

EPI-Center, 1013 Monterey Street, Suite 207 San Luis Obispo, CA 93401  
Phone: 805-781-9932 • Fax: 805-781-9384

## San Luis Obispo COASTKEEPER®

September 10, 2007

**Via Facsimile and Registered Mail-Return Receipt Requested**

Los Osos Community Services District  
2122 9<sup>th</sup> Street  
Los Osos, CA 93402

Secretary of the Interior  
1849 C Street, N.W.  
Washington, D.C. 20240

Director, U.S. Fish and Wildlife Service  
U.S. Department of the Interior  
18<sup>th</sup> and C Streets, N.W.  
Washington, D.C. 20240

**RE: Sixty-Day Notice of Intent to Sue for Violation of Section 9 of the Endangered Species Act at Property Owned by the Los Osos Community Services District (APN 074-229-017).**

This letter serves as a sixty day notice of intent of San Luis Obispo COASTKEEPER®, to sue the Los Osos Community Services District, its board of directors, and any other responsible District employees or contractors, all in their official capacities, over violations of the Endangered Species Act (ESA) 16 U.S.C. §1531, *et seq.*, for actions, omissions and policies related to management activities at LOCSO owned property (APN 074-229-017) known as the Tri-W property (Tri-W).

SLO Coastkeeper intends to bring a civil suit against the above referenced parties (collectively referred to as the "District" sixty days (60) after the date of this letter, because these parties have caused and intend to continue to knowingly cause take of the endangered Morro shoulderband snail (*Helminthoglypta walkeriana*) in violation of §9 of ESA.

This notice is provided to the extent that such notice is deemed necessary by a court.



San Luis Obispo COASTKEEPER® a Program of Environment in the Public Interest is a trademark and service mark of WATERKEEPER® Alliance, Inc. and is licensed for use herein.

San Luis Obispo **COASTKEEPER®**, a program of Environment in the Public Interest (EPI), is a 501(C)(3) corporation organized for the purpose of ensuring that the public has a voice with Government officials charged with responsibilities for environmental protection. The primary mission of SLO Coastkeeper is to advocate the public's interest in preserving habitat and biodiversity in California. SLO Coastkeeper and its supporters are further interested in improving quality of life through watershed protection, land use planning and environmental awareness on the California Central Coast, including protection of the Morro shoulderband snail and their habitat.

All communication and correspondence for this matter should be addressed to our attorney, Kate Neiswender, at:

Law Office of Kate Neiswender  
P.O. Box 24617  
Ventura, California 93002  
Tel: 805-649-5575  
Fax: 805-649-8188  
E-mail: kmn-law@sbcglobal.net

### **Background**

In 1998 the Los Osos Community Services District was created in Los Osos California (San Luis Obispo County). The services provided by LOCSD included domestic water, drainage/runoff, parks, lighting, emergency services, and waste water.

In 2000 the California Central Coast Regional Water Quality Control Board adopted a time schedule for Los Osos Community Services District requiring compliance with the Porter-Cologne, California Clean Water Act through the installation of a community wide waste water system to collect, treat, and dispose of sewage discharged from individual houses and businesses within boundaries of the Community Services District.

As part of LOSCD's actions to comply with the enforcement actions of the Regional Water Quality Control Board, the Tri-W site was purchased for the purpose locating a waste water treatment facility. In addition an Environmental Impact Report was certified as per California Environmental Quality Act (CEQA); preparation of a District wide HCP was begun; proper permits, including a section 10 permit from the USFWS, were acquired; and construction-site preparation at Tri-W and other locations began. As part of the permit requirements the 11 acre Tri-W site was enclosed with temporary fencing.



San Luis Obispo **COASTKEEPER®** a Program of Environment in the Public Interest is a trademark and service mark of WATERKEEPER® Alliance, Inc. and is licensed for use herein

However, a recall election in September of 2005 changed the majority of LOCSD Board of Directors and subsequently construction activities at the Tri-W property were halted, but the fencing left in place.

Subsequent affirmative action by the LOCSD Board also terminated project elements which had provided the project a Federal nexus. Upon loss of the Federal nexus, the FWS biological opinion and Section 10 permit covering activities at the Tri-W site became null.

On or about July 22, 2007 LOCSD initiated new grading activities at the Tri-W site and were advised at that time that suitable habitat as well as individuals of the endangered species had been identified on portions of the property and a likelihood of injury or harassment of the endangered snail existed. Re-initiation of consultation with USFWS was recommended at that time. However, the District proceeded with the grading work without initiating informal or formal consultation.

During the month July/August 2007, the District allowed the fence to fall into disrepair and pieces of the cyclone fencing have fallen on; become entangled in; and overgrown by habitat elements known to provide feeding sites, breeding areas, and shelter for the endangered Morro shoulderband snail.

