



via electronic mail and USPS

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California Coastal Commission
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**Re: Agenda Item Friday December 12, 2014, King Ventures Resort (Collections Project)
(Substantial Issue Review)**

Dear Mr. Watson:

These comments are submitted on behalf of the Sierra Club and the Center for Biological Diversity on Appeal No. A-3-SNC 14-0001 (King Ventures Resort, Collections Project).

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. Sierra Club appealed the decision of Sand City approving a Coastal Development Permit ("CDP") for this Project and submits this letter as an appellant to this proceeding.

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 800,000 members and e-activists, many of whom reside in California. The Center has worked for many years to protect imperiled plants and wildlife, open space and habitat, and air and water quality along California coasts. The Center supports Sierra Club's appeal of Sand City's decision to issue a CDP for the Project, which will result in significant impacts to habitat and wildlife.

Sierra Club filed an appeal from an approval of a Coastal Development Permit by the City of Sand City for the Collections Project. The CDP allows for construction of a 340-unit resort and related facilities. The project also includes a conference center, spa, restaurant, and on and offsite roads, parking, and public access improvements. The project is located in a dune area seaward of Highway One in the City of Sand City, extending from Tioga Avenue north that is roughly 26 acres, about 8 of which are currently used for construction materials handling and storage, and the remainder of which is undeveloped dune area (about 70% of the overall site). Construction at full buildout would result in some 572,127 square feet of facilities, covering some 11.5 acres of the site, and covering over 60% of the undeveloped dune portion of the site (essentially all dune areas inland of the 15-foot elevation.)

The appeals assert that Sand City's approval of the Project is not consistent with the Sand City Local Coastal Program (LCP) and contradicts provisions of the Coastal Act with respect to hazard avoidance, protection of public views, natural resource protection, public recreational access, and public services. The City's approval permits construction of a large resort complex on the sand dunes above a rapidly eroding shoreline, within the public view shed from Highway One, and on land supporting state and federally listed species, including land federally designated as critical habitat for Western Snowy Plover.

This massive development will occur, in part, on land currently undeveloped and used by the western snowy plover, a listed-species under the Endangered Species Act ("ESA"). (58 Fed. Reg. 12864). This large scale development requires significant grading and alteration of the existing dune habitat and will irreparably alter designated Critical Habitat for the western snowy plover and "take" of the western snowy plover within the meaning of the ESA will inevitably occur from project construction and operation. (16 USCS § 1532).

Although this Project is slated to occupy Critical Habitat for the endangered species, no Incidental Take Permit ("ITP") under the Endangered Species Act has been issued by the US Fish & Wildlife Service ("US FWS"). (16 USCS § 1539). Instead of applying for an ITP, the developer has submitted a legally inadequate Habitat Protection Plan ("HPP") to the City in connection with its permit application. The HPP raises serious issues, failed to provide adequate protection of western snowy plover and will not avoid take to the maximum extent possible. In light of the significant environmental impacts of the Project with respect to western snowy plover and an inadequate environmental review of the Project, as well as its inconsistency with the Sand Coty LCP policies and the public access provisions of the Coastal Act, the Coastal Commission Staff Report recommends finding a substantial issue exists. The Center and the Sierra Club agree with this assessment and commend the Staff Report for its recommendation. Both groups believe that more environmental review and protections for western snowy plover are needed prior to approval of a CDP for the Project. For the foregoing reasons, both urge the Coastal Commission accept the staff recommendations and find that a substantial issue exists.

I. Sand City has Failed to Adequately Analyze All Impacts of the Project on Western Snowy Plover and Has Failed to Address Impacts on Western Snowy Plover Arising From Increased Recreational Uses of the Area

The Coastal Act requires the Commission to condition public access and uses associated with the Collections Project in a manner that does not impair the viability of fragile natural resources, such as the threatened western snowy plover. When reviewing and approving development projects, the Commission must also take into account potential overuse of natural resources. (Pub. Res. Code § 30210). The proposed site of the Project includes land currently used by western snowy plover as foraging and winter habitat.

