



*via certified mail*

July 27, 2016

Ed Ghandour  
Security National Guarantee  
505 Montgomery St, 11<sup>th</sup> Floor  
San Francisco, CA 94111

The Honorable Sally Jewell  
Secretary of the Interior  
U.S. Department of the Interior  
1849 C Street, NW  
Washington, DC 20240

**Re: Notice of Intent to Sue for Violations of the Endangered Species Act from Construction and Operation of the Monterey Bay Shores Development**

Dear Mr. Ghandour,

On behalf of the Center for Biological Diversity, Sierra Club, National Audubon Society and Monterey Audubon Society (collectively “conservation groups”), we hereby provide notice, pursuant to 16 U.S.C. § 1540(g), that Security National Guarantee (SNG) will violate the Endangered Species Act (“ESA”) and its implementing regulations by moving forward with constructing and operating the Monterey Bay Shores Resort (“Project”), which will result in harassment, harm, injury and mortality of western snowy plovers on and adjacent to the Project site. This letter is provided to you pursuant to the 60-day notice requirement of the ESA’s citizen suit provision and to the extent such notice is deemed necessary by a court. 16 U.S.C. § 1540(g)(2). The activities described in this notice will violate the take provisions of the ESA and if SNG continues to move forward with construction of the Project as it is currently proposed, the conservation groups intend to commence a civil action against you for violations of section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).

The Sierra Club is a national nonprofit organization of over 732,000 members dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth’s ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. Over 193,500 Sierra Club members reside in California.

The Center for Biological Diversity is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center for Biological Diversity has over a million members and e-activists throughout California and the western United States. The Center has worked for many years to protect imperiled plants and wildlife, open space and habitat, air and water quality along California coasts.

Founded in 1905, Audubon is a not-for-profit organization, exempt from tax under section 501(c)(3). It is one of the country’s oldest and largest conservation organizations.

Audubon’s mission is to conserve and restore natural ecosystems, focusing on birds, other wildlife and their habitats for the benefit of humanity and the earth’s biological diversity. Audubon California, a state field program of the National Audubon Society, works to enhance and protect critical wildlife habitat, promote environmentally sensible land-use strategies, and educate growing and diverse population. Audubon California protects thousands of acres of wildlife habitat, offers vibrant educational programs in diverse neighborhoods, and engages new and nontraditional audiences in conservation.

Monterey Audubon is a non-profit conservation group founded in 1943 with some 1000 members, primarily residing in Monterey County. Since its inception, Monterey Audubon has been devoted to celebrating, conserving and restoring the birds, ecology and wildlife of the greater Monterey Region.

According to the United States Fish and Wildlife Service (“USFWS”), western snowy plover “[e]ggs or chicks within or near construction areas would likely be killed by construction activities or abandoned by their parents due to harassment caused by construction activity” and “take in the forms of harm and harassment would be expected due to destruction of occupied breeding habitat (when it is converted to resort facilities) and use of the Project area and adjacent areas by thousands of additional people per year.”<sup>1</sup> Therefore, the conservation groups hereby request that SNG halt all current and/or proposed construction activities at the Project site until it has: (1) obtained an Incidental Take Permit (“ITP”) from the USFWS, and (2) prepared a Habitat Conservation Plan (“HCP”) that has been approved by the USFWS.

This is the same course of action the USFWS recommended in its April 1, 2016 letter to the California Coastal Commission (“Commission”), which detailed the deficiencies in SNG’s current Habitat Protect Plan (“HPP”).<sup>2</sup> Following a detailed review of the proposed Project and associated HPP, the USFWS concluded that the HPP “is not sufficient to avoid take of listed species caused by construction and use of the Project” and “the only available approach for take that would result from the Project to be permitted under the [ESA] is for the Applicant to prepare a HCP in support of an application for an [ITP].”<sup>3</sup> The Commission concurred with the USFWS conclusions in its May 3, 2016 letter to SNG.<sup>4</sup> The conservation groups urge the Commission not to authorize construction of the Project until an HCP and ITP are approved by USFWS for the Project and SNG complies with the ESA before moving forward.

## **I. The Endangered Species Act**

The Endangered Species Act (“ESA”) affords broad protections to threatened and endangered species. The ESA is “the most comprehensive legislation for the preservation of

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<sup>1</sup> U.S. Fish and Wildlife Service, 2016, Letter Regarding Monterey Bay Shores Resort Development (April 8, 2016) (p. 3) attached as Exhibit A (hereinafter “USFWS 2016 Letter”).

<sup>2</sup> USFWS 2016 Letter, pp. 8-9.

<sup>3</sup> *Id.*

<sup>4</sup> California Coastal Commission, 2016, Letter Regarding Coastal Development Permit A-3-SNC-98-114 (Monterey Bay Shores Resort)—Prior to Construction Condition Compliance Status (May 3, 2016) (pp. 4-5) (hereinafter “Commission 2016 letter”).

endangered species ever enacted by any nation.”<sup>5</sup> Its fundamental purposes are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [and] to provide a program for the conservation of such endangered species and threatened species . . . .”<sup>6</sup>

To achieve these objectives, the ESA directs the USFWS to determine which species of plants and animals are “threatened” and “endangered” and place them on the list of species afforded protection under the ESA.<sup>7</sup> An “endangered” species is one “in danger of extinction throughout all or a significant portion of its range,” and a “threatened” species is “likely to become endangered in the near future throughout all or a significant portion of its range.”<sup>8</sup> Once a species is listed, the ESA provides a variety of procedural and substantive protections to ensure not only the species’ continued survival, but also its ultimate recovery. The Supreme Court has noted that “Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities.”<sup>9</sup>

Section 9 of the ESA prohibits any “person” from “taking” or causing take of any member of an endangered species.<sup>10</sup> This take prohibition also applies to threatened species such as the western snowy plover.<sup>11</sup> The term “take” is defined broadly, need not be lethal, and includes to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” or cause another to do so.<sup>12</sup> The USFWS has further defined “harass” to include “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, including breeding, feeding, or sheltering.”<sup>13</sup> In addition, “harm” is defined to “include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”<sup>14</sup>

The ESA’s legislative history supports “the broadest possible” reading of the prohibition against take.<sup>15</sup> “Take” includes direct as well as indirect harm and need not be purposeful.<sup>16</sup> Present or future harms qualify as take: “an imminent threat of harm . . . falls easily within the broad scope of Congress’ definition of ‘take.’”<sup>17</sup>

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<sup>5</sup> *Tennessee Valley Auth. v. Hill* (“Hill”), 437 U.S. 153, 180 (1978).

<sup>6</sup> 16 U.S.C. § 1531(b).

<sup>7</sup> 16 U.S.C. § 1533.

<sup>8</sup> *Id.* at §§ 1532(6), (20).

<sup>9</sup> *Hill*, 437 U.S. at 194.

<sup>10</sup> 16 U.S.C. § 1538(a).

<sup>11</sup> *Id.* at § 1533(d); 50 C.F.R. § 17.31.

<sup>12</sup> 16 U.S.C. § 1532(19).

<sup>13</sup> 50 C.F.R. § 17.3.

<sup>14</sup> *Id.*

<sup>15</sup> *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995).

<sup>16</sup> *Id.* at 704; see also *Nat’l Wildlife Fed’n v. Burlington N. R.R.*, 23 F.3d 1508, 1512 (9th Cir. 1994).

