

*via electronic mail and USPS*

April 3, 2014

California Coastal Commission  
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**Re: Agenda Item Wednesday 10a Concerning Application No. A-3-SNC-98-114 for Monterey Bay Shores Resort**

Dear Commissioners:

These comments are submitted on behalf of the Center for Biological Diversity, Sierra Club, Audubon California and Monterey Audubon Society on Application A-3-SNC-98-114 and the associated Coastal Commission staff report. Coastal Commission Staff Report for A-3-SNC-98-1114 (2014) (hereinafter Staff Report (2014)). The application, submitted by applicant Security National Guaranty (“SNG”), would develop a 40 acre parcel of coastal land in Sand City. The Monterey Bay Shores Resort Project (“Project”), when finished, will include 1.34 million square feet mixed-use development. The Project includes 184 hotel rooms, 184 condominium units and extensive visitor facilities, including restaurants, spa, three swimming pools, and a conference center. This massive development will occur on land currently undeveloped and used by the western snowy plover, a threatened species under the federal Endangered Species Act. This large scale development requires the grading of 680,000 cubic yards of sands and will irreparably alter designated critical habitat for the western snowy plover (“plover”) and “take” of the plover will likely occur from project construction and operation.

Although this Project is slated to occupy critical habitat for the threatened species and “take” of plover likely to occur, no Incidental Take Permit (“ITP”) under the Endangered Species Act (“ESA”) has been issued by the U.S. Fish and Wildlife Service (“USFWS”). Instead of applying for an ITP, the developer has submitted a legally inadequate Habitat Protection Plan (“HPP”) to the Commission which will not avoid take to the maximum extent. Despite the significant environmental impacts of the Project with respect to plover and an inadequate environmental review of the Project, the Coastal Commission Staff Report recommends approval

of the Project. While the Center, Sierra Club, and Audubon commend the Staff Report for including many needed special conditions on the Project as requirements for approval of a Coastal Development Permit (“CDP”) for the Project, we believe that more environmental review and protection for plover is needed prior to approval of a CDP for the Project. For the foregoing reasons, we urge the Coastal Commission to deny the permit for the Project or, at a minimum, delay any approval of the Project until adequate environmental review of the impacts of the Projects can be completed. If the Commission chooses to approve the Project, we urge the Commission to include conditions that require that the applicant to develop a comprehensive Habitat Conservation Plan (“HCP”) and receive an Incidental Take Permit before the Project can be implemented.

The Center for Biological Diversity is a non-profit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center for Biological Diversity has over 675,000 members and e-activists throughout California and the western United States. The Center has worked for many years to protect imperiled plants and wildlife, open space and habitat, air and water quality along California coasts.

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

Now in its second century, Audubon connects people with birds, nature and the environment that supports us all. Our national network of community-based nature centers, chapters, scientific, education, and advocacy programs engages millions of people from all walks of life in conservation action to protect and restore the natural world. Audubon California is the state program of Audubon with over 50,000 members and supporters and 48 chapters.

## **I. The Coastal Commission has Failed to Meet its Obligations Under CEQA**

The Commission must ensure under the California Code of Regulations § 13096 that permit applications are consistent with CEQA and support its conclusions with findings of facts and reasoning. Acting under its own regulations and CEQA Guidelines Sec 15096 (g)(1), the Commission has a duty to decide independently how to respond to significant impacts that may occur to sensitive coastal resources as a result of the Project. Specifically, the Coastal Commission must thorough analyze and determine that a development is in conformity with the public access and public recreation policies of Chapter 3 of the California Coastal Act before granting a Coastal Development Permit (“CDP”). Pub. Res. Code § 30200.

