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# Th23b

Filed: 8/23/2017  
Action Deadline: 1/20/2018  
Staff: Kevin Kahn - SC  
Staff Report: 9/1/2017  
Hearing Date: 9/14/2017

## STAFF REPORT: CDP HEARING

**Application Number:** 3-12-050

**Applicant:** California Department of Parks and Recreation, Off-Highway Motor Vehicle Recreation Division

**Project Location:** Various locations within the Oceano Dunes State Vehicular Recreation Area in the City of Grover Beach and in unincorporated Oceano in southern San Luis Obispo County.

**Project Description:** Implement a five-year adaptive management program to reduce particulate matter (“dust”) emissions through multiple methods, including through dune stabilization and restoration.

**Staff Recommendation:** Approval with Conditions.

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## SUMMARY OF STAFF RECOMMENDATION

The California Department of Parks and Recreation (DPR) proposes a five-year program (Program) to implement a series of measures aimed at controlling and minimizing particulate matter (or “dust”) emissions associated with Oceano Dunes State Vehicular Recreation Area (ODSVRA, or Park). Such emissions have been and are currently impairing air quality in downwind communities, including in some cases through exceedances of State and Federal particulate matter emission standards. The Program is meant to implement measures designed to comply with San Luis Obispo County Air Pollution Control District (APCD) air quality requirements, including Rule 1001, which was adopted by APCD in 2011 and requires DPR to minimize particulate matter emissions for ODSVRA. By design, the proposed Program represents a programmatic approach that broadly identifies a list of potential measures that may be used to control dust emissions, whereas the final decision as to the actual types and amounts

of dust control measures to be used will be selected by DPR, in consultation with the California Air Resources Board (CARB) and APCD. Broadly, these measures are generally aimed at stabilizing dune structure and restoring dune surface properties in a manner that can help to reduce potential dust emissions. Proposed measures include planting up to 20 acres of native dune vegetation per year, both within and outside of areas used for Off-Highway Vehicle (OHV) riding (for a total of up to 100 acres of dune vegetation by the end of year five); deploying up to 40 acres of seasonal dust control measures (e.g., wind fencing) during the windy season (i.e., roughly from March to September each year) within the OHV riding area; and installing and operating monitoring equipment to evaluate dust abatement effectiveness. In addition, the Program includes additional related measures, including potentially planting trees on private property inland of ODSVRA boundaries, and installing grooved concrete ‘track-out’ devices<sup>1</sup> to reduce inland sand transport at the two vehicular Park entrances at West Grand Avenue and Pier Avenue. And finally, the Program also seeks to authorize dust control measures that were permitted under prior years’ emergency CDPs, including the installation of air quality monitoring equipment and the restoration of dune areas used for dust abatement purposes. Again, DPR identifies the proposed Program measures as potential options, acknowledging that the actual measures employed would be developed in conjunction with APCD and CARB, including to meet Rule 1001 compliance and objectives.

The Coastal Act states that air quality protection programs are the principal responsibility of local air pollution control districts (APCD in this case) and CARB, and requires that Commission actions be consistent with these entities’ air pollution control programs and requirements.<sup>2</sup> That said, while the Act states that the Commission cannot establish or modify air quality or emission standards, the Commission must still review development required to implement air pollution control programs and requirements to ensure the development is consistent with Coastal Act requirements, including with respect to the protection of environmentally sensitive habitat areas (ESHA), public views, public recreational access, and other coastal resources. In other words, the Coastal Act does not provide an ‘override’ of Coastal Act requirements on the basis of air quality protection, and the Commission must still evaluate such proposed development for consistency with the Coastal Act.

In this case, DPR’s proposed project emanates from, is meant to implement, and is proposed pursuant to APCD’s dust emission reduction programs, including Rule 1001. Therefore, a key analytic question under the Coastal Act is whether DPR’s proposed Program is consistent with APCD’s (and CARB’s) air pollution control programs and requirements, particularly Rule 1001, or whether changes are necessary to ensure consistency and compliance with their programs and requirements as the Coastal Act requires. In addition, the other key analytic question is whether DPR’s proposed project, as well as any modifications necessary to ensure its consistency with APCD/CARB programs and requirements, is consistent with Coastal Act policies, particularly whether the methods to be used to abate dust comport with policies protecting and regulating dunes and their associated habitats, which in this location are considered to be ESHA under both

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<sup>1</sup> Track-out devices refer to grates and grooves and similar apparatuses designed to shake loose sand from vehicles before it is taken further inland where it can contribute to potential dust problems.

<sup>2</sup> Coastal Act Sections 30414 and 30253(c).

the Coastal Act and the San Luis Obispo County LCP due to their rarity and especially valuable ecosystem/habitat function, and with Coastal Act public access and recreation policies.

With respect to the former question, in terms of the proposed Program's consistency with applicable air quality protection programs and requirements, both APCD and CARB have reviewed DPR's proposed project and have written letters formally stating their evaluation on the adequacy/efficacy of DPR's proposed project to reduce particulate matter emissions in accordance with applicable air quality protection requirements/programs, including Rule 1001 (see **Exhibits 8 and 9**). Notably, while both CARB and APCD agree that DPR's proposed programmatic approach appears to be generally broad enough to allow for an appropriate suite of potential measures to control and reduce dust/particulate matter, APCD has expressed concerns with some of the Program's detailed parameters. Specifically, while DPR's proposed project limits dust control measures to a defined program area boundary, specifies limits on the amounts of dust mitigation to be undertaken in any given year, and allows for dune vegetation planting to be located in areas not used for OHV riding, APCD has expressed concerns about all of these provisions. As more fully explained in this report, APCD is concerned that these provisions may unnecessarily restrict the type, amount, and location of dust control abatement which may be found, via further scientific study through ongoing air quality modeling being undertaken jointly by CARB, APCD, and DPR, to be needed to sufficiently abate dust emissions. As such, to allow for the measures that may be needed for consistency with applicable air quality requirements, APCD indicates that DPR's dust control Program needs to be modified to: ensure that dust control measures are allowed in any areas shown to be highly emissive, and that specific mitigation measures be based on scientific evidence and modeling, and not just within pre-prescribed boundaries and limits; ensure that dune vegetation is planted within areas used for OHV use due to these areas' greater emissivity relative to non-riding areas; and ensure that perimeter fencing around highly emissive areas is also a potential tool that could be used for dust abatement.

With these changes, APCD indicates that the Program would be sufficiently encompassing to allow the broad range of dust abatement measures that may be necessary to meet applicable air quality requirements, with the specific type, amount, and location of measures to be ultimately determined collaboratively among DPR, APCD, and CARB based on scientifically defensible air quality modeling. The Program would continue to be undertaken in an adaptive management framework where such measures are evaluated and modified for maximum dust abatement efficacy. APCD indicates that the Program would allow for the measures necessary to be consistent with applicable air quality requirements if it is modified in these ways. As such, and pursuant to Coastal Act Section 30253(c), staff is recommending that the suite of potential dust control measures be expanded as outlined by APCD, including that the specific areas where these measures are applied be focused on the proposed Program area, but that they can be applied wherever it makes the most sense for addressing APCD and CARB requirements based on the ongoing collaboration between DPR, APCD, and CARB. This CDP therefore authorizes the additional measures, locations, and amounts identified by APCD, but it in no way requires DPR to implement such additional measures, as the specific measures to be undertaken will be developed by DPR in conjunction with CARB and APCD. The CDP simply ensures that the proposed project will be consistent with Section 30253(c) by authorizing the type, amount, and location of dust abatement measures that may be needed to be consistent with applicable air quality requirements and that are otherwise consistent with the Coastal Act. In addition, staff is

recommending that the annual work program, intended to identify the specific measures to be applied for any particular year as proposed by DPR, be submitted with evidence that APCD and CARB have reviewed the measures and consider them consistent with their requirements, if any,<sup>3</sup> related to dust control at ODSVRA. This further ensures that the work program will be consistent with Section 30253(c). Staff also recommends a condition to allow for the program to be extended past the initial five years if there are no changed circumstances requiring Commission review of the program as approved.

With respect to the Program's consistency with other Coastal Act requirements, the project (including as modified to meet applicable APCD requirements as required by the Coastal Act) at its core is a comprehensive Program that seeks to stabilize dune structure, and protect and restore dune surface properties so as to help reduce emissions, including within more emissive/disturbed areas currently used for OHV riding activity. The project is thus inherently an allowed use within dune ESHA and is designed not to significantly disrupt habitat values. Thus, as conditioned, the project is consistent with Coastal Act habitat protection policies.

At the same time, it appears likely that the Program will lead to a decrease in areas available for OHV recreation, some seasonally and some more permanent. Although this raises some Coastal Act public recreational access concerns, staff believes it is appropriate and Coastal Act consistent in this case, including as the Act explicitly requires that its public access provisions "be implemented in a manner that takes into account the need to regulate the time, place and manner of public access" depending on, among other things, "the capacity of the site to sustain use and at what level of intensity," and the need to potentially limit access "depending on such factors as the fragility of the natural resources in the area."<sup>4</sup> In this case, it is appropriate to implement measures that have the effect of limiting the 'time, place, and manner' of OHV use associated with the fragile dunes in question to stabilize their structure, restore their surface properties, and address applicable air quality requirements. In addition, while the Program may result in limiting some areas currently open to OHV and camping recreational uses, significant public recreational access representing several thousand acres will still be available at ODSVRA, including some two square miles of dune and some three linear miles of beach available for OHV riding. Thus, for all these reasons, the project will not result in significant adverse impacts to public access and is consistent with these other Coastal Act policies.

As conditioned, DPR's approach to restore dune surface properties, minimize dust emissions, and meet applicable air quality requirements by, among other means, ensuring dune revegetation is located within emissive areas subject to OHV activity, and by ensuring that all measures are scientifically defensible and designed to comply with applicable APCD and CARB requirements, can be found consistent with the Coastal Act. Again, the approval authorizes a broad program for dust abatement and dune protection, with the specific measures to be deployed ultimately determined through partnership and coordination among DPR, CARB, and APCD and submitted to the Executive Director for review and approval to ensure their consistency with this CDP.

