CALIFORNIA COASTAL COMMISSION
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SENT VIA REGULAR, CERTIFIED, AND ELECTRONIC MAIL

July 7, 2020

Lisa Mangat, California State Parks Director
Liz McGuirk, California State Parks Chief Deputy Director
Dept. of Parks and Recreation
1416 9th Street, Rm 1405
Sacramento, CA 95814

Subject:	**Consent Executive Director Cease and Desist Order No. ED-20-CD-01**
Date Issued:	July 7, 2020
Expiration Date:	October 5, 2020
Violation File No.:	V-3-20-0048
Property Location:	Oceano Dunes State Vehicular Recreation Area; San Luis Obispo County
Violations:	Beach grading/grooming and grading in the dunes with bulldozers and other heavy equipment; placement of stakes with mylar ribbons to deter Western snowy plover nesting activities; moving or directing nesting plovers or broods; “scuffing out” plover nesting scrapes; and placement of fences, posts, stakes etc. in areas occupied by nesting plovers

This Consent Executive Director Cease and Desist Order (“Consent Order” or “Consent EDCDO”) represents a mutual agreement between the California Department of Parks and Recreation (“DPR”) and the Executive Director of the California Coastal Commission (“Commission”). In light of the desire of both DPR and the Executive Director of the Commission to address the need to protect coastal resources at the Oceano Dunes State Vehicular Recreation Area and to address those issues in a collegial manner that provides a legal framework for such activities, DPR agrees to enter into this Consent Order and agrees to abide by the terms and conditions set forth herein. To this end, DPR and the Executive Director of the Commission, and his staff, have had discussions over the past several days for the purpose of finding this agreed upon framework for addressing this matter in the near term, and both parties look

forward to continuing to work collaboratively to find a long term solution that meets the goals of both agencies.

I. CONSENT ORDER

Pursuant to my authority under California Public Resources Code ("PRC") Section 30809, I hereby order you, in your official capacities as the legal representatives of DPR, which is the owner/operator of the State Park properties known as the Oceano Dunes State Vehicular Recreation Area ("ODSVRA" or the "Park"), located in the communities of Grover Beach and Oceano in San Luis Obispo County ("Subject Property"); and DPR as an agency, including all of its staff and agents; (collectively, "DPR") to cease and desist from allowing, undertaking, or allowing or undertaking maintenance of, the following unpermitted development[1] on the Subject Property (as defined in Section III below): beach grading/grooming and grading in the dunes with bulldozers and other heavy equipment south of Mile Post (MP) 3; placement of stakes with mylar ribbons or other activities to deter Western snowy plover nesting activities; "scuffing out" plover nesting scrapes; and placement of fences, posts, ropes, etc. in areas occupied by nesting plovers or in areas with plovers exhibiting nesting behavior; except as specifically authorized by this Consent Order. In addition, in order to: (1) protect Western snowy plover and California least tern nesting habitat, which constitutes environmentally sensitive habitat area ("ESHA"[2]); (2) mitigate for impacts to nesting plover habitat resulting from unpermitted activities that have already taken place;[3] (3) ensure consistency with the requirements of CDP 4-82-300, as amended, and as it has been implemented to protect plovers and terns, including their nesting habitat; and (4) pursuant to PRC Section 30809(c), avoid irreparable injury to the Subject Property, including the aforementioned ESHA, pending action by the Commission under PRC Section 30810; I hereby order and authorize DPR to comply with the following terms and conditions:

1. DPR shall immediately and completely cease and desist from conducting any further unpermitted development of the sort listed above or new unpermitted development or development that is inconsistent with any approved coastal development permit ("CDP"), including CDP No. 4-82-300, CDP No. 3-12-050, or Emergency CDP Nos. G-3-19-0053 and G-3-20-0013, as any such CDP has been or is subsequently amended, but excluding any remedial measures authorized or required by this Consent Order or other order issued by the Commission pertaining to the Subject Property.

[1] Note that the description of the unpermitted development at issue herein is not necessarily a complete list of all unpermitted development at the ODSVRA that is in violation of the Coastal Act and/or the San Luis Obispo County Local Coastal Program. 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.

[2] See PRC §§ 30107.5 and 30240.

[3] See also June 16, 2020 letter from Lisa Haage to Lisa Mangat and Liz McGuirk.

