

CALIFORNIA COASTAL COMMISSION

SAN DIEGO AREA

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Staff: EL-SD
Staff Report: September 29, 2005
Hearing Date: October 12-14, 2005

AMENDMENT REQUEST
STAFF REPORT AND PRELIMINARY RECOMMENDATION

Application No.: 6-84-525-A1

Applicant: 22nd District Agricultural
Association

Agent: Patricia A. Butler

Original Description: Construction of a pedestrian underpass (approximately 600 feet long and 20 feet wide) to connect existing grandstand spectator area with the racetrack infield.

Proposed Amendment: Modify Special Condition #1 to delete reference to a Memorandum of Agreement (MOA) with California Department of Fish & Game (CDFG) requiring provision of least tern nesting habitat, and to instead require the provision, maintenance and monitoring of 11.3 acres of least tern nesting habitat to be constructed as part of the San Dieguito Wetland Restoration Project as mitigation for the pedestrian underpass to the racetrack infield. The amendment also proposes the placement of Area W6b of the San Dieguito Restoration Plan into permanent open space.

Site: South of the San Dieguito River, both east and west of I-5, and east of the Del Mar Fairgrounds, Del Mar and San Diego, San Diego County

Substantive File Documents: San Dieguito Wetlands Restoration Project Final Restoration Plan, revised July, 2005, and received September 6, 2005; CDP #6-04-088; Three-way Agreement between 22nd District Agricultural Association (District), Southern California Edison (SCE), and the Joint Powers Authority (JPA), dated July 2005 and Draft Grant of Easement (Least Tern Nesting Habitat Sites)

STAFF NOTES:**Summary of Staff's Preliminary Recommendation:**

Staff recommends approval of the proposed amendment, including replacement of Special Condition #1. Implementation of this amendment will resolve an outstanding permit violation, and will be done in conjunction with the San Dieguito Wetland Restoration Project Final Restoration Plan (FRP). The FRP identifies areas for four new least tern sites, totaling 11.3 acres. This amount of new least tern nesting area, along with

an existing 1-acre site on CDFG property, has been deemed adequate by the CDFG and U.S. Fish and Wildlife Service (Service) to serve this species needs in this location. In addition to a revised Special Condition #1, staff recommends three more conditions to address maintenance and monitoring of the new nesting sites, dedication of Area W6b of the San Dieguito Restoration Plan, and options if the proposed nesting sites fail. Chapter 3 of the Coastal Act is the legal standard of review for this amendment request.

I. PRELIMINARY STAFF RECOMMENDATION:

The staff recommends the Commission adopt the following resolution:

MOTION: *I move that the Commission approve the proposed amendment to Coastal Development Permit No. 6-84-525 pursuant to the staff recommendation.*

STAFF RECOMMENDATION OF APPROVAL:

Staff recommends a YES vote. Passage of this motion will result in approval of the amendment as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

RESOLUTION TO APPROVE A PERMIT AMENDMENT:

The Commission hereby approves the coastal development permit amendment on the grounds that the development as amended and subject to conditions, will be in conformity with the policies of Chapter 3 of the Coastal Act and will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3. Approval of the permit amendment complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the amended development on the environment, or 2) there are no feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the amended development on the environment.

II. Special Conditions.

The permit amendment is subject to the following conditions:

1. Construction of Least Tern Nesting Sites. This condition supercedes and replaces Special Condition #1 of the original permit. The original condition required replacing impacted least tern nesting area through implementation of an existing Memorandum of Agreement (MOA) between the 22nd District Agricultural Association (District) and the California Department of Fish and Game (CDFG). The 1984 MOA has not been implemented and the least tern nesting area impacted in 1984 is being replaced by the project approved by this subject permit amendment.

PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall submit to the Executive Director, for review and written approval, final plans for the creation and preparation of no less than 11.3 acres of least tern nesting area, which shall consist of the final plans for areas NS11, NS12, NS13, and NS14 as approved by the Executive Director pursuant to Coastal Development Permit #6-04-088.

PRIOR TO THE COMMENCEMENT OF CONSTRUCTION, the applicant shall submit to the Executive Director, for review and written acceptance, copies of the signed, approved and recorded, where applicable, three-way agreement between the District, Southern California Edison (SCE) and the San Dieguito River Park Joint Powers Authority (JPA), and all grants of easement.

The permittee shall undertake the development in accordance with the approved final plans. Any proposed changes to the final plans shall be reported to the Executive Director. No changes to the plans shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

2. Revised Maintenance and Monitoring Program. PRIOR TO THE ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT, the applicant shall submit to the Executive Director, for review and written approval, a final maintenance and monitoring program, that shall be in substantial conformance with the preliminary program titled Annual Maintenance & Maintenance Monitoring of Least Tern Nesting Sites, draft dated May 7, 2001 and attached hereto as Exhibit #3, except it shall be revised to include:

1. an estimated annual budget;
2. submittal of an annual maintenance and monitoring report to the Executive Director at the end of each nesting season; and
3. incorporation of any applicable modifications adopted by the Coastal Commission on either CDP#6-04-088 or the subject amendment.

The permittee shall undertake annual maintenance and monitoring for the four new nesting sites in perpetuity, subject to abandonment and future conversion as allowed in Special Condition #4 below, in accordance with the approved final plan. Any proposed changes to the maintenance and monitoring program shall be reported to the Executive Director. No changes to the plan shall occur without a Coastal Commission approved amendment to this coastal development permit unless the Executive Director determines that no amendment is required.

3. Offer to Dedicate Open Space Easement.

- A. No development, as defined in section 30106 of the Coastal Act shall occur in the 8-acre site known as Area W6b as shown in Exhibit #2 except for the following

development, if approved by the Coastal Commission in a coastal development permit: (1) creation of wetlands that are compatible with the surrounding San Dieguito Wetland Restoration Project and (2) creation of habitat area, as defined by the Coastal Act, if compatible with the surrounding San Dieguito Wetland Restoration Project.