<sup>17</sup> *Forest Conservation Council v. Rosboro Lumber Co.*, 50 F.3d 784, 785 (9th Cir. 1995).

The ESA authorizes private enforcement of the take prohibition through a broad citizen suit provision. “[A]ny person may commence a civil suit on his own behalf to enjoin any person, including . . . any . . . governmental instrumentality or agency . . . who is alleged to be in violation of any provision of [the ESA] . . . .”<sup>18</sup> Citizens may seek to enjoin both present activities that constitute an ongoing take and future activities that are reasonably likely to result in a take.<sup>19</sup> Courts have held that “the language and legislative history of the ESA, as well as applicable case law, support our holding today that a showing of a future injury to an endangered or threatened species is actionable under the ESA [citizen suit provisions].”<sup>20</sup> 50 F.3d at 783. Upon a showing of “imminent threat of injury to wildlife,” the injury requirement of the Secretary’s definition of “take” and “harm” would be satisfied.<sup>21</sup> The ESA’s citizen suit provision also provides for the award of costs of litigation, including reasonable attorney and expert witness’ fees.<sup>22</sup>

Under section 10 of the ESA, a non-federal entity such as a developer can avoid potential liability for taking a threatened species by obtaining an incidental take permit.<sup>23</sup> In exchange for permission to “take” a listed species pursuant to an ITP, the permit applicant must commit to implement a plan that “conserv[es]” – *i.e.*, facilitates the recovery of – the species.<sup>24</sup> This plan is called a Habitat Conservation Plan and it must delineate “the impact which will likely result from such taking” and the “steps the applicant will take to minimize and mitigate such impacts . . . .”<sup>25</sup> You have chosen not to take this course to avoid potential liability, and because take of western snowy plover will result from your project, you are subject to an action by the signatories to this letter in federal court to prevent take of the species.

## II. The Monterey Bay Shores Project

The Monterey Bay Shores Project will develop a forty-acre site – 13.4 million square feet – to attract thousands of visitors and residents to its 184 hotel rooms, 184 condominiums, restaurants, spas, swimming pools, and conference center. In addition to the development, the Project entails approximately 680,000 cubic yards of grading (385,000 cubic yards of which would be disposed), 15.6 acres of “habitat restoration,” public access trails and amenities, utility extensions and infrastructure, and related development (e.g., roads, parking lots, signs, fences,

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<sup>18</sup> 16 U.S.C. § 1540(g).

<sup>19</sup> *Nat’l Wildlife*, 23 F.3d at 1511.

<sup>20</sup> *Forest Conservation Council v. Rosboro Lumber Company*, 50 F.3d 781, 783 (9th Cir. 1995)

<sup>21</sup> *Id.*; see also *Animal Welfare Institute v. Beech Ridge Energy*, 675 F.Supp 2d 540 (D. Md. 2009) (enjoining construction of wind turbines until an ITP is obtained by developer to protect Indiana Bat).

<sup>22</sup> 16 U.S.C. § 1540(g)(4).

<sup>23</sup> 16 U.S.C. § 1539(a)(1)(B).

<sup>24</sup> *Id.* at §§ 1539(a)(1)(B), (a)(2)(A); see also *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 441-42 (5th Cir. 2001) (“[c]onservation’ is a much broader concept than mere survival” because the “ESA’s definition of ‘conservation’ *speaks to the recovery of a threatened or endangered species*” (emphasis added)).

<sup>25</sup> 16 U.S.C. § 1539(a)(2)(A).

and lights).

This Project was originally proposed in 1998. The applicants submitted a draft Habitat Conservation Plan to the USFWS in February 2006, but the HCP was never finalized or approved.<sup>26</sup> The Project, therefore, has not received an incidental take permit. In lieu of an HCP, SNG has prepared a Habitat Protection Plan, which purports to avoid take of western snowy plover.<sup>27</sup> The HPP, however, does not meet the same legal standards or contain the same enforcement mechanisms as an HCP.<sup>28</sup>

Since 2009, the USFWS has repeatedly criticized the Project's failure to protect listed species on the Project site and determined that the Project will result in take of western snowy plover if it moved forward with construction and operation.<sup>29</sup> The Service has determined that the only available means for SNG to avoid liability for take is to submit an HCP in support of an application for an ITP. The USFWS has expressly stated that the latest version of the HPP is legally inadequate because it is insufficient to avoid take of the western snowy plover and other federally listed species.<sup>30</sup> Point Blue<sup>31</sup>, Commission staff and independent biologists have also reviewed the latest version of the HPP and have reached the same conclusion as the USFWS.<sup>32</sup> As currently proposed, the Project would result in take of western snowy plovers and SNG will

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<sup>26</sup> U.S. Fish and Wildlife Service 2014, Letter Regarding Monterey Bay Shores Development (April 7, 2014) (hereinafter "USFWS 2014 Letter"); *see also* USFWS 2016 Letter.

<sup>27</sup> SNG, 2015, Habitat Protection Plan, 1-1 (November 2015).

<sup>28</sup> *See* 16 U.S.C. § 1539(a)(2)(B) (requiring that the "applicant will ensure that adequate funding for the plan will be provided"); 50 C.F.R. § 17.32 (outlining criteria for revocation).

<sup>29</sup> These concerns were raised over a series of five letters by USFWS starting in 2009 that were solicited by the Commission staff or offered by USFWS to assist Commission staff in its processing of the Coastal Development Permit application and interpreting applicable regulations pertaining to unlawful take. The Commission's deference to USFWS' conclusion that the only available means to avoid take was for the developer to prepare a HCP as part of an application for an ITP is warranted here because USFWS has the requisite expertise and was delegated authority to enforce provisions of the ESA relating to take by Congress. *See Skidmore v. Swift and Company*, 323 US 134, 140 (1944); cited with approval in *Yamaha Corporation v. State Board of Equalization*, 19 Cal. 4th 1 (1998).

<sup>30</sup> USFWS 2014 Letter, p. 8.

<sup>31</sup> Point Blue is a non-profit conservation science organization that has done surveys of western snowy plovers on and adjacent to the Project site. Results from their surveys have been relied upon by the Commission and USFWS.

<sup>32</sup> USFWS 2016 Letter; *See also* California Coastal Commission. 2014. CDP Application Hearing, Staff Report Addendum for W10a Application A-3-SNC-98-114 (Monterey Bay Shores Resort). Prepared April 8, 2014 for April 9, 2014 Hearing. p. 6; *see also* Point Blue Conservation Science. 2014 Apr 1. Letter to the California Coastal Commission regarding Agenda Item 10a; Application A-3-SNC-98-114. *See also* Cashen S. 2016. Comments on the Habitat Protection Plan for the Monterey Bay Shores Resort Project; *see also* Baye PR. 2014. Scientific/technical peer review of multiple environmental documents for Monterey Bay Shores Ecoresort, Sand City, California.

be liable under the ESA if it takes steps to move forward with construction of the Project without an HCP and ITP.<sup>33</sup>

### III. Western Snowy Plovers' Historical and Continue Use of the Project Site



The western snowy plover (*Charadrius nivosus nivosus*) is one of the least numerous shorebirds in North America and the Pacific coast population of the western snowy plover was federally listed as threatened in 1993.<sup>34</sup> Historically, thousands of western snowy plovers nested along the California coast.<sup>35</sup> However, by 1980, the western snowy plover had disappeared from significant parts of its coastal California breeding range, and biologists estimate the breeding population along the coast has now dwindled to less than 1,500 birds.<sup>36</sup>

The population has continued to decline despite publication of the recovery plan and protection under the ESA. Habitat degradation – often from beach-front recreation and development – has caused the western snowy plover's population to decline over the past century.<sup>37</sup> Because western snowy plover habitat consists of unstable sandy shorelines, it is “highly susceptible to degradation by construction of seawalls, breakwaters, jetties, piers, homes, hotels, parking lots, access roads, trails, bike baths, day-use parks, marinas, ferry terminals, recreational facilities, and support services.”<sup>38</sup> Unstable coastal habitat also makes western

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<sup>33</sup> California Coastal Commission, 2015, Letter Re: Coastal Development Permit A-3-SNC-98-114 (Monterey Bay Shores Resort) (Nov. 9 2015).