2. DPR, on its own accord, has removed all mylar flags it determined can be removed without disturbing nesting plovers. DPR shall monitor the areas where flags remain on a regular (at least weekly) basis and ensure that all remaining mylar flagging is removed immediately upon DPR's determination that removal of such flagging would not disturb nesting plovers. For any such flagging that DPR determines cannot be removed without disturbing nesting plovers, DPR shall report the location and circumstances to me for my approval and notify me or my staff (collectively, "the Executive Director") when you believe the flagging can be safely removed. Pin flags to denote areas where nesting activity has occurred or is occurring are authorized by this Consent EDCDO per standard practice approved by the United States Fish and Wildlife Service ("USFWS") and the California Department of Fish and Wildlife ("CDFW").

3. DPR shall immediately prohibit public camping, public vehicle use, and public Off-Highway Vehicle (OHV) use south of MP 3 until October 1, 2020[4]. This Consent Order does not affect public pedestrian access south of MP 3, but if DPR determines such access will disturb nesting plovers or terns, this Consent Order authorizes DPR to restrict such access as necessary. This Consent Order also authorizes DPR to post signage and/or place stake and rope delineation to notify the public of the activities that are available in areas that are addressed in this Consent Order, if it can be done in a manner that does not disturb nesting plovers or terns.

4. DPR shall immediately cease all grading, grooming, and heavy equipment use south of MP 3. DPR shall not resume grooming for the duration of this Consent Order. This Consent Order does authorize DPR to undertake limited grading with heavy equipment, but only for urgent or emergency purposes (such as to address such substantial sand buildup as would render critical protective fencing ineffective), as confirmed by the Executive Director, and only to the minimum extent necessary to address the emergency. DPR will also first confer with the USFWS and CDFW to ensure that they have input on the avoidance and minimization measures to protect shorebirds and to ensure such measures are consistent with existing permits. Thus, prior to undertaking grading or use of heavy equipment, DPR shall demonstrate that USFWS and CDFW have reviewed those measures and shall either: (a) demonstrate that the proposed actions are consistent with protocols that have been approved by the Executive Director, or (b) describe to the Executive Director, pursuant to section 11, below, any unique circumstances not covered by approved protocols and the proposed response thereto, for his review and approval, with that review and response to be provided, if at all possible, within 2 hours, and in no event more than 24 hours. In the event there is no response from the Executive Director within 24 hours

[4] March to October 1 is the well- established breeding period for plovers. See for example, https://www.govinfo.gov/content/pkg/FR-2011-03-22/pdf/2011-4906.pdf at Page 16047.

from notification, and DPR has met all the standards and requirements of this Consent Order, including this paragraph, DPR may proceed with the proposed grading with heavy equipment. DPR shall also immediately limit DPR vehicle use south of MP 3 to the greatest extent practicable.

5. This Consent EDCDO authorizes DPR's recent (since May 1, 2020) and future (for the term of this Consent Order) placement of temporary exclosures outside of the southern exclosure to protect nesting plovers/terns from disturbance and/or for predator control, but only to the extent any such individual exclosure is either demonstrated to be consistent with protocols that have been approved by the Executive Director or separately authorized by the Executive Director in response to a case-specific proposal requiring immediate action, with that review and response to be provided, if at all possible, within 2 hours, and in no event more than 4 hours, provided notification is provided between the hours of 6am to 6pm and to the extent that current exclosures are at least 100' in radius for plovers and 330' in radius for terns[5], and in a location where they are providing protection for the birds. In the event that the Executive Director receives notification between the hours of 6 am and 6 pm, but there is no response from the Executive Director within 4 hours, and DPR has met all the standards and requirements in this Consent Order, including this paragraph, DPR may proceed with the proposed placement of a temporary exclosure. Additional exclosures can only be erected when necessary and in a manner that does not disturb or harm nesting plovers or terns.[6]

6. DPR shall immediately cease, and on its own accord has ceased, "scuffing" nesting scrapes or otherwise disturbing inchoate nesting sites and will not resume any such activity.

7. DPR shall immediately cease moving or directing nesting plovers/terns, broods, or plovers/terns exhibiting nesting behavior. However, limited rescue activities, pursuant to USFWS's Recovery Permit, are allowable under this Consent Order only in clear and extraordinary circumstances, when unavoidable, imminent danger to plovers/terns is present and only as a last resort, either (a) pursuant to a protocol approved by the Executive Director and after notice is given to the Executive Director, and with personnel from the CDFW and USFWS invited to oversee relocation, or (b) upon notice and approval of the Executive Director on

[5] To the extent conducted pursuant to size/buffer guidelines in DPR's 2020 Nesting Season Management Plan. If there are exclosure methods that are less invasive but equally protective of the birds in a given area, such as signage and rope fences or combining exclosure areas, DPR can propose for approval other such methods.