- B. PRIOR TO ISSUANCE OF THE COASTAL DEVELOPMENT PERMIT AMENDMENT**, the applicant shall execute and record a document in a form and content acceptable to the Executive Director, irrevocably offering to dedicate to the San Dieguito River Valley Joint Powers Authority (JPA) an open space and conservation easement for the purpose of open space and future wetland and/or habitat creation. Such easement shall be located over the 8-acre area known as W6b in the San Dieguito Wetland Restoration Project as shown in Exhibit #2. The recorded document shall include legal descriptions of both the applicant's entire parcel and the easement area. The recorded document shall also reflect that development in the easement area is restricted as set forth in this permit condition.

4. Future Conversion of Tern Nesting Sites. The four approved least tern nesting sites (i.e., 11.3 acres of useable nesting habitat) shall be actively maintained and monitored by the applicant, consistent with the approved plans, for a minimum of ten years following the completion of construction of the sites and surrounding wetland restoration areas in accordance with the approved Final Restoration Plan. If, at the end of ten years, any or all of the sites have not been successfully occupied (i.e., fledging of chicks) by nesting least terns or snowy plovers, the applicant may apply to the Coastal Commission for another amendment to this permit to propose alternative use of the areas. Any such alternative use shall be fully compatible with the surrounding natural areas of the restored wetland, and consistent with an open space designation. At the same time, the applicant shall propose new methods or locations to fulfill the District's continuing obligation under the subject permit to provide at least 11.3 acres of viable least tern nesting habitat.

5. Condition Compliance. Within 90 days of Commission action on this coastal development permit amendment, or within such additional time as the Executive Director may grant for good cause, the applicant shall satisfy all requirements specified in the conditions hereto that the applicant is required to satisfy prior to the issuance of this permit. Failure to comply with this requirement may result in the institution of enforcement action under the provisions of Chapter 9 of the Coastal Act.

III. Findings and Declarations.

The Commission finds and declares as follows:

1. Original Project/Site History/Amendment Description. In 1984, the Commission approved a coastal development permit (CDP) for the 22nd District Agricultural Association (District) for construction of a pedestrian tunnel between the existing grandstand area and the racetrack infield. The purpose of the project was to expand the

viewing area for patrons of the annual thoroughbred race meet at the Del Mar Racetrack, to provide a different race perspective and to allow a greater number of people to attend the events. The tunnel has been built and in operation for approximately twenty years.

As part of the Commission's approval of the District's CDP #6-84-525 in November 1984, the Commission found that, "[U]se of the infield by either fairgoers or racetrack attendees would therefore be expected to increase the intensity of the site's use and in turn have a substantial impact on the need for increased parking and/or circulation improvements." They further found that, "[A] historical least tern nesting area exists on an area commonly known as the South Overflow Parking Lot (SOL). This area is presently used for parking during the Del Mar County Fair; the District seeks to continue this use on portions, if not all, of the affected parcel." Finally, the Commission found that, "[T]he parcel, currently used as an overflow parking lot for the racetrack and fairgrounds during the summer, is one which the terns have used for nesting in the past but with no success in the last ten years due to disturbance by domestic animals and people."

Since construction of the proposed infield tunnel would intensify the use of the sixteen acre SOL during the summer, which is also the least tern nesting season, the Commission required that sixteen acres of appropriate nesting habitat be provided elsewhere for the California Least Tern as mitigation for that increase in intensity of use. To satisfy the mitigation requirement, the District proposed to enter into an agreement with the California Department of Fish and Game (CDFG), and that agreement was then proposed as part of the project.

In December 1984, the District and CDFG entered into a Memorandum of Agreement (MOA). The District remains obligated under the terms of the MOA, as part of the District's pedestrian tunnel proposal and as incorporated into Special Condition #1 of the District's CDP #6-84-525, to create sixteen acres of nesting habitat for the California Least Tern in the manner specified in the 1984 MOA.

Sections 3 and 4 of the 1984 MOA provided for two potential means to satisfy this requirement. The 1984 MOA also required the District to designate and manage a four-acre interim least tern nesting site on the south overflow lot until such time as a permanent site was established under either Section 3 or 4 of the agreement. Section 3 of the 1984 MOA identified the preferred permanent least tern nesting site as being the property known as Del Mar 88, then in private ownership. The terms of the MOA required the District to cause seven acres to be made available for a least tern nesting site in conjunction with a CDFG effort to obtain an additional nine acres. However, Section 4 of the 1984 MOA set forth a timeframe in which the creation of the preferred permanent nesting site referenced in Section 3 was to have occurred. Section 4 also provided for an alternate requirement for the creation of a permanent nesting site, stating "[i]n the event that the District and the DFG are unable on or before October 1, 1989, to cause the preferred suitable Tern nesting habitat to be made available, as provided in Section 3, then the District shall create a sixteen (16) acre Tern nesting site on State lands leased or owned by the DFG within the SDLEP [San Dieguito Lagoon Enhancement Plan] area." When the District was unable to cause the preferred permanent least tern

nesting site to be made available within the required timeframe, it became responsible under Section 4 of the 1984 MOA for creation of the entire 16-acre permanent nesting site.

