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Action Deadline: 12/16/2020  
Staff: Kevin Kahn - SC  
Staff Report Date: 6/24/2020  
Hearing Date: 7/9/2020

## STAFF REPORT: CDP AMENDMENT

- Application Number:** 3-12-050-A1
- 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 (ODSVRA), which spans the City of Grover Beach and the unincorporated community of Oceano in southern San Luis Obispo County.
- Approved Project:** Implement a five-year adaptive management program to reduce dust and particulate matter emissions through multiple methods, including through dune restoration.
- Proposed Amendment:** (1) Allow an additional 52.2 acres of permanent dust control mitigation in the dunes; (2) recognize 48 acres where such mitigation has already been completed through emergency CDP (ECDP) authorization; (3) recognize, after-the fact (ATF), 4.2 acres where such mitigation has already been completed without the benefit of a CDP; and (4) recognize ATF 40 acres of seasonal wind fencing that has already been installed without the required Coastal Commission authorization.
- Staff Recommendation:** Approval with Conditions
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## **SUMMARY OF STAFF RECOMMENDATION**

The California Department of Parks and Recreation (DPR or State Parks) operates the Oceano Dunes State Vehicular Recreation Area (ODSVRA, or Park) in southern San Luis Obispo County. ODSVRA is an off-highway vehicle (OHV) park that encompasses some 3,500 acres and includes approximately six linear miles of sandy beach, where about 1,330 acres of dune and beach area (or over two square miles) is currently allocated to OHV and overnight camping use, with essentially the entire 6 mile stretch of beach allowable for vehicular use, and the remainder of the Park either off-limits to OHV and camping uses, or off-limits to all use as protected dune and other habitat areas. Notwithstanding that level of use intensity in the allowed OHV/camping areas, the Commission has identified all of ODSVRA as an environmentally sensitive habitat area (ESHA), including in the San Luis Obispo County Local Coastal Program (LCP). ODSVRA operates under a coastal development permit (CDP) that was initially approved by the Commission in 1982 (CDP 4-82-300), and that is the subject of required annual Commission reviews to address potential issues, including the obvious challenge of competing habitat and OHV recreation objectives, the last of which took place in July of 2019. DPR also implements a dust abatement program at ODSVRA that is the subject of a different CDP, CDP 3-12-050, and that CDP is the subject of this CDP amendment application.

DPR proposes to amend CDP 3-12-050 primarily to allow for an additional 52.2 dune acres within which to apply permanent dust control mitigation,<sup>1,2</sup> but also to allow the Executive Director to sign off on implementation of specific future measures under the CDP at any time, rather than requiring the Commission to do so on an annual basis under the current terms of the CDP. Further, in addition to changing these overall parameters of the CDP, DPR has already installed the 52.2 acres of permanent dust control mitigation (48 acres of which were authorized by emergency CDPs (ECDPs),<sup>3</sup> but 4.2 acres of which were installed in early 2020 without any type of CDP), and has also already installed the 40 acres of seasonal wind fencing (in March 2020, also without required CDP authorization). Thus, DPR is also requesting after-the-fact (ATF) approval for the 4.2 acres of already completed permanent dust control mitigation and the 40 acres of already completed seasonal wind fencing for this year, as well as the required regular authorization for the 48 acres that were installed under the ECDP. In addition to these ATF components of the application, other violations have recently

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<sup>1</sup> Permanent dust control mitigation consists of permanently eliminating any vehicular, off-highway vehicle (OHV), camping, and any other non-habitat use in these areas, fencing them off, and restoring them via native dune plant revegetation.

<sup>2</sup> Because the base dust control CDP has already authorized 104 acres of such permanent dust control mitigation, the amended CDP would therefore authorize a total of 156.2 acres of such mitigation.

<sup>3</sup> ECDPs G-3-19-0053 and G-3-20-0013. The Commission was sued over its issuance of the ECDPs by the Friends of Oceano Dunes in February 2020.

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

occurred at ODSVRA, including in the areas affected by this CDP amendment application.<sup>4</sup>

By way of background, on September 14, 2017,<sup>5</sup> the Commission originally approved CDP 3-12-050, which authorized DPR's then proposed five-year program to implement a series of measures aimed at controlling and minimizing particulate matter (or "dust") emissions associated with ODSVRA. Such emissions have been, and are currently, impairing air quality in downwind communities, including exceeding state and federal particulate matter emission standards in some cases. 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, working, visiting, or otherwise present inland of ODSVRA, including particularly in the Nipomo Mesa area. DPR's dust control program is meant to implement measures designed to comply with APCD air quality requirements, including APCD Rule 1001, which was adopted by APCD in 2011 and requires DPR to minimize particulate matter emissions from ODSVRA. These measures are mostly aimed at stabilizing dune structure and restoring dune surface and vegetation properties in a manner that can help reduce potential dust emissions. The CDP allowed DPR to retire 104 acres of dune ESHA from vehicular, OHV, camping, and other non-habitat uses, including by fencing off and restoring these areas with native dune vegetation (i.e., permanent dust control mitigation); to annually deploy 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 and camping area; and to install and operate monitoring equipment to evaluate dust abatement effectiveness. DPR's dust control program was and is meant to be adaptive, acknowledging that the actual measures to be employed on the ground over time would be developed in conjunction with APCD and the California Air Resources Board (CARB), including to meet Rule 1001 compliance and objectives. To account for this adaptive capacity, the CDP requires DPR to obtain Coastal Commission approval (via an Annual Work Plan) prior to implementation of any specific measures on the ground per the CDP. Although the Program remains authorized through September 14, 2022, DPR has exhausted the 105 acres allowed for permanent dust control mitigation by CDP 3-12-050,<sup>6</sup> and thus any

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<sup>4</sup> These additional violations include, but are not limited to the placement of stakes with mylar ribbons to deter western snowy plover nesting activities within the 48-acre area that is the subject of this CDP amendment request. This violation is being addressed through Commission Violation File Number V-3-20-0048, as further described in the Violation section of this report. The violations involving the need for ATF approval for 4.2 acres of permanent dust control and the 40 acres of seasonal wind fencing are addressed in this report.

<sup>5</sup> The Commission initially approved the CDP on September 14, 2017, and the Commission was sued over its approval by the Friends of Oceano Dunes. In January 2020, the San Luis Obispo County Superior Court remanded the project back to the Commission for additional review of the project's coastal resource impacts, and the Commission will consider approval of the CDP for the remanded project on July 9, 2020.

<sup>6</sup> The CDP allowed up to approximately 100 acres of such mitigation, where 'approximately' was understood to be between 95 and 105 acres. DPR has instituted 104 acres of permanent dust control mitigation under the CDP, which the Commission has deemed to exhaust the available acreage for same

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

additional such mitigation, such as proposed in this application, requires additional CDP authorization.

In the time since the Commission's last Annual Work Plan approval in June 2018, DPR has entered into a Stipulated Order of Abatement (SOA) with the APCD. The SOA was based on APCD assessment that DPR's efforts to date were not resulting in adequate dust reduction, and that additional measures were needed to better address public health and air quality concerns. As approved in November 2019, the SOA identified new dust reduction requirements that DPR must meet within a four-year period (between 2019 to 2023). Namely, under the SOA, DPR must ensure that activities at ODSVRA: 1) don't lead to dust that exceeds maximum allowed state and federal daily PM10 levels at downwind air monitors; and 2) do lead to daily baseline PM10 emissions at those monitors being reduced by at least 50% compared to 2013 levels. The most immediate requirement identified by APCD's Scientific Advisory Group (SAG)<sup>7</sup> was to direct DPR to permanently close off two specific areas (totaling 52.2 acres) to vehicular, OHV, camping and any other non-habitat use, and to revegetate and restore these areas as natural dune landforms (i.e., a 48-acre foredune ESHA area near the beach, and a 4.2-acre backdune ESHA area slightly more inland). These 52.2 acres are the primary subject of this CDP amendment application.

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 the Commission to ensure that new development is consistent with these entities' air pollution control programs and requirements.<sup>8</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 that such development is consistent with Coastal Act requirements, including the protection of ESHA, public views, public recreational access, and other coastal resources. In other words, there is no 'override' of these other 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 APCD Rule 1001 and the SOA. Therefore, as with the originally approved dust control program under the original dust control CDP, Coastal Act Section 30253(c) requires the Commission to determine whether DPR's proposed amendment is consistent with APCD's air pollution control programs and requirements, particularly Rule 1001 and the SOA, or whether changes are necessary to ensure consistency and compliance with these programs and requirements. In addition, Coastal Act Sections 30200 and 30401

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under the terms and conditions of the CDP. In other words, DPR does not still have authorization for another acre of such mitigation.

<sup>7</sup> The SAG is an entity that was formed pursuant to the SOA to provide advice to APCD on all technical air quality matters and recommendations related to the SOA, and to achieving Rule 1001 compliance overall.

<sup>8</sup> Coastal Act Sections 30414 and 30253(c).

