



Chatten-Brown Law Group, APC
Kathryn Pettit | Associate
325 W. Washington Street, Suite 2193
San Diego, CA 92103
kmp@chattenbrownlawgroup.com
Phone: (619) 393-1440

September 20, 2023

State Lands Commission
Executive Officer Jennifer Lucchesi (*Jennifer.Lucchesi@slc.ca.gov*)
Public Land Management Specialist Drew Simpkin (*Drew.Simpkin@slc.ca.gov*)
301 East Ocean Boulevard
Long Beach, CA 90802

Re: Third-Party Enforcement in the Lower Santa Ana River Needs to Be Required as a Condition of the County of Orange's Lease

Dear Ms. Lucchesi and Mr. Simpkin:

On behalf of the Endangered Habitats League and Sea & Sage Audubon Society, we provide the following comments on the County of Orange's ("County") request for a lease to conduct activities in public, sovereign land in the Lower Santa Ana River, which the State Lands Commission ("Commission") will consider at its next meeting on October 19, 2023.

It has become glaringly apparent that third-party enforcement is the only effective solution to the ongoing violations of local and environmental laws occurring in the Lower Santa Ana River Mouth and flood control channel ("SAR"). The County's refusal to prevent trespassing and unleashed dogs in this area inflicts harm on endangered species, destroys environmentally sensitive habitat areas, and endangers unsuspecting people and dogs, as documented by several agencies and environmental organizations.

This behavior violates the County's current lease with the Commission, as well as the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act.

We applaud the Commission for requiring the County to enforce its laws prohibiting trespassing in the SAR as a condition of the County's lease granted on October 21, 2021. The Commission had the foresight to grant the County a two-year lease, rather than a five-year lease, to provide an opportunity to assess whether the current lease framework is adequately protecting the endangered shorebirds who inhabit the SAR.

The County now requests renewal of its lease. And the current framework is not working. The mountain of evidence of the dire need for third party enforcement in the SAR has only continued to grow since then, as detailed below.

We respectfully urge the Commission to require the County to provide funding for third-party enforcement of State and local environmental laws in the SAR as a condition of any lease renewal.

Alternatively, we urge the Commission to set a monetary rent, with all or a large percentage of the rent dedicated to third-party enforcement. In the current lease set to expire, the Commission listed the consideration as “[t]he public use and benefit, with the State reserving the right at any time to set a monetary rent if the Commission finds such action to be in the State’s best interests.” (Exhibit I, p. 47¹ [Commission Staff Report], emphasis added.)

Funding for third-party enforcement is in the State’s best interests, and is necessary to protect the public trust land and resources in the SAR.

I. The Evidence of the Ineffectiveness of Current Enforcement and the Need for Third-Party Enforcement in the River Continues to Grow

As extensively documented in EHL’s correspondence to the County on April 4, 2022, and to the Commission on September 15, 2022, the County continues to allow unlawful, destructive, and dangerous trespassing and unleashed dogs in the SAR. (**Exhibit I**, p. 9 [April 2022 Letter to County]; **Exhibit I**, p. 2 [September 2022 Letter to Commission].)

After Commission staff refuted the County’s claims it did not have a duty to enforce its legal restrictions in the SAR, the County indicated it was “willing to enforce this ordinance within the Lease Premises to protect public safety and the environment.” (Ex. I, p. 52, 10.)

This promise was incorporated as a condition of the County’s lease, and an essential underpinning to the Commission’s environmental findings:

Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat.

(Ex. I, p. 52 [Commission staff report].)

¹ Given the multitude of exhibits and enclosures from this letter and previous correspondence, all page citations are to the bate stamps numbers beginning with “001” at Exhibit I.

a. Large Crowds and Unleashed Dogs Continued to Disturb Wildlife in the Santa Ana River Due to County Non-Enforcement

Orange County Coastkeeper (“OCCK”) has provided ongoing monitoring of the SAR since January 2021. Unfortunately, the data indicates no improvement in the frequency of trespassing, presence of off-leash dogs, or disturbance to the endangered Western Snowy Plovers and California Least Tern since the commencement of the County’s October 2021 lease.

There was a universal acknowledgement of the futility of verbal warnings at the last Commission hearing:

The Applicant has provided information detailing the County Sheriff’s efforts to enforce County ordinances within the County’s Flood Control Channel. However, these efforts have been limited to verbal warnings only, and no fines have been issued. In addition, the warnings have only applied to the County’s Flood Control Channel, not land within the Commission’s jurisdiction. Members of the public as well as staff from other State agencies indicate that verbal warnings have not been effective and have not reduced use within the Lease Premises.

(Exhibit I, p. 50 [Commission staff report].)

Yet, every OCCK report since then – for two years – indicates that *zero* citations have issued by County law enforcement.

Further, the most recent OCCK January-June 2023 Monitoring Report observed 9,256 people and 798 dogs in the SAR during surveys, with 69% of the dogs observed off-leash. (**Exhibit II** [“OCCK 2023 Report”], p. 142-144.) Of the 1,094 surveys conducted, “Law Enforcement Officers” were present less than 15% of the time.² Unsurprisingly, no citations were observed to be issued. (Ibid.) Law enforcement made “contact” only nine times—about 5% of the time they were present. (Ibid.)

The most recent OCCK 2023 Report also reported hundreds of bird disturbances, also known as “flushing events,” where birds present on the beach are approached by humans and/or dogs that induce them depart the beach. (Ex. II, p. 146.)

² Lifeguards were included as “Law Enforcement Officers” in the report, and were observed most frequently (48 out of 162 officers). (Ex. II, p. 146.)



Dog on top of ESHA, taken on August 22, 2023

In 2.5 years, OCCK surveys have reported 36,237 people, and 4,591 dogs. And this data excludes the time when OCCK is not out conducting surveys.

OCCK's latest report provides further evidence that the County simply will not comply with its lease conditions, which require it to enforce its laws in the SAR. This underscores the need for a new condition requiring the County to provide funding for third-party enforcement.

As Endangered Habitats League detailed in its previous letter to the Commission, the County's own reports admit that its officers can only visit the SAR when they have no other obligations, often outside of peak usage, and that when they do visit, they only issue a warning from their car bullhorns. (Ex. I, pp. 4-5.)

And it seems the County is no longer even issuing verbal warnings. As recent as August 22, 2023, the Orange County Sheriff's Department is filmed while it watches the SAR, and fails to issue any warnings or make announcements via loudspeaker. (**Exhibit III** [link to video], p. 151.)³

³ The County similarly failed to uphold its promises to the Coastal Commission in 2019 "to issue citations as necessary." (Ex. I, p. 19.)

The County's lackluster "efforts" to protect the endangered birds' nesting area pales in comparison to that of other reserves, such as Bolsa Chica, which fence off the entire area.



Photos of signage and fencing at Bolsa Chica

In comparison, the signage at SAR is confusing, and at times even conflicting.



Photos of signage at SAR and surrounding beach

And the signs at the SAR – restricting dogs and trespassing – are demonstrably ineffective.



The SAR is one of the few places the endangered shorebirds can take refuge, and is essential to their population’s continued survival. The SAR abuts a designated California Least Tern Nesting sanctuary, and is one of the few sites where Least Terns continue to breed. (Ex. I, p. 17.) Snowy plovers regularly roost west of the adjacent Least Tern Preserve fencing and the SAR, which was designated as critical habitat for the plovers. (Ibid.)

We again echo the sentiment from the State Parks Department: *“Remember that there are many places where [people] can take [their] dog, but only one place—the beach—where snowy plovers can breed.”* (Id. at p. 20.)

b. County Monitors Are Similarly Ineffective for Enforcement

The County recently sought permits from the U.S. Army Corps of Engineers (“USACE”) for outlets maintenance, including in the SAR. (Public Notice/Application Number: SPL-2010-00868.) The County’s application permit admitted the importance of the site for the threatened plovers and least terns, and relied on monitors to be present during maintenance activities to ensure protection. (Ibid.)

Yet, photographic evidence taken during past dredging activities demonstrate that monitors do little to prevent trespassing and unleashed dogs in the SAR. (Exhibit IV, p. 153.)

Therefore, we underscore that third party enforcement, such as City of Newport Beach Animal Control, or California Department of Fish and Wildlife (“CDFW”), is necessary.

c. Drones and Paragliding In The Santa Ana River Mouth Further Threaten Endangered Shorebirds and Public Safety

Paragliders have begun utilizing the SAR as well, placing even further strain on sensitive habitat already under immense stress. (Exhibit III [link to video of paragliding at the River Mouth on August 5, 2023].)



Paragliding and drones can seriously harm nesting shorebirds. In June 2012, a drone illegally flew over and crashed onto Bolsa Chica and induced nesting Least Terns to abandon 2,000 eggs.⁴ There were reportedly no hatchlings that year on the sand-covered island, “littered with the egg shells.” (Ibid.) A warden for CDFW said drones have grown into an ongoing problem in that area. (Ibid.)

The State Parks prohibits kites and hang gliding near plover nesting areas.⁵ Several studies have documented the impact of “free-flight activities” (i.e., hang-gliders, paragliders and their powered derivatives), as well as drones on wildlife.⁶ These negative effects are due to the high noise levels (in the case of powered craft) and the visual similarity of such aircraft to large raptors, which elicits escape or aggression behaviors. (Ibid.)

⁴ <https://www.pe.com/2021/06/03/illegal-drone-scares-terns-which-abandon-3000-eggs-on-bolsa-chica-nesting-island/>.

⁵ https://www.parks.ca.gov/?page_id=30020

⁶ Environmental Conservation, Volume 49, Issue 1, March 2022, pp. 8 – 16. DOI: <https://doi.org/10.1017/S0376892921000412>; see also https://www.fs.usda.gov/pnw/pubs/pnw_gtr993.pdf [p. 74].)

We request the Commission to consider the growing impacts of drones and paragliding in the SAR as well.

II. Continued Trespassing Is a Public Safety Risk

As noted in the Commission’s previous staff report, the County will enforce its Flood Control District trespassing ordinances (section 3-9-35) within the Lease Premises “to *protect public safety* and the environment.” (Ex. I, p. 52, emphasis added.)

The County’s signs around the SAR and flood control channel state “Channels can be dangerous. You may not be within the channel or on the slopes. You must stay away from the top edge of the channel slope... STAY OUT – STAY ALIVE.” County signs further up the SAR similarly indicate the bikeway is subject to flooding and may “become impassable.” There have been at least two casualties of swimmers near the Santa Ana River mouth and canal.⁷

Additionally, dogs face dangers when swimming in the SAR flood control channel. (**Exhibit V** [“Dog’s death in storm drain near ‘dog beach’ raises safety issue”], p. 159.) The owner almost lost her life, noting, “I had to let go of his collar because if I didn’t I would have been sucked in after him.”

The County itself has underscored that people should not be entering this area: “It may look inviting, but it’s still a flood-control channel and it’s dangerous,” said Orange County Public Works spokesman Shannon Widor. (Ibid.)

Further, the SAR is listed as a “Special Water Quality Enforcement Zone,” which is also cautioned by nearby signs.

The SAR is not a safe or sanitary place for peoples or dogs to inhabit. That is why the County’s ordinances prohibit trespassing in the flood control channel. The continued non-enforcement endangers public safety.

⁷ <https://www.ocregister.com/2015/10/11/authorities-identify-costa-mesa-man-who-died-after-ocean-rescue-near-santa-ana-river-canal/>; <https://www.latimes.com/socal/daily-pilot/news/story/2023-08-24/swimmer-dies-in-west-newport-beach-near-santa-ana-river>

III. Failure to Provide Third Party Enforcement Results in Ongoing Violations of the Public Trust Doctrine, California Environmental Quality Act, Coastal Act, and Endangered Species Act.

The environmental harms and public safety danger from the County's non-enforcement results in ongoing violations of the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act.

The Endangered Habitats League extensively detailed these legal violations in a letter to the County over 17 months ago in April 2022. (Ex. I, pp. 11-20.) For the sake of brevity, we briefly reiterate some of the main points, but encourage review of the entire letter.

Public Trust Doctrine

The Public Trust Doctrine charges the Commission with the duty of managing and ensuring appropriate uses on sovereign lands, which include the SAR. Further, wildlife is protected by the public trust doctrine. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361.) The Commission has recognized that Least Terns and Snowy Plovers are "important Public Trust resources," and relied on enforcement in the SAR to ensure the County's lease would not run afoul of the Public Trust Doctrine. (Ex. I, p. 52.) Therefore, third-party enforcement must be required – and funded – before any lease renewal.

California Environmental Quality Act

The County and Commission relied on a 1989 USACE Supplemental Environmental Impact Statement, and a 2016 Addendum and Mitigation Monitoring and Reporting Program ("MMRP") to conclude that renewal of the County's lease would not create significant environmental impacts. (Ex. I, pp. 54-55, 12.)

The County's failure to enforce its trespassing and dog ordinances are obstructing restoration of the nearby Marsh mitigation lands for suitable nesting habitat in conflict with the MMRP. (Ex. I, pp. 12-14.) In particular, the failure to enforce County trespass ordinances runs afoul of the 2016 MMRP Mitigation Measure BIO-5-1. (Ibid)

The Commission relied on the 2016 MMRP in finding that the County's 2021 lease "as proposed" did not necessitate further environmental review. Yet, it is evident that renewal of the County's lease – absent adequate assurances of enforcement in the SAR – will result in significant environmental impacts, requiring review and mitigation under CEQA. Further, CEQA requires an agency to enforce mitigation measures. (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1166.)

If the Commission decides not to require third-party enforcement and provision of funding for said enforcement, it must require proper CEQA review, including the preparation of a supplemental Environmental Impact Report and MMRP.

Endangered Species Act

Both the federal and State Endangered Species Act prohibit “take” of endangered species. The Western Snowy Plover and California Least Tern are listed as federally threatened and endangered, respectively, and are both State special status species. (Ex. I, p. 14.) The Commission, State Parks, California Department of Fish and Wildlife, and U.S. Fish and Wildlife Service have all warned that the presence of dogs in the SAR disturbs the foraging grounds of birds and severely degrades habitat area. (Ibid.) The OCCK reports, including the most recent 2023 report, document hundreds of incidents of harassment of shorebirds.

The trespassing and unregulated dogs results in ongoing “take” of protected species under State and federal law. (50 CFR §17.3; Fish & G. Code, § 86; see *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554.) As the State Parks Department explains: “if a beach goer brings a dog onto the beach, and the dog disrupts the feeding of a bird, leading to the bird’s injury, then it is a violation of the law.” (Ex I., p. 15.)

California Coastal Act

The Commission’s decision regarding the County’s Lease Renewal is subject to CEQA, which requires analysis of consistency with applicable State laws. There are several ongoing violations of the California Coastal Act that must be considered in the Commission’s analysis.

The Coastal Act’s protections for “environmentally sensitive habitat areas” (“ESHA”) are paramount. (Public Resources Code §§ 30240, 30107.5.) The SAR features ESHA in multiple locations, both in and around the River Mouth, which is being harmed from the unregulated presence of people and dogs:

- The Coastal Commission found that the SAR Mouth provides foraging and roosting habitats for Least Tern and Western Snowy Plover, and breeding habitat for the Least Tern, species that are “key to the marine ecosystem.” (Ex. I, p. 18.)
- The Regional Water Quality Control Board stated that the River Mouth is a “RARE beneficial use designation” because it is known habitat for the Western Snowy Plovers and Least Tern that warrants protection. (Ibid.)
- The dunes on the south side of the river constitute ESHA, as found in a 2006 Coastal Commission enforcement action, because dunes are a sensitive plant community and provide habitat to the Least Tern. (Public Resources Code § 30251.)
- The California Least Tern habitat immediately adjacent to the River Mouth in the Huntington State Beach Least Tern Natural Preserve is ESHA.

As the Coastal Commission underscored in a warning to the City of Newport for allowing similar harms from unleashed dogs: impacts on ESHA create liability “under the Coastal Act at a minimum” for the local jurisdiction, as they “constitute continuing violations of the Coastal Act and continuing public nuisances.” (Ex. I, p. 19.)

Additionally, the Coastal Act requires protection and restoration of marine resources, as well as coastal waters and streams themselves. (Public Resources Code §§ 30230, 30231.) The Coastal Commission already concluded that a dog beach in the River Mouth is inconsistent with these policies. (Ex. I, p. 20.)

Finally, Section 30210 of the Coastal Act requires that public access be provided “consistent with public safety needs.” The County’s regulations on trespassing and dogs exist for public safety reasons. As discussed in Section II, the non-enforcement in the SAR poses serious harm to people and dogs, in violation of the Coastal Act.

IV. Conclusion

The Commission ensured that it would have a chance to evaluate whether the County’s lease framework effectively protects public trust resources before renewing the lease. The Commission also previously contemplated the need for third-party enforcement, and the potential to charge the County monetary rent for its lease if in the interest of the State.

The evidence demonstrates the County is still not enforcing its ordinances, and that large numbers of people and unleashed dogs are still inflicting harm on environmentally sensitive habitat areas and endangered species, and endangering their own safety, as well. As highlighted in previous correspondence, County representatives have cited “political” reasons for this nonenforcement. (Ex. I, p. 105, 27-28.) Therefore, the County cannot be entrusted with enforcement. The lease framework is not working.

We respectfully request and urge the Commission to require the County to fund and hire third-party enforcement, or require a commensurate monetary rent, as a binding condition under the lease, and as a mitigation measure under the California Environmental Quality Act.

Thank you very much for your consideration of these comments.

Sincerely,



Kathryn Pettit
Josh Chatten-Brown

Lucchesi, Simpkin
September 20, 2023
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cc

Benjamin Johnson (benjamin.johnson@slc.ca.gov)
Nina Tantraphol (nina.tantraphol@slc.ca.gov)
Lucinda Calvo (lucinda.calvo@slc.ca.gov)

Exhibit I



Chatten-Brown, Carstens & Minter LLP

Hermosa Beach Office
Phone: (310) 798-2400
San Diego Office
Phone: (619) 940-4522

2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
www.cbcearthlaw.com

Kathryn Pettit
kmp@cbcearthlaw.com
TEL: 323-348-1877

September 15, 2022

Via e-mail

State Lands Commission
Executive Officer Jennifer Lucchesi (*Jennifer.Lucchesi@slc.ca.gov*)
Public Land Management Specialist Drew Simpkin (*Drew.Simpkin@slc.ca.gov*)
301 East Ocean Boulevard
Long Beach, CA 90802

Re: The Need to Incorporate a Condition to Fund and Ensure Third-Party Enforcement in the Lower Santa Ana River into the Orange County Flood Control District's Lease.

Dear Ms. Lucchesi and Mr. Simpkin:

On behalf of the Endangered Habitats League, we respectfully urge the State Lands Commission to require the funding and hiring of third-party officers to manage enforcement of local and environmental laws in the Lower Santa Ana River mouth and flood control channel as a condition of the Orange County Flood Control District's (OCFCD) lease of State lands. There should be no renewal of OCFCD's lease without assurance of third-party enforcement with dedicated coverage in this impacted area.

As detailed in the letter we submitted to OCFCD and the County of Orange (County) in April 2022 (**Enclosure 1**), the County's refusal and inability to effectively enforce its laws pertaining to trespassing and dogs in the Lower Santa Ana River (River) mouth violates its current lease with the State Lands Commission (Commission), as well as the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act.

The current lease requires the County to enforce its own laws, and to submit an annual monitoring report to the Commission by July 8. On July 19, 2022, the Commission swiftly issued a Notice of Breach of General Lease to OCFCD, as it had not received an annual report. (**Enclosure 2.**) We reviewed the County's 3-page "Annual Report" it thereafter submitted (County Report). (**Enclosure 3.**) Not only does the County Report lack informational value—it clearly demonstrates that the County and OCFCD have simply continued with the status quo of refusing to enforce the law, inflicting harm on the endangered Western Snowy Plover and California Least Tern and Environmentally Sensitive Habitat Areas.

The County Report only confirms the Commission's concerns when it authorized the County's lease last year and anticipated third-party enforcement will likely be needed. The County has since demonstrated it will simply not enforce its laws, or alternatively, does not have the capacity or trained personnel to do so. Therefore, we respectfully urge the Commission to incorporate a binding lease condition that the County fund and hire third party-enforcement, such

as a California Department of Fish and Wildlife (CDFW) Officer or a City of Newport Beach (CNB)¹ Animal Control Officer to prevent the ongoing harm to coastal and environmental resources and violation of environmental laws.

I. Evidence Demonstrates that Trespassing and Dogs in the River Mouth Continue to Harm Endangered Species, Sensitive Habitat, and Marine Resources.

Public observations and documentation show continued high levels of people and unleashed dogs in the River mouth. Photographs taken on August 27, 2022, at 2 p.m. confirm the issue is ongoing, and third-party enforcement is required. (**Enclosure 4** [picturing over 20 people and multiple unleashed dogs]; see also Enclosure 1, p.3, Exhibit E [video and photos].) We can provide further videos if needed.

Orange County Coastkeeper monitored the River mouth from July to December 2021 and released a report (OCCK Report) demonstrating the expansive scope of the problem in the Santa Ana River. The OCCK Report detailed high levels of trespassing and dogs—the majority off-leash. (Enclosure 1, Exhibit D “July-December 2021 Report,” at p. 2.) Officers were only present seven times throughout the surveys, and no citations were observed to be issued. Of these officers, only one was reported to be a County officer. The OCCK Report includes specific accounts of the futility of voluntary warnings, continued non-compliance, and harassment of the shorebirds.

The OCCK Report casts doubt on the County’s Annual Report assertion that the number of people present in the area has declined. For example, the County Report claimed only **1.1 average warnings per visit** in December 2021. Yet, on December 19, 2021, a report by an OCCK volunteer *directly contradicts* the Report’s contention that its reported period of low warning numbers correlates with few dogs and visitors:

“...a law enforcement officer came down to the flood area and said something over the loudspeaker but no one could hear him. There were **18 dogs off leash** during the 30 minutes I was there, and at least half of them were still there when the officer arrived. A couple of people went over to ask him what he said and then left. There were still at least 6 dogs still off leash when the officer drove away, and he was too far away for people to hear what he said.”

This empiric information shows the ongoing problem in the river mouth, and that the County’s methodology in its Annual Report is unreliable and error-prone. Notably, the County Report does not even report on the number of unleashed dogs in the River mouth, which cause the most harm to endangered shorebirds.

¹ We further recall that a MOU was developed at one point for assurance of cooperation between the County and CNB. CNB is able to enforce in all jurisdictions using all available laws. Thus, the hiring of a CNB Animal Control Officer is also a viable option, as long as the Officer is dedicated to coverage of the River mouth.

The County asserts that its reported number of “Warnings” represents the “number of people present in the river mouth.” (Enclosure 3, p. 3.) If this assertion is true, there is a great discrepancy between the OCCK Report and County Report. Between July and December 2021, OCCK reported that in 63 surveys, 1,506 people and 273 dogs were observed. During this same period, the County reported almost three times the number of visits (170 visits) but over half the amount of people present. (674 people).

Using the County’s bundled “Average Warnings per visit” metric, based on this data, in total the OCCK report shows 23.9 people per visit, whereas the County shows 3.96 people per visit. **Therefore, the OCCK Report shows 6 times more people present.** This is likely due to the fact the County Officers visit at different hours.

The OCCK Report, objective monitoring data, demonstrates the County Report data is unreliable and inconsistent, and shows there are still large numbers of people and un-leashed dogs in this sensitive habitat area. This evidence calls for third-party enforcement.

II. The County’s Annual Report Demonstrates that the County Is Not Enforcing Its Laws and Is Deficient as a Reporting Mechanism.

The Commission approved OCFCD’s lease application on October 21, 2021 with the condition that the County would enforce its laws prohibiting trespassing and dogs in the River mouth. (Enclosure 1, Exhibit C [Commission Staff Report]) In particular, Commission Staff Report highlighted the futility of County Sheriffs’ verbal warnings and failure to issue fines.

Yet, amazingly, the County reports it has continued with exactly the same ineffective approach. The Report admits this bare minimum “Law Enforcement Methodology,” explaining: “OCSD Officer(s) arrive on site and if people and/or dogs are present in the river mouth they issue a warning to the entire Santa Ana River mouth (via bullhorn attached to the sheriff’s vehicle), that they are trespassing and need to leave the flood channel, or words to that effect. The OCSD log the number of visits, along with the number of people that are present in the river mouth when they issue warnings” (Enclosure 3, p. 2.)

It doesn’t appear County Officers even leave their cars, or stay to determine if people return after initially heeding the warning, or if people even listen or heard the warning at all. As detailed in our previous letter, the public does not heed voluntary warnings, especially given the County’s voiced support for an informal dog park at this location. Video documentation provided by the public at multiple California Coastal Commission hearings demonstrates that the Officers do not stay long after their announcement to see if anyone leaves or heard them. Indeed, the videos show that most of the visits are timed at **90 seconds or less**, confirming that the visits are too short for effective enforcement purposes.

The County Report admits the Officers only visit the River mouth when they have no other obligations, therefore enforcement times do not correlate to times of maximal human disturbance when enforcement is most needed (and when reporting would be most meaningful).

Conversely, visits may have coincided with periods of low visitation, skewing the results. Because the Report's "Results" table does not provide any information on the time of day, or even what day, the Officers visited the River mouth, its informational value is subverted, and shows that the County has not undertaken a serious monitoring effort.

The report also admits that the methodology employed—visits not correlating with times of peak visitor use—severely undermines any conclusion as to benefit:

OCSD Officers may be visiting the river mouth outside of peak usage and the figures may not be representative of the peak number of people trespassing in the river mouth, compared to the first three months.

Absent actual visitor and dog counts at *set times and frequencies*, it is impossible to know if the random nature of officer visits was effective or not. The County Report utilizes defective methodology. There is no ability to replicate the observations (due to lack of information on time of day, or what day). County Sheriffs are visiting at times that are not reproducible, verifiable, or representative. Therefore, the County Report cannot dispute the overwhelming evidence that there are still large numbers of people and un-leashed dogs in the River mouth, necessitating third-party enforcement.

The County Report raises other questions, especially its use of the "warnings given" metric in the "Results" table. The report should have clearly explained and labeled all empirical data. If, as the reports states, "The number of warnings given represents the number of people present in the river mouth while the officer was on site," then why does the County's Report not then label its Results table as "people present"? If the County Report is utilizing a "warnings given" metric, rather than the actual number of people present, this would have great implications for the metric's reliability.²

Finally, the Report acknowledged that the oil spill off the coast in Orange County led to severe restriction in access to the River mouth, and admits the perceived impacts of the spill may have reduced use. OCFCD cannot disentangle the effect of the spill and the pollution concerns affecting visitation from its conclusions. The shift in sand and berm size further reduced visitor use and confounded the Report's results, as the River mouth beach was reduced in size and then washed away altogether in June.

² A "warnings given" metric is contingent on County Sheriff actions and provides no objective assessment of whether those actions were effective. Nor can there be confidence in the veracity of a relationship between number of broadcasts and violations. For example, a single warning may have been given even if large numbers were present due to the proclivities of the individual officer involved or perceived effectiveness of the initial broadcast. Or, officers may have used bullhorn repeatedly during early months but did not use it repeatedly in later months simply due to fatigue, leading to a false conclusion that the number of people in the area declined. The obfuscation around metrics undermines the Report's conclusions. An indirect and fallible surrogate of number of broadcasts cannot substitute for direct and reproducible measurement of violations at regular times and dates.

For these reasons, the Report lacks foundation for its conclusion that there has been a decline in people present in the River mouth, and fails to demonstrate that the Sheriff's verbal warnings are working. It also fails to report on the presence of unleashed dogs in the River mouth, the chief concern of the Commission, environmental agencies, and the public. Setting this aside, the Report demonstrates that trespass still regularly occurs and people are present most every visit. Thus, a significant problem remains and third-party enforcement is needed.

III. Third Party Enforcement Is Required as a Condition, Otherwise Further Environmental Review Would Be Required.

We applaud the Commission's inclusion of the enforcement and reporting conditions, and the election to utilize a shorter lease term so that it could evaluate the effectiveness of the County's lease conditions. In 2021, the Commission reported it was exploring opportunities to fund additional CDFW law enforcement positions that would allow for more targeted and frequent enforcement, including the issuance of citations under both County and CDFW ordinances. Third-party enforcement is the only method that will be effective.

The County admits that the Sheriff's Department is ill-equipped to handle enforcement, and can only "visit the river mouth when they are not required to attend other high priority incidents or provide support elsewhere. Attendance on site is therefore on an as and when available basis and is not necessarily linked to periods of peak usage." (Enclosure 3, p. 2.) Also, Sheriffs do not usually typically handle conflicts between human recreation and wildlife. Such specialized enforcement should be put into the hands of personnel specifically trained for this purpose, who are knowledgeable about and who can explain the needs of the species involved, who will de-escalate tensions, and who will make interactions with people friendly and constructive. Only an educational component conducted by trained personnel will lead to sustained changes in behavior and resolution of the conflicts.

As we detailed in our previous letter to the County, in finding that the County's lease complied with environmental laws and did not require further environmental review under the California Environmental Quality Act, the Commission assumed compliance with the lease conditions and relied on the County's assertions it would effectively prevent trespassing and dogs in the River mouth. (Enclosure 1, pp. 4-12.)

The County's lease requires it to submit its next lease application by October 21, 2022. The Commission purposefully granted OCFCD a 2-year lease, rather than a 5-year lease, to provide an opportunity to assess whether the current lease framework is adequately protecting the endangered shorebirds, which includes adherence to its conditions. (Enclosure 1, p. 6.)

The status quo isn't working; therefore, we ask the Commission to require the County to fund third-party enforcement. Despite years of efforts from agencies and environmental groups, the County Report demonstrates that the County is still not effectively enforcing its ordinances and the conditions of its current lease. This evidence and the need for further environmental review and mitigation measures must be considered when the County begins applying for a new

lease this year to protect public trust and coastal resources in this area with extremely high biological value.

IV. Conclusion

The ongoing destruction of sensitive habitat and damage to endangered shore birds in the Lower Santa Ana River mouth and surrounding environmentally sensitive habitat areas has persisted for years. Without third-party enforcement, nothing will change. The County's Annual Report only underscores this fact.

The Commission has taken great steps to try to ensure the County's adherence to its lease and environmental laws. We respectfully request and urge the Commission to take the final step and require the County and OCFCD to fund and hire third-party enforcement when the County submits its new lease application next month, and to incorporate this as a binding condition under the lease, and as a mitigation measure under the California Environmental Quality Act.

We thank you both and the State Lands Commission for your continued work to protect the State's public trust resources.

Sincerely,



Kathryn Pettit
Douglas Carstens

cc:

Benjamin Johnson (benjamin.johnson@slc.ca.gov)
Lucinda Calvo (lucinda.calvo@slc.ca.gov)
Nina Tantraphol (nina.tantraphol@slc.ca.gov)

ENCLOSURE 1



Chatten-Brown, Carstens & Minter LLP

Hermosa Beach Office
Phone: (310) 798-2400
San Diego Office
Phone: (619) 940-4522

2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
www.cbcearthlaw.com

Kathryn Pettit
kmp@cbcearthlaw.com
TEL: 323-348-1877

April 4, 2022

Via e-mail

Orange County Flood Control District
Public Works Director James Treadaway (james.treadaway@ocpw.ocgov.com)
601 N. Ross Street
Santa Ana, CA 92701

Re: Notice of Violations of the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Section 9 of the Federal Endangered Species Act for Taking of Western Snowy Plover and California Least Tern and Request for Immediate Corrective Action.

Dear Mr. Treadaway:

This letter is written on behalf of the Endangered Habitats League to urge the County of Orange (“County”) and Orange County Flood Control District (“OCFCD”) to cease violations of the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act. These violations arise from the County’s intentional refusal to effectively enforce its own laws prohibiting trespassing and dogs in the Santa Ana River Mouth, inflicting harm on the endangered Western Snowy Plover and California Least Tern, on Environmentally Sensitive Habitat Areas, and on people and dogs themselves.

Recognizing these harms, on October 21, 2021, the State Lands Commission (“Commission”) approved OCFCD’s application to continue maintenance dredging in the Lower Santa Ana River (“River”) on the condition that the County would enforce its own laws prohibiting trespassing and dogs in the River Mouth. Despite this clear mandate, the County (including through OCFCD) continues to violate the conditions of its lease.

Dog parks can provide a meaningful venue for individuals and their pets to connect, when in the right location. Environmental groups and a state agency have provided the County and the City of Newport, which also refuses to enforce its own regulations in this area, with alternative dog beach locations that will not result in harm to state and federally protected species and sensitive habitat. (NGO July 2018 Comment Letter, **Exhibit A**, pp. 6, 11-12; see also Santa Ana Regional Water Quality Control Board Letter, **Exhibit B** [noting nearby existing dog beach where dog excrement and urine are less likely to wash out to sea].) The County’s encouragement, and public reinforcement via multiple media outlets, of the de facto dog park in the Santa Ana River Mouth actively harms endangered species and sensitive habitat in violation of the County’s legal obligations. The County must enforce its laws prohibiting trespassing and presence of dogs in the River Mouth to avoid violations of the aforementioned State and federal environmental laws.

I. The County’s On-Going Violations of its State Lands Commission Lease Conditions Violate the Public Trust Doctrine, the California Coastal Act, and the California Environmental Quality Act.

A. The County’s Lease Requires Enforcement of County Ordinances.

The Commission considered OCFCD’s application for a two-year lease, beginning October 21, 2021, to conduct maintenance dredging on public sovereign lands in the Lower Santa Ana River, which includes the River Mouth. (Commission Staff Report, **Exhibit C**, p. 1.) The Commission specifically addressed the use of the River Mouth as an informal off-leash dog park, and the harm this causes to the on-site Western Snowy Plovers and California Least Terns. (Ex. C, p. 3.) It also refuted the County’s previous claims that it did not have a duty to enforce restrictions on trespassing and dogs in the River Mouth, and reported that “[t]he County is now willing to enforce this ordinance within the Lease Premises to protect public safety and the environment.” (*Id.* at p. 6.)

Commission staff contacted the California Department of Parks and Recreation (“Parks”), U.S. Fish and Wildlife Service (“USFWS”), and the California Department of Fish and Wildlife (“CDFW”), who “all indicated that the presence of dogs disturbs the foraging grounds of birds and severely degrades habitat area.” (Ex. C, p. 4.)¹ As a result, the Commission required the County to enforce its own ordinances prohibiting trespassing and dogs in the River Mouth as a condition of its lease of the sovereign lands. (Ex. C, pp. 2-4, 6 [Section 4-1-45 prohibits unleashed dogs in public parks and presence of dogs altogether on public beaches; Section 3-9-35 prohibits trespassing in the Santa Ana River Flood Control Channel].) Further, under its lease the County must not interfere or object to any enforcement by a state agency of applicable laws in the River Mouth, including its own ordinances, and must provide annual reports to the Commission detailing its law enforcement efforts in the River Mouth. (Ex. C, p. 2.)

The County’s lease places an unequivocal duty on the County to *effectively* prevent trespassing in the River Mouth: “Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat.” (*Id.* at p. 6.)

The Commission Staff Report highlighted the futility of County Sheriffs’ verbal warnings and failure to issue fines.² The County must effectively prevent trespassing and off-leash dogs in the River Mouth and flood channel through the hiring of a full-time ranger and issuance of fines.

¹ The Parks Department, California Coastal Commission, and Santa Ana Regional Water Quality Control Board also expressed concerns over the impacts on California Least Tern and Western Snowy Plover when the County considered formally allowing dogs at the River Mouth in 2016. (Ex. C, p. 3.)

² In its testimony at the Commission hearing, OCFCD admitted that “thousands of warnings to vacate the area have been issued at the SAR mouth.” Commission Meeting Transcript, https://slcprwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 181.

B. The County Has Intentionally Avoided Enforcement of Its Laws, Causing Harm to Endangered Species and Environmentally Sensitive Habitat Area.

Despite years of notice from federal agencies, state agencies, and environmental groups that the County's inaction in the River Mouth creates environmental harm and violates the law, the County still refuses to enforce its prohibitions on trespassing and dogs in the River Mouth. This nonenforcement has also resulted in harm, and poses a continued risk of harm, to people and dogs.³

The continuous failure to enforce County ordinances is well documented. Orange County Coastkeeper ("OCCK") monitored the trespassing and illegal presence of dogs in the River Mouth in 2021 and released a report demonstrating the expansive scope of the problem. (OCCK Santa Ana River Mouth Monitoring Project January-June 2021 Report, **Exhibit D**, p. 2.) In only six months, over 5,000 humans, over 1,000 dogs (82% unleashed), and drones were reported in the River Mouth. (*Ibid.*) OCCK continued its monitoring, and just released its July-December 2021 Report. The OCCK December 2021 report similarly detailed high levels of trespassing and dogs—the majority off-leash—in the River Mouth. (OCCK December 2021 Report, Ex. D, p. 2.) Officers were only present seven times throughout the surveys in the time period, and no citations were observed to be issued. (*Ibid.*) The December 2021 Report includes specific accounts of the futility of voluntary warnings, continued non-compliance, and harassment of the shorebirds. (*Ibid.*)

The County's non-enforcement has continued after the Commission's approval of the County's lease.⁴ (February 19, 2022 Video and Photographs, **Exhibit E** [evidence of deliberate inaction and non-enforcement].)

County representatives have cited "political" reasons for its nonenforcement. (Ex. A, pp. 5-6.) This is unacceptable and in violation of federal and state laws.

C. The County's Failure to Comply with its Lease Conditions Violates the Public Trust Doctrine and California Coastal Act.

The Public Trust Doctrine requires the State to hold its tidal and submerged lands, stream beds, and other navigable waterways in trust for the benefit of the people of California. The Commission is charged with managing and ensuring appropriate uses on sovereign lands, which include the Santa Ana River Mouth.⁵

³ latimes.com/socal/daily-pilot/tn-dpt-me-dog-death-20161005-story.html ["Dog's death in storm drain near 'dog beach' raises safety issue"].

⁴ <https://www.ocregister.com/2021/11/03/enforcement-at-orange-countys-illegal-dog-beach-may-be-ramping-up/> [reporting that only eight days after County lease approval, people and their dogs were observed in the area during a visit by the Orange County Register]; Ex. A, p. 5; Commission Meeting Transcript, https://slcprdwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 178 [testimony about monitoring studies], p. 183 [testimony about hours of footage showing Orange County Sheriff's Department complete lack of enforcement action.].

⁵ <https://www.coastal.ca.gov/coastalvoices/PublicTrustDoctrine.pdf>.

Further, it “has long been recognized that wildlife are protected by the public trust doctrine.” (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361.) Citizens have standing to enforce the Public Trust Doctrine when the public agencies fail to discharge their duties. (*Id.* at 1366 [finding that Plaintiffs should have brought their Public Trust action against the County or CDFW].)

The Commission’s finding that the County’s lease of state sovereign lands does not substantially interfere with Public Trust uses hinged on the County’s effective enforcement of its ordinances, as Commission “staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources from harassment due to the unregulated presence of unleashed dogs.” (Ex. C, pp. 6, 8)

The County’s failure to enforce the trespassing and dog ordinances violate the Public Trust Doctrine. Further, because the California Coastal Act (“Coastal Act”) codifies and implements the Public Trust Doctrine, for these reasons the County’s intentional inaction violates the Coastal Act. (See *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 290 [highlighting that Public Resources Code section 30210 “makes specific reference to the public trust doctrine” and emphasizes the need to consider public safety interests.])

D. The County’s Inaction Violates the California Environmental Quality Act.

An agency must implement promised mitigation measures, and where it fails to do so the public may enforce under the California Environmental Quality Act (“CEQA.”) (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1166.)

For environmental review of its River dredging, OCFCD used a 1989 U.S. Army Corps of Engineers Supplemental Environmental Impact Statement as a CEQA equivalent document and prepared and approved an Addendum on April 29, 2016. (Ex. C, pp. 8-9.) In granting the County’s current lease, the Commission relied on the County’s Mitigation Monitoring and Reporting Program (“MMRP”) that the Commission previously adopted on August 9, 2016. (*Ibid.*) Based on this, the Commission concluded that the County’s activity “involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq., but such activity will not affect those significant lands. Based upon staff’s consultation with the persons nominating such lands and through the CEQA review process, it is staff’s opinion that the project, *as proposed*, is consistent with its use classification.” (Ex. C, p 9, emphasis added.) The County’s refusal to enforce its ordinances conflicts with both the Commission’s 2021 proposed project under CEQA, and impacts habitat on the adjacent mitigation lands.

The County’s 2016 CEQA findings admitted biological impacts to the River from its maintenance dredging, but found that mitigation measures would reduce impacts to a level below significance.⁶ Mitigation Measure BIO-5-1 required acquisition of eight acres of wildlife mitigation lands at the Mouth of the Santa Ana River and restoration of 88-acres of the Santa

⁶ 2016 MMRP, https://www.slc.ca.gov/Meeting_Summaries/2016_Documents/080916/Items_and_Exhibits/C31.pdf, p. 61 of PDF. (Accessed via hyperlink on page 9 of Exhibit C.)

Ana River Marsh that is adjacent to the Santa Ana River, near the Mouth of the river, as well as well as formation of a biological monitoring program.⁷ The Army Corps' Habitat Management Plan requires an on-site manager to coordinate with the Corps and local police department for enforcement of trespass ordinances.⁸

The County's non-enforcement has negatively impacted, and continues to harm, species on the Marsh mitigation lands, as noted in an Army Corps 2017 Supplemental Environmental Assessment.⁹ (“[S]nowy plovers were not observed within the Santa Ana River Marsh during surveys conducted in 2012 or 2013. While mudflats within the marsh could be used for foraging and roosting, disturbance associated with local residents and their dogs recreating in areas that are suitable for snowy plover nesting in the marsh channels likely precludes nesting activity.”) The impacts of dogs on the Marsh and another protected species, the Light-footed Ridgway's rail, were noted again in the Army Corps' 2019 Habitat Management Plan.¹⁰

Figure 1. Vicinity Map



(Map Displaying Proximity of the Marsh (outlined in red) to the River Mouth, April 2019 HMP EA, p. 36.)

The County's failure to enforce its trespassing and dog ordinances are obstructing restoration of the nearby Marsh mitigation lands for suitable nesting habitat, which is one of its stated goals. The Commission relied on the 2016 MMRP in finding that the County's 2021 lease

⁷ *Id.* at p. 13-14 of PDF, Table SEIS-16, Section III. G. 1; p. 61 of PDF; April 2019 Habitat Management Plan EA, <https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/COMPLETE%20SAR%20Marsh%20HMP%20EA%204-25-19.pdf?ver=2019-04-25-184114-38>, p. 6 of PDF. The Marsh provides restored habitat for various state threatened and endangered species such as the California least tern, western snowy plover, coastal California gnatcatcher, Belding's savannah sparrow, and light-footed Ridgway's rail. "Continued management is needed to improve and maintain habitat conditions and to minimize disturbance and degradation." (*Id.* at p. 51 of PDF.)

⁸ *Id.* at p. 22 (p. 70 of PDF).

⁹ https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/complete%20SantaAnaRiverMarsh_Final_SEA%204-25-17.pdf?ver=2017-04-25-165707-200, p. 287 of PDF.

¹⁰ April 2019 HMP EA, p. 15 (p. 17 of PDF).

activities, *as proposed*, did not necessitate further environmental review. Yet, evidence shows the negative impacts of the County's non-enforcement on the Marsh mitigation lands. The Commission will need to reassess the MMRP and appropriate level of CEQA review when the County applies for another lease, as the current lease expires in October 2023.

In fact, the County's lease requires the County to submit its next lease application no later than October 21, 2022. The County must also provide annual reports to staff detailing its law enforcement efforts by July 2022. The Commission purposefully granted OCFCD a 2-year lease, rather than a 5-year lease, to provide an opportunity to assess whether the current lease framework is adequately protecting the endangered shorebirds, which includes adherence to its conditions. (Ex. C, p. 31.)¹¹ The Commission made this decision despite OCFCD's request for a 5-year lease.¹²

Despite years of efforts from agencies and environmental groups, the County still refuses to effectively enforce its ordinances, instead choosing to violate various State and federal environmental laws, as well as the conditions of its current lease. This evidence, and the need for further environmental review and mitigation measures, must be considered when the County begins applying for a new lease this year. In particular, any future lease must require the County to provide funding for a ranger at the River Mouth and effectively enforce its ordinances.

II. The County's Allowance of a De Facto Dog Park Violates the Federal Endangered Species Act and California Endangered Species Act.

The County's deliberate non-enforcement of its ordinances and allowance of dogs in the River Mouth violates the Federal Endangered Species Act ("ESA") and California Endangered Species Act ("CESA") through the resulting continuing harassment and take of endangered species, in particular the Western Snowy Plover and California Least Tern, in the Santa River Mouth and immediately adjacent areas.

The Western Snowy Plover is listed as a threatened species by the federal government and a California Species of Special Concern. A Recovery Plan was completed by the USFWS in 2007, designating the Santa Ana River Mouth as "critical habitat."¹³ The California Least Tern is also listed as federally endangered (Federal Register, June 2, 1970) and as State of California endangered. As noted in the Commission's Staff Report, the State Parks, CDFW, and USFWS all indicated that the presence of dogs in the River Mouth disturbs the foraging grounds of birds and severely degrades habitat area. (Ex. C, p. 4.)

¹¹ The specific language of the lease bears including here: "Further, staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources, from harassment due to the unregulated presence of unleashed dogs and other domestic animals. The limited 2-year lease term will allow the Commission to re-evaluate the effectiveness of this protection and enforcement framework and adaptively manage the situation accordingly." (Ex. C, p. 31.)

¹² Commission Meeting Transcript, https://slcprdwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 179-181 ["[OCFCD] has only one concern with the draft lease, and that is the term of the lease. The draft term has been reduced to only two years as opposed to the five-year term of a prior dredging Lease..."]

¹³ 2007 Recovery Plan, https://ca.audubon.org/sites/default/files/documents/wsp_final_rp_10-1-07.pdf, p. 109.

Section 9 of the ESA and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the ESA defines “take” to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations define “harm” to include significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. (50 CFR 17.3) The Service defines “harassment” as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

CESA similarly prohibits the “take” of a California endangered or threatened species by any person or public agency. (Fish & G. Code, § 2080.) Fish and Game Code section 86 defines “take” as to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 232.) The California Department of Fish and Game has specifically stated that nest abandonment, loss of young, and reduced health and vigor of eggs and/or nestlings (resulting in reduced survival rates) may ultimately result in a take in violation of the CESA.¹⁴ This interpretation of “take” was judicially affirmed in a Court of Appeal decision.¹⁵ Further, Section 3503 prohibits the take, possession, or destruction of birds, their nests or eggs.

The USFWS and CDFW have both already notified the County that the mere “presence of leashed or unleashed dogs on the beach and in the river mouth is harmful to snowy plovers and least terns” and can degrade the adjacent federally-designated Critical Habitat, and warned that dogs capture and kill or injure snowy plovers or least terns (Wildlife Agency Letters, **Exhibit F**, Dec. 2016 Letter, p. 3, 5.) USFWS specifically stated that the “presence of dogs at the mouth of the Santa Ana River is likely to disturb federally endangered California least terns [] and federally threatened western snowy plover.” (Ex. F, Nov. 2016 Letter, p. 1.) Of further concern, the wildlife agencies noted that impacts to western snowy plovers from dogs and other beach activities are “much greater than what we observe” due to limited monitoring, and the low probability of the actual discovery of a dead or injured western snowy plover. (Ex. F, Dec. 2016, Enclosure 1, p. 3.)

The State Parks Department makes it explicit: “if a beach goer brings a dog onto the beach, and the dog disrupts the feeding of a bird, leading to the bird’s injury, then it is a violation of the law.”¹⁶ The Parks Department reports that the Western Snowy Plovers have faced a population decline for several years from habitat destruction and harassment. For this reason, State Parks “will strictly enforce regulations prohibiting dogs on State Beaches.” (*Ibid.*) The Parks also detailed the negative impact of flying kites near nesting areas, as hovering kites

¹⁴ <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83992>.

¹⁵ *Ibid.* [citing *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554].

¹⁶ https://www.parks.ca.gov/?page_id=22542 [Parks Department discussing the decline of the Western Snowy Plover from human activities, including harassment from dogs, and explaining how even well-behaved dogs cause harm to western snowy plovers].

resemble predators and may cause nest abandonment. Drones, which are much noisier, have the same effect, including on the Least Tern nesting preserve immediately adjacent to the Mouth.

Snowy plovers regularly roost west of the adjacent Least Tern Preserve fencing and the Mouths of the Santa Ana River and Talbert Outlet. In 2012, 25 acres of snowy plover critical habitat was designated at the Mouth of the Santa Ana River (Unit CA 47) for the snowy plover.¹⁷



Figure 10. Critical Habitat for the Mouth of the Santa Ana River Unit CA-47

The plovers have faced continuous threats from trespassing and dogs in the River Mouth and surrounding areas. Environmental groups have previously alerted the City of Newport to this harm, whose nonenforcement of its off-leash ordinances and illegal encroachments have also resulted in take of the Western Snowy Plover. (Ex. A; NGO May 2019 Comment Letter, **Exhibit G** [detailing ESA violations].) A report by Tom Ryan and colleagues identified regular disturbance from trespassing and dogs as a threat to the Western Snowy Plover in the area, both breeding and non-breeding, (Ex. A, p. 10.) The plovers cannot compete with unaware beach users.¹⁸

Additionally, an important nesting colony of the California Least Tern is located at Huntington State Beach, just west of the Santa Ana River Mouth. A 7.5-acre area has been fenced off to protect the nesting colony and is designated as a California Least Tern Nesting

¹⁷ <https://documents.coastal.ca.gov/reports/2018/11/th11a/th11a-11-2018-exhibits.pdf>, p. 47 of PDF; see also Ex. F, p. 8 [Figure 1 demonstrating location of Western Snowy Plover Critical Habitat extending all the way into River Mouth, and further noting shoreline data may not accurately represent the “dynamic shoreline environment.”]

¹⁸ <https://www.seaandsageaudubon.org/Conservation/LeastTerns/LETE.htm>.

Sanctuary.¹⁹ The Santa Ana River Mouth is immediately adjacent to this Least Tern Sanctuary. The Preserve is one of five locations in Orange County where least terns breed and one of the few historical sites where least terns have continued to breed.²⁰ The Least Tern forages in the Santa Ana River and Marsh. Yet, as noted in Section 1.D., the Army Corps' Environmental Assessment for the Marsh Habitat Management Plan found that the California Least Tern has declined primarily because of human disturbance to its sandy beach nesting habitat.

The California Parks Department notified the County that due to the proximity of the River Mouth, dogs at this location “will directly impact” State Park operations and management, especially its mandate to protect sensitive natural resources at the adjacent Huntington State Beach, which includes the California Least Tern Natural Preserve. (Parks Letter, **Exhibit H.**)

The presence of unleashed dogs and illegal drones have had documented deleterious impacts on other nearby least tern nesting colonies, including inducement of the least tern to abandon their eggs, resulting in take of the species under both the ESA and CESA.²¹ The County's deliberate nonenforcement of its off-leash and trespassing ordinances and allowance of a de facto dog beach in the River Mouth, is resulting in harassment and take of the endangered Western Snowy Plover and California Least Tern in violation of the Federal Endangered Species Act and California Endangered Species Act.

III. The County's Allowance of a De Facto Dog Park Violates the Coastal Act.

The County's deliberate inaction violates the Coastal Act, specifically the Coastal Act's protections of wildlife and environmentally sensitive habitat areas (“ESHAs”). The River drains the largest watershed basin in Southern California, traversing 96 miles to completion in Orange County, between Newport Beach and Huntington Beach, at the Santa Ana River Mouth. The River Mouth is at the center of a 1,300-acre ecosystem in the Lower Santa Ana River. This ecologically valuable area is an estuary—itsself ESHA—located between dune ESHA and critical habitat for the Western Snowy Plovers and California Least Tern, also ESHA. (Ex. A, p. 5.)

A. The County's Non-Enforcement Harms Various Environmentally Sensitive Habitat Areas.

The Coastal Act requires special protection of environmentally sensitive habitat area. Section 30240 mandates that ESHA “shall be protected against any significant disruption of habitat values,” restricts development in ESHA to resource dependent uses, and requires that

¹⁹<https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/COMPLETE%20SAR%20Marsh%20HMP%20EA%204-25-19.pdf?ver=2019-04-25-184114-380>, p. 12 (p. 14 of PDF).

²⁰ <https://documents.coastal.ca.gov/reports/2018/11/Th11a/Th11a-11-2018-exhibits.pdf>. (p. 30.)

²¹ <https://www.pe.com/2021/06/03/illegal-drone-scars-terns-which-abandon-3000-eggs-on-bolsa-chica-nesting-island/> [Drones and off-leash dogs are a growing threat to birds at the Huntington Beach reserve”]. Orange County Coastkeeper further describes why dogs inflict harm on these endangered birds, explaining that both species have existed in the River Mouth for tens of thousands of years, and have evolved to respond to threats from coyotes by escaping the area. Thousands of generations of shorebirds respond to coyotes by fleeing and will abandon their nests and even their chicks. Dogs greatly resemble coyotes. (<https://www.coastkeeper.org/monitoring/#sar>.)

development adjacent to ESHA be compatible with the continuance of the adjacent ESHA. The Coastal Act defines ESHA as: “[a]ny area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.” (Section 30107.5). Rare plant communities and habitats for protected wildlife are usually considered to be ESHA. (Letter from CCC Enforcement, Ex. G, Attachment 1, pp. 1-2.)

The River Mouth itself is ESHA. When the County considered formalizing the de facto dog park in the River Mouth, the California Coastal Commission (“CCC”) warned that doing so would impact foraging and roosting habitats of the Least Tern and Western Snowy Plover, as well as the breeding habitat of the Least Tern, defining both species as “key to the marine ecosystem.” (CCC Letter, **Exhibit I**, p. 2.) The CCC emphasized that the River Mouth itself is important foraging habitat for the Tern and is deemed ESHA. (*Ibid.*) The Regional Water Quality Control Board also commented that the River Mouth is a “RARE beneficial use designation” in its Basin Plan because it is known habitat for the endangered Western Snowy Plovers and Least Tern that warrants protection. (Ex. B.) The County’s non-enforcement results in harm to this ESHA, as demonstrated throughout this letter. In 2018, environmental groups met with wildlife agencies and County representatives, and requested that the City and County establish an “avian protection area” or “special protection zone.” (Ex. G, p. 9.) During this meeting, the group witnessed disruptive trespassing, off-leash dogs, and ultralights in the River Mouth. (*Id.* at p. 10.)

Further, various ESHAs exist immediately adjacent to the River Mouth. The CCC formally determined in a 2006 enforcement action that the dunes on the south side of the River constitute ESHA, as dune habitat is a sensitive plant community,²² and these dunes are utilized by the California Least Tern. (Ex. G, Att. 1, p. 2.) Section 30251 of the Coastal Act grants specific protections to dunes. The CCC required restoration of the dunes *and their preservation*. (*Ibid.*) The CCC successfully restored coastal dune habitat in 2014, and transferred responsibility over to the City of Newport to manage. (Ex. G, p. 7.) Yet, sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people, dogs, and ultralight take offs and landings. (*Id.* at p. 7, 9.) The CCC commented on the inconsistencies of a dog beach at this location with Coastal Act Section 30240, due to the proximity of this ESHA and the negative impacts from “numerous leashed and unrestrained dogs,” including dune degradation. (Ex. I, p. 2.) The County’s nonenforcement of its ordinances and encouragement of a de facto dog beach leads to harmful impacts on this restored dune ESHA.

There also exists California Least Tern habitat immediately adjacent to the River Mouth in the Huntington State Beach Least Tern Natural Preserve, as discussed in Section II. The Preserve is also ESHA that is harmed from the County’s actions. (Ex. I, p. 2.)

The CCC has previously warned the City of Newport that trampling and human disturbance of ESHA constitutes development activities under the Coastal Act that require a coastal development permit and reiterated the need for increased enforcement of dog-leash laws. (Ex. G, Att.1, p. 3.) These impacts on ESHA create liability “under the Coastal Act at a

²² Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the USFWS, CDFW, and CCC. (Ex. G, Att. 1, p. 2.)

minimum” for the local jurisdiction, as they “constitute continuing violations of the Coastal Act and continuing public nuisances.” (*Ibid.*) The Coastal Act represents a “legislative declaration” that acts harming the state’s natural resources constitute a public nuisance. (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 618; *CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 318.) Due to its lease of the River Mouth from the State Lands Commission, the County (through OCFCD) is the responsible landowner and is thus liable for the continuing harm to ESHA in the River Mouth. Further, activities occurring on the County’s land is harming surrounding ESHA. This constitutes a continuing public nuisance, leaving the County liable under the Coastal Act *at a minimum*.

The CCC required the County to place signage around the River Mouth to inform the public of the trespassing and dog regulations, specifically to protect the Western Snowy Plovers and California Least Terns.²³ (See Exhibit J [photo of signs, surrounded by dogs and people].) The signage required a Coastal Development Permit that placed further conditions on the County, including provision of annual enforcement reports that detail County enforcement efforts (Staff Report, p. 5.) The CCC Staff Report detailed the County’s various Coastal Act violations, as well as CCC’s previous efforts to ensure County compliance with the Coastal Act, including sending a letter to the County on June, 12, 2019,²⁴ notifying the County of its Coastal Act violations and impacts “to sensitive bird species related to commercial dog-walking activities taking place within the mouth of the river, which is considered development under Coastal Act section 30106, and is inconsistent with the resource protection policies of the Coastal Act, including but not limited to Section 30240.” (Staff Report, p. 1.) In response to these ongoing violations, the County proposed installation of signage, and “communicated to staff that Orange County Sheriff’s presence has been increased in the area to regularly enforce these laws on a more consistent basis **and to issue citations as necessary.**” (Staff Report, p. 2, emphasis added.) This Commission Staff Report was issued in January 2020. Yet, as demonstrated in the State Lands Commission 2021 Staff Report, the OCKK Monitoring Studies, and evidence submitted herein, the County did not follow through on its promise to issue citations, and the token voluntary warnings and signs have been ineffective. (Exhibits D, E, J.)

B. The County’s Non-Enforcement Harms Marine Resources and Biological Productivity and Poses a Risk to the Public in Violation of the Coastal Act.

The Coastal Act requires protection and restoration of marine resources, as well as coastal waters and streams themselves. In particular, Section 30230 requires that “[m]arine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.” Section 30231 requires the maintenance and restoration of the biological productivity and quality of coastal waters and streams.

²³ <https://documents.coastal.ca.gov/reports/2020/7/W14c/W14c-7-2020-report.pdf> (“Staff Report”).

²⁴ *Id.* [Exhibit 6, detailing the significance of habitat at the River Mouth and the County’s exposure to liability.]

The CCC concluded that a dog beach in the River Mouth is inconsistent with the aforementioned policies of the Coastal Act, and would degrade the functioning of the area to provide habitat for marine organisms, with attendant impacts to biological productivity. (Ex. I, p. 3.) Further, the negative impacts on sensitive habitats, including degradation of dune vegetation within and adjacent to the River Mouth, impedes biological productivity and water quality of wetlands at the River Mouth. (*Ibid.*)

Finally, Section 30210 requires that public access be provided “consistent with public safety needs.” The County’s trespassing ordinances exist because of the dangers posed by the flood channel. The dog ordinances also exist for public safety reasons. Further, the site itself poses risks to its users. As discussed in Section I.B., the County’s failure to enforce its prohibitions on trespassing and dogs in the River Mouth and flood channel poses serious harm to people and dogs. The Santa Ana River suffers from contamination and runoff, as well as disease that poses risk to humans and dogs alike.²⁵

The environmental community has repeatedly identified nearby, safer, alternative locations for dog beaches that would not harm ESHA or endangered species. The County’s intentional non-enforcement of its trespassing and dog ordinances, and allowance of a de facto dog beach in the River Mouth violates the Coastal Act.

IV. Conclusion

For years, environmental groups have implored the County of Orange to enforce its ordinances that prohibit trespassing and dogs in the River Mouth. Over five years ago, the County tried to formally establish a dog beach at this location but withdrew its efforts after wildlife agencies underscored the environmental harm it would cause. Yet, the de facto dog beach still exists, and is still causing harm to endangered species and sensitive habitat, both on site and immediately surrounding the River Mouth.

We understand there is public pressure on the County to maintain a dog beach at this location. However, there exist much safer and environmentally friendly dog beaches and parks nearby for the public. The Santa Ana River Mouth is not one of them. The California State Parks Department²⁶ aptly summarizes why the County must enforce its ordinances:

Beach areas are vital ecosystems. While western snowy plovers and other shorebirds can survive and nest only in certain areas, domesticated dogs are not part of the natural beach ecosystem. Remember that there are many places where [people] can take [their] dog, but only one place—the beach—where snowy plovers can breed.

²⁵ See <https://www.ocregister.com/2020/12/02/oc-water-districts-file-massive-lawsuit-over-pfas-contaminants/> [reporting contamination of the Santa Ana River]; <https://californiaglobe.com/articles/riverside-county-officials-warn-public-about-deadly-bacteria-in-santa-ana-river/> [“Riverside County Officials Warn Public About Deadly Bacteria in Santa Ana River”]. Dogs can act as vectors for pathogens. See <https://bmcvetres.biomedcentral.com/articles/10.1186/s12917-020-02607-w>.

²⁶ https://www.parks.ca.gov/?page_id=22542.

The County and OCFCD must effectively enforce the County's ordinances, issue citations, and invest resources in a full-time ranger. Failure to do so violates the conditions of OCFCD's lease, the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act. For these reasons, we request immediate corrective action.

Sincerely,

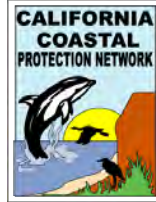


Kathryn Pettit
Douglas Carstens

cc:

Chairman Doug Chaffee, Orange County Board of Supervisors (*Fourth.District@ocgov.com*)
Vice Chairman Donald Wagner (*Donald.Wagner@ocgov.com*)
Supervisor Andrew Do (*Andrew.Do@ocgov.com*)
Supervisor Katrina Foley (*Katrina.Foley@ocgov.com*)
Supervisor Lisa Bartlett (*Lisa.Bartlett@ocgov.com*)
Leon J. Page, County of Orange, County Counsel (*leon.page@coco.ocgov.com*)
Nardy Khan, Infrastructure Programs Deputy Director, OC Public Works (*nardy.khan@ocpw.ocgov.com*)
Amanda Carr, Env. Resources Deputy Director, OC Public Works (*amanda.carr@ocpw.ocgov.com*)
Jennifer Lucchesi, Executive Officer, State Lands Commission (*Jennifer.Lucchesi@slc.ca.gov*)
Drew Simpkin, Public Land Management Specialist, State Lands Comm. (*Drew.Simpkin@slc.ca.gov*)
Benjamin Johnson, Counsel, State Lands Commission (*benjamin.johnson@slc.ca.gov*)
Jack Ainsworth, Executive Director, California Coastal Commission (*John.Ainsworth@coastal.ca.gov*)
Lisa Haage, Chief of Enforcement, California Coastal Commission (*Lisa.Haage@coastal.ca.gov*)
Andrew Willis, So. Cal. Enforcement Supervisor, Coastal Commission (*Andrew.Willis@coastal.ca.gov*)
Louise Warren, Chief Counsel, California Coastal Commission (*louise.warren@coastal.ca.gov*)
Paul Souza, Regional Director, Pacific SW Region, U.S. Fish & Wildlife Service (*paul_souza@fws.gov*)
Sandy Vissman, Wildlife Biologist, U.S. Fish & Wildlife Service (*sandy_vissman@fws.gov*)
Ed Pert, South Coast Regional Manager, Cal. Dept. of Fish & Wildlife (*Ed.Pert@wildlife.ca.gov*)
Eric Weiss, Senior Environmental Scientist, Cal. Dept. of Fish & Wildlife (*Eric.Weiss@wildlife.ca.gov*)
Assemblywoman Cottie Petrie-Norris (*assemblymember.petrie-norris@assembly.ca.gov*)

Exhibit A



July 25, 2018

Mr. Gregg Ramirez
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

SUBJECT: REVIEW OF DRAFT WESTERN SNOWY PLOVER MANAGEMENT PLAN FOR EAST BALBOA PENINSULA BEACHES NEWPORT BEACH, CALIFORNIA CDP APPLICATION NOS. 5-17-0465 AND 5-17-0515

Dear Mr. Ramirez,

On June 20, 2018, the City of Newport Beach (City) held an open house seeking public input into a Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches, Newport Beach, California, prepared by the consulting firm of Dudek. The City's draft plan covers a limited part of the Balboa Peninsula that the US Fish & Wildlife Service (USFWS) designates as critical habitat for the Western Snowy Plover (WSP). The City's plan does not address various aspects of dune/beach management in the

City that represent ongoing violations of the Coastal Act. This letter provides peer review of the City's draft WSP management plan by biologist Robert Hamilton, President of Hamilton Biological, Inc. To provide relevant context for the peer-review comments, the letter begins with a description of the range of beach and dune management issues for which the City appears to be in violation of the Coastal Act and other relevant resource-protection regulations.

This letter reiterates points made in Mr. Hamilton's letter to Mr. Dave Kiff of the City, dated September 17, 2017, and in multiple presentations by Mr. Hamilton to the California Coastal Commission (CCC) during hearings in 2017 and 2018. Presentations to the CCC addressing many of the same issues were also made by Sea & Sage Audubon, the Orange County chapter of the California Native Plant Society, the Sierra Club OC Conservation Committee, the Banning Ranch Conservancy, OC Habitats, and attorney Mark Massara. We all understand that no means exist to quickly and easily resolve long-standing conflicts involving such factors as coastal access; coastal recreation with dogs and ultralight aircraft; waste management; encroachment of private land uses into public open space; and protection of sensitive resources, but the City's lack of response to these issues – outside of a limited area that the City deems appropriate – has been unacceptable. The City's effort to focus everyone's attention on one small part of the Balboa Peninsula, and to propose only modest conservation efforts in that area, would sweep all other beach/dune management issues under the carpet for years to come. Such a grossly inadequate and violative approach to management of sensitive coastal resources cannot be allowed to succeed if the Coastal Act is to remain a credible regulatory policy constraining governmental agencies and private land owners alike.

REGULATIONS APPLICABLE TO BEACH, DUNE, AND ESTUARINE HABITATS

Page 4.1 of the City's certified Local Coastal Program (LCP) states:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. **These include southern dune scrub...** [emphasis added]

Page 4.42 of the LCP states:

In Newport Beach, southern coastal foredune habitat extends southwest along the ocean side of the Balboa Peninsula from 10th Street to the tip of the peninsula.

At the City's first open house to discuss relevant beach/dune management issues, on September 14, 2017, botanist Ron Vanderhoff testified about his observations of rare plants in dune habitats on the Balboa Peninsula, and requested effective management of all dune areas to maintain and restore their value as limited and unique habitats for rare plants. As stated on Page 4.42 of the City's LCP:

Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Coastal Commission, or local agencies.

Section 30240 of the Coastal Act restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA. To achieve compliance with this requirement, the City's LCP includes Policy 4.1.1-10:

Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. **Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible.** Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance. [emphasis added]

To date, the City and CCC have made no effort to establish the required minimum 50-foot buffer around any area of beach/dune ESHA. Rather, people and pets have generally been afforded unfettered access to all beach and dune areas, resulting in long-term, ongoing degradation of dune ESHA, and harassment (i.e., "take") of WSPs in their traditional wintering areas, in violation of Section 30240 (and the federal Endangered Species Act, as discussed subsequently).

Where the City has provided protective fencing to a limited area of dunes — between D and E Streets on the Balboa Peninsula — the fence itself lacked a Coastal Development Permit (CDP), was established within ESHA and/or the required ESHA buffer, and its dimensions may have been smaller than optimal for the WSP (the species targeted for protection). Residents at the City open house on September 14, 2017, testified that the design of the enclosures actually encouraged some people to run dogs off-leash within them. As discussed subsequently in this letter, the City now proposes to remove the fencing and to replace it with bollards and signage, as well as exotic landscaping along the margins of concrete walkways that were constructed through the dune ESHA in recent years without completing the required CDP review process.

Pages 4.42-4.43 of the LCP state:

Ornamental and non-native species, likely introduced from the adjacent residences, dominate much of the southern coastal foredune habitat. Numerous residences use the beach area as an extension of their backyards. Some residents have planted and irrigated the ornamental species, which have replaced native species in these areas. Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.

In an effort to offset this ongoing violation of the Coastal Act, LCP Policy 4.5.1-1 identifies as a sort of remedy "the removal of exotic vegetation and the restoration of native vegetation in dune habitat." Setting aside the illegality of attempting to mitigate impacts to ESHA by restoring a different area (cf. *Bolsa Chica Land Trust v. Superior Court*), it appears that no such exotic removal/dune restoration has occurred in a systematic way commensurate with the level of impact from numerous encroachments upon dune habitats in Newport Beach. Thus, the unpermitted encroachment has continued and ex-

panded, impacting the dune ecosystem in many parts of Newport Beach. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers “to prevent impacts that would significantly degrade the adjacent ESHA.” In practice, the City does not do this, and thus violates its own LCP and the Coastal Act.

The degradation of dune habitat has been striking near the mouth of the Santa Ana River – a formally designated ESHA that CCC Statewide Enforcement Supervisor Aaron McClendon recognized as having been successfully restored to native dune scrub habitat four years ago. In a letter to the respondents dated October 15, 2014 (Subject: “Final Monitoring Plan – Compliance with Consent Cease and Desist Order CCC- 06-CD-01 and Consent Restoration Order CCC-06-RO-01”), Mr. McClendon described this restoration effort as “one of the most successful we have seen” and lauded the Newport Beach residents for having “turned a difficult situation into a very positive outcome, enhancing some of the rarest coastal habitats on the southern California coast.” At that point, under the Coastal Act, the City became legally responsible to manage the restored dune ESHA near the river mouth consistent with its LCP. Having made no serious effort to do so, dune ESHA in this area has become visibly degraded. Non-native, invasive plant species are becoming re-established in this area, and sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people and dogs.

Section 7.04.020 of the City of Newport Beach Municipal Code requires all dogs to be leashed at all times, and Section 7.04.030 prohibits dogs on beaches from 10:00 a.m. to 4:30 p.m. year-round and requires that owners clean up their dogs’ feces.

The County’s web page, <http://www.ocpetinfo.com/services/petlaws>, summarizes relevant parts of the Orange County Codified Ordinance (OCCO) as follows:

4-1-45: “No person owning or having charge, care, custody, or control of any dog shall cause or permit, either willfully or through failure to exercise due care or control, any such dog to be upon any public property unless such dog be restrained by a substantial chain, or leash not exceeding six (6) feet in length, and is under the charge of a person competent to exercise care, custody, and control over such dog.” You must keep your dog leashed anytime your dog is off your property. Your dog must be on a leash no longer than six (6) feet in length and in the care of a competent adult. There are designated “dog parks” throughout Orange County that lawfully allow the absence of a leash.

4-1-46: “No person having the charge of any dog, except a guide dog or service dog, shall permit said dog to be under any circumstances within public school property, certain county parks, or any public beach”. It is unlawful to be on any public school property with your dog. Setting your dog loose to play, even within a fenced area, at a public school is a direct violation of this ordinance. See OC Parks for county parks that permit dogs that are leashed.

When both the City and the County of Orange decided, several years ago, to effectively stop enforcing these local ordinances near the river mouth, local dog-owners responded

by turning this ecologically valuable area – an estuary located between dune ESHA and critical habitat for the WSP and California Least Tern (also clearly ESHA) – into a *de facto* unleashed dog beach. This, despite prohibitions against such activities contained in the Coastal Act and various relevant local ordinances.

In 2016, the County attempted to formally designate the Santa Ana River mouth as a “dog beach” through preparation of an Initial Study/Negative Declaration, but received extensive substantive comments submitted by the CCC, USFWS, several respected conservation organizations, and local residents, demonstrating the destructiveness of this policy in an environmentally sensitive area that many public and private groups have spent millions of dollars and thousands of hours restoring and maintaining for its ecological values. Rather than taking the information on board and working toward a legal and amicable solution to a difficult problem, the County tabled consideration of that CEQA document and continued allowing the illegal use of the river estuary. The County refuses to partner with the City to enact enforcement of its ordinances in the River Jetties area, despite ongoing outreach from the environmental community, and has gone as far as to allow the media (including extensive social media) to promote this *de facto* “dog beach” without any comment.

At the open house on September 14, 2017, several speakers requested that the City and County work together to resolve this ongoing violation. More than eight months later, on June 4, 2018, an on-site meeting was convened at the River Jetties, attended by you, additional representatives from the City, County representatives including Shane Silsby and Colby Cataldi, enforcement officer Jordan Sanchez of the California Coastal Commission, wildlife biologist Sandy Vissman of the USFWS, Penny Elia representing the Sierra Club OC Conservation Committee, Susan Sheakley representing Sea & Sage Audubon, attorney Mark Massara, and Mr. Hamilton. Clearly, nothing had changed since the previous fall with respect to masses of people bringing their dogs to the river estuary via Newport Beach. While discussing the issue, we all observed numerous people running unleashed dogs in the river mouth, and the City animal control personnel attending the meeting spent much of their time turning several more people away, despite our conspicuous presence and despite signage informing the public of the illegality of bringing dogs into that area. At the meeting, Ms. Vissman reiterated her standing request that the City and County establish an “avian protection area” or “special protection zone” encompassing the ecologically important river estuary and adjacent dune habitats as we stood next to dune ESHA that was being trampled by off-leash dogs and their owners.

At the meeting, representatives of the City and County once again acknowledged the problem, but rather than attempting to work toward a solution that everyone could live with, including the ESHA and listed species, you and Mr. Silsby pointed out that local elected representatives consider the prospect of prohibiting dogs from the area in and around the river estuary – in accordance with both City and County ordinances, as well as the Coastal Act and the state and federal Endangered Species Acts – to be polit-

ically unacceptable, because dog owners represent a more potent lobbying force compared with advocates of environmental protection in compliance with local, state, and federal laws.

As you know, the environmental community has repeatedly identified alternative locations for dog beaches in Newport Beach that would not harm ESHA or listed species, and that would be completely acceptable to the environmental community, but to date neither City nor County has shown any interest in exploring the potential feasibility of such a solution. The only consideration that carries any weight is that dog-owners have loudly expressed their intent to keep running their dogs in the dunes and river estuary, regardless of any law, because they have come to expect deference from all authorities in this specific area. Therefore, the only remedies that appear to be possible involve a state or federal agency stepping in and enforcing ongoing violations of the Coastal Act and/or Endangered Species Act, or some environmental organization or private party bringing legal action. If you are aware of another feasible avenue for protecting the estuary and adjacent ESHA, as required by multiple layers of legal requirements, please let us know.

During the process of reviewing beach/dune management issues, Mr. Hamilton inspected two decades of aerial imagery and observed the incremental construction of 22 concrete walkways extending from the ends of streets south across the beach. Many of these impact traditional WSP wintering locations, coastal dunes, and/or areas that should be identified as ESHA buffers. See Exhibits 1 and 2, below.

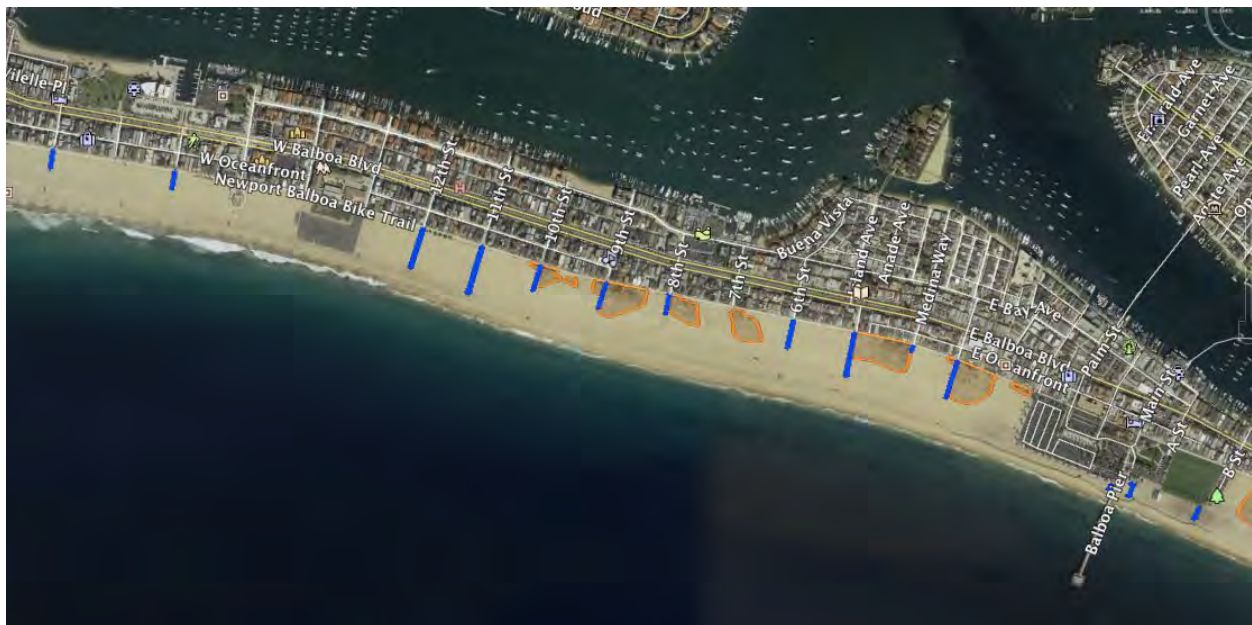


Exhibit 1, showing in dark blue the locations of 14 walkways that extend through dune and/or beach habitats, between 18th Street and B Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.



Exhibit 2, showing in dark blue the locations of eight walkways that extend through dune and/or beach habitats between C Street and M Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.

One walkway, extending more than 300 feet south from the end of E Street, was specifically identified by Tom Ryan and colleagues¹ as being potentially deleterious to the population of WSP that traditionally winters in that area. Page 15 of their report stated:

Declines were detected between 2014 and 2017 at Huntington State Beach and the Balboa Peninsula (Table 2). We observed the largest decline on the Balboa Peninsula (Table 2) following the installation of a walkway on the beach that was placed within the area traditionally used by roosting plovers.

Page 27 stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has continued into 2015-16. Additionally, this beach became narrower during the fall months

¹ Thomas Ryan, Stacey Vigallon, Lucien Plauzoles, Cheryl Egger, Susan Sheakley, Ross Griswold, and Bettina Eastman. 2017. *The Western Snowy Plover in Los Angeles and Orange Counties, California: September 2014 to February 2017*. Report dated February 24, 2017, prepared for State of California, Department of Fish and Wildlife, San Diego, CA.

due to beach erosion from late summer/fall hurricanes in the central Eastern Pacific. This is a broad sandy beach, with residential homes backing it. It is very popular with beachgoers during the summer months. It also supports a 1.24 hectare dune restoration area where a pair of plovers has nested in recent years. This is the only known beach nesting Snowy Plover pair on the mainland in LAC or OC, although they did not nest here in 2014, 2015 or 2016.

The City cooperates with Mr. Ryan and his research colleagues, and receives these reports, but the City apparently has not taken any action to evaluate the validity of the concerns expressed in multiple reports that identify the E Street walkway as a potentially important contributor to disturbance of plovers that traditionally roost, and sometimes nest, in the affected area. The local WSP population declined sharply immediately after this walkway was built, and the plovers have not nested on the Balboa Peninsula since it was installed, despite the fencing.

In various venues, City staff has been questioned as to whether *any* of the 22 walkways built by the City were approved by the CCC through the CDP application process, or subjected to any kind of environmental analysis prior to construction, as required under the Coastal Act. By all accounts to date, the walkways were installed without going through any sort of public review process, despite many of them being located within ESHA, ESHA buffers, and/or critical habitat for the WSP. It may be that the walkways were built, in part, to discourage people and pets from wandering through areas of dune, and to increase accessibility to the ocean for people with disabilities, but this would not absolve the City from the requirement to conduct a formal environmental impact analysis involving public review. At minimum, walkways through sensitive areas should be subject to post-construction ecological monitoring to evaluate their effects upon sensitive natural resources. Rather than creating paved pathways for people and their pets to walk into the heart of WSP critical habitat and Special Protection Zones, a more protective approach would be to actively discourage people from walking through the most sensitive dune areas, and through the required 50-foot ESHA buffers. Nothing in the Coastal Act, or the Americans with Disabilities Act, allows local governments to sidestep normal environmental review processes in service to an overriding purpose of facilitating public access into environmentally sensitive areas.

During Mr. Hamilton's review of aerial imagery, he observed that the limits of apparent dune topography and vegetation have generally remained stable during the past two decades. Between October 2007 and December 2017, however, loss of dunes and spread of exotic iceplant or other non-native invasive vegetation apparently took place. Please see Exhibits 3 and 4, on the next page.



Exhibits 3 (above, October 22, 2007) and Exhibit 4 (below, December 3, 2017), showing in red the apparent loss of a dune and the spread of iceplant and/or other invasive, exotic vegetation, between G and I Streets on the Balboa Peninsula, over the course of a decade. Source: Google Earth Pro.



The Western Snowy Plover is listed as a threatened species by the federal government and a California Species of Special Concern. A Recovery Plan was completed by the USFWS in 2007. Newport Beach lies within Recovery Unit 6, whose goals include protecting wintering plovers and doubling the breeding population from 243 (2005-2009 average) to 500 breeding individuals. The species is reportedly nesting in Huntington Beach this year, and has intermittently nested on dunes on the Balboa Peninsula. WSP breeding populations have responded positively and swiftly to recent improvements in management practices at historic breeding locations in Santa Barbara and Los Angeles counties. Were the City's dunes to be managed appropriately, consistent with the City's

LCP and with the federal WSP Recovery Plan, it is reasonable to expect that the species would nest at least semi-regularly, if not regularly, on the Balboa Peninsula. Any management plan that does not have this as a primary objective, consistent with the Recovery Plan goals, is not a serious plan designed to contribute toward the species' recovery.

Page 8 of the report by Tom Ryan and colleagues, for the years 2014 to 2017, identifies the following threats to WSP, both breeding and non-breeding:

1. A lack of public awareness of the presence of Snowy Plover roosts and a lack of information about how to avoid disturbing the plovers while enjoying the beach;
2. Lack of training and information on locations of Snowy Plover roosts among some staff that drive and operate equipment on the beaches;
3. Regular disturbance, removal of foraging resources, and occasional mortality resulting from beach grooming, operation of heavy equipment, and regular vehicular traffic;
4. Regular disturbance and occasional mortality from off-leash dogs;
5. Beach management practices that remove kelp and associated arthropods;
6. Recreational activities and occasional large events that flush plovers from roosts and leave large amounts of refuse near roosts; and
7. Native and non-native predators drawn in unusually large concentrations to human refuse on and near the beach and pet food placed outside at nearby residences.

Any comprehensive management plan for beaches and dunes regularly utilized by WSP would have to thoroughly and intelligently address each of these important resource-management issues, both within the designated critical habitat area and in all other areas of Newport Beach where WSP's are known to congregate.

The USFWS administers the Endangered Species Act of 1973. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define "harm" to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. "Harassment" is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

Exemptions to the prohibitions against "take" in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a federal agency and may affect a listed species, the Federal agency must consult with the Service, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a federal agency, but may result in the "take" of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act.

To qualify for the permit, a project proponent must submit an application to the Service together with a Habitat Conservation Plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. At the City's open house on September 14, 2017, Sandy Vissman of the USFWS suggested that preparation of an HCP would be appropriate to cover incidental "take" of WSP due to ongoing activities and routine beach and dune management operations undertaken by the City on the Balboa Peninsula. Actions requiring a permit may include beach driving, mechanical raking (beach grooming), recreational use, presence of dogs or other domestic animals, and human refuse that attracts predators of the WSP.

SITING OF DOG BEACH

Managing City beaches and dunes consistent with the LCP involves balancing environmental protection requirements against the reasonable expectations of tourists and local beachgoers. Any successful comprehensive planning approach will need to identify extensive areas that can be managed for the exclusive use of humans and their pets. Fortunately, Newport Beach, with its miles of beaches that do not support dunes, traditional WSP roosting or nesting areas, or other sensitive biological resources, should be able to achieve this balance.

As a start, we have identified two other locations that the City should evaluate. Both are located near large parking lots, and neither appears to conflict with provisions of the City's LCP or those of the Coastal Act. One potentially suitable area is at Corona del Mar State Beach (Big Corona Beach), the eastern half of which appears to be well suited to serving as a dog beach, and the other is the expanse of beach near the base of Newport Pier. Please see Exhibits 5 and 6, below and on the next page.

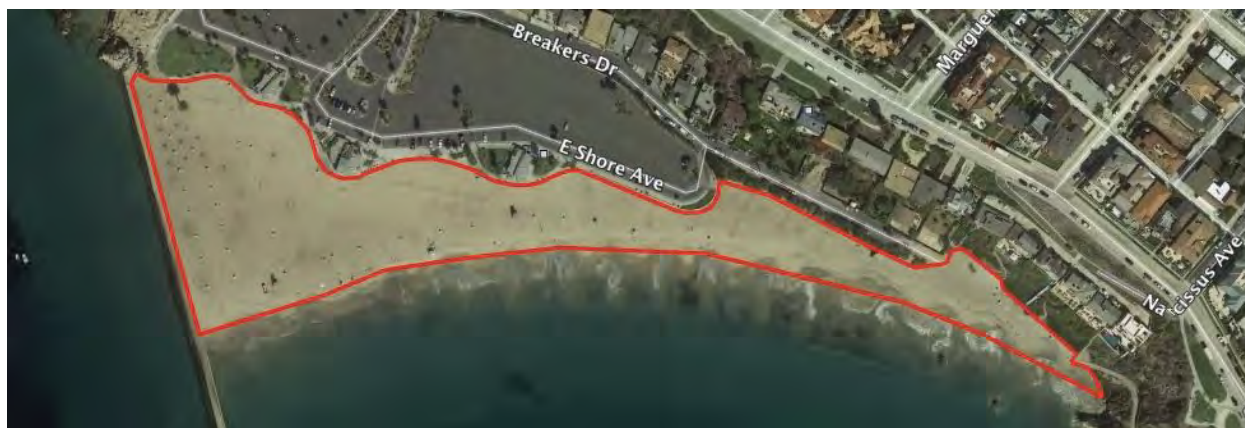


Exhibit 5, showing Corona del Mar State Beach (Big Corona Beach). Located on the eastern side of Newport Bay, the eastern part of this beach appears well-suited for designation as a dog beach. The area has ample parking and lacks potentially sensitive biological resources. Source: Google Earth Pro.



Exhibit 6, showing the beach near Newport Pier. This area also appears to be well-suited for use as a dog beach, with ample parking and low ecological sensitivity. Source: Google Earth Pro.

Regardless of whether either of these areas are ultimately determined to be suitable for designation as dog beaches, Newport Beach has enough sandy beaches not located within or adjacent to ESHA to accommodate people and their pets without degrading any areas that satisfy ESHA criteria under the terms of the City's LCP and the Coastal Act.

EXAMPLES OF APPROPRIATE CONSERVATION PLANNING

For reasons discussed herein, achieving compliance with the California Coastal Act and federal Endangered Species Act in Newport Beach will require a comprehensive and science-based approach to beach and dune management. Areas that qualify as ESHA, ESHA buffer, or that serve as traditional roosting or nesting habitat for the federally threatened WSP, must be managed in accordance with the applicable laws.

With regard to the Coastal Act, CCC staff has already provided the City with a blueprint for achieving compliance in the form of the comprehensive beach/dune management plan that the City of Pacifica developed in 2014 to obtain a CDP for installation of 1,300 feet of year-round fencing, 930 feet of seasonal fencing, and associated interpretive signs at Pacifica State Beach. The CCC staff provided specific direction to the City to use the City of Pacifica management plan as a template for what is expected in Newport Beach during a meeting on May 19, 2017. Minutes of this meeting are on file with City Manager Dave Kiff.

With regard to the federal Endangered Species Act, the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010, a document available online at the following address:

https://www.fws.gov/oregonfwo/FieldOffices/Newport/WesternSnowyPlover/Documents/WSP-HCP_08182010.pdf

Mr. Hamilton recommended that the City and its consultant, Dudek, review these plans as potential starting points upon which to develop a comprehensive dune/beach management plan that would comply with relevant precedents in the application of the Coastal Act and federal Endangered Species Act. The City declined, and instead produced the Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches. The following section provides Mr. Hamilton's peer-review comments on the Draft Plan.

REVIEW OF CITY'S DRAFT WSP MANAGEMENT PLAN

The Draft Plan, prepared by Dudek with consulting biologist John Konecny, fails to implement the request made by Andrew Willis of Coastal staff, in a letter to the City dated September 11, 2017 (attached), for a "comprehensive" plan that would address beach/dune/WSP management issues on all City beaches, from River Jetties to the end of the Balboa Peninsula. In particular, the City (together with the County of Orange) refuses to meaningfully engage with the issue of degradation of ESHA at River Jetties and the Santa Ana River estuary. Instead, as documented in this letter and in other venues, these agencies have allowed this area to become a *de facto* "dog beach."

Page 18 of the Draft Plan states, "In June 2011, the City installed approximately 1,300 linear feet of fencing around approximately 2.1 acres of habitat between the walkway fingers of D and E Streets." This is factually incorrect, as the E Street walkway did not exist until 2014 (the D Street walkway was built in 2002/2003). Page 27 of the previously cited report by Ryan and colleagues stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has continued into 2015-16.

Thus, the WSP fencing installed in 2011 was not "between the walkway fingers of D and E Streets," as only one of the walkways existed at that time (and, apparently, neither walkway was built with the required CDP).

The Coastal Act does not prioritize the facilitation of beach access, for disabled persons or anyone else, at the expense of ESHA and protection of listed species. Building concrete walkways into the middle of WSP critical habitat without a CDP is plainly illegal.

If this glaring issue can be successfully glossed over in the WSP Management Plan, and in the City's application for a CDP for the unpermitted fence, the entire process will lack legitimacy.

The Draft Plan does not mention the Special Protection Zones (SPZ's) for WSP that the USFWS recognizes near the tip of the Balboa Peninsula. See Exhibit 7, below.



Exhibit 7. Aerial showing habitat areas in orange, WSP critical habitat in light blue, and WSP Special Protection Zones in yellow. Source: Google Earth Pro.

Tom Ryan and colleagues have observed that, at least during some winters, WSP congregate in this area to a greater extent than they do within the designated critical habitat area. The Draft Plan should fully discuss the SPZ's and, in compliance with the Coastal Act, identify them as ESHA.

The exhibit on Page 32 of the Draft Plan — Lifeguard Vehicle Access Map — shows only the designated critical habitat area. The SPZ to the southeast is not shown. Table 3 on Page 35 of the Draft Plan allows for ongoing wrack removal, sand grooming, sand removal, and berm construction in this SPZ “with monitoring.” No signage, bollards, or other tangible measures appear to apply to the SPZ. This half-measure seems likely to result in the southeastern SPZ continuing to be groomed for beachgoers rather than maintained and protected as potentially suitable nesting habitat for the WSP.

Page 37 of the Draft Plan states:

Regulatory signage will also have a greater focus on the illegal act of “taking” of a protected species, as defined by the ESA, and the consequences to this violation. Interpretative signage in the critical habitat area will also help support regulatory signage, reinforce the importance of compliance and educate the public as to the impacts on the WSP when posted rules are violated.

It has been demonstrated that signage has no effect upon people and their dogs “taking” listed species at the River Jetties/Santa Ana River estuary. As discussed previously in these comments, the public has illegally converted the area into a “dog beach” with both the City’s and County’s knowing acquiescence. Thus, the idea that people are going to be deterred by signage, or that City law enforcement will start enforcing the federal Endangered Species Act on beachgoers at the Balboa Peninsula, lacks credibility. The City refuses to enforce its own ordinance at River Jetties, and the public should not expect it to do so on the Balboa Peninsula.

It should go without saying that the WSP Management Plan should not introduce plant species not native to dunes in Orange County. Only locally native plant species of apparent value to WSP should be planted. Unfortunately, the Draft Plan calls for landscaping with non-native plants, including plants potentially harmful to plovers. For example, the exhibit on Page 39 of the Draft Plan, reproduced below as Exhibit 8, shows one of the existing, unpermitted concrete walkways, the margins of which would be lined with such species as Silver Dune Lupine (*Lupinus chamissonis*) and Sandhill Sage (*Artemisia pycnocephala*), neither of which occur in Orange County.



Exhibit 8. Conceptual exhibit from Page 39 of the Draft Plan.

Other non-native species identified for planting under the Draft Plan include Mock Heather (*Ericameria ericoides*), a shrub recorded only once in Orange County, along the Santa Ana River near the Riverside County line. Coyote Brush (*Baccharis pilularis*) and Cliff Buckwheat (*Eriogonum parvifolium*) are shrubs native to the County, but inappropriate for planting in a plan designed to restore natural dune scrub of value to WSP. Plovers seek open ground that lacks shrubby habitat that provides cover for exotic predators, especially cats and rats.

An exhibit on Page 40 of the Draft Plan, reproduced below as Exhibit 9, shows plantings of shrubs and flowers along the sidewalk at the base of the finger walkways.

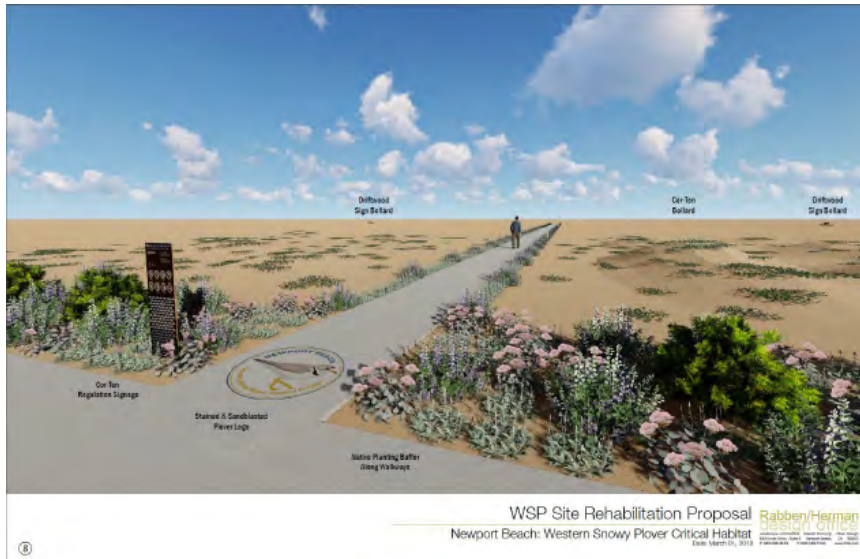


Exhibit 9. Conceptual exhibit from Page 40 of the Draft Plan.

Adjusting the habitat-restoration component to utilize only species verified as being native to Orange County dunes may be accomplished capably, and with little effort, by reviewing the attached 2015 master's thesis by Josh Weinik², which incorporates a detailed analysis of the existing native and exotic dune vegetation on the Balboa Peninsula. Please do not introduce any species not verified as being native to dunes in Newport Beach. Adding to the encroachment of landscaping into the dunes (*in the name of WSP management*) would be worse than doing nothing at all.

An exhibit on Page 41 of the Draft Plan, reproduced below as Exhibit 10, shows the City's proposed logo for the new management program:



Exhibit 10. It would be inappropriate to use a Piping Plover (with yellow legs and bill) as the logo for the program instead of a Western Snowy Plover (which has gray legs and black bill).

² Josh Brett Weinik. 2015. *A Comparative Study on the Vegetation of Western Snowy Plover Habitat Within Urban and Natural Coastal Dune Systems of Southern California*. MS Thesis, California State University, Fullerton.

The Draft Plan fails to discuss any specific plans to remove the most problematic and widespread, non-native plant that people have planted throughout large swaths of the dunes at Newport Beach, *Carpobrotus edulis*. It is unacceptable for the Draft Plan to ignore the most important invasive plant on Newport Beach.

The Draft Plan specifies a 10-mph speed limit for lifeguards and other personnel driving through the Balboa Peninsula WSP critical habitat area. This is twice as fast as allowed under the 2007 WSP Recovery Plan. Vehicles routinely flush WSP on local beaches, and sometimes even strike birds attempting to hide in the sand. In this respect, as in all others, the WSP Management Plan must be consistent with the WSP Recovery Plan.

The Draft Plan contains no mention of recent nesting of WSP in portions of Los Angeles County (Malibu Lagoon, Dockweiler Beach, Surfrider Beach), where WSP had not been found nesting for 70 years, but which the birds have quickly recolonized after only a few years of serious protection. The Draft Plan fails to note that, in 2018, Snowy Plovers nested on the Huntington Beach side of the Santa Ana River estuary. In light of this current positive trend in recolonization of southland beaches, recolonization of the Balboa Peninsula by nesting WSP is a highly attainable goal. Indeed, with adequate protection of ESHA and ESHA buffers in and around the estuary, plovers could also nest in the dunes at River Jetties. Yet the City refuses to provide any such protection to dune ESHA or the required buffers, in violation of its LCP and the Coastal Act.

To allow for the possibility of determining the success or failure of the WSP management effort, the plan must establish appropriate goals and metrics. Otherwise, the City will have no way of determining whether the management approach is having the desired results. The Plan should include an adaptive management component, so that managers will have cues for when to change course in order to meet the Plan's goals. For example, in all areas where management actions are initiated or changed from current practice, biologists should measure usage of the area by WSP and other native wildlife before and after the change in management. This will allow the City and others to understand which actions are having positive results and which actions may require further consideration.

On the Balboa Peninsula, a goal of the Plan should be the establishment at least a small WSP nesting population.

At River Jetties, a goal of the Plan should be the elimination of disturbance by dogs and people, both in the dunes and in the river estuary.

CONCLUSIONS AND RECOMMENDATIONS

The City's Draft WSP Management Plan represents an unambitious and misdirected effort that seeks to achieve minimal protection of a limited part of the Balboa Peninsula. The 2007 Recovery Plan calls for doubling the WSP nesting population in the Recovery Unit that includes Newport Beach. Plovers have nested on the Balboa Peninsula within the last decade, and the species has been recolonizing many beaches in southern California in response to increased protection from human disturbance. And yet, the Draft Plan treats nesting by WSP as only a possible side-effect of limited management actions directed mainly toward wintering plovers. The Draft Plan focuses most of its management recommendations on the smallest area possible – the limited area of designated WSP Critical Habitat. The following statement, on page 36 of the Draft Plan, crystallizes the City's level of commitment to meaningful change in beach/dune management: "All existing beach recreation activities will be allowed without restrictions." Propping up the status quo to the greatest extent feasible will not protect dune ESHA or manage the local WSP population in compliance with the Coastal Act and the federal Endangered Species Act.

The City's poor record of policing beachgoers – at River Jetties and in other sensitive habitat areas – does not promote optimism that implementing a Management Plan reliant upon signage and "symbolic fencing" will achieve even the modest goals set forth in the Draft Plan, let alone the attainable and appropriate goal of recolonization of Newport Beach by nesting plovers.

Those aspects of the Draft Plan involving introduction of shrubs and other plants not native to the dune ecosystem of the Balboa Peninsula would be more ecologically damaging than doing nothing at all. In compliance with the City's LCP and the Coastal Act, any planting undertaken within dune ESHA or ESHA buffers must take the form of ecological restoration – promoting the establishment of low-growing herbaceous species known to be native to dunes in Newport Beach – not shrubby landscaping intended to satisfy the aesthetic preferences of local residents and City officials.

The City's concrete walkways into and through dune ESHA, ESHA buffers, and WSP critical habitat were built without the required CDP's, and are therefore illegal. At least one of these walkways, at E Street, was specifically identified by WSP biologists as having potentially impacted the wintering flock of WSP on the Balboa Peninsula, due to increased human disturbance, shortly after it was installed four years ago. It seems clear that at least some of these walkways have greater potential for causing ecological damage than does the unpermitted WSP protective fencing that prompted preparation of the Draft WSP Management Plan. To achieve compliance with the City's LCP and the Coastal Act, all concrete walkways passing through identified ESHA and/or ESHA buffers must obtain after-the-fact CDP's from the Coastal Commission. By following the required review process, it may become clear that some of the walkways – those that funnel people into areas with greatest suitability for nesting by WSP – ought to be removed entirely.

In order for the final plan to have potential to achieve worthwhile and measurable conservation achievements, the plan's authors must develop well-considered goals and metrics within an adaptive management framework.

As discussed in these comments, CCC staff provided the City with a blueprint for achieving compliance, in the form of the City of Pacifica's 2014 comprehensive beach/dune management plan. And the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010 that the City and its consultants may look to for further relevant guidance. Furthermore, USFWS has provided the City with ample direction on how to properly prepare a comprehensive management plan (see attachments from USFWS). The City should carefully consider successful approaches that local governments elsewhere along the Pacific Coast have taken to achieve positive outcomes for people, rare species, and threatened coastal ecosystems.

Thank you for the opportunity to review the City's Draft WSP Management Plan.

Sincerely,



Robert A. Hamilton, President
Hamilton Biological, Inc.

Andrea Jones
Director of Bird Preservation
Audubon California

Travis Longcore, Ph.D.
Conservation Chair
Los Angeles Audubon Society

Susan Sheakley
Conservation Chair
Sea & Sage Audubon Society

Scott Thomas
Conservation, Special Projects
Sea & Sage Audubon Society

Terry Welsh, M.D.
President
Banning Ranch Conservancy

Susan Jordan
Executive Director
California Coastal Protection Network

Celia Kutcher
Conservation Chair
OC Chapter California
Native Plant Society

Garry Brown
Founder & President
Orange County Coastkeeper
Inland Empire Waterkeeper

Dan Silver
Executive Director
Endangered Habitats League

Mike Wellborn
President
Friends of Harbors, Beaches
and Parks

Michelle Gastil
Banning Ranch Task Force
Sierra Club

Penny Elia
OC Conservation Committee
Sierra Club

Conner Everts
Executive Director
Southern California
Watershed Alliance

Marko Popovich
President
Still Protecting Our Newport

Jack Eidt
Director
Wild Heritage Planners

Attached: • September 11, 2017 letter from Andrew Willis, CCC Enforcement
• Three letters from USFWS dated 1-9-2016, 2-16-2017, 4-10-2018
• Josh Brett Weinik. 2015. *A Comparative Study on the Vegetation of Western Snowy Plover Habitat Within Urban and Natural Coastal Dune Systems of Southern California*. MS Thesis, California State University, Fullerton.

Copies to: California Coastal Commissioners; Jack Ainsworth, CCC; Lisa Haage, CCC; Aaron McClendon, CCC; Andrew Willis, CCC; Liliana Roman, CCC; Karl Schwing, CCC; Charles Posner, CCC; Jordan Sanchez, CCC; Laurie Koteen, CCC; Jonna Engel, CCC; Sandy Vissman, USFWS; Hans Sin, CDFW; Erinn Wilson, CDFW; Lana Nguyen, California State Parks; Mark Massara; Tom Ryan; Josh Weinik; Christine Whitcraft; Michelle Clemente.

Exhibit B

From: Robertson, Glenn@Waterboards [mailto:Glenn.Robertson@waterboards.ca.gov]
Sent: Wednesday, December 21, 2016 6:19 PM
To: Uzo Diribe, Chris
Cc: Cross, Wanda@Waterboards
Subject: Negative Declaration, Orange County Code of Ordinance Proposed Amendment (Dog Beach), SAR Tidal Prism

To Chris Uzo-Diribe, Orange County Public Works/OC Development Service:

Regional Board staff submit the following comments regarding the Orange County Public Works' proposal for a dog beach/dog park at the Santa Ana River mouth:

We believe that a greater probability of interface and disturbance than the project's Negative Declaration (ND) indicates will occur between dogs (whether during proposed leashed or unleashed periods) and the federally threatened western snowy plover and endangered California least tern, due to the birds' presence and periods of occupation overlap during most of the 12-month period at this exact location. The proposed dog beach location is identified with a RARE beneficial use designation in the Regional Board's Water Quality Control Plan of the Santa Ana River Basin (Basin Plan) because it is a known habitat area for the birds, and there is a high potential for the plover to overwinter at this unincorporated site (located between the City of Newport Beach and Huntington State Beach), and for the least tern to expand beyond the adjacent recognized nesting area in Huntington State Beach (as observed by the CAC). As such, the location warrants protection.

Staff disagrees that the Orange County Code of Ordinances Section 4-1-45 (restraint of dogs) should be amended to relax the restraining of dogs to allow "no leash" from October through February. This will legitimize the dog-walking local residents currently practice, which is currently illegal.

Board staff note that a dog beach already exists in the City of Huntington Beach west of the Huntington Beach Pier at the back of the beach below a public walkway. In contrast to the proposed Santa Ana River mouth location, dog excrement and urine appears less likely to wash out to sea due to tidal or river action at this location. At any location however, residents should always be highly encouraged to pick up pet excrement so that it does not enter any waterway.

Any future dredging of the Santa Ana River terminus will be required to comply with the federal and State Endangered Species Acts as well.

Board staff suggest the County consider the possibility of transferring this unincorporated area to the State of California in order to extend Huntington State Beach to the boundary of Newport Beach to extend the protected habitat area for the federally threatened western snowy plover and endangered California least tern. We agree with California Coastal

Commission staff concerns (CAC, May 16, 2016 letter to the Orange County Board of Supervisors) that other inland or beach sites would be less problematic, and suggest possible alternative dog park sites be reviewed.

We thank Orange County staff for their consideration of our above comments.

Glenn S. Robertson
Engineering Geologist, M.S., PG
Regional Planning Programs Section, CEQA Coordinator
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501
Phone: 951-782-3259
Fax: 951-781-6288
Email: Glenn.Robertson@waterboards.ca.gov

Exhibit C

Staff Report 21

APPLICANT:

Orange County Flood Control District

PROPOSED ACTION:

Termination of a General Lease – Public Agency Use and Issuance of a General Lease – Public Agency Use and Dredging

AREA, LAND TYPE, AND LOCATION:

Sovereign land located in the Lower Santa Ana River, Orange County.

AUTHORIZED USE:

Use and maintenance of two riprap flood control jetties, one riprap dike, and maintenance dredging in the Lower Santa Ana River.

TERM:

2 years, beginning October 21, 2021.

CONSIDERATION:

The public use and benefit, with the State reserving the right at any time to set a monetary rent if the Commission finds such action to be in the State's best interests.

SPECIFIC LEASE PROVISIONS:

- County Ordinances.
 - Lessor and Lessee acknowledge that the leased area is public, sovereign land within the territorial boundaries of the County of Orange and within the jurisdiction of the Orange County Flood Control District and that the Orange County Flood Control District may enforce reasonable time, place, and manner restrictions on public use of the Leased Premises to protect public health, safety, and the environment.
 - Lessor agrees that Orange County Code of Ordinances sections 3-9-35, 9-1-40, 9-1-52 may be enforced on the Leased Premises. Lessor further

agrees that Orange County Code of Ordinances sections pertaining to public beaches and other public areas of unincorporated Orange County may be enforced on the Leased Premises to the extent that such sections are found in the future to apply to the Leased Premises and do not conflict with State law or the Public Trust Doctrine.

- Lessee must enforce Orange County Code of Ordinances sections 3-9-35, 9-1-40, and 9-1-52, and any sections pertaining to public beaches and other public areas found to apply to the Leased Premises in the future that do not conflict with State law or the Public Trust Doctrine.
- State enforcement in the Santa Ana River Mouth.
 - Lessee must not interfere with any enforcement by the California Department of Fish and Wildlife, California Department of Parks and Recreation, or **any other agency's enforcement of applicable law or regulation** in the Lease Premises and adjacent County-owned property (together, the Santa Ana River Mouth).
 - Lessee must not object to enforcement of its ordinances in the Santa Ana River Mouth by an authorized state enforcement agency unless a court rules that such ordinance does not apply to that area.
 - Lessee must not object and must accommodate, to the fullest extent possible, any current or future lease to a state or federal agency for environmental and public trust resource protection purposes over the same property as the Lease Premises.
- Lessee must collaborate and coordinate in good faith in any future applications and agreements for enforcement in the Santa Ana River Mouth. Applications and agreements for enforcement may include, but are not limited to, agreements with the California Department of Fish and Wildlife, California Department of Parks and Recreation, and the California Coastal Commission.
- Lessee must provide annual reports to Commission staff detailing County law enforcement efforts in the Santa Ana River Mouth.
- Terminate, effective October 21, 2021, Lease Number PRC 2171, a General Lease – Public Agency Use, issued to the Orange County Flood Control District.

BACKGROUND:

The mouth of the Lower Santa Ana River (River) is located between Huntington Beach State Park in the city of Huntington Beach, and the city of Newport Beach. The adjacent upland is unincorporated land within Orange County (County). The Applicant began conducting maintenance dredging activities in the River in 1990

to improve flood control capacity, and due to ongoing sediment deposition has continued to conduct dredging activities periodically since that time in order to ensure flood protection. In addition to dredging, the Applicant also maintains flood control jetties and a dike within the Lease Premises. A relatively small portion of dredged material is removed from sovereign land at the River mouth, with the majority of the material removed from the River channel inland and outside of the **Commission's jurisdiction**. During periods of non-dredging, the accumulation of sand within the flood control channel creates areas that have become popular with dog owners and is used as an informal off-leash dog park.

In May 2016, the County proposed to amend Section 4-1-45 of the Orange County Code of Ordinances to allow dogs in the River mouth. The County prepared an Initial Study/Negative Declaration (IP 16-234) analyzing the environmental impacts of the amendment. Several stakeholders, including the California Department of Parks and Recreation (Parks), California Coastal Commission (CCC), Santa Ana Regional Water Quality Control Board, and local environmental groups wrote letters expressing concern that **the County's Initial Study/Negative Declaration did not** discuss the impact the dog park would have on California Least Tern and Western Snowy Plover that are known to use the area for habitat. The County Board of Supervisors considered the proposed ordinance amendment on April 26 and October 25, 2016, but it was never approved.

The Huntington State Beach Least Tern Natural Preserve (Preserve), managed by Parks, is located adjacent and upcoast of the River. Dogs are not permitted on the State Beach (except for service dogs) and must be leashed within parking lots and multi-use trails. In the city of Newport Beach, dogs are never allowed on the beach or any beachfront sidewalk between 10 a.m. and 4:30 p.m., including the ocean front beaches and bay front beaches. Off-leash dogs are never allowed in any public spaces including parks and beaches.

