

CALIFORNIA COASTAL COMMISSION

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**SENT VIA ELECTRONIC MAIL**

June 16, 2020

Lisa Mangat, California State Parks Director

Lisa.Mangat@parks.ca.gov

Liz McGuirk, California State Parks Chief Deputy Director

Liz.McGuirk@parks.ca.gov

Re: Violation¹ File No. V-3-20-0048 - Oceano Dunes State Vehicular Recreation Area (ODSVRA)

Dear Mses. Mangat and McGuirk:

Thank you for the call on Friday, June 12, 2020, with our Executive Director, Jack Ainsworth, Ocean Protection Council Director, Mark Gold, and me to discuss recent unpermitted activities at ODSVRA associated with the above-referenced violation file. We respect the important role that the California Department of Parks and Recreation (DPR) plays in protecting California's natural resources, and greatly appreciate your willingness to resolve these matters quickly, particularly in light of our joint interest in protecting federal and state listed species and sensitive habitats. The assurances and updates that you provided in that meeting are very helpful toward such resolution.

To briefly summarize where we are right now, we received complaints early in the week of June 1st alleging that significant grading was taking place at ODSVRA, as well as activities designed to disrupt western snowy plover nesting (including installing stakes with mylar to dissuade plover nesting, scuffing out plover nesting 'scrapes', directing or moving plovers to the southern enclosure area, etc.), all without coastal development permits (CDPs). We investigated those complaints, and informed you, Ms. McGuirk, as well as other senior DPR staff, on June 4th (at our monthly coordination call) that those activities were taking place and that we had no evidence of any CDPs for them. At that time, you and other DPR staff on the call indicated that you had no knowledge of such activities but would look into it. On Friday, June 5th, we discussed these issues with a senior DPR staff member of the Oceano Dunes District and directed him to see to it that DPR immediately cease all such activities, as they were unpermitted and were having an adverse impact on coastal

¹ Please note that the description herein of the violations at issue is not necessarily a complete list of all unpermitted development at the ODSVRA that is in violation of the Coastal Act or the San Luis Obispo County LCP. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other unpermitted development at ODSVRA as indicative of Commission acceptance of, or acquiescence in, any such development. Please further note that the term "violation" as used throughout this letter refers to alleged violations of the Coastal Act or the San Luis Obispo County LCP.

resources. Following a back and forth discussion at the top management levels for DPR, the Commission, and the Natural Resources Agency over the course of the week of June 8th, we had the aforementioned meeting on the afternoon of Friday June 12th. At that time, you told us that the practice of “scuffing” nests had stopped and would not be used in the future. You also told us that all unpermitted physical development would be removed. We also had a productive conversation about the Coastal Act permitting requirements that apply to all such activities that qualify as “development” (as defined by the Coastal Act) and the fact that, due to the location on a sandy beach and in an environmentally sensitive habitat area, exemptions from those permitting requirements that might otherwise come into play are not applicable, as discussed further below. We committed to sending you this letter regarding our investigations into violations at the site, and to explain some of the background and permitting requirements that may be helpful moving forward here, and to explaining the issues to all parties.

Background

As you all of course know, the ODSVRA is an off-highway vehicle (OHV) park located seaward of the community of Oceano in southern San Luis Obispo County. ODSVRA is operated by DPR’s Off-Highway Motor Vehicle Recreation Division, and it is the only DPR OHV park in the State’s Coastal Zone. As such, it is the only California coastal state park to allow vehicles to drive on dunes and beach sand, and the only DPR OHV park subject to the Coastal Commission’s jurisdiction. While ODSVRA provides a unique public recreational opportunity, the same sandy resources that make the Park attractive for vehicular uses also constitute significant natural resources in the Coastal Zone, and the entirety of ODSVRA has been designated as an environmentally sensitive habitat area (ESHA)² by the Coastal Commission, including in the San Luis Obispo County certified local coastal program (LCP), due in large part to its sensitivity and the habitat it affords, including to state and federal Endangered Species Act (CESA and ESA, respectively)-listed species. Further, ODSVRA is part of a larger sensitive ecological system, the Nipomo-Guadalupe dunes complex, that spans San Luis Obispo and Santa Barbara Counties. The Nipomo-Guadalupe dunes complex provides habitat for a host of sensitive plant and animal species, many of which enjoy protected status under State and/or Federal law.