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

require the Commission to determine whether DPR's proposed project, as well as any modifications necessary to ensure its consistency with APCD/CARB programs and requirements, is consistent with other Coastal Act provisions, particularly whether the dust abatement methods appropriately address dune ESHA and public recreational access requirements.

As to the first question regarding the proposed amendment's consistency with applicable air quality protection programs and requirements, APCD reviewed DPR's proposed amendment project and provided written concurrence that DPR's proposals are consistent with applicable air quality requirements. APCD found that the 48-acre foredune area was deemed most critical by the SAG to control dust generation, and the 4.2-acre restoration area was also identified by the SAG as being important for immediate dust abatement. Notably, as discussed in this report, DPR and APCD worked together to craft this set of projects consistent with the SOA, including because of their efficacy in reducing dust emissions. This point should not be understated, as the proposed measures are deemed critical by air quality scientists to address these important public health problems. As such, the proposed amendment is consistent with the requirements of Coastal Act Section 30253(c).

With respect to the proposed amendment's consistency with other Coastal Act requirements, similar to the original CDP, the proposed amendment at its core is a series of projects that seek to stabilize dune structure. They seek to protect and restore dune surface and vegetation properties to help reduce emissions, notably within areas where OHV riding activities take place. These areas have been scientifically shown to be highly emissive as a result of such activity. The project will benefit dune habitat through dune restoration, and is thus inherently an allowed use within dune ESHA and is designed not to significantly disrupt habitat values. Thus, the proposed amendment is consistent with Coastal Act habitat protection policies.

At the same time, similar to the originally approved CDP, the proposed additional dust abatement and restoration areas will lead to a decrease in areas available for OHV use and other forms of public recreation, perhaps most notably a loss of some 60 acres<sup>9</sup> out of ODSVRA's roughly 125 acres of prime beachfront camping area nearest the shoreline.<sup>10</sup> Although this raises Coastal Act public recreational access concerns,

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<sup>9</sup> The 48-acre foredune restoration area includes a DPR-proposed 100-foot buffer within which camping is also not allowed (but vehicles can still use this area for other activities, including OHV use), and thus although 48 acres is being permanently retired from vehicular, OHV, camping, and other non-habitat uses, that results in roughly 60 acres where camping would no longer be allowed when the buffer is added in. The 4.2-acre backdune restoration area is not within an area typically used for camping.

<sup>10</sup> All 1,330 acres of ODSVRA that are open to OHV activities are also open to camping (i.e., there are no designated camping sites, rather campers are allowed to set up camp anywhere in this area), but most camping takes place to the north and in the flatter areas of the Park nearest the ocean (roughly between post markers 3 and 6, and this is the 'prime beachfront camping area' referred to), including because most camping is via large recreational vehicles, toy haulers, and similar equipment that cannot access into the steeper and more sloped dunes. So, although the actual acreage that would be off-limits to camping through this amendment is relatively small when measured against the entire area where

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

especially related to the loss of prime camping area, staff believes it is appropriate and Coastal Act consistent because these areas are being removed from that public recreational use due to problems emanating from the use itself. In such cases, the Act is clear that its requirements for providing maximum public recreational access opportunities must be tempered with the need to “protect...natural resource areas from overuse”, and indeed it 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” and for “the protection of fragile coastal resources.”<sup>11</sup>

In this case, it is appropriate to implement measures that have the effect of limiting the “time, place, and manner” of public recreational use based on the “capacity of the site to sustain use and at what level of intensity” at the fragile dunes in question to stabilize their structure, restore their surface and vegetation properties, and address the problems emanating from such use, namely “requirements imposed by an air pollution control district”, here the APCD.<sup>12</sup> In addition, while the proposed amendment will permanently result in some 52.2 fewer acres of dune/beach acreage dedicated to OHV and camping recreational uses (and roughly 60 fewer acres for camping specifically), significant public recreational access (for hiking, beachgoing, and other low-intensity public access and recreational pursuits) representing several thousand acres and some six miles of beach will still be available at ODSVRA, even with the seasonal deployment authorized herein for 40 acres of wind fencing.<sup>13</sup> Additionally, some two square miles of dune ESHA will continue to be available for OHV riding and camping. At the same time, and as discussed above, the prime camping area will be decreased by about half, which is unfortunate but also a reasonable outcome given that the uses within that area have led to problems that have led to APCD and DPR agreeing to implement essential APCD air quality requirements, namely permanent dust control, in that area. In short, the proposed changes are consistent with the Coastal Act’s public recreational access provisions that require unsustainable and high intensity uses to be restricted when they lead to resource and other problems, here air quality problems/APCD requirements.

In addition, and to state what is often overlooked by some, all of the dunes at ODSVRA are ESHA, and eliminating non-resource-dependent vehicular uses in ESHA (i.e., something the Coastal Act doesn’t allow in these dune ESHA areas) and restoring these

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camping is allowed (i.e., roughly 60 acres compared to 1,330 acres), it is not insignificant in terms of the effect on this prime camping area.

<sup>11</sup> Coastal Act Sections 30210, 30212, and 30214.

<sup>12</sup> Coastal Act Sections 30214 and 30253(c).

<sup>13</sup> The 40 acres of seasonal wind fencing is already authorized by the CDP as a dust control tool that may be applied, but requires Commission authorization, and this amendment represents that authorization. The 40 acres was installed in two separate 20-acre arrays in the back dunes and adjacent to the inland boundary of the OHV riding area, and thus the seasonal effect of this is almost entirely in terms of 40 acres less OHV area (since camping does not take place here as a general rule).

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

areas as protected dune habitat (i.e., something the Coastal Act fundamentally requires and supports in these dune ESHA areas) is inherently and clearly consistent with the Coastal Act.

Further, the proposed amendment aligns with the goals of the Commission's Environmental Justice Policy and the Coastal Act's environmental justice objectives by ensuring that Commission CDP actions do not unduly burden particular segments of the populace with adverse environmental outcomes, particularly on issues as important and fundamental to public health and welfare as air quality. Namely, the air quality problems associated with these uses at ODSVRA fall predominantly on the adjacent and downwind communities of Oceano and Nipomo, where Oceano is approximately 50% Hispanic/Latino with a Federal poverty rate of nearly 20% (and a community that was designated as an "Opportunity Zone" by Governor Brown in 2018 pursuant to the Tax Cuts and Jobs Act of 2017), and Nipomo is roughly 40% Hispanic/Latino with a Federal poverty rate of 10%. These communities of color bear the brunt of the burden of ODSVRA use, including with respect to adverse air quality, thereby raising prototypical environmental justice concerns regarding the benefits and burdens of environmental protection. The proposed amendment is designed to help ease the air quality burdens felt by these communities, and thus it is consistent with Commission and Coastal Act environmental justice objectives and requirements.

Finally, as alluded to above, the original dust control CDP currently requires Commission approval (following a public hearing) of a DPR-submitted Annual Work Plan *prior to* deployment of any specific dust measures on the ground. The Annual Work Plan is meant to document all of the measures proposed for the calendar year, along with evidence that APCD has approved the measures as being consistent with their plans and requirements. While this construct was intended to provide appropriate Commission oversight of the dust control program, it unfortunately has not responded well to the actual manner in which dust control projects are proposed and evaluated. This includes because it does not reflect the manner in which DPR and APCD's collaboration leads to actual projects year-round (and not just as one slate of projects for the year), and the need for authorizations that don't necessarily track to the Commission's monthly hearing schedule. In order to more effectively and efficiently allow necessary dust control projects to move forward as quickly as needed under the CDP, the proposed amendment would also allow the Executive Director to sign off projects that are consistent with what the Commission has authorized through the CDP as amended.<sup>14</sup> Staff supports this change, and believes that the result should result in more timely dust control.

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<sup>14</sup> Such projects would not include permanent dust control measures such as proposed in this amendment for the 52.2 acres, as the amended CDP would not allow for any more such acreage. Rather, these future projects that the Executive Director could sign off on under this CDP as amended would be for temporary projects (such as seasonal dust control) and for other measures already approved by the Commission (e.g., monitoring measures, track out devices at Pier and Grand Avenues, inland tree planting, etc.).

### **CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)**

As conditioned, the amended project addresses a known and significant public health and air quality problem associated with ODSVRA, and is designed to take its adaptive cues from applicable APCD requirements and associated DPR proposals. 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 amended dust control program 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 and public recreational access opportunities. As conditioned, staff believes that the amended dust control program is consistent with the Coastal Act, and recommends that the Commission approve the CDP amendment. The motion to do so is found on page 10.

