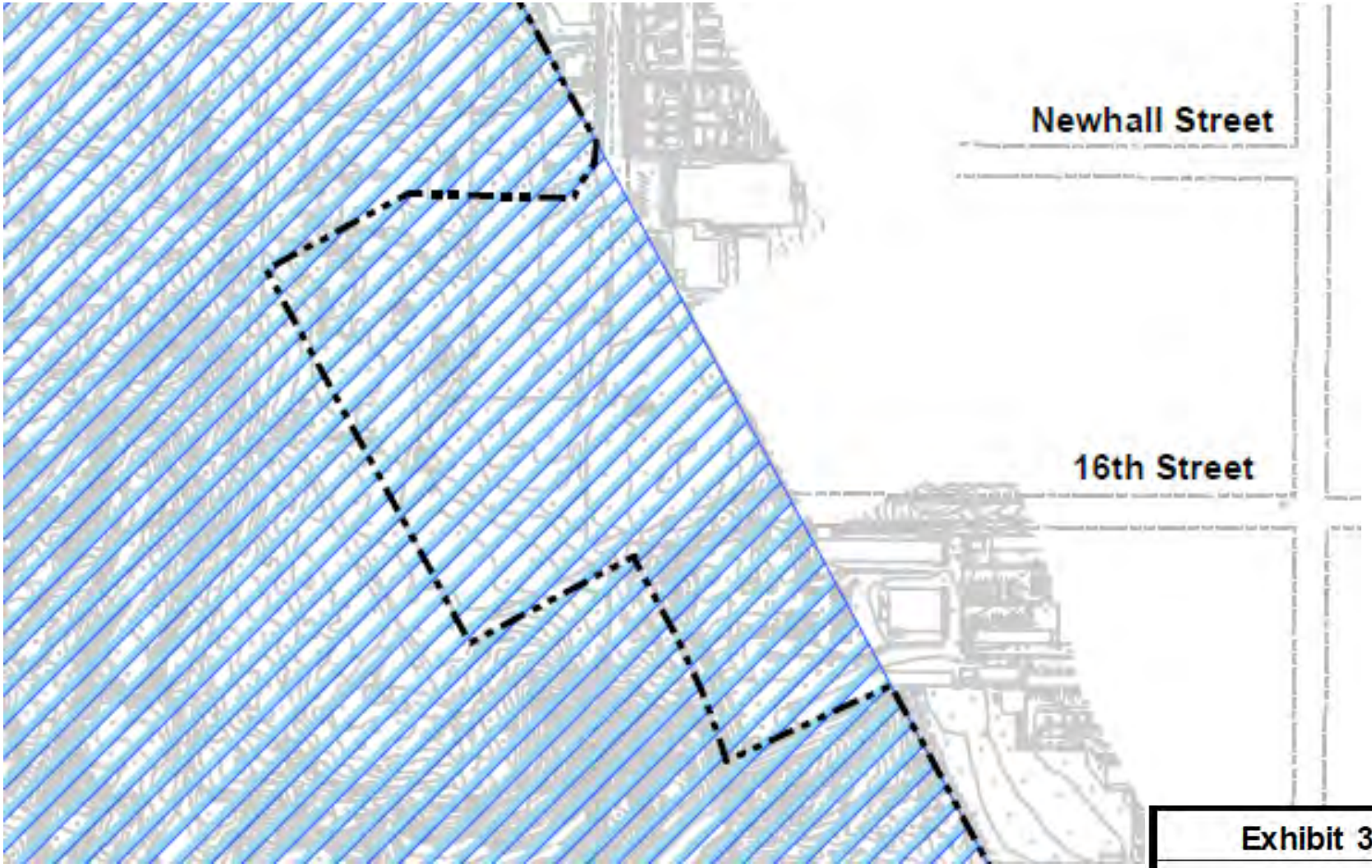


USFWS San Diego Fairy Shrimp
Critical Habitat

Exhibit 3

California Coastal Commission

CAGN Critical Habitat



USFWS CAGN Critical Habitat

Exhibit 3

California Coastal Commission

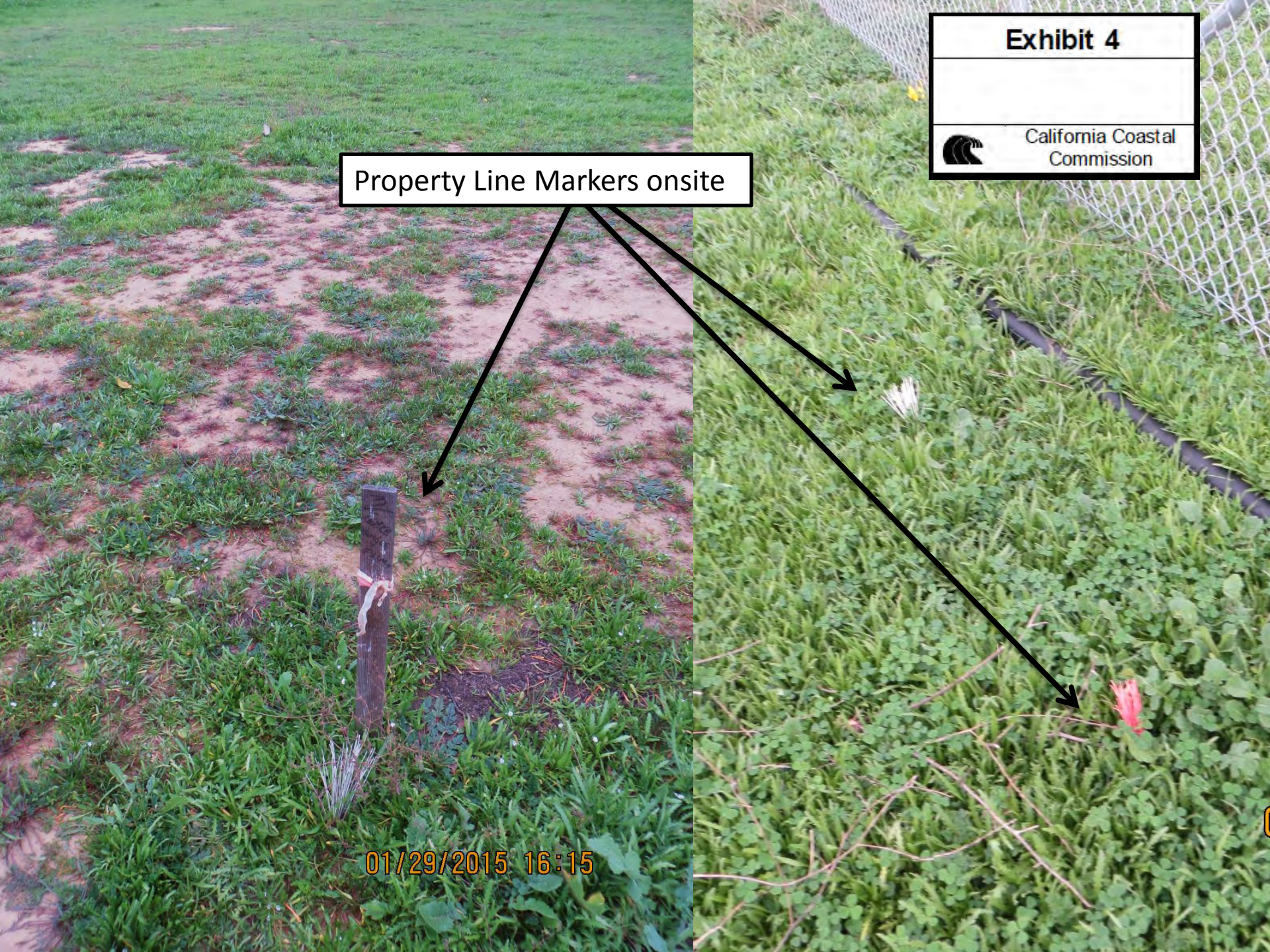


Exhibit 4
California Coastal Commission
Property Line Markers onsite
01/29/2015 16:15


Newly fenced site, not graded or compacted
01/29/2015 16:35


Exhibit 4
California Coastal Commission
Storage yard: graded and compacted


Exhibit 4
California Coastal Commission
Concrete footings
01/29/2015 16:10

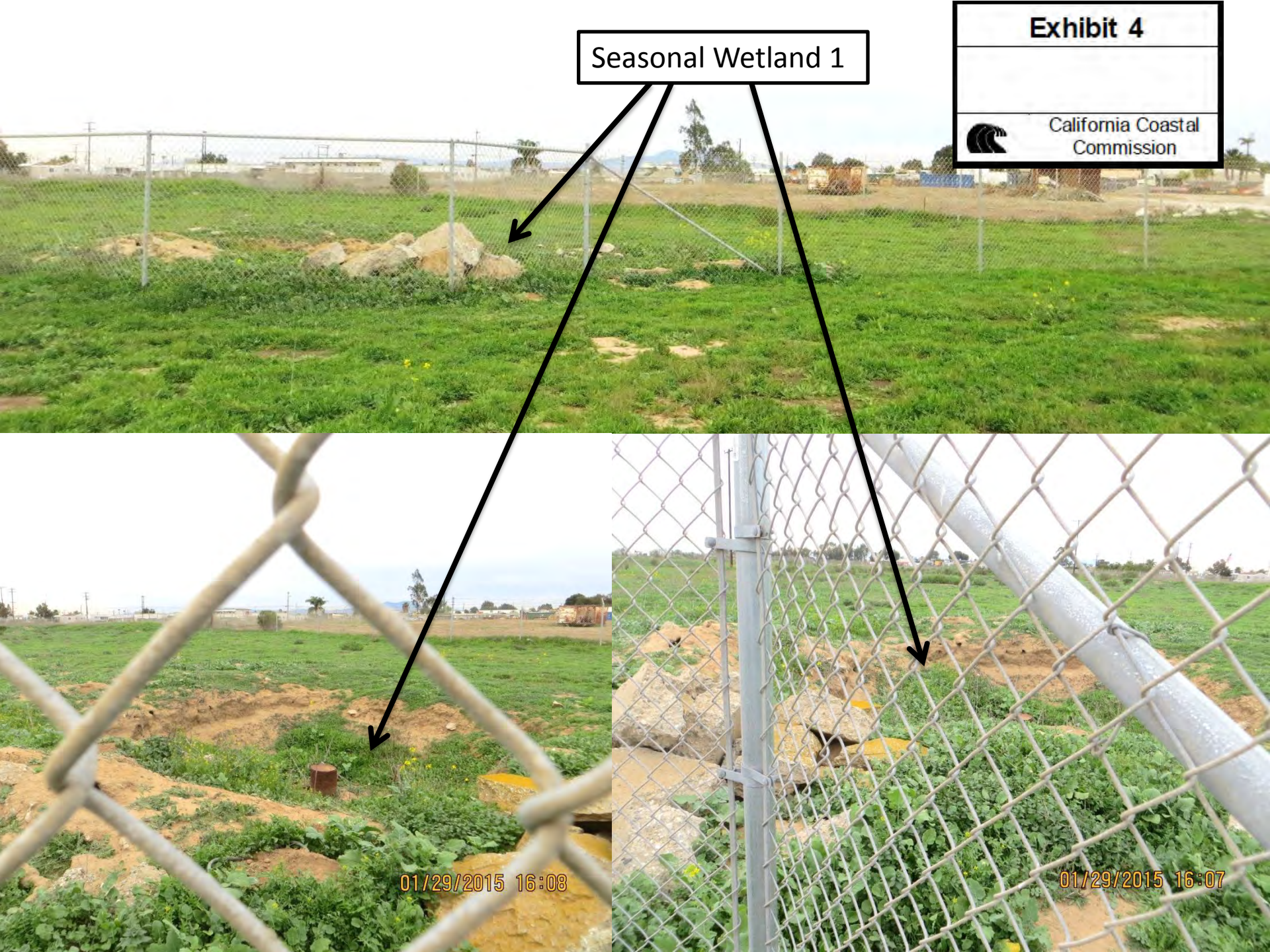

Seasonal Wetland 1
Exhibit 4
California Coastal Commission
01/29/2015 16:08
01/29/2015 16:07


Exhibit 4
California Coastal Commission
01/29/2015 16:15
0.22 acre site

Exhibit 4

California Coastal Commission

Adjacent burrowing owl territory
(on NBR property)

Exhibit 4

California Coastal Commission

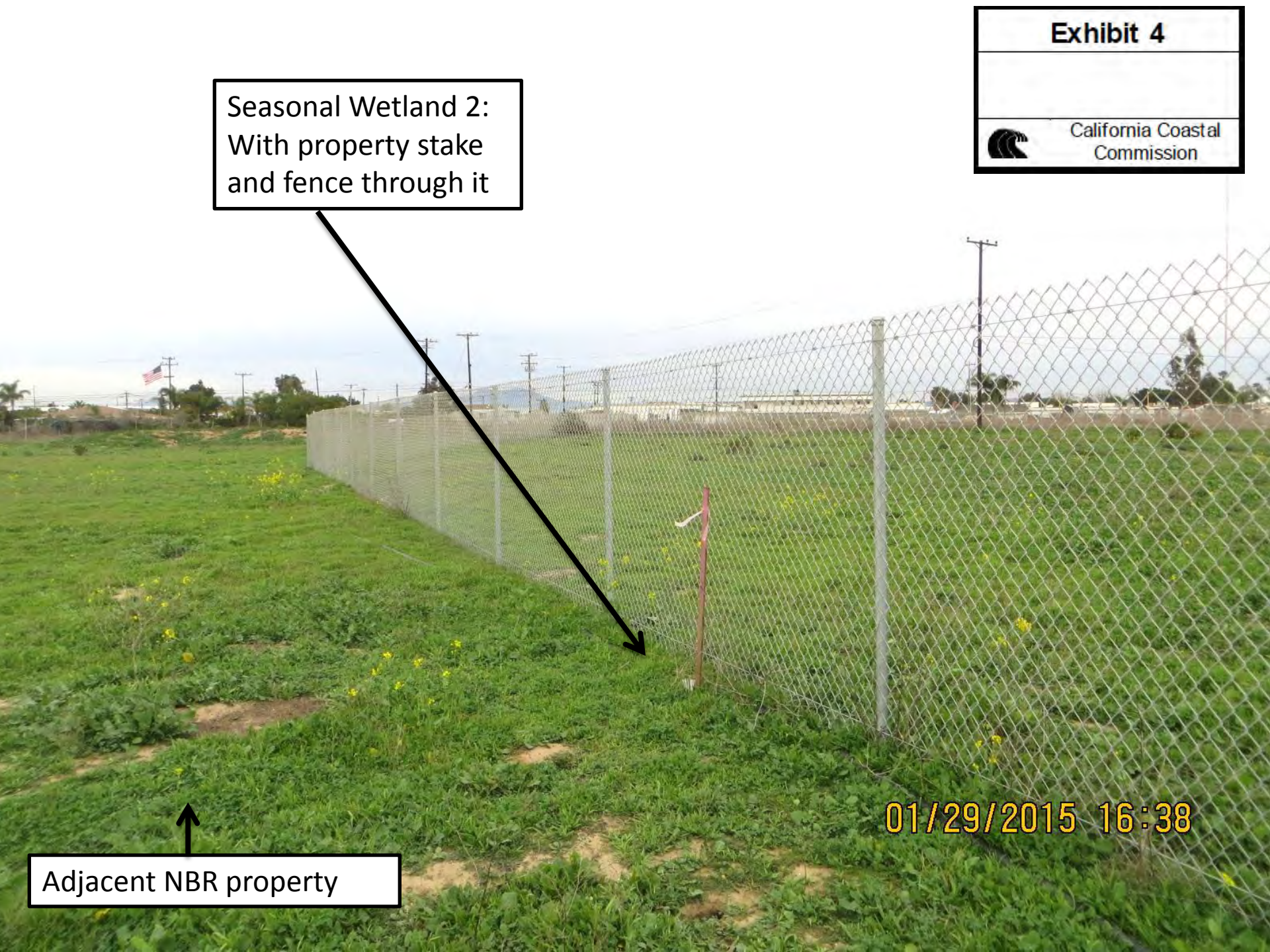


Exhibit 4
California Coastal Commission
Seasonal Wetland 2: With property stake and fence through it
01/29/2015 16:38
Adjacent NBR property

Exhibit 4

California Coastal Commission

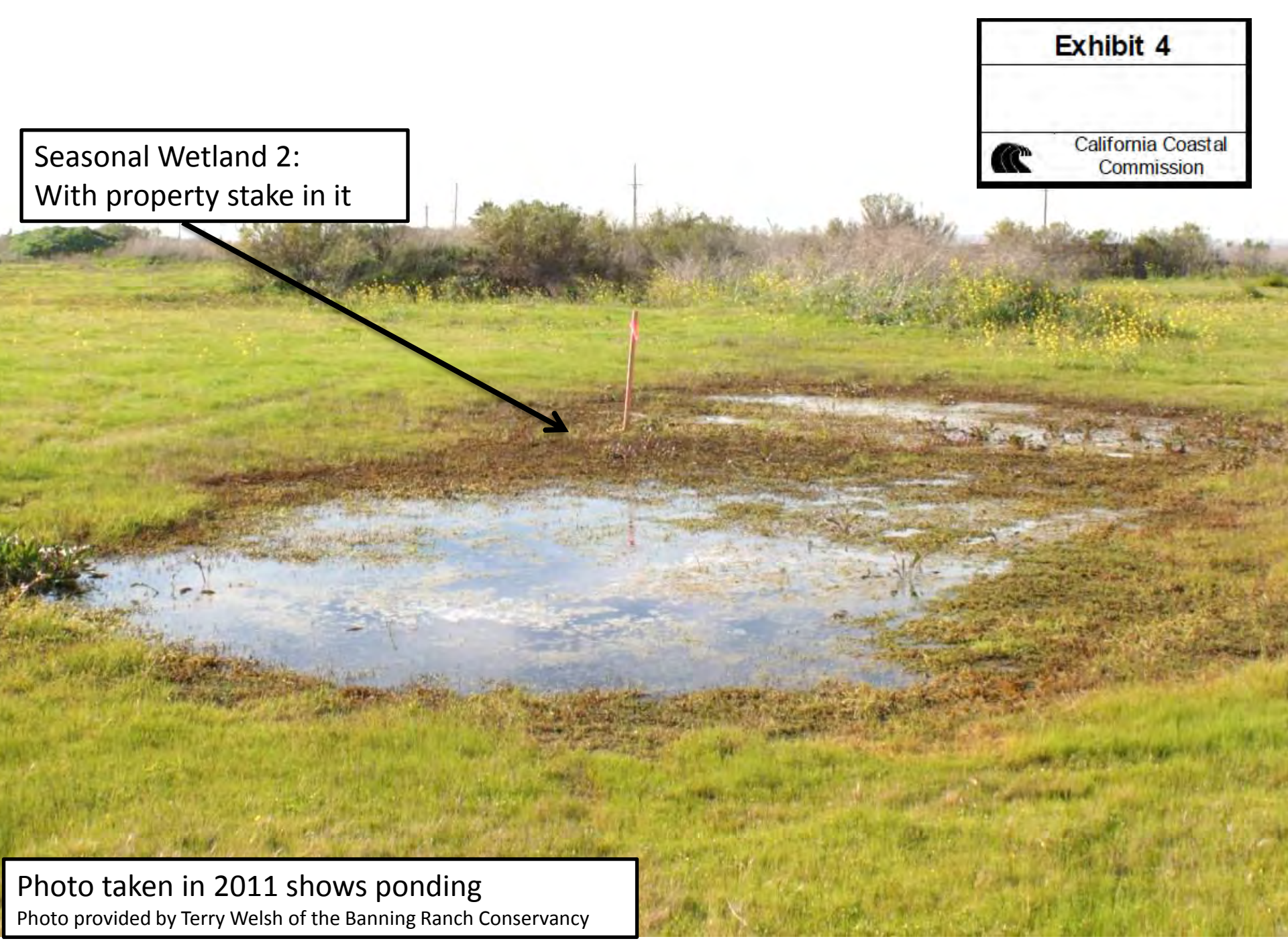


Photo taken in 2011 shows ponding

Photo provided by Terry Welsh of the Banning Ranch Conservancy

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CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

M E M O R A N D U M

FROM: Jonna D. Engel, Ph.D., Ecologist

TO: Amber Dobson, Coastal Analyst

SUBJECT: Biological Resources in Vicinity of Newport-Mesa Unified School District Unpermitted Fence

DATE: February 26, 2015

Documents Reviewed:

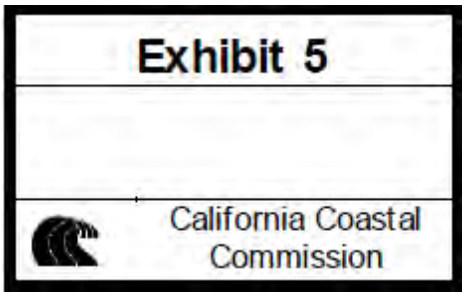
Hamilton, Robb. February 23, 2015. Letter report: Application No. 5-13-1100; NMUSD Unpermitted Fence, 975 West 16th Street, Newport Beach, California. Submitted To: Dr. Jonna Engel, California Coastal Commission.