On August 30, 2007 the Board of Directors approved a contract with the Morro Group to provide avoidance monitoring services as part of the "Tri-W Fence Removal Project". However, "take" has already occurred and the District has now approved a new project which is likely to result in additional violations of the Endangered Species Act unless immediate corrective action is taken.

### **Morro shoulderband snail**

The Morro shoulderband snail (*Helminthoglypta walkeriana*) was added to the List of Endangered Wildlife on December 15, 1994 (59 FR 64613). A recovery plan for the Morro shoulderband snail and four plants from western San Luis Obispo County was published in September 1998. The Final Determination of Critical Habitat for the Morro shoulderband snail was approved March 9, 2001 (50 CFR Part 17).

The Morro shoulderband snail (*Helminthoglypta walkeriana*) is a member of the land snail family Helminthoglyptidae and is restricted to sandy soils of coastal dune and coastal sage scrub communities near Morro Bay. Critical habitat for the Morro shoulderband snail includes sand or sandy soils needed for reproduction, a land slope not greater than ten percent to facilitate movement of individuals, and the presence of native coastal dune scrub vegetation. The final rule defines coastal dune scrub as vegetation typically but not exclusively represented by mock heather, buckwheat, eriastrum, chamisso lupine and dudleya; and in more inland locations by California sagebrush, coyote brush and black sage.



### Violations of ESA §9

The ESA prohibits any “person” from “taking” any species deemed to threatened or endangered. 16 U.S.C. §1538, C.F.R. §17.31. Congress broadly defined “take” in the ESA to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.” 16 U.S.C. § 1532(19). “Take is defined ...in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.” S. Rep. No. 93-307, at 7 (1973). The Act also makes it unlawful for any person to “attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this action.” 16 U.S.C. § 1538(g).

The term “harm” is broadly defined to include “any act which actually kills or injures wildlife. Such acts may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 C.F.R. § 17.3. Likewise, the term “harass” is broadly defined to include any “intentional or negligent act or omission which 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.”

Three circuit courts of appeals have agreed that a state or local agency may be held liable under Section 9 of the ESA for permitting conduct that causes “take” of a listed species, even though it is the on-the-ground action— public recreation in this case—that directly harm the species. *See, Loggerhead Turtle v. County Council of Volusia Co.*, 148 F.3d 1231, 1251 (11<sup>th</sup> Cir. 1998), *cert. den.* 119 S.Ct. 1488 (1999), *citing, Defenders of Wildlife v. Administrator, EPA*, 882 F.2d 1294 (8<sup>th</sup> Cir 1989)(recognizing ESA liability where a ‘regulatory entity purports to make lawful an activity that allegedly violates the ESA.’); *see also Strahan v Linnon*, 127 F.3d at 163.

The District’s policies and management of the Tri-W property results in take of Morro shoulderband snail. The District is responsible to maintain temporary fencing which prevents access, unauthorized activities, and generally protects Morro shoulderband snail individuals and habitat. Further, the neglect of the fence has allowed portions of the fence to fall on, crush, or damage coastal dune scrub habitat essential to the life requirements of Morro shoulderband snail. As such, there is no question that the District has caused take of Morro shoulderband snail by failing to maintain the fence and now threatens further take through the fence removal project.

San Luis Obispo **COASTKEEPER** contends that District policies and management practices have resulted in direct and indirect harm to Morro shoulderband snail. Moreover, SLO Coastkeeper contends that removal of the fence would allow human incursion that would be impossible for the District to police or enforce and is likely to result in take of Morro shoulderband snail through harm and harassment, interference with essential behaviors such as feeding, breeding, destruction of shelter, as well as direct mortality. As explained above, the District’s management and maintenance of the Tri-W property has

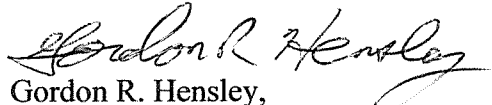


San Luis Obispo COASTKEEPER® a Program of Environment in the Public Interest is a trademark and service mark of WATERKEEPER® Alliance, Inc. and is licensed for use herein.

resulted in violation of the take prohibition of §9 of the ESA. As such, until and unless it has obtained an ITP from the USFWS for take of federally protected species, the District must cease all activities that cause take, including but not limited to activities that would allow or facilitate public access to the Tri-W property such as removing the fencing.

We look forward to a prompt response to this letter.

Sincerely,

  
Gordon R. Hensley,  
San Luis Obispo **COASTKEEPER**



San Luis Obispo **COASTKEEPER**® a Program of Environment in the Public Interest is a trademark and service mark of WATERKEEPER® Alliance, Inc. and is licensed for use herein.