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2493 Portola Road, Suite B  
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**Re: United States Fish and Wildlife Service (USFWS) and California Department of Parks and Recreation (State Parks) Proposed Oceano Dunes District Draft Habitat Conservation Plan and Draft Environmental Assessment**

Dear Mr. Henry and Ms. Chang:

The California Coastal Commission (Coastal Commission) is the state agency responsible for implementing the California Coastal Act (Coastal Act), which regulates development in the coastal zone, including the areas covered by this proposed draft Habitat Conservation Plan (DHCP).<sup>1</sup> The Coastal Act's habitat protection policies are wide-ranging. A component of these policies specifically requires protection of environmentally sensitive habitat areas (ESHA), which are defined by the rarity or value of plant or animal life and their habitats. The presence or absence of threatened, endangered, and/or otherwise listed sensitive species in an area often plays a central role in ESHA determinations. Importantly, the Coastal Act and the applicable LCPs prohibit non-resource dependent development in ESHA, and the entire Oceano Dunes State Vehicular Recreation Area (referred to herein as ODSVRA, Oceano Dunes, or Park) has been designated ESHA by the Commission, including in the certified San Luis Obispo County LCP. Therefore, most of the activities with the potential to impact ESHA, and which are proposed to be covered by the DHCP in ODSVRA, especially those related to vehicular activities, are prohibited by the Coastal Act and the LCPs.

Thus, we appreciate the opportunity to comment on the DHCP and its associated Draft Environmental Assessment (DEA) because: DHCP measures are likely to affect ESHA protected by the Coastal Act and applicable LCPs; at least some measures are likely to require coastal development permit (CDP) authorization;<sup>2</sup> and at least some proposed to be covered activities are inconsistent with key Coastal Act and LCP ESHA policies

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<sup>1</sup> Pursuant to the Coastal Act, the Coastal Commission shares jurisdiction over the areas covered by this DHCP with San Luis Obispo County and the cities of Grover Beach and Pismo Beach, each of which has a Commission-certified local coastal program (LCP). Almost all of Oceano Dunes State Vehicular Recreation Area is subject to the County's LCP.

<sup>2</sup> Under the Coastal Act, activities or construction that qualify as development (as defined in Coastal Act Section 30106) require a CDP unless they are otherwise exempt from CDP requirements, or the required CDP is waived pursuant to the Commission's CDP waiver process (see also Coastal Act Section 30600).

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that apply throughout ODSVRA. To be clear, we are not commenting on USFWS' implementation of the federal Endangered Species Act (ESA) per se. Rather, we are commenting because the Commission's obligations under the Coastal Act and the LCPs are independent of and distinct from those exercised by USFWS, and the DHCP affects coastal resources that are regulated and protected under the Coastal Act and LCPs.<sup>3</sup>

The DHCP and DEA address the management and protection of 10 ESA-listed species<sup>4</sup> within the California Department of Parks and Recreation's (referred to herein as State Parks or DPR) 5,005-acre Oceano Dunes District program area, which is comprised of both Pismo State Beach and the Oceano Dunes State Vehicular Recreation Area, and is meant to be the underlying document on which a future USFWS Incidental Take Permit (ITP) would be based. Under the ESA, the measures included in the HCP must minimize and mitigate, to the maximum extent practicable, the impacts caused by State Parks' proposed 52 "covered activities" (which include motorized recreation, camping, and natural resource management).

Oceano Dunes currently operates under two primary CDPs that govern the kinds, locations, and intensities of allowed use and development at the Park, as well as the resource protection measures that are required to ensure consistency with the Coastal Act and the applicable LCPs. This includes Coastal Commission CDP 4-82-300 as amended, which covers overall off-highway vehicle (OHV) use, camping, and other use parameters for the Park, as well as Coastal Commission CDP 3-12-050 as amended, which authorizes implementation of a dust abatement program at Oceano Dunes. Importantly, both of these CDPs include ongoing obligations that require regular review and adaptation. For example, CDP 4-82-300 only temporarily authorized certain ODSVRA use parameters in 1982 that have not yet been finalized (e.g., related to access to the Park, use limits and carrying capacity, etc.), and, as such, requires an annual Coastal Commission review of Park operations under the CDP. Each re-review can lead to modifications of Park operations.

We previously provided comments on the DHCP and its associated Draft Environmental Impact Report (DEIR) earlier this year (in May 2020). Those comments were informed, in part, by the Coastal Commission's direction to State Parks at a July 2019 hearing for the most recent annual review of CDP 4-82-300, where the Coastal Commission

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<sup>3</sup> We also note that the California Department of Fish and Wildlife (CDFW) independently has authorities under the California Endangered Species Act and other state laws, including the requirement to review and approve Natural Community Conservation Plans (NCCPs) to address any potential take of California Endangered Species Act-listed species, most of which overlap with federally-listed species. It is our understanding that State Parks is in the preliminary stages of preparing such an NCCP for ODSVRA, and we suggest that USFWS coordinate with CDFW as it works towards its final HCP to ensure that these documents and their requirements are harmonized.

<sup>4</sup> These are the bird species Western snowy plover (*Charadrius nivosus nivosus*) and California least tern (*Sternula antillarum browni*); the amphibian species California red-legged frog (*Rana draytonii*); the fish species tidewater goby (*Eucyclogobius newberryi*); and the plant species marsh sandwort (*Arenaria paludicola*), La Graciosa thistle (*Cirsium scariosum* var. *loncholepis*), surf thistle (*Cirsium rhotophilum*), beach spectaclepod (*Dithyrea maritima*), Nipomo Mesa lupine (*Lupinus nipomensis*), and Gambel's watercress (*Nasturtium gambelii*).

required State Parks to address 15 specific management measures as part of its current efforts to draft a Public Works Plan (PWP) intended to govern Park uses and development moving forward under the Coastal Act. These management measures included evaluating alternative Park entrances, prohibiting vehicle use at night, expanding and making the seasonal enclosure permanent, prohibiting vehicular crossings of Arroyo Grande Creek, reducing vehicular use limits, and a series of similar measures designed to protect sensitive species and habitats pursuant to the Coastal Act and the underlying LCPs.<sup>5</sup> One common thread of our May DEIR and DHCP comments was that many of the alternatives rejected in these documents are the very same management measures that the Coastal Commission directed State Parks to address in its PWP. Thus, we reiterate that it is not appropriate for these measures to be rejected in the DHCP because the PWP and the DHCP will ultimately need to be harmonized.

The current DHCP has not been significantly modified since our last comments, and thus we reiterate all of the comments and suggestions from our May 2020 letter here (attached and incorporated herein in its entirety), and strongly suggest that the DHCP be revised to address the Commission's July 2019 direction to State Parks, and, in particular, in relation to the specific and explicit management measures that the Commission required State Parks to address. Further, the DEA, much like the DEIR, suffers from the same deficiencies outlined above. In addition, we have the following comments, observations, and suggestions for amending the DEA and the DHCP, with comments on each document generally also applicable to the other.

### Comments on the DEA

#### *DEA Alternatives Analysis*

As with the DEIR, we are concerned with the DEA's characterization and dismissal of certain alternatives and the reasons for doing so. The DEA considered a total of 11 alternatives. Seven of these alternatives were dismissed without further detailed evaluation and four of them were further considered in more depth. Among the seven immediately rejected alternatives was "No Take Park Operation" that would prohibit vehicle use in the Park; a "Changes in Oceano Dunes SVRA Access" alternative that would include either a bridge over Arroyo Grande Creek or the introduction of a different access route that would avoid vehicular creek crossing; a "Restricted Riding Times" alternative that would prohibit night riding and that would close the Park to vehicle use seasonally; and a "Reduced Vehicle Use Limits" alternative that would reduce the number of vehicles allowed at ODSVRA by some unspecified amount. Each of these rejected alternatives run directly counter to those protective measures that the Coastal Commission, in its July 2019 action, required State Parks to address in its PWP. We recommend these alternatives, including potential combinations and permutations of each, be fully evaluated, including to ensure harmony between the HCP and PWP. In addition, the reasons that USFWS cites for rejecting these options were inappropriately

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<sup>5</sup> A summary of the Commission's July 2019 action, as well as the Commission's comment letter to State Parks emanating from it, are attached to this letter. They help to provide context and rationale for the Commission's action, and should be referred to for same in the context of these DEA and DHCP comments.

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dismissive. For example, several alternatives were rejected solely because of: “1) failure to meet the purpose and need for the project; 2) infeasibility; and 3) inability to avoid significant impacts” (DEA page 14). We would suggest that USFWS reevaluate these rejected alternatives. In our view, the Commission-identified options would lead to greater habitat protection (rather than less), are feasible, and can appropriately avoid significant impacts to sensitive resources.

With respect to the four alternatives that were further considered, the first is the “No Action” alternative, which is characterized as a continuation of the status quo, and perpetuates ODSVRA’s vehicular recreation and habitat management protocols (including maintaining the existing size and duration of the seasonal habitat enclosure). This ‘status quo’ alternative is described as avoiding take of listed species. However, it is well documented that the current status quo has led to significant take of listed species for many years.<sup>6</sup> Therefore, on this basis, we find that the DEA mischaracterizes the potential outcome of a no action alternative, and should be corrected to reflect the reality of ongoing take.

The DEA also evaluated the “Maintain Southern Enclosure” and “Permanent Year-Round Enclosures” alternatives, but also dismissed them because of concerns that they would reduce areas available for vehicular recreation. The DEA states (on page 73):

*This loss of shoreline access conflicts with project objectives to balance conservation and recreation demands, particularly to preserve, manage, and expand recreational opportunities and to manage, maintain, and maximize unique coastal camping and recreational amenities. CDPR concluded the HCP as proposed (Proposed Action Alternative) better meets project objectives of operating the covered park units in a manner that provides for public use and enjoyment while conserving park resources and preserving, managing, and expanding motorized and non-motorized recreational access”*

It is not clear to us why State Parks’ vehicular recreation objectives are being used as criteria for rejecting habitat protection measures pursuant to a USFWS DEA designed to evaluate options for habitat protection under the ESA. And the rejection of these alternatives is despite the fact that the DEA acknowledges their potential benefit to listed species. For example, with respect to the potential to make the southern enclosure year-round, which is one of the aforementioned 15 operational changes that the Commission likewise provided to State Parks, the DEA states (on page 49):

*Results from studies conducted by Dr. Jenny Dugan and Dr. Mark Page (Marine Science Institute at the University of California Santa Barbara) suggest the 7-month closure of breeding habitat during the breeding season is not a sufficient period of time for invertebrates, which are a food source for SNPL, to effectively*

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<sup>6</sup> As USFWS has found, existing Park operations (i.e., the aforementioned ‘status quo’) are already causing high levels of take (see, for example, USFWS letter titled “Oceano Dunes State Vehicular Recreation Area Endangered Species Act Violations and Habitat Conservation Plan” dated March 29, 2016; and USFWS letter titled “Oceano Dunes State Vehicular Recreation Area, Second Notice of Additional Endangered Species Act Violations” dated December 22, 2016).

*recover species diversity and abundance along the Southern Enclosure shoreline following natural winter population declines associated with the 5 months of recreational use. In addition, a year-round enclosure would ensure that vegetation and microtopography impacts from winter-season motorized recreation would be reduced. As a result, establishing the Southern Enclosure as a permanent year-round enclosure would have, at least temporarily, a beneficial impact on SNPL breeding and wintering habitat by reducing impacts to invertebrates, vegetation, and microtopography from winter recreation.*

In this quoted text, the DEA concurs with the Commission's assessment that year-round maintenance of the southern enclosure is appropriate for habitat purposes, including as it would allow for natural recovery of the beach macroinvertebrate community, which provides key food-chain support for listed species. Yet, despite acknowledging this clear benefit, the DEA dismisses this option on grounds that are unrelated to species and habitat protection. This reasoning is antithetical to the stated purpose of a DEA, namely to provide for species protection, and should be re-evaluated. Ultimately, the DEA dismisses the remaining three alternatives and concludes that the "Proposed Action (Proposed HCP)" (i.e., State Parks' current proposed draft HCP) is the Federal action under consideration for ITP authorization. The DEA justifies it by stating "the HCP would either not appreciably affect recreational opportunities...or [would] increase OHV recreation by 75 acres" (EA Page 74). Again, we do not understand why vehicular recreation is being used as justification to dismiss alternatives in a document meant to minimize impacts and increase habitat protection.

Overall, we are concerned that the DEA alternatives analysis does not adequately analyze the potential biological impacts of each alternative nor the biological benefits of the alternatives that were rejected. For example, with respect to OHV use, there are a number of studies that have evaluated the adverse impacts of OHV use on beaches (including both intertidal and upper beach zones) and dunes. One such study found that OHV recreational activity causes the highest levels of environmental harm to beaches and dunes of any recreational activity.<sup>7</sup> Another identified such harms to include disturbing dune physical attributes and stability; destroying dune vegetation and leading to lower plant diversity and cover; and disturbing, injuring, or killing beach and dune fauna (invertebrates and vertebrates), including sensitive species.<sup>8</sup> Where on the one hand the DEA acknowledges that reduced vehicular use would reduce take, it then uses uncertainty in the actual outcome as a basis for rejecting vehicle reductions in contradiction to its own analytical process conclusions. In addition, the Commission specifically directed State Parks to seek to reduce vehicular use as a means of reducing habitat impacts, and this option needs a more thorough analysis in the DEA, including

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<sup>7</sup> Schlacher, T.A., L. Thompson, and S. Price: Vehicles versus Conservation of Invertebrates on Sandy Beaches: Mortalities Inflicted by Off-Road Vehicles on Ghost Crabs, in *Marine Ecology* (V.28; 354-367; 2007).

<sup>8</sup> Defeo, O., A. McLachlan, D.S. Schoeman, T.A. Schlacher, J. Dugan, A. Jones, M. Lastra, and F. Scapini: Threats to Sandy Beach Ecosystems: A Review, in *Estuarine, Coastal, and Shelf Science* (V.81; 1-12; 2009).

the degree to which reduced maximum use numbers (at a variety of different reduction levels) might affect habitat protection.

With respect to vehicular crossings at Arroyo Grande Creek, vehicles currently drive through the creek at a variety of depths and also breach the banks of the creek in such a way that the creek banks can erode considerably and widen the creek channel. Vehicles operating in the creek have the potential to crush and otherwise adversely affect species in the creek directly. In addition, and perhaps just as dangerous to these creek species, is that the destruction of creek banks has the effect of expanding and altering the creek bed in ways that reduce the water depth and limit the time period over which migration between the creek and ocean is viable for fish species, potentially reducing their ability to enter and exit the creek and to reproduce. As you are aware, the period of direct connection between Arroyo Grande Creek and the ocean is critical for anadromous fish species, such as steelhead, which complete part of their life cycle in the ocean, and tidewater goby, which can be flushed from creeks, and rely on the period of creek-ocean connectivity to recolonize freshwater creeks and to maintain their populations regionally. Both species occupy Arroyo Grande Creek.<sup>9</sup> Moreover, any vehicular use near the Arroyo Grande Lagoon that impacts its mouth and causes it to breach precipitously and rapidly, such as through such creek morphological changes, may also have the effect of flushing tidewater goby from the lower reaches of the creek into the ocean, where some portion of those flushed will meet their demise. California red-legged frog may also be present around Arroyo Grande Lagoon and Creek during this time period, and the frogs themselves, as well as their egg sacs, may also be harmed by a precipitous breaching event. Therefore, we recommend that the DEA analyze in more depth the potential adverse impacts of vehicles driving through Arroyo Grande Creek during the time of year when rain water has elevated the banks of Arroyo Grande Creek and lagoon breaching is likely, and following any breach event, including when the creek is flowing to the Pacific Ocean. We further advise that the DEA evaluate an alternative to prohibit crossings of the creek when it flows to the ocean, as the Commission directed State Parks to do.

Further, the DEA needs to include a more complete analysis of the alternative that makes the seasonal enclosure permanent and/or expands it. As is, the DEA concludes that the enclosure can be reduced in size and remain seasonal (i.e., a reduction of 109 acres in relation to the existing 300-acre area), and that a currently off-limits (to vehicles) adjacent 40-acre dune ESHA area can be opened up to OHV recreation. Moreover, the DHCP sets revised targets for annual nesting populations of Western snowy plover and California least tern that are set below current nesting rates. These actions are by definition less protective than even current measures. In addition, evidence points to the conclusion that the current seasonal enclosure is actually too

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<sup>9</sup> The south-central California coastal steelhead, although federally threatened, is not proposed to be covered in this HCP, apparently based on a 2008 agreement with NOAA Fisheries. However, this species does occupy Arroyo Grande Creek, and we would strongly suggest that the DHCP appropriately account for the needs of this species in any case. In addition, tidewater goby is a federally endangered fish species, whose population fluctuates inter-annually in Arroyo Grande Creek. Maintenance of the population regionally relies on at least some of the rivers and creeks in any one location to support populations of this species in all years, including Arroyo Grande Creek.