## TABLE OF CONTENTS

<b>I. MOTION AND RESOLUTION .....</b>	<b>10</b>
<b>II. STANDARD CONDITIONS .....</b>	<b>10</b>
<b>III. SPECIAL CONDITIONS .....</b>	<b>11</b>
<b>IV. FINDINGS AND DECLARATIONS.....</b>	<b>13</b>
A. Project Location.....	13
B. CDP 4-82-300 Background .....	15
C. Dust Control Project History .....	16
D. Project Description .....	21
E. Coastal Development Permit Amendment Determination .....	21
1. Dust Emissions and Dune Habitat.....	21
2. Public Access and Recreation.....	26
3. Annual Work Plan .....	31
4. Environmental Justice .....	32
5. Violation .....	35
F. California Environmental Quality Act (CEQA).....	36

### APPENDICES

Appendix A – Substantive File Documents

Appendix B – Staff Contacts with Agencies and Groups

### EXHIBITS

Exhibit 1: Project Location and Site Photos

Exhibit 2: DPR’s Proposed Dust Control Program Amendment

Exhibit 3: Dust Control Measures Photos

### CORRESPONDENCE

Correspondence 1: Public Comments Received

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

### I. MOTION AND RESOLUTION

Staff recommends that the Commission, after a public hearing, **approve** a coastal development permit amendment 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 amendment as conditioned and adoption of the following resolution and findings. The motion passes only by an affirmative vote of a majority of the Commissioners present.

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

***Resolution to the Approve CDP Amendment:** The Commission hereby approves Coastal Development Permit Amendment Number 3-12-050-A1 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<sup>15</sup>

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.

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<sup>15</sup> These standard conditions were the same as were applicable to CDP 3-12-050, and remain unchanged with this amendment.

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

- 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<sup>16</sup>

This permit is granted subject to the following special conditions:

- 1. Approved Project.** This CDP authorizes the California Department of Parks and Recreation (DPR or State Parks) to implement specified airborne particulate matter emission (“dust”) control and related monitoring measures at the Oceano Dunes State Vehicular Recreation Area (ODSVRA) in order to reduce and control dust generated at ODSVRA consistent with the requirements of San Luis Obispo County Air Pollution Control District (APCD) and the California Air Resources Board (CARB) subject to these standard and special conditions, limited to all of the following:
  - (a) Permanent Dust Control Measures.** Approved permanent dust control measures are limited to permanently discontinuing vehicular, OHV, camping and other non-habitat uses within 156.2 acres of the vehicular, OHV, and camping areas at ODSVRA, fencing off these areas to protect them, and planting native dune vegetation within the fenced off areas.
  - (b) Seasonal Dust Control Measures.** Approved seasonal dust control measures are limited to temporarily installing wind fencing, porous roughness elements, soil stabilizers and straw bales, and/or perimeter fencing (around emissive ‘hot spots’) within up to 40 acres of the vehicular, OHV, and camping areas at ODSVRA at any one time, generally during the windy season (generally between March through September) each year. Soil stabilizers and/or straw bales shall only be used if the Executive Director determines that the proposed soil stabilizers and/or straw bales can be installed in an amount, configuration, and composition that will not significantly disrupt dune habitat values (i.e., in this case meaning that there is no significant degradation of dune habitats and/or vegetation, and the use is kept to the minimum amount necessary to abate dust).
  - (c) Other Dust Control Measures.** Other approved dust control measures are limited to installing ‘track out’ devices within the existing pavement areas (and not on beach sand) at the Pier Avenue and West Grand Avenue entrances to ODSVRA, and installing native trees inland of ODSVRA provided such native trees shall only be planted where the State Parks 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 (i.e., in this case meaning that there is no obstruction of significant public coastal views,

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<sup>16</sup> These special conditions are slightly modified from the original version to address changes made through this amendment, including refinements for clarity in relation to the approved dust control program.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

no significant degradation of dune habitats and/or vegetation, and no loss of prime agricultural lands or lands used for agricultural production).

- (d) Monitoring Measures.** Approved monitoring measures include the construction and operation of the S1 and Oso Flaco Meteorological and Air Quality Monitoring Stations, as well as other similar monitoring stations consistent with APCD or CARB requirements.
- (e) Property Owner Consent.** Authority for State Parks to implement the approved dust control and monitoring measures at any given location is subject to the requirement that State Parks has landowner approval to undertake development on that property.
- (f) APCD and CARB Requirements.** Notwithstanding subsections (a) through (e) above, any dust control and monitoring measures implemented under this CDP shall be consistent with any applicable requirements of APCD or CARB related to dust control at ODSVRA.

All requirements above shall be enforceable components of this CDP. The Permittee shall undertake development in accordance with this condition and the Approved Project described above. Minor adjustments to the above requirements which do not require a CDP amendment or new CDP (as determined by the Executive Director) may be allowed by the Executive Director if such adjustments: (1) are deemed reasonable and necessary; and (2) do not adversely impact coastal resources.

- 2. Dust Control Work Plan.** Prior to implementing any of the Approved Project elements, the Permittee shall submit, for Executive Director review and approval, two copies of a Dust Control Work Plan that clearly describes the specific dust control and monitoring measures to be implemented pursuant to it. The Dust Control Work Plan shall be submitted with evidence that APCD and CARB have reviewed the measures and consider them consistent with their requirements related to dust control at ODSVRA. Each Dust Control Work Plan shall include a description of previously deployed measures, including monitoring data identifying effectiveness (including the effectiveness and success of dune revegetation) and any coastal resource impacts.
- 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. The expiration date shall only be extended if there are not changed circumstances that the Executive Director determines would require the proposal to be heard as a new CDP or CDP amendment.
- 4. Indemnification by State Parks/Liability for Costs and Attorneys' Fees.** By acceptance of this CDP, State Parks agrees to reimburse the Coastal Commission

### **3-12-050-A1 (ODSVRA Dust Control Amendment)**

in full for all Coastal Commission costs and attorneys' fees (including (1) those charged by the Office of the Attorney General, and (2) any court costs and attorneys' fees that the Coastal Commission may be required by a court to pay) that the Coastal Commission incurs in connection with the defense of any action brought by a party other than State Parks against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval 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 or State Parks) Off-Highway Motor Vehicle Recreation 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 approximately 3,500 acres and includes approximately six linear miles of sandy beach. 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 extent. 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 and camping. Approximately 1,330 acres of ODSVRA (or over two square miles) and three linear 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. Some 1,200 acres are open to non-OHV/camping public access (e.g., general beachgoing, with street-legal vehicles allowed in this area between West Grand Avenue and the beginning of the OHV riding and camping area at Post Marker 2<sup>17</sup>) and about 970 acres is off-limits to all forms of public access to protect dune and other coastal

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<sup>17</sup> There are a series of tall posts installed as navigation markers within ODSVRA, known as Marker Posts 1 through 8.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

resources. 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>18</sup> Furthermore, the entire ODSVRA area is mapped as a sensitive resource area (which also constitutes ESHA per the Local Coastal Program (LCP)) in the San Luis Obispo County LCP (see **Exhibit 3**). ODSVRA is also 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, much of 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 all protected under the Federal and State Endangered Species Acts (ESA and CESA respectively).

There are two interim vehicular entry points for ODSVRA.<sup>19</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 are allowed to drive approximately two miles south along the lower beach towards the interim<sup>20</sup> 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**). At 584 acres, the La Grande property makes up nearly half of the OHV area of the Park (or about 44% of the overall riding area). This area is primarily owned by San Luis Obispo County<sup>21</sup> and the County currently allows DPR to use the area for DPR's operations.<sup>22</sup>

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<sup>18</sup> See, for example, CDP 4-82-300 as amended, and Commission reviews related to its implementation over the years.

<sup>19</sup> See discussion that follows regarding CDP 4-82-300 for details on the 'interim' nature of Park access.

<sup>20</sup> Id (see below regarding interim status).

<sup>21</sup> According to DPR, there are also 41 additional private inholdings in the La Grande area, totaling some 4.5 acres overall.

<sup>22</sup> State Parks represents that it leases the property from the County on a month-to-month basis by operation of Civil Code Sections 1945 and 1946 since the County has never provided notice that it

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

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 by the Commission through its base CDP approval in 1982 due to 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 State Parks parking lot and 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. CDP 4-82-300 Background

Under the Coastal Act, ODSVRA operates under a CDP first 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, 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, the last of which was in 2001. The CDP, as amended through CDP Amendment 4-82-300-A5 in 2001, currently authorizes and requires the following:

- A defined OHV and camping area (i.e., the “open riding and camping area”) subject to the following interim maximum use limits:
  - A maximum of 2,580 street-legal vehicles per day
  - A maximum of 1,720 OHVs at any given time
  - A maximum of 1,000 camping units per day
- The use of a Technical Review Team (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 OHV staging and off-loading area just south of Post 2. No non-street legal vehicle is allowed to be operated north of the Post 2, and

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intended to cancel the lease (which expired by its own terms in 2009). And County staff has indicated that DPR continues to operate on the basis of an ongoing “holdover” month-to-month agreement with the County.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

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 San Luis Obispo County LCP via an LCP amendment, 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 required to be staffed in a way to both count vehicles to ensure that maximum use limits are not exceeded, and also to explain where street-legal vehicles, OHVs, and camping are and are not allowed. These access points remain “interim” until a permanent staging area is designated by the Commission through the CDP, and also through the LCP via LCP amendment.
- 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 provisions of the Coastal Act and the LCP, and to appropriately and adequately mitigate for the ongoing, evolving impacts associated with Park use. Importantly, as noted by the interim nature of the approval (including for staging and access, and use limits), the approval was not meant set any such parameters in stone, but rather was structured to determine final use parameters, including ultimately determining the capacity of the Park to sustain use and at what level of intensity, though evaluation and adaptation, currently through the annual review process. The Commission last annually reviewed the base CDP in July 2019, and provided State Parks with direction moving forward.<sup>23</sup>

### C. Dust Control Project History

#### ODSVRA Dust

Dust emissions associated with ODSVRA have resulted, and continue to result, in air quality problems inland of ODSVRA, including leading to state and federal ambient air

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<sup>23</sup> See <https://documents.coastal.ca.gov/reports/2020/2/Th4.5/Th4.5-2-2020-report.pdf> for a summary of the Commission’s action at that July 2019 annual review hearing.