County ordinances also prohibit dogs within public beaches (except for service dogs). The Applicant also maintains trespassing restrictions within their jurisdiction and control, including the Santa Ana River Flood Control Channel.

The Applicant maintains that its dog ordinances do not apply to the State-owned land. Specifically, the dog-leash requirement does not apply because the County does not consider the State-owned property to be "public property" (section 4-1-45), and dogs are not prohibited because the County does not consider the State-owned property to be a "public beach" (section 4-1-46).

Until recently, the County believed the limits of Orange County ended at the boundary of its upland fee parcel. The County now agrees that the boundary extends 3 miles into the Pacific Ocean, as described in Government Code section

23130, and that the Flood Control District trespassing ordinances (section 3-9-35) apply within the Lease Premises.

The California coast is a critical habitat for the Western Snowy Plover and the California Least Tern. Plovers are **listed as “threatened”** under the federal U.S. Endangered Species Act and are listed as a species of “special concern” under the California Endangered Species Act. California Least Tern is listed as “endangered” under both Federal and State laws.

Local environmental groups contacted Commission staff with concerns that the presence of off-leash dogs has and continues to threaten endangered and threatened bird species within the Lease Premises, including the Western Snowy Plover and California Least Tern. Staff consulted Parks, U.S. Fish and Wildlife Service, and the California Department of Fish and Wildlife (CDFW) to discuss the impact dogs have on birds at this location. In addition, staff also consulted local non-profits, including the Sea and Sage Audubon Society, Orange County Habitats, and Orange County Coast Keepers. State, Federal, and local organizations all indicated that the presence of dogs disturbs the foraging grounds of birds and severely degrades habitat area.

The Applicant has provided information detailing the **County Sheriff’s** efforts to enforce County ordinances within the County’s Flood Control Channel. However, these efforts have been limited to verbal warnings only, and no fines have been issued. In addition, the warnings have only applied to the County’s Flood Control Channel, **not land within the Commission’s jurisdiction**. Members of the public as well as staff from other State agencies indicate that verbal warnings have not been effective and have not reduced use within the Lease Premises.

On July 8, 2020, the CCC approved a County signage plan, including educational and **“no trespassing” signage along the up-coast and down-coast rock jetties** near the mouth of the River to protect sensitive bird species. CCC also approved an amendment to that permit on March 1, 2021, to add additional signs. **The County’s Coastal Development Permit (CDP) No. 5-02-031**, that authorizes maintenance dredging of various outlets in the County, including the River Mouth expires in 2023.

Commission and CCC staff are exploring opportunities to fund additional CDFW law enforcement positions that would allow for more targeted and frequent enforcement within the Lease Premises and potentially the issuance of citations under both County and CDFW ordinances.

STAFF ANALYSIS AND RECOMMENDATION:

AUTHORITY:

Public Resources Code sections 6005, 6216, 6301, 6303, 6321, 6321.2, 6501.1, and 6503; California Code of Regulations, title 2, sections 2000 and 2003.

PUBLIC TRUST AND STATE'S BEST INTERESTS:

On October 22, 2009, the Commission authorized a 20-year General Lease – Public Agency Use to the Applicant for flood control jetties at the Lower Santa Ana River ([Item C26, October 22, 2009](#)). That lease expires May 28, 2027. The Applicant has requested that the lease be terminated and included in a new lease which will also include the Applicant's annual maintenance dredging activities.

The improvements include three structures - an approximately 600-foot-long western jetty, an approximately 530-foot-long eastern jetty, and an approximately 850-foot-long dike running between and parallel to the jetties at a distance of approximately 100 feet from the western jetty.

On August 9, 2016, the Commission authorized a 5-year General Lease – Dredging to the Applicant for maintenance dredging in the Lower Santa Ana River and deposition of dredged materials at a receiver site at North Beach in the city of San Clemente ([Item C31, August 9, 2016](#)). That lease expired on August 8, 2021. The Applicant is applying for a new General Lease – Public Agency Use and Dredging for maintenance dredging in the Lower Santa Ana River. Dredged materials are no longer deposited at the North Beach receiver site so it is not included in the application.

On September 30, 2021, Commission staff issued the County a Letter of Non-Objection for emergency sediment removal at the mouth of the River. County staff provided information, photos and water quality data showing detrimental impacts to plants and wildlife in the Santa Ana River Salt Marsh, including potential die-off of fish, plants, and habitat. To restore tidal flows, the Letter of Non-Objection permitted the County to excavate approximately 6,500-10,000 cubic yards of sand to create a 30-50-foot-wide channel to restore tidal flushing to the Santa Ana River Salt Marsh. The Letter of Non-Objection only allows emergency sediment removal up to October 21, 2021 and does not allow maintenance dredging as contemplated in the proposed lease.

In response to the October 2nd oil spill, offshore of Huntington Beach, the County obtained a waiver of a Coastal Development Permit to construct sand berms across the River mouth to protect onshore coastal habitats and resources. On

October 8th the Unified Command, including CDFW, advised the County that they could breach the berm at the River mouth to restore tidal flows. Work began to breach the berm on October 9th.

Maintenance dredging at this location removes built-up sand and encourages positive flow from the channel to the ocean. Uses along the River channel include wetlands, parks, and well-developed industrial, commercial, and residential property for many miles upstream. Periodic dredging to keep the River mouth open helps improve public safety and limits property damage by reducing flood risk. Additionally, the Huntington State Beach Least Tern Natural Preserve benefits from the dredging by reducing sand encroachment within the Preserve.

Until recently, the County had maintained that its Flood Control District trespassing ordinances (section 3-9-35) did not apply within the Lease Premises. The County is now willing to enforce this ordinance within the Lease Premises to protect public safety and the environment. Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat. If funding for additional law enforcement through the CDFW becomes available, it would supplement County enforcement efforts at this location.

The proposed lease does not substantially interfere with Public Trust uses and is for a limited 2-year term. The dredging is intended to promote public health and safety by minimizing flooding threats. Further, staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources, from harassment due to the unregulated presence of unleashed dogs and other domestic animals. The limited 2-year lease term will allow the Commission to re-evaluate the effectiveness of this protection and enforcement framework and adaptively manage the situation accordingly.

CLIMATE CHANGE:

Climate change impacts, including prolonged drought, sea-level rise, more frequent and intense storm events, and flooding will likely affect the lease area, structures, and the activity of maintenance dredging.

Orange County, along with other parts of the state, has been in a severe drought for over 2 years, and stream flow for the Santa Ana River is below average, according to the [National Integrated Drought Information System](#) managed by the National Oceanic and Atmospheric Administration. Reduced stream flow can result in less sediment reaching the river mouth and may impact the timing of dredging

and the volume of sediment that needs to be removed for maintaining the open channel.

While the amount of fresh water reaching the river mouth is decreased during the drought, sea water levels are increasing annually at an accelerated rate. The California Ocean Protection Council updated the *State of California Sea-Level Rise Guidance in 2018* to provide a synthesis of the best available science on sea-level rise projections and rates. Commission staff evaluated the “high emissions,” “medium-high risk aversion” scenario to apply a conservative approach based on both current emission trajectories and the lease location and structures. The Los Angeles tide gauge was used for the projected sea-level rise scenario for the lease area as listed in Table 1.

Table 1. Projected Sea-Level Rise for Los Angeles

Year	Projection (feet)
2030	0.7
2040	1.2
2050	1.8
2100	6.7

Source: Table 28, State of California Sea-Level Rise Guidance: 2018 Update

Note: Projections are with respect to a 1991 to 2009 baseline.

Rising sea levels, combined with storms or extreme tidal events such as King Tides can produce increased wave heights and intensity, and wash more sediment into the river mouth channel, as well as debris. As stated in *Safeguarding California Plan: 2018 Update* (California Natural Resources Agency 2018), in addition to sea-level rise, precipitation patterns are becoming more variable. Though the wet seasons are shorter, warmer atmospheric temperatures are generating more powerful storms that release greater amounts of rain, flushing high volumes of freshwater and sediment down the river channel in a short amount of time. These flash floods can cause excessive damage to the lease area structures and land depending on their force and frequency.

Regular maintenance, as referenced in the lease, may reduce the likelihood of severe structural degradation or dislodgement. Pursuant to the proposed lease, the Applicant acknowledges that the lease premises and adjacent upland are located in an area that may be subject to the effects of climate change, including sea-level rise.

CONCLUSION:

For the reasons stated above, staff believes the issuance of the proposed lease will not substantially impair the public rights to navigation, fishing, or other Public Trust needs and values at this location, at this time, and for the foreseeable term of the lease; and is in the best interests of the State.

OTHER PERTINENT INFORMATION:

1. Approval or denial of the lease is a discretionary action by the Commission. Each time the Commission approves or rejects a use of sovereign land, it exercises legislatively delegated authority and responsibility as trustee of the State's Public Trust lands as authorized by law. If the Commission denies the lease, the Applicant may be required to remove the flood control jetties and dike, and will not be authorized to conduct maintenance dredging. Upon expiration or prior termination of the lease, the Applicant also has no right to a new lease or to renewal of any previous lease.
2. This action is consistent with the "Meeting Evolving Public Trust Needs" Strategic Focus Area of the Commission's 2021-2025 Strategic Plan.
3. Termination of the lease is not a project as defined by the California Environmental Quality Act (CEQA) because it is an administrative action that will not result in direct or indirect physical changes in the environment.

Authority: Public Resources Code section 21065 and California Code of Regulations, title 14, section 15378, subdivision (b)(5).

4. Existing Structures: Staff recommends that the Commission find that this activity is exempt from the requirements of CEQA as a categorically exempt project. The project is exempt under Class 1, Existing Facilities; California Code of Regulations, title 2, section 2905, subdivision (a)(2).

Authority: Public Resources Code section 21084 and California Code of Regulations, title 14, section 15300 and California Code of Regulations, title 2, section 2905.

5. Maintenance Dredging: A Supplemental Environmental Impact Statement (EIS) prepared by the U.S. Army Corps of Engineers was used by the Orange County Flood Control District as a CEQA-equivalent document and approved on November 28, 1989, and an Addendum was prepared by the Orange County

Flood Control District and approved on April 29, 2016, for this Project. The California State Lands Commission staff has reviewed such documents.

The Mitigation Monitoring Program and a Statement of Findings made in conformance with the State CEQA Guidelines (Cal. Code Regs., tit. 14, §§ 15091, 15096) were previously adopted by the Commission on August 9, 2016 ([Item 31, August 09, 2016](#)).

6. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq., but such activity will not affect those significant lands. Based upon staff's consultation with the persons nominating such lands and through the CEQA review process, it is staff's opinion that the project, as proposed, is consistent with its use classification.

APPROVALS OBTAINED:

U.S. Army Corps of Engineers
California Coastal Commission
State Water Resources Control Board

EXHIBITS:

- A. Land Description
- B. Site and Location Map

RECOMMENDED ACTION:

It is recommended that the Commission:

CEQA FINDING:

Existing Structures: Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a categorically exempt project, Class 1, Existing Facilities; California Code of Regulations, title 2, section 2905, subdivision (a)(2).

Maintenance Dredging: Find that a Supplemental EIS was prepared by the U.S. Army Corps of Engineers, was used by the Orange County Flood Control District as a CEQA-equivalent document and approved on November 28, 1989, and an Addendum prepared for this project by Orange County Flood Control District and

approved on April 29, 2016, and that the Commission has reviewed and considered the information contained therein.

The Commission previously adopted the Mitigation Monitoring Program on August 9, 2016 ([Item 31, August 09, 2016](#)), and it remains in full force.

Determine that the project, as approved, will not have a significant effect on the environment.

PUBLIC TRUST AND STATE'S BEST INTERESTS:

Find that termination of the lease and issuance of the proposed lease will not substantially impair the public rights to navigation and fishing or substantially interfere with the Public Trust needs and values at this location, at this time, and for the foreseeable term of the lease; and is in the best interests of the State.

SIGNIFICANT LANDS INVENTORY FINDING:

Find that this activity is consistent with the use classification designated by the Commission for the land pursuant to Public Resources Code section 6370 et seq.

AUTHORIZATION:

1. Terminate, effective October 21, 2021, Lease Number PRC 2171, a General Lease – Public Agency Use, issued to the Orange County Flood Control District.
2. Authorize issuance of a General Lease – Public Agency Use and Dredging to the Applicant beginning October 21, 2021, for a term of 2 years, for the use and maintenance of two riprap flood control jetties, a riprap dike, and maintenance dredging in the Lower Santa Ana River as described in Exhibit A and shown on Exhibit B (for reference purposes only) attached and by this reference made a part hereof; consideration is the public use and benefit, with the State reserving the right at any time to set a monetary rent if the Commission finds such action to be in the State's best interests.

EXHIBIT A

LEASE 9358

LAND DESCRIPTION

That certain parcel of tide and submerged lands adjacent to Fractional Section 19, Township 6 South, Range 10 West, San Bernardino Base and Meridian, in the County of Orange, State of California, described as follows: bounded on the north by the line of ordinary high tide of the Pacific Ocean; bounded on the east by the southwesterly prolongation of the westerly boundary of the City of Newport Beach, being also the southwesterly prolongation of the easterly line of Summit Street as per map of Seashore Colony Tract, recorded in Book 7, Page 25 of Miscellaneous Maps, in the Office of the County Recorder of said County; bounded on the northwest and southwest by a line described as follows: commencing at a point on the easterly line of Rancho Las Bolsas, as said line is shown on a map filed in Book 28, Page 17 of Record of Surveys in the Office of said County Recorder, said point being described on said map as "Fd.1" iron rod Sta. 4+28.35"; thence South 15°48'40" West along said Rancho line, 202.47 feet to a point described on said map as "Sta. 6+30.82 Set 1" I.P.", said point being also at the intersection of the southerly line of the Pacific Electric Railway Company right of way as shown on said map; thence North 53°58'30" West along said southerly right of way line, 4.46 feet; thence South 36°01'30" West, 374.00 feet; thence South 24°59'14" West, 650.00 feet; thence South 65°00'46" East to said southwesterly prolongation of the westerly boundary of the City of Newport Beach.

APPROVED

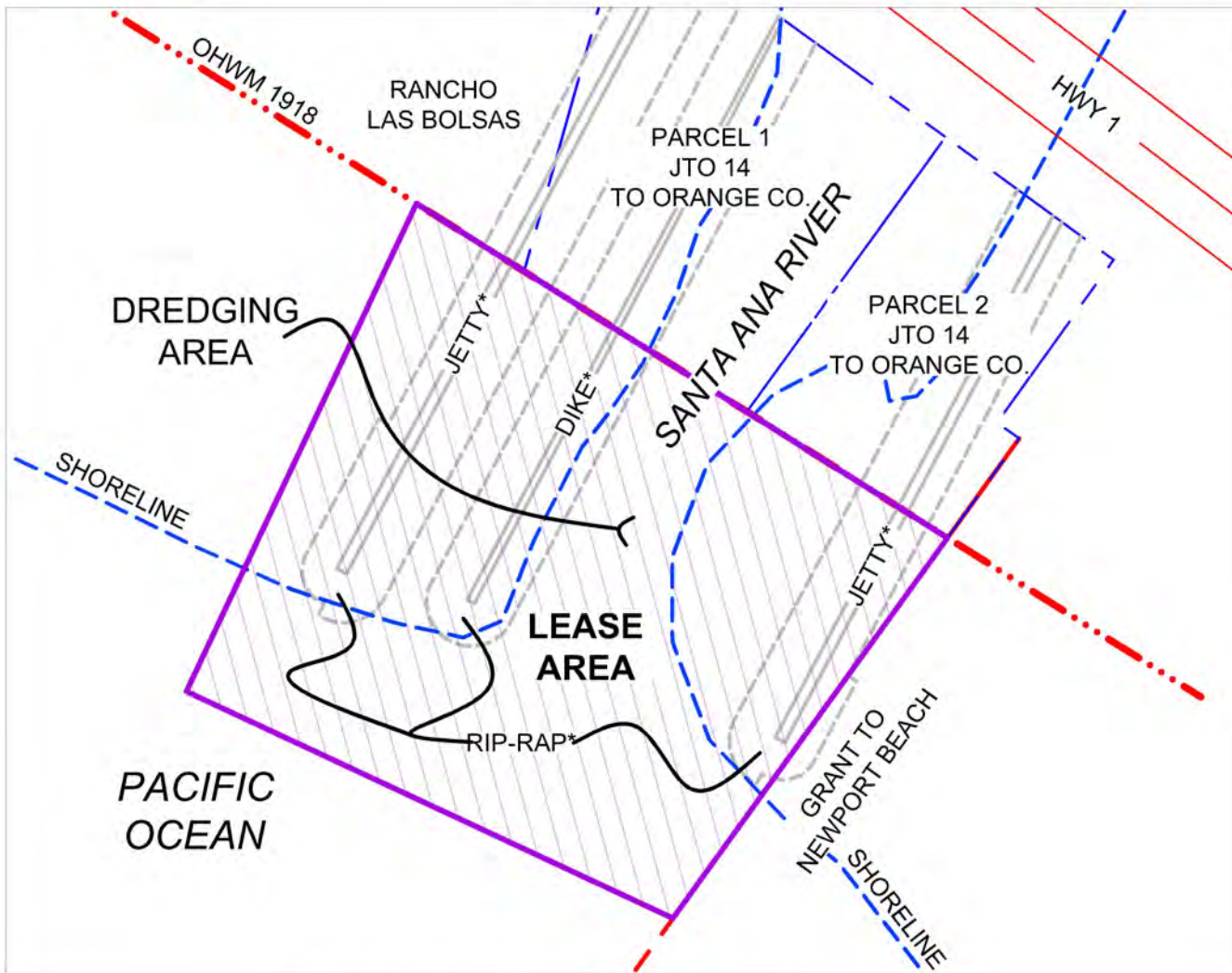
John D. Pavlik Date: 9/28/09
 John D. Pavlik L.S. 5168
 Expiration Date: June 30, 2011



*The above description is a duplicate of that original description prepared by John D. Pavlik, LS 5168 on 9/28/09 as found in PRC file 2171, Calendar Item 26 approved on 10/22/09.

NO SCALE

SITE



Santa Ana River at the Pacific Ocean

NO SCALE

LOCATION



MAP SOURCE: USGS QUAD

Exhibit B

LEASE 9358
 ORANGE CO. FLOOD
 CONTROL DISTRICT
 GENERAL LEASE - PUBLIC
 AGENCY USE & DREDGING
 ORANGE COUNTY



This Exhibit is solely for purposes of generally defining the lease premises, is based on unverified information provided by the Lessee or other parties and is not intended to be, nor shall it be construed as, a waiver or limitation of any State interest in the subject or any other property.

Exhibit D

Santa Ana River Mouth Monitoring Project January-June 2021 Report



Orange County Coastkeeper (Coastkeeper) is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective programs in education, advocacy, restoration, research, enforcement, and conservation.

The Santa Ana River Mouth Monitoring Project (SAR Project) enlists volunteers, community groups and local government to monitor human, dog and bird activity in the Santa Ana River Mouth area, a 13.2 acre parcel of land that is owned by four agencies including the California State Lands Commission, California State Parks, the County of Orange, and the City of Newport Beach. Due to the fragmented ownership of the area management of activities and law enforcement

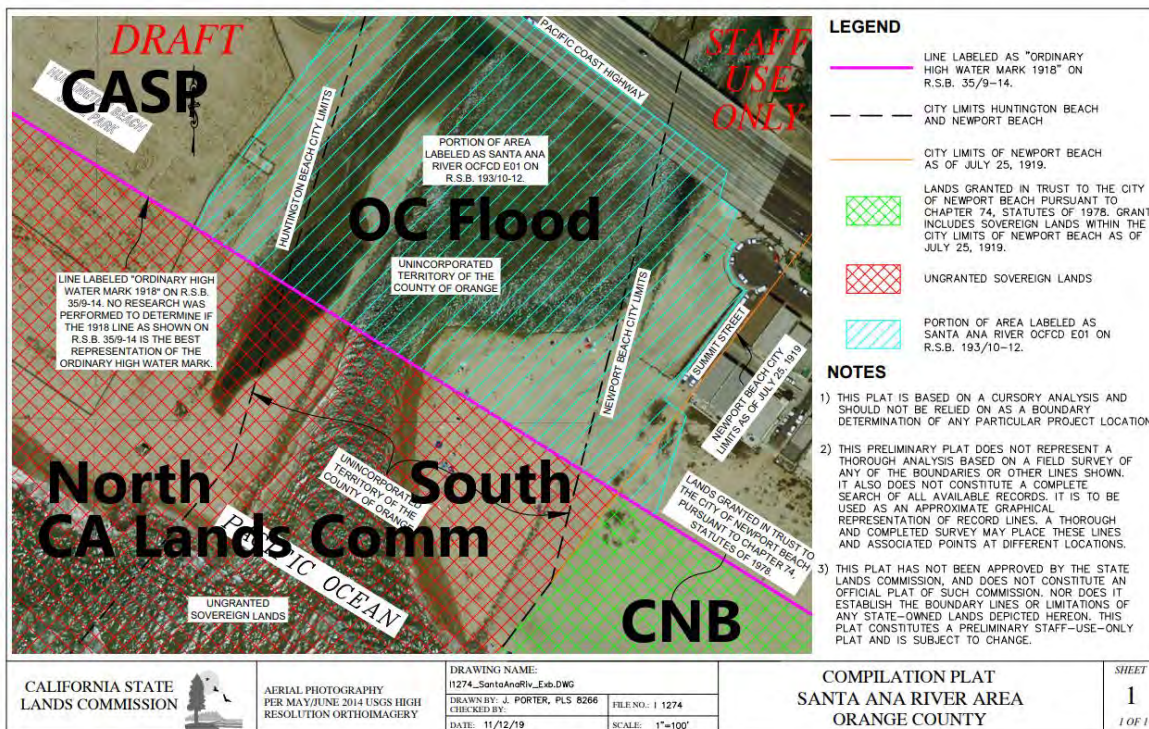
in the area have been difficult. The initial six months of the SAR Project covered in this report January 2021 and June 2021 was run as a pilot program by Orange County Coastkeeper (OCCK) with funding from the City of Newport Beach. The project is continuing with funding from the City of Newport Beach Community Grants Program and the Rose Foundation. The goal of the SAR project is to monitor human, dog and bird use of the area and to provide education and outreach to residents and visitors about the Wildlife Management Area at the Santa Ana River Mouth and the endangered species that reside within it.

Executive Summary

After initial program development of the pilot study monitoring of the area began on February 9th, 2021. Final revisions of the study protocol were completed by March 23rd, 2021 and all subsequent surveys followed a standard protocol that is used for all surveys.

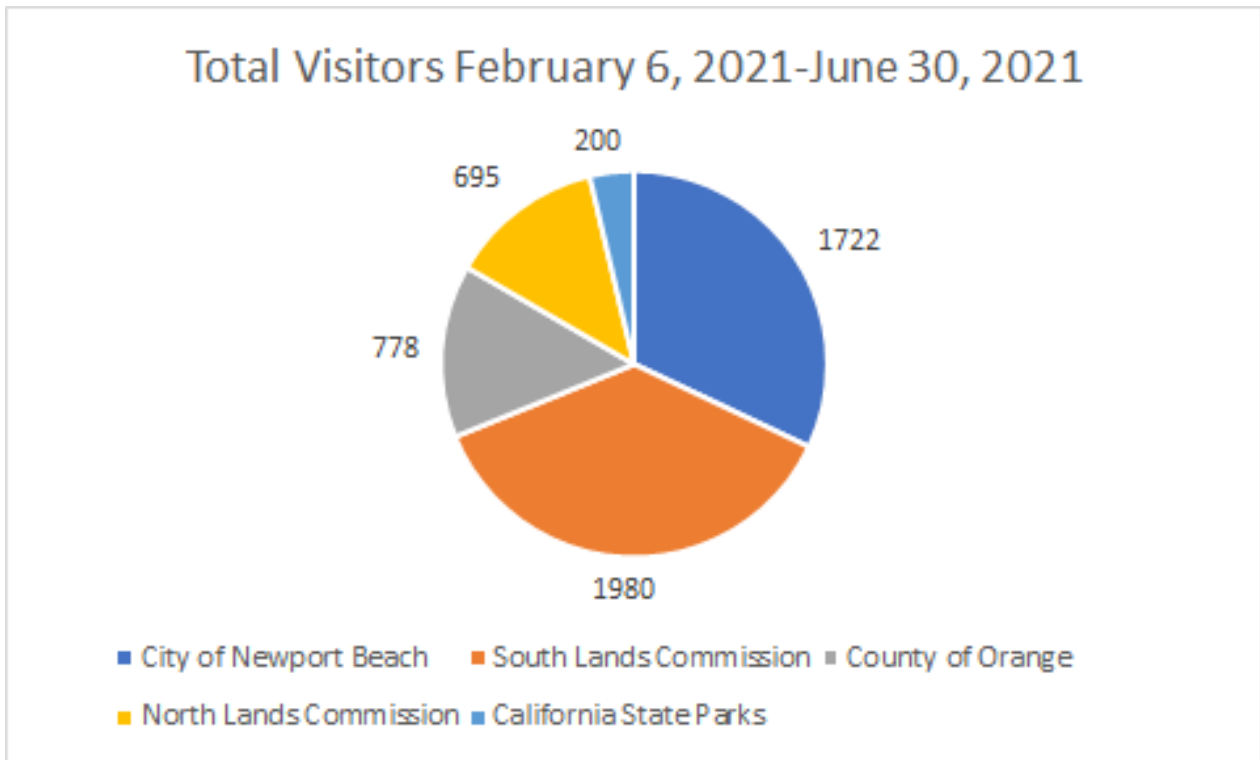
As of June 30, 2021 151 surveys at the Santa Ana River Mouth were completed by 26 trained volunteers. In the 151 surveys collected, 5,375 humans and 1,096 dogs were observed, of the dogs 894 were off-leash and 202 on-leash . Two drones were observed and all but eight surveys documented dogs in the Santa Ana River Mouth in only 8 completed surveys. Dogs off-leash accounted for 82 percent the dogs observed. No citations were observed to be issued by Law Enforcement. California State Parks Law Enforcement was called out by staff once for repeated bird flushing on 6/18/2021 on County of Orange and California State Parks Property by a dog owner and their dog.

GRAPHS AND MAP

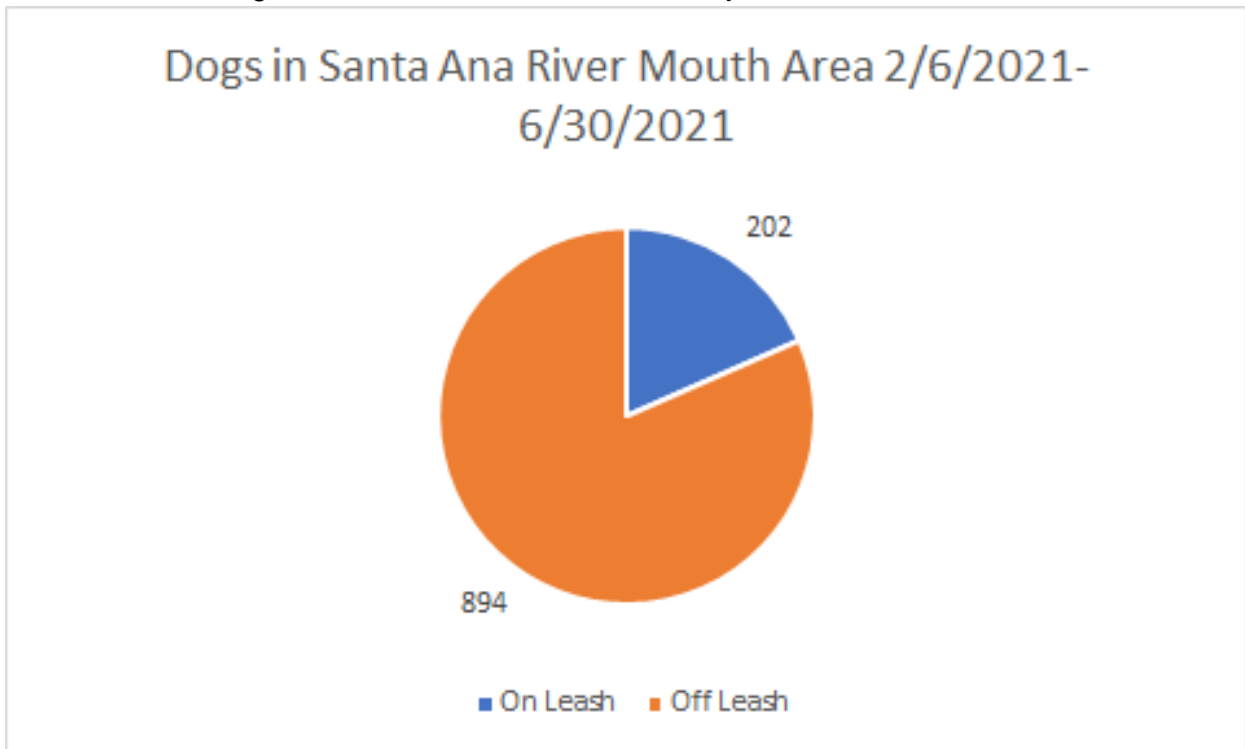


(Map of Santa Ana River Mouth with property names overlaid. California State Lands Commission property was split into North and South portions of the map after March 23rd, divided by the location of the river mouth during surveys, to improve our ability to understand access use in the area better.)

Total number of visitors based on location:

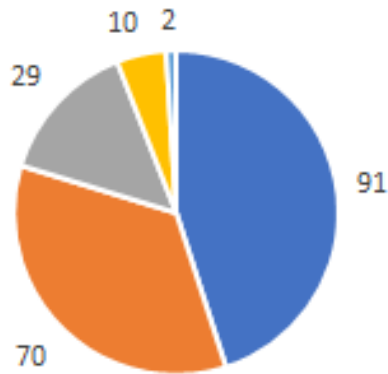


Total number of dogs in the Santa Ana River Mouth Project Area:



Locations of dogs recorded on leash:

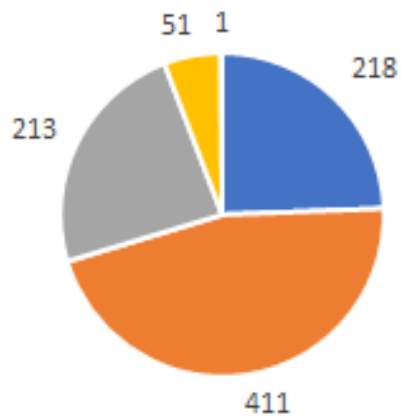
Dogs On-Leash By Land Manager Organization 2/6/2021-6/30/2021



■ City of Newport Beach
 ■ South Lands Commission
 ■ County of Orange
■ North Lands Commission
 ■ California State Parks

Locations of dogs recorded off leash:

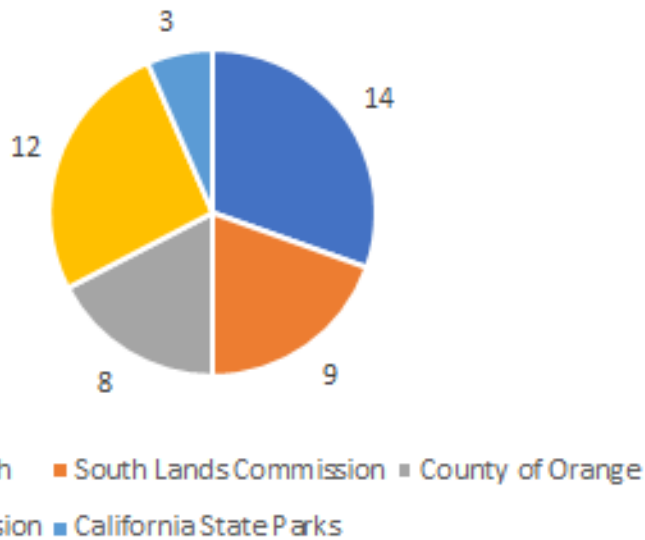
Dogs Off-Leash by Land Manager Organization 2/6/2021-6/30/2021



■ City of Newport Beach
 ■ South Lands Commission
 ■ County of Orange
■ North Lands Commission
 ■ California State Parks

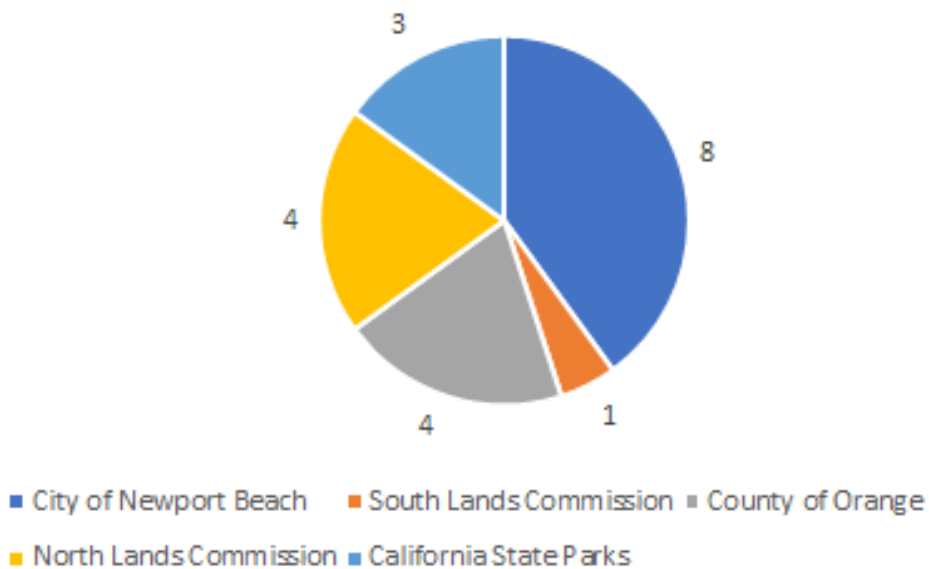
Recorded disturbances:

Total Number of Instances of Bird Disturbance by Land Owner 2/6/2021-6/30/2021



(Bird disturbance defined as when birds are present on a part of the beach and are approached by humans and/or dogs and they depart the beach.)

Law Enforcement Officers Present by Land Area



Training

Training took place with two components, an online one hour Zoom training that took place in February 2021 was recorded and distributed to new volunteers who were unable to attend the initial Zoom training session. Volunteers then met with Volunteer Coordinator Suzanne Welsh at the

Santa Ana River Mouth to go over the monitoring protocol and to go over the property map in person. Volunteers were trained to monitor human recreation use, dog use, and were instructed how to fill out the data sheet to track other uses like drones, disturbances to birds (where birds are approached by humans or dogs and leave the area), and to denote law enforcement officer presence.

Outreach Table



During this project Orange County Coastkeeper was able to conduct an outreach table for beach visitors. Visitors were given pamphlets detailing information about California Least Terns and Western Snowy Plovers. Additional information about the laws regarding dogs in the area and free biodegradable waste bags were provided to visitors as well. Between May 15th, 2021 and June 30th, 2021 the outreach table was set up five times and one virtual outreach event was held as well. Overall OC Coastkeeper has engaged 387 visitors with its outreach table and virtual outreach event.

COVID-19 Impacts

The greatest impact to this project was a delay in implementing the outreach table due to COVID-19 restrictions and vaccine availability. Staff was able to begin the outreach program in May after full vaccination status was met.

Next Steps

Our next steps in this project include additional volunteer recruitment from the local community as well as a continuation of the outreach table.

Santa Ana River Mouth Monitoring Project July-December 2021 Report



Orange County Coastkeeper (Coastkeeper) is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective programs in education, advocacy, restoration, research, enforcement, and conservation.

The Santa Ana River Mouth Monitoring Project (SAR Project) enlists volunteers, community groups and local government to monitor human, dog and bird activity in the Santa Ana River Mouth area, a 13.2 acre parcel of land that is owned by four agencies including the California State Lands Commission, California State Parks, the County of Orange, and the City of Newport Beach. Due to the fragmented ownership of the area, management of activities and law

enforcement in the area have been difficult. The second six months of the SAR Project covered in this report (July 2021 through December 2021) was run as an ongoing project by Orange County Coastkeeper (OCCK) with funding from the City of Newport Beach. The project is continuing with funding from the City of Newport Beach Community Grants Program and the Rose Foundation. The goal of the SAR project is to monitor human, dog and bird use of the area and to provide education and outreach to residents and visitors about the Wildlife Management Area at the Santa Ana River Mouth and the endangered species that reside within it.

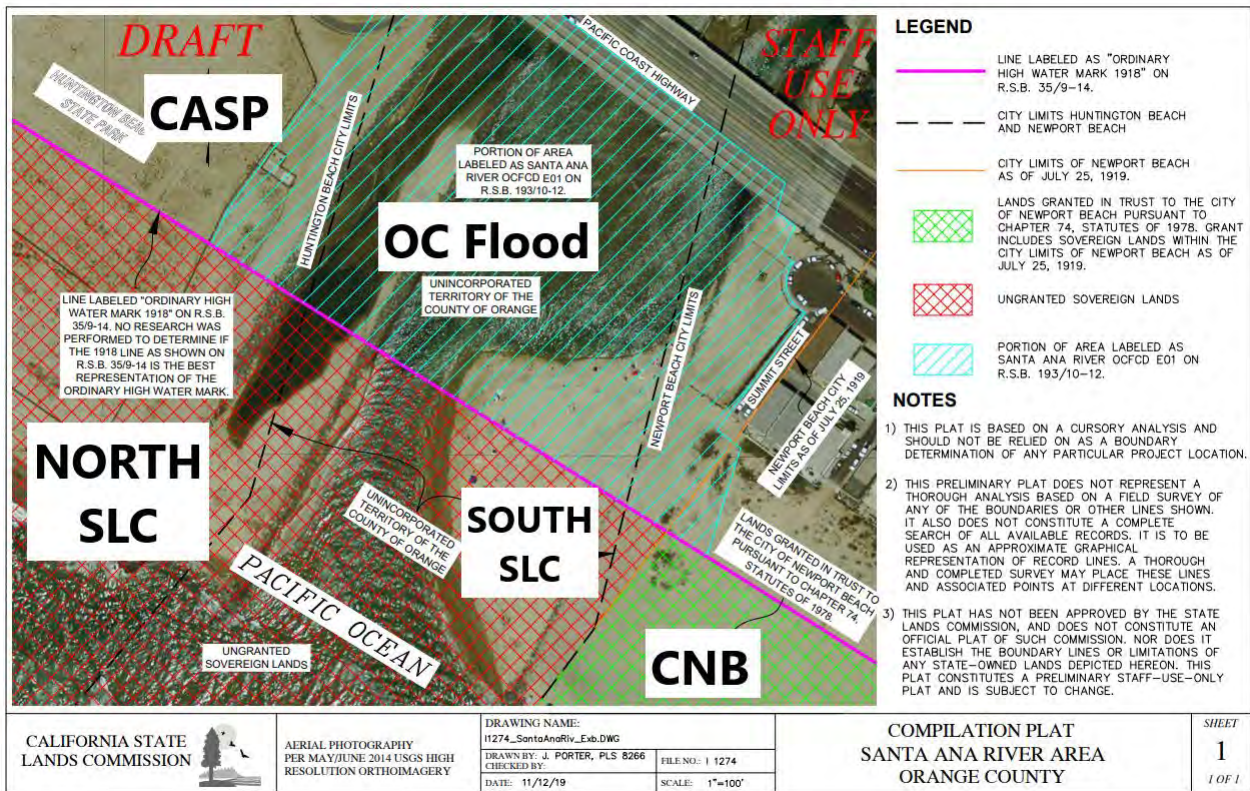
Executive Summary

After the initial program development of the pilot study, monitoring of the area began on February 9th, 2021. Final revisions of the study protocol were completed by March 23rd, 2021 and all subsequent surveys followed a standard protocol that is used for all surveys.

As of December 31st 2021, 63 surveys at the Santa Ana River Mouth were completed by 36 trained volunteers. In the 63 surveys collected, 1,506 people and 273 dogs were observed. Of the dogs 194 were off-leash and 79 on-leash. Dogs off-leash accounted for 71 percent the dogs observed. Law Enforcement Officers were present 7 times throughout all 63 surveys completed in this time period. No citations were observed to be issued.

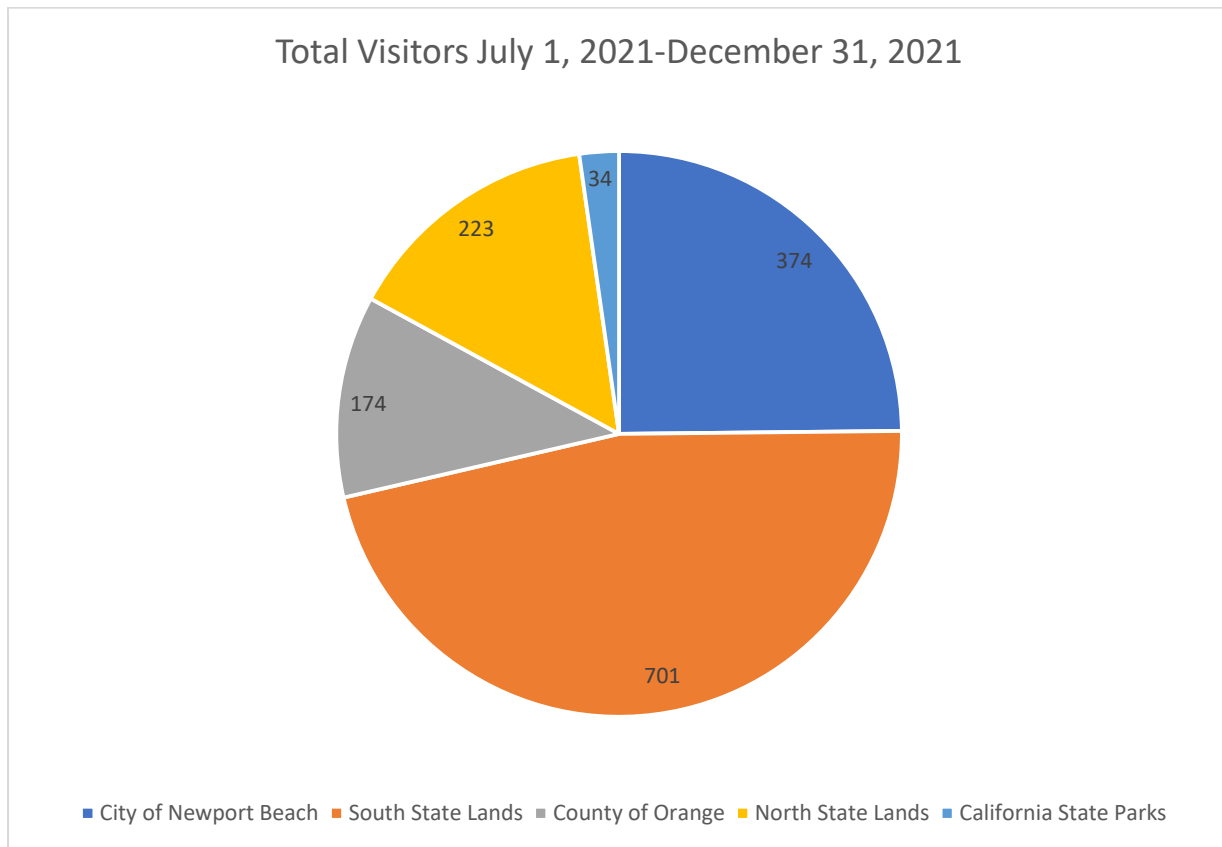
On 12/19/2021, according to a volunteer, "...a law enforcement officer came down to the flood area and said something over the loudspeaker but no one could hear him. There were 18 dogs off leash during the 30 minutes I was there, and at least half of them were still there when the officer arrived. A couple of people went over to ask him what he said and then left. There were still at least 6 dogs still off leash when the officer drove away, and he was too far away for people to hear what he said. Today there were only 3 surfers out in the water when I arrived and I was delighted to see many shorebirds had returned to the south end of the beach, which was devoid of birds with dogs present. After 17 minutes a dog chased the entire flock off and only one gull returned within the next 15 minute period. I approached the couple and asked them if they knew that this beach had a requirement for their dogs to be on a leash. They said they knew, and that they come out there twice per day. I asked them if they had been issued any tickets and they said no. I called animal control to report the incident and took pictures of the couple and the dog for future reference. They left before animal control could arrive, within 10 minutes of the flushing incident and the birds still had not returned with over 5 minutes after the dog had left the area." Reports like this are common from volunteers, interns, and staff who spend time completing surveys.

GRAPHS AND MAP

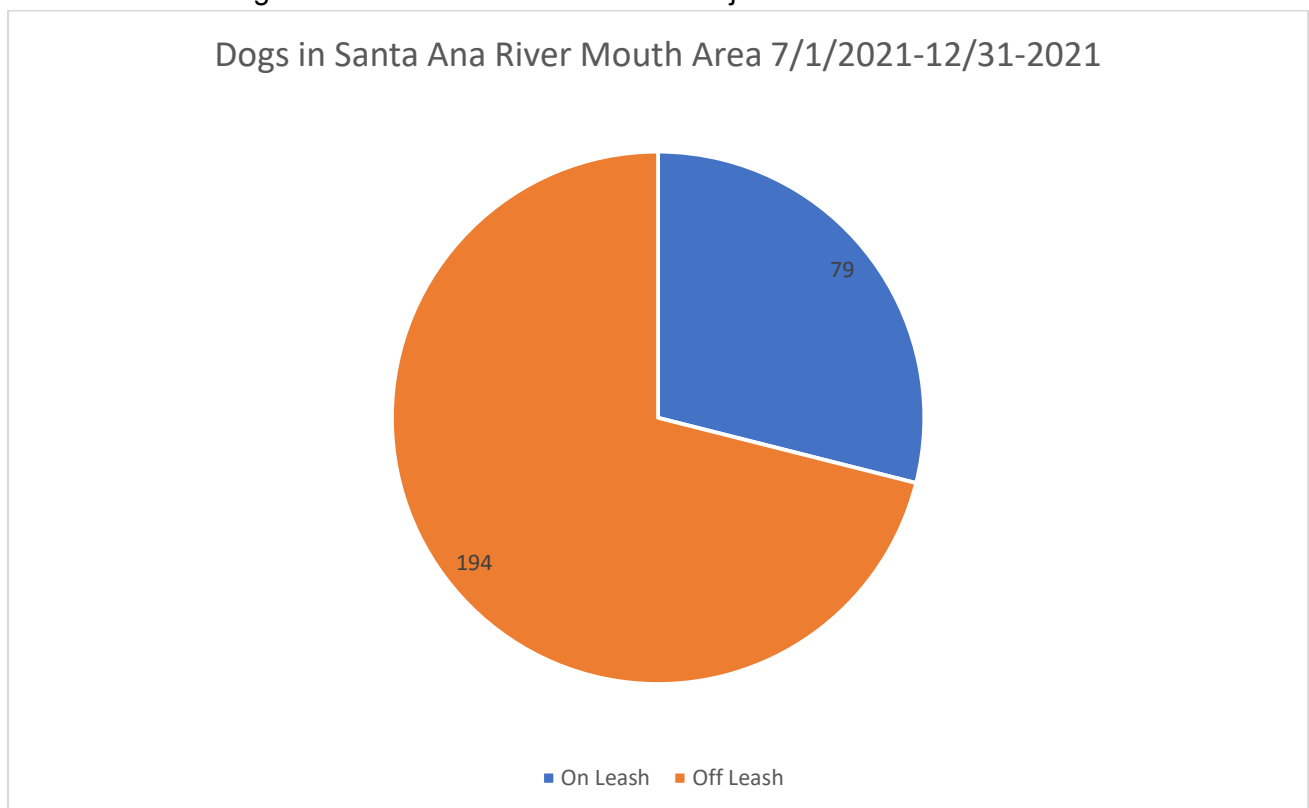


(Map of Santa Ana River Mouth with property names overlaid to correlate with data sheets. California State Lands Commission property was split into North and South portions, divided by the location of the river mouth during surveys, to improve our ability to understand access use in the area better. **CASP**=California State Parks; **OC Flood**: Orange County Flood Control Channel; **CNB**= City of Newport Beach; **NORTH SLC** = North State Lands Commission; **SOUTH SLC**= South State Lands Commission)

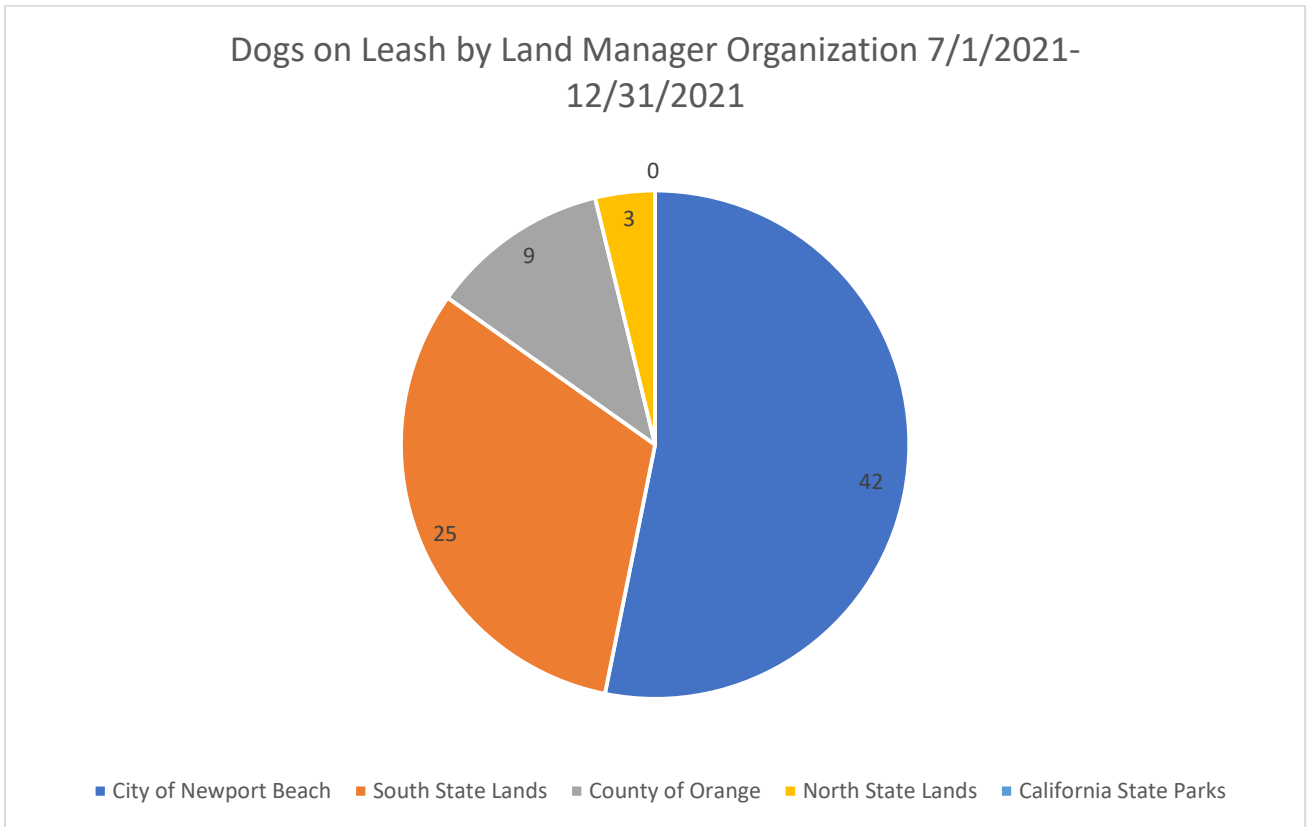
Total number of visitors based on location:



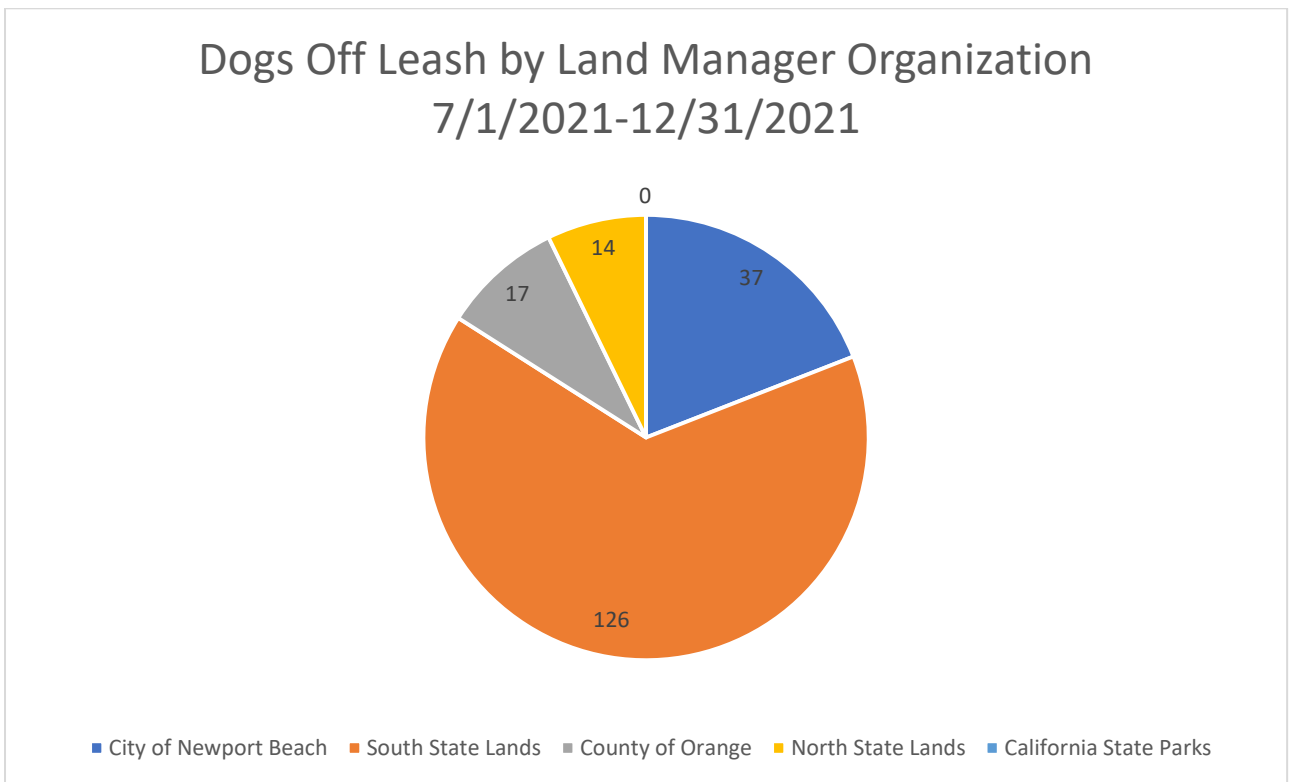
Total number of dogs in the Santa Ana River Mouth Project Area:



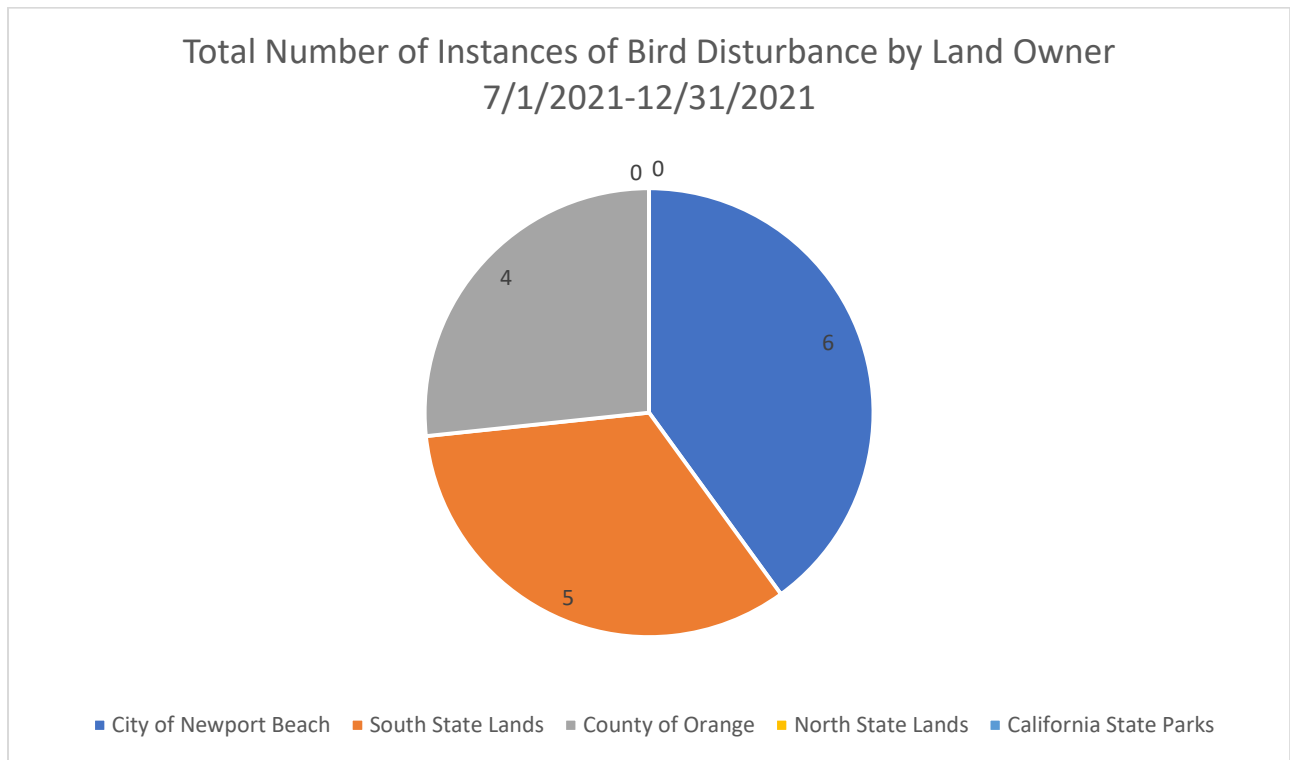
Locations of dogs recorded on leash:



Locations of dogs recorded off leash:

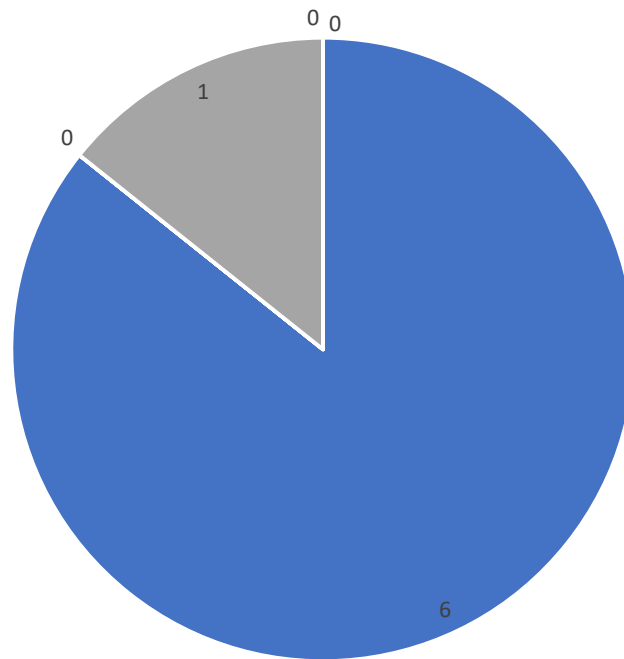


Recorded disturbances:



(Bird disturbance defined as when birds are present on a part of the beach and are approached by humans and/or dogs and they depart the beach.)

Law Enforcement Officers Present by Land Area



■ City of Newport Beach ■ South State Lands ■ County of Orange ■ North State Lands ■ California State Parks

Training

Training took place with two components, an online one hour Zoom training that took place in February 2021 was recorded and distributed to new volunteers along with training documents. Volunteers then met with Volunteer Coordinator Suzanne Welsh at the Santa Ana River Mouth to go over the monitoring protocol and the property map in person. Volunteers were trained to monitor human recreation use, dog use, and were instructed how to fill out the data sheet to track other uses like drones, disturbances to birds (where birds are approached by humans or dogs and leave the area), and to denote law enforcement officer presence.

Outreach Table



During this project Orange County Coastkeeper was able to conduct an outreach table for beach visitors. Visitors were given pamphlets detailing information about California Least Terns and Western Snowy Plovers. Additional information about the laws regarding dogs in the area and free biodegradable waste bags were provided to visitors as well. Between July 1, 2021 and December 31, 2021 the outreach table was set up three times. Challenges for our public outreach included issues with volunteer recruitment and retention, lack of funding for staff presence, the October 2021 oil spill, and a sand nourishment project that resulted in heavy machinery being used in the survey and outreach area from October through the end of the year. Overall OC Coastkeeper has engaged over 533 visitors with our outreach table (5 in person outreach events) and virtual outreach events in 2021. OC Coastkeeper participated in a virtual outreach event with California Surf Anglers in May of 2021 that has gained 393 views to date (<https://www.facebook.com/726138938/videos/10159755567818939/>) and in a segment produced by NBTV (Newport Beach TV) for local broadcast that's also available on the City of Newport Beach's website and YouTube pages (<https://www.youtube.com/watch?v=CF8svp1-r60>).

COVID-19 Impacts

Due to the fluctuating nature of the COVID-19 pandemic, there have been ongoing issues with volunteer retention as public crowds grow and decline with the weather, especially in regards to staffing the outreach table with volunteers.

Other Impacts

On October 2nd, 2021 approximately 24,000 gallons of oil was released into the ocean off of Huntington Beach, just north of the Santa Ana River Mouth area. While a natural sand bar had closed off the river mouth just the week prior, preventative booming was put in place by the Office of Spill Prevention as a protective measure in addition to the creation of 6 foot tall sand berms along the shore in order to protect the sensitive wetland habitat from potential oil spill impacts. Cleanup efforts in the area were centered at Talbert Marsh, the wetland just north of the survey area, and heavy machinery and cleanup efforts were common in the Santa Ana River Mouth area throughout the month of October.

In November 2021 the County of Orange began a dredging project in the Santa Ana River Mouth to transport sand to the beach adjacent to the San Clemente Pier and to the Newport Peninsula between 40th and 52nd Streets. Heavy machinery is operating on the beach Monday-Friday from 8 AM to 5 PM, preventing weekday outreach table events from occurring, and is ongoing through March 2022.

Next Steps

Our next steps in this project include additional volunteer recruitment from the local community, continuation of the outreach table, and continuing to gather surveys. OC Coastkeeper was awarded a grant by the California Coastal Conservancy in October 2021, effective January 2022, that will allow us to substantially increase our ability to complete surveys and outreach in the Santa Ana River Mouth.

Exhibit E

February 19, 2022 Surf Cam Video:

<https://drive.google.com/file/d/11tbOoUQAwm5FRdOciQJFdMNkv0GK67aR/view>

Photographic Evidence of Non-Enforcement:



Date: November 22, 2021 between 10 AM and 1 PM.



Date: November 22, 2021 between 10 AM and 1 PM.



Exhibit F



U.S. Fish and Wildlife Service
Carlsbad Fish and Wildlife Office
2177 Salk Avenue, Suite 250
Carlsbad, California 92008
760-431-9440
FAX 760-431-9624



California Department of Fish and Wildlife
South Coast Region
3883 Ruffin Road
San Diego, California 92123
858-467-4201
FAX 858-467-4239

In Reply Refer To:
FWS-OR-17B0026-17CPA0028

December 14, 2016
Sent by Email

Ms. Chris Uzo-Diribe
Orange County Public Works
300 N. Flower Street
Santa Ana, California 92703-5000
chris.uzodiribe@ocpw.ocgov.com

Subject: Negative Declaration for the Orange County Code of Ordinance Proposed Amendment (Dog Beach) Project, IP 16-234, Huntington Beach, California (SCH# 2016111021)

Dear Ms. Uzo-Diribe:

The U.S. Fish and Wildlife Service (Service) and the California Department of Fish and Wildlife (Department), hereafter collectively referred to as the Wildlife Agencies, have reviewed the above-referenced Negative Declaration (ND) dated November 2016. The Wildlife Agencies have identified potential effects of this project on wildlife and sensitive habitats. The project details provided herein are based on the information provided in the Initial Study (IS)/ND and associated documents.

The primary concern and mandate of the Service is the protection of public fish and wildlife resources and their habitats. The Service has legal responsibility for the welfare of migratory birds, anadromous fish, and endangered animals and plants occurring in the United States. The Service is also responsible for administering the Federal Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), including habitat conservation plans (HCP) developed under section 10(a)(1)(B) of the Act. The Department is a Trustee Agency and a Responsible Agency pursuant to the California Environmental Quality Act (CEQA; §§ 15386 and 15381, respectively) and is responsible for ensuring appropriate conservation of the state's biological resources, including rare, threatened, and endangered plant and animal species, pursuant to the California Endangered Species Act (CESA; Fish and Game Code § 2050 *et seq.*) and Fish and Game Code (FGC) section 1600 *et seq.* The Department also administers the Natural Community Conservation Planning program, a California regional habitat conservation planning program.

The proposed project is a proposal that would end restrictions on off-leash dogs on unincorporated Orange County (County) land at the mouth of the Santa Ana River and designate the land as a dog park. The IS/ND includes the proposed amendment to the Orange County Code of Ordinances, as follows: *"c. A dog, under the charge of a person competent to exercise care, custody, and control over such dog, may be permitted to be upon public property without restraint only during the months of October through February in the unincorporated area downstream from Pacific Coast Highway at the outlet of the Santa Ana River between the incorporated cities of Huntington Beach and Newport Beach which area is hereby designated a dog park. During the months of March through September, a dog, under the charge of a person competent to exercise care, custody, and control over such dog, must be restrained by a substantial chain or leash not to exceed six (6) feet in length."*

The dog park would be located immediately adjacent to a California least tern (*Sternula antillarum browni*; least tern) and western snowy plover (Pacific Coast population DPS) [*Charadrius nivosus nivosus* (*C. alexandrinus* n.); snowy plover] colony. Least terns are listed as endangered under CESA and the Act; they are also fully protected under FGC section 3511(b)(6). Snowy plovers are listed as threatened under the Act and are a state species of special concern. As expressed during a July 6, 2016, meeting with the Department¹ and in a November 21, 2016, letter from the Service, (Service2016b), the Wildlife Agencies have recommended that the County not designate the area at the mouth of the Santa Ana River as a dog park due to the potential impacts to least terns and snowy plovers.

The Wildlife Agencies have significant concerns regarding this proposed amendment, and offer our comments and recommendations to assist the County in avoiding, minimizing, and adequately mitigating project-related impacts to biological resources, and to ensure that the project is consistent with ongoing regional habitat conservation planning efforts.

General Comments:

The Santa Ana River mouth is located approximately half way between the other nearest estuaries (Bolsa Chica and Upper Newport Bay) and supports a large array of shorebirds much of the year, including the snowy plover, black-bellied plover, semi-palmated plover, willet, long-billed curlew, marbled godwit, western sandpiper, least sandpiper, and long-billed dowitcher (Page and Shuford 2000; Ryan 2016). The Santa Ana River mouth also provides resources for the least tern, which uses the river mouth and adjacent dunes between the months of April and September.

The Pacific coast population of snowy plover was listed as threatened on March 5, 1993 (58 Federal Register (FR) 12864) under the authorities of the Act. The snowy plover uses habitat at the mouth of the Santa Ana River primarily during the non-breeding season, but may be present year-round. Non-breeding habitat is important for snowy plovers and other migratory shorebirds because this habitat supplies food and resting areas that allow birds to build fat reserves for spring migration and the upcoming breeding season. Snowy plovers forage for invertebrates and also rest on the beach, mudflats, and sandbars at and near the mouth of the Santa Ana River. The Service recognized the importance of this site to the snowy plover by designating Critical Habitat (Figure 1, below) at the mouth of the Santa Ana River on June 19, 2012 (Service 2012).

The least tern was listed as endangered in 1970 under the authority of the Act, and designated as fully protected in 1970 and endangered in 1971 under the authorities of CESA. The least tern is migratory, and uses habitat within and adjacent to the mouth of the Santa Ana River during the breeding season (April-September). Least terns nest primarily within the fenced Huntington Beach Least Tern Preserve adjacent to the river mouth; however, they also roost outside the fenced boundary (Housel *et al.* 2014). Adult and fledgling least terns have been observed to loaf and preen outside the colony fence along the beach strand and Santa Ana River mouth. Least terns forage on small fish in the near shore ocean, the Santa Ana River and river mouth, and the Santa Ana River estuary. When chicks fledge, they rest on the banks and sand bars at the mouth of the Santa Ana River as well as within the boundaries of the Huntington Beach Least Tern Preserve (Housel *et al.* 2014).

¹ Meeting in person with Department staff Hans Sin and Supervisor Michelle Steel and staff. July 6, 2016. Orange County Supervisors' office.

The presence of leashed or unleashed dogs on the beach and in the river mouth is harmful to snowy plovers and least terns, causing individuals to flush frequently, unnecessarily expending energy reserves. The presence of dogs on the beach or in the river mouth can also result in less time spent foraging (Lafferty 2001). A reduction in foraging time is likely to reduce the ability of snowy plovers and least terns to build fat reserves necessary for migration and reproduction. Dogs may also capture and kill or injure snowy plovers or least terns. For example, at Surfside Beach, Orange County, California, a snowy plover was captured by a dog in September 2009, but was recovered, rehabilitated and released (Ryan and Hamilton 2009) and at Coal Oil Point, Santa Barbara County, California, one snowy plover chick was killed by an unleashed dog (Lafferty *et al.* 2006).

The IS/ND does not adequately define the baseline conditions of the project area including baseline recreational use, traffic, parking availability and distribution and abundance of wildlife resources. In addition, the IS/ND does not quantify the anticipated increase in public use at the Santa Ana River mouth that is likely to occur if this area is designated as a dog park. Understanding the baseline conditions and anticipated increase in recreational use that would result from designation as a dog park is essential to assessing the direct and indirect effects to wildlife resources, including listed species.

The proposed designation of this area as a dog park is likely to result in increased recreational use and dog presence. We remain concerned that increased recreational use, dog presence, and likely changes in foot traffic patterns (i.e., increased travel from the State Parks parking lots to the south side of the river channel, increased foot traffic up the river and into Santa Ana River estuary) will significantly impact the snowy plover and least tern. We recognize that the current proposal states that dogs may only be off-leash outside the least tern breeding season, but the anticipated increased presence of dogs—leashed or unleashed—in sensitive habitat would impact the least tern and snowy plover.

Specific Comments:

1. The IS/ND does not recognize that impacts to species protected by the Act and CESA, such as least tern and snowy plover, may be significant without mitigation. The Wildlife Agencies offer the following evidence as to why significant impacts have potential to occur as a result of the project ordinance change:
 - a. The IS/ND implies that dogs may have an impact on endangered and threatened species if allowed off leash during the nesting season (page 3, IS). Although the IS checklist concludes that the project's impact to biological resources would be less than significant, the impact analysis goes on to cite that biological-based avoidance measures would apply after project completion (i.e., dogs on leashes during the snowy plover and California least tern nesting seasons of March through September).
 - b. There are documented instances of dogs capturing western snowy plovers in Orange County (Surfside Beach; Ryan and Hamilton 2009). In Santa Barbara County a snowy plover chick was killed by an unleashed dog (Coal Oil Point; Lafferty *et al.* 2006). Even if a direct attack does not occur, the mere presence of dogs on the beach is harmful to snowy plovers, causing them to flush frequently, expend energy reserves unnecessarily, and spend less time foraging (Lafferty 2001). Because of this, in Los Angeles and Ventura Counties, the Service has recommended avoidance to reduce impacts to less than significant in cases where activity similar to that described in the project was proposed (Service 2016a.).

- c. Predation managers have documented three instances of take of least tern from domestic dogs in San Diego County. Most notably, a least tern was attacked and killed by a dog that dug under a chain link fence to access an enclosed colony similar to that at the project site (Bonesteel 2016, pers. comm.).

A ND is appropriate only when the lead agency assesses there is no substantial evidence that the proposed project may have a significant effect on the environment; a Mitigated Negative Declaration (MND), alternatively, applies when changes to the project or other mitigation measures are imposed such that all potentially significant effects are avoided or reduced to a level of insignificance. These factors, as well as failure to include an adequate environmental baseline within the ND (see Specific Comment 2 below), lead us to conclude that the avoidance and minimization measures provided in the project description of the ND should have been incorporated into mitigation monitoring or reporting program commitments (California Public Resources Code, Section 21081.6; CEQA Guidelines, Section 15074(d)), along with other mitigation measures that bring impacts below a level of significance, as required under CEQA. Based on the potential for the project to have a significant impact on biological resources, we conclude that an ND is not the appropriate environmental document for this project.

2. Section 3.1.4 of the ND (Biological Resources) provides inadequate information regarding the biological resources on site and is based on a single reconnaissance-level site visit conducted in September 2016. The information provided is inadequate to draw the “less than significant effect” determination presented. Information regarding the numbers of least terns and snowy plovers that use the site, location of snowy plover roosts, and measures that will be taken to ensure adequate separation between dogs and roosting snowy plovers are necessary. For example, in February 2015, 18 snowy plovers were recorded at adjacent Huntington State Beach, and in February 2016, 16 snowy plovers were recorded.

Figure 3 of the IS portrays an inaccurate representation of the Western Snowy Plover Critical Habitat Unit CA 47, the mouth of the Santa Ana River. As depicted in Figure 1, this unit lies immediately north of the river channel, and extends to the ocean. As noted on the figure, “shoreline data may not accurately represent the dynamic shoreline environment.” However, the habitat area is immediately adjacent to the water in the dynamic shoreline environment. The description of the boundaries of Snowy Plover Critical Habitat Unit 47, including a figure, should be included in the project’s final environmental document.

3. The presence of leashed and off-leash dogs and anticipated increase in recreational use would degrade occupied snowy plover habitat, including Critical Habitat Unit CA 47. As proposed, there would be no fence or barrier or intensified enforcement to preclude off-leash dogs from using snowy plover habitat. Snowy plover Critical Habitat includes, in accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, the physical and biological features essential to the conservation of the species which *may require special management considerations or protection*. Physical and biological features include, but are not limited to: (1) space for individual and population growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, and rearing (or development) of offspring; and (5) habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species. When the Service designated critical habitat, the

Service indicated that “For areas lacking a Federal nexus, the Service will work with beach and land managers to implement recovery actions that will avoid or offset adverse effects of disturbance” (Service 2012). Therefore, a discussion of how the project activities would or would not significantly impact this Critical Habitat Unit, including any applicable mitigation measures, should be included in the project’s environmental document.

4. Allowing off-leash dogs in and adjacent to snowy plover habitat is likely to harass and potentially harm individual snowy plovers. The presence of off-leash dogs within or adjacent to the areas where snowy plovers congregate to forage and roost will cause the birds to flee, resulting in increased stress and expenditure of energy. Repeated flushing may result in complete avoidance of important roosting and foraging sites by snowy plovers. In addition, off-leash dogs are likely to chase and occasionally catch, injure, or kill snowy plovers using beach habitat within and adjacent to the river. Actions that result in “take” of federally protected birds are prohibited under section 9 of the Act. Take is defined in Section 3(19) of the Act as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
5. The Wildlife Agencies are also concerned about enforcement of on- and off-leash activity. The IS/ND does not describe how leash restrictions proposed by the project will be enforced, or what penalties will result from failing to comply with the ordinances. Without appropriately robust enforcement, significant impacts to least tern and snowy plover may occur in the form of incidental take. As a State fully protected species, take cannot be authorized for least tern by the Department. A thorough discussion of enforcement, therefore, including history of enforcement on the site with regard to current ordinances, should be included in the project’s environmental document. A mitigation measure describing how enforcement will be implemented should also be included.
6. Measures to ensure that dog owners do not park at Huntington State Beach parking lot and walk adjacent to the Least Tern Colony en route to the proposed dog park are necessary. Section 3.1.16 of the IS (Transportation/Traffic) does not adequately address the availability for parking for a dog park, or the potential for increased use of the parking lot at Huntington State Beach. An inadequacy of parking adjacent to the southern side of the river (in Newport Beach) is likely to result in dog owners parking at Huntington State Beach parking areas. If dog owners park at Huntington State Beach, dog owners and dogs would walk immediately adjacent to the fenced Least Tern Colony or through the snowy plover Critical Habitat on the ocean-ward side of the Least Tern Colony to reach the proposed dog park area. Increased foot traffic and dog traffic would increase disturbance to least terns and snowy plovers. The project’s environmental document should include a thorough discussion of how these factors will impact biological resources, and incorporate mitigation measures that make those impacts less than significant.

In closing, the Wildlife Agencies re-iterate our November 21, 2016, recommendation that the proposal to designate the mouth of the Santa Ana River as a dog park and allow off-leash dogs be permanently abandoned so that the project avoids significant impacts to biological resources. Snowy plovers and least terns depend upon this area for food, resting, breeding, and chick rearing. We remain interested in working with you to increase awareness, incorporate good stewardship practices, and strengthen habitat conservation efforts on Orange County beaches, including the potential of developing a HCP to address recreational impacts and overall conservation of the least tern and snowy plover on Orange County beaches. We have recommended that “Special Protection Zones” be

developed on beaches in Los Angeles County [Service 2016 (enclosed)], and a similar approach would be appropriate on Orange County Beaches.

The Wildlife Agencies are available to assist the County in addressing our concerns. We request an opportunity to review and comment on any response that the County has to our comments and to receive notification of the forthcoming hearing date for the project (CEQA Guidelines; §15073(e)). If you have any questions regarding these comments, please contact Sandy Vissman of the Service at 760-431-9440, extension 274 or Jennifer Turner of the Department at 858-467-2717.

Sincerely,



Gail Sevens
Environmental Program Manager
California Department of Fish and Wildlife

for Karen A. Goebel
Assistant Field Supervisor
U.S. Fish and Wildlife Service

Enclosure

cc:

Andrew Willis, California Coastal Commission
Hans Sin, California Department of Fish and Wildlife
Greg Gauthier, California State Coastal Conservancy
Michelle Steel, Orange County Board of Supervisors
Scott Morgan, State Clearinghouse
Carolyn Lieberman, U.S. Fish and Wildlife Service
State Clearinghouse

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- [Service] U.S. Fish and Wildlife Service. 2016a. January 19, 2016 letter from Service to Jamie King, of California Department of Parks and Recreation, Angeles District. 08EVEN00-2015-CPA-0067. 6 pages.
- [Service] U.S. Fish and Wildlife Service. 2016b. November 21, 2016 letter from Service to Michelle Steel, of Orange County Board of Supervisors. FWS-OR-17B0026-17CPA0015. 2 pages.

Personal Communication

- Bonesteel, Brian. 2016. U.S. Department of Agriculture. Personal communication regarding predator management at California least tern and western snowy plover colonies in San Diego. On file, California Department of Fish and Wildlife R5 Office. Dated December 5, 2016.

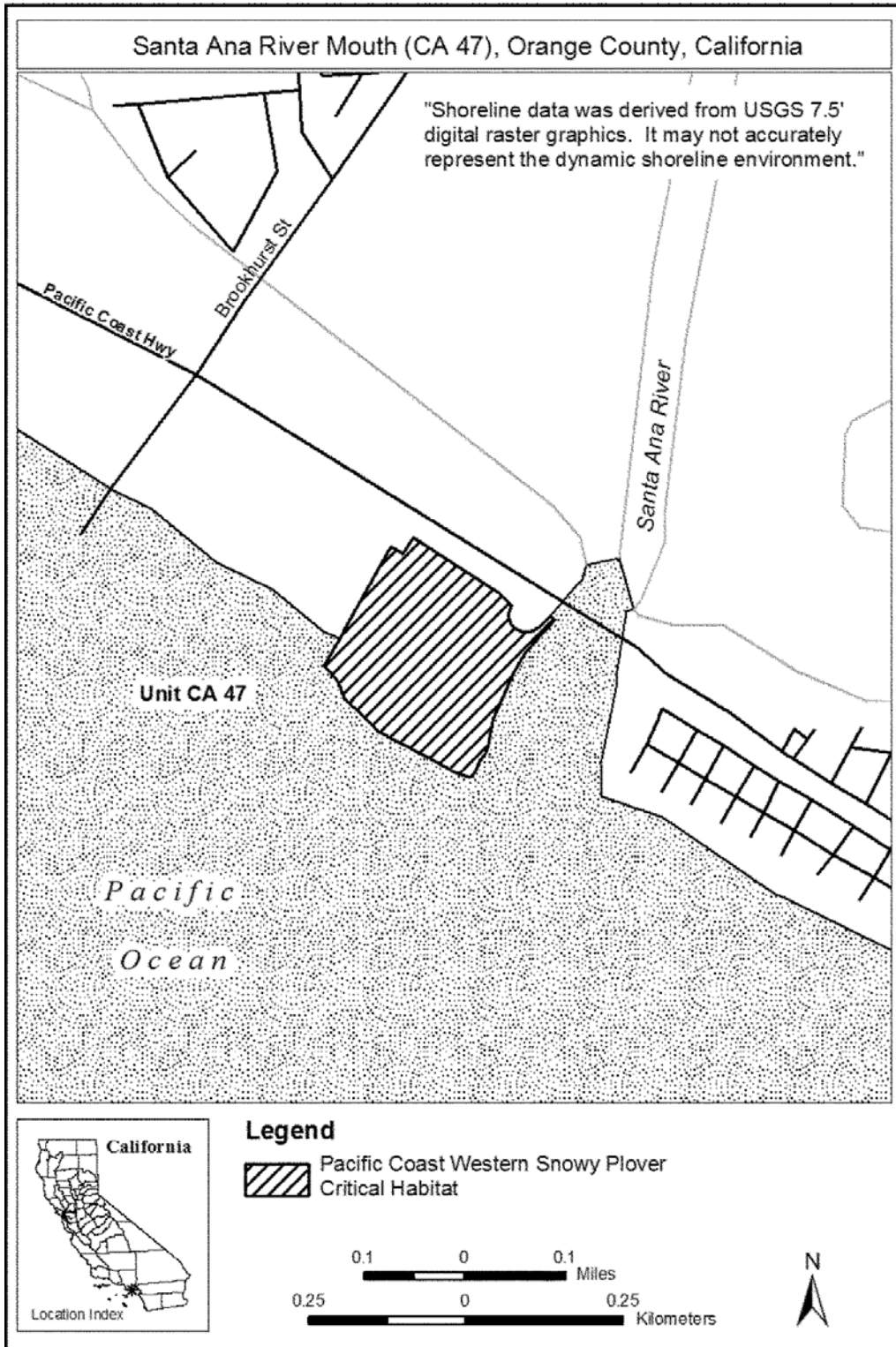


Figure 1. Western Snowy Plover Critical Habitat Unit CA 47

ENCLOSURE



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Ventura Fish and Wildlife Office
2493 Portola Road, Suite B
Ventura, California 93003

IN REPLY REFER TO:
08EVEN00-2015-CPA-0067

January 19, 2016

Jamie King, Environmental Scientist
California Department of Parks and Recreation, Angeles District
1925 Las Virgenes Road
Calabasas, California 91302

Subject: Protective Measures for Western Snowy Plovers on Beaches in Los Angeles
County, California

Dear Ms. King:

We, the U.S. Fish and Wildlife Service (Service), are contacting you and other beach administrators and stakeholders who have an interest in western snowy plovers (*Charadrius nivosus nivosus*), recreation, management, and operations on beaches in Los Angeles County. Western snowy plovers are known to winter on beaches in Los Angeles County and have attempted to nest at Surfrider Beach in Malibu. After a series of discussions, meetings, and electronic mail exchanges with beach administrators, stakeholders, and western snowy plover experts, we have developed some measures we recommend to help protect this species on beaches in Los Angeles County and not interfere with continued recreation activities, and beach management operations.

The Service's responsibilities include administering the Endangered Species Act of 1973, as amended (Act), including sections 7, 9, and 10. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines take to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define harm to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. Harassment is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Exemptions to the prohibitions against take in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a Federal agency and may affect a listed species, the Federal agency must consult with the Service, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a Federal agency, but may result in the take of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act. To

qualify for the permit, a project proponent would need to submit an application to the Service together with a habitat conservation plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. A complete description of the requirements for a HCP can be found at 50 CFR 17.32 or our website (<http://www.fws.gov/ventura>).

The Pacific coast population of the western snowy plover was listed as threatened on March 5, 1993 (58 Federal Register (FR) 12864) under the authorities of the Act. Critical habitat for the species, which includes Zuma Beach (Unit CA 43), Malibu Beach (Unit CA 44), Santa Monica Beach (Subunit CA 45A), Dockweiler North (Subunit CA 45B), Dockweiler South (Subunit CA 45C), and Hermosa State Beach (Subunit 45D), was designated on June 19, 2012 (77 FR 36728).

2

Ryan et al. (2014) determined that western snowy plovers in Los Angeles County overwinter at seven primary spots. These overwintering sites are within critical habitat for the subspecies and include locations at Zuma Beach (near Lifeguard Tower 9 and Zuma Lagoon), Malibu Lagoon (Surfrider Beach), Santa Monica Beach, Dockweiler State Beach (near Lifeguard Tower 58), Hermosa Beach, and Cabrillo Beach. Ryan et al. (2014) also reported that western snowy plovers occasionally overwinter at sites at Leo Carrillo State Beach, Paradise Cove, Dan Blocker County Beach, Big Rock Beach, Will Rogers State Beach, Venice Beach, central Dockweiler State Beach, El Segundo Beach, Manhattan Beach, Redondo Beach, and Terminal 400 in Los Angeles Harbor.

Western snowy plovers exhibit strong fidelity to overwintering sites, returning to the same beaches every year after nesting elsewhere and migrating. Overwintering habitat is important for western snowy plovers and other migratory shorebirds because the time spent at these sites is when these birds build fat reserves for spring migration and the upcoming breeding season. Overwintering sites also provide connectivity for dispersal between breeding sites. Furthermore, with appropriate management, sites that currently support only wintering western snowy plovers have the potential to attract new nesting western snowy plovers with appropriate management. This has been demonstrated at Coal Oil Point, Santa Barbara County, and Hollywood Beach, Ventura County. Western snowy plovers also made a nesting attempt at Surfrider Beach, Malibu, Los Angeles County, after overwintering there. The importance of overwintering beaches to the western snowy plover tends to be overlooked and discounted when it comes to conservation of the subspecies, with more attention being given to known breeding locations. However, the Service acknowledged the importance of overwintering habitat for the western snowy plover by including such areas in the critical habitat designated for the subspecies in June 19, 2012 (77 FR 36728).

We understand that beaches in Los Angeles County, including the seven aforementioned overwintering sites, experience disturbance from mechanical raking (i.e., beach grooming) for removal of garbage, kelp, and other debris. Dugan et al. (2003) reports that over 160 kilometers of southern California sandy beaches are groomed regularly and that grooming decreases the species richness, abundance, and biomass of wrack-associated invertebrates that are likely important western snowy plover prey resources. Beach grooming also removes favorable nesting habitats and likely destroys nest scrapes and eggs.

Other activities occurring on Los Angeles County beaches that could lead to the disturbance of overwintering western snowy plovers include recreational use, vehicular traffic (e.g., lifeguard patrols), domestic animals (i.e., dogs), and predators attracted to human refuse (i.e., trash). Recreational activities such as sunbathing, swimming, dog walking, and sports, require support services such as police and lifeguard patrols, water quality monitoring, erosion control, and trash pick-up, which increase the presence of vehicles on the beach. Vehicles driven on the beach have struck and killed western snowy plovers, as well as other shorebirds, in Los Angeles County. For example, on January 9, 2007, a western snowy plover was found dead by volunteer monitors on Zuma Beach in a fresh tire track due to a vehicle strike. The only vehicle observed on the beach that morning was a Lifeguard truck conducting routine patrols. On, August 19, 2013, a California State Park monitor witnessed another western snowy plover being struck by a Lifeguard vehicle during routine patrols. In this particular case, the western snowy plover initially survived the strike with a crushed head and was transported to a rehab center in Los Angeles; however, the plover died from the injury. Other instances have also been documented of black-bellied plovers (*Pluvialis squatarola*) being struck by vehicles at Dockweiler State Beach on March 17, 2009, and November 24, 2009.

The mere presence of dogs on the beach is harmful to western snowy plovers, causing them to flush frequently, unnecessarily expending energy reserves, as well as spending less time foraging (Lafferty 2001). In addition to expending more energy evading dogs and spending less time foraging, there are instances when dogs actually capture and kill or injure western snowy plovers. For example, at Surfside Beach, Orange County, California, a western snowy plover was captured by a dog in September 2009, but was recovered, rehabilitated and released (Ryan and Hamilton 2009). Also at Coal Oil Point, Santa Barbara County, California, one western snowy plover chick was killed by an unleashed dog (Lafferty et al. 2006).

Because monitoring of overwintering western snowy plovers is extremely limited at some locations, if it occurs at all, we believe the impacts to western snowy plovers from beach grooming, recreational activities, vehicular traffic, dogs, and predators attracted to food and trash to beaches is much greater than what we observe. Furthermore, the discovery of a dead or injured western snowy plover is unlikely because the bodies of these birds are taken by scavengers or removed by the daily beach grooming activities.

Efforts to protect wintering western snowy plovers on Los Angeles County Beaches should be implemented within 500 feet of the central roost location. The following measures should be implemented from the arrival of the first returning western snowy plovers in July until they depart in April to May each year. Specifically, at Surfrider Beach in Malibu these measures should be implemented year-round for the entirety of California Department of Parks and Recreation (State Parks) property. For all beaches in Los Angeles County, these areas should be referred to as "Special Protection Zones" and managed and maintained differently from adjacent areas of beaches without roosting western snowy plovers.

Recommendations for Special Protection Zones.

Routine Operation of Vehicles and Heavy Machinery

- All drivers of vehicles and machinery that are operated on sections of beach where western snowy plovers occur should receive annual training per a Service approved program to avoid western snowy plovers. Training logs should be kept for all staff. State Parks staff should have successfully completed the Beach Driving Operations Training Course and annual refresher courses.
- Vehicles should avoid operating within Special Protection Zones, with the exception of activities such as essential patrols, trash pick-up and other activities agreed to by wildlife agencies as being essential. Vehicles simply transiting between points should not be allowed within these areas. For Surfrider Beach specifically, the following measures should be implemented: 1) All beach vehicle operation will be limited to emergency response activities (e.g., Code “R” responses; rescue preventions, including boat warnings; urgent law enforcement issues; and emergency medical service calls); and 2) If heavy equipment is needed onsite for emergency activities (boat rescue, structure protection) or other projects consistent with State Park’s mission, State Parks resource staff will be contacted for approval prior to accessing the site, and as needed, to provide monitoring for vehicles at all times when onsite.
- Visible markers, possibly with signage should be placed within 100 feet of the top of the beach slope and at the inland corners of the Special Protection Zones to remind vehicle operators of their presence. (This is not applicable at State Park’s section of Surfrider Beach because the entire area is within a Special Protection Zone).
- When essential activities must occur, vehicles should remain below a maximum 10 miles per hour speed limit and if western snowy plovers are encountered, the driver should back up at least 50 feet and/or alter their route to avoid flushing plovers.

Beach Maintenance and Clean up

- Regular sand grooming should be discontinued within Special Protection Zones. This activity both flushes the birds and removes important foraging resources (e.g. surf-cast kelp). These small areas should be cleaned by hand crews, trained in western snowy plover avoidance. If mechanical clean-up is necessary, it should be done in the presence of a qualified western snowy plover monitor who will locate the roosting plovers and ensure that machinery does not flush or disturb them.
- For Surfrider Beach, as agreed to by State Parks and Los Angeles County, sand grooming is not permitted at Surfrider Beach on State Park’s property. Wrack is to be left in place and trash removed by hand.

Recreational Activities

- “Refuge Areas” should be created using symbolic fencing or another barrier deemed suitable for this use during periods of high beach use at popular beaches in July, August, and September. These should be erected in a 300-foot diameter (or other configuration suitable for the beach, but roughly 300 feet long) around the traditional center of the plover’s roosting

areas on popular beaches such as Zuma, Dockweiler State Beach 58, and Hermosa Beach. Signage should be placed on the barrier such as has been done at Surfrider Beach in Malibu (which used signs made by local school children).

- Large-scale recreational activities such as triathlons, surf camps, beach volleyball camps, etc. should not be permitted within the Special Protection Zones. Docents should visit camps adjacent to the Special Protection Zones to talk to participants about western snowy plovers.
- Enforcement of existing regulations for off-leash dogs should be increased within the Zones.

Western Snowy Plover Awareness Training

Any staff personnel that operate motorized vehicles on Los Angeles County beaches should be required to attend annual training to increase their awareness of western snowy plovers. This training should include a short instructional tutorial that describes the biology of the western snowy plover, its habitat and life history, its legal status, and the consequences of violating the Act. The tutorial slide show (e.g., power point type presentation) or informational hand-out would be developed by the Service with input from your respective agencies, California Department of Fish and Wildlife, and the Los Angeles Audubon Society. In addition to the tutorial, staff should view a video provided by the Service that demonstrates safe driving techniques on beaches with sensitive wildlife. Staff members should be required to sign a statement acknowledging they have viewed and understand the tutorial and video. The signed statement would be kept on file with the respective agencies in the employee's record.

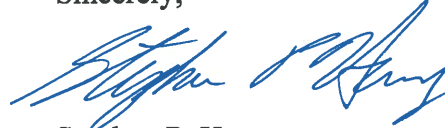
Although these measures should help reduce the potential for take of western snowy plovers, take, as defined earlier, is still likely to occur. And any take of listed species that would result from activities on your beaches would require either (a) exemption from the prohibitions against take in section 9 of the Act pursuant to section 7 or (b) take authorization pursuant to section 10(a)(1)(B) of the Act. Unless a Federal nexus exists that could cover the entire action area under an interagency consultation pursuant to section 7, we recommend that you seek an incidental take permit through the habitat conservation planning process, pursuant to section 10(a)(1)(B) of the Act.

With your cooperation, we can help conserve the western snowy plover on public beaches while still providing recreational opportunities for tourists and the people of Los Angeles County. We suggest revisiting these recommended measures at least annually to ensure they continue to benefit the western snowy plover on public beaches in Los Angeles County while minimizing the impact on residents and beachgoers; however, we are available any time to discuss this program.

As a reminder, this implementation of these recommended avoidance measures do not constitute authorization from us to take federally listed species in any manner. In the event that federally listed species are detected anywhere where activities could result in take, you should contact us to assess any potential effects to listed species and the possible need for other avoidance measures.

If you have any questions regarding the western snowy plover or other federally listed species on public beaches in Los Angeles County, please contact Chris Dellith or Bill Standley of my staff at (805) 644-1766, extensions 227 or 315, respectively.

Sincerely,



Stephen P. Henry
Field Supervisor

Identical Letter to:

Fernando Boiteux, Los Angeles County Fire Department
Charlotte Miyamoto, Los Angeles County Beaches and Harbors
Ioannice Lee, City of Los Angeles
Dean Kubani, City of Santa Monica

cc:

Jim Watkins, U.S. Fish and Wildlife Service, Arcata Office
Jonathan Snyder, U.S. Fish and Wildlife Service, Carlsbad Office
Erin Dean, U.S. Fish and Wildlife Service, Law Enforcement Office
Dan Swenson, U.S. Army Corps of Engineers
Nancy Frost, California Department of Fish and Wildlife
Stacey Vigallon, Los Angeles Audubon Society



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
Carlsbad Fish and Wildlife Office
2177 Salk Avenue, Suite 250
Carlsbad, California 92008



In Reply Refer To:
FWS-OR-17B0026-17CPA0015

November 21, 2016
Sent by Email

Supervisor Michelle Steel
Orange County Board of Supervisors
10 Civic Center Plaza
Santa Ana, California 92701

Subject: Off-leash Dogs at the Santa Ana River Mouth, Orange County, California

Dear Supervisor Steel,

We are contacting you regarding a recent proposal to allow off-leash dogs at the Santa Ana River mouth. The primary concern and mandate of the U.S. Fish and Wildlife Service (Service) is the protection of public fish and wildlife resources and their habitats. We have legal responsibility for the welfare of migratory birds, anadromous fish, and endangered animals and plants occurring in the United States. We are responsible for administering the Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d *et seq.*), and the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*).

The presence of dogs at the mouth of the Santa Ana River is likely to disturb federally endangered California least terns (*Sternula antillarum browni*; least tern) and federally threatened western snowy plover (Pacific Coast population DPS) [*Charadrius nivosus nivosus* (*C. alexandrinus* n.); snowy plover]. Both of these federally protected birds use the beach habitat within and immediately adjacent to the river. Least terns nest in protected beach habitat immediately to the north of the river mouth (Huntington Beach Least Tern Nesting Area); forage in the waters at the river mouth; and roost on the adjacent shoreline, dunes, and sandbars. Snowy plovers forage and roost on the shoreline, dunes, and sand bars adjacent to the river mouth.

In 2012, our agency designated an area immediately adjacent to the Santa Ana River mouth as *Western Snowy Plover Critical Habitat, Unit 47* (Service 2012) because the area supports habitat that is “...essential to the conservation of the species, which may require special management considerations or protection” (Act, 16 U.S.C. 1531 *et seq.*). Special management considerations for this site should include minimizing disturbance to the western snowy plover.

Allowing off-leashed dogs on the beach adjacent to least tern and snowy plover habitat is likely to disturb these species in several ways. The mere presence of off-leashed dogs on the beach will cause foraging or loafing birds to flee, resulting in increased stress and expenditure of energy. Repeated flushing may result in complete avoidance of these important foraging and loafing sites

by overwintering snowy plovers. In addition, off-leashed dogs are likely to chase and occasionally even catch, injure, or kill least terns or snowy plovers using beach habitat within and adjacent to the river. Actions that result in “take” of federally protected birds are prohibited under section 9 of the Act. Take is defined in Section 3(19) of the Act as “*harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.*”

Due to these concerns, we support the Orange County Board of Supervisors’ decision to remove consideration of allowing off-leashed dogs at the Santa Ana River mouth (October 25, 2016, agenda item 49) and recommend that the proposal be permanently abandoned. In addition, we are interested in coordinating with you to increase awareness, incorporate good stewardship practices, and strengthen habitat conservation efforts on Orange County beaches.

Shorebirds and seabirds that depend on our coastline, including the least tern and snowy plover, require areas where they can rest and obtain food (forage). Good stewardship and habitat conservation for shorebirds would include measures that reduce anthropogenic disturbances and assure food availability in shorebird/ seabird habitat. We are available to meet with appropriate Orange County personnel and can provide additional information about the biology and ecology of the least tern and snowy plover, location(s) of critical habitat units and breeding/wintering sites, or arrange a site visit to discuss the conservation needs of these species, including the potential value of developing a Habitat Conservation Plan (HCP) to address recreational impacts and overall conservation of the two species on Orange County beaches.

We appreciate your support and interest in the protection of the least tern and snowy plover and other federally protected species in Orange County. Please contact Senior Fish and Wildlife Biologist Sandy Vissman of this office at 760- 431-9440, extension 274, if you would like additional information, or if you would like to conduct a site visit.

Sincerely,

Karen A. Goebel
Assistant Field Supervisor

LITERATURE CITED

[Service] U.S. Fish and Wildlife Service. 2012. Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover. Federal Register/Vol. 77, No. 118 / Tuesday, June 19, 2012. Pages 36728-36869.

Exhibit G



May 31, 2019

Mr. Gregg Ramirez
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

SUBJECT: REVIEW OF DRAFT WESTERN SNOWY PLOVER MANAGEMENT PLAN FOR EAST BALBOA PENINSULA BEACHES NEWPORT BEACH, CALIFORNIA CDP APPLICATION NOS. 5-17-0465 AND 5-17-0515

Dear Mr. Ramirez,

On May 20, 2019, the City of Newport Beach (City) held an open house seeking public input into a revised Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches, Newport Beach, California (“revised draft plan”), prepared by Glenn Lukos Associates. This letter, written by Robert A. Hamilton, President of Hamilton Biological, Inc., provides independent technical review of the revised draft plan.

APPLICABLE COASTAL ACT REGULATIONS

The Western Snowy Plover (WSP) is one of several native species associated with beaches and dunes that receive formal protection under the City's certified Local Coastal Program (LCP). The LCP consists of a Coastal Land Use Plan (CLUP) and an Implementation Plan.

Section 30107.5 of California Coastal Act defines Environmentally Sensitive Habitat Areas (ESHA's) as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

Section 30240 of the Coastal Act restricts development in any ESHA to resource dependent uses, and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA.

Page 4.3 of the CLUP states:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. **These include southern dune scrub...** [emphasis added]

Page 4.42 of the CLUP states:

In Newport Beach, southern coastal foredune habitat extends southwest along the ocean side of the Balboa Peninsula from 10th Street to the tip of the peninsula.

Policy 4.1.1-10, on page 4-7 of the CLUP, provides direction for complying with Section 30240 of the Coastal Act:

Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. **Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible.** Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance. [emphasis added]

To date, the City has made no effort to (a) identify all beach/dune ESHA; (b) establish the required minimum 50-foot buffer around all ESHA; (c) remove unpermitted development in beach/dune ESHA (or obtain an after-the-fact permit); or (d) develop City-wide beach/dune management policies designed to avoid future loss or degradation of ESHA. As reviewed below, the City's failure to implement its certified LCP in beach/dune areas has led to long-term, ongoing degradation of dune ESHA, and harassment (i.e., "take") of WSP's in traditional wintering areas, in violation of Section 30240 of the Coastal Act (and the federal Endangered Species Act, as discussed subsequently).

CURRENT/ONGOING VIOLATIONS OF THE COASTAL ACT

Unpermitted Fencing/Paracord Barrier

Where the City did provide protective fencing to a limited area of dunes – between D and E Streets on the Balboa Peninsula – the fence itself lacked a Coastal Development Permit (CDP), was established within ESHA and/or the required ESHA buffer, and its dimensions may have been smaller than optimal for the WSP (the species targeted for protection). At the most recent open house, on May 20, 2019, the City reported having removed some sections of fencing and replacing it with a paracord barrier. These actions, like so many others taken by the City in areas of dune ESHA, were completed without benefit of formal environmental analysis or the required Coastal Development Permit, and therefore violated the Coastal Act.

Unpermitted Encroachments into Beach/Dune ESHA

Pages 4.42-4.43 of the LCP state:

Ornamental and non-native species, likely introduced from the adjacent residences, dominate much of the southern coastal foredune habitat. Numerous residences use the beach area as an extension of their backyards. Some residents have planted and irrigated the ornamental species, which have replaced native species in these areas. Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.

This encroachment of private landscaping into public ESHA represents an ongoing violation of the Coastal Act. Policy 4.5.1-1, in the certified LCP, suggests that this encroachment is offset by “the removal of exotic vegetation and the restoration of native vegetation in dune habitat,” but impacts to ESHA cannot be mitigated by restoring a different area (see *Bolsa Chica Land Trust v. Superior Court*). Furthermore, no such dune restoration has occurred in a systematic way commensurate with the level of impact from numerous encroachments upon dune habitats in Newport Beach.

Unpermitted encroachment has continued and expanded, impacting substantial areas of beach/dune ESHA. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers “to prevent impacts that would significantly degrade the adjacent ESHA.” In practice, the City does not do this, and thus violates its own certified LCP and the Coastal Act.

Unpermitted Concrete Walkways

During the past two decades, the City has constructed 22 concrete walkways extending from the ends of streets south across the beach. Many of these impact traditional WSP wintering locations, coastal dune ESHA, and/or required ESHA buffers. See Exhibits 1 and 2, on the following page.



Exhibit 1, showing in dark blue the locations of 14 walkways that extend through dune and/or beach habitats, between 18th Street and B Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.



Exhibit 2, showing in dark blue the locations of eight walkways that extend through dune and/or beach habitats between C Street and M Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.

It appears that none of the 22 walkways built by the City was subjected to any formal environmental review, public review, or approval by the CCC through the CDP application process. Section 30001 of the Coastal Act states:

- a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.
- b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.
- c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.
- d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.

Building concrete walkways through beach/dune ESHA and ESHA buffer, and into traditional WSP wintering grounds, without any form of environmental review, violates these basic tenets of carefully protecting the ecological balance of the coastal zone.

City representatives state that the walkways were built to increase accessibility to the ocean for disabled people, and have suggested that none of the walkways could be removed without violating the Americans with Disabilities Act. It is untrue that the City is entitled to undertake construction through ESHA and into traditional WSP wintering areas, without environmental review or permits, simply by invoking the Americans with Disabilities Act.

Section 30200(b) of the Coastal Act states:

Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, Section 30007.5 shall be utilized to resolve the conflict and the resolution of such conflicts shall be supported by appropriate findings setting forth the basis for the resolution of identified policy conflicts.

Section 30007.5 of the Coastal Act states:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner that on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

For Coastal Act compliance, “balancing” or “conflict resolution” requires that conflicts may be resolved in a manner which on balance is the most protective of significant coastal resources. To establish a policy conflict and approve a project based on conflict resolution, the following findings are necessary:

- The project is inconsistent with at least one Chapter 3 policy of the Coastal Act (e.g., unpermitted impacts to environmentally sensitive habitat areas, wetlands, or agricultural resources).
- Denial or modification of the project to eliminate the policy inconsistency would adversely affect other coastal resources that the Coastal Act requires to be protected or enhanced.
- There are no feasible alternatives that could achieve project objectives without violating a Chapter 3 policy of the Coastal Act.
- The project’s adverse impacts are minimized and mitigated to the maximum extent feasible.

Subjecting the 22 walkways to the required analysis would likely result in removal of some of them. This is because the overall goal of providing adequate public access to the ocean in Newport Beach could be achieved without impacting ESHA, ESHA buffers, or facilitating human incursion into traditional WSP wintering or breeding areas.

Consider the walkway that extends more than 300 feet south from the end of E Street. This walkway, constructed in fall 2014, was specifically identified by Tom Ryan and colleagues¹ as being potentially deleterious to WSP’s that traditionally winter in that area, and that nested there in 2008, 2009, and 2013². Page 15 of the 2017 WSP report stated:

Declines were detected between 2014 and 2017 at Huntington State Beach and the Balboa Peninsula (Table 2). We observed the largest decline on the Balboa Peninsula (Table 2) following the installation of a walkway on the beach that was placed within the area traditionally used by roosting plovers.

Page 27 stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has

¹ Ryan, T, S Vigallon, L Plauzoles, C Egger, S Sheakley, R Griswold, and B Eastman. 2017. *The Western Snowy Plover in Los Angeles and Orange Counties, California: September 2014 to February 2017*. Report dated February 24, 2017, prepared for State of California, Department of Fish and Wildlife, San Diego, CA.

² Ryan, TP, S Vigallon, DS Cooper, C Delith, K Johnston, and L Nguyen. 2019. *Return of beach-nesting Snowy Plovers to Los Angeles County following a 68-year absence*. *Western Birds* 50:16–25. [https://www.westernfieldornithologists.org/archive/V50/50\(1\)-p016-p025.pdf](https://www.westernfieldornithologists.org/archive/V50/50(1)-p016-p025.pdf)

continued into 2015-16. Additionally, this beach became narrower during the fall months due to beach erosion from late summer/fall hurricanes in the central Eastern Pacific. This is a broad sandy beach, with residential homes backing it. It is very popular with beachgoers during the summer months. It also supports a 1.24 hectare dune restoration area where a pair of plovers has nested in recent years. This is the only known beach nesting Snowy Plover pair on the mainland in LAC or OC, although they did not nest here in 2014, 2015 or 2016.

The City cooperates with Mr. Ryan and his research colleagues, and receives regular reports on the status of WSP in the City. Multiple reports identify the E Street walkway as a potentially important contributor to disturbance of plovers that traditionally roost in the affected area, and that have nested there three times in the past 12 years (but not since the E Street walkway was put in). The most recent report covering 2018³ (not cited in the revised draft plan) shows a rebounding of WSP numbers wintering on the Balboa Peninsula, but with a shift away from the E Street area and toward the M Street area.

Removal and Degradation of Dune ESHA, Balboa Peninsula

Review of aerial imagery shows that the limits of dune topography and vegetation have generally remained stable for two decades. As shown in Exhibits 3 and 4, on the following page, however, the City lost at least one area of dune ESHA between October 2007 and December 2017. I first reported on this situation in a letter to the City and the CCC dated September 21, 2017, and Steve Ray and I have testified about this continuing situation at multiple CCC hearings. In the intervening 20 months, neither the City nor the CCC has taken any follow-up action to correct this Coastal Act violation.

Degradation of Dune/Estuarine ESHA at River Jetties

The degradation of dune and estuarine habitat has been striking near the mouth of the Santa Ana River. The dunes in this area are formally designated as ESHA. In a letter to area residents dated October 15, 2014 (Subject: "Final Monitoring Plan – Compliance with Consent Cease and Desist Order CCC- 06-CD-01 and Consent Restoration Order CCC-06-RO-01"), Deputy Chief of Enforcement Aaron McClendon described restoration of dune ESHA in this area as "one of the most successful we have seen" and lauded the local residents for having "turned a difficult situation into a very positive outcome, enhancing some of the rarest coastal habitats on the southern California coast." At that point, under the Coastal Act, the City became legally responsible for managing the restored dune ESHA near the river mouth consistent with its certified LCP. Having made no serious effort to do so, dune ESHA in this area has become visibly degraded. Non-native, invasive plant species are becoming established in this area, and sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people, dogs, and ultralight take offs and landings.

³ Ryan Ecological Consulting. 2019. Western Snowy Plover and California Least Tern in Orange and Los Angeles Counties, California; January to December 2018. Report dated January 31, 2019, prepared for San Diego Zoo Global, Escondido, CA.



Exhibit 3. Aerial image taken October 22, 2007, showing in red an apparent dune between G and I Streets on the Balboa Peninsula, with a limited area of non-native iceplant near the northern edge of the indicated area. Source: Google Earth Pro.



Exhibit 4. Aerial image taken December 3, 2017, showing in red the same area, between G and I Streets on the Balboa Peninsula. Over the course of a decade, dune ESHA was removed and non-native iceplant was allowed to expand substantially. Source: Google Earth Pro.