<sup>34</sup> Morrison RIG, BJ McCaffery, RE Gill, SK Skagen, SL Jones, GW Page, CL Gratto-Trevor, BA Andres. 2006. Population estimates of North American shorebirds, 2006. Wader Study Group Bulletin 111:66-84; 58 Fed. Reg. 12864 (Mar. 5, 1993)

<sup>35</sup> WesternSnowyPlover.org. n.d. Western Snowy Plover Natural History and Population Trends. Adapted from U.S. Fish and Wildlife Western Snowy Plover Pacific Coast Population Draft Recovery Plan, May 2001. Available at:

<[http://www.westernsnowyplover.org/pdfs/plover\\_natural\\_history.pdf](http://www.westernsnowyplover.org/pdfs/plover_natural_history.pdf)> (Accessed 14 Nov 2014). See also Thomas SM, JE Lyons, BA Andres, EE T-Smith, E Palacios, JF Cavitt, JA Royle, SD Fellows, K Maty, WH Howe, E Mellink, S Melvin, T Zimmerman. 2012. Population Size of Snowy Plovers Breeding in North America. Waterbirds 35(1):1-14.

<sup>36</sup> *Ibid.*

<sup>37</sup> 2007. Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*). Sacramento, California. xiv + 751..

<sup>38</sup> *Id.*, 34.

snowy plovers vulnerable to climate change, since sea level rise and erosion decrease their habitat area.<sup>39</sup>

Western snowy plovers have been observed using the Project site for nesting, foraging, and over-wintering for more than 25 years.<sup>40</sup> The Project site not only supports western snowy plovers, but also contains federally designated critical habitat for the species. Critical habitat is defined as “a specific geographic area that is essential for the conservation of a threatened or endangered species and that may require special management and protection.”<sup>41</sup> Within designated critical habitat, the USFWS protects areas that provide primary constituent elements (“PCEs”), which are the physical and biological features of a landscape that a species needs to survive and reproduce.<sup>42</sup> The Project site currently provides these PCEs.<sup>43</sup>

As discussed in the USFWS’s April 1, 2016, letter to the Commission, the HPP presents inaccurate, incomplete, and misleading information regarding nesting activity and the survey effort within the Project area.<sup>44</sup> For example, USFWS specifically disputes the HPP’s denial of a 2014 bluff-top nest that was identified by a California Department of Parks and Recreation environmental scientist. The HPP uses this inaccurate and misleading information to set artificially low success criteria for breeding western snowy plovers within the Project area.<sup>45</sup> As noted in the HPP, your consultants have not surveyed the Project site for western snowy plover nests since 2005.<sup>46</sup> Instead, the HPP’s description of western snowy plover nesting activity on the Project site relies on data collected by Point Blue.<sup>47</sup> However, Point Blue’s surveys efforts

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<sup>39</sup> Thomas 2012, Population Size of Snowy Plovers Breeding in North America (2012).

<sup>40</sup> California Coastal Commission. 2014. CDP Application Hearing, Staff Report Addendum for W10a Application A-3-SNC-98-114 (Monterey Bay Shores Resort). Prepared April 8, 2014 for April 9, 2014 Hearing. p. 98.

<sup>41</sup> USFWS. 2002. Critical Habitat: What is it? Publication 703/358 2105. Available at: <<http://endangered.fws.gov>>. (Accessed 14 Nov 2015).

<sup>42</sup> *Ibid.*

<sup>43</sup> USFWS. 2014 Apr 7. Letter to the California Coastal Commission. Attachment to Staff Report Addendum for April 8, 2014 for April 9, 2014 Hearing; *See also* Federal Register. 2012 Jun 19. Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover; Final Rule. Federal Register 77(118):36728-36869.

<sup>44</sup> USFWS 2016 Letter, pp. 2-4.

<sup>45</sup> *Id.*, p. 7.

<sup>46</sup> HPP, Table 1. The 2014 surveys attributed to your consultants (i.e., URS Corp and EMC Planning Group) consisted of a site visit to inspect the location of a reported nest (i.e., not to document the abundance of nests on the Project site); Table 1 in the revised HPP suggests nest data collected between 2001 and 2004 is reported in Zander (2005). However, Zander (2005) appears to be limited to surveys conducted in 2005. *See* Revised HPP, p. 5-7. Moreover, the surveys were conducted by Point Blue, under contract to Zander Associates. *See* 2008 EIR Addendum, p. 41.

<sup>47</sup> Table 1 in the revised HPP suggests nest data collected between 2001 and 2004 is reported in Zander (2005). However, Zander (2005) appears to be limited to surveys conducted in 2005. *See* Revised HPP, p. 5-7. Moreover, the surveys were conducted by Point Blue, under contract to Zander Associates. *See* 2008 EIR Addendum, p. 41.

have been limited and inconsistent in the Project area.<sup>48</sup> Indeed, over the past 15 years, Point Blue has only monitored the lower beach dune area (Area 2 in the HPP) infrequently, if at all.<sup>49</sup>

Because comprehensive surveys of the Project site have not been consistently conducted, and because data on western snowy plover activity within the foredune/secondary dune portion of the Project site were limited to incidental sightings (i.e., while monitoring the lower beach), it is extremely likely there has been considerably more western snowy plover nesting activity on the Project site than what has been detected by Point Blue. Nevertheless, 46 western snowy plover nests have been found on the Project site since 1990 (Figures 1-3).<sup>50</sup> These include nine nests in both 2015 and 2016.<sup>51</sup> The presence of critical habitat, PCEs, and at least 46 nests since 1990 demonstrates the Project site provides habitat that is important to the persistence and recovery of the western snowy plover.



