

CALIFORNIA ENVIRONMENTAL LAW PROJECT

A Non-Profit Legal Corporation



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May 12, 2015

VIA FAX (415) 904-5400 and FEDEX

Steve Kinsey, Chairman
California Coastal Commission
45 Fremont Street, Suite 2000
San Francisco, CA 94105-2219

Re: A-3-SNC-98-114-EDD (Condition Compliance Dispute Resolution:
SNG EcoResort Project (GDP A-3-SNC-98-114))

Dear Mr. Kinsey:

This letter is submitted on behalf of California Audubon, the Peninsula Audubon Society, the Center for Biological Diversity, and Sierra Club in support of the Staff Report and recommendations in connection with the above-captioned Dispute Resolution hearing to be held May 15 with respect to the non-compliance of the SNG EcoResort Project with pre-issuance CDP conditions. All of the above conservation groups have deep concerns that construction and operation of this project will involve incidental take of Western Snowy Plover (“WSP”) without appropriate mitigation and monitoring measures that would reduce, minimize, and avoid incidental take of WSP. With regards to the Dispute Resolution Procedure, the conservation groups believe the Developer is not in compliance with each pre-issuance condition of the Coastal Development Permit (“CDP”) is not in compliance with those pre-issuance conditions of the CDP that involve protection of or compact avoidance for Western Snowy Plover (WSP). In particular, the developer has failed to comply with pre-issuance conditions related to habitat protection for sensitive species and measures intended to prevent unlawful “take” of sensitive species. 16 U.S.C. 1540.

In August 2014, this Commission approved pre-CDP issuance conditions for this Project. However, over the last seven months, despite a number of submissions, the Developer has been unable or unwilling to satisfy the terms of the pre-issuance conditions, as stated in the Staff Report. Unwilling or unable because of financial constraints to provide maps, diagrams, and required plans that satisfy the conditions, the Developer invokes Dispute Resolution in an attempt to persuade Commissioners that despite its non-compliance with the pre-issuance conditions, a CDP should issue. The conservation groups urge the Commission to adopt findings consistent with the Staff Report for the May 15, 2015 hearing and to reject the developer's contentions that it has satisfied the conditions.

The conservation groups believe that there is substantial evidence in the record to support a determination upholding "the Executive Director's determination that Special Conditions 1-6, 9(f), and 20, which are the subject of the Dispute Resolution Number A-3-SNC-98-114 EDD, have not been met." The conservation groups urge the Commission to adopt findings finding that SNG is not in compliance with Special Conditions 1-6, 9(f), and 20, as recommended by staff in its Report.

The conservation groups, through their previous correspondence with the Commission in connection with the April 2014 permit hearing and the August 2014 hearing on the pre and post CDP issuance conditions, have repeatedly set out their concerns that the SNG EcoResort Project have repeatedly set out their concerns that the Project will not adequately protect WSP. In particular, the conservation groups are concerned about the Developer having elected not to obtain an incidental take permit for WSP from USFWS pursuant to 16 USC § 1539 and failing to minimize or avoid any activities, in connection with construction and operation of the Project, that would result in unlawful take of WSP, in violation of Section 10 of the Endangered Species Act, 16 USC §1540. They are also concerned that the Developer intends to ignore the requirements in the pre-issuance conditions that there be "enhanced" habitat for WSP as part of a Dune Restoration Plan as well as other conditions intended to minimize and avoid take (such as biological survey protocols, minimization of lighting that would attract predators, and location of construction staging areas).

As the Staff Report points out, and as supplemented by the attached Report of Scott Cashen, biologist, submitted on behalf of California Audubon, Peninsula Audubon, CBD, and the Sierra Club, the submissions of the Developer fail to satisfy several of pre-issuance CDP conditions that implicate WSP (historically occupied) habitat and that were intended to enhance habitat for the WSP, as well as other conditions intended to include certain measures that would minimize and avoid take of WSP.

I. The Developer Has Failed to Comply with Conditions 3(a), 3(d), 3(h) and 3(i) Providing for a Dune Habitat Restoration Plan that Enhances Sensitive Species Habitat

Condition 3(a) provides:

“Restoration shall be premised on enhancing dune habitat so that it is self-functioning, high quality habitat in perpetuity.” (emphasis added.)