[6] Alternatively, to minimize DPR staff time, installation and maintenance costs, and disturbance to nesting birds, DPR may propose, for ED review and approval, an expanded version of the southern exclosure that starts at MP 3, jogs inland along the existing fenceline, and extends laterally (parallel to the coast) along the inland line of the restoration area fencing to join the southern exclosure fencing at MP 6 – thus creating a single exclosure area rather than many separate single-nest exclosures.

a case-by-case basis and with personnel from CDFW and USFWS invited to oversee relocation. Activities that could potentially harm plovers/terns and/or block/disturb safe access for chicks to the shoreline shall immediately cease, and avoidance practiced before rescue activities can be deemed necessary. DPR shall verbally confer with USFWS/CDFW regarding such rescue activities to ensure compliance with ESA/CESA.

8. By July 15, 2020, DPR shall submit a report[7] to the Executive Director affirming that all activities required by this Consent Order to cease have ceased, and that all development required by this Order to be removed has been removed.

9. Prior to the expiration of any given deadline established by this Consent Order, DPR may request from the Executive Director an extension of the unexpired deadline. Such a request shall be made in writing[8] at least ten days in advance of the deadline and directed to the Executive Director in the San Francisco office of the Commission. The Executive Director may grant an extension of any deadline upon a showing of good cause, if the Executive Director determines that you have diligently worked to comply with their obligations under this Consent Order but cannot meet deadlines due to unforeseen circumstances beyond your control, and if extension of such deadline will not lead to additional coastal resource impacts. A violation of this Section may result in penalties, as provided for in Section 30821.6 of the Coastal Act.

10. The Executive Director may require revisions to deliverables required under this Consent Order, and DPR shall revise any such deliverables consistent with the Executive Director's specifications and resubmit them for further review and approval by the Executive Director, within ten days of receipt of a modification request from the Executive Director.

11. Any notification to be provided to the Executive Director pursuant to the provisions above, shall be provided by email to all of the following:
    - Jack Ainsworth, at John.Ainsworth@coastal.ca.gov
    - Lisa Haage, at Lisa.Haage@coastal.ca.gov
    - Dan Carl, at Dan.Carl@coastal.ca.gov
    - Pat Veesart at Pat.Veesart@coastal.ca.gov
    - Kevin Kahn at Kevin.Kahn@coastal.ca.gov

[7] With a narrative and photographs.

[8] Due to the COVID-19 emergency, all correspondence should be directed by email unless otherwise required by the Coastal Act or regulation.

II. ENTITYSUBJECT TO THE CONSENT ORDER

The persons subject to this Consent Executive Director Cease and Desist Order are the California Department of Parks and Recreation and anyone acting on its behalf or on its above-referenced property, including its employees, agents, contractors, and anyone acting in concert with the foregoing.

III. IDENTIFICATION OF THE PROPERTY

The property that is the subject of this Consent EDCDO is known as the Oceano Dunes State Vehicular Recreation Area, located at the western (seaward) edge of the communities of Grover Beach and Oceano in San Luis Obispo County.

IV. DESCRIPTION OF ACTIVITES COVERED BY THIS CONSENT ORDER

The activities that are restricted by this Consent EDCDO[9] include unpermitted beach grading/grooming and grading in the dunes and foredunes with bulldozers and other heavy equipment; placement of stakes with mylar ribbons to deter Western snowy plover nesting activities; moving or directing nesting plovers or broods; "scuffing out" plover nesting scrapes; resumption of public camping, public vehicle use and public OHV use south of MP3 prior to October 1, 2020; and placement of fences, posts, ropes, etc. in areas occupied by nesting plovers or in areas with plovers exhibiting nesting behavior.

V. COMMISSION AUTHORITY TO ACT

The Executive Director of the Commission is issuing this Consent Order pursuant to his authority under PRC Sections 30809(a)(2).

VI. FINDINGS

DPR and the Executive Director have worked over the last several days to come to an agreement on this Consent EDCDO that provides a legal framework to address this matter in the near term to protect protected resources on the Subject Property. Please see attached addendum entitled "Background Information and Additional Findings" for a description of the events leading up to this Consent EDCDO. Both DPR and the Executive Director acknowledge that additional measures will be addressed in a future action by the Commission to address the long-term goals and responsibilities of each agency, and endeavor to work together collaboratively through this time.

