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June 1, 2020

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**Subject: California Department of Parks and Recreation Oceano Dunes District
Habitat Conservation Plan (HCP) and Draft Environmental Impact Report
(DEIR) (Project), SCH No. 2018011012**

Dear Mr. Glick:

The California Department of Fish and Wildlife (CDFW) received a Notice of Availability of a DEIR from the California Department of Parks and Recreation (CDPR) Off-Highway Motor Vehicle Recreation (OHMVR) Division of the Oceano Dunes District (hereafter, CDPR) for the Project pursuant to the California Environmental Quality Act (CEQA) and CEQA Guidelines.¹

Thank you for the opportunity to provide comments and recommendations regarding those activities involved in the Project that may affect California fish and wildlife. Likewise, we appreciate the opportunity to provide comments regarding those aspects of the Project that CDFW, by law, may be required to carry out or approve through the exercise of its own regulatory authority under the Fish and Game Code.

CDFW ROLE

CDFW is California's **Trustee Agency** for fish and wildlife resources and holds those resources in trust by statute for all the people of the State. (Fish & G. Code, §§ 711.7, subd. (a) & 1802; Pub. Resources Code, § 21070; CEQA Guidelines § 15386, subd. (a).) CDFW, in its trustee capacity, has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants, and habitat necessary for biologically

¹ CEQA is codified in the California Public Resources Code in section 21000 et seq. The "CEQA Guidelines" are found in Title 14 of the California Code of Regulations, commencing with section 15000.

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sustainable populations of those species. (*Id.*, § 1802.) Similarly, for purposes of CEQA, CDFW is charged by law to provide, as available, biological expertise during public agency environmental review efforts, focusing specifically on projects and related activities that have the potential to adversely affect fish and wildlife resources.

CDFW is also submitting comments as a **Responsible Agency** under CEQA. (Pub. Resources Code, § 21069; CEQA Guidelines, § 15381.) CDFW expects that it may need to exercise regulatory authority as provided by the Fish and Game Code. As proposed, for example, the Project may be subject to CDFW's lake and streambed alteration regulatory authority. (Fish & G. Code, § 1600 et seq.) Likewise, to the extent implementation of the Project as proposed may result in "take" as defined by State law of any species protected under the California Endangered Species Act (CESA) (Fish & G. Code, § 2050 et seq.), related take authorization as provided by the Fish and Game Code will be required.

In this role, CDFW is responsible for providing, as available, biological expertise during public agency environmental review efforts (i.e., CEQA), focusing specifically on project activities that have the potential to adversely affect fish and wildlife resources. CDFW provides recommendations to identify potential impacts and possible measures to avoid or reduce those impacts.

Nesting Birds: CDFW has jurisdiction over actions with potential to result in the disturbance or destruction of active nest sites or the unauthorized take of birds. Fish and Game Code sections that protect birds, eggs and nests include, sections 3503 (regarding unlawful take, possession or needless destruction of the nest or eggs of any bird), 3503.5 (regarding the take, possession or destruction of any birds-of-prey or their nests or eggs), and 3513 (regarding unlawful take of any migratory nongame bird). CDFW encourages Project implementation occur during the bird non-nesting season. However, if ground-disturbing activities must occur during the breeding season (February through mid-September), the Project applicant(s) is/are responsible for ensuring that implementation of the Project does not result in violation of the Migratory Bird Treaty Act or relevant Fish and Game Codes.

Fully Protected Species: CDFW has jurisdiction over fully protected species of birds, mammals, amphibians, reptiles, and fish, pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. Take of any fully protected species is prohibited, and CDFW cannot authorize their take in association with a general project except under the provisions of a Natural Communities Conservation Plan (NCCP), 2081.7 or a Memorandum of Understanding for scientific purposes.

Rare Species: Species of plants and animals need not be listed as Endangered, Rare or Threatened (E, R or T) pursuant to CESA and/or the Federal Endangered Species

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Act (ESA) to be considered E, R or T under CEQA. If a species can be shown to meet the criteria for a listing as E, R or T under CESA and/or ESA as specified in the CEQA Guidelines (California Code of Regulations [CCR], Title 14, Chapter 3, Section 15380), it should be fully considered in the environmental analysis for the Project.

