LEGAL MEMORANDUM
State of California, Department of Parks and Recreation

The Director has asked the Legal Office to analyze the potential liabilities if units of the State Park System close, partially close, or are operated at reduced service levels or by other entities due to cuts to California State Parks' ("State Parks") budget. Below is such analysis categorized by subject matter. Attached to this memorandum is a Parks Closure/Reduction in Services Procedure Checklist, which is intended to assist Park Operations in mitigating risks that likely will result from closures or reduced services at a park unit. Please note that this analysis is made according to general rules of law and is intended to provide a general overview of potential liabilities if units of the State Park System close, partially close, or are operated at reduced service levels. This memorandum focuses on likely potential liabilities; due to the many risks inherent with land ownership, there may be exposures to risk not herein addressed. In order to fully analyze the potential liabilities to State Parks related to the closure or reduced operations of a particular park unit, the Legal Office would be required to analyze the units' acquisition documents, contracts, real and personal property, operations, etc., on a case-by-case basis as each unit of the State Park System is unique in regards to deed restrictions, contractual obligations, assets, and operations. Additionally, as this analysis is a general overview, and not a fact specific analysis, nothing herein is meant to opine on the merits of a particular lawsuit should one be filed arising out of or related to closure or reduced operations of a park unit. Furthermore, nothing herein waives any right, remedy, or defense State Parks may have related to any cause of action arising out of related to closure or reduced operations of a park unit.

I. Dangerous Condition of Public Property

A dangerous condition means a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used. A public entity is liable for injury caused by a dangerous condition of its property if the plaintiff establishes that the property was in a dangerous condition at the time of the injury, that the injury was proximately caused by the dangerous condition, that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred, and that either: (a) a negligent or wrongful act or omission of an employee of the public entity created the dangerous condition; or (b) the public entity had actual or constructive notice of the dangerous condition a sufficient time prior to the injury to have taken measures to protect against the dangerous condition.

Potential liability exists as long as people are using the parks. In order to avoid potential liability for dangerous conditions on its property, State Parks would have to completely exclude the public from park property. Even if a park is officially closed, State Parks could incur liability if the public uses the park. Liability for a dangerous

condition of public property is not dependent on whether the users are invitees or trespassers, so State Parks has a duty to protect even those who may be in the park illegally from dangerous conditions.

Turning a blind eye to public use of a closed park is problematic. As a public entity, State Parks can be held responsible for dangerous conditions that it should have known existed on its property, as well as those it actually knew existed. The “should have known” element (constructive knowledge) is most effectively countered by conducting regular inspections intended to inform the public entity whether the property was safe for the uses for which it was intended and for uses that the public entity actually knows were being made of the public property (i.e. the public entity argues that it inspected the premises and did not find the condition that was dangerous to the foreseeable users). However, if State Parks has no staff to conduct inspections of, or observe, the property, some dangers might go undetected and increase. The lack of monitoring could make it more difficult to refute a claim by a plaintiff that State Parks should have known of a dangerous condition and should therefore be liable for injury caused by that condition.

Natural condition, trail, and hazardous recreational immunities would still limit liability for such things as hiking or riding on trails, but State Parks could incur liability for injury and damage caused by existing improvements and structures such as sidewalks, picnic and camping areas, culverts, parking lots, railings, porches and stairs, among other things, which might continue to be accessed by the public. The unmaintained, shuttered facilities themselves could also pose an increasing hazard as they deteriorate. The majority of State Parks’ dangerous condition lawsuits involve outdoor conditions, so just closing buildings, but not the entire park, is not likely to eliminate all potential liability. In fact, lack of monitoring and ongoing maintenance could result in increased liability.

Further, State Parks would continue to have potential liability for dangerous conditions that threaten adjacent properties. This includes falling trees, and landslides that cause injury to persons. Courts have said that natural condition immunity does not protect against injury or damage on adjacent property because the adjacent property owner has not assumed the risk by using the property on which the dangerous condition is found. There may be some potential for State Parks to be liable for fires that spread from its property to adjacent property. However, the case law on natural condition immunity for damage to adjacent property is not extensive, so the issue of liability is somewhat unsettled, especially with regard to wildfires.

Although State Parks can always attempt to defend a lawsuit by arguing that the practicability and cost of taking preventive measures was too burdensome in relation to the probability and gravity of potential injury, it is unknown whether this immunity would be effective if State Parks closes a park and takes no preventive measures at all.