Section 7.04.020 of the City of Newport Beach Municipal Code requires all dogs to be leashed at all times, and Section 7.04.030 prohibits dogs on beaches from 10:00 a.m. to 4:30 p.m. year-round and requires that owners clean up their dogs' feces.

The County's web page, <http://www.ocpetinfo.com/services/petlaws>, summarizes relevant parts of the Orange County Codified Ordinance (OCCO) as follows:

4-1-45: "No person owning or having charge, care, custody, or control of any dog shall cause or permit, either willfully or through failure to exercise due care or control, any such dog to be upon any public property unless such dog be restrained by a substantial chain, or leash not exceeding six (6) feet in length, and is under the charge of a person competent to exercise care, custody, and control over such dog." You must keep your dog leashed anytime your dog is off your property. Your dog must be on a leash no longer than six (6) feet in length and in the care of a competent adult. There are designated "dog parks" throughout Orange County that lawfully allow the absence of a leash.

4-1-46: "No person having the charge of any dog, except a guide dog or service dog, shall permit said dog to be under any circumstances within public school property, certain county parks, or any public beach". It is unlawful to be on any public school property with your dog. Setting your dog loose to play, even within a fenced area, at a public school is a direct violation of this ordinance. See OC Parks for county parks that permit dogs that are leashed.

When both the City and the County of Orange (County) decided, several years ago, to effectively stop enforcing these local ordinances near the river mouth, local dog-owners responded by turning this ecologically valuable area – an estuary located between dune ESHA and critical habitat for the WSP and California Least Tern (also clearly ESHA) – into a *de facto* unleashed dog beach. They have been followed by pilots of "ultralights," who frequently use the river estuary and restored dune area as places to take off and land their exceedingly noisy, gas-powered aircraft.

In 2016, the County attempted to formally designate the Santa Ana River estuary as a "dog beach" through preparation of an Initial Study/Negative Declaration (IS/ND), but received extensive substantive comments submitted by the CCC, USFWS, several respected conservation organizations, and local residents, demonstrating the destructiveness of this policy in an environmentally sensitive area that many public and private groups have spent millions of dollars and thousands of hours restoring and maintaining for its ecological values. In response, the County tabled consideration of the IS/ND, conducted multiple on-site media events to promote the newly created "dog beach," and continued allowing the illegal use of the river estuary. Years later, large numbers of people continue to bring off-leash dogs to the river estuary.

On June 4, 2018, an on-site meeting was convened at River Jetties, attended by you, other City representatives, County representatives including Shane Silsby and Colby Cataldi, enforcement officer Jordan Sanchez of the CCC, wildlife biologist Sandy Vissman of the USFWS, Penny Elia representing the Sierra Club OC Conservation Committee, Susan Sheakley representing Sea & Sage Audubon, attorney Mark Massara, and Mr. Hamilton. At the meeting, Ms. Vissman reiterated her standing request that the City and County establish an "avian protection area" or "special protection zone"

encompassing the ecologically important river estuary and adjacent dune habitats as we stood next to dune ESHA and all witnessed it being trampled by off-leash dogs and their owners. Also in our presence, an ultralight operator began unpacking his equipment from his truck.

At the meeting, representatives of the City and County once again acknowledged these problems, but rather than attempting to work toward a solution that everyone could live with, including the ESHA and listed species, you and Mr. Silsby pointed out that local elected representatives consider the prospect of prohibiting dogs from the area in and around the river estuary – in accordance with both City and County ordinances, as well as the Coastal Act and the state and federal Endangered Species Acts – to be politically unacceptable, because dog owners represent a more potent lobbying force compared with advocates of environmental protection in compliance with local, state, and federal laws.

On December 3, 2018, Principal Engineer Jim Volz of OC Public Works and three members of his staff, met with Ms. Elia of the Sierra Club, as well as representatives of Sea & Sage Audubon and the Surfrider Foundation. According to Ms. Elia (pers. comm.), Mr. Volz assured the environmental groups that signage intended to keep the public and dogs out of the Santa Ana River estuary would be installed within 60 days. Mr. Volz stated that this signage would be covered by a Coastal Development Permit (CDP) that he would work directly with CCC staff to expedite. The signage was never installed.

Most recently, on May 23, 2019, the County responded to a Public Records Act Request from Ms. Elia by claiming that the County's jurisdiction at the mouth of the Santa Ana River is much more limited than had been previously disclosed. A map purporting to show County jurisdiction does not align with the project area for the County's 2016 IS/ND for the "dog beach" (which was never certified), and no representatives of the County raised this as an issue during either the site meeting on June 4, 2018, or the meeting with OC Public Works on December 3, 2018.

Regardless of this jurisdictional confusion, the bottom line remains that sensitive ecological resources within and adjacent to the Santa Ana River estuary are not receiving protections called for under the City's certified LCP and under the Coastal Act. What has not been discussed or considered, to date, is that the City and County manage these sensitive resources and sovereign lands on behalf of the California State Lands Commission (CSLC), which owns the land but does not appear to have been integrally involved in shaping recent land-use decisions in this ecologically important area. Given the range of land-use conflicts described herein, and the lack of a coherent response from the City, County, and CCC, the signatories to this letter intend to involve the CSLC moving forward.

ALTERNATIVE SITES FOR DOG BEACHES

Managing City beaches and dunes consistent with the City's certified LCP involves balancing environmental protection requirements against the reasonable expectations of

tourists and local beachgoers. Any successful comprehensive planning approach will need to identify extensive areas that can be managed for the exclusive use of humans and their pets. Fortunately, Newport Beach, with its miles of beaches that do not support dunes, traditional WSP roosting or nesting areas, or other sensitive biological resources, should be able to achieve this balance.

Starting in 2017, Hamilton Biological has been recommending that the City consider two alternative locations that could work well as dog beaches. Both are located near large parking lots, and neither appears to conflict with provisions of the City's LCP or those of the Coastal Act. One potentially suitable area is at Corona del Mar State Beach (Big Corona Beach), the eastern half of which appears to be well suited to serving as a dog beach, and the other is the expanse of beach near the base of Newport Pier. Please see Exhibits 5 and 6, below.

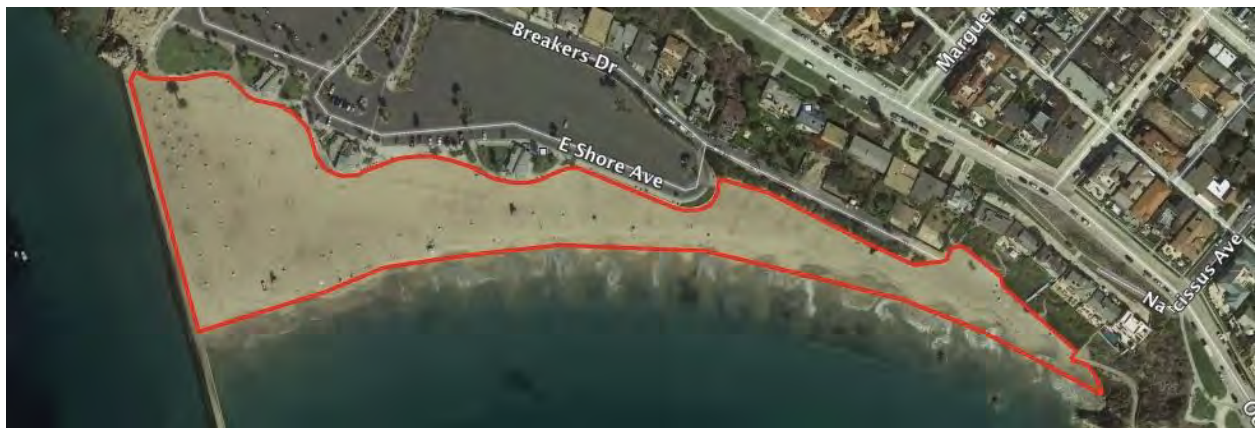


Exhibit 5, showing Corona del Mar State Beach (Big Corona Beach). Located on the eastern side of Newport Bay, the eastern part of this beach appears well-suited for designation as a dog beach. The area has ample parking and lacks potentially sensitive biological resources. Source: Google Earth Pro.



Exhibit 6, showing the beach near Newport Pier. This area also appears to be well-suited for use as a dog beach, with ample parking and low ecological sensitivity. Source: Google Earth Pro.

Regardless of whether either of the identified areas is ultimately determined to be suitable for designation as a dog beach, Newport Beach has enough sandy beaches not located within or adjacent to ESHA to accommodate people and their pets without illegally degrading any areas that satisfy ESHA criteria under the terms of the City's LCP and the Coastal Act.

COMPLIANCE WITH THE FEDERAL ENDANGERED SPECIES ACT

As a federally listed threatened species, the WSP is covered under the Endangered Species Act of 1973. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define "harm" to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. "Harassment" is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

Exemptions to the prohibitions against "take" in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a federal agency and may affect a listed species, the federal agency must consult with the USFWS, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a federal agency, but may result in the "take" of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act.

To qualify for an incidental take permit, a project proponent must submit an application to the USFWS together with a Habitat Conservation Plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. At the City's open house on September 14, 2017, Sandy Vissman of the USFWS suggested that preparation of an HCP would be appropriate to cover incidental "take" of WSP due to ongoing activities and routine beach and dune management operations undertaken by the City on the Balboa Peninsula. Actions requiring a permit may include beach driving, mechanical raking (beach grooming), recreational use, presence of dogs or other domestic animals, and human refuse that attracts predators of the WSP.

THE NEED FOR A COMPREHENSIVE MANAGEMENT PLAN

In a letter to the City dated September 11, 2017 (attached), Andrew Willis of Coastal staff requested that the City prepare a "comprehensive" plan to address beach/dune/WSP management issues on all City beaches, from River Jetties to the end of the Balboa Peninsula (approximately 5.2 miles of beach and dune habitat). The

geographic scope of the revised draft plan, however, is restricted to the part of the Balboa Peninsula that the USFWS designates as critical habitat for the WSP, plus a limited stretch of beach to the southeast (approximately 1.1 mile of beach and dune habitat, representing 21 percent of the total).

Hamilton Biological, Inc., has discussed the importance of comprehensive management of the City's beach/dune ESHA in various venues, including a letter to Mr. Dave Kiff of the City dated September 11, 2017; multiple presentations to the California Coastal Commission (CCC) during hearings in 2017 and 2018; and a letter dated July 25, 2018, that was co-signed by Dan Silver (Endangered Habitats League), Conner Everts (Southern California Watershed Alliance), Marko Popovich (Still Protecting Our Newport), Celia Kutcher (California Native Plant Society, Orange County), Mike Wellborn (Friends of Harbors, Beaches and Parks), Garry Brown (Orange County Coastkeeper), Michelle Gastil (Sierra Club Banning Ranch Task Force), Penny Elia (Sierra Club OC Conservation Committee), Terry Welsh (Banning Ranch Conservancy), Andrea Jones (Audubon California), Susan Sheakley and Scott Thomas (Sea & Sage Audubon), Travis Longcore (Los Angeles Audubon), and Jack Eidt (Wild Heritage Planners).

Presentations to the CCC addressing many of the same issues have been made by Sea & Sage Audubon, the Orange County chapter of the California Native Plant Society, the Sierra Club OC Conservation Committee, the Banning Ranch Conservancy, OC Habitats, Wild Heritage Planners, Surfrider Foundation, SPON, and attorney Mark Massara.

Page 3 of the revised draft plan attempts to justify the City's ongoing refusal to prepare a comprehensive plan:

The City recognizes the importance of incorporating conservation measures that will maximize the protection for wintering WSP at each of the wintering sites across the City's beaches. This Plan provides the detailed measures that once approved and adopted can be used as the framework for other areas in the City where site specific protective measures for WSP require formal establishment and implementation. As discussed throughout this Plan, various departments within the City of Newport Beach already incorporate actions during day-to-day operations aimed at WSP protection; however, additional measures, based on site specific conditions may be warranted. This Plan provides an important milestone in achieving maximum protection for WSP throughout the City, through implementation of an adaptive management approach.

This confirmation by the City – that additional beach/dune ESHA's "require formal establishment and implementation" of "site specific protective measures" – represents a small step forward. Unfortunately, the revised draft plan does not (a) identify the specific ESHA's that do not currently receive protection, or (b) explain the City's rationale for putting off protecting certain ESHA's to an unspecified date in the future. An adequate resource management plan for beach/dune areas must include several elements:

1. Mapping and descriptions of all beach/dune ESHA in the City.
2. Objective disclosure and discussion of all apparent violations of the LCP and Coastal Act in beach and dune areas.

3. Plans for protecting each area of beach/dune ESHA in the City consistent with requirements of the City's certified LCP.
4. Timing for implementing all required management actions (the Coastal Act does not allow for protecting some ESHA now and other ESHA at an unspecified later date).

RELEVANT EXAMPLES OF CONSERVATION PLANNING

For reasons discussed herein, achieving compliance with the Coastal Act and federal Endangered Species Act in Newport Beach will require a comprehensive and science-based approach to beach and dune management. *Areas that qualify as ESHA, ESHA buffer, or that serve as traditional roosting or nesting habitat for the federally threatened WSP must be managed in accordance with the applicable laws.*

With regard to the Coastal Act, CCC staff has already provided the City with a blueprint for achieving compliance in the form of the comprehensive beach/dune management plan that the City of Pacifica developed in 2014 to obtain a CDP for installation of 1,300 feet of year-round fencing, 930 feet of seasonal fencing, and associated interpretive signs at Pacifica State Beach. During a meeting on May 19, 2017, CCC staff specifically directed the City to use the City of Pacifica management plan as a template for what is expected in Newport Beach. Minutes of this meeting were placed on file by former City Manager Dave Kiff.

With regard to the federal Endangered Species Act, the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010, a document available online at the following address:

https://www.fws.gov/oregonfwo/FieldOffices/Newport/WesternSnowyPlover/Documents/WSP-HCP_08182010.pdf

Hamilton Biological has recommended that the City and its consultants review the Pacifica and Oregon plans as useful starting points upon which to develop a comprehensive dune/beach management plan that would comply with relevant precedents in the application of the Coastal Act and federal Endangered Species Act. The City has so far rejected this recommendation. The following section provides Mr. Hamilton's peer-review comments on the revised draft plan prepared by Glenn Lukos Associates.

REVIEW OF THE REVISED DRAFT PLAN

As with the original draft plan (Dudek, June 2018), the revised draft plan by Glenn Lukos Associates fails to implement the request made by Andrew Willis of the CCC staff for a “comprehensive” plan addressing beach/dune ESHA and WSP management issues on all City beaches. As discussed previously, the City does not adequately protect the restored dune ESHA near River Jetties, and both the City and the County refuse to take steps to limit harassment of listed species in the Santa Ana River estuary (both the WSP and the California Least Tern nested near the river mouth in 2018).

The revised draft plan, like the previous iteration, fails to incorporate relevant information from researchers who have spent many years monitoring the status of the WSP in Newport Beach and elsewhere in the region. Both the 2018 annual report⁴ and an even more recent publication on the resumption of nesting by WSP’s in Los Angeles County⁵ include relevant information on the species’ recent status in Orange County. That neither report is cited in the revised draft plan demonstrates the inadequacy of the research that went into the plan’s preparation.

Section 1.1, Site Description

Page 2 of the revised draft plan accurately characterizes coastal dune habitat:

The coastal dune ecosystem is one of the most sensitive and declining habitat types on the West Coast and has historically been impacted by development, with continuing impacts from invasive, non-native species.

The plan should describe the WSP’s place within the coastal dune ecosystem and then discuss specific protections for coastal dune ESHA contained in the City’s certified LCP (see page 2 of this letter). Instead, the plan discusses WSP Critical Habitat, failing to point out that Critical Habitat is a subset of beach/dune ESHA already granted strong protections – including freedom from construction of concrete walkways and provision of minimum 50-foot buffers – under the City’s certified LCP and under the Coastal Act. The City’s continued resistance to incorporating its own LCP protections into the WSP management plan signals the City’s intention to continue ignoring those protections. Such a bad-faith approach to resource management and land-use regulation violates the Coastal Act’s most basic tenets.

⁴ Ryan Ecological Consulting. 2019. Western Snowy Plover and California Least Tern in Orange and Los Angeles Counties, California; January to December 2018. Report dated January 31, 2019, prepared for San Diego Zoo Global, Escondido, CA.

⁵ Ryan, TP, S Vigallon, DS Cooper, C Delith, K Johnston, and L Nguyen. 2019. *Return of beach-nesting Snowy Plovers to Los Angeles County following a 68-year absence*. *Western Birds* 50:16–25. [https://www.westernfieldornithologists.org/archive/V50/50\(1\)-p016-p025.pdf](https://www.westernfieldornithologists.org/archive/V50/50(1)-p016-p025.pdf)

Section 1.1.1, Critical Habitat Area

Page 3 of the revised draft plan describes how the designation of Critical Habitat has no effect on public access, and mentions several concrete walkways that the City has built within Critical Habitat:

The critical habitat designation does not affect accessibility by the public and in this regard would be the same as other stretches of beach on Balboa Peninsula. The ocean-front boardwalk extends along the critical habitat area from B Street and ends approximately 200 southeast of E Street. Six street end entrances are located from A Street to G Street. In addition, C, D, E, F and G Streets each have an asphalt concrete pathway that extend various lengths from the intersection of the street entrance and boardwalk, toward the ocean.

The concrete walkways at the ends of C, D, E, F, and G Streets – like 17 others shown in Exhibits 1 and 2 on page 4 of this letter – were built without the required Coastal Development Permits; see pages 3–7 of this letter. Significantly, Ryan et al. (2017) concluded that unpermitted construction of the E Street walkway in 2014 has probably contributed to reduced wintering of WSP in that area. Per the most recent annual report (Ryan Ecological Consulting 2019), when WSP wintering numbers rebounded in 2017/2018 the main roosting area had shifted to the southeast, outside of the designated Critical Habitat area. The WSP management plan must address problems stemming from unpermitted development in beach/dune ESHA rather than treating the walkways as legitimate, permissible, features of the existing setting.

Page 3 of the revised draft plan states, without evidence, “the current potential for nesting is low.” Page 3 also states:

The City recognizes the importance of incorporating conservation measures that will maximize the protection for *wintering* WSP at each of the *wintering* sites across the City’s beaches. [emphasis added]

The authors of the revised draft plan fail to mention that WSP *nested* on the Balboa Peninsula in 2008, 2009, and 2013 (but have not done so subsequently, following construction of the E Street walkway). Also highly relevant, but not mentioned in the revised draft plan, is the WSP’s recent recolonization of long-dormant nesting grounds at Malibu Lagoon State Beach, Santa Monica State Beach, Dockweiler State Beach, and the mouth of the Santa Ana River, on the Huntington Beach side (Ryan et al. 2019). Instead of identifying factors that could lead to similar success on the Balboa Peninsula, the revised draft plan treats resumption of nesting as an unrealistic goal. Ryan and colleagues (2019) identified several specific management actions that apparently increased the suitability of the above-listed sites for nesting plovers, thereby facilitating recolonization. As summarized in the abstract of their paper:

Plovers selected sites within or adjacent to areas protected by fenced enclosures. We protected all nests with mini-exclosures. We suggest that this recolonization was due to the combination of protection of potential nesting sites, protection of individual nests, and exceptional recent productivity at other nesting sites in southern California. The fenced enclosures provided essential protection from vehicles and encouraged accumulation of beach wrack around the nests and feeding areas. Additionally, once nests were

established, the placement of exclosures provided essential protection from native predators and pet and feral dogs and cats. Protection with both fencing and exclosures, combined with management to minimize disturbance, will be essential for maintaining this new nesting population.

If the WSP were to remain a non-breeding species on the Balboa Peninsula, in spite of a well-conceived management plan that implements all feasible means known to increase the suitability of beach/dune habitats for nesting plovers, the City could not be faulted. **This is not the approach being taken.** By setting its conservation goals unreasonably low, the City is primed to claim its plan a success based on simply maintaining the status quo of plovers continuing to winter on the Balboa Peninsula – an area where they nested historically and in the recent past. **This is not acceptable.**

1.2.2, US Fish & Wildlife Service: Western Snowy Plover Recovery Plan

The revised draft plan fails to disclose all of the relevant management goals contained in the 2007 Recovery Plan for the WSP. In addition to increasing the breeding population in Recovery Unit 6 to 500 individuals, the Recovery Plan calls for protecting wintering plovers from wrack removal, vehicles, pets, and human-related disturbance.

1.2.3, California Coastal Act

Page 6 of the revised draft plan claims, without basis, that the plan was “prepared in a manner that is fully consistent with the provisions of the City’s LCP.” As pages 1–10 of this letter explain, the City’s failure to implement its certified LCP in beach/dune areas has led to long-term, ongoing loss and degradation of dune ESHA that comprises suitable habitat for the WSP. A compliant WSP management plan would (a) identify all beach/dune ESHA; (b) establish the required minimum 50-foot buffer around all ESHA; (c) remove unpermitted development in beach/dune ESHA (or obtain an after-the-fact permit, if warranted, as determined via thorough environmental review); and (d) develop City-wide beach/dune management policies designed to avoid future loss or degradation of ESHA. The revised draft plan falls far short of this standard.

1.2.5, City of Newport Beach: Coastal Land Use Plan

Page 7 of the revised draft plan states:

The CLUP includes policies for the protection of environmentally sensitive habitat areas (ESHA). ESHAs are areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments. Because the area covered by the critical habitat designation supports roosting habitat for a threatened species, the federally designated critical habitat area meets the definition of ESHA in the City’s CLUP.

This is an erroneous reading of the CLUP. As discussed on page 2 of this letter, (a) the City’s CLUP identifies as ESHA *all* areas of southern dune scrub, not only those that overlap with designated Critical Habitat; and (b) Policy 4.1.1-10, on page 4-7 of the CLUP, states that all terrestrial ESHA shall have a minimum buffer width of 50 feet

wherever possible. Failure of the City to fulfill these requirements over a period of many years has led to loss and degradation of large areas of beach/dune ESHA.

2.3, WSP Population Status on Balboa Peninsula

The Balboa Peninsula lies well within the WSP's breeding range, and was historically known as a regular nesting location for the species. As the area became more heavily developed in recent decades, and in the absence of effective management of dune habitat, the peninsula became mainly a wintering site. This does not mean that the site lacks suitable nesting habitat, and in fact the species nested on the Balboa Peninsula in 2008, 2009, and 2013 (Ryan et al. 2009). As discussed on page 16 of this letter, WSP's have recently recolonized long-dormant nesting grounds at multiple sites in Orange and Los Angeles Counties, responding to specific management actions that apparently increased the suitability of the above-listed sites for nesting plovers. Implementation of similar management actions on the Balboa Peninsula could lead to the same result. Thus, the assertion on page 9 of the revised draft report that the "USFWS has concluded that the Balboa Peninsula is used by WSP for wintering rather than nesting" represents a misleading oversimplification.

3.1, Habitat

Page 11 of the revised draft plan states:

The vegetated areas of dunes are separated by paths and walkways are intended to provide for directed or controlled beach access that limits impacts to the dunes.

The intention of establishing numerous unpermitted concrete walkways across beach and dune areas may have been to limit impacts to the dunes, but, because the walkways were never subjected to required environmental review under the Coastal Development Permitting process, any such suppositions lack substance. A more effective way to limit human intrusion into important WSP roosting and/or nesting habitat would be to establish walkways that lead people *away* from the most important habitat areas, not into the heart of the designated Critical Habitat. In fact, as discussed previously, numbers of WSP wintering in the Critical Habitat area have declined sharply starting in 2014, when the City constructed the unpermitted E Street walkway.

Page 11 continues:

Ornamental vegetation occurs in patches adjacent to some residences on the ocean side of the boardwalk extending at a maximum just over 50 feet from the oceanfront homes into the Critical Habitat.

As discussed on page 3 of this letter, the encroachment of private landscaping into public ESHA represents an ongoing violation of the Coastal Act. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers "to prevent impacts that would significantly degrade the adjacent ESHA." In practice, the City does not do this, and thus violates its own certified LCP and the Coastal Act.

3.1.3, Delineation – Existing Fence

Page 12 of the revised draft plan states, “In June 2011, the City installed approximately 1,300 linear feet of fencing around approximately 2.1 acres of habitat between the walkway fingers of D and E Streets.” This is factually incorrect, as the E Street walkway did not exist until 2014 (the D Street walkway was built in 2002/2003).

Otherwise, page 12 of the revised draft plan describes how the City has installed and removed various forms of protective fencing and paracord barriers. As these actions were not completed with benefit of formal environmental analysis or the required Coastal Development Permit, they represent Coastal Act violations.

3.3.2, Dogs on Beach

Page 14 of the revised draft plan states:

The City is committed to enforcing the restrictions regarding dogs on the beach and intends to increase enforcement and Animal Control presence as well as issuance of citations for violations.

This sounds pleasing, but at the open house on May 20, 2019, multiple residents of Newport Beach complained that the existing animal control response is extremely slow, with officers typically taking hours to show up after a call. Between this and the lax enforcement of leash laws at River Jetties, the revised draft plan lacks credibility in its assurances that the City will now prioritize ticketing people walking their dogs on the Balboa Peninsula. A more effective approach would be (a) to remove all walkways from Critical Habitat and the other area to the southeast where WSP regularly roost; (b) to fence off a large enough area of Critical Habitat for WSPs to use for nesting; and (c) to strictly prohibit incursions into the fenced area by people or their pets.

4, Objectives of the Plan

Page 16 of the revised draft plan states:

The goal of this particular Plan is to provide management actions that will ensure the ongoing protection of existing biological resources within Critical Habitat Unit 48 (and areas to the east), while also setting forth the management and operational activities to be implemented for other areas within the City used by wintering WSP.

The status quo of WSP’s wintering on the Balboa Peninsula – a historical nesting site for the plover – is being maintained in the absence of a comprehensive management plan. As has been demonstrated in recent years in Orange and Los Angeles Counties, recolonization of the peninsula by nesting plovers is a completely realistic goal that the City should be pursuing with this WSP Habitat Management Plan.

As a result of the revised draft plan’s undue emphasis on wintering WSP, the eight numbered objectives listed on pages 16 and 17 of the revised draft plan do not include the full suite of actions that would likely be needed to re-establish a regular nesting population of the WSP on the Balboa Peninsula. Consistent with the findings of Ryan et

al. (2019), the following additional actions should be taken to facilitate recolonization of the Balboa Peninsula by nesting WSP:

- Establishment of a large, well-designed enclosure to keep people and dogs out of potentially suitable nesting habitat.
- Removal of unpermitted walkways that encourage people and pets to encroach into potentially suitable nesting habitat.
- Monitoring of WSP during the nesting season, and establishment of exclosures around any scrapes detected, to keep predators away from the plover eggs.

5.3.1, Wintering and Nesting Window Surveys

Page 20 of the revised draft plan calls for a single nesting season survey between late May and mid-June. Table 1 in the recent *Western Birds* article by Ryan and colleagues specifies that six nests in Orange and Los Angeles Counties were initiated **between April 17 and May 15**. Given the importance of identifying WSP scrapes in order to protect them with exclosures, it is recommended that nesting season surveys be conducted at least weekly from April 1 to June 15.

CONCLUSIONS AND RECOMMENDATIONS

The 2007 Recovery Plan calls for doubling the WSP nesting population in the Recovery Unit that includes Newport Beach. Plovers have nested on the Balboa Peninsula within the last decade, and the species has already started recolonizing several other beaches in southern California in response to increased protection from human disturbance. Like the 2018 draft plan prepared by Dudek, the revised draft plan treats nesting by WSP as only a possible side-effect of limited management actions directed mainly toward wintering plovers. Certainly, the final plan should include all management prescriptions identified in the published scientific literature as facilitating WSP recolonization of historical nesting sites.

As detailed herein, an adequately protective WSP management plan also would identify and address numerous past and ongoing violations of the City's certified LCP and the Coastal Act, not only on the Balboa Peninsula but all the way up to River Jetties.

The 22 unpermitted concrete walkways constructed through beach and dune areas must be subjected to a thorough and credible analysis to determine their effects upon beach/dune ESHA and required ESHA buffers. It may be appropriate to issue after-the-fact permits for some of the walkways, but others should be removed to limit human intrusion into the most important roosting and potentially suitable nesting areas.

The City's poor record of policing beachgoers — at River Jetties and in other sensitive habitat areas — does not promote optimism that implementing a management plan reliant upon signage and “symbolic fencing” will achieve even the limited goals set forth in the revised draft plan, let alone recolonization by nesting plovers consistent with the

goals of the 2007 Recovery Plan. Effective management of the WSP on the Balboa Peninsula is likely to require carefully designed fencing or another type of barrier that would keep people and pets away from potentially suitable nesting habitat.

The City should carefully consider approaches that local governments elsewhere along the Pacific Coast have taken to successfully balance the requirements of people, rare species, and threatened coastal ecosystems. As discussed in this letter, CCC staff provided the City with a blueprint for achieving Coastal Act compliance – the City of Pacifica’s 2014 comprehensive beach/ dune management plan – and the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010 that the City and its consultants may look to for further relevant guidance.

Thank you for the opportunity to review the Draft WSP Management Plan for East Balboa Peninsula Beaches, Newport Beach, California.

Sincerely,



Robert A. Hamilton, President
Hamilton Biological, Inc.

Andrea Jones
Director of Bird Conservation
Audubon California

Travis Longcore, Ph.D.
Conservation Chair
Los Angeles Audubon Society

Susan Sheakley
Conservation Chair
Sea & Sage Audubon Society

Scott Thomas
Conservation, Special Projects
Sea & Sage Audubon Society

Terry Welsh, M.D.
President
Banning Ranch Conservancy

Celia Kutcher
Conservation Chair
OC Chapter California
California Native Plant Society

Garry Brown
Founder & President
Orange County Coastkeeper
Inland Empire Waterkeeper

Dan Silver, M.D.
Executive Director
Endangered
Habitats League

Gloria Sefton
Vice President
Friends of Harbors, Beaches,
and Parks

Michelle Gastil
Banning Ranch Task Force
Sierra Club

Penny Elia
OC Conservation Committee
Sierra Club

Conner Everts
Executive Director
Southern California
Watershed Alliance

Marko Popovich
President
Still Protecting Our Newport

Jack Eidt
Director
Wild Heritage Planners

Attached: September 11, 2017 letter from Andrew Willis, CCC Enforcement

Copies to: California Coastal Commissioners; Jack Ainsworth, CCC; Lisa Haage, CCC; Aaron McClendon, CCC; Andrew Willis, CCC; Liliana Roman, CCC; Karl Schwing, CCC; Jordan Sanchez, CCC; Laurie Koteen, CCC; Jonna Engel, CCC; Brian Bugsch, CSLC; Benjamin Johnson, CSLC; Grace Kato, CSLC; Ken Foster, CSLC; Sandy Vissman, USFWS; Hans Sin, CDFW; Erinn Wilson, CDFW; Lana Nguyen, California State Parks; Mark Massara; Tom Ryan; Josh Weinik; Christine Whitcraft; Michelle Clemente

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



September 11, 2017

Dave Kiff
City Manager
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

Subject: Protection of Snowy Plover and dune habitat in the City of Newport Beach

Dear Mr. Kiff:

Thank you for your continued attention to the issue of protecting Western Snowy Plover habitat in the City of Newport Beach. I appreciate the time you have taken to meet and discuss this issue; it is an exciting opportunity to partner with the City to protect an endangered species in the midst of urban southern California, where remaining open space and habitat areas are especially significant because of their rarity and, consequently, importance to wildlife. We're looking forward to continuing our partnership with the City, both through the City's protection of coastal resources pursuant to the policies of the City Local Coastal Program ("LCP"), and through the processing of two coastal development permit applications (Coastal Development Permit Application Nos. 5-17-0465 and 5-17-0515) that the City has submitted to remove plover habitat fencing on a City beach, and a third application to implement a long, term comprehensive management plan for the Western Snowy Plover that the City has indicated is forthcoming.

We're hopeful that these applications can be modified into a comprehensive project to fully protect plover habitat, and dunes habitat as well, on City beaches. Indeed, in response to Coastal Development Permit Application Nos. 5-17-0465 and 5-17-0515, in a June 26, 2017 letter to the City, Commission staff noted, first, that we must consider the immediate impacts to sensitive biological resources that are protected by the existing fencing that may occur if the fencing is removed, and, second, the need for any application to remove existing habitat fencing to include a management plan for ongoing protection of existing biological resources in the area of the proposed project. The purpose of this letter is to provide some additional information regarding the incentive for preparing a management plan that protects all habitats on City beaches, and in particular, all environmentally sensitive habitat areas ("ESHA") and to both avoid misunderstandings, and provide information that would help design a plan that would be consistent with the Coastal Act and potentially approvable by the Commission.

ESHA is defined in Coastal Act Section 30107.5 as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Rare plant communities and habitats for protected wildlife species are generally

considered by the Commission to be ESHA. The City LCP (Section 4.1.1.1), which serves as guidance for Commission decisions regarding development activities on City beaches, identifies several potential attributes of ESHA, including the following:

A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.

B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.

As you know, the Coastal Act and City LCP provide strict protections for ESHA: Section 30240 of the Coastal Act restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA.

The Commission has found in a previous action that at least one area of the City beaches is ESHA, and other areas appear to be potentially similar; the Commission formally determined in a 2006 enforcement action that the dunes on the south side of the Santa Ana River constitute ESHA because of the presence of dunes and because the dunes are potentially used by a protected bird species, the federally and state listed as endangered California Least Tern. Consequently, the Commission required restoration of the dunes and their preservation.

The extent of ESHA on City beaches is not necessarily limited to the dunes that were the subject of the 2006 Commission action. This simply was the area that was the subject of the enforcement action. In fact, using the same analysis by which the Commission found that the dunes at the Santa Ana River are ESHA suggests that other habitat for protected species and dune habitats on City beaches could rise to the level of ESHA. As you are no doubt aware, Western Snowy Plovers use City beaches for foraging and roosting and the United States Fish and Wildlife Service has identified an area of City beach as Critical Habitat for the Western Snowy Plover because the area is essential to the conservation of the species. Also, again as I'm sure you are aware, the City's beaches are peppered with dunes, including dunes that support native dune plant species. The City LCP (Section 4.1.5) says about dunes that "Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Coastal Commission, or local agencies."

Dunes are also afforded protection under Section 30251 of the Coastal Act, which limits the alteration of natural landforms in order to protect the scenic and visual qualities of coastal areas. Finally, and perhaps most intriguing for low-lying Newport Beach, sand dunes provide protection for inland, low-lying areas from strong storm waves. Dune management, or the construction of "living shorelines" capitalize on the natural ability of these systems to protect coastlines from sea-level rise and storm related hazards while also providing benefits such as habitat, recreation, a more pleasing visual tableau, and the continuation or enhancement of ecosystem services. Indeed Sections 2.8.3-5 and 2.8.3-6 of the LCP encourage, respectively, "the use of sand dunes with native vegetation as a protective device in beach areas" and "the use of

non-structural methods, such as dune restoration and sand nourishment, as alternatives to shoreline protective devices.”

Although some areas of City beach have been fenced and provide some protection for habitat and dunes, in other areas, a lack of protection leaves potential ESHA exposed to trampling and other disturbances that could result in removal of major vegetation, landform alteration that constitutes grading, and change of intensity of use of a sensitive habitat area. The City LCP notes that “Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.” [Section 4.1.5] The trampling and other activities described above constitute development activities under the Coastal Act that require a coastal development permit. No coastal development permit has been issued by the Commission for these activities on City beaches.

Although the purpose of this letter is just to reach out and offer assistance and coordination, we should also point out that there are legal provisions that apply as well. The potential for unpermitted activity resulting in impacts to unprotected areas of ESHA on City beaches creates potential liability (under the Coastal Act at a minimum) for the City, as the property owner, even for actions it may not actually perform. Regardless of who performs unpermitted development, such as landform alteration or removal of major vegetation within a dune habitat, the persistence of the resulting changes in topography or vegetation coverage, etc., constitute continuing violations of the Coastal Act and continuing public nuisances that a property owner is liable for correcting. The Coastal Act represents a legislative declaration that acts injurious to the state’s natural resources constitute a public nuisance. (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal. App.3d 605, 618; *CEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 318.) In *Leslie Salt* (p. 622), the court held that:

“...liability and the duty to take affirmative action [to correct a condition of noncompliance with applicable legal requirements] flow not from the landowner’s active responsibility for [that] condition of his land...or his knowledge of or intent to cause such [a condition] but rather, and quite simply, from his very possession and control of the land in question.”

Since a property owner is responsible, along with the party that undertook unpermitted development, for unpermitted development that has occurred on the property owner’s property, it is in the interest of the property owner to consider measures to prevent and address such unpermitted development. For that reason, we recommend that the City modify the current applications to incorporate a proposal for a comprehensive habitat protection program that will help ensure impacts to habitat on City beaches are avoided and protect critical resources and, at the same time, reduce the City’s potential exposure to liability for such damage.

We would be happy to meet with City staff to discuss what measures might be appropriate to incorporate into a comprehensive program, be they a combination of retention of existing fencing and installation of new fencing or symbolic fencing around dune areas and wildlife habitat on City beaches, restoration of degraded habitat areas, increased enforcement of dog-leash laws, consideration of beach grooming practices, and installation of information signage, to name a few, and, we look forward to collaborating with the City to ensure protection of habitats on City beaches. Again, we thank you for your cooperation, work, and efforts in seeking protection for

Mr. Kiff
September 11, 2017
Page 4 of 4

Western Snowy Plover habitat on City beaches. If you have any questions about this letter, please do not hesitate to call me at 562-590-5071.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrew Willis', with a stylized, cursive flourish.

Andrew Willis
Enforcement Supervisor

**cc: Lisa Haage, Chief of Enforcement, CCC
Karl Schwing, Deputy Director, CCC**

Exhibit H



DEPARTMENT OF PARKS AND RECREATION

Orange Coast District
3030 Avenida del Presidente
San Clemente, CA 92672
949-492-0802

Lisa Ann L. Mangat, Director

May 6, 2016

Supervisor Michelle Steel
Orange County Board of Supervisors
10 Civic Center Plaza
Santa Ana, CA 92701

Re: Santa Ana River Jetty Leash-Free Dog Friendly Beach Designation

Dear Supervisor Steel,

As neighboring land managers, State Parks is interested in the contemplated change of land use at the Santa Ana river mouth. We understand, through the media, that the County of Orange is considering designating an off-leash dog beach in that area. Given that our properties are separated only by the Santa Ana River Jetty, we foresee a high probability that decisions made on your property will directly affect us. Given the presence of the California Least Tern Natural Preserve immediately up coast of our boundary, we would appreciate the opportunity to review any environmental documents, general plans, or recreation plans that have been prepared on this topic.

We look forward to engaging in discussions with you regarding the effects an off-leash dog beach designation would have on our mission, including public safety, recreational opportunities, and of course, natural resources. In particular, we would like to better understand the impacts this will have on sensitive species such as the endangered California least tern and threatened Western snowy plover located so near the area in question, and discuss what parameters will be in place to protect them if the area is formalized as a dog beach.

If you should have any questions or need additional information, please do not hesitate to contact me at (714) 377-2187 or via email: eric.dymmel@parks.ca.gov.

Sincerely,

Eric L. Dymmel
North Sector Superintendent
Orange Coast District
California State Parks

Cc: Orange County Executive office
Orange Coast District Superintendent



DEPARTMENT OF PARKS AND RECREATION

Orange Coast District
3030 Avenida del Presidente
San Clemente, CA 92672
949-492-0802

Lisa Ann L. Mangat, Director

Transmitted via Email to: ocpcustomer@ocpw.ocgov.com

December 2, 2016

Chris Uzo-Diribe
County of Orange
OCPW/OC Development Service
300 North Flower Street
Santa Ana, CA 92703

Regarding: Negative Declaration (ND) File No. IP 16-234 – Orange County Code of Ordinance Proposed Amendment (Dog Beach) – OCPW/OC Development Services

Dear Chris Uzo-Diribe:

The Department of Parks and Recreation (State Parks) has reviewed the Negative Declaration (ND) File No. IP 16-234 – Orange County Code of Ordinance Proposed Amendment (Dog Beach) document, and understand that the County of Orange is proposing to designate an on/off leash dog-friendly beach area. Given that our properties are separated only by the Santa Ana River jetty, we believe this decision will directly impact State Park operations and management, especially with regard to State Parks' mandate to protect the sensitive natural resources at Huntington State Beach (HSB), adjacent to the County's proposed project area. As such we respectfully submit the comments below.

The Negative Declaration in support of this project does not adequately address the potentially significant impacts to the ecosystem as a result of the presence of dogs on the adjacent State Parks property. Of particular concern are potential impacts to the California Least Tern Natural Preserve (CALT NP) subunit at HSB and the sensitive and endangered species protected there. Natural Preserves are established per the California Public Resources Code (Section 5019.71) for land use specifically aimed to protect and preserve rare or endangered plant or animal species and their supporting ecosystems. The California State Park and Recreation Commission established the California Least Tern Preserve at HSB in 1975 in order to protect and preserve the federal and state-listed California least tern (LETE). The Natural Preserve currently supports one of the most productive LETE colonies in the state.

The County's proposed change of land use will require State Parks to provide additional operation and management of this area in order to properly enforce the protections and mandates afforded these existing sensitive resources under State and Federal law. The proposed project may also result in un-mitigatable and potentially significant impacts to the conservation of sensitive natural resources on State Park property. The cost and impact to existing State Parks operations has not been taken into consideration in the Negative Declaration.

The proposed project site is important foraging and resting habitat for both the LETE and the federally-threatened western snowy plover (WESP). LETE rely on fish of varying species and size depending on the stage of the breeding cycle they are in. HSB is consistently one of the top nesting sites in the state for LETE, and it is hypothesized that the proximity of three different

foraging areas (the Pacific Ocean, Santa Ana River, and Brookhurst Marsh) may be a strong factor in this colony's success.¹ The Santa Ana River (SAR) provides a calm area that allows fledgling LETE to learn how to fish without strong currents or waves and provides a safe loafing and resting area for both adults and juveniles from the colony as well as those migrating south to their wintering grounds.²

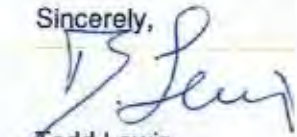
Potentially significant impacts resulting from the expected increase in public access to the proposed project area has not been adequately addressed in the Negative Declaration for the proposed project. The area between the SAR and the CALT NP has traditionally experienced less foot traffic than the beach, allowing the birds to remain undisturbed. The County's proposed project, however, would lead to greater public use of this area with no satisfactory way to prevent visitors with dogs from accessing the State Beach and impacting LETE and WESP.

The California Least Tern Natural Preserve (CALT NP) and area immediately surrounding it is federally-designated critical habitat for western snowy plovers (WESP) by the US Fish and Wildlife Service in the species' recovery plan in 2012. WESPs have been observed foraging and roosting immediately up coast in front of the CALT NP. These overwintering sites are becoming recognized more and more as an important component for the success of the species.³ Winter roosts provide connectivity for dispersal for birds from different breeding sites and allow birds to build stores for spring migration and the upcoming breeding season. WESP show strong site fidelity to overwintering sites and will often return to the same sites year after year; the potentially significant impact to WESP from dogs within and adjacent to these winter roosts has not been assessed to its full extent within the Negative Declaration for the proposed project.

We look forward to engaging in further communications with you regarding our concerns the impacts a dog beach designation would have on State Parks property.

Thank you for the opportunity to submit comments to the Negative Declaration. If you should have any questions or need additional information, please do not hesitate to call our District Environmental Coordinator Julie Tobin at 949-607-9510 or via email to Julie.Tobin@parks.ca.gov.

Sincerely,



Todd Lewis
District Superintendent
Orange Coast District

Copy via email: Monica Aleman, NSC - Resource Section – CA State Parks
Lana Nguyen, Orange Coast District, CA State Parks
Kevin Pearsall, Orange Coast District, CA State Parks
James Newland, Orange Coast District, CA State Parks

¹ California Least Tern Breeding Survey, 2012 Season. State of California, Natural Resources Agency, Department of Fish and Wildlife, Wildlife Branch

² Ibid.

³ Ibid.

Exhibit I

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



December 14, 2016

Chris Uzo-Diribe
Planner IV, OCPW
OC Planning
300 N. Flower Street, 1st Floor
Santa Ana, CA 92702-4048

**RE: County of Orange Dog Beach Santa Ana River, Comments on Negative Declaration
(IP# 16-234)**

Dear Ms. Uzo-Diribe:

Thank you for the opportunity to comment on the proposed dog park at the Santa Ana River mouth, which would impact biological and other coastal resources (e.g., water quality, public access, scenic resources) that exist at the site in the County of Orange. We appreciate that such uses can be significant to the community, however, we would like to work with the County to find a solution that would have fewer potential negative environmental impacts.

The Coastal Commission has the responsibility to carefully review any development in the coastal zone for compliance with the California Coastal Act of 1976¹. The proposed project (establish a dog park), situated within and adjacent to the Santa Ana River, is located entirely within the Coastal Commission's permitting jurisdiction in the coastal zone. Section 30600(a) of the Coastal Act requires that, in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, shall obtain a coastal development permit. The proposed dog park constitutes "development" under the Coastal Act that requires a coastal development permit, as the creation, through the proposed ordinance, of an official dog park in an open space area intensifies the use of the area.

The proposed project is located in an unincorporated area of the county that is presently not part of any local government's certified Local Coastal Program (LCP). Therefore, in the absence of a certified LCP, the County must obtain a coastal development permit from the Coastal Commission prior to proceeding with the proposed project. The Coastal Commission's standard of review for the coastal development permit application would be the Chapter 3 policies of the Coastal Act. The coastal development permit process will ensure that the proposed project is undertaken in a manner consistent with the Chapter 3 policies of the Coastal Act. Therefore, the proposed Negative Declaration should address whether the proposed project is consistent with the Chapter 3 policies of the Coastal Act, specifically Section 30240 of the Coastal Act, which restricts development within Environmentally Sensitive Habitat Areas ("ESHA") to resource dependent uses and requires development adjacent to ESHA be sited and designed to avoid impacts to ESHA.

¹ The Coastal Act is found beginning at Section 30000 of the California Public Resources Code.

Coastal Commission staff believes that the proposed project would impact the foraging and roosting habitats of the federally and state listed as endangered California Least Tern and federally listed as threatened Western Snowy Plover, as well as the breeding habitat of the Least Tern. In fact, the County's environmental review of the project has identified the project site as habitat for these protected species. Thus, the proposed project appears to be inconsistent with resource protection policies of the Coastal Act. As you probably know, one of the few successful breeding colonies of the Least Tern in Orange County is located on the north side of the Santa Ana River mouth, just up coast from the proposed dog park. The river mouth itself is important foraging habitat for the Least Tern, and the beach along this stretch of coast is foraging and roosting habitat for the Snowy Plover. Habitats for protected wildlife species are termed ESHA by the Coastal Act and are afforded special protection, as noted above.

In fact, the Commission formally determined in a 2006 enforcement action that the dunes on the south side of the Santa Ana River, which are situated in a location immediately adjacent to the proposed dog park, constitute ESHA, in part because they are a component of the Least Tern's local habitat, and required their restoration and preservation. Thus, there are significant questions about the consistency of the proposed dog park in this location with resource protection policies of the Coastal Act, including, but not necessarily limited to, Section 30240. Section 30240 restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA. The dog park is not a resource dependent use (i.e. it does not require the presence of the ESHA to function), and the dog park, where numerous leashed and unrestrained dogs would be present, and which is proposed to be located directly within the foraging areas of the Least Tern and Snowy Plover and adjacent to the breeding area of Least Tern, is not sited or designed to avoid impacts to ESHA.

The Commission will also apply Chapter 3 policies of the Coastal Act to address the proposed project's impacts to, among other things, public access and recreation, scenic resources, marine resources, and biological productivity and water quality of coastal waters. For instance, Section 30230 (Marine Resources) of the Coastal Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Also, Section 30231 (Biological Productivity; Water Quality) states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Orange County – Santa Ana River Dog Park

Coastal Commission Staff Comments

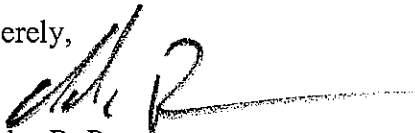
Page 3 of 3

Creation of an official dog park, and consequent introduction of numerous leashed and unrestrained dogs and the disturbance associated with such use, within an area that the environmental review process has identified as foraging habitat for protected species, which are key to the marine ecosystem, potentially eliminates or significantly degrades the functioning of the area to provide habitat for marine organisms, with attendant negative impacts to biological productivity. Furthermore, the potential for this activity to remove and degrade dune vegetation within and adjacent to the proposed project site, in addition to its impacts to sensitive habitats, may impede the biological productivity and water quality of the wetland at the Santa Ana River mouth through the reduction of the natural vegetation buffering this wetland.

Due to the apparent inconsistency of the proposed project with policies of the Coastal Act, Commission staff suggests that the proponents of the dog park work with County and Commission staff to investigate all possible options for locating such an amenity at a site where adverse impacts to protected wildlife species would be avoided. Commission staff believes additional environmental review is necessary for the proposed project and requests that such review consider alternative project designs and project locations that may reduce or avoid adverse impacts to biological resources. Each of the issues identified in this letter, as well as other environmental impacts identified in the Negative Declaration, should be analyzed in the context of potential alternative project designs and project locations. Could adverse impacts to biological resources be reduced or eliminated if the location of the project was changed?

In closing, we suggest that the County analyze additional alternatives to the proposed project, including alternatives that avoid impacts to ESHA, marine resources, and biological productivity and water quality of coastal waters. Alternative mitigation plans should also be proposed as part of the environmental review. Please note that the comments provided herein are preliminary in nature; more specific comments may be appropriate as the project develops. We hope that these comments are useful, and respectfully reserve the opportunity to comment more specifically at a later date. Commission staff requests notification of any future activity associated with this project or related projects. Please call me at (562) 590-5071 if you have any questions. Thank you for the opportunity to comment on the proposed project.

Sincerely,



Charles R. Posner
Supervisor of Planning

Exhibit J





ENCLOSURE 2

**CALIFORNIA STATE LANDS
COMMISSION**

100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202



Established in 1938

JENNIFER LUCCHESI, Executive Officer

916.574.1800

TTY CA Relay Service: 711 or Phone **800.735.2922**
from Voice Phone **800.735.2929**
or for Spanish **800.855.3000**

Contact Phone: (916) 574-1900

July 19, 2022

File Ref.: Lease 9358

To: Nardy Kahn (SENT VIA ELECTRONIC MAIL ONLY:
nardy.khan@ocpw.ocgov.com)
Orange County Flood Control District

Subject: Notice of Breach of General Lease – Public Agency Use, Lower Santa Ana River, Orange County

Dear Ms. Khan:

Pursuant to Section 2, Paragraph 16 of the subject lease, "Lessee must provide annual reports to Commission staff detailing County law enforcement efforts in the Santa Ana River Mouth. Reports will be due no later than July 8 of each year." As of this date Commission staff has not received the required report.

This letter serves as notification that the Orange County Flood Control District has 30-days from the date of this letter to cure its breach of Section 2, Paragraph 16 by providing the required report. Failure to provide the report within the cure period shall constitute a default of the lease, pursuant to Section 2, Paragraph 12(b).

Please forward the annual report to my attention as soon as possible but no later than August 18, 2022. Should you have any questions, please contact me at drew.simpkin@slc.ca.gov or at (916) 574-2275.

Sincerely,



Drew Simpkin

Public Land Management Specialist

cc's: see next page

N. Khan
July 19, 2022
Page 2

cc: Jim Volz, OCFCD
Giles Mathews, OCFCD
Andrew Willis, CCC
Ben Johnson, CSLC

ENCLOSURE 3

Santa Ana River Mouth – Annual Report to State Lands Commission (June 2021- June 2022)

Introduction

Orange County Flood Control District (OCFCD) holds a lease (9358) from California State Lands Commission (SLC) to remove sand from the Santa Ana River Mouth for the purposes of flood protection. Orange County Public Works (OCPW), behalf of the OCFCD, conducts as needed sand removal between September and March each year.

The SLC is concerned that dogs and humans are disturbing the legally protected California least tern and snowy plover by entering the river mouth, including within the leased land. Both species of protected bird forage in the Santa Ana River mouth. In order to address the concerns of the SLC the lease included a condition requiring OCFCD to submit annual reports of law enforcement efforts. See condition below.

Condition 16. states:

Lessee must provide annual reports to Commission staff detailing County law enforcement efforts in the Santa Ana River Mouth. Reports will be due no later than July 8 of each year.

The Santa Ana River is a flood facility and trespass is prohibited under Orange County Code of Ordinances Sec. 3-9-35. OCPW requested the support of the Orange County Sheriff Department (OCSD) to provide support to enforce the above and other trespass related codes.



Figure 1. Limits of SLC Lease in Santa Ana River Mouth

Law Enforcement Methodology

OCSD conduct regular enforcement visits to the Santa Ana River Mouth. The OCSD Officer(s) arrive on site and if people and/or dogs are present in the river mouth they issue a warning to the entire Santa Ana River mouth (via bullhorn attached to the sheriff’s vehicle), that they are trespassing and need to leave the flood channel, or words to that effect. The OCSD log the number of visits, along with the number of people that are present in the river mouth when they issue warnings.

OCPW instructed OCSD on October 28, 2021 that OC Codified Ordinances extend all the way into the ocean, extending into California States Lands that are leased to the OCFCD. From that date OCSD extended its warnings to anyone in the river mouth all the way to the ocean. The limits of OCSD enforcement therefore extends from the downstream side of Pacific Coast Highway to the Ocean and from the rip-rap jetty on the Newport Beach side of the channel to the rip-rap jetty on the Huntington State Beach side of the channel.

It should be noted that OCSD Officers visit the river mouth when they are not required to attend other high priority incidents or provide support elsewhere. Attendance on site is therefore on an as and when available basis and is not necessarily linked to periods of peak usage.

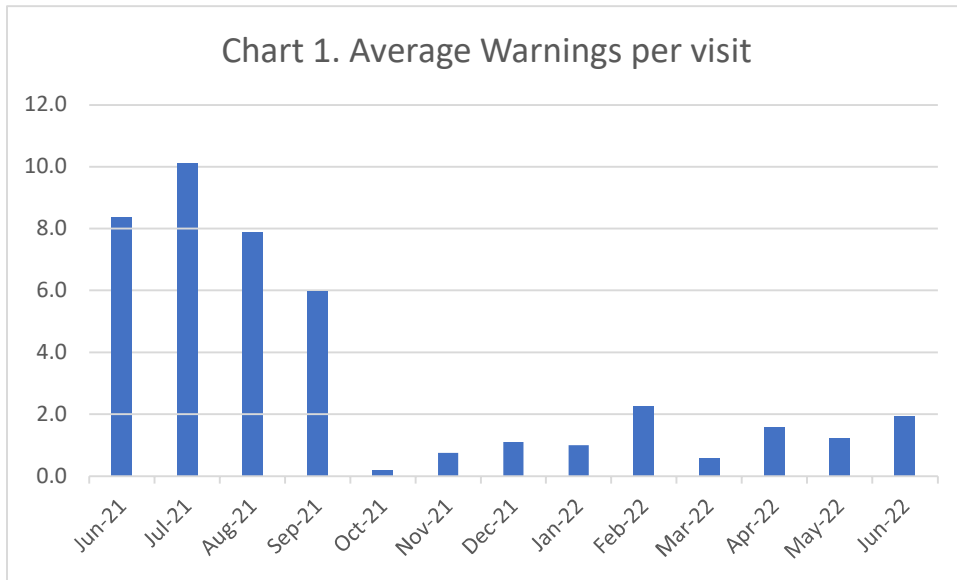
Results

See the table below for a breakdown of OCSD visits, by month. OCSD conducted a total of three hundred and seventy visits to the river mouth. In that time they issued one thousand one hundred and ten warnings. Chart 1 provides a breakdown of the average warnings per visit.

It should be noted that a significant oil spill occurred off the coast in Orange County which led to a severe restriction in access to the river mouth during cleanup efforts through October to January.

Month	Visits	Warnings	Average Warnings per visit
Jun-21	23	192	8.3
21-Jul	18	182	10.1
21-Aug	31	244	7.9
21-Sep	32	191	6.0
21-Oct*	36	7	0.2
21-Nov*	24	18	0.8
21-Dec*	29	32	1.1
22-Jan*	36	36	1.0
22-Feb	39	88	2.3
22-Mar	34	19	0.6
22-Apr	26	41	1.6
22-May	30	37	1.2
22-Jun	12	23	1.9

- * The Amplify Oil Spill occurred in October 2021



Discussion

OCSD conducted regular visits to the Santa Ana River mouth every month for the last year. The number of warnings given represents the number of people present in the river mouth while the officer was on site. There appears to be a decline in people being present in the river mouth from the first three months (8.3, 10.1, 7.9 average warnings per visit, respectively) to between 0.2-2.3 warnings per visit for the last ten months.

There are a number of possible reasons for the apparent reduction in people trespassing in the river mouth, which may include:

1. Sustained OCSD activity may have reduced the number of people trespassing in the channel.
2. OCSD Officers may be visiting the river mouth outside of peak usage and the figures may not be representative of the peak number of people trespassing in the river mouth, compared to the first three months.
3. The oil spill in October 2021, limited access to the river mouth for the duration of the cleanup.
4. Perceived impacts of the oil spill may have reduced use of the river mouth by dog owners in the aftermath of the spill.
5. The sand in the river mouth shifted, due to changing ocean currents in Spring, reducing the size of the sand berm on the Newport Beach side of the channel and then washing it away altogether in June. Access to the river mouth is therefore more challenging.
6. Sporadic enforcement by California State Parks Officers may have reduced the number of people entering the river mouth from the Huntington State Beach side.

It is possible that the apparent reduction in people utilizing the Santa Ana River mouth is a combination of two or more of the above reasons. The OCSD will continue to conduct visits and issue warnings to anyone trespassing in the channel.

ENCLOSURE 4

Saturday, August 27, 2022 at 2 p.m.



Exhibit II

Santa Ana River Mouth Monitoring Project January-June 2023 Report



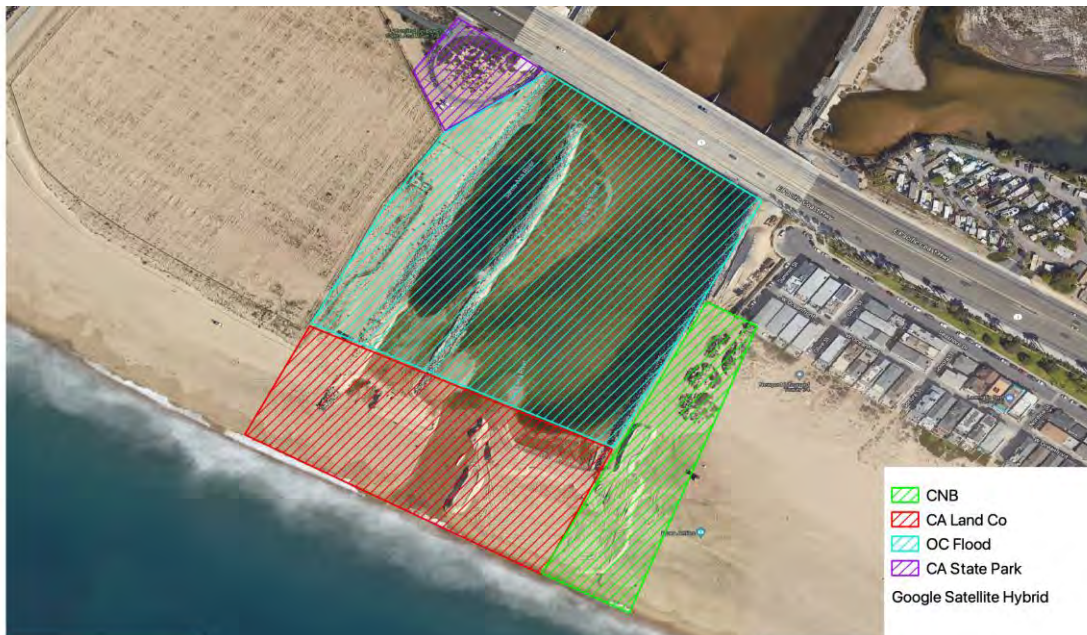
Orange County Coastkeeper (Coastkeeper) is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective programs in education, advocacy, restoration, research, enforcement, and conservation.

The Santa Ana River Mouth Monitoring Project (SAR Project) enlists volunteers, community groups and local government to monitor human, dog and bird activity in the Santa Ana River Mouth area, a 13.2 acre parcel of land that is owned by four agencies including the California State Lands Commission, California State Parks, the County of Orange, and the City of Newport Beach. Due to the fragmented ownership of the area and differing regulations, management of activities and law enforcement in the area have been difficult. The six months of the SAR Project covered in this report (January 2023 through June 2023) was run as an ongoing project by Orange County Coastkeeper (OCCK) with funding from the California Coastal Conservancy. The goal of the SAR project is to monitor human, dog, and bird use of the area and to provide education and outreach to residents and visitors about the Wildlife Management Area at the Santa Ana River Mouth and the endangered species that reside within it.

EXECUTIVE SUMMARY

Between January and June 2023, 1094 surveys at the Santa Ana River Mouth were completed by 18 trained volunteers and 3 employees. In the surveys collected, 9,256 people and 798 dogs were observed. Of the dogs 548 were off-leash and 250 on-leash. Dogs off-leash accounted for 69% of the dogs observed. Law Enforcement Officers were present 162 times throughout all surveys completed in this time period with Lifeguards observed most frequently followed by Police. No citations were observed to be issued, though 9 contacts were made by law enforcement officers.

MAP AND PROJECT BOUNDARIES



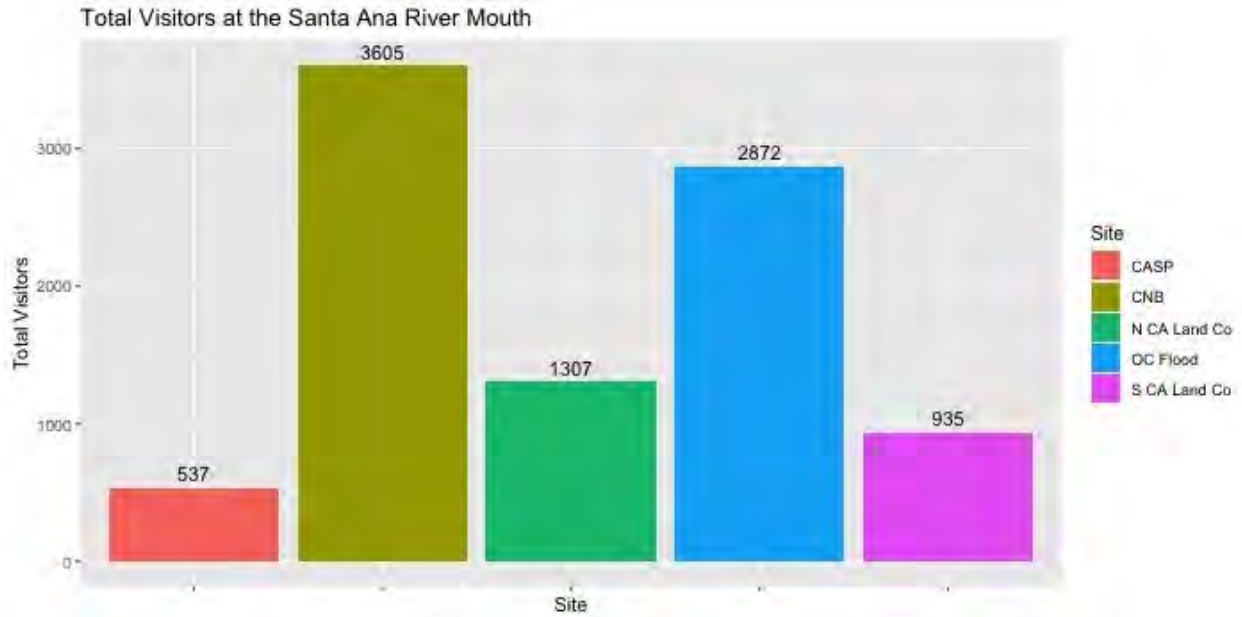
Map of Santa Ana River Mouth with property names overlaid to correlate with data sheets. **CASP**=California State Parks; **OC Flood**=Orange County Flood Control Channel; **CNB**= City of Newport Beach; **CA Land Co**= California State Lands Commission. In our data collection and analysis California State Lands Commission property was split into North and South portions, divided by the location of the river mouth during surveys, to improve our ability to understand access and use in the area.

ANALYSIS

Previously the data was analyzed using Excel, the datasheet has since been reformatted to be easier to use by volunteers and compatible with R; a statistical analysis program widely used in scientific writing for data visualization. The graphs were coded using the R programming language, allowing for higher efficiency in analysis and easier replication.

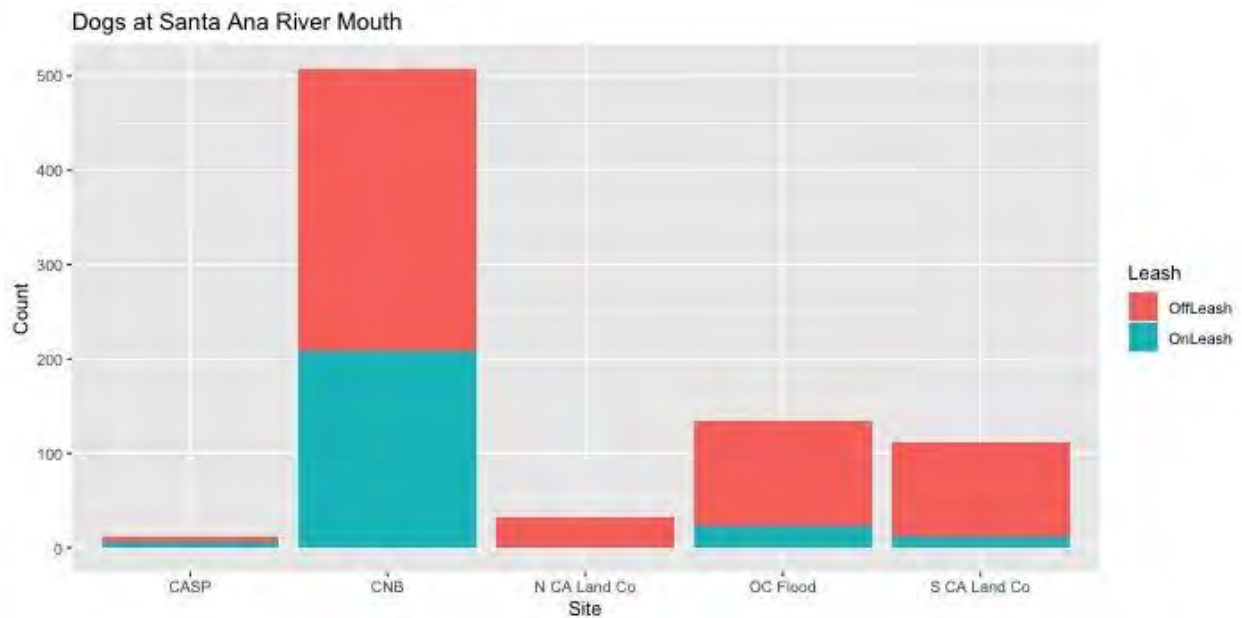
GRAPHS

Visitors Based On Location



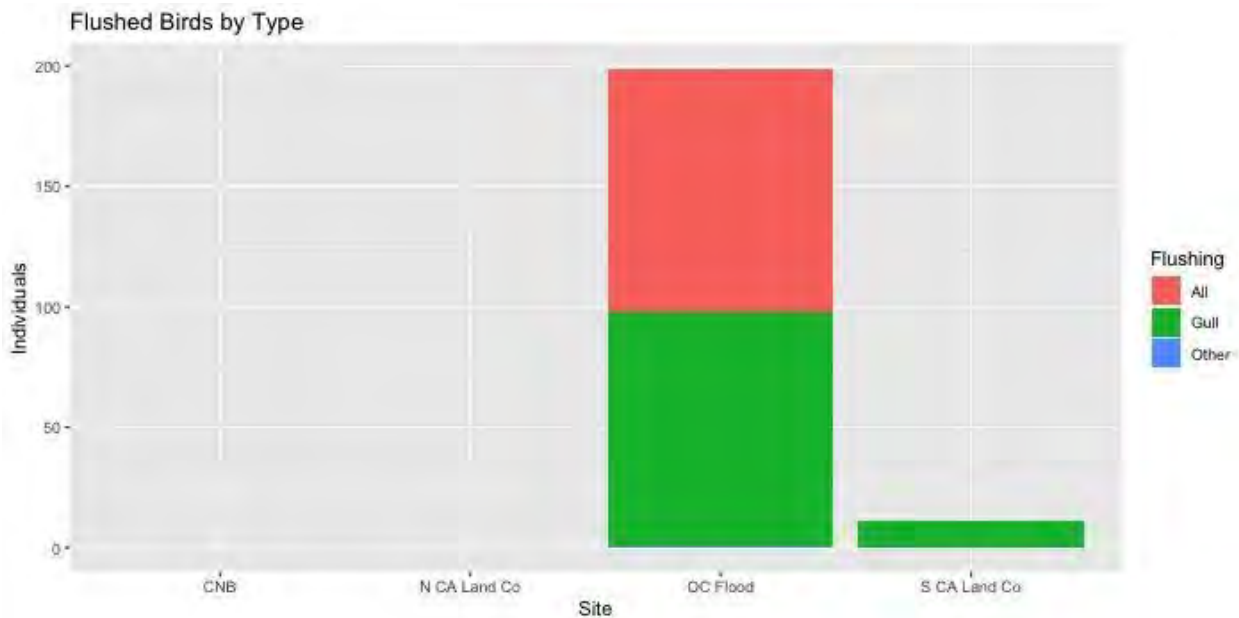
Dogs Based On Location

A total of 798 dogs were recorded at the Santa Ana River Mouth; 250 (31%) were on leash and 548 (69%) were off leash.



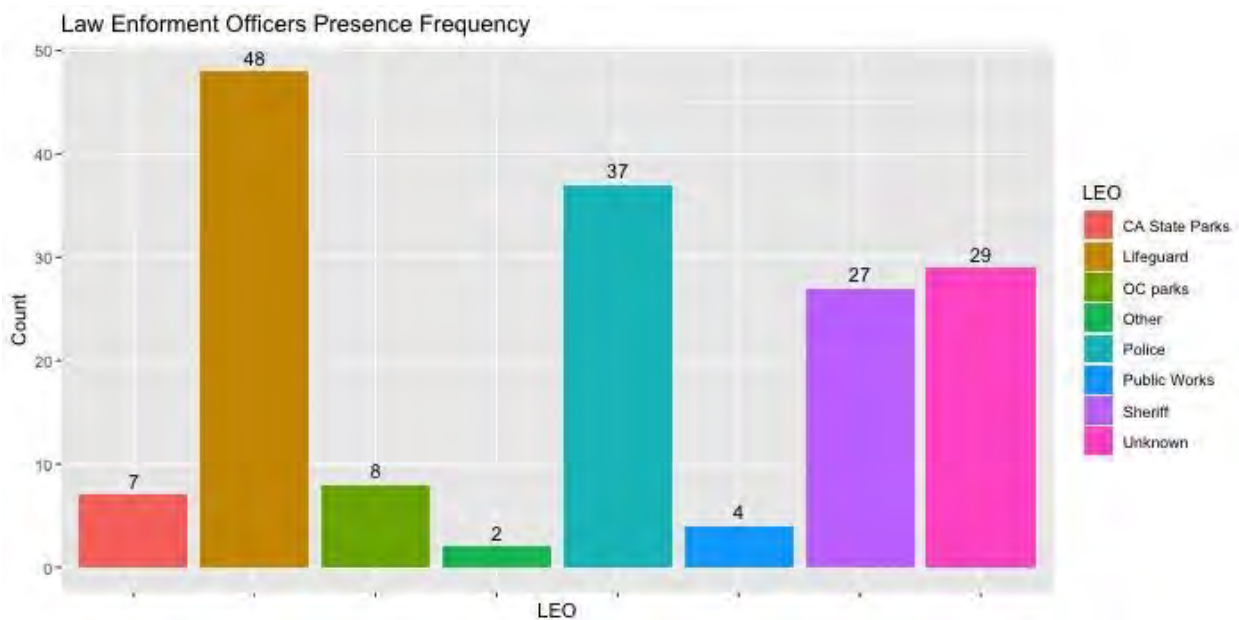
Bird Disturbances By Location

Bird disturbance, also known as flushing events, are defined when birds are present on a part of the beach and are approached by humans and/or dogs and they depart the beach. A total of 210 flushing events occurred in the OC Flood and South California Lands Commission jurisdictions. 48% of the bird flushes included a mix of terns, gulls, and shorebirds, 51% of the bird flushes were only gulls, and less than 1% consisted of other bird species.

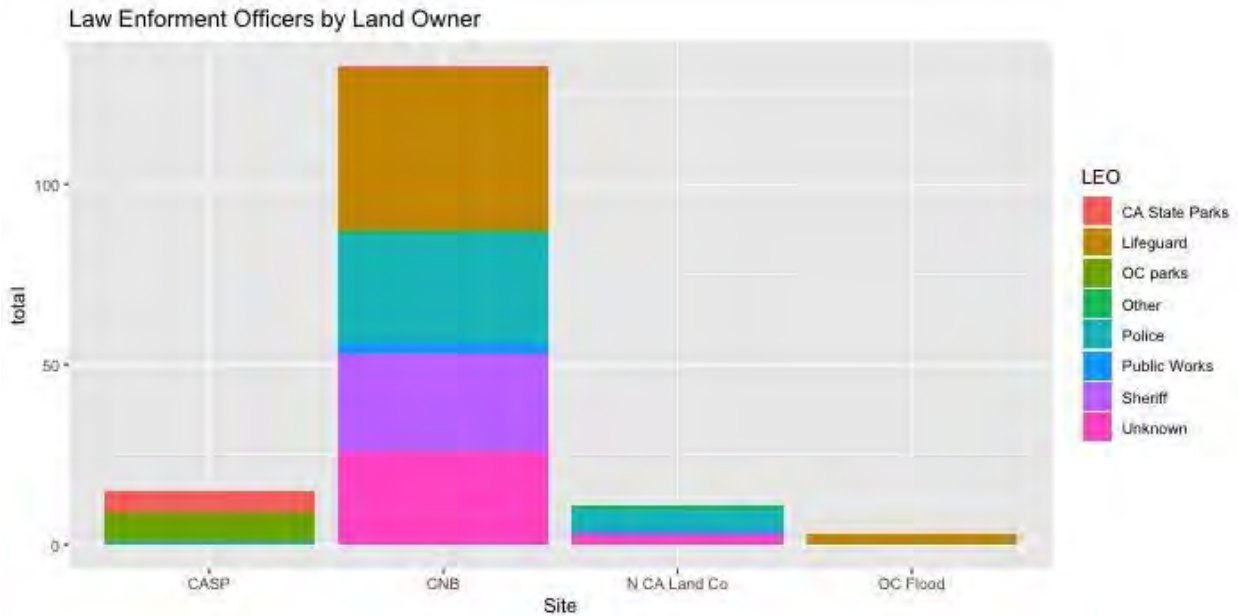


Law Enforcement Officers (LEO) Frequency

A total of 162 law enforcement officers were present during observational surveys. There were a total of 9 contacts made by various law enforcement officers.



Law Enforcement Officers by Location



TRAINING

Training took place with two components, an online one hour Zoom training that took place in February 2021 was recorded and distributed to new volunteers along with training documents. Volunteers then met with Volunteer Coordinator Sabrina Medina at the Santa Ana River Mouth to go over the monitoring protocol and the property map in person. Volunteers were trained to understand the land manager boundaries, monitor human recreation use, and identify bird species. In addition volunteers were instructed how to fill out the data sheet and given access to the standard operating protocol for the surveys.

OUTREACH TABLE


During this project Orange County Coastkeeper was able to conduct an outreach table for beach visitors. Visitors were given pamphlets detailing information about California Least Terns and Western Snowy Plovers. Additional information about the laws regarding dogs in the area and free biodegradable waste bags were provided to visitors as well. Between January and June 2023 the outreach table was set up at the Santa Ana River Mouth and targeted recreational beach users. Challenges for our public outreach included issues with volunteer recruitment and retention, and staffing capacity as the project was restarted after a funding hiatus. Overall OC Coastkeeper engaged in one on one or small group conversations with 14 visitors during the reporting period. An updated informational banner was developed to be used at outreach events that highlights the endangered and threatened species of birds and City of Newport Beach dog rules.



THREATENED AND ENDANGERED BIRDS ON THE BEACH


Western Snowy Plovers are a small species of shorebird that rely on coastal habitat. They use sandy beaches for nesting and forage on marine invertebrates along the shoreline. The Santa Ana River Mouth is considered Critical Habitat by U.S. Fish and Wildlife Service due to the wide open spaces and minimal vegetation. Additionally the kelp and driftwood found on the beach helps harbor food and offers protection from predators.

Western Snowy Plovers



California Least terns have a limited habitat along California coastlines. They use sandy beaches to nest and primarily use estuaries and lagoons to hunt. Least terns can be seen hovering over the Santa Ana River Mouth before plunging into the water for prey. This federally endangered species habitat has severely reduced due to coastal development and beach recreation.

California Least Terns




PROTECT THE BIRDS OF THE SANTA ANA RIVER MOUTH

Our fur babies don't mean to, but they can often scare off small hard to see threatened and endangered species causing them to abandon their nests.

LET THE BIRDS BE
Share the beach

WHEN ARE DOGS ALLOWED?
City of Newport Beach

- Dogs are never allowed on the beach or any beachfront sidewalk between the hours of 10 a.m. and 4:30 p.m., including the ocean front beaches and bay front beaches.
- Before 10 a.m. and after 4:30 p.m., dogs are allowed, if they are securely restrained by a substantial leash or chain not exceeding six feet in length and controlled by a person who is competent to restrain the dog.
- Off-leash dogs are never allowed in any public spaces including parks and beaches.



Brown Pelicans

Seagulls

Shorebirds

Keeping dogs on leash can help protect the birds that are nesting at the Santa Ana River Mouth!

Other Updates

This project is funded through a grant from the California Coastal Conservancy. Due to a gap in funding during a contract update to augment our funding, all data collection in January through early April of 2023 was done by previously trained volunteers. Paid staff resumed work on the project in April 2023 when the new funding became available. Since that time the project has been growing in volunteers and staff involvement, which has led to the creation of a Standard

Operating Procedure to ensure consistency in our survey methods. A new datasheet was also created to ease the data collection process and eliminate discrepancies. Other outreach materials, including a new banner, were also updated to increase public awareness.

Next Steps

Our next steps in this project include additional volunteer recruitment from the local community, continuation of the outreach table, and continuing to gather surveys. We will be purchasing needed equipment and updating our training materials. We will also begin presentations to local community outreach to state and local agency staff to get the information from this project to all interested parties.

Exhibit III

Chatten-Brown Law Group Link to videos:

https://drive.google.com/drive/folders/1Eu3-EfTgaxmvHGgsYkA7uXv-RX- HpvZ?usp=share_link

Exhibit IV

Photographs taken during County dredging in 2021



Pictured: Man and dogs next to “no trespassing sign” in front of birds, monitor stands in yellow jacket to the right



Pictured: other side of previous photograph, same monitor stands in yellow jacket in the middle







Pictured: two unleashed dogs, one in the sensitive dune habitat, in front of County dredging operations

Photographs during dredging in 2020



Pictured: Children play in dredging pile





Pictured: County sign saying "Work Zone Keep Out"

Exhibit V

WE WANT YOU ON MARS

DISCOVER EXCITING NEW CAREER PATHS WITH US ON THE RED PLANET

LEARN MORE



Dog's death in storm drain near 'dog beach' raises safety issue

BY HANNAH FRY | STAFF WRITER
OCT. 5, 2016 6:02 PM PT



Madi McNaughton was just looking for a calm spot on the beach to play with her three dogs.

They had been frequent visitors to the stretch of sand between Newport and Huntington beaches, known in recent years as an unofficial dog beach where pups can run off leash.

ADVERTISEMENT

But McNaughton never imagined that a sunny day playing in the ocean could so quickly turn tragic.

ADVERTISEMENT

The 24-year-old Huntington Beach resident's 3-year-old mastiff mix, Rupert, drowned last Thursday after he was submerged in a storm drain east of the beach.

McNaughton, a veterinary assistant at VCA West Coast Specialty and Emergency Animal Hospital in Fountain Valley, sat with Rupert's body for five hours.

"I was just waiting for him to wake up," she said. "He looked so peaceful, like he was sleeping. It was the worst day of my life."



Madi McNaughton, of Huntington Beach, placed fliers around the Santa Ana River area warning dog owners to stay away from the storm drain that claimed her 150-pound mastiff mix Rupert. (Hannah Fry / Daily Pilot)

ADVERTISEMENT

The day at the beach had started like any other. McNaughton had decided to toss a ball for her dogs and a friend's dog where the water was calm, away from the waves and past the Pacific Coast Highway overpass. She often had seen people with their dogs and children in the area, so she figured she was still safely in the confines of the unofficial dog beach.

She realized later that the boundaries of the beach end at the overpass and she had taken her dogs into a flood channel.

ADVERTISEMENT

The area is appealing to many people because the water tends to be calmer farther from the waves.

"It may look inviting, but it's still a flood-control channel and it's dangerous," said Orange County Public Works spokesman Shannon Widor.

McNaughton tossed the ball and Rupert bounded to retrieve it, but as soon as he reached the toy, the tide came in and water began pushing the 150-pound dog toward a drain on the side of the Santa Ana River bed.

The drain consists of a concrete wall with an opening at the bottom used to keep storm and tidal waters from overflowing the river.

The current was strong and Rupert was moving quickly, so McNaughton jumped into the water and, unable to touch the bottom, swam toward her beloved dog.

"I grabbed the top of the drain and reached in right as he was going under to grab his collar," she said.

As her left hand clutched Rupert's collar, her right hand gripped the top of the concrete wall.

"My arm was completely stretched out and I couldn't breathe because the water had started going over my head," she said. "I had to let go of his collar because if I didn't I would have been sucked in after him."

She scrambled out of the water and rushed to the other end of the drain to find that it was covered by a metal grate, preventing Rupert from passing through.

ADVERTISEMENT

"He got stuck," she said. "I stood there at the grate for three to five minutes, just hoping to see some sign of him. I knew there was no way he was still alive. I was hysterical at that point."

McNaughton got Rupert from the Baldwin Park shelter when he was 3 months old. Plagued with mange, elbow dysplasia and degenerative hip disease, Rupert endured surgery after surgery. McNaughton had planned on nursing him back to health and offering him for adoption. But she fell in love with his loving, goofy personality.

Rupert had a penchant for destroying balls and was so excitable that he would whip his tail back and forth with such fervor that it would leave welts on McNaughton's legs.

ADVERTISEMENT

"He was just a gentle giant," she said. "He was the happiest dog, the best dog I've ever had. He was my baby."

Ten minutes after Rupert disappeared into the tide, his large body washed out of the drain, and animal-control officers, lifeguards and McNaughton's brother lifted him from the water.

"The hardest part of it all was seeing his washed-up body with his head underwater and knowing he was gone," McNaughton said.

For years, signs have been posted near the bike path that runs above the area warning people to stay out of the flood-control channel. But for dog owners walking from the dog beach to the other side of the Pacific Coast Highway overpass, there was no indication of the danger, McNaughton said.

In response to the tragedy, McNaughton posted fliers — featuring photos of her and Rupert — by the drain and along the bike path warning others not to make the same fatal mistake.

County crews also put up orange temporary fencing in the area. In coming weeks, crews will install a more permanent barrier and additional signs to dissuade people from entering the flood channel.

They also are investigating why there was no grate on the side of the drain where Rupert went in, Widor said. The absence of a grate allowed his body to flow inside.

"We're doing everything we can to make sure this doesn't happen again," Widor said.

The Santa Ana River area has received significant attention this year from county and Newport Beach officials, as well as nearby homeowners and those who frequent the area with their dogs.

The issue of leash laws came to the forefront late last year after Newport Beach Mayor Diane Dixon said she was fielding complaints from homeowners about unleashed dogs and unremoved dog waste.

In response, the city conducted an online survey to determine whether Newport residents would favor the city enforcing county leash laws at that beach. Hundreds of people responded, with the majority asking the city to leave the area alone.

In March, after two hours of passionate testimony from dog owners who frequent the spot, Newport's Parks, Beaches and Recreation Commission voted unanimously to reject a proposal to have city animal-control officers enforce leash restrictions there. The commission instead suggested the county look into designating the area as an official dog beach.

Dixon, city staff, dog beach advocates and county Supervisor Michelle Steel, whose district includes Newport Beach, began working on a proposal to that effect.

An ordinance to designate the area as the first legal dog beach on county land passed the Board of Supervisors' first reading but stalled in May over concerns from two environmental groups that having unleashed canines in the area could harm two at-risk bird species.

Michelle Cook, communications director for Steel, said at the time that county staff was looking into the groups' concerns and had not yet made a determination.

Dog beach advocate and current Newport Beach City Council candidate Mike Glenn said he expects the issue to head back to the Board of Supervisors in the next few months.

Glenn said Rupert's death could have been prevented with better signage and education about the boundaries of the unofficial dog beach.

"Some people, unfortunately, have been defining the area where Rupert died as dog beach," Glenn said. "This is not the proposed dog beach area."

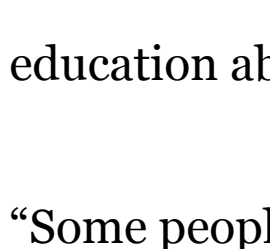
Glenn maintains that the proposed dog beach area closer to the ocean is safe and should be maintained as an off-leash area for canines.

McNaughton agrees that that beach should kept as is, but she hopes Rupert's death motivates officials to fence off the riverbed area near the storm drain.

"I just want it to be a safe place for dogs and their owners to play," she said. "I still want the dog beach there. All the dogs I've ever seen there are happy."

hannah.fry@latimes.com

Twitter: [@HannahFryTCN](https://twitter.com/HannahFryTCN)



Hannah Fry

Twitter Instagram Email Facebook

Hannah Fry is a Metro reporter covering Orange County for the Los Angeles Times. She joined the newspaper in 2013 as a reporter for the Daily Pilot, a Times Community News publication. Fry most recently covered breaking news for The Times and was part of the team that was a 2020 Pulitzer finalist for its coverage of a boat fire that killed 34 people off the coast of Santa Barbara. She grew up in Orange County and got her start as an intern at the Orange County Register.

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3151 Airway Avenue, Suite F-110
Costa Mesa, CA 92626
Phone 714-850-1965
Fax 714-850-1592
www.coastkeeper.org

October 13, 2023

California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento CA 95825

Re: 10/19/23 Agenda Item 42 Orange County Flood Control Lease

Dear Chair Kounalakis and Commission members,

Orange County Coastkeeper ("Coastkeeper") is a nonprofit clean water organization with the mission to protect and promote water resources that are swimmable, drinkable, fishable and sustainable. We have been working to improve all aspects of water quality in the Santa Ana River Watershed since our inception in 1999. The Santa Ana River (SAR) mouth is of special concern to us due to the intersection of water quality, public access and endangered and threatened species in the area. Careful management of the area is required to balance these issues to protect the public trust. The State Lands Commission has the opportunity through its lease requirements to change the dynamic at the Santa Ana River mouth from a lawless area that presents significant risks to the public and wildlife to an effectively managed area where the public and wildlife are protected.

The lawless nature of this area is well known as discussed in this [LA Time Article](#). This is such a significant issue that the California Coastal Conservancy has funded Coastkeeper to run an ongoing project at the Santa Ana River mouth. The goal of the project is to monitor the activities at the SAR Mouth and educate visitors on how they can minimize their impact on the threatened and endangered bird species present in the area. Started in 2021, this Coastkeeper study has documented the human, dog and bird activities at the Santa Ana River Mouth and produced five reports on the activities in the area. The most recent Coastkeeper report, covering the first six months of 2023 is available [here](#) and documents that of the 798 dogs observed at the SAR Mouth 69% of them were off leash. This is in spite of clear signage that dogs must be on leash at all times and that there are endangered bird species in the area. This situation has remained unchanged over the project period as the dog owners know there is no enforcement of the existing laws.

[This](#) is an example of what you can find online promoting dogs at the beach. While the Orange County Sheriff does show up occasionally and yell at people through a bullhorn, their own report documents that they have issued no citations. This "warning" level of enforcement is clearly not working. The standard procedure for enforcement is to issue warnings as a start, then issue citations. The dictionary defines enforce "to effectively carry out" The data from the County and Coastkeeper reports shows that there is no real enforcement taking place at the SAR mouth. This lack of enforcement is not only a threat to wildlife, but to public safety. Dogs off leash are a threat to beach visitors and other dogs. I personally have been jumped on and barked at by off leash dogs while visiting the beach. I have been bit by dogs

in the past and the unleashed and out of control dogs in this area make me uncomfortable to be there. The current situation makes the SAR mouth s a dangerous place for visitors and wildlife.

I asked our two staff members who spent a lot of time out there to each write a short narrative about what they encountered. They are below.

#1

Personally, I did not have any direct interaction with dog owners. However, I witnessed it when the sheriffs were explaining to a couple of dog owners about the regulations. The dog owners claimed that they were not aware of the regulations. But I saw the dog owners that are completely ignorant and tried to avoid any eye contact with me as they were obviously aware of the regulation and decided to ignore it. Unfortunately, lifeguards are not being proactive, and not enforcing the regulations is not helping the situation. Most of the lifeguards are not aware of the regulations as some of them are just there to cover for a day or two. The ones who are there more frequently are not interested in giving the dog owners a warning or informing them. I have not seen even one interaction between the lifeguards and the dog owners in the City of Newport Beach.

#2

Interactions With Dog Owners at SAR

I have had several interactions with dog owners at SAR and most of them have been non-confrontational. I usually say that we are doing surveys looking at human, dog, and bird behavior, trying to see how we can best manage this area for everyone. One of the owners with a small dog mentioned that her dog would probably be more scared of the birds than they were of her. Some others mention that the birds already have their fenced in areas, so are confused as to why it matters. I did have one conversation last week where I could tell that the man was getting angry. He had 2 very large dogs that he had allowed off the leash and they were running everywhere around the channel and beach. He saw the new sign and was asking about what we were looking for. When I explained that we were taking data on human, dog, and bird interactions, he asked what we were going to use the data for. He insisted that there was no reason to change anything. He said he had been coming here for 40 years and that it had always been like this, so unless the bird population numbers changed 40 years ago, then it wasn't the dogs.

As a life-long southern California resident, I sincerely doubt that there has been no change in visitation in the last 40 years. Likewise, I doubt that the number of dogs hasn't increased in that time period. Especially with the emergence of the internet, with sites about dog-friendly beaches and Instagram posts, it is inevitable that the number of dogs at the beach has increased. He said that the parking situation keeps the number of visitors down at this particular beach. I tried to be pleasant and assured him that, if that was the case, we would now have data to back it up, but he was upset that "some organization" would try to "fix something that wasn't broken." I thanked him for his input.

Overall, it is a very uncomfortable situation. The dog owners feel we are there to take away something they enjoy doing, and that their "best friends" love. I don't think that we have made much of an impact on the dog owners so far. I have noticed that our new sign that specifies what we are doing there has made a difference in the way people interact with me.

The dog owners do listen to the Sheriff when they come down and tell everyone to get out of the OC Flood area. They say they do this once per day, and I have seen it several times. The lifeguards from the City of Newport Beach, however, do not enforce the laws about dogs on the beach. I witnessed a man with a dog specifically ask the lifeguard if dogs were allowed on the beach. He said he had always seen them here but had never brought his dog before. She basically told him the rules for the different areas, but said that they didn't enforce them. She directed him to the California State Lands Commission area since that seems to be "no man's land" when it comes to rules. Today I saw the animal control truck and he asked if I had called in the two dead chickens. I told him no, and he mentioned something about the county receiving the call, but saying it was on city property. Apparently, these turf disputes happen quite often between agencies. He did proudly declare that he kicked two dog owners off the beach. So, the Newport laws are sometimes upheld, but not by the lifeguards; only by animal control.

In conclusion we ask that the State Lands Commission reduce the timeframe for the current lease renewal to two years and require real enforcement, including citations by local law enforcement. The fact is that the current "enforcement" situation is not working and needs to change. Six months of vigorous enforcement that includes citations will change the dynamic at the site and provide a safer environment for the public and wildlife. In the past the City of Newport Beach has hired private security staff to patrol beach areas. This is a model that should be explored for this area as well,

Thank You,

A handwritten signature in cursive script that reads "Raymond F. Hiemstra". The signature is written in dark ink and is positioned above the typed name and title.

Raymond Hiemstra
Associate Director of Policy and Projects
Orange County Coastkeeper



October 16, 2023

The Hon. Eleni Kounalakis, Chair
California State Lands Commission
100 Howe Avenue Suite 100-South
Sacramento, CA 95825

RE: Item 42, October 19, 2022: Orange County Flood Control District lease renewal—*OPPOSE UNLESS AMENDED*

Dear Chair Kounalakis and Members of the Commission:

Endangered Habitats League (EHL) opposes renewal of this lease absent accountability and remedy for the flagrant breach of terms by Orange County. Lease renewal must add a condition that leads to *actual enforcement* of safety and environmental measures. Renewal absent such conditions *rewards non-compliance*, perpetuates an *unacceptable status quo*, and endangers both the public and bird species listed as threatened/endangered by state and federal governments.

The current lease *requires* the County to enforce its own regulations regarding trespass and off-leash dogs and improve conditions on the ground.

Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat.

“Enforce” means to “compel obedience.” Enforcement is thus an outcome, not a process. Orange County Coastkeeper has documented the continued presence of thousands of trespassers and hundreds of off leash dogs disturbing nesting birds and depriving them of energy needed for long distance migration and breeding. There are also illegal hang gliders. The County’s own reports are fully consistent with this failure to enforce. They show widespread ongoing violations, ineffectual measures, no accountable methodology, e.g., reporting during high use periods, and *no* citations issued. Use of the Sheriff is not working; *wishful thinking is not lease compliance*.

Renewal to allow dredging is fine. But it must be accompanied by *a new condition to fund enforcement* by an appropriate agency—other than the Sheriff—either external, such as Calif. Dept of Fish and Wildlife or Newport Beach Animal Control, or

internal, such as County's own Code Enforcement or Animal Services divisions. A 60-day period to put this in place would allow for a smooth transition.

Sample new condition:

Within 60 days, the County will demonstrate to State Land Commission's satisfaction that it has put in place new and adequate enforcement personnel, with the authority to issue warnings and citations under the applicable ordinances, either internally such as from its Code Enforcement or Animal Services divisions, or externally from other agencies, along with a reporting system.

Please do not allow Orange County to conduct a charade and suffer no accountability. This is not the way our government works. It is easily feasible to fix this problem, and you have the means to do so.

Yours truly,



Dan Silver
Executive Director

Enclosure

Letter to State Lands Commission, "Third-Party Enforcement in the Lower Santa Ana River Needs to Be Required as a Condition of the County of Orange's Lease," Chatten-Brown Law Group, Sept. 20, 2023



October 16, 2023

California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, CA 95825

Agenda Item #42: Orange County Flood Control District, Santa Ana River
OPPOSE UNLESS AMENDED

Dear Chair Kounalakis and Commission Members:

The Sierra Club Orange County Conservation Committee has been working to protect and preserve the Santa Ana River mouth ecosystem for many years. We oppose the renewal of this lease given the inadequacy of the conditions set forward. Based on all of the evidence we have provided staff over the past two years during the current limited two-year lease term, there is no denying that the County has failed to comply – the photos, videos and Orange County Coastkeeper monitoring reports could not provide stronger or more compelling evidence of non-compliance. A five-year lease renewal not only rewards the County's non-compliance, but sets the stage for further non-compliance. This is not acceptable when there are solutions – many of which have been discussed with both County and SLC staff over the last two years.

The 2021 limited lease was very clear and straightforward as to what this Commission was attempting to accomplish, and what was required of the County:

- The limited 2-year lease term will allow the Commission to **re-evaluate the effectiveness** of this protection and enforcement framework and adaptively manage the situation accordingly.
- **Lessee must enforce** Orange County Code of Ordinances sections 3-9-35, 9-1-40, and 9-1-52, and any sections pertaining to public beaches and other public areas found to apply to the Leased Premises in the future that do not conflict with State law or the Public Trust Doctrine.

With all of the indisputable evidence that has been provided to this Commission, along with multiple legal analyses of the situation (letters attached), it is incomprehensible as to why the recommendation for renewal of the status quo is being made. The effectiveness of this lease has not been properly re-evaluated.

We once again ask that this Commission require the County to **enforce** their very own ordinances that are in place to protect both the public and the endangered species. There is no arguing that multiple County ordinances are being completely ignored by their dredging monitors during maintenance activities, but also during the remaining 300+ days of the year that dogs, paragliders and humans habitually trespass in this area, thereby preventing listed California Least Terns and Western Snowy Plovers from using this important ecological area adjacent to their nesting grounds.

We ask that the Commissioners request an amended lease that requires the County, within 60 days of the approval of this lease, to fund enforcement by an external agency as referenced in both staff reports (2021 and 2023), or an internal division within the County which excludes the County's Sheriff's Department, which, through two years of failed compliance, has demonstrated their unwillingness to enforce these County ordinances.

The County has, at its immediate disposal, both Code Enforcement and Animal Control Divisions. It is unclear why the County has chosen to engage the Sheriff's department given that they have repeatedly reported that the Sheriff is already over-burdened with other priorities, and is unable to be at the river mouth during peak hours when off-leash dogs and paragliders are most prevalent. We need boots on the ground during the times when infractions occur, every single day – rain or shine.

Although the Mitigation Monitoring Report is not a product of this agency, it is outdated and requires updating if it is going to be relied upon for any type of proper compliance. Utilizing a report from 20+ years ago simply doesn't work, and that includes the Army Corps documents that are even more outdated.

When we speak to this Commission about the ongoing impacts to threatened and endangered species year after year, our goal is to seek your assistance in actually removing these species from the endangered species list. We are asking once again for your assistance today. Further degradation of important habitat for multiple listed species, in violation of multiple existing regulations, is not acceptable when there are solutions readily available to us.

Please, deny this lease that is before you, and amend it to reflect a **re-evaluated lease** that responds to the total lack of effectiveness that we have all witnessed and documented over the past two years.

Thank you again for the opportunity to express our concerns. We look forward to your support.

Sincerely,

A handwritten signature in cursive script that reads "Penny Elia".

Penny Elia
Orange County Conservation Committee
Sierra Club

Attachments: Chatten-Brown, Carstens & Minter LLP letter to OCFCD 4-4-2022
(copied to SLC staff)
Chatten-Brown Law Group letter to SLC 9-20-23



Chatten-Brown, Carstens & Minter LLP

Hermosa Beach Office
Phone: (310) 798-2400
San Diego Office
Phone: (619) 940-4522

2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
www.cbcearthlaw.com

Kathryn Pettit
kmp@cbcearthlaw.com
TEL: 323-348-1877

April 4, 2022

Via e-mail

Orange County Flood Control District
Public Works Director James Treadaway (james.treadaway@ocpw.ocgov.com)
601 N. Ross Street
Santa Ana, CA 92701

Re: Notice of Violations of the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Section 9 of the Federal Endangered Species Act for Taking of Western Snowy Plover and California Least Tern and Request for Immediate Corrective Action.

Dear Mr. Treadaway:

This letter is written on behalf of the Endangered Habitats League to urge the County of Orange (“County”) and Orange County Flood Control District (“OCFCD”) to cease violations of the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act. These violations arise from the County’s intentional refusal to effectively enforce its own laws prohibiting trespassing and dogs in the Santa Ana River Mouth, inflicting harm on the endangered Western Snowy Plover and California Least Tern, on Environmentally Sensitive Habitat Areas, and on people and dogs themselves.

Recognizing these harms, on October 21, 2021, the State Lands Commission (“Commission”) approved OCFCD’s application to continue maintenance dredging in the Lower Santa Ana River (“River”) on the condition that the County would enforce its own laws prohibiting trespassing and dogs in the River Mouth. Despite this clear mandate, the County (including through OCFCD) continues to violate the conditions of its lease.

Dog parks can provide a meaningful venue for individuals and their pets to connect, when in the right location. Environmental groups and a state agency have provided the County and the City of Newport, which also refuses to enforce its own regulations in this area, with alternative dog beach locations that will not result in harm to state and federally protected species and sensitive habitat. (NGO July 2018 Comment Letter, **Exhibit A**, pp. 6, 11-12; see also Santa Ana Regional Water Quality Control Board Letter, **Exhibit B** [noting nearby existing dog beach where dog excrement and urine are less likely to wash out to sea].) The County’s encouragement, and public reinforcement via multiple media outlets, of the de facto dog park in the Santa Ana River Mouth actively harms endangered species and sensitive habitat in violation of the County’s legal obligations. The County must enforce its laws prohibiting trespassing and presence of dogs in the River Mouth to avoid violations of the aforementioned State and federal environmental laws.

I. The County's On-Going Violations of its State Lands Commission Lease Conditions Violate the Public Trust Doctrine, the California Coastal Act, and the California Environmental Quality Act.

A. The County's Lease Requires Enforcement of County Ordinances.

The Commission considered OCFCD's application for a two-year lease, beginning October 21, 2021, to conduct maintenance dredging on public sovereign lands in the Lower Santa Ana River, which includes the River Mouth. (Commission Staff Report, **Exhibit C**, p. 1.) The Commission specifically addressed the use of the River Mouth as an informal off-leash dog park, and the harm this causes to the on-site Western Snowy Plovers and California Least Terns. (Ex. C, p. 3.) It also refuted the County's previous claims that it did not have a duty to enforce restrictions on trespassing and dogs in the River Mouth, and reported that "[t]he County is now willing to enforce this ordinance within the Lease Premises to protect public safety and the environment." (*Id.* at p. 6.)

Commission staff contacted the California Department of Parks and Recreation ("Parks"), U.S. Fish and Wildlife Service ("USFWS"), and the California Department of Fish and Wildlife ("CDFW"), who "all indicated that the presence of dogs disturbs the foraging grounds of birds and severely degrades habitat area." (Ex. C, p. 4.)¹ As a result, the Commission required the County to enforce its own ordinances prohibiting trespassing and dogs in the River Mouth as a condition of its lease of the sovereign lands. (Ex. C, pp. 2-4, 6 [Section 4-1-45 prohibits unleashed dogs in public parks and presence of dogs altogether on public beaches; Section 3-9-35 prohibits trespassing in the Santa Ana River Flood Control Channel].) Further, under its lease the County must not interfere or object to any enforcement by a state agency of applicable laws in the River Mouth, including its own ordinances, and must provide annual reports to the Commission detailing its law enforcement efforts in the River Mouth. (Ex. C, p. 2.)

The County's lease places an unequivocal duty on the County to *effectively* prevent trespassing in the River Mouth: "Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat." (*Id.* at p. 6.)

The Commission Staff Report highlighted the futility of County Sheriffs' verbal warnings and failure to issue fines.² The County must effectively prevent trespassing and off-leash dogs in the River Mouth and flood channel through the hiring of a full-time ranger and issuance of fines.

¹ The Parks Department, California Coastal Commission, and Santa Ana Regional Water Quality Control Board also expressed concerns over the impacts on California Least Tern and Western Snowy Plover when the County considered formally allowing dogs at the River Mouth in 2016. (Ex. C, p. 3.)

² In its testimony at the Commission hearing, OCFCD admitted that "thousands of warnings to vacate the area have been issued at the SAR mouth." Commission Meeting Transcript, https://slcprwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 181.

B. The County Has Intentionally Avoided Enforcement of Its Laws, Causing Harm to Endangered Species and Environmentally Sensitive Habitat Area.

Despite years of notice from federal agencies, state agencies, and environmental groups that the County's inaction in the River Mouth creates environmental harm and violates the law, the County still refuses to enforce its prohibitions on trespassing and dogs in the River Mouth. This nonenforcement has also resulted in harm, and poses a continued risk of harm, to people and dogs.³

The continuous failure to enforce County ordinances is well documented. Orange County Coastkeeper ("OCCK") monitored the trespassing and illegal presence of dogs in the River Mouth in 2021 and released a report demonstrating the expansive scope of the problem. (OCCK Santa Ana River Mouth Monitoring Project January-June 2021 Report, **Exhibit D**, p. 2.) In only six months, over 5,000 humans, over 1,000 dogs (82% unleashed), and drones were reported in the River Mouth. (*Ibid.*) OCCK continued its monitoring, and just released its July-December 2021 Report. The OCCK December 2021 report similarly detailed high levels of trespassing and dogs—the majority off-leash—in the River Mouth. (OCCK December 2021 Report, Ex. D, p. 2.) Officers were only present seven times throughout the surveys in the time period, and no citations were observed to be issued. (*Ibid.*) The December 2021 Report includes specific accounts of the futility of voluntary warnings, continued non-compliance, and harassment of the shorebirds. (*Ibid.*)

The County's non-enforcement has continued after the Commission's approval of the County's lease.⁴ (February 19, 2022 Video and Photographs, **Exhibit E** [evidence of deliberate inaction and non-enforcement].)

County representatives have cited "political" reasons for its nonenforcement. (Ex. A, pp. 5-6.) This is unacceptable and in violation of federal and state laws.

C. The County's Failure to Comply with its Lease Conditions Violates the Public Trust Doctrine and California Coastal Act.

The Public Trust Doctrine requires the State to hold its tidal and submerged lands, stream beds, and other navigable waterways in trust for the benefit of the people of California. The Commission is charged with managing and ensuring appropriate uses on sovereign lands, which include the Santa Ana River Mouth.⁵

³ latimes.com/socal/daily-pilot/tn-dpt-me-dog-death-20161005-story.html ["Dog's death in storm drain near 'dog beach' raises safety issue"].

⁴ <https://www.ocregister.com/2021/11/03/enforcement-at-orange-countys-illegal-dog-beach-may-be-ramping-up/> [reporting that only eight days after County lease approval, people and their dogs were observed in the area during a visit by the Orange County Register]; Ex. A, p. 5; Commission Meeting Transcript, https://slcprdwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 178 [testimony about monitoring studies], p. 183 [testimony about hours of footage showing Orange County Sheriff's Department complete lack of enforcement action.].

⁵ <https://www.coastal.ca.gov/coastalvoices/PublicTrustDoctrine.pdf>.

Further, it “has long been recognized that wildlife are protected by the public trust doctrine.” (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361.) Citizens have standing to enforce the Public Trust Doctrine when the public agencies fail to discharge their duties. (*Id.* at 1366 [finding that Plaintiffs should have brought their Public Trust action against the County or CDFW].)

The Commission’s finding that the County’s lease of state sovereign lands does not substantially interfere with Public Trust uses hinged on the County’s effective enforcement of its ordinances, as Commission “staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources from harassment due to the unregulated presence of unleashed dogs.” (Ex. C, pp. 6, 8)

The County’s failure to enforce the trespassing and dog ordinances violate the Public Trust Doctrine. Further, because the California Coastal Act (“Coastal Act”) codifies and implements the Public Trust Doctrine, for these reasons the County’s intentional inaction violates the Coastal Act. (See *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 290 [highlighting that Public Resources Code section 30210 “makes specific reference to the public trust doctrine” and emphasizes the need to consider public safety interests.])

D. The County’s Inaction Violates the California Environmental Quality Act.

An agency must implement promised mitigation measures, and where it fails to do so the public may enforce under the California Environmental Quality Act (“CEQA.”) (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1166.)

For environmental review of its River dredging, OCFCD used a 1989 U.S. Army Corps of Engineers Supplemental Environmental Impact Statement as a CEQA equivalent document and prepared and approved an Addendum on April 29, 2016. (Ex. C, pp. 8-9.) In granting the County’s current lease, the Commission relied on the County’s Mitigation Monitoring and Reporting Program (“MMRP”) that the Commission previously adopted on August 9, 2016. (*Ibid.*) Based on this, the Commission concluded that the County’s activity “involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq., but such activity will not affect those significant lands. Based upon staff’s consultation with the persons nominating such lands and through the CEQA review process, it is staff’s opinion that the project, *as proposed*, is consistent with its use classification.” (Ex. C, p 9, emphasis added.) The County’s refusal to enforce its ordinances conflicts with both the Commission’s 2021 proposed project under CEQA, and impacts habitat on the adjacent mitigation lands.

The County’s 2016 CEQA findings admitted biological impacts to the River from its maintenance dredging, but found that mitigation measures would reduce impacts to a level below significance.⁶ Mitigation Measure BIO-5-1 required acquisition of eight acres of wildlife mitigation lands at the Mouth of the Santa Ana River and restoration of 88-acres of the Santa

⁶ 2016 MMRP, https://www.slc.ca.gov/Meeting_Summaries/2016_Documents/080916/Items_and_Exhibits/C31.pdf, p. 61 of PDF. (Accessed via hyperlink on page 9 of Exhibit C.)

Ana River Marsh that is adjacent to the Santa Ana River, near the Mouth of the river, as well as well as formation of a biological monitoring program.⁷ The Army Corps' Habitat Management Plan requires an on-site manager to coordinate with the Corps and local police department for enforcement of trespass ordinances.⁸

The County's non-enforcement has negatively impacted, and continues to harm, species on the Marsh mitigation lands, as noted in an Army Corps 2017 Supplemental Environmental Assessment.⁹ ("[S]nowy plovers were not observed within the Santa Ana River Marsh during surveys conducted in 2012 or 2013. While mudflats within the marsh could be used for foraging and roosting, disturbance associated with local residents and their dogs recreating in areas that are suitable for snowy plover nesting in the marsh channels likely precludes nesting activity.") The impacts of dogs on the Marsh and another protected species, the Light-footed Ridgway's rail, were noted again in the Army Corps' 2019 Habitat Management Plan.¹⁰

Figure 1. Vicinity Map



(Map Displaying Proximity of the Marsh (outlined in red) to the River Mouth, April 2019 HMP EA, p. 36.)

