



**VIA EMAIL AND  
CERTIFIED MAIL, RETURN RECEIPT REQUESTED (with attachments on disk)**

July 19, 2017

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**Re: Notice of Intent to Sue for Violations of Section 9 of the Federal Endangered Species Act for Taking Western Snowy Plover, Oceano Dunes State Vehicular Recreation Area**

Dear Secretary Laird, Director Mangat, and Director Bonham, Regional Director Souza, and Secretary Zinke,

I am writing on behalf of the Center for Biological Diversity (the “Center”) to inform you of violations of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.* (“ESA”) arising from activities authorized by the California Department of Parks and Recreation (“State Parks”) at Oceano Dunes State Vehicular Recreation Area, and to request that you take immediate action to remedy these violations. This letter is provided to you pursuant to the 60-day notice requirement of the ESA’s citizen suit provision, to the extent such notice is deemed necessary by a court. 16 U.S.C. § 1540(g)(2). The activities described in this notice violate the take provisions of the ESA and, if they are not curtailed, the Center intends to commence a civil action against you and other responsible state officials or employees, acting in their official capacity, for violations of section 9 of the ESA. 16 U.S.C. § 1538(a)(1)(B).

## 1. Statutory Framework

Section 9 of the ESA specifically prohibits the “take” of an endangered species, 16 U.S.C. § 1538(a)(1)(B), a term broadly defined to include harassing, harming, pursuing, wounding or killing such species, 16 U.S.C. § 1532(19). The term “harm” is further defined to include “significant habitat modification or degradation where it ... injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. §17.3 “Harass” includes any “act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering.” *Id.* The ESA’s legislative history supports “the broadest possible” reading of “take.” *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 704-05 (1995). “Take” includes direct as well as indirect harm and need not be purposeful. *Id.* at 704; *see also National Wildlife Federation v. Burlington Northern Railroad*, 23 F.3d 1508, 1512 (9th Cir. 1994). The ESA’s prohibition on take applies equally to threatened species, unless a species-specific rule promulgated by the FWS pursuant to ESA section 4(d) provides otherwise. 50 C.F.R. § 17.31(a).

The take prohibition applies to any “person,” 16 U.S.C. § 1538(a)(1), including state agencies, 16 U.S.C. § 1532(13). The ESA further makes it unlawful for any person, including state agencies, to “cause to be committed” the take of a species. 16 U.S.C. § 1538(g). Violations of Section 9 are enforceable under the ESA’s citizen-suit provision. 16 U.S.C. § 1540(g).

Courts have repeatedly held that government regulations authorizing third parties to engage in harmful actions can constitute an illegal taking under Section 9 of the ESA. *See Strahan v. Cox*, 127 F.3d 155, 158, 163-64 (1st Cir. 1997), *cert. denied*, 525 U.S. 830 (1998) (state agency caused takings of the endangered right whale because it “licensed commercial fishing operations to use gillnets and lobster pots in specifically the manner that is likely to result in violation of [the ESA]”); *Defenders of Wildlife v. Administrator, Env’tl. Protection Agency*, 882 F.2d 1294, 1300-01 (8th Cir. 1989) (federal agency caused takes of endangered black-footed ferret through its “decision to register pesticides” even though other persons actually distributed or used the pesticides); *Loggerhead Turtle v. City Council of Volusia County*, 148 F.3d 1231, 1253 (11th Cir. 1998) (county’s inadequate regulation of beachfront artificial light sources may constitute a taking of turtles in violation of the ESA).

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]. U.S.C. § 1540(g). A plaintiff can seek to enjoin both present activities that constitute and ongoing take and future activities that are reasonably likely to result in take. *See Burlington Northern Railroad*, 23 F.3d 1508 at 1511.

## 2. The Oceano Dunes State Vehicular Recreation Area

The Oceano Dunes State Vehicular Recreation Area (“SVRA”) includes both state owned lands and county owned lands near the community of Oceano in San Luis Obispo County, California. The SVRA includes approximately 1,500 acres of sand dunes and 5.5 linear miles of beach areas open for use by motorized vehicles. This area is operated and managed by State Parks pursuant

to the SVRA's 1975 General Development Plan and Resource Management Plan ("Plan"), as amended in 1994. Under that plan, State Parks allows street-legal vehicles to operate on the beach in the northern portion of the SVRA, while the southern portion is open to off-highway vehicles ("OHVs") and vehicular camping. Oceano Dunes SVRA is open throughout the year. The Plan authorizes both general use of the SVRA and special OHV events. In addition to the general vehicle use permitted within the Oceano Dunes SVRA, in the past the State Parks has permitted a number of special OHV events. Unfortunately, the existing management plan is woefully outdated<sup>1</sup> and the State Parks' management of the area has repeatedly failed to adequately protect the many imperiled species and their habitats that are found on these public lands.