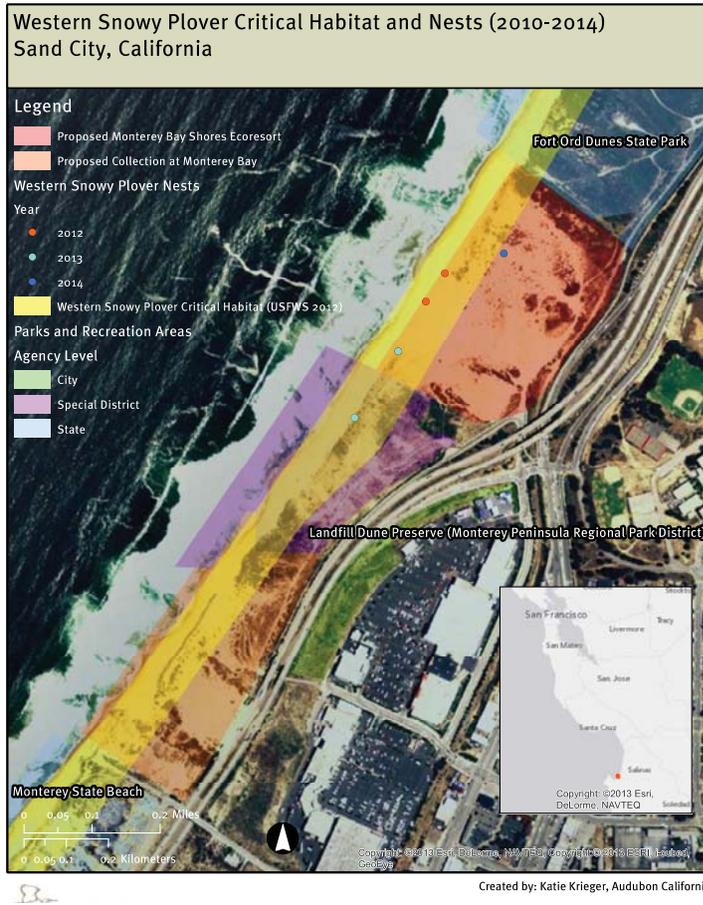
<sup>48</sup> USFWS 2014 Letter, p. 3.

<sup>49</sup> Personal communication with Carleton Eyster, Avian Ecologist, Point Blue Conservation Science on February 25, 2016.

<sup>50</sup> Point Blue Conservation Science. 2014 Apr 1. Letter to the California Coastal Commission regarding Agenda Item 10a; Application A-3-SNC-98-114. *See also* Point Blue Conservation Science. 2015 Aug 20. Letter submitted to the California Coastal Commission regarding the SNG Dune Restoration Plan.

<sup>51</sup> Point Blue Conservation Science. 2014 Apr 1. Letter to the California Coastal Commission regarding Agenda Item 10a; Application A-3-SNC-98-114. *See also* Point Blue Conservation Science. 2015 Aug 20. Letter submitted to the California Coastal Commission regarding the SNG Dune Restoration Plan. Nest data for 2016 provided through personal communication with Point Blue Conservation Science.

**Figure 1.** Western snowy plover nest locations on the Project site, 1990-2013.<sup>52</sup>



**Figure 2.** Map of western snowy plover nests detected on the Project site, 2010-2014.

<sup>52</sup> Point Blue Conservation Science. 2014 Apr 1. Letter to the California Coastal Commission regarding Agenda Item 10a; Application A-3-SNC-98-114.



**Figure 3.** Western snowy plover nest locations on the Project site during 2015. Nest NC08 consisted of a hatched brood of three chicks.

#### **IV. Violations of the Endangered Species Act: The Project as Currently Proposed Will Result in Take of Western Snowy Plovers**

The Project, including the latest version of the HPP, does not adequately address the concerns raised in the USFWS’s April 7, 2014, letter to the Commission, nor does it contain the measures needed to avoid illegal take of western snowy plovers.<sup>53</sup> After reviewing the most recent version of the HPP, USFWS has concluded that in addition to earlier concerns raised by the USFWS and the Commission: (1) eggs or chicks within or near construction areas would likely be killed by construction activities or abandoned by their parents due to harassment caused by construction activities; (2) take in the form of harm and harassment would be expected due to the destruction of occupied breeding habitat (when it is converted to resort facilities) and use of the Project area and adjacent areas by thousands of additional people per year; (3) SNG’s Predator Management Plan lacks assurances that it will be implemented or effective; (4) the HPP prescribes management actions that are likely to result in take of western snowy plover and other listed species; (5) the HPP is not sufficient to avoid take of listed species caused by construction and operation of the Project; and, therefore, SNG needs to prepare a HCP in support of an application for an ITP to avoid liability under the ESA.<sup>54</sup> The conservation groups share many of these concerns and agree that take of western snowy plover is reasonably likely to occur if Project construction moves forward.

First, the Project will significantly reduce important western snowy plover habitat along the shoreline of Monterey Bay, including historic nesting and foraging habitat on and

<sup>53</sup> USFWS 2016 Letter, pp. 1-9.

<sup>54</sup> *Id.*

immediately adjacent to the Project site (above the mean high tide) which will be graded.<sup>55</sup> The USFWS has calculated that “approximately 88 percent of the habitat above the high tide line [would be] disturbed during construction and 38 percent [would be] permanently destroyed.”<sup>56</sup> In addition to the direct impacts of the Project that reduce western snowy plover habitat, sea level rise and erosion linked to climate change will also contribute to reduction of western snowy plover habitat. USFWS predicts that sea level rise and shoreline erosion will cause parts of the resort to fall below the high tide line within 75 years.<sup>57</sup> In 2014, USFWS stated that “[h]abitat would be immediately lost upon construction ... [w]e expect take of the species would occur in the form of harm, harassment, and direct injury or mortality.”<sup>58</sup>

Next, currently there is minimal disturbance to western snowy plovers at the Project site and surrounding beaches because human use is limited by the absence of parking areas and beach access points.<sup>59</sup> However, as the Commission has acknowledged, once the Project is developed “the site is likely to become a popular place to access the shoreline for area residents and visitors alike, given the easy access from the highway and readily available parking.”<sup>60</sup> Because anthropogenic disturbance is the primary threat to the western snowy plover, numerous biologists have concluded that protecting occupied sites from human disturbance and associated domestic animals may be essential to the conservation and recovery of the species.<sup>61</sup> Although the proposed Project would result in a significant increase in anthropogenic disturbance at a site that is occupied by nesting western snowy plovers, SNG has not committed to any meaningful measures that would protect western snowy plovers at the site. For example, SNG’s HPP allows SNG to conduct grading and other construction activities during the western snowy plover nesting season if SNG determines it is not feasible to avoid grading and other construction activities during that time.<sup>62</sup> In addition the lateral access features of the Project will substantially increase the likelihood of take of western snowy plovers nesting near the points of access.

Once the Project begins operating, human disturbance would occur throughout all remaining occupied habitat, except within two seasonal nesting protection zones established by

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<sup>55</sup> California Coastal Commission. 2014. CDP Application Hearing, Staff Report Addendum for W10a Application A-3-SNC-98-114 (Monterey Bay Shores Resort). Prepared April 8, 2014 for April 9, 2014 Hearing. p. 97.

<sup>56</sup> USFWS 2014 Letter, p. 3.

<sup>57</sup> *Id.*

<sup>58</sup> USFWS 2014 Letter, p. 4.

<sup>59</sup> California Coastal Commission. 2014. CDP Application Hearing, Staff Report Addendum for W10a Application A-3-SNC-98-114 (Monterey Bay Shores Resort). Prepared April 8, 2014 for April 9, 2014 Hearing. p. 124.

<sup>60</sup> *Ibid*, pp. 124 and 125.

<sup>61</sup> United States Fish and Wildlife Service. 2007. Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*). Sacramento, California. xiv + 751. See also Brindock KM, MA Colwell. 2011. Habitat Selection by Western Snowy Plovers During the Nonbreeding Season. *Journal of Wildlife Management* 75(4):786-793.