The County's failure to enforce its trespassing and dog ordinances are obstructing restoration of the nearby Marsh mitigation lands for suitable nesting habitat, which is one of its stated goals. The Commission relied on the 2016 MMRP in finding that the County's 2021 lease

⁷ *Id.* at p. 13-14 of PDF, Table SEIS-16, Section III. G. 1; p. 61 of PDF; April 2019 Habitat Management Plan EA, <https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/COMPLETE%20SAR%20Marsh%20HMP%20EA%204-25-19.pdf?ver=2019-04-25-184114-38>, p. 6 of PDF. The Marsh provides restored habitat for various state threatened and endangered species such as the California least tern, western snowy plover, coastal California gnatcatcher, Belding's savannah sparrow, and light-footed Ridgway's rail. "Continued management is needed to improve and maintain habitat conditions and to minimize disturbance and degradation." (*Id.* at p. 51 of PDF.)

⁸ *Id.* at p. 22 (p. 70 of PDF).

⁹ https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/complete%20SantaAnaRiverMarsh_Final_SEA%204-25-17.pdf?ver=2017-04-25-165707-200, p. 287 of PDF.

¹⁰ April 2019 HMP EA, p. 15 (p. 17 of PDF).

activities, *as proposed*, did not necessitate further environmental review. Yet, evidence shows the negative impacts of the County's non-enforcement on the Marsh mitigation lands. The Commission will need to reassess the MMRP and appropriate level of CEQA review when the County applies for another lease, as the current lease expires in October 2023.

In fact, the County's lease requires the County to submit its next lease application no later than October 21, 2022. The County must also provide annual reports to staff detailing its law enforcement efforts by July 2022. The Commission purposefully granted OCFCD a 2-year lease, rather than a 5-year lease, to provide an opportunity to assess whether the current lease framework is adequately protecting the endangered shorebirds, which includes adherence to its conditions. (Ex. C, p. 31.)¹¹ The Commission made this decision despite OCFCD's request for a 5-year lease.¹²

Despite years of efforts from agencies and environmental groups, the County still refuses to effectively enforce its ordinances, instead choosing to violate various State and federal environmental laws, as well as the conditions of its current lease. This evidence, and the need for further environmental review and mitigation measures, must be considered when the County begins applying for a new lease this year. In particular, any future lease must require the County to provide funding for a ranger at the River Mouth and effectively enforce its ordinances.

II. The County's Allowance of a De Facto Dog Park Violates the Federal Endangered Species Act and California Endangered Species Act.

The County's deliberate non-enforcement of its ordinances and allowance of dogs in the River Mouth violates the Federal Endangered Species Act ("ESA") and California Endangered Species Act ("CESA") through the resulting continuing harassment and take of endangered species, in particular the Western Snowy Plover and California Least Tern, in the Santa River Mouth and immediately adjacent areas.

The Western Snowy Plover is listed as a threatened species by the federal government and a California Species of Special Concern. A Recovery Plan was completed by the USFWS in 2007, designating the Santa Ana River Mouth as "critical habitat."¹³ The California Least Tern is also listed as federally endangered (Federal Register, June 2, 1970) and as State of California endangered. As noted in the Commission's Staff Report, the State Parks, CDFW, and USFWS all indicated that the presence of dogs in the River Mouth disturbs the foraging grounds of birds and severely degrades habitat area. (Ex. C, p. 4.)

¹¹ The specific language of the lease bears including here: "Further, staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources, from harassment due to the unregulated presence of unleashed dogs and other domestic animals. The limited 2-year lease term will allow the Commission to re-evaluate the effectiveness of this protection and enforcement framework and adaptively manage the situation accordingly." (Ex. C, p. 31.)

¹² Commission Meeting Transcript, https://slcprdwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 179-181 ["[OCFCD] has only one concern with the draft lease, and that is the term of the lease. The draft term has been reduced to only two years as opposed to the five-year term of a prior dredging Lease..."]

¹³ 2007 Recovery Plan, https://ca.audubon.org/sites/default/files/documents/wsp_final_rp_10-1-07.pdf, p. 109.

Section 9 of the ESA and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the ESA defines “take” to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations define “harm” to include significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. (50 CFR 17.3) The Service defines “harassment” as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

CESA similarly prohibits the “take” of a California endangered or threatened species by any person or public agency. (Fish & G. Code, § 2080.) Fish and Game Code section 86 defines “take” as to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 232.) The California Department of Fish and Game has specifically stated that nest abandonment, loss of young, and reduced health and vigor of eggs and/or nestlings (resulting in reduced survival rates) may ultimately result in a take in violation of the CESA.¹⁴ This interpretation of “take” was judicially affirmed in a Court of Appeal decision.¹⁵ Further, Section 3503 prohibits the take, possession, or destruction of birds, their nests or eggs.

The USFWS and CDFW have both already notified the County that the mere “presence of leashed or unleashed dogs on the beach and in the river mouth is harmful to snowy plovers and least terns” and can degrade the adjacent federally-designated Critical Habitat, and warned that dogs capture and kill or injure snowy plovers or least terns (Wildlife Agency Letters, **Exhibit F**, Dec. 2016 Letter, p. 3, 5.) USFWS specifically stated that the “presence of dogs at the mouth of the Santa Ana River is likely to disturb federally endangered California least terns [] and federally threatened western snowy plover.” (Ex. F, Nov. 2016 Letter, p. 1.) Of further concern, the wildlife agencies noted that impacts to western snowy plovers from dogs and other beach activities are “much greater than what we observe” due to limited monitoring, and the low probability of the actual discovery of a dead or injured western snowy plover. (Ex. F, Dec. 2016, Enclosure 1, p. 3.)

The State Parks Department makes it explicit: “if a beach goer brings a dog onto the beach, and the dog disrupts the feeding of a bird, leading to the bird’s injury, then it is a violation of the law.”¹⁶ The Parks Department reports that the Western Snowy Plovers have faced a population decline for several years from habitat destruction and harassment. For this reason, State Parks “will strictly enforce regulations prohibiting dogs on State Beaches.” (*Ibid.*) The Parks also detailed the negative impact of flying kites near nesting areas, as hovering kites

¹⁴ <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83992>.

¹⁵ *Ibid.* [citing *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554].

¹⁶ https://www.parks.ca.gov/?page_id=22542 [Parks Department discussing the decline of the Western Snowy Plover from human activities, including harassment from dogs, and explaining how even well-behaved dogs cause harm to western snowy plovers].

resemble predators and may cause nest abandonment. Drones, which are much noisier, have the same effect, including on the Least Tern nesting preserve immediately adjacent to the Mouth.

Snowy plovers regularly roost west of the adjacent Least Tern Preserve fencing and the Mouths of the Santa Ana River and Talbert Outlet. In 2012, 25 acres of snowy plover critical habitat was designated at the Mouth of the Santa Ana River (Unit CA 47) for the snowy plover.¹⁷



Figure 10. Critical Habitat for the Mouth of the Santa Ana River Unit CA-47

The plovers have faced continuous threats from trespassing and dogs in the River Mouth and surrounding areas. Environmental groups have previously alerted the City of Newport to this harm, whose nonenforcement of its off-leash ordinances and illegal encroachments have also resulted in take of the Western Snowy Plover. (Ex. A; NGO May 2019 Comment Letter, **Exhibit G** [detailing ESA violations].) A report by Tom Ryan and colleagues identified regular disturbance from trespassing and dogs as a threat to the Western Snowy Plover in the area, both breeding and non-breeding, (Ex. A, p. 10.) The plovers cannot compete with unaware beach users.¹⁸

Additionally, an important nesting colony of the California Least Tern is located at Huntington State Beach, just west of the Santa Ana River Mouth. A 7.5-acre area has been fenced off to protect the nesting colony and is designated as a California Least Tern Nesting

¹⁷ <https://documents.coastal.ca.gov/reports/2018/11/th11a/th11a-11-2018-exhibits.pdf>, p. 47 of PDF; see also Ex. F, p. 8 [Figure 1 demonstrating location of Western Snowy Plover Critical Habitat extending all the way into River Mouth, and further noting shoreline data may not accurately represent the “dynamic shoreline environment.”]

¹⁸ <https://www.seaandsageaudubon.org/Conservation/LeastTerns/LETE.htm>.

Sanctuary.¹⁹ The Santa Ana River Mouth is immediately adjacent to this Least Tern Sanctuary. The Preserve is one of five locations in Orange County where least terns breed and one of the few historical sites where least terns have continued to breed.²⁰ The Least Tern forages in the Santa Ana River and Marsh. Yet, as noted in Section 1.D., the Army Corps' Environmental Assessment for the Marsh Habitat Management Plan found that the California Least Tern has declined primarily because of human disturbance to its sandy beach nesting habitat.

The California Parks Department notified the County that due to the proximity of the River Mouth, dogs at this location “will directly impact” State Park operations and management, especially its mandate to protect sensitive natural resources at the adjacent Huntington State Beach, which includes the California Least Tern Natural Preserve. (Parks Letter, **Exhibit H.**)

The presence of unleashed dogs and illegal drones have had documented deleterious impacts on other nearby least tern nesting colonies, including inducement of the least tern to abandon their eggs, resulting in take of the species under both the ESA and CESA.²¹ The County's deliberate nonenforcement of its off-leash and trespassing ordinances and allowance of a de facto dog beach in the River Mouth, is resulting in harassment and take of the endangered Western Snowy Plover and California Least Tern in violation of the Federal Endangered Species Act and California Endangered Species Act.

III. The County's Allowance of a De Facto Dog Park Violates the Coastal Act.

The County's deliberate inaction violates the Coastal Act, specifically the Coastal Act's protections of wildlife and environmentally sensitive habitat areas (“ESHAs”). The River drains the largest watershed basin in Southern California, traversing 96 miles to completion in Orange County, between Newport Beach and Huntington Beach, at the Santa Ana River Mouth. The River Mouth is at the center of a 1,300-acre ecosystem in the Lower Santa Ana River. This ecologically valuable area is an estuary—itsself ESHA—located between dune ESHA and critical habitat for the Western Snowy Plovers and California Least Tern, also ESHA. (Ex. A, p. 5.)

A. The County's Non-Enforcement Harms Various Environmentally Sensitive Habitat Areas.

The Coastal Act requires special protection of environmentally sensitive habitat area. Section 30240 mandates that ESHA “shall be protected against any significant disruption of habitat values,” restricts development in ESHA to resource dependent uses, and requires that

¹⁹<https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/COMPLETE%20SAR%20Marsh%20HMP%20EA%204-25-19.pdf?ver=2019-04-25-184114-380>, p. 12 (p. 14 of PDF).

²⁰ <https://documents.coastal.ca.gov/reports/2018/11/Th11a/Th11a-11-2018-exhibits.pdf>. (p. 30.)

²¹ <https://www.pe.com/2021/06/03/illegal-drone-scars-terns-which-abandon-3000-eggs-on-bolsa-chica-nesting-island/> [Drones and off-leash dogs are a growing threat to birds at the Huntington Beach reserve”]. Orange County Coastkeeper further describes why dogs inflict harm on these endangered birds, explaining that both species have existed in the River Mouth for tens of thousands of years, and have evolved to respond to threats from coyotes by escaping the area. Thousands of generations of shorebirds respond to coyotes by fleeing and will abandon their nests and even their chicks. Dogs greatly resemble coyotes. (<https://www.coastkeeper.org/monitoring/#sar>.)

development adjacent to ESHA be compatible with the continuance of the adjacent ESHA. The Coastal Act defines ESHA as: “[a]ny area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.” (Section 30107.5). Rare plant communities and habitats for protected wildlife are usually considered to be ESHA. (Letter from CCC Enforcement, Ex. G, Attachment 1, pp. 1-2.)

The River Mouth itself is ESHA. When the County considered formalizing the de facto dog park in the River Mouth, the California Coastal Commission (“CCC”) warned that doing so would impact foraging and roosting habitats of the Least Tern and Western Snowy Plover, as well as the breeding habitat of the Least Tern, defining both species as “key to the marine ecosystem.” (CCC Letter, **Exhibit I**, p. 2.) The CCC emphasized that the River Mouth itself is important foraging habitat for the Tern and is deemed ESHA. (*Ibid.*) The Regional Water Quality Control Board also commented that the River Mouth is a “RARE beneficial use designation” in its Basin Plan because it is known habitat for the endangered Western Snowy Plovers and Least Tern that warrants protection. (Ex. B.) The County’s non-enforcement results in harm to this ESHA, as demonstrated throughout this letter. In 2018, environmental groups met with wildlife agencies and County representatives, and requested that the City and County establish an “avian protection area” or “special protection zone.” (Ex. G, p. 9.) During this meeting, the group witnessed disruptive trespassing, off-leash dogs, and ultralights in the River Mouth. (*Id.* at p. 10.)

Further, various ESHAs exist immediately adjacent to the River Mouth. The CCC formally determined in a 2006 enforcement action that the dunes on the south side of the River constitute ESHA, as dune habitat is a sensitive plant community,²² and these dunes are utilized by the California Least Tern. (Ex. G, Att. 1, p. 2.) Section 30251 of the Coastal Act grants specific protections to dunes. The CCC required restoration of the dunes *and their preservation*. (*Ibid.*) The CCC successfully restored coastal dune habitat in 2014, and transferred responsibility over to the City of Newport to manage. (Ex. G, p. 7.) Yet, sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people, dogs, and ultralight take offs and landings. (*Id.* at p. 7, 9.) The CCC commented on the inconsistencies of a dog beach at this location with Coastal Act Section 30240, due to the proximity of this ESHA and the negative impacts from “numerous leashed and unrestrained dogs,” including dune degradation. (Ex. I, p. 2.) The County’s nonenforcement of its ordinances and encouragement of a de facto dog beach leads to harmful impacts on this restored dune ESHA.

There also exists California Least Tern habitat immediately adjacent to the River Mouth in the Huntington State Beach Least Tern Natural Preserve, as discussed in Section II. The Preserve is also ESHA that is harmed from the County’s actions. (Ex. I, p. 2.)

The CCC has previously warned the City of Newport that trampling and human disturbance of ESHA constitutes development activities under the Coastal Act that require a coastal development permit and reiterated the need for increased enforcement of dog-leash laws. (Ex. G, Att.1, p. 3.) These impacts on ESHA create liability “under the Coastal Act at a

²² Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the USFWS, CDFW, and CCC. (Ex. G, Att. 1, p. 2.)

minimum” for the local jurisdiction, as they “constitute continuing violations of the Coastal Act and continuing public nuisances.” (*Ibid.*) The Coastal Act represents a “legislative declaration” that acts harming the state’s natural resources constitute a public nuisance. (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 618; *CEEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 318.) Due to its lease of the River Mouth from the State Lands Commission, the County (through OCFCD) is the responsible landowner and is thus liable for the continuing harm to ESHA in the River Mouth. Further, activities occurring on the County’s land is harming surrounding ESHA. This constitutes a continuing public nuisance, leaving the County liable under the Coastal Act *at a minimum*.

The CCC required the County to place signage around the River Mouth to inform the public of the trespassing and dog regulations, specifically to protect the Western Snowy Plovers and California Least Terns.²³ (See Exhibit J [photo of signs, surrounded by dogs and people].) The signage required a Coastal Development Permit that placed further conditions on the County, including provision of annual enforcement reports that detail County enforcement efforts (Staff Report, p. 5.) The CCC Staff Report detailed the County’s various Coastal Act violations, as well as CCC’s previous efforts to ensure County compliance with the Coastal Act, including sending a letter to the County on June, 12, 2019,²⁴ notifying the County of its Coastal Act violations and impacts “to sensitive bird species related to commercial dog-walking activities taking place within the mouth of the river, which is considered development under Coastal Act section 30106, and is inconsistent with the resource protection policies of the Coastal Act, including but not limited to Section 30240.” (Staff Report, p. 1.) In response to these ongoing violations, the County proposed installation of signage, and “communicated to staff that Orange County Sheriff’s presence has been increased in the area to regularly enforce these laws on a more consistent basis **and to issue citations as necessary.**” (Staff Report, p. 2, emphasis added.) This Commission Staff Report was issued in January 2020. Yet, as demonstrated in the State Lands Commission 2021 Staff Report, the OCCK Monitoring Studies, and evidence submitted herein, the County did not follow through on its promise to issue citations, and the token voluntary warnings and signs have been ineffective. (Exhibits D, E, J.)

B. The County’s Non-Enforcement Harms Marine Resources and Biological Productivity and Poses a Risk to the Public in Violation of the Coastal Act.

The Coastal Act requires protection and restoration of marine resources, as well as coastal waters and streams themselves. In particular, Section 30230 requires that “[m]arine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.” Section 30231 requires the maintenance and restoration of the biological productivity and quality of coastal waters and streams.

²³ <https://documents.coastal.ca.gov/reports/2020/7/W14c/W14c-7-2020-report.pdf> (“Staff Report”).

²⁴ *Id.* [Exhibit 6, detailing the significance of habitat at the River Mouth and the County’s exposure to liability.]

The CCC concluded that a dog beach in the River Mouth is inconsistent with the aforementioned policies of the Coastal Act, and would degrade the functioning of the area to provide habitat for marine organisms, with attendant impacts to biological productivity. (Ex. I, p. 3.) Further, the negative impacts on sensitive habitats, including degradation of dune vegetation within and adjacent to the River Mouth, impedes biological productivity and water quality of wetlands at the River Mouth. (*Ibid.*)

Finally, Section 30210 requires that public access be provided “consistent with public safety needs.” The County’s trespassing ordinances exist because of the dangers posed by the flood channel. The dog ordinances also exist for public safety reasons. Further, the site itself poses risks to its users. As discussed in Section I.B., the County’s failure to enforce its prohibitions on trespassing and dogs in the River Mouth and flood channel poses serious harm to people and dogs. The Santa Ana River suffers from contamination and runoff, as well as disease that poses risk to humans and dogs alike.²⁵

The environmental community has repeatedly identified nearby, safer, alternative locations for dog beaches that would not harm ESHA or endangered species. The County’s intentional non-enforcement of its trespassing and dog ordinances, and allowance of a de facto dog beach in the River Mouth violates the Coastal Act.

IV. Conclusion

For years, environmental groups have implored the County of Orange to enforce its ordinances that prohibit trespassing and dogs in the River Mouth. Over five years ago, the County tried to formally establish a dog beach at this location but withdrew its efforts after wildlife agencies underscored the environmental harm it would cause. Yet, the de facto dog beach still exists, and is still causing harm to endangered species and sensitive habitat, both on site and immediately surrounding the River Mouth.

We understand there is public pressure on the County to maintain a dog beach at this location. However, there exist much safer and environmentally friendly dog beaches and parks nearby for the public. The Santa Ana River Mouth is not one of them. The California State Parks Department²⁶ aptly summarizes why the County must enforce its ordinances:

Beach areas are vital ecosystems. While western snowy plovers and other shorebirds can survive and nest only in certain areas, domesticated dogs are not part of the natural beach ecosystem. Remember that there are many places where [people] can take [their] dog, but only one place—the beach—where snowy plovers can breed.

²⁵ See <https://www.ocregister.com/2020/12/02/oc-water-districts-file-massive-lawsuit-over-pfas-contaminants/> [reporting contamination of the Santa Ana River]; <https://californiaglobe.com/articles/riverside-county-officials-warn-public-about-deadly-bacteria-in-santa-ana-river/> [“Riverside County Officials Warn Public About Deadly Bacteria in Santa Ana River”]. Dogs can act as vectors for pathogens. See <https://bmcvetres.biomedcentral.com/articles/10.1186/s12917-020-02607-w>.

²⁶ https://www.parks.ca.gov/?page_id=22542.

The County and OCFCD must effectively enforce the County's ordinances, issue citations, and invest resources in a full-time ranger. Failure to do so violates the conditions of OCFCD's lease, the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act. For these reasons, we request immediate corrective action.

Sincerely,

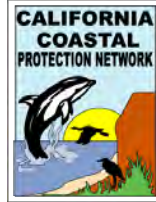


Kathryn Pettit
Douglas Carstens

cc:

Chairman Doug Chaffee, Orange County Board of Supervisors (*Fourth.District@ocgov.com*)
Vice Chairman Donald Wagner (*Donald.Wagner@ocgov.com*)
Supervisor Andrew Do (*Andrew.Do@ocgov.com*)
Supervisor Katrina Foley (*Katrina.Foley@ocgov.com*)
Supervisor Lisa Bartlett (*Lisa.Bartlett@ocgov.com*)
Leon J. Page, County of Orange, County Counsel (*leon.page@coco.ocgov.com*)
Nardy Khan, Infrastructure Programs Deputy Director, OC Public Works (*nardy.khan@ocpw.ocgov.com*)
Amanda Carr, Env. Resources Deputy Director, OC Public Works (*amanda.carr@ocpw.ocgov.com*)
Jennifer Lucchesi, Executive Officer, State Lands Commission (*Jennifer.Lucchesi@slc.ca.gov*)
Drew Simpkin, Public Land Management Specialist, State Lands Comm. (*Drew.Simpkin@slc.ca.gov*)
Benjamin Johnson, Counsel, State Lands Commission (*benjamin.johnson@slc.ca.gov*)
Jack Ainsworth, Executive Director, California Coastal Commission (*John.Ainsworth@coastal.ca.gov*)
Lisa Haage, Chief of Enforcement, California Coastal Commission (*Lisa.Haage@coastal.ca.gov*)
Andrew Willis, So. Cal. Enforcement Supervisor, Coastal Commission (*Andrew.Willis@coastal.ca.gov*)
Louise Warren, Chief Counsel, California Coastal Commission (*louise.warren@coastal.ca.gov*)
Paul Souza, Regional Director, Pacific SW Region, U.S. Fish & Wildlife Service (*paul_souza@fws.gov*)
Sandy Vissman, Wildlife Biologist, U.S. Fish & Wildlife Service (*sandy_vissman@fws.gov*)
Ed Pert, South Coast Regional Manager, Cal. Dept. of Fish & Wildlife (*Ed.Pert@wildlife.ca.gov*)
Eric Weiss, Senior Environmental Scientist, Cal. Dept. of Fish & Wildlife (*Eric.Weiss@wildlife.ca.gov*)
Assemblywoman Cottie Petrie-Norris (*assemblymember.petrie-norris@assembly.ca.gov*)

Exhibit A



July 25, 2018

Mr. Gregg Ramirez
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

**SUBJECT: REVIEW OF DRAFT WESTERN SNOWY PLOVER MANAGEMENT PLAN
FOR EAST BALBOA PENINSULA BEACHES
NEWPORT BEACH, CALIFORNIA
CDP APPLICATION NOS. 5-17-0465 AND 5-17-0515**

Dear Mr. Ramirez,

On June 20, 2018, the City of Newport Beach (City) held an open house seeking public input into a Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches, Newport Beach, California, prepared by the consulting firm of Dudek. The City's draft plan covers a limited part of the Balboa Peninsula that the US Fish & Wildlife Service (USFWS) designates as critical habitat for the Western Snowy Plover (WSP). The City's plan does not address various aspects of dune/beach management in the

City that represent ongoing violations of the Coastal Act. This letter provides peer review of the City's draft WSP management plan by biologist Robert Hamilton, President of Hamilton Biological, Inc. To provide relevant context for the peer-review comments, the letter begins with a description of the range of beach and dune management issues for which the City appears to be in violation of the Coastal Act and other relevant resource-protection regulations.

This letter reiterates points made in Mr. Hamilton's letter to Mr. Dave Kiff of the City, dated September 17, 2017, and in multiple presentations by Mr. Hamilton to the California Coastal Commission (CCC) during hearings in 2017 and 2018. Presentations to the CCC addressing many of the same issues were also made by Sea & Sage Audubon, the Orange County chapter of the California Native Plant Society, the Sierra Club OC Conservation Committee, the Banning Ranch Conservancy, OC Habitats, and attorney Mark Massara. We all understand that no means exist to quickly and easily resolve long-standing conflicts involving such factors as coastal access; coastal recreation with dogs and ultralight aircraft; waste management; encroachment of private land uses into public open space; and protection of sensitive resources, but the City's lack of response to these issues – outside of a limited area that the City deems appropriate – has been unacceptable. The City's effort to focus everyone's attention on one small part of the Balboa Peninsula, and to propose only modest conservation efforts in that area, would sweep all other beach/dune management issues under the carpet for years to come. Such a grossly inadequate and violative approach to management of sensitive coastal resources cannot be allowed to succeed if the Coastal Act is to remain a credible regulatory policy constraining governmental agencies and private land owners alike.

REGULATIONS APPLICABLE TO BEACH, DUNE, AND ESTUARINE HABITATS

Page 4.1 of the City's certified Local Coastal Program (LCP) states:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. **These include southern dune scrub...** [emphasis added]

Page 4.42 of the LCP states:

In Newport Beach, southern coastal foredune habitat extends southwest along the ocean side of the Balboa Peninsula from 10th Street to the tip of the peninsula.

At the City's first open house to discuss relevant beach/dune management issues, on September 14, 2017, botanist Ron Vanderhoff testified about his observations of rare plants in dune habitats on the Balboa Peninsula, and requested effective management of all dune areas to maintain and restore their value as limited and unique habitats for rare plants. As stated on Page 4.42 of the City's LCP:

Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Coastal Commission, or local agencies.

Section 30240 of the Coastal Act restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA. To achieve compliance with this requirement, the City's LCP includes Policy 4.1.1-10:

Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. **Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible.** Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance. [emphasis added]

To date, the City and CCC have made no effort to establish the required minimum 50-foot buffer around any area of beach/dune ESHA. Rather, people and pets have generally been afforded unfettered access to all beach and dune areas, resulting in long-term, ongoing degradation of dune ESHA, and harassment (i.e., "take") of WSPs in their traditional wintering areas, in violation of Section 30240 (and the federal Endangered Species Act, as discussed subsequently).

Where the City has provided protective fencing to a limited area of dunes — between D and E Streets on the Balboa Peninsula — the fence itself lacked a Coastal Development Permit (CDP), was established within ESHA and/or the required ESHA buffer, and its dimensions may have been smaller than optimal for the WSP (the species targeted for protection). Residents at the City open house on September 14, 2017, testified that the design of the enclosures actually encouraged some people to run dogs off-leash within them. As discussed subsequently in this letter, the City now proposes to remove the fencing and to replace it with bollards and signage, as well as exotic landscaping along the margins of concrete walkways that were constructed through the dune ESHA in recent years without completing the required CDP review process.

Pages 4.42-4.43 of the LCP state:

Ornamental and non-native species, likely introduced from the adjacent residences, dominate much of the southern coastal foredune habitat. Numerous residences use the beach area as an extension of their backyards. Some residents have planted and irrigated the ornamental species, which have replaced native species in these areas. Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.

In an effort to offset this ongoing violation of the Coastal Act, LCP Policy 4.5.1-1 identifies as a sort of remedy "the removal of exotic vegetation and the restoration of native vegetation in dune habitat." Setting aside the illegality of attempting to mitigate impacts to ESHA by restoring a different area (cf. *Bolsa Chica Land Trust v. Superior Court*), it appears that no such exotic removal/dune restoration has occurred in a systematic way commensurate with the level of impact from numerous encroachments upon dune habitats in Newport Beach. Thus, the unpermitted encroachment has continued and ex-

panded, impacting the dune ecosystem in many parts of Newport Beach. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers “to prevent impacts that would significantly degrade the adjacent ESHA.” In practice, the City does not do this, and thus violates its own LCP and the Coastal Act.

The degradation of dune habitat has been striking near the mouth of the Santa Ana River – a formally designated ESHA that CCC Statewide Enforcement Supervisor Aaron McClendon recognized as having been successfully restored to native dune scrub habitat four years ago. In a letter to the respondents dated October 15, 2014 (Subject: “Final Monitoring Plan – Compliance with Consent Cease and Desist Order CCC-06-CD-01 and Consent Restoration Order CCC-06-RO-01”), Mr. McClendon described this restoration effort as “one of the most successful we have seen” and lauded the Newport Beach residents for having “turned a difficult situation into a very positive outcome, enhancing some of the rarest coastal habitats on the southern California coast.” At that point, under the Coastal Act, the City became legally responsible to manage the restored dune ESHA near the river mouth consistent with its LCP. Having made no serious effort to do so, dune ESHA in this area has become visibly degraded. Non-native, invasive plant species are becoming re-established in this area, and sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people and dogs.

Section 7.04.020 of the City of Newport Beach Municipal Code requires all dogs to be leashed at all times, and Section 7.04.030 prohibits dogs on beaches from 10:00 a.m. to 4:30 p.m. year-round and requires that owners clean up their dogs’ feces.

The County’s web page, <http://www.ocpetinfo.com/services/petlaws>, summarizes relevant parts of the Orange County Codified Ordinance (OCCO) as follows:

4-1-45: “No person owning or having charge, care, custody, or control of any dog shall cause or permit, either willfully or through failure to exercise due care or control, any such dog to be upon any public property unless such dog be restrained by a substantial chain, or leash not exceeding six (6) feet in length, and is under the charge of a person competent to exercise care, custody, and control over such dog.” You must keep your dog leashed anytime your dog is off your property. Your dog must be on a leash no longer than six (6) feet in length and in the care of a competent adult. There are designated “dog parks” throughout Orange County that lawfully allow the absence of a leash.

4-1-46: “No person having the charge of any dog, except a guide dog or service dog, shall permit said dog to be under any circumstances within public school property, certain county parks, or any public beach”. It is unlawful to be on any public school property with your dog. Setting your dog loose to play, even within a fenced area, at a public school is a direct violation of this ordinance. See OC Parks for county parks that permit dogs that are leashed.

When both the City and the County of Orange decided, several years ago, to effectively stop enforcing these local ordinances near the river mouth, local dog-owners responded

by turning this ecologically valuable area – an estuary located between dune ESHA and critical habitat for the WSP and California Least Tern (also clearly ESHA) – into a *de facto* unleashed dog beach. This, despite prohibitions against such activities contained in the Coastal Act and various relevant local ordinances.

In 2016, the County attempted to formally designate the Santa Ana River mouth as a “dog beach” through preparation of an Initial Study/Negative Declaration, but received extensive substantive comments submitted by the CCC, USFWS, several respected conservation organizations, and local residents, demonstrating the destructiveness of this policy in an environmentally sensitive area that many public and private groups have spent millions of dollars and thousands of hours restoring and maintaining for its ecological values. Rather than taking the information on board and working toward a legal and amicable solution to a difficult problem, the County tabled consideration of that CEQA document and continued allowing the illegal use of the river estuary. The County refuses to partner with the City to enact enforcement of its ordinances in the River Jetties area, despite ongoing outreach from the environmental community, and has gone as far as to allow the media (including extensive social media) to promote this *de facto* “dog beach” without any comment.

At the open house on September 14, 2017, several speakers requested that the City and County work together to resolve this ongoing violation. More than eight months later, on June 4, 2018, an on-site meeting was convened at the River Jetties, attended by you, additional representatives from the City, County representatives including Shane Silsby and Colby Cataldi, enforcement officer Jordan Sanchez of the California Coastal Commission, wildlife biologist Sandy Vissman of the USFWS, Penny Elia representing the Sierra Club OC Conservation Committee, Susan Sheakley representing Sea & Sage Audubon, attorney Mark Massara, and Mr. Hamilton. Clearly, nothing had changed since the previous fall with respect to masses of people bringing their dogs to the river estuary via Newport Beach. While discussing the issue, we all observed numerous people running unleashed dogs in the river mouth, and the City animal control personnel attending the meeting spent much of their time turning several more people away, despite our conspicuous presence and despite signage informing the public of the illegality of bringing dogs into that area. At the meeting, Ms. Vissman reiterated her standing request that the City and County establish an “avian protection area” or “special protection zone” encompassing the ecologically important river estuary and adjacent dune habitats as we stood next to dune ESHA that was being trampled by off-leash dogs and their owners.

At the meeting, representatives of the City and County once again acknowledged the problem, but rather than attempting to work toward a solution that everyone could live with, including the ESHA and listed species, you and Mr. Silsby pointed out that local elected representatives consider the prospect of prohibiting dogs from the area in and around the river estuary – in accordance with both City and County ordinances, as well as the Coastal Act and the state and federal Endangered Species Acts – to be polit-

ically unacceptable, because dog owners represent a more potent lobbying force compared with advocates of environmental protection in compliance with local, state, and federal laws.

As you know, the environmental community has repeatedly identified alternative locations for dog beaches in Newport Beach that would not harm ESHA or listed species, and that would be completely acceptable to the environmental community, but to date neither City nor County has shown any interest in exploring the potential feasibility of such a solution. The only consideration that carries any weight is that dog-owners have loudly expressed their intent to keep running their dogs in the dunes and river estuary, regardless of any law, because they have come to expect deference from all authorities in this specific area. Therefore, the only remedies that appear to be possible involve a state or federal agency stepping in and enforcing ongoing violations of the Coastal Act and/or Endangered Species Act, or some environmental organization or private party bringing legal action. If you are aware of another feasible avenue for protecting the estuary and adjacent ESHA, as required by multiple layers of legal requirements, please let us know.

During the process of reviewing beach/dune management issues, Mr. Hamilton inspected two decades of aerial imagery and observed the incremental construction of 22 concrete walkways extending from the ends of streets south across the beach. Many of these impact traditional WSP wintering locations, coastal dunes, and/or areas that should be identified as ESHA buffers. See Exhibits 1 and 2, below.

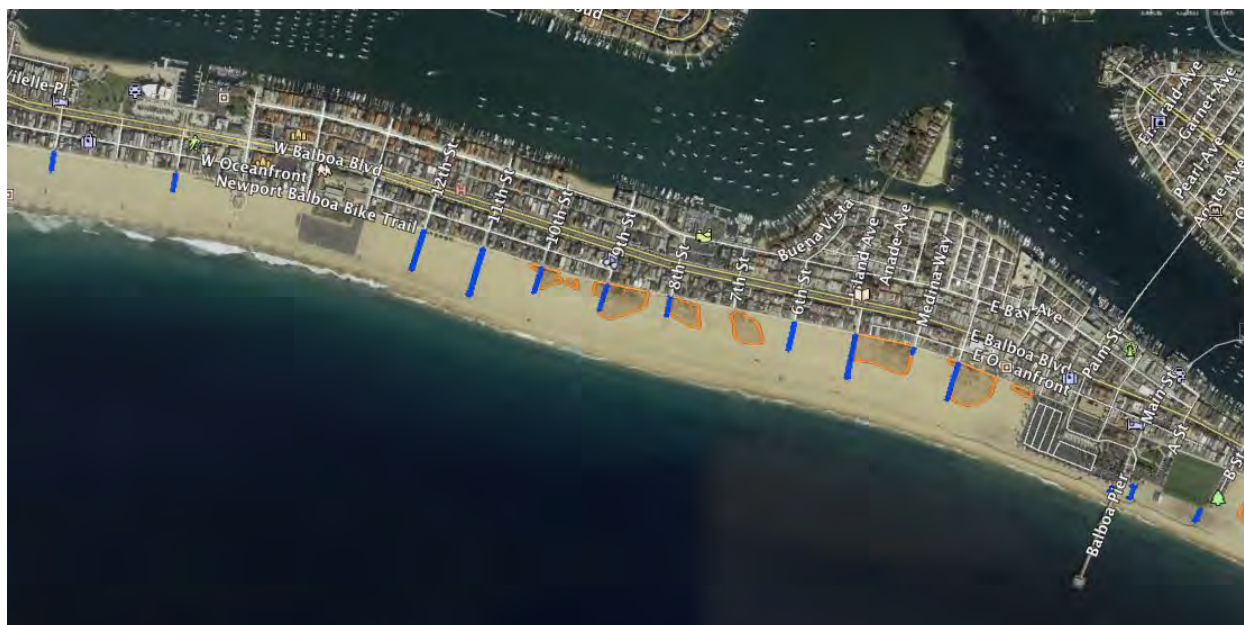


Exhibit 1, showing in dark blue the locations of 14 walkways that extend through dune and/or beach habitats, between 18th Street and B Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.



Exhibit 2, showing in dark blue the locations of eight walkways that extend through dune and/or beach habitats between C Street and M Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.

One walkway, extending more than 300 feet south from the end of E Street, was specifically identified by Tom Ryan and colleagues¹ as being potentially deleterious to the population of WSP that traditionally winters in that area. Page 15 of their report stated:

Declines were detected between 2014 and 2017 at Huntington State Beach and the Balboa Peninsula (Table 2). We observed the largest decline on the Balboa Peninsula (Table 2) following the installation of a walkway on the beach that was placed within the area traditionally used by roosting plovers.

Page 27 stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has continued into 2015-16. Additionally, this beach became narrower during the fall months

¹ Thomas Ryan, Stacey Vigallon, Lucien Plauzoles, Cheryl Egger, Susan Sheakley, Ross Griswold, and Bettina Eastman. 2017. *The Western Snowy Plover in Los Angeles and Orange Counties, California: September 2014 to February 2017*. Report dated February 24, 2017, prepared for State of California, Department of Fish and Wildlife, San Diego, CA.

due to beach erosion from late summer/fall hurricanes in the central Eastern Pacific. This is a broad sandy beach, with residential homes backing it. It is very popular with beachgoers during the summer months. It also supports a 1.24 hectare dune restoration area where a pair of plovers has nested in recent years. This is the only known beach nesting Snowy Plover pair on the mainland in LAC or OC, although they did not nest here in 2014, 2015 or 2016.

The City cooperates with Mr. Ryan and his research colleagues, and receives these reports, but the City apparently has not taken any action to evaluate the validity of the concerns expressed in multiple reports that identify the E Street walkway as a potentially important contributor to disturbance of plovers that traditionally roost, and sometimes nest, in the affected area. The local WSP population declined sharply immediately after this walkway was built, and the plovers have not nested on the Balboa Peninsula since it was installed, despite the fencing.

In various venues, City staff has been questioned as to whether *any* of the 22 walkways built by the City were approved by the CCC through the CDP application process, or subjected to any kind of environmental analysis prior to construction, as required under the Coastal Act. By all accounts to date, the walkways were installed without going through any sort of public review process, despite many of them being located within ESHA, ESHA buffers, and/or critical habitat for the WSP. It may be that the walkways were built, in part, to discourage people and pets from wandering through areas of dune, and to increase accessibility to the ocean for people with disabilities, but this would not absolve the City from the requirement to conduct a formal environmental impact analysis involving public review. At minimum, walkways through sensitive areas should be subject to post-construction ecological monitoring to evaluate their effects upon sensitive natural resources. Rather than creating paved pathways for people and their pets to walk into the heart of WSP critical habitat and Special Protection Zones, a more protective approach would be to actively discourage people from walking through the most sensitive dune areas, and through the required 50-foot ESHA buffers. Nothing in the Coastal Act, or the Americans with Disabilities Act, allows local governments to sidestep normal environmental review processes in service to an overriding purpose of facilitating public access into environmentally sensitive areas.

During Mr. Hamilton's review of aerial imagery, he observed that the limits of apparent dune topography and vegetation have generally remained stable during the past two decades. Between October 2007 and December 2017, however, loss of dunes and spread of exotic iceplant or other non-native invasive vegetation apparently took place. Please see Exhibits 3 and 4, on the next page.



Exhibits 3 (above, October 22, 2007) and Exhibit 4 (below, December 3, 2017), showing in red the apparent loss of a dune and the spread of iceplant and/or other invasive, exotic vegetation, between G and I Streets on the Balboa Peninsula, over the course of a decade. Source: Google Earth Pro.



The Western Snowy Plover is listed as a threatened species by the federal government and a California Species of Special Concern. A Recovery Plan was completed by the USFWS in 2007. Newport Beach lies within Recovery Unit 6, whose goals include protecting wintering plovers and doubling the breeding population from 243 (2005-2009 average) to 500 breeding individuals. The species is reportedly nesting in Huntington Beach this year, and has intermittently nested on dunes on the Balboa Peninsula. WSP breeding populations have responded positively and swiftly to recent improvements in management practices at historic breeding locations in Santa Barbara and Los Angeles counties. Were the City's dunes to be managed appropriately, consistent with the City's

LCP and with the federal WSP Recovery Plan, it is reasonable to expect that the species would nest at least semi-regularly, if not regularly, on the Balboa Peninsula. Any management plan that does not have this as a primary objective, consistent with the Recovery Plan goals, is not a serious plan designed to contribute toward the species' recovery.

Page 8 of the report by Tom Ryan and colleagues, for the years 2014 to 2017, identifies the following threats to WSP, both breeding and non-breeding:

1. A lack of public awareness of the presence of Snowy Plover roosts and a lack of information about how to avoid disturbing the plovers while enjoying the beach;
2. Lack of training and information on locations of Snowy Plover roosts among some staff that drive and operate equipment on the beaches;
3. Regular disturbance, removal of foraging resources, and occasional mortality resulting from beach grooming, operation of heavy equipment, and regular vehicular traffic;
4. Regular disturbance and occasional mortality from off-leash dogs;
5. Beach management practices that remove kelp and associated arthropods;
6. Recreational activities and occasional large events that flush plovers from roosts and leave large amounts of refuse near roosts; and
7. Native and non-native predators drawn in unusually large concentrations to human refuse on and near the beach and pet food placed outside at nearby residences.

Any comprehensive management plan for beaches and dunes regularly utilized by WSP would have to thoroughly and intelligently address each of these important resource-management issues, both within the designated critical habitat area and in all other areas of Newport Beach where WSP's are known to congregate.

The USFWS administers the Endangered Species Act of 1973. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define "harm" to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. "Harassment" is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

Exemptions to the prohibitions against "take" in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a federal agency and may affect a listed species, the Federal agency must consult with the Service, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a federal agency, but may result in the "take" of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act.

To qualify for the permit, a project proponent must submit an application to the Service together with a Habitat Conservation Plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. At the City's open house on September 14, 2017, Sandy Vissman of the USFWS suggested that preparation of an HCP would be appropriate to cover incidental "take" of WSP due to ongoing activities and routine beach and dune management operations undertaken by the City on the Balboa Peninsula. Actions requiring a permit may include beach driving, mechanical raking (beach grooming), recreational use, presence of dogs or other domestic animals, and human refuse that attracts predators of the WSP.

SITING OF DOG BEACH

Managing City beaches and dunes consistent with the LCP involves balancing environmental protection requirements against the reasonable expectations of tourists and local beachgoers. Any successful comprehensive planning approach will need to identify extensive areas that can be managed for the exclusive use of humans and their pets. Fortunately, Newport Beach, with its miles of beaches that do not support dunes, traditional WSP roosting or nesting areas, or other sensitive biological resources, should be able to achieve this balance.

As a start, we have identified two other locations that the City should evaluate. Both are located near large parking lots, and neither appears to conflict with provisions of the City's LCP or those of the Coastal Act. One potentially suitable area is at Corona del Mar State Beach (Big Corona Beach), the eastern half of which appears to be well suited to serving as a dog beach, and the other is the expanse of beach near the base of Newport Pier. Please see Exhibits 5 and 6, below and on the next page.

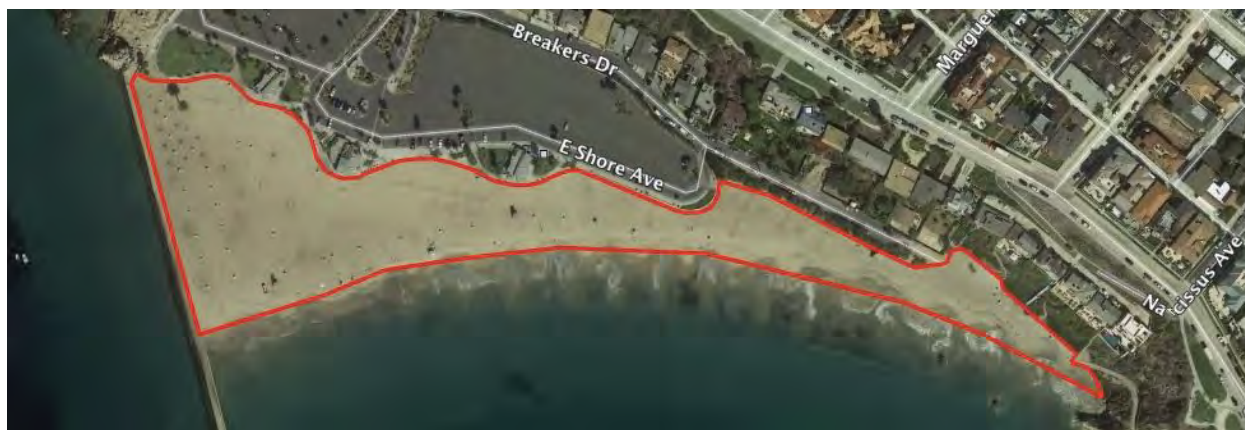


Exhibit 5, showing Corona del Mar State Beach (Big Corona Beach). Located on the eastern side of Newport Bay, the eastern part of this beach appears well-suited for designation as a dog beach. The area has ample parking and lacks potentially sensitive biological resources. Source: Google Earth Pro.



Exhibit 6, showing the beach near Newport Pier. This area also appears to be well-suited for use as a dog beach, with ample parking and low ecological sensitivity. Source: Google Earth Pro.

Regardless of whether either of these areas are ultimately determined to be suitable for designation as dog beaches, Newport Beach has enough sandy beaches not located within or adjacent to ESHA to accommodate people and their pets without degrading any areas that satisfy ESHA criteria under the terms of the City's LCP and the Coastal Act.

EXAMPLES OF APPROPRIATE CONSERVATION PLANNING

For reasons discussed herein, achieving compliance with the California Coastal Act and federal Endangered Species Act in Newport Beach will require a comprehensive and science-based approach to beach and dune management. Areas that qualify as ESHA, ESHA buffer, or that serve as traditional roosting or nesting habitat for the federally threatened WSP, must be managed in accordance with the applicable laws.

With regard to the Coastal Act, CCC staff has already provided the City with a blueprint for achieving compliance in the form of the comprehensive beach/dune management plan that the City of Pacifica developed in 2014 to obtain a CDP for installation of 1,300 feet of year-round fencing, 930 feet of seasonal fencing, and associated interpretive signs at Pacifica State Beach. The CCC staff provided specific direction to the City to use the City of Pacifica management plan as a template for what is expected in Newport Beach during a meeting on May 19, 2017. Minutes of this meeting are on file with City Manager Dave Kiff.

With regard to the federal Endangered Species Act, the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010, a document available online at the following address:

https://www.fws.gov/oregonfwo/FieldOffices/Newport/WesternSnowyPlover/Documents/WSP-HCP_08182010.pdf

Mr. Hamilton recommended that the City and its consultant, Dudek, review these plans as potential starting points upon which to develop a comprehensive dune/beach management plan that would comply with relevant precedents in the application of the Coastal Act and federal Endangered Species Act. The City declined, and instead produced the Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches. The following section provides Mr. Hamilton's peer-review comments on the Draft Plan.

REVIEW OF CITY'S DRAFT WSP MANAGEMENT PLAN

The Draft Plan, prepared by Dudek with consulting biologist John Konecny, fails to implement the request made by Andrew Willis of Coastal staff, in a letter to the City dated September 11, 2017 (attached), for a "comprehensive" plan that would address beach/dune/WSP management issues on all City beaches, from River Jetties to the end of the Balboa Peninsula. In particular, the City (together with the County of Orange) refuses to meaningfully engage with the issue of degradation of ESHA at River Jetties and the Santa Ana River estuary. Instead, as documented in this letter and in other venues, these agencies have allowed this area to become a *de facto* "dog beach."

Page 18 of the Draft Plan states, "In June 2011, the City installed approximately 1,300 linear feet of fencing around approximately 2.1 acres of habitat between the walkway fingers of D and E Streets." This is factually incorrect, as the E Street walkway did not exist until 2014 (the D Street walkway was built in 2002/2003). Page 27 of the previously cited report by Ryan and colleagues stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has continued into 2015-16.

Thus, the WSP fencing installed in 2011 was not "between the walkway fingers of D and E Streets," as only one of the walkways existed at that time (and, apparently, neither walkway was built with the required CDP).

The Coastal Act does not prioritize the facilitation of beach access, for disabled persons or anyone else, at the expense of ESHA and protection of listed species. Building concrete walkways into the middle of WSP critical habitat without a CDP is plainly illegal.

If this glaring issue can be successfully glossed over in the WSP Management Plan, and in the City's application for a CDP for the unpermitted fence, the entire process will lack legitimacy.

The Draft Plan does not mention the Special Protection Zones (SPZ's) for WSP that the USFWS recognizes near the tip of the Balboa Peninsula. See Exhibit 7, below.



Exhibit 7. Aerial showing habitat areas in orange, WSP critical habitat in light blue, and WSP Special Protection Zones in yellow. Source: Google Earth Pro.

Tom Ryan and colleagues have observed that, at least during some winters, WSP congregate in this area to a greater extent than they do within the designated critical habitat area. The Draft Plan should fully discuss the SPZ's and, in compliance with the Coastal Act, identify them as ESHA.

The exhibit on Page 32 of the Draft Plan — Lifeguard Vehicle Access Map — shows only the designated critical habitat area. The SPZ to the southeast is not shown. Table 3 on Page 35 of the Draft Plan allows for ongoing wrack removal, sand grooming, sand removal, and berm construction in this SPZ “with monitoring.” No signage, bollards, or other tangible measures appear to apply to the SPZ. This half-measure seems likely to result in the southeastern SPZ continuing to be groomed for beachgoers rather than maintained and protected as potentially suitable nesting habitat for the WSP.

Page 37 of the Draft Plan states:

Regulatory signage will also have a greater focus on the illegal act of “taking” of a protected species, as defined by the ESA, and the consequences to this violation. Interpretative signage in the critical habitat area will also help support regulatory signage, reinforce the importance of compliance and educate the public as to the impacts on the WSP when posted rules are violated.

It has been demonstrated that signage has no effect upon people and their dogs “taking” listed species at the River Jetties/Santa Ana River estuary. As discussed previously in these comments, the public has illegally converted the area into a “dog beach” with both the City’s and County’s knowing acquiescence. Thus, the idea that people are going to be deterred by signage, or that City law enforcement will start enforcing the federal Endangered Species Act on beachgoers at the Balboa Peninsula, lacks credibility. The City refuses to enforce its own ordinance at River Jetties, and the public should not expect it to do so on the Balboa Peninsula.

It should go without saying that the WSP Management Plan should not introduce plant species not native to dunes in Orange County. Only locally native plant species of apparent value to WSP should be planted. Unfortunately, the Draft Plan calls for landscaping with non-native plants, including plants potentially harmful to plovers. For example, the exhibit on Page 39 of the Draft Plan, reproduced below as Exhibit 8, shows one of the existing, unpermitted concrete walkways, the margins of which would be lined with such species as Silver Dune Lupine (*Lupinus chamissonis*) and Sandhill Sage (*Artemisia pycnocephala*), neither of which occur in Orange County.



Exhibit 8. Conceptual exhibit from Page 39 of the Draft Plan.

Other non-native species identified for planting under the Draft Plan include Mock Heather (*Ericameria ericoides*), a shrub recorded only once in Orange County, along the Santa Ana River near the Riverside County line. Coyote Brush (*Baccharis pilularis*) and Cliff Buckwheat (*Eriogonum parvifolium*) are shrubs native to the County, but inappropriate for planting in a plan designed to restore natural dune scrub of value to WSP. Plovers seek open ground that lacks shrubby habitat that provides cover for exotic predators, especially cats and rats.

An exhibit on Page 40 of the Draft Plan, reproduced below as Exhibit 9, shows plantings of shrubs and flowers along the sidewalk at the base of the finger walkways.

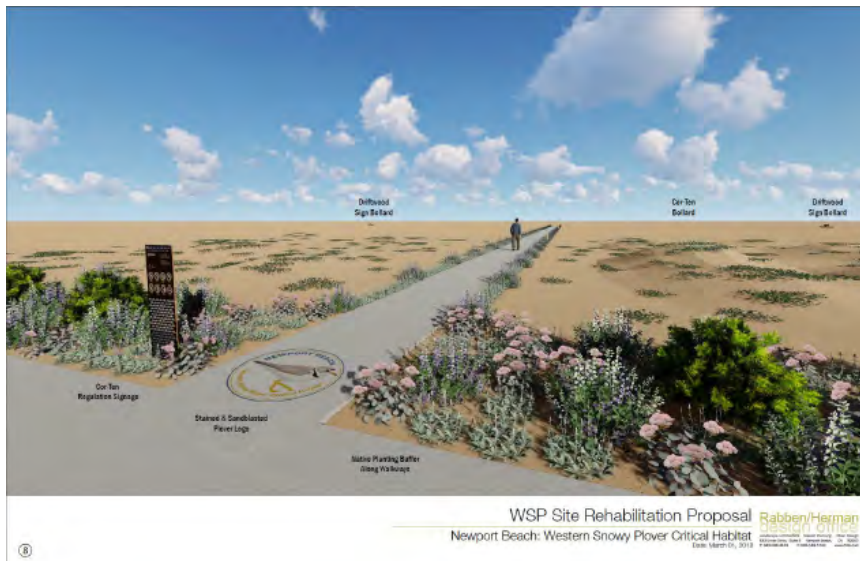


Exhibit 9. Conceptual exhibit from Page 40 of the Draft Plan.

Adjusting the habitat-restoration component to utilize only species verified as being native to Orange County dunes may be accomplished capably, and with little effort, by reviewing the attached 2015 master's thesis by Josh Weinik², which incorporates a detailed analysis of the existing native and exotic dune vegetation on the Balboa Peninsula. Please do not introduce any species not verified as being native to dunes in Newport Beach. Adding to the encroachment of landscaping into the dunes (*in the name of WSP management*) would be worse than doing nothing at all.

An exhibit on Page 41 of the Draft Plan, reproduced below as Exhibit 10, shows the City's proposed logo for the new management program:



Exhibit 10. It would be inappropriate to use a Piping Plover (with yellow legs and bill) as the logo for the program instead of a Western Snowy Plover (which has gray legs and black bill).

² Josh Brett Weinik. 2015. *A Comparative Study on the Vegetation of Western Snowy Plover Habitat Within Urban and Natural Coastal Dune Systems of Southern California*. MS Thesis, California State University, Fullerton.

The Draft Plan fails to discuss any specific plans to remove the most problematic and widespread, non-native plant that people have planted throughout large swaths of the dunes at Newport Beach, *Carpobrotus edulis*. It is unacceptable for the Draft Plan to ignore the most important invasive plant on Newport Beach.

The Draft Plan specifies a 10-mph speed limit for lifeguards and other personnel driving through the Balboa Peninsula WSP critical habitat area. This is twice as fast as allowed under the 2007 WSP Recovery Plan. Vehicles routinely flush WSP on local beaches, and sometimes even strike birds attempting to hide in the sand. In this respect, as in all others, the WSP Management Plan must be consistent with the WSP Recovery Plan.

The Draft Plan contains no mention of recent nesting of WSP in portions of Los Angeles County (Malibu Lagoon, Dockweiler Beach, Surfrider Beach), where WSP had not been found nesting for 70 years, but which the birds have quickly recolonized after only a few years of serious protection. The Draft Plan fails to note that, in 2018, Snowy Plovers nested on the Huntington Beach side of the Santa Ana River estuary. In light of this current positive trend in recolonization of southland beaches, recolonization of the Balboa Peninsula by nesting WSP is a highly attainable goal. Indeed, with adequate protection of ESHA and ESHA buffers in and around the estuary, plovers could also nest in the dunes at River Jetties. Yet the City refuses to provide any such protection to dune ESHA or the required buffers, in violation of its LCP and the Coastal Act.

To allow for the possibility of determining the success or failure of the WSP management effort, the plan must establish appropriate goals and metrics. Otherwise, the City will have no way of determining whether the management approach is having the desired results. The Plan should include an adaptive management component, so that managers will have cues for when to change course in order to meet the Plan's goals. For example, in all areas where management actions are initiated or changed from current practice, biologists should measure usage of the area by WSP and other native wildlife before and after the change in management. This will allow the City and others to understand which actions are having positive results and which actions may require further consideration.

On the Balboa Peninsula, a goal of the Plan should be the establishment at least a small WSP nesting population.

At River Jetties, a goal of the Plan should be the elimination of disturbance by dogs and people, both in the dunes and in the river estuary.

CONCLUSIONS AND RECOMMENDATIONS

The City's Draft WSP Management Plan represents an unambitious and misdirected effort that seeks to achieve minimal protection of a limited part of the Balboa Peninsula. The 2007 Recovery Plan calls for doubling the WSP nesting population in the Recovery Unit that includes Newport Beach. Plovers have nested on the Balboa Peninsula within the last decade, and the species has been recolonizing many beaches in southern California in response to increased protection from human disturbance. And yet, the Draft Plan treats nesting by WSP as only a possible side-effect of limited management actions directed mainly toward wintering plovers. The Draft Plan focuses most of its management recommendations on the smallest area possible – the limited area of designated WSP Critical Habitat. The following statement, on page 36 of the Draft Plan, crystallizes the City's level of commitment to meaningful change in beach/dune management: "All existing beach recreation activities will be allowed without restrictions." Propping up the status quo to the greatest extent feasible will not protect dune ESHA or manage the local WSP population in compliance with the Coastal Act and the federal Endangered Species Act.

The City's poor record of policing beachgoers – at River Jetties and in other sensitive habitat areas – does not promote optimism that implementing a Management Plan reliant upon signage and "symbolic fencing" will achieve even the modest goals set forth in the Draft Plan, let alone the attainable and appropriate goal of recolonization of Newport Beach by nesting plovers.

Those aspects of the Draft Plan involving introduction of shrubs and other plants not native to the dune ecosystem of the Balboa Peninsula would be more ecologically damaging than doing nothing at all. In compliance with the City's LCP and the Coastal Act, any planting undertaken within dune ESHA or ESHA buffers must take the form of ecological restoration – promoting the establishment of low-growing herbaceous species known to be native to dunes in Newport Beach – not shrubby landscaping intended to satisfy the aesthetic preferences of local residents and City officials.

The City's concrete walkways into and through dune ESHA, ESHA buffers, and WSP critical habitat were built without the required CDP's, and are therefore illegal. At least one of these walkways, at E Street, was specifically identified by WSP biologists as having potentially impacted the wintering flock of WSP on the Balboa Peninsula, due to increased human disturbance, shortly after it was installed four years ago. It seems clear that at least some of these walkways have greater potential for causing ecological damage than does the unpermitted WSP protective fencing that prompted preparation of the Draft WSP Management Plan. To achieve compliance with the City's LCP and the Coastal Act, all concrete walkways passing through identified ESHA and/or ESHA buffers must obtain after-the-fact CDP's from the Coastal Commission. By following the required review process, it may become clear that some of the walkways – those that funnel people into areas with greatest suitability for nesting by WSP – ought to be removed entirely.

In order for the final plan to have potential to achieve worthwhile and measurable conservation achievements, the plan's authors must develop well-considered goals and metrics within an adaptive management framework.

As discussed in these comments, CCC staff provided the City with a blueprint for achieving compliance, in the form of the City of Pacifica's 2014 comprehensive beach/dune management plan. And the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010 that the City and its consultants may look to for further relevant guidance. Furthermore, USFWS has provided the City with ample direction on how to properly prepare a comprehensive management plan (see attachments from USFWS). The City should carefully consider successful approaches that local governments elsewhere along the Pacific Coast have taken to achieve positive outcomes for people, rare species, and threatened coastal ecosystems.

Thank you for the opportunity to review the City's Draft WSP Management Plan.

Sincerely,



Robert A. Hamilton, President
Hamilton Biological, Inc.

Andrea Jones
Director of Bird Preservation
Audubon California

Travis Longcore, Ph.D.
Conservation Chair
Los Angeles Audubon Society

Susan Sheakley
Conservation Chair
Sea & Sage Audubon Society

Scott Thomas
Conservation, Special Projects
Sea & Sage Audubon Society

Terry Welsh, M.D.
President
Banning Ranch Conservancy

Susan Jordan
Executive Director
California Coastal Protection Network

Celia Kutcher
Conservation Chair
OC Chapter California
Native Plant Society

Garry Brown
Founder & President
Orange County Coastkeeper
Inland Empire Waterkeeper

Dan Silver
Executive Director
Endangered Habitats League

Mike Wellborn
President
Friends of Harbors, Beaches
and Parks

Michelle Gastil
Banning Ranch Task Force
Sierra Club

Penny Elia
OC Conservation Committee
Sierra Club

Conner Everts
Executive Director
Southern California
Watershed Alliance

Marko Popovich
President
Still Protecting Our Newport

Jack Eidt
Director
Wild Heritage Planners

Attached: • September 11, 2017 letter from Andrew Willis, CCC Enforcement
• Three letters from USFWS dated 1-9-2016, 2-16-2017, 4-10-2018
• Josh Brett Weinik. 2015. *A Comparative Study on the Vegetation of Western Snowy Plover Habitat Within Urban and Natural Coastal Dune Systems of Southern California*. MS Thesis, California State University, Fullerton.

Copies to: California Coastal Commissioners; Jack Ainsworth, CCC; Lisa Haage, CCC; Aaron McClendon, CCC; Andrew Willis, CCC; Liliana Roman, CCC; Karl Schwing, CCC; Charles Posner, CCC; Jordan Sanchez, CCC; Laurie Koteen, CCC; Jonna Engel, CCC; Sandy Vissman, USFWS; Hans Sin, CDFW; Erinn Wilson, CDFW; Lana Nguyen, California State Parks; Mark Massara; Tom Ryan; Josh Weinik; Christine Whitcraft; Michelle Clemente.

Exhibit B

From: Robertson, Glenn@Waterboards [mailto:Glenn.Robertson@waterboards.ca.gov]
Sent: Wednesday, December 21, 2016 6:19 PM
To: Uzo Diribe, Chris
Cc: Cross, Wanda@Waterboards
Subject: Negative Declaration, Orange County Code of Ordinance Proposed Amendment (Dog Beach), SAR Tidal Prism

To Chris Uzo-Diribe, Orange County Public Works/OC Development Service:

Regional Board staff submit the following comments regarding the Orange County Public Works' proposal for a dog beach/dog park at the Santa Ana River mouth:

We believe that a greater probability of interface and disturbance than the project's Negative Declaration (ND) indicates will occur between dogs (whether during proposed leashed or unleashed periods) and the federally threatened western snowy plover and endangered California least tern, due to the birds' presence and periods of occupation overlap during most of the 12-month period at this exact location. The proposed dog beach location is identified with a RARE beneficial use designation in the Regional Board's Water Quality Control Plan of the Santa Ana River Basin (Basin Plan) because it is a known habitat area for the birds, and there is a high potential for the plover to overwinter at this unincorporated site (located between the City of Newport Beach and Huntington State Beach), and for the least tern to expand beyond the adjacent recognized nesting area in Huntington State Beach (as observed by the CAC). As such, the location warrants protection.

Staff disagrees that the Orange County Code of Ordinances Section 4-1-45 (restraint of dogs) should be amended to relax the restraining of dogs to allow "no leash" from October through February. This will legitimize the dog-walking local residents currently practice, which is currently illegal.

Board staff note that a dog beach already exists in the City of Huntington Beach west of the Huntington Beach Pier at the back of the beach below a public walkway. In contrast to the proposed Santa Ana River mouth location, dog excrement and urine appears less likely to wash out to sea due to tidal or river action at this location. At any location however, residents should always be highly encouraged to pick up pet excrement so that it does not enter any waterway.

Any future dredging of the Santa Ana River terminus will be required to comply with the federal and State Endangered Species Acts as well.

Board staff suggest the County consider the possibility of transferring this unincorporated area to the State of California in order to extend Huntington State Beach to the boundary of Newport Beach to extend the protected habitat area for the federally threatened western snowy plover and endangered California least tern. We agree with California Coastal

Commission staff concerns (CAC, May 16, 2016 letter to the Orange County Board of Supervisors) that other inland or beach sites would be less problematic, and suggest possible alternative dog park sites be reviewed.

We thank Orange County staff for their consideration of our above comments.

Glenn S. Robertson
Engineering Geologist, M.S., PG
Regional Planning Programs Section, CEQA Coordinator
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501
Phone: 951-782-3259
Fax: 951-781-6288
Email: Glenn.Robertson@waterboards.ca.gov

Exhibit C

Staff Report 21

APPLICANT:

Orange County Flood Control District

PROPOSED ACTION:

Termination of a General Lease – Public Agency Use and Issuance of a General Lease – Public Agency Use and Dredging

AREA, LAND TYPE, AND LOCATION:

Sovereign land located in the Lower Santa Ana River, Orange County.

AUTHORIZED USE:

Use and maintenance of two riprap flood control jetties, one riprap dike, and maintenance dredging in the Lower Santa Ana River.

TERM:

2 years, beginning October 21, 2021.

CONSIDERATION:

The public use and benefit, with the State reserving the right at any time to set a monetary rent if the Commission finds such action to be in the State's best interests.

SPECIFIC LEASE PROVISIONS:

- County Ordinances.
 - Lessor and Lessee acknowledge that the leased area is public, sovereign land within the territorial boundaries of the County of Orange and within the jurisdiction of the Orange County Flood Control District and that the Orange County Flood Control District may enforce reasonable time, place, and manner restrictions on public use of the Leased Premises to protect public health, safety, and the environment.
 - Lessor agrees that Orange County Code of Ordinances sections 3-9-35, 9-1-40, 9-1-52 may be enforced on the Leased Premises. Lessor further

agrees that Orange County Code of Ordinances sections pertaining to public beaches and other public areas of unincorporated Orange County may be enforced on the Leased Premises to the extent that such sections are found in the future to apply to the Leased Premises and do not conflict with State law or the Public Trust Doctrine.

- Lessee must enforce Orange County Code of Ordinances sections 3-9-35, 9-1-40, and 9-1-52, and any sections pertaining to public beaches and other public areas found to apply to the Leased Premises in the future that do not conflict with State law or the Public Trust Doctrine.
- State enforcement in the Santa Ana River Mouth.
 - Lessee must not interfere with any enforcement by the California Department of Fish and Wildlife, California Department of Parks and Recreation, or **any other agency's enforcement of applicable law or regulation** in the Lease Premises and adjacent County-owned property (together, the Santa Ana River Mouth).
 - Lessee must not object to enforcement of its ordinances in the Santa Ana River Mouth by an authorized state enforcement agency unless a court rules that such ordinance does not apply to that area.
 - Lessee must not object and must accommodate, to the fullest extent possible, any current or future lease to a state or federal agency for environmental and public trust resource protection purposes over the same property as the Lease Premises.
- Lessee must collaborate and coordinate in good faith in any future applications and agreements for enforcement in the Santa Ana River Mouth. Applications and agreements for enforcement may include, but are not limited to, agreements with the California Department of Fish and Wildlife, California Department of Parks and Recreation, and the California Coastal Commission.
- Lessee must provide annual reports to Commission staff detailing County law enforcement efforts in the Santa Ana River Mouth.
- Terminate, effective October 21, 2021, Lease Number PRC 2171, a General Lease – Public Agency Use, issued to the Orange County Flood Control District.

BACKGROUND:

The mouth of the Lower Santa Ana River (River) is located between Huntington Beach State Park in the city of Huntington Beach, and the city of Newport Beach. The adjacent upland is unincorporated land within Orange County (County). The Applicant began conducting maintenance dredging activities in the River in 1990

to improve flood control capacity, and due to ongoing sediment deposition has continued to conduct dredging activities periodically since that time in order to ensure flood protection. In addition to dredging, the Applicant also maintains flood control jetties and a dike within the Lease Premises. A relatively small portion of dredged material is removed from sovereign land at the River mouth, with the majority of the material removed from the River channel inland and outside of the **Commission's jurisdiction**. During periods of non-dredging, the accumulation of sand within the flood control channel creates areas that have become popular with dog owners and is used as an informal off-leash dog park.

In May 2016, the County proposed to amend Section 4-1-45 of the Orange County Code of Ordinances to allow dogs in the River mouth. The County prepared an Initial Study/Negative Declaration (IP 16-234) analyzing the environmental impacts of the amendment. Several stakeholders, including the California Department of Parks and Recreation (Parks), California Coastal Commission (CCC), Santa Ana Regional Water Quality Control Board, and local environmental groups wrote letters expressing concern that **the County's Initial Study/Negative Declaration did not** discuss the impact the dog park would have on California Least Tern and Western Snowy Plover that are known to use the area for habitat. The County Board of Supervisors considered the proposed ordinance amendment on April 26 and October 25, 2016, but it was never approved.

The Huntington State Beach Least Tern Natural Preserve (Preserve), managed by Parks, is located adjacent and upcoast of the River. Dogs are not permitted on the State Beach (except for service dogs) and must be leashed within parking lots and multi-use trails. In the city of Newport Beach, dogs are never allowed on the beach or any beachfront sidewalk between 10 a.m. and 4:30 p.m., including the ocean front beaches and bay front beaches. Off-leash dogs are never allowed in any public spaces including parks and beaches.

County ordinances also prohibit dogs within public beaches (except for service dogs). The Applicant also maintains trespassing restrictions within their jurisdiction and control, including the Santa Ana River Flood Control Channel.

The Applicant maintains that its dog ordinances do not apply to the State-owned land. Specifically, the dog-leash requirement does not apply because the County does not consider the State-owned property to be "public property" (section 4-1-45), and dogs are not prohibited because the County does not consider the State-owned property to be a "public beach" (section 4-1-46).

Until recently, the County believed the limits of Orange County ended at the boundary of its upland fee parcel. The County now agrees that the boundary extends 3 miles into the Pacific Ocean, as described in Government Code section

23130, and that the Flood Control District trespassing ordinances (section 3-9-35) apply within the Lease Premises.

The California coast is a critical habitat for the Western Snowy Plover and the California Least Tern. Plovers are **listed as “threatened”** under the federal U.S. Endangered Species Act and are listed as a species of “special concern” under the California Endangered Species Act. California Least Tern is listed as “endangered” under both Federal and State laws.

Local environmental groups contacted Commission staff with concerns that the presence of off-leash dogs has and continues to threaten endangered and threatened bird species within the Lease Premises, including the Western Snowy Plover and California Least Tern. Staff consulted Parks, U.S. Fish and Wildlife Service, and the California Department of Fish and Wildlife (CDFW) to discuss the impact dogs have on birds at this location. In addition, staff also consulted local non-profits, including the Sea and Sage Audubon Society, Orange County Habitats, and Orange County Coast Keepers. State, Federal, and local organizations all indicated that the presence of dogs disturbs the foraging grounds of birds and severely degrades habitat area.

The Applicant has provided information detailing the **County Sheriff’s** efforts to enforce County ordinances within the County’s Flood Control Channel. However, these efforts have been limited to verbal warnings only, and no fines have been issued. In addition, the warnings have only applied to the County’s Flood Control Channel, **not land within the Commission’s jurisdiction**. Members of the public as well as staff from other State agencies indicate that verbal warnings have not been effective and have not reduced use within the Lease Premises.

On July 8, 2020, the CCC approved a County signage plan, including educational and **“no trespassing” signage along the up-coast and down-coast rock jetties** near the mouth of the River to protect sensitive bird species. CCC also approved an amendment to that permit on March 1, 2021, to add additional signs. **The County’s Coastal Development Permit (CDP) No. 5-02-031**, that authorizes maintenance dredging of various outlets in the County, including the River Mouth expires in 2023.

Commission and CCC staff are exploring opportunities to fund additional CDFW law enforcement positions that would allow for more targeted and frequent enforcement within the Lease Premises and potentially the issuance of citations under both County and CDFW ordinances.

STAFF ANALYSIS AND RECOMMENDATION:

AUTHORITY:

Public Resources Code sections 6005, 6216, 6301, 6303, 6321, 6321.2, 6501.1, and 6503; California Code of Regulations, title 2, sections 2000 and 2003.

PUBLIC TRUST AND STATE'S BEST INTERESTS:

On October 22, 2009, the Commission authorized a 20-year General Lease – Public Agency Use to the Applicant for flood control jetties at the Lower Santa Ana River ([Item C26, October 22, 2009](#)). That lease expires May 28, 2027. The Applicant has requested that the lease be terminated and included in a new lease which will also include the Applicant's annual maintenance dredging activities.

The improvements include three structures - an approximately 600-foot-long western jetty, an approximately 530-foot-long eastern jetty, and an approximately 850-foot-long dike running between and parallel to the jetties at a distance of approximately 100 feet from the western jetty.

On August 9, 2016, the Commission authorized a 5-year General Lease – Dredging to the Applicant for maintenance dredging in the Lower Santa Ana River and deposition of dredged materials at a receiver site at North Beach in the city of San Clemente ([Item C31, August 9, 2016](#)). That lease expired on August 8, 2021. The Applicant is applying for a new General Lease – Public Agency Use and Dredging for maintenance dredging in the Lower Santa Ana River. Dredged materials are no longer deposited at the North Beach receiver site so it is not included in the application.

On September 30, 2021, Commission staff issued the County a Letter of Non-Objection for emergency sediment removal at the mouth of the River. County staff provided information, photos and water quality data showing detrimental impacts to plants and wildlife in the Santa Ana River Salt Marsh, including potential die-off of fish, plants, and habitat. To restore tidal flows, the Letter of Non-Objection permitted the County to excavate approximately 6,500-10,000 cubic yards of sand to create a 30-50-foot-wide channel to restore tidal flushing to the Santa Ana River Salt Marsh. The Letter of Non-Objection only allows emergency sediment removal up to October 21, 2021 and does not allow maintenance dredging as contemplated in the proposed lease.

In response to the October 2nd oil spill, offshore of Huntington Beach, the County obtained a waiver of a Coastal Development Permit to construct sand berms across the River mouth to protect onshore coastal habitats and resources. On

October 8th the Unified Command, including CDFW, advised the County that they could breach the berm at the River mouth to restore tidal flows. Work began to breach the berm on October 9th.

Maintenance dredging at this location removes built-up sand and encourages positive flow from the channel to the ocean. Uses along the River channel include wetlands, parks, and well-developed industrial, commercial, and residential property for many miles upstream. Periodic dredging to keep the River mouth open helps improve public safety and limits property damage by reducing flood risk. Additionally, the Huntington State Beach Least Tern Natural Preserve benefits from the dredging by reducing sand encroachment within the Preserve.

Until recently, the County had maintained that its Flood Control District trespassing ordinances (section 3-9-35) did not apply within the Lease Premises. The County is now willing to enforce this ordinance within the Lease Premises to protect public safety and the environment. Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat. If funding for additional law enforcement through the CDFW becomes available, it would supplement County enforcement efforts at this location.

The proposed lease does not substantially interfere with Public Trust uses and is for a limited 2-year term. The dredging is intended to promote public health and safety by minimizing flooding threats. Further, staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources, from harassment due to the unregulated presence of unleashed dogs and other domestic animals. The limited 2-year lease term will allow the Commission to re-evaluate the effectiveness of this protection and enforcement framework and adaptively manage the situation accordingly.

CLIMATE CHANGE:

Climate change impacts, including prolonged drought, sea-level rise, more frequent and intense storm events, and flooding will likely affect the lease area, structures, and the activity of maintenance dredging.

Orange County, along with other parts of the state, has been in a severe drought for over 2 years, and stream flow for the Santa Ana River is below average, according to the [National Integrated Drought Information System](#) managed by the National Oceanic and Atmospheric Administration. Reduced stream flow can result in less sediment reaching the river mouth and may impact the timing of dredging

and the volume of sediment that needs to be removed for maintaining the open channel.

While the amount of fresh water reaching the river mouth is decreased during the drought, sea water levels are increasing annually at an accelerated rate. The California Ocean Protection Council updated the *State of California Sea-Level Rise Guidance in 2018* to provide a synthesis of the best available science on sea-level rise projections and rates. Commission staff evaluated the “high emissions,” “medium-high risk aversion” scenario to apply a conservative approach based on both current emission trajectories and the lease location and structures. The Los Angeles tide gauge was used for the projected sea-level rise scenario for the lease area as listed in Table 1.

Table 1. Projected Sea-Level Rise for Los Angeles

Year	Projection (feet)
2030	0.7
2040	1.2
2050	1.8
2100	6.7

Source: Table 28, State of California Sea-Level Rise Guidance: 2018 Update

Note: Projections are with respect to a 1991 to 2009 baseline.

Rising sea levels, combined with storms or extreme tidal events such as King Tides can produce increased wave heights and intensity, and wash more sediment into the river mouth channel, as well as debris. As stated in *Safeguarding California Plan: 2018 Update* (California Natural Resources Agency 2018), in addition to sea-level rise, precipitation patterns are becoming more variable. Though the wet seasons are shorter, warmer atmospheric temperatures are generating more powerful storms that release greater amounts of rain, flushing high volumes of freshwater and sediment down the river channel in a short amount of time. These flash floods can cause excessive damage to the lease area structures and land depending on their force and frequency.

Regular maintenance, as referenced in the lease, may reduce the likelihood of severe structural degradation or dislodgement. Pursuant to the proposed lease, the Applicant acknowledges that the lease premises and adjacent upland are located in an area that may be subject to the effects of climate change, including sea-level rise.

CONCLUSION:

For the reasons stated above, staff believes the issuance of the proposed lease will not substantially impair the public rights to navigation, fishing, or other Public Trust needs and values at this location, at this time, and for the foreseeable term of the lease; and is in the best interests of the State.

OTHER PERTINENT INFORMATION:

1. Approval or denial of the lease is a discretionary action by the Commission. Each time the Commission approves or rejects a use of sovereign land, it exercises legislatively delegated authority and responsibility as trustee of the State's Public Trust lands as authorized by law. If the Commission denies the lease, the Applicant may be required to remove the flood control jetties and dike, and will not be authorized to conduct maintenance dredging. Upon expiration or prior termination of the lease, the Applicant also has no right to a new lease or to renewal of any previous lease.
2. This action is consistent with the "Meeting Evolving Public Trust Needs" Strategic Focus Area of the Commission's 2021-2025 Strategic Plan.
3. Termination of the lease is not a project as defined by the California Environmental Quality Act (CEQA) because it is an administrative action that will not result in direct or indirect physical changes in the environment.

Authority: Public Resources Code section 21065 and California Code of Regulations, title 14, section 15378, subdivision (b)(5).

4. Existing Structures: Staff recommends that the Commission find that this activity is exempt from the requirements of CEQA as a categorically exempt project. The project is exempt under Class 1, Existing Facilities; California Code of Regulations, title 2, section 2905, subdivision (a)(2).

Authority: Public Resources Code section 21084 and California Code of Regulations, title 14, section 15300 and California Code of Regulations, title 2, section 2905.

5. Maintenance Dredging: A Supplemental Environmental Impact Statement (EIS) prepared by the U.S. Army Corps of Engineers was used by the Orange County Flood Control District as a CEQA-equivalent document and approved on November 28, 1989, and an Addendum was prepared by the Orange County

Flood Control District and approved on April 29, 2016, for this Project. The California State Lands Commission staff has reviewed such documents.

The Mitigation Monitoring Program and a Statement of Findings made in conformance with the State CEQA Guidelines (Cal. Code Regs., tit. 14, §§ 15091, 15096) were previously adopted by the Commission on August 9, 2016 ([Item 31, August 09, 2016](#)).

6. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq., but such activity will not affect those significant lands. Based upon staff's consultation with the persons nominating such lands and through the CEQA review process, it is staff's opinion that the project, as proposed, is consistent with its use classification.

APPROVALS OBTAINED:

U.S. Army Corps of Engineers
California Coastal Commission
State Water Resources Control Board

EXHIBITS:

- A. Land Description
- B. Site and Location Map

RECOMMENDED ACTION:

It is recommended that the Commission:

CEQA FINDING:

Existing Structures: Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a categorically exempt project, Class 1, Existing Facilities; California Code of Regulations, title 2, section 2905, subdivision (a)(2).

Maintenance Dredging: Find that a Supplemental EIS was prepared by the U.S. Army Corps of Engineers, was used by the Orange County Flood Control District as a CEQA-equivalent document and approved on November 28, 1989, and an Addendum prepared for this project by Orange County Flood Control District and

approved on April 29, 2016, and that the Commission has reviewed and considered the information contained therein.

The Commission previously adopted the Mitigation Monitoring Program on August 9, 2016 ([Item 31, August 09, 2016](#)), and it remains in full force.

Determine that the project, as approved, will not have a significant effect on the environment.

PUBLIC TRUST AND STATE'S BEST INTERESTS:

Find that termination of the lease and issuance of the proposed lease will not substantially impair the public rights to navigation and fishing or substantially interfere with the Public Trust needs and values at this location, at this time, and for the foreseeable term of the lease; and is in the best interests of the State.

SIGNIFICANT LANDS INVENTORY FINDING:

Find that this activity is consistent with the use classification designated by the Commission for the land pursuant to Public Resources Code section 6370 et seq.

AUTHORIZATION:

1. Terminate, effective October 21, 2021, Lease Number PRC 2171, a General Lease – Public Agency Use, issued to the Orange County Flood Control District.
2. Authorize issuance of a General Lease – Public Agency Use and Dredging to the Applicant beginning October 21, 2021, for a term of 2 years, for the use and maintenance of two riprap flood control jetties, a riprap dike, and maintenance dredging in the Lower Santa Ana River as described in Exhibit A and shown on Exhibit B (for reference purposes only) attached and by this reference made a part hereof; consideration is the public use and benefit, with the State reserving the right at any time to set a monetary rent if the Commission finds such action to be in the State's best interests.

EXHIBIT A

LEASE 9358

LAND DESCRIPTION

That certain parcel of tide and submerged lands adjacent to Fractional Section 19, Township 6 South, Range 10 West, San Bernardino Base and Meridian, in the County of Orange, State of California, described as follows: bounded on the north by the line of ordinary high tide of the Pacific Ocean; bounded on the east by the southwesterly prolongation of the westerly boundary of the City of Newport Beach, being also the southwesterly prolongation of the easterly line of Summit Street as per map of Seashore Colony Tract, recorded in Book 7, Page 25 of Miscellaneous Maps, in the Office of the County Recorder of said County; bounded on the northwest and southwest by a line described as follows: commencing at a point on the easterly line of Rancho Las Bolsas, as said line is shown on a map filed in Book 28, Page 17 of Record of Surveys in the Office of said County Recorder, said point being described on said map as "Fd.1" iron rod Sta. 4+28.35"; thence South 15°48'40" West along said Rancho line, 202.47 feet to a point described on said map as "Sta. 6+30.82 Set 1" I.P.", said point being also at the intersection of the southerly line of the Pacific Electric Railway Company right of way as shown on said map; thence North 53°58'30" West along said southerly right of way line, 4.46 feet; thence South 36°01'30" West, 374.00 feet; thence South 24°59'14" West, 650.00 feet; thence South 65°00'46" East to said southwesterly prolongation of the westerly boundary of the City of Newport Beach.

APPROVED

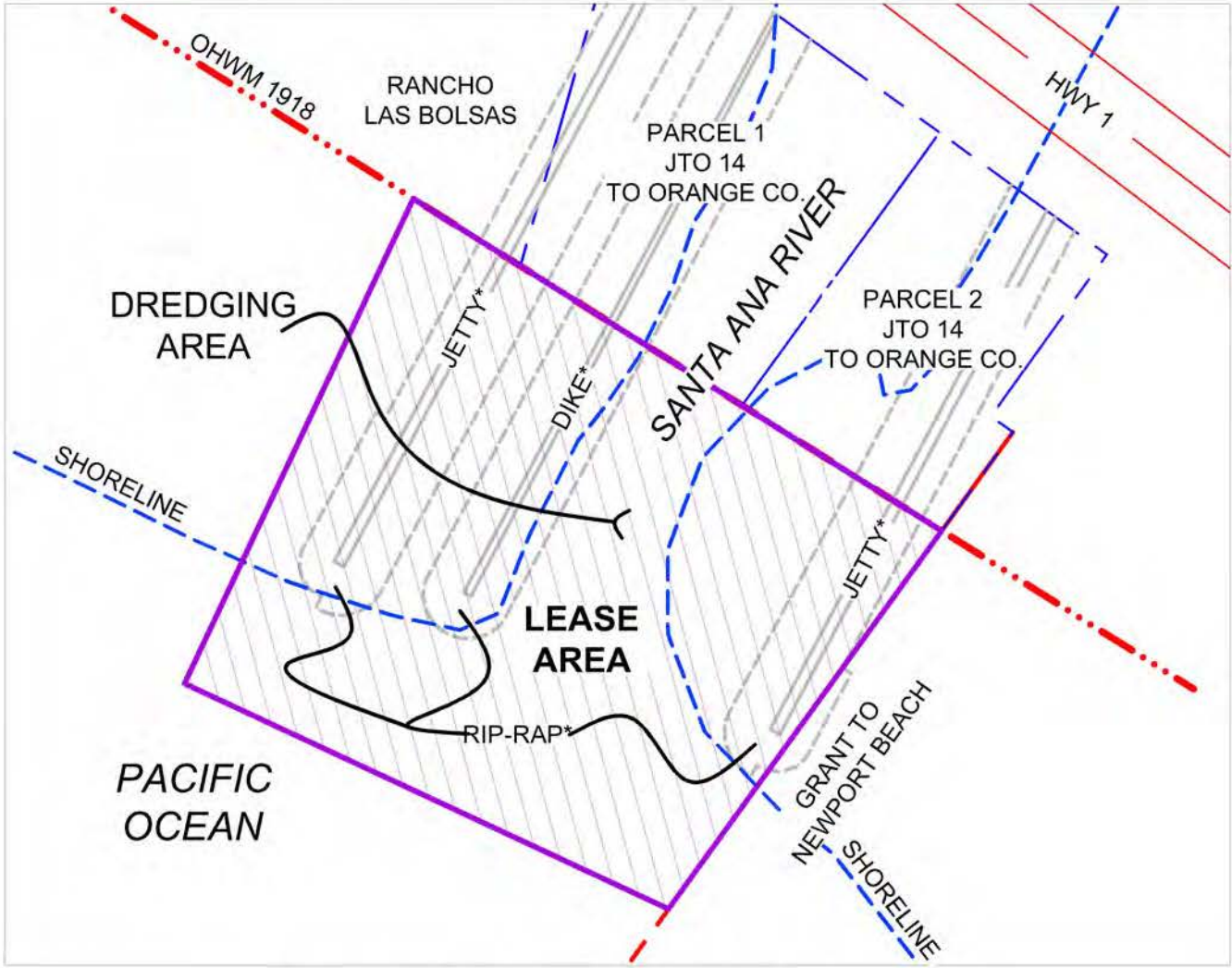
John D. Pavlik Date: 9/28/09
 John D. Pavlik L.S. 5168
 Expiration Date: June 30, 2011



*The above description is a duplicate of that original description prepared by John D. Pavlik, LS 5168 on 9/28/09 as found in PRC file 2171, Calendar Item 26 approved on 10/22/09.

NO SCALE

SITE



Santa Ana River at the Pacific Ocean

NO SCALE

LOCATION



MAP SOURCE: USGS QUAD

Exhibit B

LEASE 9358
 ORANGE CO. FLOOD
 CONTROL DISTRICT
 GENERAL LEASE - PUBLIC
 AGENCY USE & DREDGING
 ORANGE COUNTY



This Exhibit is solely for purposes of generally defining the lease premises, is based on unverified information provided by the Lessee or other parties and is not intended to be, nor shall it be construed as, a waiver or limitation of any State interest in the subject or any other property.

Exhibit D



Santa Ana River Mouth Monitoring Project January-June 2021 Report



Orange County Coastkeeper (Coastkeeper) is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective programs in education, advocacy, restoration, research, enforcement, and conservation.

The Santa Ana River Mouth Monitoring Project (SAR Project) enlists volunteers, community groups and local government to monitor human, dog and bird activity in the Santa Ana River Mouth area, a 13.2 acre parcel of land that is owned by four agencies including the California State Lands Commission, California State Parks, the County of Orange, and the City of Newport Beach. Due to the fragmented ownership of the area management of activities and law enforcement

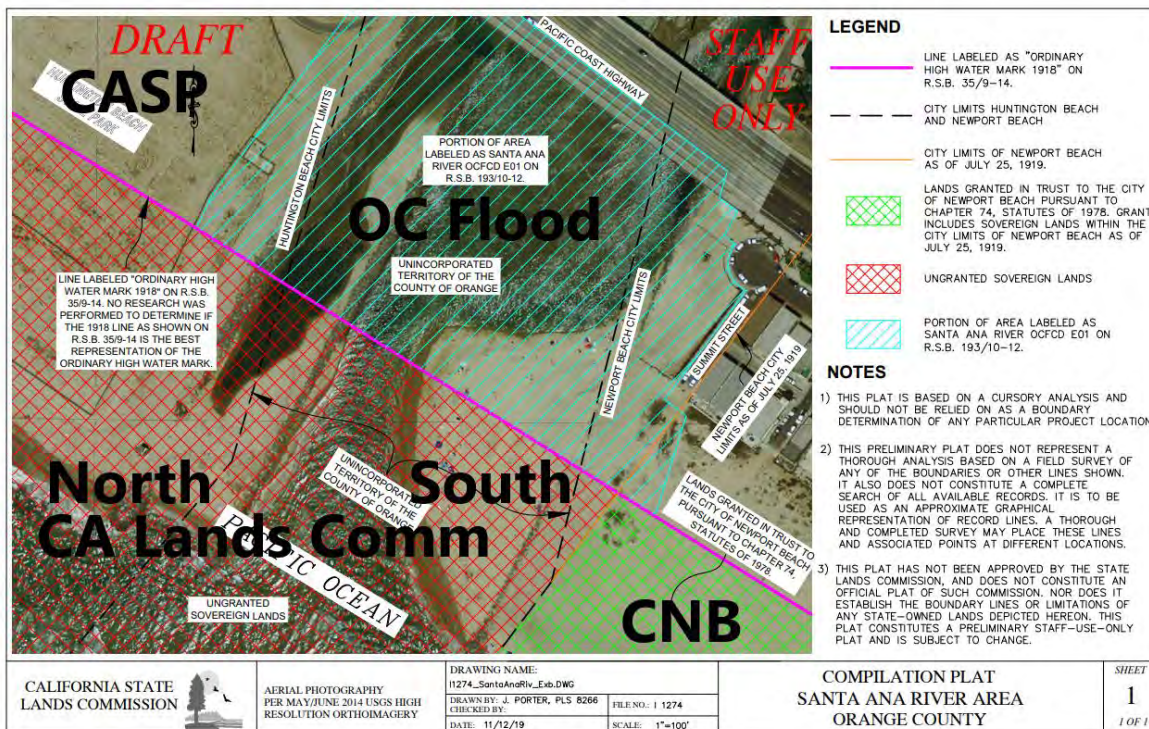
in the area have been difficult. The initial six months of the SAR Project covered in this report January 2021 and June 2021 was run as a pilot program by Orange County Coastkeeper (OCCK) with funding from the City of Newport Beach. The project is continuing with funding from the City of Newport Beach Community Grants Program and the Rose Foundation. The goal of the SAR project is to monitor human, dog and bird use of the area and to provide education and outreach to residents and visitors about the Wildlife Management Area at the Santa Ana River Mouth and the endangered species that reside within it.

Executive Summary

After initial program development of the pilot study monitoring of the area began on February 9th, 2021. Final revisions of the study protocol were completed by March 23rd, 2021 and all subsequent surveys followed a standard protocol that is used for all surveys.

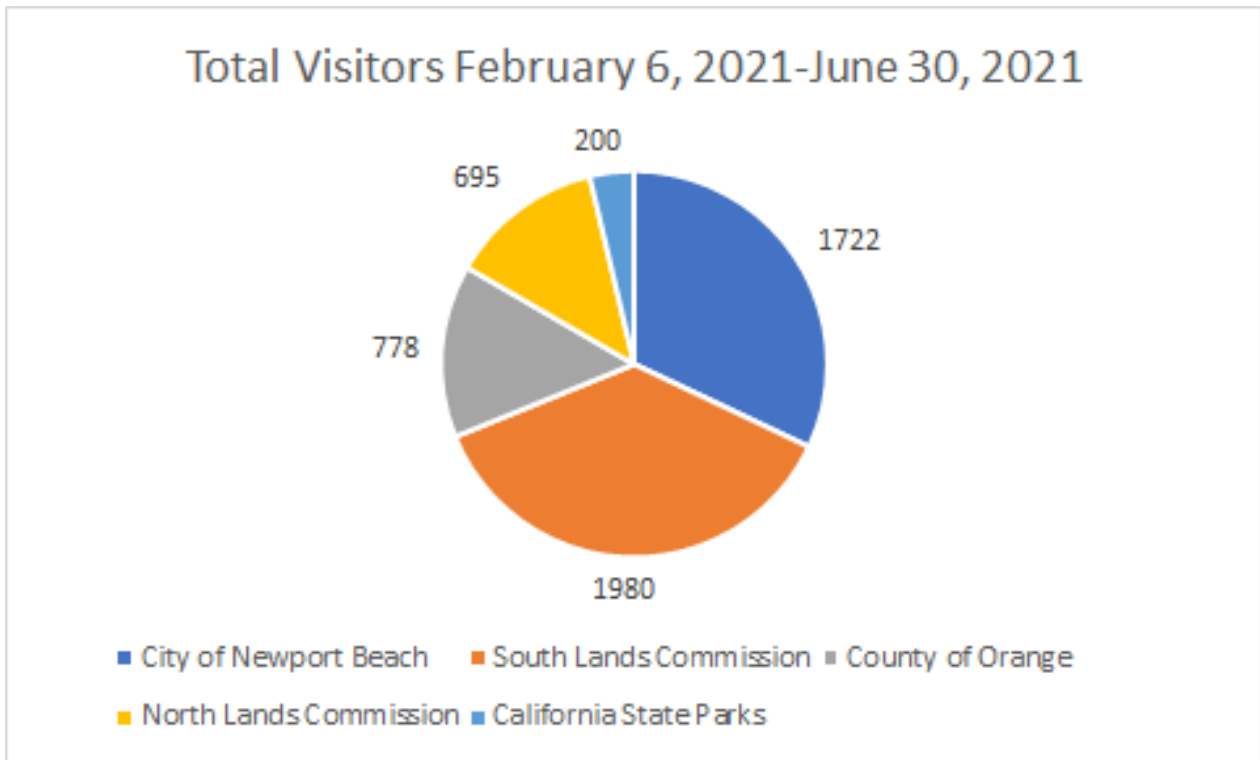
As of June 30, 2021 151 surveys at the Santa Ana River Mouth were completed by 26 trained volunteers. In the 151 surveys collected, 5,375 humans and 1,096 dogs were observed, of the dogs 894 were off-leash and 202 on-leash . Two drones were observed and all but eight surveys documented dogs in the Santa Ana River Mouth in only 8 completed surveys. Dogs off-leash accounted for 82 percent the dogs observed. No citations were observed to be issued by Law Enforcement. California State Parks Law Enforcement was called out by staff once for repeated bird flushing on 6/18/2021 on County of Orange and California State Parks Property by a dog owner and their dog.

GRAPHS AND MAP

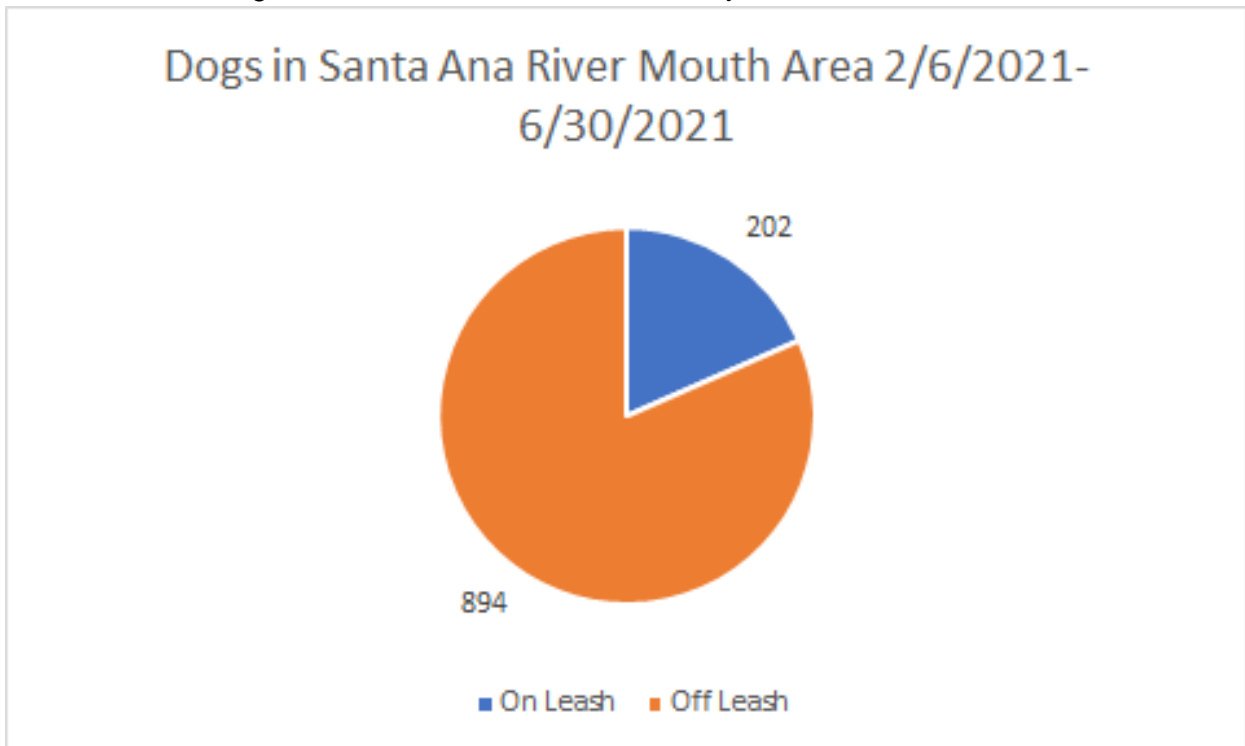


(Map of Santa Ana River Mouth with property names overlaid. California State Lands Commission property was split into North and South portions of the map after March 23rd, divided by the location of the river mouth during surveys, to improve our ability to understand access use in the area better.)

Total number of visitors based on location:

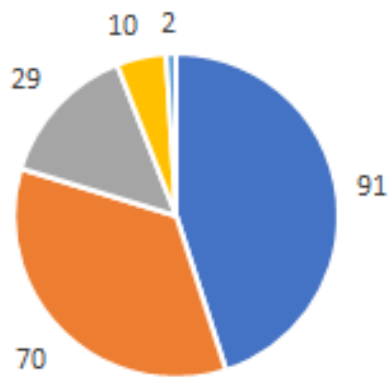


Total number of dogs in the Santa Ana River Mouth Project Area:



Locations of dogs recorded on leash:

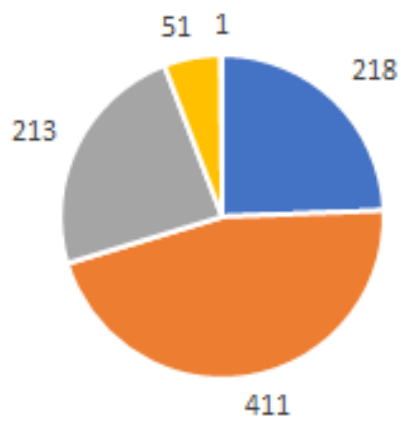
Dogs On-Leash By Land Manager Organization 2/6/2021-6/30/2021



■ City of Newport Beach
 ■ South Lands Commission
 ■ County of Orange
■ North Lands Commission
 ■ California State Parks

Locations of dogs recorded off leash:

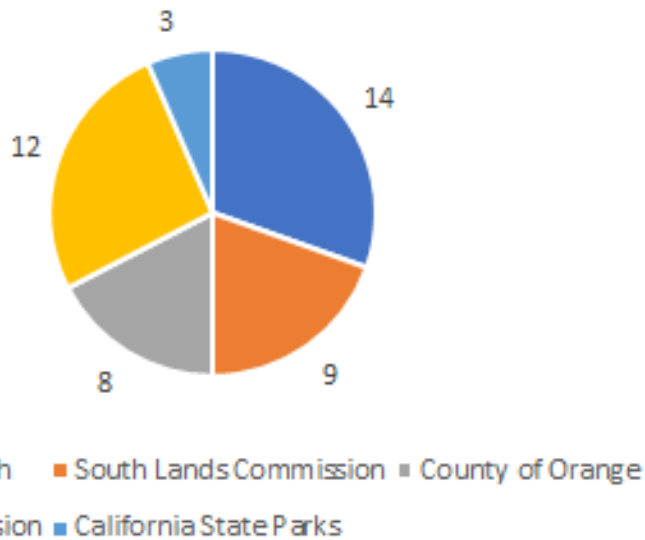
Dogs Off-Leash by Land Manager Organization 2/6/2021-6/30/2021



■ City of Newport Beach
 ■ South Lands Commission
 ■ County of Orange
■ North Lands Commission
 ■ California State Parks

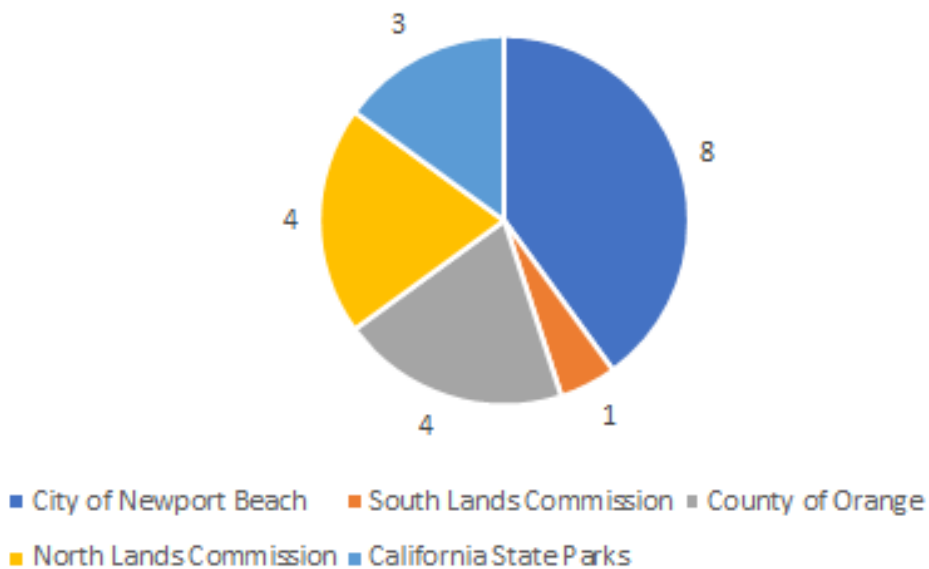
Recorded disturbances:

Total Number of Instances of Bird Disturbance by Land Owner 2/6/2021-6/30/2021



(Bird disturbance defined as when birds are present on a part of the beach and are approached by humans and/or dogs and they depart the beach.)

Law Enforcement Officers Present by Land Area



Training

Training took place with two components, an online one hour Zoom training that took place in February 2021 was recorded and distributed to new volunteers who were unable to attend the initial Zoom training session. Volunteers then met with Volunteer Coordinator Suzanne Welsh at the

Santa Ana River Mouth to go over the monitoring protocol and to go over the property map in person. Volunteers were trained to monitor human recreation use, dog use, and were instructed how to fill out the data sheet to track other uses like drones, disturbances to birds (where birds are approached by humans or dogs and leave the area), and to denote law enforcement officer presence.

Outreach Table



During this project Orange County Coastkeeper was able to conduct an outreach table for beach visitors. Visitors were given pamphlets detailing information about California Least Terns and Western Snowy Plovers. Additional information about the laws regarding dogs in the area and free biodegradable waste bags were provided to visitors as well. Between May 15th, 2021 and June 30th, 2021 the outreach table was set up five times and one virtual outreach event was held as well. Overall OC Coastkeeper has engaged 387 visitors with its outreach table and virtual outreach event.

COVID-19 Impacts

The greatest impact to this project was a delay in implementing the outreach table due to COVID-19 restrictions and vaccine availability. Staff was able to begin the outreach program in May after full vaccination status was met.

Next Steps

Our next steps in this project include additional volunteer recruitment from the local community as well as a continuation of the outreach table.

Santa Ana River Mouth Monitoring Project July-December 2021 Report



Orange County Coastkeeper (Coastkeeper) is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective programs in education, advocacy, restoration, research, enforcement, and conservation.

The Santa Ana River Mouth Monitoring Project (SAR Project) enlists volunteers, community groups and local government to monitor human, dog and bird activity in the Santa Ana River Mouth area, a 13.2 acre parcel of land that is owned by four agencies including the California State Lands Commission, California State Parks, the County of Orange, and the City of Newport Beach. Due to the fragmented ownership of the area, management of activities and law

enforcement in the area have been difficult. The second six months of the SAR Project covered in this report (July 2021 through December 2021) was run as an ongoing project by Orange County Coastkeeper (OCCK) with funding from the City of Newport Beach. The project is continuing with funding from the City of Newport Beach Community Grants Program and the Rose Foundation. The goal of the SAR project is to monitor human, dog and bird use of the area and to provide education and outreach to residents and visitors about the Wildlife Management Area at the Santa Ana River Mouth and the endangered species that reside within it.

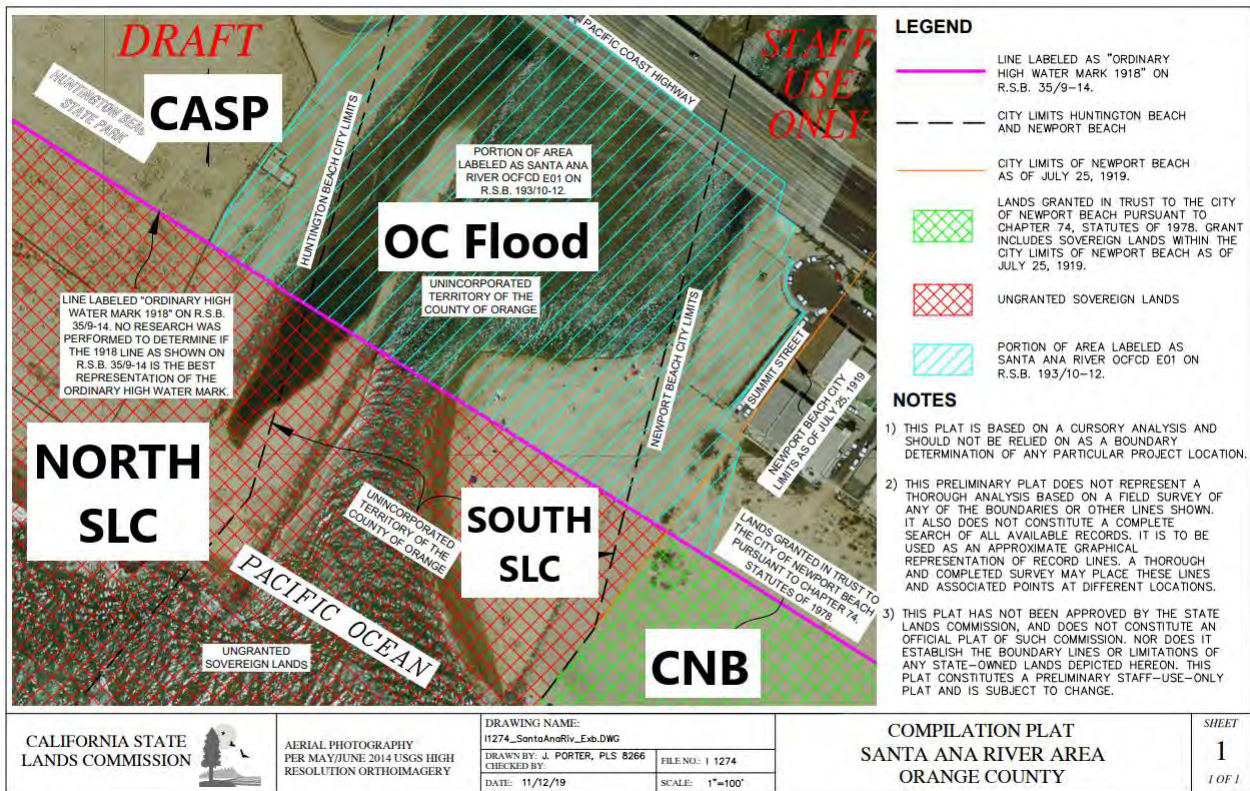
Executive Summary

After the initial program development of the pilot study, monitoring of the area began on February 9th, 2021. Final revisions of the study protocol were completed by March 23rd, 2021 and all subsequent surveys followed a standard protocol that is used for all surveys.

As of December 31st 2021, 63 surveys at the Santa Ana River Mouth were completed by 36 trained volunteers. In the 63 surveys collected, 1,506 people and 273 dogs were observed. Of the dogs 194 were off-leash and 79 on-leash. Dogs off-leash accounted for 71 percent the dogs observed. Law Enforcement Officers were present 7 times throughout all 63 surveys completed in this time period. No citations were observed to be issued.