Two such species are the Western snowy plover (*Charadrius nivosus nivosus*) and California least tern (*Sternula antillarum browni*), which are threatened and endangered species, respectively, under ESA and/or CESA and other protective statutes.³ Because plovers and terns nest on open stretches of beach and dune, or in areas of sparse vegetation, they are particularly vulnerable to human disturbance, and their nesting habitat overlaps with the OHV riding and camping areas at ODSVRA, increasing the vulnerability of these shorebirds to vehicle collision, or other forms of ‘take’ and habitat value disruption. To provide areas of protected habitat for these species, as is consistent with their protected status and species recovery goals, DPR annually fences off approximately 300

² See Section 30240 of the Public Resources Code.

³ The California least tern is state and federally-listed as endangered under CESA and ESA – and thus a “fully protected” species. The Western snowy plover is federally-listed as threatened. While the Western snowy plover is not listed as endangered under CESA, it does have rarity status (e.g., it is listed as G3 S2S3 by the State and it is a California Species of Special Concern and has other rarity listings) and plover habitat is typically considered ESHA.

acres of suitable nesting habitat for the exclusive use of nesting plovers and terns during the nesting season. This area, known as the seasonal enclosure⁴, begins at mile post (MP) 6 and extends southward along the shoreline for two plus miles and inland from this point. Because of danger from OHVs, other vehicles, and campers, plovers and terns typically are unable to nest outside of the seasonal enclosure.

Because of the Covid 19 emergency, as you know, the ODSVRA (like many other state parks in California) was closed to vehicular and camping access pursuant to the Governor's March 19, 2020 Stay-At-Home order. Since vehicular and camping uses in the dunes and on the beach were curtailed, the dunes have begun to naturally re-form in areas where regular vehicular and other human disturbance had previously prevented that from happening. Because of the cessation of vehicular activity, it appears that plovers and terns are also taking advantage of the lack of disturbance to reoccupy nesting/foraging areas that have been unavailable for decades. However, DPR's recent grading activities and plover nesting deterrence actions (as discussed on the first page) are preventing the natural expansion of plover/tern nesting.

Recent Events Regarding These Actions

In early June, Commission enforcement staff began receiving reports of a variety of unpermitted activities taking place at ODSVRA, and began our investigation, as is our standard practice, by reaching out to the party involved, here, State Parks. We raised this matter first in our standing monthly call on June 4, 2020, just to make sure that you all were aware of this issue and to flag it for your input and to make sure we were talking to the correct staff, and we raised it again on June 5, 2020 in a telephone conversation with ODSVRA staff.

June 5, 2020 Telephone Conversation

The Commission's Enforcement Supervisor, Pat Veasart, spoke with the ODSVRA's Senior Environmental Scientist, Ronnie Glick, on June 5, 2020, regarding recent activities undertaken by DPR at the ODSVRA since the time when vehicle entry/use and camping were curtailed due to the Covid19 emergency. From that conversation, and from the materials noted below, we understand those activities to include the following: beach grading/grooming with bulldozers and other heavy equipment; placement of stakes with mylar ribbons to deter Western snowy plover and California least tern nesting activities; "scuffing out" plover nesting scrapes; placement of red flagging to identify the location of former scrapes; placement of fences, posts, ropes, etc. in areas occupied by nesting plovers and terns; herding or directing plover and tern chicks to enclosure areas; and other activities described in DPR's *Protocols to Protect Western Snowy Plover and California Least Tern During 2020 Oceano Dunes State Vehicular Area Park Reopening* (the Protocols), DPR's *2020 Nesting Season Management Plan to Avoid Take of the California Least Tern and Western Snowy Plover at Oceano Dunes State Vehicular Recreation Area* (2020 Nesting Season Management Plan), and Mr. Glick's email response to Lisa Belenky (from the Center for Biological Diversity) dated May 28, 2020. Commission staff's response was to note that many of the above activities constitute "development," as that term is

⁴ While the Commission has acknowledged in past amendments to CDP 4-82-300 that State Parks undertakes a seasonal enclosure fencing program in conjunction with USFWS, such enclosure fencing has not been explicitly proposed in the context of a CDP application nor approved under as part of that CDP.

defined in the Coastal Act and the applicable LCP and had apparently occurred without the benefit of CDP authorization at ODSVRA.