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<sup>3</sup> If APCD or CARB have not imposed any "requirements" related to specific dust control measures, then the condition would not create such requirements.

<sup>4</sup> Coastal Act Section 30214.

Commission staff has worked extensively and cooperatively with DPR, APCD, CARB, and many interested members of the public over many years to address air quality in a manner that responds to the various needs, goals, and interests of the many parties involved. The Program, as modified, will allow for the flexibility and adaptability needed to abate what APCD has deemed a significant and ongoing public health threat, while also ensuring the protection of sensitive dune resources. As conditioned, the dust control Program is consistent with the Coastal Act, and staff recommends the Commission **approve** the CDP. The motion and resolution to do so are on page 7.

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### APPENDICES

Appendix A – Substantive File Documents

Appendix B – Staff Contacts with Agencies and Groups

### EXHIBITS

Exhibit 1: Project Location and Site Photos

Exhibit 2: ODSVRA Photos

Exhibit 3: San Luis Obispo County LCP ESHA Map

Exhibit 4: CDP 4-82-300 With Amendments

Exhibit 5: APCD Rule 1001

Exhibit 6: DPR’s Proposed Dust Control Program

Exhibit 7: Dust Control Measures Photos

Exhibit 8: Letter from the California Air Resources Board (CARB)

Exhibit 9: Letter from the San Luis Obispo County Air Pollution Control District (APCD)

Exhibit 10: Memorandum from Coastal Commission Staff Ecologist Dr. Laurie Koteen

### CORRESPONDENCE

Correspondence 1: Public Comments Received

## I. MOTION AND RESOLUTION

Staff recommends that the Commission, after public hearing, **approve** a coastal development permit for the proposed development. To implement this recommendation, staff recommends a **YES** vote on the following motion. Passage of this motion will result in approval of the CDP as conditioned and adoption of the following resolution and findings. The motion passes only by affirmative vote of a majority of the Commissioners present.

***Motion:** I move that the Commission **approve** Coastal Development Permit Number 3-12-050 pursuant to the staff recommendation, and I recommend a **yes** vote.*

***Resolution to Approve CDP:** The Commission hereby approves Coastal Development Permit Number 3-12-050 and adopts the findings set forth below on grounds that the development as conditioned will be in conformity with the policies of Chapter 3 of the Coastal Act. Approval of the permit complies with the California Environmental Quality Act because either 1) feasible mitigation measures and/or alternatives have been incorporated to substantially lessen any significant adverse effects of the development on the environment, or 2) there are no further feasible mitigation measures or alternatives that would substantially lessen any significant adverse impacts of the development on the environment.*

## II. STANDARD CONDITIONS

This permit is granted subject to the following standard conditions:

- 1. Notice of Receipt and Acknowledgment.** The permit is not valid and development shall not commence until a copy of the permit, signed by the Permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.
- 2. Expiration.** If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.
- 3. Interpretation.** Any questions of intent of interpretation of any condition will be resolved by the Executive Director or the Commission.
- 4. Assignment.** The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.
- 5. Terms and Conditions Run with the Land.** These terms and conditions shall be perpetual, and it is the intention of the Commission and the Permittee to bind all future owners and possessors of the subject property to the terms and conditions.

## III. SPECIAL CONDITIONS

This permit is granted subject to the following special conditions:

**1. Approved Project.** This CDP authorizes the Permittee to implement specified airborne particulate matter emission (“dust”) control and related monitoring measures at ODSVRA in order to reduce and control dust generated at the Oceano Dunes State Vehicular Recreation Area (ODSVRA) consistent with the requirements of San Luis Obispo County Air Pollution Control District (APCD) subject to these standard and special conditions, including 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 (e.g., no significant degradation of dune habitats and/or vegetation, etc.).

**(b) Monitoring Measures.** Approved monitoring measures include the construction and operation of the S1 and Oso Flaco Meteorological and Air Quality Monitoring Stations in the locations identified in Exhibit 6, as well as other similar monitoring stations consistent with APCD or California Air Resources Board (CARB) requirements.

**(c) Dust Control and Monitoring Area.** Approved dust control and monitoring measures are to be located in the area identified as “Primary Dust Control Area” in Exhibit 6, but may extend out of this area as necessary to meet CARB or APCD 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 (e.g., 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, etc.).

**(d) Dust Control Measures Coverage.** Approved dust control measures are expected to result in planting/maintaining approximately 20 acres of vegetation each year (or approximately 100 acres over a five-year period), and installing approximately 40 acres of other dust control (e.g., wind fencing, etc.) during the windy season (i.e., between March through September) each year.

**(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 or CARB related to dust control at ODSVRA.

The Permittee shall undertake development in accordance with the Approved Project described above, unless the Commission amends this CDP or the Executive Director determines that no amendment is legally required for any proposed minor deviations. All



requirements of the Approved Project described above shall be enforceable components of the CDP.

2. **Annual Approval Required.** Prior to implementing any of the Approved Project elements for each calendar year, the Permittee shall submit, for Executive Director review and approval, an Annual Work Plan that clearly describes the dust control and monitoring measures to be implemented for that year, where the Annual 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 Annual Work Plan shall include a description of the previous year's measures, including monitoring data identifying effectiveness and any coastal resource impacts, including the effectiveness and success of dune revegetation.
3. **Duration of Authorization.** This CDP authorizes the Approved Project for five years (i.e., until September 14, 2022). The Executive Director may extend the expiration date by additional five-year periods if the Permittee submits a written request to do so prior to September 14, 2022 (and prior to the expiration date for any subsequent five-year extension approvals), where such request shall summarize the previous five year's efforts subject to the same requirements as the Annual Work Plan, and the expiration date shall only be extended if the summary of the Annual Work Plans and/or other related information demonstrate that there are not changed circumstances that the Executive Director determines would require the proposal to be heard as a new CDP or CDP amendment by the Coastal Commission.
4. **Indemnification by Permittee/Liability for Costs and Attorneys' Fees.** By acceptance of this CDP, the Permittee 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 the Permittee against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of this CDP. The Coastal Commission retains complete authority to conduct and direct the Commission's defense of any such action against the Coastal Commission.

#### IV. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

##### A. PROJECT LOCATION

The proposed project is located in multiple locations at and near the Oceano Dunes State Vehicular Recreation Area (ODSVRA, or Park). Formerly known as Pismo Dunes State Vehicular Recreation Area, ODSVRA is located on the central California coast in southern San Luis Obispo County (see **Exhibit 1**). ODSVRA is part of the much larger 18-mile-long Guadalupe-Nipomo Dunes complex. The cities of Pismo Beach and Grover Beach form the northern border of the Park. To the east are the Phillips 66 Refinery (formerly ConocoPhillips Refinery), the unincorporated community of Oceano, and private lands that generally consist of dunes, coastal scrub, and agricultural fields. The southern border of the Park abuts the

Guadalupe-Nipomo Dunes National Wildlife Refuge. ODSVRA is mostly owned and entirely operated by the California Department of Parks and Recreation's (DPR) Off-Highway Motor Vehicle Division. The Park is a very popular visitor destination, with annual attendance in the millions and annual vehicular use in the hundreds of thousands.

ODSVRA encompasses 3,590 acres and includes approximately six linear miles of sandy beach. Approximately 1,500 acres of ODSVRA (or almost two square miles) and three miles of beach are currently available for off-highway vehicle (OHV) use, and street-legal vehicle use can range essentially along the entire six-mile stretch. The Park varies in width from a few hundred yards along its northerly boundaries near the Pismo Dunes Natural Preserve to up to three miles wide in places along its southerly portion. ODSVRA is divided into different regions based upon allowable activities, including areas set aside strictly for resource protection and preservation, for street-legal vehicle use, and for a combination of street-legal/OHV use. The separation and delineation of these specific areas was developed through past cooperative efforts of DPR, the Coastal Commission, San Luis Obispo County, and the California Department of Fish and Wildlife (CDFW). The entire ODSVRA area has been identified by the Commission as an environmentally sensitive habitat area (ESHA).<sup>5</sup> Furthermore, the entire ODSVRA area is mapped as a sensitive resource area (which also constitutes ESHA per the LCP) in the San Luis Obispo County LCP (see **Exhibit 3**). ODSVRA is part of a significant and sensitive ecological system, the Nipomo-Guadalupe dunes complex, much of which has been preserved exclusively for habitat protection purposes. In addition, ODSVRA has been identified as critical habitat for the threatened Western snowy plover, and supports other sensitive species, including the endangered California least tern, Steelhead trout, and Tidewater goby, which are protected under the Federal and State Endangered Species Acts.

There are two interim vehicular entry points for ODSVRA.<sup>6</sup> The northernmost entrance (and the northern boundary for allowed vehicular use of any kind on the beach) is at West Grand Avenue within the City of Grover Beach (see **Exhibit 1**). The second entrance is located about one mile south of West Grand Avenue at Pier Avenue within the unincorporated community of Oceano. From both entry points onto the beach, street-legal vehicles then drive approximately two miles south along the lower beach towards the interim OHV staging and allowed riding areas (see staging and riding areas noted on **Exhibit 1**). This staging area is the designated area where OHVs that have been trailered in by street-legal vehicles can be off-loaded and ridden. OHVs may be off-loaded in other areas south of the staging area, but the staging area at Post 2 is the location where OHV use is first allowed heading south from the interim entrance points. OHV riding is allowed in most of the Park area south of the staging area, and street-legal vehicle use can range essentially along the entire six-mile stretch of the ODSVRA. The riding area consists of the sandy beach located between the staging area to the fencing constructed north of Oso Flaco Lake, a distance of approximately three miles, as well as the back dunes from approximately Post 4 to Post 8, where the back dune riding area extends in some areas almost two miles inland. Included in the riding area between approximately Post 4 and Post 7 is the La Grande property (see **Exhibit 1**). The La Grande property occupies 584 acres of the Park (or

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<sup>5</sup> See, for example, CDP 4-82-300 as amended, and Commission reviews related to its implementation over the years.