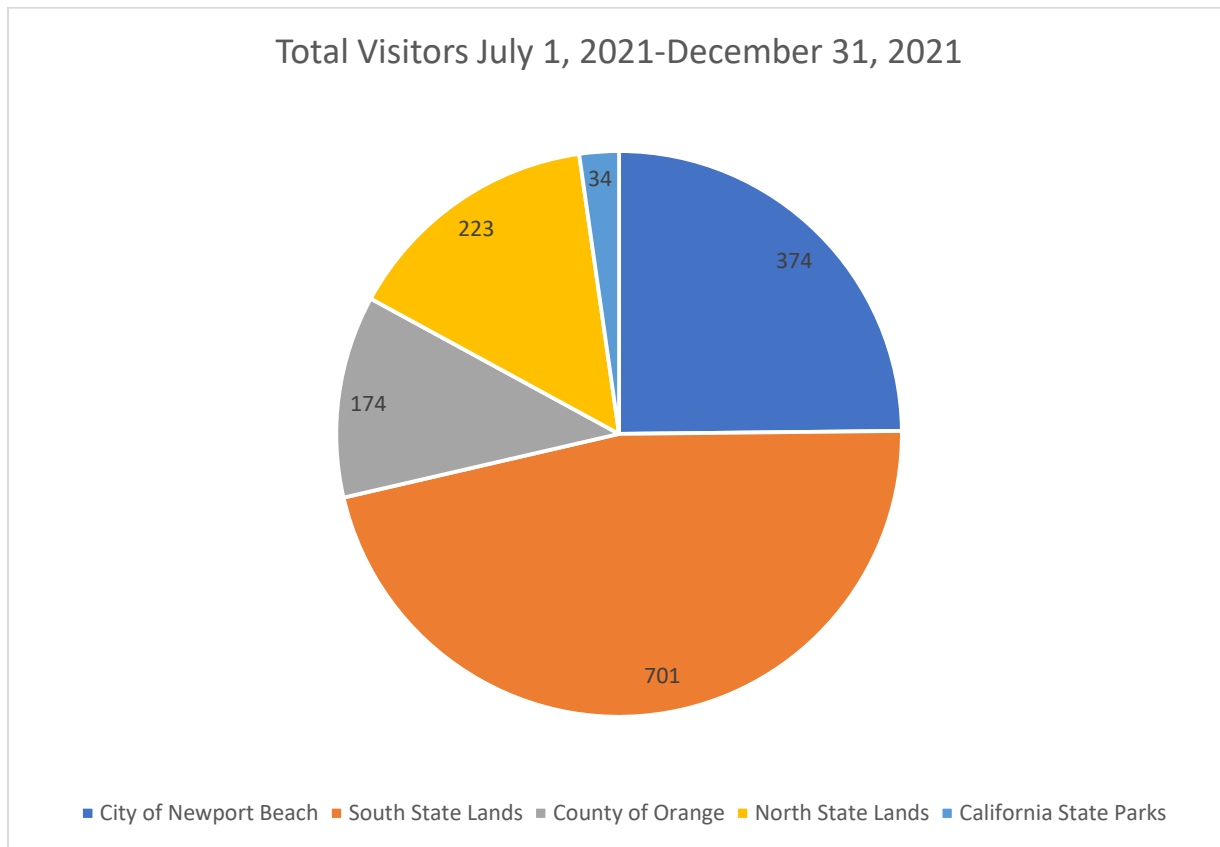
On 12/19/2021, according to a volunteer, "...a law enforcement officer came down to the flood area and said something over the loudspeaker but no one could hear him. There were 18 dogs off leash during the 30 minutes I was there, and at least half of them were still there when the officer arrived. A couple of people went over to ask him what he said and then left. There were still at least 6 dogs still off leash when the officer drove away, and he was too far away for people to hear what he said. Today there were only 3 surfers out in the water when I arrived and I was delighted to see many shorebirds had returned to the south end of the beach, which was devoid of birds with dogs present. After 17 minutes a dog chased the entire flock off and only one gull returned within the next 15 minute period. I approached the couple and asked them if they knew that this beach had a requirement for their dogs to be on a leash. They said they knew, and that they come out there twice per day. I asked them if they had been issued any tickets and they said no. I called animal control to report the incident and took pictures of the couple and the dog for future reference. They left before animal control could arrive, within 10 minutes of the flushing incident and the birds still had not returned with over 5 minutes after the dog had left the area." Reports like this are common from volunteers, interns, and staff who spend time completing surveys.

GRAPHS AND MAP

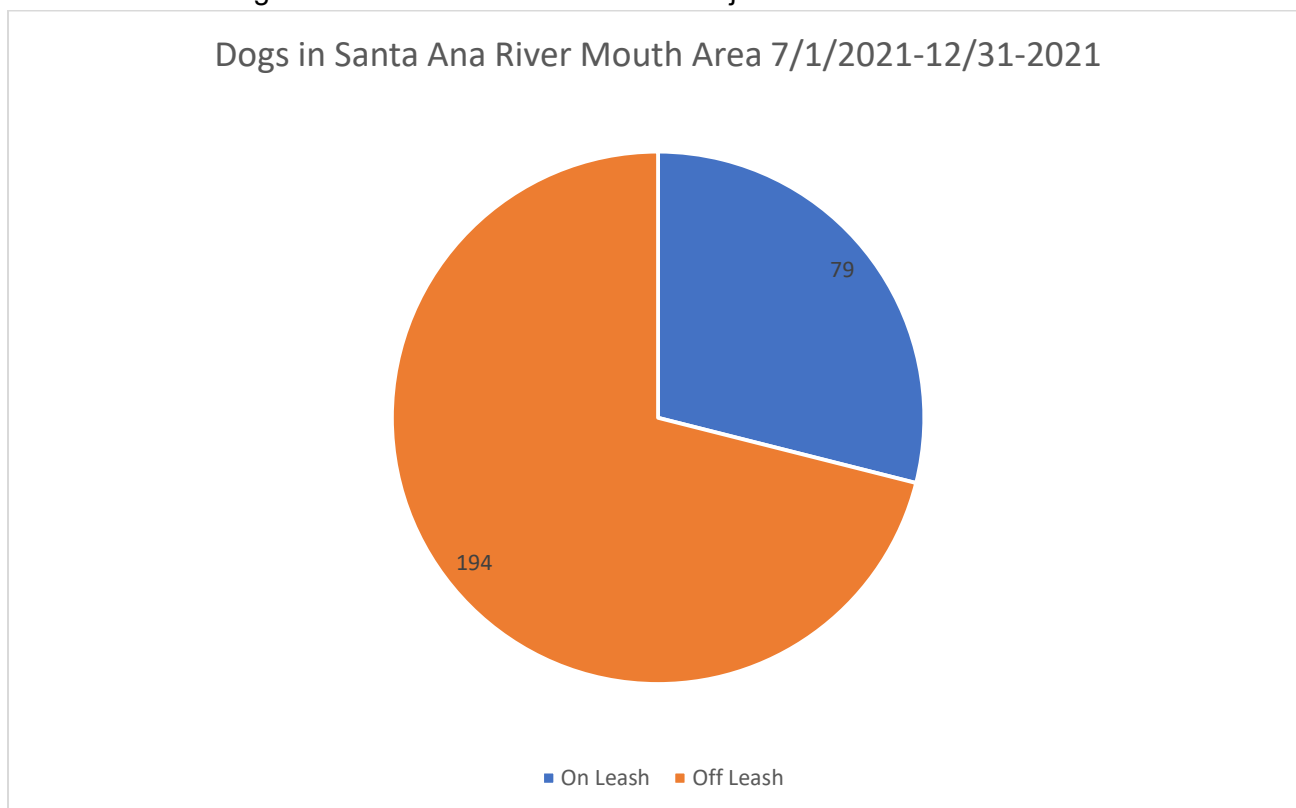


(Map of Santa Ana River Mouth with property names overlaid to correlate with data sheets. California State Lands Commission property was split into North and South portions, divided by the location of the river mouth during surveys, to improve our ability to understand access use in the area better. **CASP**=California State Parks; **OC Flood**: Orange County Flood Control Channel; **CNB**= City of Newport Beach; **NORTH SLC** = North State Lands Commission; **SOUTH SLC**= South State Lands Commission)

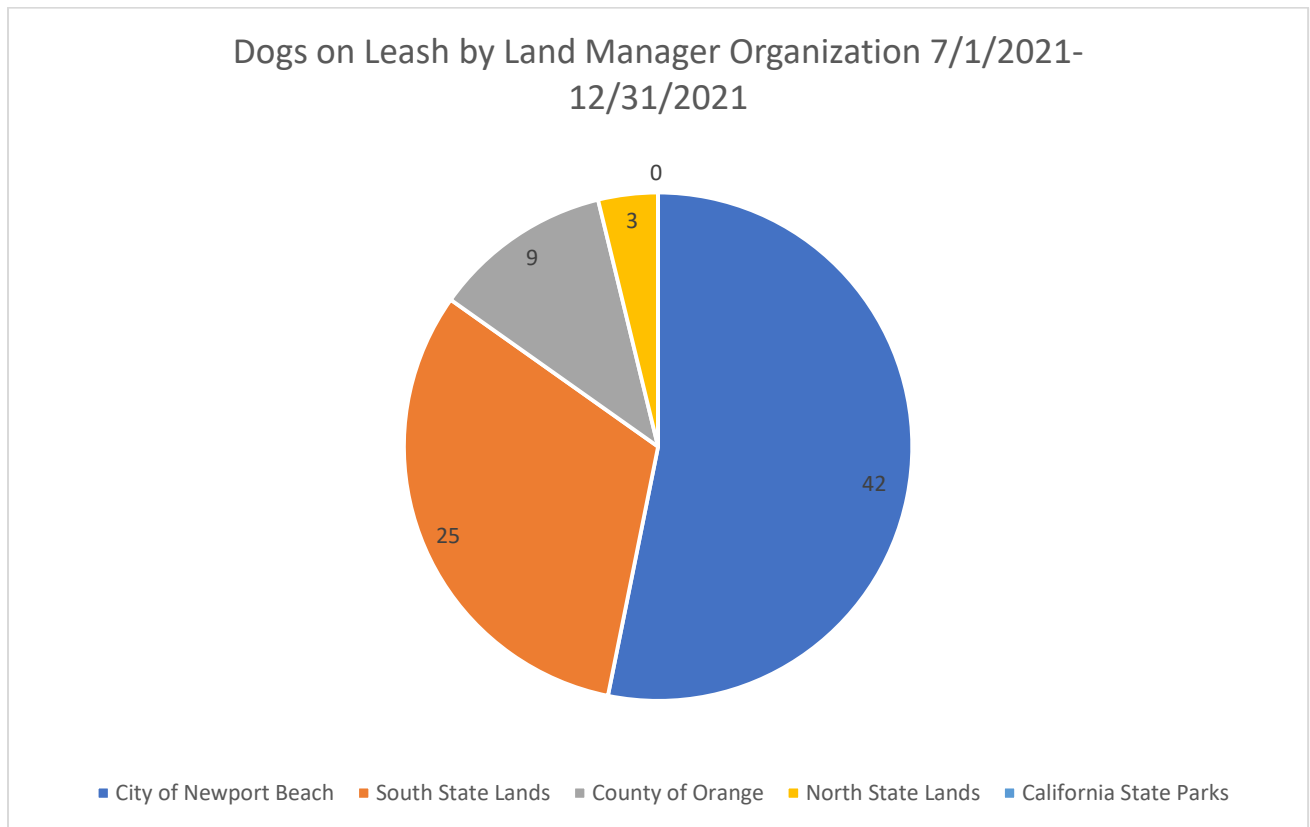
Total number of visitors based on location:



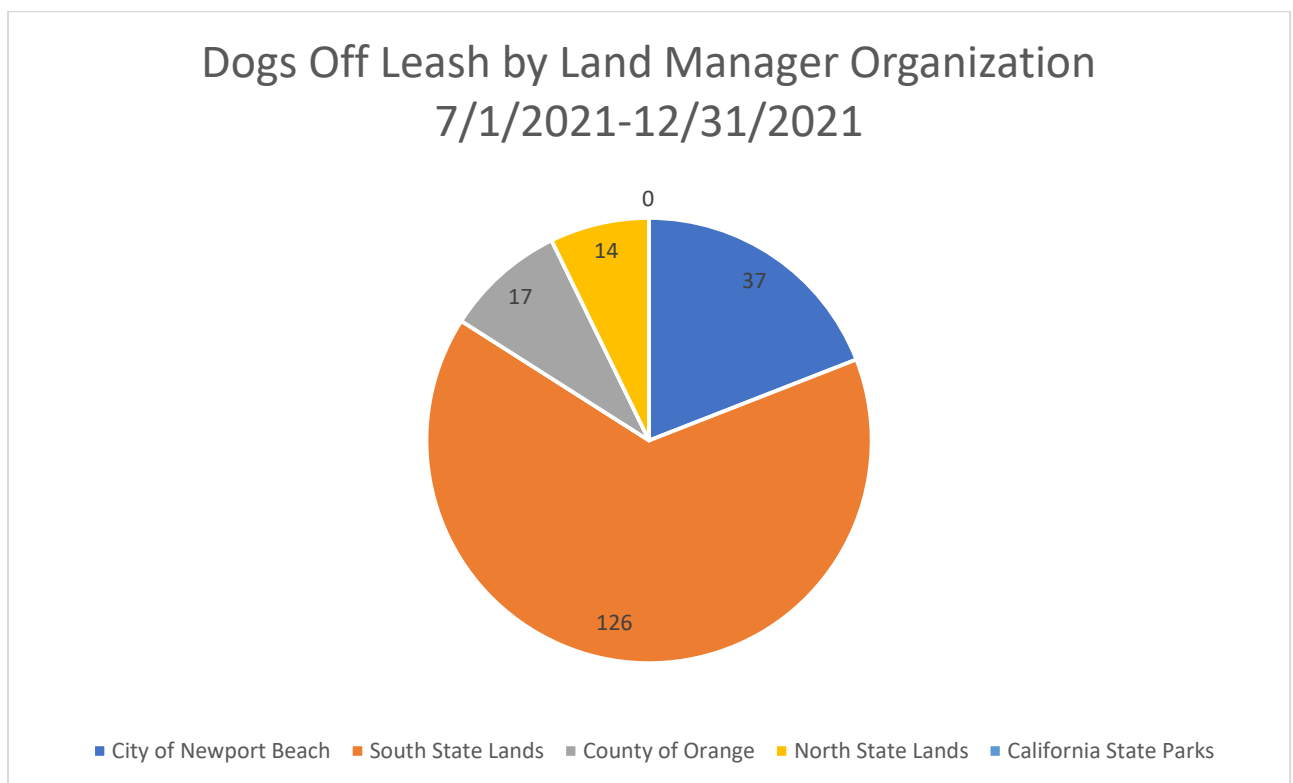
Total number of dogs in the Santa Ana River Mouth Project Area:



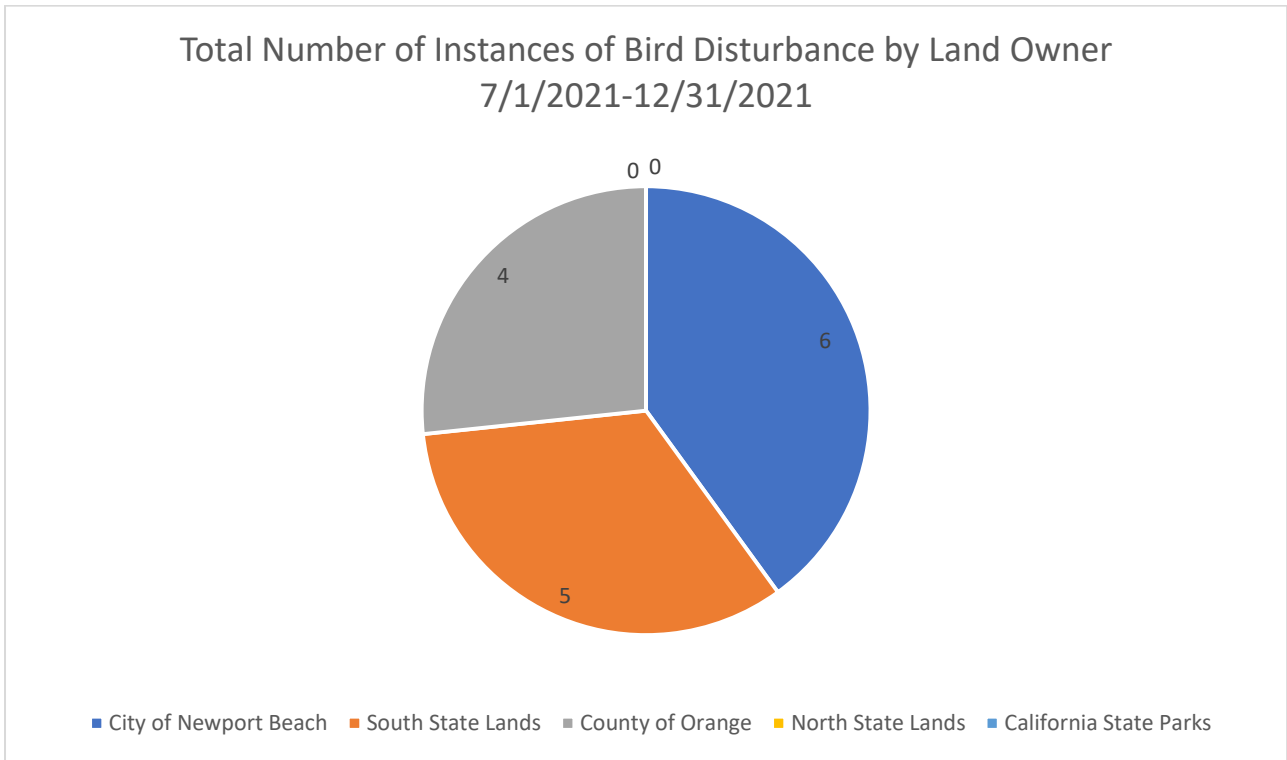
Locations of dogs recorded on leash:



Locations of dogs recorded off leash:

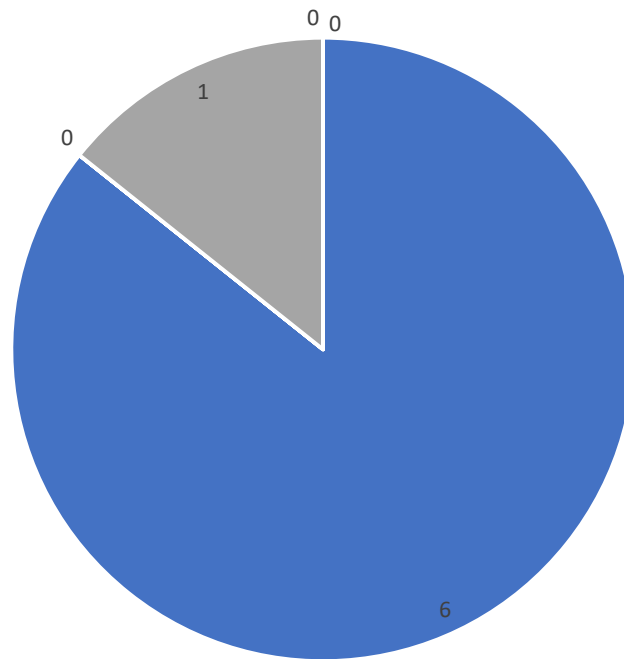


Recorded disturbances:



(Bird disturbance defined as when birds are present on a part of the beach and are approached by humans and/or dogs and they depart the beach.)

Law Enforcement Officers Present by Land Area



■ City of Newport Beach ■ South State Lands ■ County of Orange ■ North State Lands ■ California State Parks

Training

Training took place with two components, an online one hour Zoom training that took place in February 2021 was recorded and distributed to new volunteers along with training documents. Volunteers then met with Volunteer Coordinator Suzanne Welsh at the Santa Ana River Mouth to go over the monitoring protocol and the property map in person. Volunteers were trained to monitor human recreation use, dog use, and were instructed how to fill out the data sheet to track other uses like drones, disturbances to birds (where birds are approached by humans or dogs and leave the area), and to denote law enforcement officer presence.

Outreach Table



During this project Orange County Coastkeeper was able to conduct an outreach table for beach visitors. Visitors were given pamphlets detailing information about California Least Terns and Western Snowy Plovers. Additional information about the laws regarding dogs in the area and free biodegradable waste bags were provided to visitors as well. Between July 1, 2021 and December 31, 2021 the outreach table was set up three times. Challenges for our public outreach included issues with volunteer recruitment and retention, lack of funding for staff presence, the October 2021 oil spill, and a sand nourishment project that resulted in heavy machinery being used in the survey and outreach area from October through the end of the year. Overall OC Coastkeeper has engaged over 533 visitors with our outreach table (5 in person outreach events) and virtual outreach events in 2021. OC Coastkeeper participated in a virtual outreach event with California Surf Anglers in May of 2021 that has gained 393 views to date (<https://www.facebook.com/726138938/videos/10159755567818939/>) and in a segment produced by NBTV (Newport Beach TV) for local broadcast that's also available on the City of Newport Beach's website and YouTube pages (<https://www.youtube.com/watch?v=CF8svp1-r60>).

COVID-19 Impacts

Due to the fluctuating nature of the COVID-19 pandemic, there have been ongoing issues with volunteer retention as public crowds grow and decline with the weather, especially in regards to staffing the outreach table with volunteers.

Other Impacts

On October 2nd, 2021 approximately 24,000 gallons of oil was released into the ocean off of Huntington Beach, just north of the Santa Ana River Mouth area. While a natural sand bar had closed off the river mouth just the week prior, preventative booming was put in place by the Office of Spill Prevention as a protective measure in addition to the creation of 6 foot tall sand berms along the shore in order to protect the sensitive wetland habitat from potential oil spill impacts. Cleanup efforts in the area were centered at Talbert Marsh, the wetland just north of the survey area, and heavy machinery and cleanup efforts were common in the Santa Ana River Mouth area throughout the month of October.

In November 2021 the County of Orange began a dredging project in the Santa Ana River Mouth to transport sand to the beach adjacent to the San Clemente Pier and to the Newport Peninsula between 40th and 52nd Streets. Heavy machinery is operating on the beach Monday-Friday from 8 AM to 5 PM, preventing weekday outreach table events from occurring, and is ongoing through March 2022.

Next Steps

Our next steps in this project include additional volunteer recruitment from the local community, continuation of the outreach table, and continuing to gather surveys. OC Coastkeeper was awarded a grant by the California Coastal Conservancy in October 2021, effective January 2022, that will allow us to substantially increase our ability to complete surveys and outreach in the Santa Ana River Mouth.

Exhibit E

February 19, 2022 Surf Cam Video:

<https://drive.google.com/file/d/11tbOoUQAwm5FRdOciQJFdMnkv0GK67aR/view>

Photographic Evidence of Non-Enforcement:



Date: November 22, 2021 between 10 AM and 1 PM.



Date: November 22, 2021 between 10 AM and 1 PM.



Exhibit F



U.S. Fish and Wildlife Service
Carlsbad Fish and Wildlife Office
2177 Salk Avenue, Suite 250
Carlsbad, California 92008
760-431-9440
FAX 760-431-9624



California Department of Fish and Wildlife
South Coast Region
3883 Ruffin Road
San Diego, California 92123
858-467-4201
FAX 858-467-4239

In Reply Refer To:
FWS-OR-17B0026-17CPA0028

December 14, 2016
Sent by Email

Ms. Chris Uzo-Diribe
Orange County Public Works
300 N. Flower Street
Santa Ana, California 92703-5000
chris.uzodiribe@ocpw.ocgov.com

Subject: Negative Declaration for the Orange County Code of Ordinance Proposed Amendment (Dog Beach) Project, IP 16-234, Huntington Beach, California (SCH# 2016111021)

Dear Ms. Uzo-Diribe:

The U.S Fish and Wildlife Service (Service) and the California Department of Fish and Wildlife (Department), hereafter collectively referred to as the Wildlife Agencies, have reviewed the above-referenced Negative Declaration (ND) dated November 2016. The Wildlife Agencies have identified potential effects of this project on wildlife and sensitive habitats. The project details provided herein are based on the information provided in the Initial Study (IS)/ND and associated documents.

The primary concern and mandate of the Service is the protection of public fish and wildlife resources and their habitats. The Service has legal responsibility for the welfare of migratory birds, anadromous fish, and endangered animals and plants occurring in the United States. The Service is also responsible for administering the Federal Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), including habitat conservation plans (HCP) developed under section 10(a)(1)(B) of the Act. The Department is a Trustee Agency and a Responsible Agency pursuant to the California Environmental Quality Act (CEQA; §§ 15386 and 15381, respectively) and is responsible for ensuring appropriate conservation of the state's biological resources, including rare, threatened, and endangered plant and animal species, pursuant to the California Endangered Species Act (CESA; Fish and Game Code § 2050 *et seq.*) and Fish and Game Code (FGC) section 1600 *et seq.* The Department also administers the Natural Community Conservation Planning program, a California regional habitat conservation planning program.

The proposed project is a proposal that would end restrictions on off-leash dogs on unincorporated Orange County (County) land at the mouth of the Santa Ana River and designate the land as a dog park. The IS/ND includes the proposed amendment to the Orange County Code of Ordinances, as follows: “c. A dog, under the charge of a person competent to exercise care, custody, and control over such dog, may be permitted to be upon public property without restraint only during the months of October through February in the unincorporated area downstream from Pacific Coast Highway at the outlet of the Santa Ana River between the incorporated cities of Huntington Beach and Newport Beach which area is hereby designated a dog park. During the months of March through September, a dog, under the charge of a person competent to exercise care, custody, and control over such dog, must be restrained by a substantial chain or leash not to exceed six (6) feet in length.”

The dog park would be located immediately adjacent to a California least tern (*Sternula antillarum browni*; least tern) and western snowy plover (Pacific Coast population DPS) [*Charadrius nivosus nivosus* (*C. alexandrinus n.*); snowy plover] colony. Least terns are listed as endangered under CESA and the Act; they are also fully protected under FGC section 3511(b)(6). Snowy plovers are listed as threatened under the Act and are a state species of special concern. As expressed during a July 6, 2016, meeting with the Department¹ and in a November 21, 2016, letter from the Service, (Service2016b), the Wildlife Agencies have recommended that the County not designate the area at the mouth of the Santa Ana River as a dog park due to the potential impacts to least terns and snowy plovers.

The Wildlife Agencies have significant concerns regarding this proposed amendment, and offer our comments and recommendations to assist the County in avoiding, minimizing, and adequately mitigating project-related impacts to biological resources, and to ensure that the project is consistent with ongoing regional habitat conservation planning efforts.

General Comments:

The Santa Ana River mouth is located approximately half way between the other nearest estuaries (Bolsa Chica and Upper Newport Bay) and supports a large array of shorebirds much of the year, including the snowy plover, black-bellied plover, semi-palmated plover, willet, long-billed curlew, marbled godwit, western sandpiper, least sandpiper, and long-billed dowitcher (Page and Shuford 2000; Ryan 2016). The Santa Ana River mouth also provides resources for the least tern, which uses the river mouth and adjacent dunes between the months of April and September.

The Pacific coast population of snowy plover was listed as threatened on March 5, 1993 (58 Federal Register (FR) 12864) under the authorities of the Act. The snowy plover uses habitat at the mouth of the Santa Ana River primarily during the non-breeding season, but may be present year-round. Non-breeding habitat is important for snowy plovers and other migratory shorebirds because this habitat supplies food and resting areas that allow birds to build fat reserves for spring migration and the upcoming breeding season. Snowy plovers forage for invertebrates and also rest on the beach, mudflats, and sandbars at and near the mouth of the Santa Ana River. The Service recognized the importance of this site to the snowy plover by designating Critical Habitat (Figure 1, below) at the mouth of the Santa Ana River on June 19, 2012 (Service 2012).

The least tern was listed as endangered in 1970 under the authority of the Act, and designated as fully protected in 1970 and endangered in 1971 under the authorities of CESA. The least tern is migratory, and uses habitat within and adjacent to the mouth of the Santa Ana River during the breeding season (April-September). Least terns nest primarily within the fenced Huntington Beach Least Tern Preserve adjacent to the river mouth; however, they also roost outside the fenced boundary (Housel *et al.* 2014). Adult and fledgling least terns have been observed to loaf and preen outside the colony fence along the beach strand and Santa Ana River mouth. Least terns forage on small fish in the near shore ocean, the Santa Ana River and river mouth, and the Santa Ana River estuary. When chicks fledge, they rest on the banks and sand bars at the mouth of the Santa Ana River as well as within the boundaries of the Huntington Beach Least Tern Preserve (Housel *et al.* 2014).

¹ Meeting in person with Department staff Hans Sin and Supervisor Michelle Steel and staff. July 6, 2016. Orange County Supervisors' office.

The presence of leashed or unleashed dogs on the beach and in the river mouth is harmful to snowy plovers and least terns, causing individuals to flush frequently, unnecessarily expending energy reserves. The presence of dogs on the beach or in the river mouth can also result in less time spent foraging (Lafferty 2001). A reduction in foraging time is likely to reduce the ability of snowy plovers and least terns to build fat reserves necessary for migration and reproduction. Dogs may also capture and kill or injure snowy plovers or least terns. For example, at Surfside Beach, Orange County, California, a snowy plover was captured by a dog in September 2009, but was recovered, rehabilitated and released (Ryan and Hamilton 2009) and at Coal Oil Point, Santa Barbara County, California, one snowy plover chick was killed by an unleashed dog (Lafferty *et al.* 2006).

The IS/ND does not adequately define the baseline conditions of the project area including baseline recreational use, traffic, parking availability and distribution and abundance of wildlife resources. In addition, the IS/ND does not quantify the anticipated increase in public use at the Santa Ana River mouth that is likely to occur if this area is designated as a dog park. Understanding the baseline conditions and anticipated increase in recreational use that would result from designation as a dog park is essential to assessing the direct and indirect effects to wildlife resources, including listed species.

The proposed designation of this area as a dog park is likely to result in increased recreational use and dog presence. We remain concerned that increased recreational use, dog presence, and likely changes in foot traffic patterns (i.e., increased travel from the State Parks parking lots to the south side of the river channel, increased foot traffic up the river and into Santa Ana River estuary) will significantly impact the snowy plover and least tern. We recognize that the current proposal states that dogs may only be off-leash outside the least tern breeding season, but the anticipated increased presence of dogs—leashed or unleashed—in sensitive habitat would impact the least tern and snowy plover.

Specific Comments:

1. The IS/ND does not recognize that impacts to species protected by the Act and CESA, such as least tern and snowy plover, may be significant without mitigation. The Wildlife Agencies offer the following evidence as to why significant impacts have potential to occur as a result of the project ordinance change:
 - a. The IS/ND implies that dogs may have an impact on endangered and threatened species if allowed off leash during the nesting season (page 3, IS). Although the IS checklist concludes that the project's impact to biological resources would be less than significant, the impact analysis goes on to cite that biological-based avoidance measures would apply after project completion (i.e., dogs on leashes during the snowy plover and California least tern nesting seasons of March through September).
 - b. There are documented instances of dogs capturing western snowy plovers in Orange County (Surfside Beach; Ryan and Hamilton 2009). In Santa Barbara County a snowy plover chick was killed by an unleashed dog (Coal Oil Point; Lafferty *et al.* 2006). Even if a direct attack does not occur, the mere presence of dogs on the beach is harmful to snowy plovers, causing them to flush frequently, expend energy reserves unnecessarily, and spend less time foraging (Lafferty 2001). Because of this, in Los Angeles and Ventura Counties, the Service has recommended avoidance to reduce impacts to less than significant in cases where activity similar to that described in the project was proposed (Service 2016a.).

- c. Predation managers have documented three instances of take of least tern from domestic dogs in San Diego County. Most notably, a least tern was attacked and killed by a dog that dug under a chain link fence to access an enclosed colony similar to that at the project site (Bonesteel 2016, pers. comm.).

A ND is appropriate only when the lead agency assesses there is no substantial evidence that the proposed project may have a significant effect on the environment; a Mitigated Negative Declaration (MND), alternatively, applies when changes to the project or other mitigation measures are imposed such that all potentially significant effects are avoided or reduced to a level of insignificance. These factors, as well as failure to include an adequate environmental baseline within the ND (see Specific Comment 2 below), lead us to conclude that the avoidance and minimization measures provided in the project description of the ND should have been incorporated into mitigation monitoring or reporting program commitments (California Public Resources Code, Section 21081.6; CEQA Guidelines, Section 15074(d)), along with other mitigation measures that bring impacts below a level of significance, as required under CEQA. Based on the potential for the project to have a significant impact on biological resources, we conclude that an ND is not the appropriate environmental document for this project.

2. Section 3.1.4 of the ND (Biological Resources) provides inadequate information regarding the biological resources on site and is based on a single reconnaissance-level site visit conducted in September 2016. The information provided is inadequate to draw the “less than significant effect” determination presented. Information regarding the numbers of least terns and snowy plovers that use the site, location of snowy plover roosts, and measures that will be taken to ensure adequate separation between dogs and roosting snowy plovers are necessary. For example, in February 2015, 18 snowy plovers were recorded at adjacent Huntington State Beach, and in February 2016, 16 snowy plovers were recorded.

Figure 3 of the IS portrays an inaccurate representation of the Western Snowy Plover Critical Habitat Unit CA 47, the mouth of the Santa Ana River. As depicted in Figure 1, this unit lies immediately north of the river channel, and extends to the ocean. As noted on the figure, “shoreline data may not accurately represent the dynamic shoreline environment.” However, the habitat area is immediately adjacent to the water in the dynamic shoreline environment. The description of the boundaries of Snowy Plover Critical Habitat Unit 47, including a figure, should be included in the project’s final environmental document.

3. The presence of leashed and off-leash dogs and anticipated increase in recreational use would degrade occupied snowy plover habitat, including Critical Habitat Unit CA 47. As proposed, there would be no fence or barrier or intensified enforcement to preclude off-leash dogs from using snowy plover habitat. Snowy plover Critical Habitat includes, in accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, the physical and biological features essential to the conservation of the species which *may require special management considerations or protection*. Physical and biological features include, but are not limited to: (1) space for individual and population growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, and rearing (or development) of offspring; and (5) habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species. When the Service designated critical habitat, the

Service indicated that “For areas lacking a Federal nexus, the Service will work with beach and land managers to implement recovery actions that will avoid or offset adverse effects of disturbance” (Service 2012). Therefore, a discussion of how the project activities would or would not significantly impact this Critical Habitat Unit, including any applicable mitigation measures, should be included in the project’s environmental document.

4. Allowing off-leash dogs in and adjacent to snowy plover habitat is likely to harass and potentially harm individual snowy plovers. The presence of off-leash dogs within or adjacent to the areas where snowy plovers congregate to forage and roost will cause the birds to flee, resulting in increased stress and expenditure of energy. Repeated flushing may result in complete avoidance of important roosting and foraging sites by snowy plovers. In addition, off-leash dogs are likely to chase and occasionally catch, injure, or kill snowy plovers using beach habitat within and adjacent to the river. Actions that result in “take” of federally protected birds are prohibited under section 9 of the Act. Take is defined in Section 3(19) of the Act as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
5. The Wildlife Agencies are also concerned about enforcement of on- and off-leash activity. The IS/ND does not describe how leash restrictions proposed by the project will be enforced, or what penalties will result from failing to comply with the ordinances. Without appropriately robust enforcement, significant impacts to least tern and snowy plover may occur in the form of incidental take. As a State fully protected species, take cannot be authorized for least tern by the Department. A thorough discussion of enforcement, therefore, including history of enforcement on the site with regard to current ordinances, should be included in the project’s environmental document. A mitigation measure describing how enforcement will be implemented should also be included.
6. Measures to ensure that dog owners do not park at Huntington State Beach parking lot and walk adjacent to the Least Tern Colony en route to the proposed dog park are necessary. Section 3.1.16 of the IS (Transportation/Traffic) does not adequately address the availability for parking for a dog park, or the potential for increased use of the parking lot at Huntington State Beach. An inadequacy of parking adjacent to the southern side of the river (in Newport Beach) is likely to result in dog owners parking at Huntington State Beach parking areas. If dog owners park at Huntington State Beach, dog owners and dogs would walk immediately adjacent to the fenced Least Tern Colony or through the snowy plover Critical Habitat on the ocean-ward side of the Least Tern Colony to reach the proposed dog park area. Increased foot traffic and dog traffic would increase disturbance to least terns and snowy plovers. The project’s environmental document should include a thorough discussion of how these factors will impact biological resources, and incorporate mitigation measures that make those impacts less than significant.

In closing, the Wildlife Agencies re-iterate our November 21, 2016, recommendation that the proposal to designate the mouth of the Santa Ana River as a dog park and allow off-leash dogs be permanently abandoned so that the project avoids significant impacts to biological resources. Snowy plovers and least terns depend upon this area for food, resting, breeding, and chick rearing. We remain interested in working with you to increase awareness, incorporate good stewardship practices, and strengthen habitat conservation efforts on Orange County beaches, including the potential of developing a HCP to address recreational impacts and overall conservation of the least tern and snowy plover on Orange County beaches. We have recommended that “Special Protection Zones” be

developed on beaches in Los Angeles County [Service 2016 (enclosed)], and a similar approach would be appropriate on Orange County Beaches.

The Wildlife Agencies are available to assist the County in addressing our concerns. We request an opportunity to review and comment on any response that the County has to our comments and to receive notification of the forthcoming hearing date for the project (CEQA Guidelines; §15073(e)). If you have any questions regarding these comments, please contact Sandy Vissman of the Service at 760-431-9440, extension 274 or Jennifer Turner of the Department at 858-467-2717.

Sincerely,



Gail Sevens
Environmental Program Manager
California Department of Fish and Wildlife

for Karen A. Goebel
Assistant Field Supervisor
U.S. Fish and Wildlife Service

Enclosure

cc:

Andrew Willis, California Coastal Commission
Hans Sin, California Department of Fish and Wildlife
Greg Gauthier, California State Coastal Conservancy
Michelle Steel, Orange County Board of Supervisors
Scott Morgan, State Clearinghouse
Carolyn Lieberman, U.S. Fish and Wildlife Service
State Clearinghouse

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- Lafferty, K.D. 2001. Disturbance to wintering western snowy plovers. *Biological Conservation* 101 (2001) 315–325.
- Lafferty K.D., D. Goodman, C.P. Sandoval. 2006. Restoration of breeding by snowy plovers following protection from disturbance. *Biodivers. Conserv.* 15:2217–2230.
- Page, G.W. and W.D. Shuford. 2000. U.S. Shorebird Conservation Plan Southern Pacific Coast Regional Shorebird Plan Version 1.0. 66 pages.
- Ryan, T. 2016. Los Angeles & Orange County Western Snowy Plover Monthly Report for October 2016. 14 pages.
- Ryan, T.P. and R. Hamilton. 2009. Surfside Beach Sand Replenishment Project, Snowy Plover Monitoring, Final Report. Prepared by Ryan Ecological Consulting, Pasadena, CA. 19 pp + appendices.
- [Service] U.S. Fish and Wildlife Service. 2012. Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover; Final Rule. 77 Federal Register Volume 77, pages 36728-36869.
- [Service] U.S. Fish and Wildlife Service. 2016a. January 19, 2016 letter from Service to Jamie King, of California Department of Parks and Recreation, Angeles District. 08EVEN00-2015-CPA-0067. 6 pages.
- [Service] U.S. Fish and Wildlife Service. 2016b. November 21, 2016 letter from Service to Michelle Steel, of Orange County Board of Supervisors. FWS-OR-17B0026-17CPA0015. 2 pages.

Personal Communication

- Bonesteel, Brian. 2016. U.S. Department of Agriculture. Personal communication regarding predator management at California least tern and western snowy plover colonies in San Diego. On file, California Department of Fish and Wildlife R5 Office. Dated December 5, 2016.

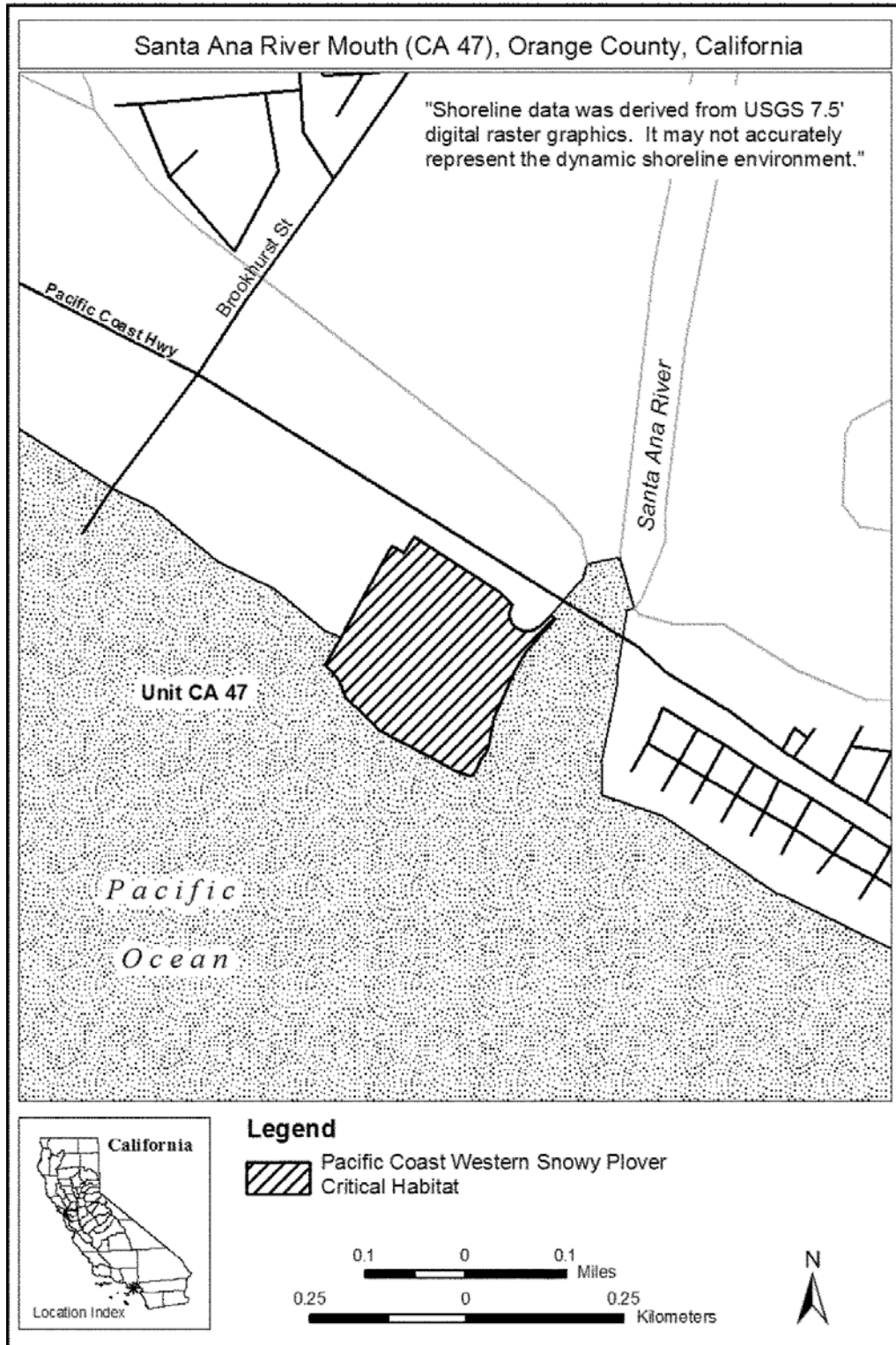


Figure 1. Western Snowy Plover Critical Habitat Unit CA 47

ENCLOSURE



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Ventura Fish and Wildlife Office
2493 Portola Road, Suite B
Ventura, California 93003

IN REPLY REFER TO:
08EVEN00-2015-CPA-0067

January 19, 2016

Jamie King, Environmental Scientist
California Department of Parks and Recreation, Angeles District
1925 Las Virgenes Road
Calabasas, California 91302

Subject: Protective Measures for Western Snowy Plovers on Beaches in Los Angeles
County, California

Dear Ms. King:

We, the U.S. Fish and Wildlife Service (Service), are contacting you and other beach administrators and stakeholders who have an interest in western snowy plovers (*Charadrius nivosus nivosus*), recreation, management, and operations on beaches in Los Angeles County. Western snowy plovers are known to winter on beaches in Los Angeles County and have attempted to nest at Surf Rider Beach in Malibu. After a series of discussions, meetings, and electronic mail exchanges with beach administrators, stakeholders, and western snowy plover experts, we have developed some measures we recommend to help protect this species on beaches in Los Angeles County and not interfere with continued recreation activities, and beach management operations.

The Service's responsibilities include administering the Endangered Species Act of 1973, as amended (Act), including sections 7, 9, and 10. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines take to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define harm to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. Harassment is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Exemptions to the prohibitions against take in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a Federal agency and may affect a listed species, the Federal agency must consult with the Service, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a Federal agency, but may result in the take of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act. To

qualify for the permit, a project proponent would need to submit an application to the Service together with a habitat conservation plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. A complete description of the requirements for a HCP can be found at 50 CFR 17.32 or our website (<http://www.fws.gov/ventura>).

The Pacific coast population of the western snowy plover was listed as threatened on March 5, 1993 (58 Federal Register (FR) 12864) under the authorities of the Act. Critical habitat for the species, which includes Zuma Beach (Unit CA 43), Malibu Beach (Unit CA 44), Santa Monica Beach (Subunit CA 45A), Dockweiler North (Subunit CA 45B), Dockweiler South (Subunit CA 45C), and Hermosa State Beach (Subunit 45D), was designated on June 19, 2012 (77 FR 36728).

Ryan et al. (2014) determined that western snowy plovers in Los Angeles County overwinter at seven primary spots. These overwintering sites are within critical habitat for the subspecies and include locations at Zuma Beach (near Lifeguard Tower 9 and Zuma Lagoon), Malibu Lagoon (Surfrider Beach), Santa Monica Beach, Dockweiler State Beach (near Lifeguard Tower 58), Hermosa Beach, and Cabrillo Beach. Ryan et al. (2014) also reported that western snowy plovers occasionally overwinter at sites at Leo Carrillo State Beach, Paradise Cove, Dan Blocker County Beach, Big Rock Beach, Will Rogers State Beach, Venice Beach, central Dockweiler State Beach, El Segundo Beach, Manhattan Beach, Redondo Beach, and Terminal 400 in Los Angeles Harbor.

Western snowy plovers exhibit strong fidelity to overwintering sites, returning to the same beaches every year after nesting elsewhere and migrating. Overwintering habitat is important for western snowy plovers and other migratory shorebirds because the time spent at these sites is when these birds build fat reserves for spring migration and the upcoming breeding season. Overwintering sites also provide connectivity for dispersal between breeding sites. Furthermore, with appropriate management, sites that currently support only wintering western snowy plovers have the potential to attract new nesting western snowy plovers with appropriate management. This has been demonstrated at Coal Oil Point, Santa Barbara County, and Hollywood Beach, Ventura County. Western snowy plovers also made a nesting attempt at Surfrider Beach, Malibu, Los Angeles County, after overwintering there. The importance of overwintering beaches to the western snowy plover tends to be overlooked and discounted when it comes to conservation of the subspecies, with more attention being given to known breeding locations. However, the Service acknowledged the importance of overwintering habitat for the western snowy plover by including such areas in the critical habitat designated for the subspecies in June 19, 2012 (77 FR 36728).

We understand that beaches in Los Angeles County, including the seven aforementioned overwintering sites, experience disturbance from mechanical raking (i.e., beach grooming) for removal of garbage, kelp, and other debris. Dugan et al. (2003) reports that over 160 kilometers of southern California sandy beaches are groomed regularly and that grooming decreases the species richness, abundance, and biomass of wrack-associated invertebrates that are likely important western snowy plover prey resources. Beach grooming also removes favorable nesting habitats and likely destroys nest scrapes and eggs.

Other activities occurring on Los Angeles County beaches that could lead to the disturbance of overwintering western snowy plovers include recreational use, vehicular traffic (e.g., lifeguard patrols), domestic animals (i.e., dogs), and predators attracted to human refuse (i.e., trash). Recreational activities such as sunbathing, swimming, dog walking, and sports, require support services such as police and lifeguard patrols, water quality monitoring, erosion control, and trash pick-up, which increase the presence of vehicles on the beach. Vehicles driven on the beach have struck and killed western snowy plovers, as well as other shorebirds, in Los Angeles County. For example, on January 9, 2007, a western snowy plover was found dead by volunteer monitors on Zuma Beach in a fresh tire track due to a vehicle strike. The only vehicle observed on the beach that morning was a Lifeguard truck conducting routine patrols. On, August 19, 2013, a California State Park monitor witnessed another western snowy plover being struck by a Lifeguard vehicle during routine patrols. In this particular case, the western snowy plover initially survived the strike with a crushed head and was transported to a rehab center in Los Angeles; however, the plover died from the injury. Other instances have also been documented of black-bellied plovers (*Pluvialis squatarola*) being struck by vehicles at Dockweiler State Beach on March 17, 2009, and November 24, 2009.

The mere presence of dogs on the beach is harmful to western snowy plovers, causing them to flush frequently, unnecessarily expending energy reserves, as well as spending less time foraging (Lafferty 2001). In addition to expending more energy evading dogs and spending less time foraging, there are instances when dogs actually capture and kill or injure western snowy plovers. For example, at Surfside Beach, Orange County, California, a western snowy plover was captured by a dog in September 2009, but was recovered, rehabilitated and released (Ryan and Hamilton 2009). Also at Coal Oil Point, Santa Barbara County, California, one western snowy plover chick was killed by an unleashed dog (Lafferty et al. 2006).

Because monitoring of overwintering western snowy plovers is extremely limited at some locations, if it occurs at all, we believe the impacts to western snowy plovers from beach grooming, recreational activities, vehicular traffic, dogs, and predators attracted to food and trash to beaches is much greater than what we observe. Furthermore, the discovery of a dead or injured western snowy plover is unlikely because the bodies of these birds are taken by scavengers or removed by the daily beach grooming activities.

Efforts to protect wintering western snowy plovers on Los Angeles County Beaches should be implemented within 500 feet of the central roost location. The following measures should be implemented from the arrival of the first returning western snowy plovers in July until they depart in April to May each year. Specifically, at Surfrider Beach in Malibu these measures should be implemented year-round for the entirety of California Department of Parks and Recreation (State Parks) property. For all beaches in Los Angeles County, these areas should be referred to as "Special Protection Zones" and managed and maintained differently from adjacent areas of beaches without roosting western snowy plovers.

Recommendations for Special Protection Zones.

Routine Operation of Vehicles and Heavy Machinery

- All drivers of vehicles and machinery that are operated on sections of beach where western snowy plovers occur should receive annual training per a Service approved program to avoid western snowy plovers. Training logs should be kept for all staff. State Parks staff should have successfully completed the Beach Driving Operations Training Course and annual refresher courses.
- Vehicles should avoid operating within Special Protection Zones, with the exception of activities such as essential patrols, trash pick-up and other activities agreed to by wildlife agencies as being essential. Vehicles simply transiting between points should not be allowed within these areas. For Surfrider Beach specifically, the following measures should be implemented: 1) All beach vehicle operation will be limited to emergency response activities (e.g., Code “R” responses; rescue preventions, including boat warnings; urgent law enforcement issues; and emergency medical service calls); and 2) If heavy equipment is needed onsite for emergency activities (boat rescue, structure protection) or other projects consistent with State Park’s mission, State Parks resource staff will be contacted for approval prior to accessing the site, and as needed, to provide monitoring for vehicles at all times when onsite.
- Visible markers, possibly with signage should be placed within 100 feet of the top of the beach slope and at the inland corners of the Special Protection Zones to remind vehicle operators of their presence. (This is not applicable at State Park’s section of Surfrider Beach because the entire area is within a Special Protection Zone).
- When essential activities must occur, vehicles should remain below a maximum 10 miles per hour speed limit and if western snowy plovers are encountered, the driver should back up at least 50 feet and/or alter their route to avoid flushing plovers.

Beach Maintenance and Clean up

- Regular sand grooming should be discontinued within Special Protection Zones. This activity both flushes the birds and removes important foraging resources (e.g. surf-cast kelp). These small areas should be cleaned by hand crews, trained in western snowy plover avoidance. If mechanical clean-up is necessary, it should be done in the presence of a qualified western snowy plover monitor who will locate the roosting plovers and ensure that machinery does not flush or disturb them.
- For Surfrider Beach, as agreed to by State Parks and Los Angeles County, sand grooming is not permitted at Surfrider Beach on State Park’s property. Wrack is to be left in place and trash removed by hand.

Recreational Activities

- “Refuge Areas” should be created using symbolic fencing or another barrier deemed suitable for this use during periods of high beach use at popular beaches in July, August, and September. These should be erected in a 300-foot diameter (or other configuration suitable for the beach, but roughly 300 feet long) around the traditional center of the plover’s roosting

areas on popular beaches such as Zuma, Dockweiler State Beach 58, and Hermosa Beach. Signage should be placed on the barrier such as has been done at Surfrider Beach in Malibu (which used signs made by local school children).

- Large-scale recreational activities such as triathlons, surf camps, beach volleyball camps, etc. should not be permitted within the Special Protection Zones. Docents should visit camps adjacent to the Special Protection Zones to talk to participants about western snowy plovers.
- Enforcement of existing regulations for off-leash dogs should be increased within the Zones.

Western Snowy Plover Awareness Training

Any staff personnel that operate motorized vehicles on Los Angeles County beaches should be required to attend annual training to increase their awareness of western snowy plovers. This training should include a short instructional tutorial that describes the biology of the western snowy plover, its habitat and life history, its legal status, and the consequences of violating the Act. The tutorial slide show (e.g., power point type presentation) or informational hand-out would be developed by the Service with input from your respective agencies, California Department of Fish and Wildlife, and the Los Angeles Audubon Society. In addition to the tutorial, staff should view a video provided by the Service that demonstrates safe driving techniques on beaches with sensitive wildlife. Staff members should be required to sign a statement acknowledging they have viewed and understand the tutorial and video. The signed statement would be kept on file with the respective agencies in the employee's record.

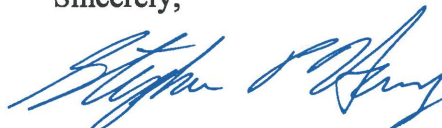
Although these measures should help reduce the potential for take of western snowy plovers, take, as defined earlier, is still likely to occur. And any take of listed species that would result from activities on your beaches would require either (a) exemption from the prohibitions against take in section 9 of the Act pursuant to section 7 or (b) take authorization pursuant to section 10(a)(1)(B) of the Act. Unless a Federal nexus exists that could cover the entire action area under an interagency consultation pursuant to section 7, we recommend that you seek an incidental take permit through the habitat conservation planning process, pursuant to section 10(a)(1)(B) of the Act.

With your cooperation, we can help conserve the western snowy plover on public beaches while still providing recreational opportunities for tourists and the people of Los Angeles County. We suggest revisiting these recommended measures at least annually to ensure they continue to benefit the western snowy plover on public beaches in Los Angeles County while minimizing the impact on residents and beachgoers; however, we are available any time to discuss this program.

As a reminder, this implementation of these recommended avoidance measures do not constitute authorization from us to take federally listed species in any manner. In the event that federally listed species are detected anywhere where activities could result in take, you should contact us to assess any potential effects to listed species and the possible need for other avoidance measures.

If you have any questions regarding the western snowy plover or other federally listed species on public beaches in Los Angeles County, please contact Chris Dellith or Bill Standley of my staff at (805) 644-1766, extensions 227 or 315, respectively.

Sincerely,



Stephen P. Henry
Field Supervisor

Identical Letter to:

Fernando Boiteux, Los Angeles County Fire Department
Charlotte Miyamoto, Los Angeles County Beaches and Harbors
Ioannice Lee, City of Los Angeles
Dean Kubani, City of Santa Monica

cc:

Jim Watkins, U.S. Fish and Wildlife Service, Arcata Office
Jonathan Snyder, U.S. Fish and Wildlife Service, Carlsbad Office
Erin Dean, U.S. Fish and Wildlife Service, Law Enforcement Office
Dan Swenson, U.S. Army Corps of Engineers
Nancy Frost, California Department of Fish and Wildlife
Stacey Vigallon, Los Angeles Audubon Society



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
Carlsbad Fish and Wildlife Office
2177 Salk Avenue, Suite 250
Carlsbad, California 92008



In Reply Refer To:
FWS-OR-17B0026-17CPA0015

November 21, 2016
Sent by Email

Supervisor Michelle Steel
Orange County Board of Supervisors
10 Civic Center Plaza
Santa Ana, California 92701

Subject: Off-leash Dogs at the Santa Ana River Mouth, Orange County, California

Dear Supervisor Steel,

We are contacting you regarding a recent proposal to allow off-leash dogs at the Santa Ana River mouth. The primary concern and mandate of the U.S. Fish and Wildlife Service (Service) is the protection of public fish and wildlife resources and their habitats. We have legal responsibility for the welfare of migratory birds, anadromous fish, and endangered animals and plants occurring in the United States. We are responsible for administering the Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d *et seq.*), and the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*).

The presence of dogs at the mouth of the Santa Ana River is likely to disturb federally endangered California least terns (*Sternula antillarum browni*; least tern) and federally threatened western snowy plover (Pacific Coast population DPS) [*Charadrius nivosus nivosus* (*C. alexandrinus* n.); snowy plover]. Both of these federally protected birds use the beach habitat within and immediately adjacent to the river. Least terns nest in protected beach habitat immediately to the north of the river mouth (Huntington Beach Least Tern Nesting Area); forage in the waters at the river mouth; and roost on the adjacent shoreline, dunes, and sandbars. Snowy plovers forage and roost on the shoreline, dunes, and sand bars adjacent to the river mouth.

In 2012, our agency designated an area immediately adjacent to the Santa Ana River mouth as *Western Snowy Plover Critical Habitat, Unit 47* (Service 2012) because the area supports habitat that is “...essential to the conservation of the species, which may require special management considerations or protection” (Act, 16 U.S.C. 1531 *et seq.*). Special management considerations for this site should include minimizing disturbance to the western snowy plover.

Allowing off-leashed dogs on the beach adjacent to least tern and snowy plover habitat is likely to disturb these species in several ways. The mere presence of off-leashed dogs on the beach will cause foraging or loafing birds to flee, resulting in increased stress and expenditure of energy. Repeated flushing may result in complete avoidance of these important foraging and loafing sites

by overwintering snowy plovers. In addition, off-leashed dogs are likely to chase and occasionally even catch, injure, or kill least terns or snowy plovers using beach habitat within and adjacent to the river. Actions that result in “take” of federally protected birds are prohibited under section 9 of the Act. Take is defined in Section 3(19) of the Act as “*harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.*”

Due to these concerns, we support the Orange County Board of Supervisors’ decision to remove consideration of allowing off-leashed dogs at the Santa Ana River mouth (October 25, 2016, agenda item 49) and recommend that the proposal be permanently abandoned. In addition, we are interested in coordinating with you to increase awareness, incorporate good stewardship practices, and strengthen habitat conservation efforts on Orange County beaches.

Shorebirds and seabirds that depend on our coastline, including the least tern and snowy plover, require areas where they can rest and obtain food (forage). Good stewardship and habitat conservation for shorebirds would include measures that reduce anthropogenic disturbances and assure food availability in shorebird/ seabird habitat. We are available to meet with appropriate Orange County personnel and can provide additional information about the biology and ecology of the least tern and snowy plover, location(s) of critical habitat units and breeding/wintering sites, or arrange a site visit to discuss the conservation needs of these species, including the potential value of developing a Habitat Conservation Plan (HCP) to address recreational impacts and overall conservation of the two species on Orange County beaches.

We appreciate your support and interest in the protection of the least tern and snowy plover and other federally protected species in Orange County. Please contact Senior Fish and Wildlife Biologist Sandy Vissman of this office at 760- 431-9440, extension 274, if you would like additional information, or if you would like to conduct a site visit.

Sincerely,

Karen A. Goebel
Assistant Field Supervisor

LITERATURE CITED

[Service] U.S. Fish and Wildlife Service. 2012. Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover. Federal Register/Vol. 77, No. 118 / Tuesday, June 19, 2012. Pages 36728-36869.

Exhibit G



May 31, 2019

Mr. Gregg Ramirez
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

SUBJECT: REVIEW OF DRAFT WESTERN SNOWY PLOVER MANAGEMENT PLAN FOR EAST BALBOA PENINSULA BEACHES NEWPORT BEACH, CALIFORNIA CDP APPLICATION NOS. 5-17-0465 AND 5-17-0515

Dear Mr. Ramirez,

On May 20, 2019, the City of Newport Beach (City) held an open house seeking public input into a revised Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches, Newport Beach, California ("revised draft plan"), prepared by Glenn Lukos Associates. This letter, written by Robert A. Hamilton, President of Hamilton Biological, Inc., provides independent technical review of the revised draft plan.

APPLICABLE COASTAL ACT REGULATIONS

The Western Snowy Plover (WSP) is one of several native species associated with beaches and dunes that receive formal protection under the City's certified Local Coastal Program (LCP). The LCP consists of a Coastal Land Use Plan (CLUP) and an Implementation Plan.

Section 30107.5 of California Coastal Act defines Environmentally Sensitive Habitat Areas (ESHA's) as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

Section 30240 of the Coastal Act restricts development in any ESHA to resource dependent uses, and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA.

Page 4.3 of the CLUP states:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. **These include southern dune scrub...** [emphasis added]

Page 4.42 of the CLUP states:

In Newport Beach, southern coastal foredune habitat extends southwest along the ocean side of the Balboa Peninsula from 10th Street to the tip of the peninsula.

Policy 4.1.1-10, on page 4-7 of the CLUP, provides direction for complying with Section 30240 of the Coastal Act:

Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. **Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible.** Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance. [emphasis added]

To date, the City has made no effort to (a) identify all beach/dune ESHA; (b) establish the required minimum 50-foot buffer around all ESHA; (c) remove unpermitted development in beach/dune ESHA (or obtain an after-the-fact permit); or (d) develop City-wide beach/dune management policies designed to avoid future loss or degradation of ESHA. As reviewed below, the City's failure to implement its certified LCP in beach/dune areas has led to long-term, ongoing degradation of dune ESHA, and harassment (i.e., "take") of WSP's in traditional wintering areas, in violation of Section 30240 of the Coastal Act (and the federal Endangered Species Act, as discussed subsequently).

CURRENT/ONGOING VIOLATIONS OF THE COASTAL ACT

Unpermitted Fencing/Paracord Barrier

Where the City did provide protective fencing to a limited area of dunes – between D and E Streets on the Balboa Peninsula – the fence itself lacked a Coastal Development Permit (CDP), was established within ESHA and/or the required ESHA buffer, and its dimensions may have been smaller than optimal for the WSP (the species targeted for protection). At the most recent open house, on May 20, 2019, the City reported having removed some sections of fencing and replacing it with a paracord barrier. These actions, like so many others taken by the City in areas of dune ESHA, were completed without benefit of formal environmental analysis or the required Coastal Development Permit, and therefore violated the Coastal Act.

Unpermitted Encroachments into Beach/Dune ESHA

Pages 4.42-4.43 of the LCP state:

Ornamental and non-native species, likely introduced from the adjacent residences, dominate much of the southern coastal foredune habitat. Numerous residences use the beach area as an extension of their backyards. Some residents have planted and irrigated the ornamental species, which have replaced native species in these areas. Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.

This encroachment of private landscaping into public ESHA represents an ongoing violation of the Coastal Act. Policy 4.5.1-1, in the certified LCP, suggests that this encroachment is offset by “the removal of exotic vegetation and the restoration of native vegetation in dune habitat,” but impacts to ESHA cannot be mitigated by restoring a different area (see *Bolsa Chica Land Trust v. Superior Court*). Furthermore, no such dune restoration has occurred in a systematic way commensurate with the level of impact from numerous encroachments upon dune habitats in Newport Beach.

Unpermitted encroachment has continued and expanded, impacting substantial areas of beach/dune ESHA. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers “to prevent impacts that would significantly degrade the adjacent ESHA.” In practice, the City does not do this, and thus violates its own certified LCP and the Coastal Act.

Unpermitted Concrete Walkways

During the past two decades, the City has constructed 22 concrete walkways extending from the ends of streets south across the beach. Many of these impact traditional WSP wintering locations, coastal dune ESHA, and/or required ESHA buffers. See Exhibits 1 and 2, on the following page.



Exhibit 1, showing in dark blue the locations of 14 walkways that extend through dune and/or beach habitats, between 18th Street and B Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.



Exhibit 2, showing in dark blue the locations of eight walkways that extend through dune and/or beach habitats between C Street and M Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.

It appears that none of the 22 walkways built by the City was subjected to any formal environmental review, public review, or approval by the CCC through the CDP application process. Section 30001 of the Coastal Act states:

- a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.
- b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.
- c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.
- d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.

Building concrete walkways through beach/dune ESHA and ESHA buffer, and into traditional WSP wintering grounds, without any form of environmental review, violates these basic tenets of carefully protecting the ecological balance of the coastal zone.

City representatives state that the walkways were built to increase accessibility to the ocean for disabled people, and have suggested that none of the walkways could be removed without violating the Americans with Disabilities Act. It is untrue that the City is entitled to undertake construction through ESHA and into traditional WSP wintering areas, without environmental review or permits, simply by invoking the Americans with Disabilities Act.

Section 30200(b) of the Coastal Act states:

Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, Section 30007.5 shall be utilized to resolve the conflict and the resolution of such conflicts shall be supported by appropriate findings setting forth the basis for the resolution of identified policy conflicts.

Section 30007.5 of the Coastal Act states:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner that on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

For Coastal Act compliance, “balancing” or “conflict resolution” requires that conflicts may be resolved in a manner which on balance is the most protective of significant coastal resources. To establish a policy conflict and approve a project based on conflict resolution, the following findings are necessary:

- The project is inconsistent with at least one Chapter 3 policy of the Coastal Act (e.g., unpermitted impacts to environmentally sensitive habitat areas, wetlands, or agricultural resources).
- Denial or modification of the project to eliminate the policy inconsistency would adversely affect other coastal resources that the Coastal Act requires to be protected or enhanced.
- There are no feasible alternatives that could achieve project objectives without violating a Chapter 3 policy of the Coastal Act.
- The project’s adverse impacts are minimized and mitigated to the maximum extent feasible.

Subjecting the 22 walkways to the required analysis would likely result in removal of some of them. This is because the overall goal of providing adequate public access to the ocean in Newport Beach could be achieved without impacting ESHA, ESHA buffers, or facilitating human incursion into traditional WSP wintering or breeding areas.

Consider the walkway that extends more than 300 feet south from the end of E Street. This walkway, constructed in fall 2014, was specifically identified by Tom Ryan and colleagues¹ as being potentially deleterious to WSP’s that traditionally winter in that area, and that nested there in 2008, 2009, and 2013². Page 15 of the 2017 WSP report stated:

Declines were detected between 2014 and 2017 at Huntington State Beach and the Balboa Peninsula (Table 2). We observed the largest decline on the Balboa Peninsula (Table 2) following the installation of a walkway on the beach that was placed within the area traditionally used by roosting plovers.

Page 27 stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has

¹ Ryan, T, S Vigallon, L Plauzoles, C Egger, S Sheakley, R Griswold, and B Eastman. 2017. *The Western Snowy Plover in Los Angeles and Orange Counties, California: September 2014 to February 2017*. Report dated February 24, 2017, prepared for State of California, Department of Fish and Wildlife, San Diego, CA.

² Ryan, TP, S Vigallon, DS Cooper, C Delith, K Johnston, and L Nguyen. 2019. *Return of beach-nesting Snowy Plovers to Los Angeles County following a 68-year absence*. *Western Birds* 50:16–25. [https://www.westernfieldornithologists.org/archive/V50/50\(1\)-p016-p025.pdf](https://www.westernfieldornithologists.org/archive/V50/50(1)-p016-p025.pdf)

continued into 2015-16. Additionally, this beach became narrower during the fall months due to beach erosion from late summer/fall hurricanes in the central Eastern Pacific. This is a broad sandy beach, with residential homes backing it. It is very popular with beachgoers during the summer months. It also supports a 1.24 hectare dune restoration area where a pair of plovers has nested in recent years. This is the only known beach nesting Snowy Plover pair on the mainland in LAC or OC, although they did not nest here in 2014, 2015 or 2016.

The City cooperates with Mr. Ryan and his research colleagues, and receives regular reports on the status of WSP in the City. Multiple reports identify the E Street walkway as a potentially important contributor to disturbance of plovers that traditionally roost in the affected area, and that have nested there three times in the past 12 years (but not since the E Street walkway was put in). The most recent report covering 2018³ (not cited in the revised draft plan) shows a rebounding of WSP numbers wintering on the Balboa Peninsula, but with a shift away from the E Street area and toward the M Street area.

Removal and Degradation of Dune ESHA, Balboa Peninsula

Review of aerial imagery shows that the limits of dune topography and vegetation have generally remained stable for two decades. As shown in Exhibits 3 and 4, on the following page, however, the City lost at least one area of dune ESHA between October 2007 and December 2017. I first reported on this situation in a letter to the City and the CCC dated September 21, 2017, and Steve Ray and I have testified about this continuing situation at multiple CCC hearings. In the intervening 20 months, neither the City nor the CCC has taken any follow-up action to correct this Coastal Act violation.

Degradation of Dune/Estuarine ESHA at River Jetties

The degradation of dune and estuarine habitat has been striking near the mouth of the Santa Ana River. The dunes in this area are formally designated as ESHA. In a letter to area residents dated October 15, 2014 (Subject: "Final Monitoring Plan – Compliance with Consent Cease and Desist Order CCC- 06-CD-01 and Consent Restoration Order CCC-06-RO-01"), Deputy Chief of Enforcement Aaron McClendon described restoration of dune ESHA in this area as "one of the most successful we have seen" and lauded the local residents for having "turned a difficult situation into a very positive outcome, enhancing some of the rarest coastal habitats on the southern California coast." At that point, under the Coastal Act, the City became legally responsible for managing the restored dune ESHA near the river mouth consistent with its certified LCP. Having made no serious effort to do so, dune ESHA in this area has become visibly degraded. Non-native, invasive plant species are becoming established in this area, and sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people, dogs, and ultralight take offs and landings.

³ Ryan Ecological Consulting. 2019. Western Snowy Plover and California Least Tern in Orange and Los Angeles Counties, California; January to December 2018. Report dated January 31, 2019, prepared for San Diego Zoo Global, Escondido, CA.



Exhibit 3. Aerial image taken October 22, 2007, showing in red an apparent dune between G and I Streets on the Balboa Peninsula, with a limited area of non-native iceplant near the northern edge of the indicated area. Source: Google Earth Pro.



Exhibit 4. Aerial image taken December 3, 2017, showing in red the same area, between G and I Streets on the Balboa Peninsula. Over the course of a decade, dune ESHA was removed and non-native iceplant was allowed to expand substantially. Source: Google Earth Pro.

Section 7.04.020 of the City of Newport Beach Municipal Code requires all dogs to be leashed at all times, and Section 7.04.030 prohibits dogs on beaches from 10:00 a.m. to 4:30 p.m. year-round and requires that owners clean up their dogs' feces.

The County's web page, <http://www.ocpetinfo.com/services/petlaws>, summarizes relevant parts of the Orange County Codified Ordinance (OCCO) as follows:

4-1-45: "No person owning or having charge, care, custody, or control of any dog shall cause or permit, either willfully or through failure to exercise due care or control, any such dog to be upon any public property unless such dog be restrained by a substantial chain, or leash not exceeding six (6) feet in length, and is under the charge of a person competent to exercise care, custody, and control over such dog." You must keep your dog leashed anytime your dog is off your property. Your dog must be on a leash no longer than six (6) feet in length and in the care of a competent adult. There are designated "dog parks" throughout Orange County that lawfully allow the absence of a leash.

4-1-46: "No person having the charge of any dog, except a guide dog or service dog, shall permit said dog to be under any circumstances within public school property, certain county parks, or any public beach". It is unlawful to be on any public school property with your dog. Setting your dog loose to play, even within a fenced area, at a public school is a direct violation of this ordinance. See OC Parks for county parks that permit dogs that are leashed.

When both the City and the County of Orange (County) decided, several years ago, to effectively stop enforcing these local ordinances near the river mouth, local dog-owners responded by turning this ecologically valuable area – an estuary located between dune ESHA and critical habitat for the WSP and California Least Tern (also clearly ESHA) – into a *de facto* unleashed dog beach. They have been followed by pilots of "ultralights," who frequently use the river estuary and restored dune area as places to take off and land their exceedingly noisy, gas-powered aircraft.

In 2016, the County attempted to formally designate the Santa Ana River estuary as a "dog beach" through preparation of an Initial Study/Negative Declaration (IS/ND), but received extensive substantive comments submitted by the CCC, USFWS, several respected conservation organizations, and local residents, demonstrating the destructiveness of this policy in an environmentally sensitive area that many public and private groups have spent millions of dollars and thousands of hours restoring and maintaining for its ecological values. In response, the County tabled consideration of the IS/ND, conducted multiple on-site media events to promote the newly created "dog beach," and continued allowing the illegal use of the river estuary. Years later, large numbers of people continue to bring off-leash dogs to the river estuary.

On June 4, 2018, an on-site meeting was convened at River Jetties, attended by you, other City representatives, County representatives including Shane Silsby and Colby Cataldi, enforcement officer Jordan Sanchez of the CCC, wildlife biologist Sandy Vissman of the USFWS, Penny Elia representing the Sierra Club OC Conservation Committee, Susan Sheakley representing Sea & Sage Audubon, attorney Mark Massara, and Mr. Hamilton. At the meeting, Ms. Vissman reiterated her standing request that the City and County establish an "avian protection area" or "special protection zone"

encompassing the ecologically important river estuary and adjacent dune habitats as we stood next to dune ESHA and all witnessed it being trampled by off-leash dogs and their owners. Also in our presence, an ultralight operator began unpacking his equipment from his truck.

At the meeting, representatives of the City and County once again acknowledged these problems, but rather than attempting to work toward a solution that everyone could live with, including the ESHA and listed species, you and Mr. Silsby pointed out that local elected representatives consider the prospect of prohibiting dogs from the area in and around the river estuary – in accordance with both City and County ordinances, as well as the Coastal Act and the state and federal Endangered Species Acts – to be politically unacceptable, because dog owners represent a more potent lobbying force compared with advocates of environmental protection in compliance with local, state, and federal laws.

On December 3, 2018, Principal Engineer Jim Volz of OC Public Works and three members of his staff, met with Ms. Elia of the Sierra Club, as well as representatives of Sea & Sage Audubon and the Surfrider Foundation. According to Ms. Elia (pers. comm.), Mr. Volz assured the environmental groups that signage intended to keep the public and dogs out of the Santa Ana River estuary would be installed within 60 days. Mr. Volz stated that this signage would be covered by a Coastal Development Permit (CDP) that he would work directly with CCC staff to expedite. The signage was never installed.

Most recently, on May 23, 2019, the County responded to a Public Records Act Request from Ms. Elia by claiming that the County's jurisdiction at the mouth of the Santa Ana River is much more limited than had been previously disclosed. A map purporting to show County jurisdiction does not align with the project area for the County's 2016 IS/ND for the "dog beach" (which was never certified), and no representatives of the County raised this as an issue during either the site meeting on June 4, 2018, or the meeting with OC Public Works on December 3, 2018.

Regardless of this jurisdictional confusion, the bottom line remains that sensitive ecological resources within and adjacent to the Santa Ana River estuary are not receiving protections called for under the City's certified LCP and under the Coastal Act. What has not been discussed or considered, to date, is that the City and County manage these sensitive resources and sovereign lands on behalf of the California State Lands Commission (CSLC), which owns the land but does not appear to have been integrally involved in shaping recent land-use decisions in this ecologically important area. Given the range of land-use conflicts described herein, and the lack of a coherent response from the City, County, and CCC, the signatories to this letter intend to involve the CSLC moving forward.

ALTERNATIVE SITES FOR DOG BEACHES

Managing City beaches and dunes consistent with the City's certified LCP involves balancing environmental protection requirements against the reasonable expectations of

tourists and local beachgoers. Any successful comprehensive planning approach will need to identify extensive areas that can be managed for the exclusive use of humans and their pets. Fortunately, Newport Beach, with its miles of beaches that do not support dunes, traditional WSP roosting or nesting areas, or other sensitive biological resources, should be able to achieve this balance.

Starting in 2017, Hamilton Biological has been recommending that the City consider two alternative locations that could work well as dog beaches. Both are located near large parking lots, and neither appears to conflict with provisions of the City's LCP or those of the Coastal Act. One potentially suitable area is at Corona del Mar State Beach (Big Corona Beach), the eastern half of which appears to be well suited to serving as a dog beach, and the other is the expanse of beach near the base of Newport Pier. Please see Exhibits 5 and 6, below.

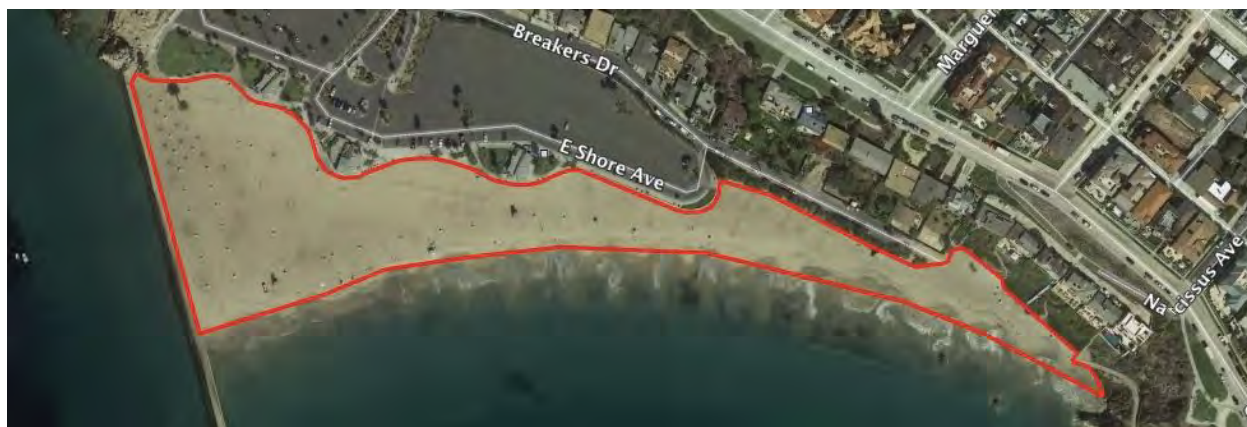


Exhibit 5, showing Corona del Mar State Beach (Big Corona Beach). Located on the eastern side of Newport Bay, the eastern part of this beach appears well-suited for designation as a dog beach. The area has ample parking and lacks potentially sensitive biological resources. Source: Google Earth Pro.



Exhibit 6, showing the beach near Newport Pier. This area also appears to be well-suited for use as a dog beach, with ample parking and low ecological sensitivity. Source: Google Earth Pro.

Regardless of whether either of the identified areas is ultimately determined to be suitable for designation as a dog beach, Newport Beach has enough sandy beaches not located within or adjacent to ESHA to accommodate people and their pets without illegally degrading any areas that satisfy ESHA criteria under the terms of the City's LCP and the Coastal Act.

COMPLIANCE WITH THE FEDERAL ENDANGERED SPECIES ACT

As a federally listed threatened species, the WSP is covered under the Endangered Species Act of 1973. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define "harm" to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. "Harassment" is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

Exemptions to the prohibitions against "take" in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a federal agency and may affect a listed species, the federal agency must consult with the USFWS, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a federal agency, but may result in the "take" of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act.

To qualify for an incidental take permit, a project proponent must submit an application to the USFWS together with a Habitat Conservation Plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. At the City's open house on September 14, 2017, Sandy Vissman of the USFWS suggested that preparation of an HCP would be appropriate to cover incidental "take" of WSP due to ongoing activities and routine beach and dune management operations undertaken by the City on the Balboa Peninsula. Actions requiring a permit may include beach driving, mechanical raking (beach grooming), recreational use, presence of dogs or other domestic animals, and human refuse that attracts predators of the WSP.

THE NEED FOR A COMPREHENSIVE MANAGEMENT PLAN

In a letter to the City dated September 11, 2017 (attached), Andrew Willis of Coastal staff requested that the City prepare a "comprehensive" plan to address beach/dune/WSP management issues on all City beaches, from River Jetties to the end of the Balboa Peninsula (approximately 5.2 miles of beach and dune habitat). The

geographic scope of the revised draft plan, however, is restricted to the part of the Balboa Peninsula that the USFWS designates as critical habitat for the WSP, plus a limited stretch of beach to the southeast (approximately 1.1 mile of beach and dune habitat, representing 21 percent of the total).

Hamilton Biological, Inc., has discussed the importance of comprehensive management of the City's beach/dune ESHA in various venues, including a letter to Mr. Dave Kiff of the City dated September 11, 2017; multiple presentations to the California Coastal Commission (CCC) during hearings in 2017 and 2018; and a letter dated July 25, 2018, that was co-signed by Dan Silver (Endangered Habitats League), Conner Everts (Southern California Watershed Alliance), Marko Popovich (Still Protecting Our Newport), Celia Kutcher (California Native Plant Society, Orange County), Mike Wellborn (Friends of Harbors, Beaches and Parks), Garry Brown (Orange County Coastkeeper), Michelle Gastil (Sierra Club Banning Ranch Task Force), Penny Elia (Sierra Club OC Conservation Committee), Terry Welsh (Banning Ranch Conservancy), Andrea Jones (Audubon California), Susan Sheakley and Scott Thomas (Sea & Sage Audubon), Travis Longcore (Los Angeles Audubon), and Jack Eidt (Wild Heritage Planners).

Presentations to the CCC addressing many of the same issues have been made by Sea & Sage Audubon, the Orange County chapter of the California Native Plant Society, the Sierra Club OC Conservation Committee, the Banning Ranch Conservancy, OC Habitats, Wild Heritage Planners, Surfrider Foundation, SPON, and attorney Mark Massara.

Page 3 of the revised draft plan attempts to justify the City's ongoing refusal to prepare a comprehensive plan:

The City recognizes the importance of incorporating conservation measures that will maximize the protection for wintering WSP at each of the wintering sites across the City's beaches. This Plan provides the detailed measures that once approved and adopted can be used as the framework for other areas in the City where site specific protective measures for WSP require formal establishment and implementation. As discussed throughout this Plan, various departments within the City of Newport Beach already incorporate actions during day-to-day operations aimed at WSP protection; however, additional measures, based on site specific conditions may be warranted. This Plan provides an important milestone in achieving maximum protection for WSP throughout the City, through implementation of an adaptive management approach.

This confirmation by the City – that additional beach/dune ESHA's "require formal establishment and implementation" of "site specific protective measures" – represents a small step forward. Unfortunately, the revised draft plan does not (a) identify the specific ESHA's that do not currently receive protection, or (b) explain the City's rationale for putting off protecting certain ESHA's to an unspecified date in the future. An adequate resource management plan for beach/dune areas must include several elements:

1. Mapping and descriptions of all beach/dune ESHA in the City.
2. Objective disclosure and discussion of all apparent violations of the LCP and Coastal Act in beach and dune areas.

3. Plans for protecting each area of beach/dune ESHA in the City consistent with requirements of the City's certified LCP.
4. Timing for implementing all required management actions (the Coastal Act does not allow for protecting some ESHA now and other ESHA at an unspecified later date).

RELEVANT EXAMPLES OF CONSERVATION PLANNING

For reasons discussed herein, achieving compliance with the Coastal Act and federal Endangered Species Act in Newport Beach will require a comprehensive and science-based approach to beach and dune management. *Areas that qualify as ESHA, ESHA buffer, or that serve as traditional roosting or nesting habitat for the federally threatened WSP must be managed in accordance with the applicable laws.*

With regard to the Coastal Act, CCC staff has already provided the City with a blueprint for achieving compliance in the form of the comprehensive beach/dune management plan that the City of Pacifica developed in 2014 to obtain a CDP for installation of 1,300 feet of year-round fencing, 930 feet of seasonal fencing, and associated interpretive signs at Pacifica State Beach. During a meeting on May 19, 2017, CCC staff specifically directed the City to use the City of Pacifica management plan as a template for what is expected in Newport Beach. Minutes of this meeting were placed on file by former City Manager Dave Kiff.

With regard to the federal Endangered Species Act, the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010, a document available online at the following address:

https://www.fws.gov/oregonfwo/FieldOffices/Newport/WesternSnowyPlover/Documents/WSP-HCP_08182010.pdf

Hamilton Biological has recommended that the City and its consultants review the Pacifica and Oregon plans as useful starting points upon which to develop a comprehensive dune/beach management plan that would comply with relevant precedents in the application of the Coastal Act and federal Endangered Species Act. The City has so far rejected this recommendation. The following section provides Mr. Hamilton's peer-review comments on the revised draft plan prepared by Glenn Lukos Associates.

REVIEW OF THE REVISED DRAFT PLAN

As with the original draft plan (Dudek, June 2018), the revised draft plan by Glenn Lukos Associates fails to implement the request made by Andrew Willis of the CCC staff for a “comprehensive” plan addressing beach/dune ESHA and WSP management issues on all City beaches. As discussed previously, the City does not adequately protect the restored dune ESHA near River Jetties, and both the City and the County refuse to take steps to limit harassment of listed species in the Santa Ana River estuary (both the WSP and the California Least Tern nested near the river mouth in 2018).

The revised draft plan, like the previous iteration, fails to incorporate relevant information from researchers who have spent many years monitoring the status of the WSP in Newport Beach and elsewhere in the region. Both the 2018 annual report⁴ and an even more recent publication on the resumption of nesting by WSP’s in Los Angeles County⁵ include relevant information on the species’ recent status in Orange County. That neither report is cited in the revised draft plan demonstrates the inadequacy of the research that went into the plan’s preparation.

Section 1.1, Site Description

Page 2 of the revised draft plan accurately characterizes coastal dune habitat:

The coastal dune ecosystem is one of the most sensitive and declining habitat types on the West Coast and has historically been impacted by development, with continuing impacts from invasive, non-native species.

The plan should describe the WSP’s place within the coastal dune ecosystem and then discuss specific protections for coastal dune ESHA contained in the City’s certified LCP (see page 2 of this letter). Instead, the plan discusses WSP Critical Habitat, failing to point out that Critical Habitat is a subset of beach/dune ESHA already granted strong protections – including freedom from construction of concrete walkways and provision of minimum 50-foot buffers – under the City’s certified LCP and under the Coastal Act. The City’s continued resistance to incorporating its own LCP protections into the WSP management plan signals the City’s intention to continue ignoring those protections. Such a bad-faith approach to resource management and land-use regulation violates the Coastal Act’s most basic tenets.

⁴ Ryan Ecological Consulting. 2019. Western Snowy Plover and California Least Tern in Orange and Los Angeles Counties, California; January to December 2018. Report dated January 31, 2019, prepared for San Diego Zoo Global, Escondido, CA.

⁵ Ryan, TP, S Vigallon, DS Cooper, C Delith, K Johnston, and L Nguyen. 2019. *Return of beach-nesting Snowy Plovers to Los Angeles County following a 68-year absence*. *Western Birds* 50:16–25. [https://www.westernfieldornithologists.org/archive/V50/50\(1\)-p016-p025.pdf](https://www.westernfieldornithologists.org/archive/V50/50(1)-p016-p025.pdf)

Section 1.1.1, Critical Habitat Area

Page 3 of the revised draft plan describes how the designation of Critical Habitat has no effect on public access, and mentions several concrete walkways that the City has built within Critical Habitat:

The critical habitat designation does not affect accessibility by the public and in this regard would be the same as other stretches of beach on Balboa Peninsula. The ocean-front boardwalk extends along the critical habitat area from B Street and ends approximately 200 southeast of E Street. Six street end entrances are located from A Street to G Street. In addition, C, D, E, F and G Streets each have an asphalt concrete pathway that extend various lengths from the intersection of the street entrance and boardwalk, toward the ocean.

The concrete walkways at the ends of C, D, E, F, and G Streets – like 17 others shown in Exhibits 1 and 2 on page 4 of this letter – were built without the required Coastal Development Permits; see pages 3–7 of this letter. Significantly, Ryan et al. (2017) concluded that unpermitted construction of the E Street walkway in 2014 has probably contributed to reduced wintering of WSP in that area. Per the most recent annual report (Ryan Ecological Consulting 2019), when WSP wintering numbers rebounded in 2017/2018 the main roosting area had shifted to the southeast, outside of the designated Critical Habitat area. The WSP management plan must address problems stemming from unpermitted development in beach/dune ESHA rather than treating the walkways as legitimate, permissible, features of the existing setting.

Page 3 of the revised draft plan states, without evidence, “the current potential for nesting is low.” Page 3 also states:

The City recognizes the importance of incorporating conservation measures that will maximize the protection for *wintering* WSP at each of the *wintering* sites across the City’s beaches. [emphasis added]

The authors of the revised draft plan fail to mention that WSP *nested* on the Balboa Peninsula in 2008, 2009, and 2013 (but have not done so subsequently, following construction of the E Street walkway). Also highly relevant, but not mentioned in the revised draft plan, is the WSP’s recent recolonization of long-dormant nesting grounds at Malibu Lagoon State Beach, Santa Monica State Beach, Dockweiler State Beach, and the mouth of the Santa Ana River, on the Huntington Beach side (Ryan et al. 2019). Instead of identifying factors that could lead to similar success on the Balboa Peninsula, the revised draft plan treats resumption of nesting as an unrealistic goal. Ryan and colleagues (2019) identified several specific management actions that apparently increased the suitability of the above-listed sites for nesting plovers, thereby facilitating recolonization. As summarized in the abstract of their paper:

Plovers selected sites within or adjacent to areas protected by fenced enclosures. We protected all nests with mini-exclosures. We suggest that this recolonization was due to the combination of protection of potential nesting sites, protection of individual nests, and exceptional recent productivity at other nesting sites in southern California. The fenced enclosures provided essential protection from vehicles and encouraged accumulation of beach wrack around the nests and feeding areas. Additionally, once nests were

established, the placement of exclosures provided essential protection from native predators and pet and feral dogs and cats. Protection with both fencing and exclosures, combined with management to minimize disturbance, will be essential for maintaining this new nesting population.

If the WSP were to remain a non-breeding species on the Balboa Peninsula, in spite of a well-conceived management plan that implements all feasible means known to increase the suitability of beach/dune habitats for nesting plovers, the City could not be faulted. **This is not the approach being taken.** By setting its conservation goals unreasonably low, the City is primed to claim its plan a success based on simply maintaining the status quo of plovers continuing to winter on the Balboa Peninsula – an area where they nested historically and in the recent past. **This is not acceptable.**

1.2.2, US Fish & Wildlife Service: Western Snowy Plover Recovery Plan

The revised draft plan fails to disclose all of the relevant management goals contained in the 2007 Recovery Plan for the WSP. In addition to increasing the breeding population in Recovery Unit 6 to 500 individuals, the Recovery Plan calls for protecting wintering plovers from wrack removal, vehicles, pets, and human-related disturbance.

1.2.3, California Coastal Act

Page 6 of the revised draft plan claims, without basis, that the plan was “prepared in a manner that is fully consistent with the provisions of the City’s LCP.” As pages 1–10 of this letter explain, the City’s failure to implement its certified LCP in beach/dune areas has led to long-term, ongoing loss and degradation of dune ESHA that comprises suitable habitat for the WSP. A compliant WSP management plan would (a) identify all beach/dune ESHA; (b) establish the required minimum 50-foot buffer around all ESHA; (c) remove unpermitted development in beach/dune ESHA (or obtain an after-the-fact permit, if warranted, as determined via thorough environmental review); and (d) develop City-wide beach/dune management policies designed to avoid future loss or degradation of ESHA. The revised draft plan falls far short of this standard.

1.2.5, City of Newport Beach: Coastal Land Use Plan

Page 7 of the revised draft plan states:

The CLUP includes policies for the protection of environmentally sensitive habitat areas (ESHA). ESHAs are areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments. Because the area covered by the critical habitat designation supports roosting habitat for a threatened species, the federally designated critical habitat area meets the definition of ESHA in the City’s CLUP.

This is an erroneous reading of the CLUP. As discussed on page 2 of this letter, (a) the City’s CLUP identifies as ESHA *all* areas of southern dune scrub, not only those that overlap with designated Critical Habitat; and (b) Policy 4.1.1-10, on page 4-7 of the CLUP, states that all terrestrial ESHA shall have a minimum buffer width of 50 feet

wherever possible. Failure of the City to fulfill these requirements over a period of many years has led to loss and degradation of large areas of beach/dune ESHA.

2.3, WSP Population Status on Balboa Peninsula

The Balboa Peninsula lies well within the WSP's breeding range, and was historically known as a regular nesting location for the species. As the area became more heavily developed in recent decades, and in the absence of effective management of dune habitat, the peninsula became mainly a wintering site. This does not mean that the site lacks suitable nesting habitat, and in fact the species nested on the Balboa Peninsula in 2008, 2009, and 2013 (Ryan et al. 2009). As discussed on page 16 of this letter, WSP's have recently recolonized long-dormant nesting grounds at multiple sites in Orange and Los Angeles Counties, responding to specific management actions that apparently increased the suitability of the above-listed sites for nesting plovers. Implementation of similar management actions on the Balboa Peninsula could lead to the same result. Thus, the assertion on page 9 of the revised draft report that the "USFWS has concluded that the Balboa Peninsula is used by WSP for wintering rather than nesting" represents a misleading oversimplification.

3.1, Habitat

Page 11 of the revised draft plan states:

The vegetated areas of dunes are separated by paths and walkways are intended to provide for directed or controlled beach access that limits impacts to the dunes.

The intention of establishing numerous unpermitted concrete walkways across beach and dune areas may have been to limit impacts to the dunes, but, because the walkways were never subjected to required environmental review under the Coastal Development Permitting process, any such suppositions lack substance. A more effective way to limit human intrusion into important WSP roosting and/or nesting habitat would be to establish walkways that lead people *away* from the most important habitat areas, not into the heart of the designated Critical Habitat. In fact, as discussed previously, numbers of WSP wintering in the Critical Habitat area have declined sharply starting in 2014, when the City constructed the unpermitted E Street walkway.

Page 11 continues:

Ornamental vegetation occurs in patches adjacent to some residences on the ocean side of the boardwalk extending at a maximum just over 50 feet from the oceanfront homes into the Critical Habitat.

As discussed on page 3 of this letter, the encroachment of private landscaping into public ESHA represents an ongoing violation of the Coastal Act. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers "to prevent impacts that would significantly degrade the adjacent ESHA." In practice, the City does not do this, and thus violates its own certified LCP and the Coastal Act.

3.1.3, Delineation – Existing Fence

Page 12 of the revised draft plan states, “In June 2011, the City installed approximately 1,300 linear feet of fencing around approximately 2.1 acres of habitat between the walkway fingers of D and E Streets.” This is factually incorrect, as the E Street walkway did not exist until 2014 (the D Street walkway was built in 2002/2003).

Otherwise, page 12 of the revised draft plan describes how the City has installed and removed various forms of protective fencing and paracord barriers. As these actions were not completed with benefit of formal environmental analysis or the required Coastal Development Permit, they represent Coastal Act violations.

3.3.2, Dogs on Beach

Page 14 of the revised draft plan states:

The City is committed to enforcing the restrictions regarding dogs on the beach and intends to increase enforcement and Animal Control presence as well as issuance of citations for violations.

This sounds pleasing, but at the open house on May 20, 2019, multiple residents of Newport Beach complained that the existing animal control response is extremely slow, with officers typically taking hours to show up after a call. Between this and the lax enforcement of leash laws at River Jetties, the revised draft plan lacks credibility in its assurances that the City will now prioritize ticketing people walking their dogs on the Balboa Peninsula. A more effective approach would be (a) to remove all walkways from Critical Habitat and the other area to the southeast where WSP regularly roost; (b) to fence off a large enough area of Critical Habitat for WSPs to use for nesting; and (c) to strictly prohibit incursions into the fenced area by people or their pets.

4, Objectives of the Plan

Page 16 of the revised draft plan states:

The goal of this particular Plan is to provide management actions that will ensure the ongoing protection of existing biological resources within Critical Habitat Unit 48 (and areas to the east), while also setting forth the management and operational activities to be implemented for other areas within the City used by wintering WSP.

The status quo of WSP’s wintering on the Balboa Peninsula – a historical nesting site for the plover – is being maintained in the absence of a comprehensive management plan. As has been demonstrated in recent years in Orange and Los Angeles Counties, recolonization of the peninsula by nesting plovers is a completely realistic goal that the City should be pursuing with this WSP Habitat Management Plan.

As a result of the revised draft plan’s undue emphasis on wintering WSP, the eight numbered objectives listed on pages 16 and 17 of the revised draft plan do not include the full suite of actions that would likely be needed to re-establish a regular nesting population of the WSP on the Balboa Peninsula. Consistent with the findings of Ryan et

al. (2019), the following additional actions should be taken to facilitate recolonization of the Balboa Peninsula by nesting WSP:

- Establishment of a large, well-designed enclosure to keep people and dogs out of potentially suitable nesting habitat.
- Removal of unpermitted walkways that encourage people and pets to encroach into potentially suitable nesting habitat.
- Monitoring of WSP during the nesting season, and establishment of exclosures around any scrapes detected, to keep predators away from the plover eggs.

5.3.1, Wintering and Nesting Window Surveys

Page 20 of the revised draft plan calls for a single nesting season survey between late May and mid-June. Table 1 in the recent Western Birds article by Ryan and colleagues specifies that six nests in Orange and Los Angeles Counties were initiated **between April 17 and May 15**. Given the importance of identifying WSP scrapes in order to protect them with exclosures, it is recommended that nesting season surveys be conducted at least weekly from April 1 to June 15.

CONCLUSIONS AND RECOMMENDATIONS

The 2007 Recovery Plan calls for doubling the WSP nesting population in the Recovery Unit that includes Newport Beach. Plovers have nested on the Balboa Peninsula within the last decade, and the species has already started recolonizing several other beaches in southern California in response to increased protection from human disturbance. Like the 2018 draft plan prepared by Dudek, the revised draft plan treats nesting by WSP as only a possible side-effect of limited management actions directed mainly toward wintering plovers. Certainly, the final plan should include all management prescriptions identified in the published scientific literature as facilitating WSP recolonization of historical nesting sites.

As detailed herein, an adequately protective WSP management plan also would identify and address numerous past and ongoing violations of the City's certified LCP and the Coastal Act, not only on the Balboa Peninsula but all the way up to River Jetties.

The 22 unpermitted concrete walkways constructed through beach and dune areas must be subjected to a thorough and credible analysis to determine their effects upon beach/dune ESHA and required ESHA buffers. It may be appropriate to issue after-the-fact permits for some of the walkways, but others should be removed to limit human intrusion into the most important roosting and potentially suitable nesting areas.

The City's poor record of policing beachgoers — at River Jetties and in other sensitive habitat areas — does not promote optimism that implementing a management plan reliant upon signage and "symbolic fencing" will achieve even the limited goals set forth in the revised draft plan, let alone recolonization by nesting plovers consistent with the

goals of the 2007 Recovery Plan. Effective management of the WSP on the Balboa Peninsula is likely to require carefully designed fencing or another type of barrier that would keep people and pets away from potentially suitable nesting habitat.

The City should carefully consider approaches that local governments elsewhere along the Pacific Coast have taken to successfully balance the requirements of people, rare species, and threatened coastal ecosystems. As discussed in this letter, CCC staff provided the City with a blueprint for achieving Coastal Act compliance – the City of Pacifica’s 2014 comprehensive beach/ dune management plan – and the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010 that the City and its consultants may look to for further relevant guidance.

Thank you for the opportunity to review the Draft WSP Management Plan for East Balboa Peninsula Beaches, Newport Beach, California.

Sincerely,



Robert A. Hamilton, President
Hamilton Biological, Inc.

Andrea Jones
Director of Bird Conservation
Audubon California

Travis Longcore, Ph.D.
Conservation Chair
Los Angeles Audubon Society

Susan Sheakley
Conservation Chair
Sea & Sage Audubon Society

Scott Thomas
Conservation, Special Projects
Sea & Sage Audubon Society

Terry Welsh, M.D.
President
Banning Ranch Conservancy

Celia Kutcher
Conservation Chair
OC Chapter California
California Native Plant Society

Garry Brown
Founder & President
Orange County Coastkeeper
Inland Empire Waterkeeper

Dan Silver, M.D.
Executive Director
Endangered
Habitats League

Gloria Sefton
Vice President
Friends of Harbors, Beaches,
and Parks

Michelle Gastil
Banning Ranch Task Force
Sierra Club

Penny Elia
OC Conservation Committee
Sierra Club

Conner Everts
Executive Director
Southern California
Watershed Alliance

Marko Popovich
President
Still Protecting Our Newport

Jack Eidt
Director
Wild Heritage Planners

Attached: September 11, 2017 letter from Andrew Willis, CCC Enforcement

Copies to: California Coastal Commissioners; Jack Ainsworth, CCC; Lisa Haage, CCC; Aaron McClendon, CCC; Andrew Willis, CCC; Liliana Roman, CCC; Karl Schwing, CCC; Jordan Sanchez, CCC; Laurie Koteen, CCC; Jonna Engel, CCC; Brian Bugsch, CSLC; Benjamin Johnson, CSLC; Grace Kato, CSLC; Ken Foster, CSLC; Sandy Vissman, USFWS; Hans Sin, CDFW; Erinn Wilson, CDFW; Lana Nguyen, California State Parks; Mark Massara; Tom Ryan; Josh Weinik; Christine Whitcraft; Michelle Clemente

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



September 11, 2017

Dave Kiff
City Manager
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

Subject: Protection of Snowy Plover and dune habitat in the City of Newport Beach

Dear Mr. Kiff:

Thank you for your continued attention to the issue of protecting Western Snowy Plover habitat in the City of Newport Beach. I appreciate the time you have taken to meet and discuss this issue; it is an exciting opportunity to partner with the City to protect an endangered species in the midst of urban southern California, where remaining open space and habitat areas are especially significant because of their rarity and, consequently, importance to wildlife. We're looking forward to continuing our partnership with the City, both through the City's protection of coastal resources pursuant to the policies of the City Local Coastal Program ("LCP"), and through the processing of two coastal development permit applications (Coastal Development Permit Application Nos. 5-17-0465 and 5-17-0515) that the City has submitted to remove plover habitat fencing on a City beach, and a third application to implement a long, term comprehensive management plan for the Western Snowy Plover that the City has indicated is forthcoming.

We're hopeful that these applications can be modified into a comprehensive project to fully protect plover habitat, and dunes habitat as well, on City beaches. Indeed, in response to Coastal Development Permit Application Nos. 5-17-0465 and 5-17-0515, in a June 26, 2017 letter to the City, Commission staff noted, first, that we must consider the immediate impacts to sensitive biological resources that are protected by the existing fencing that may occur if the fencing is removed, and, second, the need for any application to remove existing habitat fencing to include a management plan for ongoing protection of existing biological resources in the area of the proposed project. The purpose of this letter is to provide some additional information regarding the incentive for preparing a management plan that protects all habitats on City beaches, and in particular, all environmentally sensitive habitat areas ("ESHA") and to both avoid misunderstandings, and provide information that would help design a plan that would be consistent with the Coastal Act and potentially approvable by the Commission.

ESHA is defined in Coastal Act Section 30107.5 as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Rare plant communities and habitats for protected wildlife species are generally

considered by the Commission to be ESHA. The City LCP (Section 4.1.1.1), which serves as guidance for Commission decisions regarding development activities on City beaches, identifies several potential attributes of ESHA, including the following:

A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.

B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.

As you know, the Coastal Act and City LCP provide strict protections for ESHA: Section 30240 of the Coastal Act restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA.

The Commission has found in a previous action that at least one area of the City beaches is ESHA, and other areas appear to be potentially similar; the Commission formally determined in a 2006 enforcement action that the dunes on the south side of the Santa Ana River constitute ESHA because of the presence of dunes and because the dunes are potentially used by a protected bird species, the federally and state listed as endangered California Least Tern. Consequently, the Commission required restoration of the dunes and their preservation.

The extent of ESHA on City beaches is not necessarily limited to the dunes that were the subject of the 2006 Commission action. This simply was the area that was the subject of the enforcement action. In fact, using the same analysis by which the Commission found that the dunes at the Santa Ana River are ESHA suggests that other habitat for protected species and dune habitats on City beaches could rise to the level of ESHA. As you are no doubt aware, Western Snowy Plovers use City beaches for foraging and roosting and the United States Fish and Wildlife Service has identified an area of City beach as Critical Habitat for the Western Snowy Plover because the area is essential to the conservation of the species. Also, again as I'm sure you are aware, the City's beaches are peppered with dunes, including dunes that support native dune plant species. The City LCP (Section 4.1.5) says about dunes that "Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Coastal Commission, or local agencies."

Dunes are also afforded protection under Section 30251 of the Coastal Act, which limits the alteration of natural landforms in order to protect the scenic and visual qualities of coastal areas. Finally, and perhaps most intriguing for low-lying Newport Beach, sand dunes provide protection for inland, low-lying areas from strong storm waves. Dune management, or the construction of "living shorelines" capitalize on the natural ability of these systems to protect coastlines from sea-level rise and storm related hazards while also providing benefits such as habitat, recreation, a more pleasing visual tableau, and the continuation or enhancement of ecosystem services. Indeed Sections 2.8.3-5 and 2.8.3-6 of the LCP encourage, respectively, "the use of sand dunes with native vegetation as a protective device in beach areas" and "the use of

non-structural methods, such as dune restoration and sand nourishment, as alternatives to shoreline protective devices.”

Although some areas of City beach have been fenced and provide some protection for habitat and dunes, in other areas, a lack of protection leaves potential ESHA exposed to trampling and other disturbances that could result in removal of major vegetation, landform alteration that constitutes grading, and change of intensity of use of a sensitive habitat area. The City LCP notes that “Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.” [Section 4.1.5] The trampling and other activities described above constitute development activities under the Coastal Act that require a coastal development permit. No coastal development permit has been issued by the Commission for these activities on City beaches.

Although the purpose of this letter is just to reach out and offer assistance and coordination, we should also point out that there are legal provisions that apply as well. The potential for unpermitted activity resulting in impacts to unprotected areas of ESHA on City beaches creates potential liability (under the Coastal Act at a minimum) for the City, as the property owner, even for actions it may not actually perform. Regardless of who performs unpermitted development, such as landform alteration or removal of major vegetation within a dune habitat, the persistence of the resulting changes in topography or vegetation coverage, etc., constitute continuing violations of the Coastal Act and continuing public nuisances that a property owner is liable for correcting. The Coastal Act represents a legislative declaration that acts injurious to the state’s natural resources constitute a public nuisance. (Leslie Salt Co. v. San Francisco Bay Conservation etc. Com. (1984) 153 Cal. App.3d 605, 618; CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal.App.3d 306, 318.) In Leslie Salt (p. 622), the court held that:

“...liability and the duty to take affirmative action [to correct a condition of noncompliance with applicable legal requirements] flow not from the landowner’s active responsibility for [that] condition of his land...or his knowledge of or intent to cause such [a condition] but rather, and quite simply, from his very possession and control of the land in question.”

Since a property owner is responsible, along with the party that undertook unpermitted development, for unpermitted development that has occurred on the property owner’s property, it is in the interest of the property owner to consider measures to prevent and address such unpermitted development. For that reason, we recommend that the City modify the current applications to incorporate a proposal for a comprehensive habitat protection program that will help ensure impacts to habitat on City beaches are avoided and protect critical resources and, at the same time, reduce the City’s potential exposure to liability for such damage.

We would be happy to meet with City staff to discuss what measures might be appropriate to incorporate into a comprehensive program, be they a combination of retention of existing fencing and installation of new fencing or symbolic fencing around dune areas and wildlife habitat on City beaches, restoration of degraded habitat areas, increased enforcement of dog-leash laws, consideration of beach grooming practices, and installation of information signage, to name a few, and, we look forward to collaborating with the City to ensure protection of habitats on City beaches. Again, we thank you for your cooperation, work, and efforts in seeking protection for

Mr. Kiff
September 11, 2017
Page 4 of 4

Western Snowy Plover habitat on City beaches. If you have any questions about this letter, please do not hesitate to call me at 562-590-5071.

Sincerely,

A handwritten signature in black ink, appearing to read 'Andrew Willis', with a stylized flourish at the end.

Andrew Willis
Enforcement Supervisor

**cc: Lisa Haage, Chief of Enforcement, CCC
Karl Schwing, Deputy Director, CCC**

Exhibit H



DEPARTMENT OF PARKS AND RECREATION

Orange Coast District
3030 Avenida del Presidente
San Clemente, CA 92672
949-492-0802

Lisa Ann L. Mangat, Director

May 6, 2016

Supervisor Michelle Steel
Orange County Board of Supervisors
10 Civic Center Plaza
Santa Ana, CA 92701

Re: Santa Ana River Jetty Leash-Free Dog Friendly Beach Designation

Dear Supervisor Steel,

As neighboring land managers, State Parks is interested in the contemplated change of land use at the Santa Ana river mouth. We understand, through the media, that the County of Orange is considering designating an off-leash dog beach in that area. Given that our properties are separated only by the Santa Ana River Jetty, we foresee a high probability that decisions made on your property will directly affect us. Given the presence of the California Least Tern Natural Preserve immediately up coast of our boundary, we would appreciate the opportunity to review any environmental documents, general plans, or recreation plans that have been prepared on this topic.

We look forward to engaging in discussions with you regarding the effects an off-leash dog beach designation would have on our mission, including public safety, recreational opportunities, and of course, natural resources. In particular, we would like to better understand the impacts this will have on sensitive species such as the endangered California least tern and threatened Western snowy plover located so near the area in question, and discuss what parameters will be in place to protect them if the area is formalized as a dog beach.

If you should have any questions or need additional information, please do not hesitate to contact me at (714) 377-2187 or via email: eric.dymmel@parks.ca.gov.

Sincerely,

Eric L. Dymmel
North Sector Superintendent
Orange Coast District
California State Parks

Cc: Orange County Executive office
Orange Coast District Superintendent



DEPARTMENT OF PARKS AND RECREATION

Orange Coast District
3030 Avenida del Presidente
San Clemente, CA 92672
949-492-0802

Lisa Ann L. Mangat, Director

Transmitted via Email to: ocpcustomer@ocpw.ocgov.com

December 2, 2016

Chris Uzo-Diribe
County of Orange
OCPW/OC Development Service
300 North Flower Street
Santa Ana, CA 92703

Regarding: Negative Declaration (ND) File No. IP 16-234 – Orange County Code of Ordinance Proposed Amendment (Dog Beach) – OCPW/OC Development Services

Dear Chris Uzo-Diribe:

The Department of Parks and Recreation (State Parks) has reviewed the Negative Declaration (ND) File No. IP 16-234 – Orange County Code of Ordinance Proposed Amendment (Dog Beach) document, and understand that the County of Orange is proposing to designate an on/off leash dog-friendly beach area. Given that our properties are separated only by the Santa Ana River jetty, we believe this decision will directly impact State Park operations and management, especially with regard to State Parks' mandate to protect the sensitive natural resources at Huntington State Beach (HSB), adjacent to the County's proposed project area. As such we respectfully submit the comments below.

The Negative Declaration in support of this project does not adequately address the potentially significant impacts to the ecosystem as a result of the presence of dogs on the adjacent State Parks property. Of particular concern are potential impacts to the California Least Tern Natural Preserve (CALT NP) subunit at HSB and the sensitive and endangered species protected there. Natural Preserves are established per the California Public Resources Code (Section 5019.71) for land use specifically aimed to protect and preserve rare or endangered plant or animal species and their supporting ecosystems. The California State Park and Recreation Commission established the California Least Tern Preserve at HSB in 1975 in order to protect and preserve the federal and state-listed California least tern (LETE). The Natural Preserve currently supports one of the most productive LETE colonies in the state.