During the June 5 telephone conversation between DPR staff and Commission staff, DPR staff indicated their belief that recent grading activities are authorized by CDP No. 3-12-050. This CDP, approved by the Coastal Commission on September 14, 2017, authorized a five-year adaptive management program to reduce particulate matter (dust) emissions from ODSVRA through multiple methods, including through dune revegetation and restoration and seasonal wind fencing. Although some limited grading would be associated with these dust control efforts, the grading activities that have occurred recently are much more substantial, and it appears that most of the recent grading has occurred outside of the areas authorized for dust control abatement activities. Thus, the recent substantial grading, including the grading fronting the residences along Strand Way, does not appear to be authorized by CDP No. 3-12-050. Relatedly, the area where wind fencing has been placed fronting the residences along Strand Way is also outside of the scope of CDP No. 3-12-050, and said fencing is not authorized by that CDP either.⁵

Commission staff also noted that, given the nature and location of the substantial grading in question, it appears to have no dust control, dune protection or restoration purpose. DPR staff then suggested that the recent grading activities are exempt from Coastal Act permitting requirements as “ongoing maintenance”, but Commission staff noted that the recent grading appeared to be more substantial and far-ranging than any such maintenance of which we have been aware in the past, and in fact appears to significantly exceed and be of a different nature than past maintenance activities. We further noted that the grading of large swaths of the lower dune/beach area of the ODSVRA, as far as MP 6, does not appear to be related to maintenance needs or objectives, especially in light of the fact that ODSVRA is currently closed to street vehicles, OHVs, and camping use that might otherwise be a potential basis for the need for maintenance.

In any event, and as we discussed during the call on June 12, such grading of the beach and foredunes does not qualify as “repair and maintenance” as that phrase is used in the Coastal Act (Pub. Res. Code § 30610(d)). Moreover, even if such grading did qualify as repair or maintenance, as those terms are used in Section 30610(d), it would still require a CDP due to its location on a beach and in dune ESHA.⁶ Finally, we reviewed the permits that have been issued for the Park and confirmed that the subject grading activities are also not covered under the base CDP that authorizes general Park operations (CDP No. 4-82-300 as amended).

Our staffs also discussed DPR’s recent plover and tern management activities, including installing stakes with mylar flags attached, installation of new fencing, “scuffing” of potential plover nests, and herding or directing of plovers. Parks staff stated their understanding that the United States Fish and Wildlife Service (USFWS) (through Lena Chang) and the California Department of Fish and Wildlife (CDFW) (through Bob Stafford) had reviewed the 2020 Nesting Season Management Plan and had “accepted” it.

⁵ Some seasonal wind fencing activities in this area fronting Strand Way were authorized in 2008 by the Commission, but that authorization expired in 2013 (see 3-08-041-W).

⁶ See 14 C.C.R. § 13252(a)(3).

When we contacted Senior Fish and Wildlife Biologist Lena Chang at USFWS, she stated the following:

From my understanding, State Parks is adapting their management to the unusual circumstances of closures due to COVID-19, which has resulted in the park being closed to vehicles and plovers venturing out of the usual nesting enclosure; even though the park is closed to vehicles right now, they are trying to manage for when they are operating more normally.

Further, when we contacted Regional Manager Julie Vance at CDFW, she stated the following:

I don't believe that State Parks has discussed this with CDFW but will check with staff to verify. Thank you for bringing this to our attention.

Coastal Commission staff also contacted Program Manager Bob Stafford at CDFW on Monday, June 8, 2020. Mr. Stafford did not remember having seen either the Protocols or the 2020 Nesting Season Management Plan, nor did he remember reviewing, authorizing, or "accepting" said documents. He indicated that the first he heard of this was on Friday, June 5, when he was contacted by Julie Vance regarding same. He did, however, indicate that other CDFW staff may have reviewed the plan.

On June 15, 2020 we also received the following from Ms. Chang at USFWS:

"After further internal discussion, our office sent State Parks an email on June 9 to request they discontinue scuffing plover scrapes."