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

quality standards exceedances 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, working, visiting, or otherwise present inland of ODSVRA, including particularly 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 inland of ODSVRA near the residential community of Nipomo, recorded two exceedances of the federal daily PM10 standard, 282 exceedances of the state daily PM10 standard, and six exceedances of the federal daily PM2.5 standard.<sup>24</sup> In addition, the federal and state standard for annual average emissions of PM2.5 is 12.0 µg/m<sup>3</sup>, and monitoring indicates that this standard too had been exceeded twice in this same time frame. Federal and state standards have also been exceeded at APCD’s inland Mesa 2 monitoring station. Indeed, on certain days of the year, this area has the highest particulate matter concentrations and worst air quality in all of the United States.<sup>25</sup>

Several studies<sup>26</sup> have concluded that OHV activity is a major contributing factor to the high particulate matter levels recorded inland of ODSVRA, including on the Nipomo Mesa, and that the primary emissions causes are 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, which 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, have also been found to be a significant, if lesser, contributor to the elevated PM10 levels. Based on the conclusions reached in the studies, and to address these air quality impacts, APCD adopted Rule 1001 in 2011.

#### **APCD Rule 1001**

APCD Rule 1001 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 ODSVRA for dust mitigation, but rather was designed to be broad enough to allow DPR 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

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<sup>24</sup> The federal daily standard for PM10 is 150 micrograms (one-millionth of a gram) per cubic meter of air (expressed as 150 µg/m<sup>3</sup>) and for PM2.5 is 35 µg/m<sup>3</sup>. The California daily standard for PM10 is 50 µg/m<sup>3</sup>.

<sup>25</sup> Including at least four times in 2019 when Nipomo had the highest Air Quality Index rating of combined particulate matter and ozone concentrations in the country, according to the United States Environmental Protection Agency (airnow.gov website).

<sup>26</sup> Including APCD’s Phase 1 study (*Nipomo Mesa Particulate Study – Phase 1*) and its Phase 2 study (*South County Phase 2 Particulate Study – Phase 2*).

## **CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)**

concentrations at the monitor downwind of the riding area must not exceed  $55\mu\text{g}/\text{m}^3$  if the difference in PM<sub>10</sub> concentrations at the two monitors is greater than 20%.

- 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 dust control program originally approved by the Commission in 2017 under CDP 3-12-050 authorized DPR's proposed approach to reduce particulate matter emissions pursuant to Rule 1001 requirements.

### **CDP 3-12-050**

Specifically, in 2017 the Commission approved CDP 3-12-050 to implement State Parks' proposed measures designed to comply with APCD air quality requirements, including Rule 1001. Broadly, these measures were generally aimed at stabilizing dune structure and restoring dune surface and vegetation properties in a manner that can help to reduce potential dust emissions. The CDP allowed State Parks to retire up to 105 acres<sup>27</sup> of dune ESHA from vehicular, OHV, camping, and other non-habitat uses, including by fencing off and restoring these areas with native dune vegetation (i.e., permanent dust control mitigation); to annual deploy 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 and camping area; and to install and operate monitoring equipment to evaluate dust abatement effectiveness. State Parks' dust control program is meant to be adaptative, acknowledging that the actual measures to be employed on the ground over time would be developed in conjunction with APCD and CARB, including to meet Rule 1001 compliance and objectives. To account for this adaptive capacity, the CDP requires State Parks to obtain Coastal Commission approval (via an Annual Work Plan) prior to implementation of any specific measures on the ground per the CDP. Although the Program remains authorized through September 14, 2022, DPR has exhausted the acreage allowed for permanent dust control mitigation by CDP 3-12-050, and thus any additional such mitigation, such as proposed in this application, requires additional CDP authorization.

### **APCD/State Parks Stipulated Order of Abatement**

More recently, and based on APCD assessments that State Parks' efforts to date were not resulting in adequate dust reduction, State Parks and APCD entered into a Stipulated Order of Abatement (SOA) (in 2018, as modified in 2019) to identify and

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<sup>27</sup> The CDP allowed up to approximately 100 acres of such mitigation, where 'approximately' was understood to be between 95 and 105 acres. DPR has instituted 104 acres of permanent dust control mitigation under the CDP, which the Commission has deemed to exhaust the available acreage for same under the terms and conditions of the CDP. In other words, DPR does not still have authorization for another acre of such mitigation.

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

implement additional measures needed to better reduce dust related to vehicular activity at ODSVRA. The SOA also included the formation of a Scientific Advisory Group (SAG) to provide advice to APCD on all technical air quality matters and recommendations related to the SOA, and to achieving Rule 1001 compliance overall. The SOA specified new dust reduction requirements that State Parks must meet within a four-year period between 2019 to 2023. Namely, under the SOA, DPR must ensure that activities at ODSVRA: 1) don't lead to dust that exceeds maximum allowed state and federal daily PM10 levels at downwind air monitors; and 2) do lead to daily baseline PM10 emissions at those monitors being reduced by at least 50% compared to 2013 levels. In June of 2019, APCD approved State Parks' PMRP that was developed to meet these SOA requirements. At that time the modeling from the PMRP suggested that roughly 500 acres of OHV riding and camping area, or roughly one-third of the pre-dust control riding area of roughly 1,500 acres, may need to be permanently closed off to OHV/camping activity and revegetated in order to get close to, but still not meet, the requirements of the SOA. The PMRP states:

As shown in Table 5-8, the installation of approximately 500 total acres of dust control measures (including approximately 132 acres of existing dust control measures) is predicted to make demonstrable progress towards reducing the 2013 maximum 24-hour PM10 baseline emissions by 50%. This amount of dust control, assuming 100% control effectiveness, would reduce May 22, 2013 maximum baseline emissions by approximately 36% (based on emissions from the entirety of Oceano Dunes SVRA) to approximately 47% (based on emissions from the SVRA's open riding and camping area), and even more so if the results are expanded to emissions reductions averaged over the 10 highest emissions days from the 2013 baseline period. To achieve these estimated reductions, the OHMVR Division would need to install approximately 369 additional acres of dust control measures, namely vegetation. Any future proposed dust control measures would need to be in compliance with applicable statute and permitting requirements, and be evaluated for potential environmental impacts in compliance with CEQA. The 369 additional acres estimate is likely to be a minimum value, as the actual size and success of future dust control projects would depend on topography, planting success, etc. Furthermore, while the modeling indicates substantial progress would be made, the predicted emissions reductions are below the objective set by SOA Condition 2.c. In light of this, the OHMVR Division, the SAG, and the SLOAPCD will need to carefully consider the use and application of resources towards meeting this SOA objective. Refer to Chapter 6 for details on the OHMVR Division's ability to support the extensive vegetation planting contemplated by the PMRP sensitivity analysis. The OHMVR Division, the SAG, and the SLOAPCD may also need to carefully consider and establish appropriate increments of progress towards reducing 2013 maximum 24-hour PM10 baseline emissions by 50%.

Since then, more recent SAG/APCD air quality modeling has suggested that roughly 800 acres, or more than half of the pre-dust control OHV/camping area, may need to be permanently retired from OHV/camping use and revegetated to meet APCD Rule 1001 requirements for dust abatement for air quality and public health reasons. In any case,

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

whether it is a total of 500 acres or 800 acres or something in between, it appears clear that significant additional permanent dust control mitigation beyond the 104 acres already deployed under the Commission's CDP and authorization to date are going to be required by APCD.