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small, as opposed to allowing it to be further reduced to allow for additional OHV use. In fact, a large number of plovers are found nesting in areas outside of the existing enclosure. In 2018, 66 plover pairs were found nesting to the west and south of the current enclosure, and there has been an increase in observed aggressive territorial behavior in areas of overcrowding within the enclosure. Moreover, plover mortality has been high, including 15 plover adults and chicks that were found dead in 2018 (8 of which were found crushed next to tire tracks). Plovers naturally seek to avoid encounters with humans,<sup>10</sup> so the presence of a refuge away from human pressures, particularly related to vehicles and OHV riding, will undoubtedly increase plover protection overall. This includes reducing plover mortality during the overwintering season (from October through February) when no enclosure is currently present. At a minimum, making the enclosure permanent would allow recovery of the dunes and beach-dwelling invertebrate species on which plovers feed. Given the Commission's direction to State Parks to make these enclosures a permanent feature (or to expand them), we recommend the DEA consider the above factors when assessing this alternative in order to better analyze the potential for these enclosures to provide habitat benefits.

For the alternative that would eliminate vehicular activities at night, we recommend that the DEA analyze the likely effects of night lighting, noise, and activities on the nocturnal routines of bird species and mammals. These effects can lead to significant disruptions in species' behavior, such as modified avoidance behaviors, disorientation, disruption of foraging and migration patterns, increased predation risk, and disruption of circadian rhythms.<sup>11</sup> In addition, noise/sound plays an important role in an ecosystem, and activities such as finding desirable habitat and mates, avoiding predators, protecting young, and establishing territories are all dependent on the acoustic environment. Such environment is modified by vehicular activities at night at ODSVRA, which affects all of these critical species activities. A growing number of studies indicate that animals, like humans, are stressed by noisy environments.<sup>12</sup> The listed species at Oceano Dunes are all more vulnerable to the impacts identified above at night, and it is clear that a nighttime restriction against vehicular activities, as the Commission has identified as appropriate, would only serve to better protect listed species and their habitats. We recommend that the DEA be modified to include a thorough evaluation of the nighttime vehicular prohibition alternative.

Finally, we note that this past breeding season was extremely informative with respect to species use and needs at the Park, and it should inform the DEA's analysis on what types of measures might best protect listed species through an HCP. For example, with

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<sup>10</sup> Lafferty KD. 2001. Disturbance to wintering western snowy plovers. *Biological Conservation* 101:315-325. Lafferty KD, Goodman D, Sandoval CP. 2006. Restoration of breeding by snowy plovers following protection from disturbance. *Biodiversity and Conservation* 15:2217-2230.

<sup>11</sup> Rich, C. & T. Longcore (Eds.) 2006. *Ecological Consequences of Artificial Night Lighting*. Island Press, Washington. 458 pgs.

<sup>12</sup> Shannon, G., M.F. McKenna, L.M. Angeloni, K.F. Crooks, K.M. Fristrup, E. Brown, K.A. Warner, M.D. Nelson, C. White, J. Briggs, S. McFarland & G. Witemyer. 2016. A synthesis of two decades of research documenting the effects of noise on wildlife. *Biological Reviews*. v. 91: 982-1005.

the Park closed to vehicular activity (but still open to normal beach use activity) in response to the COVID-19 pandemic, there was a significant increase in plover activity, extending north to at least marker-post 3 (i.e., over a mile north of the seasonal enclosure, which was extant at the time as well). In response, State Parks embarked on a series of unpermitted measures to disrupt nesting-related plover activities outside of the seasonal enclosure area by grading the beach/foredunes and employing a series of deterrence measures (including scuffing out potential nesting sites, placing mylar flags, and otherwise deterring plover nesting outside of the enclosure area). And as you are aware, in early July the Commission's Executive Director issued to State Parks a Consent Executive Director Cease and Desist Order (ED-20-CD-01) that required State Parks to cease such activities. The expansion of plover breeding and foraging activities outside of the enclosure is evidence that reduced vehicle presence, a larger enclosure, or both would be beneficial for plovers going forward. The DEA/DHCP should account for this empirical evidence.

### Comments on the DHCP

Our primary concern with the DHCP is that although the HCP is intended to "provide habitat-level protection and management and minimize human-related impacts to key threatened or endangered wildlife," the DHCP instead outlines management protocols that would actually *decrease* existing protection for such species (DHCP p. 1-1). This is despite the fact that, as described above, existing management has already resulted in significant take of listed shorebird species. Thus, by allowing even more take than is currently occurring at the Park, the DHCP does not appear to meet the requirement to minimize the impacts of the covered activities. All of the above DEA comments apply here to the DHCP.

### *DHCP Alternatives Analysis*

As with the DEIR and DEA, we have similar concerns regarding the adequacy of the DHCP's alternatives analysis. The DHCP identifies one of the two commonly considered alternatives as a "no project alternative in which no permit would be issued and take would be avoided" (DHCP at p. 8-1). However, while the DHCP analyzes a "no project" alternative, it is not one in which take is avoided, as described above. Instead, the DHCP recognizes that existing operations currently result in take and rejects this alternative because USFWS would still be required to enforce the Endangered Species Act and such enforcement might result in operation shutdowns in order to prevent take. In essence, this alternative is rejected not because it is infeasible or because it would result in take of listed species, but because it would result in greater protection of listed species. We therefore believe that this alternative has been mischaracterized in the DHCP, and any discussion of it needs to be corrected to address these issues.

The second alternative analyzed in the DHCP would retain the current size of the southern enclosure. It was rejected, however, even though it would result in less take of listed species than the chosen alternative, because the DHCP concludes that the reduction or elimination of the southern enclosure would better meet Oceano Dunes' "recreational needs", and that take under the chosen alternative would be minimized. But the analysis of this second alternative does not find that it is infeasible (and it is not



infeasible as the Coastal Act explicitly allows for the time, place, and intensity of recreational access to be modified based on resource protection needs) and thus does not meet the requirements that HCPs minimize and mitigate take to the maximum extent feasible. We believe that this alternative should be analyzed further as it is also consistent with the Commission's direction to State Parks to make the southern enclosure permanent.

We also recommend that the HCP also consider alternatives that reduce the current level of OHV use in the Park, including an evaluation of all 15 measures that State Parks is required by the Coastal Commission to address in its proposed PWP, which is expected to be before the Commission in early 2021.<sup>13</sup> Further, another alternative we would like evaluated is one in which there is no OHV use in the Park. This is an alternative that the Coastal Commission identified in its July 2019 action (again, see attached), and it is one that would clearly reduce take of the listed species covered by the HCP. Commission staff believes that it would make sense to evaluate an alternative that phases out OHV use over five years, and that ultimately provides for a camping and vehicular recreation area between West Grand Avenue and Pier Avenue, with non-vehicular beach and dune use south of there (i.e., Commission staff's current recommendation to State Parks on the PWP). While we recognize that these alternatives may ultimately not meet State Parks' OHV objectives, it is important that decision-makers and the public have the benefit of such an evaluation when decisions are made about the allowed types and intensities of use at Oceano Dunes that are covered by an HCP.

In sum, without an analysis of a broader range of management and mitigation alternatives, we do not think that the DHCP adequately demonstrates that the chosen alternative mitigates and minimizes the impacts of Park operations on the 10 listed species "to the maximum extent practicable," as is required under ESA.<sup>14</sup>

#### *DHCP Biological Analysis*

In addition to the above concerns regarding the breadth of alternatives analyzed in the DEA and DHCP, and the conclusions drawn, we also have specific concerns regarding the DHCP's assessment of biological impacts that underlies its analysis. Thus, we also recommend that the DEA and DHCP include consideration of the following, all of which support and are supported by our recommendations above:

1. With regard to Western snowy plover (WSP) and California least tern (CLT), the DHCP proposes reducing the existing 300-acre seasonal southern enclosure to 191

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<sup>13</sup> State Parks is required to submit a proposed PWP for Commission consideration that addresses all of the Commission's direction and requirements. It was originally required to be submitted by Summer 2020 for Commission action, but it is currently expected to be submitted by the end of December 2020, and before the Commission in early 2021. The Commission agreed to this revised schedule not only in light of delays attributable to the COVID-19 pandemic and the unprecedented wildfires this year, but also because of the appointment of a new State Parks Director, and the California Natural Resources Agency also requested additional time to help State Parks develop the PWP.

<sup>14</sup> See, for example, *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274, 1291-1292 (E.D. Cal. 2000).

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acres, and thus seasonally increasing OHV use by 109 acres. In addition, it proposes opening to OHV use another currently off-limits 40-acre dune ESHA area supporting native dune vegetation very near to the seasonal enclosure and Oso Flaco Lake. Opening up this undisturbed dune area will encourage new traffic adjacent to the existing seasonal enclosure and increase the risk of take of WSP chicks and nesting adults. Note that all portions of the seasonal enclosure targeted for reduction, and all of the area near the shoreline in Oceano Dunes as a whole, are USFWS-designated "critical habitat" for WSP. Further, the areas of the seasonal enclosure slated to be opened up to OHV use are among the most widely-used for nesting (i.e., Subarea 6) or serve as important buffer areas for highly used nesting areas (i.e., the east boneyard area buffers the west boneyard enclosure). The WSP population is already limited in the Park due to a dearth of areas free from OHV use. We recommend that the DHCP include additional analysis of these proposed reductions in protected areas, including consideration of the following:

- a. Between 2005 and 2018, Subarea 6, which is proposed to be opened for OHV use under the DHCP, was the location of 25-45% of all WSPs and 35-80% of all CLT nests during the breeding period.
- b. The northern portion of Subarea 6 (slated to be removed from protection first), has been the location of the CLT communal night roost over the last several years. According to the USFWS, "secure roosting and foraging areas are essential to the recovery of the species,"<sup>15</sup> and may serve as a means for lowering predation at CLT nesting sites.<sup>16</sup>
- c. Although the DHCP does state that Subarea 6 would be removed in stages, and only if species' objectives are met, those objectives are set far below current and historical occupancy and fledgling rates. At a practical level, this ensures they will be easily met. For example, the DHCP sets 155 WSP breeding pairs as its annual goal, which is substantially lower than the five-year average of 202 breeding pairs. Similarly, the DHCP establishes a goal of 1.0 fledgling per adult male plover per year. However, the five-year average fledgling rate is 1.68. For CLT, the DHCP goals of 41 breeding pairs per year and a fledge rate of 1.0 juveniles per nesting pair is also lower than recent documentation. These standards would have the effect of allowing a decrease in breeding and fledgling success. The DHCP does not provide evidence to support how these lower rates were derived, how they minimize and mitigate the effects of the covered activities, or how they best protect listed species and their habitat.

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<sup>15</sup> See USFWS' Carlsbad California Office (2006), California least tern *Sternula antillarum browni*, Five-year review, summary and evaluation, at [https://www.fws.gov/carlsbad/SpeciesStatusList/5YR/20060926\\_5YR\\_CLT.pdf](https://www.fws.gov/carlsbad/SpeciesStatusList/5YR/20060926_5YR_CLT.pdf).

<sup>16</sup> See Atwood, Jonathon L., (1986), Delayed Nocturnal Occupation of Breeding Colonies by Least Terns, *Sterna antillarum*, Auk v. 103, pgs. 242-244; Wilson, Erika C., Hubert, Wayne A., and Anderson, Stanley H., "Nocturnal Roosting by Interior Least Terns Early in the Nesting Season" (1991), Nebraska Bird Review (417) (at <https://digitalcommons.unl.edu/nebbirdrev/417>).

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- d. Further, the removal of Subarea 6 will cause nests established in the remaining enclosure areas to be packed more tightly. There is already evidence that the tight spacing of WSP and CLT nests within the existing 300-acre seasonal enclosure acreage has led to adult territorial aggression when chicks from one brood wander into the territory of another (hence the Coastal Commission's July 2019 recommendation to increase the size of the enclosure area).
  - e. The DHCP also proposes that bump outs or individual nest enclosures would be used if plovers nest in Subarea 6 following the removal of fencing. In our view, this is not an equivalent means of protection. Although individual nest enclosures have been known to provide nest protection, they can also lead to greater predation of adult WSPs when avian predators perch on top of the enclosures and consume adults as soon as they leave the nest, with mortality of nest eggs or chicks soon to follow. Further, plovers are more likely to establish in areas that are already protected from OHV trespass, as evidenced by their repeated establishment within the southern enclosure despite crowding and the availability of other locations in the Park that provide suitable nesting habitat.
2. The proposed closure of the east boneyard enclosure and opening up of an additional 40 acres to OHV riding just north of Oso Flaco Lake are also likely to increase take of WSP and CLT. Although the DHCP notes that fewer birds have nested in the east boneyard location in recent years, this enclosure area still provides an important buffer to the west boneyard area, where more WSPs nest. This buffer helps maintain a substantial distance between nesting birds and OHV riders and pedestrians. Moreover, the east boneyard enclosure has acted as a barrier for through traffic between northern and southern areas of the Park during the nesting season, and from northern access to the Oso Flaco Lake area. If it is removed, it is highly likely that OHV traffic will increase in this location. This would increase the risk of vehicle collisions with WSP and decrease habitat protection.
  3. There has been an alarmingly high take of WSP at Oceano Dunes in recent years. In 2018, there was one documented CLT and 36 WSP deaths from all causes to chicks, juveniles and adults. Many additional birds were injured. In 2019, the documented death rates were 3 for CLT and 26 for WSP. It was also noted that several of these individuals were found amidst tire tracks.<sup>17</sup> Given the difficulty of locating small birds across this vast area, these numbers undoubtedly underestimate the actual take of these listed species.
  4. The success criteria for WSP and CLT (as noted in 1(c) above) raises concerns more generally about the adequacy of the analysis of appropriate minimization and mitigation measures in the DHCP. We recommend that the DHCP focus more on

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<sup>17</sup> See Iwanicha, J., A. Clark, R. Slack, S. Robinson (Oceano Dunes District), and D. George (Point Blue Conservation Science), "Nesting of the CA least tern and western snowy plover at Oceano Dunes State Vehicular Recreation Area, San Luis Obispo County, California, 2019, Appendix H"; and see California Department of Parks and Recreation Off-Highway Motor Vehicle Division, Oceano Dunes District "Nesting of the CA least tern and western snowy plover at Oceano Dunes State Vehicular Recreation Area, San Luis Obispo County, California, 2019, Appendix H".

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maximizing habitat protections and seeking ways to increase the occupancy of breeding pairs and fledgling rates. We are concerned that the DHCP lowers the bar for success by setting goals for plover and tern nesting and occupancy below population numbers that are obtainable today, and are concerned that they could then be used as justification to open up additional acreage to OHV activity, thereby neither minimizing impacts to protected species nor maximizing mitigation.

5. Also notable within the DHCP are the omission of several measures that would appear to be relatively easy to implement, and which could lower take. For example, the discussion of plover protections focuses primarily on nesting WSP and CLT. Many WSP, however, overwinter at Oceano Dunes, and this population is also subject to high predation. In addition, although many locations in Oceano Dunes have a posted speed limit of 15 mph, speeds in excess of 15 mph appear to be commonplace. A vigorous speed limit enforcement program with Park ejections and penalties could help reduce the threat posed by speeding vehicles to all species that share the Park with human recreationists (and would likely help to better protect public safety as well).
6. One other measure for which myriad solutions exist include the development of better practices for solid waste management. A visit to the park earlier this year revealed open dumpsters at marker-post 2. This area is known to be a major attractant for predators, especially gulls (hundreds have been detected over a single hour when conditions are right) that are known to predate WSP and CLT. Improving solid waste management is one of the Commission's 15 directive measures, but it is not discussed in the DHCP.
7. The prohibition on vehicular use at night, including night OHV riding, as recommended by the Commission to State Parks, would also undoubtedly reduce mortality of WSP and CLT, as well as night-migrating California red-legged frogs (see also the discussion above).
8. Although some educational materials are posted regarding the presence of threatened and endangered species in the Park, a robust education program that sought to enlist the stewardship of Park visitors and better inform them about activities likely to cause take would undoubtedly be beneficial.
9. Beyond the changes that will affect WSP and CLT successful breeding and population recovery, there are no proposed changes to the crossing of Arroyo Grande Creek, despite the probability that this activity leads to take of tidewater goby every year, as described in more detail above, and despite the fact that it is also one of the 15 Commission-identified changes for the Park. The DHCP describes the dynamic tendency for Arroyo Grande Creek to morph and change as it breaches the lagoon mouth and forms ponds that likely contain tidewater goby and other fish species. Regarding management of these dynamic ponds, the DHCP states: "it is not feasible for CDPR staff to move fencing and closure signage each time the area changes and visitors may not know they are prohibited from driving through ponded areas." To reduce the possibility of take during this dynamic period,

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(which likely only occurs for a period of days or weeks at most,) riders could easily be prohibited from entering this area for this entire period. It would only require signs to be erected a single time and only affect ridership for a short period of the year.

10. Personnel and cost limitations are invoked in several passages within the DHCP for measures that would likely reduce harm to listed species but that are dismissed. Yet in many cases, it would appear that relatively simple and cost-effective solutions could be productively employed. The DHCP also fails to establish that such cost increases somehow make these options infeasible mitigation measures. To the extent that costs prevents operation of the Park in a manner that sustains high use levels but is also protective of these species, the answer is not to simply allow for less species protection.

### Conclusion

While we have identified a number of concerns with the DEA and DHCP, we strongly support the efforts of State Parks and USFWS to address the significant issues associated with protection of special status species at Oceano Dunes and Pismo State Beach. We understand that the DHCP and DEA represent many years of work for your agencies and for the many stakeholders involved in this process. We appreciate all of the work that has gone into producing these draft documents.