[9] Although this Consent Order applies only to certain activities, as described herein, nothing in this Consent Order should be construed to suggest that those are the only activities at the ODSVRA that are in violation of the Coastal Act or the San Luis Obispo County LCP, including of any CDP.

DPR does not acknowledge any wrongdoing with respect to the Executive Director's allegations, determinations, and findings regarding the activities described herein, and this Consent Order shall not be construed to suggest or imply any such agreement with respect to those allegations. Nonetheless, in order to address this specific matter through the Consent EDCDO, DPR agrees that the jurisdictional requirements for issuance and enforcement of this Consent Order has been met and agrees to not contest the issuance or enforcement of this Consent EDCDO. By entering into this Consent EDCDO, DPR does not waive any rights, arguments, or defenses it may have related to future or further actions by the Executive Director or the Coastal Commission related to the activities, allegations, determinations, and findings described herein the Consent EDCDO.

As I explained in my letter sent to you on July 3, 2020, and as described above, I have determined that violations of the Coastal Act and the San Luis Obispo County Local Coastal Program ("LCP") have occurred on the Subject Property
In addition, DPR failed to provide existing plans to the Commission for review and approval under the Coastal Act, even though those plans contemplate various development activities, and some are already being implemented, including plans to manage nesting plovers and terns (including fencing, staking, and moving of birds) and maintenance plans that propose extensive and frequent grading and/or grooming of beaches and dunes. The implementation of said plans has led to damage of beach and dune ESHA and harm to protected species.

With limited exceptions not applicable here, PRC Section 30600(a) states that, in addition to obtaining any other permit required by law, any person[10] wishing to perform or undertake any development in the coastal zone must obtain a CDP. "Development" is defined by Section 30106 of the Coastal Act as follows:

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

The unpermitted development described herein clearly constitutes "development" within the meaning of the above-quoted definition and therefore requires a CDP. The activities undertaken were unpermitted and may also be inconsistent with previously issued CDPs, and no other CDP has been issued for the subject activities. I understand that DPR intends to propose some of these activities as part of a Public Works Plan ("PWP"), but that PWP application has yet to be received, much less approved. In

[10] PRC Section 30600(a) defines the term "person" (by reference to PRC Section 21066) to include "the state, and any of the agencies and political subdivisions [thereof]."

addition, no CDP application has been submitted to seek Coastal Act authorization for these activities.

The unpermitted development is also not exempt from the Coastal Act's permitting requirements under PRC Section 30610, as explained below, and/or Title 14, California Code of Regulations (CCR), Sections 13250-13253, which make even those activities that genuinely qualify as repair or maintenance ineligible for an exemption if they occur in, among other places, a beach or sand area, or in any ESHA.

As a jurisdictional requirement to issue this Consent EDCDO, I have determined that DPR has undertaken development that requires a CDP without first securing a CDP (inconsistent with the Coastal Act and the San Luis Obispo County LCP) and development that is inconsistent with an existing CDP. I have also determined that DPR did not respond to the NOI in a "satisfactory manner" as that phrase is used in PRC Section 30809 and defined in 14 CCR Section 13180(a), in part in that it did not agree to our proposed terms by the deadline provided. However, after this time, our agencies have worked together to come up with a solution to address this matter consensually through the agreement of this Consent Order. Therefore, I am issuing this Consent EDCDO to direct and authorize you to undertake the above-described actions that are necessary to avoid irreparable injury to the Subject Property while this Consent Order is in effect.

VII. COMPLIANCE OBLIGATION

Strict compliance with this Consent Order by all parties subject thereto is required. Pursuant to PRC Section 30821.6(a) "Any person or governmental agency who intentionally or negligently violates any cease and desist order issued… by the executive director or the commission… may be liable civilly in a sum of not to exceed six thousand dollars ($6,000) for each day in which that violation persists…."

VIII. CHALLENGE

Pursuant to PRC Section 30803(b), any person or entity to whom this Consent Order is issued may file a petition with the Superior Court and seek a stay of this Consent Order. However, in light of the intent of the parties to agree on the terms of this Consent Order, DPR hereby agrees not to seek a stay pursuant to PRC section 30803(b) or to challenge the issuance and enforceability of this Consent Orders in a court of law or equity.

IX. EFFECTIVE DATE

This Consent EDCDO shall be effective upon its issuance and shall expire 90 days from the date issued (October 5, 2020).

Should you have any questions regarding this matter, please contact Patrick Veesart at (805) 835-8732 (or pat.veesart@coastal.ca.gov) or Alex Helperin at (415) 904-5228 (or alex.helperin@coastal.ca.gov).