Lake and Streambed Alteration: CDFW has regulatory authority with regard to activities occurring in streams and/or lakes that could adversely affect any fish or wildlife resource, pursuant to Fish and Game Code sections 1600 *et seq.* Section 1602(a) of the Fish and Game Code requires an entity to notify CDFW before engaging in activities that would substantially change the bed, channel, or bank of a stream or substantially divert or obstruct the natural flow of a stream.

Water Pollution: Pursuant to Fish and Game Code Section 5650, it is unlawful to deposit in, permit to pass into, or place where it can pass into “Waters of the State” any substance or material deleterious to fish, plant life, or bird life, including non-native species. The Regional Water Quality Control Board and United States Army Corps of Engineers also has jurisdiction regarding discharge and pollution to Waters of the State.

PROJECT DESCRIPTION SUMMARY

Proponent: CDPR

Project Description: The Project consists of the ongoing operation and management of the Pismo State Beach and the Oceano Dunes State Vehicular Recreation Area (ODSVRA). CDPR has prepared a draft Habitat Conservation to support the issuance of a Federal incidental take permit (ITP) by the United States Fish and Wildlife Service (USFWS) under Sections 10(a)(1)(A) and 10(a)(1)(B) of the Federal Endangered Species Act (FESA) of 1973. The issuance of the ITP would authorize take of the Federally listed species identified in the DEIR and HCP during the management and operation of two state parks. The DEIR would also support an analysis of impacts in the event that CDPR were to prepare a Natural Community Conservation Plan (NCCP) in support of an application to CDFW for issuance of a permit authorizing incidental take of State-listed animal and plant species pursuant to California Fish and Game Code sections 2800 *et seq.*, including section 2835. The analysis of impacts in the draft HCP is based on the current program being implemented by CDPR at Pismo State Beach and OSDVRA. The HCP includes 52 operations and maintenance activities divided into five categories: park visitor activities, natural resources management, park maintenance, visitor services, and other activities. The majority of the activities described in the HCP have been occurring at the parks for decades and are considered part of the baseline environmental conditions of the HCP area. The HCP also includes four new activities that are evaluated in the DEIR:

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1. The capture and captive rearing of western snowy plover (*Charadrius nivosus nivosus*; SNPL) chicks and eggs if they cannot be reunited with an attending adult or are at risk of death or injury from HCP activities not related to HCP species management activities (e.g., motorized recreation, pedestrian recreation, new covered activities).
2. Mechanical trash removal through beach raking or grooming from Grande Avenue south to orientation marker (Post) 6.
3. The removal of seasonal fencing erected along the Boneyard Enclosure (approximately 49 acres) and the incremental removal of seasonal fencing along the 6 Enclosure (60 acres) to allow year-round recreation in these two enclosures.
4. The use of unmanned aircraft systems (UAS) (e.g., drones) in the HCP area to reduce the cost associated with data collection.

The HCP also covers new activities currently being planned or which may be considered in the future that will be evaluated in a separate environmental review for CEQA compliance according to DEIR Section 2.4.2.3.

Location: The HCP area includes 5,005 acres of Pismo State Beach and ODSVRA. The HCP area is bound by the City of Pismo Beach to the north, the Guadalupe-Nipomo Dunes National Wildlife Refuge to the south, urban and agricultural land to the east and the Pacific Ocean to the west. Primary access to the HCP area is via United States Highway 101 and State Route 1.

COMMENTS AND RECOMMENDATIONS

CDFW offers the comments and recommendations below to assist CDPR in adequately identifying and/or mitigating the Project's significant, or potentially significant, direct and indirect impacts on fish and wildlife (biological) resources.

Removal of Seasonal Fencing: The proposed removal of the seasonal fencing along the east Boneyard Enclosure and the 6 Enclosure would reduce the amount of protected nesting habitat available for SNPL and California least tern (*Sternula antillarum browni*; CLTE) in the HCP area by 1/3, a large portion of which is high quality nesting habitat for these species. This large-scale habitat removal will result in a reduction of available protected nesting habitat which may in turn lead to these species nesting outside of the protected habitat and exposing them to additional potential impacts from human and recreation activities occurring within the HCP area. Additional impacts may also occur from nest overcrowding in the remaining protected areas, outcompetition of available