We also note, however, that rather than completing the CEQA/NEPA and HCP processes at this time, State Parks and USFWS could wait to further consider the HCP and its associated EIR/EA until after the Coastal Commission takes action on State Parks' PWP. The content of the PWP would then be available to inform the range of alternatives and management measures that would need to be considered in the HCP and EIR/EA. Although this would delay the HCP and EIR/EA process, having that process commence after the Commission acts on the PWP would provide greater certainty to the agencies involved because USFWS, State Parks, and the Coastal Commission would have the benefit of the information developed through the completion of the PWP (and/or LCP/CDP changes). As indicated above, the Commission is expected to consider the PWP in early 2021 (e.g., at a hearing tentatively planned for early February or March), so there would not be a significant amount of delay if this approach were pursued. Ultimately, and given the above-described benefits that would accrue from a brief delay, this approach would seem to be the best and most productive use of our collective time and resources.

Overall, we hope that this letter provides constructive comments on the DEA and DHCP, especially in the context of State Parks' efforts to prepare a PWP for Coastal Commission review and the range of alternatives that the Coastal Commission asked State Parks to address in that Plan. We would be happy to discuss any particular comments or strategies that you may want to employ moving forward through your processes. In any case, we hope that our comments help strengthen these documents and would be very willing to work with USFWS and State Parks to address our comments collaboratively. Please do not hesitate to contact me if you have any questions or concerns.

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December 19, 2020

Sincerely,



Kevin Kahn  
Central Coast District Supervisor  
California Coastal Commission

Attachments: (1) Coastal Commission letter to State Parks dated July 12, 2019 (describing coastal resource issues and constraints affecting Park operations, and providing direction to State Parks on those issues); (2) Coastal Commission letter to State Parks dated July 23, 2019 (describing the Commission's July 2019 action); (3) Coastal Commission letter to State Parks and USFWS dated May 29, 2020 (providing comments and recommendations regarding the DHCP and DEIR).

cc: Armando Quintero, California State Parks Director  
Liz McGuirk, California State Parks Chief Deputy Director  
Sarah Miggins, California State Parks OHV Deputy Director  
Jim Newland, California State Parks PWP Manager  
Kevin Pearce, California State Parks ODSVRA Superintendent  
Ronnie Glick, California State Parks Senior Environmental Scientist  
Paul Souza, United States Fish and Wildlife Service Region 8 Director  
Julie Vance, California Department of Fish and Wildlife Region 4 Manager  
Trevor Keith, San Luis Obispo County Planning Director  
Bruce Buckingham, City of Grover Beach Community Development Director  
Matthew Downing, City of Pismo Beach Community Development Director

**CALIFORNIA COASTAL COMMISSION**

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July 12, 2019

Lisa Mangat, Director  
California Department of Parks and Recreation  
P.O. Box 942896  
Sacramento, CA 94296

Re: Oceano Dunes State Vehicular Recreation Area

Dear Ms. Mangat:

The California Coastal Commission wholeheartedly welcomes the effort by the California Department of Parks and Recreation (State Parks) to take what State Parks calls a “fresh look” at modifying operations at the Oceano Dunes State Vehicular Recreation Area (ODSVRA) in light of current realities. The Commission also agrees that the time is right to finally resolve the array of longstanding issues that have affected ODSVRA and surrounding areas for decades. State Parks has requested that the Coastal Commission put its thoughts and recommendations in writing to help better facilitate ongoing deliberations and discussions regarding the future of ODSVRA, including as your agency develops a Public Works Plan (PWP) for continuing operations at ODSVRA moving forward.

Since this PWP effort began in 2017, Dan Carl, the Coastal Commission’s Central Coast District Director, and Kevin Kahn, the District Supervisor, have been working closely with State Parks staff to identify and discuss all of the interrelated issues the PWP is intended to resolve. Among other matters, and at a foundational level, the PWP is intended to address ODSVRA compliance issues associated with the base coastal development permit (CDP), where the Commission originally authorized interim vehicle use parameters at the site back in the early 1980s (CDP 4-82-300 as amended). That base CDP also requires ongoing oversight by the Commission through annual reviews of the effectiveness of the interim operational parameters authorized by the CDP at managing and addressing coastal resource impacts, where the Commission can modify CDP conditions and requirements to ensure Coastal Act consistency with respect to ongoing operations at that time.

Commission staff have been providing your agency with feedback on the PWP in ongoing meetings and discussions, as well as in writing since this effort began (e.g., the recent June 13, 2018 letter on the Notice of Preparation for the PWP Environmental Impact Report).

Commission staff also discussed these same issues in depth in a meeting with your main PWP staff in Santa Cruz on April 3, 2019, and briefly on the phone with you and other State Parks senior managers, as well as the Commission’s Executive Director, Jack Ainsworth, on May 16, 2019. The Executive Director and other Commission staff senior managers subsequently had an in-person meeting in Sacramento at your offices on June 3, 2019 with you and your senior management staff, including from the Off-Highway Motor Vehicle Recreation Division, wherein these same issues were again discussed in detail and in depth, including in terms of potential longer term operational and management changes at ODSVRA to ensure compliance with the CDP, the Coastal Act, and the LCP, and where the relationship of these issues to the Coastal

Commission's annual ODSVRA base CDP review in July 2019 in San Luis Obispo were also discussed.

Commission staff's intent throughout these discussions has been to work collaboratively with State Parks to identify the many difficult coastal resource issues and constraints that affect ODSVRA and surrounding area, and to help provide guidance in the development of a comprehensive plan that fully addresses these issues and constraints. And the Coastal Commission as a body considered and deliberated with the same intent at the July 11, 2019 public hearing for the annual ODSVRA base CDP review in San Luis Obispo, and concluded by taking an action to make a series of changes to begin to address these issues and constraints through the CDP. The Commission also directed Commission staff to transmit this letter and attachment, under the signature of the chair, which outlines the issues and concerns at ODSVRA, as more fully discussed in the staff report for the CDP review, and provides direction to State Parks on alternatives to consider in the proposed PWP. Ultimately, the Coastal Commission concluded and decided that ODSVRA cannot continue to operate as it has while complying with the base CDP, the Coastal Act, and the LCP, and that it is time to explore alternatives to transition ODSVRA away from high-intensity off-highway vehicle (OHV) use to other forms of public access and recreation in order to meet Coastal Act requirements.

Among the key issues that the Coastal Commission has identified include that OHV use is contributing to ongoing air quality degradation, harming environmentally sensitive habitat, and leading to the deaths of endangered birds. In what is also an environmental justice issue, many members of the community of Oceano, one that is 50% Hispanic/Latino, have reported to Commission staff that they cannot use the beaches at ODSVRA for more traditional enjoyment of beach areas (such as walks, or just sitting on a towel and enjoying the shoreline) without safety concerns relating to OHV use. The lack of restaurants, hotels, or businesses (other than those oriented towards the OHV community) that would generally accompany a thriving California beach community are also lacking, according to Commission staff observations and reports from the residents. California Native American Tribes have also voiced concern regarding a lack of adequate consultation on the CDP and LCP processes, and have further observed that the site includes areas that are sacred ancestral lands.

In light of these critical coastal resource issues, the Coastal Commission urges State Parks to consider, for example, lower-impact alternatives such as beach camping (including potentially via some street-legal vehicles) and more traditional beach activities. The current PWP effort provides an appropriate vehicles to do so. In fact, the current setting and context provide an opportunity to more fully understand and evaluate other options consistent with both agencies' goals and legal constraints at this environmentally sensitive shoreline location.

Attached to this letter is an outline and detailed analysis of the significant coastal resource issues and constraints that affect ODSVRA operations as well as some Coastal Commission recommendations based on that analysis. The Coastal Commission believes that any resolution of current ODSVRA issues consistent with the Coastal Act must respond to and address all of the concerns identified in this letter and attachment. The six overlapping issue areas and potential next steps are summarized here:



- **CDP 4-82-300 Compliance Issues.** CDP 4-82-300 approved only interim ODSVRA accessways and OHV use levels. That permit envisioned identifying and finalizing accessways and OHV use levels (the “carrying capacity”) after careful consideration of the environmental impacts on coastal resources and other constraints affecting ODSVRA operations. The Commission does not believe that the current level of OHV use is sustainable in a manner consistent with the Coastal Act and that therefore a much less intensive form of access and recreation must be considered moving forward.
- **Local Coastal Program (LCP) Compliance Issues.** The LCP designates the entire ODSVRA as an environmentally sensitive habitat area (ESHA). Only resource-dependent uses are allowed in ESHA, and OHV use is not a resource-dependent use. Therefore, OHV use cannot be found consistent with the LCP’s ESHA provisions. Any PWP (or other framework used to bring these issues to resolution) is required to be consistent with the LCP.
- **Air Quality Issues.** State Parks is under San Luis Obispo County Air Pollution Control District (APCD) order to reduce dust associated with ODSVRA operations due to what the district has deemed a “significant and ongoing public health threat” for the people living, working, and otherwise present inland of ODSVRA. State Parks has eliminated riding activities from about 100 acres of the ODSVRA and put in place other measures to reduce dust through its partnership with the APCD. However, current APCD assessments are that State Parks’ efforts to date are not resulting in adequate dust reduction. An estimated 500 acres of OHV riding area, or about *one-third of the current riding area* of 1,500 acres, may need to be permanently closed off to all riding activity and revegetated to help resolve public health issues and help meet air quality requirements. The Commission is broadly supportive of approving implementation measures required by APCD that will facilitate State Parks’ compliance with APCD orders to reduce dust associated with ODSVRA OHV operations.
- **Rare and Endangered Species and Habitat Issues.** ODSVRA itself is part of a larger and significant and sensitive ecological system known as the Guadalupe-Nipomo dunes complex. Dunes and dune habitat are among the rarest and most ecologically productive of all coastal ecosystems in California, and these dunes are also home to several special status species protected under both State and Federal law, including the respective Endangered Species Acts (ESA). These habitats and species – which qualify as ESHA under the Coastal Act both in consideration of their special status under the federal and State ESAs, but also independently of either of these statutes – are being significantly adversely impacted at ODSVRA, including a number of violations of the ESA associated with the take of threatened western snowy plovers and endangered California least terns due to vehicular activities every year at the ODSVRA. These activities are in violation of the State and Federal ESAs – and, for substantially the same reasons, are inconsistent with ESHA protections. Furthermore, every year the Technical Review Team’s Scientific Subcommittee has strongly advised State Parks to make the current seasonal enclosure for these species (i.e., an area of approximately 300 acres, or roughly 20% of the current OHV riding area) permanent, at a minimum. These special status species/ESHA issues also dictate that a reduced level and intensity of OHV use is needed at the ODSVRA.

- **Environmental Justice and Tribal Issues.** Vehicle use at ODSVRA has led to disproportionate impacts on the residents of Oceano, and also Nipomo, who bear the burdens of the ODSVRA operations with essentially none of the benefits. Oceano is approximately 50% Hispanic/Latino with a Federal poverty rate of nearly 20%, and Nipomo is roughly 40% Hispanic/Latino with a Federal poverty rate of 10%. Pismo Beach by comparison has a population that is approximately 84% non-Hispanic white with a Federal poverty rate of 8.4%. (The overall poverty rate in the state of California is 13.3%.) In addition to the above described dust issues that residents have reported to Commission staff, including during site visits, that they must continually deal with relating to the OHV use, ODSVRA operations have limited economic development of Oceano's beachfront and community. Residents have also reported to Commission staff that OHV use has also prevented them from simply enjoying the adjacent six miles of sandy beaches and some 1,500 acres of coastal dunes through more traditional recreational beach uses such as walking or sitting on the beach. This presents an environmental justice problem, where OHV users gain the benefits of ODSVRA use, but the adjacent less affluent communities of color are forced to bear the problems and degradation associated with that use. Local tribal representatives (especially the Northern Chumash) also have informed Commission staff that they do not feel that they were adequately consulted in CDP and LCP processes for ODSVRA, do not support continued OHV use, and consider the ODSVRA to include areas that are sacred ancestral lands that should not be allowed to be used in these ways. The Commission is committed to both environmental justice and tribal consultation and justice with respect to implementation of the Coastal Act, including after expressly adopting policies for both within the past year. Equitable access for all requires a fundamental rethinking of how the ODSVRA can and should operate in the future to address these environmental justice and Native American cultural issues in a manner fully consistent with the Coastal Act.
- **PWP and PWP Proposed Project Issues.** The PWP was envisioned two and half years ago by State Parks as a way to address these ongoing and significant coastal resource issues and constraints. However, to date the Commission has not seen any draft PWP language that reflects an appropriate plan that can be found consistent with the LCP and Coastal Act. State Parks' recent PWP proposal to construct a new campground, staging, riding, and OHV entrance at Oso Flaco Lake presents what appear to be serious LCP inconsistencies related to agricultural conversion and ESHA degradation, at a minimum. Moreover, in place of circumscribing ODSVRA uses and activities in ways that resolve the issues and problems identified above, it actually would appear to *increase* OHV use and related coastal resource impacts. The Commission does not believe that the proposed Oso Flaco Lake project is an appropriate management alternative or approvable under the LCP, and it appears to indicate that State Parks is not yet pursuing the PWP in a manner that considers all of the coastal resource constraints and sensitive issues relevant here.
- **Next Steps.** The problems identified in this letter are significant and fundamental inconsistencies with the Coastal Act and suggest that it is time to start thinking about ways to transition the ODSVRA away from OHV use to other forms of public access and recreation. Low-impact car beach camping, for example, could provide a unique, lower-cost, overnight coastal camping opportunity that ties into the history of ODSVRA and continues its rich camping tradition, but with a significantly reduced impact on sensitive coastal resources and

surrounding communities. And there are undoubtedly other potential options for appropriately transitioning the Park. The Coastal Commission welcomes the opportunity to engage with you and the community to develop a new vision for ODSVRA and surrounding area for the future.

Please see the attachment for more details on the above issues and next steps for suggested resolution.

In closing, the Coastal Commission hopes that State Parks understands and accepts these comments as coming from a place of deep respect for State Parks and its mission, and a desire to work cooperatively. The Coastal Commission is committed to working with State Parks, the interested public, and the community to address all of these issues, and we look forward to continuing dialogue. If you have questions or would like to discuss further, please do not hesitate to contact Jack Ainsworth, Dan Carl, or Kevin Kahn.

Sincerely,



DAYNA BOCHCO, Chair  
California Coastal Commission

Attachment: ODSVRA Issues Discussion

cc: Dan Canfield, Deputy Director, California Department of Parks and Recreation OHMVR Division  
James Newland, ODSVRA PWP Project Manager, California Department of Parks and Recreation  
Kevin Pearce, District Superintendent, California Department of Parks and Recreation Oceano Dunes Dist.  
Trevor Keith, Director, San Luis Obispo County Planning and Building Department  
Matt Janssen, Division Manager, San Luis Obispo County Planning and Building Department  
Rita Neal, County Counsel, San Luis Obispo County  
Gary Willey, Air Pollution Control Officer, San Luis Obispo County Air Pollution Control District  
Kurt Karperos, Deputy Executive Officer, California Air Resources Board  
Lena Chang, Senior Fish and Wildlife Biologist, United State Fish and Wildlife Service  
Julie Vance, Central Coast Regional Manager, California Department of Fish and Wildlife

## **Attachment: ODSVRA Issues Discussion**

### **CDP 4-82-300 Compliance Issues**

The Coastal Commission's base CDP authorized certain operational and use parameters for OHV activity within the sensitive dune environment at ODSVRA back in the early 1980s. That CDP was premised on understanding and balancing the tension between OHV use and the fact that such use was occurring within biologically sensitive dune areas that the Commission and the County's LCP have both determined meet the Coastal Act's definition of environmentally sensitive habitat area (or ESHA, as defined in Coastal Act Section 30107.5), where such intensive and impactful non-resource dependent use would otherwise not be allowed by the Coastal Act. The CDP's terms and conditions, as amended, set in motion a series of (ultimately failed) efforts to understand the environmentally sustainable "carrying capacity" of the dunes to accommodate OHV use (e.g., carrying capacity studies, the Technical Review Team (TRT) effort, interim use limits, etc.). Ultimately, even today, almost 40 years later, ODSVRA is operating under *interim* and only *temporarily authorized* maximum use standards (e.g., maximum numbers of on-road vehicles, OHVs, campers, etc., per day) that have yet to be finalized as required by the CDP based on an actual accounting of issues and constraints that would dictate appropriate use levels. As discussed herein, it is clear that current interim use levels are not sustainable.

Further, the Commission has never finalized the way in which access to ODSVRA is authorized by the CDP, and the current entrances (at West Grand Avenue and at Pier Avenue) are also only *interim* and only *temporarily authorized* under the CDP. The Commission and the base CDP always envisioned that alternative ODSVRA access locations would be evaluated and the best alternative authorized, including weighing how such access might best be provided in light of resource and other constraints. Although required to be completed back in the 1980s, these ODSVRA entrance issues have yet to be resolved and represent a nearly 40-year-old CDP compliance issue. In the meantime, the two interim entrances lead to a series of resource concerns and problems (e.g., lack of vehicle-free general public beach access, habitat impacts when vehicles cross Arroyo Grande Creek, impacts to the Oceano community more generally, etc.). Again, the current system of access into ODSVRA is not sustainable.