<sup>6</sup> See discussion that follows regarding CDP 4-82-300 for details on the 'interim' nature of Park access.

about 40% of the overall riding area), and this area is primarily owned by San Luis Obispo County<sup>7</sup> and is currently leased by the County to DPR on a month-to-month basis.

Just south of the open riding area is the Oso Flaco Lake area (see **Exhibit 1**). The Oso Flaco Lake area was historically open to riding prior to the creation of ODSVRA, but was closed off to OHV use in 1982 due to severe resource degradation from OHV use in that area. This area now supports a healthy system of distinct habitats, including freshwater lakes and a marsh, a significant riparian system, vegetated dune habitats, and coastal sage scrub. A pedestrian-only access point to the Oso Flaco Lake area is located at the end of Oso Flaco Lake Road.

See site location maps, ODSVRA maps and figures, and photos of the ODSVRA area in **Exhibits 1 and 2**. In addition, DPR also provides access to an interactive virtual tour of the site that is available at <http://www.regal360.com/clients/ohv/index.html>.

## **B. COASTAL DEVELOPMENT PERMIT 4-82-300 AND AMENDMENTS BACKGROUND**

Under the Coastal Act, ODSVRA operates under a CDP issued by the Coastal Commission in 1982. The CDP identifies the basic parameters for Park operation, including its access and staging areas, where OHV riding and camping is allowed, the number of allowed OHV vehicles and camping units allowed, and requirements for habitat and sensitive species protection. The CDP has a long history and a unique operating structure, and has been amended five times, as described below.

### ***CDP 4-82-300***

On June 17, 1982, prior to certification of the LCP's Land Use Plan (LUP), the Commission first approved CDP 4-82-300 to allow DPR to construct fencing to delineate use and restricted areas, to establish interim Park access control (via the construction of two interim kiosks at entry locations), to designate an interim OHV staging area, and to address the carrying capacity of the Park by setting vehicle use limits. The fencing, interim staging and access areas, and use limits were permitted as the initial phase of what was seen as a longer term program to manage OHV use within the ODSVRA consistent with the access, recreation, and resource protection policies of the Coastal Act.

Special Condition 2 of CDP 4-82-300 (see **Exhibit 4**)<sup>8</sup> required the temporary access kiosks to be located at West Grand Avenue in Grover Beach and Pier Avenue in Oceano (see locations in **Exhibit 2**). Per Special Condition 3, the kiosks were to be manned with DPR representatives giving OHV users information about the CDP 4-82-300 terms and conditions, including with respect to CDP restrictions on riding within fenced-off areas, prohibitions on riding within the

<sup>7</sup> According to DPR, there are also 41 additional private inholdings in the La Grande Tract area, totaling some 4.5 acres overall. Each of these property owners has been invited to be a co-applicant for this proposed project in accordance with Coastal Act section 30601.5, but none have expressed interest in same.

<sup>8</sup> **Exhibit 4** shows the conditions of CDP 4-82-300 and its five amendments in order, including in strikethrough and underline format to show the ways in which subsequent amendments altered previous conditions. **Exhibit 4** also includes a clean copy of the conditions of the CDP as amended through and including 4-82-300-A5 at the end of the exhibit starting on page 38. These latter conditions are the conditions currently in effect.

Oso Flaco Lake area, and restrictions on riding within any other areas designated as private property or that were vegetated, regardless of fencing or signage. Special Condition 3(c) also established that only street-legal vehicles were allowed to drive on the section of beach from the interim access entrance points south to the start of the Sand Highway,<sup>9</sup> and designated the area south from the start of the Sand Highway to the fencing north of Oso Flaco Creek for OHV use. Special Condition 3(d) required that the number of OHVs allowed at any given time within ODSVRA must be limited to a specified number of users, and directed DPR, San Luis Obispo County, and the Commission's Executive Director to consult with each other to identify the appropriate number of users. Per Condition 3(b), camping units,<sup>10</sup> defined as one camper vehicle per camping unit, were also restricted to a maximum number of 500 units per night to be reserved through the State Park Reservation System. Finally, the CDP did not allow DPR's proposal to place a third interim access kiosk and entrance at the causeway across Oso Flaco Lake due to the unique habitats and biological significance of that area.

Special Condition 3(e) also required the placement of approximately 35,000 linear feet (almost seven miles) of fencing around a subset of sensitive resource areas within ODSVRA to protect them from further degradation due to OHV use. The areas that were left open to riding were the open sand sheets that were generally devoid of vegetation at that time, either as a result of OHV use or otherwise. The fencing was to be placed along the boundary of ODSVRA, along the eastern (i.e., inland) boundary of the Sand Highway, and around vegetated islands and archeological resources located within ODSVRA open riding areas (see **Exhibit 2**). Special Condition 4 required a dune restoration program to help restore dune vegetation and habitat within the now non-riding and fenced-off areas that had been degraded over time.

Finally, Special Condition 1(a) established a temporary OHV staging area on the beach just north of the beginning of the Sand Highway. The staging area's location was intended to be interim until a permanent location was identified. Pursuant to the terms of Special Condition 1(b), and reflecting the importance the Commission placed on establishing a permanent staging area, a failure to establish and construct a permanent staging area within three years of the date of certification of the County's LUP or LCP would result in the CDP's review, and modification of use parameters at ODSVRA by the County or the Commission. Furthermore, Special Condition 6 required that, until a permanent staging area is operational, a formal review of the effectiveness of the conditions of the CDP shall take place annually, undertaken by the Commission, County, DPR, CDFW, and the community of Oceano. Special Condition 6 also stated that if after each annual review pursuant to this condition, or after the three-year review required pursuant to Special Condition 1(b), it is found that OHV use is not occurring in a manner that protects environmentally sensitive habitats and adjacent community values consistent with the County's LUP, then OHV use may be further limited.

Essentially, CDP 4-82-300 initiated what was seen as a long-term program to manage OHV use and resource protection under the Coastal Act through the CDP given that OHV use includes

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<sup>9</sup> The 'Sand Highway' is identified by a series of marker posts that head inland from the beach to the back dune area and then run south through the back dunes, and it is demarcated as the main route for vehicles traveling through the back dunes to destinations up and downcoast within ODSVRA.

<sup>10</sup> ODSVRA does not include defined camping spaces, rather camps may be established on the sand anywhere within that portion of the Park open to OHV use.

ongoing and evolving impacts to coastal resources. The CDP created an annual review process to evaluate the effectiveness of DPR in managing recreational use in tandem with resource protection. Based on the effectiveness of DPR in managing ODSVRA in this way, OHV use within the ODSVRA could be modified as required to further protect ODSVRA resources pursuant to the terms and conditions of the CDP. Conversely, if ODSVRA resources and OHV uses were found to have been effectively managed to provide an appropriate balance between resource protection and access, the CDP allowed that OHV use could also be increased to a level not to exceed the enforcement and management capabilities of DPR. Again, see CDP 4-82-300 conditions of approval in **Exhibit 4**.

***CDP 4-82-300-A1***

CDP 4-82-300 was first amended on August 26, 1982 (see changes to conditions associated with the first amendment starting on page 8 of **Exhibit 4**), just a couple of months after it was initially approved. The amendment delayed the effective date of implementing the 500-camp-site daily limit from Labor Day 1982 to September 15, 1982, or by approximately two weeks. It also moved the location of the interim staging area north approximately  $\frac{3}{4}$  of a mile to the two-mile post (Post 2, where it is still located today) and provided more specific fencing requirements. This amendment was the result of a resolution of a dispute between DPR and the County that arose during the original permit process as to the appropriate locations for the interim staging area and protective fencing.

***CDP 4-82-300-A2***

The CDP was amended again a little less than a year later on June 21, 1983 (see changes to conditions associated with the second amendment starting on page 14 of **Exhibit 4**). The then recently created California Off-Highway Vehicle Commission, created pursuant to PRC Section 5090, conducted hearings and reviewed the effectiveness of the resource management requirements outlined in the base CDP as then amended through 4-82-300-A1, and concluded that DPR had effectively controlled OHV use and had made positive gains in resource protection and restoration. Based on these findings, DPR proposed an amendment to the CDP requesting an increase in the maximum number of allowed campers from 500 to 1,500 per day. The Coastal Commission at that time noted and recognized such progress, including: significant areas of protective fencing had been established; the dunes by Oso Flaco Lake had begun to be stabilized, dune vegetation restoration efforts had begun, and the area was once again being used by fishermen, hikers, birdwatchers, and picnickers; a barrier fence was established at Oso Flaco Creek to prevent OHV use; volunteer OHV groups had established an effective patrol force to help Park staff; and DPR had budgeted for more seasonal and permanent employees.

However, the Commission also noted that other resource protection measures were not being implemented, including that the Oso Flaco Creek fence was not installed in a timely manner, resulting in some degradation of the dune system south of the creek. Therefore, the Commission found that camping spaces should only be increased incrementally, and increased the maximum number of allowed camping units to 1,000 per day. This amendment also changed Special Condition 6 to specify that, if after any required review of Park management, it is found that OHV use is not occurring in a manner that protects ESHA and community values consistent with the LUP, OHV use and the maximum number of camping units allowed can be further limited by the Executive Director with concurrence by the County Board of Supervisors. If the reviews find

OHV use is consistent with such standards, then OHV use and maximum camping units may be increased.