The County's proposed change of land use will require State Parks to provide additional operation and management of this area in order to properly enforce the protections and mandates afforded these existing sensitive resources under State and Federal law. The proposed project may also result in un-mitigatable and potentially significant impacts to the conservation of sensitive natural resources on State Park property. The cost and impact to existing State Parks operations has not been taken into consideration in the Negative Declaration.

The proposed project site is important foraging and resting habitat for both the LETE and the federally-threatened western snowy plover (WESP). LETE rely on fish of varying species and size depending on the stage of the breeding cycle they are in. HSB is consistently one of the top nesting sites in the state for LETE, and it is hypothesized that the proximity of three different

foraging areas (the Pacific Ocean, Santa Ana River, and Brookhurst Marsh) may be a strong factor in this colony's success.¹ The Santa Ana River (SAR) provides a calm area that allows fledgling LETE to learn how to fish without strong currents or waves and provides a safe loafing and resting area for both adults and juveniles from the colony as well as those migrating south to their wintering grounds.²

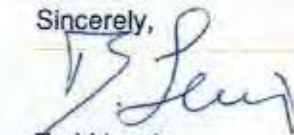
Potentially significant impacts resulting from the expected increase in public access to the proposed project area has not been adequately addressed in the Negative Declaration for the proposed project. The area between the SAR and the CALT NP has traditionally experienced less foot traffic than the beach, allowing the birds to remain undisturbed. The County's proposed project, however, would lead to greater public use of this area with no satisfactory way to prevent visitors with dogs from accessing the State Beach and impacting LETE and WESP.

The California Least Tern Natural Preserve (CALT NP) and area immediately surrounding it is federally-designated critical habitat for western snowy plovers (WESP) by the US Fish and Wildlife Service in the species' recovery plan in 2012. WESPs have been observed foraging and roosting immediately up coast in front of the CALT NP. These overwintering sites are becoming recognized more and more as an important component for the success of the species.³ Winter roosts provide connectivity for dispersal for birds from different breeding sites and allow birds to build stores for spring migration and the upcoming breeding season. WESP show strong site fidelity to overwintering sites and will often return to the same sites year after year; the potentially significant impact to WESP from dogs within and adjacent to these winter roosts has not been assessed to its full extent within the Negative Declaration for the proposed project.

We look forward to engaging in further communications with you regarding our concerns the impacts a dog beach designation would have on State Parks property.

Thank you for the opportunity to submit comments to the Negative Declaration. If you should have any questions or need additional information, please do not hesitate to call our District Environmental Coordinator Julie Tobin at 949-607-9510 or via email to Julie.Tobin@parks.ca.gov.

Sincerely,



Todd Lewis
District Superintendent
Orange Coast District

Copy via email: Monica Aleman, NSC - Resource Section – CA State Parks
Lana Nguyen, Orange Coast District, CA State Parks
Kevin Pearsall, Orange Coast District, CA State Parks
James Newland, Orange Coast District, CA State Parks

¹ California Least Tern Breeding Survey, 2012 Season. State of California, Natural Resources Agency, Department of Fish and Wildlife, Wildlife Branch

² Ibid.

³ Ibid.

Exhibit I

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



December 14, 2016

Chris Uzo-Diribe
Planner IV, OCPW
OC Planning
300 N. Flower Street, 1st Floor
Santa Ana, CA 92702-4048

**RE: County of Orange Dog Beach Santa Ana River, Comments on Negative Declaration
(IP# 16-234)**

Dear Ms. Uzo-Diribe:

Thank you for the opportunity to comment on the proposed dog park at the Santa Ana River mouth, which would impact biological and other coastal resources (e.g., water quality, public access, scenic resources) that exist at the site in the County of Orange. We appreciate that such uses can be significant to the community, however, we would like to work with the County to find a solution that would have fewer potential negative environmental impacts.

The Coastal Commission has the responsibility to carefully review any development in the coastal zone for compliance with the California Coastal Act of 1976¹. The proposed project (establish a dog park), situated within and adjacent to the Santa Ana River, is located entirely within the Coastal Commission's permitting jurisdiction in the coastal zone. Section 30600(a) of the Coastal Act requires that, in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, shall obtain a coastal development permit. The proposed dog park constitutes "development" under the Coastal Act that requires a coastal development permit, as the creation, through the proposed ordinance, of an official dog park in an open space area intensifies the use of the area.

The proposed project is located in an unincorporated area of the county that is presently not part of any local government's certified Local Coastal Program (LCP). Therefore, in the absence of a certified LCP, the County must obtain a coastal development permit from the Coastal Commission prior to proceeding with the proposed project. The Coastal Commission's standard of review for the coastal development permit application would be the Chapter 3 policies of the Coastal Act. The coastal development permit process will ensure that the proposed project is undertaken in a manner consistent with the Chapter 3 policies of the Coastal Act. Therefore, the proposed Negative Declaration should address whether the proposed project is consistent with the Chapter 3 policies of the Coastal Act, specifically Section 30240 of the Coastal Act, which restricts development within Environmentally Sensitive Habitat Areas ("ESHA") to resource dependent uses and requires development adjacent to ESHA be sited and designed to avoid impacts to ESHA.

¹ The Coastal Act is found beginning at Section 30000 of the California Public Resources Code.

Coastal Commission staff believes that the proposed project would impact the foraging and roosting habitats of the federally and state listed as endangered California Least Tern and federally listed as threatened Western Snowy Plover, as well as the breeding habitat of the Least Tern. In fact, the County's environmental review of the project has identified the project site as habitat for these protected species. Thus, the proposed project appears to be inconsistent with resource protection policies of the Coastal Act. As you probably know, one of the few successful breeding colonies of the Least Tern in Orange County is located on the north side of the Santa Ana River mouth, just up coast from the proposed dog park. The river mouth itself is important foraging habitat for the Least Tern, and the beach along this stretch of coast is foraging and roosting habitat for the Snowy Plover. Habitats for protected wildlife species are termed ESHA by the Coastal Act and are afforded special protection, as noted above.

In fact, the Commission formally determined in a 2006 enforcement action that the dunes on the south side of the Santa Ana River, which are situated in a location immediately adjacent to the proposed dog park, constitute ESHA, in part because they are a component of the Least Tern's local habitat, and required their restoration and preservation. Thus, there are significant questions about the consistency of the proposed dog park in this location with resource protection policies of the Coastal Act, including, but not necessarily limited to, Section 30240. Section 30240 restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA. The dog park is not a resource dependent use (i.e. it does not require the presence of the ESHA to function), and the dog park, where numerous leashed and unrestrained dogs would be present, and which is proposed to be located directly within the foraging areas of the Least Tern and Snowy Plover and adjacent to the breeding area of Least Tern, is not sited or designed to avoid impacts to ESHA.

The Commission will also apply Chapter 3 policies of the Coastal Act to address the proposed project's impacts to, among other things, public access and recreation, scenic resources, marine resources, and biological productivity and water quality of coastal waters. For instance, Section 30230 (Marine Resources) of the Coastal Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Also, Section 30231 (Biological Productivity; Water Quality) states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Orange County – Santa Ana River Dog Park

Coastal Commission Staff Comments

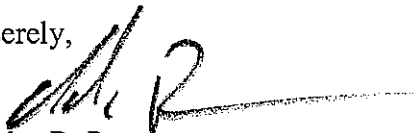
Page 3 of 3

Creation of an official dog park, and consequent introduction of numerous leashed and unrestrained dogs and the disturbance associated with such use, within an area that the environmental review process has identified as foraging habitat for protected species, which are key to the marine ecosystem, potentially eliminates or significantly degrades the functioning of the area to provide habitat for marine organisms, with attendant negative impacts to biological productivity. Furthermore, the potential for this activity to remove and degrade dune vegetation within and adjacent to the proposed project site, in addition to its impacts to sensitive habitats, may impede the biological productivity and water quality of the wetland at the Santa Ana River mouth through the reduction of the natural vegetation buffering this wetland.

Due to the apparent inconsistency of the proposed project with policies of the Coastal Act, Commission staff suggests that the proponents of the dog park work with County and Commission staff to investigate all possible options for locating such an amenity at a site where adverse impacts to protected wildlife species would be avoided. Commission staff believes additional environmental review is necessary for the proposed project and requests that such review consider alternative project designs and project locations that may reduce or avoid adverse impacts to biological resources. Each of the issues identified in this letter, as well as other environmental impacts identified in the Negative Declaration, should be analyzed in the context of potential alternative project designs and project locations. Could adverse impacts to biological resources be reduced or eliminated if the location of the project was changed?

In closing, we suggest that the County analyze additional alternatives to the proposed project, including alternatives that avoid impacts to ESHA, marine resources, and biological productivity and water quality of coastal waters. Alternative mitigation plans should also be proposed as part of the environmental review. Please note that the comments provided herein are preliminary in nature; more specific comments may be appropriate as the project develops. We hope that these comments are useful, and respectfully reserve the opportunity to comment more specifically at a later date. Commission staff requests notification of any future activity associated with this project or related projects. Please call me at (562) 590-5071 if you have any questions. Thank you for the opportunity to comment on the proposed project.

Sincerely,



Charles R. Posner
Supervisor of Planning

Exhibit J





WARNING
WINDY BEACHES: TAKE THE PRECAUTIONS TO PROTECT YOUR CHILDREN FROM STRONG WINDS.
CAUTION: BEACHES ARE NOT SUITABLE FOR ALL CHILDREN.
WAVE AND CURRENTS: LEAVE YOUR CHILDREN AT THE BEACH.
WEATHER AND CURRENTS: LEAVE YOUR CHILDREN AT THE BEACH.
BE SAFE: PLAY SAFE

NO PARACHUTES
SMOKING
ALCOHOL
GLASS
LITTERING
DOGS (from 6:00 AM to 6:00 PM)
FIRES (from 6:00 AM to 6:00 PM)
FIREWORKS
DRIVING or PARKING MOTORIZED VEHICLES
ON OCEAN FRONT BEACHES AND SIDEWALKS
REACH CLOSE: 10 feet to 8 feet

A Reminder about Dogs
Dogs are not allowed on the beach from 6:00 AM to 6:00 PM.
Dogs must be on a leash and under the control of their owner at all times.
Dogs are not allowed on the beach during the hours of 6:00 AM to 6:00 PM.
Dogs are not allowed on the beach during the hours of 6:00 AM to 6:00 PM.
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PET-FRIENDLY
PET-FRIENDLY
PET-FRIENDLY
PET-FRIENDLY

From: [Lizzie Braver](#)
To: [CSLC CommissionMeeting](#)
Subject: Written Comment for Agenda Item 42: Orange County Flood Control Lease
Date: Tuesday, October 17, 2023 4:20:16 PM

Attention: This email originated from outside of SLC and should be treated with extra caution.

Dear Commission members,

I am writing to bring to your attention my concerns about the proposed Orange County Flood Control Lease. As an intern at Orange County Coastkeeper, a nonprofit organization devoted to preserving our freshwater and saltwater ecosystems, I have worked on their Santa Ana River Monitoring project. The Santa Ana River Mouth is an ecologically sensitive area, vital for the nesting and feeding of endangered bird species. However, I have observed firsthand a significant problem of the lack of enforcement against off-leash dogs. This poses a grave threat to these endangered birds, their habitats, and the ongoing efforts to restore their populations.

Should this lease be approved, I strongly urge you to prioritize effective enforcement measures to safeguard this delicate ecosystem and the species that rely on it for survival. This issue not only affects wildlife but also poses a risk to public safety, as unleashed dogs can be a danger to beach visitors and other animals.

As someone deeply committed to the preservation of our natural resources, I implore you to ensure that the Santa Ana River Mouth becomes a well-managed area, where the public trust is upheld, and both the public and wildlife are protected. The current state of affairs, marked by a lack of enforcement, is untenable, and I believe that stringent measures are essential to create a safer and more sustainable environment for everyone.

Thank you for your attention.

Sincerely,
Lizzie Braver



October 17, 2023

California State Lands Commission
100 Howe Avenue, Suite 100 South
Sacramento, CA 95825

**RE: Agenda Item #42 – Orange County Flood Control District lease renewal—
OPPOSE UNLESS AMENDED**

Dear Chair Kounalakis and Commission Members:

Friends of Harbors, Beaches and Parks (FHBP) appreciates the opportunity to once again address our concerns with the approval of this lease as conditioned. Our mission is “to promote, protect, and enhance the harbors, beaches, parks, trails, open spaces, natural preserves, and historic sites in Orange County.”

We continue to be alarmed at the complete lack of enforcement of the protective ordinances and regulations set forth by the County of Orange (County) at this river mouth that apply to both public safety and natural resource protection. Note that it is the County that is completely disregarding its own ordinances and regulations year after year. Additionally, the County has failed to comply with the conditions of the lease that the State Lands Commission issued in 2021 as a trial lease to gauge the County’s compliance. There has been no compliance with the conditions set forth for enforcement, resulting in ongoing impacts to Western Snowy Plover habitat and other natural resources.

FHBP has been engaged with many other environmental NGOs over the last six years in an attempt to protect the endangered species and dune ESHA in this sensitive area (see Exhibit A of the attached letter from Chatten-Brown Law Group). We have addressed our ongoing concerns with multiple agencies regarding the impacts created by trespassing, off-leash dogs, paragliders, and poorly monitored grading and dredging activities with multiple agencies.

Attached is the September 20, 2023, letter that was prepared by Chatten-Brown Law Group on behalf of Audubon and Endangered Habitats League addressing many of our concerns. We fully support all the requests made in this letter with special emphasis on conditioning this upcoming lease to require the County to retain third-party enforcement resources. Because the County has not come through to provide enforcement of their protective ordinances during the past two years of this trial lease, we further request that the County be issued the new lease for only 60-days and that within that 60-day

period they are required to engage third-party enforcement through one of the agencies recommended by staff, or by utilizing their own Code Enforcement Officers. Below is the contact person for the County.

Erica Carlos
Code Enforcement Officer, Neighborhood Preservation Section
OC Community Services
300 N. Flower St., 1st Floor
Santa Ana, CA 92702-4048
phone: (714) 667-8896
email: erica.carlos@ocpw.ocgov.com
website: www.ocplanning.net

We have been told for several years that the Orange County Sheriff's Department (OCSD) has other priorities and cannot handle enforcement at the river mouth. We are unclear as to when the County made the decision to utilize OCSD given that the more appropriate division within the County would be their Code Enforcement Division.

The attached letter provides an excellent overview of the challenges we have faced since the County Board of Supervisors attempted to convert this area into a dog beach in 2016. Due to the major push back from multiple agencies and the environmental community, the County withdrew this plan, but went forward with publicity to promote the use of this area by the public and off-leash dogs. This publicity and the County's unwillingness and total failure to enforce its protective ordinances is resulting in ongoing impacts to Western Snowy Plover, Least Tern, and Dune ESHA.

Please take the appropriate action on October 19, 2023, to correct this situation that has been allowed to go unresolved for far too long.

Thank you again for the opportunity to express our concerns. We look forward to your support.

Sincerely,



Michael Wellborn
President

Attachment: Chatten-Brown Law Group letter to SLC 9-20-23

**Chatten-Brown Law Group, APC**

Kathryn Pettit | Associate
325 W. Washington Street, Suite 2193
San Diego, CA 92103
kmp@chattenbrownlawgroup.com
Phone: (619) 393-1440

September 20, 2023

State Lands Commission
Executive Officer Jennifer Lucchesi (*Jennifer.Lucchesi@slc.ca.gov*)
Public Land Management Specialist Drew Simpkin (*Drew.Simpkin@slc.ca.gov*)
301 East Ocean Boulevard
Long Beach, CA 90802

**Re: Third-Party Enforcement in the Lower Santa Ana River Needs to Be
Required as a Condition of the County of Orange's Lease**

Dear Ms. Lucchesi and Mr. Simpkin:

On behalf of the Endangered Habitats League and Sea & Sage Audubon Society, we provide the following comments on the County of Orange's ("County") request for a lease to conduct activities in public, sovereign land in the Lower Santa Ana River, which the State Lands Commission ("Commission") will consider at its next meeting on October 19, 2023.

It has become glaringly apparent that third-party enforcement is the only effective solution to the ongoing violations of local and environmental laws occurring in the Lower Santa Ana River Mouth and flood control channel ("SAR"). The County's refusal to prevent trespassing and unleashed dogs in this area inflicts harm on endangered species, destroys environmentally sensitive habitat areas, and endangers unsuspecting people and dogs, as documented by several agencies and environmental organizations.

This behavior violates the County's current lease with the Commission, as well as the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act.

We applaud the Commission for requiring the County to enforce its laws prohibiting trespassing in the SAR as a condition of the County's lease granted on October 21, 2021. The Commission had the foresight to grant the County a two-year lease, rather than a five-year lease, to provide an opportunity to assess whether the current lease framework is adequately protecting the endangered shorebirds who inhabit the SAR.

The County now requests renewal of its lease. And the current framework is not working. The mountain of evidence of the dire need for third party enforcement in the SAR has only continued to grow since then, as detailed below.

We respectfully urge the Commission to require the County to provide funding for third-party enforcement of State and local environmental laws in the SAR as a condition of any lease renewal.

Alternatively, we urge the Commission to set a monetary rent, with all or a large percentage of the rent dedicated to third-party enforcement. In the current lease set to expire, the Commission listed the consideration as “[t]he public use and benefit, with the State reserving the right at any time to set a monetary rent if the Commission finds such action to be in the State’s best interests.” (Exhibit I, p. 47¹ [Commission Staff Report], emphasis added.)

Funding for third-party enforcement is in the State’s best interests, and is necessary to protect the public trust land and resources in the SAR.

I. The Evidence of the Ineffectiveness of Current Enforcement and the Need for Third-Party Enforcement in the River Continues to Grow

As extensively documented in EHL’s correspondence to the County on April 4, 2022, and to the Commission on September 15, 2022, the County continues to allow unlawful, destructive, and dangerous trespassing and unleashed dogs in the SAR. (**Exhibit I**, p. 9 [April 2022 Letter to County]; **Exhibit I**, p. 2 [September 2022 Letter to Commission].)

After Commission staff refuted the County’s claims it did not have a duty to enforce its legal restrictions in the SAR, the County indicated it was “willing to enforce this ordinance within the Lease Premises to protect public safety and the environment.” (Ex. I, p. 52, 10.)

This promise was incorporated as a condition of the County’s lease, and an essential underpinning to the Commission’s environmental findings:

Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat.

(Ex. I, p. 52 [Commission staff report].)

¹ Given the multitude of exhibits and enclosures from this letter and previous correspondence, all page citations are to the bate stamps numbers beginning with “001” at Exhibit I.

a. Large Crowds and Unleashed Dogs Continued to Disturb Wildlife in the Santa Ana River Due to County Non-Enforcement

Orange County Coastkeeper (“OCCK”) has provided ongoing monitoring of the SAR since January 2021. Unfortunately, the data indicates no improvement in the frequency of trespassing, presence of off-leash dogs, or disturbance to the endangered Western Snowy Plovers and California Least Tern since the commencement of the County’s October 2021 lease.

There was a universal acknowledgement of the futility of verbal warnings at the last Commission hearing:

The Applicant has provided information detailing the County Sheriff’s efforts to enforce County ordinances within the County’s Flood Control Channel. However, these efforts have been limited to verbal warnings only, and no fines have been issued. In addition, the warnings have only applied to the County’s Flood Control Channel, not land within the Commission’s jurisdiction. Members of the public as well as staff from other State agencies indicate that verbal warnings have not been effective and have not reduced use within the Lease Premises.

(Exhibit I, p. 50 [Commission staff report].)

Yet, every OCCK report since then – for two years – indicates that *zero* citations have issued by County law enforcement.

Further, the most recent OCCK January-June 2023 Monitoring Report observed 9,256 people and 798 dogs in the SAR during surveys, with 69% of the dogs observed off-leash. (**Exhibit II** [“OCCK 2023 Report”], p. 142-144.) Of the 1,094 surveys conducted, “Law Enforcement Officers” were present less than 15% of the time.² Unsurprisingly, no citations were observed to be issued. (Ibid.) Law enforcement made “contact” only nine times—about 5% of the time they were present. (Ibid.)

The most recent OCCK 2023 Report also reported hundreds of bird disturbances, also known as “flushing events,” where birds present on the beach are approached by humans and/or dogs that induce them depart the beach. (Ex. II, p. 146.)

² Lifeguards were included as “Law Enforcement Officers” in the report, and were observed most frequently (48 out of 162 officers). (Ex. II, p. 146.)



Dog on top of ESHA, taken on August 22, 2023

In 2.5 years, OCCK surveys have reported 36,237 people, and 4,591 dogs. And this data excludes the time when OCCK is not out conducting surveys.

OCCK's latest report provides further evidence that the County simply will not comply with its lease conditions, which require it to enforce its laws in the SAR. This underscores the need for a new condition requiring the County to provide funding for third-party enforcement.

As Endangered Habitats League detailed in its previous letter to the Commission, the County's own reports admit that its officers can only visit the SAR when they have no other obligations, often outside of peak usage, and that when they do visit, they only issue a warning from their car bullhorns. (Ex. I, pp. 4-5.)

And it seems the County is no longer even issuing verbal warnings. As recent as August 22, 2023, the Orange County Sheriff's Department is filmed while it watches the SAR, and fails to issue any warnings or make announcements via loudspeaker. (**Exhibit III** [link to video], p. 151.)³

³ The County similarly failed to uphold its promises to the Coastal Commission in 2019 "to issue citations as necessary." (Ex. I, p. 19.)

The County's lackluster "efforts" to protect the endangered birds' nesting area pales in comparison to that of other reserves, such as Bolsa Chica, which fence off the entire area.



Photos of signage and fencing at Bolsa Chica

In comparison, the signage at SAR is confusing, and at times even conflicting.



Photos of signage at SAR and surrounding beach

And the signs at the SAR – restricting dogs and trespassing – are demonstrably ineffective.



The SAR is one of the few places the endangered shorebirds can take refuge, and is essential to their population’s continued survival. The SAR abuts a designated California Least Tern Nesting sanctuary, and is one of the few sites where Least Terns continue to breed. (Ex. I, p. 17.) Snowy plovers regularly roost west of the adjacent Least Tern Preserve fencing and the SAR, which was designated as critical habitat for the plovers. (Ibid.)

We again echo the sentiment from the State Parks Department: *“Remember that there are many places where [people] can take [their] dog, but only one place—the beach—where snowy plovers can breed.”* (Id. at p. 20.)

b. County Monitors Are Similarly Ineffective for Enforcement

The County recently sought permits from the U.S. Army Corps of Engineers (“USACE”) for outlets maintenance, including in the SAR. (Public Notice/Application Number: SPL-2010-00868.) The County’s application permit admitted the importance of the site for the threatened plovers and least terns, and relied on monitors to be present during maintenance activities to ensure protection. (Ibid.)

Yet, photographic evidence taken during past dredging activities demonstrate that monitors do little to prevent trespassing and unleashed dogs in the SAR. (Exhibit IV, p. 153.)

Therefore, we underscore that third party enforcement, such as City of Newport Beach Animal Control, or California Department of Fish and Wildlife (“CDFW”), is necessary.

c. Drones and Paragliding In The Santa Ana River Mouth Further Threaten Endangered Shorebirds and Public Safety

Paragliders have begun utilizing the SAR as well, placing even further strain on sensitive habitat already under immense stress. (Exhibit III [link to video of paragliding at the River Mouth on August 5, 2023].)



Paragliding and drones can seriously harm nesting shorebirds. In June 2012, a drone illegally flew over and crashed onto Bolsa Chica and induced nesting Least Terns to abandon 2,000 eggs.⁴ There were reportedly no hatchlings that year on the sand-covered island, “littered with the egg shells.” (Ibid.) A warden for CDFW said drones have grown into an ongoing problem in that area. (Ibid.)

The State Parks prohibits kites and hang gliding near plover nesting areas.⁵ Several studies have documented the impact of “free-flight activities” (i.e., hang-gliders, paragliders and their powered derivatives), as well as drones on wildlife.⁶ These negative effects are due to the high noise levels (in the case of powered craft) and the visual similarity of such aircraft to large raptors, which elicits escape or aggression behaviors. (Ibid.)

⁴ <https://www.pe.com/2021/06/03/illegal-drone-scares-terns-which-abandon-3000-eggs-on-bolsa-chica-nesting-island/>.

⁵ https://www.parks.ca.gov/?page_id=30020

⁶ Environmental Conservation, Volume 49, Issue 1, March 2022, pp. 8 – 16. DOI: <https://doi.org/10.1017/S0376892921000412>; see also https://www.fs.usda.gov/pnw/pubs/pnw_gtr993.pdf [p. 74].)

We request the Commission to consider the growing impacts of drones and paragliding in the SAR as well.

II. Continued Trespassing Is a Public Safety Risk

As noted in the Commission’s previous staff report, the County will enforce its Flood Control District trespassing ordinances (section 3-9-35) within the Lease Premises “to *protect public safety* and the environment.” (Ex. I, p. 52, emphasis added.)

The County’s signs around the SAR and flood control channel state “Channels can be dangerous. You may not be within the channel or on the slopes. You must stay away from the top edge of the channel slope... STAY OUT – STAY ALIVE.” County signs further up the SAR similarly indicate the bikeway is subject to flooding and may “become impassable.” There have been at least two casualties of swimmers near the Santa Ana River mouth and canal.⁷

Additionally, dogs face dangers when swimming in the SAR flood control channel. (**Exhibit V** [“Dog’s death in storm drain near ‘dog beach’ raises safety issue”], p. 159.) The owner almost lost her life, noting, “I had to let go of his collar because if I didn’t I would have been sucked in after him.”

The County itself has underscored that people should not be entering this area: “It may look inviting, but it’s still a flood-control channel and it’s dangerous,” said Orange County Public Works spokesman Shannon Widor. (Ibid.)

Further, the SAR is listed as a “Special Water Quality Enforcement Zone,” which is also cautioned by nearby signs.

The SAR is not a safe or sanitary place for peoples or dogs to inhabit. That is why the County’s ordinances prohibit trespassing in the flood control channel. The continued non-enforcement endangers public safety.

⁷ <https://www.ocregister.com/2015/10/11/authorities-identify-costa-mesa-man-who-died-after-ocean-rescue-near-santa-ana-river-canal/>; <https://www.latimes.com/socal/daily-pilot/news/story/2023-08-24/swimmer-dies-in-west-newport-beach-near-santa-ana-river>

III. Failure to Provide Third Party Enforcement Results in Ongoing Violations of the Public Trust Doctrine, California Environmental Quality Act, Coastal Act, and Endangered Species Act.

The environmental harms and public safety danger from the County's non-enforcement results in ongoing violations of the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act.

The Endangered Habitats League extensively detailed these legal violations in a letter to the County over 17 months ago in April 2022. (Ex. I, pp. 11-20.) For the sake of brevity, we briefly reiterate some of the main points, but encourage review of the entire letter.

Public Trust Doctrine

The Public Trust Doctrine charges the Commission with the duty of managing and ensuring appropriate uses on sovereign lands, which include the SAR. Further, wildlife is protected by the public trust doctrine. (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361.) The Commission has recognized that Least Terns and Snowy Plovers are "important Public Trust resources," and relied on enforcement in the SAR to ensure the County's lease would not run afoul of the Public Trust Doctrine. (Ex. I, p. 52.) Therefore, third-party enforcement must be required – and funded – before any lease renewal.

California Environmental Quality Act

The County and Commission relied on a 1989 USACE Supplemental Environmental Impact Statement, and a 2016 Addendum and Mitigation Monitoring and Reporting Program ("MMRP") to conclude that renewal of the County's lease would not create significant environmental impacts. (Ex. I, pp. 54-55, 12.)

The County's failure to enforce its trespassing and dog ordinances are obstructing restoration of the nearby Marsh mitigation lands for suitable nesting habitat in conflict with the MMRP. (Ex. I, pp. 12-14.) In particular, the failure to enforce County trespass ordinances runs afoul of the 2016 MMRP Mitigation Measure BIO-5-1. (Ibid)

The Commission relied on the 2016 MMRP in finding that the County's 2021 lease "as proposed" did not necessitate further environmental review. Yet, it is evident that renewal of the County's lease – absent adequate assurances of enforcement in the SAR – will result in significant environmental impacts, requiring review and mitigation under CEQA. Further, CEQA requires an agency to enforce mitigation measures. (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1166.)

If the Commission decides not to require third-party enforcement and provision of funding for said enforcement, it must require proper CEQA review, including the preparation of a supplemental Environmental Impact Report and MMRP.

Endangered Species Act

Both the federal and State Endangered Species Act prohibit “take” of endangered species. The Western Snowy Plover and California Least Tern are listed as federally threatened and endangered, respectively, and are both State special status species. (Ex. I, p. 14.) The Commission, State Parks, California Department of Fish and Wildlife, and U.S. Fish and Wildlife Service have all warned that the presence of dogs in the SAR disturbs the foraging grounds of birds and severely degrades habitat area. (Ibid.) The OCCK reports, including the most recent 2023 report, document hundreds of incidents of harassment of shorebirds.

The trespassing and unregulated dogs results in ongoing “take” of protected species under State and federal law. (50 CFR §17.3; Fish & G. Code, § 86; see *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554.) As the State Parks Department explains: “if a beach goer brings a dog onto the beach, and the dog disrupts the feeding of a bird, leading to the bird’s injury, then it is a violation of the law.” (Ex I., p. 15.)

California Coastal Act

The Commission’s decision regarding the County’s Lease Renewal is subject to CEQA, which requires analysis of consistency with applicable State laws. There are several ongoing violations of the California Coastal Act that must be considered in the Commission’s analysis.

The Coastal Act’s protections for “environmentally sensitive habitat areas” (“ESHA”) are paramount. (Public Resources Code §§ 30240, 30107.5.) The SAR features ESHA in multiple locations, both in and around the River Mouth, which is being harmed from the unregulated presence of people and dogs:

- The Coastal Commission found that the SAR Mouth provides foraging and roosting habitats for Least Tern and Western Snowy Plover, and breeding habitat for the Least Tern, species that are “key to the marine ecosystem.” (Ex. I, p. 18.)
- The Regional Water Quality Control Board stated that the River Mouth is a “RARE beneficial use designation” because it is known habitat for the Western Snowy Plovers and Least Tern that warrants protection. (Ibid.)
- The dunes on the south side of the river constitute ESHA, as found in a 2006 Coastal Commission enforcement action, because dunes are a sensitive plant community and provide habitat to the Least Tern. (Public Resources Code § 30251.)
- The California Least Tern habitat immediately adjacent to the River Mouth in the Huntington State Beach Least Tern Natural Preserve is ESHA.

As the Coastal Commission underscored in a warning to the City of Newport for allowing similar harms from unleashed dogs: impacts on ESHA create liability “under the Coastal Act at a minimum” for the local jurisdiction, as they “constitute continuing violations of the Coastal Act and continuing public nuisances.” (Ex. I, p. 19.)

Additionally, the Coastal Act requires protection and restoration of marine resources, as well as coastal waters and streams themselves. (Public Resources Code §§ 30230, 30231.) The Coastal Commission already concluded that a dog beach in the River Mouth is inconsistent with these policies. (Ex. I, p. 20.)

Finally, Section 30210 of the Coastal Act requires that public access be provided “consistent with public safety needs.” The County’s regulations on trespassing and dogs exist for public safety reasons. As discussed in Section II, the non-enforcement in the SAR poses serious harm to people and dogs, in violation of the Coastal Act.

IV. Conclusion

The Commission ensured that it would have a chance to evaluate whether the County’s lease framework effectively protects public trust resources before renewing the lease. The Commission also previously contemplated the need for third-party enforcement, and the potential to charge the County monetary rent for its lease if in the interest of the State.

The evidence demonstrates the County is still not enforcing its ordinances, and that large numbers of people and unleashed dogs are still inflicting harm on environmentally sensitive habitat areas and endangered species, and endangering their own safety, as well. As highlighted in previous correspondence, County representatives have cited “political” reasons for this nonenforcement. (Ex. I, p. 105, 27-28.) Therefore, the County cannot be entrusted with enforcement. The lease framework is not working.

We respectfully request and urge the Commission to require the County to fund and hire third-party enforcement, or require a commensurate monetary rent, as a binding condition under the lease, and as a mitigation measure under the California Environmental Quality Act.

Thank you very much for your consideration of these comments.

Sincerely,



Kathryn Pettit
Josh Chatten-Brown

Lucchesi, Simpkin
September 20, 2023
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cc

Benjamin Johnson (benjamin.johnson@slc.ca.gov)
Nina Tantraphol (nina.tantraphol@slc.ca.gov)
Lucinda Calvo (lucinda.calvo@slc.ca.gov)

Exhibit I



Chatten-Brown, Carstens & Minter LLP

Hermosa Beach Office
Phone: (310) 798-2400
San Diego Office
Phone: (619) 940-4522

2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
www.cbcearthlaw.com

Kathryn Pettit
kmp@cbcearthlaw.com
TEL: 323-348-1877

September 15, 2022

Via e-mail

State Lands Commission
Executive Officer Jennifer Lucchesi (*Jennifer.Lucchesi@slc.ca.gov*)
Public Land Management Specialist Drew Simpkin (*Drew.Simpkin@slc.ca.gov*)
301 East Ocean Boulevard
Long Beach, CA 90802

Re: The Need to Incorporate a Condition to Fund and Ensure Third-Party Enforcement in the Lower Santa Ana River into the Orange County Flood Control District's Lease.

Dear Ms. Lucchesi and Mr. Simpkin:

On behalf of the Endangered Habitats League, we respectfully urge the State Lands Commission to require the funding and hiring of third-party officers to manage enforcement of local and environmental laws in the Lower Santa Ana River mouth and flood control channel as a condition of the Orange County Flood Control District's (OCFCD) lease of State lands. There should be no renewal of OCFCD's lease without assurance of third-party enforcement with dedicated coverage in this impacted area.

As detailed in the letter we submitted to OCFCD and the County of Orange (County) in April 2022 (**Enclosure 1**), the County's refusal and inability to effectively enforce its laws pertaining to trespassing and dogs in the Lower Santa Ana River (River) mouth violates its current lease with the State Lands Commission (Commission), as well as the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act.

The current lease requires the County to enforce its own laws, and to submit an annual monitoring report to the Commission by July 8. On July 19, 2022, the Commission swiftly issued a Notice of Breach of General Lease to OCFCD, as it had not received an annual report. (**Enclosure 2.**) We reviewed the County's 3-page "Annual Report" it thereafter submitted (County Report). (**Enclosure 3.**) Not only does the County Report lack informational value—it clearly demonstrates that the County and OCFCD have simply continued with the status quo of refusing to enforce the law, inflicting harm on the endangered Western Snowy Plover and California Least Tern and Environmentally Sensitive Habitat Areas.

The County Report only confirms the Commission's concerns when it authorized the County's lease last year and anticipated third-party enforcement will likely be needed. The County has since demonstrated it will simply not enforce its laws, or alternatively, does not have the capacity or trained personnel to do so. Therefore, we respectfully urge the Commission to incorporate a binding lease condition that the County fund and hire third party-enforcement, such

as a California Department of Fish and Wildlife (CDFW) Officer or a City of Newport Beach (CNB)¹ Animal Control Officer to prevent the ongoing harm to coastal and environmental resources and violation of environmental laws.

I. Evidence Demonstrates that Trespassing and Dogs in the River Mouth Continue to Harm Endangered Species, Sensitive Habitat, and Marine Resources.

Public observations and documentation show continued high levels of people and unleashed dogs in the River mouth. Photographs taken on August 27, 2022, at 2 p.m. confirm the issue is ongoing, and third-party enforcement is required. (**Enclosure 4** [picturing over 20 people and multiple unleashed dogs]; see also Enclosure 1, p.3, Exhibit E [video and photos].) We can provide further videos if needed.

Orange County Coastkeeper monitored the River mouth from July to December 2021 and released a report (OCCK Report) demonstrating the expansive scope of the problem in the Santa Ana River. The OCCK Report detailed high levels of trespassing and dogs—the majority off-leash. (Enclosure 1, Exhibit D “July-December 2021 Report,” at p. 2.) Officers were only present seven times throughout the surveys, and no citations were observed to be issued. Of these officers, only one was reported to be a County officer. The OCCK Report includes specific accounts of the futility of voluntary warnings, continued non-compliance, and harassment of the shorebirds.

The OCCK Report casts doubt on the County’s Annual Report assertion that the number of people present in the area has declined. For example, the County Report claimed only **1.1 average warnings per visit** in December 2021. Yet, on December 19, 2021, a report by an OCCK volunteer *directly contradicts* the Report’s contention that its reported period of low warning numbers correlates with few dogs and visitors:

“...a law enforcement officer came down to the flood area and said something over the loudspeaker but no one could hear him. There were **18 dogs off leash** during the 30 minutes I was there, and at least half of them were still there when the officer arrived. A couple of people went over to ask him what he said and then left. There were still at least 6 dogs still off leash when the officer drove away, and he was too far away for people to hear what he said.”

This empiric information shows the ongoing problem in the river mouth, and that the County’s methodology in its Annual Report is unreliable and error-prone. Notably, the County Report does not even report on the number of unleashed dogs in the River mouth, which cause the most harm to endangered shorebirds.

¹ We further recall that a MOU was developed at one point for assurance of cooperation between the County and CNB. CNB is able to enforce in all jurisdictions using all available laws. Thus, the hiring of a CNB Animal Control Officer is also a viable option, as long as the Officer is dedicated to coverage of the River mouth.

The County asserts that its reported number of “Warnings” represents the “number of people present in the river mouth.” (Enclosure 3, p. 3.) If this assertion is true, there is a great discrepancy between the OCCK Report and County Report. Between July and December 2021, OCCK reported that in 63 surveys, 1,506 people and 273 dogs were observed. During this same period, the County reported almost three times the number of visits (170 visits) but over half the amount of people present. (674 people).

Using the County’s bundled “Average Warnings per visit” metric, based on this data, in total the OCCK report shows 23.9 people per visit, whereas the County shows 3.96 people per visit. **Therefore, the OCCK Report shows 6 times more people present.** This is likely due to the fact the County Officers visit at different hours.

The OCCK Report, objective monitoring data, demonstrates the County Report data is unreliable and inconsistent, and shows there are still large numbers of people and un-leashed dogs in this sensitive habitat area. This evidence calls for third-party enforcement.

II. The County’s Annual Report Demonstrates that the County Is Not Enforcing Its Laws and Is Deficient as a Reporting Mechanism.

The Commission approved OCFCD’s lease application on October 21, 2021 with the condition that the County would enforce its laws prohibiting trespassing and dogs in the River mouth. (Enclosure 1, Exhibit C [Commission Staff Report]) In particular, Commission Staff Report highlighted the futility of County Sheriffs’ verbal warnings and failure to issue fines.

Yet, amazingly, the County reports it has continued with exactly the same ineffective approach. The Report admits this bare minimum “Law Enforcement Methodology,” explaining: “OCSD Officer(s) arrive on site and if people and/or dogs are present in the river mouth they issue a warning to the entire Santa Ana River mouth (via bullhorn attached to the sheriff’s vehicle), that they are trespassing and need to leave the flood channel, or words to that effect. The OCSD log the number of visits, along with the number of people that are present in the river mouth when they issue warnings” (Enclosure 3, p. 2.)

It doesn’t appear County Officers even leave their cars, or stay to determine if people return after initially heeding the warning, or if people even listen or heard the warning at all. As detailed in our previous letter, the public does not heed voluntary warnings, especially given the County’s voiced support for an informal dog park at this location. Video documentation provided by the public at multiple California Coastal Commission hearings demonstrates that the Officers do not stay long after their announcement to see if anyone leaves or heard them. Indeed, the videos show that most of the visits are timed at **90 seconds or less**, confirming that the visits are too short for effective enforcement purposes.

The County Report admits the Officers only visit the River mouth when they have no other obligations, therefore enforcement times do not correlate to times of maximal human disturbance when enforcement is most needed (and when reporting would be most meaningful).

Conversely, visits may have coincided with periods of low visitation, skewing the results. Because the Report's "Results" table does not provide any information on the time of day, or even what day, the Officers visited the River mouth, its informational value is subverted, and shows that the County has not undertaken a serious monitoring effort.

The report also admits that the methodology employed—visits not correlating with times of peak visitor use—severely undermines any conclusion as to benefit:

OCSD Officers may be visiting the river mouth outside of peak usage and the figures may not be representative of the peak number of people trespassing in the river mouth, compared to the first three months.

Absent actual visitor and dog counts at *set times and frequencies*, it is impossible to know if the random nature of officer visits was effective or not. The County Report utilizes defective methodology. There is no ability to replicate the observations (due to lack of information on time of day, or what day). County Sheriffs are visiting at times that are not reproducible, verifiable, or representative. Therefore, the County Report cannot dispute the overwhelming evidence that there are still large numbers of people and un-leashed dogs in the River mouth, necessitating third-party enforcement.

The County Report raises other questions, especially its use of the "warnings given" metric in the "Results" table. The report should have clearly explained and labeled all empirical data. If, as the reports states, "The number of warnings given represents the number of people present in the river mouth while the officer was on site," then why does the County's Report not then label its Results table as "people present"? If the County Report is utilizing a "warnings given" metric, rather than the actual number of people present, this would have great implications for the metric's reliability.²

Finally, the Report acknowledged that the oil spill off the coast in Orange County led to severe restriction in access to the River mouth, and admits the perceived impacts of the spill may have reduced use. OCFCD cannot disentangle the effect of the spill and the pollution concerns affecting visitation from its conclusions. The shift in sand and berm size further reduced visitor use and confounded the Report's results, as the River mouth beach was reduced in size and then washed away altogether in June.

² A "warnings given" metric is contingent on County Sheriff actions and provides no objective assessment of whether those actions were effective. Nor can there be confidence in the veracity of a relationship between number of broadcasts and violations. For example, a single warning may have been given even if large numbers were present due to the proclivities of the individual officer involved or perceived effectiveness of the initial broadcast. Or, officers may have used bullhorn repeatedly during early months but did not use it repeatedly in later months simply due to fatigue, leading to a false conclusion that the number of people in the area declined. The obfuscation around metrics undermines the Report's conclusions. An indirect and fallible surrogate of number of broadcasts cannot substitute for direct and reproducible measurement of violations at regular times and dates.

For these reasons, the Report lacks foundation for its conclusion that there has been a decline in people present in the River mouth, and fails to demonstrate that the Sheriff's verbal warnings are working. It also fails to report on the presence of unleashed dogs in the River mouth, the chief concern of the Commission, environmental agencies, and the public. Setting this aside, the Report demonstrates that trespass still regularly occurs and people are present most every visit. Thus, a significant problem remains and third-party enforcement is needed.

III. Third Party Enforcement Is Required as a Condition, Otherwise Further Environmental Review Would Be Required.

We applaud the Commission's inclusion of the enforcement and reporting conditions, and the election to utilize a shorter lease term so that it could evaluate the effectiveness of the County's lease conditions. In 2021, the Commission reported it was exploring opportunities to fund additional CDFW law enforcement positions that would allow for more targeted and frequent enforcement, including the issuance of citations under both County and CDFW ordinances. Third-party enforcement is the only method that will be effective.

The County admits that the Sheriff's Department is ill-equipped to handle enforcement, and can only "visit the river mouth when they are not required to attend other high priority incidents or provide support elsewhere. Attendance on site is therefore on an as and when available basis and is not necessarily linked to periods of peak usage." (Enclosure 3, p. 2.) Also, Sheriffs do not usually typically handle conflicts between human recreation and wildlife. Such specialized enforcement should be put into the hands of personnel specifically trained for this purpose, who are knowledgeable about and who can explain the needs of the species involved, who will de-escalate tensions, and who will make interactions with people friendly and constructive. Only an educational component conducted by trained personnel will lead to sustained changes in behavior and resolution of the conflicts.

As we detailed in our previous letter to the County, in finding that the County's lease complied with environmental laws and did not require further environmental review under the California Environmental Quality Act, the Commission assumed compliance with the lease conditions and relied on the County's assertions it would effectively prevent trespassing and dogs in the River mouth. (Enclosure 1, pp. 4-12.)

The County's lease requires it to submit its next lease application by October 21, 2022. The Commission purposefully granted OCFCD a 2-year lease, rather than a 5-year lease, to provide an opportunity to assess whether the current lease framework is adequately protecting the endangered shorebirds, which includes adherence to its conditions. (Enclosure 1, p. 6.)

The status quo isn't working; therefore, we ask the Commission to require the County to fund third-party enforcement. Despite years of efforts from agencies and environmental groups, the County Report demonstrates that the County is still not effectively enforcing its ordinances and the conditions of its current lease. This evidence and the need for further environmental review and mitigation measures must be considered when the County begins applying for a new

lease this year to protect public trust and coastal resources in this area with extremely high biological value.

IV. Conclusion

The ongoing destruction of sensitive habitat and damage to endangered shore birds in the Lower Santa Ana River mouth and surrounding environmentally sensitive habitat areas has persisted for years. Without third-party enforcement, nothing will change. The County's Annual Report only underscores this fact.

The Commission has taken great steps to try to ensure the County's adherence to its lease and environmental laws. We respectfully request and urge the Commission to take the final step and require the County and OCFCD to fund and hire third-party enforcement when the County submits its new lease application next month, and to incorporate this as a binding condition under the lease, and as a mitigation measure under the California Environmental Quality Act.

We thank you both and the State Lands Commission for your continued work to protect the State's public trust resources.

Sincerely,



Kathryn Pettit
Douglas Carstens

cc:

Benjamin Johnson (benjamin.johnson@slc.ca.gov)
Lucinda Calvo (lucinda.calvo@slc.ca.gov)
Nina Tantraphol (nina.tantraphol@slc.ca.gov)

ENCLOSURE 1



Chatten-Brown, Carstens & Minter LLP

Hermosa Beach Office
Phone: (310) 798-2400
San Diego Office
Phone: (619) 940-4522

2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
www.cbcearthlaw.com

Kathryn Pettit
kmp@cbcearthlaw.com
TEL: 323-348-1877

April 4, 2022

Via e-mail

Orange County Flood Control District
Public Works Director James Treadaway (james.treadaway@ocpw.ocgov.com)
601 N. Ross Street
Santa Ana, CA 92701

Re: Notice of Violations of the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Section 9 of the Federal Endangered Species Act for Taking of Western Snowy Plover and California Least Tern and Request for Immediate Corrective Action.

Dear Mr. Treadaway:

This letter is written on behalf of the Endangered Habitats League to urge the County of Orange (“County”) and Orange County Flood Control District (“OCFCD”) to cease violations of the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act. These violations arise from the County’s intentional refusal to effectively enforce its own laws prohibiting trespassing and dogs in the Santa Ana River Mouth, inflicting harm on the endangered Western Snowy Plover and California Least Tern, on Environmentally Sensitive Habitat Areas, and on people and dogs themselves.

Recognizing these harms, on October 21, 2021, the State Lands Commission (“Commission”) approved OCFCD’s application to continue maintenance dredging in the Lower Santa Ana River (“River”) on the condition that the County would enforce its own laws prohibiting trespassing and dogs in the River Mouth. Despite this clear mandate, the County (including through OCFCD) continues to violate the conditions of its lease.

Dog parks can provide a meaningful venue for individuals and their pets to connect, when in the right location. Environmental groups and a state agency have provided the County and the City of Newport, which also refuses to enforce its own regulations in this area, with alternative dog beach locations that will not result in harm to state and federally protected species and sensitive habitat. (NGO July 2018 Comment Letter, **Exhibit A**, pp. 6, 11-12; see also Santa Ana Regional Water Quality Control Board Letter, **Exhibit B** [noting nearby existing dog beach where dog excrement and urine are less likely to wash out to sea].) The County’s encouragement, and public reinforcement via multiple media outlets, of the de facto dog park in the Santa Ana River Mouth actively harms endangered species and sensitive habitat in violation of the County’s legal obligations. The County must enforce its laws prohibiting trespassing and presence of dogs in the River Mouth to avoid violations of the aforementioned State and federal environmental laws.

I. The County’s On-Going Violations of its State Lands Commission Lease Conditions Violate the Public Trust Doctrine, the California Coastal Act, and the California Environmental Quality Act.

A. The County’s Lease Requires Enforcement of County Ordinances.

The Commission considered OCFCD’s application for a two-year lease, beginning October 21, 2021, to conduct maintenance dredging on public sovereign lands in the Lower Santa Ana River, which includes the River Mouth. (Commission Staff Report, **Exhibit C**, p. 1.) The Commission specifically addressed the use of the River Mouth as an informal off-leash dog park, and the harm this causes to the on-site Western Snowy Plovers and California Least Terns. (Ex. C, p. 3.) It also refuted the County’s previous claims that it did not have a duty to enforce restrictions on trespassing and dogs in the River Mouth, and reported that “[t]he County is now willing to enforce this ordinance within the Lease Premises to protect public safety and the environment.” (*Id.* at p. 6.)

Commission staff contacted the California Department of Parks and Recreation (“Parks”), U.S. Fish and Wildlife Service (“USFWS”), and the California Department of Fish and Wildlife (“CDFW”), who “all indicated that the presence of dogs disturbs the foraging grounds of birds and severely degrades habitat area.” (Ex. C, p. 4.)¹ As a result, the Commission required the County to enforce its own ordinances prohibiting trespassing and dogs in the River Mouth as a condition of its lease of the sovereign lands. (Ex. C, pp. 2-4, 6 [Section 4-1-45 prohibits unleashed dogs in public parks and presence of dogs altogether on public beaches; Section 3-9-35 prohibits trespassing in the Santa Ana River Flood Control Channel].) Further, under its lease the County must not interfere or object to any enforcement by a state agency of applicable laws in the River Mouth, including its own ordinances, and must provide annual reports to the Commission detailing its law enforcement efforts in the River Mouth. (Ex. C, p. 2.)

The County’s lease places an unequivocal duty on the County to *effectively* prevent trespassing in the River Mouth: “Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat.” (*Id.* at p. 6.)

The Commission Staff Report highlighted the futility of County Sheriffs’ verbal warnings and failure to issue fines.² The County must effectively prevent trespassing and off-leash dogs in the River Mouth and flood channel through the hiring of a full-time ranger and issuance of fines.

¹ The Parks Department, California Coastal Commission, and Santa Ana Regional Water Quality Control Board also expressed concerns over the impacts on California Least Tern and Western Snowy Plover when the County considered formally allowing dogs at the River Mouth in 2016. (Ex. C, p. 3.)

² In its testimony at the Commission hearing, OCFCD admitted that “thousands of warnings to vacate the area have been issued at the SAR mouth.” Commission Meeting Transcript, https://slcprwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 181.

B. The County Has Intentionally Avoided Enforcement of Its Laws, Causing Harm to Endangered Species and Environmentally Sensitive Habitat Area.

Despite years of notice from federal agencies, state agencies, and environmental groups that the County's inaction in the River Mouth creates environmental harm and violates the law, the County still refuses to enforce its prohibitions on trespassing and dogs in the River Mouth. This nonenforcement has also resulted in harm, and poses a continued risk of harm, to people and dogs.³

The continuous failure to enforce County ordinances is well documented. Orange County Coastkeeper ("OCCK") monitored the trespassing and illegal presence of dogs in the River Mouth in 2021 and released a report demonstrating the expansive scope of the problem. (OCCK Santa Ana River Mouth Monitoring Project January-June 2021 Report, **Exhibit D**, p. 2.) In only six months, over 5,000 humans, over 1,000 dogs (82% unleashed), and drones were reported in the River Mouth. (*Ibid.*) OCCK continued its monitoring, and just released its July-December 2021 Report. The OCCK December 2021 report similarly detailed high levels of trespassing and dogs—the majority off-leash—in the River Mouth. (OCCK December 2021 Report, Ex. D, p. 2.) Officers were only present seven times throughout the surveys in the time period, and no citations were observed to be issued. (*Ibid.*) The December 2021 Report includes specific accounts of the futility of voluntary warnings, continued non-compliance, and harassment of the shorebirds. (*Ibid.*)

The County's non-enforcement has continued after the Commission's approval of the County's lease.⁴ (February 19, 2022 Video and Photographs, **Exhibit E** [evidence of deliberate inaction and non-enforcement].)

County representatives have cited "political" reasons for its nonenforcement. (Ex. A, pp. 5-6.) This is unacceptable and in violation of federal and state laws.

C. The County's Failure to Comply with its Lease Conditions Violates the Public Trust Doctrine and California Coastal Act.

The Public Trust Doctrine requires the State to hold its tidal and submerged lands, stream beds, and other navigable waterways in trust for the benefit of the people of California. The Commission is charged with managing and ensuring appropriate uses on sovereign lands, which include the Santa Ana River Mouth.⁵

³ latimes.com/socal/daily-pilot/tn-dpt-me-dog-death-20161005-story.html ["Dog's death in storm drain near 'dog beach' raises safety issue"].

⁴ <https://www.ocregister.com/2021/11/03/enforcement-at-orange-countys-illegal-dog-beach-may-be-ramping-up/> [reporting that only eight days after County lease approval, people and their dogs were observed in the area during a visit by the Orange County Register]; Ex. A, p. 5; Commission Meeting Transcript, https://slcprdwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 178 [testimony about monitoring studies], p. 183 [testimony about hours of footage showing Orange County Sheriff's Department complete lack of enforcement action.].

⁵ <https://www.coastal.ca.gov/coastalvoices/PublicTrustDoctrine.pdf>.

Further, it “has long been recognized that wildlife are protected by the public trust doctrine.” (*Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1361.) Citizens have standing to enforce the Public Trust Doctrine when the public agencies fail to discharge their duties. (*Id.* at 1366 [finding that Plaintiffs should have brought their Public Trust action against the County or CDFW].)

The Commission’s finding that the County’s lease of state sovereign lands does not substantially interfere with Public Trust uses hinged on the County’s effective enforcement of its ordinances, as Commission “staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources from harassment due to the unregulated presence of unleashed dogs.” (Ex. C, pp. 6, 8)

The County’s failure to enforce the trespassing and dog ordinances violate the Public Trust Doctrine. Further, because the California Coastal Act (“Coastal Act”) codifies and implements the Public Trust Doctrine, for these reasons the County’s intentional inaction violates the Coastal Act. (See *Carstens v. California Coastal Com.* (1986) 182 Cal.App.3d 277, 290 [highlighting that Public Resources Code section 30210 “makes specific reference to the public trust doctrine” and emphasizes the need to consider public safety interests.])

D. The County’s Inaction Violates the California Environmental Quality Act.

An agency must implement promised mitigation measures, and where it fails to do so the public may enforce under the California Environmental Quality Act (“CEQA.”) (*Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1166.)

For environmental review of its River dredging, OCFCD used a 1989 U.S. Army Corps of Engineers Supplemental Environmental Impact Statement as a CEQA equivalent document and prepared and approved an Addendum on April 29, 2016. (Ex. C, pp. 8-9.) In granting the County’s current lease, the Commission relied on the County’s Mitigation Monitoring and Reporting Program (“MMRP”) that the Commission previously adopted on August 9, 2016. (*Ibid.*) Based on this, the Commission concluded that the County’s activity “involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq., but such activity will not affect those significant lands. Based upon staff’s consultation with the persons nominating such lands and through the CEQA review process, it is staff’s opinion that the project, *as proposed*, is consistent with its use classification.” (Ex. C, p 9, emphasis added.) The County’s refusal to enforce its ordinances conflicts with both the Commission’s 2021 proposed project under CEQA, and impacts habitat on the adjacent mitigation lands.

The County’s 2016 CEQA findings admitted biological impacts to the River from its maintenance dredging, but found that mitigation measures would reduce impacts to a level below significance.⁶ Mitigation Measure BIO-5-1 required acquisition of eight acres of wildlife mitigation lands at the Mouth of the Santa Ana River and restoration of 88-acres of the Santa

⁶ 2016 MMRP, https://www.slc.ca.gov/Meeting_Summaries/2016_Documents/080916/Items_and_Exhibits/C31.pdf, p. 61 of PDF. (Accessed via hyperlink on page 9 of Exhibit C.)

Ana River Marsh that is adjacent to the Santa Ana River, near the Mouth of the river, as well as well as formation of a biological monitoring program.⁷ The Army Corps' Habitat Management Plan requires an on-site manager to coordinate with the Corps and local police department for enforcement of trespass ordinances.⁸

The County's non-enforcement has negatively impacted, and continues to harm, species on the Marsh mitigation lands, as noted in an Army Corps 2017 Supplemental Environmental Assessment.⁹ (“[S]nowy plovers were not observed within the Santa Ana River Marsh during surveys conducted in 2012 or 2013. While mudflats within the marsh could be used for foraging and roosting, disturbance associated with local residents and their dogs recreating in areas that are suitable for snowy plover nesting in the marsh channels likely precludes nesting activity.”) The impacts of dogs on the Marsh and another protected species, the Light-footed Ridgway's rail, were noted again in the Army Corps' 2019 Habitat Management Plan.¹⁰

Figure 1. Vicinity Map



(Map Displaying Proximity of the Marsh (outlined in red) to the River Mouth, April 2019 HMP EA, p. 36.)

The County's failure to enforce its trespassing and dog ordinances are obstructing restoration of the nearby Marsh mitigation lands for suitable nesting habitat, which is one of its stated goals. The Commission relied on the 2016 MMRP in finding that the County's 2021 lease

⁷ *Id.* at p. 13-14 of PDF, Table SEIS-16, Section III. G. 1; p. 61 of PDF; April 2019 Habitat Management Plan EA, <https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/COMPLETE%20SAR%20Marsh%20HMP%20EA%204-25-19.pdf?ver=2019-04-25-184114-38>, p. 6 of PDF. The Marsh provides restored habitat for various state threatened and endangered species such as the California least tern, western snowy plover, coastal California gnatcatcher, Belding's savannah sparrow, and light-footed Ridgway's rail. "Continued management is needed to improve and maintain habitat conditions and to minimize disturbance and degradation." (*Id.* at p. 51 of PDF.)

⁸ *Id.* at p. 22 (p. 70 of PDF).

⁹ https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/complete%20SantaAnaRiverMarsh_Final_SEA%204-25-17.pdf?ver=2017-04-25-165707-200, p. 287 of PDF.

¹⁰ April 2019 HMP EA, p. 15 (p. 17 of PDF).

activities, *as proposed*, did not necessitate further environmental review. Yet, evidence shows the negative impacts of the County's non-enforcement on the Marsh mitigation lands. The Commission will need to reassess the MMRP and appropriate level of CEQA review when the County applies for another lease, as the current lease expires in October 2023.

In fact, the County's lease requires the County to submit its next lease application no later than October 21, 2022. The County must also provide annual reports to staff detailing its law enforcement efforts by July 2022. The Commission purposefully granted OCFCD a 2-year lease, rather than a 5-year lease, to provide an opportunity to assess whether the current lease framework is adequately protecting the endangered shorebirds, which includes adherence to its conditions. (Ex. C, p. 31.)¹¹ The Commission made this decision despite OCFCD's request for a 5-year lease.¹²

Despite years of efforts from agencies and environmental groups, the County still refuses to effectively enforce its ordinances, instead choosing to violate various State and federal environmental laws, as well as the conditions of its current lease. This evidence, and the need for further environmental review and mitigation measures, must be considered when the County begins applying for a new lease this year. In particular, any future lease must require the County to provide funding for a ranger at the River Mouth and effectively enforce its ordinances.

II. The County's Allowance of a De Facto Dog Park Violates the Federal Endangered Species Act and California Endangered Species Act.

The County's deliberate non-enforcement of its ordinances and allowance of dogs in the River Mouth violates the Federal Endangered Species Act ("ESA") and California Endangered Species Act ("CESA") through the resulting continuing harassment and take of endangered species, in particular the Western Snowy Plover and California Least Tern, in the Santa River Mouth and immediately adjacent areas.

The Western Snowy Plover is listed as a threatened species by the federal government and a California Species of Special Concern. A Recovery Plan was completed by the USFWS in 2007, designating the Santa Ana River Mouth as "critical habitat."¹³ The California Least Tern is also listed as federally endangered (Federal Register, June 2, 1970) and as State of California endangered. As noted in the Commission's Staff Report, the State Parks, CDFW, and USFWS all indicated that the presence of dogs in the River Mouth disturbs the foraging grounds of birds and severely degrades habitat area. (Ex. C, p. 4.)

¹¹ The specific language of the lease bears including here: "Further, staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources, from harassment due to the unregulated presence of unleashed dogs and other domestic animals. The limited 2-year lease term will allow the Commission to re-evaluate the effectiveness of this protection and enforcement framework and adaptively manage the situation accordingly." (Ex. C, p. 31.)

¹² Commission Meeting Transcript, https://slcprdwordpressstorage.blob.core.windows.net/wordpressdata/2021/12/10-21-21_Transcripts.pdf, p. 179-181 ["[OCFCD] has only one concern with the draft lease, and that is the term of the lease. The draft term has been reduced to only two years as opposed to the five-year term of a prior dredging Lease..."]

¹³ 2007 Recovery Plan, https://ca.audubon.org/sites/default/files/documents/wsp_final_rp_10-1-07.pdf, p. 109.

Section 9 of the ESA and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the ESA defines “take” to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations define “harm” to include significant habitat modification or degradation which kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. (50 CFR 17.3) The Service defines “harassment” as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

CESA similarly prohibits the “take” of a California endangered or threatened species by any person or public agency. (Fish & G. Code, § 2080.) Fish and Game Code section 86 defines “take” as to “hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill.” (*Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 232.) The California Department of Fish and Game has specifically stated that nest abandonment, loss of young, and reduced health and vigor of eggs and/or nestlings (resulting in reduced survival rates) may ultimately result in a take in violation of the CESA.¹⁴ This interpretation of “take” was judicially affirmed in a Court of Appeal decision.¹⁵ Further, Section 3503 prohibits the take, possession, or destruction of birds, their nests or eggs.

The USFWS and CDFW have both already notified the County that the mere “presence of leashed or unleashed dogs on the beach and in the river mouth is harmful to snowy plovers and least terns” and can degrade the adjacent federally-designated Critical Habitat, and warned that dogs capture and kill or injure snowy plovers or least terns (Wildlife Agency Letters, **Exhibit F**, Dec. 2016 Letter, p. 3, 5.) USFWS specifically stated that the “presence of dogs at the mouth of the Santa Ana River is likely to disturb federally endangered California least terns [] and federally threatened western snowy plover.” (Ex. F, Nov. 2016 Letter, p. 1.) Of further concern, the wildlife agencies noted that impacts to western snowy plovers from dogs and other beach activities are “much greater than what we observe” due to limited monitoring, and the low probability of the actual discovery of a dead or injured western snowy plover. (Ex. F, Dec. 2016, Enclosure 1, p. 3.)

The State Parks Department makes it explicit: “if a beach goer brings a dog onto the beach, and the dog disrupts the feeding of a bird, leading to the bird’s injury, then it is a violation of the law.”¹⁶ The Parks Department reports that the Western Snowy Plovers have faced a population decline for several years from habitat destruction and harassment. For this reason, State Parks “will strictly enforce regulations prohibiting dogs on State Beaches.” (*Ibid.*) The Parks also detailed the negative impact of flying kites near nesting areas, as hovering kites

¹⁴ <https://nrm.dfg.ca.gov/FileHandler.ashx?DocumentID=83992>.

¹⁵ *Ibid.* [citing *Department of Fish & Game v. Anderson-Cottonwood Irrigation Dist.* (1992) 8 Cal.App.4th 1554].

¹⁶ https://www.parks.ca.gov/?page_id=22542 [Parks Department discussing the decline of the Western Snowy Plover from human activities, including harassment from dogs, and explaining how even well-behaved dogs cause harm to western snowy plovers].

resemble predators and may cause nest abandonment. Drones, which are much noisier, have the same effect, including on the Least Tern nesting preserve immediately adjacent to the Mouth.

Snowy plovers regularly roost west of the adjacent Least Tern Preserve fencing and the Mouths of the Santa Ana River and Talbert Outlet. In 2012, 25 acres of snowy plover critical habitat was designated at the Mouth of the Santa Ana River (Unit CA 47) for the snowy plover.¹⁷



Figure 10. Critical Habitat for the Mouth of the Santa Ana River Unit CA-47

The plovers have faced continuous threats from trespassing and dogs in the River Mouth and surrounding areas. Environmental groups have previously alerted the City of Newport to this harm, whose nonenforcement of its off-leash ordinances and illegal encroachments have also resulted in take of the Western Snowy Plover. (Ex. A; NGO May 2019 Comment Letter, **Exhibit G** [detailing ESA violations].) A report by Tom Ryan and colleagues identified regular disturbance from trespassing and dogs as a threat to the Western Snowy Plover in the area, both breeding and non-breeding, (Ex. A, p. 10.) The plovers cannot compete with unaware beach users.¹⁸

Additionally, an important nesting colony of the California Least Tern is located at Huntington State Beach, just west of the Santa Ana River Mouth. A 7.5-acre area has been fenced off to protect the nesting colony and is designated as a California Least Tern Nesting

¹⁷ <https://documents.coastal.ca.gov/reports/2018/11/th11a/th11a-11-2018-exhibits.pdf>, p. 47 of PDF; see also Ex. F, p. 8 [Figure 1 demonstrating location of Western Snowy Plover Critical Habitat extending all the way into River Mouth, and further noting shoreline data may not accurately represent the “dynamic shoreline environment.”]

¹⁸ <https://www.seaandsageaudubon.org/Conservation/LeastTerns/LETE.htm>.

Sanctuary.¹⁹ The Santa Ana River Mouth is immediately adjacent to this Least Tern Sanctuary. The Preserve is one of five locations in Orange County where least terns breed and one of the few historical sites where least terns have continued to breed.²⁰ The Least Tern forages in the Santa Ana River and Marsh. Yet, as noted in Section 1.D., the Army Corps' Environmental Assessment for the Marsh Habitat Management Plan found that the California Least Tern has declined primarily because of human disturbance to its sandy beach nesting habitat.

The California Parks Department notified the County that due to the proximity of the River Mouth, dogs at this location “will directly impact” State Park operations and management, especially its mandate to protect sensitive natural resources at the adjacent Huntington State Beach, which includes the California Least Tern Natural Preserve. (Parks Letter, **Exhibit H.**)

The presence of unleashed dogs and illegal drones have had documented deleterious impacts on other nearby least tern nesting colonies, including inducement of the least tern to abandon their eggs, resulting in take of the species under both the ESA and CESA.²¹ The County's deliberate nonenforcement of its off-leash and trespassing ordinances and allowance of a de facto dog beach in the River Mouth, is resulting in harassment and take of the endangered Western Snowy Plover and California Least Tern in violation of the Federal Endangered Species Act and California Endangered Species Act.

III. The County's Allowance of a De Facto Dog Park Violates the Coastal Act.

The County's deliberate inaction violates the Coastal Act, specifically the Coastal Act's protections of wildlife and environmentally sensitive habitat areas (“ESHAs”). The River drains the largest watershed basin in Southern California, traversing 96 miles to completion in Orange County, between Newport Beach and Huntington Beach, at the Santa Ana River Mouth. The River Mouth is at the center of a 1,300-acre ecosystem in the Lower Santa Ana River. This ecologically valuable area is an estuary—itsself ESHA—located between dune ESHA and critical habitat for the Western Snowy Plovers and California Least Tern, also ESHA. (Ex. A, p. 5.)

A. The County's Non-Enforcement Harms Various Environmentally Sensitive Habitat Areas.

The Coastal Act requires special protection of environmentally sensitive habitat area. Section 30240 mandates that ESHA “shall be protected against any significant disruption of habitat values,” restricts development in ESHA to resource dependent uses, and requires that

¹⁹<https://www.spl.usace.army.mil/Portals/17/docs/publicnotices/COMPLETE%20SAR%20Marsh%20HMP%20EA%204-25-19.pdf?ver=2019-04-25-184114-380>, p. 12 (p. 14 of PDF).

²⁰ <https://documents.coastal.ca.gov/reports/2018/11/Th11a/Th11a-11-2018-exhibits.pdf>. (p. 30.)

²¹ <https://www.pe.com/2021/06/03/illegal-drone-scars-terns-which-abandon-3000-eggs-on-bolsa-chica-nesting-island/> [Drones and off-leash dogs are a growing threat to birds at the Huntington Beach reserve”]. Orange County Coastkeeper further describes why dogs inflict harm on these endangered birds, explaining that both species have existed in the River Mouth for tens of thousands of years, and have evolved to respond to threats from coyotes by escaping the area. Thousands of generations of shorebirds respond to coyotes by fleeing and will abandon their nests and even their chicks. Dogs greatly resemble coyotes. (<https://www.coastkeeper.org/monitoring/#sar>.)

development adjacent to ESHA be compatible with the continuance of the adjacent ESHA. The Coastal Act defines ESHA as: “[a]ny area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.” (Section 30107.5). Rare plant communities and habitats for protected wildlife are usually considered to be ESHA. (Letter from CCC Enforcement, Ex. G, Attachment 1, pp. 1-2.)

The River Mouth itself is ESHA. When the County considered formalizing the de facto dog park in the River Mouth, the California Coastal Commission (“CCC”) warned that doing so would impact foraging and roosting habitats of the Least Tern and Western Snowy Plover, as well as the breeding habitat of the Least Tern, defining both species as “key to the marine ecosystem.” (CCC Letter, **Exhibit I**, p. 2.) The CCC emphasized that the River Mouth itself is important foraging habitat for the Tern and is deemed ESHA. (*Ibid.*) The Regional Water Quality Control Board also commented that the River Mouth is a “RARE beneficial use designation” in its Basin Plan because it is known habitat for the endangered Western Snowy Plovers and Least Tern that warrants protection. (Ex. B.) The County’s non-enforcement results in harm to this ESHA, as demonstrated throughout this letter. In 2018, environmental groups met with wildlife agencies and County representatives, and requested that the City and County establish an “avian protection area” or “special protection zone.” (Ex. G, p. 9.) During this meeting, the group witnessed disruptive trespassing, off-leash dogs, and ultralights in the River Mouth. (*Id.* at p. 10.)

Further, various ESHAs exist immediately adjacent to the River Mouth. The CCC formally determined in a 2006 enforcement action that the dunes on the south side of the River constitute ESHA, as dune habitat is a sensitive plant community,²² and these dunes are utilized by the California Least Tern. (Ex. G, Att. 1, p. 2.) Section 30251 of the Coastal Act grants specific protections to dunes. The CCC required restoration of the dunes *and their preservation*. (*Ibid.*) The CCC successfully restored coastal dune habitat in 2014, and transferred responsibility over to the City of Newport to manage. (Ex. G, p. 7.) Yet, sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people, dogs, and ultralight take offs and landings. (*Id.* at p. 7, 9.) The CCC commented on the inconsistencies of a dog beach at this location with Coastal Act Section 30240, due to the proximity of this ESHA and the negative impacts from “numerous leashed and unrestrained dogs,” including dune degradation. (Ex. I, p. 2.) The County’s nonenforcement of its ordinances and encouragement of a de facto dog beach leads to harmful impacts on this restored dune ESHA.

There also exists California Least Tern habitat immediately adjacent to the River Mouth in the Huntington State Beach Least Tern Natural Preserve, as discussed in Section II. The Preserve is also ESHA that is harmed from the County’s actions. (Ex. I, p. 2.)

The CCC has previously warned the City of Newport that trampling and human disturbance of ESHA constitutes development activities under the Coastal Act that require a coastal development permit and reiterated the need for increased enforcement of dog-leash laws. (Ex. G, Att.1, p. 3.) These impacts on ESHA create liability “under the Coastal Act at a

²² Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the USFWS, CDFW, and CCC. (Ex. G, Att. 1, p. 2.)

minimum” for the local jurisdiction, as they “constitute continuing violations of the Coastal Act and continuing public nuisances.” (*Ibid.*) The Coastal Act represents a “legislative declaration” that acts harming the state’s natural resources constitute a public nuisance. (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal.App.3d 605, 618; *CEEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 318.) Due to its lease of the River Mouth from the State Lands Commission, the County (through OCFCD) is the responsible landowner and is thus liable for the continuing harm to ESHA in the River Mouth. Further, activities occurring on the County’s land is harming surrounding ESHA. This constitutes a continuing public nuisance, leaving the County liable under the Coastal Act *at a minimum*.

The CCC required the County to place signage around the River Mouth to inform the public of the trespassing and dog regulations, specifically to protect the Western Snowy Plovers and California Least Terns.²³ (See Exhibit J [photo of signs, surrounded by dogs and people].) The signage required a Coastal Development Permit that placed further conditions on the County, including provision of annual enforcement reports that detail County enforcement efforts (Staff Report, p. 5.) The CCC Staff Report detailed the County’s various Coastal Act violations, as well as CCC’s previous efforts to ensure County compliance with the Coastal Act, including sending a letter to the County on June, 12, 2019,²⁴ notifying the County of its Coastal Act violations and impacts “to sensitive bird species related to commercial dog-walking activities taking place within the mouth of the river, which is considered development under Coastal Act section 30106, and is inconsistent with the resource protection policies of the Coastal Act, including but not limited to Section 30240.” (Staff Report, p. 1.) In response to these ongoing violations, the County proposed installation of signage, and “communicated to staff that Orange County Sheriff’s presence has been increased in the area to regularly enforce these laws on a more consistent basis **and to issue citations as necessary.**” (Staff Report, p. 2, emphasis added.) This Commission Staff Report was issued in January 2020. Yet, as demonstrated in the State Lands Commission 2021 Staff Report, the OCKK Monitoring Studies, and evidence submitted herein, the County did not follow through on its promise to issue citations, and the token voluntary warnings and signs have been ineffective. (Exhibits D, E, J.)

B. The County’s Non-Enforcement Harms Marine Resources and Biological Productivity and Poses a Risk to the Public in Violation of the Coastal Act.

The Coastal Act requires protection and restoration of marine resources, as well as coastal waters and streams themselves. In particular, Section 30230 requires that “[m]arine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.” Section 30231 requires the maintenance and restoration of the biological productivity and quality of coastal waters and streams.

²³ <https://documents.coastal.ca.gov/reports/2020/7/W14c/W14c-7-2020-report.pdf> (“Staff Report”).

²⁴ *Id.* [Exhibit 6, detailing the significance of habitat at the River Mouth and the County’s exposure to liability.]

The CCC concluded that a dog beach in the River Mouth is inconsistent with the aforementioned policies of the Coastal Act, and would degrade the functioning of the area to provide habitat for marine organisms, with attendant impacts to biological productivity. (Ex. I, p. 3.) Further, the negative impacts on sensitive habitats, including degradation of dune vegetation within and adjacent to the River Mouth, impedes biological productivity and water quality of wetlands at the River Mouth. (*Ibid.*)

Finally, Section 30210 requires that public access be provided “consistent with public safety needs.” The County’s trespassing ordinances exist because of the dangers posed by the flood channel. The dog ordinances also exist for public safety reasons. Further, the site itself poses risks to its users. As discussed in Section I.B., the County’s failure to enforce its prohibitions on trespassing and dogs in the River Mouth and flood channel poses serious harm to people and dogs. The Santa Ana River suffers from contamination and runoff, as well as disease that poses risk to humans and dogs alike.²⁵

The environmental community has repeatedly identified nearby, safer, alternative locations for dog beaches that would not harm ESHA or endangered species. The County’s intentional non-enforcement of its trespassing and dog ordinances, and allowance of a de facto dog beach in the River Mouth violates the Coastal Act.

IV. Conclusion

For years, environmental groups have implored the County of Orange to enforce its ordinances that prohibit trespassing and dogs in the River Mouth. Over five years ago, the County tried to formally establish a dog beach at this location but withdrew its efforts after wildlife agencies underscored the environmental harm it would cause. Yet, the de facto dog beach still exists, and is still causing harm to endangered species and sensitive habitat, both on site and immediately surrounding the River Mouth.

We understand there is public pressure on the County to maintain a dog beach at this location. However, there exist much safer and environmentally friendly dog beaches and parks nearby for the public. The Santa Ana River Mouth is not one of them. The California State Parks Department²⁶ aptly summarizes why the County must enforce its ordinances:

Beach areas are vital ecosystems. While western snowy plovers and other shorebirds can survive and nest only in certain areas, domesticated dogs are not part of the natural beach ecosystem. Remember that there are many places where [people] can take [their] dog, but only one place—the beach—where snowy plovers can breed.

²⁵ See <https://www.ocregister.com/2020/12/02/oc-water-districts-file-massive-lawsuit-over-pfas-contaminants/> [reporting contamination of the Santa Ana River]; <https://californiaglobe.com/articles/riverside-county-officials-warn-public-about-deadly-bacteria-in-santa-ana-river/> [“Riverside County Officials Warn Public About Deadly Bacteria in Santa Ana River”]. Dogs can act as vectors for pathogens. See <https://bmcvetres.biomedcentral.com/articles/10.1186/s12917-020-02607-w>.

²⁶ https://www.parks.ca.gov/?page_id=22542.

The County and OCFCD must effectively enforce the County's ordinances, issue citations, and invest resources in a full-time ranger. Failure to do so violates the conditions of OCFCD's lease, the Public Trust Doctrine, California Coastal Act, California Environmental Quality Act, California Endangered Species Act, and Federal Endangered Species Act. For these reasons, we request immediate corrective action.

Sincerely,

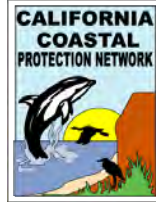


Kathryn Pettit
Douglas Carstens

cc:

Chairman Doug Chaffee, Orange County Board of Supervisors (*Fourth.District@ocgov.com*)
Vice Chairman Donald Wagner (*Donald.Wagner@ocgov.com*)
Supervisor Andrew Do (*Andrew.Do@ocgov.com*)
Supervisor Katrina Foley (*Katrina.Foley@ocgov.com*)
Supervisor Lisa Bartlett (*Lisa.Bartlett@ocgov.com*)
Leon J. Page, County of Orange, County Counsel (*leon.page@coco.ocgov.com*)
Nardy Khan, Infrastructure Programs Deputy Director, OC Public Works (*nardy.khan@ocpw.ocgov.com*)
Amanda Carr, Env. Resources Deputy Director, OC Public Works (*amanda.carr@ocpw.ocgov.com*)
Jennifer Lucchesi, Executive Officer, State Lands Commission (*Jennifer.Lucchesi@slc.ca.gov*)
Drew Simpkin, Public Land Management Specialist, State Lands Comm. (*Drew.Simpkin@slc.ca.gov*)
Benjamin Johnson, Counsel, State Lands Commission (*benjamin.johnson@slc.ca.gov*)
Jack Ainsworth, Executive Director, California Coastal Commission (*John.Ainsworth@coastal.ca.gov*)
Lisa Haage, Chief of Enforcement, California Coastal Commission (*Lisa.Haage@coastal.ca.gov*)
Andrew Willis, So. Cal. Enforcement Supervisor, Coastal Commission (*Andrew.Willis@coastal.ca.gov*)
Louise Warren, Chief Counsel, California Coastal Commission (*louise.warren@coastal.ca.gov*)
Paul Souza, Regional Director, Pacific SW Region, U.S. Fish & Wildlife Service (*paul_souza@fws.gov*)
Sandy Vissman, Wildlife Biologist, U.S. Fish & Wildlife Service (*sandy_vissman@fws.gov*)
Ed Pert, South Coast Regional Manager, Cal. Dept. of Fish & Wildlife (*Ed.Pert@wildlife.ca.gov*)
Eric Weiss, Senior Environmental Scientist, Cal. Dept. of Fish & Wildlife (*Eric.Weiss@wildlife.ca.gov*)
Assemblywoman Cottie Petrie-Norris (*assemblymember.petrie-norris@assembly.ca.gov*)

Exhibit A



July 25, 2018

Mr. Gregg Ramirez
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

SUBJECT: REVIEW OF DRAFT WESTERN SNOWY PLOVER MANAGEMENT PLAN FOR EAST BALBOA PENINSULA BEACHES NEWPORT BEACH, CALIFORNIA CDP APPLICATION NOS. 5-17-0465 AND 5-17-0515

Dear Mr. Ramirez,

On June 20, 2018, the City of Newport Beach (City) held an open house seeking public input into a Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches, Newport Beach, California, prepared by the consulting firm of Dudek. The City's draft plan covers a limited part of the Balboa Peninsula that the US Fish & Wildlife Service (USFWS) designates as critical habitat for the Western Snowy Plover (WSP). The City's plan does not address various aspects of dune/beach management in the

City that represent ongoing violations of the Coastal Act. This letter provides peer review of the City's draft WSP management plan by biologist Robert Hamilton, President of Hamilton Biological, Inc. To provide relevant context for the peer-review comments, the letter begins with a description of the range of beach and dune management issues for which the City appears to be in violation of the Coastal Act and other relevant resource-protection regulations.

This letter reiterates points made in Mr. Hamilton's letter to Mr. Dave Kiff of the City, dated September 17, 2017, and in multiple presentations by Mr. Hamilton to the California Coastal Commission (CCC) during hearings in 2017 and 2018. Presentations to the CCC addressing many of the same issues were also made by Sea & Sage Audubon, the Orange County chapter of the California Native Plant Society, the Sierra Club OC Conservation Committee, the Banning Ranch Conservancy, OC Habitats, and attorney Mark Massara. We all understand that no means exist to quickly and easily resolve long-standing conflicts involving such factors as coastal access; coastal recreation with dogs and ultralight aircraft; waste management; encroachment of private land uses into public open space; and protection of sensitive resources, but the City's lack of response to these issues – outside of a limited area that the City deems appropriate – has been unacceptable. The City's effort to focus everyone's attention on one small part of the Balboa Peninsula, and to propose only modest conservation efforts in that area, would sweep all other beach/dune management issues under the carpet for years to come. Such a grossly inadequate and violative approach to management of sensitive coastal resources cannot be allowed to succeed if the Coastal Act is to remain a credible regulatory policy constraining governmental agencies and private land owners alike.

REGULATIONS APPLICABLE TO BEACH, DUNE, AND ESTUARINE HABITATS

Page 4.1 of the City's certified Local Coastal Program (LCP) states:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. **These include southern dune scrub...** [emphasis added]

Page 4.42 of the LCP states:

In Newport Beach, southern coastal foredune habitat extends southwest along the ocean side of the Balboa Peninsula from 10th Street to the tip of the peninsula.

At the City's first open house to discuss relevant beach/dune management issues, on September 14, 2017, botanist Ron Vanderhoff testified about his observations of rare plants in dune habitats on the Balboa Peninsula, and requested effective management of all dune areas to maintain and restore their value as limited and unique habitats for rare plants. As stated on Page 4.42 of the City's LCP:

Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Coastal Commission, or local agencies.

Section 30240 of the Coastal Act restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA. To achieve compliance with this requirement, the City's LCP includes Policy 4.1.1-10:

Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. **Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible.** Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance. [emphasis added]

To date, the City and CCC have made no effort to establish the required minimum 50-foot buffer around any area of beach/dune ESHA. Rather, people and pets have generally been afforded unfettered access to all beach and dune areas, resulting in long-term, ongoing degradation of dune ESHA, and harassment (i.e., "take") of WSPs in their traditional wintering areas, in violation of Section 30240 (and the federal Endangered Species Act, as discussed subsequently).

Where the City has provided protective fencing to a limited area of dunes — between D and E Streets on the Balboa Peninsula — the fence itself lacked a Coastal Development Permit (CDP), was established within ESHA and/or the required ESHA buffer, and its dimensions may have been smaller than optimal for the WSP (the species targeted for protection). Residents at the City open house on September 14, 2017, testified that the design of the enclosures actually encouraged some people to run dogs off-leash within them. As discussed subsequently in this letter, the City now proposes to remove the fencing and to replace it with bollards and signage, as well as exotic landscaping along the margins of concrete walkways that were constructed through the dune ESHA in recent years without completing the required CDP review process.

Pages 4.42-4.43 of the LCP state:

Ornamental and non-native species, likely introduced from the adjacent residences, dominate much of the southern coastal foredune habitat. Numerous residences use the beach area as an extension of their backyards. Some residents have planted and irrigated the ornamental species, which have replaced native species in these areas. Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.

In an effort to offset this ongoing violation of the Coastal Act, LCP Policy 4.5.1-1 identifies as a sort of remedy "the removal of exotic vegetation and the restoration of native vegetation in dune habitat." Setting aside the illegality of attempting to mitigate impacts to ESHA by restoring a different area (cf. *Bolsa Chica Land Trust v. Superior Court*), it appears that no such exotic removal/dune restoration has occurred in a systematic way commensurate with the level of impact from numerous encroachments upon dune habitats in Newport Beach. Thus, the unpermitted encroachment has continued and ex-

panded, impacting the dune ecosystem in many parts of Newport Beach. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers “to prevent impacts that would significantly degrade the adjacent ESHA.” In practice, the City does not do this, and thus violates its own LCP and the Coastal Act.

The degradation of dune habitat has been striking near the mouth of the Santa Ana River – a formally designated ESHA that CCC Statewide Enforcement Supervisor Aaron McClendon recognized as having been successfully restored to native dune scrub habitat four years ago. In a letter to the respondents dated October 15, 2014 (Subject: “Final Monitoring Plan – Compliance with Consent Cease and Desist Order CCC- 06-CD-01 and Consent Restoration Order CCC-06-RO-01”), Mr. McClendon described this restoration effort as “one of the most successful we have seen” and lauded the Newport Beach residents for having “turned a difficult situation into a very positive outcome, enhancing some of the rarest coastal habitats on the southern California coast.” At that point, under the Coastal Act, the City became legally responsible to manage the restored dune ESHA near the river mouth consistent with its LCP. Having made no serious effort to do so, dune ESHA in this area has become visibly degraded. Non-native, invasive plant species are becoming re-established in this area, and sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people and dogs.

Section 7.04.020 of the City of Newport Beach Municipal Code requires all dogs to be leashed at all times, and Section 7.04.030 prohibits dogs on beaches from 10:00 a.m. to 4:30 p.m. year-round and requires that owners clean up their dogs’ feces.

The County’s web page, <http://www.ocpetinfo.com/services/petlaws>, summarizes relevant parts of the Orange County Codified Ordinance (OCCO) as follows:

4-1-45: “No person owning or having charge, care, custody, or control of any dog shall cause or permit, either willfully or through failure to exercise due care or control, any such dog to be upon any public property unless such dog be restrained by a substantial chain, or leash not exceeding six (6) feet in length, and is under the charge of a person competent to exercise care, custody, and control over such dog.” You must keep your dog leashed anytime your dog is off your property. Your dog must be on a leash no longer than six (6) feet in length and in the care of a competent adult. There are designated “dog parks” throughout Orange County that lawfully allow the absence of a leash.

4-1-46: “No person having the charge of any dog, except a guide dog or service dog, shall permit said dog to be under any circumstances within public school property, certain county parks, or any public beach”. It is unlawful to be on any public school property with your dog. Setting your dog loose to play, even within a fenced area, at a public school is a direct violation of this ordinance. See OC Parks for county parks that permit dogs that are leashed.

When both the City and the County of Orange decided, several years ago, to effectively stop enforcing these local ordinances near the river mouth, local dog-owners responded

by turning this ecologically valuable area – an estuary located between dune ESHA and critical habitat for the WSP and California Least Tern (also clearly ESHA) – into a *de facto* unleashed dog beach. This, despite prohibitions against such activities contained in the Coastal Act and various relevant local ordinances.

In 2016, the County attempted to formally designate the Santa Ana River mouth as a “dog beach” through preparation of an Initial Study/Negative Declaration, but received extensive substantive comments submitted by the CCC, USFWS, several respected conservation organizations, and local residents, demonstrating the destructiveness of this policy in an environmentally sensitive area that many public and private groups have spent millions of dollars and thousands of hours restoring and maintaining for its ecological values. Rather than taking the information on board and working toward a legal and amicable solution to a difficult problem, the County tabled consideration of that CEQA document and continued allowing the illegal use of the river estuary. The County refuses to partner with the City to enact enforcement of its ordinances in the River Jetties area, despite ongoing outreach from the environmental community, and has gone as far as to allow the media (including extensive social media) to promote this *de facto* “dog beach” without any comment.

At the open house on September 14, 2017, several speakers requested that the City and County work together to resolve this ongoing violation. More than eight months later, on June 4, 2018, an on-site meeting was convened at the River Jetties, attended by you, additional representatives from the City, County representatives including Shane Silsby and Colby Cataldi, enforcement officer Jordan Sanchez of the California Coastal Commission, wildlife biologist Sandy Vissman of the USFWS, Penny Elia representing the Sierra Club OC Conservation Committee, Susan Sheakley representing Sea & Sage Audubon, attorney Mark Massara, and Mr. Hamilton. Clearly, nothing had changed since the previous fall with respect to masses of people bringing their dogs to the river estuary via Newport Beach. While discussing the issue, we all observed numerous people running unleashed dogs in the river mouth, and the City animal control personnel attending the meeting spent much of their time turning several more people away, despite our conspicuous presence and despite signage informing the public of the illegality of bringing dogs into that area. At the meeting, Ms. Vissman reiterated her standing request that the City and County establish an “avian protection area” or “special protection zone” encompassing the ecologically important river estuary and adjacent dune habitats as we stood next to dune ESHA that was being trampled by off-leash dogs and their owners.

At the meeting, representatives of the City and County once again acknowledged the problem, but rather than attempting to work toward a solution that everyone could live with, including the ESHA and listed species, you and Mr. Silsby pointed out that local elected representatives consider the prospect of prohibiting dogs from the area in and around the river estuary – in accordance with both City and County ordinances, as well as the Coastal Act and the state and federal Endangered Species Acts – to be polit-

ically unacceptable, because dog owners represent a more potent lobbying force compared with advocates of environmental protection in compliance with local, state, and federal laws.

As you know, the environmental community has repeatedly identified alternative locations for dog beaches in Newport Beach that would not harm ESHA or listed species, and that would be completely acceptable to the environmental community, but to date neither City nor County has shown any interest in exploring the potential feasibility of such a solution. The only consideration that carries any weight is that dog-owners have loudly expressed their intent to keep running their dogs in the dunes and river estuary, regardless of any law, because they have come to expect deference from all authorities in this specific area. Therefore, the only remedies that appear to be possible involve a state or federal agency stepping in and enforcing ongoing violations of the Coastal Act and/or Endangered Species Act, or some environmental organization or private party bringing legal action. If you are aware of another feasible avenue for protecting the estuary and adjacent ESHA, as required by multiple layers of legal requirements, please let us know.

During the process of reviewing beach/dune management issues, Mr. Hamilton inspected two decades of aerial imagery and observed the incremental construction of 22 concrete walkways extending from the ends of streets south across the beach. Many of these impact traditional WSP wintering locations, coastal dunes, and/or areas that should be identified as ESHA buffers. See Exhibits 1 and 2, below.

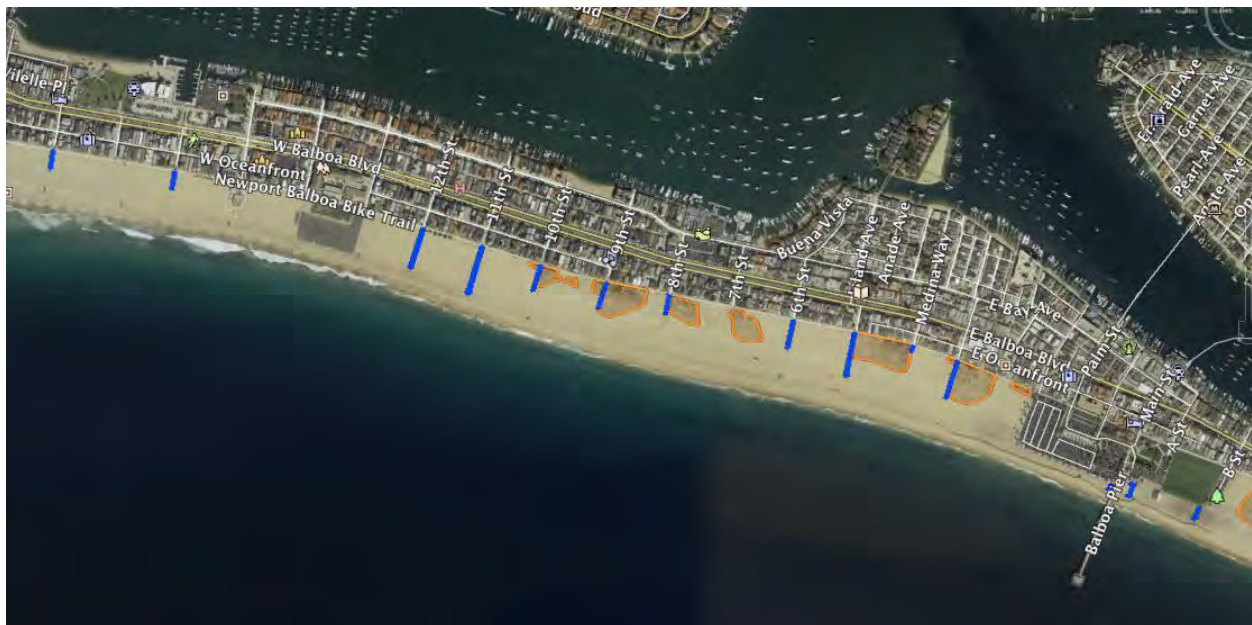


Exhibit 1, showing in dark blue the locations of 14 walkways that extend through dune and/or beach habitats, between 18th Street and B Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.



Exhibit 2, showing in dark blue the locations of eight walkways that extend through dune and/or beach habitats between C Street and M Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.

One walkway, extending more than 300 feet south from the end of E Street, was specifically identified by Tom Ryan and colleagues¹ as being potentially deleterious to the population of WSP that traditionally winters in that area. Page 15 of their report stated:

Declines were detected between 2014 and 2017 at Huntington State Beach and the Balboa Peninsula (Table 2). We observed the largest decline on the Balboa Peninsula (Table 2) following the installation of a walkway on the beach that was placed within the area traditionally used by roosting plovers.

Page 27 stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has continued into 2015-16. Additionally, this beach became narrower during the fall months

¹ Thomas Ryan, Stacey Vigallon, Lucien Plauzoles, Cheryl Egger, Susan Sheakley, Ross Griswold, and Bettina Eastman. 2017. *The Western Snowy Plover in Los Angeles and Orange Counties, California: September 2014 to February 2017*. Report dated February 24, 2017, prepared for State of California, Department of Fish and Wildlife, San Diego, CA.

due to beach erosion from late summer/fall hurricanes in the central Eastern Pacific. This is a broad sandy beach, with residential homes backing it. It is very popular with beachgoers during the summer months. It also supports a 1.24 hectare dune restoration area where a pair of plovers has nested in recent years. This is the only known beach nesting Snowy Plover pair on the mainland in LAC or OC, although they did not nest here in 2014, 2015 or 2016.

The City cooperates with Mr. Ryan and his research colleagues, and receives these reports, but the City apparently has not taken any action to evaluate the validity of the concerns expressed in multiple reports that identify the E Street walkway as a potentially important contributor to disturbance of plovers that traditionally roost, and sometimes nest, in the affected area. The local WSP population declined sharply immediately after this walkway was built, and the plovers have not nested on the Balboa Peninsula since it was installed, despite the fencing.

In various venues, City staff has been questioned as to whether *any* of the 22 walkways built by the City were approved by the CCC through the CDP application process, or subjected to any kind of environmental analysis prior to construction, as required under the Coastal Act. By all accounts to date, the walkways were installed without going through any sort of public review process, despite many of them being located within ESHA, ESHA buffers, and/or critical habitat for the WSP. It may be that the walkways were built, in part, to discourage people and pets from wandering through areas of dune, and to increase accessibility to the ocean for people with disabilities, but this would not absolve the City from the requirement to conduct a formal environmental impact analysis involving public review. At minimum, walkways through sensitive areas should be subject to post-construction ecological monitoring to evaluate their effects upon sensitive natural resources. Rather than creating paved pathways for people and their pets to walk into the heart of WSP critical habitat and Special Protection Zones, a more protective approach would be to actively discourage people from walking through the most sensitive dune areas, and through the required 50-foot ESHA buffers. Nothing in the Coastal Act, or the Americans with Disabilities Act, allows local governments to sidestep normal environmental review processes in service to an overriding purpose of facilitating public access into environmentally sensitive areas.

During Mr. Hamilton's review of aerial imagery, he observed that the limits of apparent dune topography and vegetation have generally remained stable during the past two decades. Between October 2007 and December 2017, however, loss of dunes and spread of exotic iceplant or other non-native invasive vegetation apparently took place. Please see Exhibits 3 and 4, on the next page.



Exhibits 3 (above, October 22, 2007) and Exhibit 4 (below, December 3, 2017), showing in red the apparent loss of a dune and the spread of iceplant and/or other invasive, exotic vegetation, between G and I Streets on the Balboa Peninsula, over the course of a decade. Source: Google Earth Pro.



The Western Snowy Plover is listed as a threatened species by the federal government and a California Species of Special Concern. A Recovery Plan was completed by the USFWS in 2007. Newport Beach lies within Recovery Unit 6, whose goals include protecting wintering plovers and doubling the breeding population from 243 (2005-2009 average) to 500 breeding individuals. The species is reportedly nesting in Huntington Beach this year, and has intermittently nested on dunes on the Balboa Peninsula. WSP breeding populations have responded positively and swiftly to recent improvements in management practices at historic breeding locations in Santa Barbara and Los Angeles counties. Were the City's dunes to be managed appropriately, consistent with the City's

LCP and with the federal WSP Recovery Plan, it is reasonable to expect that the species would nest at least semi-regularly, if not regularly, on the Balboa Peninsula. Any management plan that does not have this as a primary objective, consistent with the Recovery Plan goals, is not a serious plan designed to contribute toward the species' recovery.

Page 8 of the report by Tom Ryan and colleagues, for the years 2014 to 2017, identifies the following threats to WSP, both breeding and non-breeding:

1. A lack of public awareness of the presence of Snowy Plover roosts and a lack of information about how to avoid disturbing the plovers while enjoying the beach;
2. Lack of training and information on locations of Snowy Plover roosts among some staff that drive and operate equipment on the beaches;
3. Regular disturbance, removal of foraging resources, and occasional mortality resulting from beach grooming, operation of heavy equipment, and regular vehicular traffic;
4. Regular disturbance and occasional mortality from off-leash dogs;
5. Beach management practices that remove kelp and associated arthropods;
6. Recreational activities and occasional large events that flush plovers from roosts and leave large amounts of refuse near roosts; and
7. Native and non-native predators drawn in unusually large concentrations to human refuse on and near the beach and pet food placed outside at nearby residences.

Any comprehensive management plan for beaches and dunes regularly utilized by WSP would have to thoroughly and intelligently address each of these important resource-management issues, both within the designated critical habitat area and in all other areas of Newport Beach where WSP's are known to congregate.

The USFWS administers the Endangered Species Act of 1973. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define "harm" to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. "Harassment" is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

Exemptions to the prohibitions against "take" in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a federal agency and may affect a listed species, the Federal agency must consult with the Service, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a federal agency, but may result in the "take" of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act.

To qualify for the permit, a project proponent must submit an application to the Service together with a Habitat Conservation Plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. At the City's open house on September 14, 2017, Sandy Vissman of the USFWS suggested that preparation of an HCP would be appropriate to cover incidental "take" of WSP due to ongoing activities and routine beach and dune management operations undertaken by the City on the Balboa Peninsula. Actions requiring a permit may include beach driving, mechanical raking (beach grooming), recreational use, presence of dogs or other domestic animals, and human refuse that attracts predators of the WSP.

SITING OF DOG BEACH

Managing City beaches and dunes consistent with the LCP involves balancing environmental protection requirements against the reasonable expectations of tourists and local beachgoers. Any successful comprehensive planning approach will need to identify extensive areas that can be managed for the exclusive use of humans and their pets. Fortunately, Newport Beach, with its miles of beaches that do not support dunes, traditional WSP roosting or nesting areas, or other sensitive biological resources, should be able to achieve this balance.

As a start, we have identified two other locations that the City should evaluate. Both are located near large parking lots, and neither appears to conflict with provisions of the City's LCP or those of the Coastal Act. One potentially suitable area is at Corona del Mar State Beach (Big Corona Beach), the eastern half of which appears to be well suited to serving as a dog beach, and the other is the expanse of beach near the base of Newport Pier. Please see Exhibits 5 and 6, below and on the next page.

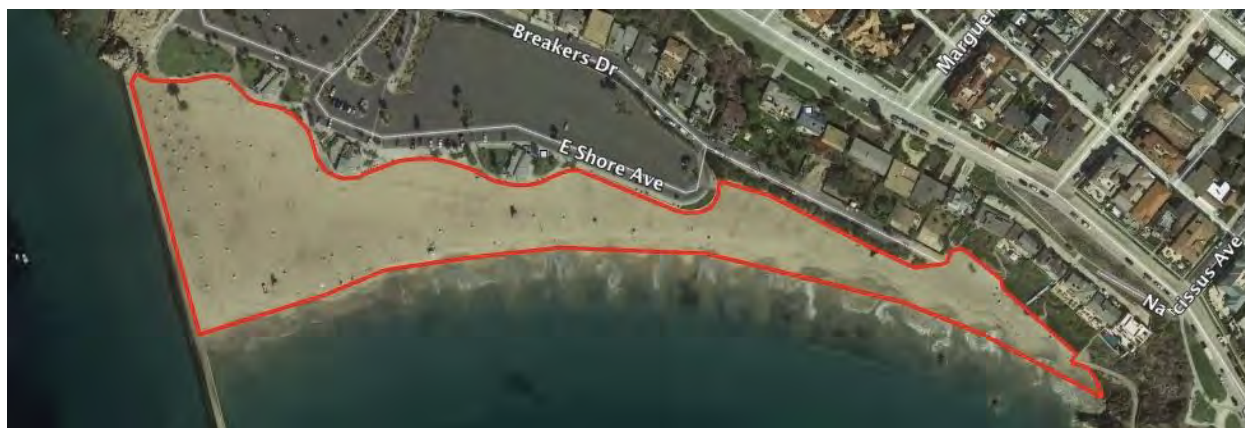


Exhibit 5, showing Corona del Mar State Beach (Big Corona Beach). Located on the eastern side of Newport Bay, the eastern part of this beach appears well-suited for designation as a dog beach. The area has ample parking and lacks potentially sensitive biological resources. Source: Google Earth Pro.



Exhibit 6, showing the beach near Newport Pier. This area also appears to be well-suited for use as a dog beach, with ample parking and low ecological sensitivity. Source: Google Earth Pro.

Regardless of whether either of these areas are ultimately determined to be suitable for designation as dog beaches, Newport Beach has enough sandy beaches not located within or adjacent to ESHA to accommodate people and their pets without degrading any areas that satisfy ESHA criteria under the terms of the City's LCP and the Coastal Act.

EXAMPLES OF APPROPRIATE CONSERVATION PLANNING

For reasons discussed herein, achieving compliance with the California Coastal Act and federal Endangered Species Act in Newport Beach will require a comprehensive and science-based approach to beach and dune management. Areas that qualify as ESHA, ESHA buffer, or that serve as traditional roosting or nesting habitat for the federally threatened WSP, must be managed in accordance with the applicable laws.

With regard to the Coastal Act, CCC staff has already provided the City with a blueprint for achieving compliance in the form of the comprehensive beach/dune management plan that the City of Pacifica developed in 2014 to obtain a CDP for installation of 1,300 feet of year-round fencing, 930 feet of seasonal fencing, and associated interpretive signs at Pacifica State Beach. The CCC staff provided specific direction to the City to use the City of Pacifica management plan as a template for what is expected in Newport Beach during a meeting on May 19, 2017. Minutes of this meeting are on file with City Manager Dave Kiff.

With regard to the federal Endangered Species Act, the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010, a document available online at the following address:

https://www.fws.gov/oregonfwo/FieldOffices/Newport/WesternSnowyPlover/Documents/WSP-HCP_08182010.pdf

Mr. Hamilton recommended that the City and its consultant, Dudek, review these plans as potential starting points upon which to develop a comprehensive dune/beach management plan that would comply with relevant precedents in the application of the Coastal Act and federal Endangered Species Act. The City declined, and instead produced the Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches. The following section provides Mr. Hamilton's peer-review comments on the Draft Plan.

REVIEW OF CITY'S DRAFT WSP MANAGEMENT PLAN

The Draft Plan, prepared by Dudek with consulting biologist John Konecny, fails to implement the request made by Andrew Willis of Coastal staff, in a letter to the City dated September 11, 2017 (attached), for a "comprehensive" plan that would address beach/dune/WSP management issues on all City beaches, from River Jetties to the end of the Balboa Peninsula. In particular, the City (together with the County of Orange) refuses to meaningfully engage with the issue of degradation of ESHA at River Jetties and the Santa Ana River estuary. Instead, as documented in this letter and in other venues, these agencies have allowed this area to become a *de facto* "dog beach."

Page 18 of the Draft Plan states, "In June 2011, the City installed approximately 1,300 linear feet of fencing around approximately 2.1 acres of habitat between the walkway fingers of D and E Streets." This is factually incorrect, as the E Street walkway did not exist until 2014 (the D Street walkway was built in 2002/2003). Page 27 of the previously cited report by Ryan and colleagues stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has continued into 2015-16.

Thus, the WSP fencing installed in 2011 was not "between the walkway fingers of D and E Streets," as only one of the walkways existed at that time (and, apparently, neither walkway was built with the required CDP).

The Coastal Act does not prioritize the facilitation of beach access, for disabled persons or anyone else, at the expense of ESHA and protection of listed species. Building concrete walkways into the middle of WSP critical habitat without a CDP is plainly illegal.

If this glaring issue can be successfully glossed over in the WSP Management Plan, and in the City's application for a CDP for the unpermitted fence, the entire process will lack legitimacy.

The Draft Plan does not mention the Special Protection Zones (SPZ's) for WSP that the USFWS recognizes near the tip of the Balboa Peninsula. See Exhibit 7, below.



Exhibit 7. Aerial showing habitat areas in orange, WSP critical habitat in light blue, and WSP Special Protection Zones in yellow. Source: Google Earth Pro.

Tom Ryan and colleagues have observed that, at least during some winters, WSP congregate in this area to a greater extent than they do within the designated critical habitat area. The Draft Plan should fully discuss the SPZ's and, in compliance with the Coastal Act, identify them as ESHA.

The exhibit on Page 32 of the Draft Plan — Lifeguard Vehicle Access Map — shows only the designated critical habitat area. The SPZ to the southeast is not shown. Table 3 on Page 35 of the Draft Plan allows for ongoing wrack removal, sand grooming, sand removal, and berm construction in this SPZ “with monitoring.” No signage, bollards, or other tangible measures appear to apply to the SPZ. This half-measure seems likely to result in the southeastern SPZ continuing to be groomed for beachgoers rather than maintained and protected as potentially suitable nesting habitat for the WSP.

Page 37 of the Draft Plan states:

Regulatory signage will also have a greater focus on the illegal act of “taking” of a protected species, as defined by the ESA, and the consequences to this violation. Interpretative signage in the critical habitat area will also help support regulatory signage, reinforce the importance of compliance and educate the public as to the impacts on the WSP when posted rules are violated.

It has been demonstrated that signage has no effect upon people and their dogs “taking” listed species at the River Jetties/Santa Ana River estuary. As discussed previously in these comments, the public has illegally converted the area into a “dog beach” with both the City’s and County’s knowing acquiescence. Thus, the idea that people are going to be deterred by signage, or that City law enforcement will start enforcing the federal Endangered Species Act on beachgoers at the Balboa Peninsula, lacks credibility. The City refuses to enforce its own ordinance at River Jetties, and the public should not expect it to do so on the Balboa Peninsula.

It should go without saying that the WSP Management Plan should not introduce plant species not native to dunes in Orange County. Only locally native plant species of apparent value to WSP should be planted. Unfortunately, the Draft Plan calls for landscaping with non-native plants, including plants potentially harmful to plovers. For example, the exhibit on Page 39 of the Draft Plan, reproduced below as Exhibit 8, shows one of the existing, unpermitted concrete walkways, the margins of which would be lined with such species as Silver Dune Lupine (*Lupinus chamissonis*) and Sandhill Sage (*Artemisia pycnocephala*), neither of which occur in Orange County.



Exhibit 8. Conceptual exhibit from Page 39 of the Draft Plan.

Other non-native species identified for planting under the Draft Plan include Mock Heather (*Ericameria ericoides*), a shrub recorded only once in Orange County, along the Santa Ana River near the Riverside County line. Coyote Brush (*Baccharis pilularis*) and Cliff Buckwheat (*Eriogonum parvifolium*) are shrubs native to the County, but inappropriate for planting in a plan designed to restore natural dune scrub of value to WSP. Plovers seek open ground that lacks shrubby habitat that provides cover for exotic predators, especially cats and rats.

An exhibit on Page 40 of the Draft Plan, reproduced below as Exhibit 9, shows plantings of shrubs and flowers along the sidewalk at the base of the finger walkways.

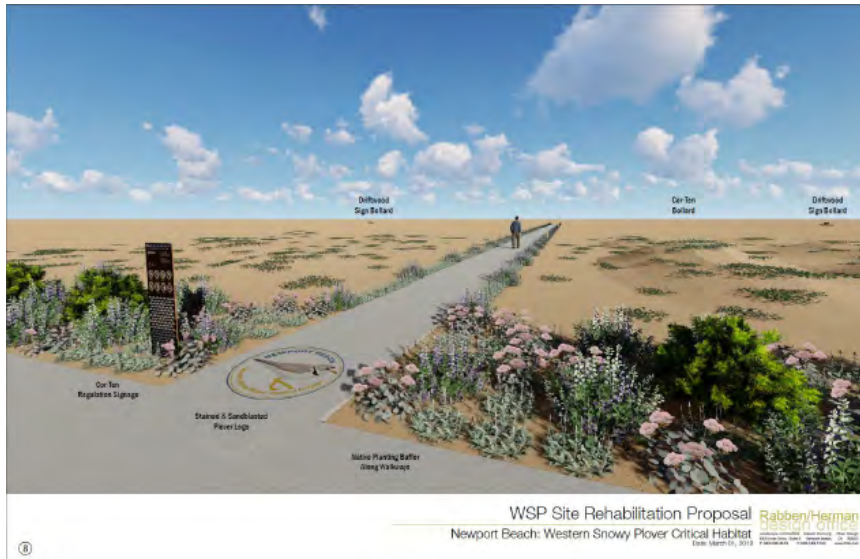


Exhibit 9. Conceptual exhibit from Page 40 of the Draft Plan.