In addition, all of the other issues and constraints discussed separately below are also CDP 4-82-300 compliance issues, including as they go to these core questions of sustainable use under the CDP (e.g., issues associated with San Luis Obispo County Local Coastal Program (LCP) compliance, air quality requirements, Endangered Species Act (ESA) compliance, County ownership of some 584 acres of the OHV area in ODSVRA, California Native American tribal concerns (e.g., regarding ancestral lands and sacred sites), and environmental justice concerns related to the effect of ODSVRA operations on the surrounding area, including the community of Oceano). That is not to say that each of these are not issues on their own and that these issues do not independently require resolution for other reasons, but rather it is to acknowledge that the Commission's base CDP remains the fundamental Coastal Act regulatory instrument that governs current operations as well as any next steps at ODSVRA. If the PWP intends to "replace" the CDP, as Parks has indicated is an objective of the PWP effort, then *all* of these CDP issues must be able to be addressed and brought to resolution through it.

## **LCP Compliance Issues**

One of the significant challenges facing ODSVRA is the fact that the LCP designates the *entire* ODSVRA as coastal dune ESHA,<sup>1</sup> and further designates the Park’s wetland and lake areas as Sensitive Resource Areas (SRAs)<sup>2</sup> (i.e., specific types of ESHA under the LCP that are also governed by additional SRA provisions that serve to further protect such resource areas from degradation). Importantly, OHV use is not allowed in ESHA or in SRAs pursuant to the LCP, and thus, per the LCP, OHV use is not allowed at ODSVRA at all. At the same time, because the LCP also acknowledges that OHV use takes place in the Park, and because some LCP policies refer to such vehicular use, it has been argued by some that the LCP includes some internal incongruities on these points.<sup>3</sup> While there is some evidence to suggest that the LCP intended for these potential anomalies to be resolved through establishing the above-described sustainable carrying capacity through CDP and LCP amendments,<sup>4</sup> the reality is threefold: first, the appropriate carrying capacity has never been identified nor defined beyond the interim use limits specified under the CDP; second, neither the CDP nor the LCP has been amended to identify an appropriate and environmentally sustainable carrying capacity; and third, even if that was the road to resolution that was intended in the early 1980s, ESHA and LCP jurisprudence has evolved since the time of original LCP certification in such a way that LCPs must be construed to be consistent with the Coastal Act, which provides LCPs with their statutory authority.<sup>5</sup> The Coastal Act and the LCP’s ESHA sections are clear that only resource-dependent uses are allowed in ESHA. OHV use is not dependent on ESHA resources, and thus under the Coastal Act and the LCP, OHV use at ODSVRA is actually prohibited. Any proposed LCP amendment to harmonize LCP policies with ongoing OHV use would similarly be fundamentally inconsistent with the Coastal Act protections required for ESHA. Given this reality, we have to

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<sup>1</sup> The entire Park is considered ESHA under the LCP, including because it is mapped and designated as dune ESHA “Terrestrial Habitat” by the LCP’s South County Coastal Area Plan.

<sup>2</sup> Including the Oso Flaco Lakes SRA, the Dune Lakes SRA, and the Black Lake Canyon SRA portions of the Park.

<sup>3</sup> Any potential incongruities on these points, to the degree they exist, are definitely weighted towards ESHA and resource protection, rather than OHV use. In fact, although the LCP explicitly calls out riding in the dunes in places, it does so almost entirely in terms of identifying it as having occurred historically, and also in terms of its adverse impacts on coastal resources. For example, the LCP states that “the unique flora of much of the inland dunes is being severely degraded by recreational vehicle use,” and “continued use of dunes by off-road vehicles has led to environmental degradation of this habitat and has eliminated historical daytime use” (LCP South County Area Plan pages 3-10 through 3-13).

<sup>4</sup> For example, the South County Coastal Area Plan references CDP 4-82-300 and its carrying capacity requirements with respect to understanding and regulating potential camping and OHV use limits, habitat protection, community impacts, and other recreational uses.

<sup>5</sup> See *McAllister v. Coastal Commission* (2009) 169 Cal.App.4<sup>th</sup> 912, wherein the Sixth District Court of Appeal overturned a project approval by the Commission in the early 2000s interpreting an LCP ESHA policy to allow non-resource-dependent (residential in that case) use and development in ESHA. The Court found that such an interpretation was improper, and that the LCP must be understood in relation to the requirements of Coastal Act Section 30240, from which LCP ESHA policies derive their authority, even if those LCP policies might appear to provide an argument to allow a non-resource-dependent use in ESHA. In other words, the Court determined that an LCP cannot be read to allow non-resource-dependent development or use in ESHA, but rather that it must be understood first in terms of Section 30240 requirements. As a published appellate court decision, that decision requires the Commission to interpret LCPs, including the San Luis Obispo County LCP, in that way.

conclude that continued OHV use at ODSVRA because of these Coastal Act and LCP ESHA/SRA inconsistencies is simply not approvable.

Further, about 40% of the total ODSVRA area currently allotted to OHV use, or almost 600 acres, is explicitly designated by the LCP as a buffer area that is “required for habitat protection.”<sup>6</sup> In addition, this nearly 600-acre property is also not even owned by State Parks, but is rather owned almost entirely by San Luis Obispo County (i.e., the roughly 584-acre La Grande property). Regarding the La Grande Tract specifically, three additional things should be mentioned on this point. First, there is no current lease or other arrangement for State Parks to continue using the La Grande property for any purpose. This is the County’s property, and there is nothing stopping the County from disallowing continued State Parks’ use of its property at any time, and/or from disallowing OHV use specifically. Second, whereas there may be some internal incongruities related to LCP text describing potential vehicular use more generally at the Park when it is ESHA, that issue does not apply to the La Grande area because the LCP not only identifies this area as ESHA, but it also explicitly calls it a buffer area “required for habitat protection,” which, based on evidence of OHV use impacts is not compatible with ongoing OHV use. In other words, the LCP does not include any potential incongruities with respect to the La Grande area, and the LCP clearly prohibits OHV use (and any other habitat-degrading use) in this area. And third, in past litigation in the early 2000s over the continued use of the La Grande area for OHV use,<sup>7</sup> the LCP inconsistency issue was not resolved, it remains outstanding to this day, and it would need to be resolved in any Coastal Commission and/or San Luis Obispo County action related to use of that property by OHVs, including through any such action on a CDP amendment, LCP amendment, or a PWP.<sup>8</sup> La Grande property issues, including the fact that State Parks does not even own this acreage, are a significant issue and constraint to continued OHV use at ODSVRA.

Finally, a PWP can only be approved if it is consistent with the underlying LCP (see Coastal Act Section 30605). As described above, there are clearly LCP inconsistencies and issues with continued OHV use, and the County has recently acknowledged as much in recent communications with you, stating: “[South County Coastal Area Plan] Figure 4 and Standard 9 need to be updated to be consistent with the Coastal Commission permit. The project description for the PWP EIR needs to be broad enough to address the potential impacts associated with such an amendment to the County Local Coastal Plan. State Parks should submit and receive approval for that Local Coastal Plan amendment prior to approving the PWP”.<sup>9</sup> The underlying issue is, however, that these types of fundamental LCP inconsistencies cannot be resolved through LCP

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<sup>6</sup> See South County Coastal Area Plan Recreation Policy 9 and Figure 4.

<sup>7</sup> Two lawsuits, which were ultimately consolidated (*Friends of Oceano Dunes v. County of San Luis Obispo* and *Sierra Club v. State of California*).

<sup>8</sup> The Court ultimately found that it could not reach the merits of the La Grande property case because the lawsuits were challenging a proposed sale of the property at the time and did not request review of a specific agency action related to allowing continued use of the property for OHV. In the case of an agency *action* that would allow continued OHV use, those issues would become relevant and litigable on this very point.

<sup>9</sup> See San Luis Obispo County Counsel Rita Neal’s July 17, 2018 letter to State Parks.



amendments that allow continued OHV use due to core Coastal Act inconsistencies regarding ESHA protections. And, as indicated above, the existing LCP, as understood based on recent court decisions (e.g., the *McAllister* decision mentioned above), directs that OHV use is *not allowed* at ODSVRA under the Coastal Act and the LCP, so it creates a fundamental issue/constraint to State Parks' OHV operations moving forward.

### **Air Quality Issues**

As well documented by the San Luis Obispo County Air Pollution Control District (APCD) and the California Air Resources Board (CARB), significant particulate matter (or 'dust') is generated by OHV use on the dunes at ODSVRA, resulting in exceedances of State and Federal particulate matter standards for inland and downwind communities,<sup>10</sup> including Oceano more broadly and along the Nipomo Mesa. The high particulate matter concentrations have resulted in what the APCD has deemed a "significant and ongoing public health threat" for the people living, working, and otherwise present inland of ODSVRA. Indeed, on certain days of the year, this area has the highest particulate matter concentrations and worst air quality *in all of the United States*.<sup>11</sup> To address this significant public health crisis, APCD has required State Parks to comply with APCD Rule 1001 (adopted by the APCD in 2011), including the requirement for State Parks to implement appropriate dust control measures as part of a Particulate Matter Reduction Plan (PMRP) aimed at reducing particulate matter and meeting the Rule's dust reduction requirements. State Parks' initial efforts towards reducing dust were authorized by the Commission on an emergency basis starting in 2013, and subsequently by regular CDP in 2017 (CDP 3-12-050),<sup>12</sup> and applicable measures to be applied were last updated and approved by the Commission under that CDP in June of 2018.

Since that time, and based on APCD/CARB assessments that State Parks' efforts to date were not resulting in adequate dust reduction, State Parks recently entered into a Stipulated Order of Abatement (SOA) (in 2018, as modified in 2019) with the APCD to identify and implement additional measures needed to reduce dust related to vehicular activity at ODSVRA. The latest modeling from State Parks' draft PMRP suggests that roughly 500 acres of OHV riding area, or roughly *one-third of the current riding area* of 1,500 acres, may need to be permanently closed off to all riding activity and revegetated in order to help resolve public health issues and to help meet applicable air quality requirements. Again, this is a serious public health issue that in some ways compels more immediate action than many of the other issues and constraints at ODSVRA, and needs effective and timely resolution in the short term. The fact that Rule 1001 was adopted

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<sup>10</sup> Including exceedances of State and Federal ambient air quality standards for particulate matter equal to or less than 10 and 2.5 microns in size, known as PM10 and PM2.5, respectively.

<sup>11</sup> Including most recently on April 11, 2019, April 21, 2019, and May 28, 2019. On those dates, Nipomo had the highest Air Quality Index rating of combined particulate matter and ozone concentrations in the country, according to the United States Environmental Protection Agency (airnow.gov website).

<sup>12</sup> The Commission has been sued by the Friends of Oceano Dunes four times since 2016 over the Commission's authorization of measures to protect inland communities from ODSVRA dust (three times in San Luis Obispo County Superior Court: Case Numbers 16CV-0160, 17CV-0267, and 17CV-0576; and once in federal court (the U.S. District Court for the Central District of California), Case Number 2:17-cv-8733). All of these litigation cases remain pending.

in 2011 but the air quality problem remains, and remains acute, almost a decade later speaks volumes to the need for change at ODSVRA. These aforementioned APCD/air quality issues are particularly relevant with respect to CDP 4-82-300 because of the CDP's primary purpose in understanding and evaluating sustainable use, including with respect to appropriate vehicular carrying capacity, and the way such use affects coastal resources, including significant and sensitive of dune resources. Clearly, the current amount of OHV use, just based on air quality impacts alone, but also in terms of the corresponding effect on coastal resources, is not sustainable nor meeting the CDP's objectives.

In short, ODSVRA vehicular activities have been and are resulting in a significant and continuing public health air quality hazard in the area inland of ODSVRA, notwithstanding measures taken to date to combat these issues, and it appears clear that Park operations must be significantly adjusted for this reason, including in the very short term (as in the next few months). The reality of the effects of the ODSVRA's OHV use on public health, including in relation to dune resource degradation associated with same, is a fundamental issue/constraint to State Parks' operations moving forward and similarly suggests that the status quo is simply not sustainable.

### **Rare and Endangered Species and Habitat Issues**

Despite ongoing OHV use, ODSVRA still represents a rich coastal resource area, and it has been designated as an environmentally sensitive habitat area (ESHA) by the Coastal Commission in the certified LCP, which designation has been affirmed by the Commission countless times since then through its CDP actions and annual reviews. In fact, ODSVRA is part of a larger and significant and sensitive ecological system known as the Guadalupe-Nipomo dunes complex. Dunes and dune habitat are among the rarest and most ecologically productive of all coastal ecosystems, which is why the Commission designates dune as ESHA under the Coastal Act, why the County and the Commission designated dunes as ESHA under this LCP when it was certified, and why the Commission has otherwise affirmed that designation regarding ODSVRA dunes and related habitats as ESHA in its past actions. Not only are the ODSVRA dunes themselves sensitive coastal resources, but this dune habitat is also *very* sensitive to degradation from OHV use and activities. In fact, many studies have looked at the adverse impacts of OHV use on beaches (including both intertidal and upper beach zones) and dunes, finding that OHV recreational activity causes the highest levels of environmental harm to beaches and dunes of *any* recreational activity,<sup>13</sup> where such harm includes disturbing dune physical attributes and stability; destroying dune vegetation and leading to lower plant diversity and cover; and disturbing, injuring, or killing beach and dune fauna (invertebrates and vertebrates), including sensitive species.<sup>14</sup> In addition, dunes often support other sensitive fauna, and at ODSVRA have been identified by the USFWS as critical habitat for the threatened (under the Federal Endangered Species Act (ESA)) western snowy plover. The dunes and other related habitats at

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<sup>13</sup> See, for example, Schlacher, T.A., L. Thompson, and S. Price: Vehicles versus Conservation of Invertebrates on Sandy Beaches: Mortalities Inflicted by Off-Road Vehicles on Ghost Crabs, in *Marine Ecology* (V.28; 354-367; 2007).

<sup>14</sup> See for example, Defeo, O., A. McLachlan, D.S. Schoeman, T.A. Schlacher, J. Dugan, A. Jones, M. Lastra, and F. Scapini: *Threats to Sandy Beach Ecosystems: A Review*, in *Estuarine, Coastal, and Shelf Science* (V.81; 1-12; 2009).



ODSVRA also support other endangered and threatened species, including the California least tern, California red-legged frog, steelhead trout, and tidewater goby.<sup>15,16</sup>

Although State Parks implements a suite of sensitive species management measures, it has not been enough to ensure that these rare species and habitats are given the protections that are *required* under State and Federal law, including the respective ESAs. In fact, OHV use at ODSVRA has continued to cause harm to and the death of ESA-protected species, which constitutes illegal “take” of these species under both the State and Federal ESAs. ESA regulators indicate that such take, including such continued and ongoing take, is simply not allowable and is actually *prohibited* under the ESA. For example, in recent 2016 letters to State Parks, the USFWS described continuing western snowy plover deaths (i.e., three western snowy plovers known to be killed by vehicles in just one 30-day period preceding their first 2016 letter, and at least three more killed in the next several months preceding their second letter) and referred to other mortalities of both western snowy plovers and California least terns that have occurred since 2001, all representing significant violations of the Federal ESA.<sup>17</sup> Similarly, in 2015 and 2016 letters,<sup>18</sup> CDFW identified seven documented California least tern deaths in 2014, and at least ten documented tern mortalities over the preceding fifteen years, which all represent significant violations of the State ESA. Furthermore, vehicles continue to drive through Arroyo Grande Creek when it is flowing, affecting ESA-endangered tidewater goby and ESA-threatened steelhead trout known to be present there. California red-legged frogs are also known to inhabit Arroyo Grande Lagoon, and are similarly under threat. And, most recently in 2018, State Parks documented eight more western snowy plovers and California least terns that were crushed and killed by OHVs.<sup>19</sup>

State Parks has been in a protracted, nearly two-decade effort to develop a Habitat Conservation Plan (HCP) to support an incidental take permit (ITP) related to listed species take at ODSVRA under the Federal ESA, but has never produced a draft HCP for public review, and it is unclear when or even if a Federal HCP/ITP might ever be approved by USFWS.<sup>20</sup> Further, although

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<sup>15</sup> California least tern is listed as an endangered species under both the Federal and State ESAs; tidewater goby is listed as endangered under the Federal ESA, and western snowy plover, California red-legged frog, and South Central Coast steelhead trout are listed as threatened under the Federal ESA.

<sup>16</sup> Although the California and State ESAs are directly administered by other resource agencies (including the United States Fish and Wildlife Service (USFWS) and the California Department of Fish and Wildlife (CDFW)), the Coastal Commission has an independent authority under the Coastal Act to protect coastal resources in general, and ESHA specifically. In discharging this responsibility, the Commission has generally found that habitats for ESA-listed species are protected as ESHA, including the type of occupied listed species habitats that are present at ODSVRA.

<sup>17</sup> See March 29, 2016 and December 22, 2016 USFWS letters.

<sup>18</sup> See July 3, 2015 and March 3, 2016 CDFW letters.

<sup>19</sup> Documented in State Parks’ Nesting of the California Least Tern and Western Snowy Plover at Oceano Dunes State Vehicular Recreation Area, San Luis Obispo County, California, 2018 Season.