Although State Parks has adopted nesting season management plans that address some impacts to listed birds, including most recently the 2017 plan,<sup>2</sup> harm continues to occur. Oceano Dunes SVRA does not have any incidental take authorization for the endangered species found there – State Parks has no section 10 HCP or section 7 biological opinion<sup>3</sup> that would cover the snowy plover and California least tern, which continue to be harassed, harmed and even killed by activities at the SVRA.<sup>4</sup>

The Oceano Dunes SVRA also operates pursuant to a Coastal Development Permit ("CDP") issued by the California Coastal Commission ("Commission") which allows up to 1,000 registered camping vehicles (including an unlimited number of OHVs associated with registered campers) and 4,300 day use vehicles (of which 1,720 can be OHVs) per day and contains additional requirements during special events.

In January 2017, the Commission held a hearing to consider amendments to the CDP and the Commission's staff report showed that the limits in the existing permit have not been consistently adhered to by the State Parks in managing the SVRA. The 2017 Commission Staff

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<sup>1</sup> In 2017 a dust plan was adopted but other aspects of the plan have not been updated. Notably, in June 2017 the San Luis Obispo County Air Pollution Control District issued a Notice of Violation to State Parks for violations of air district rules (Attachment 1).

<sup>2</sup> 2017 Nesting Season Management Plan to Avoid Take of the California Least Tern and Western Snowy Plover at Oceano Dunes State Vehicular Recreation Area, San Luis Obispo County, California, February 2017 (Attachment 2).

<sup>3</sup> "On March 21, 2001 the California Department of Parks and Recreation (DPR), Oceano Dunes District State Vehicular Recreation Area's (ODSVRA, SVRA) incidental take authorization pursuant to Section 7 of the Endangered Species Act expired. The incidental take authorization with the U.S. Army Corps of Engineers (ACOE) was not renewed. The ACOE determined that the activity being conducted at the ODSVRA was no longer under ACOE jurisdiction. Therefore ODSVRA lost the federal nexus needed to renew the Section 7 permit." 2017 Nesting Season Management Plan.

<sup>4</sup> See Nesting of the California Least Tern and Western Snowy Plover at Oceano Dunes State Vehicular Recreation Area, San Luis Obispo County, California, 2016 Season, November 2016 (Attachment 3); USFWS letter dated Dec. 22, 2016, "Oceano Dunes State Vehicular Recreation Area, Second Notice of Additional Endangered Species Act Violations" pp.15 (Attachment 4, also available at <https://documents.coastal.ca.gov/reports/2017/1/th14a-1-2017.pdf> Coastal Commission Staff Report at pdf 171); USFWS letter dated March 29, 2016, "Oceano Dunes State Vehicular Recreation Area Endangered Species Act Violations and Habitat Conservation Plan" (Attachment 5, also available in Coastal Comm. Staff Report at pdf 177).

Report and letters submitted to the Commission also raised concerns with impacts to snowy plovers, California least terns and to steelhead habitat, discussed more fully below. After the hearing, the Commission continued consideration of amendments to the CDP until the September 2017 in Cambria, California.<sup>5</sup>

### 3. The Western Snowy Plover

The western snowy plover (*Charadrius alexandrinus nivosus*) is a small shorebird. The Pacific coast population of the snowy plover breeds primarily on coastal beaches from southern Washington to southern Baja California, Mexico. Nesting generally occurs on flat open areas, such as sand spits, dune-backed beaches, beaches at creek and river mouths, and salt pans at lagoons and estuaries. Nests are generally shallow depressions in sand, with most nests in southern California located within 100 meters of water. Most snowy plovers return to the exact same location for nesting year after year. Breeding season in southern California begins in early or mid-March, with fledging extending through the third week in September. Snowy plovers winter on many of the same beaches used for breeding, generally congregating in loose flocks for roosting and foraging during winter.