Bramlet, D. July 7, 2014. Habitat Assessment for the Fencing at 975 W. 16th Street, Newport Beach, California. Prepared For: Newport-Mesa Unified School District.

Ortega, B.A. (Dudek). March 7, 2014. 2014 Focused Non-Breeding Season Burrowing Owl Surveys, Newport Banning Ranch Project, Orange County, California. Report addressed to Michael Mohler, Newport Banning Ranch, LLC.

Welsh, Terry (Banning Ranch Conservancy). November 30, 2013. Vernal Pools, Wetlands, Fairy Shrimp and the Unpermitted Newport Mesa Unified School District Fence.

Dudek. October 24, 2013. Review and Comparison of California Gnatcatcher Surveys Results for the Newport Banning Ranch Property, Orange County, California. Memorandum addressed to Newport Banning Ranch, LLC.



Vergne, P.J. (Dudek). August 26, 2013. 90-Day Protocol Survey Report for the Federally-Listed Pacific Pocket Mouse on the Newport Banning Ranch, City of Newport Beach and Unincorporated Orange County, Orange County, California. Permit Number *TE-068072-3*. Report addressed to Ms. Susie Tharratt, Recovery Permit Coordinator, Carlsbad Fish and Wildlife Office.

Ortega, B.A. (Dudek). May 31, 2013. Focused California Gnatcatcher Survey, Newport Banning Ranch Project, Orange County, California. Report addressed to U.S. Fish and Wildlife Service; Attn: Recovery Permit Coordinator.

Davis, J.H. IV (Dudek). May 2013. Jurisdictional Determination of Seasonal Features for the Newport Banning Ranch. Prepared for Newport Banning Ranch, LLC.

Davis, J.H. IV (Dudek). February 2013. Grassland Assessment and Vegetation Mapping Survey Report for the Newport Banning Ranch. Prepared for Newport Banning Ranch LLC.

Bomkamp, T (Glenn Lukos Associates) and J. H. Davis IV (Dudek). January 29, 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 addressed to Christine Medak, U.S. Fish and Wildlife Service.

Davis, J.H. IV (Dudek). January 2013. Raptor Survey Report for the Newport Banning Ranch. Prepared for Newport Banning Ranch LLC.

Bomkamp, T. (Glenn Lukos Associates). June 14, 2011. Clarification Regarding CAGN Mapping from 2002 Protocol Surveys Conducted by Glenn Lukos Associates for West Newport Oil. Memorandum to Christine Medak, USFWS.

BonTerra Consulting. June 25, 2009. Results of Coastal California Gnatcatcher Surveys for Newport Banning Ranch Project Site, Orange County, California. Letter addressed to Ms. Sandy Marquez, USFWS.

Glenn Lukos Associates. August 2008. The Newport Banning Ranch Biological Technical Report. Report prepared for Mike Mohler, Newport Banning Ranch, LLC.

Glenn Lukos Associates. July 19, 2007. Submittal of 45-Day Report for coastal California gnatcatcher Surveys for the 412.5 Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California. Survey report from Glenn Lukos Associates Biologist Ingrid Chlup to Sandra Marquez, USFWS.

Glenn Lukos Associates. July 25, 2006. Submittal of 45-Day Report for Coastal California Gnatcatcher Presence/Absence Surveys for the 412.5 Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California. Survey report from Glenn Lukos Associates Biologist Jeff Ahrens to Daniel Marquez, USFWS.

Glenn Lukos Associates. October 14, 2002. Protocol Surveys for the Coastal California Gnatcatcher; West Newport Oil Property, Orange County California. Survey report from Glenn Lukos Associates Biologist Tony Bompkamp to Leonard Anderson, West Newport Oil Property.

Gnatcatcher survey map. 2000. Unknown source (we believe the source is PCR Services).

PCR Services. 1998. Gnatcatcher survey map.

PCR Services. 1997. Gnatcatcher survey map.

LSA. 1996. Spring 1996 California Gnatcatcher Survey. Survey report from LSA Biologist Richard Erickson to Leonard Anderson.

LSA. 1995. Spring 1995 California Gnatcatcher Survey. Survey report from LSA Biologist Richard Erickson to Leonard Anderson.

LSA. 1994. Results of 1994 Gnatcatcher and Wren Surveys. Survey report from LSA Biologists Robb Hamilton and Richard Erickson to Leonard Anderson, West Newport Oil Company.

I have been asked to examine the biological resources on and in the vicinity of an unpermitted, 2,046 foot long, six foot high, chain link fence constructed on mostly vacant property owned by the Newport-Mesa Unified School District (NMUSD), to determine whether the area supports environmentally sensitive habitat (ESHA). To do so I visited the site on January 29, 2015; reviewed a series of biological studies conducted for the adjacent Newport Banning Ranch (NBR), David Bramlet's biological report for NMUSD, and Robb Hamilton's letter report (see 'documents reviewed' above); reviewed historical and current aerial photographs; and consulted with agency biologists. The NMUSD property is immediately adjacent to Newport Banning Ranch, a 400 acre property that is the largest remaining privately owned open space along the coast in Orange County.

The portion of the NMUSD property with the unpermitted fence ('fence') is characterized by disturbed non-native annual grassland interspersed with patches of degraded coastal sage scrub (CSS). The fence is located in an area that supports seasonal wetlands and vernal pools and crosses right through pool SW2 (identified as pool "K" by Dudek)[1] and alongside pool SW1 (Figure 1). A portion of the fence is within the area identified by the United States Fish and Wildlife Service (USFWS) as critical habitat subunit 1C for San Diego fairy shrimp (*Branchinecta sandiegonensis*) (Figure 2) and within the area identified as the watershed for several vernal pools including three pools that are known to support San Diego fairy shrimp (Dudek pools "H", "I", and "J") (Figure 3). In addition, burrowing owls (*Athene cunicularia*) and several species of raptors have been observed on and in the vicinity of the NMUSD property and large patches of purple needlegrass (*Nasella pulchra*) occur along the border of the southwest and southeast corner of the property. The site of the fence also lies within critical habitat unit 7 for the California gnatcatcher (*Polioptila californica californica*), the only coastal critical habitat that the USFWS has identified for gnatcatchers in Orange County (Figure 4).

Annual Grasslands

The annual grassland on the NMUSD property is dominated by a mix of non-native species including ripgut grass (*Bromus diandrus*), foxtail chess (*Bromus madritensis* ssp. *rubens*), black mustard (*Brassica nigra*), and tocalote (*Centaurea melitensis*). Annual grasslands, although dominated by non-native species, provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species of mammals, birds, and reptiles including burrowing owls and many species of raptors. Burrowing owls as well as several species of raptors including red-tailed hawks, Cooper's hawks, and American kestrels, have been observed within and immediately adjacent to the NMUSD property (Figure 5).

Although non-native and native vegetation removal wasn't reported in the applicant's biological analysis, the construction activities associated with installing the fence trampled the ground and vegetation, and compacted and disturbed approximately 0.47 acres

Coastal Sage Scrub

Coastal sage scrub is increasingly rare in the coastal zone; loss of CSS habitat in southern California is estimated to be 70 to 90 percent[2,3]. Coastal sage scrub in

[1] Davis, J.H. IV (Dudek). May 2013. Jurisdictional Determination of Seasonal Features for the Newport Banning Ranch. Prepared for Newport Banning Ranch, LLC., and,

Bomkamp, T (Glenn Lukos Associates) and J. H. Davis IV (Dudek). January 29, 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 addressed to Christine Medak, U.S. Fish and Wildlife Service.

[2] Westman, W.E. 1981. Diversity relations and succession in Californian coastal sage scrub. Ecology, Vol. 62: 170-184

[3] 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

southern California provides habitat for about 100 rare species, many of which are also endemic to limited geographic regions[4]. One such species is the California gnatcatcher, a threatened species on the federal endangered species list. The California gnatcatcher is an obligate, year-round resident of CSS communities[5]. Gnatcatchers in southern California preferentially nest and feed in coastal scrub vegetation on mesas and gentle slopes that are characterized by varying abundances of California sagebrush, California sunflower; and California buckwheat[6]. While no formal protocol level California gnatcatcher surveys have been conducted on the NMUSD property, gnatcatcher surveys spanning over 20 years have taken place on NBR and gnatcatchers are known to occupy (breed, nest, and forage) year-round in various locations of coastal scrub habitat on NBR and have been observed within 200–300 feet of the NMUSD property during some of those surveys.

The small patches of CSS on the NMUSD property are comprised of native shrubs including coastal goldenbush (*Isocoma menziesii*), coyote brush (*Baccharis pilularis*), and deerweed (*Acmispon glaber*). Although the CSS on the school district property does not have CSS signature species such as California sunflower (Encelia californiaca), California buckwheat (Eriogonum californicum), and California sagebrush (*Artemisia californica*), it is still within the area designated as critical habitat for gnatcatchers and provides them with valuable foraging area.

According to Mr. Hamilton:

> *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).*

Gnatcatcher (*Polioptila californica californica*). 50; Federal Register 72:72069. (December 19, 2007).

[4] Westman (1981) op. cit.

[5] Atwood, J.L. and D.R. Bontrager. 2001. California Gnatcatcher (*Polioptila californica). In* The Birds of North America, No. 574 (A. Poole and F. Gill, eds.). The Birds of North America, Inc. Philadelphia, PA.

[6] Ibid.

> *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.*

The fence is an artificial barrier in an otherwise open expanse of 100's of acres that also negatively impacts the natural passage and movement patterns of native animals such as coyotes, raccoons, skunks, and rabbits as well as non-native animals such as feral cats. According to Mr. Bramlet there is evidence that animals have dug out crossing areas under the fence. Coyotes play an important role in the life history of gnatcatchers as top predators that prey on animals such as raccoons, skunks, and feral cats that prey on gnatcatcher eggs and chicks, helping to keep these species populations in check and thereby contributing to the survival of gnatcatchers.

Purple Needlegrass Grassland

Purple needlegrass, the California state grass, is a tuft or bunch grass species once found abundantly throughout California grasslands. Purple needlegrass grasslands have become increasingly rare due to intensive conversion to agricultural land, urban development and invasion of non-native grasses and are now identified as a rare (G3, S3.1) habitat type in need of priority monitoring and restoration by the California Department of Fish and Wildlife's (CDFW) Natural Diversity Database (CNDDB). In California, native grasslands once covered nearly 20 percent of the land area, but today are reduced to less than 0.1 percent[7]. The CNDDB considers grasslands with 10 percent or more cover by purple needlegrass to be significant, and recommends that these be protected as remnants of original California prairie. Large patches of purple needlegrass that in aggregate form purple needlegrass grassland are located adjacent to the NMUSD fence. These grasslands provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species of mammals, birds, and reptiles. Burrowing owls and red-tailed hawks, Cooper's hawks, and American kestrels have been observed perching and foraging within and in the vicinity of the purple needlegrass grassland adjacent to the NMUSD property.

Burrowing Owls

Burrowing owls, listed by the CNDDB as a rare species (S2) and a CDFW species of special concern, as a bird of special concern by the United States Fish and Wildlife Service (USFWS), and as a sensitive species by the Bureau of Land management (BLM), have declined dramatically in California, especially along the southern coast, due to loss and fragmentation of grassy, open landscapes. In fact, they were thought to have been extirpated in all of Orange County (and most of coastal Southern California),

[7] National Park Service. 2000. Draft general management plan & environmental impact statement. Santa Monica Mountains National Recreation Area – California.

except for a small breeding population at Seal Beach Naval Weapons Station (Figure 6)[8]. However, burrowing owls have been documented since 2008 to winter on and immediately adjacent to the portion of the NMUSD property with the unpermitted fence as well as on other portions of NBR (Figure 1). During my January 29, 2015 site visit I observed a burrowing owl perching and flying just outside the fence near pool SW2.

Burrowing owls require large expanses of open space for foraging; a 2012 CDFW report titled *Staff Report on Burrowing Owl Mitigation*[9] states that adult male home ranges have been documented to comprise anywhere from

> *…280 acres in intensively irrigated agroecosystems in Imperial Valley (Rosenberg and Haley 2004) to 450 acres in mixed agricultural lands at Lemoore Naval Air Station, CA (Gervais et al. 2003), to 600 acres in pasture in Saskatchewan, Canada (Haug and Oliphan 1990). But owl home ranges may be much larger, perhaps by an order of magnitude, in non-irrigated grasslands such as at Carrizo Plain, California (Gervaise et al. 2008), based on telemetry studies and distribution of nests. Foraging occurs primarily within 600 m of their nests (within approximately 300 acres, based on a circle with a 600 m radius) during the breeding season.*

Loss of habitat, as mentioned above, is likely the main factor in the decline of burrowing owls given their requirement of large areas of open grassland. On the school district property there is approximately three acres of non-native annual grassland, with more contiguous grasslands on the adjacent property. The installation of the fence dividing the grassland likely disturbed both burrow habitat and foraging habitat for the owls onsite.

ESHA Definition

Section 30107.5 of the Coastal Act defines Environmentally Sensitive Habitat as:

> *Any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.*

Plants and animals and habitats that meet the rarity criterion under this definition may include those identified in the CDFW's CNDDB, which includes rare natural communities identified by CDFW; plant and animal species identified as rare, threatened or endangered by the state or federal government under the state or federal

[8] Figures 1 through 6 represent habitat information provided to the Commission. Additional field work would be necessary in order for me to make final ESHA and wetland boundary determinations.

[9] California Department of Fish and Game (State of California, Natural Resources Agency). March 7, 2012. Staff Report on Burrowing Owl Mitigation

Endangered Species Act; plants, animals, and plant communities listed by NatureServe as state or global-ranked 1, 2, or 3; plants and animals identified CDFW as species of special concern; and/or California Native Plant Society listed 1B and 2 plant species[10].

ESHA Determination

The purple needlegrass grassland immediately adjacent to the NMUSD property is rare primarily from habitat loss due to development and is easily degraded and disturbed by human activities and development. The non-native annual grasslands and the CSS on the NMUSD property provide especially valuable ecosystem services (foraging habitat for burrowing owls and California gnatcatchers) and are easily degraded and disturbed by human activities and development. Therefore, these areas meet the Coastal Act definition of ESHA and are protected under section 30240 of the Coastal Act, environmentally sensitive habitat areas (ESHA); adjacent developments, which requires that ESHA is protected as follows:

> *(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.*
>
> *(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.*

Wetlands

The NMUSD site is located on a mesa immediately adjacent to the NBR property which has been shown to support a number of seasonal wetlands, including vernal pools. The subject site also supports such wetlands. Seasonal wetlands may not support vernal pool invertebrate or plant indicator species, but do meet one or more of the three wetland parameters required by the Coastal Act to qualify as a Coastal Act wetland; that is they meet the hydrology, hydrophytic vegetation, and/or hydric soils parameter requirements.

Vernal Pools

Vernal pools are shallow surficial depressions that seasonally fill with water during winter and spring rains and dry up during summer months. Vernal pools are rare and unique habitats that support a number of plant and animal species endemic to (found

[10] The CNDDB is a state depository of lists of rare natural communities and rare plant and animal species generated by an array of regional, state, national and international sources that are vetted, maintained and continually updated by the Biogeographic Branch of the California Department of Fish and Wildlife (CDFW). In making ESHA determinations, Commission staff generally review a subset of these lists including the list of natural communities identified as rare by CDFW, the State and Federal government lists of rare, threatened or endangered plant and animals species, the natural communities and plant and animal species listed by NatureServe as State or Global-ranked 1, 2, or 3, the plant and animal species listed as California Species of Special Concern, and plant species listed by the California Native Plant Society as 1B or 2.

only in) vernal pools. Plant species indicative of vernal pools, including brass buttons (*Cotula coronopifolia*) and woolly marbles (*Psilocarphus sp.*), occur in several of the vernal pools on NBR. Fairy shrimp are vernal pool indicator species and there are two species present in the vernal pools on NBR; the federally endangered San Diego fairy shrimp and the versatile fairy shrimp (*Branchinecta lindahli*). Vernal pool protocol level surveys to date have documented fairy shrimp in at least 37 vernal pools on NBR including eight pools occupied by the San Diego fairy shrimp. Fifteen acres on NBR and portions of the NMUSD property have been identified by the as San Diego fairy shrimp critical habitat by the USFWS (Figure 2). This area is the only designated critical habitat for this species in Orange County.

On the NBR side of the unpermitted fence there are three pools (H, I, and J) documented to support the federally endangered San Diego fairy shrimp and a couple other pools documented to support the versatile fairy shrimp. Mr. Bramlet did not perform a wetland delineation however he does identify three seasonal wetlands that he identified as SW1, SW2, and SW3 (Figure 1). Mr. Bramlet describes SW1, which is immediately adjacent to the unpermitted fence, as "a small pit some 14 ft. long by 12ft. wide and is roughly 52 inches deep." He states that there is evidence of ponding but that most of the plants are upland species except for spike rush (*Eleocharis palustris*) which is an obligate (Obl) wetland species. A photograph of the pool taken approximately four years ago shows that the pool supported ostracods (seed shrimp), a vernal pool indicator species, and pollywogs (Welsh, 2013) which suggests that the pool would likely be identified as a vernal pool by a formal protocol survey. The pool identified as SW2 by Mr. Bramlet is Dudek pool "K". Mr. Bramlet stated that woolly marbles, a vernal pool indicator plant species, were scattered thoughout pool SW2 and formal vernal protocol level surveys have been conducted on this pool by NBR and it was found to support versatile fairy shrimp and to therefore be a vernal pool.

Wetlands and vernal pools are protected under section 30233 of the Coastal Act. In some prior matters, the Commission has considered vernal ponds to be a type of ESHA and has protected them under section 30240 of the Coastal Act. Either way, whether viewed pursuant to section 30233 or 30240, the construction and presence of the unpermitted fence in seasonal wetlands or vernal pools (SW1 and SW2) resulted in fill or impacts to wetlands inconsistent with both of these policies.