LUP Policy 3.31 provides that “visitor serving and public recreational uses...shall be consistent with the protection of natural resources.” The Collection Project will cause significant adverse impacts to western snowy plover that have used and occupied the Collections site and adjacent sites and will certainly not result in “protection” to the threatened western snowy plover.

The Sand City LCP requires that the natural resources of the dune systems west of Highway One be protected. Both the Sand City LCP and the Coastal Act require that coastal access and recreation activities on the site and in the region, by both the Project’s guests, residents, and the general public, be provided and managed in a manner that effectively protects natural resources. Adequate protection for the dune habitat means that intensive public use and recreational activities within these areas will be *significantly limited*. Nonetheless, it appears from the FEIR and the Mitigation Monitoring Program that inadequate consideration has been given to protecting natural resources on the site despite permitting extensive use of the dune habitat by guests and the public.

Coastal Act Section 30210 requires, in part, that specific public access management measures necessary to protect sensitive species be identified and included in the project’s Mitigation and Monitoring Program, as well as in any HPP. However, the Project lacks such public access management measures sufficient to protect western snowy plover and therefore fails to meet the requirements of the Coastal Act.

The Project applicant has proposed an area (7 acres) suitable for dune restoration, relocation, and/or stabilization. The area is intended to be new habitat for rare and endangered species but is inadequate to mitigate for the significant impacts of the Project. Construction of the Project threatens the biological and natural resource values of this dune environment contrary to LCP policies that require new development to protect natural resources. Nearly all of the dunes landward of the 15 foot elevation would be altered during construction of the Project (approximately 20 acres of dunes would be disturbed, and 11.5 acres would be permanently lost as a result of development.)

The Project as approved by the City 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 western snowy 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 later 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 chicks. 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 adverse effects of increased public use of the property and on the neighboring public park properties where western snowy plover foraging and nesting uses occur in designated critical habitat will not be avoided and minimized under the Mitigation and Monitoring measures proposed by the applicant and approved by Sand City.

The Pacific coast population of the western snowy plover has continued to decline despite publication of the recovery plan and protection under the Endangered Species Act. Point Blue Conservation Science (in collaboration with the USFWS and California Department of Parks and Recreation) has been monitoring the status of nesting snowy plovers at shores of Monterey Bay since 1984, and on small pocket beaches in northern Santa Cruz County since 1988.¹ Point Blue Conservation Science’s report for the 2013 breeding season concluded:

Plovers experienced another year of subpar breeding success in the Monterey Bay area in 2013. Clutch hatching rate was 54% and chick fledging rate 31% below the prior 14-year average. As a result, the total of 116 fledges was 51% lower than the average of the prior 14 years. The consequence of the low number of fledglings produced in 2013 will likely be a smaller breeding population in the Monterey Bay area in 2014. One fledged young per male is necessary to sustain a population experiencing average mortality levels but only 0.6 chicks per male fledged in 2013.²

Poor reproductive success has contributed to the decline and low population size of the western snowy plover, especially where it breeds on coastal beaches used by humans for recreation.³

1 Point Blue Conservation Science. 2014. Nesting of the Snowy Plover in the Monterey Bay Area, California in 2013. Point Blue Conservation Science, Petaluma (CA). 32 pp.

² *Ibid.*

³ Colwell MA, CB Millett, JJ Meyer, JN Hall, SJ Hurley, SE McAllister, AN Transou, RR LeValley. 2005. Snowy Plover reproductive success in beach and river habitats. *Journal of Field Ornithology* 76(4):373-382.