Condition 3(d) provides:

“Special provisions shall be applied to explicitly enhance sensitive species habitats, including at a minimum snowy plover and Smith’s blue butterfly habitats, as part of dune restoration activities, and such provisions shall be consistent with applicable state and federal agency requirements for these species.” (emphasis added).

The Staff Report finds that the “submitted Dune Restoration Plan does not provide any specific provisions to protect and enhance sensitive species habitats, including for Western Snowy Plover.” The Staff Report finds that any such Plan must “focus on areas where the plover has historically occupied the site, including access to the more interior dunes through the lower area fronting the old borrow pit.” (Staff Report p.14). The current draft of the Plan completely fails to do that. Since Condition 3(d) requires that the provisions in the restoration plan with respect to sensitive species “shall be consistent with applicable state and federal requirements for these species,” the Staff Report finds that with Condition 3 requires “coordination” with CDFW and USFWS in connection with preparation of the Plan. (Staff Report p. 14.) Yet, there is no evidence whatsoever that such coordination has taken place. Moreover, as pointed out by Scott Cashen in the attached letter-report, the developer has not complied with Conditions 3(h) and 3(i), which require the Dune Restoration Plan to include reporting and contingency programs, as well as monitoring and maintenance plans.

II. The Developer Has Failed To Comply with Pre-Issuance Conditions Relating to a Construction Plan

Condition 2(a) provides:

“The Construction Plan shall identify the specific location of all construction areas, all staging areas, and all construction access corridors in site plan view. All such areas within which construction activities and/or staging are to take place shall be minimized to the maximum extent feasible in order to have the

least impact on dunes, public access and public views, as well as to maintain best management practices (BMPs) to protect dune resources on-site and in the surrounding area, including by using inland areas for staging and storing construction equipment and materials, as feasible.”

Condition 2(e) provides:

“The plan shall include pre-construction surveys for sensitive species including WSP and Smith’s blue butterfly. If any such species is identified in the project impact area, the Permittee shall consult with the biological monitor, CDFW, USFWS and the Executive Director, and shall implement mitigation measures as directed by the ED, including measures consistent with the approved HPP and/or any other state or federal agency requirements.”

There is no evidence in the maps and drawings submitted as the Construction Plan, in which construction areas, staging areas, and construction access areas are designated that any consideration was given to minimizing impacts on dune resources (including sensitive species) in planning for those construction areas. Nor is there any specification of BMP’s to protect dune resources on-site or in the “surrounding area.”

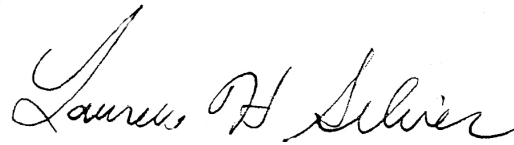
Condition 2(e) requires the Plan to include pre-construction survey protocols to determine the presence of sensitive species including WSP and also requires that there be specific location of all construction and staging areas in order to minimize to the maximum extent feasible any impact on dunes and dune resources. The conservation groups also believe that Special Condition 2 requires at a minimum consideration of historically occupied habitat in connection with the designation of the construction areas. There is no evidence that this was done. Since, as pointed out in the maps provided by Point Blue, there has been markedly increased use of the site by WSP this breeding season, it would have been appropriate as well to have performed a pre-construction survey for WSP presence. The Developer then would have been able to plan the specific location of all construction and staging areas in a manner that minimizes impacts to dune resources, as required under Condition 2(e).

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Attached hereto is the Report of Scott Cashen, an expert biologist with extensive knowledge about the area and impacted species. The conservation groups urge the Commission to adopt and confirm the determination of the Executive Director that SNG is not in compliance with certain of the pre-issuance conditions, as reflected in the Staff Report. If you have questions or concern please feel free to contact us at your convenience.