<sup>20</sup> USFWS published a NOP/NOI to prepare draft environmental documents (under CEQA and NEPA, respectively) for a draft HCP in early 2018, but that NOP/NOI effort did not include an actual draft HCP to be evaluated. In any case, USFWS may need to put the process on hold, including due to State Parks’ pursuit of the referenced PWP that

focused, detailed, and science-based resource monitoring programs are an important element of Federal HCPs/ITPs, and notwithstanding Parks' efforts to date on this point, State Parks has been operating for some fifty years without a comprehensive resource monitoring program vetted under a certified ESA document, such as an HCP/ITP, which impairs the Commission's ability to understand and assess the status of the Park's sensitive habitats and species, and the effect of OHV use on them. In addition, whether or not USFWS ultimately approves an HCP/ITP allowing for some manner of take of ESA-protected species under the *Federal ESA*, CDFW is not allowed to authorize *any* take for California least tern under the *State ESA* except for authorized research (pursuant to the tern's designations as endangered under the State ESA and as Fully Protected under Fish and Game Code Section 3511). Thus, although State Parks can potentially pursue a HCP/ITP to address take under the Federal ESA, it is not clear that there is even a path forward for State Parks to address impacts to listed species under the State ESA and related State statutes. On these points, in 2017 State Parks was served a 60-Day Notice of Intent to Sue for Violations of Section 9 of the Federal Endangered Species Act by the Center for Biological Diversity.<sup>21</sup>

In attempting to address some of these ESA issues, State Parks maintains a seasonal habitat protection enclosure area for listed species in the southernmost seaward portion of the OHV riding area from March through September annually. A total area of approximately 300 acres (or roughly 20% of the current OHV riding area) is off limits to vehicles for that seven-month period. However, for the five-month period from October through February, this southern enclosure area is open to public use, including for camping, street-legal vehicles, and OHVs. Such use results in large areas of flattened terrain and barren sand with very limited scattered natural debris and vegetation, thereby limiting its value as a nesting habitat refuge when the area is off limits for the other seven months of the year. This area is also immediately adjacent to the sensitive Oso Flaco Lake and surrounding dune area that is currently off limits to vehicles for habitat protection purposes as directed by the Commission.<sup>22</sup> For many years, the TRT's Scientific Subcommittee, including the Commission's Senior Ecologists, has strongly recommended that this area be closed year round for rare and endangered species protection

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might result in a different analytic framework when completed (and thus a moving target) for HCP development and review (e.g., different Park configurations, operations, and use levels). As such, and despite the acute need for an HCP, particularly given past documented episodes of ESA species take, it is not clear whether such an HCP will be fruitful at this time in evaluating environmental impacts when ODSVRA's operational parameters are in flux, and in need of fundamental change to address the range of issues and constraints affecting ODSVRA operations.

<sup>21</sup> Including for failure to have an HCP/ITP to authorize take of western snowy plover: "Although Section 10 of the ESA provides for HCPs that, if approved by the Service, could authorize a certain level of take, State Parks does not have an HCP for snowy plovers at Oceano Dunes SVRA. State Parks has claimed that it has been developing an HCP for the Oceano Dunes SVRA pursuant to section 10 of the ESA for over two decades, but no such plan has been approved by the Service or even noticed for public review." However, CBD entered into an agreement with State Parks at that time to not actively pursue said litigation as long as active progress was being made in pursuit of the HCP. CBD indicates that they reserve the right to initiate the litigation should HCP efforts languish, and that they are considering their options on that front currently given the current context on this issue.

<sup>22</sup> Including in 1982 when CDP 4-82-300 was initially approved which prohibited OHV riding in the Oso Flaco area, and in the CDP's fourth amendment in 1991 which prohibited equestrian use in this area as well.

purposes, but State Parks has not implemented this recommendation, and the area currently is only seasonally available for listed species for just over half each year.

Thus, while ODSVRA is ESHA for a variety of reasons, including with respect to ESA-related species and their habitats, thus independently raising Coastal Act and LCP concerns, past and continued rare and endangered species and habitat harm and “take” have constituted and continue to represent outright violations of the State and Federal Endangered Species Acts. Violation of these laws is prohibited and, short of complete avoidance of same at least for the State ESA, are not allowed even with an HCP/ITP. Thus, continued OHV operations at ODSVRA in light of these rare and endangered species/ESHA inconsistencies is another fundamental issue/constraint to State Parks’ operations moving forward.

### **Environmental Justice and Tribal Issues**

At its August 2018 meeting, the Coastal Commission adopted its Tribal Consultation Policy to comply with state law and ensure California Native American tribal members are full participants in Commission decisions that affect cultural resources. In addition, at the March 2019 meeting, the Commission adopted its Environmental Justice Policy, the goal of which is to integrate the principles of environmental justice, equality, and social equity into all aspects of the Commission’s coastal resource planning and regulatory program. Taking an environmental justice approach to coastal policy requires a fundamental re-thinking of who is connected to the coast, and how. For instance, tribal and indigenous communities with cultural ties to the coast depend on access to ancestral lands and sacred sites to maintain traditional practices, yet their unique perspectives are frequently overlooked or undervalued. Environmental justice stakeholders across the country who have been working in this policy arena for decades have also noted that wherever low income communities and communities of color are concentrated in coastal regions, they are frequently disconnected from the coast by both social and physical barriers. Historic inequalities, as well as California’s growing population, changing demographics, socio-economic forces, judicial decisions, and policy choices continue to shape development patterns and population shifts that widen the disparity gap. Not only is equitable access to the coast for all Californians essential, so is protecting coastal natural resources for future generations.

OHV uses at ODSVRA have led to disproportionate impacts on the residents of Oceano, who bear all of the burdens of the ODSVRA operations with essentially none of the benefits. The town of Oceano is the de facto “gateway” to ODSVRA, but OHV use has not only limited economic development of Oceano’s beachfront but it has also prevented any meaningful non-OHV use of the immediately adjacent six miles of the community’s sandy beaches and some 1,500 acres of coastal dunes. While other seaside California residents take for granted being able to picnic, stroll, or just sit on a beach towel, this is not an option for many in Oceano. The use of the beach and natural dune areas for OHV riding has also been a long term concern for local tribal representatives (especially the Northern Chumash), who were not adequately consulted when the initial CDP was approved and when the LCP was first certified for this area, who do not support continued OHV use, and who consider ODSVRA to include areas that are sacred ancestral lands that should not, in any circumstance, be used in these ways. For the community of Oceano, not only are these coastal and shoreline areas ‘lost’ to the community, but these kinds

of impacts are also only compounded by other impacts, such as the aforementioned dust problems that fall disproportionately on this community. Similarly, year-round grading and sand removal at the ODSVRA entrance (i.e., State Parks apparently weekly removes sand from the Park's entrance areas and trucks it to the local landfill) has the undesirable effect of potentially funneling higher tides into the town. This practice also represents a counterproductive coastal hazard adaptation strategy and activity where removal of this natural barrier to sea level rise actually diminishes one of the community's most valuable resources for future resiliency and adaptation to rising seas. In fact, one of the more important dune ecosystem functions is the ability to serve as a buffer against rising seas and coastal hazards, and any activity that weakens or adversely impacts dunes also weakens this critical adaptation and protection function as well.

In addition, ODSVRA operations are seen by many as stunting what some consider basic community services, local amenities, and economic improvements for the community of Oceano, a community that is 49.8% Hispanic/Latino with a federal poverty rate of 18.8%,<sup>23</sup> and a community that was designated as an "Opportunity Zone" by Governor Brown in 2018.<sup>24</sup> The community is more recently becoming more organized in this respect, including the recent creation of the Oceano Beach Community Association and their work with local Cal Poly San Luis Obispo students to help update the Oceano Community Plan. The County too has recently raised concerns of this type, stating in 2018: "Oceano residents are impacted by the operation of the ODSVRA. The two million annual visitors to the park are impacting the residents of Oceano as they come and go using Pier Avenue (the primary access point to the park). Residents must deal with sand tracked out of the park on vehicle tires and blown off their trailers as they depart Oceano. Residents must also deal with an increased crime rate, additional trash and periods of significant noise. In addition, local first responders and hospitals are impacted as a result of the operation of the ODSVRA."<sup>25</sup> To the County's point, recent years have seen an increase in unpermitted activities in the dunes (e.g., concerts, such as the Pismocean event), large scale OHV events (e.g., Huckfest), and a series of significant injuries and even deaths, all related to the high-intensity OHV use of ODSVRA, and all also unduly affecting the surrounding communities. In addition, the aforementioned dust adversely affects inland communities, like Oceano, and also Nipomo (which is 39.6% Hispanic/Latino with a 10.2% poverty rate) disproportionately. This presents a classic environmental justice dilemma, wherein Park users gain the benefits of Park use, but adjacent and inland communities, particularly less affluent communities of color, are forced to bear the problems and degradation associated with that use. Unlike the more affluent, adjacent beach communities, such as Avila Beach and Pismo Beach, the residents of Oceano have *no* non-motorized beach access options, and the downwind, inland residents residing under the dust plume receive no benefit from ODSVRA operations. It is clear that these kinds of impacts and inequalities to surrounding areas need to be reassessed, both in light of the Commission's recent Environmental Justice Policy and Tribal Consultation

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<sup>23</sup> According to the U.S. Census American Community Survey 5-Year Estimates, 2013-2017. For relative reference, California's poverty rate overall is 13.3%, and the City of Pismo Beach's is 8.4%, with a population that is 84% non-Hispanic white.

<sup>24</sup> Pursuant to the Tax Cuts and Jobs Act of 2017.

<sup>25</sup> See July 17, 2018 letter from San Luis Obispo County Counsel Rita Neal to State Parks.

commitments, but also in terms of appropriately addressing historic and generational inequalities that are at least partially due to Park operations on surrounding areas, in a manner which is consistent with the protection of coastal resources, as required under the CDP, Coastal Act, and LCP.

In short, ODSVRA has been operating for many years without adequately addressing environmental justice and Native American tribal concerns, and these concerns need to be clearly and effectively taken into account as the future of ODSVRA operations is considered. It is clear that current operations of ODSVRA do not adequately respond to the way in which they affect surrounding communities, including those which are less wealthy and include more underserved people of color, and do not appropriately respond to the needs of the tribes that consider these areas sacred ancestral lands and their ancestral home. These are all core CDP 4-82-300 issues as well, not the least of which is because the CDP required State Parks to select an OHV access and staging system that accounted for and reduced impacts to the community of Oceano. Again, the entrance system has never been finalized as required, the impacts to the community remain unaddressed and unmitigated, and these environmental and tribal justice issues are also a fundamental issue/constraint to State Park's operations moving forward that suggest that the status quo is not sustainable.

#### **PWP and PWP Proposed Project Issues**

As indicated at the outset of this letter, Commission staff and the Commission have discussed with State Parks and identified over the last couple of years the issues and constraints that need to be resolved through State Parks' proposed PWP, as discussed above. To date, however, the Commission has yet to see any actual draft PWP language. Thus it is unclear to what degree these issues and problems are being considered and addressed, and thus whether the PWP can possibly be successful in that regard. Therefore, the Commission was surprised when the first substantive PWP document that was distributed publicly for review (in February 2019) simply identified a series of projects to be undertaken, but did not address the issues and constraints that Commission staff and the Commission has been discussing with State Parks staff for some time. In fact, the primary proposed project apparently being considered under the PWP does not really address these far ranging issues, problems and constraints, but instead would actually appear to exacerbate all of them – namely the proposed new campground, staging, riding, and OHV entrance at Oso Flaco Lake. This project not only presents what appear to be serious LCP inconsistencies related to agricultural conversion and ESHA degradation, at a minimum, but instead of circumscribing Park uses and activities in ways that resolve the problems identified, it actually would appear to *increase* OHV use and related impacts associated with same. This project appears to be based on a premise of a 'no net OHV loss of riding area', which is a perspective that has long been espoused by OHV riding groups such as the Friends of Oceano Dunes, and a perspective articulated by Parks when Commission staff met with State Parks staff in early 2017 as Parks was kicking off their PWP effort. However, as Commission staff informed State Parks then, and as it has continued to inform State Parks since, 'no net OHV loss' is not only something the Commission cannot support as a foundational element of the PWP, but is actually both counterproductive to success and counterintuitive in terms of the very real issues and constraints affecting ODSVRA and its continued operations. In any event, the Commission does not believe that the proposed Oso Flaco Lake project is approvable, nor does it believe it



shows that the PWP effort is moving in the right direction. On the contrary, it appears to be a fairly clear indication that the PWP is heading in direction that is not in keeping with the vision of a developing a contemporary plan that addresses the many difficult and serious issues and constraints presented by OHV riding in the dunes.

### **Next Steps**

As indicated, the Commission has always viewed the PWP effort as a vehicle to address issues and problems that have been identified over the years due to ODSVRA operations, including issues and problems as they pertain to the base CDP but also as related to LCP inconsistencies, air quality and public health dangers, ESA violations, and environmental and tribal justice. And State Parks has likewise described this PWP effort as taking a fresh look at modifying Park operations in light of these current issues and realities while providing for ODSVRA uses that appropriately respond to and respect ODSVRA's special coastal setting. As indicated above, in the Commission's view the issues and constraints that collectively affect ODSVRA make it clear that ODSVRA cannot continue to operate as it has in the past. Instead, the identified issues and constraints suggest that it is time to start thinking about ways to transition ODSVRA away from OHV use to other forms of public access and recreation that better respond to the current realities that affect and are affected by activities at this shoreline location. In short, in the Coastal Commission's view ODSVRA operations that are fully consistent with on-the-ground realities, and with today's laws and requirements, do *not* include OHV use.

As is, the entire ODSVRA is ESHA where OHV use is not even allowed, some 584 acres (or roughly 40% of the OHV riding area) are owned by San Luis Obispo County, some 500 acres (or roughly 33% of the OHV riding area) may soon be closed to riding due to APCD/CARB dust control requirements, and some 300 acres (or roughly 20% of the OHV riding area) needs to be made a permanent ESA-habitat enclosure off-limits to OHV. It is clear to the Commission that the constraints are rapidly closing in on OHV use, and it appears clear that it is happening in the very short term. Granted, current vehicular and OHV users will no doubt suggest that allowing continued OHV use is exactly the manner in which State Parks should proceed, including in light of the OHV-related legislation,<sup>26</sup> but to do so is to suggest that State Parks should simply

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<sup>26</sup> On that point, it is important to note that that legislation (i.e., Public Resources Code (PRC) Section 5090 et seq) supports and encourages OHV recreational use, but at the same time it does *not* support it at all costs. In fact, the legislation is clear that when OHV use is leading to problems, such as is the case at ODSVRA, then it is appropriate to shut down that use if necessary to protect sensitive natural and cultural resources. For example, PRC Section 5090.02(a)(3) states that the Legislature finds: "The indiscriminate and uncontrolled use of those vehicles may have a deleterious impact on the environment, wildlife habitats, native wildlife, and native flora"; and PRC Section 5090.02(c)(4) states: "When areas or trails or portions thereof cannot be maintained to appropriate established standards for sustained long-term use, they should be closed to use and repaired, to prevent accelerated erosion. Those areas should remain closed until they can be managed within the soil conservation standard or should be closed and restored"; and PRC Section 5090.35(a) states: "The protection of public safety, the appropriate utilization of lands, and the conservation of natural and cultural resources are of the highest priority in the management of the state vehicular recreation areas." Thus, although it has been argued by some that this enabling legislation does not allow for the phasing out of OHV use, the legislation itself paints a different picture, one that clearly recognizes that it does *not* stand for OHV use at all cost, and rather requires such use to be undertaken in a manner consistent with long-term sustainable use where the conservation of natural and cultural resources is prioritized; and it certainly allows for closing off OHV use where it is causing the types of problems it is causing at ODSVRA. In addition, and

disregard the realities affecting ODSVRA, and to suggest that those realities are somehow inconsequential. In the Commission's view, they are not. It is not a single issue that is leading to this conclusion, rather it is the myriad of significant and overlapping issues, including those described in this letter and attachment, that are compounding and that together serve to constrain what can and should happen in ODSVRA. In the Commission's view what is appropriate in the coastal zone necessarily changes and evolves over time, including with advancing scientific knowledge and more appropriate, evolving regulatory requirements to protect sensitive habitats, species and other coastal resources. OHV use in ESHA, and the amount of problems engendered by it, is not an appropriate use in this setting in light of the serious issues and constraints identified above. The Commission hopes that State Parks agrees, and looks forward to working with State Parks in the development of a contemporary ODSVRA plan for Oceano Dunes that recognizes current science, contemporary laws and regulations, and good public policy that is in the best interests of all people.

On that point, the Commission notes that there are clearly a range of options that State Parks could consider moving forward that can appropriately respond to the above-described significant issues and constraints affecting continued operations at ODSVRA, and further notes that there are those who would suggest that ODSVRA eliminate vehicular use in the dunes as one potential solution. It is clear to the Commission that that would be a fair conclusion based on the evidence. At the same time, it is also clear to the Commission that there may be other options that would make sense for both State Parks and the public, including a version of ODSVRA's future that retained some non-OHV vehicular use of ODSVRA, not only based on its designation as a vehicular recreation area, but also based on its rich history in providing for and accommodating other forms of vehicular use that would not have the same level of adverse impact as OHV use. For example, street-legal vehicle camping on a limited portion of the beach might be able to provide a unique, lower-cost, overnight coastal camping opportunity that ties into the history of ODSVRA and continues its rich camping tradition, but with a significantly reduced impact on sensitive coastal resources and surrounding communities. If properly designed, it could not only retain a unique offering in coastal California, but it could also allow for safe access for residents and visitors that would have the added benefit of greater compatibility with the town of Oceano, including being more closely aligned with its growth and related economic development.