The U.S. Fish and Wildlife Service (the “Service”) listed the Pacific coast population of the snowy plover as a threatened species under the ESA in 1993. 58 Fed. Reg. 12864 (March 5, 1993). In listing the snowy plover, the Service determined that off-road vehicles pose a significant threat to snowy plovers, especially in nesting areas where motor vehicles can crush eggs or nestlings and/or flush adult plovers from nest sites resulting in nest abandonment and/or mortality to nestlings. *Id.* at 12871-12872. Nesting generally occurs in Southern California between March and September. Even during fall and winter, outside of the nesting season, snowy plover remain at risk from off-road vehicle use on beaches where they are foraging.

In 1999, the Service designated approximately 18,000 acres in Washington, Oregon, and California as critical habitat for the snowy plover, including beach portions of the Oceano Dunes SVRA. 64 Fed. Reg. 68508, 68517 (December 7, 1999). Following a lawsuit by development and OHV interests, the Service voluntarily remanded this critical habitat designation and issued a new final designation in 2005. 70 Fed. Reg. 56970 (September 29, 2005). The 2005 designation excluded the open riding area of the Oceano Dunes SVRA based on the Service’s conclusion that it was not essential to the conservation of the snowy plover because it was subject to regular disturbance from both street legal vehicles and OHVs. *Id.* at 57004. In addition, the 2005 designation concluded that portions of the Oceano Dunes SVRA coastal strand outside the open riding area, were essential to the conservation of the snowy plover, but excluded these areas on economic grounds under section 4(b)(2) of the ESA. *Id.*<sup>6</sup> In 2012, the Service revised the critical habitat designation and, as most relevant here, expanded the areas covered in Unit 31 to

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<sup>5</sup> The Center has urged the Commission to ensure through the CDP amendment process that the revised coastal development permit clearly prohibits and disapproves of any activities likely to result in future violations of the ESA. *See* Jan. 6, 2017 CBD letter to Commission (Attachment 6). Absent such amendments, the Commission may also be liable for that take to the extent the activities are permitted under the CDP.

<sup>6</sup> In 2006, the Service issued a proposed special rule for the snowy plover under section 4(d) of the ESA that would replace the blanket take prohibition of section 9. That special rule was never adopted.

include areas within the Oceano Dunes SVRA riding area. 77 Fed. Reg. 36728-36869 (June 19, 2012); *see id.* at 36733 (response to comments), 36850 (map).

Snowy plovers nest and breed within the Oceano Dunes SVRA between March and September. During this breeding season, nesting snowy plovers are protected to some extent from vehicles and other human interference by fenced enclosures. Snowy plovers also over-winter at Oceano Dunes SVRA and are thus present on the beach and in the SVRA *long after* the enclosures are removed. The enclosures were expanded pursuant to a 2003 settlement agreement between the State Parks and the Sierra Club. That same settlement agreement anticipated that State Parks would obtain take authorization for impacts to snowy plovers and other species through a valid Habitat Conservation Plan (“HCP”) from the U.S. Fish and Wildlife Service. However, to date, 14 years later the State Parks has failed to do so.

Despite the State Parks’ adoption and implementation of nesting season management plans, significant documented take of snowy plover associated with ORV activities has continued. Most recently, in 2016 several dead plovers were found in the riding area with signs of blunt trauma and in tire tracks. For example, in March 2016 one snowy plover was found dead in tire tracks and another was found crushed in the riding area, on October 10, 2016 a snowy plover was found dead in a vehicle track, on November 1, 2016 a snowy plover was found dead in a vehicle track, and 2 additional snowy plover were found dead in vehicle tracks later in November 2016.<sup>7</sup>

#### 4. California Least Tern

The California Least Tern (*Sterna antillarum browni*) is listed as an endangered species under the Federal ESA and is also listed as an endangered species under the California Endangered Species Act (“CESA”) and a fully protected species under California law. The California least tern nests in colonies on the Pacific coast of California and Baja, Mexico on relatively open beaches where vegetation is limited by the tidal scouring. California least tern could formerly be found in great abundance from Moss Landing, Monterey County, California to San Jose del Cabo, southern Baja California, Mexico. It was impacted in the 19th and early 20th century by the millinery trade which collected feathers for women's hats, but not to the degree that many east coast birds were. The Migratory Bird Treaty Act of 1916 ended the threat, but the least tern plummeted again some decades later due to growing development and recreational pressures which destroyed habitat, disturbed birds, and increased predation by introduced and native species. The construction of the Pacific Coast Highway brought all these threats to much of California's coast. By the 1940s, terns were gone from most beaches of Orange and Los Angeles counties and were considered sparse elsewhere. To avoid humans, some tern colonies nest at more inland mudflat and dredge fill sites, which appears to make them more susceptible to predation by foxes, raccoons, cats and dogs.