The signatories below represent that they have the authority to sign on behalf of their organizations.

Signed,

JOHN AINSWORTH
Executive Director
California Coastal Commission

Date: July 7, 2020

Signed,

LISA MANGAT
Director
California State Parks

Date: July 7, 2020

Enclosure: Addendum – Background Information and Additional Findings
July 3, 2020 letter confirming notice of intent to Issue EDCDO

cc: Lisa Haage, Chief of Enforcement
Alex Helperin, Deputy Chief Counsel
Patrick Veesart, Northern California Enforcement Supervisor
Dan Carl, Central Coast District Director
Kevin Kahn, Central Coast District Supervisor
Jonna Engel, Senior Ecologist

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Addendum to Consent Executive Director Cease and Desist Order No. ED-20-CD-01

Background Information and Additional Findings

We first learned of what seems to be a significant increase and/or expansion of grading activities at ODSVRA in early May 2020, when grading activities were reported to my staff. An investigation on May 5, 2020, confirmed that extensive beach grading/grooming had occurred on that day. My staff continues to receive reports of grading/grooming in various locations at ODSVRA.

On June 4, 2020, we received copies of:

- DPR's 2020 Nesting Season Management Plan
- DPR's Protocols to Protect Western Snowy Plover and California Least Tern
- DPR's Snowy Plover and Least Tern Nests by Location
- A Report on Oceano Plovers by Jeff Miller of the Center for Biological Diversity (CBD)
- An email exchange and documents exchanged between Ronnie Glick, ODSVRA's Senior Environmental Scientist, and Lisa Belenky, an attorney for CBD, confirming DPR's engagement in many of the above-referenced activities, including the scuffing of nests, use of mylar flags and herding of birds to deter nesting activities.

The above documents described various activities (described herein and in our letter dated June 16, 2020) that appeared to be unpermitted development and that were of concern to my staff. On June 4, 2020, senior Commission staff relayed those concerns to senior DPR staff at a monthly coordination call.

On June 5, 2020, the Commission's Northern California Enforcement Supervisor, Pat Veesart, spoke with the ODSVRA's Senior Environmental Scientist, Ronnie Glick, regarding the activities described herein (as well as in our June 16, 2020 letter) as having been 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 fences, posts, ropes, etc. in areas occupied by nesting plovers; moving or directing adult plovers and chicks to exclosure areas; and other activities described in DPR's Protocols to Protect Western Snowy Plover and California Least Tern, the 2020 Nesting Season Management Plan, and Mr. Glick's email response to Lisa Belenky (noted above) dated May 28, 2020. Commission staff noted in this call that many of the above activities

constitute “development,” as that term is defined in the Coastal Act and the applicable LCP and had apparently occurred without the benefit of CDP authorization at ODSVRA. Also, during the June 5 telephone conversation between DPR staff and Commission staff, DPR staff expressed 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 are the subject of this Consent Order 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 via CDP 3-12-050. Thus, the recent grading addressed by this Consent Order is not authorized by CDP No. 3-12-050.

Commission staff also noted in this call that the recent grading activities do not appear to have any 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 responded 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. Commission staff further noted that the grading of large swaths of the beach and dune area of the ODSVRA appears to be in excess of maintenance needs, 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, such grading of the beach and dunes does not qualify as “repair and maintenance” as that phrase is used in the Coastal Act (PRC § 30610(d)). Moreover, even if such grading were to 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[1]. 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).

In the June 5 telephone call, Commission and DPR staff also discussed DPR’s recent plover and tern management activities, including installing stakes with mylar flags attached, installing new fencing, “scuffing” of potential plover nests, and herding or directing of plovers. Our understanding from those conversations is that DPR has been adapting its management to the unusual circumstances of closures due to the COVID-19 pandemic, which has resulted in the Park being closed to vehicles, and in plovers nesting outside of the seasonal nesting exclosure. Even though the Park is closed to vehicles right now, DPR is apparently trying to manage the plovers to facilitate the Park’s complete reopening.

[1] See 14 CCR § 13252(a)(3).

Commission staff's subsequent conversations with CDFW and USFWS indicate that neither agency had fully reviewed or approved DPR's plover/tern management activities undertaken during the Park closure[2].

During the June 5, 2020 phone call, DPR staff also raised questions about the Commission's authority to manage protected species. Commission staff response was that our actions are not directed to managing those species under the ESA or CESA, but to addressing activities that constitute "development" under the Coastal Act that would require a CDP, and in the absence of such permits, appear to be Coastal Act/LCP 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 ESHA degradation.