In any case, these issues, constraints, and conclusions, however, also represent an important opportunity to rethink this Park and what 3,600 acres of State-owned and operated dune ESHA and six linear miles of public beach *should be* into the future, properly taking into consideration protection of coastal resources. And the PWP process in which State Parks is engaged can clearly operate as a key vehicle to think about, define, and effectuate that future. But to the Commission, the coastal resource issues and constraints that collectively affect ODSVRA make it clear that ODSVRA's future cannot continue to operate as it has in the past without change under the CDP.

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perhaps just as compelling, PRC Section 5090 does not somehow preempt other State laws, including the Coastal Act (and by extension the LCP). On the contrary, as with other laws affecting the same resources, it is important to harmonize the laws as much as possible. On that point, here, proper application of both laws based upon facts on the ground would appear to suggest the same outcome: namely that OHV use at this location is not sustainable, and the time has come to transition to other appropriate recreational uses.

Instead, the identified issues and constraints suggest that it is time to start thinking about ways to transition ODSVRA away from OHV use to other forms of public access and recreation that better respond to the current realities that affect and are affected by activities at this shoreline location. ODSVRA operations that are fully consistent with on-the-ground realities and with the legal requirements of the CDP, Coastal Act, and LCP do not include OHV use, and thus, whether through the PWP process or otherwise, including through a future CDP review, State Parks needs to explore a future ODSVRA that transitions away from OHV and towards less intensive forms of public access and recreation.

Again, there are clearly a range of possibilities that could be considered for ODSVRA moving forward, including undoubtedly others different from these, and the Commission *very much* welcomes the opportunity to engage with State Parks and the community in an effort to develop a truly new vision for the Park and surrounding area for the future. Good coastal planning and good public policy direct no less.



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July 23, 2019

Lisa Mangat, Director  
California Department of Parks and Recreation  
P.O. Box 942896  
Sacramento, CA 94296

Re: Oceano Dunes State Vehicular Recreation Area

Dear Ms. Mangat:

As you know, the California Coastal Commission held a public hearing last Thursday July 11th in San Luis Obispo to review State Parks operations and management at the Oceano Dunes State Vehicular Recreation Area (ODSVRA) in relation to the base coastal development permit (CDP) that originally authorized interim vehicle use parameters at the site back in the early 1980s (CDP 4-82-300 as amended). Following that July 11th public hearing, the Commission deferred action on Commission staff's recommended operational and other short-term changes to the CDP terms and conditions, and instead took an action:

1. Directing the Commission Chair to send a comment letter (identified in the staff report as Exhibit 13 – sent separately from this letter, and dated July 12, 2019) providing Coastal Commission direction to State Parks moving forward as regards operational and management changes that the Commission believes are necessary at ODSVRA to ensure Coastal Act consistency, including through State Parks' proposed Public Works Plan (PWP);
2. Requiring State Parks to incorporate all of staff's recommended operational and other short-term changes in the staff report (see "Staff-Recommended Additional CDP Special Conditions" attachment) as permanent conditions through the PWP;
3. Requiring State Parks to provide the Commission with in-person quarterly reports on the progress of State Parks' PWP efforts over the next year (i.e., through summer 2020); and
4. Requiring State Parks to bring forward a PWP for Commission consideration that addresses the staff-recommended operational and other short-term changes (see attachment) and the Commission's comments and direction (see July 12, 2019 letter), otherwise by the summer of 2020.

We look forward to working with you and your staff over the next year, and beyond, to help bring about needed change at ODSVRA to ensure consistency with the Coastal Act. If you have any questions, please don't hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Ainsworth".

JOHN AINSWORTH  
Executive Director

Attachment: Staff-Recommended Additional CDP Special Conditions

- 1. Predator Management Plan.** By October 31, 2019, the Permittee shall submit for Executive Director review and approval a Predator Management Plan. The Plan shall be prepared by a resource ecologist (or ecologists) with experience with sensitive species and predation issues, shall be based on consultation with USFWS, and shall identify the measures to be implemented to protect sensitive species (including Western snowy plover and California least tern) from predation, including by coyotes, raccoons, skunks, opossums, ravens, gulls, owls, and peregrine falcons. At a minimum, the Plan shall identify measures to better manage trash and food waste enclosures, and BMPs to better address predation of sensitive species, including in terms of fencing surrounding all vegetated dunes suitable for predator management. The Permittee shall immediately implement the Predator Management Plan upon Executive Director approval.
- 2. Vehicular Enforcement Plan.** By October 31, 2019, the Permittee shall submit for Executive Director review and approval a Vehicular Enforcement Plan. The Plan shall identify the measures to be taken to comply with and actively enforce all CDP ODSVRA vehicular use limits, all vehicular speed limits, and all other vehicular requirements associated with the CDP, including through additional signs, rangers, and parameters for verifying that the number of vehicles in the Park do not exceed maximum allowances. The Permittee shall immediately implement the Vehicular Enforcement Plan upon Executive Director approval.
- 3. Fencing Augmentation and Enhancement Plan.** By October 31, 2019, the Permittee shall submit for Executive Director review and approval a Fencing Augmentation and Enhancement Plan. The Plan shall identify additional fencing to be installed to better protect coastal resources (including additional fencing in the South Oso Flaco Lake area, fencing suitable for enhanced predator management, fencing to better define the southern enclosure, and fencing to ensure all vegetated dune areas are appropriately fenced off). The Permittee shall immediately implement the Fencing Augmentation and Enhancement Plan upon Executive Director approval.
- 4. Public Outreach Plan.** By October 31, 2019, the Permittee shall submit for Executive Director review and approval a Public Outreach Plan. The Plan shall be designed with the goal to maximize use of appropriate beach and dune areas by lower-income, youth, and tribal parties, where such Plan shall identify all measures and venues to be used to advertise and increase awareness of such available uses (e.g., ODSVRA website, press release, calendar listings, ads on radio, print ads, social media (including Facebook, Twitter, and Instagram), etc.). The Plan shall be designed to reach as many potential lower-income, youth, and tribal audiences as possible, including audiences that might not normally be reached through traditional and local means (e.g., inland communities). The Permittee shall immediately implement the Public Outreach Plan upon Executive Director approval.
- 5. Monitoring Program.** All CDP requirements associated with the Technical Review Team (TRT) shall be deleted, and the role and responsibilities currently attributable to the TRT shall instead be incorporated into a Monitoring Program that will be used by the Permittee to monitor Park use and management under the CDP, where the information collected pursuant to such monitoring will be provided to the Commission annually. By December 31, 2019, the

Permittee shall submit for Executive Director review and approval the Monitoring Program. The Program shall describe the structure, content, and methods for ongoing monitoring of public access and recreational uses, including vehicular recreation (accounting for attendance numbers, special events, and user types, etc.), and of dune resources, dune vegetation, and creek and wetlands resources (including but not limited to Arroyo Grande Creek) as well as sensitive species resources. The Program shall be sufficiently detailed to identify the data and information that must be collected to document the effectiveness of Park management activities in protecting the aforementioned dune and other coastal resources (including evaluating vehicular recreation and coastal resource trends, impacts, and issues facing Park operations), and to support recommendations for changes to Park management to better address any identified impacts. The Program shall provide for the submittal of annual monitoring reports to the Executive Director for review and approval, where each monitoring report shall include recommendations for changes to operational and management parameters under the CDP to better protect coastal resources, which shall be implemented as directed by the Executive Director's approval of the report if the Executive Director: (a) determines that no amendment is legally required to implement the changes; (b) deems the changes reasonable and necessary; and (c) determines that the changes do not adversely impact coastal resources. In any case, the Executive Director shall also have the discretion to schedule any particular monitoring report for a Coastal Commission hearing where the Commission will be asked to concur with the Executive Director's report approval and/or to make changes to operational parameters under the CDP otherwise to better protect coastal resources. The Permittee shall immediately implement the Monitoring Program upon Executive Director approval, and the first monitoring report shall be due to the Executive Director no later than July 31, 2020, with subsequent year's annual monitoring reports also due on July 31st.

- 6. Special Events Protocol.** By October 31, 2019, the Permittee shall submit for Executive Director review and approval a Special Events Protocol. The Protocol shall specify that a separate CDP shall be required for all special events that could result in adverse impacts to coastal resources (including music festivals, concerts, OHV events (e.g., Huckfest), and any other special events that propose an intensity of use beyond those specified in the CDP), and shall provide a methodology for identifying, evaluating, mitigating (for projected coastal resource impacts), and permitting of any proposed special events. The Permittee shall immediately implement the Special Events Protocol upon Executive Director approval.
- 7. Nighttime Vehicular Use Prohibited.** All vehicular and OHV activity within ODSVRA shall be prohibited during nighttime hours (i.e., from one-hour after sunset and to one-hour before sunrise), which restriction shall be a component of the Vehicular Enforcement Plan (see Special Condition 2 above).
- 8. Arroyo Grande Creek Crossing Plan.** Vehicular crossings through Arroyo Grande Creek shall be prohibited, except for emergency vehicles, and all OHV and camping operations shall cease when the creek flows to the ocean. The Permittee shall regularly monitor the creek so as to ensure that users are not allowed to the southern side of the creek area when the creek may soon connect to the ocean, and so as to provide time for users then south of the creek area to exit the Park before it will connect to the ocean. By October 31, 2019, the

Permittee shall submit for Executive Director review and approval an Arroyo Grande Creek Crossing Plan that shall identify all measures to be taken to maintain consistency with this condition, including any materials to be provided to Park users, signs near the creek, and protocols for ensuring that there are no creek crossings under the conditions specified above, which restrictions shall be a component of the Vehicular Enforcement Plan (see Special Condition 2 above). The Permittee shall immediately implement the Arroyo Grande Creek Crossing Plan upon Executive Director approval.

- 9. Updated Interim Use Limits.** Interim OHV, street-legal vehicle, and camping daily use limits shall be reduced an amount proportionate to acreage that has been removed from vehicular/OHV use (e.g., due to dust control requirements, other enclosures, etc.), including as future areas are taken offline. As of July 11, 2019, 1,048 acres are authorized for OHV and camping use, and interim use limits are as follows: (a) 1,806 street-legal vehicles per day; 700 camping units per night; and (c) 1,204 OHVs per day. A street-legal vehicle that also stays overnight counts as both a street-legal vehicle and as a camping unit. These restrictions shall be a component of the Vehicular Enforcement Plan (see Special Condition 2 above).
- 10. No Interim Use Limit Exceptions.** The four exceptions (specified in Special Condition 3d of the fifth amendment to the CDP) that allow unlimited vehicular and OHV use on Memorial Day, Fourth of July, Labor Day, and Thanksgiving weekends and related days shall be eliminated, and interim OHV, street-legal vehicle, and camping use limits (see Special Condition 9 above) shall apply 365 days per year. These restrictions shall be a component of the Vehicular Enforcement Plan (see Special Condition 2 above).
- 11. Entrance Study.** By December 31, 2019, the Permittee shall submit for Executive Director review and approval an Entrance Study. The Study shall evaluate changes that can be made to provide vehicular access into the Park in a manner that will reduce coastal resource impacts relative to the existing interim entrances, particularly as it relates Arroyo Grande Creek crossings and more normal and typical beach uses north of the riding area. The Study may be based upon Permittee's past analyses (i.e., including the '2006 Alternative Access Study Oceano Dunes State Vehicular Recreation Area' produced by Condor Environmental Planning Services, Inc.), but shall be updated as necessary to reflect any pertinent new information (including with respect to habitat protections for sensitive species) that may affect its evaluations and/or conclusions. The purpose of the Study is to identify a preferred entrance system for the Park, including through analysis of the environmental impacts and benefits (including with respect to dunes, habitats, creeks, beaches, neighborhoods, and community character) and feasibility associated with alternative entrances, including evaluating options across the same set of analysis factors and levels of detail. The Executive Director will agendaize Commission consideration of the Entrance Study at the next annual CDP review, when the Commission may require changes to Park entrances in consideration of the Study and any other relevant information.
- 12. Permanent Southern Enclosure.** The roughly 300-acre seasonal ESA vehicular enclosure area (see **Exhibit 2**) shall permanently exclude vehicles, and such area shall be restored as needed to enhance habitat values consistent with allowed passive public access use. By October 31, 2019, the Permittee shall submit for Executive Director review and approval a

Permanent Enclosure Plan. The Plan shall be prepared by a resource ecologist (or ecologists) with experience with sensitive species, shall be based on consultation with USFWS, and shall identify the measures to be implemented to make the seasonal enclosure permanent and to restore the area as needed to enhance habitat values for sensitive species (including Western snowy plover and California least tern) consistent with allowed passive public access use. The Permittee shall immediately implement the Permanent Enclosure Plan upon Executive Director approval.

**13. Authorize Dust Control Areas.** This CDP authorizes State Parks to implement specified airborne particulate matter emission (“dust”) control and related monitoring measures at ODSVRA in order to reduce and control dust generated at ODSVRA consistent with the requirements of San Luis Obispo County Air Pollution Control District (APCD) and the California Air Resources Board (CARB) subject to all of the following:

- a. Dust Control Measures.** Approved dust control measures include planting native dune vegetation, installing wind fencing, installing porous roughness elements, installing perimeter fencing (around emissive ‘hot spots’), installing ‘track out’ devices at the Pier Avenue and West Grand Avenue entrances to ODSVRA, and installing native trees inland of ODSVRA. Soil stabilizers and straw bales shall only be utilized when the Executive Director determines that the proposed soil stabilizers and/or straw bales will be utilized in an amount, configuration, and composition that will not significantly disrupt dune habitat values (no significant degradation of dune habitats and/or vegetation; use to be kept to the minimum amount necessary to abate dust).
- b. Monitoring Measures.** Air quality monitoring stations consistent with APCD and/or CARB requirements that are sited and designed to limit any associated coastal resource impacts as much as possible.
- c. Dust Control and Monitoring Area.** Approved dust control and monitoring measures are to be located in the areas specified (by APCD and/or CARB) as necessary to meet APCD and/or CARB requirements, subject to concurrence by the Executive Director. In addition, track out devices are to be located at Pier and West Grand Avenues, but shall only be allowed within the existing paved street areas and shall not be allowed on the beach sand. Further, native trees shall only be planted where the Permittee has provided property owner consent for same, and where the Executive Director determines that the proposed native trees will be planted in an amount, configuration, and species type that will not have significant adverse effects on coastal resources (no obstruction of any public coastal views; no significant degradation of dune vegetation and habitat; no loss of prime agricultural lands or lands used for agricultural production).
- d. Dust Control Measures Coverage.** Dust control measures approved pursuant to this CDP are expected to result in planting/maintaining approximately 350 acres. Authority for State Parks to implement the approved dust control and related monitoring measures at any given location is subject to the requirement that State Parks has landowner approval to undertake development on that property.

- e. **APCD and CARB Requirements.** Notwithstanding subsections (a) through (d) above, any dust control measures implemented under this CDP shall be consistent with any applicable requirements of APCD and CARB related to dust control at ODSVRA.

Prior to implementing any of the approved dust control and monitoring measures, the Permittee shall submit, for Executive Director review and approval, a Dust Control Work Plan that clearly describes the dust control and monitoring measures to be implemented, where the Dust Control Work Plan shall be submitted with evidence that APCD and CARB have reviewed the measures and consider them consistent with their requirements related to dust control at ODSVRA. Each Dust Control Work Plan submitted by the Permittee shall include a description of the previous dust control and monitoring measures undertaken, including monitoring data identifying effectiveness, including the effectiveness and success of dune revegetation, and any coastal resource impacts. The Executive Director shall review each Dust Control Work Plan to ensure consistency with the terms and conditions of this CDP, including with respect to the protection of coastal resources. The Permittee shall immediately implement the Dust Control Work Plan upon Executive Director approval.

- 14. Indemnification by State Parks/Liability for Costs and Attorneys' Fees.** State Parks agrees to reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys' fees (including (1) those charged by the Office of the Attorney General, and (2) any court costs and attorneys' fees that the Coastal Commission may be required by a court to pay) that the Coastal Commission incurs in connection with the defense of any action brought by a party other than State Parks against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval of these CDP changes. The Coastal Commission retains complete authority to conduct and direct the Commission's defense of any such action against the Coastal Commission, its officers, employees, agents, successors and assigns.
- 15. Special Condition Conflicts.** In case of any conflict between these special conditions (i.e., Special Conditions 1 through 15 as approved by the Coastal Commission on July 11, 2019) and other CDP 4-82-300 special conditions (see Exhibit 4), these special conditions (Special Conditions 1 through 15) shall take precedence.

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**August 5, 2019**

Lisa Mangat, Director  
California Department of Parks and Recreation  
P.O. Box 942896  
Sacramento, CA 94296

**Re: Oceano Dunes State Vehicular Recreation Area**

Dear Ms. Mangat:

I write today to clarify one item in my letter to you dated July 23, 2019 wherein I identified the parameters of the action taken by the California Coastal Commission on July 11, 2019 in relation to CDP 4-82-300 regarding the Oceano Dunes State Vehicular Recreation Area (ODSVRA). Specifically, in that July 23rd letter I indicated that, among other things, the Commission took an action “Requiring State Parks to incorporate all of staff’s recommended operational and other short-term changes in the staff report (see “Staff-Recommended Additional CDP Special Conditions” attachment) as permanent conditions through the PWP”. Upon further review of the hearing record, I would like to clarify that aspect of the action, and to replace it with the following: “Requiring State Parks to address all of staff’s recommended operational and other short-term changes in the staff report (see “Staff-Recommended Additional CDP Special Conditions” attachment) as permanent conditions within the PWP process”.