Sincerely,

CALIFORNIA ENVIRONMENTAL LAW
PROJECT



Laurens H. Silver
California Environmental Law Project



Aruna Prabhala, Center for Biological Diversity

On Behalf of California Audubon, Peninsula
Audubon Society, Center for Biological Diversity
and Sierra Club

cc:

Michael Watson, via Fax (831) 427-4877 and FedEx
California Coastal Commission
725 Front Street, #300
Santa Cruz, CA 95060

Daniel Lester, via Fax (831) 427-4877

May 11, 2015

Mr. Steve Kinsey
California Coastal Commission
45 Fremont Street, #2000
San Francisco, CA 94105

Subject: Monterey Bay Shores Resort Project—Compliance with Coastal Development Permit Conditions (Dispute Resolution for CDP A-3-SNC-98-114)

Dear Mr. Kinsey:

This letter contains my comments on Security National Guaranty's (Applicant) compliance with the special pre-issuance conditions associated with the Coastal Development Permit for the Monterey Bay Shores Resort Project (Project). Specifically, I address the special conditions that have implications on effects to the western snowy plover, which is a federally threatened shorebird known to occur on the Project site.

I am an environmental biologist with 21 years of professional experience in wildlife ecology and natural resources management. To date, I have served as a biological resources expert for over 100 projects throughout California. My experience in this regard includes assisting various clients with evaluations of biological resource issues, and preparing comments (or testimony) on projects undergoing environmental review. My educational background includes a B.S. in Resource Management from the University of California at Berkeley, and a M.S. in Wildlife and Fisheries Science from the Pennsylvania State University.

The comments herein are based on an extensive review of scientific literature, documents in the administrative record, the analysis and associated exhibits provided by Coastal Commission staff on 30 April 2015, and the knowledge and experience I have acquired during more than 21 years of work in the field of natural resources management.

Dune Protection Plan (Special Condition 3)

Provisions to Enhance Snowy Plover and Smith's Blue Butterfly Habitats

Special Condition 3 requires Dune Restoration Plans that have been approved by the Executive Director prior to issuance of the CDP. The Dune Restoration Plans must contain special provisions to explicitly enhance snowy plover and Smith's blue butterfly habitats as part of dune restoration activities (Special Condition 3[d]). The Applicant claims the provisions for snowy plover and Smith's blue butterfly are not a required condition, and that they are a part of the Habitat Protection Plan ("HPP") that will be submitted after sign off on the pre-issuance conditions.¹ In my opinion, the Settlement

Agreement makes it clear that provisions for snowy plover and Smith's blue butterfly habitat enhancements are prior-to-issuance ("PTI") requirements. Nevertheless, I reviewed the Applicant's HPP and found nothing in it that would provide more than a superficial benefit to the snowy plover and Smith's blue butterfly. Similarly, I found nothing in the HPP (or Dune Restoration Plans) that ensures the Applicant's proposed measures would result in "self-functioning, high quality habitat in perpetuity," as is required by Special Condition 3(a).

Monitoring and Maintenance Plan

The Applicant's Dune Restoration Plans are supposed to contain a plan for monitoring and maintenance of snowy plover and Smith's blue butterfly habitat areas for the duration of the development agreement. Special Condition 3(h) identifies requisite components of the monitoring and maintenance plan. They include the schedule, proposed monitoring studies, study design, and adaptive management procedures. The Dune Restoration Plans submitted by the Applicant do not describe how the Applicant intends to monitor and maintain enhanced habitats such that they provide a long-term benefit to the snowy plover and Smith's blue butterfly.

Reporting and Contingency

Special Condition 3(i) outlines the reporting and contingency program needed to ensure the performance standards specified in the Dune Restoration Plans are met. The Applicant's Dune Restoration Plans do not identify any performance standards. This is a significant flaw, because without performance standards there is no assurance that restoration activities would be successful, or that they would have any value in conservation of the snowy plover and Smith's blue butterfly. Moreover, the performance standards identified in the HPP are entirely inappropriate because they are based on vegetation goals, and not on the response of the target species (i.e., snowy plover and Smith's blue butterfly).