Adjusting the habitat-restoration component to utilize only species verified as being native to Orange County dunes may be accomplished capably, and with little effort, by reviewing the attached 2015 master's thesis by Josh Weinik², which incorporates a detailed analysis of the existing native and exotic dune vegetation on the Balboa Peninsula. Please do not introduce any species not verified as being native to dunes in Newport Beach. Adding to the encroachment of landscaping into the dunes (*in the name of WSP management*) would be worse than doing nothing at all.

An exhibit on Page 41 of the Draft Plan, reproduced below as Exhibit 10, shows the City's proposed logo for the new management program:



Exhibit 10. It would be inappropriate to use a Piping Plover (with yellow legs and bill) as the logo for the program instead of a Western Snowy Plover (which has gray legs and black bill).

² Josh Brett Weinik. 2015. *A Comparative Study on the Vegetation of Western Snowy Plover Habitat Within Urban and Natural Coastal Dune Systems of Southern California*. MS Thesis, California State University, Fullerton.

The Draft Plan fails to discuss any specific plans to remove the most problematic and widespread, non-native plant that people have planted throughout large swaths of the dunes at Newport Beach, *Carpobrotus edulis*. It is unacceptable for the Draft Plan to ignore the most important invasive plant on Newport Beach.

The Draft Plan specifies a 10-mph speed limit for lifeguards and other personnel driving through the Balboa Peninsula WSP critical habitat area. This is twice as fast as allowed under the 2007 WSP Recovery Plan. Vehicles routinely flush WSP on local beaches, and sometimes even strike birds attempting to hide in the sand. In this respect, as in all others, the WSP Management Plan must be consistent with the WSP Recovery Plan.

The Draft Plan contains no mention of recent nesting of WSP in portions of Los Angeles County (Malibu Lagoon, Dockweiler Beach, Surfrider Beach), where WSP had not been found nesting for 70 years, but which the birds have quickly recolonized after only a few years of serious protection. The Draft Plan fails to note that, in 2018, Snowy Plovers nested on the Huntington Beach side of the Santa Ana River estuary. In light of this current positive trend in recolonization of southland beaches, recolonization of the Balboa Peninsula by nesting WSP is a highly attainable goal. Indeed, with adequate protection of ESHA and ESHA buffers in and around the estuary, plovers could also nest in the dunes at River Jetties. Yet the City refuses to provide any such protection to dune ESHA or the required buffers, in violation of its LCP and the Coastal Act.

To allow for the possibility of determining the success or failure of the WSP management effort, the plan must establish appropriate goals and metrics. Otherwise, the City will have no way of determining whether the management approach is having the desired results. The Plan should include an adaptive management component, so that managers will have cues for when to change course in order to meet the Plan's goals. For example, in all areas where management actions are initiated or changed from current practice, biologists should measure usage of the area by WSP and other native wildlife before and after the change in management. This will allow the City and others to understand which actions are having positive results and which actions may require further consideration.

On the Balboa Peninsula, a goal of the Plan should be the establishment at least a small WSP nesting population.

At River Jetties, a goal of the Plan should be the elimination of disturbance by dogs and people, both in the dunes and in the river estuary.

CONCLUSIONS AND RECOMMENDATIONS

The City's Draft WSP Management Plan represents an unambitious and misdirected effort that seeks to achieve minimal protection of a limited part of the Balboa Peninsula. The 2007 Recovery Plan calls for doubling the WSP nesting population in the Recovery Unit that includes Newport Beach. Plovers have nested on the Balboa Peninsula within the last decade, and the species has been recolonizing many beaches in southern California in response to increased protection from human disturbance. And yet, the Draft Plan treats nesting by WSP as only a possible side-effect of limited management actions directed mainly toward wintering plovers. The Draft Plan focuses most of its management recommendations on the smallest area possible – the limited area of designated WSP Critical Habitat. The following statement, on page 36 of the Draft Plan, crystallizes the City's level of commitment to meaningful change in beach/dune management: "All existing beach recreation activities will be allowed without restrictions." Propping up the status quo to the greatest extent feasible will not protect dune ESHA or manage the local WSP population in compliance with the Coastal Act and the federal Endangered Species Act.

The City's poor record of policing beachgoers – at River Jetties and in other sensitive habitat areas – does not promote optimism that implementing a Management Plan reliant upon signage and "symbolic fencing" will achieve even the modest goals set forth in the Draft Plan, let alone the attainable and appropriate goal of recolonization of Newport Beach by nesting plovers.

Those aspects of the Draft Plan involving introduction of shrubs and other plants not native to the dune ecosystem of the Balboa Peninsula would be more ecologically damaging than doing nothing at all. In compliance with the City's LCP and the Coastal Act, any planting undertaken within dune ESHA or ESHA buffers must take the form of ecological restoration – promoting the establishment of low-growing herbaceous species known to be native to dunes in Newport Beach – not shrubby landscaping intended to satisfy the aesthetic preferences of local residents and City officials.

The City's concrete walkways into and through dune ESHA, ESHA buffers, and WSP critical habitat were built without the required CDP's, and are therefore illegal. At least one of these walkways, at E Street, was specifically identified by WSP biologists as having potentially impacted the wintering flock of WSP on the Balboa Peninsula, due to increased human disturbance, shortly after it was installed four years ago. It seems clear that at least some of these walkways have greater potential for causing ecological damage than does the unpermitted WSP protective fencing that prompted preparation of the Draft WSP Management Plan. To achieve compliance with the City's LCP and the Coastal Act, all concrete walkways passing through identified ESHA and/or ESHA buffers must obtain after-the-fact CDP's from the Coastal Commission. By following the required review process, it may become clear that some of the walkways – those that funnel people into areas with greatest suitability for nesting by WSP – ought to be removed entirely.

In order for the final plan to have potential to achieve worthwhile and measurable conservation achievements, the plan's authors must develop well-considered goals and metrics within an adaptive management framework.

As discussed in these comments, CCC staff provided the City with a blueprint for achieving compliance, in the form of the City of Pacifica's 2014 comprehensive beach/dune management plan. And the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010 that the City and its consultants may look to for further relevant guidance. Furthermore, USFWS has provided the City with ample direction on how to properly prepare a comprehensive management plan (see attachments from USFWS). The City should carefully consider successful approaches that local governments elsewhere along the Pacific Coast have taken to achieve positive outcomes for people, rare species, and threatened coastal ecosystems.

Thank you for the opportunity to review the City's Draft WSP Management Plan.

Sincerely,



Robert A. Hamilton, President
Hamilton Biological, Inc.

Andrea Jones
Director of Bird Preservation
Audubon California

Travis Longcore, Ph.D.
Conservation Chair
Los Angeles Audubon Society

Susan Sheakley
Conservation Chair
Sea & Sage Audubon Society

Scott Thomas
Conservation, Special Projects
Sea & Sage Audubon Society

Terry Welsh, M.D.
President
Banning Ranch Conservancy

Susan Jordan
Executive Director
California Coastal Protection Network

Celia Kutcher
Conservation Chair
OC Chapter California
Native Plant Society

Garry Brown
Founder & President
Orange County Coastkeeper
Inland Empire Waterkeeper

Dan Silver
Executive Director
Endangered Habitats League

Mike Wellborn
President
Friends of Harbors, Beaches
and Parks

Michelle Gastil
Banning Ranch Task Force
Sierra Club

Penny Elia
OC Conservation Committee
Sierra Club

Conner Everts
Executive Director
Southern California
Watershed Alliance

Marko Popovich
President
Still Protecting Our Newport

Jack Eidt
Director
Wild Heritage Planners

Attached: • September 11, 2017 letter from Andrew Willis, CCC Enforcement
• Three letters from USFWS dated 1-9-2016, 2-16-2017, 4-10-2018
• Josh Brett Weinik. 2015. *A Comparative Study on the Vegetation of Western Snowy Plover Habitat Within Urban and Natural Coastal Dune Systems of Southern California*. MS Thesis, California State University, Fullerton.

Copies to: California Coastal Commissioners; Jack Ainsworth, CCC; Lisa Haage, CCC; Aaron McClendon, CCC; Andrew Willis, CCC; Liliana Roman, CCC; Karl Schwing, CCC; Charles Posner, CCC; Jordan Sanchez, CCC; Laurie Koteen, CCC; Jonna Engel, CCC; Sandy Vissman, USFWS; Hans Sin, CDFW; Erinn Wilson, CDFW; Lana Nguyen, California State Parks; Mark Massara; Tom Ryan; Josh Weinik; Christine Whitcraft; Michelle Clemente.

Exhibit B

From: Robertson, Glenn@Waterboards [mailto:Glenn.Robertson@waterboards.ca.gov]
Sent: Wednesday, December 21, 2016 6:19 PM
To: Uzo Diribe, Chris
Cc: Cross, Wanda@Waterboards
Subject: Negative Declaration, Orange County Code of Ordinance Proposed Amendment (Dog Beach), SAR Tidal Prism

To Chris Uzo-Diribe, Orange County Public Works/OC Development Service:

Regional Board staff submit the following comments regarding the Orange County Public Works' proposal for a dog beach/dog park at the Santa Ana River mouth:

We believe that a greater probability of interface and disturbance than the project's Negative Declaration (ND) indicates will occur between dogs (whether during proposed leashed or unleashed periods) and the federally threatened western snowy plover and endangered California least tern, due to the birds' presence and periods of occupation overlap during most of the 12-month period at this exact location. The proposed dog beach location is identified with a RARE beneficial use designation in the Regional Board's Water Quality Control Plan of the Santa Ana River Basin (Basin Plan) because it is a known habitat area for the birds, and there is a high potential for the plover to overwinter at this unincorporated site (located between the City of Newport Beach and Huntington State Beach), and for the least tern to expand beyond the adjacent recognized nesting area in Huntington State Beach (as observed by the CAC). As such, the location warrants protection.

Staff disagrees that the Orange County Code of Ordinances Section 4-1-45 (restraint of dogs) should be amended to relax the restraining of dogs to allow "no leash" from October through February. This will legitimize the dog-walking local residents currently practice, which is currently illegal.

Board staff note that a dog beach already exists in the City of Huntington Beach west of the Huntington Beach Pier at the back of the beach below a public walkway. In contrast to the proposed Santa Ana River mouth location, dog excrement and urine appears less likely to wash out to sea due to tidal or river action at this location. At any location however, residents should always be highly encouraged to pick up pet excrement so that it does not enter any waterway.

Any future dredging of the Santa Ana River terminus will be required to comply with the federal and State Endangered Species Acts as well.

Board staff suggest the County consider the possibility of transferring this unincorporated area to the State of California in order to extend Huntington State Beach to the boundary of Newport Beach to extend the protected habitat area for the federally threatened western snowy plover and endangered California least tern. We agree with California Coastal

Commission staff concerns (CAC, May 16, 2016 letter to the Orange County Board of Supervisors) that other inland or beach sites would be less problematic, and suggest possible alternative dog park sites be reviewed.

We thank Orange County staff for their consideration of our above comments.

Glenn S. Robertson
Engineering Geologist, M.S., PG
Regional Planning Programs Section, CEQA Coordinator
Santa Ana Regional Water Quality Control Board
3737 Main Street, Suite 500
Riverside, CA 92501
Phone: 951-782-3259
Fax: 951-781-6288
Email: Glenn.Robertson@waterboards.ca.gov

Exhibit C

Staff Report 21

APPLICANT:

Orange County Flood Control District

PROPOSED ACTION:

Termination of a General Lease – Public Agency Use and Issuance of a General Lease – Public Agency Use and Dredging

AREA, LAND TYPE, AND LOCATION:

Sovereign land located in the Lower Santa Ana River, Orange County.

AUTHORIZED USE:

Use and maintenance of two riprap flood control jetties, one riprap dike, and maintenance dredging in the Lower Santa Ana River.

TERM:

2 years, beginning October 21, 2021.

CONSIDERATION:

The public use and benefit, with the State reserving the right at any time to set a monetary rent if the Commission finds such action to be in the State's best interests.

SPECIFIC LEASE PROVISIONS:

- County Ordinances.
 - Lessor and Lessee acknowledge that the leased area is public, sovereign land within the territorial boundaries of the County of Orange and within the jurisdiction of the Orange County Flood Control District and that the Orange County Flood Control District may enforce reasonable time, place, and manner restrictions on public use of the Leased Premises to protect public health, safety, and the environment.
 - Lessor agrees that Orange County Code of Ordinances sections 3-9-35, 9-1-40, 9-1-52 may be enforced on the Leased Premises. Lessor further

agrees that Orange County Code of Ordinances sections pertaining to public beaches and other public areas of unincorporated Orange County may be enforced on the Leased Premises to the extent that such sections are found in the future to apply to the Leased Premises and do not conflict with State law or the Public Trust Doctrine.

- Lessee must enforce Orange County Code of Ordinances sections 3-9-35, 9-1-40, and 9-1-52, and any sections pertaining to public beaches and other public areas found to apply to the Leased Premises in the future that do not conflict with State law or the Public Trust Doctrine.
- State enforcement in the Santa Ana River Mouth.
 - Lessee must not interfere with any enforcement by the California Department of Fish and Wildlife, California Department of Parks and Recreation, or **any other agency's enforcement of applicable law or regulation** in the Lease Premises and adjacent County-owned property (together, the Santa Ana River Mouth).
 - Lessee must not object to enforcement of its ordinances in the Santa Ana River Mouth by an authorized state enforcement agency unless a court rules that such ordinance does not apply to that area.
 - Lessee must not object and must accommodate, to the fullest extent possible, any current or future lease to a state or federal agency for environmental and public trust resource protection purposes over the same property as the Lease Premises.
- Lessee must collaborate and coordinate in good faith in any future applications and agreements for enforcement in the Santa Ana River Mouth. Applications and agreements for enforcement may include, but are not limited to, agreements with the California Department of Fish and Wildlife, California Department of Parks and Recreation, and the California Coastal Commission.
- Lessee must provide annual reports to Commission staff detailing County law enforcement efforts in the Santa Ana River Mouth.
- Terminate, effective October 21, 2021, Lease Number PRC 2171, a General Lease – Public Agency Use, issued to the Orange County Flood Control District.

BACKGROUND:

The mouth of the Lower Santa Ana River (River) is located between Huntington Beach State Park in the city of Huntington Beach, and the city of Newport Beach. The adjacent upland is unincorporated land within Orange County (County). The Applicant began conducting maintenance dredging activities in the River in 1990

to improve flood control capacity, and due to ongoing sediment deposition has continued to conduct dredging activities periodically since that time in order to ensure flood protection. In addition to dredging, the Applicant also maintains flood control jetties and a dike within the Lease Premises. A relatively small portion of dredged material is removed from sovereign land at the River mouth, with the majority of the material removed from the River channel inland and outside of the **Commission's jurisdiction**. During periods of non-dredging, the accumulation of sand within the flood control channel creates areas that have become popular with dog owners and is used as an informal off-leash dog park.

In May 2016, the County proposed to amend Section 4-1-45 of the Orange County Code of Ordinances to allow dogs in the River mouth. The County prepared an Initial Study/Negative Declaration (IP 16-234) analyzing the environmental impacts of the amendment. Several stakeholders, including the California Department of Parks and Recreation (Parks), California Coastal Commission (CCC), Santa Ana Regional Water Quality Control Board, and local environmental groups wrote letters expressing concern that the **County's Initial Study/Negative Declaration did not** discuss the impact the dog park would have on California Least Tern and Western Snowy Plover that are known to use the area for habitat. The County Board of Supervisors considered the proposed ordinance amendment on April 26 and October 25, 2016, but it was never approved.

The Huntington State Beach Least Tern Natural Preserve (Preserve), managed by Parks, is located adjacent and upcoast of the River. Dogs are not permitted on the State Beach (except for service dogs) and must be leashed within parking lots and multi-use trails. In the city of Newport Beach, dogs are never allowed on the beach or any beachfront sidewalk between 10 a.m. and 4:30 p.m., including the ocean front beaches and bay front beaches. Off-leash dogs are never allowed in any public spaces including parks and beaches.

County ordinances also prohibit dogs within public beaches (except for service dogs). The Applicant also maintains trespassing restrictions within their jurisdiction and control, including the Santa Ana River Flood Control Channel.

The Applicant maintains that its dog ordinances do not apply to the State-owned land. Specifically, the dog-leash requirement does not apply because the County does not consider the State-owned property to be "public property" (section 4-1-45), and dogs are not prohibited because the County does not consider the State-owned property to be a "public beach" (section 4-1-46).

Until recently, the County believed the limits of Orange County ended at the boundary of its upland fee parcel. The County now agrees that the boundary extends 3 miles into the Pacific Ocean, as described in Government Code section

23130, and that the Flood Control District trespassing ordinances (section 3-9-35) apply within the Lease Premises.

The California coast is a critical habitat for the Western Snowy Plover and the California Least Tern. Plovers are **listed as “threatened”** under the federal U.S. Endangered Species Act and are listed as a species of “special concern” under the California Endangered Species Act. California Least Tern is listed as “endangered” under both Federal and State laws.

Local environmental groups contacted Commission staff with concerns that the presence of off-leash dogs has and continues to threaten endangered and threatened bird species within the Lease Premises, including the Western Snowy Plover and California Least Tern. Staff consulted Parks, U.S. Fish and Wildlife Service, and the California Department of Fish and Wildlife (CDFW) to discuss the impact dogs have on birds at this location. In addition, staff also consulted local non-profits, including the Sea and Sage Audubon Society, Orange County Habitats, and Orange County Coast Keepers. State, Federal, and local organizations all indicated that the presence of dogs disturbs the foraging grounds of birds and severely degrades habitat area.

The Applicant has provided information detailing the **County Sheriff’s** efforts to enforce County ordinances within the County’s Flood Control Channel. However, these efforts have been limited to verbal warnings only, and no fines have been issued. In addition, the warnings have only applied to the County’s Flood Control Channel, **not land within the Commission’s jurisdiction**. Members of the public as well as staff from other State agencies indicate that verbal warnings have not been effective and have not reduced use within the Lease Premises.

On July 8, 2020, the CCC approved a County signage plan, including educational and **“no trespassing” signage along the up-coast and down-coast rock jetties** near the mouth of the River to protect sensitive bird species. CCC also approved an amendment to that permit on March 1, 2021, to add additional signs. **The County’s Coastal Development Permit (CDP) No. 5-02-031**, that authorizes maintenance dredging of various outlets in the County, including the River Mouth expires in 2023.

Commission and CCC staff are exploring opportunities to fund additional CDFW law enforcement positions that would allow for more targeted and frequent enforcement within the Lease Premises and potentially the issuance of citations under both County and CDFW ordinances.

STAFF ANALYSIS AND RECOMMENDATION:

AUTHORITY:

Public Resources Code sections 6005, 6216, 6301, 6303, 6321, 6321.2, 6501.1, and 6503; California Code of Regulations, title 2, sections 2000 and 2003.

PUBLIC TRUST AND STATE'S BEST INTERESTS:

On October 22, 2009, the Commission authorized a 20-year General Lease – Public Agency Use to the Applicant for flood control jetties at the Lower Santa Ana River ([Item C26, October 22, 2009](#)). That lease expires May 28, 2027. The Applicant has requested that the lease be terminated and included in a new lease which will also include the Applicant's annual maintenance dredging activities.

The improvements include three structures - an approximately 600-foot-long western jetty, an approximately 530-foot-long eastern jetty, and an approximately 850-foot-long dike running between and parallel to the jetties at a distance of approximately 100 feet from the western jetty.

On August 9, 2016, the Commission authorized a 5-year General Lease – Dredging to the Applicant for maintenance dredging in the Lower Santa Ana River and deposition of dredged materials at a receiver site at North Beach in the city of San Clemente ([Item C31, August 9, 2016](#)). That lease expired on August 8, 2021. The Applicant is applying for a new General Lease – Public Agency Use and Dredging for maintenance dredging in the Lower Santa Ana River. Dredged materials are no longer deposited at the North Beach receiver site so it is not included in the application.

On September 30, 2021, Commission staff issued the County a Letter of Non-Objection for emergency sediment removal at the mouth of the River. County staff provided information, photos and water quality data showing detrimental impacts to plants and wildlife in the Santa Ana River Salt Marsh, including potential die-off of fish, plants, and habitat. To restore tidal flows, the Letter of Non-Objection permitted the County to excavate approximately 6,500-10,000 cubic yards of sand to create a 30-50-foot-wide channel to restore tidal flushing to the Santa Ana River Salt Marsh. The Letter of Non-Objection only allows emergency sediment removal up to October 21, 2021 and does not allow maintenance dredging as contemplated in the proposed lease.

In response to the October 2nd oil spill, offshore of Huntington Beach, the County obtained a waiver of a Coastal Development Permit to construct sand berms across the River mouth to protect onshore coastal habitats and resources. On

October 8th the Unified Command, including CDFW, advised the County that they could breach the berm at the River mouth to restore tidal flows. Work began to breach the berm on October 9th.

Maintenance dredging at this location removes built-up sand and encourages positive flow from the channel to the ocean. Uses along the River channel include wetlands, parks, and well-developed industrial, commercial, and residential property for many miles upstream. Periodic dredging to keep the River mouth open helps improve public safety and limits property damage by reducing flood risk. Additionally, the Huntington State Beach Least Tern Natural Preserve benefits from the dredging by reducing sand encroachment within the Preserve.

Until recently, the County had maintained that its Flood Control District trespassing ordinances (section 3-9-35) did not apply within the Lease Premises. The County is now willing to enforce this ordinance within the Lease Premises to protect public safety and the environment. Under the terms of the lease, the County must enforce its applicable ordinances in the Lease Premises, including no trespassing within the Santa Ana River Flood Control Channel. The application of this ordinance will restrict individuals and dogs from accessing the Lease Premises and reduce impacts to endangered and threatened bird species and their habitat. If funding for additional law enforcement through the CDFW becomes available, it would supplement County enforcement efforts at this location.

The proposed lease does not substantially interfere with Public Trust uses and is for a limited 2-year term. The dredging is intended to promote public health and safety by minimizing flooding threats. Further, staff believes the proposed lease terms provide a framework for continued protection of the Least Terns and Snowy Plovers, important Public Trust resources, from harassment due to the unregulated presence of unleashed dogs and other domestic animals. The limited 2-year lease term will allow the Commission to re-evaluate the effectiveness of this protection and enforcement framework and adaptively manage the situation accordingly.

CLIMATE CHANGE:

Climate change impacts, including prolonged drought, sea-level rise, more frequent and intense storm events, and flooding will likely affect the lease area, structures, and the activity of maintenance dredging.

Orange County, along with other parts of the state, has been in a severe drought for over 2 years, and stream flow for the Santa Ana River is below average, according to the [National Integrated Drought Information System](#) managed by the National Oceanic and Atmospheric Administration. Reduced stream flow can result in less sediment reaching the river mouth and may impact the timing of dredging

and the volume of sediment that needs to be removed for maintaining the open channel.

While the amount of fresh water reaching the river mouth is decreased during the drought, sea water levels are increasing annually at an accelerated rate. The California Ocean Protection Council updated the *State of California Sea-Level Rise Guidance in 2018* to provide a synthesis of the best available science on sea-level rise projections and rates. Commission staff evaluated the “high emissions,” “medium-high risk aversion” scenario to apply a conservative approach based on both current emission trajectories and the lease location and structures. The Los Angeles tide gauge was used for the projected sea-level rise scenario for the lease area as listed in Table 1.

Table 1. Projected Sea-Level Rise for Los Angeles

Year	Projection (feet)
2030	0.7
2040	1.2
2050	1.8
2100	6.7

Source: Table 28, State of California Sea-Level Rise Guidance: 2018 Update

Note: Projections are with respect to a 1991 to 2009 baseline.

Rising sea levels, combined with storms or extreme tidal events such as King Tides can produce increased wave heights and intensity, and wash more sediment into the river mouth channel, as well as debris. As stated in *Safeguarding California Plan: 2018 Update* (California Natural Resources Agency 2018), in addition to sea-level rise, precipitation patterns are becoming more variable. Though the wet seasons are shorter, warmer atmospheric temperatures are generating more powerful storms that release greater amounts of rain, flushing high volumes of freshwater and sediment down the river channel in a short amount of time. These flash floods can cause excessive damage to the lease area structures and land depending on their force and frequency.

Regular maintenance, as referenced in the lease, may reduce the likelihood of severe structural degradation or dislodgement. Pursuant to the proposed lease, the Applicant acknowledges that the lease premises and adjacent upland are located in an area that may be subject to the effects of climate change, including sea-level rise.

CONCLUSION:

For the reasons stated above, staff believes the issuance of the proposed lease will not substantially impair the public rights to navigation, fishing, or other Public Trust needs and values at this location, at this time, and for the foreseeable term of the lease; and is in the best interests of the State.

OTHER PERTINENT INFORMATION:

1. Approval or denial of the lease is a discretionary action by the Commission. Each time the Commission approves or rejects a use of sovereign land, it exercises legislatively delegated authority and responsibility as trustee of the State's Public Trust lands as authorized by law. If the Commission denies the lease, the Applicant may be required to remove the flood control jetties and dike, and will not be authorized to conduct maintenance dredging. Upon expiration or prior termination of the lease, the Applicant also has no right to a new lease or to renewal of any previous lease.
2. This action is consistent with the "Meeting Evolving Public Trust Needs" Strategic Focus Area of the Commission's 2021-2025 Strategic Plan.
3. Termination of the lease is not a project as defined by the California Environmental Quality Act (CEQA) because it is an administrative action that will not result in direct or indirect physical changes in the environment.

Authority: Public Resources Code section 21065 and California Code of Regulations, title 14, section 15378, subdivision (b)(5).

4. Existing Structures: Staff recommends that the Commission find that this activity is exempt from the requirements of CEQA as a categorically exempt project. The project is exempt under Class 1, Existing Facilities; California Code of Regulations, title 2, section 2905, subdivision (a)(2).

Authority: Public Resources Code section 21084 and California Code of Regulations, title 14, section 15300 and California Code of Regulations, title 2, section 2905.

5. Maintenance Dredging: A Supplemental Environmental Impact Statement (EIS) prepared by the U.S. Army Corps of Engineers was used by the Orange County Flood Control District as a CEQA-equivalent document and approved on November 28, 1989, and an Addendum was prepared by the Orange County

Flood Control District and approved on April 29, 2016, for this Project. The California State Lands Commission staff has reviewed such documents.

The Mitigation Monitoring Program and a Statement of Findings made in conformance with the State CEQA Guidelines (Cal. Code Regs., tit. 14, §§ 15091, 15096) were previously adopted by the Commission on August 9, 2016 ([Item 31, August 09, 2016](#)).

6. This activity involves lands identified as possessing significant environmental values pursuant to Public Resources Code section 6370 et seq., but such activity will not affect those significant lands. Based upon staff's consultation with the persons nominating such lands and through the CEQA review process, it is staff's opinion that the project, as proposed, is consistent with its use classification.

APPROVALS OBTAINED:

U.S. Army Corps of Engineers
California Coastal Commission
State Water Resources Control Board

EXHIBITS:

- A. Land Description
- B. Site and Location Map

RECOMMENDED ACTION:

It is recommended that the Commission:

CEQA FINDING:

Existing Structures: Find that the activity is exempt from the requirements of CEQA pursuant to California Code of Regulations, title 14, section 15061 as a categorically exempt project, Class 1, Existing Facilities; California Code of Regulations, title 2, section 2905, subdivision (a)(2).

Maintenance Dredging: Find that a Supplemental EIS was prepared by the U.S. Army Corps of Engineers, was used by the Orange County Flood Control District as a CEQA-equivalent document and approved on November 28, 1989, and an Addendum prepared for this project by Orange County Flood Control District and

approved on April 29, 2016, and that the Commission has reviewed and considered the information contained therein.

The Commission previously adopted the Mitigation Monitoring Program on August 9, 2016 ([Item 31, August 09, 2016](#)), and it remains in full force.

Determine that the project, as approved, will not have a significant effect on the environment.

PUBLIC TRUST AND STATE'S BEST INTERESTS:

Find that termination of the lease and issuance of the proposed lease will not substantially impair the public rights to navigation and fishing or substantially interfere with the Public Trust needs and values at this location, at this time, and for the foreseeable term of the lease; and is in the best interests of the State.

SIGNIFICANT LANDS INVENTORY FINDING:

Find that this activity is consistent with the use classification designated by the Commission for the land pursuant to Public Resources Code section 6370 et seq.

AUTHORIZATION:

1. Terminate, effective October 21, 2021, Lease Number PRC 2171, a General Lease – Public Agency Use, issued to the Orange County Flood Control District.
2. Authorize issuance of a General Lease – Public Agency Use and Dredging to the Applicant beginning October 21, 2021, for a term of 2 years, for the use and maintenance of two riprap flood control jetties, a riprap dike, and maintenance dredging in the Lower Santa Ana River as described in Exhibit A and shown on Exhibit B (for reference purposes only) attached and by this reference made a part hereof; consideration is the public use and benefit, with the State reserving the right at any time to set a monetary rent if the Commission finds such action to be in the State's best interests.

EXHIBIT A

LEASE 9358

LAND DESCRIPTION

That certain parcel of tide and submerged lands adjacent to Fractional Section 19, Township 6 South, Range 10 West, San Bernardino Base and Meridian, in the County of Orange, State of California, described as follows: bounded on the north by the line of ordinary high tide of the Pacific Ocean; bounded on the east by the southwesterly prolongation of the westerly boundary of the City of Newport Beach, being also the southwesterly prolongation of the easterly line of Summit Street as per map of Seashore Colony Tract, recorded in Book 7, Page 25 of Miscellaneous Maps, in the Office of the County Recorder of said County; bounded on the northwest and southwest by a line described as follows: commencing at a point on the easterly line of Rancho Las Bolsas, as said line is shown on a map filed in Book 28, Page 17 of Record of Surveys in the Office of said County Recorder, said point being described on said map as "Fd.1" iron rod Sta. 4+28.35"; thence South 15°48'40" West along said Rancho line, 202.47 feet to a point described on said map as "Sta. 6+30.82 Set 1" I.P.", said point being also at the intersection of the southerly line of the Pacific Electric Railway Company right of way as shown on said map; thence North 53°58'30" West along said southerly right of way line, 4.46 feet; thence South 36°01'30" West, 374.00 feet; thence South 24°59'14" West, 650.00 feet; thence South 65°00'46" East to said southwesterly prolongation of the westerly boundary of the City of Newport Beach.

APPROVED

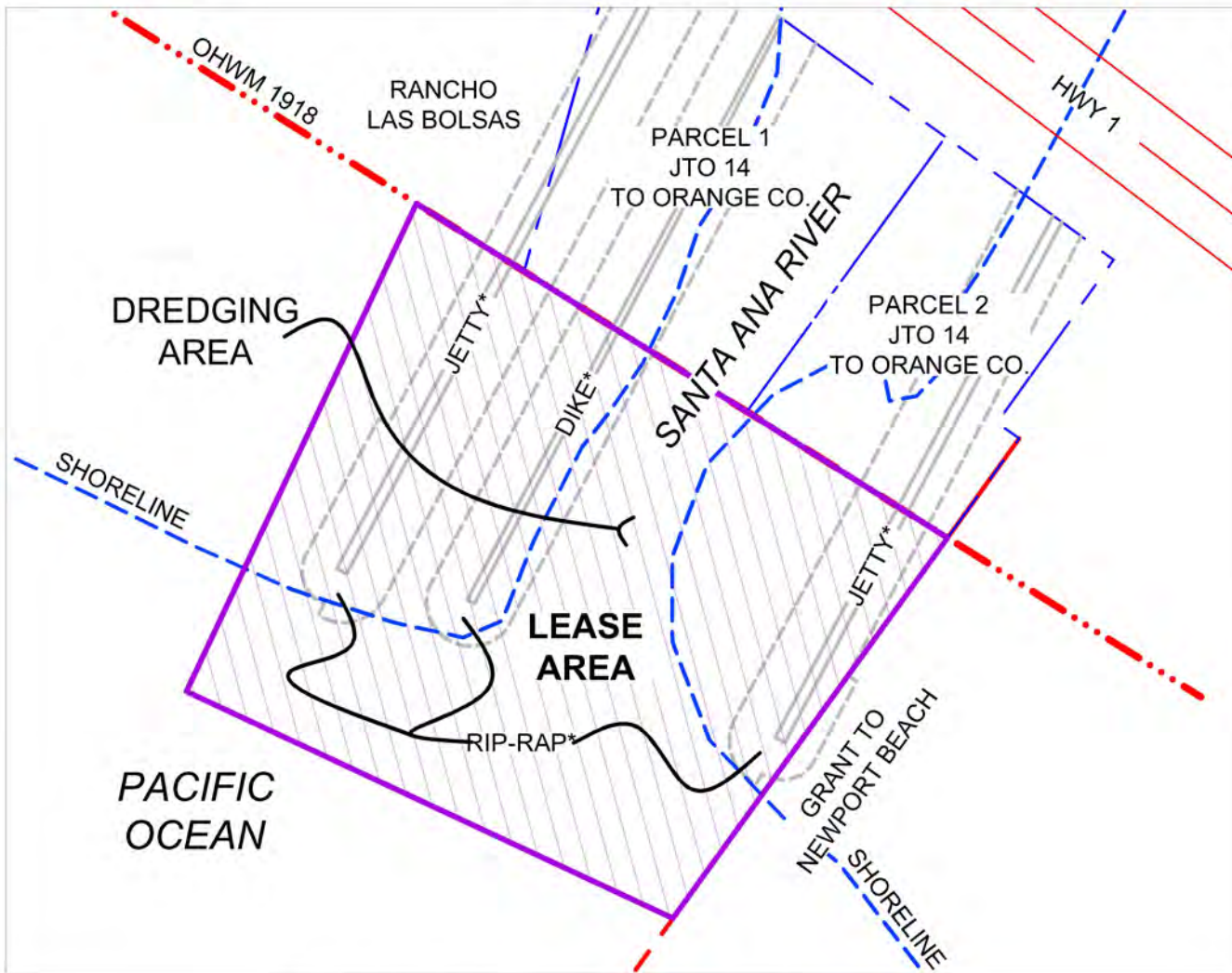
John D. Pavlik Date: 9/28/09
 John D. Pavlik L.S. 5168
 Expiration Date: June 30, 2011



*The above description is a duplicate of that original description prepared by John D. Pavlik, LS 5168 on 9/28/09 as found in PRC file 2171, Calendar Item 26 approved on 10/22/09.

NO SCALE

SITE



Santa Ana River at the Pacific Ocean

NO SCALE

LOCATION



MAP SOURCE: USGS QUAD

Exhibit B

LEASE 9358
 ORANGE CO. FLOOD CONTROL DISTRICT
 GENERAL LEASE - PUBLIC AGENCY USE & DREDGING
 ORANGE COUNTY



This Exhibit is solely for purposes of generally defining the lease premises, is based on unverified information provided by the Lessee or other parties and is not intended to be, nor shall it be construed as, a waiver or limitation of any State interest in the subject or any other property.

Exhibit D



Santa Ana River Mouth Monitoring Project January-June 2021 Report



Orange County Coastkeeper (Coastkeeper) is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective programs in education, advocacy, restoration, research, enforcement, and conservation.

The Santa Ana River Mouth Monitoring Project (SAR Project) enlists volunteers, community groups and local government to monitor human, dog and bird activity in the Santa Ana River Mouth area, a 13.2 acre parcel of land that is owned by four agencies including the California State Lands Commission, California State Parks, the County of Orange, and the City of Newport Beach. Due to the fragmented ownership of the area management of activities and law enforcement

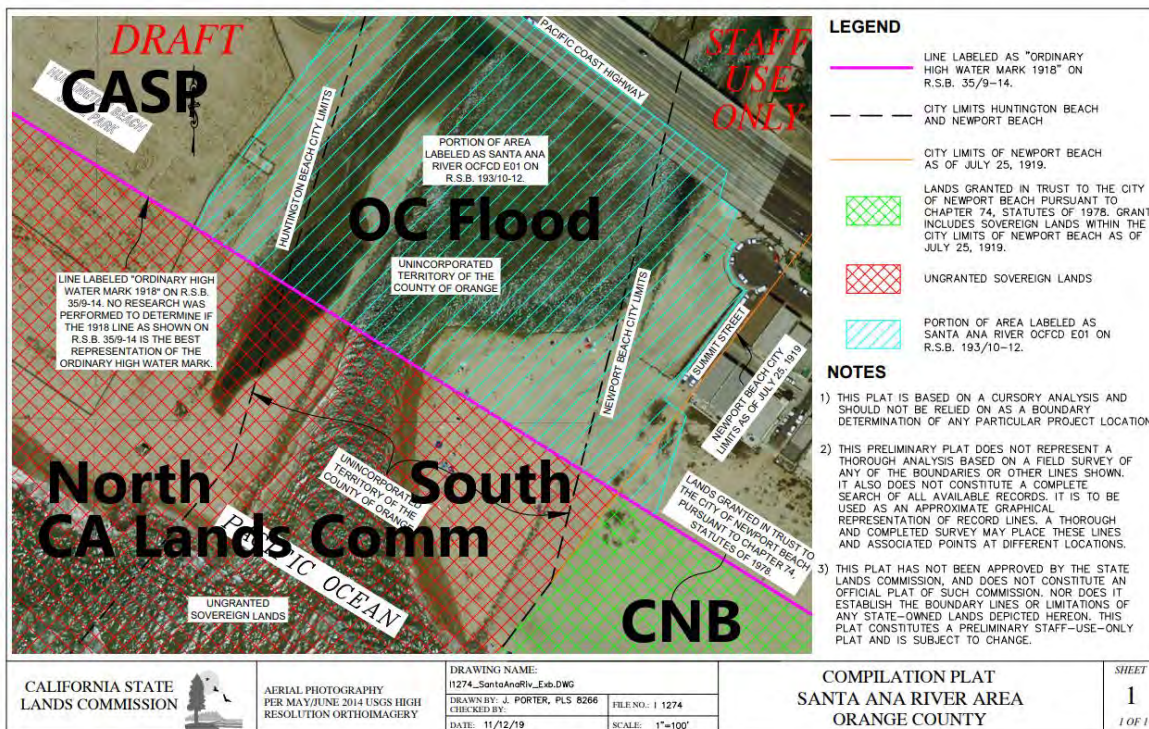
in the area have been difficult. The initial six months of the SAR Project covered in this report January 2021 and June 2021 was run as a pilot program by Orange County Coastkeeper (OCCK) with funding from the City of Newport Beach. The project is continuing with funding from the City of Newport Beach Community Grants Program and the Rose Foundation. The goal of the SAR project is to monitor human, dog and bird use of the area and to provide education and outreach to residents and visitors about the Wildlife Management Area at the Santa Ana River Mouth and the endangered species that reside within it.

Executive Summary

After initial program development of the pilot study monitoring of the area began on February 9th, 2021. Final revisions of the study protocol were completed by March 23rd, 2021 and all subsequent surveys followed a standard protocol that is used for all surveys.

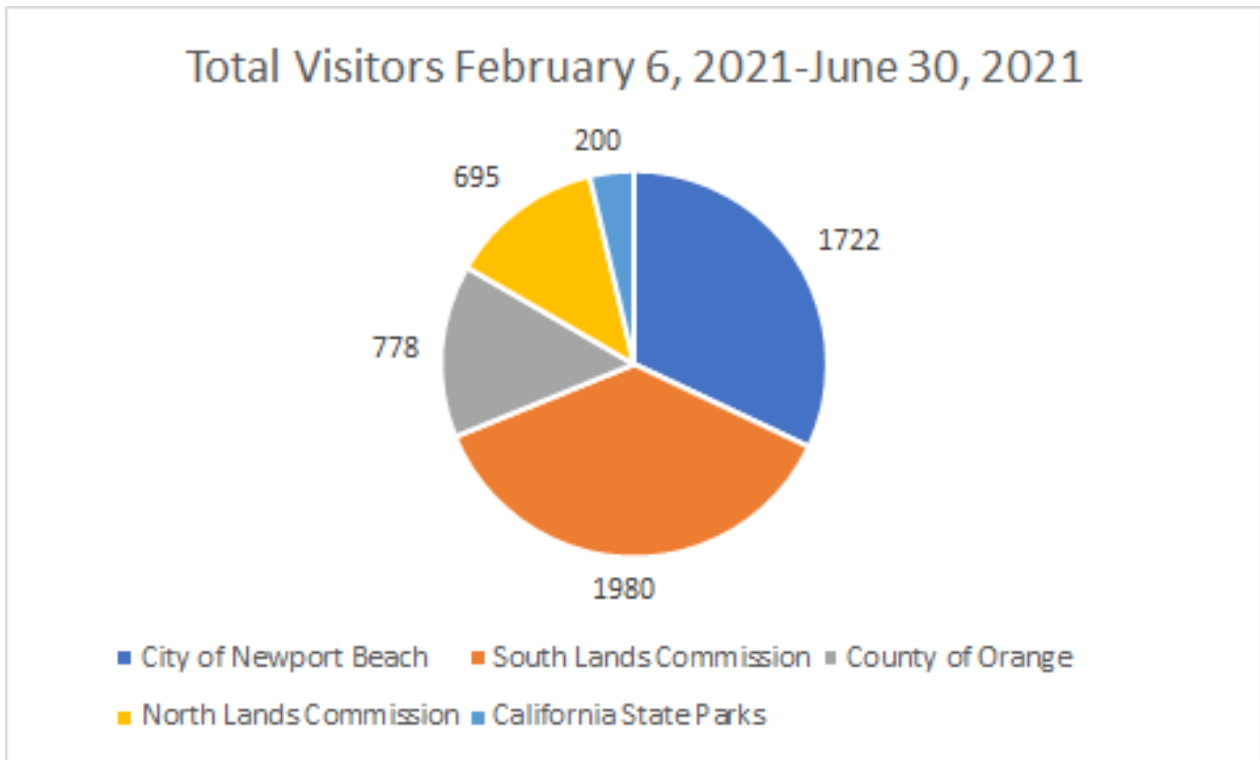
As of June 30, 2021 151 surveys at the Santa Ana River Mouth were completed by 26 trained volunteers. In the 151 surveys collected, 5,375 humans and 1,096 dogs were observed, of the dogs 894 were off-leash and 202 on-leash. Two drones were observed and all but eight surveys documented dogs in the Santa Ana River Mouth in only 8 completed surveys. Dogs off-leash accounted for 82 percent the dogs observed. No citations were observed to be issued by Law Enforcement. California State Parks Law Enforcement was called out by staff once for repeated bird flushing on 6/18/2021 on County of Orange and California State Parks Property by a dog owner and their dog.

GRAPHS AND MAP

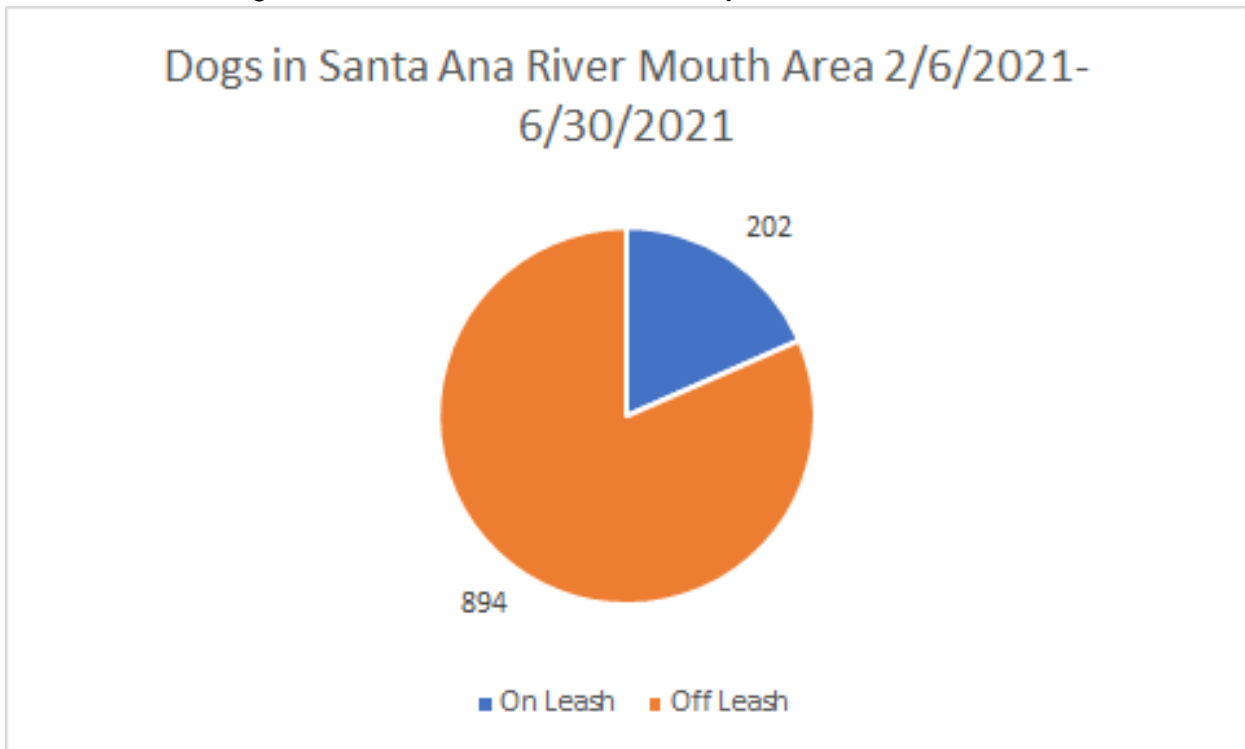


(Map of Santa Ana River Mouth with property names overlaid. California State Lands Commission property was split into North and South portions of the map after March 23rd, divided by the location of the river mouth during surveys, to improve our ability to understand access use in the area better.)

Total number of visitors based on location:

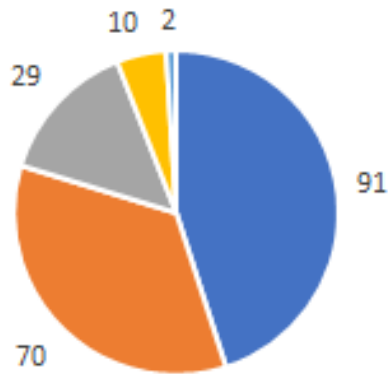


Total number of dogs in the Santa Ana River Mouth Project Area:



Locations of dogs recorded on leash:

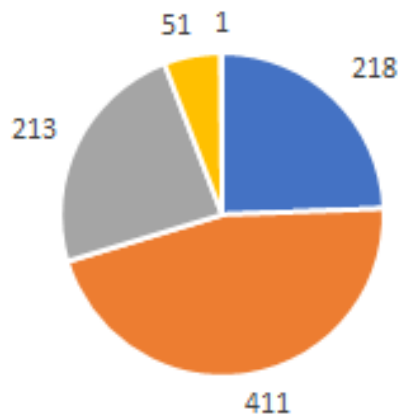
Dogs On-Leash By Land Manager Organization 2/6/2021-6/30/2021



■ City of Newport Beach
 ■ South Lands Commission
 ■ County of Orange
■ North Lands Commission
 ■ California State Parks

Locations of dogs recorded off leash:

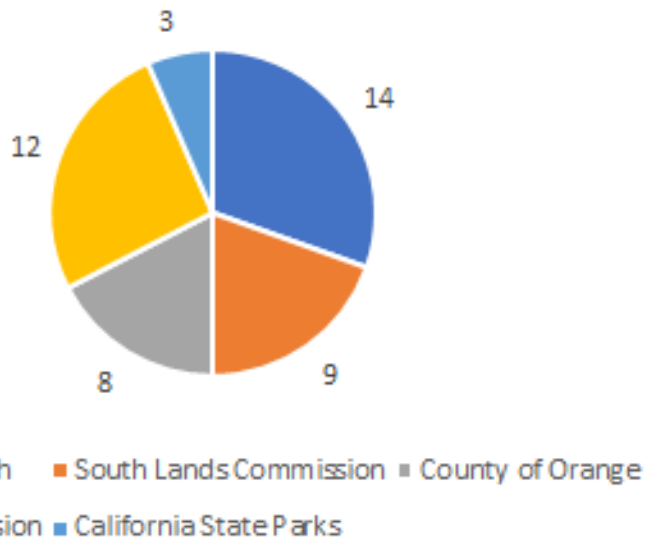
Dogs Off-Leash by Land Manager Organization 2/6/2021-6/30/2021



■ City of Newport Beach
 ■ South Lands Commission
 ■ County of Orange
■ North Lands Commission
 ■ California State Parks

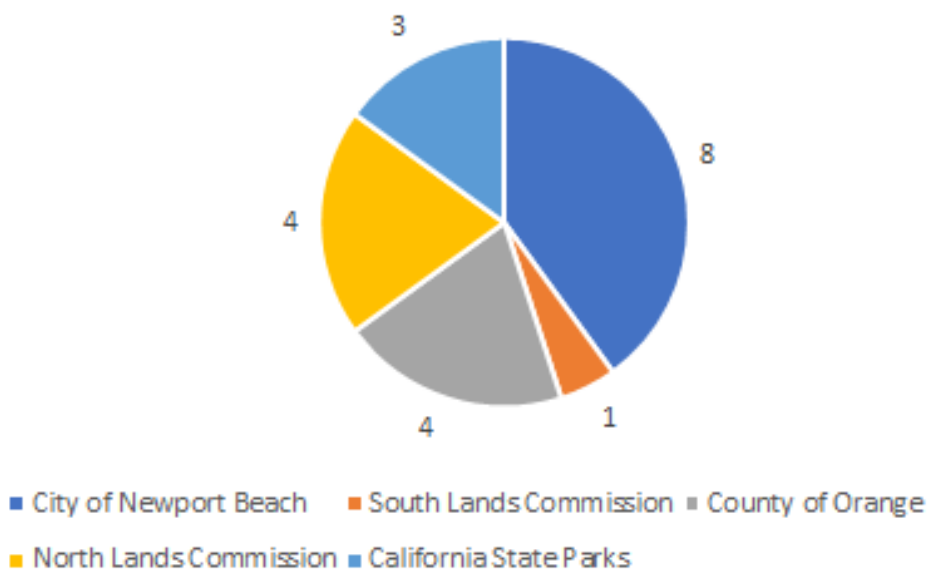
Recorded disturbances:

Total Number of Instances of Bird Disturbance by Land Owner 2/6/2021-6/30/2021



(Bird disturbance defined as when birds are present on a part of the beach and are approached by humans and/or dogs and they depart the beach.)

Law Enforcement Officers Present by Land Area



Training

Training took place with two components, an online one hour Zoom training that took place in February 2021 was recorded and distributed to new volunteers who were unable to attend the initial Zoom training session. Volunteers then met with Volunteer Coordinator Suzanne Welsh at the

Santa Ana River Mouth to go over the monitoring protocol and to go over the property map in person. Volunteers were trained to monitor human recreation use, dog use, and were instructed how to fill out the data sheet to track other uses like drones, disturbances to birds (where birds are approached by humans or dogs and leave the area), and to denote law enforcement officer presence.

Outreach Table



During this project Orange County Coastkeeper was able to conduct an outreach table for beach visitors. Visitors were given pamphlets detailing information about California Least Terns and Western Snowy Plovers. Additional information about the laws regarding dogs in the area and free biodegradable waste bags were provided to visitors as well. Between May 15th, 2021 and June 30th, 2021 the outreach table was set up five times and one virtual outreach event was held as well. Overall OC Coastkeeper has engaged 387 visitors with its outreach table and virtual outreach event.

COVID-19 Impacts

The greatest impact to this project was a delay in implementing the outreach table due to COVID-19 restrictions and vaccine availability. Staff was able to begin the outreach program in May after full vaccination status was met.

Next Steps

Our next steps in this project include additional volunteer recruitment from the local community as well as a continuation of the outreach table.

Santa Ana River Mouth Monitoring Project July-December 2021 Report



Orange County Coastkeeper (Coastkeeper) is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective programs in education, advocacy, restoration, research, enforcement, and conservation.

The Santa Ana River Mouth Monitoring Project (SAR Project) enlists volunteers, community groups and local government to monitor human, dog and bird activity in the Santa Ana River Mouth area, a 13.2 acre parcel of land that is owned by four agencies including the California State Lands Commission, California State Parks, the County of Orange, and the City of Newport Beach. Due to the fragmented ownership of the area, management of activities and law

enforcement in the area have been difficult. The second six months of the SAR Project covered in this report (July 2021 through December 2021) was run as an ongoing project by Orange County Coastkeeper (OCCK) with funding from the City of Newport Beach. The project is continuing with funding from the City of Newport Beach Community Grants Program and the Rose Foundation. The goal of the SAR project is to monitor human, dog and bird use of the area and to provide education and outreach to residents and visitors about the Wildlife Management Area at the Santa Ana River Mouth and the endangered species that reside within it.

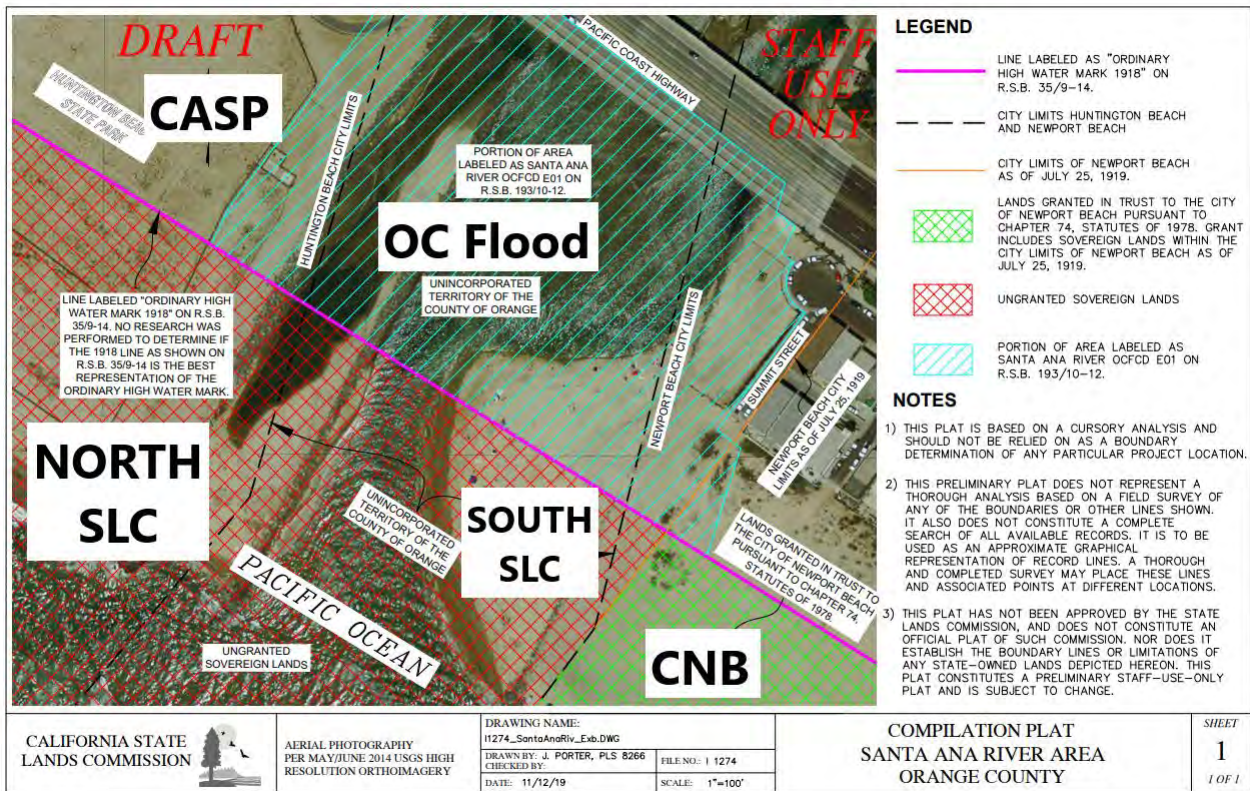
Executive Summary

After the initial program development of the pilot study, monitoring of the area began on February 9th, 2021. Final revisions of the study protocol were completed by March 23rd, 2021 and all subsequent surveys followed a standard protocol that is used for all surveys.

As of December 31st 2021, 63 surveys at the Santa Ana River Mouth were completed by 36 trained volunteers. In the 63 surveys collected, 1,506 people and 273 dogs were observed. Of the dogs 194 were off-leash and 79 on-leash. Dogs off-leash accounted for 71 percent the dogs observed. Law Enforcement Officers were present 7 times throughout all 63 surveys completed in this time period. No citations were observed to be issued.

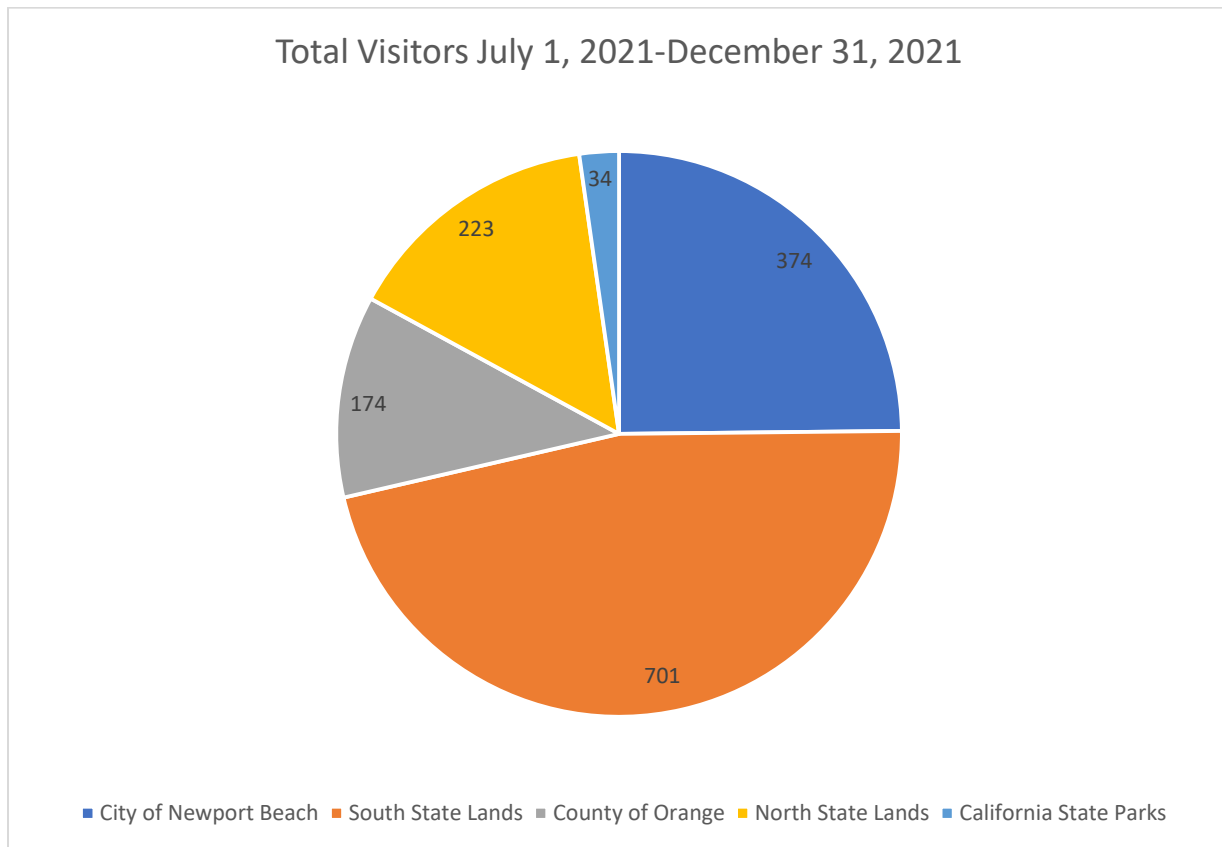
On 12/19/2021, according to a volunteer, "...a law enforcement officer came down to the flood area and said something over the loudspeaker but no one could hear him. There were 18 dogs off leash during the 30 minutes I was there, and at least half of them were still there when the officer arrived. A couple of people went over to ask him what he said and then left. There were still at least 6 dogs still off leash when the officer drove away, and he was too far away for people to hear what he said. Today there were only 3 surfers out in the water when I arrived and I was delighted to see many shorebirds had returned to the south end of the beach, which was devoid of birds with dogs present. After 17 minutes a dog chased the entire flock off and only one gull returned within the next 15 minute period. I approached the couple and asked them if they knew that this beach had a requirement for their dogs to be on a leash. They said they knew, and that they come out there twice per day. I asked them if they had been issued any tickets and they said no. I called animal control to report the incident and took pictures of the couple and the dog for future reference. They left before animal control could arrive, within 10 minutes of the flushing incident and the birds still had not returned with over 5 minutes after the dog had left the area." Reports like this are common from volunteers, interns, and staff who spend time completing surveys.

GRAPHS AND MAP

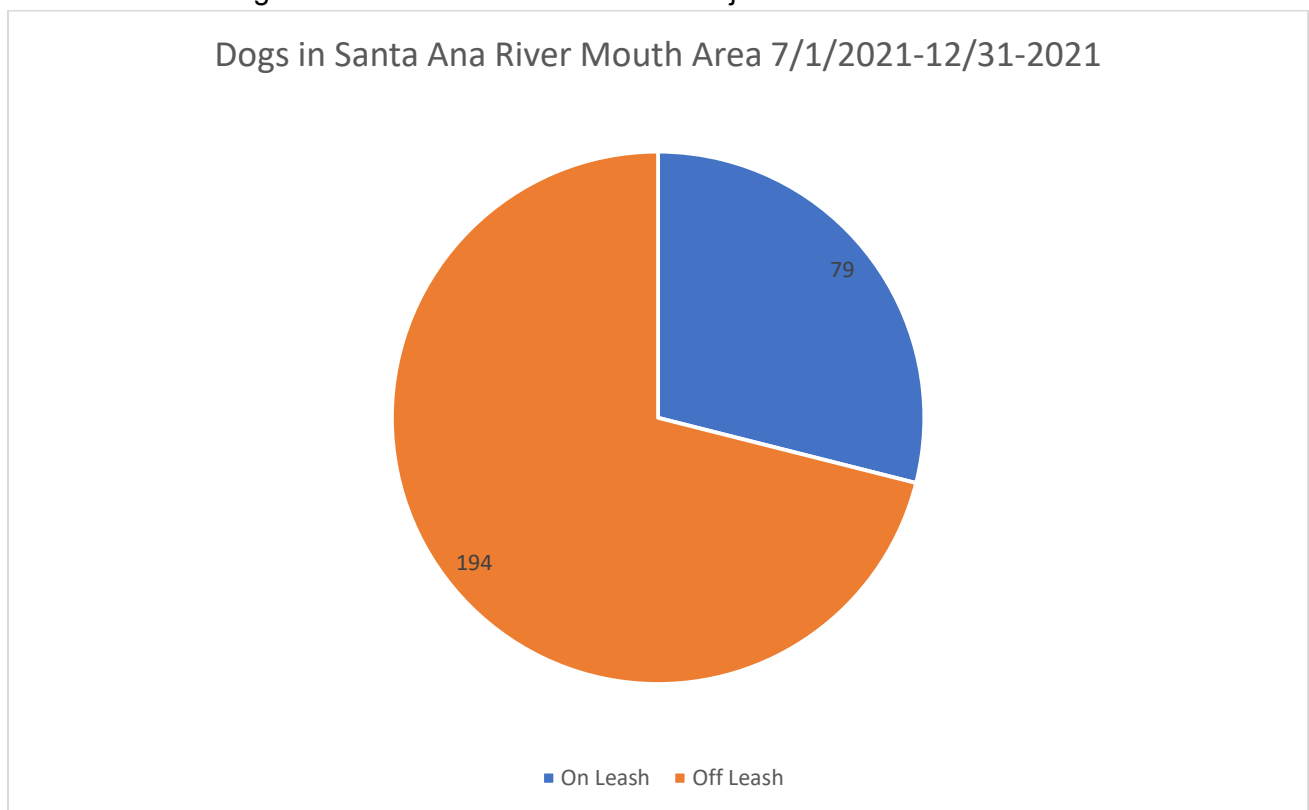


(Map of Santa Ana River Mouth with property names overlaid to correlate with data sheets. California State Lands Commission property was split into North and South portions, divided by the location of the river mouth during surveys, to improve our ability to understand access use in the area better. **CASP**=California State Parks; **OC Flood**: Orange County Flood Control Channel; **CNB**= City of Newport Beach; **NORTH SLC** = North State Lands Commission; **SOUTH SLC**= South State Lands Commission)

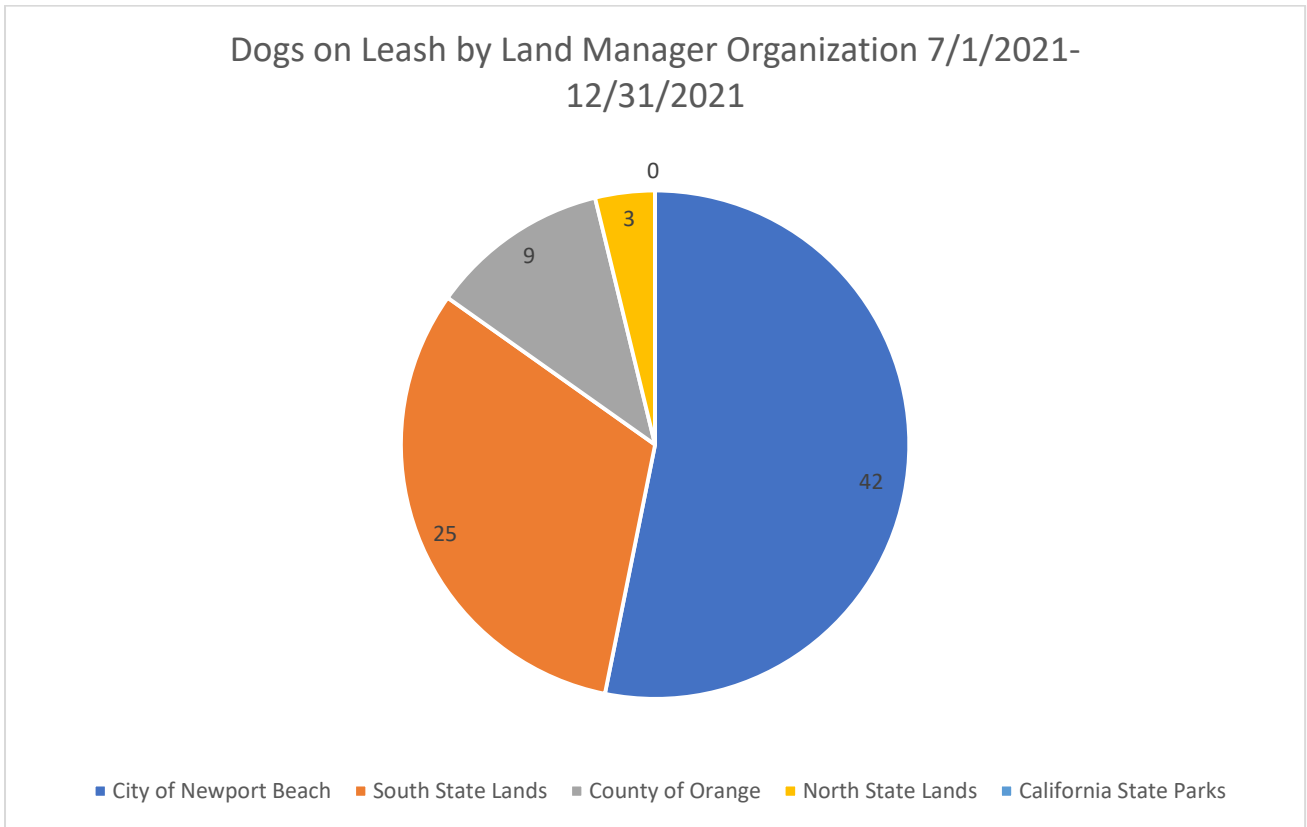
Total number of visitors based on location:



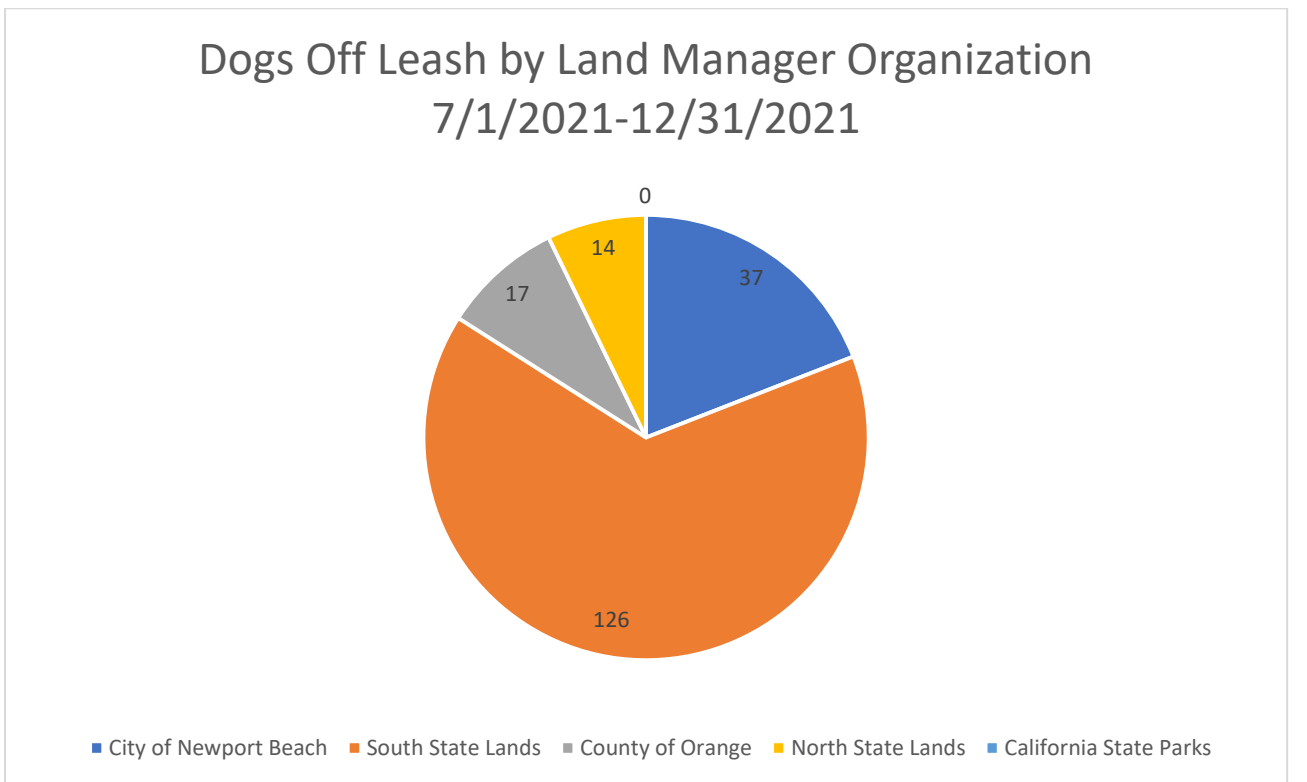
Total number of dogs in the Santa Ana River Mouth Project Area:



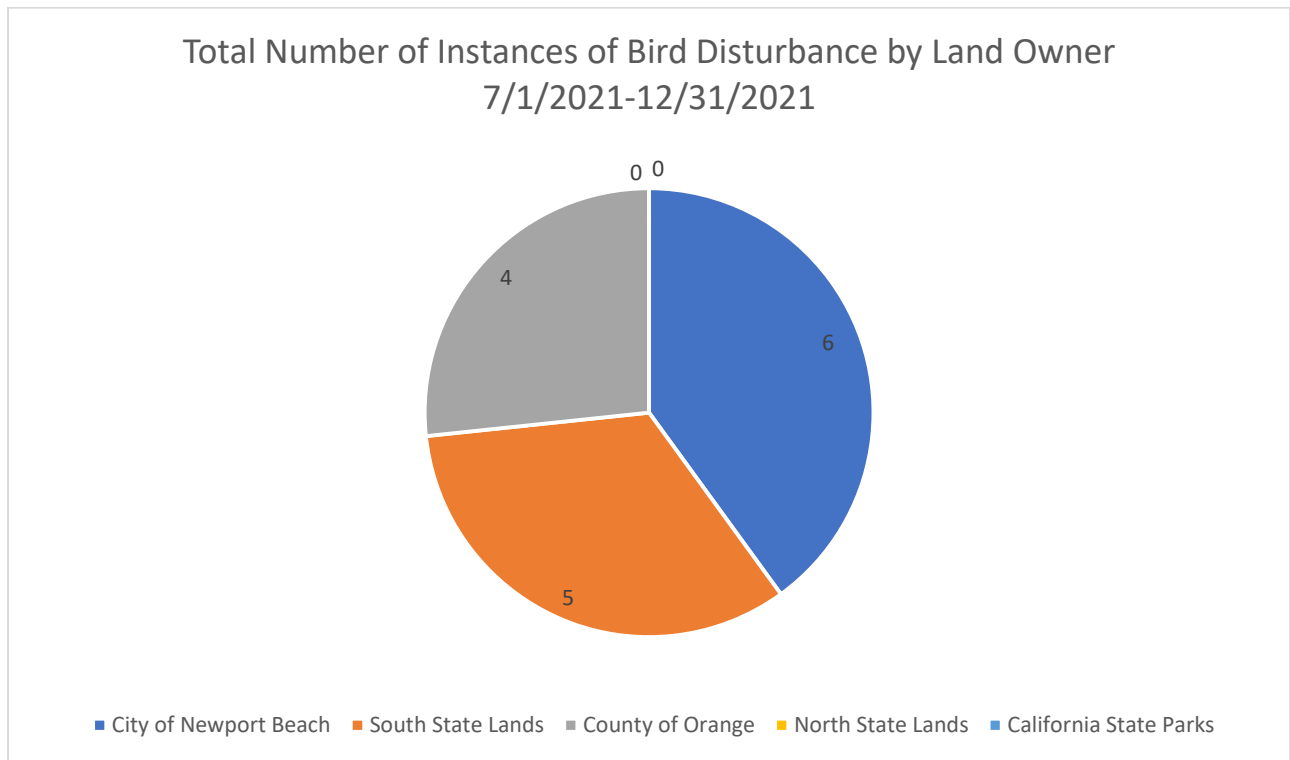
Locations of dogs recorded on leash:



Locations of dogs recorded off leash:

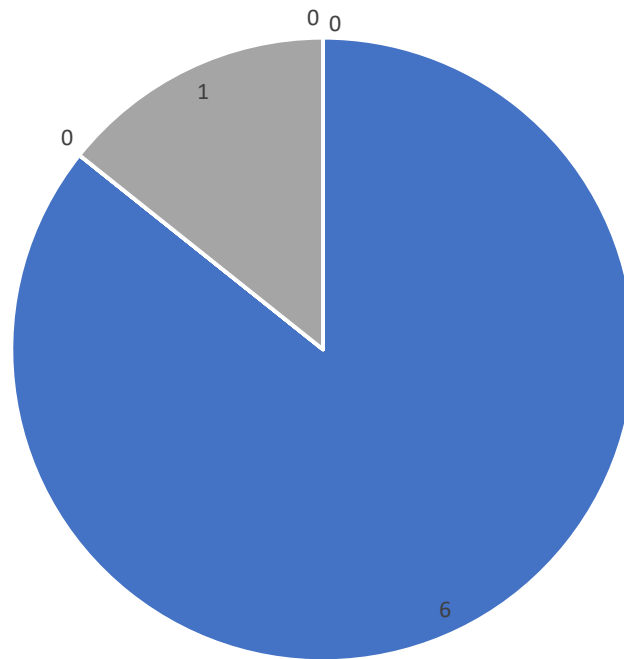


Recorded disturbances:



(Bird disturbance defined as when birds are present on a part of the beach and are approached by humans and/or dogs and they depart the beach.)

Law Enforcement Officers Present by Land Area



■ City of Newport Beach ■ South State Lands ■ County of Orange ■ North State Lands ■ California State Parks

Training

Training took place with two components, an online one hour Zoom training that took place in February 2021 was recorded and distributed to new volunteers along with training documents. Volunteers then met with Volunteer Coordinator Suzanne Welsh at the Santa Ana River Mouth to go over the monitoring protocol and the property map in person. Volunteers were trained to monitor human recreation use, dog use, and were instructed how to fill out the data sheet to track other uses like drones, disturbances to birds (where birds are approached by humans or dogs and leave the area), and to denote law enforcement officer presence.

Outreach Table



During this project Orange County Coastkeeper was able to conduct an outreach table for beach visitors. Visitors were given pamphlets detailing information about California Least Terns and Western Snowy Plovers. Additional information about the laws regarding dogs in the area and free biodegradable waste bags were provided to visitors as well. Between July 1, 2021 and December 31, 2021 the outreach table was set up three times. Challenges for our public outreach included issues with volunteer recruitment and retention, lack of funding for staff presence, the October 2021 oil spill, and a sand nourishment project that resulted in heavy machinery being used in the survey and outreach area from October through the end of the year. Overall OC Coastkeeper has engaged over 533 visitors with our outreach table (5 in person outreach events) and virtual outreach events in 2021. OC Coastkeeper participated in a virtual outreach event with California Surf Anglers in May of 2021 that has gained 393 views to date (<https://www.facebook.com/726138938/videos/10159755567818939/>) and in a segment produced by NBTV (Newport Beach TV) for local broadcast that's also available on the City of Newport Beach's website and YouTube pages (<https://www.youtube.com/watch?v=CF8svp1-r60>).

COVID-19 Impacts

Due to the fluctuating nature of the COVID-19 pandemic, there have been ongoing issues with volunteer retention as public crowds grow and decline with the weather, especially in regards to staffing the outreach table with volunteers.

Other Impacts

On October 2nd, 2021 approximately 24,000 gallons of oil was released into the ocean off of Huntington Beach, just north of the Santa Ana River Mouth area. While a natural sand bar had closed off the river mouth just the week prior, preventative booming was put in place by the Office of Spill Prevention as a protective measure in addition to the creation of 6 foot tall sand berms along the shore in order to protect the sensitive wetland habitat from potential oil spill impacts. Cleanup efforts in the area were centered at Talbert Marsh, the wetland just north of the survey area, and heavy machinery and cleanup efforts were common in the Santa Ana River Mouth area throughout the month of October.

In November 2021 the County of Orange began a dredging project in the Santa Ana River Mouth to transport sand to the beach adjacent to the San Clemente Pier and to the Newport Peninsula between 40th and 52nd Streets. Heavy machinery is operating on the beach Monday-Friday from 8 AM to 5 PM, preventing weekday outreach table events from occurring, and is ongoing through March 2022.

Next Steps

Our next steps in this project include additional volunteer recruitment from the local community, continuation of the outreach table, and continuing to gather surveys. OC Coastkeeper was awarded a grant by the California Coastal Conservancy in October 2021, effective January 2022, that will allow us to substantially increase our ability to complete surveys and outreach in the Santa Ana River Mouth.

Exhibit E

February 19, 2022 Surf Cam Video:

<https://drive.google.com/file/d/11tbOoUQAwm5FRdOciQJFdMNkv0GK67aR/view>

Photographic Evidence of Non-Enforcement:



Date: November 22, 2021 between 10 AM and 1 PM.



Date: November 22, 2021 between 10 AM and 1 PM.



Exhibit F



U.S. Fish and Wildlife Service
Carlsbad Fish and Wildlife Office
2177 Salk Avenue, Suite 250
Carlsbad, California 92008
760-431-9440
FAX 760-431-9624



California Department of Fish and Wildlife
South Coast Region
3883 Ruffin Road
San Diego, California 92123
858-467-4201
FAX 858-467-4239

In Reply Refer To:
FWS-OR-17B0026-17CPA0028

December 14, 2016
Sent by Email

Ms. Chris Uzo-Diribe
Orange County Public Works
300 N. Flower Street
Santa Ana, California 92703-5000
chris.uzodiribe@ocpw.ocgov.com

Subject: Negative Declaration for the Orange County Code of Ordinance Proposed Amendment (Dog Beach) Project, IP 16-234, Huntington Beach, California (SCH# 2016111021)

Dear Ms. Uzo-Diribe:

The U.S. Fish and Wildlife Service (Service) and the California Department of Fish and Wildlife (Department), hereafter collectively referred to as the Wildlife Agencies, have reviewed the above-referenced Negative Declaration (ND) dated November 2016. The Wildlife Agencies have identified potential effects of this project on wildlife and sensitive habitats. The project details provided herein are based on the information provided in the Initial Study (IS)/ND and associated documents.

The primary concern and mandate of the Service is the protection of public fish and wildlife resources and their habitats. The Service has legal responsibility for the welfare of migratory birds, anadromous fish, and endangered animals and plants occurring in the United States. The Service is also responsible for administering the Federal Endangered Species Act (Act) of 1973, as amended (16 U.S.C. 1531 *et seq.*), including habitat conservation plans (HCP) developed under section 10(a)(1)(B) of the Act. The Department is a Trustee Agency and a Responsible Agency pursuant to the California Environmental Quality Act (CEQA; §§ 15386 and 15381, respectively) and is responsible for ensuring appropriate conservation of the state's biological resources, including rare, threatened, and endangered plant and animal species, pursuant to the California Endangered Species Act (CESA; Fish and Game Code § 2050 *et seq.*) and Fish and Game Code (FGC) section 1600 *et seq.* The Department also administers the Natural Community Conservation Planning program, a California regional habitat conservation planning program.

The proposed project is a proposal that would end restrictions on off-leash dogs on unincorporated Orange County (County) land at the mouth of the Santa Ana River and designate the land as a dog park. The IS/ND includes the proposed amendment to the Orange County Code of Ordinances, as follows: “c. A dog, under the charge of a person competent to exercise care, custody, and control over such dog, may be permitted to be upon public property without restraint only during the months of October through February in the unincorporated area downstream from Pacific Coast Highway at the outlet of the Santa Ana River between the incorporated cities of Huntington Beach and Newport Beach which area is hereby designated a dog park. During the months of March through September, a dog, under the charge of a person competent to exercise care, custody, and control over such dog, must be restrained by a substantial chain or leash not to exceed six (6) feet in length.”

The dog park would be located immediately adjacent to a California least tern (*Sternula antillarum browni*; least tern) and western snowy plover (Pacific Coast population DPS) [*Charadrius nivosus nivosus* (*C. alexandrinus n.*); snowy plover] colony. Least terns are listed as endangered under CESA and the Act; they are also fully protected under FGC section 3511(b)(6). Snowy plovers are listed as threatened under the Act and are a state species of special concern. As expressed during a July 6, 2016, meeting with the Department¹ and in a November 21, 2016, letter from the Service, (Service2016b), the Wildlife Agencies have recommended that the County not designate the area at the mouth of the Santa Ana River as a dog park due to the potential impacts to least terns and snowy plovers.

The Wildlife Agencies have significant concerns regarding this proposed amendment, and offer our comments and recommendations to assist the County in avoiding, minimizing, and adequately mitigating project-related impacts to biological resources, and to ensure that the project is consistent with ongoing regional habitat conservation planning efforts.

General Comments:

The Santa Ana River mouth is located approximately half way between the other nearest estuaries (Bolsa Chica and Upper Newport Bay) and supports a large array of shorebirds much of the year, including the snowy plover, black-bellied plover, semi-palmated plover, willet, long-billed curlew, marbled godwit, western sandpiper, least sandpiper, and long-billed dowitcher (Page and Shuford 2000; Ryan 2016). The Santa Ana River mouth also provides resources for the least tern, which uses the river mouth and adjacent dunes between the months of April and September.

The Pacific coast population of snowy plover was listed as threatened on March 5, 1993 (58 Federal Register (FR) 12864) under the authorities of the Act. The snowy plover uses habitat at the mouth of the Santa Ana River primarily during the non-breeding season, but may be present year-round. Non-breeding habitat is important for snowy plovers and other migratory shorebirds because this habitat supplies food and resting areas that allow birds to build fat reserves for spring migration and the upcoming breeding season. Snowy plovers forage for invertebrates and also rest on the beach, mudflats, and sandbars at and near the mouth of the Santa Ana River. The Service recognized the importance of this site to the snowy plover by designating Critical Habitat (Figure 1, below) at the mouth of the Santa Ana River on June 19, 2012 (Service 2012).

The least tern was listed as endangered in 1970 under the authority of the Act, and designated as fully protected in 1970 and endangered in 1971 under the authorities of CESA. The least tern is migratory, and uses habitat within and adjacent to the mouth of the Santa Ana River during the breeding season (April-September). Least terns nest primarily within the fenced Huntington Beach Least Tern Preserve adjacent to the river mouth; however, they also roost outside the fenced boundary (Housel *et al.* 2014). Adult and fledgling least terns have been observed to loaf and preen outside the colony fence along the beach strand and Santa Ana River mouth. Least terns forage on small fish in the near shore ocean, the Santa Ana River and river mouth, and the Santa Ana River estuary. When chicks fledge, they rest on the banks and sand bars at the mouth of the Santa Ana River as well as within the boundaries of the Huntington Beach Least Tern Preserve (Housel *et al.* 2014).

¹ Meeting in person with Department staff Hans Sin and Supervisor Michelle Steel and staff. July 6, 2016. Orange County Supervisors' office.

The presence of leashed or unleashed dogs on the beach and in the river mouth is harmful to snowy plovers and least terns, causing individuals to flush frequently, unnecessarily expending energy reserves. The presence of dogs on the beach or in the river mouth can also result in less time spent foraging (Lafferty 2001). A reduction in foraging time is likely to reduce the ability of snowy plovers and least terns to build fat reserves necessary for migration and reproduction. Dogs may also capture and kill or injure snowy plovers or least terns. For example, at Surfside Beach, Orange County, California, a snowy plover was captured by a dog in September 2009, but was recovered, rehabilitated and released (Ryan and Hamilton 2009) and at Coal Oil Point, Santa Barbara County, California, one snowy plover chick was killed by an unleashed dog (Lafferty *et al.* 2006).

The IS/ND does not adequately define the baseline conditions of the project area including baseline recreational use, traffic, parking availability and distribution and abundance of wildlife resources. In addition, the IS/ND does not quantify the anticipated increase in public use at the Santa Ana River mouth that is likely to occur if this area is designated as a dog park. Understanding the baseline conditions and anticipated increase in recreational use that would result from designation as a dog park is essential to assessing the direct and indirect effects to wildlife resources, including listed species.

The proposed designation of this area as a dog park is likely to result in increased recreational use and dog presence. We remain concerned that increased recreational use, dog presence, and likely changes in foot traffic patterns (i.e., increased travel from the State Parks parking lots to the south side of the river channel, increased foot traffic up the river and into Santa Ana River estuary) will significantly impact the snowy plover and least tern. We recognize that the current proposal states that dogs may only be off-leash outside the least tern breeding season, but the anticipated increased presence of dogs—leashed or unleashed—in sensitive habitat would impact the least tern and snowy plover.

Specific Comments:

1. The IS/ND does not recognize that impacts to species protected by the Act and CESA, such as least tern and snowy plover, may be significant without mitigation. The Wildlife Agencies offer the following evidence as to why significant impacts have potential to occur as a result of the project ordinance change:
 - a. The IS/ND implies that dogs may have an impact on endangered and threatened species if allowed off leash during the nesting season (page 3, IS). Although the IS checklist concludes that the project's impact to biological resources would be less than significant, the impact analysis goes on to cite that biological-based avoidance measures would apply after project completion (i.e., dogs on leashes during the snowy plover and California least tern nesting seasons of March through September).
 - b. There are documented instances of dogs capturing western snowy plovers in Orange County (Surfside Beach; Ryan and Hamilton 2009). In Santa Barbara County a snowy plover chick was killed by an unleashed dog (Coal Oil Point; Lafferty *et al.* 2006). Even if a direct attack does not occur, the mere presence of dogs on the beach is harmful to snowy plovers, causing them to flush frequently, expend energy reserves unnecessarily, and spend less time foraging (Lafferty 2001). Because of this, in Los Angeles and Ventura Counties, the Service has recommended avoidance to reduce impacts to less than significant in cases where activity similar to that described in the project was proposed (Service 2016a.).

- c. Predation managers have documented three instances of take of least tern from domestic dogs in San Diego County. Most notably, a least tern was attacked and killed by a dog that dug under a chain link fence to access an enclosed colony similar to that at the project site (Bonesteel 2016, pers. comm.).

A ND is appropriate only when the lead agency assesses there is no substantial evidence that the proposed project may have a significant effect on the environment; a Mitigated Negative Declaration (MND), alternatively, applies when changes to the project or other mitigation measures are imposed such that all potentially significant effects are avoided or reduced to a level of insignificance. These factors, as well as failure to include an adequate environmental baseline within the ND (see Specific Comment 2 below), lead us to conclude that the avoidance and minimization measures provided in the project description of the ND should have been incorporated into mitigation monitoring or reporting program commitments (California Public Resources Code, Section 21081.6; CEQA Guidelines, Section 15074(d)), along with other mitigation measures that bring impacts below a level of significance, as required under CEQA. Based on the potential for the project to have a significant impact on biological resources, we conclude that an ND is not the appropriate environmental document for this project.

2. Section 3.1.4 of the ND (Biological Resources) provides inadequate information regarding the biological resources on site and is based on a single reconnaissance-level site visit conducted in September 2016. The information provided is inadequate to draw the “less than significant effect” determination presented. Information regarding the numbers of least terns and snowy plovers that use the site, location of snowy plover roosts, and measures that will be taken to ensure adequate separation between dogs and roosting snowy plovers are necessary. For example, in February 2015, 18 snowy plovers were recorded at adjacent Huntington State Beach, and in February 2016, 16 snowy plovers were recorded.

Figure 3 of the IS portrays an inaccurate representation of the Western Snowy Plover Critical Habitat Unit CA 47, the mouth of the Santa Ana River. As depicted in Figure 1, this unit lies immediately north of the river channel, and extends to the ocean. As noted on the figure, “shoreline data may not accurately represent the dynamic shoreline environment.” However, the habitat area is immediately adjacent to the water in the dynamic shoreline environment. The description of the boundaries of Snowy Plover Critical Habitat Unit 47, including a figure, should be included in the project’s final environmental document.

3. The presence of leashed and off-leash dogs and anticipated increase in recreational use would degrade occupied snowy plover habitat, including Critical Habitat Unit CA 47. As proposed, there would be no fence or barrier or intensified enforcement to preclude off-leash dogs from using snowy plover habitat. Snowy plover Critical Habitat includes, in accordance with section 3(5)(A)(i) and 4(b)(1)(A) of the Act and regulations at 50 CFR 424.12, the physical and biological features essential to the conservation of the species which *may require special management considerations or protection*. Physical and biological features include, but are not limited to: (1) space for individual and population growth and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, and rearing (or development) of offspring; and (5) habitats that are protected from disturbance or are representative of the historical, geographical, and ecological distributions of a species. When the Service designated critical habitat, the

Service indicated that “For areas lacking a Federal nexus, the Service will work with beach and land managers to implement recovery actions that will avoid or offset adverse effects of disturbance” (Service 2012). Therefore, a discussion of how the project activities would or would not significantly impact this Critical Habitat Unit, including any applicable mitigation measures, should be included in the project’s environmental document.

4. Allowing off-leash dogs in and adjacent to snowy plover habitat is likely to harass and potentially harm individual snowy plovers. The presence of off-leash dogs within or adjacent to the areas where snowy plovers congregate to forage and roost will cause the birds to flee, resulting in increased stress and expenditure of energy. Repeated flushing may result in complete avoidance of important roosting and foraging sites by snowy plovers. In addition, off-leash dogs are likely to chase and occasionally catch, injure, or kill snowy plovers using beach habitat within and adjacent to the river. Actions that result in “take” of federally protected birds are prohibited under section 9 of the Act. Take is defined in Section 3(19) of the Act as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”
5. The Wildlife Agencies are also concerned about enforcement of on- and off-leash activity. The IS/ND does not describe how leash restrictions proposed by the project will be enforced, or what penalties will result from failing to comply with the ordinances. Without appropriately robust enforcement, significant impacts to least tern and snowy plover may occur in the form of incidental take. As a State fully protected species, take cannot be authorized for least tern by the Department. A thorough discussion of enforcement, therefore, including history of enforcement on the site with regard to current ordinances, should be included in the project’s environmental document. A mitigation measure describing how enforcement will be implemented should also be included.
6. Measures to ensure that dog owners do not park at Huntington State Beach parking lot and walk adjacent to the Least Tern Colony en route to the proposed dog park are necessary. Section 3.1.16 of the IS (Transportation/Traffic) does not adequately address the availability for parking for a dog park, or the potential for increased use of the parking lot at Huntington State Beach. An inadequacy of parking adjacent to the southern side of the river (in Newport Beach) is likely to result in dog owners parking at Huntington State Beach parking areas. If dog owners park at Huntington State Beach, dog owners and dogs would walk immediately adjacent to the fenced Least Tern Colony or through the snowy plover Critical Habitat on the ocean-ward side of the Least Tern Colony to reach the proposed dog park area. Increased foot traffic and dog traffic would increase disturbance to least terns and snowy plovers. The project’s environmental document should include a thorough discussion of how these factors will impact biological resources, and incorporate mitigation measures that make those impacts less than significant.

In closing, the Wildlife Agencies re-iterate our November 21, 2016, recommendation that the proposal to designate the mouth of the Santa Ana River as a dog park and allow off-leash dogs be permanently abandoned so that the project avoids significant impacts to biological resources. Snowy plovers and least terns depend upon this area for food, resting, breeding, and chick rearing. We remain interested in working with you to increase awareness, incorporate good stewardship practices, and strengthen habitat conservation efforts on Orange County beaches, including the potential of developing a HCP to address recreational impacts and overall conservation of the least tern and snowy plover on Orange County beaches. We have recommended that “Special Protection Zones” be

developed on beaches in Los Angeles County [Service 2016 (enclosed)], and a similar approach would be appropriate on Orange County Beaches.

The Wildlife Agencies are available to assist the County in addressing our concerns. We request an opportunity to review and comment on any response that the County has to our comments and to receive notification of the forthcoming hearing date for the project (CEQA Guidelines; §15073(e)). If you have any questions regarding these comments, please contact Sandy Vissman of the Service at 760-431-9440, extension 274 or Jennifer Turner of the Department at 858-467-2717.

Sincerely,



Gail Sevens
Environmental Program Manager
California Department of Fish and Wildlife

for Karen A. Goebel
Assistant Field Supervisor
U.S. Fish and Wildlife Service

Enclosure

cc:

Andrew Willis, California Coastal Commission
Hans Sin, California Department of Fish and Wildlife
Greg Gauthier, California State Coastal Conservancy
Michelle Steel, Orange County Board of Supervisors
Scott Morgan, State Clearinghouse
Carolyn Lieberman, U.S. Fish and Wildlife Service
State Clearinghouse

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- [Service] U.S. Fish and Wildlife Service. 2016a. January 19, 2016 letter from Service to Jamie King, of California Department of Parks and Recreation, Angeles District. 08EVEN00-2015-CPA-0067. 6 pages.
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- Bonesteel, Brian. 2016. U.S. Department of Agriculture. Personal communication regarding predator management at California least tern and western snowy plover colonies in San Diego. On file, California Department of Fish and Wildlife R5 Office. Dated December 5, 2016.

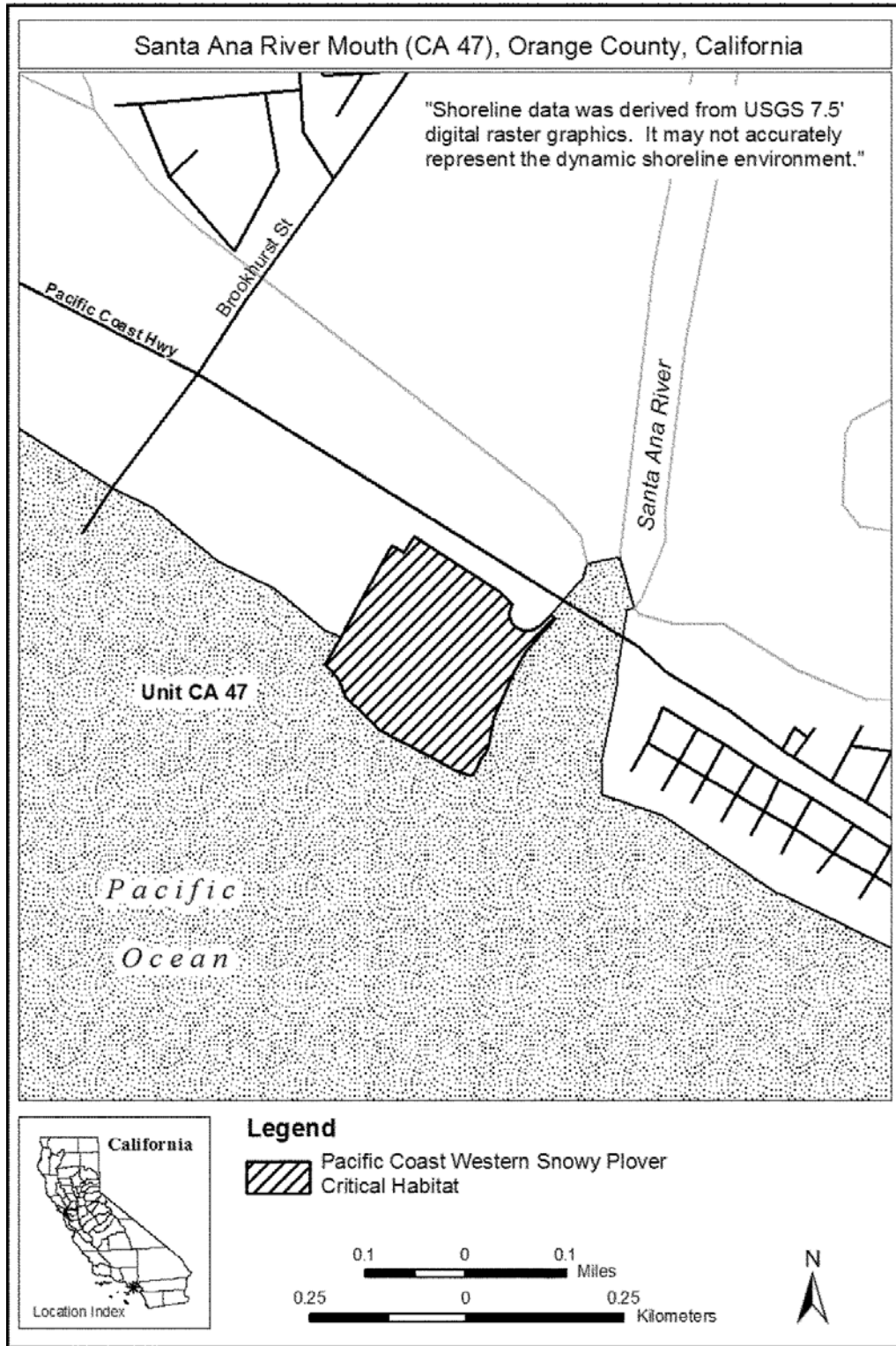


Figure 1. Western Snowy Plover Critical Habitat Unit CA 47

ENCLOSURE



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Ventura Fish and Wildlife Office
2493 Portola Road, Suite B
Ventura, California 93003

IN REPLY REFER TO:
08EVEN00-2015-CPA-0067

January 19, 2016

Jamie King, Environmental Scientist
California Department of Parks and Recreation, Angeles District
1925 Las Virgenes Road
Calabasas, California 91302

Subject: Protective Measures for Western Snowy Plovers on Beaches in Los Angeles
County, California

Dear Ms. King:

We, the U.S. Fish and Wildlife Service (Service), are contacting you and other beach administrators and stakeholders who have an interest in western snowy plovers (*Charadrius nivosus nivosus*), recreation, management, and operations on beaches in Los Angeles County. Western snowy plovers are known to winter on beaches in Los Angeles County and have attempted to nest at Surfrider Beach in Malibu. After a series of discussions, meetings, and electronic mail exchanges with beach administrators, stakeholders, and western snowy plover experts, we have developed some measures we recommend to help protect this species on beaches in Los Angeles County and not interfere with continued recreation activities, and beach management operations.

The Service's responsibilities include administering the Endangered Species Act of 1973, as amended (Act), including sections 7, 9, and 10. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines take to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define harm to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. Harassment is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering. Exemptions to the prohibitions against take in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a Federal agency and may affect a listed species, the Federal agency must consult with the Service, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a Federal agency, but may result in the take of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act. To

qualify for the permit, a project proponent would need to submit an application to the Service together with a habitat conservation plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. A complete description of the requirements for a HCP can be found at 50 CFR 17.32 or our website (<http://www.fws.gov/ventura>).

The Pacific coast population of the western snowy plover was listed as threatened on March 5, 1993 (58 Federal Register (FR) 12864) under the authorities of the Act. Critical habitat for the species, which includes Zuma Beach (Unit CA 43), Malibu Beach (Unit CA 44), Santa Monica Beach (Subunit CA 45A), Dockweiler North (Subunit CA 45B), Dockweiler South (Subunit CA 45C), and Hermosa State Beach (Subunit 45D), was designated on June 19, 2012 (77 FR 36728).

Ryan et al. (2014) determined that western snowy plovers in Los Angeles County overwinter at seven primary spots. These overwintering sites are within critical habitat for the subspecies and include locations at Zuma Beach (near Lifeguard Tower 9 and Zuma Lagoon), Malibu Lagoon (Surfrider Beach), Santa Monica Beach, Dockweiler State Beach (near Lifeguard Tower 58), Hermosa Beach, and Cabrillo Beach. Ryan et al. (2014) also reported that western snowy plovers occasionally overwinter at sites at Leo Carrillo State Beach, Paradise Cove, Dan Blocker County Beach, Big Rock Beach, Will Rogers State Beach, Venice Beach, central Dockweiler State Beach, El Segundo Beach, Manhattan Beach, Redondo Beach, and Terminal 400 in Los Angeles Harbor.

Western snowy plovers exhibit strong fidelity to overwintering sites, returning to the same beaches every year after nesting elsewhere and migrating. Overwintering habitat is important for western snowy plovers and other migratory shorebirds because the time spent at these sites is when these birds build fat reserves for spring migration and the upcoming breeding season. Overwintering sites also provide connectivity for dispersal between breeding sites. Furthermore, with appropriate management, sites that currently support only wintering western snowy plovers have the potential to attract new nesting western snowy plovers with appropriate management. This has been demonstrated at Coal Oil Point, Santa Barbara County, and Hollywood Beach, Ventura County. Western snowy plovers also made a nesting attempt at Surfrider Beach, Malibu, Los Angeles County, after overwintering there. The importance of overwintering beaches to the western snowy plover tends to be overlooked and discounted when it comes to conservation of the subspecies, with more attention being given to known breeding locations. However, the Service acknowledged the importance of overwintering habitat for the western snowy plover by including such areas in the critical habitat designated for the subspecies in June 19, 2012 (77 FR 36728).

We understand that beaches in Los Angeles County, including the seven aforementioned overwintering sites, experience disturbance from mechanical raking (i.e., beach grooming) for removal of garbage, kelp, and other debris. Dugan et al. (2003) reports that over 160 kilometers of southern California sandy beaches are groomed regularly and that grooming decreases the species richness, abundance, and biomass of wrack-associated invertebrates that are likely important western snowy plover prey resources. Beach grooming also removes favorable nesting habitats and likely destroys nest scrapes and eggs.

Other activities occurring on Los Angeles County beaches that could lead to the disturbance of overwintering western snowy plovers include recreational use, vehicular traffic (e.g., lifeguard patrols), domestic animals (i.e., dogs), and predators attracted to human refuse (i.e., trash). Recreational activities such as sunbathing, swimming, dog walking, and sports, require support services such as police and lifeguard patrols, water quality monitoring, erosion control, and trash pick-up, which increase the presence of vehicles on the beach. Vehicles driven on the beach have struck and killed western snowy plovers, as well as other shorebirds, in Los Angeles County. For example, on January 9, 2007, a western snowy plover was found dead by volunteer monitors on Zuma Beach in a fresh tire track due to a vehicle strike. The only vehicle observed on the beach that morning was a Lifeguard truck conducting routine patrols. On, August 19, 2013, a California State Park monitor witnessed another western snowy plover being struck by a Lifeguard vehicle during routine patrols. In this particular case, the western snowy plover initially survived the strike with a crushed head and was transported to a rehab center in Los Angeles; however, the plover died from the injury. Other instances have also been documented of black-bellied plovers (*Pluvialis squatarola*) being struck by vehicles at Dockweiler State Beach on March 17, 2009, and November 24, 2009.

The mere presence of dogs on the beach is harmful to western snowy plovers, causing them to flush frequently, unnecessarily expending energy reserves, as well as spending less time foraging (Lafferty 2001). In addition to expending more energy evading dogs and spending less time foraging, there are instances when dogs actually capture and kill or injure western snowy plovers. For example, at Surfside Beach, Orange County, California, a western snowy plover was captured by a dog in September 2009, but was recovered, rehabilitated and released (Ryan and Hamilton 2009). Also at Coal Oil Point, Santa Barbara County, California, one western snowy plover chick was killed by an unleashed dog (Lafferty et al. 2006).

Because monitoring of overwintering western snowy plovers is extremely limited at some locations, if it occurs at all, we believe the impacts to western snowy plovers from beach grooming, recreational activities, vehicular traffic, dogs, and predators attracted to food and trash to beaches is much greater than what we observe. Furthermore, the discovery of a dead or injured western snowy plover is unlikely because the bodies of these birds are taken by scavengers or removed by the daily beach grooming activities.

Efforts to protect wintering western snowy plovers on Los Angeles County Beaches should be implemented within 500 feet of the central roost location. The following measures should be implemented from the arrival of the first returning western snowy plovers in July until they depart in April to May each year. Specifically, at Surfrider Beach in Malibu these measures should be implemented year-round for the entirety of California Department of Parks and Recreation (State Parks) property. For all beaches in Los Angeles County, these areas should be referred to as "Special Protection Zones" and managed and maintained differently from adjacent areas of beaches without roosting western snowy plovers.

Recommendations for Special Protection Zones.

Routine Operation of Vehicles and Heavy Machinery

- All drivers of vehicles and machinery that are operated on sections of beach where western snowy plovers occur should receive annual training per a Service approved program to avoid western snowy plovers. Training logs should be kept for all staff. State Parks staff should have successfully completed the Beach Driving Operations Training Course and annual refresher courses.
- Vehicles should avoid operating within Special Protection Zones, with the exception of activities such as essential patrols, trash pick-up and other activities agreed to by wildlife agencies as being essential. Vehicles simply transiting between points should not be allowed within these areas. For Surfrider Beach specifically, the following measures should be implemented: 1) All beach vehicle operation will be limited to emergency response activities (e.g., Code “R” responses; rescue preventions, including boat warnings; urgent law enforcement issues; and emergency medical service calls); and 2) If heavy equipment is needed onsite for emergency activities (boat rescue, structure protection) or other projects consistent with State Park’s mission, State Parks resource staff will be contacted for approval prior to accessing the site, and as needed, to provide monitoring for vehicles at all times when onsite.
- Visible markers, possibly with signage should be placed within 100 feet of the top of the beach slope and at the inland corners of the Special Protection Zones to remind vehicle operators of their presence. (This is not applicable at State Park’s section of Surfrider Beach because the entire area is within a Special Protection Zone).
- When essential activities must occur, vehicles should remain below a maximum 10 miles per hour speed limit and if western snowy plovers are encountered, the driver should back up at least 50 feet and/or alter their route to avoid flushing plovers.

Beach Maintenance and Clean up

- Regular sand grooming should be discontinued within Special Protection Zones. This activity both flushes the birds and removes important foraging resources (e.g. surf-cast kelp). These small areas should be cleaned by hand crews, trained in western snowy plover avoidance. If mechanical clean-up is necessary, it should be done in the presence of a qualified western snowy plover monitor who will locate the roosting plovers and ensure that machinery does not flush or disturb them.
- For Surfrider Beach, as agreed to by State Parks and Los Angeles County, sand grooming is not permitted at Surfrider Beach on State Park’s property. Wrack is to be left in place and trash removed by hand.

Recreational Activities

- “Refuge Areas” should be created using symbolic fencing or another barrier deemed suitable for this use during periods of high beach use at popular beaches in July, August, and September. These should be erected in a 300-foot diameter (or other configuration suitable for the beach, but roughly 300 feet long) around the traditional center of the plover’s roosting

areas on popular beaches such as Zuma, Dockweiler State Beach 58, and Hermosa Beach. Signage should be placed on the barrier such as has been done at Surfrider Beach in Malibu (which used signs made by local school children).

- Large-scale recreational activities such as triathlons, surf camps, beach volleyball camps, etc. should not be permitted within the Special Protection Zones. Docents should visit camps adjacent to the Special Protection Zones to talk to participants about western snowy plovers.
- Enforcement of existing regulations for off-leash dogs should be increased within the Zones.

Western Snowy Plover Awareness Training

Any staff personnel that operate motorized vehicles on Los Angeles County beaches should be required to attend annual training to increase their awareness of western snowy plovers. This training should include a short instructional tutorial that describes the biology of the western snowy plover, its habitat and life history, its legal status, and the consequences of violating the Act. The tutorial slide show (e.g., power point type presentation) or informational hand-out would be developed by the Service with input from your respective agencies, California Department of Fish and Wildlife, and the Los Angeles Audubon Society. In addition to the tutorial, staff should view a video provided by the Service that demonstrates safe driving techniques on beaches with sensitive wildlife. Staff members should be required to sign a statement acknowledging they have viewed and understand the tutorial and video. The signed statement would be kept on file with the respective agencies in the employee's record.

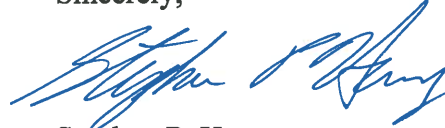
Although these measures should help reduce the potential for take of western snowy plovers, take, as defined earlier, is still likely to occur. And any take of listed species that would result from activities on your beaches would require either (a) exemption from the prohibitions against take in section 9 of the Act pursuant to section 7 or (b) take authorization pursuant to section 10(a)(1)(B) of the Act. Unless a Federal nexus exists that could cover the entire action area under an interagency consultation pursuant to section 7, we recommend that you seek an incidental take permit through the habitat conservation planning process, pursuant to section 10(a)(1)(B) of the Act.