<sup>62</sup> USFWS 2016 Letter, p. 5.

an unpermitted biologist<sup>63</sup> on the lower beach strand.<sup>64</sup> The 2015 HPP does not identify the size of these seasonal nesting protection zones, although the previous version of the HPP (dated October 2013) indicated they would be 1 to 2 acres each.<sup>65</sup> This is insufficient to protecting nesting western snowy plovers—especially the precocial fledglings—from human disturbance nor would it necessarily contain the necessary food resources. These concerns were also raised by the USFWS in its April 1, 2016 letter.<sup>66</sup>

Similarly, predation, by both native and nonnative species, has been identified as a major factor limiting western snowy plover reproductive success at many Pacific coast sites.<sup>67</sup> Predation, while predominantly a natural phenomenon, is exacerbated through the introduction of nonnative predators (e.g., domestic and feral cats) pets and unintentional human encouragement of larger populations of native predators (e.g., raccoons, skunks, ravens, and gulls) by providing supplemental food, water, and nest sites.<sup>68</sup> Residential development in or near western snowy plover habitat attracts predators.<sup>69</sup> As a result, the Project will increase predation pressure on the local western snowy plover population, thus further threatening persistence of any western snowy plovers that remain in the Project area after the Project begins operating. As described in the USFWS's April 1, 2016, letter to the Commission, SNG's Predator Management Plan incorporates measures likely to result in take of western snowy plovers, and overall lacks assurances that it will be implemented or effective.<sup>70</sup>

In summary, Project construction and operation threatens the western snowy plover through habitat loss and degradation; death and disturbance during construction and from the subsequent increase in human activity within occupied nesting habitat; increased predation pressure; and even some of the measures likely to result in take proposed in SNG's HPP and Predator Management Plan.<sup>71</sup> The Commission itself concluded the Project has the potential to *forever displace western snowy plovers* from the Project site.<sup>72</sup> By moving forward to construction and operation of the Project without a valid HCP and ITP, SNG will be liable under the Endangered Species Act ("ESA") for take of western snowy plover.<sup>73</sup>

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<sup>63</sup> *Id.*, pp. 4 and 5. The surveys and seasonal nesting protection zones proposed in the HPP are likely to result in take and can only be appropriately permitted under an incidental take permit.

<sup>64</sup> 2015 HPP, p. 4-19.

<sup>65</sup> 2013 HPP, p. 4-15.

<sup>66</sup> USFWS 2016 Letter, pp.4-5.

<sup>67</sup> United States Fish and Wildlife Service. 2007. Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*). Sacramento, California. xiv + 751.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> USFWS 2016 Letter, pp. 6-7.

<sup>71</sup> *Id.*

<sup>72</sup> California Coastal Commission. 2014. CDP Application Hearing, Staff Report Addendum for W10a Application A-3-SNC-98-114 (Monterey Bay Shores Resort). Prepared April 8, 2014 for April 9, 2014 Hearing. p. 98.

<sup>73</sup> *Forest Conservation Council v. Rosboro Lumber Company*, 50 F. 3d. 782-783 (1995).

## CONCLUSION

As the above makes clear, if SNG moves forward with construction and operation of the Project, SNG will likely violate section 9 of the ESA by causing take of western snowy plovers. Any efforts by the SNG to minimize impacts to western snowy plover are irrelevant, so long as one western snowy plover is killed, harassed, harmed, or otherwise taken as a result of the development.<sup>74</sup> As USFWS has concluded, the measures proposed by SNG in its HPP to minimize and avoid take will instead *likely result in take* since their design is inadequate to protect nesting western snowy plovers and their precocial chicks from harm. The prior disappearance of a western snowy plover nest on the Project footprint demonstrates the high likelihood that take has and will continue to occur as a result of this Project.<sup>75</sup> As the USFWS letter explicitly states, “the proposed [P]roject is still likely to result in take of listed species.”<sup>76</sup> Therefore, the imminent threat of continued harm to western snowy plover constitutes take under section 9 of the ESA.<sup>77</sup>

Pursuant to the citizen suit provision of the ESA, 16 U.S.C. §§ 1540(g)(1)(A), (2)(A), the conservation groups are providing SNG with 60 days notice of their intention to commence a civil action against SNG for the take of the western snowy plover. We will further seek an award for any costs and fees associated with the litigation, including reasonable attorney and expert fees. We are hopeful that SNG will take all necessary measures to avoid the unauthorized future taking of western snowy plovers. If you have any questions about this notice, please do not hesitate to contact us.

Sincerely,  
Laurens H. Silver  
Attorney for Sierra Club, Monterey Audubon Society, National Audubon Society

Aruna Prabhala  
Staff Attorney  
Center for Biological Diversity

cc: John Ainsworth, Acting Executive Director  
California Coastal Commission  
45 Fremont Street, Suite 2000  
San Francisco, California 94105

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<sup>74</sup> See *Strahan v. Coxe*, 127 F.3d 155,165 (1st Cir. 1997) (“a single injury to one whale is a taking under the ESA”); 16 U.S.C. § 1532(19).

<sup>75</sup> USFWS 2016 Letter, pp. 3-4 (Acknowledging existence of 2014 bluff-top nest that was confirmed by California Department of Parks and Recreation and concluding that construction and operation of the Project will likely result in take of western snowy plover).

<sup>76</sup> USFWS 2016 p. 2.

<sup>77</sup> See *Forest Conservation*, 50 F.3d at 784.

# Exhibit A



# United States Department of the Interior



FISH AND WILDLIFE SERVICE  
Ventura Fish and Wildlife Office  
2493 Portola Road, Suite B  
Ventura, California 93003

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APR 08 2016

April 1, 2016

CALIFORNIA  
COASTAL COMMISSION  
CENTRAL COAST OFFICE

Executive Director  
California Coastal Commission  
c/o Central Coast Office  
725 Front Street, Suite 300  
Santa Cruz, California 95060

**Subject:** Monterey Bay Shores Resort Development, Sand City, Monterey County, California

Dear Coastal Commission Executive Director, Commissioners, and Commission Staff:

The U.S. Fish and Wildlife Service (Service) is providing this letter to the California Coastal Commission (Commission) in response to your request for comments on a November 11, 2015, draft "Habitat Protection Plan" (2015 HPP; EMC Planning Group Inc. 2015) for the proposed Monterey Bay Shores Resort Development, Sand City, Monterey County, California (Project). The Project is proposed by Security National Guarantee (Applicant) and includes the construction of a 184-room hotel, 184 (92 residential and 92 visitor-serving) condominium units, conference facilities, a restaurant, a spa, pools, landscaping, public access, and parking. The proposed Project development would total 1.34 million square feet of resort and residential facilities within an approximately 12-acre footprint. These facilities would be constructed on a 39-acre ocean-front site in Sand City, California. On February 19, 2016, Mike Watson and Dan Carl of the Commission staff discussed the 2015 HPP with Jacob Martin and Glen Knowles of my staff. Mr. Watson and Mr. Carl requested our review of the 2015 HPP and its adequacy to address special condition 15 of your May 30, 2014, notice of intent to issue a Coastal Development Permit (CDP) for the Project (Commission 2014). Much of special condition 15 is based on concerns raised in our letter on the Project, addressed to Mr. Watson, dated April 7, 2014 (2014 letter; Henry, in litt. 2014). We also provided additional information and clarifying comments in letters dated May 13, 2015, and August 21, 2015.