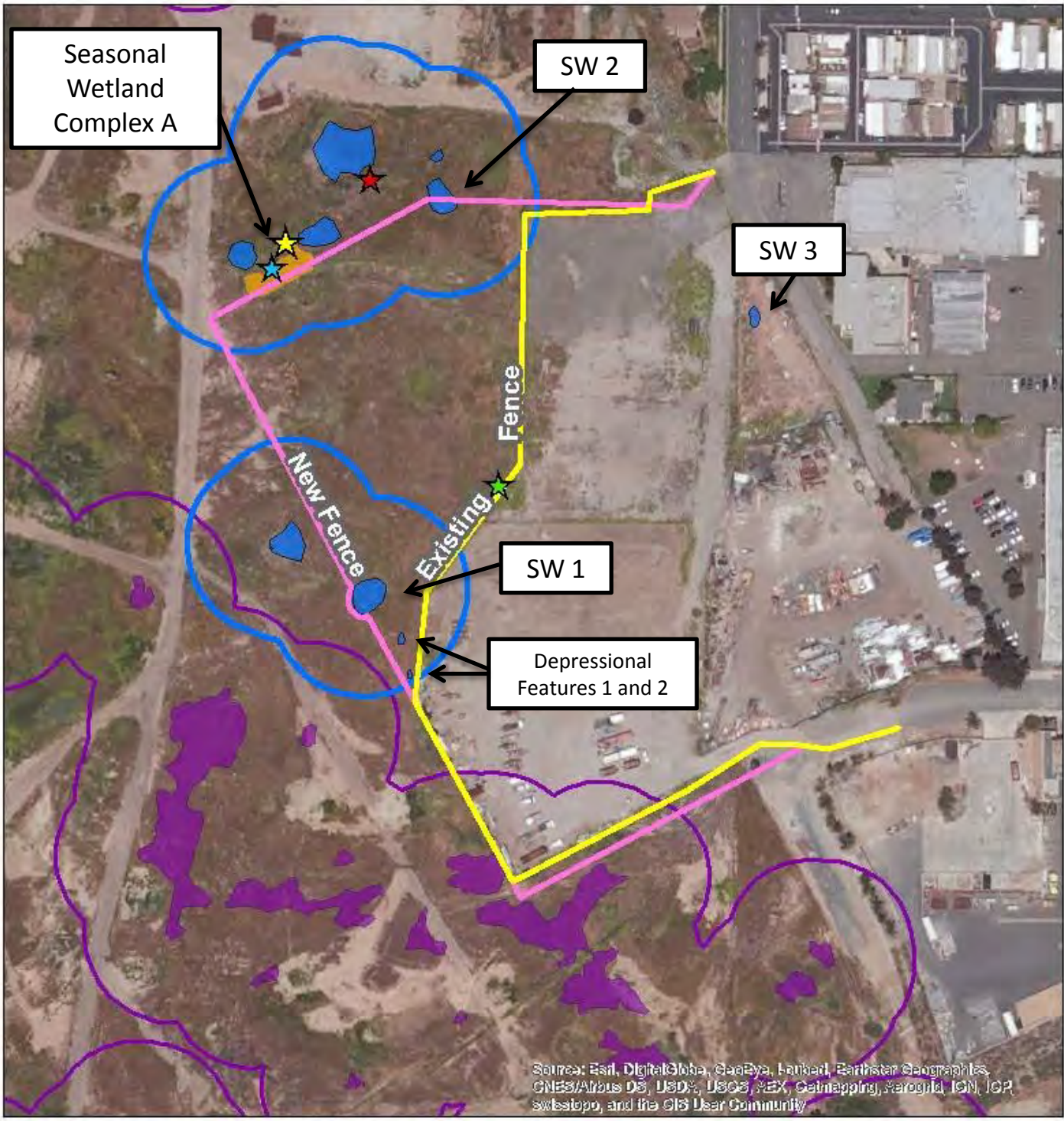
Buffers

The Commission protects ESHA and wetlands by applying buffers. Buffers are important for preserving the integrity and natural function of individual species and habitats. The purpose of a buffer is to create a zone where there will be little or no human activity. The purpose of a buffer is to "cushion" species and habitats from disturbance and allow native species to go about their "business as usual". A buffer area is not itself a part of the ESHA or wetland, but a "buffer" or "screen" that protects the habitat area from adverse environmental impacts caused by development. In the

case of the purple needlegrass ESHA and wetlands (vernal pools) on and in the vicinity of the NMUSD fence, I recommend that a minimum buffer of 100 feet be applied.

Conclusion

As documented above, the area of the NMUSD property with the fence supports several habitat types that I find rise to the level of ESHA, including purple needlegrass grassland and California gnatcatcher and burrowing owl foraging habitat, as well as seasonal wetlands/vernal pools. These habitat areas are subject to the provisions of Coastal Act sections 30233 and 30240. In order to protect these areas I recommend a minimum buffer of 100 feet.



NMUSD Fence

- Existing Fence
- New Fence
- Seasonal Wetlands
- Purple Needle Grass Grassland
- Wetland 100ft. Buffer
- PNGG 100 ft. Buffer
- Disturbed Mulefat Thicket

Documented Burrowing Owls

- 2008 GLA
- 2009 BonTerra
- 2009 GLA
- 2010 GLA

COASTAL

For Illustrative Purposes Only.
Locations Approximate.
Sources: ESRI, CCC, Bonterra, GLA, Dudek.

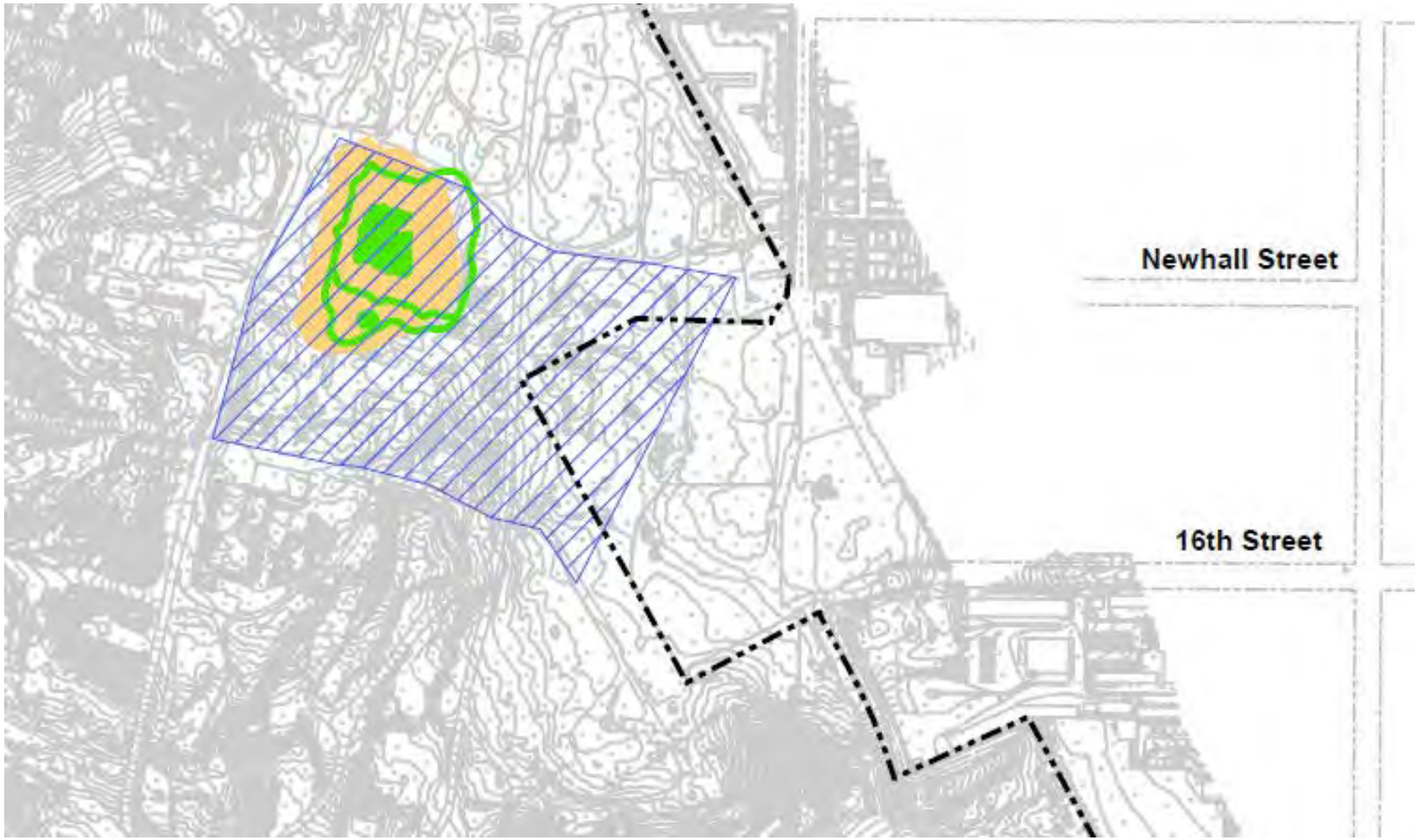
N

0 50 100 200 Feet

DSM 2/11/15

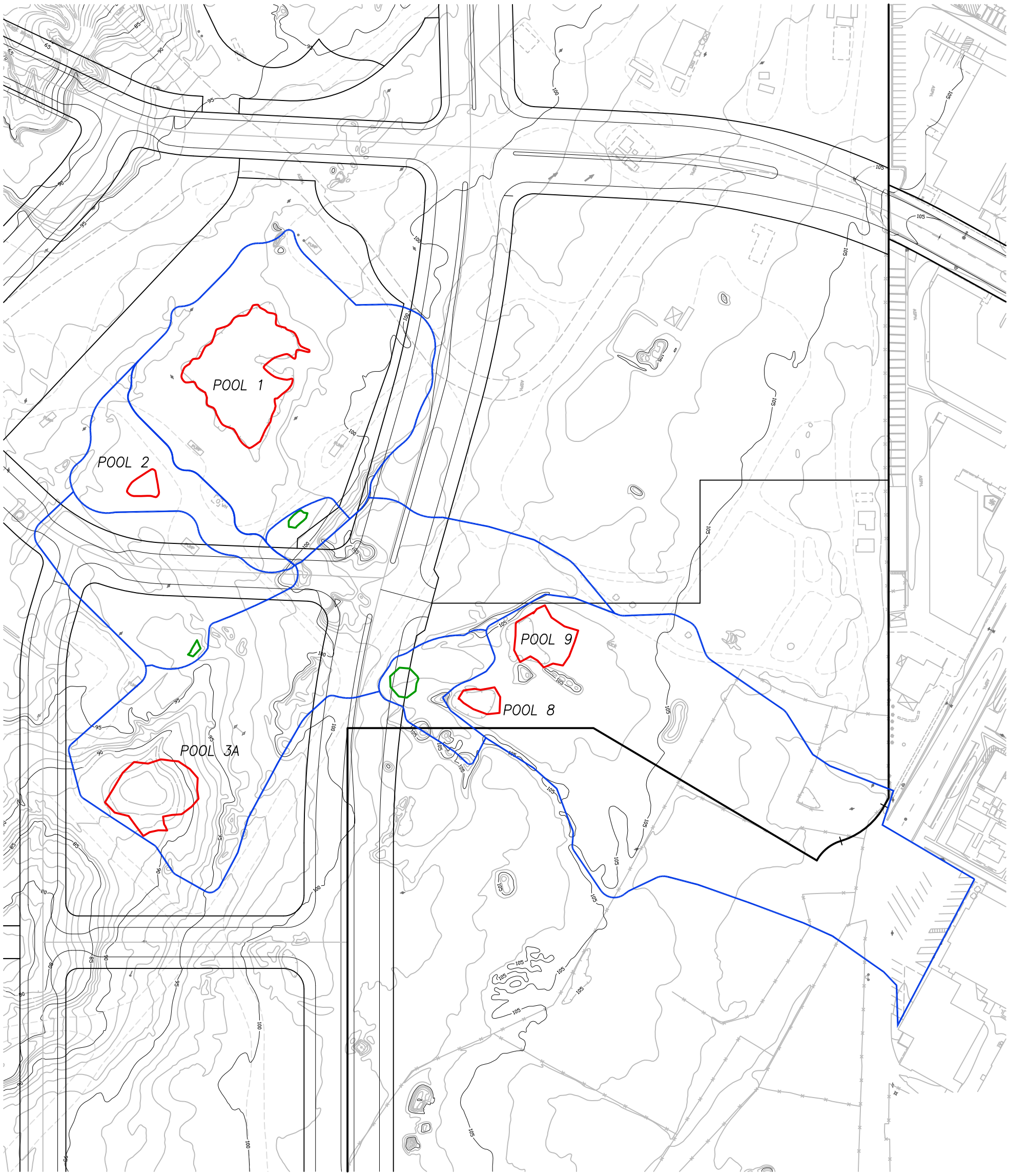
Figure 1

SDFS Critical Habitat



USFWS San Diego Fairy Shrimp
Critical Habitat

Figure 2



N.T.S.

VERNAL POOL
APPROXIMATE WATERSHED STUDY

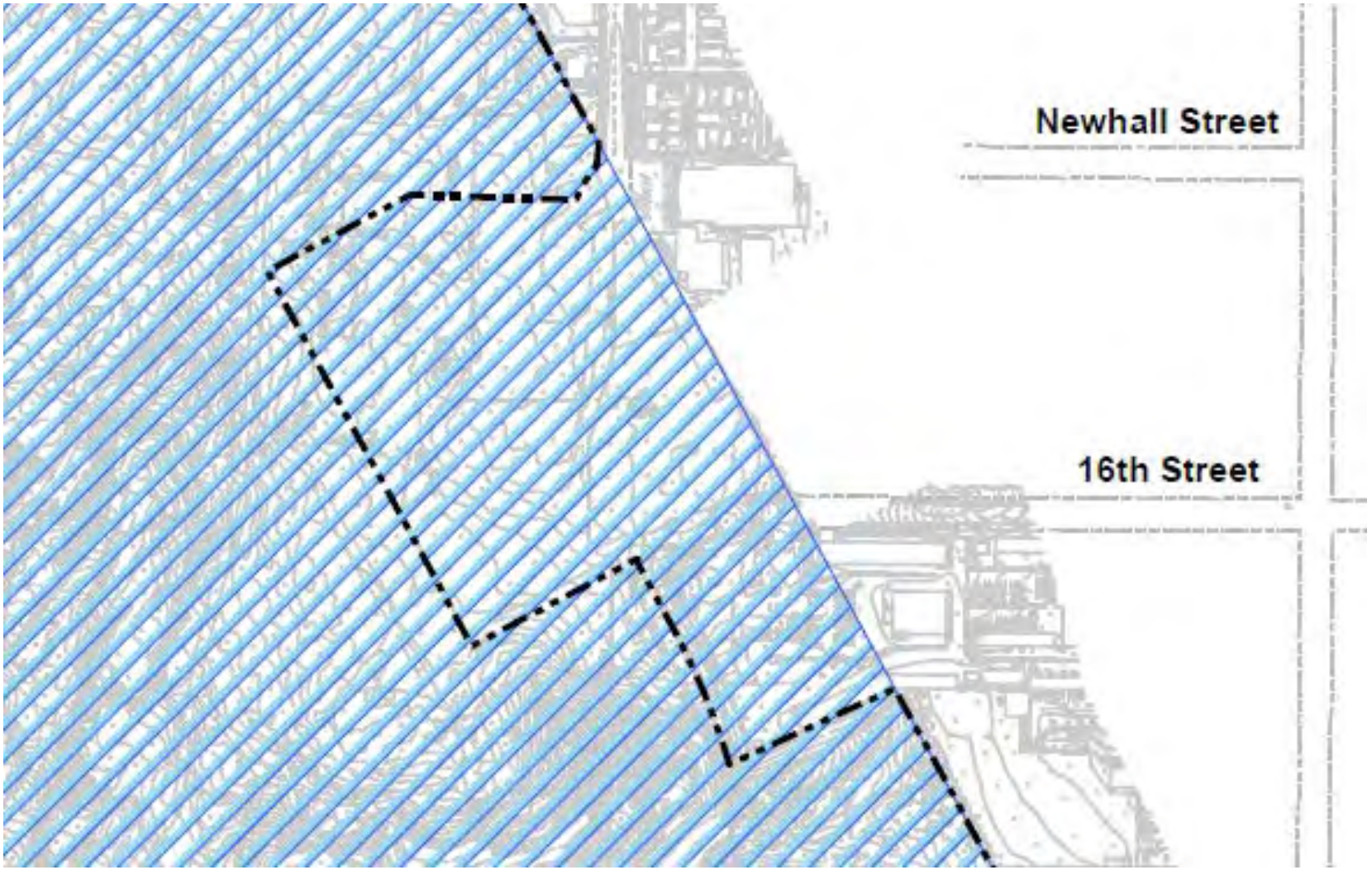
MAY 15, 2013

Figure 3

FUSCOE ENGINEERING
16795 Von Karman, Suite 100
Irvine, California 92606
tel 949.474.1960 • fax 949.474.5315
www.fuscoe.com

P:\Projects\821\01\Eng\Exhibits\82101-XH-VernalPool.dwg (5/15/2013 9:53 AM) Plotted by: Michelle Penaloza

CAGN Critical Habitat

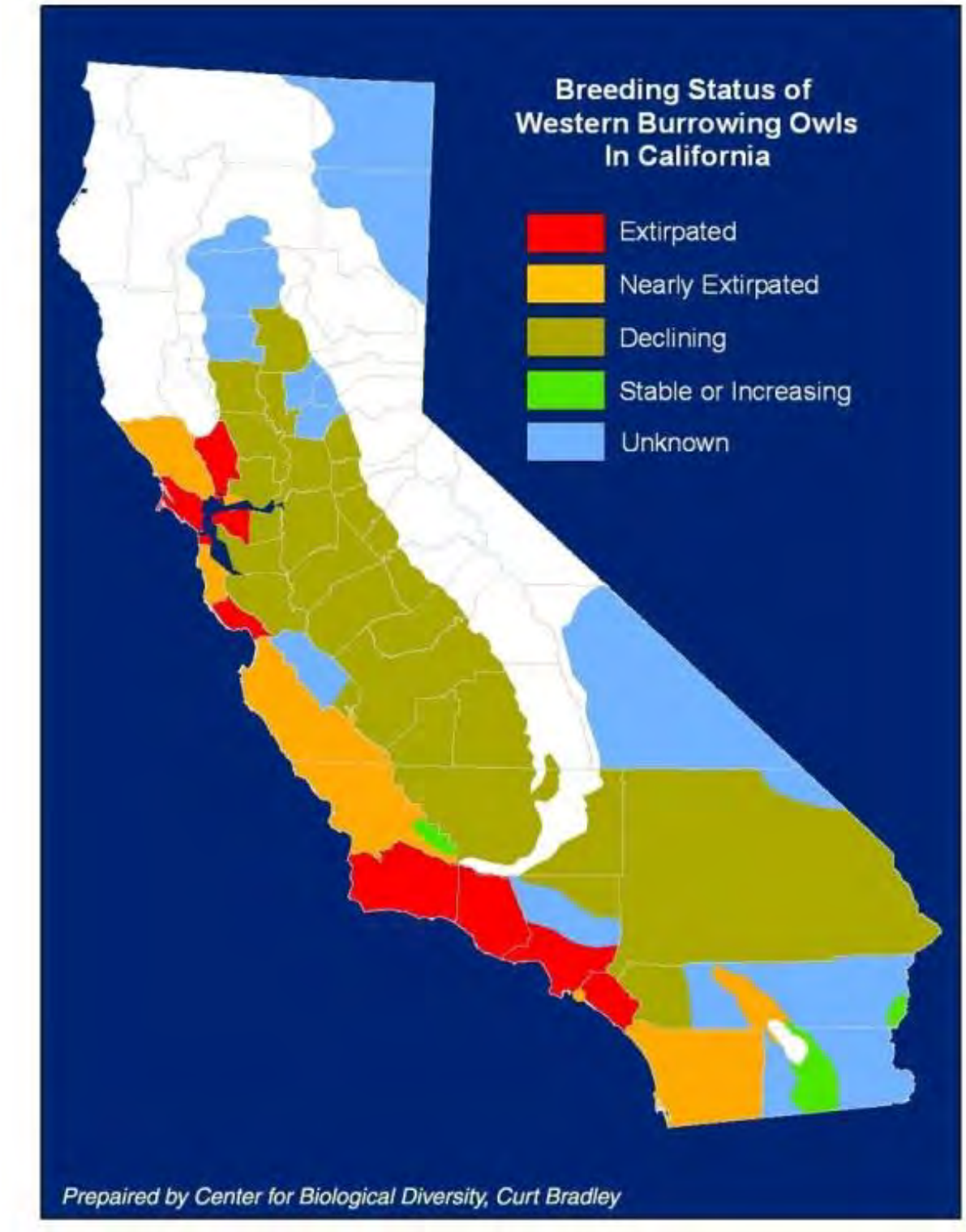


USFWS CAGN Critical Habitat

Figure 4

Figure 5 - Dudek 2013 Raptor Survey Results

Appendix C (Burrowing Owl data)



Back to Main Section

Figure 6

STATE OF CALIFORNIA – NATURAL RESOURCES AGENCY
EDMUND G. BROWN, JR, *Governor*

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

February 15, 2013

Tim Marsh
NMUSD Administrative Director, Facilities Support Services
2985 Bear St., Bldg. E
Costa Mesa, CA 92626

Violation File Number:	V-5-13-003
Property location:	Whittier Ave., in between 16th and 17th St. Newport Beach; County of Orange APN 114-170-63
Unpermitted Development[1]:	Chain-link fence constructed in environmentally sensitive habitat

Dear Mr. Marsh:

This letter is regarding the chain-link fence constructed around the Newport Mesa Unified School District (NMUSD) property located adjacent to the Banning Ranch property in Newport Beach, which was completed without the required coastal development permit (CDP) and proper study of potential significant impacts on environmentally sensitive habitats related to construction.