As long as people are using the parks, closed or not, State Parks will risk being sued for personal injuries. Even in a case where State Parks is ultimately found to have no liability, defending the lawsuit can cost tens of thousands of dollars, not including the cost of Attorney General representation. From a liability standpoint, closing the parks

would probably not benefit State Parks and could in fact increase its liability for dangerous condition of public property.

II. Nuisance

Under Civil Code §3479, a nuisance is anything that is “an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property…”

While it is impossible to anticipate all the ways a nuisance might arise, any problematic condition on park property that results from lack of attention and which affects neighboring property could theoretically become a nuisance. Homeless camps, marijuana farms, dangerous trees, and illegal partying on park property come to mind as possibilities.

Nuisance may also arise from a natural condition. One California appeals court has opined that liability for nuisance may result from a natural condition if there is a finding of negligence in dealing with that natural condition. Fire hazards could potentially constitute a nuisance.

III. Lack of Services

State Parks is not likely to incur liability if it fails to provide such services as lifeguards on the beaches, because it generally has no mandatory duty to do so. However, such lack of services likely will result in increased danger to the public. Further, if in any situation, State Parks has assumed a duty to provide a protective service to the extent that the public has come to rely on it, State Parks would have to adequately notify the public that such service is no longer being provided.

IV. Warning Signs

In order to mitigate the potential for liability, State Parks should provide extensive signage informing the public of what areas are closed, hazardous conditions and any significant changes in protective services or conditions that deviate from what the public had come to expect at the particular park unit.

V. Parks Operated by Private Entities

Public Resources §5080.30 allows State Parks to enter into operating agreements with other governmental agencies. In order for State Parks to enter into an operating agreement with a private entity, such as a non-profit, legislation granting State Parks such authority is required.

If a park is operated by a private entity, the private entity and State Parks could be jointly liable for any damages or injury resulting from a dangerous condition of the park property. In order to shift the responsibility for liability to the private entity, State Parks would have to require the private entity to indemnify State Parks. The private entity

would not be protected by the same immunities that apply to public entities, such as State Parks. Thus, many private entities might be unwilling to take on such risks.

The exception is that some public land trusts may be eligible to claim immunities for natural conditions, landslides, trails, and hazardous recreational immunities if they meet the qualifications of Government Code §831.5. The statute says a "public entity," for purposes of those immunities, includes a public land trust which is (1) a 501(c)(3) non-profit organization under the Internal Revenue Code; (2) has articles of incorporation that has among its principal charitable purposes the conservation of land for public access, agricultural, scientific, historical, educational, recreational, scenic or open-space opportunities; and (3) has an agreement with the State Coastal Conservancy, the California Tahoe Conservancy or the State Public Works Board to hold the public land in trust or to hold the lands to provide non-discriminatory public access consistent with the protection and conservation of the coastal or other natural resources. Whether this statute could be adapted or amended to apply to private entities operating units of the State Park System is unknown.

In some cases, special legislation has allowed a non-profit to operate units of the State Park System. Examples include El Presidio de Santa Barbara State Historic Park and the Marconi Conference Center. Those operating agreements have provisions whereby the operating entity indemnifies State Parks for liability.

Other statutes also allow private entities to conduct some operations within State Park property. It is worth exploring ways that these operations may be expanded to include minimal services in order to keep certain parks operating at a low level without turning over the entire operation to another entity and/or requiring a complete park closure. Relationships to explore for expansion possibilities include concessions (Public Resources Code §5080 et seq.), cooperating associations (Public Resources Code §513), and Public Resources Code §5010.1 service agreements. Sole source or exemptions from bidding should also be explored to accommodate the temporary expansion of services in order to cover services that State Parks can no longer provide at this time. Legislation relaxing or exempting bidding requirements for these contracts could also be narrowly crafted in order to facilitate keeping certain parks open during desperate budget times and should be considered.

VI. Contractual Obligations Related to Real and Personal Property

It is impossible to know all the restrictions that apply to every piece of real or personal property State Parks owns. State Parks would have to conduct a comprehensive survey to make such determination. Alternatively, it could wait until any contractual or deed violations are brought to its attention through a claim or lawsuit. Below are general restrictions related to State Parks' real and personal property.

A. Donation Agreements

State Parks may have contractual obligations that come with its property. For example, real property that was donated might have deed restrictions requiring that the property be used only for state park purposes and be made accessible to the public for recreation. Closure of the park for a prolonged period might violate the donation agreement. Such deeds might also have a reversion clause that would require State Parks to return the property to the donor upon violation of the terms of the donation. This could especially be possible if the property was acquired from a land trust.