The Coastal Commission claims that it has “reviewed the relevant coastal resource issues associated with the proposed project, and has identified appropriate and necessary modifications to address adverse impacts to such coastal resources to the extent allowed while avoiding a taking of private property without just compensation.” Staff Report at 133 (2014). However, the Coastal Act and CEQA obligates the Commission to do more than review the environmental analysis of a project before concluding “the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).” *Id.* The “Commission is required, among other things, to disapprove a project if alternatives or feasible environmental mitigation measures are available.” *La Costa Homeowners’ Assn v. California Coastal Comm.* 101 Cal. App. 4th 804, 819-820 (2002); *see* Report of Peter Baye, coastal ecologist (to be submitted separately). In order for a Project to move forward, the Coastal Commission must require the adoption of any feasible alternatives and mitigation measures that will substantially lessen such effects. In light of its authority under the Coastal Act to protect coastal natural resources that are affected by access and recreation, which is a principal part of the project it is considering for approval of a CDP, it must consider feasible alternatives and mitigation measures sufficient to reduce take to the maximum extent.

The Commission cannot rely solely upon the EIR prepared by the lead agency, particularly since the EIR lacked recent nesting data on plover. Instead, the Commission must undertake an independent and thorough environmental review of the Project’s impacts that fall specifically under its distinctive appellate jurisdiction “approves or carry out.” Pub. Res. Code § 21002.1(d). The Commission must also ensure that any coastal development be consistent with the public access policies of the Coastal Act. *City of San Diego v. Calif. Coastal Comm.* 119 Cal. App. 3d 228 (1981); *see also* Pub. Res. Code. § 30214. Specifically, Section 30214 of the Coast Act provides:

“The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place and manner of public access depending on the facts and circumstance in each case, including, but not limited to the following:

- (1) Topographic and geologic site characteristics
- (2) The capacity of the site to sustain use and at what level of intensity
- (3) The appropriateness of limiting public access to the rights of pass and repass depending on such factors as the **fragility of the natural resources in the area...**”

Pub. Res. Code §30214 (emphasis added). The Commission has thus far failed to fully meet its unique CEQA obligations and fully analyze all potentially significant environmental impacts from the Project that fall directly within the purview of the Commission, particularly with regard to the natural resources that will be directly and indirectly impacted by the proposed Project in association with public access and recreation.

The Coastal Commission has a distinct role in balancing competing values “local planning options and needs versus statewide concerns in preservation of the unique California

coastal zone.” *City of Chula Vista v. Superior Court* (1982) 133 Cal. App. 3d 472 (1982). The Commission can and should fully consider whether the proposed development involves significant impacts on plover associated with the public access uses resulting from constructed project features and increased opportunities for public access to the beach at the project site. It should also consider the cumulative impacts on plover of the Collections project to the south, approved in January 2014, by Sand City, the proposed campground at Fort Ord Dunes State Park to the north, and of the EcoResort. *Bel Mar Estates v. California Coastal Com.*, 115 Cal. App. 3d 936, 941-2 (1981).

#### **A. Coast Commission has Failed to Adequately Analyze All Impacts on Western Snowy Plover**

As stated *supra*, the Coastal Act requires the Commission to condition public access and uses associated with the project in a manner that does not impair the viability of fragile natural resources such as the threatened plover. When reviewing and approving development projects, the Commission must also take into account potential overuse of natural resources. Pub. Res. Code § 30210. Plovers commonly nest in open depressions on the beach and in dune areas. The proposed site of the Project includes currently used plover nesting, foraging, and winter use habitat. *See* Report of Peter Baye, coastal ecologist (to be submitted separately). During the past ten years, over 150 nests have occurred on the 4 plus miles of beach and dunes of Fort Ord Dunes State Park that borders the North-east boundary of the project. Since 1990, over 100 nests have occurred *southwest* of Fort Ord Dunes State Park (2.5 miles of beachfront), 27 of which were located on the Project site on approximately 1/3 mile of beachfront. *See* Attached Maps of Historical Western Snowy Plover Nesting Sites.

The Project as currently proposed and recommended by the staff report will allow for dramatic increases in public access to the area. However, the Commission failed to ensure that public access to the coastal area is being provided consistent with the protection of natural resources, namely preservation of critical habitat for the imperiled western snowy plover and prevention of unauthorized “taking” of plover through interference with nesting and brooding and other behaviors. Pub. Res. Code § 30210. This Project will bring increased public use and access of the snowy plover habitat in two ways. One, the Project’s construction and operation will bring a growing influx of individuals staying as guests at the Project’s hotels and residents at the Project’s condos. This incremental increase in overnight and long-term guests at the Project will increase the number of people using snowy plover habitat in a manner that will likely result in “take” of nesting birds and fledglings. Second, parts of the Project include infrastructure improvements to increase public access.