***CDP 4-82-300-A3***

On August 24, 1984 the CDP was amended for a third time (see changes to conditions associated with the third amendment starting on page 19 of **Exhibit 4**). This amendment adjusted the fence lines to allow for OHV use in areas which were historically unvegetated open sand, or which had become so damaged by past vehicular use that revegetation success was deemed unlikely at that time. The Commission found that while the proposed amendment would result in the opening of additional dune area to OHV use, the additional areas did not contain sensitive vegetation or wetland habitats and that opening these areas to vehicular use would not result in habitat damage. The new fence alignment would continue to protect existing vegetated areas and would not restrict OHV use on large areas of open sand suitable for such use.

***CDP 4-82-300-A4***

On September 10, 1991 the CDP was amended a fourth time (see changes to conditions associated with the fourth amendment starting on page 25 of **Exhibit 4**). OHV use in the Oso Flaco Lake area was prohibited under the base permit in 1982 in order to protect sensitive resources in the area. However, the absence of OHVs and the associated recovery of the dune and related habitats in this area also resulted in increased interest from pedestrians and equestrians. This increased use had begun to lead to some negative impacts in the form of trampling of vegetation. To reduce these trampling impacts, the amendment modified Special Condition 1(c) by prohibiting equestrian use in the Oso Flaco Lake area.

***CDP 4-82-300-A5***

Condition compliance reviews initiated by the Commission in 1994, partly in response to concerns expressed by the County regarding the intensity of recreational use from camping vehicles, resulted in a renewed effort to understand the carrying capacity of the Park and to regulate the types and levels of public use accordingly. Special Condition 3(d) of the base CDP required that by January 1983, DPR would establish limits on the number of OHV day users, in consultation with the County and Commission. Similar to other conditions, this condition envisioned that DPR, the County, and the Commission would cooperatively work together to identify the carrying capacity of the Park, meaning the maximum number of OHV users the Park could handle while meeting all of the CDP's resource protection standards. However, the carrying capacity of the Park was never established through this framework, and indeed remains unresolved today.

Following discussions to address Park carrying capacity, DPR applied for CDP amendment 4-82-300-A5 to implement another means to manage vehicle impacts within ODSVRA (see changes to conditions associated with the fifth amendment starting on page 30 of **Exhibit 4**). The amendment proposed by DPR included the establishment of a Technical Review Team (TRT) that could function to develop information to help support Park use decisions as an alternative to the carrying capacity analysis approach. The implementation of the TRT was a shift to a different type of adaptive management, the intent being that the TRT would serve as an advisory board to help oversee monitoring of environmental and use trends at ODSVRA, and to help advise the ODSVRA Superintendent, and ultimately the Commission through the annual review process, on resource management issues. The TRT would include an independent Scientific Subcommittee

whose role would be to identify, develop, and evaluate the scientific information needed by decision makers to ensure that the Park was being appropriately managed, including that natural resources were being adequately managed and protected. The TRT and the ODSVRA Superintendent would be required to prepare annual reports summarizing recreational use and habitat trends in the ODSVRA, as well as the TRT's major accomplishments, projects, correspondence, and recommendations. Importantly, one of the priority research projects assigned by the Commission to the TRT was the need for a "comprehensive, long-term monitoring and comparative analysis of the resource impacts associated with varying levels of use, including the highest (peak use) attendance period" (see Special Condition 5(d) of CDP amendment CDP 4-82-300-A5). In other words, the TRT was tasked with developing information and evidence to support identifying and authorizing a specific level of use for the Park, thus transitioning the earlier CDP requirements for a carrying capacity study into similar analyses to be undertaken through the TRT process. The amendment also required the Commission to annually review the "overall effectiveness of the Technical Review Team in managing vehicle impacts at the ODSVRA. If the Commission is satisfied with the review, the amendment will remain in effect for another year. Otherwise, an alternative approach to resource management, or a set of management measures, may be instituted through this process" (see Special Condition 2 of CDP amendment CDP 4-82-300-A5 in **Exhibit 4**).

While the Commission accepted the TRT's formation and role in studying Park issues and developing appropriate recommendations on resource protection, it also decided that interim vehicle use limits needed to be maintained in some form. The amendment thus included separate use limits for street-legal vehicles, OHVs, and camping units. Those interim limits were determined to be 2,580 street-legal vehicles per day, a total of 1,720 OHVs at any given time, and 1,000 camping units per day. In the interim, to allow for historic use patterns, vehicle limits were allowed to be exceeded for Memorial Day, 4th of July, Labor Day, and Thanksgiving weekends.<sup>11</sup> Again, however, these use limits were specifically described as being interim, with the goal being that the TRT, as part of its ongoing research and management program, would study and recommend to the ODSVRA Superintendent and the Commission appropriate vehicle use limits that fundamentally reflect an analysis of vehicular impacts and overall carrying capacity in relation to resource protection otherwise.

The Commission ultimately approved CDP amendment 4-82-300-A5 in 2001. Special Condition 1 of this amendment replaced Special Conditions 3(b) (that restricted camping to a maximum of 1,000 units/vehicles), 3(d) (that required Park use limits to be established by January 1983), and 6 (that required an annual review of OHV use impacts on ESHA and community values). Special Condition 2 of the amendment required the Commission to annually review the overall effectiveness of the TRT in managing vehicle impacts at the ODSVRA, including evaluating the findings of the TRT's annual review. Special Condition 3 set forth the Park's interim vehicle use limits. Special Condition 4 established the formation of the TRT, including requirements that it monitor and recommend adjustments to use limits and other resource management measures, and set up a Scientific Subcommittee that would advise the TRT on those resource management measures. Finally, Special Condition 5 required the TRT and the ODSVRA Superintendent to prepare and submit to the Commission annual reports (covering the period from October to

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<sup>11</sup> Although these holiday exceedance limits have not been adjusted through changes to the permit, DPR no longer allows exceedances on these holiday weekends due to a settlement agreement.

September) summarizing annual recreational use and habitat trends at the ODSVRA, highlighting the TRT's major accomplishments (including progress made towards meeting the objectives of the TRT), projects, correspondence, and recommendations on park management issues, as well as a summary of subcommittee, working group, and task force activities. Thus, the Commission's ability to require modifications to current management measures was initially established by Special Condition 6 of 4-82-300, and retained by Special Condition 2 of CDP amendment 4-82-300-A5.

***Current CDP Status***

As indicated above, CDP 4-82-300 has been amended five times (see **Exhibit 4** for the changes each made to the conditions of the CDP, including a clean copy of the current conditions starting on page 38 of the exhibit). The CDP, as amended through CDP Amendment 4-82-300-A5 in 2001, currently authorizes and requires the following:

- The use of the TRT to study Park management issues and recommend appropriate resource protection measures, and to prepare an annual report summarizing such efforts and recommendations. The Commission is to annually review the effectiveness of the TRT in terms of its effect on ODSVRA management, and to potentially require different management approaches if warranted to best address vehicular use impacts and resource protection requirements.
- The designation of an interim staging area just south of the Two-Mile Post. No non-street legal vehicle is allowed to be operated north of the Two-Mile Post, and therefore such vehicles must be trailered to the staging area from the interim West Grand and Pier Avenue entrances.
- A permanent staging area is to be selected based upon a review of at least four sites via an environmental impacts analysis. Until a permanent staging area is designated, including in the LCP, the Commission or the County may review and modify the CDP as necessary. The Oso Flaco Lakes area cannot be used for the staging area, and equestrian use there is prohibited.
- West Grand Avenue and Pier Avenue are the two designated interim entrance points, which are to be staffed with a Public Information Program that both counts vehicles to ensure that use limits are not exceeded and also explains where street-legal vehicle and OHV use is and is not allowed. These access points remain "interim" until a permanent staging area is designated, again including through the LCP.
- OHV use is off-limits within vegetated dune areas, the area south of Oso Flaco Creek, and any other fenced-off areas.
- Ongoing programs for protecting and restoring dunes (including vegetated dune areas) and protecting archaeological resources (including via fencing and prohibiting OHV use within in all cases) are required.

Each of the amendments altered the base CDP's terms and conditions in a variety of ways. Overall, however, it is clear that the terms and conditions of the base CDP, as amended, are designed to provide for continued study and ongoing adaptive management of the Park related to



core issues associated with striking an appropriate balance between facilitating public recreation and protecting dune and related coastal resources consistent with the access, recreation, and other resource protection policies of the Coastal Act and the LCP, and to appropriately and adequately mitigate for the ongoing, evolving impacts associated with Park use.

### **C. CURRENT DUST CONTROL PROJECT HISTORY**

Dust emissions associated with ODSVRA are resulting in air quality problems inland of ODSVRA, 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. The high particulate matter concentrations have resulted in what the San Luis Obispo County Air Pollution Control District (APCD) has deemed a “significant and ongoing public health threat” for the people living inland of ODSVRA, including in the Nipomo Mesa area. Between 2013 and August 2017, an APCD air quality monitor (often referred to as the CDF monitor or tower), located one-half mile east of ODSVRA near the residential community of Nipomo, has recorded two exceedances of the Federal daily PM10 standard,<sup>12</sup> 282 exceedances of the State daily PM10 standard,<sup>13</sup> and nine exceedances of the federal daily PM2.5 standard. In addition, the federal and state standard for annual average emissions of PM2.5 is 12.0  $\mu\text{g}/\text{m}^3$ , and monitoring indicates that this standard too has been exceeded twice in this same time frame. All of these standards have also been exceeded at the Mesa 2 and other local air quality monitoring stations.

Several studies have been performed to help better understand dust emissions associated with ODSVRA including by establishing causation between the measured dust emission exceedances and ODSVRA, as summarized below (see also Commission Staff Ecologist Dr. Laurie Koteen’s memorandum in **Exhibit 10** summarizing the previous research and study on these issues).