The District was unable to find a nesting site that met the specific parameters of the 1984 MOA, leaving them in non-compliance with the permit. Thus, in October 1991, the District and Commission entered into a Settlement Agreement. Under the terms of Section 1(d) of the Settlement Agreement (SA), the District agreed that the Executive Director of the Commission shall have the authority to "determine the appropriate permanent Least Tern nesting site or alternative mitigation" on, or by means of which, the District could satisfy its obligations under the 1984 MOA and CDP #6-84-525. The District had purchased the Rivermouth Property previously, and had entered into a second MOA with CDFG in an attempt to use 5 acres of this site for the nesting area. The SA expressly provided that the Executive Director's authority included the power to determine the suitability of the Rivermouth Property for this purpose. Moreover, the SA provided that the District may fulfill its obligations by creating least tern nesting habitat on any alternative site that is agreed to by both the Executive Director and the District, and also provided for consideration of alternative means by which the District could satisfy its obligations under the 1984 MOA and CDP #6-84-525.

The District submitted an analysis of seven alternative sites and/or methods to satisfy the mitigation requirement of the original permit, including the Rivermouth Property. For various reasons, none of the suggested alternatives was acceptable. Thus, until recently, the Executive Director and the District had not been able to agree on a permanent least tern nesting site to satisfy the District's obligations under the 1984 MOA and CDP #6-84-525. However, the obligations remain today as binding on the District and as subject to the Commission's legal enforcement authority as they were when they were first imposed.

When in 1992 the Coastal Commission approved the San Dieguito Lagoon as the restoration site for mitigation required by Southern California Edison and its partners under a separate coastal development permit (CDP #6-81-330, formerly 183-73), it was mutually agreed that the District should defer further efforts until the planning for the overall San Dieguito wetland restoration project was complete. For this reason, the Commission did not pursue enforcement actions against the District for its non-compliance with CDP #6-84-525 during this period. Planning for the overall restoration project is finished, and a coastal development permit application (CDP #6-04-088) for the restoration project is pending before the Commission on the October, 2005 agenda.

The District has often stated its expectation that the wetland restoration plan would provide sufficient least tern nesting habitat to satisfy the District's outstanding obligations under CDP #6-84-525. The Commission finds that the FRP does identify suitable least tern nesting habitat sufficient to satisfy the District's permit obligations as discussed below. Four new nesting sites for the California Least Tern are identified in the FRP, now under Commission review. In consultation with the CDFG and USFWS, Commission staff concluded that, with proper maintenance and monitoring, these four

sites would be suitable for least tern nesting site habitat. Representatives of both the CDFG and USFWS concur with this conclusion. Through the subject amendment request to the District's permit, these four sites are proposed as the habitat necessary to fulfill these obligations for the reasons discussed below.

The 1984 MOA, as incorporated as a requirement of CDP #6-84-525, specifies that the permanent least tern nesting site be located within the area encompassed by the San Dieguito Lagoon Enhancement Plan (SDLEP). The area of the SDLEP generally conforms to the portion of the current wetland restoration plan that is west of Interstate 5. The current wetland restoration plan also includes significant acreage east of I-5. Two of the nesting sites, NS 11 and 12, are located within the original SDLEP area west of I-5 and two sites, NS 13 and 14, are located within the expanded wetland restoration area east of I-5.

As noted above, the 1984 MOA requires the District to create the 16 acres "on land owned by the CDFG." The staff interprets this stipulation as having as its purpose relieving the District of the cost of acquisition for an alternative permanent nesting habitat. Creating the required least tern nesting habitat without imposing site acquisition costs would be consistent with this underlying purpose of the MOA, regardless of actual site ownership. The four new nesting sites proposed in the restoration plan all are on property that is being made available by the JPA and SCE for project implementation. Thus, the District would not be liable for any acquisition costs in accordance with this provision of the 1984 MOA.

The 1984 MOA intended that the 16 acres be contiguous (i.e., one large site). Based on SCE's latest grading plans, the total footprint for the four sites is approximately 20 acres, with a total usable acreage of 11.3 acres. The four sites are not contiguous. Nevertheless, based on input from project biologists, CDFG and USFWS, these four sites have the greatest potential for success and would be compatible with the overall restoration plan. Moreover, in the opinion of experts on California Least Terns, the construction of multiple nesting sites is advantageous. Multiple nesting sites provide the opportunity for terns to move from one site to another if a site becomes unsuitable due to the presence of predators or other factors. In addition, the nesting sites identified in the restoration plan are located as far away as possible from perch sites for avian predators (power lines, adjacent high land). California Least Terns prefer to nest on sites with an open panorama (e.g., not next to a freeway berm). In this regard, the nesting sites west of the freeway (NS11 and 12), with a less obstructed view of the ocean, probably have the best chance of successful use.

In accepting the four new nesting sites identified in the FRP, the District will benefit in several ways.

- First, SCE has agreed to construct the sites in fulfillment of the District's obligation under CDP #6-84-525 at no direct cost to the District in exchange for access to the river mouth for inlet maintenance. SCE is not required under its SONGS permit to provide for least tern nesting habitat as part of its obligation to

restore 150 acres of wetlands to mitigate the loss of fish caused by the operation of SONGS.

- Second, the JPA and SCE will be providing the land on which to construct the nesting sites through a Grant of Easement (Least Tern Nesting Habitat Sites) to the District. Thus, the District is relieved of any cost for land acquisition.
- Third, the District purchased the Rivermouth Property at a cost of \$235,000 for the purposes of constructing the tern habitat as well as enabling the District to breach the lagoon mouth when District property was threatened by high water levels resulting from inlet closures. Part of SCE's permit requirement for the wetland restoration is to maintain the lagoon mouth open to tidal influence, in perpetuity. By granting SCE access to the Rivermouth Property, the District will be relieved of its need to maintain the inlet for flood control.
- Finally, the District would be in compliance with its least tern mitigation requirements under CDP #6-84-525.

Although the herein approved least tern nesting sites will be maintained and monitored for ten years following completion of construction of the San Dieguito Wetland Restoration Project, there is no guarantee that least terns will actually colonize those sites within that time frame. Should any or all of the sites fail to become viable least tern habitat, the District is still under an obligation to comply with the original permit condition and provide alternative mitigation. Special Condition #4 provides that, should this occur, the District will return to the Commission with an alternative mitigation proposal.