The Service's responsibilities include administering the Endangered Species Act of 1973, as amended (Act), including sections 7, 9, and 10. Section 9 of the Act prohibits the taking of any federally listed endangered or threatened wildlife species. Section 3(19) of the Act defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Harm is further defined by the Service to include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. Harass is defined by the Service as intentional or negligent actions that create the likelihood of injury to a listed species by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. The Act provides for civil and criminal penalties

for the unlawful taking of listed species. Exemptions to the prohibitions against take may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a Federal agency, and may affect a listed species, the Federal agency must consult with the Service pursuant to section 7(a)(2) of the Act. If a proposed project does not involve a Federal agency but may result in the take of a listed animal species, the project proponent should apply to the Service for an incidental take permit pursuant to section 10(a)(1)(B) of the Act. To qualify for an incidental take permit, project proponents must submit an application to the Service together with a habitat conservation plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated to the maximum extent practicable and how the plan would be funded. A complete description of the requirements for a HCP can be found at section 10(a)(2)(B) of the Act and at 50 Code of Federal Regulations 17.32.

Mr. Watson and Mr. Carl requested that we analyze the adequacy to which the 2015 HPP has addressed the so called "eight concerns for western snowy plover" as discussed in special condition 15 of your May 30, 2014, notice of intent to issue a CDP. We presented these points in our 2014 letter. As stated in our May 13, 2015, letter, these points were intended as examples of the inadequacies of the 2013 HPP and not an exhaustive list of corrections needed to avoid take of listed species. We reiterate here that even if these points are addressed, we believe the proposed project is still likely to result in take of listed species. However, as technical assistance to you, we have reviewed the 2015 HPP's "Responses to USFWS Concerns" (section 4.8, pages 4-46 through 4-49) and offer the following discussion of how the "eight concerns" are addressed there. We have included the original numbered list of concerns from our 2014 letter (in italics), below, with each concern followed by our updated comments regarding how it is addressed in the 2015 HPP:

*(1) The discussion of nesting activity (of the western snowy plover (*Charadrius nivosus nivosus*)) in section 4.2.1 (pages 4-2 and 4-5) does not discuss the 2012 or 2013 breeding seasons, in which successful nests hatched within the Project area.*

The 2015 HPP is inaccurate and incomplete in its description of the recent history of nesting activity and the level of survey effort within the Project area. We acknowledge that the HPP has been updated since the version we commented on in 2014, but the updates introduce inaccurate information and potentially misleading language and do not present information on the most recent (2015) nesting season, as detailed in the following paragraphs:

As discussed in our May 13, 2015, letter, during the 2014 nesting season a western snowy plover nest was found in the bluff-top portion of the Project site (2014 bluff-top nest), very near or possibly within the footprint of proposed Project facilities (California Department of Parks and Recreation, in litt. 2014). The 2014 bluff-top nest was symbolically fenced by a concerned citizen. We were not notified of this fencing before it was installed and we normally require (Service 2007) that persons installing symbolic fencing are permitted under the Act. The fence was subsequently removed by an unknown party and the eggs disappeared. The 2015 HPP (pages 3-8 and 4-13) accuses the concerned citizen of trespassing and denies the existence of the 2014 bluff-top nest. The 2015 HPP's denial of the existence of the 2014 bluff-top nest (see footnote page 4-13) is apparently based on a site visit conducted by the Service and 2014 surveys conducted by consulting firms (URS and EMC). The 2015 HPP provides no detail regarding the site visit by the Service or what was observed and no member of my staff visited the site. We presume that the 2015 HPP refers to an investigation

conducted by Service Law Enforcement, which occurred after the eggs and fence had already disappeared (i.e., the nest was not found because the visit occurred after it was already gone). The 2015 HPP provides no detail regarding the consultant's surveys and we have no information on when or where they were conducted. Furthermore, no personnel of URS or EMC are known by us to be qualified or were approved by us to conduct any surveys for breeding western snowy plovers at the Project site. Nesting season surveys for the western snowy plover require that the surveyor be approved under a permit from us (Service 2007), due to the likelihood of take of the species during surveys, especially if conducted by individuals lacking the appropriate skills and training.

Although the 2014 bluff-top nest was originally found by a concerned citizen, it was subsequently identified to species, photographed, and its location was confirmed using a global positioning system unit, by a California Department of Parks and Recreation environmental scientist who is permitted by us to work with the western snowy plover and has extensive experience with the species (California Department of Parks and Recreation, in litt. 2014). The HPP's denial of this nest's existence downplays the likelihood of take of western snowy plovers due to construction and use of the proposed facilities. Eggs or chicks within or near construction areas would likely be killed by construction activities or abandoned by their parents due to harassment caused by construction activities. Furthermore take in the forms of harm and harassment would be expected due to the destruction of occupied breeding habitat (when it is converted to resort facilities) and use of the Project area and adjacent areas by thousands of additional people per year; see our 2014 letter for more detailed discussion.

The 2015 HPP also presents inaccurate information regarding how thoroughly and consistently the Project site has been surveyed for western snowy plover nesting. On page 1-8, the HPP indicates that the City of Sand City began sponsoring breeding-season surveys of its jurisdiction, including the Project area, by Point Blue Conservation Science, in 2005. The 2015 HPP does not mention that the effort sponsored by the City of Sand City was temporary (2005-2008) and we are aware of no thorough survey of the Project site since then. The information presented is misleading because the 2015 HPP does not acknowledge that survey effort within the Project area has been infrequent, inconsistent, and primarily on the lower beach (Eyster, in litt. 2016); the HPP implies that western snowy plover nesting activities are largely absent in the project area without acknowledging the lack of surveys.

The HPP is dated November 2015, but does not provide information on the 2015 nesting season (which was completed by the end of September 2015). During the 2015 nesting season, at least nine western snowy plover nests (eight found as eggs and one found as chicks after hatch) were found in Sand City, within and around the Project area (Neuman, in litt. 2016). Please also note that these nests were found despite limited surveys that did not cover the entire Project area (Eyster, in litt. 2016) and it is entirely possible that additional nests occurred anywhere within the Project area.

In summary, the 2015 HPP states repeatedly that there has been no nesting in inland portions of the site for 21 years, but does not acknowledge that there has been little to no survey effort in those areas since 2008 and denies the existence of the well-documented nest that was found there anecdotally in 2014. Furthermore, the 2015 HPP (pages 3-6 through 3-8) indicates a low level of nesting within and surrounding the Project site, but again does not acknowledge the low survey effort in those areas and does not include the increased nesting activity observed in 2015. Information on nesting within the

Project site and vicinity is not completely or accurately presented and this concern has therefore not been adequately addressed.

*(2) The biological objectives on pages 4-7 and 4-8 would not provide an undisturbed area where western snowy plovers would be free to establish nests. Instead, two areas would be surveyed for western snowy plovers (by a biologist retained by the Applicant) and if nests were found in the first of those areas (the "beach and strand"), the biologist would be "in coordination with the construction supervisor, resort manager or property owner... authorized to restrict access to nesting snowy plover areas through implementation of an adaptive management plan, and through the erection of exclosures and signage to protect nests during the breeding season." We expect that in the above-described circumstances, increased human disturbance within the nesting habitat would preclude nesting and no nests would be found. In addition, if nests were found, their protection would be left at the discretion of a biologist of unknown qualifications who would report only to the Applicant. Furthermore, the second area surveyed (the "foredune/secondary dune") would only be surveyed and no protection of any nests located is even described as "authorized."*

The 2015 HPP (page 4-47) indicates that two seasonal "nesting protection zones" would be established annually throughout the nesting season. However, the location of these zones is described merely as "likely" (Figure 6). Furthermore the 2015 HPP (page 4-20) states that an "approved biologist" would "control the extent" of these zones. This biologist would be retained by the Applicant and "approved by the Commission Executive Director" (see next two paragraphs for comments on the "approved biologist"). Thus, the size and location of these zones remain undetermined and at the discretion of an unknown biologist who would answer only to the Applicant. The 2015 HPP therefore provides no assurance that the "nesting protection zones" would be established in sizes or locations that would provide undisturbed nesting habitat and this concern has not been adequately addressed.