Thank you for taking the time during our telephone call on January 29, 2013 to discuss the habitat characteristics of this site, and the potentially significant impacts resulting from a fence bisecting areas of high ecological value. We are encouraged by your statement that the school district takes resolution of this issue seriously, and that your preference is, as ours certainly is, to resolve this issue consensually. To that end, our goal is to continue to work with you and the school district to come to a mutually agreeable solution to resolve the fence development issue.

For reference, the California Coastal Act[2] was enacted by the State Legislature in 1976 to provide long-term protection of California's 1,100-mile coastline through implementation of a comprehensive planning and regulatory program designed to

[1] Please note that the description herein of the violation at issue is not necessarily a complete list of all development on the subject property that is in violation of the Coastal Act and/or that may be of concern to the Commission. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other development on the subject property as indicative of Commission acceptance of, or acquiescence in, any such development.

[2] The Coastal Act is codified in sections 30,000 to 30,900 of the California Public Resources Code. All further section references are to that code, and thus, to the Coastal Act, unless otherwise indicated.

Exhibit 6

California Coastal Commission

manage conservation and development of coastal resources. The California Coastal Commission ("Commission") is the state agency created by, and charged with administering, the Coastal Act of 1976. In making its permit and land use planning decisions, the Commission carries out Coastal Act policies, which, amongst other goals, seek to protect and restore sensitive habitats (such as *wetlands, grasslands, and nesting sites for protected species*); protect natural landforms; protect scenic landscapes and views of the sea; protect against loss of life and property from coastal hazards; and provide maximum public access to the sea.

Pursuant to Section 30600 (a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a CDP, in addition to any other permit required by law. "Development" is defined by Section 30106 of the Coastal Act as:

> ***"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....***

The above-mentioned chain-link fence constitutes development under the Coastal Act and, therefore, requires a coastal development permit. Any non-exempt development activity (which is the case here) conducted in the Coastal Zone without a valid CDP, or which does not substantially conform to a previously issued permit, constitutes a violation of the Coastal Act.

Background

Commission staff received complaints regarding the subject fence on January 8, 2013, and confirmed its placement on January 23, 2013. As we discussed, the location of the fence is especially problematic due to the proximity of rare biological resources which occur in and around the defined area of the NMUSD property and the Banning Ranch property. The subject fence could potentially cause adverse impacts to these sensitive species and habitats including, but not limited to: habitat for various migratory birds such as California gnatcatcher (for which the entire NMUSD property and much of Banning Ranch are USFWS designated critical habitat), Burrowing owl, Northern harrier, White-tailed kite, Loggerhead shrike, Horned lark, and Killdeer; wetland vernal pools habitat (home to native amphibians, insects, and fairy shrimp – specifically, San Diego fairy shrimp, for which parts of the NMUSD property are USFWS designated critical habitats); and rare native grasslands and scrub habitats. These habitats serve a crucial role in the ecology and survival of the multiple threatened, endangered, and

Exhibit 6

California Coastal Commission

special-status species that inhabit the greater Banning Ranch ecosystem (which includes the subject property).

On January 31, 2013, staff viewed the site from an adjacent property and confirmed the presence of two Burrowing owls in the immediate vicinity of the subject chain-link fence; at two different locations in the northern area of the development. One owl was observed on the outer edge of a burrow, atop a berm, located approximately 50 feet from the subject fence. During that same visit, another owl was observed 175 feet east of owl #1, and approximately 30 feet from the fence. Although these 2 owls appear to be wintering on property adjacent to NMUSD (belonging to NBR LLC), they are in close proximity to the subject fence. Additionally, on January 6, 2013, a member of the public documented a burrowing owl roosted just inside the fence on NMUSD property, beneath a small palm tree on the northern boundary. Finally, the presence of Burrowing owls on, or in close proximity to the site, has been documented in multiple surveys of the Banning Ranch property, which on occasion extended onto the subject property. Numerous sightings of owls at these locations have been documented, including the past several weeks.

Thus, it is our conclusion that the subject fence could potentially pose a threat to the well-being and continued survival of multiple sensitive species inhabiting the greater Banning Ranch ecosystem. Clearly then, important ecological resources exist in vicinity of the fence and any Commission review of the fence would necessarily include an assessment of the fences potential impacts on the site's significant resources (as described above).

Please be advised that, per the request of the USFWS, any activity on or around the fence should be avoided at this time of year due to the presence of vernal pools, as well as ongoing study of these pools, and the presence of wintering Burrowing owls. We appreciate your cooperation in seeing that this request is upheld.

Resolution

In some cases, a violation involving non-compliance with an approved coastal permit may be resolved through the Commission to authorize the removal of the unpermitted development and restore the site. However, in light of USFWS's request to postpone activity around the fence to a time of year that would have the least impact to sensitive species, we look forward to working with you and the USFWS to set an appropriate date discuss our options. You indicated, in our telephone conversation last week, your desire to resolve this matter amicably and in a timely manner. To that end, we would be more than happy to meet and discuss potential solutions, at your earliest convenience. Please contact me no later than **March 17, 2013**, to set up a time to do so.

While we are hopeful that we can resolve this matter cordially, please be advised that the Coastal Act has a number of potential remedies to address violations of the Coastal Act including the following:

Exhibit 6

California Coastal Commission

Section 30810 states that if the Commission determines that any person has undertaken, or is threatening to undertake, any activity that may require a permit from the Coastal Commission without first securing a permit, they may issue an order directing that person to cease and desist. A cease and desist order may be subject to terms and conditions that are necessary to avoid irreparable injury to the area or to ensure compliance with the Coastal Act. Section 30811 also provides the Coastal Commission the authority to issue a restoration order to address violations at a site.

However, as noted above, we would like to work with you to resolve these issues amicably. One available option to consider is agreeing to a "consent order". A consent order would provide you with an opportunity to resolve this matter consensually, and to have input into the process and timing of resolving the unpermitted development and restoration of the subject property.

Please call me at (562) 590-5071 if you have any questions or concerns regarding this letter. Thank you for your cooperation and attention to this matter.

Sincerely,

Adam V. Radpour
South Coast District Enforcement

cc: **Sherilyn Sarb, Deputy Director, CCC**
Teresa Henry, South Coast District Manager, CCC
Karl Schwing, Orange County Planning Supervisor, CCC
Patrick Veesart, Southern California Enforcement Supervisor, CCC
Andrew Willis, Enforcement Analyst, CCC

Exhibit 6

California Coastal Commission

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 ~ rob

Exhibit 7
California Coastal Commission

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.

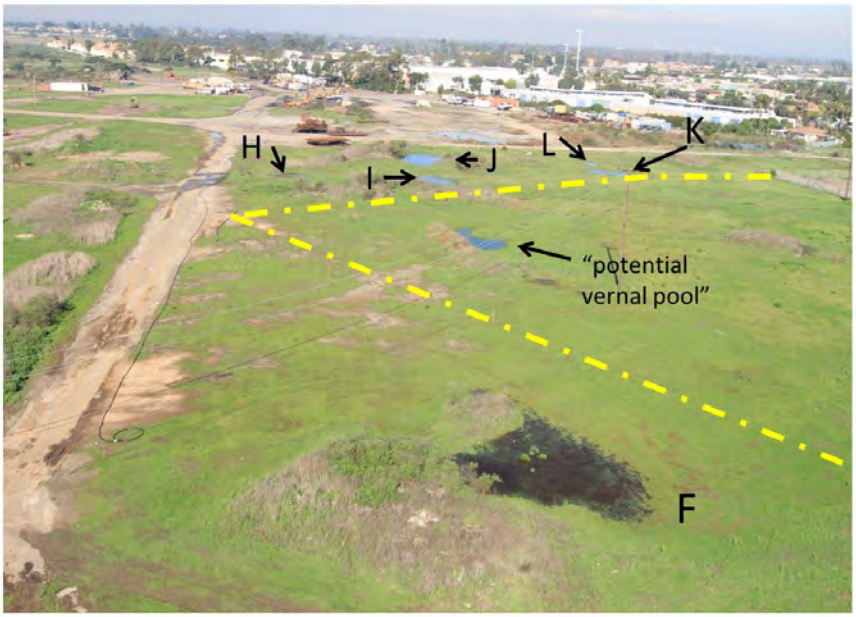


Figure 1. Oblique aerial image, facing north, showing the approximate limits of the unpermitted fence in yellow. Several areas of ponded water are visible in the vicinity of the fence. December 10, 2010. Source: Banning Ranch Conservancy.

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.

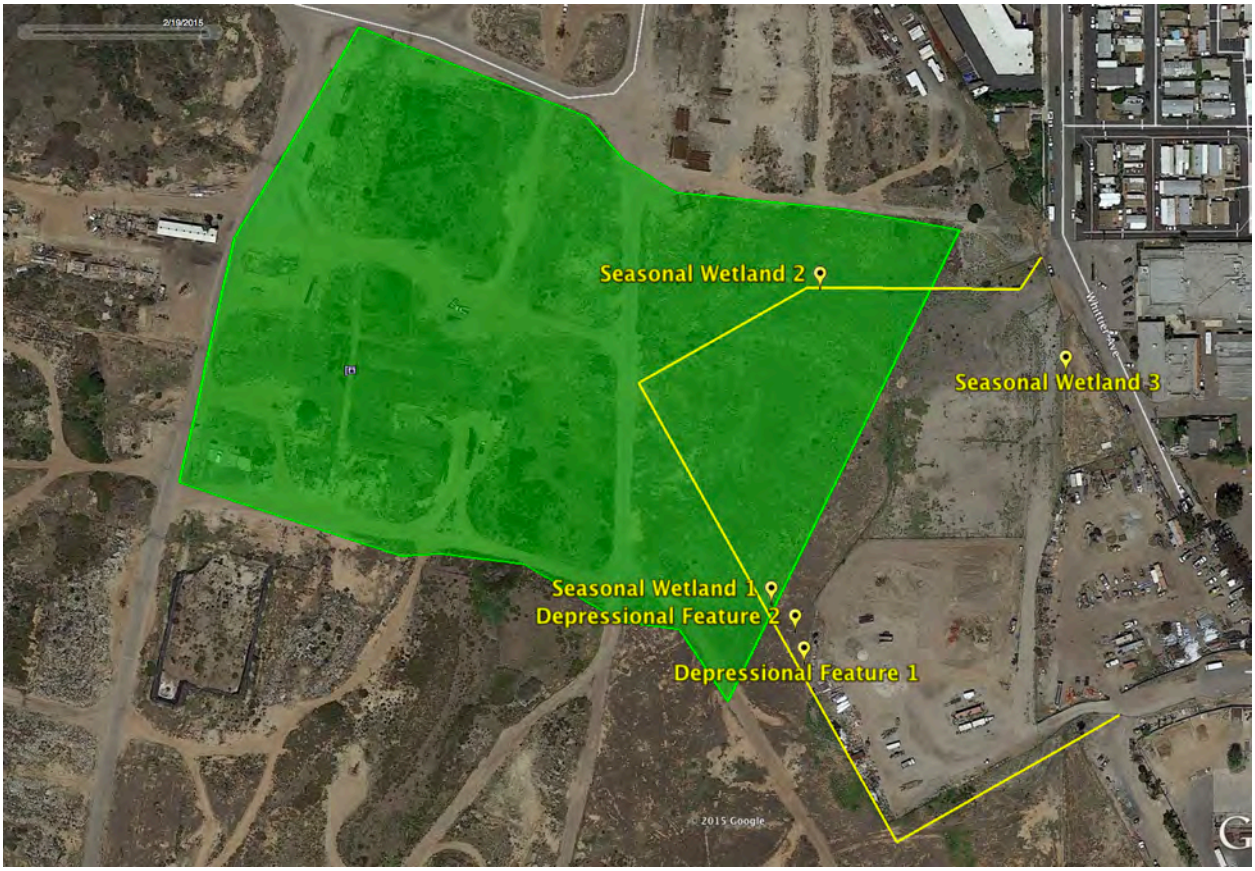


Figure 5. The green polygon shows critical habitat for the San Diego Fairy Shrimp (Subunit 1C). The unpermitted NMUSD fence is shown in yellow. Seasonal Wetland Nos. 1 and 2 are within designated critical habitat, while Seasonal Wetland 3 and the two Depressional Features are just outside the polygon. 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,

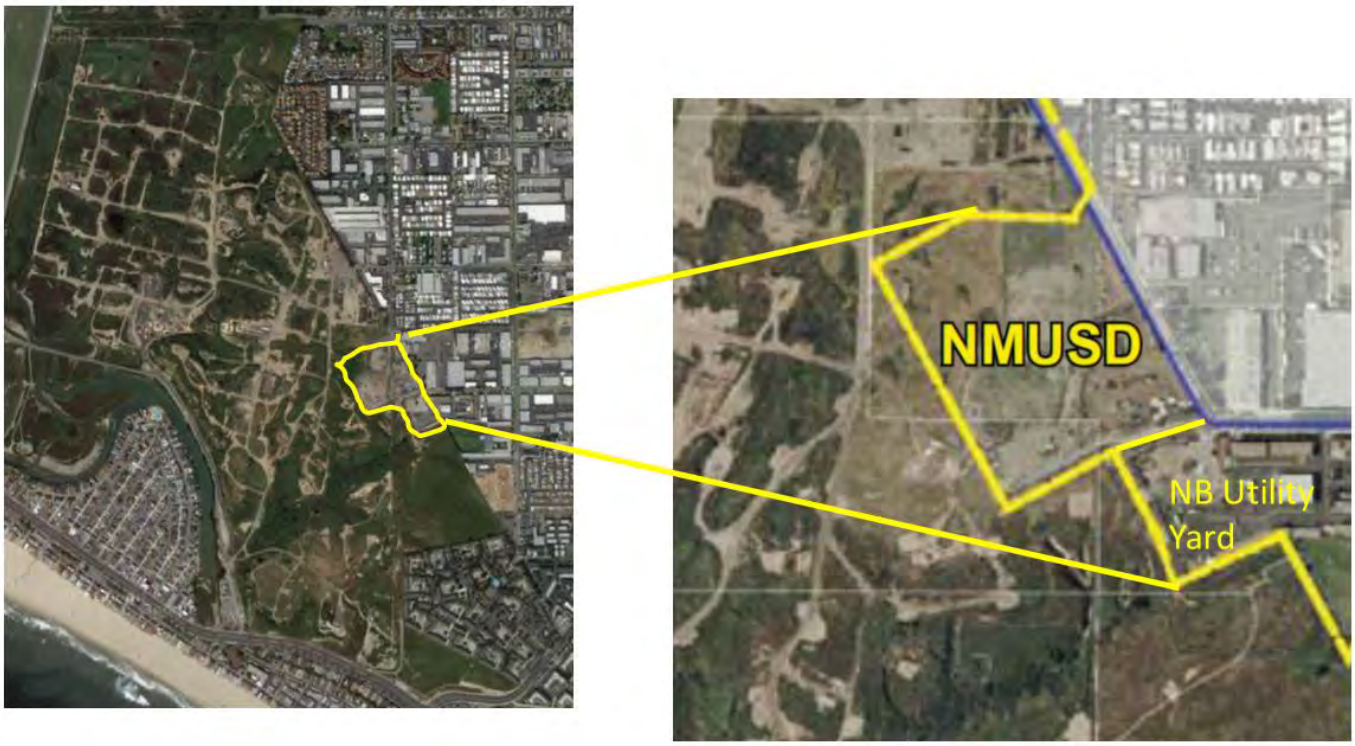
Robert A. Hamilton
President, Hamilton Biological, Inc.

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

1/8/13

To Newport Mesa Unified School District:

This letter concerns the chain link fence being constructed around the 11.5-acre parcel of Banning Ranch surplus property owned by Newport Mesa Unified School District (the NMUSD property). The eastern portion of this parcel is being used for equipment storage, while the western portion (approximately 1/4 to 1/3 of the total acreage) is undeveloped, and serves as wildlife habitat. For years and years (until the end of 2012) there has been no fence between the western portion of the NMUSD property and the remainder of the Banning Ranch.



Map of 11.5-acre NMUSD property

(and adjacent smaller Newport Beach Utility Yard)

Background:

The Banning Ranch Conservancy is a 501c3 non-profit dedicated "*to the preservation, acquisition, conservation and maintenance of the entire Banning Ranch as a permanent public open space, park, and coastal nature preserve."*

The local community has longed-envisioned the NMUSD property as part of the future Banning Ranch Park and Preserve. The school district was contacted by the Sierra Club Banning Ranch Park and Preserve Task Force several years ago about purchasing the NMUSD property should the district consider selling. It is our understanding that no decision to sell has been made, but that, in 2011, a Memorandum of Understanding had been approved between the school district and NBR LLC to alter the property lines of the NMUSD property to accommodate the proposed 1375-home Banning Ranch development.

The wealth of biological resources on the Banning Ranch extends to, and includes, the NMUSD property (at least the undeveloped western portion). The entire NMUSD property is critical habitat for the California Gnatcatcher, and the NMUSD property involves critical habitat for the San Diego Fairy Shrimp. At least one vernal pool exists on the NMUSD property (and several vernal pools, including some with San Diego Fairy Shrimp, lie on the immediately adjacent NBR LLC property). The NMUSD property has been documented to contain the wintering Burrowing Owl. Nassella grass, goldenbush and coyote brush has been documented on Banning Ranch adjacent to the NMUSD property.

The New Fence:

During the last week of 2012, a new chain link fence was constructed around the portion of the NMUSD property that had been previously in open contact with the rest of Banning Ranch. This fence appears to now make the entire NMUSD property surrounded by chain link fence.

Looking northeast, September 2012

Looking northeast, Late December, 2012

Questions:

1. Was the fence constructed by the school district?
2. What is the purpose of this fence?
3. When was the decision made to build the fence? Who was involved with this decision? Was this discussed at School Board meetings?
4. Will the fence be temporary, or permanent?
5. What is planned for the undeveloped portions of the NMUSD property?
6. Since the western portion of the UMUSDF property is undeveloped and has, for years, served as wildlife habitat and as part of the Banning Ranch ecosystem, have wildlife surveys been undertaken to determine the potential impact to wildlife? Specifically, have the effects of the new fence on the wintering of Burrowing Owls been studied (see Appendix A)? Have the effects on the vernal pools both on and immediately adjacent to the NMUSD property been studied (see Appendix B)?
7. As the NMUSD property is in the Coastal Zone, and the fence represents "development" under the Coastal Act, has the school district applied for, and obtained, a Coastal Development Permit (CDP)?
8. As the NMUSD property is critical habitat for the California Gnatcatcher, has the school district consulted the US Fish and Wildlife Service to determine whether this fence will result in a "taking" of the California Gnatcatcher (or the San Diego Fairy Shrimp)?

Thank you in advance for answering these questions. We realize these are involved questions and will require careful preparation. Our interest in preserving the biological resources of Banning Ranch is very great and genuine. And we repeat our deepest desire to eventually see the NMUSD property as part of the future Banning Ranch Park and Preserve. The developed portions would serve well as active sports areas, parking areas, or as a site for an interpretive/learning center, while the undeveloped areas could become part of the future nature preserve.

Please contact me to discuss this further.

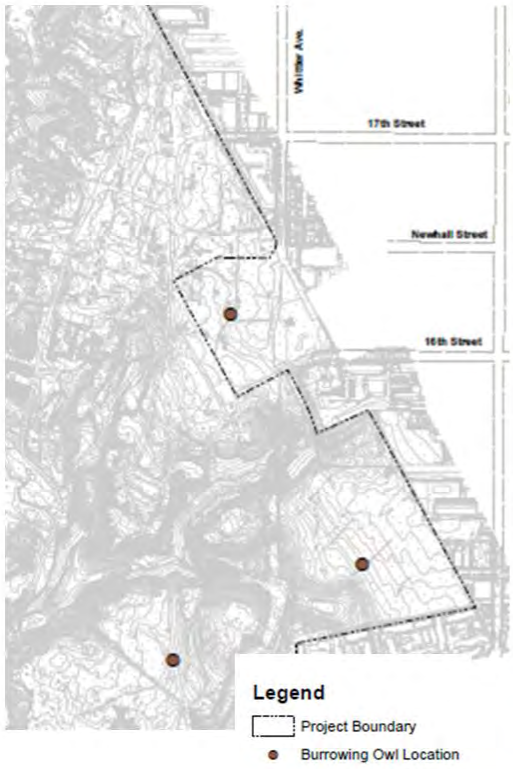
Terry Welsh, M.D.