DPR staff also raised questions about the Commission's authority to manage protected species, so we want to assure you that our actions are not directed to managing those species under the ESA and CESA, but to addressing activities that constitute "development" under the Coastal Act that would require a CDP,⁷ and in the absence of such permits, appear to be Coastal Act violations. Thus, regardless of USFWS and CDFW's positions regarding DPR's Protocols or 2020 Nesting Season Management Plan, development undertaken in the Coastal Zone requires authorization under the Coastal Act in order to be legal. Moreover, the subject activities appear to be having substantial adverse impacts to coastal resources that are protected under the Coastal Act, including through ESHA degradation (see also discussion below).

As required by our enforcement process, Commission staff explained to Parks' staff that the above-described development activities (including placement of stakes with mylar ribbons to deter plover and tern nesting, "scuffing out" potential nests, directing or relocating plovers, placement of additional fencing, and the substantial grading of the lower

⁷ Neither DPR's CDP for dust control purposes (CDP No. 3-12-050) nor the base CDP for park operations (CDP No. 4-82-300) authorizes any mylar flagging or other deterrence measures. Similarly, the restoration of the foredune area, where some of the flags were placed, was approved via two Emergency CDPs: G-3-19-0053 and G-3-20-0013. The former was issued in December 2019 and the latter in January 2020. The project approved by those ECDPs was only to include perimeter fencing and native dune plants, and that area needs follow up permitting (scheduled for July). Thus, it appears that these recent development activities are violations of these ECDPs or goes beyond what was approved in those ECDPs.

dune/beach) all meet the Coastal Act's definition of "development" (i.e., because it is the placement/erection of solid material, grading, and change in intensity of use of land) and require a CDP – which DPR apparently does not have – and thus are all violations of the Coastal Act. Staff requested that DPR cease all of the above-described unpermitted activities and provided our contact information for a response and any follow up discussions.

June 7, 2020 Site Visit by Commission Staff

On Sunday, June 7, 2020, Jonna Engel, Coastal Commission Senior Ecologist, and Pat Veasart conducted a site visit, at the ODSVRA in order to verify conditions on the ground. They entered the Park at 9:30 am from Strand Way and walked south from MP1 to MP6 (and back) along the beach and the foredunes.

They saw that DPR had removed stakes and mylar flagging from an area north of MP4, where it had previously been installed to deter plover nesting and saw that three new single-nest plover exclosures had been installed (approximately 120', 80', and 60' in diameter). None of the exclosures they observed appear to be the minimum 200-foot diameter called for in the Protocols.

At MP4 they observed 2 adult and 3 fledgling snowy plovers outside of the newly fenced exclosures. They spoke with DPR staff at this location, who confirmed that the stakes with mylar flagging had been installed to deter plover nesting, and that the stakes and mylar had been removed when plovers nested outside the exclosures near MP4 despite the stakes and mylar ribbons. DPR staff confirmed that the three new fenced exclosures had been erected to protect nesting plovers. DPR staff also confirmed that State Parks staff are "scuffing out" plover scrapes outside of exclosures, and that the plover scrapes are marked with red flagging. CCC staff observed numerous red flags marking plover scrapes in the vicinity of MP4 and outside of fenced exclosures.

At MP5 they observed 5 adult and 5 fledgling snowy plovers outside of fenced exclosures. Stakes and mylar flagging remains inside the fenced restoration areas between MP4 and MP6. There are also stakes and mylar flagging outside the fenced restoration areas, to the west of the fencing at MP5. In this area of stakes and mylar flagging, they observed 9 red flags denoting former plover scrapes. Midway between MP5 and MP6 they documented 4 adult and 4 fledgling snowy plovers outside of fenced exclosures. Just north of MP6 on the beach they observed 4 adult snowy plovers outside of fenced exclosures.

June 12, 2020 Meeting

On Friday, June 12, 2020, we had the aforementioned meeting by phone (with DPR and Commission staff, and Mark Gold) to discuss this matter, and had a productive and helpful conversation as noted above. As a result, you confirmed that DPR will immediately and permanently remove all stakes and flagging, cease "scuffing" out plover scrapes and other nesting deterrence activities, and temporarily suspend the use of heavy equipment in beach and dune areas for grading, grooming, or other purposes, and Commission staff noted that for any such activities, a CDP is required. We also noted that we needed to discuss further the issue of "directing" or "moving" the birds⁸, and the most effective size

⁸ From Page 2 of the Protocols: "If determined practical and necessary, staff will carefully direct the brood to the Southern Exclosure ... After attempts to move broods to the exclosure, if the brood

and configuration of enclosure areas. In order to clarify the agreements reached by consensus on June 12 and avoid any confusion, we thought it would be useful to summarize what we understand to be the agreements reached. Please let us know if we have misunderstood any of our discussions:

1) DPR stated it has already ceased from “scuffing out” potential plover nesting scrapes and will not recommence these activities.