These changes to the property will bring members of the public not directly using the Project’s facility but visiting habitat used by snowy plover. The effects of increased public use of the property and on neighboring public park properties where plover nesting also occurs in designated critical habitat are inadequately analyzed in the staff report. Increased use of snowy plover habitat by the public has led to decreased nesting in other nearby habitat for the species. For example, Snowy Plovers nested regularly in the dunes between Tioga Rd. and Playa Rd. in the City of Sand City throughout the 1990s, but a nest has not been located there for over 10 years, since the development of a bike bath that is now widely used by beachgoers. The

unregulated impact of human use of this area has greatly diminished the viability of this area for nesting plovers, just as this development threatens to do as well.

Therefore, the incomplete analysis of increased public access impacts on western snowy plovers done by the Commission staff is in direct conflict with the Commission's CEQA responsibilities as well as the Coastal Act management policies. "The Commission as representative of the state and protector of the statewide interests in conservation and coast management must have an effective role when it comes to balancing these values, else the agency no real purpose. Local government is not expected to concern itself with statewide interests to the same extent that a statewide agency would." *City of Chula Vista* 133 Cal. App. 3d 471 (1982) (citing Pub. Res. Code § 30001.5). The Commission has a unique role to fulfill when there is an appeal of a CDP approved by a local agency in reviewing the environmental documents for the Project with respect to the project's consistency with the provisions of the public access policies of the Act. Aside from reviewing the work done by the lead agency, the Commission must independently review whether a Project violates the Coastal Act policies relating to public access. Here, the Commission has failed to adequately undertake that analysis with regard to impacts of the Project associated with public access that will likely result in unlawful take of plover within the meaning of the ESA.

#### **B. Not All Feasible Mitigation Measures for the Project's Significant Environmental Impacts on the Environment have been Adopted**

The staff report concludes after its environmental review that "there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects that approval of the proposed project, as modified, would have on the environment within the meaning of CEQA" and if all conditions are met "the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A)." Staff Report at 133 (2014).

However, not all impacts on plover from the Project have been analyzed and not all potential mitigation measures to avoid take of plover have been reviewed or adopted. Specifically, no provision is made in the HPP for mitigation off-site to reduce or avoid take of plover on the public park properties to the north and south of the site. There is also no provision for preventing take by prohibiting construction during plover nesting season. There is no discussion of the cumulative impacts of this project on plover when considered along with the Collections project approved by Sand City.

#### **II. The Coastal Commission Should Not Approve a Project that will Result in Take of a Threatened Species**

The Coastal Commission has a statutory duty to protect coastal natural resources when implementing the public access policies of the Coastal Act and issuing CDP. This Project will likely threaten and harm one of those coastal natural resources, the imperiled western snowy plover. Listed in 1993, the plover has seen its population rise because of ESA protections but

continues to struggle. 58 Fed. Reg. 12864. The plover faces numerous threats including harassment, nest-disturbance and loss of habitat from destructive development Projects, like the proposed Project. In light of continued plover nesting activity on the Project site and substantial evidence of likely take from the Project, we urge the Commission to deny Project approval. The Commission should not be in the business of permitting the take of threatened species but instead be fighting for California precious coastal resources.

**A. Evidence before the Commission Makes Clear that Take of Snowy Plovers is Likely and HPP Fails to Provide Adequate Protection**

As noted above, the proposed Project is located in the middle of a 15 mile length of federally designated shoreline critical habitat for the threatened western snowy plover, with 27 nests located on the Project site. Critical habitat designation identifies, to the extent known using the best scientific and commercial data available, those physical or biological features within an area that are essential to the conservation of the species (such as space, food, cover, and protected habitat). In identifying those physical and biological features within an area, the Service focuses on the principal biological or physical constituent elements such as roost sites, nesting ground, water quality, tidal features and others that are essential to the conservation of the species. 77 Fed. Reg. 36744. In the designation of critical habitat for plover the USFWS noted a number of factors especially pertinent to the site of the proposed project and the adjacent areas:

“.....we identify areas surrounding known breeding and wintering areas containing space for nesting territories, foraging activities, and connectivity for dispersal and nonbreeding or nesting use to be a physical or biological feature needed by this species.”