Consistency with State and Federal Agency Requirements

The Applicant misleadingly contends it would implement measures "consistent with known and accepted applicable state and federal agency requirements for [western snowy plover]."² It is important for the Commissioners to understand that the U.S. Fish and Wildlife Service (USFWS) already has concluded (by letter dated 2014 Apr 7) that the Project would likely cause take of western snowy plovers, that the provisions of the Applicant's current (unapproved) HPP are not sufficient to avoid this take, and that it is unlikely that the take of western snowy plovers would be adequately mitigated on-site.³ The Applicant has refused to prepare an HCP or apply for an incidental take permit. Furthermore, the Applicant has ignored the requirements of the pre-issuance conditions

¹ Staff Exhibit 7, p. 14.

² *Ibid.*

³ USFWS, 2014 Apr 7 letter to the California Coastal Commission, p. 8.

relating to enhancement of snowy plover habitat and instead deferred habitat enhancement issues to the HPP it is required to prepare after permit issuance.

In summary, although the Applicant asserts the PTI requirements of Special Condition 3 would be satisfied, there is no evidence in the administrative record supporting that assertion. As a result, I concur with staff that the Applicant's Dune Restoration Plans are not in compliance with PTI requirements of Special Condition 3.

Habitat Protection Plan

I recognize the Applicant is not required to have an approved HPP before the CDP is issued. However, several of the special conditions that *are* required before the CDP is issued are dependent on the HPP. For example, Special Condition 2(e) requires pre-construction surveys for sensitive species including western snowy plover, and Smith's blue butterfly, *consistent with the HPP*. However, neither the existing draft of the Applicant's HPP nor the construction plan identifies the methods that would be used to ensure the efficacy of the pre-construction surveys. Moreover, the existing (unapproved) HPP specifies the need for pre-construction surveys for snowy plovers only if construction is expected to begin or continue during "prime plover nesting season."⁴ This issue is confounded because the HPP does identify what the Applicant considers to be the "prime plover nesting season." To reduce the potential for take, pre-construction surveys for plover nests, and precocial young, need to be conducted throughout the *entire* breeding season. In my opinion, the pre-construction survey requirements described in the draft HPP (together with the absence of survey protocols set out in the construction plan) do not satisfy the intent of Special Condition 2(e).

Lighting (Special Condition 1(m))

The Applicant's lighting plan includes more than 100 lights of various sizes and lumens on project pathways and roadways. Seventy-four lights would be on the proposed pathways seaward of the planned development. I concur with staff's assessment that the lighting scheme is not wildlife friendly, and that even low lighting of the dunes can subject vulnerable species, such as western snowy plover, to increased predation by attracting predators. This is significant because the Applicant intends to install lighting in the immediate vicinity of snowy plover nest sites.⁵

Public Access Management Plan and Resort Pathways (Special Conditions 5 and 11)

According to staff, the Public Access Management Plan has not been updated. In addition, the Applicant has proposed resort pathways that extend into an area historically used by western snowy plovers. Because anthropogenic disturbance is the primary threat to the western snowy plover, the location of the resort pathways and the content of the Applicant's Public Access Management Plan have direct implications on Project impacts

⁴ HPP, p. 4-13.

⁵ Data obtained from Point Blue Conservation Science, Petaluma (CA).

to the species.⁶

Conclusion

As staff notes, “[t]he special conditions were imposed to ensure that the approval conforms to LCP and Coastal Act development standards, including that it...restores and protects dune habitat on the site [and] enhances habitat values for listed species...”

Based on my review of the administrative record, including plans and other documents provided by the Applicant, it is my conclusion that the Project, as currently proposed, would not restore and protect dune habitat, nor would it enhance habitat values for the western snowy plover.

Sincerely,



Scott Cashen, M.S.
Senior Biologist

⁶ United States Fish and Wildlife Service. 2007. Recovery Plan for the Pacific Coast Population of the Western Snowy Plover (*Charadrius alexandrinus nivosus*). Sacramento, California. xiv + 751. *See also* Brindock KM, MA Colwell. 2011. Habitat Selection by Western Snowy Plovers During the Nonbreeding Season. *Journal of Wildlife Management* 75(4):786-793.