President, Banning Ranch Conservancy

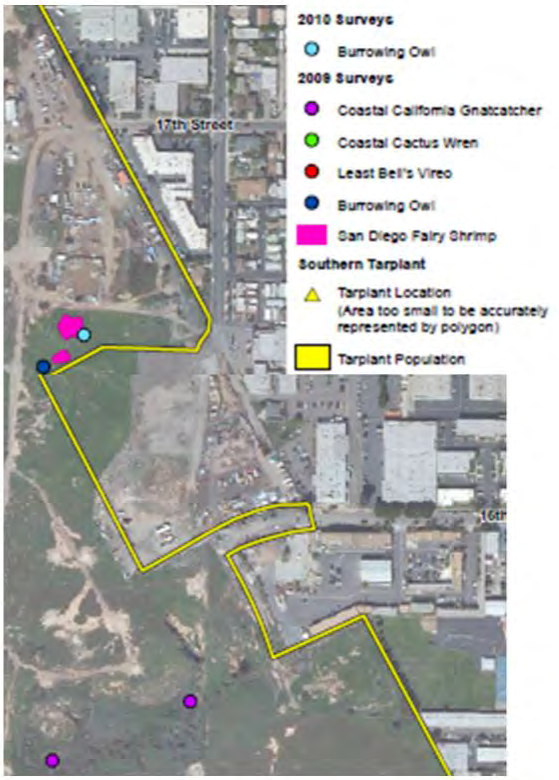
PO Box 16071, Newport Beach, CA 92659-6071

714-719-2148

Appendix A (Burrowing Owl)



2008 wintering Burrow Owl study

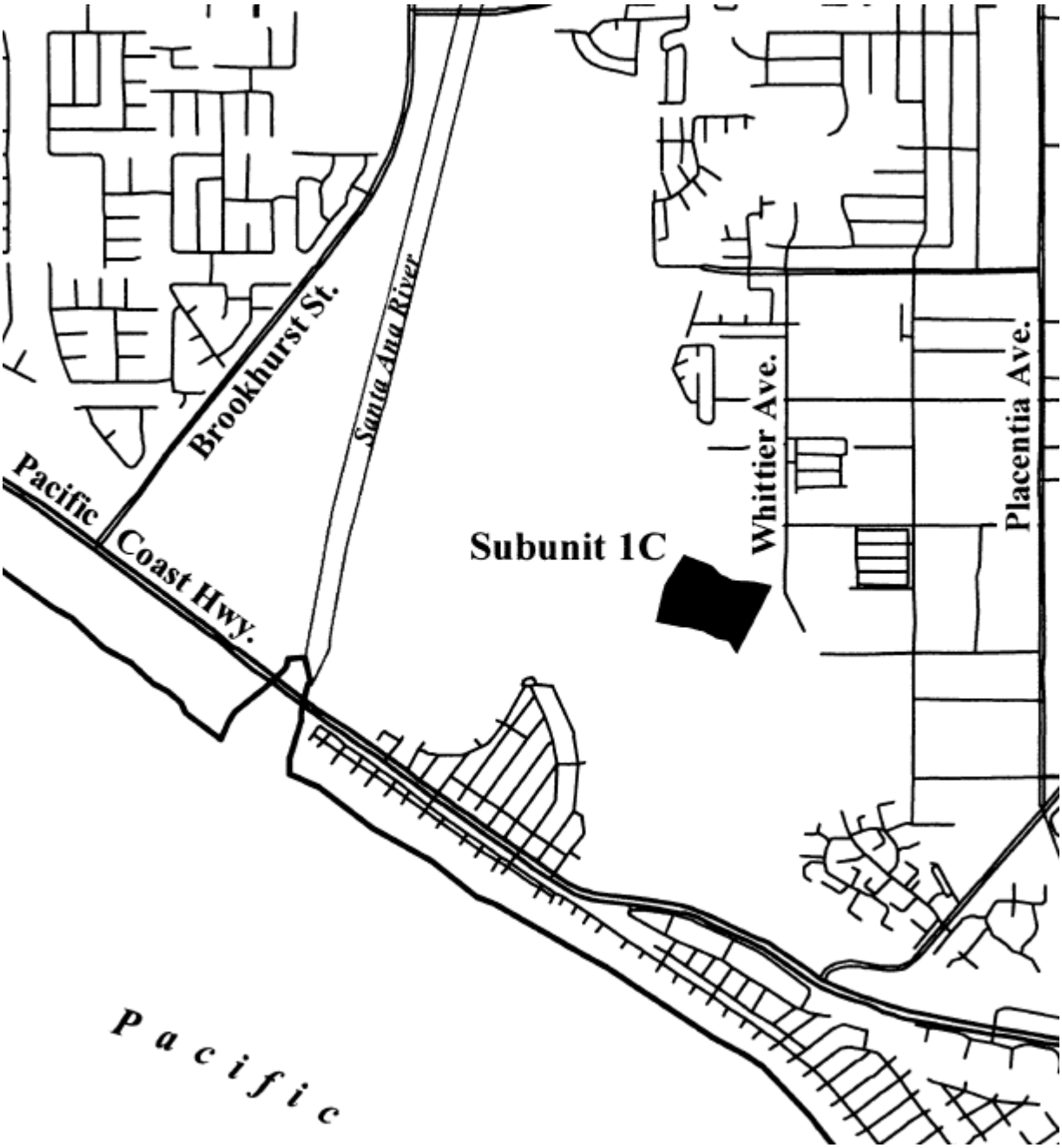


2009 and 2010 studies showing Burrowing Owls and San Diego Fairy Shrimp (pools I and J) in immediate vicinity to fence.

Wintering Burrowing Owl spotted by local birder December 2012 at northern boundary of NMUSD property.

Appendix B (Vernal Pools)

The NMUSD property involves USFWS-declared critical habitat for the San Diego Fairy Shrimp.

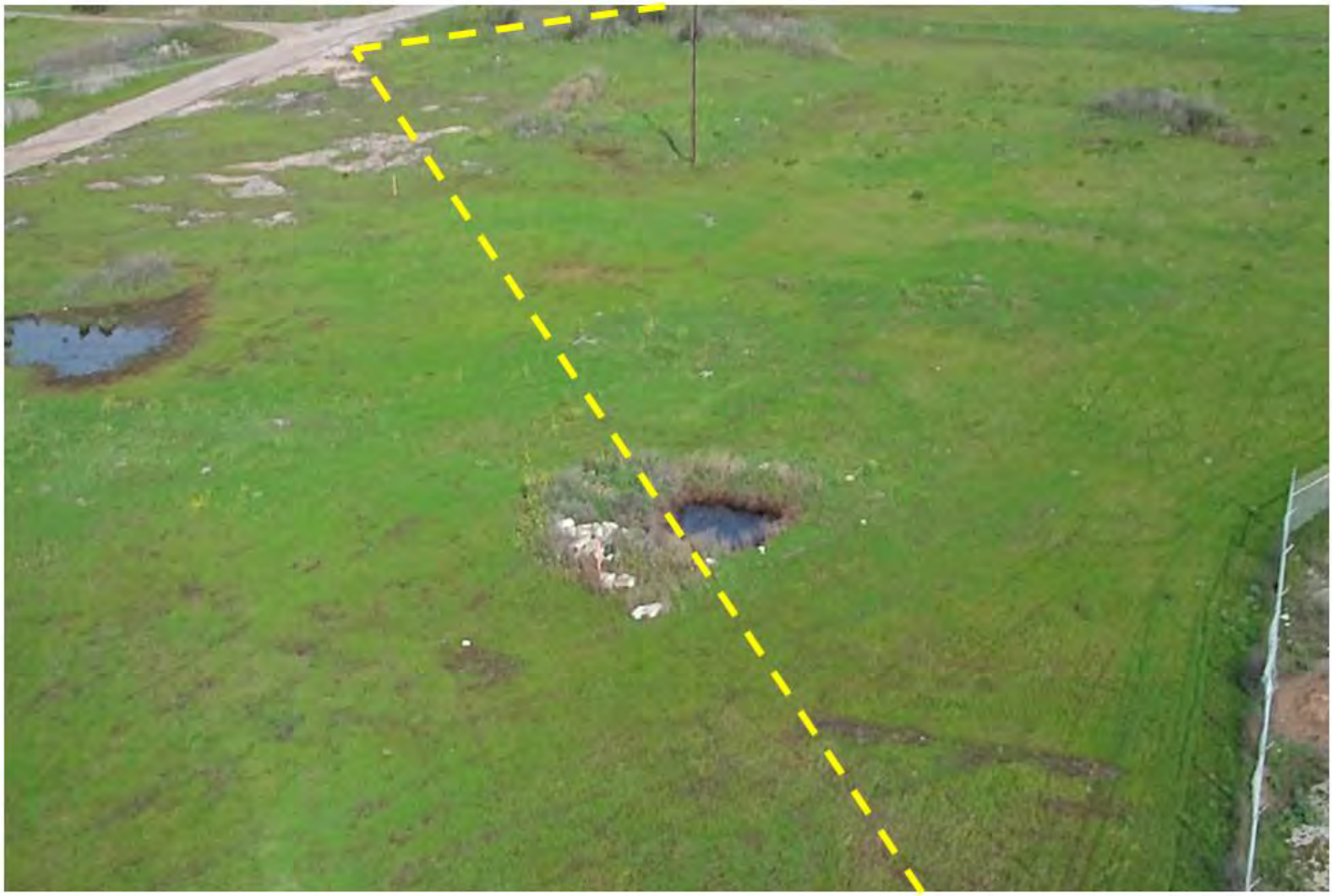


Map of USFWS-declared critical habitat (15 acres) for the endangered San Diego Fairy Shrimp (from Federal Registry Vol. 72, No. 238, 12/12/07 pg. 70689)

Map of vernal pools from 2011/2012 fairy shrimp survey

Aerial photo from 1/28/10 showing vernal pools in proximity to new fence.

The new fence is in close proximity to several vernal pools. Pools I and J are known to contain the endangered San Diego Fairy Shrimp. The new fence appears to traverse mounds, possibly representing “mima-mounds” associated with pool I.



Pool #6 definitely lies on the NMUSD property, and has been documented to contain Ostracods (Seed Shrimp) and pollywogs. This underscores its role in the larger vernal pool complex that exists across the Banning Ranch mesa. Protocol fairy shrimp surveys have yet to be performed on pool #6.

Vernal Pools, Wetlands, Fairy Shrimp and the unpermitted Newport Mesa Unified School District fence

Vernal Pool K on NMUSD property, looking towards west

Terry Welsh
Banning Ranch Conservancy
11/30/13

Introduction

The newly contructed, unpermitted fence on the Newport Mesa Unified School District (NMUSD) property is located in critical habitat for the San Diego Fairy Shrimp. The newly constructed fence is located in the immediate vicinity (less than 100 feet) of 7 vernal pools and one potential vernal pool. Three of the seven vernal pools are known to be occupied by the San Diego Fairy Shrimp. The other four vernal pools, and the potential vernal pool, have not been adequately excluded for being occupied by the San Diego Fairy Shrimp. All seven of the vernal pools, and the potential vernal pool, likely qualify as either wetlands or Environmentally Sensitive Habiat Areas (ESHAs) under the Coastal Act. The fence directly traverses one of these vernal pools. All of the vernal pools, and their watersheds, need to be proteced with 100 foot buffers.

Critical Habitat

According to the Federal Registry (Vol. 72, No. 238 /Wednesday, December 12, 2007 /Rules and Regulations) the NMUSD property is located in the only designated critical habitat area (Subunit 1C) for the San Diego Fairy Shrimp (***Branchinecta sandiegonensis***) in all of Orange County. Furthermore, according to this Federal Registry entry, the vernal pool complex on the Banning Ranch mesa (which includes the NMUSD property) along with the vernal pool complex at Fairveiw Park in Costa Mesa *"represent the only remaining examples of coastal vernal pools in Orange County."*

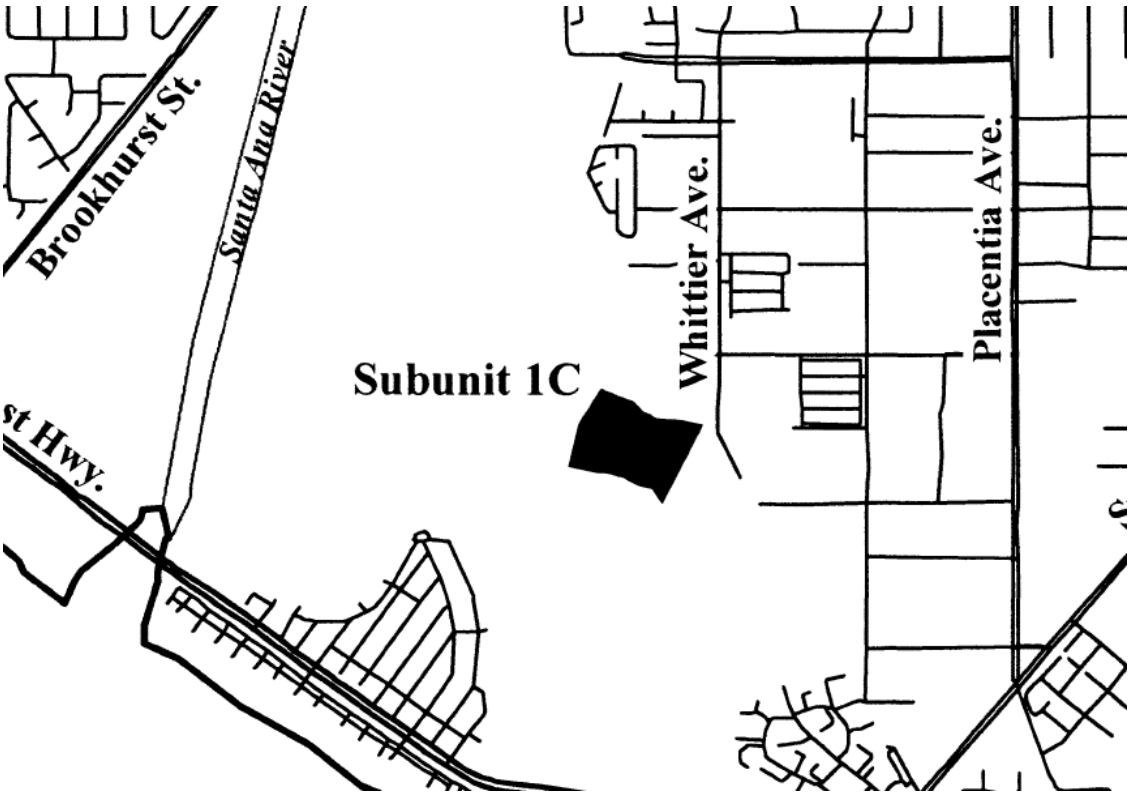


Figure 1 Map of critical habitat (Subunit 1C)

The vernal pool complex on the Banning Ranch mesa may well have existed for thousands of years, and continues to this day despite the disturbances that have occurred for the last several decades. Nearly all the vernal pools on the Banning Ranch mesa exhibit some degree of disturbance.

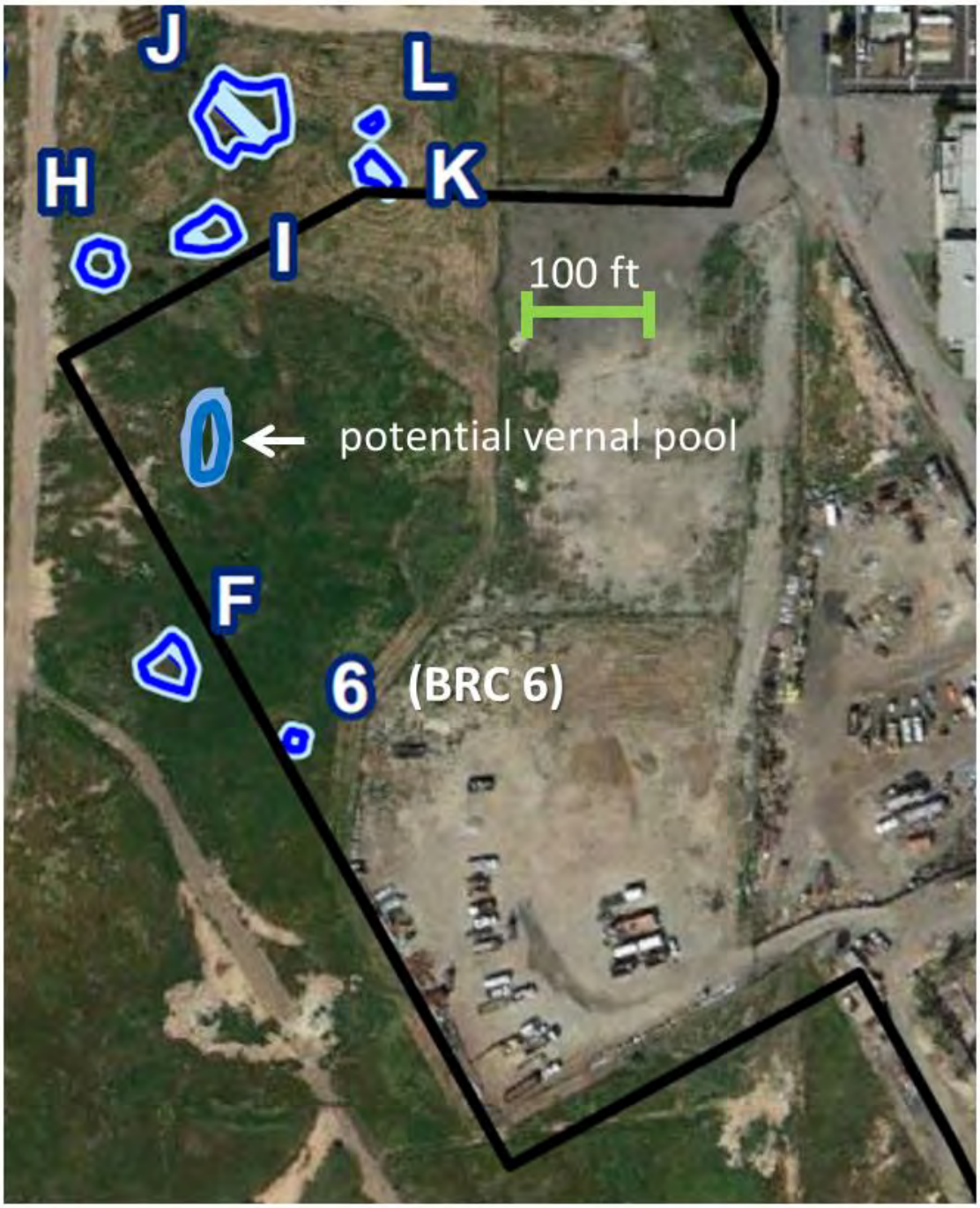


Figure 2 Vernal pools on the NMUSD property (and on the immediately adjacent NBR property).