In this proposed amendment, the applicant seeks to eliminate the requirement to comply with the obligations of the 1984 MOA, and to instead construct, monitor and maintain the approximately 11.3 acres of new least tern nesting sites that are described in the San Dieguito Wetland Restoration Project as Least Tern Nesting Sites NS11, NS12, NS13, and NS14. The first two sites are located west of I-5 and the other two are located east of I-5. The proposed amendment also includes dedication of Area W6b, as 8-acre site owned by the District, as permanent open space.

All four nesting sites are proposed to be constructed concurrent with the rest of the restoration project. The areas where the sites will be constructed currently consist primarily of vacant, upland area and some wetlands (2.89 acres). Construction of the sites will entail placement of dredge spoils to create the flat sandy areas preferred by the terns. This same nesting habitat type is also used by the western snowy plover, another endangered avian species. The sites will be constructed using soil and sand excavated from other areas of the overall restoration project (CDP #6-04-088), and will occupy a total footprint of approximately 20 acres. They will be elevated above the adjacent salt marsh as flat-topped mounds with gentle side slopes, and will be maintained in an unvegetated state, as preferred by the terns. The usable flat nesting area will total 11.3 acres, and breaks down as follows: NS11 = 2.0 acres, NS12 = 1.4 acres, NS13 = 5.4 acres, and NS14 = 2.5 acres. All four sites will be located on the south side of the San

Dieguito River. NS11 and NS14 are partially adjacent to proposed berms in the overall restoration project, whereas NS12 and NS13 are freestanding. Construction of the sites will result in permanent impacts to 2.89 acres of existing wetlands.

The plans for creation of these four sites have been prepared in conjunction with the plans for the San Dieguito Wetland Restoration Project. All of the plans for construction of the San Dieguito Wetland Restoration Project, including the plans for construction of these least tern nesting sites, have been submitted to the Commission for approval as CDP #6-04-088. The applicant proposes to construct the sites consistent with these plans, along with any changes to the plans required as a condition of approval of CDP #6-04-088. Special Condition #1 of this amendment requires submittal of final plans for the nesting sites, which must be in strict compliance with the final plans approved by the Executive Director pursuant to the overall restoration project (CDP #6-04-088), and further requires submittal of copies of all required legal documents addressing this amendment and the nesting sites.

2. Wetland Impacts/Endangered Species. The Coastal Act policies most pertinent to this matter state, in part:

Section 30233.

(a) The diking, filling, or dredging of open coastal waters, wetlands, estuaries, and lakes shall be permitted in accordance with other applicable provisions of this division, where there is no feasible less environmentally damaging alternative, and where feasible mitigation measures have been provided to minimize adverse environmental effects, and shall be limited to the following: [...]

(7) Restoration purposes.

(8) Nature study, aquaculture, or similar resource dependent activities.

(b) Dredging and spoils disposal shall be planned and carried out to avoid significant disruption to marine and wildlife habitats and water circulation. Dredge spoils suitable for beach replenishment should be transported for such purposes to appropriate beaches or into suitable long shore current systems.

(c) In addition to the other provisions of this section, diking, filling, or dredging in existing estuaries and wetlands shall maintain or enhance the functional capacity of the wetland or estuary. ...

Section 30240.

(a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.

(b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.

As part of the Commission's approval of the District's CDP #6-84-525 in November 1984, the Commission found that construction of the proposed infield tunnel would intensify the use of the 16-acre SOL, which is the site of a historic least tern nesting area, during the fair and races. The Commission required that sixteen acres of appropriate nesting habitat be provided elsewhere within the lagoon for the California Least Tern as mitigation for that increase in intensity of use. To satisfy the mitigation requirement, the District proposed to enter into the agreement with the California Department of Fish and Game (CDFG) discussed in the prior finding.

Section 4 of the 1984 MOA set forth a timeframe in which the creation of the preferred permanent nesting site referenced in Section 3 was to have occurred. When the District was unable to cause the preferred permanent least tern nesting site to be made available within the required timeframe, it became responsible under Section 4 of the 1984 MOA for creation of the entire 16 acre permanent nesting site. In June 1990, the District entered into a second MOA with the CDFG. This 1990 MOA provided for the creation of least tern nesting habitat on five acres of land near the mouth of the San Dieguito River (identified in the 1990 MOA as "the Rivermouth Property"). The District had purchased this property in December 1989 for the primary purpose of being able to keep the rivermouth open to avoid flooding on the Fairgrounds, in addition to providing land needed to satisfy the least tern nesting requirements. The Commission was not party to this second MOA, nor was it ever incorporated into the original CDP in any fashion.

Because of the significant differential in the size of the useable portion of the Rivermouth Property relative to the size of the permanent nesting site required by Section 4 of the 1984 MOA (5 vs. 16 acres), its acceptability as a means of fulfilling the District's obligations under that MOA could only be determined through a proceeding before the Commission to amend CDP #6-84-525. Before any such amendment proceeding was commenced, the District abandoned all but one acre of the 4-acre interim site that had been designated on the southernmost portion of the SOL and prepared 15 acres of the SOL for parking.

Efforts to find a way for the District to satisfy its obligations continued. In 1992, the District submitted a coastal development permit application for the Rivermouth Property that included an evaluation of alternative permanent sites; the application was never completed and thus never filed or processed. Neither the Commission staff, state and federal resource agencies nor members of the public believed the Rivermouth Property to be suitable for least terns. According to wildlife experts at USFWS and CDFG, the Rivermouth Property was not "a practicable nesting area." It is too low and surrounded by obstructions and subject to periodic inundation, erosion, and loss during storms. This site is also located adjacent to a beach intensely used by dogs and people, which could disrupt nesting activity. Further, use of this site would involve placing fences in the flood plain that could trap debris during periods of high river discharge.