To be clear, review of the hearing record indicates that the very strong intent of the Commission, including through the separate July 12, 2019 letter under the Chair’s signature summarizing the Commission’s direction to State Parks regarding the changes that the Commission believes are necessary at OSDVRA to ensure Coastal Act consistency (including with respect to State Parks’ proposed Public Works Plan (PWP)), was for State Parks to seriously address each of the staff report’s recommended operational and other short-term changes in the PWP currently being developed. Further, it is also clear that the strong intent of the Commission was for State Parks to take seriously both the Commission’s articulated direction in the Commission’s letter *and* the staff report-recommended changes, and to ensure that *both* of these are reflected in upcoming PWP products and efforts, including ultimately through a PWP submittal for Commission consideration by summer of 2020.

I hope that that helps to clarify that aspect of the Commission’s July 11, 2019 action. We look forward to working with you and your staff over the next year, and beyond, to help bring about needed change at OSDVRA to ensure consistency with the Coastal Act. If you have any questions, please don’t hesitate to contact me.

Sincerely,

A handwritten signature in blue ink, appearing to read "John Ainsworth".

JOHN AINSWORTH  
Executive Director  
California Coastal Commission

**CALIFORNIA COASTAL COMMISSION**

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May 29, 2020

Ronnie Glick, Senior Environmental Scientist  
California Department of Parks and Recreation  
Oceano Dunes District  
340 James Way, Suite 270  
Pismo Beach, CA 93449

Lena Chang, Senior Wildlife Biologist  
United States Fish and Wildlife Service  
Ventura Fish and Wildlife Office  
2493 Portola Road, Suite B  
Ventura, CA 93003

**Re: United States Fish and Wildlife Service (USFWS) and California Department of Parks and Recreation (State Parks) Proposed Oceano Dunes District Draft Habitat Conservation Plan and Draft Environmental Impact Report**

Dear Mr. Glick and Ms. Chang:

The California Coastal Commission (Coastal Commission) is the state agency responsible for implementing the California Coastal Act (Coastal Act), which regulates development in the coastal zone, including the areas covered by this Habitat Conservation Plan (HCP).<sup>1</sup> The Coastal Act's habitat protection policies are primarily based on protection of environmentally sensitive habitat areas (ESHA), which are defined by the rarity or value of the habitat as a whole. The presence or absence of threatened, endangered, and/or otherwise listed species in those areas often plays an important role in ESHA determinations. Importantly, the Coastal Act and applicable LCPs prohibit non-resource dependent development in ESHA, and the entire Oceano Dunes State Vehicular Recreation Area (ODSVRA) has been designated ESHA by the Commission, including in the certified San Luis Obispo County LCP. As a result, the Coastal Commission appreciates the opportunity to comment on the Draft HCP (DHCP) and its associated Draft Environmental Impact Report (DEIR) because the protection of special status species may affect the health of ESHA protected through the Coastal Act. The Commission's obligations under the Coastal Act are, however, independent of and

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<sup>1</sup> The Coastal Commission shares jurisdiction over the areas covered by this DHCP pursuant to the Coastal Act with San Luis Obispo County and the cities of Grover Beach and Pismo Beach, all of which have certified local coastal programs (LCPs), with almost all of Oceano Dunes State Vehicular Recreation Area subject to the County's Local Coastal Program.



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distinct from those exercised by USFWS in implementing the Endangered Species Act (ESA).<sup>2</sup>

The DHCP addresses the management and protection of 10 ESA-listed species<sup>3</sup> within the 5,005-acre Oceano Dunes District program area, which is comprised of both Pismo State Beach and the Oceano Dunes State Vehicular Recreation Area (the latter referred to herein as ODSVRA, Oceano Dunes, or Park), and is meant to be the underlying document on which a future USFWS Incidental Take Permit (ITP) would be based. Under the ESA, the measures included in the HCP must minimize and mitigate, to the maximum extent practicable, the impacts caused by State Parks proposed 52 “covered activities” (including motorized recreation, camping, and natural resource management).

Oceano Dunes currently operates under two primary coastal development permits (CDPs) under the Coastal Act that govern the kinds, locations, and intensities of use and development at the Park, as well as the resource protection measures that are required to ensure consistency with the Coastal Act and the County’s LCP. This includes Coastal Commission CDP 4-82-300 as amended, which covers overall off-highway vehicle (OHV), camping, and other use parameters for the Park, as well as Coastal Commission CDP 3-12-050, which authorizes implementation of a dust abatement program at Oceano Dunes. Importantly, both of these CDPs include ongoing obligations that require regular review and adaptation. For example, CDP 4-82-300 requires an annual Coastal Commission review of Park operations, which can lead to modifications of such operations through each such review.

We have the following comments, observations, and suggestions, first for the DEIR and then on the DHCP, although comments on one are generally applicable to the other. These comments are informed, in part, by the Coastal Commission’s direction to State Parks at a July 2019 hearing for the most recent annual review of CDP 4-82-300, where the Coastal Commission required State Parks to address 15 management measures as part of its current Public Works Plan (PWP) efforts. These management measures included evaluating alternative Park entrances, prohibiting vehicle use at night, expanding and making the seasonal enclosure permanent, prohibiting vehicular crossings of Arroyo Grande Creek, reducing vehicular use limits, and a series of similar

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<sup>2</sup> We also note that the California Department of Fish and Wildlife (CDFW) independently has authorities under the California Endangered Species Act and other state laws, including the requirement to review and approve a Natural Community Conservation Plan (NCCP) to address any potential take of California Endangered Species Act-listed species, most of which overlap with federally listed species. It is our understanding that State Parks is in the preliminary stages of preparing such an NCCP for ODSVRA, and we suggest that USFWS coordinate with CDFW as it works towards its final HCP to ensure that these documents and their requirements are harmonized.

<sup>3</sup> These are the bird species Western snowy plover (*Charadrius nivosus nivosus*) and California least tern (*Sternula antillarum browni*); the amphibian species California red-legged frog (*Rana draytonii*); the fish species tidewater goby (*Eucyclogobius newberryi*); and the plant species marsh sandwort (*Arenaria paludicola*), La Graciosa thistle (*Cirsium scariosum* var. *loncholepis*), surf thistle (*Cirsium rhotophilum*), beach spectaclepod (*Dithyrea maritima*), Nipomo Mesa lupine (*Lupinus nipomensis*), and Gambel’s watercress (*Nasturtium gambelii*).

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measures designed to protect sensitive habitat values pursuant to the Coastal Act.<sup>4</sup> One general comment that relates to both the DEIR and DHCP is that many of the alternatives rejected in these documents are the same management measures that the Coastal Commission directed State Parks to address in its PWP. We suggest that the DHCP and the DEIR be revised to more thoroughly address these potential management measures.

Comments on the DEIR

*DEIR Coastal Act Consistency Conclusions*

One of our significant concerns with the DEIR is that it concludes that none of the activities proposed in the DHCP would require an amendment to existing CDPs, including CDP 4-82-300's OHV and camping use parameters (DEIR Section 4.1.3.3). However, except for the no project alternative, all of the alternatives (including the preferred alternative) in the DEIR and DHCP propose to make material changes to OHV/camping use protocols, including reducing the southern enclosure acreage and boundary by opening up as much as approximately 109 acres of dune ESHA to year round OHV activity [CA-50], opening up a new 40-acre ESHA area near Oso Flaco Lake to OHV activity [CA-42], and mechanical beach grooming [CA-21]. Because these proposed activities constitute development as defined in the Coastal Act, all of them will require either a new CDP or an amendment to an existing CDP and must be found consistent with the Coastal Act and/or the LCP, including the policies prohibiting non-resource dependent development in ESHA. We recommend that Section 4.1.3.3 and the "Development" discussion on pages 4-13 to 4-14 be modified to reflect that these activities will require authorization by the Coastal Commission under the Coastal Act and that CDP authorization be added to Section 2.5 as a required permit.

We also are concerned about the conclusions on DEIR page 4-14 and Table 4-3 that these new covered activities would not conflict with the Coastal Act. We believe that the Coastal Commission would find that at least several of them do conflict with applicable LCPs and the Coastal Act. For example, allowing significant new areas of OHV use in dune ESHA [CA-42 and CA-50] is not consistent with Section 30240 of the Coastal Act or the equivalent sections of the County's LCP. However, the "Land Resource" section of the DEIR does not analyze whether opening up new dune ESHA areas to OHV use would be consistent with LCP and Coastal Act ESHA protection requirements. We believe that this omission is significant and recommend addition of this analysis and recognition that the proposed development raises Coastal Act and LCP conflicts because it is not resource dependent and will adversely impact ESHA. In addition, we recommend that the DEIR sections on public access and recreation be revised to recognize that these Coastal Act policies must be implemented consistent with the requirement to protect natural resource areas (see Coastal Act Sections 30210 and 30214). Beach grooming [CA-21] and snowy plover chick and egg capture [CA-12b]

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<sup>4</sup> The summary of the Commission's July 2019 action, as well as the Commission's comment letter to State Parks emanating from it, are attached to this letter, and help provide context and rationale for the Commission's action.

may also raise Coastal Act consistency issues and will require additional analysis by the Coastal Commission. For example, mechanical beach grooming is likely to impart further harm to the beach infaunal community that support the beach foodweb, including western snowy plover and California least tern.

*DEIR Biological Resources Conclusions*

DEIR Section 6.3.3 appears to underestimate the potential impact of the proposed activities on sensitive habitats. For example, the analysis of beach grooming [CA-21] acknowledges that such activities will be taking place in ESHA and that they may remove “favorable constituents within [snowy plover] and La Graciosa thistle critical habitat as well as ESHA by altering dune composition and topography. Specifically, mechanical trash removal could reduce organic surface materials (e.g., driftwood) and microtopography” (DEIR p. 6-109). The DEIR asserts that this ESHA has reduced value because it has been heavily used for recreational purposes and therefore beach grooming has a less than significant impact. The Coastal Act, however, does not provide lesser protection for potentially degraded ESHA and we recommend that this analysis be modified so that it does not purport to provide lesser protection for areas of ESHA which have experienced recreational use.

In addition, the discussion of the reduction of the seasonal exclusion [CA-50] concludes that because OHV use is currently allowed in these areas for part of the year, there will be a less than significant biological impact if such use is extended to also be allowed during the western snowy plover (WSP) and California Least Tern (CLT) breeding season. As discussed in more detail below, we do not think that the evidence supports such a conclusion. WSP and CLT, and their chicks, are more vulnerable during the breeding season and require additional protections during those times, including protection from motorized vehicles. We recommend that this section be modified to analyze the different impacts to protected species that will occur if there were to be OHV use in critical habitat areas, including both during the breeding season and outside of it.

*DEIR Coastal-Dependent Development Statements*

We are also concerned about the statements in the DEIR that State Parks considers OHV use to be a “coastal-dependent development or use,” as defined in the Coastal Act (DEIR p. 8-6). The Coastal Commission has found that that is not the case in past actions related to Oceano Dunes. Specifically, the Coastal Act defines and limits such uses to “development which requires a site on, or adjacent to, the sea to be able to function at all” (Coastal Act Section 30101). One may camp and ride OHVs (and horses) in non-coastal areas. Therefore, they are not activities that must take place along the coast to be able to function at all. The DEIR concludes that activities such as camping and vehicular recreation are “coastal-dependent” because they are taking place in beach and coastal dune areas. Simply because some activities are enjoyed at the beach or in coastal areas does not make them “coastal-dependent.” This analysis would expand coastal-dependent development or uses to any development that one might prefer to do along the coast, such as a build a home with an ocean view, into a coastal-dependent development. Such an interpretation is not consistent with the

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Coastal Act, and we request that the first paragraph, the first three bullets of Section 8.2.3, and any other similar statements/descriptions be removed from the final EIR.

*DEIR Alternatives Analysis*

With respect to alternatives, the DEIR considered a total of 11. As an initial matter, seven of these alternatives were dismissed without further evaluation, and four of them were further considered. Among the seven immediately rejected alternatives was a “No Take Park Operation” that would prohibit vehicle use in the Park, a “Changes in Oceano Dunes SVRA Access” alternative that would include either a bridge over Arroyo Grande Creek or a different access route to avoid its vehicular crossing, a “Restricted Riding Times” alternative that prohibited night riding and closed the Park to vehicle use seasonally, and an “Increased Vehicle Use Limits” alternative. These alternatives are among those that the Coastal Commission, in its July 2019 action, asked State Parks to address in its PWP, and we recommend that they also be fully evaluated here.

The four alternatives selected for further DEIR evaluation were the “No Project Alternative,” whereby State Parks does not obtain HCP/ITP authorization and instead manages the Park as it currently does, a “Reduced Disturbance in High PM10 Emissivity Areas” alternative that retains portions of the now-300-acre seasonal enclosure, a “Permanent Year-Round Enclosures” alternative that would make the now-seasonal (March through September) enclosure year-round, and a “Reduced Vehicle Use Limits” alternative with an undefined reduction in allowed OHV use.

Each of these alternatives were ultimately dismissed. The most common rationale cited by the DEIR for dismissal was the determination that the minimal, at best, benefit to habitat management and reduced take would not outweigh the significant impact on coastal vehicular recreation. For example, the reduced riding/no take alternatives were dismissed because they “would not eliminate the potential for take from non-motorized uses or from any CDPR vehicles needed to enter the area for park operations” and would do so at the expense of recreational opportunities, which is “incompatible with the recreational purpose of the SVRA...” (DEIR p. 9-3). The alleged limited reduction in take was also the reason for dismissing the use of an Arroyo Grande Creek bridge to avoid vehicular creek crossings (“Furthermore, the alternative would not reduce the potential for take of SNPL and CLTE associated with park visitor use and operations or otherwise reduce impacts of the proposed HCP” (DEIR p. 9-5)) and night riding prohibition alternatives (“As a result, restricting nighttime vehicle use would not likely reduce any potential take impacts of the HCP covered species” (DEIR p. 9-6)). Making the enclosure year-round or expanded was dismissed because “This alternative may reduce but not eliminate the potential risk for take” (DEIR p. 9-14) and “This loss of shoreline access conflicts with project objectives to balance conservation and recreation demands, particularly to preserve, manage, and expand recreational opportunities and to manage, maintain, and maximize unique coastal camping and recreational amenities” (DEIR p. 9-17). And finally, reducing vehicle use limits was dismissed because, even though take would likely be reduced with fewer vehicles, “the reduction in risk is difficult to assess and may not result in actual reduced take” (DEIR p. 9-18).

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We are concerned that the alternatives analysis does not adequately analyze the potential biological impacts of each alternative nor the biological benefits of the alternatives that were rejected. For example, with respect to OHV use, there are a number of studies that have evaluated the adverse impacts of OHV use on beaches (including both intertidal and upper beach zones) and dunes. One such study found that OHV recreational activity causes the highest levels of environmental harm to beaches and dunes of any recreational activity.<sup>5</sup> Another identified such harms to include disturbing dune physical attributes and stability; destroying dune vegetation and leading to lower plant diversity and cover; and disturbing, injuring, or killing beach and dune fauna (invertebrates and vertebrates), including sensitive species.<sup>6</sup> As such, it is unclear why the reduced vehicle use limits alternative was rejected, considering that the DEIR does state that take would likely be reduced under this alternative. It then states, however, that because it is difficult to assess the reduction in take, it may not result in reduced take. This conclusion does not appear to be supported by the rest of the analysis related to this alternative.

With respect to vehicular crossings at Arroyo Grande Creek, vehicles currently drive through the creek at a variety of depths and also breach the banks of the creek in such a way that the creek banks can erode considerably and widen the creek channel. Destruction of creek banks has the effect of expanding and altering the creek bed in ways that reduce the water depth and limit the time period over which migration between the creek and ocean is viable for fish species, potentially reducing their ability to enter and exit the creek and to reproduce. The period of direct connection between Arroyo Grande Creek and the ocean is critical for anadromous fish species, such as steelhead, which complete part of their life cycle in the ocean, and tidewater goby, which can be flushed from creeks, and rely on the period of creek-ocean connectivity to recolonize freshwater creeks and to maintain their populations regionally<sup>7</sup>. Moreover, any vehicular use near the Arroyo Grande Lagoon that impacts its mouth and causes it to breach precipitously and rapidly, such as through such creek morphological changes, may also have the effect of flushing tidewater goby from the lower reaches of the creek into the ocean, where some fraction of the population will meet their demise. California red-legged frog may also be present around Arroyo Grande Lagoon and Creek during this time period, and the frogs themselves, as well as their egg sacs, may also be

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<sup>5</sup> Schlacher, T.A., L. Thompson, and S. Price: Vehicles versus Conservation of Invertebrates on Sandy Beaches: Mortalities Inflicted by Off-Road Vehicles on Ghost Crabs, in *Marine Ecology* (V.28; 354-367; 2007).

<sup>6</sup> Defeo, O., A. McLachlan, D.S. Schoeman, T.A. Schlacher, J. Dugan, A. Jones, M. Lastra, and F. Scapini: Threats to Sandy Beach Ecosystems: A Review, in *Estuarine, Coastal, and Shelf Science* (V.81; 1-12; 2009).