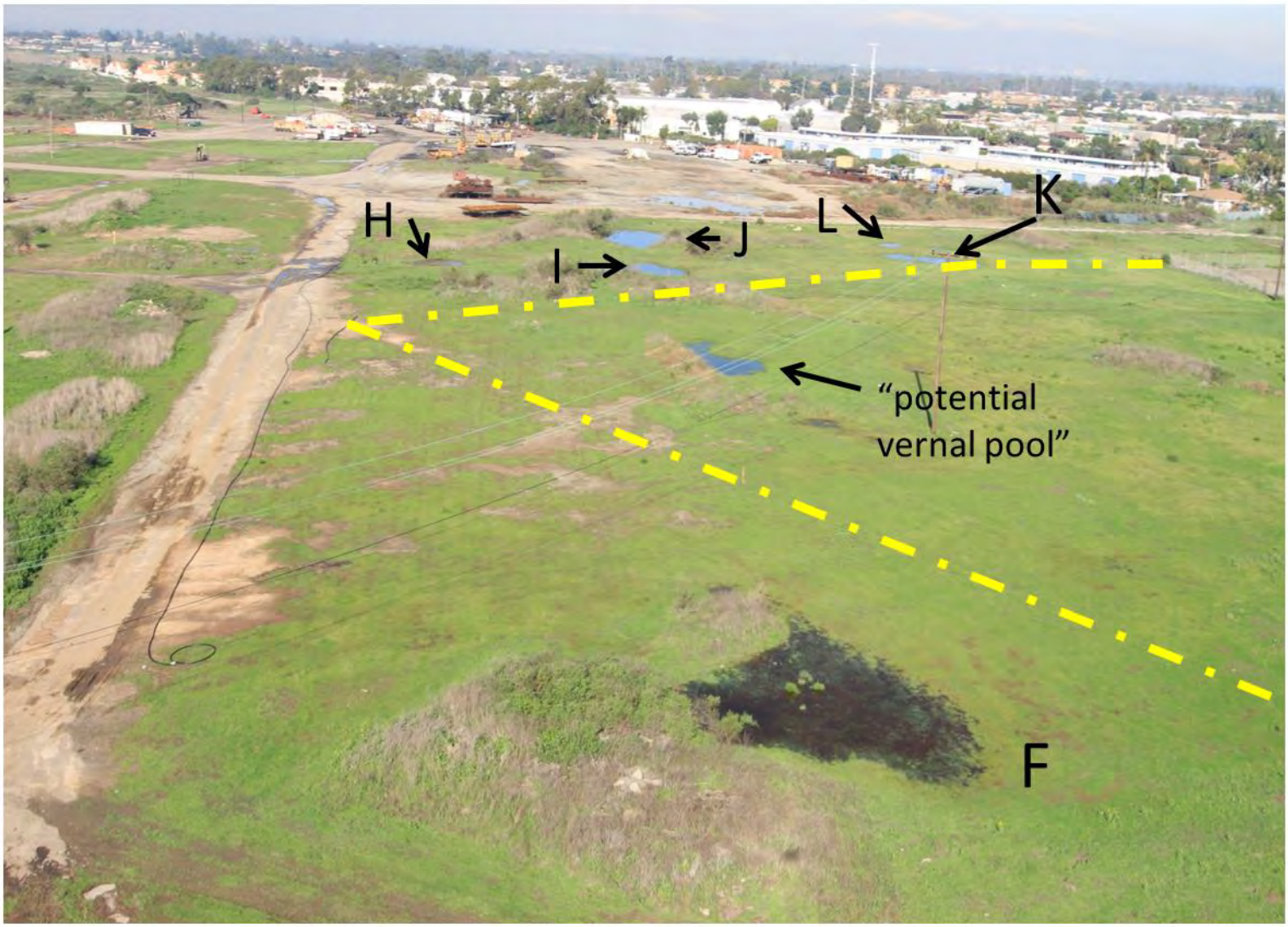


Figure 3 12/24/10 Looking towards north

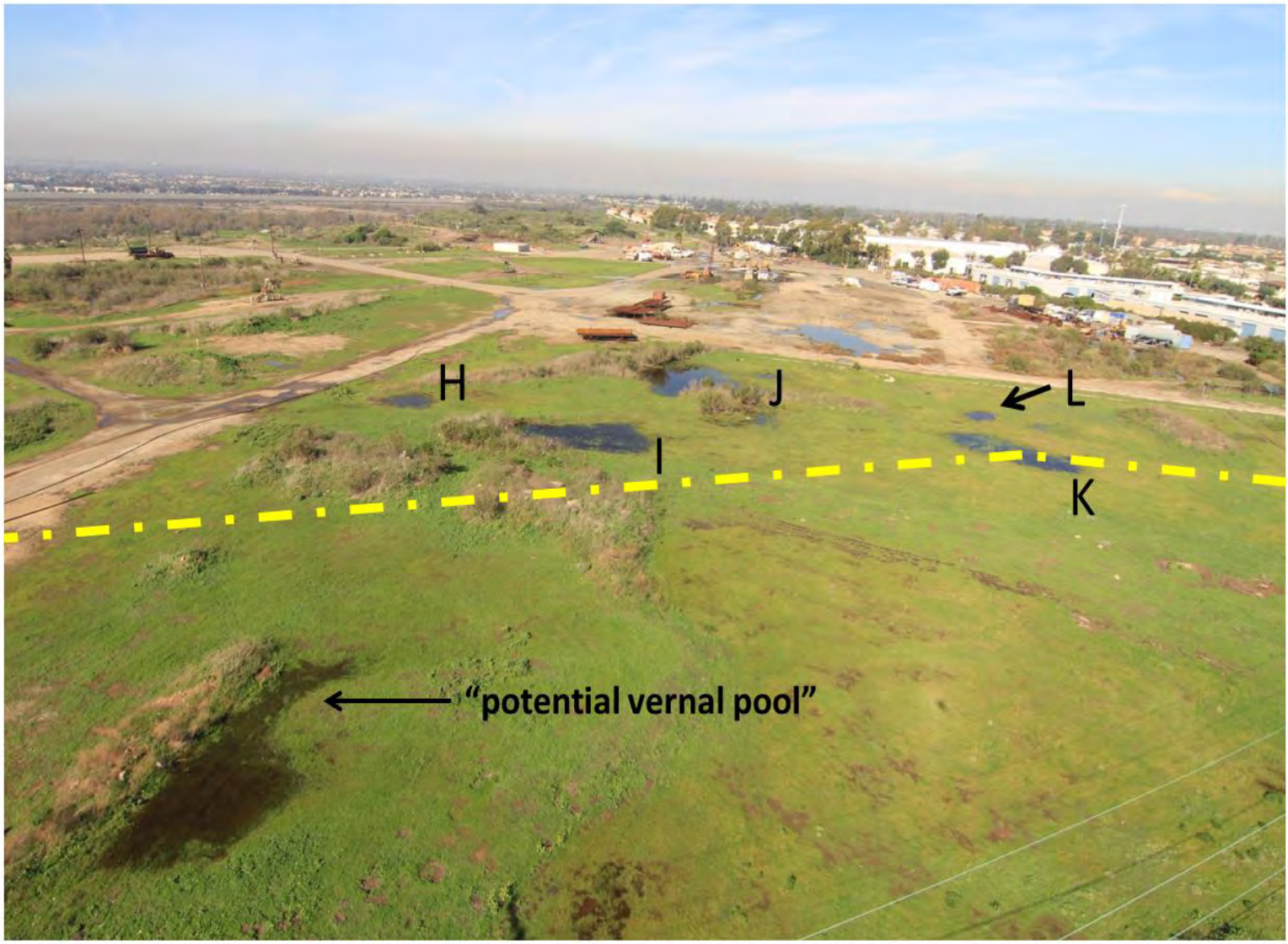


Figure 4 12/24/10 Looking towards northwest

Figure 5 12/24/10 Looking towards west

Figure 6 1/28/10 Looking towards east

Vernal Pools must have protocol fairy shrimp studies to exclude occupation by the San Diego Fairy Shrimp

The NMUSD property contains two documented vernal pools (BRC 6, and K) as well as another likely candidate for a vernal pool ("potential vernal pool"). Neither vernal pool K, nor BRC 6, nor "potential vernal pool" have had the full protocol surveys, as described by the USFWS guidelines, required for excluding occupation by listed fairy shrimp (guidelines published 4/19/96) .

These guidelines dictate that:

A complete survey consists of sampling for either:

1. two full wet season surveys done within a 5-year period; or

2. two consecutive seasons of one full wet season survey and one dry season survey (or one dry season survey and one full wet season survey).

In the case of BRC 6 and "potential vernal pool", there have neither dry season nor wet season surveys. It should be added that BRC 6 has been documented by an amateur naturalist as containing ostracod species (see Figures 7 and 8). In the case of vernal pool K, there has been a dry season survey that demostrated Versatile Fairy Shrimp (Dudek 2013). There has also been a wet season survey during the 2010/2011 wet season (Glenn Lukos) but vernal pool K was only sampled once during this wet season (1/20/11), making this an inadequate wet season survey.

In conclusion, the vernal pools on the NMUSD property need full protocol surveys to exclude occupation by listed fairy shrimp, specifically occupation by the San Diego Faiy Shrimp.

On the adjacent NBR LLC property, there are five vernal pools in the immediate area, less than 100 feet from the newly constructed fence (F, H, I, J, L). Of the five NBR LLC vernal pools, three (H, I and J) have been documented to be occupied by the San Diego Fairy Shrimp (Dudek 2013). The other two vernal pools on the NBR LLC property (F, and L) have had incomplete wet season surveys, only subjected to one single sampling during the 2010/2011 wet season (1/6/11) and therefore occupation by the San Diego Fairy Shrimp has not been adequately ruled-out. Despite substandard fairy shrimp surveys, vernal pool L has been documented to be occupied by the Versatile Fairy Shrimp.

Any vernal pool containing acquatic invertibrates such as fairy shrimp (listed or otherwise), or ostracods, meets the Hydrology criteria of the "three criteria method" used for deliniating wetlands and should be considered a coastal wetland under the Coastal Act.

Based on *the Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Arid West Region (Version 2.0)* the presence of aquatic invertebrates satisfies Wetland Hydrology Criteria B13. Under the Coastal Act, meeting one of the three major criteria (Hydrology, Hydrophytic Vegetation, or Hydric Soils) is sufficient for determining the presence of a coastal wetland.

On the NMUSD property, vernal pool K has been documented to contain Versatile Fairy Shrimp. Vernal Pool BRC 6 has been documented by an amateur naturalist to contain ostracod species (see Figures 7

and 8). Despite the documentation of ostracods in vernal pool BRC 6, full protocol wet season and dry season surveys have not been done on either BRC 6 nor "potential vernal pool."

In conclusion, the NMUSD property contains at least two coastal wetlands.

On the NBR property, in the area immediately adjacent to the newly constructed fence, there are, by virture of the presense of either San Diego or Versatile Fairy Shrimp, four documented coastal wetlands (H, I, J, and L). Vernal Pool F still needs to have full wet season surveys.

In conlcusion, the newly constructed fence traverses one documented coastal wetland (K) and is very close to at least five other documented coastal wetlands (H, I, J, L, BRC 6) and two other possible coastal wetlands (F and "potential vernal pool").

Figure 7 2/23/10 BRC 6 Looking towards north

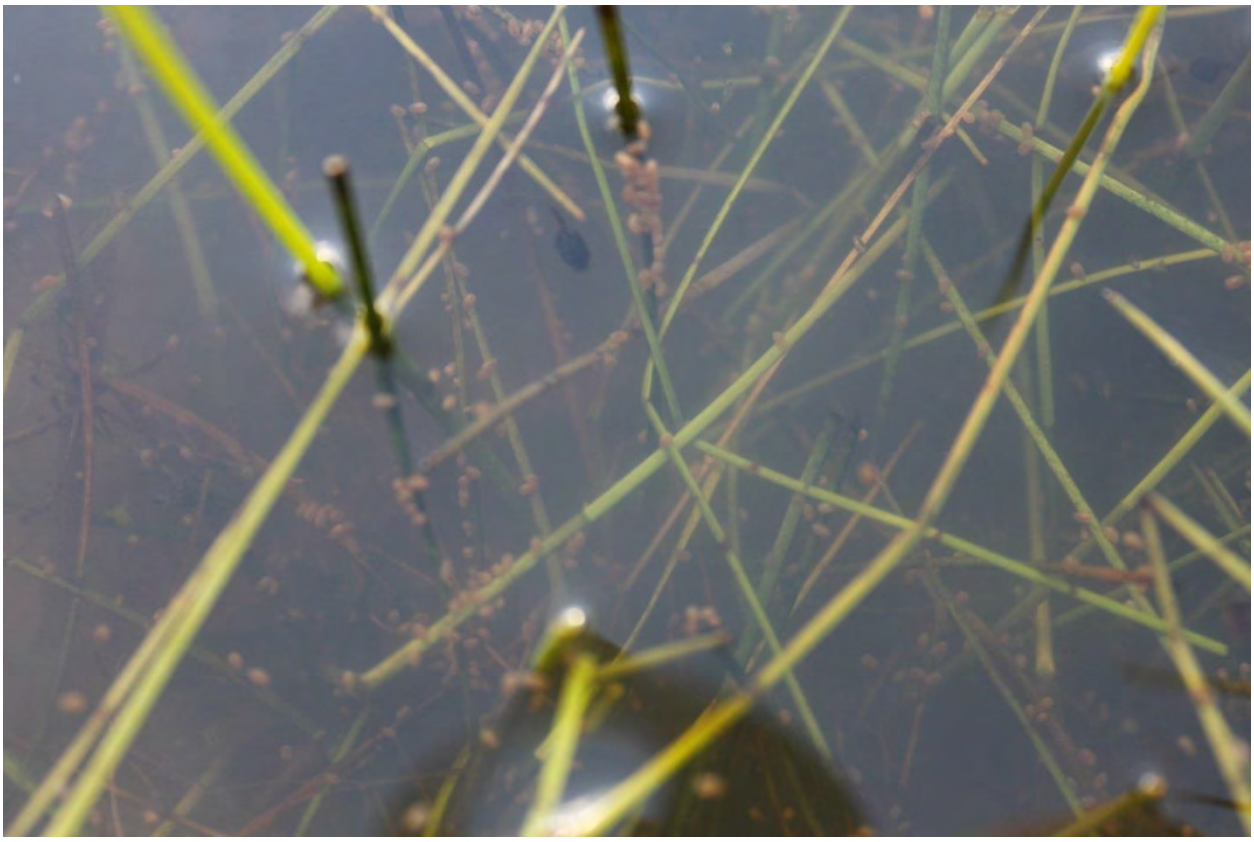


Figure 8 1/30/11 BRC 6 Ostracods and polliwog

Vernal Pool K, a documented coastal wetland, is directly traversed by the fence.

Figure 9 1/15/11 Vernal pool K. Looking towards west. Note the property line marker

Versatile fairy shrimp were found in K (Figure 9) during the 2012 dry season surveys. According to the 2013 Dudek wetland delineation report, K qualifies as a coastal wetland. The following is directly from their report:

5.4.14 Feature K

Feature K is a depression created by anthropogenic excavation of material to create adjacent berms. This feature is located within non-native grassland and covers approximately 621 square feet (0.014 acre).

Vegetation

Feature K supports as dominant native clustered tarweed (FACU) and non-native annual yellow sweetclover (FACU). Non-dominant species within the feature include non-native shortpod mustard (UPL), soft brome (FACU) and native salt heliotrope (FACU). The feature sample point

failed the Dominance Test and did not meet the Prevalence Index criteria for hydrophytic vegetation. Thus, this feature sample point does not meet the hydrophytic vegetation criterion.

Soils

Feature K soils are mapped as Myford Sandy Loam, 0-2 percent slopes by the USDA-NRCS (2012b). The soils exhibited a matrix color of 10YR 3/3 in the upper six inches and contained no redoximorphic features. Soils in this feature are not hydric and thus do not meet the hydric soils criterion.

Hydrology

Common versatile fairy shrimp and ostracods shells were present in this feature during 2012 dry season fairy shrimp surveys (ERS 2012), meeting the Aquatic Invertebrates (B13) primary indicator. Thus, this feature sample point has evidence of hydrology and meets the wetland hydrology criterion.

Summary of Feature K Characteristics

Feature K meets one of the three wetland criteria (wetland hydrology).

Watersheds need to be determined for all vernal pools. These watersheds need to be protected.

Watersheds have been determined for vernal pools H, I, and J on the immediately adjacent NBR property (Figure 10). These watersheds extend onto the NMUSD property. Watersheds need to be determined in a similar manner for vernal pools F, L, K, BRC 6 and "potential vernal pool." These watersheds need to be protected. The Coastal Commission has tradtionally required 100 foot buffers for coastal wetlands.

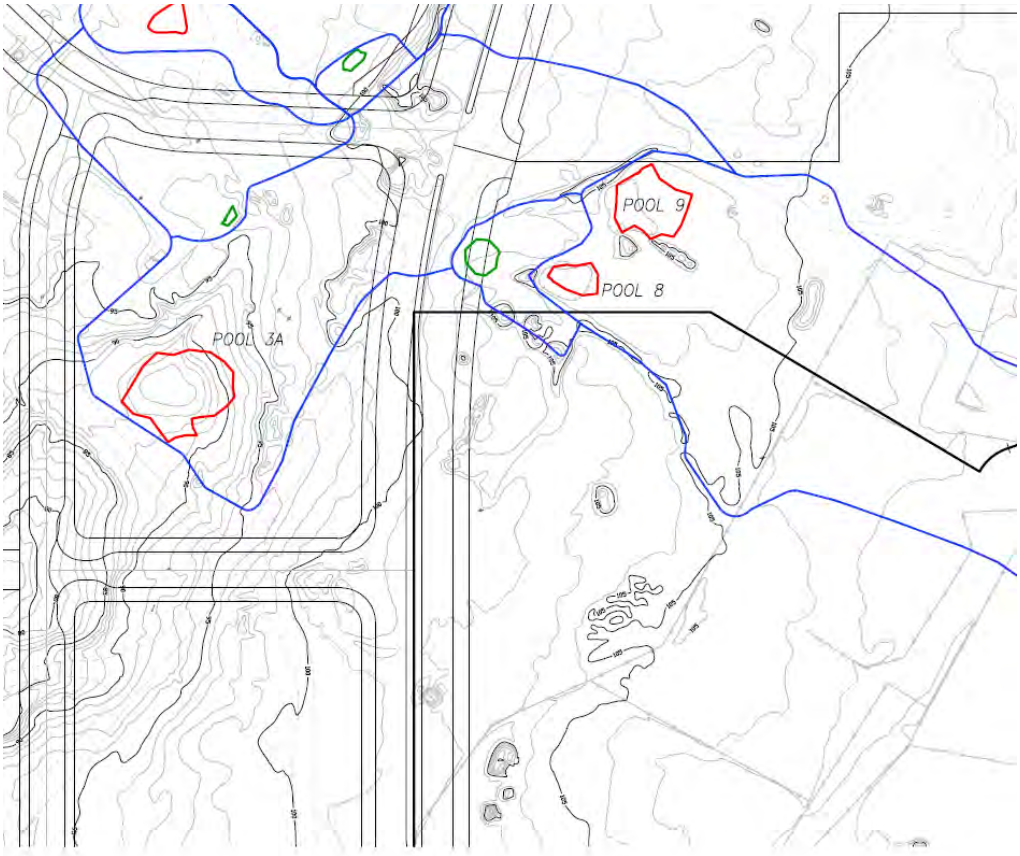


Figure 10 Watersheds (indicated by blue lines) for vernal pools H, I and J (I and J are called "pool 8" and "pool 9" respectively, while H is indicated by a green circular shape). Source is Fuscoe engineering, 5/15/13

Conclusion

The newly contructed, unpermitted fence on the Newport Mesa Unified School District (NMUSD) property is located in critical habitat for the San Diego Fairy Shrimp. The newly constructed fence is located in the immediate vicinity (less than 100 feet) of 7 vernal pools and one potential vernal pool. Three of the seven vernal pools are known to be occupied by the San Diego Fairy Shrimp. The other four vernal pools, and the potential vernal pool, have not been adequately excluded for being occupied by the San Diego Fairy Shrimp. All seven of the vernal pools, and the potential vernal pool, likely qualify as either wetlands or Environmentally Sensitive Habiat Areas (ESHAs) under the Coastal Act. The fence directly traverses one of these vernal pools. All of the vernal pools, and their watersheds, need to be proteced with 100 foot buffers.

Schwing, Karl@Coastal

From: C B <cblack949@hotmail.com>
Sent: Monday, December 09, 2013 3:50 PM
To: Padilla, Al@Coastal
Cc: Willis, Andrew@Coastal; Del Arroz, John@Coastal
Subject: Permit application-NMUSD
Attachments: CCC-NMUSD fence.doc

Hello Mr. Padilla,

Please include my comments in the record regarding the NMUSD permit application 5-131100.

Thank you,
Cindy Black

Attn: Al Padilla
CC: John Del Arroz; Andrew Willis-Enforcement Officer
Subject: NMUSD application for After the Fact permit of fence
From: Cindy Black

I am writing to you in regard to the application for an 'After the Fact' permit currently under consideration by the Commission, for the development activity associated with the fence constructed on the Newport Mesa Unified School District property located at 975 16th St., Newport Beach, which took place in December 2012.