When placed on the endangered species list in 1970, just 225 nesting tern pairs were recorded in California. The U.S. Fish and Wildlife Service recovery plan was issued in 1980 and revised in 1985. The Service issued a Recovery Plan in 2001. Protection of nest beaches from development, degradation and disturbance, predator control, and recreation management initially

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<sup>7</sup> 2016 ODSVRA Annual Report, Table G.4, at p. 140; USFWS letter dated Dec. 22, 2016 at 1.

resulted in increased populations of 1,200 pairs in 1988 with a high of 7,117 pairs in 2009. The species declined to 4,353 pairs in 2013. The breeding pairs at ODSVRA have shown a similar pattern with the highest numbers in 2008 and 2009 and some decline since that time.<sup>8</sup>

California Least tern generally nest between March and September, when they are most at risk from human disturbance during nesting season. Like plovers, terns are also harmed when made to flush from nesting and foraging activities by noise and disturbance associated with human activities including ORV use. While some human disturbance has been managed with fencing at nesting areas, it has not been entirely successful at Oceano SVRA. The design and management of the enclosures to protect California least terns at Oceano SVRA has not always been in accordance with best practices including those recommended by the California Department of Fish and Wildlife.<sup>9</sup> For example, in the past, mortalities have resulted from collisions with poorly designed fences on the enclosures.<sup>10</sup> The most recently documented non-predation mortalities in 2016 appear to have been from unknown causes.

## 5. South-Central California Steelhead

Arroyo Grande Creek within the Oceano Dunes SVRA in part of the designated critical habitat for threatened south-central California steelhead. When the creek is flowing across the beach seasonally in winter and spring, vehicles crossing the creek and driving in the creek-bed may adversely affect steelhead habitat.

In April 2008, State Parks adopted a plan to avoid take of South-Central California Coast Steelhead in San Luis Obispo Coastal Units of the State Park System. That document noted that motor vehicles crossing Arroyo Grande creek could potentially affect steelhead. State Parks also adopted motor vehicle restrictions regarding crossing Arroyo Grande Creek, stating:

It is prohibited to cross Arroyo Grande Creek in any other manner than by crossing the creek as close to the ocean waterline as possible and parallel to the ocean waterline. Driving upstream or downstream in the creek channel or in any other manner in the creek channel is prohibited. If the creek crossing is posted “closed”, crossing the creek is prohibited.<sup>11</sup>

Unfortunately, these restrictions appear to be often ignored and rather than only crossing the creek in the manner described, many ORVs have continued to drive in and through the creek more widely.<sup>12</sup>

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<sup>8</sup> See 2016 ODSVRA Annual Report, at p. 17-18.

<sup>9</sup> See CDFW letters dated March 3, 2016 and July 3, 2015 (Attachment 7, Attachment 8).

<sup>10</sup> See CDFW letter dated March 3, 2016 re 2014 tern deaths.

<sup>11</sup> Department of Parks and Recreation, OHMVR Division, Oceano Dunes District, Oceano Dunes SVRA and Pismo State Beach, Order No. 554-005-2015, January 26, 2015, Motor Vehicle Operation (Attachment 9).

<sup>12</sup> When additional restrictions were posted in winter 2017, local observers noted that these signs were largely ignored.

On January 10, 2017, NOAA Fisheries suggested specific revisions to new draft creek-crossing guidelines to protect steelhead particularly when the water is over 1 foot deep at the crossing including surveying for smolts prior to crossings or closing the creek crossing during and after storm events for up to 48 hours or until the water has receded. To date, the Center can find no evidence that State Parks has adopted additional protective creek-crossing guidelines including the suggested revisions from NOAA Fisheries. As a result, potential impacts to South-Central California steelhead populations and its critical habitat are likely to be occurring, including through water quality degradation, changes in the creek bed and banks, and direct impacts to fish.

## 6. Violation of the ESA

The available information shows that activities authorized and permitted by State Parks have resulted in prohibited take of snowy plovers through direct killing, harming, and harassment.<sup>13</sup> This take is the direct and proximate consequence of the State Parks' management of the Oceano Dunes SVRA and specifically State Parks' authorization of motorized vehicle use within occupied snowy plover habitat. It is reasonably foreseeable that future activities permitted by the State Parks at the Oceano Dunes SVRA, including special events and general motorized vehicle use in snowy plover habitat, will result in additional prohibited take of snowy plovers. So long as the State Parks allows motorized vehicle use in areas occupied by snowy plovers without adequate protective measures, the State Parks is committing an ongoing take in violation of the ESA.