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nesting space within the remaining enclosures, failure to breed and/or reduced fitness. In addition, by allowing HCP activities to encroach within closer proximity to the remaining areas of protected habitat, the quality of the remaining protected habitat may be reduced. The reduction of available nesting habitat and increased disturbance from HCP activities occurring within and adjacent to these areas may also cause SNPL, CLTE and other migratory bird species to discontinue their use of these areas and the HCP area in general. This would impact not only the populations of these species but also the area's use as a Pacific Flyway Migratory Route and overwintering area for a variety of bird species, thus causing long-term and permanent impacts to several bird species nursery sites, including SNPL and CLTE (a State fully protected species), which would trigger a mandatory finding of significance under the CEQA Appendix G Guidelines. The suggestion that these activities, with the proposed avoidance and minimization measures, will have a less than significant impact on SNPL and CLTE is a gross underestimation by the DEIR and HCP of the severity that the proposed activities will have on these populations and their long-term reproductive success. The 6 Enclosure alone is the location where up to 80% of the CLTE population nests on an annual basis. The proposed DEIR and HCP avoidance and minimization measures including a slow reduction of the 6 Enclosure, a reinstatement of the 6 Enclosure if success criteria are not met, and creating single nest enclosures for SNPL that nest outside of protected areas will not replace nor offset the removal of protected nesting and foraging habitat nor meet the requirements to avoid impacts to a fully protected species (see discussion below). As a result, this should be considered a significant and unavoidable impact under CEQA.

Mechanical Trash Removal: The DEIR and HCP propose to initiate mechanical trash removal via raking or grooming in a portion of the HCP area from Grande Avenue south to Post 6 with the possibility of future expansions into additional areas of the HCP. Beach grooming and raking has been shown to reduce the amount of available foraging habitat for avian and other wildlife species by creating a reduction and change in the composition and availability of invertebrates by altering the beach ecosystem in these areas. Invertebrate species provide an invaluable food resource to numerous populations of migrating, overwintering, nesting and foraging bird species that inhabit the HCP area and this activity may reduce or eliminate the HCP area's ability to continue to serve as a suitable stopover for migrating and overwintering birds, impacting the area's ability to continue to support the diversity and density of bird species that travel through the area and use it as an important migratory corridor.

In addition, the continued use of mechanical trash removal in these areas could also result in permanent changes to the dune composition, further reduce the availability of potential nesting habitat for SNPL, and could increase disturbance to adjacent SNPL nesting and foraging habitat even with the proposed 500-foot buffer from known nest sites. The continued disturbance from mechanical trash removal could also lead to the

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preclusion of SNPL and other bird species from nesting and/or foraging in this area in the future.

While the DEIR and HCP does state that a study will be conducted to determine the effect of mechanical trash removal on the invertebrate population, and measures will be implemented if there is a significant decline in invertebrates, this does not guarantee the protection of this invaluable food resource, nor does it guarantee the Project's ability to reestablish not only the abundance, but the diversity of the invertebrate population. The DEIR and HCP also do not describe nor reference whether an exhaustive literature review was conducted and whether results and conclusions could be extrapolated from previous work to further refine the proposed future study testing and methodologies. CDFW recommends the DEIR and HCP be revised to include a discussion of previous studies and literature regarding mechanical beach disturbance and impacts on invertebrate populations. Absent data to demonstrate the robust veracity of the conclusions drawn in the DEIR and HCP, the suggestion that impacts from mechanical trash removal would be short-term and temporary because the activity will only occur for a short duration appears to be a mischaracterization by the DEIR and HCP; the proposed activity may have a lasting impact on these populations and their long-term reproductive success. Therefore, CDFW advises that the impact of mechanical trash removal should be considered a significant and unavoidable impact under CEQA.

Capture and Captive Rearing of SNPL Chicks and Eggs: The DEIR and HCP proposes to allow the increased capture and captive rearing of up to 12 SNPL chicks and/or 12 SNPL eggs per year if the chicks and/or eggs cannot be reunited with the adult or are at risk of harm from HCP activities. The DEIR analysis assigns 1/3 of the proposed increase (i.e., 4 SNPL chicks and/or 4 eggs) to the 6 Exclusion reduction, 1/3 to future dust control measures (which will be analyzed in a separate CEQA document), and 1/3 to the increase in chick and egg capture for captive rearing if they are observed to be threatened by recreational activity or other noncovered species management activities that were not previously conducted because currently CDPR attempts to protect nests and move chicks back to the safety of the seasonal exclusion.