77 Fed. Reg. 36746. The Service also notes that “disturbance of nesting or brooding plovers by humans and domestic animals can be a major factor affecting nesting success.” 77 Fed. Reg. 36747. A primary constituent element (PCE) essential to the conservation of the pacific coast WASP includes “minimal disturbance from the presence of human, pets, vehicles, or human attracted predators, which provide relatively undisturbed areas for individual and populating growth and normal behavior.” *Id.* As the USFWS makes clear, “there has been considerable loss and degrading of habitat throughout the species range since the time of listing...we anticipate a further loss of habitat in the future due to sea level rise resulting from climate change; and the species needs habitat areas that are arranged spatially in a way that will maintain connectivity and allow dispersal within and between units.” *Id.* at 36748.

In light of the reasons set out by USFWS for the plover critical habitat designation and listing as a threatened species, the Center, Sierra Club, and Audubon urge consideration of the following factors:

- During the past ten years, over 150 nests have occurred on the 4+ miles of beach and dunes of Fort Ord Dunes State Park that borders the North-east boundary of the project;

- Since 1990, over 100 nests have occurred southwest of Fort Ord Dunes State Park (2.5 miles of beachfront), 27 of which were located on the Monterey Bay Shores project site on approximately 1/3 mile of beachfront;
- Snowy Plovers commonly nest in open depressions on the beach and in dune areas;
- Mobile broods (2-3 chicks plus the adult male) leave the nest area immediately upon hatching and typically seek minimally disturbed habitat where the male can increase vigilance for predators while flightless chicks forage;
- Plover chicks are known to move ½ a mile or more from their nest site;
- Broods hatched northeast or southwest of the project utilize the project site for foraging;
- Nesting plovers at the project site succeeded in raising young to flying age (28 days) in 2012 and 2013.

The project will reduce plover habitat by about 2/3 and compromise the habitat value of the remaining 15+ acres by a major increase in human beach use and associated disturbance. The project will impair connectivity between breeding habitats south of the project and the habitats north of the project. In particular, dispersal of plover to these habitats will be impaired. While the HPP describes 15.6 acres of dune restoration, nesting plovers have historically utilized much of the project's 39 acres, largely due to the expansive and open nature of the site. Furthermore, the HPP states that the applicant will create a 1-2 acre "nesting protection zone" which will be inadequate based on previous plover use throughout the site. This use (even for one nesting pair) will be severely compromised by the increased level of human disturbance on the project site. The construction and long term use (75+ years) of the proposed visitor and residential complex by guests, residents, pets, and event audiences provides a high probability of "take" of plover.

Given recent nesting activity of plover proximately located to the development, it is important to consider that plover near fledging are precocial and unlikely to remain within an enclosure. Chicks hatched outside the Project area on the public park areas adjacent to the site may be brooded within the Project area, and may not be located during pre-construction surveys for nests. "This area has historically been used for brooding by western snowy plovers nesting further south in San City and [in] Seaside." USFWS Letter to Mike Watson, May 11, 2009, page 3. To the extent any construction is permitted during plover nesting season, prohibited take is likely to occur. Approval of the developer's HPP is tantamount to an authorization by the Commission to the developer to take plover unlawfully.

Additionally, the "take" of threatened species over the development's lifetime by uses associated with the Project's public access improvements will extend into a significant portion of critical beach and dune habitat to the northeast and southwest of the project site. Lastly, recent estimates of sea level rise and dune erosion suggest that much of the "restored" dunes between the hotel and the bluff top edge will likely erode and disappear over the next 40+ year period between project construction and 2060. This and other evidence before the Commission makes clear that as the Project is currently proposed take of plover will likely occur and its habitat will irreparably harmed. The Commission should deny approval of the Project because of the threat it present to precious coastal resources.