The 2015 HPP prescribes nesting season surveys and exclosure construction for western snowy plovers within portions of the Project area, to be performed by a "qualified biologist". However, these activities for the western snowy plover require that the person conducting them be approved under a permit from us (Service 2007), due to the likelihood of take of the species, especially if these activities are conducted by individuals lacking the appropriate skills and training. We can issue recovery permits for surveys or exclosure construction under section 10(a)(1)(A) of the Act, but such permits are only available for scientific purposes or to enhance the propagation or survival of the species. The actions prescribed by the 2015 HPP are intended to mitigate the effects of construction and use of the Project (the Project and its associated HPP are not recovery actions) and cannot be authorized under section 10(a)(1)(A). Thus, the prescribed duties of the "approved biologist" are likely to result in take and can only be appropriately permitted under an incidental take permit pursuant to section 10(a)(1)(B) of the Act.

The 2015 HPP argues that approval of a biologist by the Commission Executive Director would ensure that the biologist has proper qualifications to work with the western snowy plover. We are concerned that this procedure would exclude the Service from the approval process; however, on various occasions we have informed the Applicant of their need for an incidental take permit to ensure the Project is in compliance with the Act. We, as the Agency responsible for administering the Act and holding expertise on the species listed thereunder, advise against this approach. The

appropriate approach would be for the Applicant to include procedures for the Service to approve qualified biologist(s) as part of a HCP prepared in support of an application for an incidental take permit. Any take caused by surveys or enclosure use, without proper permitting by the Service, would be in violation of section 9 of the Act, even if persons performing these activities are approved by the Commission Executive Director.

*(3) Western snowy plovers have nested in inland areas of the Project site, but preconstruction surveys are proposed only in beach and strand areas (page 4-13).*

The 2015 HPP (page 4-47) again inaccurately indicates that there has been no recent nesting in inland portions of the Project area, as discussed extensively under concern 1, above. The 2015 HPP (page 4-47) indicates that proposed preconstruction surveys have been expanded from the previous version of the HPP. However, the 2015 HPP is unclear as to which areas would be surveyed. Item 5 on page 4-47 indicates that there would be "pre-grading" surveys, but item 4 on that same page appears to limit such surveys to areas outside those where Project facilities would be built. For detail, please see item 4 on page 4-47 and Figure 6, which prescribe surveys of zones 1 (beach and strand), 2 (foredune/secondary dune), and 3 (back dune), but not zone 4 (development area). Thus, inland areas within zone 4 may still not be surveyed and this concern has not been adequately addressed.

*(4) Eggs and chicks are the least mobile and, therefore, the most vulnerable life stages of the western snowy plover. For this reason, we typically recommend seasonal avoidance of disturbance in or near western snowy plover nesting habitat during the breeding season (generally March 1 through September 30, annually). No seasonal restriction for construction during the western snowy plover nesting season is proposed in the HPP. Rather, the HPP (page 4-13) appears to assume that surveys, enclosure "during fledging" of any nests found, and "focused monitoring and care" will be sufficient to prevent nest loss. Enclosure "during fledging" is not biologically relevant to the western snowy plover; enclosures can help to protect eggs in some situations, but western snowy plover chicks are precocial and, as such, cannot be contained within an enclosure once they have hatched. Also, it is not clear to us what "focused monitoring and care" entails or how this would reduce the likelihood of nest abandonment.*

The 2015 HPP (page 4-47) is non-committal about any seasonal avoidance of construction effects on nesting western snowy plovers (i.e., "Permittee will seek to avoid grading during nesting season, if **feasible**, and any grading that is allowed will be limited in all cases to 60-90 days or less, if **feasible**." (bold type added for emphasis)). By indicating that the Applicant will "seek to avoid" rather than "avoid" and making any avoidance dependent on what the Applicant considers "feasible," the 2015 HPP gives no assurance that any avoidance measure would actually be implemented. Thus, there remains no requirement for seasonal avoidance of construction-related take of breeding western snowy plovers and this concern has not been adequately addressed.

*(5) The HPP (page 4-13) presumes that take of western snowy plovers resulting from nest abandonment due to construction would not occur because successful nesting occurs at Oceano Dunes State Vehicular Recreation Area (ODSVRA). This argument is flawed in two primary ways. First, take of western snowy plovers occurs at ODSVRA almost every year, and the California Department of Parks and Recreation (CDPR) is working with us on an HCP to support issuance of*

*an incidental take permit to address such take. Second, the ODSVRA encompasses more than 3,500 acres and includes more than 6 miles of shoreline, the southern third of which (approximately 300 acres) is seasonally closed to protect nesting western snowy plovers and California least terns (please see map available at: [http://ohv.parks.ca.gov/?page\\_id=1208](http://ohv.parks.ca.gov/?page_id=1208)). The ODSVRA is several orders of magnitude larger than the proposed Project site; as such it is not comparable to a 39-acre site where 88 percent of the terrestrial habitat is proposed to be graded.*

The 2015 HPP does not discuss Oceano Dunes and it appears that the Applicant has chosen to remove this argument.

*(6) The HPP (page 4-15) mentions a "Dynamic 1-2 acre Nesting Protection Zone." This zone is proposed to be established upon opening of the resort. It is not clear how this zone would be protected. Also, the location, orientation, and size of this zone are left to the discretion of a biologist of undetermined qualifications who would report only to the Applicant.*

The "dynamic protection zone" (2015 HPP page 4-48) remains undefined, with its location, size, and orientation left to the discretion of a biologist of undetermined qualifications who would report only to the Applicant. Also, as discussed for concern 2, above, the proposed duties of the "qualified biologist" are likely to result in take of the western snowy plover, which would violate the Act unless the Applicant first obtained an incidental take permit from the Service. Thus, there remains no assurance that this measure would be implemented or would be beneficial and this concern has not been adequately addressed.

*(7) The HPP (page 4-16) indicates that a predator management plan would be developed, but does not provide any detail on what the plan would entail or any certainty that it would succeed.*

The predator management plan (PMP, appendix M of the 2015 HMP) is vague and there is no assurance that it will be implemented. Lethal removal of predators (page 1-3) is described as "not consistent with the intent of the proposed project," is not proposed, and could only be potentially implemented at the discretion of a biologist of unknown qualifications who answers only to the Applicant. Also, please note that it is prohibited to capture, relocate, and release alive any native carnivore or corvid (the most likely predators at the Project site) within the State of California without proper permitting (California Fish and Game Code, section 2118). We believe that it is unlikely that an appropriate release site for captured carnivores or corvids could be found and there is also no assurance that this activity would be permitted by the State. Thus, the PMP does not propose to lethally remove predators and the Applicant's ability to relocate them is both biologically and legally questionable. The PMP's potential to respond to predation problems within the Project area is lacking.