The Project site not only supports plovers, but also contains federally designated critical habitat for the species. Critical habitat is defined as “a specific geographic area that is essential for the conservation of a threatened or endangered species and that may require special management protection.”⁴ Within designated critical habitat, the USFWS protects areas that provide primary constituent elements (PCE’s), which are the physical and biological features of a landscape that a species needs to survive and reproduce. PCE’s of critical habitat for the western snowy plover include:

1. Areas that are below heavily vegetated areas or developed areas and above the daily high tides;
2. Shoreline habitat areas for feeding, with no or very sparse vegetation, that are between the annual low tide or lowwater flow and annual high tide or highwater flow, subject to inundation but not constantly under water, that support small invertebrates, such as crabs, worms, flies, beetles, spiders, sand hoppers, clams and ostracods, that are essential food sources;
3. Surf- or water-deposited organic debris, such as seaweed (including kelp and eelgrass) or driftwood located on open substrates that supports and attracts small invertebrates described in PCE 2 for food, and provides cover or shelter from predators and weather, and assists in avoidance of detection (crypsis) for nests, chicks, and incubating adults; and
4. Minimal disturbance from the presence of humans, pets, vehicles, or human-attracted predators, which provide relatively undisturbed areas for individual and population growth and for normal behavior.⁵

The primary threat range-wide to Pacific coast population of the western snowy plover is decreased habitat availability.⁶ Specific causes and effects vary geographically, but include fragmentation, degradation, and loss of habitat due to expansion of urban development and increased recreational beach use.⁷ Intensified predation upon plovers has been traced to varied anthropogenic influences that disturb natural environments and facilitate predators.⁸

⁴ USFWS.2002. Critical Habitat: What is It? Publication 703/358 2105. Available at: <http://endangered.fws.gov> (Accessed 14 Nov 2014).

⁵ Federal Register, 2012 Jun 19. Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover; Final Rule. Federal Register 77(118):36728-36869.

⁶ Ma Donald B, T Longcore, S Dark. 2010. Habitat suitability modeling for Western Snowy Plover in Central California. The Urban Wildlands Group, Los Angeles, California, 129 pp. *See also* United States Fish and Wildlife Service. 2007. Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*). Sacramento, California. Xiv + 751.

⁷ *Ibid.*

⁸ *Ibid.*

The Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (“Recovery Plan”) specifically identifies the construction of homes, resorts, and parking lots on coastal sand dunes as an irrevocable type of habitat loss for western snowy plovers.⁹ In addition to causing direct loss of habitat, there are additional potential adverse impacts to western snowy plovers from urban development. Increased development increases human use of the beach, thereby increasing disturbance to nesting plovers.¹⁰ When urban areas interface with natural habitat areas, the value of breeding and wintering habitat to native species may be diminished by increased levels of illumination at night (e.g., building and parking lot lights); increased sound and vibration levels; and pollution drift (e.g., pesticides).¹¹

Human-associated disturbance is a key factor in reducing or eliminating nesting habitat.¹² Humans may have numerous potentially negative impacts on plovers including: (1) destruction of nests and chicks by vehicles, pedestrians, and dogs; (2) increased disturbance leading to reduced incubation or brooding constancy; and (3) decreased foraging opportunities by adults and chicks.¹³

Direct mortality may occur when vehicles or humans crush chicks. Furthermore, high levels of human activity can indirectly cause mortality by hindering normal brooding activities. When an adult snowy plover is disturbed it often leaves chicks exposed and clustered, and hence vulnerable to predation, or hypothermia during inclement weather.¹⁴

Humans also may adversely affect plover chicks in other ways. When adults and chicks react to humans by shifting behavior from foraging and brooding to crouching or vigilance, chicks may be subjected to reduced parental brooding, limited foraging time, and increased exposure to predators or inclement weather.¹⁵ Similarly, the tendency of chicks to run when approached by humans may make them more vulnerable to predation.¹⁶ Human activity may also cause brood movement, resulting in the separation of one or more chicks from the rest of the

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² MacDonald B, T Longcore, S Dark. 2010. Habitat suitability modeling for Western Snowy Plover in Central California. The Urban Wildlands Group, Los Angeles, California, 129 pp.