In addition to the planning effort for the Rivermouth Property, nesting sites intended to fulfill the District's obligations were also identified as part of the planning and environmental review process for the San Dieguito Wetland Restoration Project. In July 1991, the Commission adopted additional conditions to Southern California Edison Company (SCE) and partners' coastal development permit for the San Onofre Nuclear Generating Station (SONGS) Units 2 and 3 (CDP 6-81-330, formerly 183-73). Those conditions require SCE to, among other things, create or substantially restore 150 acres of wetlands to mitigate the loss of fish caused by the operation of SONGS. The Commission approved the San Dieguito Lagoon as the restoration site in June 1992. Detailed planning for the San Dieguito Wetland Restoration Project began, and, after many years, the restoration project is before the Commission on the October agenda.

The District has often stated its expectation that the San Dieguito Wetland Restoration Project would include sufficient least tern nesting habitat to satisfy the District's outstanding obligations under CDP #6-84-525. The Commission finds that the current San Dieguito Wetland Restoration Project does include suitable least tern nesting habitat sufficient to satisfy the District's permit obligations. The San Dieguito Wetland Restoration Project proposes to create Least Tern Nesting Sites NS11, NS12, NS13, and NS14. Sites NS11 and NS12 of the San Dieguito Wetland Restoration Project are within the preferred replacement nesting location originally identified in the 1984 MOA. Both are suitable sites on which to create least tern nesting habitat. However, they do not by themselves total the 16 acres needed to satisfy the District's obligations. Thus, two additional sites, NS13 and NS14, that are located east of I-5 and outside the area identified in the 1984 MOA, are also proposed; all four sites total approximately 11.3 acres of least tern nesting area. Although this is short of the 16 acres originally required in the 1984 MOA, the Coastal Commission and the resource agencies find that this will be sufficient area in the San Dieguito Lagoon to devote to this purpose, and that the remainder of the Lagoon property should be used to provide other vital wildlife habitats.

While acknowledging the need for this particular endangered species' habitat, construction of the four nesting sites will result in a permanent impact to just under three acres of existing high marsh and seasonal marsh wetlands. As cited above, under the Coastal Act, dredging and filling of wetlands is severely constrained. Coastal Act Section 30233(a) prohibits dredge and fill of wetlands unless three criteria are satisfied. These are:

- 1) The project is limited to one of the eight stated allowable uses;
- 2) The project has no feasible less environmentally damaging alternative;
and,
- 3) Adequate mitigation measures have been provided to minimize adverse environmental effects.

As currently proposed, the development fully meets the first two of these tests. The proposal represents one of the eight allowed uses in wetlands, as it is a segment of a much larger restoration project which will result in the creation and/or substantial restoration of over 150 acres of wetlands. The applicant, along with Commission staff

and the resource agencies, have reviewed many possible alternative locations for least tern sites. The proposed sites carry the least amount of adverse impact and greatest potential for success as any reviewed in the past. Sites for least tern and snowy plover nesting have been considered an integral part of any restoration effort, as the lagoon historically hosted these species, but disturbances over time have prevented them nesting in San Dieguito for several decades. Thus, two of the three parameters to allow impacts to wetlands have been met. The applicant does not propose to create or restore wetlands as mitigation for the loss of 2.89 acres of existing wetland.

The applicant asserts that such mitigation is not required because the 1984 MOA necessarily contemplated loss of wetlands to create the 16 acres of least tern nesting sites and did not require mitigation. Nonetheless, the applicant proposes to dedicate a conservation easement over a vacant, 8-acre site within the lagoon. This property is isolated from the District's other holdings, and is, or will be, surrounded by various components of the restoration project. Dedicating this land as permanent open space will complete the open space system in this area. Moreover, the property itself would be available for future wetland restoration purposes. This land dedication is proposed to mitigate both for provision of less tern nesting area than originally required, and the temporal loss of suitable nesting habitat in the lagoon since 1984. The 1984 MOA did not require any mitigation for wetland impacts from creation of the sites, although it was likely known that some fill of wetlands would be required. Since the Commission previously authorized and required the activity in 1984, based on advice from the Attorney General's office, additional mitigation measures cannot be imposed now.

With respect to Section 30240 of the Coastal Act, salt marsh habitats are generally considered environmentally sensitive habitat areas (ESHA); so too are areas that provide critical habitat for listed species. Although impacts to ESHA are not generally allowed under the cited Coastal Act policy, in this particular case one form of ESHA (salt marsh) is being converted to a different form of ESHA (endangered species habitat). Moreover, Section 30233 does allow impacts to ESHA wetlands in association with restoration activities. The Commission finds that even though there will be no direct mitigation for the loss of 2.89 acres of wetland, the creation of least tern nesting sites constitutes the creation of ESHA, which indirectly mitigates for the loss of the wetlands.

It is essential to the success of the nesting sites that they be properly maintained and monitored. It is clearly the intent of CDP #6-84-525 that viable least tern nesting habitat be provided. If the site is not properly maintained, then it would no longer be viable for least tern nesting. The 1984 MOA supports the objective of the permit to require viable nesting habitat. Section 1 states that one of the primary purposes of the MOA is the "establish[ment of] a *wildlife management program* for the Tern at San Dieguito Lagoon...." (Emphasis added.) The Commission finds that to achieve the goal of viable tern habitat, any such program must include at minimum certain elements such as (1) annual vegetation clearance, (2) domestic and wild animal predator control, (3) monitoring of nesting and rearing success (or lack thereof), and (4) program adjustment in response to such monitoring. These elements are more fully described in the draft maintenance and maintenance monitoring plan attached to these findings as Exhibit #3.