I urge that the Commission not issue a permit for this development activity for the following reasons:

Vernal Pool Complex

- The fence disrupts the vernal pool character and its function as a vernal pool(wetland) complex.

Coastal Act Section 30255
Priority of coastal-dependent developments

"..., coastal-dependent developments shall not be sited in a wetland."

- The fence severs the continuity of the vernal pool complex ecological community found on the mesa.

- The fence serves as a barrier impeding the natural movement of wildlife including bird species that require an adequate flight distance to safety.
  Animals follow regular migration paths in order to avoid detection which increases their survival rate. Because of this fence they are now forced along major roadways and corridors which guarantees them a much greater exposure thus reducing their chance for survival.

Coastal Act Section 30240 Environmentally sensitive habitat areas; adjacent developments

(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.

Purpose

The applicant had first claimed the reason for the fence construction was to define its property boundaries. It is not necessary to have a fence to determine property boundaries-a survey marker, or even a stake could be used in place of a fence to delineate property boundaries.
A GPS device can also be used to determine property lines.

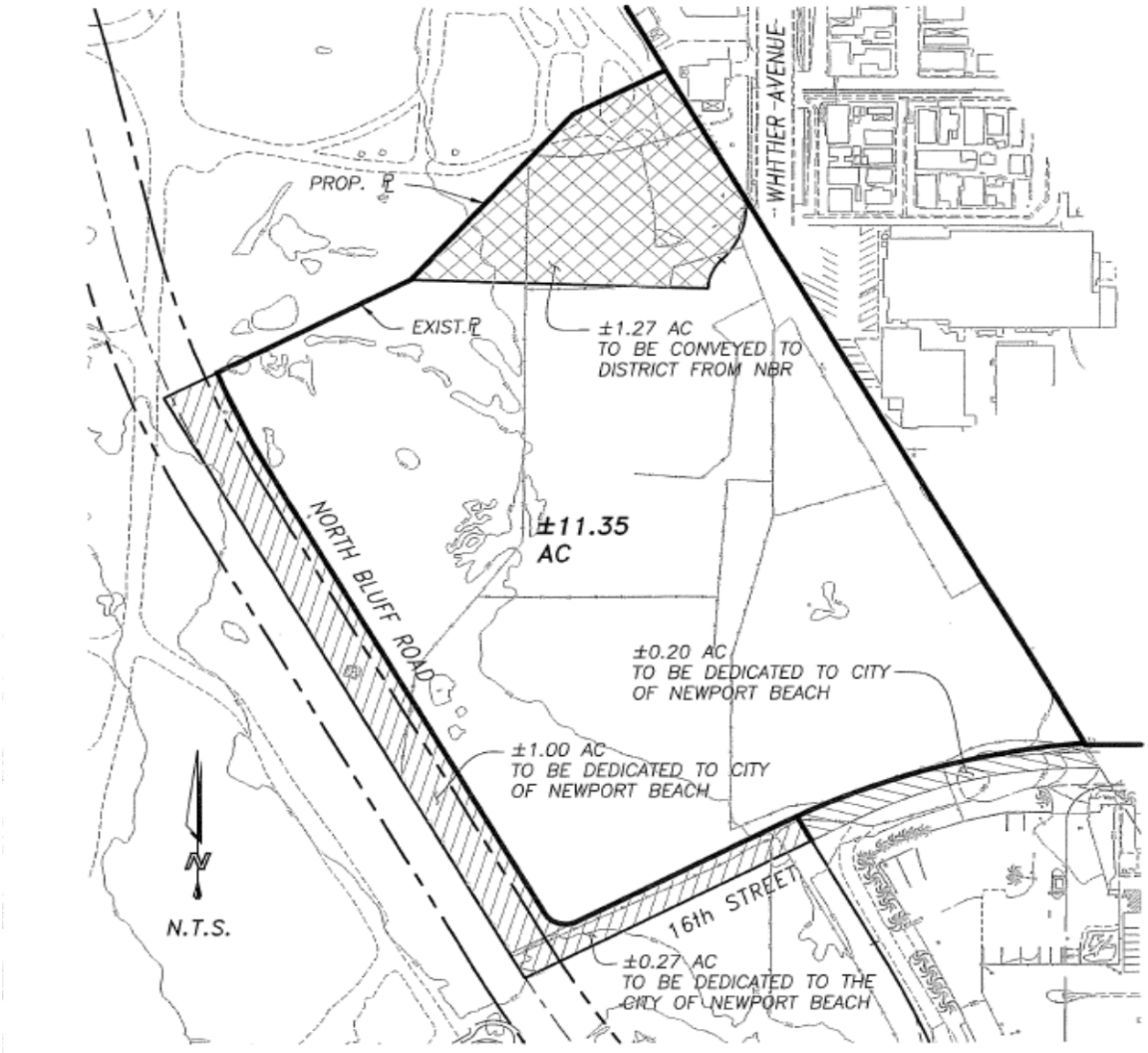
Sometime later the applicant claimed the reason for the fence was due to liability issues. 'Secure site' was the reason given on the permit application. Please keep in mind this site is devoid of any buildings or structures. The limited area used as a stockpile yard has been completely fenced for years.

- The applicant gives no reasoning for necessity of 'securing the site'.

The fence was erected on the property where it shares property boundaries with the Newport Banning Ranch. There is NO public access from the Newport Banning Ranch land, therefore, the claim of NMUSD of a liability issue due to public trespass is not a reasonable explanation justifying this development activity.

Additionally, a Memorandum of Understanding exists between the NMUSD and Newport Banning Ranch LLC, allocating a 'land swap' in which 1.27 acres of Newport Banning Ranch property bounding the most northeastern portion of NMUSD property would be transferred to NMUSD in exchange for 1.47 acres of NMUSD property to transfer to Newport Banning Ranch to support the NBR development project.
This 1.27 acres of land agreed for transfer is the same site where I have documented a pair of Burrowing Owls over a 3 month period.

EXHIBIT C
EXCHANGE PROPERTY



Burrowing Owl's

Between December 2012 and March 2013, I observed a pair of Burrowing Owls on both properties. The Burrowing Owl is designated as a CC: USFWS Bird Species of Conservation Concern and a CSC: CA Species of Special Concern.
One of the Owl's had a burrow at the base of the palm tree that was located on the NMUSD property. In correspondence with the District, Superintendent Mr. Reed claimed the tree was not on NUMSD property. It is clearly located on NMUSD property, within the boundary of the 'new' fence. The tree was cut in half and the vegetation removed from site. No one claimed credit for this activity. The tree stump is located between the new fence and the old fence, both of which are on NMUSD property.

03/7/12 DFG BUOW Staff Report, *emphasis added*
Care should be taken to minimize disturbance near occupied burrows during all seasons and not to “flush” burrowing owls especially if predators are present to reduce any potential for needless energy expenditure or burrowing owl mortality. Burrowing owls may flush if approached by pedestrians within 50m (Conway et al. 2003).

Burrowing Owl on NMUSD property before Palm tree cut in half
Facing West from Whittier St.

NMUSD employee harassing Burrowing Owl

Burrowing Owl sites Dec. 2012 thru Mar. 2013

☼ **Burrowing Owl**

Palm tree at southern most site

In addition to the Burrowing Owl's I have also confirmed that the Western spadefoot toad (Scaphiopus hammondii) a Species of Special Concern(CSC) also lives on this site.
I was unable to photograph a specimen but I do have a recording of their 'call' on videotape.
The Western spadefoot toad is also found nearby at Talbert Regional Park.

Wildlife observed by myself on the NMUSD site and immediately adjacent property, in addition to most commonly found doves, finches and sparrows:

NOTES- SE: State Endangered, ST: State Threatened, FE: Federally Endangered, FT: Federally Threatened, CC: USFWS Bird Species of Conservation Concern, CSC: CA Species of Special Concern, SR: State Rare Species

Great Blue Heron Ardea herodias CSC (breeding)
Great Egret Ardea alba CSC (breeding)
Red-tailed Hawk Buteo jamaicensis
Turkey Vulture Cathartes aura
Northern Harrier Circus cyaneus CSC (breeding)
Burrowing Owl Athene cunicularia hypugea CSC (breeding/some wintering), CC
American Kestrel Falco sparverius
Cassin's Kingbird Tyranneus vociferans
Western Bluebird Sialia mexicana
Brown Towhee Pipilo aberti
Killdeer Charadrius vociferus
Cottontail rabbit
Squirrel
Gopher

The NMUSD applied for an ATF permit November 13th. Since that time they have done additional development which was not included in the permit application.
NMUSD has added two concrete footings, posts and a gate with a chained lock on the original fence surrounding the property yard area. This section was absent for years and served as a thoroughfare for wildlife.
I am hopeful that they have done this additional activity in anticipation that they will be mandated by the Commission to remove the fence that was constructed in December 2012.

New Gate on NMUSD property-Facing West

Compliance with the California Coastal Act
Emphasis added.

Section 30240 Environmentally sensitive habitat areas; adjacent developments

(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.
(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.
(Amended by Ch. 285, Stats. 1991.)

Section 30255 Priority of coastal-dependent developments

Coastal-dependent developments shall have priority over other developments on or near the shoreline. Except as provided elsewhere in this division**, coastal-dependent developments shall not be sited in a wetland.** When appropriate, coastal-related developments should be accommodated within reasonable proximity to the coastal-dependent uses they support.
(Amended by Ch. 1090, Stats. 1979.)

Section 30601 Developments requiring coastal development permit from Commission

Prior to certification of the local coastal program and, where applicable, in addition to a permit from local government pursuant to subdivision (b) or (d) of Section 30600, a coastal development permit shall be obtained from the commission for any of the following:
(1) Developments between the sea and the first public road paralleling the sea or within 300 feet of the inland extent of any beach or of the mean high tide line of the sea where there is no beach, whichever is the greater distance.
(2) Developments not included within paragraph (1) located on tidelands, submerged lands, public trust lands, **within 100 feet of any wetland**, estuary, stream, or **within 300 feet of the top of the seaward face of any coastal bluff.**
(3) Any development which constitutes a major public works project or a major energy facility.
(Amended by Ch. 1173. Stats. 1981.) (2) Developments not included within paragraph (1) located on tidelands, submerged lands, public trust lands, **within 100 feet of any wetland**, estuary, stream, or within 300 feet of the top of the seaward face of any coastal bluff.
(3) Any development which constitutes a major public works project or a major energy facility.
(Amended by Ch. 1173. Stats. 1981.)

Section 30251 Scenic and visual qualities
The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

Section 30811 Restoration order; violations
In addition to any other authority to order restoration, the commission, a local government that is implementing a certified local coastal program, or a port governing body that is implementing a certified port master plan may, after a public hearing, **order restoration of a site if it finds that the development has occurred without a coastal development permit from the commission, local government, or port governing body, the development is inconsistent with this division, and the development is causing continuing resource damage.**
(Added by Ch. 955, Stats. 1992.)
(Section renumbered by Ch. 1199, Stats. 1993.)

Roman, Liliana@Coastal

From: Del Arroz, John@Coastal
Sent: Tuesday, December 17, 2013 5:12 PM
To: Roman, Liliana@Coastal
Subject: FW: NMUSD fence vegetation survey

John Del Arroz
Coastal Program Analyst
South Coast Office

From: Terry Welsh [mailto:terrymwelsh@hotmail.com]
Sent: Tuesday, December 10, 2013 10:12 AM
To: Dixon, John@Coastal; Engel, Jonna@Coastal; Willis, Andrew@Coastal; Schwing, Karl@Coastal; Del Arroz, John@Coastal
Subject: NMUSD fence vegetation survey

The 2013 Dudek grassland survey demonstrated areas of native purple needle grass (*Stipa pulchra*) and salt grass (*Distichlis spicata*) on the adjacent NBR property. It is quite possible that similar native grasses exist in the areas of the wintering Burrowing Owls on the NMUSD property.

The NMUSD CDP application for the unpermitted fence should not be considered complete until vegetation surveys have been performed on the NMUSD property.

Thanks you,

Terry Welsh

Schwing, Karl@Coastal

From: C B <cblack949@hotmail.com>
Sent: Friday, December 06, 2013 12:35 PM
To: Del Arroz, John@Coastal; Willis, Andrew@Coastal
Subject: FW: Please forward to Superintendent
Attachments: ESA CEQA.doc; Fenceline-North.jpg; Letter #1 UPD.ajw.npv.avr(1).doc; Owl 1-06-2013-2.jpg; Owl 1-06-2013-4.jpg; Owl NMUSD Employee.jpg; Palm tree gone.jpg; Palm tree chain sawed.jpg

Hi John-Andrew,

I thought I had provided your office with this documentation earlier in the year, to be sure I'm sending it again. It shows one of the Burrowing owls on the NMUSD property, at the base of the palm tree which was cut in half and removed-no one has claimed credit for this activity.
Thank you for all your efforts!
Cindy Black

From: cblack949@hotmail.com
To: dblack@nmusd.us; kyelsey@nmusd.us; jfranco@nmusd.us; dbrooks@nmusd.us; wdavenport@nmusd.us; mfluor@nmusd.us; kfoley@nmusd.us
Subject: Please forward to Superintendent
Date: Wed, 28 Aug 2013 10:44:30 -0700

NMUSD Board Members,

Thank you for listening to my concerns on this issue, I appreciate it, and your thoughtful consideration.
I have attached the documents which I presented at last nights Board meeting.

The issues I have regarding the fence construction are as follows;

- Necessity not demonstrated
- Fence traverses Federally designated 'critical habitat'
- Activity harming and harassing Burrowing Owls
- Destroying Palm tree with chainsaw and removal of vegetation

As I had mentioned, I spoke with Enforcement Officer Andrew Willis of the California Coastal Commission yesterday.
He is eager to discuss a resolution regarding the fence. This would be an opportune time for the removal of the fence as there is no nesting activity at this time.
Please contact me regarding any updates in this matter.

Thank you,


04/04/2013


04/04/2013

From:	Terry Welsh
To:	Dixon, John@Coastal; Engel, Jonna@Coastal; Del Arroz, John@Coastal; Schwing, Karl@Coastal; Willis, Andrew@Coastal; christine_medak@fws.gov
Subject:	Burrowing Owls and NMUSD
Date:	Friday, December 06, 2013 7:15:37 AM
Attachments:	Owl report for agencies.pdf

The attached report describes Burrowing Owls near the unpermitted NMUSD fence.

As always, thank you for your dedication.

Terry Welsh

Burrowing Owls and the Newport Mesa Unified School District (NMUSD) Proprty

Figure 1 Burrowing Owl immediately adjacent to unpermitted NMUSD fence, January 2013

Terry Welsh

Banning Ranch Conservancy

12/6/13

Introduction

Burrowing Owls are excedingly rare along the southern California coast. They are considered extirpated in Orange County except for a handful of of breeding birds at the Seal Beach Naval Weapons Stattion (Figure 2). However, a small number of Burrowing Owls (1-3 individuals, possibly more) regulary winter on Banning Ranch. At least one Burrowing Owl has been documented on the NMUSD property (Glenn Lukos 2008, Figure 3), while other individuals have been documented on the NBR property immdediately adjacent to the NMUSD property (Glenn Lukos 2009, 2010, Figures 4 , and amateur documentation 2013, Figures 5 and 6). Protection of these wintering Burrowing Owl sites, along with adequate buffers and foraging areas, is necessary for survival of this species along the southern Calfironia coast.

Figure 2 Burrowing Owls in California

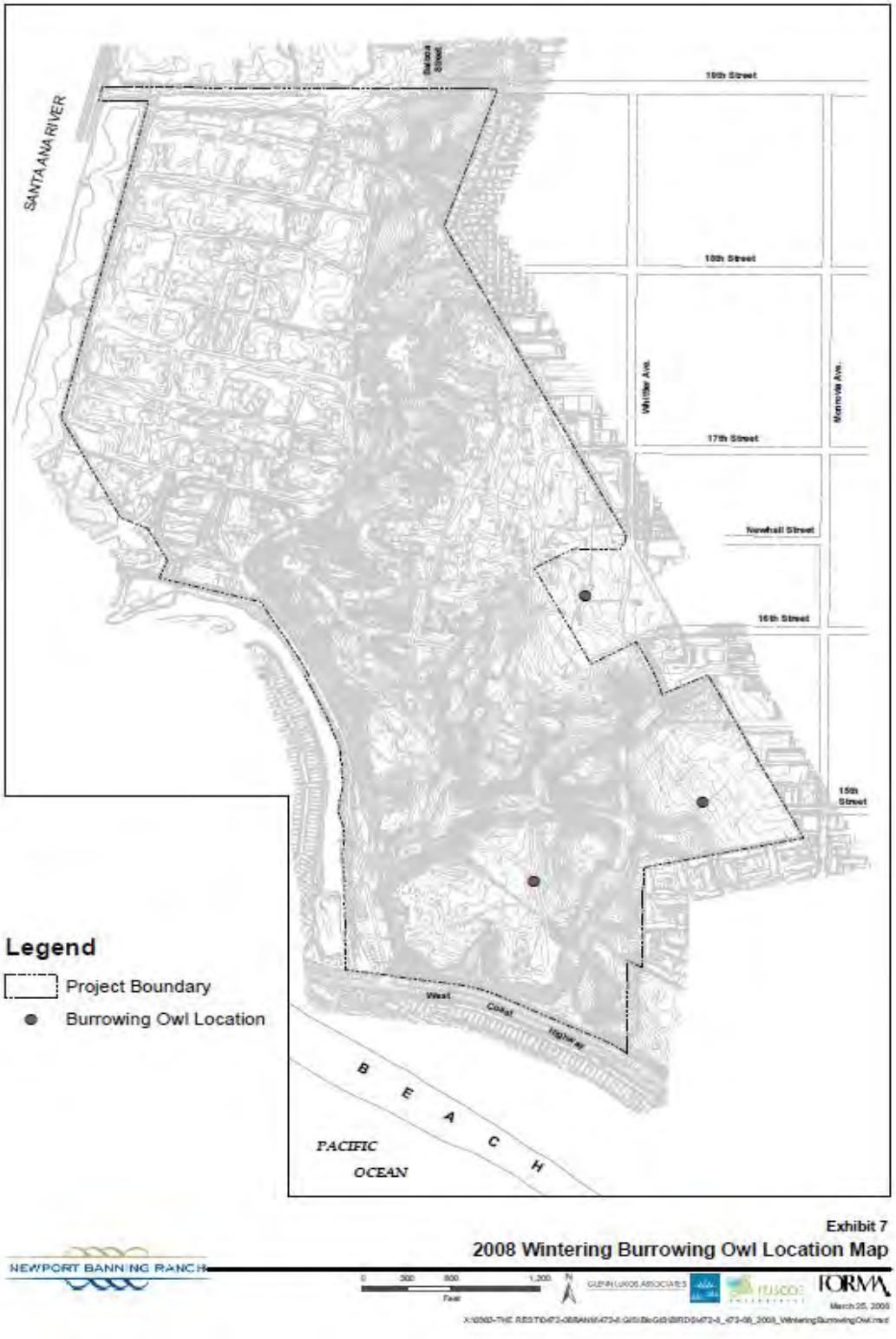


Figure 3 2008 Glenn Lukos survey (note owl on NMUSD property)

Figure 4 Glenn Lukos 2009, 2010 (this map also includes 2008 owls, but not the one on the NMUSD property)

Figure 5 Burrowing Owl January 2013 (amateur birder)

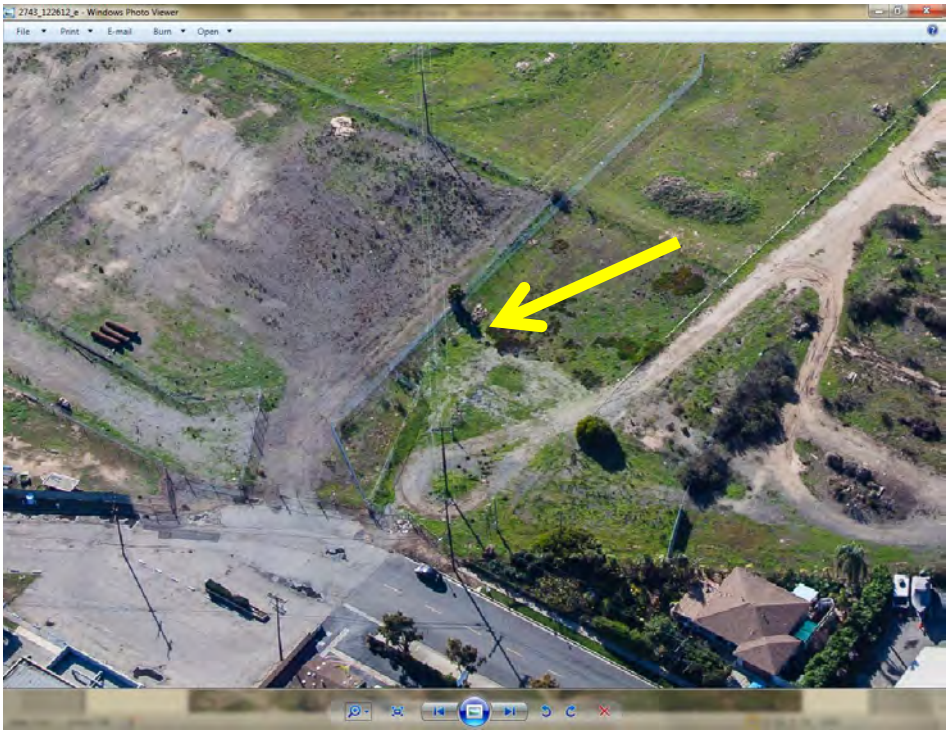


Figure 6 Location of owl in figure 4

Adequate Buffers and Foraging Areas

The March 7, 2012 Burrowing Owl Mitigation report from the California Department of Fish and Game recommends the following buffers for breeding pairs of Burrowing Owls. It is not known whether wintering Burrowing Owls would need similar, larger, or smaller buffers.