The SAG recommended that the APCD approve the PMRP, but with caveats, including directing State Parks to immediately restore a 48-acre foredune area currently used for OHV/camping use:

However, other SAG technical comments are not addressed in the Revised PMRP. For example, the SAG Response Report proposed a detailed strategy for the implementation of foredune restoration. However, a detailed foredune restoration strategy appears to remain wholly lacking in the Revised PMRP, despite a detailed strategy presented in the SAG Response Report (Section 7.1). SAG reiterates the urgency of moving forward immediately on the creation of the foredune restoration enclosure referred to in Section 6.2.1 in the PMRP and the required initial planting strategies. The SAG notes that the extent of the hypothetical foredune polygon shown in Section 6.2.1 of the PMRP (~23 acres) was identified solely for sensitivity analysis in the modelling of potential dust control measures. In comparison to nearby natural analogue reference sites at Oso Flaco Lake, however, the SAG believes that the extent of this polygon is insufficient to promote the development and restoration of a naturally functioning foredune ecosystem, would likely occupy approximately 48 acres (see Section 7.1 of the February 25 SAG Response Report). The SAG recognizes, however, that this initial 23 acre polygon is an important first step in the foredune restoration process and that future adaptive management decisions may necessitate expanding this zone based on monitoring and assessment of foredune development and related sand flux and dust emission mitigation performance. The SAG stresses that foredune development and restoration is a critical mitigation measure that could take several years to reach full effect. Enclosure of this initial restoration area should begin immediately.

In November 2019, DPR agreed to SAG/APCD's measures pursuant to the SOA, including permanently retiring the 48-acre foredune ESHA area from vehicular, OHV, camping, and other non-habitat uses; fencing this area off; and restoring and revegetating it. Since the SOA required DPR to immediately implement the foredune restoration, and since the acreage authorized for such permanent dust control mitigation per CDP 3-12-050 had been exhausted, the Commission issued two ECDPs in late 2019 and early 2020 to allow permanent dust control mitigation over the 48-acre area (ECDPs G-3-19-0053 and G-3-20-0013).<sup>28</sup> In addition, and based on DPR's agreements with APCD, in early 2020 State Parks similarly applied such permanent dust control mitigation to another 4.2-acre dune ESHA area without benefit of a CDP. DPR also deployed 40 acres of seasonal wind fencing in March 2020 without the

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<sup>28</sup> The Commission was sued over its issuance of the ECDPs by the Friends of Oceano Dunes in February 2020.

## 3-12-050-A1 (ODSVRA Dust Control Amendment)

Commission's approval of an annual work plan as is currently required per the terms of the dust control CDP (see also project description below).

### D. Project Description

DPR proposes to amend CDP 3-12-050 primarily to allow for an additional 52.2 acres within which to apply permanent dust control mitigation,<sup>29</sup> but also to allow the Executive Director to sign off on implementation of specific future measures under the CDP at any time rather than needing to have the Commission do so on an annual basis. Further, in addition to changing these overall parameters of the CDP, DPR has already installed the 52.2 acres of permanent dust control mitigation (48 acres of which were authorized by ECDP, but 4.2 acres of which were installed in early 2020 without benefit of any CDP), and has already installed 40 acres of seasonal wind fencing in March 2020 (without benefit of the CDP-required Commission approval). Thus, DPR is also requesting after the fact (ATF) approval for the 4.2 acres of already completed permanent dust control mitigation and the 40 acres of already completed seasonal wind fencing for this year (in two separate 20-acre arrays near the inland riding area boundary), as well as the required regular authorization for the 48 acres of permanent dust control mitigation that were installed via ECDP. In addition to these ATF components of the application, other violations have recently occurred as well at ODSVRA, including in the areas affected by this CDP amendment application.<sup>30</sup>

See **Exhibits 2 and 3** for a map and photos showing the location and configuration of the proposed dust control measures.

### E. Coastal Development Permit Amendment Determination

#### 1. Dust Emissions and Dune Habitat

##### Applicable Provisions

Coastal Act Section 30253 requires development to be consistent with requirements imposed by an air pollution control district or the State Air Resources Board:

**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.

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<sup>29</sup> Because the base CDP has authorized 104 acres of such permanent dust control mitigation, the amended CDP would therefore authorize a total of 156.2 acres of such mitigation.

<sup>30</sup> These additional violations include, but are not limited to the placement of stakes with mylar ribbons to deter western snowy plover nesting activities within the 48-acre area that is the subject of this CDP amendment request. This violation is being addressed through Commission Violation File Number V-3-20-0048, as further described in the Violation section of this report. The violations involving the need for ATF approval for 4.2 acres of permanent dust control and the 40 acres of seasonal wind fencing are addressed in this report.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

Coastal Act Section 30240 also requires that ESHA be protected from any significant disruption of habitat values, and only allows uses that are dependent on the resource in ESHA:

### **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:

### **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, there is no 'override' of these other Coastal Act requirements on the basis of air quality, and the Commission must still

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

evaluate such proposed development for consistency with the Coastal Act, while not establishing or modifying air quality standards.

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 and the SOA.<sup>31</sup> Therefore, pursuant to Coastal Act Section 30253(c), which requires development to be consistent with requirements imposed by local air pollution control districts, in this case APCD, a key analytic question is whether DPR's proposed dust control project is consistent with APCD air pollution control requirements. In addition, the other key analytic question is whether DPR's proposed project, in a form that is consistent with any APCD 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 and public recreational access. The dunes, 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.

#### **Air Quality Requirements**

With respect to the former question, in terms of the proposed project's consistency with applicable air quality protection programs and requirements, APCD has reviewed DPR's proposed amendment and has concurred that it is consistent with applicable air quality requirements (see **Exhibit 3**). Notably, as discussed previously, DPR and APCD worked together to craft this set of projects consistent with the SOA, including because of their estimated efficacy in reducing dust emissions. This point should not be understated, as the proposed measures are deemed critical by air quality scientists in addressing these important public health problems. As such, the proposed amendment is consistent with the requirements of Coastal Act Section 30253(c).

#### **ESHA Requirements**

The next analytic question is whether the proposed amendment is consistent with other Coastal Act requirements. Coastal Act Section 30240 protects 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. This is due to the dunes 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

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<sup>31</sup> CARB does not currently independently have any specific requirements applicable to ODSVRA, rather CARB has acted in an advisory role to APCD. As such, the applicable requirements here are really those of just APCD.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

resource-dependent use,<sup>32</sup> such as habitat restoration, to be consistent with Section 30240.

Similar to the analysis for the original dust control program as a whole, the proposed amendment at its core seeks to stabilize dunes and their surfaces via vegetative plantings to reduce emissions. Thus, although the objective is air quality related, the proposed measures are themselves designed to better protect and preserve dune features, including via dune restoration, by stabilizing dune structure and restoring dune surface and vegetative 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. Vegetation accustomed to the dune environment can also grow, and both significantly reduce dune 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 and vegetative properties of the sand dunes and reducing their emissivity. Thus, the proposed development constitutes dune habitat restoration, and is therefore an allowable use within dune ESHA under Section 30240.

The next part of Section 30240 consistency requires allowable development (in this case habitat restoration) to be undertaken in a manner that will not significantly disrupt the habitat values of the dune ESHA. All of the proposed measures are located in areas that are already disturbed dune ESHA used for vehicular, OHV, camping, and other non-habitat purposes. The proposed amendment will not only prevent the dunes from being further *disrupted*, but the dunes will also be *restored* with dune vegetation native to dune ecosystems (and grown in State Parks' Oceano Dunes nursery, including coastal buckwheat, beach bur, and seaside golden yarrow). The proposed revegetation will expand areas of vegetated dune habitat, which is one of several habitat types among a shifting mosaic of the larger Guadalupe-Nipomo Dune Complex. Vegetated fore and back dunes will create habitat for wildlife species such as the Northern California legless lizard and the threatened California red-legged frog that rely on plant cover for migration, to escape from predation, and for heat regulation. As such, revegetation is consistent with the requirement to not significantly disrupt dune habitat.

When the Commission heard the application for the initial dust control program, some members of the public argued that planting dune vegetation may harm sensitive species (like western snowy plover and California least tern) by harboring predators, including if such plantings were in the foredune areas that are designated as critical habitat under the federal Endangered Species Act for these species.<sup>33</sup> The Commission found at that time that the significance of this supposition was exaggerated for a variety of reasons, and reiterates these reasons here for why restoration via dune revegetation within foredune critical habitat will not adversely impact sensitive species. First, vehicles,

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<sup>32</sup> The Commission has generally interpreted "resource-dependent use" to mean habitat restoration, nature/scientific study, and low-intensity interpretive public access and recreation pursuits (e.g., hiking trails and pathways).

<sup>33</sup> The proposed foredune restoration project is located within designated critical habitat for western snowy plover and primary habitat for California least tern, notwithstanding the fact that these areas are used for vehicular, OHV, camping, and other non-habitat uses.