The draft plan represents what is known to be required to maintain a viable nesting habitat. The sites should be flat, with minimal vegetation and a covering of light sand with shell content. The plans call for these specific improvements. However, experience gained at several nesting sites constructed for California Least Terns (e.g., Bolsa Chica, Newport Slough, Upper Newport Bay, Batiquitos Lagoon) has clearly shown that nesting sites will fail to produce fledglings over the long term unless they are adequately maintained. The two principal maintenance issues that affect the success of constructed nesting sites involve the removal of vegetation prior to nesting and control of ground-based and avian predators. Without adequate management of vegetation and maintenance monitoring of predators and egg and chick survival, constructed nesting sites will not provide their intended resource value. The proposed plan includes a provision for removal of vegetation annually prior to the start of the nesting season, and for fencing around the base of the nesting sites to control land-based predators without providing a perch for avian predators. Therefore, the Commission finds the draft maintenance and monitoring plan to be sufficient to maintain viable nesting habitat sites in these regards. However, the plan should also include cost estimates for the annual maintenance and a requirement to submit annual status reports to the Executive Director. Special Condition #2 thus requires submittal of a final plan including these features.

In summary, the District has been under a long-term obligation to provide viable least tern nesting habitat. To fulfill this obligation, and thus resolve a long-standing violation of the original permit conditions, four least tern nesting sites are proposed to be created, maintained and monitored. It has been determined by Commission staff, CDFG, ACOE and USFW that the proposed location and amount of least tern nesting area is appropriate for the San Dieguito Lagoon region, and is thus the least environmentally damaging alternative. The Commission concurs in this determination. The construction of the nesting sites is part of a much larger restoration program, and is thus an allowable use in wetlands. Maintenance monitoring during the nesting season as outlined in the draft plan addressed in Special Condition #2 is sufficient to make certain that disturbances do not deter the successful production of fledglings. Without these steps, experience has shown that the sites will not be successful and the District would thus fail to achieve the goal of viable tern habitat as required under its permit.

Finally, Area W6b, an approximately 8-acre site owned by the District, is being offered as permanent open space that could eventually be restored to wetlands in the future. Special Condition #3 is necessary to ensure that Area W6b is in fact kept as open space as proposed by the applicant. With these conditions, the Commission finds that project approval, with the maintenance and monitoring condition, is consistent with the cited policies of the Coastal Act.

3. Visual Resources. Section 30251 of the Coastal Act addresses this issue and states:

Section 30251.

The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting.

The entire San Dieguito River and Lagoon system is a highly scenic area now, and will become even more so after the major restoration project with which this proposal is associated. In addition to constructing the four least tern nesting sites, the project will expand the tidal prism of the lagoon and maintain the river mouth in an open condition, create and enhance approximately 150 acres of wetlands, and construct a public trail system. A future nature center is also planned. Thus, it is expected that public use and enjoyment to this area will increase, making public views an even greater issue than now. In addition to the planned trails, the lagoon is also visible from several major public access routes, including I-5, Camino del Mar, El Camino Real, Via de la Valle, and the railroad tracks.

The proposed nesting sites are located in the more central portion of the lagoon, two each east and west of I-5, and all are south of the San Dieguito River. They will be elevated several feet above the surrounding salt marsh, although two of them will be joined to planned berms on at least one side. The elevation gives the birds a more panoramic view of the open water areas of the lagoon, or other open waters, where they generally forage; also, since the side slopes will be fenced around the bottom, it will be more difficult for land predators to reach the nests. Because the nesting sites will be surfaced with light sand and shells, they will be visible against the surrounding greens and blues of marsh and water. However, they are fairly small in size (the largest is only 5.4 acres, and the others less than half of that), and so distant from the adjacent street system and perimeter trails, that they will not be overly visible.

The Commission finds that the nesting sites are fully consistent with Section 30251 of the Coastal Act. Some visibility is desired, both so the targeted species can locate the areas, and for purposes of educating the public about these endangered wildlife species. It will be possible to see the nesting sites, yet they will not be particularly prominent from any public location. Moreover, barren sandy areas such as beaches, dunes and mudflats are a natural part of most functioning marsh systems and add variety and visual interest to the overall landscape.

4. Violation. Approval of this amendment and the subsequent construction and maintenance of the least tern nesting sites will resolve a long-standing permit violation. The conditions of the original permit, in accepting the 1984 MOA as part of the approved

development, bound the District to secure replacement least tern nesting sites by October 1, 1989. From that date, the District has been in violation of the permit conditions. Due to regional circumstances not under the District's control (i.e., primarily preparation of the overall restoration plan), this violation has not been pursued for purposes of fees or penalties, but the underlying obligation of the District to provide replacement sites still exists. Resolution of the violation requires the District to comply with the subject amendment to create viable nesting habitat for the California Least Tern as mitigation for the pedestrian underpass that has already been constructed. Should any or all of the sites fail to become viable least tern habitat, the District is still under an obligation to comply with the original permit condition and provide alternative mitigation. Enforcement staff will closely monitor condition compliance for this permit to ensure resolution of the long standing violation. Prompt submittals of the required annual monitoring and maintenance reports will be necessary to avoid any further enforcement action.

In order to ensure that the violation component of this application is resolved in a timely manner, the Commission finds it necessary to require the applicant to fulfill all of the Special Conditions as a prerequisite to the issuance of this permit, as required by Special Condition #5, within 90 days of Commission action. Only as conditioned is the proposed amendment consistent with the Coastal Act.

Consideration of this permit amendment application by the Commission has been based solely on the consistency of the proposed development with the policies of Chapter 3 of the Coastal Act. Commission review and action on this permit application does not constitute a waiver of any legal action with regard to any alleged violations nor does it constitute an admission as to the legality of any development undertaken on the subject site without a coastal permit.