#### ***Nipomo Mesa Particulate Study – Phase 1***

In 2004, APCD conducted what is known as the Phase 1 study to determine the cause and extent of the elevated particulate matter concentrations recorded on the Nipomo Mesa. The study concluded that entrainment of dust by prevailing northwesterly winds from ODSVRA upwind of the Nipomo Mesa was determined to be the largest factor resulting in the high particulate matter levels. However, the data from the Phase 1 study was not conclusive as to whether OHV use within ODSVRA contributed to the high particulate matter levels. The results of the Phase 1 study were presented to APCD Board of Directors in 2007, at which time the Board directed APCD staff to conduct a second study.

#### ***South County Phase 2 Particulate Study – Phase 2***

Based on the information learned from the Phase 1 study, APCD conducted a second study to determine the role OHV activity plays with respect to the high particulate levels on the Nipomo Mesa, and/or whether the petroleum coke piles at the nearby ConocoPhillips Refinery complex were the cause. The findings of the Phase 2 study concluded that:

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<sup>12</sup>The federal daily standard for PM10 is 150 micrograms (one-millionth of a gram) per cubic meter of air (expressed as 150  $\mu\text{g}/\text{m}^3$ ), and the federal daily PM2.5 standard is 35  $\mu\text{g}/\text{m}^3$ .

<sup>13</sup>The California daily standard for PM10 is 50 micrograms per cubic meter of air (50  $\mu\text{g}/\text{m}^3$ ).

### 3-12-050 (ODSVRA Dust Control)

- The airborne particulate matter predominantly impacting the region on high episode days does not originate from an offshore source.
- Neither the petroleum coke piles at the ConocoPhillips facility nor agricultural fields nor activities in and around the area are a significant source of ambient PM10 on the Nipomo Mesa.
- The airborne particulate matter impacting the Nipomo Mesa on high episode days predominantly consists of fine sand material transported to the Mesa from upwind areas under high wind conditions.
- The primary source of high PM10 levels measured on the Nipomo Mesa is the open sand sheets in the coastal dune areas.
- The open sand sheets subject to OHV activity within ODSVRA emit significantly greater amounts of particulates than the undisturbed sand sheets at the study control sites under the same wind conditions.
- Vegetated dune areas do not emit wind-blown particles, and the control site dunes have significantly higher vegetation coverage than what is present in riding areas at ODSVRA.

The Phase 2 study concluded that OHV activity is a major contributing factor to the high particulate matter levels recorded on the Nipomo Mesa, and that the primary emissions causes were direct as well as indirect impacts associated with OHV use. Indirect OHV-related emission impacts stem from de-vegetation, dune structure destabilization, and destruction of the natural dune surface caused by OHV use. The study determined that these impacts increase the ability of the wind to entrain sand particles from the dunes. Direct OHV-related emission impacts, meaning those impacts associated with fuel combustion exhaust or dust raised by the vehicle moving over the sand, were also found to be a significant, if lesser, contributor to the elevated PM10 levels. Based on the conclusions reached in the Phase 1 and 2 studies, and to address these air quality impacts, APCD adopted Rule 1001 in 2011.<sup>14</sup>

#### ***APCD Rule 1001***

APCD Rule 1001 (see **Exhibit 5**) requires DPR to monitor PM10 and implement appropriate mitigation measures to meet State and Federal air quality standards. Rule 1001 does not identify specific areas within the ODSVRA for dust mitigation, but rather is designed to be broad so as to target the specific areas shown to be highly emissive via continuing study and research. APCD Rule 1001 consists of the following key elements:

- A PM10 concentration comparison between monitors downwind of a riding area and downwind of a non-riding area. The Rule 1001 performance standard is that concentrations at the monitor downwind of the riding area must not exceed  $55\mu\text{g}/\text{m}^3$  if the difference in PM10 concentrations at the two monitors is greater than 20%.

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<sup>14</sup> Rule 1001 was the subject of litigation (*Friends of Oceano Dunes v. APCD* (San Luis Obispo County Superior Court Case CV12-0013)). Most recently, following initial Superior Court (2013) and Appellate Court (2015) decisions, and despite Friends of Oceano Dunes argument that Rule 1001 is entirely invalid, the Superior Court indicated on March 7, 2016 that APCD retains the power to enforce Rule 1001.

- A requirement to deploy monitors to provide the data necessary for evaluating dust dispersal and compliance with performance standards.
- A requirement that DPR prepare a Particulate Matter Reduction Plan (PMRP) for APCD approval specifying the mitigation methods that will be implemented to meet the Rule's performance standards.

Thus, among other things, Rule 1001 requires DPR to implement appropriate dust control measures as part of a PMRP aimed at reducing particulate matter and meeting the Rule's dust reduction requirements. The implementation of Rule 1001's requirements, including installing infrastructure to support monitoring equipment within the Park as well as measures to reduce particulate matter, constitutes development per the Coastal Act and the LCP and therefore requires a CDP, which is the CDP application proposed here. Although DPR applied for this CDP in 2012, DPR had not at that time finalized the specific measures that were to be included in its PMRP, and had not finalized its proposed project description. The Rule was also being litigated, and DPR also needed to complete its CEQA process. Thus, although substantial work continued between and among the parties to finalize the CDP application, it remained unfiled for several years.

Subsequently, several more recent circumstances allowed for the application to be filed and set for a Coastal Commission hearing. First, as indicated, the litigation regarding Rule 1001 concluded in 2016, with the Court determining that APCD retains the authority to enforce Rule 1001. Then, in March of 2017, DPR certified an EIR for its currently proposed Program, and in July of this year DPR submitted its proposed project description, allowing Commission staff to file the application as complete. Because DPR only just recently completed these prerequisites to bringing this matter to a hearing, and in light of the significant public health problems posed by the dust and the need for immediate action to address those health effects, the Commission has been working closely with DPR, APCD, CARB, and other parties since 2012 to provide for interim annual measures designed to help reduce dust problems in the short-term, including through issuing emergency CDPs (ECDPs) for a variety of dust control and monitoring measures between 2013 and 2016 (ECDPs G-3-13-0213, G-3-14-0007, G-3-15-0014, and G-3-16-0023).<sup>15</sup> The proposed project is now intended to be the longer-term program to reduce particulate matter emissions and meet Rule 1001 requirements.

#### **D. PROJECT DESCRIPTION**

DPR proposes a five-year program (Program) to implement a series of measures aimed at helping to control and minimize particulate matter emissions emanating from ODSVRA. By design, the Program broadly defines a list of potential measures that may be used to control dust emissions primarily within a specifically defined area within the La Grande Tract, with some measures located within areas currently used for OHV riding and others located outside of such riding areas. According to DPR, the 690-acre La Grande Tract area was selected as the project area due to previous modeling results identifying it as among the more emissive areas within

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<sup>15</sup>The Friends of Oceano Dunes sued the Commission and DPR over issuance of an ECDP in 2016 for implementation of DPR's 2016 dust control and monitoring measures. Friends of Oceano Dunes also challenged the Executive Director's determination that no CDP was required for DPR's dust control measures in 2017. Thus, Friends of Oceano Dunes has two active lawsuits against the Coastal Commission regarding Oceano Dunes.

ODSVRA. While the Program proposes a broad suite of potential measures DPR may undertake to control dust emissions, the ultimate decision as to the actual types and amounts of dust control measures to be employed will be selected by DPR in consultation with CARB and APCD and will be identified prior to each year's windy season (which generally begins in springtime).

Broadly, these measures are generally aimed at stabilizing dune structure and protecting/restoring the surface qualities of the sand dunes to reduce potential dust emissions. Measures described in the proposal include planting up to 20 acres of native dune vegetation per year both within and outside of areas used for OHV riding (for a total of up to 100 acres of dune vegetation by the end of year five), deploying up to 40 acres of seasonal dust control measures during the windy season (generally from March to September each year, although this may vary from year to year) within the riding area (these potential measures include wind fencing, straw bales, porous roughness elements, and soil stabilizers, and would be installed no earlier than March 1 and removed no later than September 30 each year), and installing and operating monitoring equipment to evaluate dust abatement effectiveness. In addition, the Program proposes additional related measures, including potentially planting trees on private property inland of ODSVRA boundaries (subject to property owner consent), and installing grooved concrete 'track-out' devices<sup>16</sup> to reduce sand transport at the two vehicular Park entrances at West Grand Avenue and Pier Avenue. And finally, the Program also seeks to authorize dust control measures that were permitted under prior years' ECDPs, including the installation of air quality monitoring equipment (i.e., the 'S1' tower located in the center of ODSVRA and the 'Oso Flaco' monitoring station located in the Oso Flaco area in the southeast corner of ODSVRA), and the restoration of dune areas used for dust abatement purposes but not yet restored as required by prior ECDPs (e.g., a 30-acre area of straw bales remaining in the protected dunes in the eastern portion of the La Grande tract outside of the OHV riding area).

Again, DPR identifies the proposed Program measures as potential options, acknowledging that the actual measures employed would be developed in conjunction with ACPD and CARB in an iterative adaptive management process based on modeling studies and other analyses, including to meet applicable air quality requirements such as Rule 1001. As proposed, DPR would submit its proposed dust control measures yearly in an 'Oceano Dunes SVRA Year-End Summary and Annual Work Plan' (Annual Work Plan) for the Executive Director's review and approval. The Annual Work Plan would include the specific measures to be employed for the upcoming year, including an analysis of consistency with applicable air quality requirements and this CDP's terms and conditions, as well as a review of the effectiveness of the measures undertaken in the previous year.

See **Exhibit 6** for DPR's proposed Program.

## **E. STANDARD OF REVIEW**

If a CDP for a particular development is needed from both the Commission and a local government with a certified LCP, Coastal Act Section 30601.3 allows the Commission to act on a single consolidated CDP (with the policies of Chapter 3 of the Coastal Act as the standard of

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<sup>16</sup>Track-out devices refer to grates and grooves and similar apparatus designed to shake loose sand on vehicles before it is taken further inland where it can contribute to potential dust problems.

review, and the certified LCP to be used as guidance), as long as the Commission, local government, and the applicant agree to such consolidation. In this case, development is proposed in the Commission's retained CDP jurisdiction as well as the jurisdiction of San Luis Obispo County and the City of Grover Beach. All parties agreed to consolidate the CDP application, and thus the standard of review for this consolidated CDP application is the policies of Chapter 3 of the Coastal Act.