¹³ Colwell MA, CB Millett, JJ Meyer, JN Hall, SJ Hurley, SE McAllister, AN Transou, RR LeValley. 2005. Snowy Plover reproductive success in beach and river habitats. *Journal of Field Ornithology* 76(4):373-382. *See also* United States Fish and Wildlife Service. 2007. Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*). Sacramento, California. xiv + 751.

¹⁴ Colwell MA, SJ Hurley, JN Hall, SJ Dinsmore. 2007. Age-Related Survival and Behavior of Snowy Plover Chicks. *Condor* 109(3):638-647.

¹⁵ Ruhlen TD, S Abbott, LE Stenzel, GW Page. 2003. Evidence that human disturbance reduces snowy plover chick survival. *Journal of Field Ornithology* 74(3):300-304.

¹⁶ Colwell MA, SJ Hurley, JN Hall, SJ Dinsmore. 2007. Age-Related Survival and Behavior of Snowy Plover Chicks. *Condor* 109(3):638-647.

brood.¹⁷ Movement into adjacent territories can result in attacks on the young by other adult plovers, resulting in chick death and abandonment.¹⁸

Because human-associated disturbance is the primary threat to the western snowy plover, numerous biologists have concluded that protecting occupied sites from human disturbance may be essential to conservation and recovery of the Pacific coast population of the snowy plover.¹⁹

Specifically, no provision is made in the HPP for mitigation off-site to reduce or avoid take of western snowy plover on the public park properties to the north and south of the site. No provision is made for preventing take by prohibiting construction during nesting season. There is no discussion of the cumulative impacts of this Project on western snowy plover when considered along with the Project approved by Sand City and the Commission, the SNG (EcoResort) and with a proposed camping and trailer park area at Fort Ord State Park

II. US FWS Comments on the Project Conclude That Construction and Operation of the Project Will Cause “Take” of Western Snowy Plover and Smith’s Blue Butterfly.

The January 15, 2013 US FWS Comments on the DEIR for the Collections Project are particularly pertinent to a substantial issue determination and are therefore summarized here. With respect to Smith’s blue butterfly, the US FWS concludes that the Project area contains .21 acre of occupied Smith’s blue butterfly habitat, all of which will be removed (US FWS Letter at p.2). The removal of this habitat, the US FWS concludes, would result in “take of the Smith’s blue butterfly and may reduce or preclude its dispersal across the Project area.

With respect to western snowy plover, the US FWS states:

We have four primary concerns regarding the effects of the proposed Project on the western snowy plover: (1) the direct removal of habitat due to construction of facilities, (2) the large increase in human disturbance that would be caused by users of the proposed facilities, (3) the expected increase in predators associated with increased human presence, and (4) the interaction between habitat removal and the expected rise in sea level.

The Project area totals 26.5 acres, of which 19.8 acres would be disturbed during construction and 11.7 acres would be permanently converted to developed areas (DEIR Appendix D-1, pp. 8-9); it should also be noted that 3 of the 26.5 acres are within the ocean. This calculates roughly to 84 percent of the terrestrial habitat area disturbed and 50 percent

¹⁷ Ruhlen TD, S Abbott, LE Stenzel, GW Page. 2003. Evidence that human disturbance reduces snowy plover chick survival. *Journal of Field Ornithology* 74(3):300-304.

¹⁸ *Ibid.*

¹⁹ Brindock KM, MA Colwell. 2011. Habitat Selection by Western Snowy Plovers During the Nonbreeding Season. *Journal of Wildlife Management* 75(4):786-793.

permanently removed. In addition, the site plan (DEIR p. 33) indicates that the undeveloped areas would be intermixed with buildings, public access points, roads, and trails. Therefore, those areas that are not permanently developed would be small and discontinuous. However, it appears that less than 180 feet would be left undeveloped between the high tide line and the proposed facilities and that this setback is the only substantial portion of the Project area that is not proposed for development.