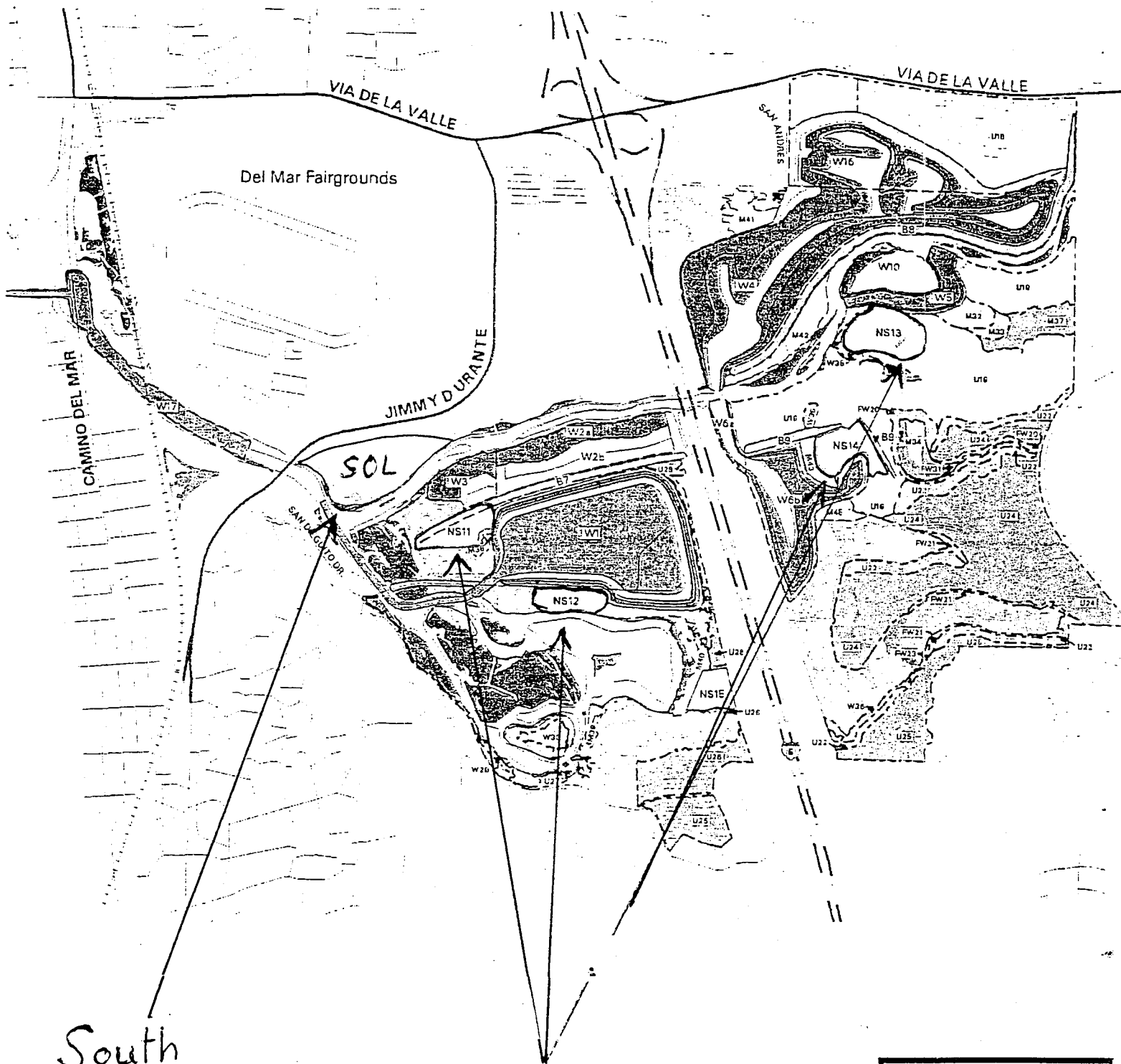
5. Local Coastal Planning. Section 30604(a) also requires that a coastal development permit, or permit amendment, shall be issued only if the Commission finds that the permitted development will not prejudice the ability of the local government to prepare a Local Coastal Program (LCP) in conformity with the provisions of Chapter 3 of the Coastal Act. In this case, with the attached special conditions, such a finding can be made.

The four sites are in areas of original jurisdiction and deferred certification within the City of San Diego, two within the Torrey Pines Community Plan area and two within the North City Future Urbanizing Area. In all cases, the Chapter 3 policies of the Coastal Act are the legal standard of review, with the certified LCP used only for guidance. This area is all identified as open space by the City of San Diego, and the proposal is consistent with that designation. The preceding findings have demonstrated that the proposal, as conditioned, is consistent with all applicable Chapter 3 policies of the Coastal Act.

6. Consistency with the California Environmental Quality Act (CEQA). Section 13096 of the Commission's Code of Regulations requires Commission approval of Coastal Development Permits to be supported by a finding showing the permit, or

permit amendment, as conditioned, to be consistent with any applicable requirements of the California Environmental Quality Act (CEQA). Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect which the activity may have on the environment.

The proposed project amendment has been conditioned in order to be found consistent with the Chapter 3 policies of the Coastal Act. Mitigation measures, including conditions addressing maintenance and monitoring of the approved least tern nesting sites will minimize all adverse environmental impacts. As conditioned, there are no feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse impact which the activity may have on the environment. Therefore, the Commission finds that the proposed project amendment is the least environmentally-damaging feasible alternative and can be found consistent with the requirements of the Coastal Act to conform to CEQA.