### **III. If the Coastal Commission Approves the Project, the Commission Should Conditional Approval on an Incidental Take Permit for Project**

If the Commission chooses to grant a permit for the Project despite the substantial evidence of likely take of the threatened plover, the Commission should include an ITP and thorough HCP as a condition of the permit. Any non-federal activity likely to result in the take of a threatened or endangered wildlife requires an ITP under Section 10 of the ESA in order to avoid engaging in illegal activity under the Act, punishable by and/or imprisonment. 16 USCS § 1539. Environmental review and approval of a take of an imperiled species, which includes to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct, must occur prior to the start of the Project. Since its listing in 1993, the pacific coast population of the western snowy plover is a species that faces substantial risk to its ongoing survival. 59 Fed. Reg. 12864. Critical habitat for the species was designated in June 2012 by USFWS and includes the planned site of the Monterey Bay Shores Resort along a 15-mile stretch of critical habitat. 77 Fed. Reg. 36728; 77 Fed. Reg. 36737-38. Here, evidence clearly shows the Project will result in the take of the threatened western snowy plover as defined in Section 9 of the ESA. Therefore, before any construction of the Project can begin, the Coastal Commission should require the applicant to apply for and receive an incidental take permit.

#### **B. The Commission Should Make Clear that an Application for an Incidental Take Permit is a Special Condition for Approval of the Project's Permit.**

The Staff Report released by the Coastal Commission includes a series of special conditions in addition to the standard conditions for a Coastal Development Permit (“CDP”). The special condition 15 states that:

PRIOR TO CONSTRUCTION, the Permittee shall submit to the Executive Director written evidence that all necessary permits, permissions, approvals, and/or authorizations for the approved project have been granted, if required, by the City of Sand City, Monterey Peninsula Water Management District, California Department of Parks and Recreation, California Department of Fish and Wildlife, and the U.S. Fish and Wildlife Service.

Staff Report at 33 (2014). While the special condition does not specify which are the *necessary permits* the applicant must obtain from the U.S. Fish and Wildlife Service, the facts underlying this Project and applicable statutes make clear the an ITP should be a necessary permit for this Project. Prior to granting a CDP for the Project, the Coastal Commission should make clear that obtaining an ITP is one of the required permits needed prior to commencement of Project construction.



### **C. The ITP and HCP Process would Provide Additional Protections for the Western Snowy Plover Prior to Project Construction**

The purpose of an ITP is to allow certain lawful human activities to co-exist with the requirements of the ESA, but the activity is always subordinate to the recovery of the species. Therefore, an ITP for a project may be issued only if the impact upon the species does not reduce the likelihood of survival and recovery of the species. 16 U.S.C. § 1539(a)(2)(B)(iv). As a result, each ITP specifies a maximum number of individuals of the protected species that may be taken during the exercise of the activity. ESA regulations state that take includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 CFR 17.3. Take beyond the designated number of animals covered by the permit is subject to the ESA’s take prohibition. 16 U.S.C. §1539(a)(1)(B). The circumstances in which an ITP is appropriate are limited, evidenced by the fact that an applicant must first show “what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized.” 16 U.S.C. § 1539(a)(2)(A)(iii).

An applicant must also show mitigation of any harm to the species. 16 U.S.C. § 1539(a)(2)(A)(ii). Mitigation measures may take many forms, such as preservation (via acquisition or conservation easement) of existing habitat; enhancement or restoration of degraded or a former habitat; creation of new habitats; establishment of buffer areas around existing habitats; modifications of land use practices, and restrictions on access. Fish & Wildlife Service, “Habitat Conservation Plans,” Endangered Species Act Library (2014) (available at [https://www.fws.gov/endangered/esa-library/pdf/HCP\\_Incidental\\_Take.pdf](https://www.fws.gov/endangered/esa-library/pdf/HCP_Incidental_Take.pdf)). The ESA’s statutory framework and accompanying regulations ensure that if a non-federal party obtains an ITP for a project, it is only after the USFWS has ensured that loss of individuals from the Project will not harm the overall population of the species. An ITP must also comply with the purpose of the ESA, which the Supreme Court has stated is “to halt and reverse the trend toward species extinction, whatever the cost.” *TVA v. Hill*, 437 U.S. 153, 184 (1978).