Pedestrians and their pets can cause direct mortality and harassment of western snowy plovers.²⁰ The DEIR acknowledges increased human use of beaches within Sand City has decreased the value of habitat for the western snowy plover. (DEIR p. 137.) The proposed Project would contribute substantially to this ongoing loss, by attracting many guests to the proposed resort and by facilitating increased public access to sensitive habitat areas within and adjacent to the Project area. The proposed Project includes several components that would increase human activity within western snowy plover habitat: (1) public access at the north and south ends of the Project area; (2) a public trail across the Project area seaward of the proposed resort; (3) extension of public roads and bike trails, (4) new public parking, and (5) a new lifeguard station and restroom (DEIR pp. 33 and 41)). This increase in human activity is likely to result in take of western snowy plovers (through harassment and harm) both within the Project area and on habitat adjacent to the Project area.

The US FWS also noted in their comments:

The [proposed ITPP for the Collections project] is largely reactionary, prescribing protection of western snowy plovers (at the discretion of a “steward” who reports to the Applicant) after their nests are found, rather than requiring that their habitat be protected to allow nesting. As previously discussed, we expect that removal of habitat coupled with increased human use of the Project area would preclude western snowy plover use. In that scenario, no nests would be found and no protection would be triggered.”

(US FWS, January 15, 2013 letter, pp. 3-6). In summary, we expect the proposed Project would result in take of the western snowy plover and render the Project area unsuitable for the species. Habitat would be immediately lost upon construction and the amount of human disturbance and predation pressure would be increased within the Project area and on adjacent areas. Take of the species is expected in the forms of harm, harassment, and direct mortality.

²⁰ United States Fish and Wildlife Service. 2007. Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*). Sacramento, California. xiv + 751.

III. Appellant Sierra Club Attaches Documents In Support of its Appeal

The Sierra Club and the Center submit to the Commission the following documents in connection with the appeal from Sand City's approval of a CDP for the "Collections" Project:

1. Figures 1 and 2, prepared by Point Blue, showing western snowy plovers nesting locations 2003-2014 to the north and south of the Collections Project;
2. A letter to Sand City Council prepared by Edward B. Thornton, Ph.D., a coastal engineer, which concludes that the Collections Project as proposed has a high probability that it will require a sea wall to mitigate the threat that erosion will pose to the structures within the stated 50-year life of the building;
3. A November 19, 2013 letter to Steve Matarazzo, City Administrator, from the California Environmental Law Project on behalf of the Sierra Club, commenting on the FEIR for the Collections Project failure to be consistent with Sand City LCP Policies relating to shoreline erosion/retreat and wave run-up/flooding, with LCP policies requiring visitor serving and public recreational uses to be consistent with the protection of natural resources, and with LCP policies relating to the impairment of the viewshed caused by the Project.
4. A letter dated January 15, 2013, from US FWS to Steve Matarazzo, Planning Department, City of Sand City, providing comments on the DEIR for the Collections project;
5. Letter from PRBO Conservation Science dated January 15, 2013 from Carleton Eyster, Avian Ecologist, to Steve Matarazzo, which provides survey data for WSP from 2000-2012; in 2012 one nest found 1/3 mile south of the site and two nests were found less than 1/3 mile north of the site, use of site by flightless plover broods, Collections site used by plovers for brood rearing, even when nests were located off-site.
6. Comments of Peter Baye, coastal ecologist and botanist, on DEIR for the Collection at Monterey Bay, dated January 15, 2013, which conclude that the biological mitigation measures for the project are basically infeasible because they are incompatible with prevailing physical processes of shoreline and retreat at the project location.

In conclusion, appellant, Sierra Club and the Center believe that Commission Staff have correctly concluded that the three appeals before the Commission (two of which are from Commissioners) present a substantial issue. Based on the staff report, and the additional exhibits tendered with this letter, Sierra Club and the Center believe that the Commission should find