<sup>7</sup> The south-central California coastal steelhead, although federally threatened, is not proposed to be covered in this HCP, apparently based on an earlier agreement with NOAA Fisheries. However, they do occupy Arroyo Grande Creek. In addition, tidewater goby is a federally endangered fish species, whose population fluctuates inter-annually in Arroyo Grande Creek. Maintenance of the population regionally relies on at least some of the rivers and creeks in any one location to support populations of this species in all years.

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harmed by a precipitous breaching event. Therefore, we recommend that the EIR analyze in more depth the potential adverse impacts of vehicles driving through Arroyo Grande Creek during the time of year when rain water has elevated the banks of Arroyo Grande Creek and breaching is likely, and following any breach event.

We also recommend that the EIR include a more complete analysis of the alternative to make the seasonal enclosure permanent and/or to expand it. There are a large number of plovers found in areas outside of the existing enclosure, including 15 that were found dead in 2018 (8 of which were found crushed next to tire tracks). Plovers naturally seek to avoid encounters with humans,<sup>8</sup> so the presence of a refuge away from human pressures, particularly OHV riding, may reduce plover loss during the overwintering season, from October through February of each year, and at a minimum would allow recovery of beach-dwelling invertebrate species on which WSP feed. In addition, there is evidence that the southern enclosure is not large enough for the current plover population, given the very large number of nests. In 2018, 66 were found nesting outside, but adjacent to, the southern enclosure, and aggressive territorial behavior in areas of overcrowding has been observed in recent years. Plovers also frequently nest between the westward edge of the enclosure and the ocean and in areas south of the enclosure, known as Oso Flaco south. We recommend that the EIR include these factors when assessing this alternative.

For the alternative that would eliminate riding at night, we recommend that the EIR analyze the likely effects of artificial night lighting on migrating bird species and mammals, including avoidance behaviors, disorientation, disruption of foraging and migration patterns, increased predation risk, and disruption of circadian rhythms.<sup>9</sup> In addition, noise or sound plays an important role in an ecosystem. Activities such as finding desirable habitat and mates, avoiding predators, protecting young, and establishing territories are all dependent on the acoustic environment. A growing number of studies indicate that animals, like humans, are stressed by noisy environments.<sup>10</sup> The listed species at Oceano Dunes are all more vulnerable to the impacts identified above at night. This information should be included when assessing the elimination of the night riding alternative.

### Comments on the DHCP

Our primary concern with the DHCP is that although the HCP is intended to “provide habitat-level protection and management and minimize human-related impacts to key

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<sup>8</sup> Lafferty KD. 2001. Disturbance to wintering western snowy plovers. *Biological Conservation* 101:315-325. Lafferty KD, Goodman D, Sandoval CP. 2006. Restoration of breeding by snowy plovers following protection from disturbance. *Biodiversity and Conservation* 15:2217-2230.

<sup>9</sup> Rich, C. & T. Longcore (Eds.) 2006. *Ecological Consequences of Artificial Night Lighting*. Island Press, Washington. 458 pgs.

<sup>10</sup> Shannon, G., M.F. McKenna, L.M. Angeloni, K.F. Crooks, K.M. Fristrup, E. Brown, K.A. Warner, M.D. Nelson, C. White, J. Briggs, S. McFarland & G. Witemyer. 2016. A synthesis of two decades of research documenting the effects of noise on wildlife. *Biological Reviews*. v. 91: 982-1005.

threatened or endangered wildlife,” the DHCP instead outlines management protocols that would actually decrease existing protection for such species, even though existing management has already resulted in significant take of species such as the western snowy plover<sup>11</sup> (DHCP p. 1-1). Thus, by allowing even more take than is currently experienced at the Park, the DHCP does not appear to meet the requirement to minimize the impacts of the covered activities.

#### *DHCP Alternatives Analysis*

As with the DEIR, we have similar concerns regarding the adequacy of the DHCP’s alternatives analysis. The DHCP identifies one of the two commonly considered alternatives as a “no project alternative in which no permit would be issued and take would be avoided” (DHCP at p. 8-1). However, while the DHCP analyzes a “no project” alternative, it is not one in which take is avoided. Instead, the DHCP recognizes that existing operations currently result in take and rejects this alternative because USFWS would still be required to enforce the Endangered Species Act and such enforcement might result in operation shutdowns in order to prevent take. In essence, this alternative is rejected not because it is infeasible or because it would result in take of listed species, but instead because it would result in greater protection of listed species. We therefore believe that this alternative should be analyzed further.

The second alternative analyzed in the DHCP would retain the current size of the southern enclosure. It was rejected, however, even though it would result in less take of listed species than the chosen alternative, because the DHCP concludes that the reduction or elimination of the southern enclosure would better meet Oceano Dunes’ “recreational needs”, and that take under the chosen alternative would be minimized. But this analysis does not find that this alternative is infeasible and thus does not meet the requirements that HCPs minimize and mitigate take to the maximum extent feasible. We believe that this alternative should be analyzed further as well.

We also recommend that the HCP also consider alternatives that reduce the current level of OHV use in the Park, including an evaluation of the 15 measures that State Parks is required by the Coastal Commission to address in its proposed PWP by this summer.<sup>12</sup> Further, another alternative we recommend be evaluated is one in which there is no OHV use in the Park. This is an alternative that the Coastal Commission identifies in its July 2019 action (again, see attached), and it is one that would clearly reduce take of the listed species covered by the HCP. While we recognize that this

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<sup>11</sup> As USFWS has found, existing Park operations (i.e., the aforementioned ‘status quo’) are already causing high levels of take (see, for example, USFWS letter titled “Oceano Dunes State Vehicular Recreation Area Endangered Species Act Violations and Habitat Conservation Plan” dated March 29, 2016; and USFWS letter titled “Oceano Dunes State Vehicular Recreation Area, Second Notice of Additional Endangered Species Act Violations” dated December 22, 2016).

<sup>12</sup> State Parks is required to submit a proposed PWP for Commission consideration that addresses all of the Commission’s direction and requirements by summer of this year, and it is currently scheduled to be heard at the Commission’s September 2020 meeting in San Luis Obispo. However, in light of the current COVID-19 pandemic, it seems likely that this hearing schedule will be delayed.

alternative may ultimately not meet State Parks' OHV objectives, we still believe that it is an important alternative to be analyzed through this HCP.

In sum, without an analysis of a broader range of management and mitigation alternatives, we do not think that the DHCP adequately demonstrates that the chosen alternative mitigates and minimizes the impacts of Park operations on the 10 listed species "to the maximum extent practicable," as is required under ESA.<sup>13</sup>

#### *DHCP Biological Analysis*

In addition to our concerns with the breadth of alternatives analyzed in the DHCP, we have concerns regarding the DHCP's assessment of biological impacts. We recommend that the HCP include consideration of the following:

1. With regard to WSP and CLT, the DHCP proposes reducing the existing 300-acre seasonal southern enclosure to 191 acres, and thus seasonally increasing OHV use by 109 acres. In addition, it proposes opening to OHV use another currently off-limits 40-acre dune ESHA area supporting native dune vegetation very near to the seasonal enclosure and Oso Flaco Lake. Opening up this undisturbed dune area will encourage new traffic adjacent to the existing seasonal enclosure and increase the risk of take of WSP chicks and nesting adults. It is worth noting that all portions of the seasonal enclosure targeted for reduction, and all of the area near the shoreline in Oceano Dunes as a whole, are USFWS-designated "critical habitat" for WSP. Further, the areas of the seasonal enclosure slated to be opened up to OHV use are among the most widely-used for nesting (i.e., Subarea 6) or serve as important buffer areas for highly used nesting areas (i.e., the east boneyard area buffers and the west boneyard enclosure). The WSP population is already limited in the Park due to a dearth of areas free from OHV use. We recommend that the DHCP include additional analysis of these proposed reductions in protected areas, including consideration of the following:
  - a. Between 2005 and 2018, Subarea 6, which is proposed to be opened for OHV use under the DHCP, was the location of 25–45% of all WSPs and 35–80% of all CLT nests during the breeding period.
  - b. The northern portion of Subarea 6 (slated to be removed from protection first), has been the location of the CLT communal night roost over the last several years. According to the USFWS, "secure roosting and foraging areas are

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<sup>13</sup> See, for example, *National Wildlife Federation v. Babbitt*, 128 F. Supp. 2d 1274, 1291-1292 (E.D. Cal. 2000).



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essential to the recovery of the species,"<sup>14</sup> and may serve as a means for lowering predation at CLT nesting sites.<sup>15</sup>

- c. Although the DHCP does state that Subarea 6 would be removed in stages, and only if species' objectives are met, those objectives are set far below current and historical occupancy and fledgling rates, practically ensuring they will be easily met. For example, the DHCP sets 155 WSP breeding pairs as its annual goal, which is substantially lower than the five-year average of 202 breeding pairs. Similarly, the DHCP establishes a goal of 1.0 fledgling per adult male plover per year. However, the five-year average fledgling rate is 1.68. For CLT, the DHCP goals of 41 breeding pairs per year and a fledge rate of 1.0 juveniles per nesting pair is also lower than recent documentation. These standards have the effect of allowing a decrease in breeding and fledgling success. The DHCP does not provide evidence to support how these lower rates were derived or how they minimize and mitigate the effects of the covered activities.
  - d. Further, the removal of Subarea 6 will cause nests established in the remaining enclosure areas to be packed more tightly, and there is already evidence that the tight spacing of WSP and CLT nests within the existing 300-acre seasonal enclosure acreage has led to adult territorial aggression when chicks from one brood wander into the territory of another (hence the Coastal Commission's July 2019 recommendation to increase the size of the enclosure area).
  - e. The DHCP also proposes that bump outs or individual nest enclosures would be used if plovers nest in Subarea 6 following the removal of fencing. In our view, this is not an equivalent means of protection. Although individual nest enclosures have been known to provide nest protection, they can also lead to greater predation of adult WSPs when avian predators perch on top of the enclosures and consume adults as soon as they leave the nest, with mortality of nest eggs or chicks soon to follow.
2. The proposed closure of the east boneyard enclosure and opening up of an additional 40 acres to OHV riding just north of Oso Flaco Lake are also likely to increase take of WSP and CLT. Although the DHCP notes that fewer birds have nested in the east boneyard location in recent years, this enclosure area still provides an important buffer to the west boneyard area, where more WSPs nest. This buffer helps maintain a substantial distance between nesting birds and OHV riders and pedestrians. Moreover, the east boneyard enclosure has acted as a

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<sup>14</sup> See USFWS' Carlsbad California Office (2006), California least tern *Sternula antillarum browni*, Five-year review, summary and evaluation, at [https://www.fws.gov/carlsbad/SpeciesStatusList/5YR/20060926\\_5YR\\_CLT.pdf](https://www.fws.gov/carlsbad/SpeciesStatusList/5YR/20060926_5YR_CLT.pdf).

<sup>15</sup> See Atwood, Jonathon L., (1986), Delayed Nocturnal Occupation of Breeding Colonies by Least Terns, *Sterna antillarum*, Auk v. 103, pgs. 242-244; Wilson, Erika C., Hubert, Wayne A., and Anderson, Stanley H., "Nocturnal Roosting by Interior Least Terns Early in the Nesting Season" (1991), Nebraska Bird Review (417) (at <https://digitalcommons.unl.edu/nebbirdrev/417>).

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barrier for through traffic between northern and southern areas of the park during the nesting season, and from northern access to the Oso Flaco Lake area. If it is removed, it is highly likely that OHV traffic will increase in this location, thereby increasing the risk of vehicle collisions with WSP.

3. There has been an alarmingly high take of WSP at Oceano Dunes in recent years. In 2018, there was one documented CLT and 36 WSP deaths from all causes to chicks, juveniles and adults. Many additional birds were injured. In 2019, the documented death rates were 3 for CLT and 26 for WSP. It was also noted that several of these individuals were found amidst tire tracks.<sup>16</sup> Given the difficulty of locating small birds across this vast area, these numbers undoubtedly underestimate the actual take of these listed species. Despite these issues, the DHCP would allow increased take by reducing existing protections.
4. The success criteria for WSP and CLT, as noted in 1(c) above, raise concerns more generally about the adequacy of the analysis of appropriate minimization and mitigation measures in the DHCP. We recommend that the DHCP focus more on maximizing habitat protections and seeking ways to increase the occupancy of breeding pairs and fledgling rates. We are concerned that the DHCP lowers the bar for success by setting more modest goals that could then be used as justification to open up additional acreage to OHV activity, thereby neither minimizing impacts to protected species nor maximizing mitigation.
5. Also notable within the DHCP are the omission of several measures that would appear to be relatively easy to implement. For example, the discussion of plover protections focuses primarily on nesting WSP and CLT. Many WSP, however, overwinter at Oceano Dunes, and this population is also subject to high predation. In addition, a visit to Oceano Dunes reveals many locations where speed limits of 15 mph are posted. Yet, speeds in excess of 15 mph appear to be commonplace. A vigorous speed limit enforcement program with park ejections and penalties could go a long way to reducing this threat to all species that share the park with human recreationists, and would likely help to better protect public safety as well.
6. One other measure for which myriad solutions exist include the development of better practices for solid waste management. A recent visit to the park revealed open dumpsters at Post 2. This area is known to be a major attractant for predators, especially gulls (hundreds have been detected over a single hour when conditions

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<sup>16</sup> See Iwanicha, J., A. Clark, R. Slack, S. Robinson (Oceano Dunes District), and D. George (Point Blue Conservation Science), "Nesting of the CA least tern and western snowy plover at Oceano Dunes State Vehicular Recreation Area, San Luis Obispo County, California, 2019, Appendix H"; and see California Department of Parks and Recreation Off-Highway Motor Vehicle Division, Oceano Dunes District "Nesting of the CA least tern and western snowy plover at Oceano Dunes State Vehicular Recreation Area, San Luis Obispo County, California, 2019, Appendix H".

are right) that are known to predate WSP and CLT. This measure is not discussed in the DHCP.

7. The prohibition on vehicular use at night, including night OHV riding, would also undoubtedly reduce mortality of WSP and CLT, as well as night-migrating California red-legged frogs (see also the discussion above).
8. Further, although some educational materials are posted regarding the presence of threatened and endangered species in the park, a robust education program that sought to enlist the stewardship of park visitors and better inform them about activities likely to cause take would undoubtedly be beneficial.
9. Beyond the changes that will affect WSP and CLT successful breeding and population recovery, there are no proposed changes to the crossing of Arroyo Grande Creek, despite the probability that this activity leads to take of tidewater goby every year, as described in more detail above. The DHCP describes the dynamic tendency for Arroyo Grande Creek to morph and change as it breaches the lagoon mouth and forms ponds that likely contain tidewater goby and other fish species. Regarding management of these dynamic ponds, the DHCP states: "it is not feasible for CDPR staff to move fencing and closure signage each time the area changes and visitors may not know they are prohibited from driving through ponded areas." To reduce the possibility of take during this dynamic period, which likely only occurs for a period of days or at most weeks, it appears that riders could easily be prohibited from entering this area for the entire period, only requiring signs to be erected a single time, and only effecting ridership for a short period of the year.
10. Personnel and cost limitations are invoked in several passages within the DHCP for measures that would likely reduce harm to listed species but that are dismissed, yet in many cases relatively simple solutions could be productively employed. The DHCP also fails to establish that even if these measures increase costs, such cost increases are not feasible mitigation measures.

### Conclusion

While we have identified a number of concerns with the DEIR and DHCP, we strongly support the efforts of State Parks and USFWS to address the significant issues associated with protection of special status listed species at Oceano Dunes and Pismo Dunes State Beach. We understand that the DHCP and DEIR represent many years of work for your agencies and for the many stakeholders involved in this process, and we appreciate all of the work that has gone into producing these draft documents.

We also note, however, that rather than completing the HCP at this time, State Parks and USFWS could wait to further consider the HCP and its associated EIR until after the Coastal Commission takes action on State Parks' PWP. The content of the PWP would then be available to inform the range of alternatives and management measures that could need to be considered in the HCP and EIR. Although this would delay the HCP

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and EIR process, having that process commence after the Commission acts on the PWP would provide greater certainty to the agencies involved, and USFWS, State Parks, and the Coastal Commission would have the benefit of the information developed through the completion of the PWP (and/or LCP/CDP changes).

Overall, we hope that this letter provides constructive comments on the DEIR and DHCP, especially in the context of State Parks' efforts to prepare a PWP for Coastal Commission review and the range of alternatives the Coastal Commission asked it to address in that Plan. We would be happy to help discuss any particular comments or strategies that you may want to employ moving forward in your processes. In any case, we hope that our comments help strengthen these documents and would be very willing to work with either or both of your agencies to address our comments collaboratively. Please do not hesitate to contact me if you have any questions or concerns.

Sincerely,



Kevin Kahn  
Central Coast District Supervisor  
California Coastal Commission

Attachments: (1) Coastal Commission letter to State Parks dated July 12, 2019 (describing coastal resource issues and constraints affecting Park operations, and providing direction to State Parks on those issues); (2) Coastal Commission letter to State Parks dated July 23, 2019 (describing the Commission's July 2019 action)

cc: Lisa Mangat, California State Parks Director  
Liz McGuirk, California State Parks Chief Deputy Director  
Dan Canfield, California State Parks Acting OHV Deputy Director  
Jim Newland, California State Parks PWP Manager  
Kevin Pearce, California State Parks Acting Oceano Dunes Superintendent  
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Paul Souza, United States Fish and Wildlife Service Region 8 Director  
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