One of the requirements of an ITP application is that a habitat conservation plan (HCP) must accompany an application for an incidental take permit. “The purpose of the habitat conservation planning process associated with the permit is to ensure there is adequate minimizing and mitigating of the effects of the authorized incidental take.” USFWS, Habitat Conservation Plans (2014). Section 10 and its associated regulations require an HCP to include: an assessment of impacts likely to result from the proposed taking of one or more federally listed species; measures the permit applicant will undertake to monitor, minimize, and mitigate for such impacts; the funding that will be made available to implement such measures; and the procedures to deal with unforeseen or extraordinary circumstances; alternative actions to the taking that the applicant analyzed, and the reasons why the applicant did not adopt such alternatives; and any additional measures that the USFWS may require as necessary or appropriate. *Id.* A draft HCP was developed by the Project in 2006 but was later abandoned. Exhibit 25: USFWS HPP Comment Letter at 1 (2009).

Rather than complete a comprehensive HCP for the Project, the applicant chose to develop a Habitat Protection Plan (“HPP”) in 2008, with only minimal updates made in October 2013. A far less comprehensive and thorough document, the HPP was sharply criticized by the FWS in a 2009 letter. *See* Exhibit 25: USFWS HPP Comment Letter at (2009). As the staff report notes, “[t]he letter identifies a number of deficiencies with the HPP and calls into question whether take of listed species can truly be avoided and therefore recommends that if “take” can only be minimized, as is suggested by the HPP measures, then the Applicant should pursue an incidental take permit in consultation with USFWS.” Staff Report at 98 (2014). Despite these criticisms and recommendation of an application for an ITP with an accompanying HCP, the applicant continues to rely on an HPP that “is fundamentally unchanged from the 2008 HPP.” *Id.* at fn.60.

While the staff report urges some revisions to the HPP as special conditions for the CDP, it is clear that an application for an ITP is “necessary,” and consistent with Condition 15, the developer must apply for an ITP prior to commencing construction. The HPP, it is clear, fails to provide the necessary protection from take occurring to the threatened western snowy plover, resulting from increased public uses and construction activity that adversely affect nesting activities on site and on neighboring publicly owned park lands.” The HPP fails to avoid or even minimize take of the imperiled species. Through the ITP process the needed mitigation for western snowy plover would be put in place and take would be minimized to the maximum extent possible.

#### **D. If the Commission Approves the Project Based on an Inadequate HPP, It Will Be Implicated in An Unlawful “Take” of Western Snowy Plover**

Take is not limited to direct interactions with threatened and endangered wildlife species but also includes any action that causes [take] to be committed. 16 U.S.C. §§ 1538(a)(1)(B), (C); 1538(g). This definition extends the prohibition on take to the acts of third parties, including state governmental agencies whose affirmative actions authorize activities that will result in the take of listed species. 16 USCS § 1538(g); *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997). As the USFWS notes, “anyone who believes that their otherwise lawful activities will result in the ‘incidental take’ of a listed wildlife species need a permit.” USFWS, Habitat Conservation Plans (2014). Here, the Coastal Commission has expressed its own doubts over whether take of western snowy plover can be avoided in connection with construction and implementation of this Project. For example, the USFWS stated “[s]everal passages of the HPP indicate that take can be minimized or reduced, but not necessarily completely avoided.” Exhibit 25: USUSFWS HPP Comment Letter at 2 (2009). If the Coastal Commission approves a project despite knowing that take will likely occur, courts have held that the Commission could be implicated in any arising take.