The PMP also proposes the use of exclosures, which, as discussed regarding concern 2 above, is likely to result in take that would be in violation of section 9 of the Act unless the Applicant is first issued an incidental take permit by the Service. The PMP also states that "Funding for predator management and monitoring on the resort site will be provided by the owner/permittee." This leaves the implementation of the PMP dependent on the financial capabilities of the Applicant or an unknown subsequent owner of the Project. Finally, the PMP concludes that "Specific quantitative success criteria for predator monitoring and control cannot be defined..." In summary, the PMP lacks assurances that it will be implemented or effective (due to a lack of both funding guarantees

and legal authority under State and Federal law) and if it is implemented, lacks any measurable criteria to define its success. Thus, there remains no assurance that a successful predator management plan will be implemented and this concern has not been adequately addressed.

*(8) The HPP (page 4-23) describes a success criterion for western snowy plover of one successful nesting pair within 10 years following construction and characterizes this threshold as "attracting nesting plovers back to the site." This goal is biologically inadequate to maintain the current level of nesting and does not recognize that western snowy plovers currently nest within the Project area. In addition, defining success as successful nesting (eggs surviving to hatch) would not guarantee successful fledging (chicks surviving until they are mature enough to fly).*

The 2015 HPP (page 4-49) uses the inaccurate and incomplete data described under concern 1 to calculate a low ("about 0.5 per year") baseline level of nesting within the Project area, then sets criteria of one nest per year and one fledge per year and describes this as an increase. Furthermore, the HPP states that if no nesting occurs, then vegetation criteria would be used to define success. Thus, the 2015 HPP sets artificially low criteria for success of breeding western snowy plovers within the Project area, then goes on to state that such criteria do not need to be met for the HPP to be considered successful. This provides no certainty that the Project site will ever be managed to allow western snowy plovers to breed and this concern has therefore not been adequately addressed.

Special condition 15 of your May 30, 2014, notice of intent to issue a CDP also indicates that the HPP must be revised to address "each of the concerns for Smith's blue butterfly" as discussed in our 2014 letter. Our ongoing concerns are discussed in the following two paragraphs:

Our 2014 letter notes that "the HPP...is inconsistent regarding avoidance of Smith's blue butterfly habitat during construction." The 2013 HPP states (page 3-4) that the project would "completely avoid the area where buckwheat plants occur," but also states (page 4-13) that surveyors would "flag each plant of seacliff or coast buckwheat within areas proposed for development." Given these inconsistencies...we are not confident that removal of currently existing Smith's blue butterfly habitat can or would be avoided during project construction". Although we acknowledge that new vegetation surveys have been used to update information on Smith's blue butterfly habitat, the 2015 HPP remains inconsistent regarding avoidance of Smith's blue butterfly habitat during construction. Page 4-17 of the 2015 HPP continues to indicate both that Smith's blue butterfly habitat "will not be subject to grading or construction" and that "(a)ny plant of seacliff or coast buckwheat within the areas proposed for development will be flagged." Also, there is no provision to avoid destruction of any buckwheat plants that are "flagged." Therefore, the 2015 HPP still provides no assurance that Smith's blue butterfly habitat can or would be avoided during project construction and this concern has not been addressed.

Our 2014 letter indicates that "We have additional concerns regarding potential take of all life stages of Smith's blue butterflies during weed removal, during seed collection, and as dispersing adults; please see the last page of our 2009 letter for a detailed discussion of these concerns." Our concerns regarding weed removal and dispersing adults have not been addressed in the 2015 HPP. Furthermore, page 4-15 indicates that seacliff buckwheat seed has been collected from outside the range of the Smith's blue butterfly for use within the Project area, which avoids take during seed collection, but may adversely affect the Smith's blue butterfly by introducing inappropriate host

plants into its habitat. The flight period of adult Smith's blue butterflies is timed to coincide with peak blooming of their buckwheat host plants, which varies geographically (Service 2006). Blooming buckwheat is necessary for Smith's blue butterfly feeding and egg deposition. Introducing host plants from outside the species' range may interfere with this timing such that adults may emerge to find that their host plants are not in bloom. Thus, the 2015 HPP does not address our concerns regarding weed control or dispersing adults and attempts to address our concern regarding seed collection in a way that may harm the species by introducing inappropriate host plants into its habitat.

Special condition 15 of your May 30, 2014, notice of intent to issue a CDP also indicates that the HPP must be revised to address "each of the concerns for...Monterey spineflower" as discussed in our April 7, 2014, letter. Our ongoing concerns are discussed in the following two paragraphs:

Our 2014 letter cites information from your staff report that indicates that up to 7 acres of the Project area may be occupied by Monterey spineflower and accordingly questions the HPP's characterization of restoration of 3.4 acres of Monterey spineflower habitat as mitigation at a 1:1 ratio. The 2015 HPP (page 3-13) still indicates that 3.4 acres of habitat would be restored with Monterey spineflower and this concern has therefore not been addressed.

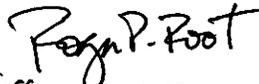
Our 2014 letter raises a concern that if areas to be restored to Monterey spineflower habitat are seaward of the proposed Project, then those areas would be at risk of loss due to sea level rise. The 2015 HPP is unclear whether Monterey spineflower would be planted in the Foredune/Secondary Dune area (all of which is seaward of the Project), the Back Dune area (some of which is seaward of the Project), or both (see Figure 6 and pages 4-36 and 4-40). Thus, much or all of the restoration area(s) for Monterey spineflower are at risk of loss due to sea level rise and this concern has not been addressed.

Special condition 15 of your May 30, 2014, notice of intent to issue a CDP also indicates that "(t)he Permittee...shall submit written evidence, if legally required, that all permits and/or authorizations for the approved project have been granted by...the U.S. Fish and Wildlife Service (if required by the Federal Endangered Species Act)." The 2015 HPP (page 1-3) incorrectly states that "(t)here are no further permits or authorizations legally required from...the USFWS for the project". As stated in our 2014 letter "(w)e expect that the proposed Project would result in take of the western snowy plover and would likely render the Project area unsuitable for the species." The Project is also likely to result in take of the Smith's blue butterfly, as discussed in our 2009 and 2014 letters. Nothing in the 2015 HPP changes our assessment of the proposed Project's potential effects to listed species: the 2015 HPP does little to address our previously voiced concerns; it is not sufficient to avoid take of listed species caused by construction and use of the Project; and, it prescribes management actions that are likely to result in take of listed species. The Act prohibits the taking of any federally listed endangered or threatened species of fish or wildlife (see sections 9 and 4(d) of the Act and implementing regulations at 50 CFR 17.21 and 17.31 for more detail). It is our understanding, and the 2015 HPP affirms, that there is no Federal involvement that would allow take caused by the Project to be addressed through the interagency consultation procedures of section 7(a)(2) of the Act. Section 10(a)(1)(A) recovery permits are only available for scientific purposes or to enhance the propagation or survival of the species and cannot be used to mitigate the effects of construction and use of the Project. Therefore, the only available approach for take that would result from the Project

to be permitted under the Act (and thereby lawful) is for the Applicant to prepare a HCP in support of an application for an incidental take permit. The Applicant is legally required to comply with the Act and has neither requested nor received any permit or authorization from the Service that would allow for the take of any listed species in association with the proposed Project. Therefore, special condition 15 has not been satisfied.

This concludes our comments on the subject Project. We appreciate your consideration of our comments and we are available to discuss them further. If you have any questions, please contact Jacob Martin of my staff at (831) 768-6953, or by e-mail at [Jacob\\_Martin@fws.gov](mailto:Jacob_Martin@fws.gov).

Sincerely,

  
Acting for Stephen P. Henry  
Field Supervisor

cc:  
Ed Ghandour, Security National Guarantee

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