The DEIR states that the capture and captive rearing of SNPL chicks and eggs is beneficial because even if some of the chicks or eggs do not survive, it serves to reduce direct mortality or injury that otherwise may occur from HCP activities. While CDFW acknowledges that captive rearing may reduce direct mortality from HCP activities, CDFW would like to point out that the increase in the proposed level of capture and captive rearing would not be necessary if the risk of injury and/or mortality was not increased by the removal of the seasonal exclusion fencing, the encroachment of HCP activities within the former exclusion areas, the reduction in the effort of CDPR attempts to protect nests and move chicks back into the safety of the seasonal exclusions, and the reduced area of available seasonal exclusions for SNPL chicks and eggs to be

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moved back into by CDPR. In addition, CDFW does not agree with the conclusion that the impacts are less than significant because the loss of SNPL chicks and eggs needs to be considered within the context of the conservation program implemented by CDPR in the HCP area, which has increased the breeding population of SNPL, and the increased loss of chicks and eggs is not expected to diminish the enlarged SNPL population sustained by the CDPR conservation program. The enlarged SNPL population sustained by the conservation program is part of the existing baseline for the Project and should not be considered to provide additional offsets to new and increased losses of SNPL chicks and eggs due to the aforementioned activities. Therefore, CDFW does not agree that the capture and captive rearing of SNPL chicks and eggs is a less than significant impact. In addition, the capture and captive rearing of SNPL chicks and eggs is considered take under Fish and Game code (as discussed above) and would require appropriate permits from CDFW before commencement of these activities.

Special Status Plant Species: The DEIR and HCP acknowledge the potential for several special status plant species to be impacted by operations and maintenance activities including but not limited to mechanical trash removal, fence installation and removal, and newly proposed activities. In particular, the DEIR and HCP describe impacts to plant species that are both State and federally listed as threatened and endangered including but not limited to the State and federally endangered marsh sandwort (*Arenaria paludicola*) and Nipomo Mesa lupine (*Lupinus nipomensis*); the State threatened and federally endangered Gambel's watercress (*Nasturtium gambelii*); and the State threatened surf thistle (*Cirsium rhotophilum*) and beach spectaclepod (*Dithyrea maritima*). The DEIR and HCP assert that while impacts to these and other plant species could occur, the impacts are less than significant due to limited areas of potentially suitable habitat.

CDFW recommends that all areas with potentially suitable habitat be surveyed for special-status plants by a qualified botanist following the "Protocols for Surveying and Evaluating Impacts to Special Status Native Plant Populations and Sensitive Natural Communities" (CDFW 2018) prior to initiating any activities that could result in disturbance to the habitat. This protocol, which is intended to maximize detectability, includes identification of reference populations to facilitate the likelihood of field investigations occurring during the appropriate floristic period. In the absence of protocol-level surveys being performed, additional surveys may be necessary.

CDFW also advises the DEIR be revised to avoid special-status plant species by a 50-foot no-disturbance buffer around the outer edge of plant population(s) or specific habitat type(s) that support special-status plant species observed in the Project site. CDFW recommends the 50-foot no-disturbance buffer include indirect impacts such as excessive dust, excessive runoff, or other disturbances that may not result from direct

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ground-disturbance but could also impact habitat quality habitat. If buffers cannot be maintained, then consultation with CDFW is warranted to determine appropriate minimization and mitigation measures for impacts to special-status plant species, or in the case of plant species listed pursuant to CESA or the Native Plant Protection Act, to determine if take can be avoided.