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

OHVs, camping, and other non-habitat uses are already taking place in these areas. This includes driving throughout the dune areas in question and adversely impacting special-status species (including through documented death of plovers and terns by vehicle strikes). Replacing that activity with revegetated dunes would be expected to better protect sensitive species in those areas relative to the activities that have historically been active there. And with respect to the potential for increased predation as a result of dune vegetation, Commission Staff Ecologist Dr. Laurie Koteen, who has reviewed the project materials and visited the site, agrees in theory with generalized assertions that certain types and locations of vegetation can harbor predators with risk to snowy plovers and least terns, but she maintains that the increased risk is small (including because bird species will not nest in or near areas they perceive to be dangerous to their chicks), and that much of the remaining predation danger can be mitigated by State Parks' predator management protocols that it has incorporated into the dust control program.<sup>34</sup> More fundamentally, she concludes that in this case, where such vegetation would be placed in a disturbed dune environment that is heavily used by street-legal vehicles and OHVs, the risk of adverse impacts to special-status species from dune vegetation is not significant in comparison to other impacts which threaten those species (i.e., street-legal vehicle and OHV use). It should also be noted that Commission staff reached out to USFWS for comment on DPR's proposed dust control amendment, and they agreed with Dr. Koteen's assessment that any concerns about predators and other adverse impacts to sensitive bird species can be addressed by State Parks' predator management protocols. Given those factors, the Commission, relying on Dr. Koteen's expertise and that of the USFWS, does not believe that the use of dune revegetation presents any new significant potential to adversely impact sensitive species through increased predation. Thus, as conditioned, the project will be implemented in a manner that will ensure no significant disruption of ESHA, including the habitat on which the western snowy plover and least tern relies.

For these reasons, as proposed, the amended project can be found consistent with Coastal Act Section 30240.

#### **Conclusion**

DPR's proposed dust abatement measures are meant to reduce dust emissions, but also will have the benefit of enhancing dune ESHA by restoring the natural dune surface and vegetative properties and stabilizing dune structure. In addition, and to state what is often overlooked by some, all of the dunes at ODSVRA are ESHA, and eliminating non-resource-dependent vehicular uses in ESHA (i.e., something the Coastal Act doesn't allow in these dune ESHA areas) and restoring these areas as protected dune habitat (i.e., something the Coastal Act fundamentally requires and supports in these dune ESHA areas) is inherently and clearly consistent with the Coastal Act. As proposed, the

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<sup>34</sup> Including monitoring for the existence of predators (such as coyotes, gulls, and skunks), trapping/removing those predators that are identified, and removing fences and other structures that serve as perching platforms for predators. Potential predation issues were also discussed in the EIR for both the base dust control program and for this amendment, and both concluded that impacts to sensitive bird species such as western snowy plover and California least tern from dune vegetation would be less than significant, given State Parks' predator management protocols.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

amended dust control Program is consistent with Coastal Act Sections 30253(c) and 30240.

### 2. Public Access and Recreation

#### Applicable Provisions

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 maximum

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

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. 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 the Coastal Act's 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 proposed dust abatement measures are to be undertaken in areas currently used for public recreational access opportunities, namely predominantly OHV riding and camping. This is in large part because these areas have been identified to date by APCD modelling as the areas that are the most emissive for dust, and thus implementation of dust control measures will be most effective in these areas. 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 used for dust abatement purposes. As described previously, the proposed project seeks to authorize an additional 52.2 acres of permanent dust mitigation through dune restoration. Altogether, the amended CDP would authorize some 156.2 acres of permanent dust mitigation through dune restoration and remove these lands from vehicular, OHV, camping, and other non-habitat uses.<sup>35</sup>

Although these impacts to public recreation (predominantly to vehicular, OHV, and camping) raise concerns with respect to Coastal Act public recreational access policies, the Coastal Act provides explicit direction on this point. Namely, and as described above, these areas are being removed from that public recreational use due to problems emanating from the use itself. In such cases, the Coastal Act is clear that its requirements for providing maximum public recreational access opportunities must be tempered with the need to "protect...natural resource areas from overuse", and indeed it 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" and for "the protection of fragile coastal resources."<sup>36</sup>

In this case, it is appropriate to implement measures that have the effect of limiting the "time, place, and manner" of public recreational use based on the "capacity of the site to

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<sup>35</sup> Permanent dust control measures have been applied to 104 acres under the original CDP, and this amendment would add 52.2 such acres, for a total of 156.2 acres under the CDP as amended.

<sup>36</sup> Coastal Act Sections 30210, 30212, and 30214.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

sustain use and at what level of intensity” at the fragile dunes in question to stabilize their structure, restore their surface and vegetation properties, and address the problems emanating from such use, namely “requirements imposed by an air pollution control district”, here the APCD.<sup>37</sup> Again, while the proposed foredune and backdune restoration projects will result in reduced acreage available for vehicular, OHV, camping, and other non-habitat recreation, the purpose for such reduction is to facilitate the stabilization of dune structure and restoration of dune surface and vegetative 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 precisely implements that requirement. As explained earlier, the dunes in question are damaged as a result of their overuse by vehicular recreation. This overuse damages the dune ecosystem and is also causing adverse public health impacts on downwind communities, and the most direct manner to address this public health impact is at the source: by helping heal the ecological function of dunes by reducing recreational use that causes their impairment and emissions. Again, this sort of regulation is precisely contemplated by the Coastal Act’s public access and recreation policies. The Act does not stand for the 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 consistency with applicable air quality requirements and for the protection of natural resources—both key Coastal Act priorities as discussed in the preceding analysis.

In addition, prior to the dust control program’s approval in 2017, there were 1,453 acres of land at ODSVRA open to OHV riding and camping.<sup>38</sup> Under prior permits, DPR has permanently retired (i.e., from vehicular, OHV, camping, and other non-habitat recreational use) and restored some 122.5 acres,<sup>39</sup> resulting in a current riding and camping area of 1,330.5 acres. The proposed amendment would reduce that pre-dust control program riding and camping area by an additional 52.2 acres, for a total reduction due to dust control measures of 174.7 acres overall (or roughly 175 acres), meaning the riding and camping area will have been reduced by 12% overall, with 8.5% already authorized and 3.5% attributable to this proposed amendment. In any case, about 1,278 acres, or about two square miles, would continue to remain available to OHV and camping use. This remains a significant area for such recreational pursuits.

That said, concerns have been raised that much of that remaining two square mile area is not suitable for camping. This is because most of the camping at ODSVRA is via large recreational vehicles (RVs), toy haulers, and similar equipment that cannot access

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<sup>37</sup> Coastal Act Sections 30214 and 30253(c).

<sup>38</sup> As of 2017, ODSVRA totaled 3,497 acres, with 2,652 acres (or over 75%) 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 (or just under 25%) that is off-limits to all forms of public access to protect dune and other coastal resources.

<sup>39</sup> 104 acres via CDP 3-12-050, and an additional 18.5 acres as part of CDP 4-82-300.

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

into the steeper and more sloped dunes, and thus are limited to the lower dunes/beach area. That is not to say that other four-wheel drive vehicles cannot access the interior dunes and potentially camp there, but it is to recognize that most camping at ODSVRA takes place via RVs, toy haulers, and similar equipment in the lower dunes/beach area where the foredune restoration area is located. The proposed amendment will reduce this area and further limit space for camping. Because campers are allowed to camp anywhere they want in the camping/OHV riding area, and there is no specific allotted space per camper, it is difficult to affix a specific numeric camping reduction to that outcome, past the fact that 1,278 acres would remain available for camping.

That said, Commission and State Parks staff agree that the prime camping areas at ODSVRA tend to be flatter, more to the north, and nearer the shoreline, with the area that is most conducive to camping stretched from about Post 3 to about Post 6 and covering around 125 acres, and the most popular area being from about Post 3 to Post 4.5 (about 50 acres).<sup>40</sup> The 48-acre foredune restoration area extends from this most popular area to the south, roughly from Post 4.5 to Post 6. The restoration area also includes a DPR-proposed 100-foot buffer within which camping is also not allowed (but vehicles can still use this area for other activities, including OHV use), and thus although 48 acres is being permanently retired from vehicular, OHV, camping, and other non-habitat uses, that results in roughly 60 acres where camping would no longer be allowed when the buffer is added in.<sup>41</sup> Thus, DPR's proposal would leave about 65 acres of the prime camping area that is most conducive to camping available. In other words, the prime camping area would be cut almost in half to about 65 acres.<sup>42</sup> This is not an insignificant reduction (even though the overall camping area still totals nearly 1,300 acres). At the same time, such reduction is appropriate and Coastal Act consistent because these areas are being removed from that public recreational use due to problems emanating from the use itself, as described above.

Concerns have also been raised that the reduction in acreage available to camping is also an impact to lower-cost recreational camping opportunities. To that point, DPR currently charges \$10 per camping unit at ODSVRA, which is less than it generally charges at developed campgrounds (typically roughly \$35 to \$50 per night per unit). However, two main things should be noted. First, ODSVRA is not a developed campground with developed campground amenities; rather, it is an open dune and beach area with limited restroom and trash/recycling facilities and no water (and is designated by State Parks as a "primitive" camping area). It is thus inappropriate to

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<sup>40</sup> In addition, there are roughly 70 acres of flatter shoreline areas suitable for camping in the southern area of the Park (from Posts 6 to 8) within the seasonal enclosure area (a roughly 300-acre area closed off to camping/OHV use from March through September during the plover nesting season), but this area is only available in the Park's 'off-season' (from October to February) and is further away from the primary camping areas to the north, and is thus not heavily used in this regard.