## **F. COASTAL DEVELOPMENT PERMIT DETERMINATION**

### **1. Dust Emissions and Dune Habitat**

#### ***Applicable Policies***

The Coastal Act requires development to be consistent with requirements imposed by an air pollution control district or the State Air Resources Board:

***Coastal Act Section 30253.***

*New development shall do all of the following:*

...

- (c) *Be consistent with requirements imposed by an air pollution control district or the State Air Resources Board as to each particular development.*

The Coastal Act also requires the protection of environmentally sensitive habitat areas from any significant disruption of their habitat values, and the only type of development allowed within such areas are associated with uses that are dependent on the resource itself:

***Coastal Act Section 30240.***

- (a) *Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.*
- (b) *Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.*

Coastal Act Section 30414 provides additional direction on how the Commission is to address air quality protection programs and requirements promulgated by the Air Resources Board and/or local air pollution control districts in its actions:

***Coastal Act Section 30414.***

- (a) *The State Air Resources Board and air pollution control districts established pursuant to state law and consistent with requirements of federal law are the principal public agencies responsible for the establishment of ambient air quality and emission standards and air pollution control programs. The provisions of this division do not authorize the commission or any local government to establish any ambient air quality standard or emission standard, air pollution control program or facility, or to modify any ambient air quality standard, emission standard, or air pollution control*

*program or facility which has been established by the state board or by an air pollution control district.*

- (b) Any provision of any certified local coastal program which establishes or modifies any ambient air quality standard, any emission standard, any air pollution control program or facility shall be inoperative.*
- (c) The State Air Resources Board and any air pollution control district may recommend ways in which actions of the commission or any local government can complement or assist in the implementation of established air quality programs.*

Thus, taken together, the Coastal Act states that air quality protection programs are principally the responsibility of local air pollution control districts (in this case APCD) and CARB, and requires that Commission actions on proposed development be consistent with APCD and CARB air pollution control programs and requirements. That being said, while the Act states that the Commission cannot establish or modify air quality or emission standards, the Commission must still review development required to implement such air pollution control programs and requirements to ensure the development is consistent with Coastal Act requirements, including the protection of ESHA and other coastal resources. In other words, the Coastal Act does not provide an ‘override’ of Coastal Act requirements on the basis of air quality, and the Commission must still evaluate such proposed development for consistency with the Coastal Act, while not establishing or modifying air quality standards.

#### ***APCD and CARB Requirements***

In this case, DPR’s proposed project emanates from, is meant to implement, and is proposed pursuant to APCD’s dust emission reduction programs, including Rule 1001. Therefore, pursuant to Coastal Act Section 30253(c), which requires development to be consistent with requirements imposed by APCD/CARB, a key analytic question is whether DPR’s proposed dust control project is consistent with APCD/CARB air pollution control requirements. In addition, the other key analytic question is whether DPR’s proposed project, as well as any changes necessary to be consistent with any APCD/CARB requirements, is also consistent with other Coastal Act policies, particularly whether the methods to be used to abate dust comport with policies protecting and regulating dunes, which in this case, as discussed previously, are considered to be ESHA in this location under both the Coastal Act and the LCP due to their rarity and their especially valuable ecosystem/habitat functions.

With respect to the former question, in terms of the proposed Program’s consistency with applicable air quality protection programs and requirements, both APCD and CARB have reviewed DPR’s proposed project and have written letters formally stating their evaluation of the adequacy/efficacy of DPR’s proposed project to reduce particulate matter emissions in accordance with their requirements and their programs (see APCD and CARB letters in **Exhibits 8 and 9**). Notably, while both CARB and APCD agree that DPR’s proposed programmatic project appears to be generally broad enough to allow for an appropriate suite of potential measures to control and reduce dust/particulate matter, APCD has expressed concerns with some of the Program’s more specific parameters. Specifically, while DPR’s proposed project limits dust control measures to a defined program area boundary within the La Grande Tract, specifies limits to the amounts of dust mitigation to be undertaken in a given year (i.e., up to 20 acres of vegetation planting and up to 40 acres of wind fencing and other measures), and allows for dune

vegetation planting to be located in areas not used for OHV riding,<sup>17</sup> APCD has expressed concerns about all of these provisions. As more fully explained in APCD's letter (again, see **Exhibit 9**), APCD is concerned that these provisions may unnecessarily restrict dust control abatement in certain areas that may be found (via further scientific study through ongoing air quality modeling being undertaken jointly by CARB, APCD, and DPR) to be needed to sufficiently ameliorate particulate matter emissions and meet applicable air quality requirements. As such, APCD indicates that DPR's proposed dust control Program needs to be slightly modified to meet their requirements, specifically to:

- Ensure that dust control measures are allowed in any areas shown to be highly emissive and in any mitigation amounts necessary, and not just within the La Grande Tract within pre-prescribed limits, based on scientific evidence and modeling
- Ensure dune vegetation can be planted within areas used for OHV use due to these areas' greater emissivity than non-riding areas
- Ensure that perimeter fencing around highly emissive areas is also a potential tool that can be used for dust abatement.

With these changes, APCD indicates that the Program would be sufficiently broad to allow dust abatement of the type, amount, and location scientifically determined via air quality modeling to be necessary to meet applicable air quality standards. Coastal Act Section 30253(c) requires proposed development to be consistent with requirements imposed by APCD or CARB. Thus, the Commission authorizes in this CDP the suite of potential dust control measures identified by APCD. It should be noted that while there may be some ambiguity in this case as to what constitutes a "requirement" of APCD or CARB, it is appropriate to modify the Program with these changes given that APCD has identified constraints to DPR's proposed Program that may hamper DPR's ability to meet applicable air quality requirements. APCD has thus identified changes that will remedy this by allowing for a broad suite of tools that *may* be implemented to meet applicable air quality requirements. In other words, the CDP does not require any specific dust abatement measures, but rather it authorizes a potential suite of tools that can be used to reduce dust in accordance with applicable standards. DPR may choose not to pursue all of these tools, but the CDP as conditioned will allow for the broad suite of tools that may be needed to meet applicable air quality standards. Similarly, to address APCD concerns, the CDP authorizes these measures (including associated monitoring) to be focused on the proposed Program area, but it also authorizes their implementation in other areas, wherever it makes the most sense for addressing APCD and CARB concerns based on the ongoing collaboration between DPR, APCD, and CARB. As such, to ensure that the proposed development is consistent with the requirements of Coastal Act Section 30253(c), the Commission includes **Special Condition 1**, which authorizes implementation of APCD's recommended measures into the project, including requiring that dune vegetation<sup>18</sup> be implemented within the most emissive riding areas, ensuring that the project area extends outside of the La Grande Tract if necessary for air quality

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<sup>17</sup> Note that DPR proposes all other dune stabilization/dust control measures, such as wind fencing, to be located within the OHV riding area.

<sup>18</sup> Although vegetation can be an effective means of reducing emissions, such vegetation planting must be undertaken in a manner that protects the area's unique dune habitat values, including in terms of being of a plant type and mix that is native and ecologically compatible with the area.

compliance, and also ensuring that the specific proposed dust measures are consistent with any APCD and CARB requirements related to ODSVRA dust control. Should these measures not be required by APCD or CARB, however, DPR is not required by this CDP to implement them.

It is noted here that **Special Condition 1(a)** allows for the use of straw bales and soil stabilizers as dust control measures, among other things. With respect to straw bales, it has been the Commission's experience at ODSVRA (through the ECDPs issued to DPR) that straw bales have had limited dust control efficacy, and that they can lead to significant adverse impacts to dune ESHA. Such bales, when introduced, can bring non-native and inappropriate vegetation and other materials into the dunes to the detriment of natural dune function and ecology for as long as they remain (as is the case with some 30 acres of a remaining straw bale array still present in the dunes, which are to be restored as part of this application). In addition, the activities necessary to remove such bales can lead to their own impacts, both from the removal activity itself (and the required access through the dunes to reach bales) and by remnants of bales that may remain in the dune environment to the continued detriment of ESHA. On this point, Commission staff ecologist Dr. Laurie Koteen (see her memorandum discussing these issues in **Exhibit 10**), and former Senior Commission staff ecologist Dr. John Dixon, have both opined that straw bales should not be used for this purpose in this dune ESHA if it can be avoided. Thus, **Special Condition 1(a)** includes a provision to only allow the use of straw bales if deemed to be required by DPR, APCD, and CARB per Section 30253(c), and if such bales will only be used in an amount, configuration, and composition that will not significantly disrupt dune habitat values.<sup>19</sup>

With respect to soil stabilizers, again, Commission staff ecologists caution against using such materials in the dune environment except to the extent required by the APCD or CARB per 30253(c). Not only is their dust abatement efficacy untested at ODSVRA, but the introduction of these unnatural materials into the dune environment could have adverse impacts on dune flora and fauna, including because such soil stabilizer material may disperse more widely into that environment. As with straw bales, Dr. Koteen (again, see **Exhibit 10**) indicates that soil stabilizers should not be used for this purpose in this dune ESHA if it can be avoided and only when such soil stabilizers will not significantly disrupt dune habitat values. Thus, **Special Condition 1(a)** also requires a showing of no significant habitat disruption if soil stabilizers are required by DPR, APCD, and CARB in order to comply with both Section 30253(c) as well as Section 30240.

In addition, **Special Condition 2** provides for the annual submittal of the yearly work plan before implementing dust control and monitoring measures for any particular year, and similarly requires any such measures to be consistent with any APCD/CARB requirements to ensure continued Section 30253(c) consistency. And **Special Condition 3** allows for an extension of the Program beyond five years if DPR requests same and if there are not any changed circumstances requiring Commission review of the program as approved.