Personal property, such as museum collections or artifacts, may also be subject to use requirements, public display, or reversion to the donor.

State Parks may also have obligations to other governmental agencies that could not be ignored, even if the park closed. For example, in some cases State Parks acquired property from a donor to satisfy the donor's mitigation obligations to agencies, such as the U.S. Fish and Wildlife Service or U.S. Army Corps of Engineers, as a result of destruction of endangered species habitat, or the California Coastal Commission, as a result of development within the Coastal Zone. In such cases, State Parks is usually required to maintain and manage the habitat in perpetuity and provide public access and could not suspend these obligations upon closure of the park.

B. Grant Contracts

State Parks has received grant funds from various sources for acquisition and development of the State Park System. Generally, receipt of grant funds are conditioned upon the obligation that the property benefitting from the grant funds be accessible to the public. Below are just two examples of the many grant programs requiring public access from which State Park properties have benefitted. Other grant programs that require public access to benefitting properties include the California Cultural and Historical Endowment and the California Heritage Fund.

i. Land and Water Conservation Fund Program

State Parks has received Land and Water Conservation Funds ("LWCF") for acquisitions and development of state park property. Title 14, California Code of Regulations, §4900, the LWCF Procedural Guide, and the grant contract between the National Park Service ("NPS") and State Parks require public access to lands acquired or developed with LWCF monies. Closing parks will be a breach of contract making State Parks liable for damages. NPS may enforce the provisions of the contract by demanding damages (repayment of LWCF monies) or an injunction for specific performance of the contract.

ii. Habitat Conservation Fund

The Habitat Conservation Fund ("HCF"), Fish and Game Code §§2785-2799.6, appropriates monies to State Parks for habitat conservation. State Parks, along with the Coastal Conservancy, the Santa Monica Mountains Conservancy, the California Tahoe Conservancy, and the Wildlife Conservation Board, received money from the HCF (Fish and Game Code §2787.)

The funds allocated to State Parks are to be used for (1) projects located in the Santa Lucia Mountain Range, (2) units of the State Park System, and (3) grants to local agencies. It is unlikely that park closures would incur contractual liability if HCF funds were from these sources. However, it could be argued that State Parks has a statutory duty to provide public access pursuant to Fish and Game Code §2799.5, which states that "reasonable public access to lands acquired in fee with funds made available pursuant to [the HCF] shall be provided except when that access may interfere with habitat protection."

State Parks may have also been a recipient of HCF funds from the other state agencies that administered HCF funds (i.e. Coastal Conservancy, the Santa Monica Mountains Conservancy, the California Tahoe Conservancy, and the Wildlife Conservation Board). If so, the agreement between the two entities will govern the relationship. Such contract will likely contain the language from Fish and Game Code §2799.5. Park closures resulting in no public access may make State Park liable for damages. The granting agency may enforce the provisions of the contract by demanding damages (repayment of HCF monies) or an injunction for specific performance of the contract.

C. Concession Contracts

State Parks has 188 concession contracts with various entities throughout the State Park System. Per such contracts, State Parks is required to provide the concessionaire the right, privilege, and duty to develop, equip, operate and maintain a concession operation on park premises. If closure of a unit of the State Park System resulted in State Parks no longer providing concessionaire park premises, it is likely that State Parks would be in breach of contract and concessionaire would be entitled to the profits he or she would have received had the contract been performed for the remaining term of the contract.

The more complicated question is whether State Parks would be in breach of contract if State Parks continues to provide the premises to the concessionaire but closes the related park unit resulting in the curtailment of concessionaire's business. Most of State Parks' concession contracts contain a clause stating State Parks makes no stipulation as to the type, size, location, or duration of public facilities to be maintained at this unit, or the continuation of State ownership thereof. However, it is unknown whether this language would excuse State Parks from performance of the concession contract as the expectation of the parties at the time of entering the concession contract is that the park will remain open to the public. Thus, it is likely that State Parks would be liable for breach of contract under this scenario as well.

D. Public Works and Services Contracts

State Parks has hundreds of public works and services contracts with various entities throughout the State Park System. Services contracts allow for termination for convenience upon thirty days notice. Thus, as long as proper notice is provided, if State Parks terminated a service contract due to closing a park unit, State Parks would not incur liability for breach of contract. Public works contracts do not provide termination for convenience. Thus, if State Parks were to terminate a public works contract due to closure of a park unit, it is likely that State Parks would be in breach of contract and contractor would be entitled to the profits he or she would have received had the contract been performed.