<sup>41</sup> The 4.2-acre backdune restoration area is not within an area typically used for camping, and thus doesn't have the same type of camping impact.

<sup>42</sup> And State parks has reduced the number of campers it allows in per day to 500 camping units. Either way, CDP 4-82-300's 1,000-camping unit maximum is still in effect, regardless of State Parks' new operational protocol, unless and until it is changed by the Commission via amendment or via an annual review.

### CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

equate the two, as the amenities provided to campers who pay the camping fee at ODSVRA are limited as compared to more developed campground/cabin areas. And perhaps more importantly, and as the Commission has acknowledged in past cases where this claim has been made, RV and similar types of camping (i.e., the predominant form of camping at ODSVRA) do not represent lower-cost camping due to the cost of the RV and similar required equipment, which prices out many of lesser means.<sup>43</sup> The Commission has found that the cost of entry to this form of camping means it should not be categorized as a lower-cost visitor-serving accommodation as compared to traditional tent camping, and in some cases may even qualify as higher-cost. That is not to say that there isn't an impact on lower-cost camping, because those who camp via other means than RVs and the like are taking advantage of a lower-cost camping experience to be sure, but it is to qualify the impact appropriately. Further, and as described above, such reduction is appropriate and Coastal Act consistent because these areas are being removed from that public recreational use due to problems emanating from the use itself.

In sum, in addition to the 1,278 acres of OHV and camping area that remain, inclusive of the 65 acres of remaining prime beachfront camping, that same area plus the Park's remaining 1,199 acres dedicated to more passive non-vehicular recreational opportunities, and its six linear miles of sandy beach, will continue to be available for such purposes, even after implementation of the amended dust control program. Thus, while the dust control program will undoubtedly result in the loss of some OHV and camping area, including reducing the amount of prime beachfront camping by almost half, the reduction is permissible under the Coastal Act to "protect...natural resource areas from overuse," and indeed 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" and for "the protection of fragile coastal resources."<sup>44</sup> Further, this reduction is required to meet applicable air quality requirements promulgated by the APCD (consistent with Section 30253(c)) and to restore dune ESHA (consistent with Section 30240). And as described above, ODSVRA's size and remaining acreage available for other public access/recreation opportunities, including six miles of beach and nearly 1,200 acres for passive recreational pursuits and almost two square miles for

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<sup>43</sup> Including during the Commission's 2014 Public Workshop on Lower Cost Visitor Serving Accommodations, where the Commission found that, when factoring in the "cost of entry" to RV camping (i.e., when including the cost of purchasing or renting an RV, cost of gas/maintenance/insurance, and cost of entrance fees), RV camping does not constitute a type of lower-cost accommodation. Specifically, as of 2011, only 8.5% of U.S. households owned an RV. Purchasing an RV can cost anywhere from \$5,000 to \$300,000, with additional costs for maintenance. For the more than 90% of U.S. households that do not own an RV, it is possible to rent one. The cost of renting an RV in California, that sleeps five people, during the peak season, ranges from approximately \$240 per night to over \$650 per night. Therefore, when the cost of purchasing/maintaining or renting an RV is combined with the cost of gas (with typical RVs requiring a gallon of gas every ten miles) and campground fee, RV campgrounds are not typically considered lower-cost.

<sup>44</sup> Coastal Act Sections 30210, 30212, and 30214.

### **3-12-050-A1 (ODSVRA Dust Control Amendment)**

OHV and camping use even after implementation of the amended project, means that significant recreational opportunities remain.

Finally, and perhaps most fundamentally, all of the areas being retired from vehicular, OHV, and camping use under the proposed project are ESHA. At a fundamental level, OHV use is not a resource-dependent use and is therefore not ordinarily allowable in ESHA. Thus, eliminating non-resource-dependent vehicular uses in ESHA (i.e., something the Coastal Act doesn't allow in these dune ESHA areas) and restoring these areas as protected dune habitat (i.e., something the Coastal Act fundamentally requires and supports in these dune ESHA areas) is inherently and clearly consistent with the Coastal Act. DPR's proposed dust control program, as amended, is therefore consistent with Coastal Act public access requirements, particularly as these requirements allow for limits on public recreational access to protect natural resources. 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. Annual Work Plan**

Finally, as described earlier, Special Condition 2 of the existing dust control CDP currently requires State Parks to submit an Annual Work Plan to the Executive Director for review and approval prior to deployment of the actual specific dust control measures DPR intends to undertake. The Annual Work Plan is to document all of the measures proposed for the calendar year, along with evidence that APCD has approved the measures as being consistent with their plans and requirements. Upon Executive Director approval, the Plan must go before the Commission at a noticed public hearing for concurrence with the Executive Director's determination.

While this construct was intended to provide appropriate Commission oversight of the dust control program, it unfortunately hasn't responded well to the actual manner in which dust control projects are proposed and evaluated. For one, the dust control measures that State Parks needs to employ to meet APCD requirements have proven not to neatly fit into a schedule that lends itself to an Annual Work Plan construct (i.e., where State Parks knows, proposes, and is ready to implement all of the APCD-approved measures early in the calendar year in such a way that can be combined in one singular work plan). Instead, the measures needed tend to be sporadic and responsive to changes that APCD and DPR agree to in their ongoing dialogue and collaboration on how best to meet applicable air quality requirements. The SOA requiring the immediate closure and restoration of the 48-acre foredune area in November of 2019 is an example of this type of sporadic timing. In addition, needing to amend the work plan, and then take it before the Commission, does not allow for the operational flexibility needed to be as responsive as possible to ensure timely approval of the proposed measures, and to initiate needed dust control. And finally, the phrasing of the condition has resulted in some uncertainty regarding whether the work plans need to be reviewed and approved at the beginning of each calendar year (regardless of whether DPR is ready to propose any specific measures) and whether failure to do so revokes the approval of any existing dust control measures (i.e., whether they need to be reauthorized via the annual work plan approval process). This interpretation of the

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

work plan requirement, and the attendant uncertainty caused by it, was not the intent of the Commission.

In short, the Annual Work Plan process needs to be revised, and Special Condition 2 does so by changing the name of the work plan from “Annual Work Plan” (which implies a singular document approved once a year) to “Dust Control Work Plan”, which is a more apt name for a plan that is meant to simply document the specific proposed measures whenever they are ready for implementation. The condition also changes the approval process from one needing Commission concurrence to allowing the Executive Director to review the measures and to sign off on them if they are consistent with the CDP, with the goal of being responsive and nimble in terms of authorization of these critical dust control elements. As modified, the program includes appropriate oversight while providing needed flexibility for implementation.

### 4. Environmental Justice

Coastal Act Sections 30107.3 and 30604(h) allow for the Commission to consider environmental justice when making CDP decisions. Specifically:

**Section 30107.3.** (a) “Environmental justice” means the fair treatment and meaningful involvement of people of all races, cultures, and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies.

(b) “Environmental justice” includes, but is not limited to, all of the following:

- (1) The availability of a healthy environment for all people.
- (2) The deterrence, reduction, and elimination of pollution burdens for populations and communities experiencing the adverse effects of that pollution, so that the effects of the pollution are not disproportionately borne by those populations and communities.
- (3) Governmental entities engaging and providing technical assistance to populations and communities most impacted by pollution to promote their meaningful participation in all phases of the environmental and land use decision making process.
- (4) At a minimum, the meaningful consideration of recommendations from populations and communities most impacted by pollution into environmental and land use decisions.

**Section 30604(h).** When acting on a coastal development permit, the issuing agency, or the Commission on appeal, may consider environmental justice, or the equitable distribution of environmental benefits throughout the state.

To implement its Coastal Act environmental justice authority, the Commission adopted an Environmental Justice Policy (“EJ Policy”) to guide and inform its decisions and

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

procedures in a manner that is consistent with the provisions in, and furthers the goals of, Chapter 3 of the Coastal Act and certified LCPs. The EJ Policy further articulates environmental justice concepts, including stating:

The term “environmental justice” is currently understood to include both substantive and procedural rights, meaning that in addition to the equitable distribution of environmental benefits, underserved communities also deserve equitable access to the process where significant environmental and land use decisions are made.

Thus, the Commission’s EJ Policy underscores the importance of both substance (i.e., evaluating whether projects do or do not disproportionately distribute environmental benefits and burdens) and process (i.e., ensuring that those potentially affected by proposed development have an equitable opportunity to participate in a transparent public process).<sup>45</sup>

In addition, the EJ Policy includes a section titled “Statement of Principles” that further elaborates how the Commission intends to implement environmental justice considerations into nine specific issue areas, one of them being on Habitat and Public Health. For this issue, the Statement of Principles states:

Understanding that public health and the health of natural ecosystems are inextricably intertwined, ecological impacts are felt first by disadvantaged and at-risk communities, and that there is no environmental justice without a healthy environment, the Commission will continue to prioritize the protection of coastal resources....The Commission will also work with the relevant public agencies to consider project impacts to air quality and soil health in disadvantaged communities which reduce the positive health and recreational benefits associated with coastal access and coastal resources for pollution-burdened communities.