In *Strahan v. Coxe*, *supra*, a federal appeals court held that the Secretary of the Massachusetts Department of Executive Office of Environmental Affairs, the Commissioner of the Massachusetts Division of Marine Fisheries, and the Commissioner of the Massachusetts Department of Fisheries, Wildlife, and Environmental Law Enforcement violated Section 9 of

the Endangered Species Act, 16 USC §1531 *et seq.* and had facilitated a “taking” of the northern right whale, an endangered species listed under the Act, insofar as they had issued licenses and permits authorizing gillnet and lobster pot fishing that caused “takings” of the northern right whale.

The Court in *Strahan v. Coxe* held that § 1538 (a)(i)(b) (prohibiting “take”) and § 1538 (g) (prohibiting solicitation or causation by a third party of a taking) applied to acts by third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place. 127 F 3d at 163. The Court relied upon similar holdings in other circuits holding federal and state government officials responsible for take of listed species under similar circumstances. *Id.* (citing *Sierra Club v. Yeutter*, 926 F.2d 429,438-39 (5th Cir.1991) (finding Forest Service's management of timber stands was a taking of the red-cockaded woodpecker in violation of the ESA); *Defenders of Wildlife v. EPA*, 882 F.2d 1294, 1301 (8th Cir.1989) (holding that the EPA's registration of pesticides containing strychnine violated the ESA, both because endangered species had died from ingesting strychnine bait and because that strychnine could only be distributed pursuant to the EPA's registration scheme); *Loggerhead Turtle v. County Council of Volusia County*, 896 F. Supp. 1170, 1180-81 (M.D. Fla.1995) (holding that county's authorization of vehicular beach access during turtle mating season exacted a taking of the turtles in violation of the ESA).

Because it was not possible for the fishing operations to continue without risking a take, the state's authorization for the fish operations to go forward was a violation of the ESA take prohibitions, according to the Court. 127 F 3d at 164. The court also rejected any arguments that “significant efforts made by the Commonwealth to ‘minimize Northern Right Whale entanglements in fishing gear,’” excuses the take of the listed species by permittees. *Id.* at 163. Lastly, federal courts have allowed citizens suits under the ESA to enjoin construction and implementation of projects where the developer has chosen not to obtain an ITP and when take of a listed species is likely. *See Animal Welfare Inst. v. Beech Ridge Energy LLC*, 675 F. Supp. 2d 540, 580-581 (2009). All that is required is a showing that an activity is reasonably certain to imminently harm, kill or wound the listed species. *Murrelet v Pacific Lumber Co.*, 83 F.3d 1060, 1067-1068 (9th Cir. Cal. 1996). Absolute certainty is not required. *Animal Welfare Inst.*, 675 F. Supp. 2d at 563-564 (2009).

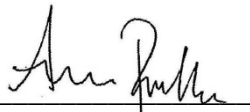
The Coastal Commission is aware that the western snowy plover relies on the habitat being adversely affected by the Project and that Project construction and operation will likely result in take. Exhibit 25, the 2009 letter from USFWS to the Commission staff, put the Commission on notice that take will likely occur. Yet, the Coastal Commission thus far has failed to ensure that all take of plover is avoided. If the Coastal Commission grants a CDP for this Project without requiring that an ITP be obtained for the Eco Resort Project, it could be implicated in any resulting take of western snowy plover under the ESA. The Commission's statutory duty to protect coastal natural resources from adverse impacts arising from increased public access associated with development, gives the commission authority to require, as a project condition, that the developer obtain an ITP and submit an HCP to the USFWS. It is clear that under the facts stated above relating to the likelihood of substantial unlawful “take” of plover, that it is appropriate and necessary for the Coastal Commission to exercise its authority to

require the applicant to submit an adequate HCP and an application for an ITP to the USFWS.” Therefore, prior to approving this Project the Commission should include as a special condition that the applicant completes a comprehensive HCP and obtains an ITP from the USFWS.

### **Conclusion**

Thank you for your attention to these comments. We look forward to working to assure that the Project and all associated permits conform to the requirements of state and federal law and that all significant impacts to the environment are fully analyzed, mitigated or avoided. Should you have any questions feel free to contact Larry Silver or Aruna Prabhala at the contact information listed below.

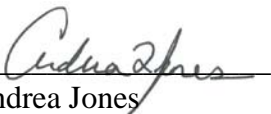
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