2) DPR agreed to immediately remove all stakes and mylar ribbon and any other devices that DPR has placed to prevent and/or discourage plover/tern nesting.

3) DPR agreed to cease from undertaking any further unpermitted development activity at the ODSVRA including the above-described dune/beach grooming/grading, placement of stakes with mylar ribbons, any potential actions of directing or herding of plovers and terns, and placement of fences, posts and ropes (unless to protect established nests), but wanted to reserve the option of discussing jointly the legal status of grading activities to determine whether they are covered by a permit. CCC noted that the grading does not appear to be covered by any current permits, that any future grading would need a permit, and that any such actions without a permit would constitute a Coastal Act violation. We agreed that we should coordinate closely going forward to avoid such a situation⁹.

4) In order to coordinate our efforts to jointly protect plovers and terns during the nesting and foraging season, prior to re-opening the Park for OHV and camping use, we agreed that our biologists and staff would meet to discuss any outstanding issues and questions. As discussed in our meeting, it would be very helpful for all parties to understand the locations of the various activities previously undertaken, especially in relation to the areas where plovers and/or terns are nesting or foraging. We therefore suggest that Parks develop a map that identifies these areas, along with a plan that evaluates options for fully protecting those areas and the species within from any sort of impact from vehicular and camping use in a manner that is most protective of these species and consistent with Coastal Act provisions. As we discussed, such options might include fencing off new enclosure areas, modifying Park use parameters, adjusting re-opening schedule, etc.

5) Please contact Pat Veasart, Northern California Enforcement Supervisor, by telephone, email, or by letter attached to an email, prior to the park’s reopening (and with enough time to have the above-described and agreed upon dialogue before any such opening), regarding DPR’s revised plans to protect these sensitive species and their habitat and the potential mitigation measures. He can be reached at (805) 835-8732 or by email at pat.veasart@coastal.ca.gov.

continues to return to the riding area far from the enclosure, the shoreline area will be closed to camping and vehicular traffic until the chicks fledge or are no longer present.”

⁹ Unfortunately, on June 15, 2020, we received a new report, with photographs, of grading operations along a fence line at the Park, apparently around MP5. It was our understanding that there would be a temporary halt on grading operations until we determine the permit status of these operations. We are checking but it seems like this is not in the area covered by the emergency CDPs

We also note that the activities discussed herein constitute serious Coastal Act issues and would like to discuss with you some mitigation steps that could address past issues and impacts, and help us jointly move past this matter entirely. We would be happy to discuss any suggestions you might have for this, which could include such things as additional protective measures, educational signage about threatened species in the area, and maybe such steps as adding covers to trash receptacles to discourage predators in the area. We are open to any creative suggestions you might have to mitigate for harmful impacts to the species in the area.

We hope that this letter proves useful to you and others to understand the Commission's position regarding these recent unpermitted activities and required resolution for them. Thank you for your attention to this matter, your cooperation, and your willingness to resolve this matter quickly. If you have any questions concerning this letter, please feel free to contact me at Lisa.Haage@coastal.ca.gov or Pat Veersart (as noted above). Many thanks again for your actions to resolve this matter and we look forward to working with you.

Sincerely,

Lisa Haage

Lisa Haage
Chief of Enforcement

cc: Mark Gold, Director, Ocean Protection Council
Dan Canfield, California State Parks Acting OHV Deputy Director
Jim Newland, California State Parks PWP Manager
Kevin Pearce, California State Parks Acting Oceano Dunes Superintendent
Ronnie Glick, Senior Environmental Scientist, State Parks Oceano Dunes District
Paul Souza, United States Fish and Wildlife Service Region 8 Director
Lena Chang, United States Fish and Wildlife Service Senior Fish & Wildlife Biologist
Julie Vance, California Department of Fish and Wildlife Regional Manager
Bob Stafford, California Department of Fish and Wildlife Program Manager
Trevor Keith, San Luis Obispo County Planning Director