As described earlier, OHV use at ODSVRA has led to adverse air quality that disproportionately impacts the residents of adjacent downwind communities of Oceano and Nipomo. Oceano is approximately 50% Hispanic/Latino with a Federal poverty rate of nearly 20% (and a community that was designated as an “Opportunity Zone” by Governor Brown in 2018 pursuant to the Tax Cuts and Jobs Act of 2017), and Nipomo is roughly 40% Hispanic/Latino with a Federal poverty rate of 10%. Located adjacent to but upwind from ODSVRA and thus not impacted by adverse air quality, Pismo Beach, by comparison, has a population that is approximately 84% non-Hispanic white with a Federal poverty rate of 8.4%, and the overall poverty rate in the state of California is

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<sup>45</sup> Commission staff has been engaged with many groups over the years that raise and seek resolution to environmental justice issues at ODSVRA, including Concerned Citizens for Clean Air, the Oceano Beach Community Association, and the Dunes Alliance. Staff discussed these issues and received input from these groups for this CDP amendment application as well, and also reached out to Central Coast Alliance United for a Sustainable Economy, or CAUSE, a prominent environmental justice organization focused on the Central Coast, including to make sure the groups were aware of their ability to participate in the public hearing.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

13.3%. These communities of color bear the brunt of the burden of ODSVRA use, including with respect to adverse air quality, thereby raising prototypical environmental justice concerns regarding the benefits and burdens of environmental protection, and thus necessitating an analysis regarding the proposed amendment's compliance with Coastal Act environmental justice provisions.

The Commission recognizes that a core component of its EJ Policy, and of the Coastal Act more broadly, is to maximize public recreational access to and along the shoreline for everyone. These issues are central in guiding the Commission's implementation of the Coastal Act. Proposed projects that may reduce public recreational access opportunities are not taken lightly and are given careful consideration. But in addition, when a particular group of people is being adversely and disproportionately affected by the impacts of recreational use, as is the case here with respect to air quality impacts from OHV use, these impacts too are core environmental justice issues, including as evidenced by the Commission's goals related to public health and air quality as articulated in the EJ Policy.

In this case, the proposed project addresses an environmental justice problem by reducing adverse air quality impacts that affect lower-income communities of color. This is inherently a positive environmental justice endeavor and consistent with the Coastal Act's definition of environmental justice to be comprised of measures that include "the deterrence, reduction, and elimination of pollution burdens for populations and communities experiencing the adverse effects of that pollution."

In addition, while ameliorating dust emissions as part of the proposed amendment will reduce the amount of acreage reserved for public access and recreational use, such reduction is appropriate and Coastal Act consistent because these areas are being removed from that public recreational use due to problems emanating from the use itself. In such cases, the Act is clear that its requirements for providing maximum public recreational access opportunities must be tempered with the need to "protect...natural resource areas from overuse", and indeed it 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" and for "the protection of fragile coastal resources."<sup>46</sup> In addition, when the type of public recreational use and intensity of such use is also leading to adverse environmental justice outcomes, then the EJ Policy and the Act's environmental justice requirements provide the Commission with another lens and tool to address it. In this case, the proposed amendment is consistent with the Coastal Act's environmental justice requirements by ensuring that Commission CDP actions do not unduly nor disproportionately burden particular segments of the populace with adverse environmental outcomes, particularly on issues as important and fundamental to public health and welfare as air quality. In fact, the proposed amendment is designed to help ease the air quality burdens felt by these inland communities, and thus it is consistent

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<sup>46</sup> Coastal Act Sections 30210, 30212, and 30214.

### 3-12-050-A1 (ODSVRA Dust Control Amendment)

with Commission and Coastal Act environmental justice objectives and requirements.

#### 5. Violation

Violations of the Coastal Act have occurred in areas subject to this CDP amendment application, including but not limited to: 1) the placement of stakes and mylar ribbons within the proposed 48-acre foredune restoration area to deter western snowy plover nesting; 2) the permanent dust control measures applied to the 4.2-acre backdune area without a CDP; and 3) the placement of the 40 acres of seasonal wind fencing without benefit of the Commission's required approval via an annual work plan pursuant to CDP 3-12-050. The first violation is the subject of Commission Violation File No. V-3-20-0048 and further described below. DPR here seeks ATF approval to resolve the latter two violations which are associated with a separate violation file, and approval and issuance of this CDP amendment pursuant to the staff recommendation and compliance with all of the terms and conditions of this permit will result in resolution of that violation file going forward.

Further, recent violations in other areas of ODSVRA have also occurred, including but not limited to: 1) significant grading in the lower dunes/beach area, and 2) activities designed to disrupt western snowy plover nesting (including installing stakes with mylar to dissuade plover nesting, scuffing out plover nesting 'scrapes', directing or moving plovers to the southern enclosure area, etc.). With respect at least to the placement of stakes and mylar ribbons, such activities have occurred both within and outside of areas subject to this CDP amendment application. These violations are the subject of Commission Violation File No. V-3-20-0048.<sup>47</sup>

State Parks has agreed to remove the stakes with mylar ribbons, and to cease from other plover nesting deterrence activities at ODSVRA, including within the 48-acre foredune restoration area that is subject to this CDP amendment application. However, resolution of the violations that are the subject of V-3-20-0048 continues to be discussed by DPR and Commission staff, and are not addressed by this CDP amendment application.

Although development has taken place prior to submission of this CDP amendment application, consideration of this application by the Commission has been based solely upon the Chapter 3 policies of the Coastal Act. Commission review and action on this CDP amendment does not constitute a waiver of any legal action with regard to the aforementioned violations, or any other violations at the site, nor does it constitute an implied statement of the Commission's position regarding the legality of development, other than the development addressed herein, undertaken on the subject site without a CDP. In fact, approval of this CDP amendment is possible only because of the terms

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<sup>47</sup> In addition, previous violations at ODSVRA, primarily related to violations of the terms and conditions of the base CDP for ODSVRA operations (i.e., CDP 4-82-300), remain unresolved (see, for example, Commission Violation File No. V-3-17-0001), and Commission staff are also working with State Parks staff towards resolution of same, including through State Parks PWP efforts as well as potential CDP 4-82-300 changes through the aforementioned annual review process.

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

and conditions included herein, and failure to comply with these terms and conditions would also constitute a violation of this CDP, as amended, and of the Coastal Act. Only as conditioned is the proposed development consistent with the Coastal Act.

### F. California Environmental Quality Act (CEQA)

Section 13096 of the California Code of Regulations requires that a specific finding be made in conjunction with CDP 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 a Program Environmental Impact Report (State Clearinghouse #2012121008) for the dust control Program on March 22, 2017, and certified an addendum to this EIR to analyze the changes proposed in this CDP amendment on May 28, 2020. The Coastal Commission's review and analysis of coastal development permit applications has been certified by the Secretary of the Natural Resources Agency 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 Section 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 amended, would lead to public recreational access impacts to OHV use that require mitigation,<sup>48</sup> as well as statements and analyses defining OHV activity as a coastal-dependent use as that term is defined under the Coastal Act.<sup>49</sup> On

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<sup>48</sup> As a mitigation measure for what the EIR concludes to be a significant and unavoidable impact to public access and recreation due to the loss of OHV acreage, DPR intends 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. However, as the Commission found in its base dust control CDP approval, 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 amended 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 of riding areas. And all the dunes at ODSVRA are ESHA where OHV use is not allowable, so any replacement area would be inconsistent with the Coastal Act.

<sup>49</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." The riding of OHVs does not require a site on, or adjacent to, the sea, and thus it is not a coastal-dependent use under the Coastal Act. Indeed, DPR operates at least eight other SVRAs, none of which are sited on, or adjacent to, the sea.

### **3-12-050-A1 (ODSVRA Dust Control Amendment)**

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 terms and 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).

## CDP 3-12-050-A1 (ODSVRA Dust Control Amendment)

### APPENDIX A – SUBSTANTIVE FILE DOCUMENTS

- *Oceano Dunes SVRA Dust Control Program* Final Program Environmental Impact Report, March 2017, State Clearinghouse #2012121008
- *Oceano Dunes SVRA Dust Control Program* Final Program Environmental Impact Report Addendum, May 2020, 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
- 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
- Northern Chumash Tribal Council
- Friends of Oceano Dunes
- Sierra Club
- Concerned Citizens for Clean Air
- Oceano Beach Community Association
- Dunes Alliance
- Central Coast Alliance United for a Sustainable Economy (CAUSE)