Commission staff explained to DPR staff that the above-described development activities 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 does not have – and thus are all violations of the Coastal Act. Commission staff provided oral notice to DPR staff of the possibility of enforcement action, including the possibility of an order, and requested that DPR immediately cease all of the above-described unpermitted activities, and provided our contact information for a response and any follow up discussions. DPR staff did not agree to immediately cease the activities described herein and instead indicated that any decision as to how to respond to CCC staff's request would be made by upper level management at DPR.

Commission staff visited ODSVRA on June 7, 2020 and observed that while some mylar flagging had been removed, including some located north of MP 4, some remained in areas where plover nesting activity was observed by DPR staff[3]. Commission staff also observed the placement of several new exclosures[4] and many red pin flags denoting plover nesting activity between MP 4 and MP 6. Finally, staff observed plovers and fledgling plovers between MP 4 and MP 6. Commission staff did not observe least terns on this particular day.

On June 12, 2020, I met with you, Ocean Protection Council Director, Mark Gold, and the Commission's Chief of Enforcement, Lisa Haage, to discuss the unpermitted development activities at ODSVRA that are the subject of this Consent Order. At that time, you told us that the practice of "scuffing" nests had stopped and would not be used

[2] On June 15, 2020, we received the following message from USFWS: "After further internal discussion, our office sent State Parks an email on June 9 to request they discontinue scuffing plover scrapes."
[3] See DPR matrix of snowy plover and least tern nesting activity - as of May 27, 2020.
[4] The exclosures observed by staff on June 7, 2020 appeared to be significantly smaller than required by the 2020 Nesting Season Management Plan and did not provide a minimum 100-foot buffer for nests

in the future. You also told us that mylar flagging would generally be removed. We 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. We committed to sending you a letter regarding our investigations into violations at the site and to explain some of the background and permitting requirements.

On June 16, 2020, Commission enforcement staff sent you a Notice of Violation letter explaining our position in greater detail noting that unpermitted activities were occurring at the site that could be violations of the Coastal Act until such time as a permit or other legal authorization was obtained, and again noting the potential for enforcement action at the site.

On July 2, 2020, we held a meeting with DPR, CDFW, and Commission staffs to discuss these matters and try to come to resolution. Although the meeting was productive and we did agree in concept on the resolution of some of the violations, in the end, DPR declined to agree to many of our terms, and I verbally notified you of my intent to issue an Executive Director Cease and Desist Order. On July 3, 2020, I sent you a letter confirming that notice of my intent (“NOI”). As indicated in the NOI, the subject unpermitted development is inconsistent with the resource protection policies of the Coastal Act, including Section 30240 (environmentally sensitive habitat areas or ESHA).

The NOI stated, in part:

“Therefore, as I indicated during yesterday’s call, because we have not been able to come to an agreement that State Parks will cease these unpermitted activities until appropriate authorization has been secured, I have determined that I need to exercise my authority as the Executive Director of the Commission, pursuant to PRC Section 30809, to issue an EDCDO.”

On July 6, 2020, we received a letter from Lisa Mangat in response to the NOI. While we very much appreciate that DPR offered to agree to a number of things, including not reopening the park to driving for the immediate future, many of DPR’s offers were specifically premised on a broader approach in which DPR would be making unilateral decisions about when, whether and how to invoke various exceptions and thereby to proceed with various activities, which would make it impossible for the Commission and the Executive Director to ensure compliance with the Coastal Act. Following that letter, I was able to discuss this further with DPR and am encouraged by the quick progress we were able to make and am appreciative of all the efforts that DPR has made to address our concerns, including by needing to have the order impose verifiable and enforceable standards.

As a jurisdictional requirement to issue this Consent EDCDO, I have determined that DPR has undertaken development that requires a CDP without first securing a CDP (inconsistent with the Coastal Act and the San Luis Obispo County LCP) and development that is inconsistent with an existing CDP. I have also determined that DPR did not respond to the NOI in a “satisfactory manner” as that phrase is used in PRC Section 30809 and defined in 14 CCR Section 13180(a), in part in that it did not agree to our proposed terms by the deadline provided. However, after this time, our agencies have worked together to come up with a solution to address this matter consensually through the agreement of this Consent Order. Therefore, I am issuing this Consent EDCDO to direct and authorize you to undertake the above-described actions that are necessary to avoid irreparable injury to the Subject Property while this Consent Order is in effect.