No exception or authorization exists that would allow the taking of snowy plovers.<sup>14</sup> Although Section 10 of the ESA provides for HCPs that, if approved by the Service, could authorize a certain level of take, State Parks does not have an HCP for snowy plovers at Oceano Dunes SVRA. State Parks has claimed that it has been developing an HCP for the Oceano Dunes SVRA pursuant to section 10 of the ESA for over two decades, but no such plan has been approved by the Service or even noticed for public review.

Activities authorized by the State Parks that are reasonably likely to result in prohibited take of snowy plovers may be enjoined under the ESA. *See United States v. Town of Plymouth*, 6 F.Supp.2d 81, 91 (D.Mass. 1998) (preliminary injunction issued against township which authorized off-road vehicles on a beach that was habitat for threatened piping plovers); *Defenders of Wildlife v. Administrator, Env'tl. Protection Agency*, 688 F. Supp. 1334, 1356-1357 (D. Minn. Apr. 11, 1988) *aff'd* 882 F.2d 1294 (1989) (enjoining the EPA from continuing its registration of strychnine until it could do so without illegally taking protected species of wildlife).

Accordingly, State Parks has violated and continues to violate section 9 of the ESA. Pursuant to the citizen suit provision of the ESA, 16 U.S.C. sections 1540(g)(1)(A) and (2)(A), the Center is providing you with sixty days' notice of our intention to commence a civil action to challenge

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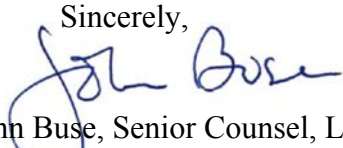
<sup>13</sup> 2016 ODSVRA Annual Report, Table G.4, at p. 140; USFWS letter dated Dec. 22, 2016 at 1.

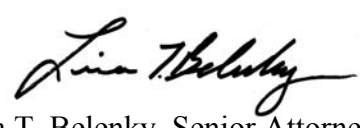
<sup>14</sup> As noted above, the Service has not finalized any section 4(d) special rule for the snowy plover, and it is doubtful that such a rule would authorize taking under these circumstances even if the 2006 proposed rule is eventually finalized.

the foregoing violations of law and any violations that may occur after service of this notice letter, and to seek their remediation in a court of law.

We are hopeful that State Parks will act to prevent take of snowy plovers that results from activities authorized by State Parks, and that representatives of State Parks will contact us prior to the commencement of legal action to discuss State Parks' obligations under the ESA. If you have any questions about the issues raised in this letter, please feel free to contact us at any time.

Sincerely,

  
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**Attachments (on disk with hard copy):**

- Attachment 1: San Luis Obispo County Air Pollution Control District, Notice of Violation Number 2963, dated June 12, 2017
- Attachment 2: 2017 Nesting Season Management Plan to Avoid Take of the California Least Tern and Western Snowy Plover at Oceano Dunes State Vehicular Recreation Area, San Luis Obispo County, California, February 2017
- Attachment 3: Nesting of the California Least Tern and Western Snowy Plover at Oceano Dunes SVRA, San Luis Obispo County, California, 2016 Season, November 2016
- Attachment 4: USFWS letter dated Dec. 22, 2016, "Oceano Dunes State Vehicular Recreation Area, Second Notice of Additional Endangered Species Act Violations"
- Attachment 5: USFWS letter dated March 29, 2016, "Oceano Dunes State Vehicular Recreation Area Endangered Species Act Violations and Habitat Conservation Plan"
- Attachment 6: Letter dated January 6, 2017 from Center for Biological Diversity to California Coastal Commission re: "Comments re Oceano Dunes SVRA CDP review: Th14a January 12, 2017 Commission Agenda"
- Attachment 7: Letter dated March 3, 2016 from CDFW "2016 Nesting Plan for California Least Tern at Oceano Dunes SVRA"
- Attachment 8: Letter dated July 3, 2015 from CDFW "Management of California least Tern at Oceano Dunes SVRA"
- Attachment 9: Department of Parks and Recreation, OHMVR Division, Oceano Dunes District, Oceano Dunes SVRA and Pismo State Beach, Order No. 554-005-2015, January 26, 2015, Motor Vehicle Operation



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