South
Overflow
Parking Lot

Least Tern
Nesting Sites

EXHIBIT NO. 1
APPLICATION NO.
6-84-525-A1
Location Map/Site Plan
 California Coastal Commission

EXHIBIT NO. 2
APPLICATION NO.
6-84-525-A1
Area W6b

Annual Maintenance & Maintenance Monitoring of Least Tern Nesting Sites

May 7, 2001

Need for maintenance and maintenance monitoring

There is a general consensus among experts that nesting sites constructed for California Least Terns and Western Snowy Plovers will not be successful unless they are adequately maintained (J. Fancher, K. Keane, N. Reed, pers. com.). The two principal maintenance issues that affect the success of constructed nesting sites involve the removal of vegetation prior to nesting and predator control. Least terns and snowy plovers generally require an open area with sandy substrate largely free of vegetation for nesting although some low profile native vegetation (e.g., verbenas) can help conceal chicks from avian predators. Optimal vegetation coverage has been reported to be from 0.2 % to 5% (Minsky 1987, from Thompson et al. 1997). The lack of success of several constructed nesting sites (e.g., Batiquitos Lagoon W1, San Elijo nesting islands, Upper Newport Bay) has been attributed, at least in part, to above optimal coverage by non-native vegetation. Second, loss of chicks through predation can be a serious problem at Least Tern and Snowy Plover nesting sites. Predation can occur on eggs and chicks from ground-based predators, such as rodents, feral cats, opossums, raccoons, and foxes. Predation can also occur from avian predators. The presence of peregrine falcons may drive terns away (e.g., Bolsa Chica), although these predators are generally not a recovery-threatening problem. Kestrels, on the other hand, may pose a serious threat to least tern and snowy plover nesting. For example, these raptors took 80 least tern chicks in 2 days at a 7-acre nesting site with several hundreds of breeding pairs at Venice. Crows and ravens can also be a problem and are the worst avian predators at Batiquitos Lagoon.

Annual maintenance and maintenance monitoring of vegetation and predators

Prior to the nesting season

Vegetation. To provide a site attractive to nesting California Least Terns and Western Snowy Plovers, the site must be relatively free of vegetation prior to the breeding season. Snowy Plovers may begin nesting about one month sooner than Least Terns so all nesting sites should be inspected in February. If vegetation coverage exceeds 5%, it must be removed. The method required to remove vegetation (dragging of a log, discing, and/or manual removal) will depend on the extent of coverage. The use of equipment to remove vegetation shall cease by March 15 to insure that maintenance activities do not disturb nesting. If vegetation clearing or spraying must be repeated after this date, the site should be checked for the presence of Snowy Plover nests. Judgments about the adequacy or appropriateness of vegetation clearing may be deferred to US Fish and Wildlife experts in Carlsbad who routinely provide such technical assistance. A pre-season walkover with Fish and Wildlife personnel to determine action items is a common practice.

EXHIBIT NO. 3
APPLICATION NO.
6-84-525-A1
Monitoring and Maintenance Plan

Fences. Fences have been successfully used to exclude ground-based predators from nesting sites. Fences will not work unless they are properly maintained. It is not unusual for windblown sand to accumulate around the base of the fence, thereby creating a ramp that serves as an access route for ground-based predators. Raccoons can scale chain-link fences and some predators may be able to dig under them. All fences used in predator exclusion shall be inspected for breaks and other predator access points and repaired prior to March 15.

Other predator control. Removal of ground-based predators may also be required. To determine if ground-based predators will pose a threat to nesting birds, monitoring of the area for these animals shall be conducted prior to the breeding season, preferably beginning February 1. If a ground-based predator(s) is consistently observed in the area of a nesting site and considered to be a potential problem by experts, it should be removed (by live trapping if possible). Observations of avian predators and/or nests in the area may also require preemptive removal if deemed a potential problem by experts. Often predator control is contracted to the US Department of Agriculture, Fish and Wildlife Service. However, there are other capable predator management contractors available not associated with government.

Monitoring and maintenance activities outside the nesting sites do not require an Endangered Species permit from US Fish and Wildlife or California Department of Fish and Game. Monitoring and maintenance activities inside the nesting sites require permits from US Fish and Wildlife and California Department of Fish and Game.

During the nesting season

Maintenance monitoring is required during the nesting season to insure that disturbances do not reduce the successful production of fledglings. Predation on eggs and/or chicks is likely to be the most common form of disturbance, although other types of disturbance (e.g., from humans, dogs, etc.) could also occur. Maintenance monitoring during the nesting season will require frequent longer visits (e.g., some time every day observing each site) to detect potential problems. Monitoring shall consist of observations of ground-based and avian predators in the area, acts of predation, damage to fences and other types of disturbances that may require action. This monitoring should be conducted daily from April 1 (or beginning of the nesting season) to September 1 (or end of the nesting season) by an experienced observer (permit from US Fish and Wildlife Service not required).

Observations of predators usually are not sufficient to detect impacts due to predation; time series data on the number of breeding pairs and clutch size (e.g., egg and fledging number) are also needed to evaluate whether methods of predator control have been successful. Such data shall be collected from April 1 (or beginning of the nesting season) to September 1 (or end of the nesting season). Based on standard methods used at other nesting sites, the census shall be conducted twice per week by a permitted biologist who can also recognize and record the nests and fledglings of the Snowy Plover, which may also occur at these sites. The use of blinds is recommended for these observations. Data collection from blinds is more time consuming than walking through the nesting site, but

less intrusive for birds, because the birds normally remain off nest during a walk through census. The most likely problem detected through monitoring within the nest site will be predation. A sudden decrease in the number of adults or fledglings should stimulate increased frequency of monitoring around the nesting sites to detect the predators. Once detected, the predators should be removed through trapping or other means.

Estimated annual cost for maintenance and maintenance monitoring of nesting sites
See attached

Reference

Thompson, B. C., J. A. Jackson, J. Burger, L. Hill, E. M. Kirsch, and J. L. Atwood.
1997. *The Birds of North America*.