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July 3, 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: Confirmation of Notice of Intent to Issue Executive Director Cease and Desist Order Violation File No. V-3-20-0048 - Oceano Dunes State Vehicular Recreation Area

Dear Mses. Mangat and McGuirk:

Thank you again for making yourselves so available over the last week to try to come to a resolution of issues that have recently arisen at the Oceano Dunes State Vehicular Recreation Area ("ODSVRA").[1] It has been an intense week of discussions, and we believe we have made a great deal of progress. Unfortunately, however, our respective agencies still have some areas of continuing disagreement, some of which present urgent issues that require immediate action. Thus, as is explained below in more detail, the purpose of this letter is to confirm my intention, as relayed to both of you during yesterday's call, to issue an Executive Director Cease and Desist Order ("EDCDO" or "Order") to State Parks. This Order will serve to protect critical coastal resources in the short term while we continue to seek longer term solutions to address Coastal Act concerns at ODSVRA. The Order can also serve to confirm those areas in which we have reached agreement, such as the cessation of "scuffing" of Western snowy plover nests, as well as provide authorization for certain actions that we agree are critical in the short term to protect coastal resources, such as the placement of appropriate exclosure fencing for plover and California least tern, when necessary.

The fundamental legal basis for this notice is that we continue to believe that a number of the activities that State Parks has been conducting, and has not agreed to cease, or that are being proposed, constitute "development," as that term is defined in the Coastal Act,[2] and lack the requisite Coastal Act authorization. The activities of most immediate concern include:

- Grading and operation of heavy equipment. Moving, removing and depositing large quantities of sand in and on the beach and foredunes south of Mile Post (MP) 3 through the use of heavy equipment (e.g., large bulldozers, etc.), and in the process disturbing and/or disrupting nesting plovers and the terns, changing

[1] *See* June 16, 2020 letter from Lisa Haage to each of you for our summary of these issues, but note that the description therein and herein is not necessarily a complete list of all unpermitted development at the ODSVRA that is in violation of the Coastal Act and/or the San Luis Obispo County Local Coastal Program. 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.

[2] *See* Cal. Pub. Res. Code ("PRC") § 30106.

surface topography and modifying the beach's biological and geophysical processes.

- Fencing and staking. The placement of stakes, fences and "exclosures" (though we agree that some of this may not only be appropriate, but urgent, and, as such, may be authorized by the Order).
- Moving or directing birds. State Parks personnel actively attempting to move plovers that exhibit nesting behaviors outside of established exclosures, or plover broods, to locations inside of established exclosures. We understand that State Parks has been carrying out, and still intends to carry out, at least in a limited fashion, these activities despite the Park currently being closed to vehicle/OHV and camping uses.
- Planned resumption of OHV/vehicle use and camping in environmentally sensitive habitat areas (ESHA) where plover nesting activities have occurred and are still occurring this nesting season, i.e., south of MP3.

Because activities undertaken at the Park constitute development and lack authorization pursuant to the Coastal Act and/or the San Luis Obispo County Local Coastal Program (the "LCP"), they constitute violations of the Coastal Act and the LCP.[3] In addition, these activities are not authorized by the base CDP that provides overall Park operation authorization (CDP 4-83-300).

Although we may agree that some of these activities may be intended, in part, to benefit the sensitive bird species, that does not change the fact that they require legal authorization. Moreover, we have not yet reached complete agreement on which activities are appropriate and consistent with the Coastal Act, nor on guidelines for conducting such activities. Further, we believe that if not conducted correctly, even well intentioned actions can cause additional coastal resource harm. It is only through the process of obtaining authorization under the Coastal Act that the Commission can fulfill its charge of ensuring that the actions taken, and the methods used, are consistent with the policies of the Coastal Act and/or the LCP. This process is specifically designed for public input, including that of other interested agencies.

Therefore, as I indicated during yesterday's call, because we have not been able to come to an agreement that State Parks will cease these unpermitted activities until appropriate authorization has been secured, I have determined that I need to exercise my authority as the Executive Director of the Commission, pursuant to PRC Section 30809, to issue an EDCDO. We continue to hope that you will agree to cease the unpermitted activities until proper authorization is in place, in which case we can structure the Order as a "Consent" EDCDO. However, if we cannot come to agreement, I plan to issue the EDCDO unilaterally. As I indicated yesterday, the Order will include a prohibition on the re-opening of the ODSVRA to camping or vehicle/OHV use south of MP 3 until the end of September (the end of nesting season), since this is the area most intensively being used by the plovers and tern this year while the Park has been closed, and thus the area with the greatest potential for impact on these nesting birds and related nesting activities.