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<sup>19</sup> Such as no disruption to dune ecosystem structure or function, no degradation of dune vegetation and dune-dependent or aquatic wildlife, no facilitation of non-native species invasion, and no disruption of natural processes of dune formation and migration.



**Section 30240 Requirements**

The next analytic question is whether the Program, including as modified to meet APCD/CARB requirements as required by Coastal Act Section 30253(c), is consistent with other Coastal Act requirements. Coastal Act Section 30240 protects environmentally sensitive habitat areas (ESHA) and prohibits non-resource dependent uses in such areas. All of the dune areas of ODSVRA constitute ESHA under the Coastal Act and the LCP, as discussed earlier, including due to it being part of a significant and sensitive ecological system, the Nipomo-Guadalupe dunes complex, much of which has been preserved exclusively for habitat protection purposes. In addition, portions of the ODSVRA area have been identified as critical habitat for the threatened Western snowy plover and endangered Steelhead trout, and support other sensitive species, including the endangered California least tern, Tidewater goby, and threatened California red-legged frog, which are protected under the Federal and State Endangered Species Acts. Thus, the project must constitute a resource dependent use to be consistent with Section 30240.

In this case the proposed project at its core seeks to stabilize dunes so as to help reduce emissions. Thus, although the objective is air quality related, the measures themselves are largely designed to better protect and preserve dune features, including stabilizing dune structure and restoring dune surface properties. When the sand is left undisturbed, a combination of salt spray and particle sorting causes a fragile crust to form over the sand surface, significantly reducing its emissivity. The proposed dust control measures prevent disturbance of sand dunes, help keep sand on-site, and restore habitat, with the overall effect of restoring the natural surface properties of the sand dunes. Thus, this development is an allowable restorative use under Section 30240.

In order to be consistent with Section 30240, the proposed development must also be designed to not significantly disrupt the habitat values of the dune ESHA. **Special Condition 1(a)** prioritizes dust control measures in areas that are already disturbed, ensuring that implementation of those dust control measures will not further disrupt the dune ESHA, and will also restore dune surfaces to a degree that is consistent with natural processes, and which can facilitate vegetation establishment. The proposed revegetation will expand areas of vegetated dune habitat, which is one of several habitat types among a shifting mosaic within the larger Guadalupe-Nipomo Dune Complex. Vegetated fore and back dunes will create habitat for wildlife species that rely on plant cover for migration and escape from predation and heat regulation, such as the Northern California legless lizard and the threatened California red-legged frog. As such, revegetation is consistent with the requirement to not significantly disrupt dune habitat. Implementation of the wind and other fencing proposed by DPR is also not expected to significantly disrupt the dune ESHA, as its presence will not inhibit the movement of wildlife. On the other hand, as described previously, installation of soil stabilizers and straw bales in ESHA does have the potential to significantly disrupt the habitat, depending on the size of the area in which they are placed and the relative level of existing disturbance in those areas (see also **Exhibit 10**). Thus, **Special Condition 1(a)** only allows installation of soil stabilizers and straw bales if such measures will be utilized in an amount, configuration, and composition that will not significantly disrupt dune ecosystem structure or function (based on such factors as these measures not degrading dune vegetation and dune-dependent or aquatic wildlife, not facilitating non-native species invasion, and not disrupting natural processes of dune formation and migration). If implementation of these measures is consistent with these criteria, they will not significantly disrupt habitat values.

Thus, as conditioned, the proposed project can be found consistent with Coastal Act Section 30240.

### ***Conclusion***

As conditioned, DPR's dust abatement and monitoring/reporting Program is a broad programmatic approach that overall has a goal of minimizing dust emissions, primarily through implementing measures that will restore the natural dune surface properties and stabilize dune structure. The CDP is conditioned to ensure that the proposed development is consistent with any requirements imposed by APCD or CARB. The proposed project will be subject to continued oversight and adaptation through continued research, modelling, and study, with the specific measures to be deployed each year developed through partnership and coordination among DPR, CARB, and APCD, with the Executive Director verifying their consistency with this CDP. The Program, as conditioned, will thus allow for the flexibility and adaptability needed to abate a significant and ongoing public health threat, while also ensuring the development will have a broad restorative effect on the sand dunes and will be implemented in a manner that does not significantly disrupt the habitat values on site. As conditioned, the dust control Program is consistent with Coastal Act Sections 30253(c) and 30240.

## **2. Public Access and Recreation**

### ***Applicable Policies***

Coastal Act Sections 30210 through 30224 specifically protect public access and recreational opportunities. In particular:

*Section 30210. In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.*

*Section 30211. Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.*

*Section 30212(a). Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where: (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources...*

*Section 30213. Lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided. Developments providing public recreational opportunities are preferred.*

*Section 30214. The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following: (1) Topographic and geologic site characteristics. (2) The capacity of the site to sustain use and at what level of intensity. (3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of*

*the natural resources in the area and the proximity of the access area to adjacent residential uses.*

**Section 30220.** *Coastal areas suited for water-oriented recreational activities that cannot readily be provided at inland water areas shall be protected for such uses.*

**Section 30221.** *Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area.*

**Section 30223.** *Upland areas necessary to support coastal recreational uses shall be reserved for such uses, where feasible.*

While a fundamental tenet of the Coastal Act is to protect and provide for public access and recreational opportunities along the coast (e.g., Sections 30210, 30211, 30221, and 30223), the Act also recognizes that this access must be provided in manner that protects other coastal resources. For example, Section 30210 requires maximization of public access consistent with public safety needs and the need to protect natural resource areas from overuse, and Section 30212(a) requires that public access be provided except where it is inconsistent with public safety and the protection of fragile coastal resources. And finally, Section 30214 explicitly requires that its public access provisions “be implemented in a manner that takes into account the need to regulate the time, place and manner of public access” depending on, among other things, “the capacity of the site to sustain use and at what level of intensity,” and the need to potentially limit access “depending on such factors as the fragility of the natural resources in the area.”

### ***Analysis***

The Program’s dust abatement measures are proposed to be undertaken in some areas currently used for public recreational opportunities, namely OHV riding and camping. Although the parameters of the proposal are broadly defined, some of the existing use areas will likely be reduced in these areas where dust abatement measures will be implemented, in large part because these areas have been identified to date by modelling as the areas that are the most emissive, and thus implementation of dust control measures will be most effective in these areas. Thus, any such recreational areas in which dust control measures would be placed would not be available for these recreational purposes, but rather would be permanently (in the case of dune vegetation areas) or temporarily (in the case of other dust control measures, such as wind fencing, which would only be operational in the windy season) used for dust abatement purposes. As described previously, the Program is expected to generally result in some 20 acres of dune vegetation being planted per year (or some 100 acres of dune that would be vegetated over five years) and approximately 40 acres of other dust abatement measures, although this acreage could be increased or decreased by DPR, in consultation with APCD and CARB, each year for five years. Thus, although these numbers could change depending on what the modelling and collaboration between DPR, APCD, and CARB result in for any particular year under the Program, following year five’s windy season, it is expected that some 100 acres of land currently used for such vehicular recreational purposes could be transitioned to vegetated dunes and thus not be available for such purposes. It could also be less or more than this area, depending on if the dunes that are vegetated are in or out of the riding area, and depending on how much dune area is actually revegetated. That being said, the estimated 100 acres provides a useful metric for understanding the project’s potential impact to public access and recreational opportunities in

quantitative terms.

Similarly, and again dependent on the means necessary to meet APCD/CARB requirements, some 40 acres of recreational area, which could be increased or decreased depending on the dust control needs in any given year, could be off-limits to recreational use during roughly the spring and summer time of each year for the duration of the project, or during approximately half of the year, when seasonal measures are also applied (e.g., wind fencing, ‘hot spot’ containment, etc.). While this is a temporary disruption of recreation, it would still result in some area being off-limits to vehicular recreation when in place (if located in the riding area) each year.

Although these impacts to vehicular recreation raise some concerns with respect to consistency with Coastal Act public access policies, the Coastal Act provides direction on this point. Specifically, and as described above, the Coastal Act explicitly requires that its public access provisions “be implemented in a manner that takes into account the need to regulate the time, place and manner of public access” depending on, among other things, “the capacity of the site to sustain use and at what level of intensity, and the need to potentially limit access “depending on such factors as the fragility of the natural resources in the area” (Section 30214). In this case, the project, as conditioned, *ensures* consistency with 30214. Specifically, while the dust control Program is likely to result in the vehicular recreational impacts described above, the purpose for such potential impacts is to facilitate the stabilization of dune structure and restoration of dune surface properties at ODSVRA, and thus to help reduce dust emissions. The Coastal Act specifically requires public access and recreational opportunities to be provided in a manner that respects fragile natural resources and protects natural areas from overuse, and the project as conditioned implements that requirement. The Act does not stand for a premise that public access and recreation must be provided in all places irrespective of constraints. It also does not prohibit reducing areas currently used for recreational access purposes as necessary to address natural resource constraints. Rather, the Act specifies the parameters for when it may be appropriate to limit and regulate such access, including for the protection of natural resources. In this case, the potential recreational impacts are due to these specifically protected purposes (i.e., the project will protect fragile dune natural resources by stabilizing dune structure and restoring dune surface properties so as to reduce emissivity and protect air quality).