E. Tucker Consent Decree

The Americans with Disabilities Act and other federal and state laws require the programs of State Parks be accessible. Pursuant to the Tucker Consent Decree, State Parks shall have accessible programs and be compliant with federal and state accessibility laws no later than June 30, 2009 through June 30, 2016, depending on the park unit.

If a park is closed to the public, there is no need to make the park accessible. However, liability for breaching the Consent Decree is a separate issue based on contract law and a court order. Granted, the state’s budget crisis was not anticipated by the parties at the time of entering the Consent Decree. However, if State Parks were to cease the work of accessibility improvements due to park closures and not meet the deadlines stated in the Consent Decree, plaintiffs could bring suit to force State Parks to continue making such improvements. Plaintiffs would most likely argue that closure of parks should make no difference in continuing the work of accessibility improvements if the closure is temporary and the park will reopen in the future. It is unlikely State Parks could use lack of funding as a defense to making parks accessible.

VII. Trespass and Encroachments

Trespass and encroachments on park property are a significant problem. If State Parks closes parks and no longer monitors it borders, it is likely that adjacent property owners will continue to build encroachments on park property. This means that it will be more difficult to eject the trespassers and State Parks will have to expend more funds in the future to protect its boundaries. State Park currently spends hundreds of thousands of dollars a year defending against trespass. These costs will only increase if State Parks can not take immediate and effective action against the trespass. Furthermore, trespass causes irreparable harm to State Park property.

VIII. Intellectual Property

A. Trademarks

State Parks has established numerous recognizable trademarks as an identifiable source of quality and good will. State Parks has also established long standing trademarks in connection with successful concession operations located within the State Park System. Many of these trademarks have historical significance, tied to the interpretation of the property. Finally, State Parks has created a brand image that consumers and commercial products and services want to identify with. This brand image will be lost with the loss of trademarks, if use is discontinued.

Trademarks are acquired, maintained, and enforced through use. Many of State Parks' trademarks are common law marks, acquired through use in commerce over at least the last 50 years. If there is a cessation of use, the priority of ownership of the marks will be lost. Some of State Parks' trademarks have been registered with the California Secretary of State's Office and some have been federally registered. These marks require updated filings and proof of continued use in order to avoid abandonment. Even with the strength of the marks and extra protection of registration, these marks will be deemed abandoned if use is not continuous.

Once a trademark is lost by abandonment through discontinued use, State Parks would have to start from square one to re-establish rights through use. Not only would this effort cost hundreds of thousands of dollars, but priority of use would be lost to any intervening user of the mark. It is likely that this would happen fairly quickly if State Parks were to close units of the State Park System. State Parks has already had to fight to defend its trademarks against third parties who are waiting to jump on the opportunity to capitalize on the brand image that State Parks has established. For example, State Parks was recently called upon in court to establish continuous use of the Malibu Pier trademark in order to avoid losing it to an unscrupulous litigant.

If State Parks were to cease using its trademarks, even on a temporary basis, the important marks would likely no longer be available at a future date should State Parks wish to resume use. Thus, current trademarks should be maintained at any level possible. Registered marks should be maintained with minimal required filings and a low level of monitoring in order to avoid abandonment. Commercial use of both registered and common law marks should be continued at some level, even if relevant parks are closed. State Parks should consider using a central source like the State Parks' website to maintain some level of trademark use of all current State Parks' trademarks. Ideally this would include the e-store and offering the sale of merchandise and printed materials. It could also include programs and/or the provision of parks and recreational services elsewhere on the State Parks' site.

B. Sponsorships

In addition to losing its valuable trademarks, State Parks could experience liability and significant loss in revenue if sponsorship or Proud Partner contracts can not be performed. The value of sponsorships and joint ventures with companies wishing to increase their environmental awareness in a visible way is just starting to be realized. This potential income would be lost if operations cease. Moreover, State Parks would risk being in breach of contract under current sponsorship deals, if the exposure and promised consideration can not be delivered.

An inventory of sponsorship agreements should be examined in order to determine which, if any, contractual obligations will be impacted by closure. Proactive negotiation of alternative benefits that could be offered by State Parks would be a way to mitigate potential liability and/or damaged relationships.