Buffers. Holroyd et al. (2001) identified a need to standardize management and disturbance mitigation guidelines. For instance, guidelines for mitigating impacts by petroleum industries on burrowing owls and other prairie species (Scobie and Faminow, 2000) may be used as a template for future mitigation guidelines (Holroyd et al. 2001). Scobie and Faminow (2000) developed guidelines for activities around occupied burrowing owl nests recommending buffers around low, medium, and high disturbance activities, respectively (see below).

Recommended restricted activity dates and setback distances by level of disturbance for burrowing owls (Scobie and Faminow 2000).

Location	Time of Year	Level of Disturbance		
		Low	Med	High
Nesting sites	April 1-Aug 15	200 m*	500 m	500 m
Nesting sites	Aug 16-Oct 15	200 m	200 m	500 m
Nesting sites	Oct 16-Mar 31	50 m	100 m	500 m

* meters (m)

The same March 7, 2012 Burrowing Owl Mitigation report also describes a foraging area of at least 280 - 600 acres as described below:

***Foraging habitat*. Foraging habitat is essential to burrowing owls. The following discussion is an excerpt from Gervais et al. (2008):**

"Useful as a rough guide to evaluating project impacts and appropriate mitigation for burrowing owls, adult male burrowing owls home ranges have been documented (calculated by minimum convex polygon) to comprise anywhere from 280 acres in intensively irrigated agroecosystems in Imperial Valley (Rosenberg and Haley 2004) to 450 acres in mixed agricultural lands at Lemoore Naval Air Station, CA (Gervais et al. 2003), to 600 acres in pasture in Saskatchewan, Canada (Haug and Oliphant 1990). But owl home ranges may be much larger, perhaps by an order of magnitude, in non-irrigated grasslands such as at Carrizo Plain, California (Gervais et al. 2008), based on telemetry studies and distribution of nests. Foraging occurs primarily within 600 m of their nests (within approximately 300 acres, based on a circle with a 600 m radius) during the breeding season."

Conclusion

Burrowing Owls are excedingly rare along the southern California coast. They are considered extirpated in Orange County except for a handful of of breeding birds at the Seal Beach Naval Weapons Stattion (Figure 2). However, a small number of Burrowing Owls (1-3 individuals, possibly more) regulary winter on Banning Ranch. At least one Burrowing Owl has been documented on the NMUSD property (Glenn Lukos 2008, Figure 3), while other individuals have been documented on the NBR property immdediately adjacent to the NMUSD property (Glenn Lukos 2009, 2010, Figures 4 , and amateur documentation 2013, Figures 5 and 6). Protection of these wintering Burrowing Owl sites, along with adequate buffers and foraging areas, is necessary for survival of this species along the southern Calfironia coast.

Roman, Liliana@Coastal

From: Del Arroz, John@Coastal
Sent: Tuesday, December 17, 2013 10:12 AM
To: Roman, Liliana@Coastal
Subject: FW: Comments on 5-131100 NMUSD Fence CDP
Attachments: NMUSD fence CDP comments.pdf

John Del Arroz
Coastal Program Analyst
South Coast Office

-----Original Message-----
From: Kevin Nelson [mailto:knelson@web-conferencing-central.com]
Sent: Tuesday, November 26, 2013 1:27 PM
To: Del Arroz, John@Coastal
Cc: Schwing, Karl@Coastal; Willis, Andrew@Coastal
Subject: Comments on 5-131100 NMUSD Fence CDP

Hello John, Karl and Andrew,

Happy Thanksgiving to you!

Here are my comments related to the fence CDP submitted by Newport Mesa School District.

Thanks,

Kevin Nelson
Web Conferencing Central
949-939-9372
knelson@web-conferencing-central.com

Comments on Fence Constructed by NMUSD Without a Permit

Coastal Commission Staff,

Please accept my comments on a fence recently installed by Newport Mesa School District without a coastal development permit.

This project is not related to the district's needs. Rather, it is the result of a land swap agreement between the NMUSD and Newport Banning Ranch LLC, a screenshot of which is included on the next page of this comment letter.

NMUSD says the fence is needed for security. Yet the existence of the land swap agreement suggests that it is part of a quid pro quo in which the district acts in the interest of NBR as part of a larger arrangement.

The ecosystem on Banning Ranch is being compromised by it's owners through a program of mowing, scraping, illegal fill into vernal pools, soil compaction, cactus removal and encouragement of non-native vegetation. The fence is simply another tool in this quiver.

Since it has no real purpose and is destructive to the establishment of an accurate biological baseline that agencies must rely on for evaluation of this ecosystem, the fence should come down.

Thank you,
Kevin Nelson
kevinsriver@gmail.com
949-939-9372

Contents:

- Image of contract between NBR and NMUSD
- Main points on fence
- Sensitivity of Vernal Pools to watershed disruption
- Burrowing Owl habitat disruption
- Images of area and history of vegetation removal

Land Swap Agreement

MEMORANDUM OF UNDERSTANDING

This Memorandum of Understanding ("Memorandum") is entered into as of this _____day of _____, 2011, by and between Newport Banning Ranch LLC, a California limited liability company, ("NBR") and the Newport-Mesa Unified School District, a political subdivision of the State of California located in Orange County, California ("District").

RECITALS

A. District is the owner of certain undeveloped property consisting of approximately 11.36 acres, a portion of which is in the City of Newport Beach and a portion of which is in the County of Orange, (the "District Property"). The District Property is described in **Exhibit A**. The District intends to reserve the District Property for future school use purposes.

B. NBR is processing a development application and environmental clearances for a master planned community in the City of Newport Beach (the "NBR Project") for the development of certain property in the City of Newport Beach and the County of Orange (the "NBR Property"). The 402-acre NBR property is adjacent to the District Property and is

AGREEMENT

1. In consideration of the dedication of right-of-way for North Bluff Road and 16th Street extension westerly of the City of Newport Beach Utility Yard by the District comprising the District Dedicated Property at a location generally depicted on **Exhibit C** (the "Dedicated Property"), NBR agrees to convey an equivalent amount of the NBR Property (approximately 1.3 acres) adjoining the District Property at a location generally depicted on **Exhibit C** (the "Exchange Property"). The precise determination of the size, configuration and location of the Exchange Property shall be determined by the parties upon completion of the following: 1) CEQA review and certification of the environmental impact report for the NBR Project, 2) approval of the NBR Project by the City of Newport Beach and the California Coastal Commission, and 3) the final design of the portion of North Bluff Road and the extension of 16th

Relevant habitat facts and effects

- The fence is a disruption of the biological viability of a rare and important vernal pool complex.

- The fence runs over mima mounds that are common elements of vernal pool hydrology, and within a few feet of a vernal pool documented to contain federally protected San Diego Fairy Shrimp.

- The fence inhibits the movement of larger animals such as coyotes and foxes.

- The fence may disrupt the hunting success of some raptors that rely on a fast horizontal approach to prey such the Northern Harrier (sighted on Banning).

- The fence is an unnecessary duplication of existing fencing that has sufficed for decades and mowed by NBR and West Newport Oil without incident.

- The construction of the fence is actually the outcome of a land swap agreement between the school district and NBR.

- The fence coincides with other habitat mowing, scraping, cactus removal, ground compacting activities being conducted on Banning Ranch which have no relation to maintenance of active wells.

- Fence is near a mound with documented use by a Burrowing Owl in 2013.

- The fence is an example of an unpermitted structure in the midst of key habitat, and should not be “grandfathered” in, setting a precedent for further actions that degrade habitat by this land owner or others who may see the lack of penalties as an invitation to build first, apply later.

Vernal Pool Research

The following quotes refer to the long term viability of vernal pool species.

- Increased isolation of pools will reduce visitation by vector organisms. This will further reduce gene flow and subsequently result in further reductions in genetic variation.

- Preservation of vernal pool communities requires preservation of the surrounding uplands for watershed and for amphibian, pollinator, and vector habitat.

- If a species' food is missing, or for plants, if a pollinator is missing, the species simply will not survive long.

- When trying to preserve communities about which little is known, careful decisions based on the best scientific knowledge available and a clear understanding of population ecology and genetics are necessary. Preservation decisions must be made at the land-scape level and consider functional communities, not just individual species or single pools.

Considerations for the Management of
Vernal Pool Faunal Communities. Marie A. Simovich

Current wetlands policies in the U.S. call for no net loss of vernal pool habitats into the future

Loss of Diversity as a Consequence of Habitat Destruction in
California Vernal Pools JAMIEL. KING Evolution and Ecology, University of California

As noted by Calhoun et al. (2003) many of the vernal pool dependent species are equally dependent on the surrounding upland. Conservation of vernal pool fauna therefore requires a landscape perspective.

The Society of Wetland Scientists, VERNAL POOLS AS "ISOLATED WETLANDS"
http://users.ipfw.edu/isiorho/wetvernalisolatedwetlands2003.pdf

Vernal Pool Research

Vernal pool landscape fragmentation results in physical and biological consequences (Saunders et al., 1991). They include a potential decline in waterfowl, shorebird, rare plant, and anostraca populations resulting from habitat loss as well as decreased use by avian species due to habitat degradation.

Avian Uses of Vernal Pools and Implications for Conservation Practice
JOSEPH G. SILVEIRA U. S. Fish and Wildlife Service
http://vernalpools.org/proceedings/silveira.pdf

- Modifications to the uplands surrounding a vernal pool (e.g., grading cuts) can negatively affect the pool's hydrology by accelerating the flow of water into or out of the subsoil, even if such modifications occur outside the pool's surface watershed.

-Subtle changes in any of the examined environmental factors (climate, topographic relief, watershed connections and pool morphology) can have major implications for the long-term persistence of the specialized endangered species that are a distinctive feature of the vernal pool ecosystem.

Branchiopod Research Group

Without a more detailed knowledge of each taxon's niche (the abiotic and biotic factors determining positive fitness) we can neither easily distinguish between historical and current ecological reasons for a population's presence or absence, nor predict a population's persistence in the face of habitat loss or alteration. As Baltz and Moyle (1993) found with native fish populations, vernal pools are also likely to be invaded by non-native species when disturbed or when other habitat is reduced. For instance, Branchinecta lindahli, a generalist and the most widespread North American species in the genus, is found in vernal pools altered by human activities, such as off-road driving and disking(Fugate, pers. obs.).

Branchinecta of North America: Population Structure and Its Implications for Conservation Practice, MICHAEL FUGATE Science Department, Claremont College

Vernal Pool Research

- For a useful discussion of the limitations of population viability analysis (PVA) and suggestions on effective ways to incorporate PVA into conservation planning, process-driven design would be based on natural disturbance regimes taken along with the area required by different taxa to maintain their internal re-colonization dynamics at levels which prevent extinction.

- A scale-hierarchic view which recognizes structure, pattern, and process in ecological phenomena leads us to place significant emphasis on the management of processes to assure functional integrity and the system's ability to respond creatively to supra-system shocks. In one sense, this is a call to transcend the Endangered Species Act, and get beyond a species-oriented approach to an ecosystem ecology-based and truly habitat-oriented "Endangered Ecosystems Act" sort of approach, which is concerned most with the management of "keystone" ecological processes and functions [Mills et al., 1993; Stone, 1995; De Leo & Levin, 1997].

- Once ecological processes and functions are allowed standing in the planning process, it becomes evident that reserves must have instead what Pickett and Thompson [1978] had called "minimum dynamic area".

Landscape Ecological Interventions: An Ecosystem Approach Ashwani Vasishth, PhD California State University, Northridge

Fence area Dec 2010

2011 image. Vernal pool K with survey marker for fence construction.

Fence runs over the edge of BRC pool 6, with documented ostracod.

Ostracod in BRC Pool 6 shown above.

Burrowing Owl mound vegetation removal

Burrowing Owl was sighted on mound near fence over a period of 3 months before vegetation was removed in 2013.

These images show exact burrow location with vegetation destroyed. Owl no longer sighted after disturbance.

Pool near fence with confirmed San Diego Fairy Shrimp

Pool I. Fence runs a few feet to the right in this image (view east)

Pool I with wetland vegetation, of which few signs remain. 2011 (view northeast)

Fence area vegetation

Plant mix across fence area 2011. (view north)

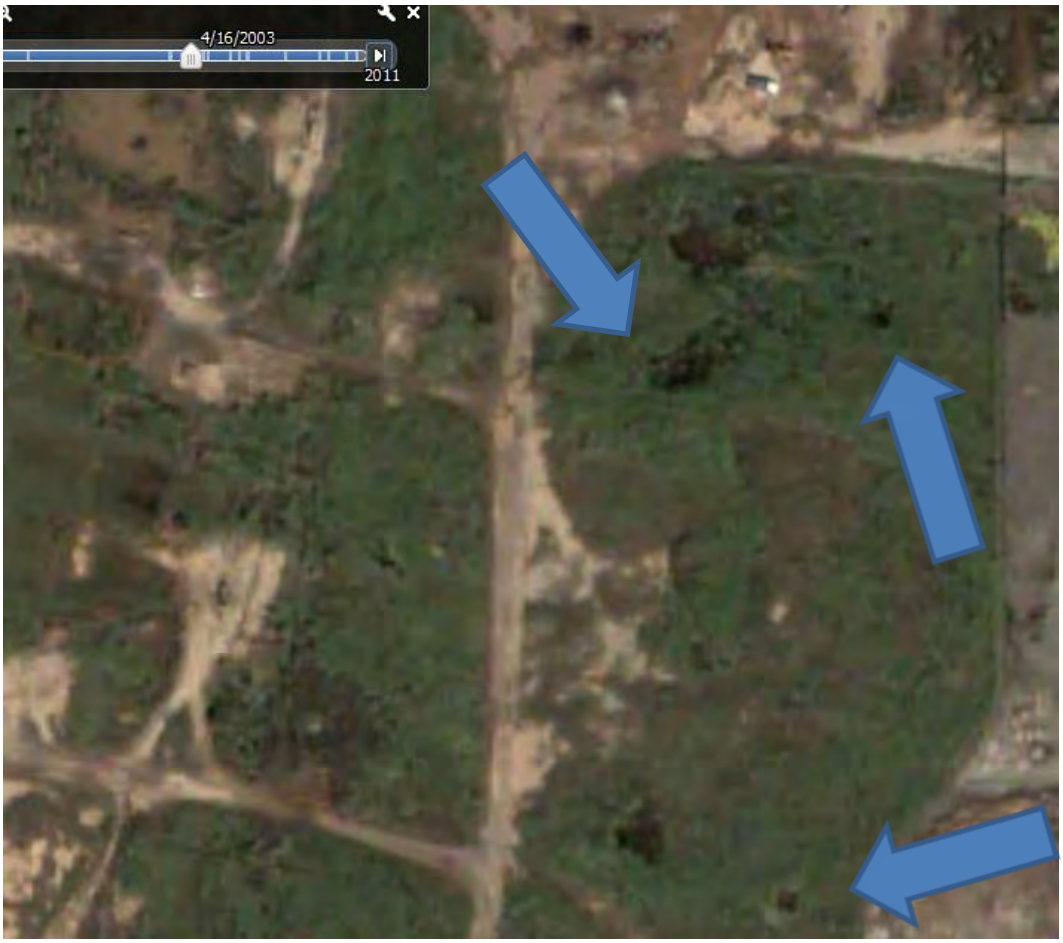
Plant mix across fence area 2011. (view north)

Fence area vegetation

Coyote bush sprouting across the area inside the fence early 2010, before mowing. (view to north)

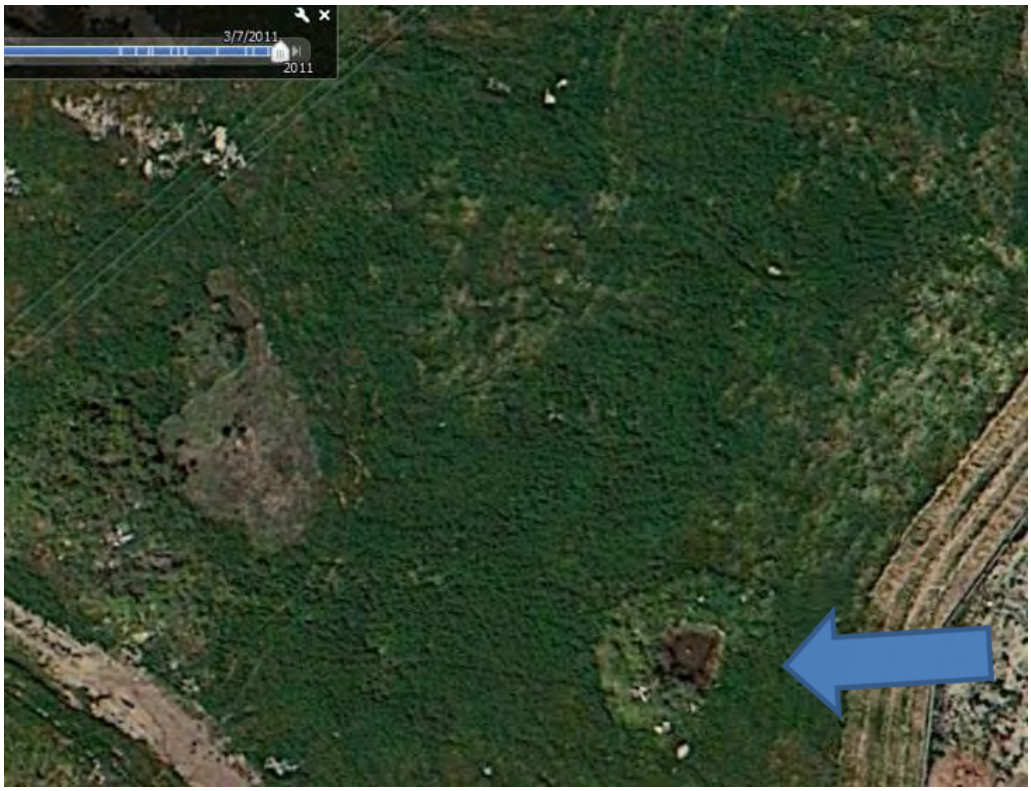
Coyote bush at south edge of fence area 2011. (view to south)

Fence area Apr 2003. Darker areas are pools.
Arrows indicate pools affected by fence.



Fence area Dec 2003 showing effects of mowing.

Fence area Mar 2011 showing vegetation



Fence and pool area being mowed by NBR & Oil company

Fence area Feb 2013

Burrowing Owl mound Feb 2013 with vegetation.

Fence area Mar 2005 showing indications of pooling and thick vegetation.

Same area Oct 2007, almost completely denuded.