In addition, there currently are 1,453 acres of land at ODSVRA currently open to OHV riding and camping.<sup>20</sup> Thus, the dust control Program as conditioned could ultimately lead to some 100 acres out of 1,453 acres not being available for vehicular recreation after five years, or less than 7% of the overall riding area, and some approximately 40 acres (less than 3% of the riding area) off limits seasonally. Over 1,300 acres would continue to remain available to OHV use in that scenario, or over two square miles of dunes for OHV riding. In addition, the Park’s remaining 1,199 acres and six linear miles of sandy beach,<sup>21</sup> which are currently available for other recreational opportunities such as hiking, beach-going, and swimming, will continue to be available for such purposes, even after implementation of the Program. Thus, while the Program may result in some reduction in OHV area, the reduction is relatively minor when compared with

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<sup>20</sup> ODSVRA totals 3,497 acres, with 2,652 acres open to public recreation of all kinds (including the 1,453 acres used for OHV riding and camping, and some 1,199 acres limited to more passive (and non-vehicular) access) and 845 acres that is off-limits to public access to protect dune and other coastal resources.

<sup>21</sup> **Special Condition 1** requires all track-out devices to be located off the beach, including to ensure that there is no loss of beach for access and recreation purposes as part of the Program.

ODSVRA's size and remaining access/recreation opportunities and thus will not significantly adversely affect public access/recreation opportunities. Even if the estimates of potential affected vehicular recreation area underestimate the ultimate total area off limits to vehicular use that results from the DPR, APCD, and CARB collaboration on the Program, ODSVRA provides a very large area for public recreational access, including over two square miles for OHV use even after Program implementation, and the recreational effects are thus limited, in addition to being appropriate in terms of the need in this case "to regulate the time, place, and manner of public access" as directed by the Act and as described above. The Program, as conditioned, will therefore not result in a significant adverse impact to public access and recreational opportunities in this context and is consistent with Coastal Act public access requirements, particularly as these requirements allow limits on access to protect natural resources.

And finally, it is important to note that DPR includes as part of this CDP application a measure to study the feasibility associated with replacing any area that is currently used for OHV use that is lost to such use for dust control purposes. Specifically, DPR seeks to provide a 1:1 replacement of any OHV riding areas that become off limits to OHV use under the Program, where replacement areas would need to be within the same regional geographic location as ODSVRA, and DPR indicates that it intends to actively research and identify these replacement lands until three years after completion of the Program or by 2025, whichever is later (see **Exhibit 6**). DPR proposes this measure to mitigate for what it concludes (including through its Environmental Impact Report) is a significant adverse impact of the project, namely what DPR describes as the loss of any lands currently used for OHV/camping use. However, there are numerous Coastal Act consistency issues with this replacement concept.

As a fundamental point, such replacement is unnecessary and unwarranted under the Coastal Act because, for all the reasons articulated above, the dust control Program as conditioned is consistent with the Coastal Act, including its public access and recreation policies, *without* such OHV riding area replacement. Thus, under the Coastal Act, there is no significant adverse impact to public access and recreation that requires mitigation, let alone 1:1 replacement riding areas. And importantly, the idea of opening up new lands to OHV/camping activity is not and cannot be authorized by this CDP, including because doing so would require an amendment to CDP 4-82-300, which provides for the basic operation of the Park under the Coastal Act. As described previously, that CDP was established as a way to balance OHV recreation with coastal resource protection, and opening up new lands to such activity raises core Coastal Act consistency issues that must be understood holistically and comprehensively with other germane issues regarding Park staging, access, use limits, and other issues. If DPR were to proposed new riding areas, all of these interrelated issues would need to be addressed in an amendment to *that* CDP, which is ODSVRA's comprehensive CDP that broadly authorizes the Park's operations under the Coastal Act, and not in *this* CDP application, which is focused on necessary dust control measures to address a significant and ongoing public health threat. Finally, and perhaps most critically, all of the areas in and around ODSVRA that are not currently available to OHV riding (i.e., the areas where DPR would seek to expand OHV riding) are ESHA, and at a fundamental level OHV use is not allowable in ESHA. Notwithstanding the fact that the base CDP, as amended, allows for OHV use in some ESHA currently, that authorization was based on the existence of pre-Coastal Act activities ultimately recognized and formalized via CDP in 1982, and as adjusted since then. DPR has not explained how authorization of *new* riding in sand dunes in ODSVRA, which constitutes ESHA, could be found consistent with Section 30240 of the Coastal Act. Therefore, and to the extent there is any question, this CDP does not authorize any activity related to any

efforts to pursue additional OHV riding area.

In conclusion, and for all the reasons articulated above, the project is consistent with the public access and recreation policies of the Coastal Act.

### 3. Other

Coastal Act Section 30620(c)(1) authorizes the Commission to require applicants to reimburse the Commission for expenses incurred in processing CDP applications. Thus, the Commission is authorized to require reimbursement for expenses incurred in defending its action on the pending CDP application in the event that the Commission's action is challenged by a party other than the Applicant. In this case, the Commission has already been sued (twice by the Friends of Oceano Dunes) and has been threatened with additional litigation (by Friends of Oceano Dunes) for its efforts to date in permitting DPR's activities related to dust control at ODSVRA consistent with Coastal Act requirements. As indicated earlier, such litigation remains pending. It is a definite possibility that approval of this CDP to authorize DPR's further efforts to comply with APCD and CARB requirements and address this significant and ongoing public health threat will subject the Commission to further litigation.

Additionally, the Sierra Club has also expressed to Commission staff that it is considering legally challenging authorization for OHV use in the La Grande Tract if the CDP under consideration is ultimately approved. The Sierra Club previously sued DPR to prohibit OHV use in La Grande Tract altogether in *Sierra Club v. California Dept. of Parks and Recreation* (2012) 202 Cal.App.4th 735 ("*Sierra Club c. DPR*"). However, in that case the Second District Court of Appeal held that "Sierra Club has failed to allege that State Parks has a clear and present ministerial duty to ban OHV activities on the La Grande Tract." (*Id.* at 743.) The Commission understands that the Sierra Club may use this CDP application as an opportunity to again challenge OHV use in La Grande Tract as a general matter. This litigation risk<sup>22</sup> also justifies imposition of a special condition requiring reimbursement by DPR of costs and attorneys' fees associated with litigation.

Therefore, consistent with Section 30620(c), the Commission imposes a condition requiring reimbursement for any costs and attorneys' fees that the Commission incurs in connection with the defense of any action brought by a party other than the Applicant challenging the approval or issuance of this permit (**Special Condition 4**).

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<sup>22</sup> As acknowledged by the court in *Sierra Club v. DPR* (e.g., 202 Cal.App.4th at 739, 743) and as discussed earlier in this report, DPR operates ODSVRA, including allowing OHV use with the La Grande Tract, pursuant to CDP No. 4-82-300 as amended. The San Luis Obispo County LCP also has specific policies addressing La Grande Tract use. The Commission thus has a long history of addressing the complicated nature of La Grande Tract use, including how such use relates to the LCP as well as other core Park issues addressed in the CDP, such as with staging and access locations. Thus, while this CDP action does address OHV use in the La Grande Tract, it only addresses it inasmuch as such use affects air quality, rather than whether such use is allowed in this area at all pursuant to the LCP. Again, this latter question is a complicated one that implicates other core ODSVRA operating issues related to the base CDP 4-82-300.

### **G. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)**

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with coastal development permit applications showing the application to be consistent with any applicable requirements of CEQA. Section 21080.5(d)(2)(A) of CEQA prohibits a proposed development from being approved if there are feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse effect that the activity may have on the environment.

The Applicant, DPR, acting as the CEQA lead agency, certified an Environmental Impact Report (State Clearinghouse #2012121008) for the proposed project on March 22, 2017. The Coastal Commission's review and analysis of coastal development permit applications has been certified by the Secretary of Resources as being the functional equivalent of environmental review under CEQA (14 CCR Section 15251(c)). As a responsible agency, the Commission complies with CEQA "by considering the EIR ... prepared by the Lead Agency and by reaching its own conclusions on whether and how to approve the project involved." (14 CCR § 15096(a).) The Commission's conclusions in this regard differ from those of DPR's CEQA findings on certain fundamental analyses and conclusions, perhaps most critically with respect to whether and how the Program, as conditioned, would lead to public access impacts to OHV use that require mitigation, as well as statements and analyses defining OHV activity as a coastal-dependent use as that term is defined under the Coastal Act.<sup>23</sup> On these issues, the Commission respectfully disagrees with DPR, and does not here concur with DPR conclusions on these issues. On the contrary, the preceding findings discuss the relevant coastal resource issues and Coastal Act consistency with the proposal, and the conditions identify appropriate modifications to avoid and/or lessen any potential for adverse impacts to said resources.

As such, there are no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects which approval of the proposed project, as conditioned, would have on the environment within the meaning of CEQA. Thus, if so conditioned, the proposed project will not result in any significant environmental effects for which feasible mitigation measures have not been employed consistent with CEQA Section 21080.5(d)(2)(A).

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<sup>23</sup> Coastal Act Section 30101 defines 'coastal-dependent development or use' as "any development or use which requires a site on, or adjacent to, the sea to be able to function at all." As such, OHV activity is not related in any way to the sea to function, and thus is not a coastal-dependent use under the Coastal Act.

**APPENDIX A – SUBSTANTIVE FILE DOCUMENTS**

- *Oceano Dunes SVRA Dust Control Program* Final Program Environmental Impact Report, March 2017, State Clearinghouse #2012121008
- *Nipomo Mesa Particulate Study – Phase 1*, San Luis Obispo County Air Pollution Control District, 2007
- *South County Phase 2 Particulate Study – Phase 2*, San Luis Obispo County Air Pollution Control District, 2010

**APPENDIX B – STAFF CONTACT WITH AGENCIES AND GROUPS**

- California Department of Parks and Recreation
- California Natural Resources Agency
- California Air Resources Board
- San Luis Obispo County Air Pollution Control District
- San Luis Obispo County Department of Planning and Building
- United States Fish and Wildlife Service
- California Department of Fish and Wildlife
- NOAA Fisheries
- Northern Chumash Tribal Council
- Friends of Oceano Dunes
- Sierra Club
- Concerned Citizens for Clean Air
- Mesa Community Alliance