C. Copyright

Finally, copyrights would also be at risk if State Parks were to close units of the State Park System. While copyright protection for original created works is not considered abandoned without use, active enforcement is necessary to protect the integrity of the works themselves. Without oversight of policing protections, all of State Parks' materials, including photographic archives, and massive amounts of online materials should be pulled from public access. The other option would be to allow uncontrolled use of the materials, recognizing that State Parks would have no way to undo the public domain status. This would mean that any objectionable use of State Park materials could not be controlled or stopped in the future. Also, the materials can be taken by commercial users and licensed or used for private profit rather than public good.

In addition to limiting access to materials where oversight will no longer be possible, important copyrights should be registered with the United States Copyright Office in order to increase protection of the materials. Minimum levels of monitoring are still recommended.

IX. California Environmental Quality Act

Compliance with the California Environmental Quality Act ("CEQA") is triggered by a discretionary decision. It may be argued that State Parks' determination regarding which parks close, partially close, are operated on a reduced service level, or stay open is a discretionary decision requiring various choices. This discretionary decision may trigger CEQA analysis.

Public Resources Code §21080 (b) (4) allows a statutory exemption from CEQA for an emergency. CEQA generally requires an imminent threat ("a sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to life, health, property or essential public services; emergency includes such occurrences as fire, flood, earthquake …as well as such occurrences as riot, accident or sabotage). However, the fiscal emergency of the State of California may justify the emergency finding. (If the Governor were to declare a

state of emergency due to a disaster, Public Resources Code §21080 (b) (3) provides a statutory exemption from CEQA.)

It might also be argued that the decision to close a certain number of parks in response to budget reductions is a ministerial decision, which is exempt from CEQA. (Public Resources Code §21080 9 (b) (1).) The argument would be made that the decision to close individual parks would be a delegated (or administrative) decision according to certain criteria and thus not subject to CEQA.

Regardless of whether State Parks' determination regarding park closures ultimately requires CEQA analysis or an exemption applies, it is extremely likely that a number of entities desiring to keep parks open will sue State Parks for CEQA compliance in hopes this will prohibit or at least delay closure of a park. It may be advantageous to State Parks in terms of timing to assert a statutory exemption and wait to see whether a lawsuit is brought.

X. Endangered Species Act

State Parks would not exempt from the Endangered Species Act if a park is closed or operating at a reduced service level. If there is "take" of an endangered whether by poaching, unauthorized access, etc., by a person at a park that is closed or operating at a reduced service level, State Parks likely would be jointly liable for the take depending on the proximate cause (failure of State Parks to take measures to protect) of the take and foreseeability by State Parks that take is likely to occur.

XI. California Coastal Act

The California Coastal Act ("CCA") contains, among other goals, the goal "to maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone…." (Public Resources Code §3000.1.5.)

With this goal, the California Coastal Commission has zealously guarded public access to the Coast, and required consistency between State Parks General Plans and the CCA and the Local Coastal Plans adopted by local governments. The California Coastal Commission regulates "development" within the Coastal Zone. "Development" is defined as "on land, in or under water, the placement or erection of any solid material or structure; … change in the density or intensity of use of land, including but not limited to, subdivision… and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto, construction, reconstruction, demolition or alteration of the size of any structure…."

It is not clear how the California Coastal Commission or a local government would go about requiring State Parks to obtain a development permit to close a park. Arguably, the closure of a park is a change in the intensity of use. The language seems to

anticipate land divisions but includes the inclusive words of “including but not limited to”. If the California Coastal Commission requires State Parks to obtain a development permit to close a park, then it could be argued that State Parks might have to get a permit to open, or that State Parks has to get permits for their parks in general. This would be untenable. Either State Parks or the California Coastal Commission could file a declaratory relief action to ask a court whether State Parks needs some type of approval to close a state park in the Coastal Zone, or either agency could also seek an Attorney General’s official or unofficial opinion. We may want to take the first action.

Currently, State Parks and the California Coastal Commission are represented by the same set of attorneys at the Attorney General’s Office, so the potential conflict between the California Coastal Commission and State Parks would require analysis. It would be highly beneficial to State Parks to obtain outside counsel in a dispute with the California Coastal Commission, due to potential conflicts.

Regardless if closing a park within the Coastal Zone requires a CCA development permit, it is extremely likely that a number of entities desiring to keep parks open will sue State Parks for CCA compliance in hopes this will prohibit or at least delay closure of a park.