As stated above, if a plant species listed pursuant to CESA or the Native Plant Protection Act is identified during botanical surveys, consultation with CDFW is warranted to determine if the Project can avoid take. If take cannot be avoided, take authorization prior to any ground-disturbing activities may be warranted. Take authorization would occur through issuance of an ITP by CDFW, pursuant to Fish and Game Code section 2081(b) or through the approval of an NCCP pursuant to Fish and Game Code section 2800 *et seq.*

The Use of UAS: The DEIR and HCP proposes to allow drones and other unmanned aircraft in the HCP area to reduce the time and cost of data collection. Although the DEIR stated that in testing, State Parks personnel have determined that an avoidance buffer of 100 feet above ground and 328 feet away from a nest site is sufficient to avoid flushing and abandonment of SNPL nest sites, CDFW does not know the parameters that were used to make this determination and is unaware of any scientific studies that have demonstrated that these buffers are sufficient to avoid flushing and abandonment of nest sites. These buffers may also be inadequate to avoid take of SNPL, CLTE or other special-status wildlife species as defined in Fish and Game Code and discussed above; therefore, CDFW recommends the DEIR and HCP prohibit the use of all UAS within the HCP area to ensure take avoidance.

Fully Protected Species: CDFW has jurisdiction over fully protected species of birds, mammals, amphibians, reptiles, and fish, pursuant to Fish and Game Code sections 3511, 4700, 5050, and 5515. Take of any fully protected species is prohibited, and CDFW cannot authorize their take in association with a general project except under the provisions of an NCCP, 2081.7 or a Memorandum of Understanding for scientific purposes. The HCP area is not currently within an approved NCCP area; 2081.7 does not apply to the proposed Project, and a development project is not considered a scientific purpose. The fully protected CLTE, white-tailed kite (*Elanus leucurus*; WTK), brown pelican (*Pelcanus occidentalis*), and American peregrine falcon (*Falco peregrines* ssp. *anatum*; APF) are known to occur within the HCP area. This status, and the absence of an NCCP for the Project, precludes CDFW from authorizing any amount of incidental take for fully protected species. When projects show the potential to cause take of fully protected species, we advise on appropriate measures to avoid take. Given the legal status of fully protected animals, take avoidance measures must meet very high standards of effectiveness. CDFW recommends the DEIR be revised to ensure full avoidance of the above-listed species. If full avoidance cannot be achieved, CDFW

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recommends the Project apply for a NCCP and that CDPR cease all ongoing operations and maintenance activities and refrain from implementation of new activities that could potentially result in take of any fully protected species until the NCCP has been approved by CDFW and take authorization pursuant to Fish and Game Code section 2835 has been obtained from CDFW.

ENVIRONMENTAL DATA

CEQA requires that information developed in environmental impact reports and negative declarations be incorporated into a database which may be used to make subsequent or supplemental environmental determinations. (Pub. Resources Code, § 21003, subd. (e).) Accordingly, please report any special-status species and natural communities detected during Project surveys to the California Natural Diversity Database (CNDDDB). The CNDDDB field survey form can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Submitting-Data>. The completed form can be mailed electronically to CNDDDB at the following email address: CNDDDB@wildlife.ca.gov. The types of information reported to CNDDDB can be found at the following link: <https://www.wildlife.ca.gov/Data/CNDDDB/Plants-and-Animals>

FILING FEES

The Project, as proposed, would have an impact on fish and/or wildlife, and assessment of filing fees is necessary. Fees are payable upon filing of the Notice of Determination by the Lead Agency and serve to help defray the cost of environmental review by CDFW. Payment of the fee is required in order for the underlying project approval to be operative, vested, and final. (Cal. Code Regs, tit. 14, § 753.5; Fish & G. Code, § 711.4; Pub. Resources Code, § 21089.)

CONCLUSION

CDFW appreciates the opportunity to comment on the DEIR and HCP to assist the CDPR in identifying and mitigating Project impacts on biological resources. Due to the issues presented in this letter, CDFW concludes that the DEIR and HCP do not adequately identify or mitigate the Project's significant, or potentially significant, impacts on biological resources. Deficiencies in the Lead Agency CEQA document can affect later project approvals by CDFW in its role as a Responsible Agency. In addition, because of these issues, CDFW has concerns that the CDPR may not have the basis to approve the project or make "findings" as required by CEQA unless the environmental document is modified to eliminate and/or mitigate significant impacts, as reasonably feasible (CEQA Guidelines, §§ 15074, 15091 & 15092).

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Questions regarding this letter or further coordination should be directed to Lori Bono, Senior Environmental Scientist (Specialist), at the address provided on this letterhead, by telephone at (559) 243-4014, extension 350, or by electronic email at Lori.Bono@wildlife.ca.gov.

Sincerely,

DocuSigned by:

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Julie A. Vance
Regional Manager

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