With your cooperation, we can help conserve the western snowy plover on public beaches while still providing recreational opportunities for tourists and the people of Los Angeles County. We suggest revisiting these recommended measures at least annually to ensure they continue to benefit the western snowy plover on public beaches in Los Angeles County while minimizing the impact on residents and beachgoers; however, we are available any time to discuss this program.

As a reminder, this implementation of these recommended avoidance measures do not constitute authorization from us to take federally listed species in any manner. In the event that federally listed species are detected anywhere where activities could result in take, you should contact us to assess any potential effects to listed species and the possible need for other avoidance measures.

If you have any questions regarding the western snowy plover or other federally listed species on public beaches in Los Angeles County, please contact Chris Dellith or Bill Standley of my staff at (805) 644-1766, extensions 227 or 315, respectively.

Sincerely,



Stephen P. Henry
Field Supervisor

Identical Letter to:

Fernando Boiteux, Los Angeles County Fire Department
Charlotte Miyamoto, Los Angeles County Beaches and Harbors
Ioannice Lee, City of Los Angeles
Dean Kubani, City of Santa Monica

cc:

Jim Watkins, U.S. Fish and Wildlife Service, Arcata Office
Jonathan Snyder, U.S. Fish and Wildlife Service, Carlsbad Office
Erin Dean, U.S. Fish and Wildlife Service, Law Enforcement Office
Dan Swenson, U.S. Army Corps of Engineers
Nancy Frost, California Department of Fish and Wildlife
Stacey Vigallon, Los Angeles Audubon Society



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Ecological Services
Carlsbad Fish and Wildlife Office
2177 Salk Avenue, Suite 250
Carlsbad, California 92008



In Reply Refer To:
FWS-OR-17B0026-17CPA0015

November 21, 2016
Sent by Email

Supervisor Michelle Steel
Orange County Board of Supervisors
10 Civic Center Plaza
Santa Ana, California 92701

Subject: Off-leash Dogs at the Santa Ana River Mouth, Orange County, California

Dear Supervisor Steel,

We are contacting you regarding a recent proposal to allow off-leash dogs at the Santa Ana River mouth. The primary concern and mandate of the U.S. Fish and Wildlife Service (Service) is the protection of public fish and wildlife resources and their habitats. We have legal responsibility for the welfare of migratory birds, anadromous fish, and endangered animals and plants occurring in the United States. We are responsible for administering the Migratory Bird Treaty Act, Bald and Golden Eagle Protection Act (16 U.S.C. 668-668d *et seq.*), and the Endangered Species Act of 1973 (Act), as amended (16 U.S.C. 1531 *et seq.*).

The presence of dogs at the mouth of the Santa Ana River is likely to disturb federally endangered California least terns (*Sternula antillarum browni*; least tern) and federally threatened western snowy plover (Pacific Coast population DPS) [*Charadrius nivosus nivosus* (*C. alexandrinus* n.); snowy plover]. Both of these federally protected birds use the beach habitat within and immediately adjacent to the river. Least terns nest in protected beach habitat immediately to the north of the river mouth (Huntington Beach Least Tern Nesting Area); forage in the waters at the river mouth; and roost on the adjacent shoreline, dunes, and sandbars. Snowy plovers forage and roost on the shoreline, dunes, and sand bars adjacent to the river mouth.

In 2012, our agency designated an area immediately adjacent to the Santa Ana River mouth as *Western Snowy Plover Critical Habitat, Unit 47* (Service 2012) because the area supports habitat that is “...essential to the conservation of the species, which may require special management considerations or protection” (Act, 16 U.S.C. 1531 *et seq.*). Special management considerations for this site should include minimizing disturbance to the western snowy plover.

Allowing off-leashed dogs on the beach adjacent to least tern and snowy plover habitat is likely to disturb these species in several ways. The mere presence of off-leashed dogs on the beach will cause foraging or loafing birds to flee, resulting in increased stress and expenditure of energy. Repeated flushing may result in complete avoidance of these important foraging and loafing sites

by overwintering snowy plovers. In addition, off-leashed dogs are likely to chase and occasionally even catch, injure, or kill least terns or snowy plovers using beach habitat within and adjacent to the river. Actions that result in “take” of federally protected birds are prohibited under section 9 of the Act. Take is defined in Section 3(19) of the Act as “*harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.*”

Due to these concerns, we support the Orange County Board of Supervisors’ decision to remove consideration of allowing off-leashed dogs at the Santa Ana River mouth (October 25, 2016, agenda item 49) and recommend that the proposal be permanently abandoned. In addition, we are interested in coordinating with you to increase awareness, incorporate good stewardship practices, and strengthen habitat conservation efforts on Orange County beaches.

Shorebirds and seabirds that depend on our coastline, including the least tern and snowy plover, require areas where they can rest and obtain food (forage). Good stewardship and habitat conservation for shorebirds would include measures that reduce anthropogenic disturbances and assure food availability in shorebird/ seabird habitat. We are available to meet with appropriate Orange County personnel and can provide additional information about the biology and ecology of the least tern and snowy plover, location(s) of critical habitat units and breeding/wintering sites, or arrange a site visit to discuss the conservation needs of these species, including the potential value of developing a Habitat Conservation Plan (HCP) to address recreational impacts and overall conservation of the two species on Orange County beaches.

We appreciate your support and interest in the protection of the least tern and snowy plover and other federally protected species in Orange County. Please contact Senior Fish and Wildlife Biologist Sandy Vissman of this office at 760- 431-9440, extension 274, if you would like additional information, or if you would like to conduct a site visit.

Sincerely,

Karen A. Goebel
Assistant Field Supervisor

LITERATURE CITED

[Service] U.S. Fish and Wildlife Service. 2012. Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover. Federal Register/Vol. 77, No. 118 / Tuesday, June 19, 2012. Pages 36728-36869.

Exhibit G



May 31, 2019

Mr. Gregg Ramirez
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

SUBJECT: REVIEW OF DRAFT WESTERN SNOWY PLOVER MANAGEMENT PLAN FOR EAST BALBOA PENINSULA BEACHES NEWPORT BEACH, CALIFORNIA CDP APPLICATION NOS. 5-17-0465 AND 5-17-0515

Dear Mr. Ramirez,

On May 20, 2019, the City of Newport Beach (City) held an open house seeking public input into a revised Draft Western Snowy Plover Management Plan for East Balboa Peninsula Beaches, Newport Beach, California (“revised draft plan”), prepared by Glenn Lukos Associates. This letter, written by Robert A. Hamilton, President of Hamilton Biological, Inc., provides independent technical review of the revised draft plan.

APPLICABLE COASTAL ACT REGULATIONS

The Western Snowy Plover (WSP) is one of several native species associated with beaches and dunes that receive formal protection under the City's certified Local Coastal Program (LCP). The LCP consists of a Coastal Land Use Plan (CLUP) and an Implementation Plan.

Section 30107.5 of California Coastal Act defines Environmentally Sensitive Habitat Areas (ESHA's) as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments."

Section 30240 of the Coastal Act restricts development in any ESHA to resource dependent uses, and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA.

Page 4.3 of the CLUP states:

Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. **These include southern dune scrub...** [emphasis added]

Page 4.42 of the CLUP states:

In Newport Beach, southern coastal foredune habitat extends southwest along the ocean side of the Balboa Peninsula from 10th Street to the tip of the peninsula.

Policy 4.1.1-10, on page 4-7 of the CLUP, provides direction for complying with Section 30240 of the Coastal Act:

Require buffer areas of sufficient size to ensure the biological integrity and preservation of the habitat they are designed to protect. **Terrestrial ESHA shall have a minimum buffer width of 50 feet wherever possible.** Smaller ESHA buffers may be allowed only where it can be demonstrated that 1) a 50-foot wide buffer is not possible due to site-specific constraints, and 2) the proposed narrower buffer would be amply protective of the biological integrity of the ESHA given the site-specific characteristics of the resource and of the type and intensity of disturbance. [emphasis added]

To date, the City has made no effort to (a) identify all beach/dune ESHA; (b) establish the required minimum 50-foot buffer around all ESHA; (c) remove unpermitted development in beach/dune ESHA (or obtain an after-the-fact permit); or (d) develop City-wide beach/dune management policies designed to avoid future loss or degradation of ESHA. As reviewed below, the City's failure to implement its certified LCP in beach/dune areas has led to long-term, ongoing degradation of dune ESHA, and harassment (i.e., "take") of WSP's in traditional wintering areas, in violation of Section 30240 of the Coastal Act (and the federal Endangered Species Act, as discussed subsequently).

CURRENT/ONGOING VIOLATIONS OF THE COASTAL ACT

Unpermitted Fencing/Paracord Barrier

Where the City did provide protective fencing to a limited area of dunes – between D and E Streets on the Balboa Peninsula – the fence itself lacked a Coastal Development Permit (CDP), was established within ESHA and/or the required ESHA buffer, and its dimensions may have been smaller than optimal for the WSP (the species targeted for protection). At the most recent open house, on May 20, 2019, the City reported having removed some sections of fencing and replacing it with a paracord barrier. These actions, like so many others taken by the City in areas of dune ESHA, were completed without benefit of formal environmental analysis or the required Coastal Development Permit, and therefore violated the Coastal Act.

Unpermitted Encroachments into Beach/Dune ESHA

Pages 4.42-4.43 of the LCP state:

Ornamental and non-native species, likely introduced from the adjacent residences, dominate much of the southern coastal foredune habitat. Numerous residences use the beach area as an extension of their backyards. Some residents have planted and irrigated the ornamental species, which have replaced native species in these areas. Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.

This encroachment of private landscaping into public ESHA represents an ongoing violation of the Coastal Act. Policy 4.5.1-1, in the certified LCP, suggests that this encroachment is offset by “the removal of exotic vegetation and the restoration of native vegetation in dune habitat,” but impacts to ESHA cannot be mitigated by restoring a different area (see *Bolsa Chica Land Trust v. Superior Court*). Furthermore, no such dune restoration has occurred in a systematic way commensurate with the level of impact from numerous encroachments upon dune habitats in Newport Beach.

Unpermitted encroachment has continued and expanded, impacting substantial areas of beach/dune ESHA. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers “to prevent impacts that would significantly degrade the adjacent ESHA.” In practice, the City does not do this, and thus violates its own certified LCP and the Coastal Act.

Unpermitted Concrete Walkways

During the past two decades, the City has constructed 22 concrete walkways extending from the ends of streets south across the beach. Many of these impact traditional WSP wintering locations, coastal dune ESHA, and/or required ESHA buffers. See Exhibits 1 and 2, on the following page.

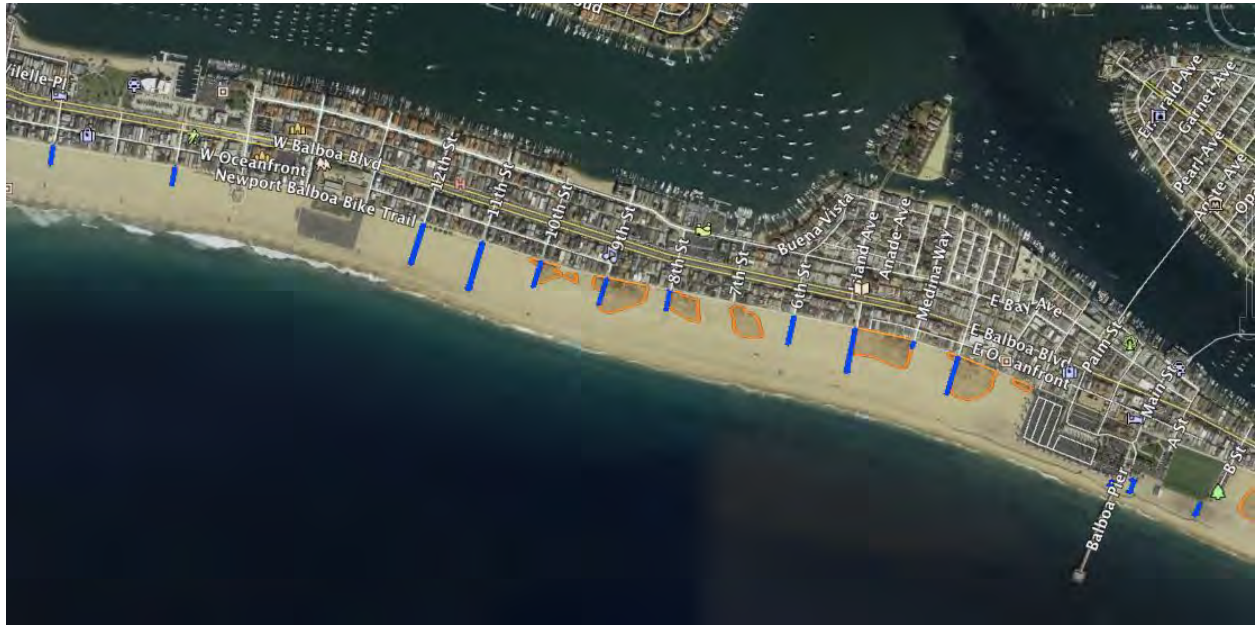


Exhibit 1, showing in dark blue the locations of 14 walkways that extend through dune and/or beach habitats, between 18th Street and B Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.



Exhibit 2, showing in dark blue the locations of eight walkways that extend through dune and/or beach habitats between C Street and M Street. Areas of coastal dunes, or potential dunes, are indicated in tan screen. Source: Google Earth Pro.

It appears that none of the 22 walkways built by the City was subjected to any formal environmental review, public review, or approval by the CCC through the CDP application process. Section 30001 of the Coastal Act states:

- a) That the California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.
- b) That the permanent protection of the state's natural and scenic resources is a paramount concern to present and future residents of the state and nation.
- c) That to promote the public safety, health, and welfare, and to protect public and private property, wildlife, marine fisheries, and other ocean resources, and the natural environment, it is necessary to protect the ecological balance of the coastal zone and prevent its deterioration and destruction.
- d) That existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to working persons employed within the coastal zone.

Building concrete walkways through beach/dune ESHA and ESHA buffer, and into traditional WSP wintering grounds, without any form of environmental review, violates these basic tenets of carefully protecting the ecological balance of the coastal zone.

City representatives state that the walkways were built to increase accessibility to the ocean for disabled people, and have suggested that none of the walkways could be removed without violating the Americans with Disabilities Act. It is untrue that the City is entitled to undertake construction through ESHA and into traditional WSP wintering areas, without environmental review or permits, simply by invoking the Americans with Disabilities Act.

Section 30200(b) of the Coastal Act states:

Where the commission or any local government in implementing the provisions of this division identifies a conflict between the policies of this chapter, Section 30007.5 shall be utilized to resolve the conflict and the resolution of such conflicts shall be supported by appropriate findings setting forth the basis for the resolution of identified policy conflicts.

Section 30007.5 of the Coastal Act states:

The Legislature further finds and recognizes that conflicts may occur between one or more policies of the division. The Legislature therefore declares that in carrying out the provisions of this division such conflicts be resolved in a manner that on balance is the most protective of significant coastal resources. In this context, the Legislature declares that broader policies which, for example, serve to concentrate development in close proximity to urban and employment centers may be more protective, overall, than specific wildlife habitat and other similar resource policies.

For Coastal Act compliance, “balancing” or “conflict resolution” requires that conflicts may be resolved in a manner which on balance is the most protective of significant coastal resources. To establish a policy conflict and approve a project based on conflict resolution, the following findings are necessary:

- The project is inconsistent with at least one Chapter 3 policy of the Coastal Act (e.g., unpermitted impacts to environmentally sensitive habitat areas, wetlands, or agricultural resources).
- Denial or modification of the project to eliminate the policy inconsistency would adversely affect other coastal resources that the Coastal Act requires to be protected or enhanced.
- There are no feasible alternatives that could achieve project objectives without violating a Chapter 3 policy of the Coastal Act.
- The project’s adverse impacts are minimized and mitigated to the maximum extent feasible.

Subjecting the 22 walkways to the required analysis would likely result in removal of some of them. This is because the overall goal of providing adequate public access to the ocean in Newport Beach could be achieved without impacting ESHA, ESHA buffers, or facilitating human incursion into traditional WSP wintering or breeding areas.

Consider the walkway that extends more than 300 feet south from the end of E Street. This walkway, constructed in fall 2014, was specifically identified by Tom Ryan and colleagues¹ as being potentially deleterious to WSP’s that traditionally winter in that area, and that nested there in 2008, 2009, and 2013². Page 15 of the 2017 WSP report stated:

Declines were detected between 2014 and 2017 at Huntington State Beach and the Balboa Peninsula (Table 2). We observed the largest decline on the Balboa Peninsula (Table 2) following the installation of a walkway on the beach that was placed within the area traditionally used by roosting plovers.

Page 27 stated:

In the fall of 2014, the City of Newport Beach constructed a 300-foot long sidewalk adjacent to the fence at the Balboa Beach Snowy Plover roost, extending from E Street (Ryan et al. 2015). This ran immediately adjacent to a fenced Snowy Plover area and directly into one of the main Snowy Plover roosting areas from 2014 (Ryan et al. 2014). This disturbance likely flushed the plovers from this roosting area in 2015 and likely contributed to the reduced numbers here in 2014-15. It appears that this effect has

¹ Ryan, T, S Vigallon, L Plauzoles, C Egger, S Sheakley, R Griswold, and B Eastman. 2017. *The Western Snowy Plover in Los Angeles and Orange Counties, California: September 2014 to February 2017*. Report dated February 24, 2017, prepared for State of California, Department of Fish and Wildlife, San Diego, CA.

² Ryan, TP, S Vigallon, DS Cooper, C Delith, K Johnston, and L Nguyen. 2019. *Return of beach-nesting Snowy Plovers to Los Angeles County following a 68-year absence*. *Western Birds* 50:16–25. [https://www.westernfieldornithologists.org/archive/V50/50\(1\)-p016-p025.pdf](https://www.westernfieldornithologists.org/archive/V50/50(1)-p016-p025.pdf)

continued into 2015-16. Additionally, this beach became narrower during the fall months due to beach erosion from late summer/fall hurricanes in the central Eastern Pacific. This is a broad sandy beach, with residential homes backing it. It is very popular with beachgoers during the summer months. It also supports a 1.24 hectare dune restoration area where a pair of plovers has nested in recent years. This is the only known beach nesting Snowy Plover pair on the mainland in LAC or OC, although they did not nest here in 2014, 2015 or 2016.

The City cooperates with Mr. Ryan and his research colleagues, and receives regular reports on the status of WSP in the City. Multiple reports identify the E Street walkway as a potentially important contributor to disturbance of plovers that traditionally roost in the affected area, and that have nested there three times in the past 12 years (but not since the E Street walkway was put in). The most recent report covering 2018³ (not cited in the revised draft plan) shows a rebounding of WSP numbers wintering on the Balboa Peninsula, but with a shift away from the E Street area and toward the M Street area.

Removal and Degradation of Dune ESHA, Balboa Peninsula

Review of aerial imagery shows that the limits of dune topography and vegetation have generally remained stable for two decades. As shown in Exhibits 3 and 4, on the following page, however, the City lost at least one area of dune ESHA between October 2007 and December 2017. I first reported on this situation in a letter to the City and the CCC dated September 21, 2017, and Steve Ray and I have testified about this continuing situation at multiple CCC hearings. In the intervening 20 months, neither the City nor the CCC has taken any follow-up action to correct this Coastal Act violation.

Degradation of Dune/Estuarine ESHA at River Jetties

The degradation of dune and estuarine habitat has been striking near the mouth of the Santa Ana River. The dunes in this area are formally designated as ESHA. In a letter to area residents dated October 15, 2014 (Subject: "Final Monitoring Plan – Compliance with Consent Cease and Desist Order CCC- 06-CD-01 and Consent Restoration Order CCC-06-RO-01"), Deputy Chief of Enforcement Aaron McClendon described restoration of dune ESHA in this area as "one of the most successful we have seen" and lauded the local residents for having "turned a difficult situation into a very positive outcome, enhancing some of the rarest coastal habitats on the southern California coast." At that point, under the Coastal Act, the City became legally responsible for managing the restored dune ESHA near the river mouth consistent with its certified LCP. Having made no serious effort to do so, dune ESHA in this area has become visibly degraded. Non-native, invasive plant species are becoming established in this area, and sensitive native wildlife species have little or no capacity to occupy the dunes due to persistent, ongoing disturbance by people, dogs, and ultralight take offs and landings.

³ Ryan Ecological Consulting. 2019. Western Snowy Plover and California Least Tern in Orange and Los Angeles Counties, California; January to December 2018. Report dated January 31, 2019, prepared for San Diego Zoo Global, Escondido, CA.



Exhibit 3. Aerial image taken October 22, 2007, showing in red an apparent dune between G and I Streets on the Balboa Peninsula, with a limited area of non-native iceplant near the northern edge of the indicated area. Source: Google Earth Pro.



Exhibit 4. Aerial image taken December 3, 2017, showing in red the same area, between G and I Streets on the Balboa Peninsula. Over the course of a decade, dune ESHA was removed and non-native iceplant was allowed to expand substantially. Source: Google Earth Pro.

Section 7.04.020 of the City of Newport Beach Municipal Code requires all dogs to be leashed at all times, and Section 7.04.030 prohibits dogs on beaches from 10:00 a.m. to 4:30 p.m. year-round and requires that owners clean up their dogs' feces.

The County's web page, <http://www.ocpetinfo.com/services/petlaws>, summarizes relevant parts of the Orange County Codified Ordinance (OCCO) as follows:

4-1-45: "No person owning or having charge, care, custody, or control of any dog shall cause or permit, either willfully or through failure to exercise due care or control, any such dog to be upon any public property unless such dog be restrained by a substantial chain, or leash not exceeding six (6) feet in length, and is under the charge of a person competent to exercise care, custody, and control over such dog." You must keep your dog leashed anytime your dog is off your property. Your dog must be on a leash no longer than six (6) feet in length and in the care of a competent adult. There are designated "dog parks" throughout Orange County that lawfully allow the absence of a leash.

4-1-46: "No person having the charge of any dog, except a guide dog or service dog, shall permit said dog to be under any circumstances within public school property, certain county parks, or any public beach". It is unlawful to be on any public school property with your dog. Setting your dog loose to play, even within a fenced area, at a public school is a direct violation of this ordinance. See OC Parks for county parks that permit dogs that are leashed.

When both the City and the County of Orange (County) decided, several years ago, to effectively stop enforcing these local ordinances near the river mouth, local dog-owners responded by turning this ecologically valuable area – an estuary located between dune ESHA and critical habitat for the WSP and California Least Tern (also clearly ESHA) – into a *de facto* unleashed dog beach. They have been followed by pilots of "ultralights," who frequently use the river estuary and restored dune area as places to take off and land their exceedingly noisy, gas-powered aircraft.

In 2016, the County attempted to formally designate the Santa Ana River estuary as a "dog beach" through preparation of an Initial Study/Negative Declaration (IS/ND), but received extensive substantive comments submitted by the CCC, USFWS, several respected conservation organizations, and local residents, demonstrating the destructiveness of this policy in an environmentally sensitive area that many public and private groups have spent millions of dollars and thousands of hours restoring and maintaining for its ecological values. In response, the County tabled consideration of the IS/ND, conducted multiple on-site media events to promote the newly created "dog beach," and continued allowing the illegal use of the river estuary. Years later, large numbers of people continue to bring off-leash dogs to the river estuary.

On June 4, 2018, an on-site meeting was convened at River Jetties, attended by you, other City representatives, County representatives including Shane Silsby and Colby Cataldi, enforcement officer Jordan Sanchez of the CCC, wildlife biologist Sandy Vissman of the USFWS, Penny Elia representing the Sierra Club OC Conservation Committee, Susan Sheakley representing Sea & Sage Audubon, attorney Mark Massara, and Mr. Hamilton. At the meeting, Ms. Vissman reiterated her standing request that the City and County establish an "avian protection area" or "special protection zone"

encompassing the ecologically important river estuary and adjacent dune habitats as we stood next to dune ESHA and all witnessed it being trampled by off-leash dogs and their owners. Also in our presence, an ultralight operator began unpacking his equipment from his truck.

At the meeting, representatives of the City and County once again acknowledged these problems, but rather than attempting to work toward a solution that everyone could live with, including the ESHA and listed species, you and Mr. Silsby pointed out that local elected representatives consider the prospect of prohibiting dogs from the area in and around the river estuary – in accordance with both City and County ordinances, as well as the Coastal Act and the state and federal Endangered Species Acts – to be politically unacceptable, because dog owners represent a more potent lobbying force compared with advocates of environmental protection in compliance with local, state, and federal laws.

On December 3, 2018, Principal Engineer Jim Volz of OC Public Works and three members of his staff, met with Ms. Elia of the Sierra Club, as well as representatives of Sea & Sage Audubon and the Surfrider Foundation. According to Ms. Elia (pers. comm.), Mr. Volz assured the environmental groups that signage intended to keep the public and dogs out of the Santa Ana River estuary would be installed within 60 days. Mr. Volz stated that this signage would be covered by a Coastal Development Permit (CDP) that he would work directly with CCC staff to expedite. The signage was never installed.

Most recently, on May 23, 2019, the County responded to a Public Records Act Request from Ms. Elia by claiming that the County's jurisdiction at the mouth of the Santa Ana River is much more limited than had been previously disclosed. A map purporting to show County jurisdiction does not align with the project area for the County's 2016 IS/ND for the "dog beach" (which was never certified), and no representatives of the County raised this as an issue during either the site meeting on June 4, 2018, or the meeting with OC Public Works on December 3, 2018.

Regardless of this jurisdictional confusion, the bottom line remains that sensitive ecological resources within and adjacent to the Santa Ana River estuary are not receiving protections called for under the City's certified LCP and under the Coastal Act. What has not been discussed or considered, to date, is that the City and County manage these sensitive resources and sovereign lands on behalf of the California State Lands Commission (CSLC), which owns the land but does not appear to have been integrally involved in shaping recent land-use decisions in this ecologically important area. Given the range of land-use conflicts described herein, and the lack of a coherent response from the City, County, and CCC, the signatories to this letter intend to involve the CSLC moving forward.

ALTERNATIVE SITES FOR DOG BEACHES

Managing City beaches and dunes consistent with the City's certified LCP involves balancing environmental protection requirements against the reasonable expectations of

tourists and local beachgoers. Any successful comprehensive planning approach will need to identify extensive areas that can be managed for the exclusive use of humans and their pets. Fortunately, Newport Beach, with its miles of beaches that do not support dunes, traditional WSP roosting or nesting areas, or other sensitive biological resources, should be able to achieve this balance.

Starting in 2017, Hamilton Biological has been recommending that the City consider two alternative locations that could work well as dog beaches. Both are located near large parking lots, and neither appears to conflict with provisions of the City's LCP or those of the Coastal Act. One potentially suitable area is at Corona del Mar State Beach (Big Corona Beach), the eastern half of which appears to be well suited to serving as a dog beach, and the other is the expanse of beach near the base of Newport Pier. Please see Exhibits 5 and 6, below.

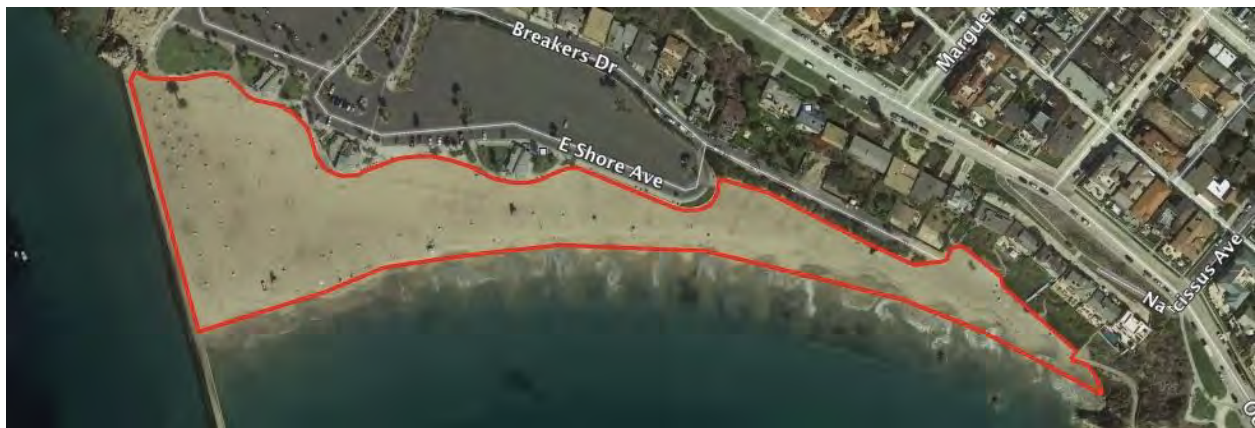


Exhibit 5, showing Corona del Mar State Beach (Big Corona Beach). Located on the eastern side of Newport Bay, the eastern part of this beach appears well-suited for designation as a dog beach. The area has ample parking and lacks potentially sensitive biological resources. Source: Google Earth Pro.



Exhibit 6, showing the beach near Newport Pier. This area also appears to be well-suited for use as a dog beach, with ample parking and low ecological sensitivity. Source: Google Earth Pro.

Regardless of whether either of the identified areas is ultimately determined to be suitable for designation as a dog beach, Newport Beach has enough sandy beaches not located within or adjacent to ESHA to accommodate people and their pets without illegally degrading any areas that satisfy ESHA criteria under the terms of the City's LCP and the Coastal Act.

COMPLIANCE WITH THE FEDERAL ENDANGERED SPECIES ACT

As a federally listed threatened species, the WSP is covered under the Endangered Species Act of 1973. Section 9 of the Act and its implementing regulations prohibit the taking of any federally listed endangered or threatened species. Section 3(19) of the Act defines "take" to mean to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. Service regulations (50 CFR 17.3) define "harm" to include significant habitat modification or degradation which actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering. "Harassment" is defined by the Service as an intentional or negligent action that creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering.

Exemptions to the prohibitions against "take" in the Act may be obtained through coordination with the Service in two ways. If a project is to be funded, authorized, or carried out by a federal agency and may affect a listed species, the federal agency must consult with the USFWS, pursuant to section 7(a)(2) of the Act. If the proposed project does not involve a federal agency, but may result in the "take" of a listed animal species, the project proponent should apply to the Service for an incidental take permit, pursuant to section 10(a)(1)(B) of the Act.

To qualify for an incidental take permit, a project proponent must submit an application to the USFWS together with a Habitat Conservation Plan (HCP) that describes, among other things, how the impacts of the proposed taking of federally listed species would be minimized and mitigated and how the plan would be funded. At the City's open house on September 14, 2017, Sandy Vissman of the USFWS suggested that preparation of an HCP would be appropriate to cover incidental "take" of WSP due to ongoing activities and routine beach and dune management operations undertaken by the City on the Balboa Peninsula. Actions requiring a permit may include beach driving, mechanical raking (beach grooming), recreational use, presence of dogs or other domestic animals, and human refuse that attracts predators of the WSP.

THE NEED FOR A COMPREHENSIVE MANAGEMENT PLAN

In a letter to the City dated September 11, 2017 (attached), Andrew Willis of Coastal staff requested that the City prepare a "comprehensive" plan to address beach/dune/WSP management issues on all City beaches, from River Jetties to the end of the Balboa Peninsula (approximately 5.2 miles of beach and dune habitat). The

geographic scope of the revised draft plan, however, is restricted to the part of the Balboa Peninsula that the USFWS designates as critical habitat for the WSP, plus a limited stretch of beach to the southeast (approximately 1.1 mile of beach and dune habitat, representing 21 percent of the total).

Hamilton Biological, Inc., has discussed the importance of comprehensive management of the City's beach/dune ESHA in various venues, including a letter to Mr. Dave Kiff of the City dated September 11, 2017; multiple presentations to the California Coastal Commission (CCC) during hearings in 2017 and 2018; and a letter dated July 25, 2018, that was co-signed by Dan Silver (Endangered Habitats League), Conner Everts (Southern California Watershed Alliance), Marko Popovich (Still Protecting Our Newport), Celia Kutcher (California Native Plant Society, Orange County), Mike Wellborn (Friends of Harbors, Beaches and Parks), Garry Brown (Orange County Coastkeeper), Michelle Gastil (Sierra Club Banning Ranch Task Force), Penny Elia (Sierra Club OC Conservation Committee), Terry Welsh (Banning Ranch Conservancy), Andrea Jones (Audubon California), Susan Sheakley and Scott Thomas (Sea & Sage Audubon), Travis Longcore (Los Angeles Audubon), and Jack Eidt (Wild Heritage Planners).

Presentations to the CCC addressing many of the same issues have been made by Sea & Sage Audubon, the Orange County chapter of the California Native Plant Society, the Sierra Club OC Conservation Committee, the Banning Ranch Conservancy, OC Habitats, Wild Heritage Planners, Surfrider Foundation, SPON, and attorney Mark Massara.

Page 3 of the revised draft plan attempts to justify the City's ongoing refusal to prepare a comprehensive plan:

The City recognizes the importance of incorporating conservation measures that will maximize the protection for wintering WSP at each of the wintering sites across the City's beaches. This Plan provides the detailed measures that once approved and adopted can be used as the framework for other areas in the City where site specific protective measures for WSP require formal establishment and implementation. As discussed throughout this Plan, various departments within the City of Newport Beach already incorporate actions during day-to-day operations aimed at WSP protection; however, additional measures, based on site specific conditions may be warranted. This Plan provides an important milestone in achieving maximum protection for WSP throughout the City, through implementation of an adaptive management approach.

This confirmation by the City – that additional beach/dune ESHA's "require formal establishment and implementation" of "site specific protective measures" – represents a small step forward. Unfortunately, the revised draft plan does not (a) identify the specific ESHA's that do not currently receive protection, or (b) explain the City's rationale for putting off protecting certain ESHA's to an unspecified date in the future. An adequate resource management plan for beach/dune areas must include several elements:

1. Mapping and descriptions of all beach/dune ESHA in the City.
2. Objective disclosure and discussion of all apparent violations of the LCP and Coastal Act in beach and dune areas.

3. Plans for protecting each area of beach/dune ESHA in the City consistent with requirements of the City's certified LCP.
4. Timing for implementing all required management actions (the Coastal Act does not allow for protecting some ESHA now and other ESHA at an unspecified later date).

RELEVANT EXAMPLES OF CONSERVATION PLANNING

For reasons discussed herein, achieving compliance with the Coastal Act and federal Endangered Species Act in Newport Beach will require a comprehensive and science-based approach to beach and dune management. *Areas that qualify as ESHA, ESHA buffer, or that serve as traditional roosting or nesting habitat for the federally threatened WSP must be managed in accordance with the applicable laws.*

With regard to the Coastal Act, CCC staff has already provided the City with a blueprint for achieving compliance in the form of the comprehensive beach/dune management plan that the City of Pacifica developed in 2014 to obtain a CDP for installation of 1,300 feet of year-round fencing, 930 feet of seasonal fencing, and associated interpretive signs at Pacifica State Beach. During a meeting on May 19, 2017, CCC staff specifically directed the City to use the City of Pacifica management plan as a template for what is expected in Newport Beach. Minutes of this meeting were placed on file by former City Manager Dave Kiff.

With regard to the federal Endangered Species Act, the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010, a document available online at the following address:

https://www.fws.gov/oregonfwo/FieldOffices/Newport/WesternSnowyPlover/Documents/WSP-HCP_08182010.pdf

Hamilton Biological has recommended that the City and its consultants review the Pacifica and Oregon plans as useful starting points upon which to develop a comprehensive dune/beach management plan that would comply with relevant precedents in the application of the Coastal Act and federal Endangered Species Act. The City has so far rejected this recommendation. The following section provides Mr. Hamilton's peer-review comments on the revised draft plan prepared by Glenn Lukos Associates.

REVIEW OF THE REVISED DRAFT PLAN

As with the original draft plan (Dudek, June 2018), the revised draft plan by Glenn Lukos Associates fails to implement the request made by Andrew Willis of the CCC staff for a “comprehensive” plan addressing beach/dune ESHA and WSP management issues on all City beaches. As discussed previously, the City does not adequately protect the restored dune ESHA near River Jetties, and both the City and the County refuse to take steps to limit harassment of listed species in the Santa Ana River estuary (both the WSP and the California Least Tern nested near the river mouth in 2018).

The revised draft plan, like the previous iteration, fails to incorporate relevant information from researchers who have spent many years monitoring the status of the WSP in Newport Beach and elsewhere in the region. Both the 2018 annual report⁴ and an even more recent publication on the resumption of nesting by WSP’s in Los Angeles County⁵ include relevant information on the species’ recent status in Orange County. That neither report is cited in the revised draft plan demonstrates the inadequacy of the research that went into the plan’s preparation.

Section 1.1, Site Description

Page 2 of the revised draft plan accurately characterizes coastal dune habitat:

The coastal dune ecosystem is one of the most sensitive and declining habitat types on the West Coast and has historically been impacted by development, with continuing impacts from invasive, non-native species.

The plan should describe the WSP’s place within the coastal dune ecosystem and then discuss specific protections for coastal dune ESHA contained in the City’s certified LCP (see page 2 of this letter). Instead, the plan discusses WSP Critical Habitat, failing to point out that Critical Habitat is a subset of beach/dune ESHA already granted strong protections – including freedom from construction of concrete walkways and provision of minimum 50-foot buffers – under the City’s certified LCP and under the Coastal Act. The City’s continued resistance to incorporating its own LCP protections into the WSP management plan signals the City’s intention to continue ignoring those protections. Such a bad-faith approach to resource management and land-use regulation violates the Coastal Act’s most basic tenets.

⁴ Ryan Ecological Consulting. 2019. Western Snowy Plover and California Least Tern in Orange and Los Angeles Counties, California; January to December 2018. Report dated January 31, 2019, prepared for San Diego Zoo Global, Escondido, CA.

⁵ Ryan, TP, S Vigallon, DS Cooper, C Delith, K Johnston, and L Nguyen. 2019. *Return of beach-nesting Snowy Plovers to Los Angeles County following a 68-year absence*. *Western Birds* 50:16–25. [https://www.westernfieldornithologists.org/archive/V50/50\(1\)-p016-p025.pdf](https://www.westernfieldornithologists.org/archive/V50/50(1)-p016-p025.pdf)

Section 1.1.1, Critical Habitat Area

Page 3 of the revised draft plan describes how the designation of Critical Habitat has no effect on public access, and mentions several concrete walkways that the City has built within Critical Habitat:

The critical habitat designation does not affect accessibility by the public and in this regard would be the same as other stretches of beach on Balboa Peninsula. The ocean-front boardwalk extends along the critical habitat area from B Street and ends approximately 200 southeast of E Street. Six street end entrances are located from A Street to G Street. In addition, C, D, E, F and G Streets each have an asphalt concrete pathway that extend various lengths from the intersection of the street entrance and boardwalk, toward the ocean.

The concrete walkways at the ends of C, D, E, F, and G Streets – like 17 others shown in Exhibits 1 and 2 on page 4 of this letter – were built without the required Coastal Development Permits; see pages 3–7 of this letter. Significantly, Ryan et al. (2017) concluded that unpermitted construction of the E Street walkway in 2014 has probably contributed to reduced wintering of WSP in that area. Per the most recent annual report (Ryan Ecological Consulting 2019), when WSP wintering numbers rebounded in 2017/2018 the main roosting area had shifted to the southeast, outside of the designated Critical Habitat area. The WSP management plan must address problems stemming from unpermitted development in beach/dune ESHA rather than treating the walkways as legitimate, permissible, features of the existing setting.

Page 3 of the revised draft plan states, without evidence, “the current potential for nesting is low.” Page 3 also states:

The City recognizes the importance of incorporating conservation measures that will maximize the protection for *wintering* WSP at each of the *wintering* sites across the City’s beaches. [emphasis added]

The authors of the revised draft plan fail to mention that WSP *nested* on the Balboa Peninsula in 2008, 2009, and 2013 (but have not done so subsequently, following construction of the E Street walkway). Also highly relevant, but not mentioned in the revised draft plan, is the WSP’s recent recolonization of long-dormant nesting grounds at Malibu Lagoon State Beach, Santa Monica State Beach, Dockweiler State Beach, and the mouth of the Santa Ana River, on the Huntington Beach side (Ryan et al. 2019). Instead of identifying factors that could lead to similar success on the Balboa Peninsula, the revised draft plan treats resumption of nesting as an unrealistic goal. Ryan and colleagues (2019) identified several specific management actions that apparently increased the suitability of the above-listed sites for nesting plovers, thereby facilitating recolonization. As summarized in the abstract of their paper:

Plovers selected sites within or adjacent to areas protected by fenced enclosures. We protected all nests with mini-exclosures. We suggest that this recolonization was due to the combination of protection of potential nesting sites, protection of individual nests, and exceptional recent productivity at other nesting sites in southern California. The fenced enclosures provided essential protection from vehicles and encouraged accumulation of beach wrack around the nests and feeding areas. Additionally, once nests were

established, the placement of exclosures provided essential protection from native predators and pet and feral dogs and cats. Protection with both fencing and exclosures, combined with management to minimize disturbance, will be essential for maintaining this new nesting population.

If the WSP were to remain a non-breeding species on the Balboa Peninsula, in spite of a well-conceived management plan that implements all feasible means known to increase the suitability of beach/dune habitats for nesting plovers, the City could not be faulted. **This is not the approach being taken.** By setting its conservation goals unreasonably low, the City is primed to claim its plan a success based on simply maintaining the status quo of plovers continuing to winter on the Balboa Peninsula – an area where they nested historically and in the recent past. **This is not acceptable.**

1.2.2, US Fish & Wildlife Service: Western Snowy Plover Recovery Plan

The revised draft plan fails to disclose all of the relevant management goals contained in the 2007 Recovery Plan for the WSP. In addition to increasing the breeding population in Recovery Unit 6 to 500 individuals, the Recovery Plan calls for protecting wintering plovers from wrack removal, vehicles, pets, and human-related disturbance.

1.2.3, California Coastal Act

Page 6 of the revised draft plan claims, without basis, that the plan was “prepared in a manner that is fully consistent with the provisions of the City’s LCP.” As pages 1-10 of this letter explain, the City’s failure to implement its certified LCP in beach/dune areas has led to long-term, ongoing loss and degradation of dune ESHA that comprises suitable habitat for the WSP. A compliant WSP management plan would (a) identify all beach/dune ESHA; (b) establish the required minimum 50-foot buffer around all ESHA; (c) remove unpermitted development in beach/dune ESHA (or obtain an after-the-fact permit, if warranted, as determined via thorough environmental review); and (d) develop City-wide beach/dune management policies designed to avoid future loss or degradation of ESHA. The revised draft plan falls far short of this standard.

1.2.5, City of Newport Beach: Coastal Land Use Plan

Page 7 of the revised draft plan states:

The CLUP includes policies for the protection of environmentally sensitive habitat areas (ESHA). ESHAs are areas in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments. Because the area covered by the critical habitat designation supports roosting habitat for a threatened species, the federally designated critical habitat area meets the definition of ESHA in the City’s CLUP.

This is an erroneous reading of the CLUP. As discussed on page 2 of this letter, (a) the City’s CLUP identifies as ESHA *all* areas of southern dune scrub, not only those that overlap with designated Critical Habitat; and (b) Policy 4.1.1-10, on page 4-7 of the CLUP, states that all terrestrial ESHA shall have a minimum buffer width of 50 feet

wherever possible. Failure of the City to fulfill these requirements over a period of many years has led to loss and degradation of large areas of beach/dune ESHA.

2.3, WSP Population Status on Balboa Peninsula

The Balboa Peninsula lies well within the WSP's breeding range, and was historically known as a regular nesting location for the species. As the area became more heavily developed in recent decades, and in the absence of effective management of dune habitat, the peninsula became mainly a wintering site. This does not mean that the site lacks suitable nesting habitat, and in fact the species nested on the Balboa Peninsula in 2008, 2009, and 2013 (Ryan et al. 2009). As discussed on page 16 of this letter, WSP's have recently recolonized long-dormant nesting grounds at multiple sites in Orange and Los Angeles Counties, responding to specific management actions that apparently increased the suitability of the above-listed sites for nesting plovers. Implementation of similar management actions on the Balboa Peninsula could lead to the same result. Thus, the assertion on page 9 of the revised draft report that the "USFWS has concluded that the Balboa Peninsula is used by WSP for wintering rather than nesting" represents a misleading oversimplification.

3.1, Habitat

Page 11 of the revised draft plan states:

The vegetated areas of dunes are separated by paths and walkways are intended to provide for directed or controlled beach access that limits impacts to the dunes.

The intention of establishing numerous unpermitted concrete walkways across beach and dune areas may have been to limit impacts to the dunes, but, because the walkways were never subjected to required environmental review under the Coastal Development Permitting process, any such suppositions lack substance. A more effective way to limit human intrusion into important WSP roosting and/or nesting habitat would be to establish walkways that lead people *away* from the most important habitat areas, not into the heart of the designated Critical Habitat. In fact, as discussed previously, numbers of WSP wintering in the Critical Habitat area have declined sharply starting in 2014, when the City constructed the unpermitted E Street walkway.

Page 11 continues:

Ornamental vegetation occurs in patches adjacent to some residences on the ocean side of the boardwalk extending at a maximum just over 50 feet from the oceanfront homes into the Critical Habitat.

As discussed on page 3 of this letter, the encroachment of private landscaping into public ESHA represents an ongoing violation of the Coastal Act. Section 30240 of the Coastal Act requires that the City identify all areas of dune ESHA and provide minimum 50-foot buffers "to prevent impacts that would significantly degrade the adjacent ESHA." In practice, the City does not do this, and thus violates its own certified LCP and the Coastal Act.

3.1.3, Delineation – Existing Fence

Page 12 of the revised draft plan states, “In June 2011, the City installed approximately 1,300 linear feet of fencing around approximately 2.1 acres of habitat between the walkway fingers of D and E Streets.” This is factually incorrect, as the E Street walkway did not exist until 2014 (the D Street walkway was built in 2002/2003).

Otherwise, page 12 of the revised draft plan describes how the City has installed and removed various forms of protective fencing and paracord barriers. As these actions were not completed with benefit of formal environmental analysis or the required Coastal Development Permit, they represent Coastal Act violations.

3.3.2, Dogs on Beach

Page 14 of the revised draft plan states:

The City is committed to enforcing the restrictions regarding dogs on the beach and intends to increase enforcement and Animal Control presence as well as issuance of citations for violations.

This sounds pleasing, but at the open house on May 20, 2019, multiple residents of Newport Beach complained that the existing animal control response is extremely slow, with officers typically taking hours to show up after a call. Between this and the lax enforcement of leash laws at River Jetties, the revised draft plan lacks credibility in its assurances that the City will now prioritize ticketing people walking their dogs on the Balboa Peninsula. A more effective approach would be (a) to remove all walkways from Critical Habitat and the other area to the southeast where WSP regularly roost; (b) to fence off a large enough area of Critical Habitat for WSPs to use for nesting; and (c) to strictly prohibit incursions into the fenced area by people or their pets.

4, Objectives of the Plan

Page 16 of the revised draft plan states:

The goal of this particular Plan is to provide management actions that will ensure the ongoing protection of existing biological resources within Critical Habitat Unit 48 (and areas to the east), while also setting forth the management and operational activities to be implemented for other areas within the City used by wintering WSP.

The status quo of WSP’s wintering on the Balboa Peninsula – a historical nesting site for the plover – is being maintained in the absence of a comprehensive management plan. As has been demonstrated in recent years in Orange and Los Angeles Counties, recolonization of the peninsula by nesting plovers is a completely realistic goal that the City should be pursuing with this WSP Habitat Management Plan.

As a result of the revised draft plan’s undue emphasis on wintering WSP, the eight numbered objectives listed on pages 16 and 17 of the revised draft plan do not include the full suite of actions that would likely be needed to re-establish a regular nesting population of the WSP on the Balboa Peninsula. Consistent with the findings of Ryan et

al. (2019), the following additional actions should be taken to facilitate recolonization of the Balboa Peninsula by nesting WSP:

- Establishment of a large, well-designed enclosure to keep people and dogs out of potentially suitable nesting habitat.
- Removal of unpermitted walkways that encourage people and pets to encroach into potentially suitable nesting habitat.
- Monitoring of WSP during the nesting season, and establishment of exclosures around any scrapes detected, to keep predators away from the plover eggs.

5.3.1, Wintering and Nesting Window Surveys

Page 20 of the revised draft plan calls for a single nesting season survey between late May and mid-June. Table 1 in the recent *Western Birds* article by Ryan and colleagues specifies that six nests in Orange and Los Angeles Counties were initiated **between April 17 and May 15**. Given the importance of identifying WSP scrapes in order to protect them with exclosures, it is recommended that nesting season surveys be conducted at least weekly from April 1 to June 15.

CONCLUSIONS AND RECOMMENDATIONS

The 2007 Recovery Plan calls for doubling the WSP nesting population in the Recovery Unit that includes Newport Beach. Plovers have nested on the Balboa Peninsula within the last decade, and the species has already started recolonizing several other beaches in southern California in response to increased protection from human disturbance. Like the 2018 draft plan prepared by Dudek, the revised draft plan treats nesting by WSP as only a possible side-effect of limited management actions directed mainly toward wintering plovers. Certainly, the final plan should include all management prescriptions identified in the published scientific literature as facilitating WSP recolonization of historical nesting sites.

As detailed herein, an adequately protective WSP management plan also would identify and address numerous past and ongoing violations of the City's certified LCP and the Coastal Act, not only on the Balboa Peninsula but all the way up to River Jetties.

The 22 unpermitted concrete walkways constructed through beach and dune areas must be subjected to a thorough and credible analysis to determine their effects upon beach/dune ESHA and required ESHA buffers. It may be appropriate to issue after-the-fact permits for some of the walkways, but others should be removed to limit human intrusion into the most important roosting and potentially suitable nesting areas.

The City's poor record of policing beachgoers — at River Jetties and in other sensitive habitat areas — does not promote optimism that implementing a management plan reliant upon signage and “symbolic fencing” will achieve even the limited goals set forth in the revised draft plan, let alone recolonization by nesting plovers consistent with the

goals of the 2007 Recovery Plan. Effective management of the WSP on the Balboa Peninsula is likely to require carefully designed fencing or another type of barrier that would keep people and pets away from potentially suitable nesting habitat.

The City should carefully consider approaches that local governments elsewhere along the Pacific Coast have taken to successfully balance the requirements of people, rare species, and threatened coastal ecosystems. As discussed in this letter, CCC staff provided the City with a blueprint for achieving Coastal Act compliance – the City of Pacifica’s 2014 comprehensive beach/ dune management plan – and the Oregon Parks and Recreation Department prepared a Habitat Conservation Plan for the WSP in 2010 that the City and its consultants may look to for further relevant guidance.

Thank you for the opportunity to review the Draft WSP Management Plan for East Balboa Peninsula Beaches, Newport Beach, California.

Sincerely,



Robert A. Hamilton, President
Hamilton Biological, Inc.

Andrea Jones
Director of Bird Conservation
Audubon California

Travis Longcore, Ph.D.
Conservation Chair
Los Angeles Audubon Society

Susan Sheakley
Conservation Chair
Sea & Sage Audubon Society

Scott Thomas
Conservation, Special Projects
Sea & Sage Audubon Society

Terry Welsh, M.D.
President
Banning Ranch Conservancy

Celia Kutcher
Conservation Chair
OC Chapter California
California Native Plant Society

Garry Brown
Founder & President
Orange County Coastkeeper
Inland Empire Waterkeeper

Dan Silver, M.D.
Executive Director
Endangered
Habitats League

Gloria Sefton
Vice President
Friends of Harbors, Beaches,
and Parks

Michelle Gastil
Banning Ranch Task Force
Sierra Club

Penny Elia
OC Conservation Committee
Sierra Club

Conner Everts
Executive Director
Southern California
Watershed Alliance

Marko Popovich
President
Still Protecting Our Newport

Jack Eidt
Director
Wild Heritage Planners

Attached: September 11, 2017 letter from Andrew Willis, CCC Enforcement

Copies to: California Coastal Commissioners; Jack Ainsworth, CCC; Lisa Haage, CCC; Aaron McClendon, CCC; Andrew Willis, CCC; Liliana Roman, CCC; Karl Schwing, CCC; Jordan Sanchez, CCC; Laurie Koteen, CCC; Jonna Engel, CCC; Brian Bugsch, CSLC; Benjamin Johnson, CSLC; Grace Kato, CSLC; Ken Foster, CSLC; Sandy Vissman, USFWS; Hans Sin, CDFW; Erinn Wilson, CDFW; Lana Nguyen, California State Parks; Mark Massara; Tom Ryan; Josh Weinik; Christine Whitcraft; Michelle Clemente

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



September 11, 2017

Dave Kiff
City Manager
City of Newport Beach
100 Civic Center Drive
Newport Beach, CA 92660

Subject: Protection of Snowy Plover and dune habitat in the City of Newport Beach

Dear Mr. Kiff:

Thank you for your continued attention to the issue of protecting Western Snowy Plover habitat in the City of Newport Beach. I appreciate the time you have taken to meet and discuss this issue; it is an exciting opportunity to partner with the City to protect an endangered species in the midst of urban southern California, where remaining open space and habitat areas are especially significant because of their rarity and, consequently, importance to wildlife. We're looking forward to continuing our partnership with the City, both through the City's protection of coastal resources pursuant to the policies of the City Local Coastal Program ("LCP"), and through the processing of two coastal development permit applications (Coastal Development Permit Application Nos. 5-17-0465 and 5-17-0515) that the City has submitted to remove plover habitat fencing on a City beach, and a third application to implement a long, term comprehensive management plan for the Western Snowy Plover that the City has indicated is forthcoming.

We're hopeful that these applications can be modified into a comprehensive project to fully protect plover habitat, and dunes habitat as well, on City beaches. Indeed, in response to Coastal Development Permit Application Nos. 5-17-0465 and 5-17-0515, in a June 26, 2017 letter to the City, Commission staff noted, first, that we must consider the immediate impacts to sensitive biological resources that are protected by the existing fencing that may occur if the fencing is removed, and, second, the need for any application to remove existing habitat fencing to include a management plan for ongoing protection of existing biological resources in the area of the proposed project. The purpose of this letter is to provide some additional information regarding the incentive for preparing a management plan that protects all habitats on City beaches, and in particular, all environmentally sensitive habitat areas ("ESHA") and to both avoid misunderstandings, and provide information that would help design a plan that would be consistent with the Coastal Act and potentially approvable by the Commission.

ESHA is defined in Coastal Act Section 30107.5 as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Rare plant communities and habitats for protected wildlife species are generally

considered by the Commission to be ESHA. The City LCP (Section 4.1.1.1), which serves as guidance for Commission decisions regarding development activities on City beaches, identifies several potential attributes of ESHA, including the following:

A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.

B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.

As you know, the Coastal Act and City LCP provide strict protections for ESHA: Section 30240 of the Coastal Act restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA.

The Commission has found in a previous action that at least one area of the City beaches is ESHA, and other areas appear to be potentially similar; the Commission formally determined in a 2006 enforcement action that the dunes on the south side of the Santa Ana River constitute ESHA because of the presence of dunes and because the dunes are potentially used by a protected bird species, the federally and state listed as endangered California Least Tern. Consequently, the Commission required restoration of the dunes and their preservation.

The extent of ESHA on City beaches is not necessarily limited to the dunes that were the subject of the 2006 Commission action. This simply was the area that was the subject of the enforcement action. In fact, using the same analysis by which the Commission found that the dunes at the Santa Ana River are ESHA suggests that other habitat for protected species and dune habitats on City beaches could rise to the level of ESHA. As you are no doubt aware, Western Snowy Plovers use City beaches for foraging and roosting and the United States Fish and Wildlife Service has identified an area of City beach as Critical Habitat for the Western Snowy Plover because the area is essential to the conservation of the species. Also, again as I'm sure you are aware, the City's beaches are peppered with dunes, including dunes that support native dune plant species. The City LCP (Section 4.1.5) says about dunes that "Dune habitat is considered a sensitive plant community and is listed as rare or threatened or is otherwise protected by the U.S. Fish and Wildlife Service, California Department of Fish and Game, California Coastal Commission, or local agencies."

Dunes are also afforded protection under Section 30251 of the Coastal Act, which limits the alteration of natural landforms in order to protect the scenic and visual qualities of coastal areas. Finally, and perhaps most intriguing for low-lying Newport Beach, sand dunes provide protection for inland, low-lying areas from strong storm waves. Dune management, or the construction of "living shorelines" capitalize on the natural ability of these systems to protect coastlines from sea-level rise and storm related hazards while also providing benefits such as habitat, recreation, a more pleasing visual tableau, and the continuation or enhancement of ecosystem services. Indeed Sections 2.8.3-5 and 2.8.3-6 of the LCP encourage, respectively, "the use of sand dunes with native vegetation as a protective device in beach areas" and "the use of

non-structural methods, such as dune restoration and sand nourishment, as alternatives to shoreline protective devices.”

Although some areas of City beach have been fenced and provide some protection for habitat and dunes, in other areas, a lack of protection leaves potential ESHA exposed to trampling and other disturbances that could result in removal of major vegetation, landform alteration that constitutes grading, and change of intensity of use of a sensitive habitat area. The City LCP notes that “Increased human activity and uncontrolled public access also adversely impact these dune habitats, as evidenced by the numerous trails bisecting the dunes.” [Section 4.1.5] The trampling and other activities described above constitute development activities under the Coastal Act that require a coastal development permit. No coastal development permit has been issued by the Commission for these activities on City beaches.

Although the purpose of this letter is just to reach out and offer assistance and coordination, we should also point out that there are legal provisions that apply as well. The potential for unpermitted activity resulting in impacts to unprotected areas of ESHA on City beaches creates potential liability (under the Coastal Act at a minimum) for the City, as the property owner, even for actions it may not actually perform. Regardless of who performs unpermitted development, such as landform alteration or removal of major vegetation within a dune habitat, the persistence of the resulting changes in topography or vegetation coverage, etc., constitute continuing violations of the Coastal Act and continuing public nuisances that a property owner is liable for correcting. The Coastal Act represents a legislative declaration that acts injurious to the state’s natural resources constitute a public nuisance. (*Leslie Salt Co. v. San Francisco Bay Conservation etc. Com.* (1984) 153 Cal. App.3d 605, 618; *CEED v. California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 318.) In *Leslie Salt* (p. 622), the court held that:

“...liability and the duty to take affirmative action [to correct a condition of noncompliance with applicable legal requirements] flow not from the landowner’s active responsibility for [that] condition of his land...or his knowledge of or intent to cause such [a condition] but rather, and quite simply, from his very possession and control of the land in question.”

Since a property owner is responsible, along with the party that undertook unpermitted development, for unpermitted development that has occurred on the property owner’s property, it is in the interest of the property owner to consider measures to prevent and address such unpermitted development. For that reason, we recommend that the City modify the current applications to incorporate a proposal for a comprehensive habitat protection program that will help ensure impacts to habitat on City beaches are avoided and protect critical resources and, at the same time, reduce the City’s potential exposure to liability for such damage.

We would be happy to meet with City staff to discuss what measures might be appropriate to incorporate into a comprehensive program, be they a combination of retention of existing fencing and installation of new fencing or symbolic fencing around dune areas and wildlife habitat on City beaches, restoration of degraded habitat areas, increased enforcement of dog-leash laws, consideration of beach grooming practices, and installation of information signage, to name a few, and, we look forward to collaborating with the City to ensure protection of habitats on City beaches. Again, we thank you for your cooperation, work, and efforts in seeking protection for

Mr. Kiff
September 11, 2017
Page 4 of 4

Western Snowy Plover habitat on City beaches. If you have any questions about this letter, please do not hesitate to call me at 562-590-5071.

Sincerely,



Andrew Willis
Enforcement Supervisor

**cc: Lisa Haage, Chief of Enforcement, CCC
Karl Schwing, Deputy Director, CCC**

Exhibit H



DEPARTMENT OF PARKS AND RECREATION

Orange Coast District
3030 Avenida del Presidente
San Clemente, CA 92672
949-492-0802

Lisa Ann L. Mangat, Director

May 6, 2016

Supervisor Michelle Steel
Orange County Board of Supervisors
10 Civic Center Plaza
Santa Ana, CA 92701

Re: Santa Ana River Jetty Leash-Free Dog Friendly Beach Designation

Dear Supervisor Steel,

As neighboring land managers, State Parks is interested in the contemplated change of land use at the Santa Ana river mouth. We understand, through the media, that the County of Orange is considering designating an off-leash dog beach in that area. Given that our properties are separated only by the Santa Ana River Jetty, we foresee a high probability that decisions made on your property will directly affect us. Given the presence of the California Least Tern Natural Preserve immediately up coast of our boundary, we would appreciate the opportunity to review any environmental documents, general plans, or recreation plans that have been prepared on this topic.

We look forward to engaging in discussions with you regarding the effects an off-leash dog beach designation would have on our mission, including public safety, recreational opportunities, and of course, natural resources. In particular, we would like to better understand the impacts this will have on sensitive species such as the endangered California least tern and threatened Western snowy plover located so near the area in question, and discuss what parameters will be in place to protect them if the area is formalized as a dog beach.

If you should have any questions or need additional information, please do not hesitate to contact me at (714) 377-2187 or via email: eric.dymmel@parks.ca.gov.

Sincerely,

Eric L. Dymmel
North Sector Superintendent
Orange Coast District
California State Parks

Cc: Orange County Executive office
Orange Coast District Superintendent



DEPARTMENT OF PARKS AND RECREATION

Orange Coast District
3030 Avenida del Presidente
San Clemente, CA 92672
949-492-0802

Lisa Ann L. Mangat, Director

Transmitted via Email to: ocpcustomer@ocpw.ocgov.com

December 2, 2016

Chris Uzo-Diribe
County of Orange
OCPW/OC Development Service
300 North Flower Street
Santa Ana, CA 92703

Regarding: Negative Declaration (ND) File No. IP 16-234 – Orange County Code of Ordinance Proposed Amendment (Dog Beach) – OCPW/OC Development Services

Dear Chris Uzo-Diribe:

The Department of Parks and Recreation (State Parks) has reviewed the Negative Declaration (ND) File No. IP 16-234 – Orange County Code of Ordinance Proposed Amendment (Dog Beach) document, and understand that the County of Orange is proposing to designate an on/off leash dog-friendly beach area. Given that our properties are separated only by the Santa Ana River jetty, we believe this decision will directly impact State Park operations and management, especially with regard to State Parks' mandate to protect the sensitive natural resources at Huntington State Beach (HSB), adjacent to the County's proposed project area. As such we respectfully submit the comments below.

The Negative Declaration in support of this project does not adequately address the potentially significant impacts to the ecosystem as a result of the presence of dogs on the adjacent State Parks property. Of particular concern are potential impacts to the California Least Tern Natural Preserve (CALT NP) subunit at HSB and the sensitive and endangered species protected there. Natural Preserves are established per the California Public Resources Code (Section 5019.71) for land use specifically aimed to protect and preserve rare or endangered plant or animal species and their supporting ecosystems. The California State Park and Recreation Commission established the California Least Tern Preserve at HSB in 1975 in order to protect and preserve the federal and state-listed California least tern (LETE). The Natural Preserve currently supports one of the most productive LETE colonies in the state.

The County's proposed change of land use will require State Parks to provide additional operation and management of this area in order to properly enforce the protections and mandates afforded these existing sensitive resources under State and Federal law. The proposed project may also result in un-mitigatable and potentially significant impacts to the conservation of sensitive natural resources on State Park property. The cost and impact to existing State Parks operations has not been taken into consideration in the Negative Declaration.

The proposed project site is important foraging and resting habitat for both the LETE and the federally-threatened western snowy plover (WESP). LETE rely on fish of varying species and size depending on the stage of the breeding cycle they are in. HSB is consistently one of the top nesting sites in the state for LETE, and it is hypothesized that the proximity of three different

foraging areas (the Pacific Ocean, Santa Ana River, and Brookhurst Marsh) may be a strong factor in this colony's success.¹ The Santa Ana River (SAR) provides a calm area that allows fledgling LETE to learn how to fish without strong currents or waves and provides a safe loafing and resting area for both adults and juveniles from the colony as well as those migrating south to their wintering grounds.²

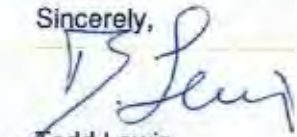
Potentially significant impacts resulting from the expected increase in public access to the proposed project area has not been adequately addressed in the Negative Declaration for the proposed project. The area between the SAR and the CALT NP has traditionally experienced less foot traffic than the beach, allowing the birds to remain undisturbed. The County's proposed project, however, would lead to greater public use of this area with no satisfactory way to prevent visitors with dogs from accessing the State Beach and impacting LETE and WESP.

The California Least Tern Natural Preserve (CALT NP) and area immediately surrounding it is federally-designated critical habitat for western snowy plovers (WESP) by the US Fish and Wildlife Service in the species' recovery plan in 2012. WESPs have been observed foraging and roosting immediately up coast in front of the CALT NP. These overwintering sites are becoming recognized more and more as an important component for the success of the species.³ Winter roosts provide connectivity for dispersal for birds from different breeding sites and allow birds to build stores for spring migration and the upcoming breeding season. WESP show strong site fidelity to overwintering sites and will often return to the same sites year after year; the potentially significant impact to WESP from dogs within and adjacent to these winter roosts has not been assessed to its full extent within the Negative Declaration for the proposed project.

We look forward to engaging in further communications with you regarding our concerns the impacts a dog beach designation would have on State Parks property.

Thank you for the opportunity to submit comments to the Negative Declaration. If you should have any questions or need additional information, please do not hesitate to call our District Environmental Coordinator Julie Tobin at 949-607-9510 or via email to Julie.Tobin@parks.ca.gov.

Sincerely,



Todd Lewis
District Superintendent
Orange Coast District

Copy via email: Monica Aleman, NSC - Resource Section – CA State Parks
Lana Nguyen, Orange Coast District, CA State Parks
Kevin Pearsall, Orange Coast District, CA State Parks
James Newland, Orange Coast District, CA State Parks

¹ California Least Tern Breeding Survey, 2012 Season. State of California, Natural Resources Agency, Department of Fish and Wildlife, Wildlife Branch

² Ibid.

³ Ibid.

Exhibit I

CALIFORNIA COASTAL COMMISSION

South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071



December 14, 2016

Chris Uzo-Diribe
Planner IV, OCPW
OC Planning
300 N. Flower Street, 1st Floor
Santa Ana, CA 92702-4048

**RE: County of Orange Dog Beach Santa Ana River, Comments on Negative Declaration
(IP# 16-234)**

Dear Ms. Uzo-Diribe:

Thank you for the opportunity to comment on the proposed dog park at the Santa Ana River mouth, which would impact biological and other coastal resources (e.g., water quality, public access, scenic resources) that exist at the site in the County of Orange. We appreciate that such uses can be significant to the community, however, we would like to work with the County to find a solution that would have fewer potential negative environmental impacts.

The Coastal Commission has the responsibility to carefully review any development in the coastal zone for compliance with the California Coastal Act of 1976¹. The proposed project (establish a dog park), situated within and adjacent to the Santa Ana River, is located entirely within the Coastal Commission's permitting jurisdiction in the coastal zone. Section 30600(a) of the Coastal Act requires that, in addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, any person, as defined in Section 21066, wishing to perform or undertake any development in the coastal zone, shall obtain a coastal development permit. The proposed dog park constitutes "development" under the Coastal Act that requires a coastal development permit, as the creation, through the proposed ordinance, of an official dog park in an open space area intensifies the use of the area.

The proposed project is located in an unincorporated area of the county that is presently not part of any local government's certified Local Coastal Program (LCP). Therefore, in the absence of a certified LCP, the County must obtain a coastal development permit from the Coastal Commission prior to proceeding with the proposed project. The Coastal Commission's standard of review for the coastal development permit application would be the Chapter 3 policies of the Coastal Act. The coastal development permit process will ensure that the proposed project is undertaken in a manner consistent with the Chapter 3 policies of the Coastal Act. Therefore, the proposed Negative Declaration should address whether the proposed project is consistent with the Chapter 3 policies of the Coastal Act, specifically Section 30240 of the Coastal Act, which restricts development within Environmentally Sensitive Habitat Areas ("ESHA") to resource dependent uses and requires development adjacent to ESHA be sited and designed to avoid impacts to ESHA.

¹ The Coastal Act is found beginning at Section 30000 of the California Public Resources Code.

Coastal Commission staff believes that the proposed project would impact the foraging and roosting habitats of the federally and state listed as endangered California Least Tern and federally listed as threatened Western Snowy Plover, as well as the breeding habitat of the Least Tern. In fact, the County's environmental review of the project has identified the project site as habitat for these protected species. Thus, the proposed project appears to be inconsistent with resource protection policies of the Coastal Act. As you probably know, one of the few successful breeding colonies of the Least Tern in Orange County is located on the north side of the Santa Ana River mouth, just up coast from the proposed dog park. The river mouth itself is important foraging habitat for the Least Tern, and the beach along this stretch of coast is foraging and roosting habitat for the Snowy Plover. Habitats for protected wildlife species are termed ESHA by the Coastal Act and are afforded special protection, as noted above.

In fact, the Commission formally determined in a 2006 enforcement action that the dunes on the south side of the Santa Ana River, which are situated in a location immediately adjacent to the proposed dog park, constitute ESHA, in part because they are a component of the Least Tern's local habitat, and required their restoration and preservation. Thus, there are significant questions about the consistency of the proposed dog park in this location with resource protection policies of the Coastal Act, including, but not necessarily limited to, Section 30240. Section 30240 restricts development in ESHA to resource dependent uses and requires that development adjacent to ESHA be compatible with the continuance of the adjacent ESHA and be sited and designed to prevent impacts that would significantly degrade the adjacent ESHA. The dog park is not a resource dependent use (i.e. it does not require the presence of the ESHA to function), and the dog park, where numerous leashed and unrestrained dogs would be present, and which is proposed to be located directly within the foraging areas of the Least Tern and Snowy Plover and adjacent to the breeding area of Least Tern, is not sited or designed to avoid impacts to ESHA.

The Commission will also apply Chapter 3 policies of the Coastal Act to address the proposed project's impacts to, among other things, public access and recreation, scenic resources, marine resources, and biological productivity and water quality of coastal waters. For instance, Section 30230 (Marine Resources) of the Coastal Act states:

Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes.

Also, Section 30231 (Biological Productivity; Water Quality) states:

The biological productivity and the quality of coastal waters, streams, wetlands, estuaries, and lakes appropriate to maintain optimum populations of marine organisms and for the protection of human health shall be maintained and, where feasible, restored through, among other means, minimizing adverse effects of waste water discharges and entrainment, controlling runoff, preventing depletion of ground water supplies and substantial interference with surface waterflow, encouraging waste water reclamation, maintaining natural vegetation buffer areas that protect riparian habitats, and minimizing alteration of natural streams.

Orange County – Santa Ana River Dog Park

Coastal Commission Staff Comments

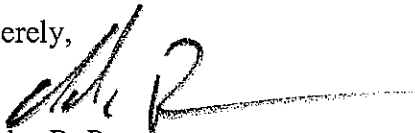
Page 3 of 3

Creation of an official dog park, and consequent introduction of numerous leashed and unrestrained dogs and the disturbance associated with such use, within an area that the environmental review process has identified as foraging habitat for protected species, which are key to the marine ecosystem, potentially eliminates or significantly degrades the functioning of the area to provide habitat for marine organisms, with attendant negative impacts to biological productivity. Furthermore, the potential for this activity to remove and degrade dune vegetation within and adjacent to the proposed project site, in addition to its impacts to sensitive habitats, may impede the biological productivity and water quality of the wetland at the Santa Ana River mouth through the reduction of the natural vegetation buffering this wetland.

Due to the apparent inconsistency of the proposed project with policies of the Coastal Act, Commission staff suggests that the proponents of the dog park work with County and Commission staff to investigate all possible options for locating such an amenity at a site where adverse impacts to protected wildlife species would be avoided. Commission staff believes additional environmental review is necessary for the proposed project and requests that such review consider alternative project designs and project locations that may reduce or avoid adverse impacts to biological resources. Each of the issues identified in this letter, as well as other environmental impacts identified in the Negative Declaration, should be analyzed in the context of potential alternative project designs and project locations. Could adverse impacts to biological resources be reduced or eliminated if the location of the project was changed?

In closing, we suggest that the County analyze additional alternatives to the proposed project, including alternatives that avoid impacts to ESHA, marine resources, and biological productivity and water quality of coastal waters. Alternative mitigation plans should also be proposed as part of the environmental review. Please note that the comments provided herein are preliminary in nature; more specific comments may be appropriate as the project develops. We hope that these comments are useful, and respectfully reserve the opportunity to comment more specifically at a later date. Commission staff requests notification of any future activity associated with this project or related projects. Please call me at (562) 590-5071 if you have any questions. Thank you for the opportunity to comment on the proposed project.

Sincerely,



Charles R. Posner
Supervisor of Planning

Exhibit J





ENCLOSURE 2

**CALIFORNIA STATE LANDS
COMMISSION**

100 Howe Avenue, Suite 100-South
Sacramento, CA 95825-8202



Established in 1938

JENNIFER LUCCHESI, Executive Officer

916.574.1800

TTY CA Relay Service: 711 or Phone **800.735.2922**
from Voice Phone **800.735.2929**
or for Spanish **800.855.3000**

Contact Phone: (916) 574-1900

July 19, 2022

File Ref.: Lease 9358

To: Nardy Kahn (SENT VIA ELECTRONIC MAIL ONLY:
nardy.khan@ocpw.ocgov.com)
Orange County Flood Control District

Subject: Notice of Breach of General Lease – Public Agency Use, Lower Santa Ana River, Orange County

Dear Ms. Khan:

Pursuant to Section 2, Paragraph 16 of the subject lease, "Lessee must provide annual reports to Commission staff detailing County law enforcement efforts in the Santa Ana River Mouth. Reports will be due no later than July 8 of each year." As of this date Commission staff has not received the required report.

This letter serves as notification that the Orange County Flood Control District has 30-days from the date of this letter to cure its breach of Section 2, Paragraph 16 by providing the required report. Failure to provide the report within the cure period shall constitute a default of the lease, pursuant to Section 2, Paragraph 12(b).

Please forward the annual report to my attention as soon as possible but no later than August 18, 2022. Should you have any questions, please contact me at drew.simpkin@slc.ca.gov or at (916) 574-2275.

Sincerely,



Drew Simpkin

Public Land Management Specialist

cc's: see next page

N. Khan
July 19, 2022
Page 2

cc: Jim Volz, OCFCD
Giles Mathews, OCFCD
Andrew Willis, CCC
Ben Johnson, CSLC

ENCLOSURE 3

Santa Ana River Mouth – Annual Report to State Lands Commission (June 2021- June 2022)

Introduction

Orange County Flood Control District (OCFCD) holds a lease (9358) from California State Lands Commission (SLC) to remove sand from the Santa Ana River Mouth for the purposes of flood protection. Orange County Public Works (OCPW), behalf of the OCFCD, conducts as needed sand removal between September and March each year.

The SLC is concerned that dogs and humans are disturbing the legally protected California least tern and snowy plover by entering the river mouth, including within the leased land. Both species of protected bird forage in the Santa Ana River mouth. In order to address the concerns of the SLC the lease included a condition requiring OCFCD to submit annual reports of law enforcement efforts. See condition below.

Condition 16. states:

Lessee must provide annual reports to Commission staff detailing County law enforcement efforts in the Santa Ana River Mouth. Reports will be due no later than July 8 of each year.

The Santa Ana River is a flood facility and trespass is prohibited under Orange County Code of Ordinances Sec. 3-9-35. OCPW requested the support of the Orange County Sheriff Department (OCSD) to provide support to enforce the above and other trespass related codes.



Figure 1. Limits of SLC Lease in Santa Ana River Mouth

Law Enforcement Methodology

OCSD conduct regular enforcement visits to the Santa Ana River Mouth. The OCSD Officer(s) arrive on site and if people and/or dogs are present in the river mouth they issue a warning to the entire Santa Ana River mouth (via bullhorn attached to the sheriff’s vehicle), that they are trespassing and need to leave the flood channel, or words to that effect. The OCSD log the number of visits, along with the number of people that are present in the river mouth when they issue warnings.

OCPW instructed OCSD on October 28, 2021 that OC Codified Ordinances extend all the way into the ocean, extending into California States Lands that are leased to the OCFCD. From that date OCSD extended its warnings to anyone in the river mouth all the way to the ocean. The limits of OCSD enforcement therefore extends from the downstream side of Pacific Coast Highway to the Ocean and from the rip-rap jetty on the Newport Beach side of the channel to the rip-rap jetty on the Huntington State Beach side of the channel.

It should be noted that OCSD Officers visit the river mouth when they are not required to attend other high priority incidents or provide support elsewhere. Attendance on site is therefore on an as and when available basis and is not necessarily linked to periods of peak usage.

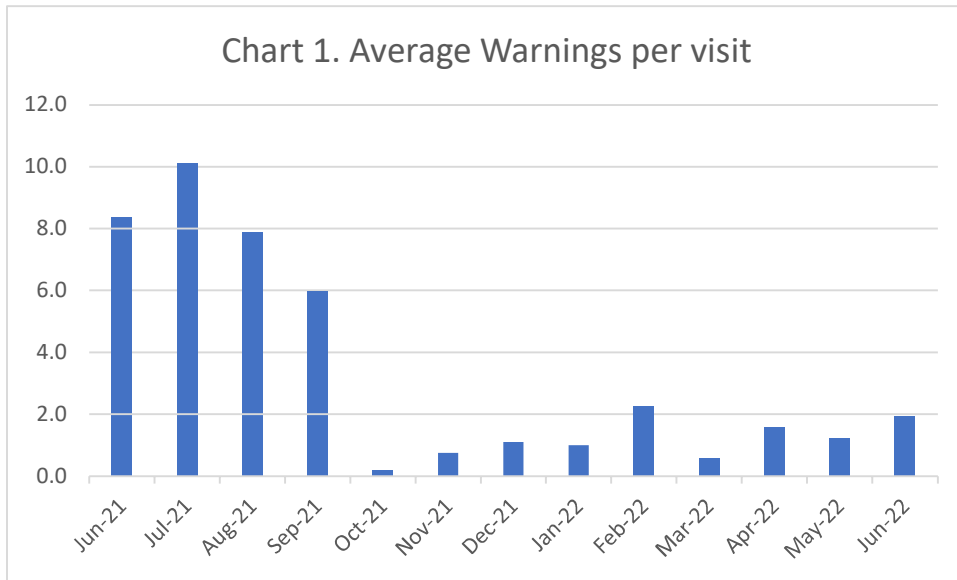
Results

See the table below for a breakdown of OCSD visits, by month. OCSD conducted a total of three hundred and seventy visits to the river mouth. In that time they issued one thousand one hundred and ten warnings. Chart 1 provides a breakdown of the average warnings per visit.

It should be noted that a significant oil spill occurred off the coast in Orange County which led to a severe restriction in access to the river mouth during cleanup efforts through October to January.

Month	Visits	Warnings	Average Warnings per visit
Jun-21	23	192	8.3
21-Jul	18	182	10.1
21-Aug	31	244	7.9
21-Sep	32	191	6.0
21-Oct*	36	7	0.2
21-Nov*	24	18	0.8
21-Dec*	29	32	1.1
22-Jan*	36	36	1.0
22-Feb	39	88	2.3
22-Mar	34	19	0.6
22-Apr	26	41	1.6
22-May	30	37	1.2
22-Jun	12	23	1.9

- * The Amplify Oil Spill occurred in October 2021



Discussion

OCSD conducted regular visits to the Santa Ana River mouth every month for the last year. The number of warnings given represents the number of people present in the river mouth while the officer was on site. There appears to be a decline in people being present in the river mouth from the first three months (8.3, 10.1, 7.9 average warnings per visit, respectively) to between 0.2-2.3 warnings per visit for the last ten months.

There are a number of possible reasons for the apparent reduction in people trespassing in the river mouth, which may include:

1. Sustained OCSD activity may have reduced the number of people trespassing in the channel.
2. OCSD Officers may be visiting the river mouth outside of peak usage and the figures may not be representative of the peak number of people trespassing in the river mouth, compared to the first three months.
3. The oil spill in October 2021, limited access to the river mouth for the duration of the cleanup.
4. Perceived impacts of the oil spill may have reduced use of the river mouth by dog owners in the aftermath of the spill.
5. The sand in the river mouth shifted, due to changing ocean currents in Spring, reducing the size of the sand berm on the Newport Beach side of the channel and then washing it away altogether in June. Access to the river mouth is therefore more challenging.
6. Sporadic enforcement by California State Parks Officers may have reduced the number of people entering the river mouth from the Huntington State Beach side.

It is possible that the apparent reduction in people utilizing the Santa Ana River mouth is a combination of two or more of the above reasons. The OCSD will continue to conduct visits and issue warnings to anyone trespassing in the channel.

ENCLOSURE 4

Saturday, August 27, 2022 at 2 p.m.



Exhibit II

Santa Ana River Mouth Monitoring Project January-June 2023 Report



Orange County Coastkeeper (Coastkeeper) is a nonprofit clean water organization that serves as a proactive steward of our fresh- and saltwater ecosystems. We work collaboratively with diverse groups in the public and private sectors to achieve healthy, accessible, and sustainable water resources for the region. We implement innovative, effective programs in education, advocacy, restoration, research, enforcement, and conservation.

The Santa Ana River Mouth Monitoring Project (SAR Project) enlists volunteers, community groups and local government to monitor human, dog and bird activity in the Santa Ana River Mouth area, a 13.2 acre parcel of land that is owned by four agencies including the California State Lands Commission, California State Parks, the County of Orange, and the City of Newport Beach. Due to the fragmented ownership of the area and differing regulations, management of activities and law enforcement in the area have been difficult. The six months of the SAR Project covered in this report (January 2023 through June 2023) was run as an ongoing project by Orange County Coastkeeper (OCCK) with funding from the California Coastal Conservancy. The goal of the SAR project is to monitor human, dog, and bird use of the area and to provide education and outreach to residents and visitors about the Wildlife Management Area at the Santa Ana River Mouth and the endangered species that reside within it.

EXECUTIVE SUMMARY

Between January and June 2023, 1094 surveys at the Santa Ana River Mouth were completed by 18 trained volunteers and 3 employees. In the surveys collected, 9,256 people and 798 dogs were observed. Of the dogs 548 were off-leash and 250 on-leash. Dogs off-leash accounted for 69% of the dogs observed. Law Enforcement Officers were present 162 times throughout all surveys completed in this time period with Lifeguards observed most frequently followed by Police. No citations were observed to be issued, though 9 contacts were made by law enforcement officers.

MAP AND PROJECT BOUNDARIES



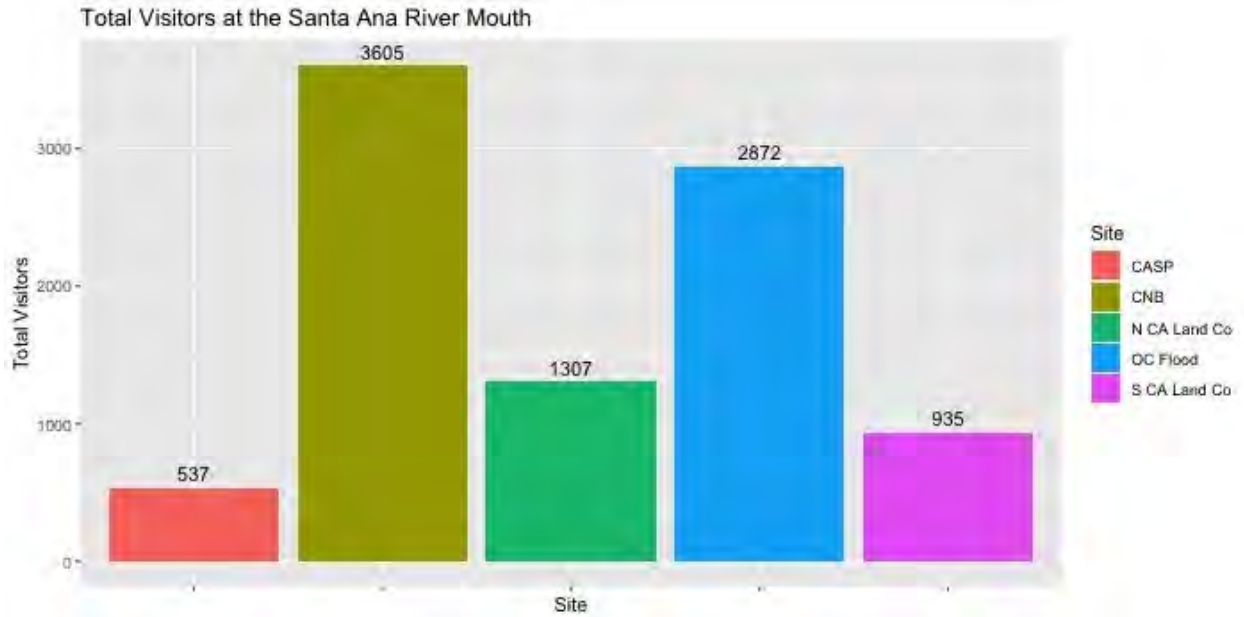
Map of Santa Ana River Mouth with property names overlaid to correlate with data sheets. **CASP**=California State Parks; **OC Flood**=Orange County Flood Control Channel; **CNB**= City of Newport Beach; **CA Land Co**= California State Lands Commission. In our data collection and analysis California State Lands Commission property was split into North and South portions, divided by the location of the river mouth during surveys, to improve our ability to understand access and use in the area.

ANALYSIS

Previously the data was analyzed using Excel, the datasheet has since been reformatted to be easier to use by volunteers and compatible with R; a statistical analysis program widely used in scientific writing for data visualization. The graphs were coded using the R programming language, allowing for higher efficiency in analysis and easier replication.

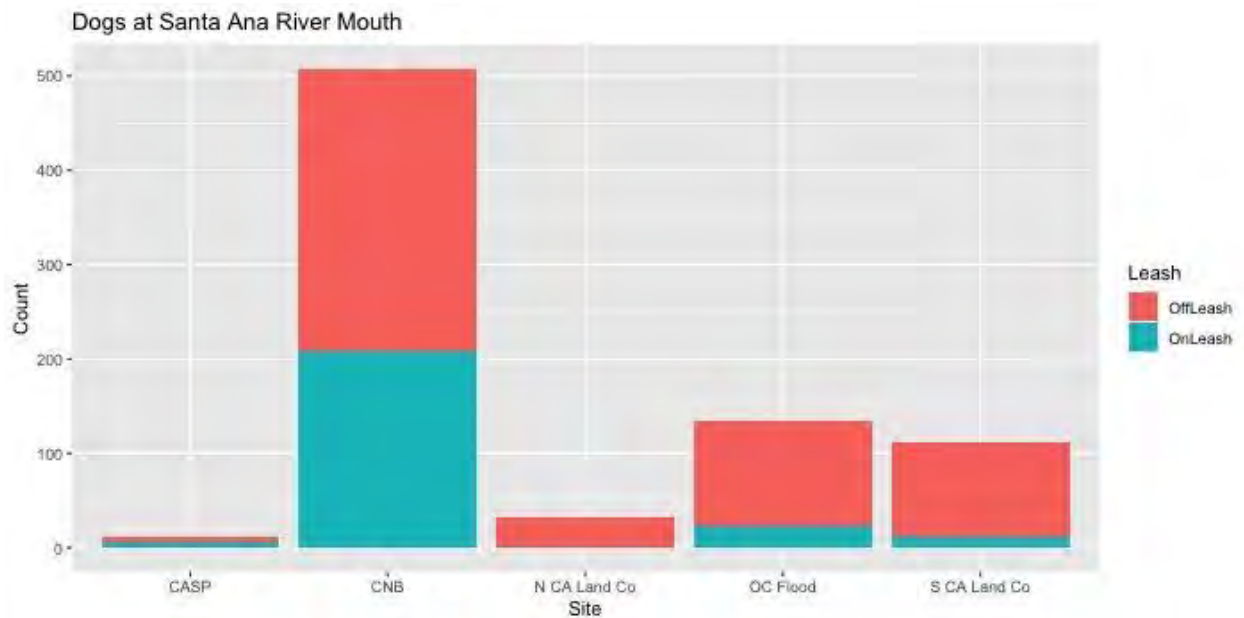
GRAPHS

Visitors Based On Location



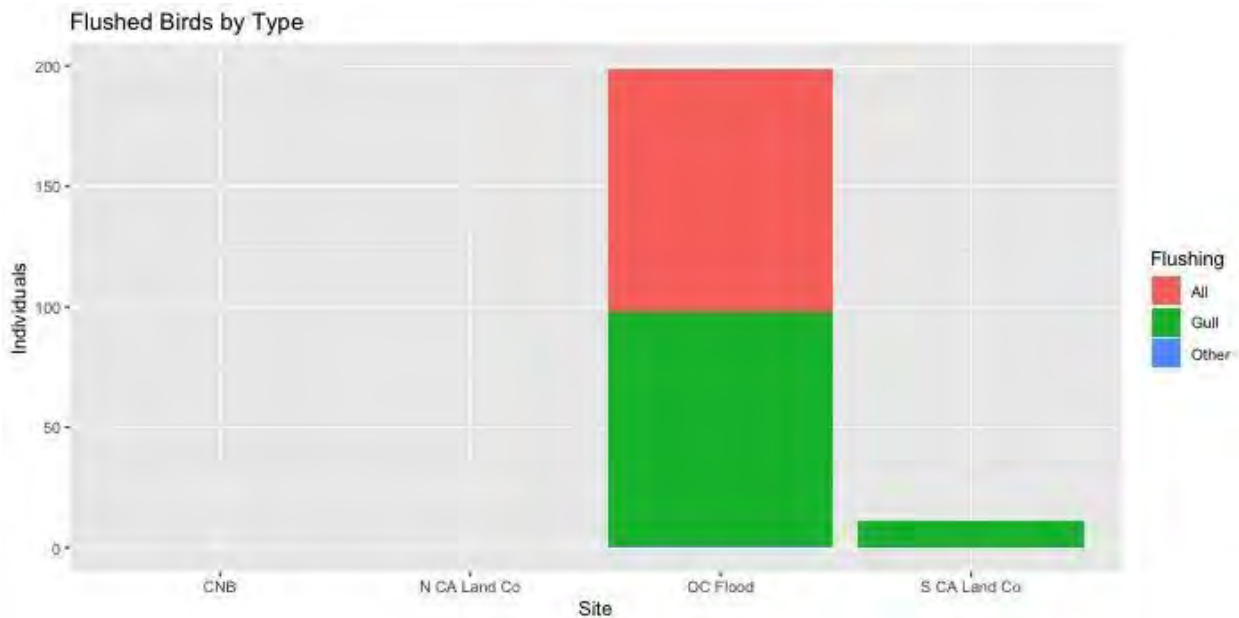
Dogs Based On Location

A total of 798 dogs were recorded at the Santa Ana River Mouth; 250 (31%) were on leash and 548 (69%) were off leash.



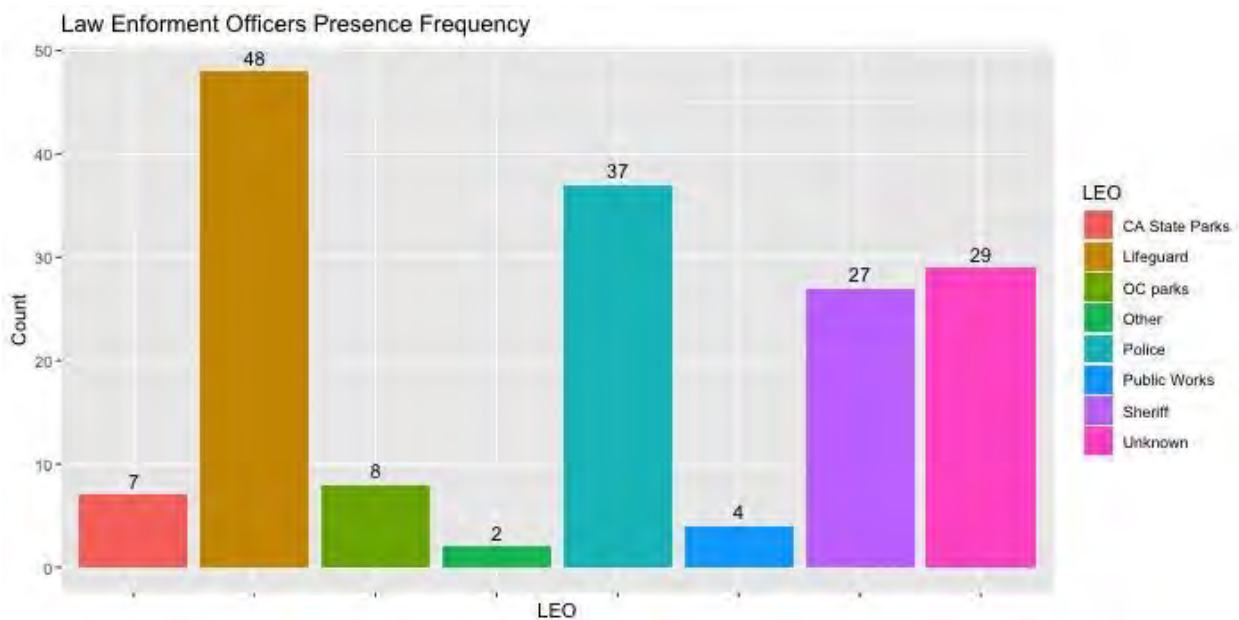
Bird Disturbances By Location

Bird disturbance, also known as flushing events, are defined when birds are present on a part of the beach and are approached by humans and/or dogs and they depart the beach. A total of 210 flushing events occurred in the OC Flood and South California Lands Commission jurisdictions. 48% of the bird flushes included a mix of terns, gulls, and shorebirds, 51% of the bird flushes were only gulls, and less than 1% consisted of other bird species.

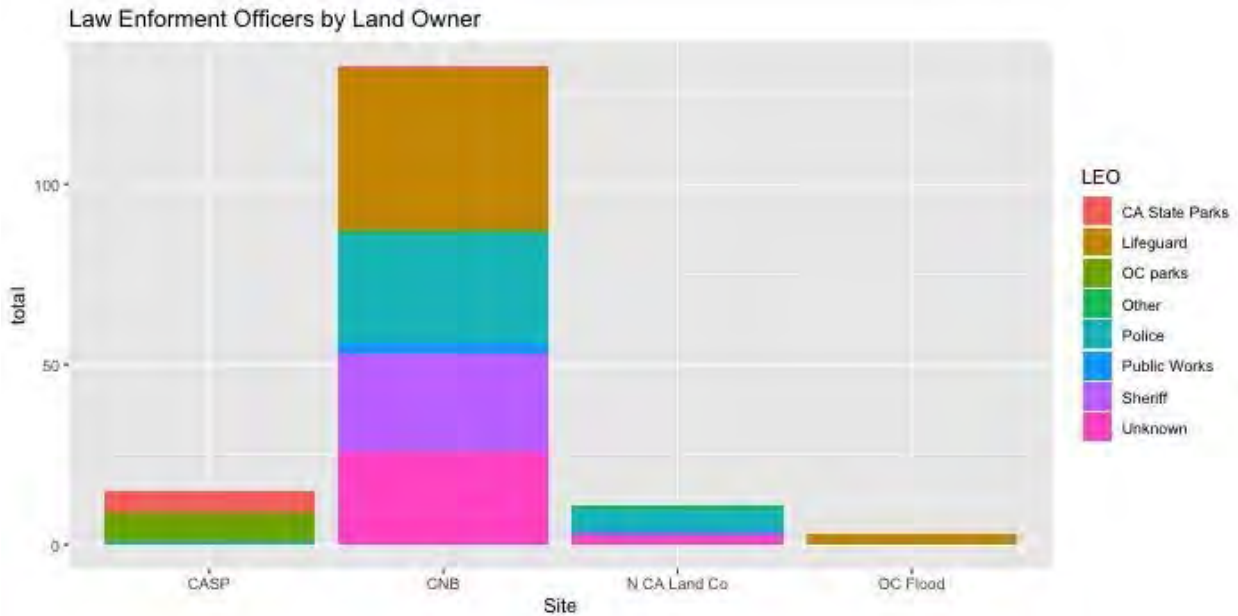


Law Enforcement Officers (LEO) Frequency

A total of 162 law enforcement officers were present during observational surveys. There were a total of 9 contacts made by various law enforcement officers.



Law Enforcement Officers by Location



TRAINING

Training took place with two components, an online one hour Zoom training that took place in February 2021 was recorded and distributed to new volunteers along with training documents. Volunteers then met with Volunteer Coordinator Sabrina Medina at the Santa Ana River Mouth to go over the monitoring protocol and the property map in person. Volunteers were trained to understand the land manager boundaries, monitor human recreation use, and identify bird species. In addition volunteers were instructed how to fill out the data sheet and given access to the standard operating protocol for the surveys.

OUTREACH TABLE


During this project Orange County Coastkeeper was able to conduct an outreach table for beach visitors. Visitors were given pamphlets detailing information about California Least Terns and Western Snowy Plovers. Additional information about the laws regarding dogs in the area and free biodegradable waste bags were provided to visitors as well. Between January and June 2023 the outreach table was set up at the Santa Ana River Mouth and targeted recreational beach users. Challenges for our public outreach included issues with volunteer recruitment and retention, and staffing capacity as the project was restarted after a funding hiatus. Overall OC Coastkeeper engaged in one on one or small group conversations with 14 visitors during the reporting period. An updated informational banner was developed to be used at outreach events that highlights the endangered and threatened species of birds and City of Newport Beach dog rules.



THREATENED AND ENDANGERED BIRDS ON THE BEACH


Western Snowy Plovers are a small species of shorebird that rely on coastal habitat. They use sandy beaches for nesting and forage on marine invertebrates along the shoreline. The Santa Ana River Mouth is considered Critical Habitat by U.S. Fish and Wildlife Service due to the wide open spaces and minimal vegetation. Additionally the kelp and driftwood found on the beach helps harbor food and offers protection from predators.

Western Snowy Plovers



California Least terns have a limited habitat along California coastlines. They use sandy beaches to nest and primarily use estuaries and lagoons to hunt. Least terns can be seen hovering over the Santa Ana River Mouth before plunging into the water for prey. This federally endangered species habitat has severely reduced due to coastal development and beach recreation.

California Least Terns




PROTECT THE BIRDS OF THE SANTA ANA RIVER MOUTH

Our fur babies don't mean to, but they can often scare off small hard to see threatened and endangered species causing them to abandon their nests.

LET THE BIRDS BE
Share the beach

WHEN ARE DOGS ALLOWED?
City of Newport Beach

- Dogs are never allowed on the beach or any beachfront sidewalk between the hours of 10 a.m. and 4:30 p.m., including the ocean front beaches and bay front beaches.
- Before 10 a.m. and after 4:30 p.m., dogs are allowed, if they are securely restrained by a substantial leash or chain not exceeding six feet in length and controlled by a person who is competent to restrain the dog.
- Off-leash dogs are never allowed in any public spaces including parks and beaches.



Shorebirds

Seagulls

Brown Pelicans

Keeping dogs on leash can help protect the birds that are nesting at the Santa Ana River Mouth!

Other Updates

This project is funded through a grant from the California Coastal Conservancy. Due to a gap in funding during a contract update to augment our funding, all data collection in January through early April of 2023 was done by previously trained volunteers. Paid staff resumed work on the project in April 2023 when the new funding became available. Since that time the project has been growing in volunteers and staff involvement, which has led to the creation of a Standard

Operating Procedure to ensure consistency in our survey methods. A new datasheet was also created to ease the data collection process and eliminate discrepancies. Other outreach materials, including a new banner, were also updated to increase public awareness.

Next Steps

Our next steps in this project include additional volunteer recruitment from the local community, continuation of the outreach table, and continuing to gather surveys. We will be purchasing needed equipment and updating our training materials. We will also begin presentations to local community outreach to state and local agency staff to get the information from this project to all interested parties.

Exhibit III

Chatten-Brown Law Group Link to videos:

https://drive.google.com/drive/folders/1Eu3-EfTgaxmvHGgsYkA7uXv-RX- HpvZ?usp=share_link

Exhibit IV

Photographs taken during County dredging in 2021



Pictured: Man and dogs next to “no trespassing sign” in front of birds, monitor stands in yellow jacket to the right



Pictured: other side of previous photograph, same monitor stands in yellow jacket in the middle







Pictured: two unleashed dogs, one in the sensitive dune habitat, in front of County dredging operations

Photographs during dredging in 2020



Pictured: Children play in dredging pile





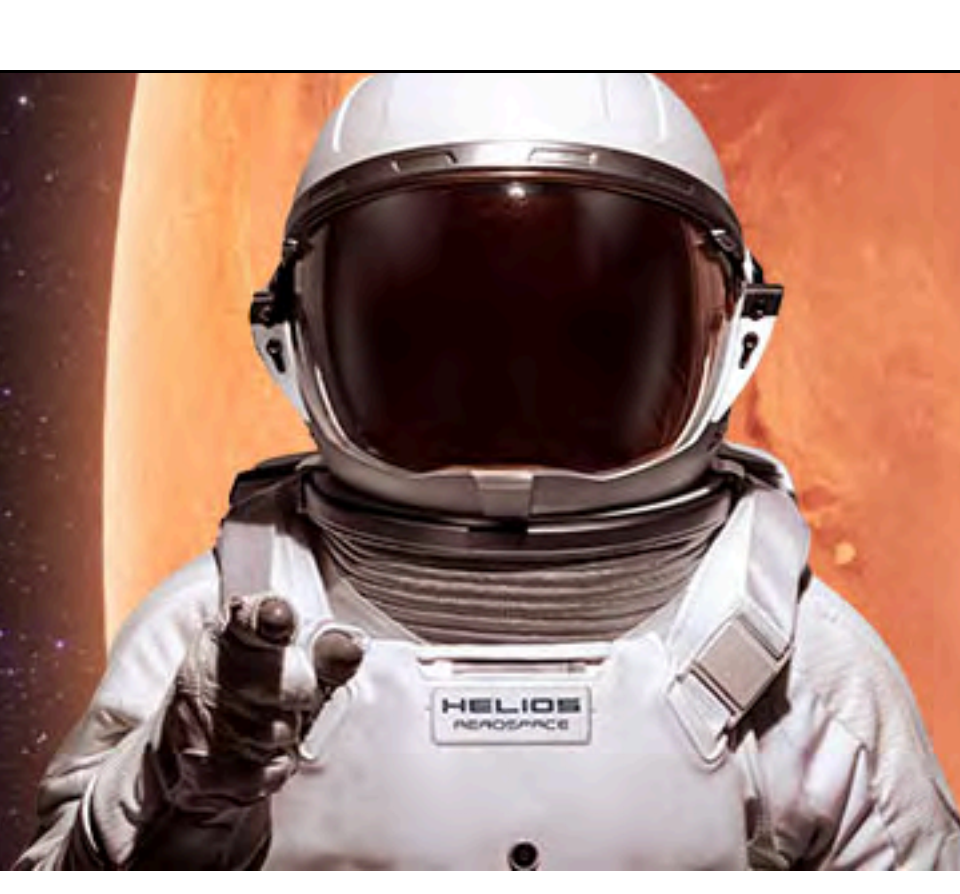
Pictured: County sign saying "Work Zone Keep Out"

Exhibit V

WE WANT YOU ON MARS

DISCOVER EXCITING NEW CAREER PATHS WITH US ON THE RED PLANET

LEARN MORE



Dog's death in storm drain near 'dog beach' raises safety issue

BY HANNAH FRY | STAFF WRITER

OCT. 5, 2016 6:02 PM PT



Madi McNaughton was just looking for a calm spot on the beach to play with her three dogs.

They had been frequent visitors to the stretch of sand between Newport and Huntington beaches, known in recent years as an unofficial dog beach where pups can run off leash.

ADVERTISEMENT

But McNaughton never imagined that a sunny day playing in the ocean could so quickly turn tragic.

ADVERTISEMENT

The 24-year-old Huntington Beach resident's 3-year-old mastiff mix, Rupert, drowned last Thursday after he was submerged in a storm drain east of the beach.

McNaughton, a veterinary assistant at VCA West Coast Specialty and Emergency Animal Hospital in Fountain Valley, sat with Rupert's body for five hours.

"I was just waiting for him to wake up," she said. "He looked so peaceful, like he was sleeping. It was the worst day of my life."



Madi McNaughton, of Huntington Beach, placed fliers around the Santa Ana River area warning dog owners to stay away from the storm drain that claimed her 150-pound mastiff mix Rupert. (Hannah Fry / Daily Pilot)

ADVERTISEMENT

The day at the beach had started like any other. McNaughton had decided to toss a ball for her dogs and a friend's dog where the water was calm, away from the waves and past the Pacific Coast Highway overpass. She often had seen people with their dogs and children in the area, so she figured she was still safely in the confines of the unofficial dog beach.

She realized later that the boundaries of the beach end at the overpass and she had taken her dogs into a flood channel.

ADVERTISEMENT

The area is appealing to many people because the water tends to be calmer farther from the waves.

"It may look inviting, but it's still a flood-control channel and it's dangerous," said Orange County Public Works spokesman Shannon Widor.

McNaughton tossed the ball and Rupert bounded to retrieve it, but as soon as he reached the toy, the tide came in and water began pushing the 150-pound dog toward a drain on the side of the Santa Ana River bed.

The drain consists of a concrete wall with an opening at the bottom used to keep storm and tidal waters from overflowing the river.

The current was strong and Rupert was moving quickly, so McNaughton jumped into the water and, unable to touch the bottom, swam toward her beloved dog.

"I grabbed the top of the drain and reached in right as he was going under to grab his collar," she said.

As her left hand clutched Rupert's collar, her right hand gripped the top of the concrete wall.

"My arm was completely stretched out and I couldn't breathe because the water had started going over my head," she said. "I had to let go of his collar because if I didn't I would have been sucked in after him."

She scrambled out of the water and rushed to the other end of the drain to find that it was covered by a metal grate, preventing Rupert from passing through.

ADVERTISEMENT

"He got stuck," she said. "I stood there at the grate for three to five minutes, just hoping to see some sign of him. I knew there was no way he was still alive. I was hysterical at that point."

McNaughton got Rupert from the Baldwin Park shelter when he was 3 months old. Plagued with mange, elbow dysplasia and degenerative hip disease, Rupert endured surgery after surgery. McNaughton had planned on nursing him back to health and offering him for adoption. But she fell in love with his loving, goofy personality.

Rupert had a penchant for destroying balls and was so excitable that he would whip his tail back and forth with such fervor that it would leave welts on McNaughton's legs.

ADVERTISEMENT

"He was just a gentle giant," she said. "He was the happiest dog, the best dog I've ever had. He was my baby."

Ten minutes after Rupert disappeared into the tide, his large body washed out of the drain, and animal-control officers, lifeguards and McNaughton's brother lifted him from the water.

"The hardest part of it all was seeing his washed-up body with his head underwater and knowing he was gone," McNaughton said.

For years, signs have been posted near the bike path that runs above the area warning people to stay out of the flood-control channel. But for dog owners walking from the dog beach to the other side of the Pacific Coast Highway overpass, there was no indication of the danger, McNaughton said.

In response to the tragedy, McNaughton posted fliers — featuring photos of her and Rupert — by the drain and along the bike path warning others not to make the same fatal mistake.

County crews also put up orange temporary fencing in the area. In coming weeks, crews will install a more permanent barrier and additional signs to dissuade people from entering the flood channel.

They also are investigating why there was no grate on the side of the drain where Rupert went in, Widor said. The absence of a grate allowed his body to flow inside.

"We're doing everything we can to make sure this doesn't happen again," Widor said.

The Santa Ana River area has received significant attention this year from county and Newport Beach officials, as well as nearby homeowners and those who frequent the area with their dogs.

The issue of leash laws came to the forefront late last year after Newport Beach Mayor Diane Dixon said she was fielding complaints from homeowners about unleashed dogs and unremoved dog waste.

In response, the city conducted an online survey to determine whether Newport residents would favor the city enforcing county leash laws at that beach. Hundreds of people responded, with the majority asking the city to leave the area alone.

In March, after two hours of passionate testimony from dog owners who frequent the spot, Newport's Parks, Beaches and Recreation Commission voted unanimously to reject a proposal to have city animal-control officers enforce leash restrictions there. The commission instead suggested the county look into designating the area as an official dog beach.

Dixon, city staff, dog beach advocates and county Supervisor Michelle Steel, whose district includes Newport Beach, began working on a proposal to that effect.

An ordinance to designate the area as the first legal dog beach on county land passed the Board of Supervisors' first reading but stalled in May over concerns from two environmental groups that having unleashed canines in the area could harm two at-risk bird species.

Michelle Cook, communications director for Steel, said at the time that county staff was looking into the groups' concerns and had not yet made a determination.

Dog beach advocate and current Newport Beach City Council candidate Mike Glenn said he expects the issue to head back to the Board of Supervisors in the next few months.

Glenn said Rupert's death could have been prevented with better signage and education about the boundaries of the unofficial dog beach.

"Some people, unfortunately, have been defining the area where Rupert died as dog beach," Glenn said. "This is not the proposed dog beach area."

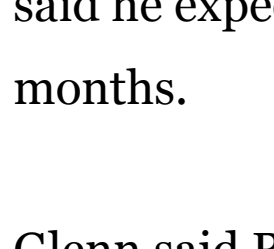
Glenn maintains that the proposed dog beach area closer to the ocean is safe and should be maintained as an off-leash area for canines.

McNaughton agrees that that beach should kept as is, but she hopes Rupert's death motivates officials to fence off the riverbed area near the storm drain.

"I just want it to be a safe place for dogs and their owners to play," she said. "I still want the dog beach there. All the dogs I've ever seen there are happy."

hannah.fry@latimes.com

Twitter: [@HannahFryTCN](https://twitter.com/HannahFryTCN)



Hannah Fry

Twitter Instagram Email Facebook

Hannah Fry is a Metro reporter covering Orange County for the Los Angeles Times. She joined the newspaper in 2013 as a reporter for the Daily Pilot, a Times Community News publication. Fry most recently covered breaking news for The Times and was part of the team that was a 2020 Pulitzer finalist for its coverage of a boat fire that killed 34 people off the coast of Santa Barbara. She grew up in Orange County and got her start as an intern at the Orange County Register.

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