Thus, the purpose of this EDCDO is to address the need for immediate action to protect sensitive coastal resources in the interim, but it is not intended to resolve all potential unpermitted activities occurring at the Park, as we have previously pointed out in our

[3] Again, see the June 16, 2020 letter for details.

correspondence and discussions. These other activities continue to lack legal authorization and require such authorization to resolve the violations. We will continue to work with you on these issues through the context of the annual CDP review and PWP processes.

Legal Framework

PRC Section 30809(a) authorizes me to issue an EDCDO to a governmental agency that:

> "has undertaken, or is threatening to undertake, any activity that (1) may require a permit from the commission without securing a permit or (2) may be inconsistent with any permit previously issued by the commission. . . . The order may be also issued to enforce any requirements of a certified local coastal program. . . ."[4]

PRC Section 30809(b) states that the order may be issued if the agency:

> "has failed to respond in a satisfactory manner to an oral notice given in person or by telephone, followed by a written confirmation, or a written notice given by certified mail or hand delivered to the landowner or the person performing the activity."

Section 13180(a) of the Commission's regulations[5] defines the phrase "satisfactory manner," as that term is used in PRC section 30809(b), as being "a response that is made in the manner and within the timeframe specified in the notice and" that satisfies the standards of Sections 13180(a)(1) or (2) of the Commission's regulations. Therefore, to prevent the issuance of a unilateral EDCDO, you must provide a response by Noon on Monday, July 6, 2020, indicating your agreement: (1) to immediately and completely cease and desist from performing any of the activities listed in the bullet points above, unless and until authorized by a valid, effective Coastal Development Permit or CDP Amendment, or by the Commission through an order or the certification of a Public Works Plan and approval of associated Notice of Impending Development; and (2) to our memorializing that agreement through the issuance of a Consent EDCDO. Please respond via email to Pat.Veesart@coastal.ca.gov, and by phone to Alex Helperin at 415-904-5228.

The Executive Director Cease and Desist Order shall be effective upon its issuance and shall be effective for 90 days. Under the Coastal Act, the EDCDO may be subject to such terms and conditions as the Executive Director may determine are necessary to avoid irreparable injury to any area within the jurisdiction of the Commission pending action by the Commission under PRC Section 30810 (which gives the Commission itself the authority to issue a permanent Cease and Desist Orders).

Pursuant to PRC Section 30809(b)(3), I am also obligated to inform you that if the EDCDO is issued, any violation thereof may subject State Parks to additional liability under the Coastal Act in the form of fines.

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[4] This language goes on to identify three criteria, one of which must be satisfied prior to the issuance of an order that is solely enforcing the requirements of an LCP. In this case, the Order would also be enforcing a Commission permit, but the criterion in subdivision 30809(a)(2) (allowing for an order to enforce an LCP) has been satisfied in any case, as Matt Janssen, Division Manager of the San Luis Obispo County Planning Department, sent an email message to Pat Veesart reiterating that the "County of San Luis Obispo agrees that the Coastal Commission should take primary enforcement authority."

[5] The Commission's regulations are codified in Title 14, Division 5.5 of the California Code of Regulations.

Conclusion

If you do confirm your agreement to cease the activities listed in the bullet points at the beginning of this letter, please also confirm in writing that State Parks will carry out the following additional commitments to which we understand you have already agreed informally, through your written proposal and in our discussions:

- Cease the placement of mylar flags or ribbons on stakes near plover nests or potential plover nesting "scrapes," or the placement of any other devices designed to, or that may reasonably be anticipated to, prevent and/or discourage plover/tern nesting; and remove any such devices that have already been placed. This does not include the placement of single pin flags to mark nest locations.
- Cease and not resume the practice of "scuffing out" potential plover nesting scrapes.
- Cease beach grooming activities between now and the end of September.
- Cease grading/operation of heavy equipment south of MP 3 until the end of September, other than in cases of emergency as determined by the Executive Director.
- Limit the use of vehicles in the Park by State Park staff to the extent practicable.
- Any other unpermitted activities identified in our June 16, 2020 violation letter that you would agree to voluntarily cease performing.

We appreciate your anticipated cooperation and look forward to working with you in the future to address the critical resource protection issues at OSDVRA and moving towards addressing activities in a legal context, such as a CDP, CDPA or PWP, that can assist all parties going forward.

Thank you.

JOHN AINSWORTH
Executive Director

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