

March 8, 2021

Via Electronic Submission

California Coastal Commission
725 Front Street
Suite 300
Santa Cruz, CA 5060

Considering OHV Use at ODSVRA – March 18, California Coastal Commission Hearing

Dear Commissioners:

On behalf of the Dunes Alliance, we submit these comments regarding the Coastal Commission's March 18 hearing to review Coastal Development Permit (CDP) 4-82-300 issued to the California Department of Parks and Recreation (State Parks) for operation of the Oceano Dunes State Vehicular Recreational Area (ODSVRA). The Dunes Alliance is a group of local community and environmental organizations interested in preserving Oceano Dunes as a natural and recreational preserve.¹ Oceano Dunes is a unique and invaluable resource that lies on the lands and waters of the Northern Chumash tribe. Dunes Alliance members are connected to Oceano Dunes for a variety of reasons – whether as residents, wildlife enthusiasts, or practicing tribal members – but they share a commitment to limiting ODSVRA's use to light-footprint recreational opportunities and to restoration of the dunes as a healthy ecosystem.

In these comments, supplementing any separate public comments submitted by the Dunes Alliance or its individual members, we evaluate four legal issues. First, as explained below, staff's recommendation to eliminate off-highway vehicle (OHV) use from ODSVRA aligns closely with the goals of the Coastal Act and best serves the local community. Second, State Parks does not have an affirmative statutory mandate to continue permitting OHV use in ODSVRA. Third, continued OHV use at ODSVRA is inconsistent with the federal Endangered Species Act and its California counterpart, a fact that provides additional support for staff's recommendations. Finally, we present additional information and legal analysis of local environmental justice issues that should inform the Commission's decision.

In sum, staff's recommendation to phase out OHV use on the fragile dune system and protected coastal resources of ODSVRA constitutes sound public policy and is entirely consistent with applicable state law, including the Coastal Act, the Off-Highway Motor Vehicle Recreation Act, and the California Endangered Species Act.

¹ The organizations in the Dunes Alliance are the Santa Lucia Chapter of the Sierra Club, the San Luis Obispo Chapter of the Surfrider Foundation, the Northern Chumash Tribal Council, Defenders of Wildlife, San Luis Obispo Coastkeeper, the Environmental Center of San Luis Obispo (ECOSLO), the Center for Biological Diversity, Concerned Citizens for Clean Air, Morro Coast Audubon, American Woodland Conservancy, and Friends of Oso Flaco Lake.

Table of Contents

I. The California Coastal Commission Has the Legal Authority to Restrict Off-Highway Vehicle Use in the Park	3
A. The Park Is an Environmentally Sensitive Habitat Area that Demands Heightened Protection	4
B. Current Operations in the Park Do Not Meet Other Coastal Act Chapter 3 Standards	6
C. State Parks' Management of the Park Does Not Undermine or Supersede Commission Authority	7
D. The Commission Has a Duty to Protect the Public Trust	8
E. CDPs Can Mandate All Reasonable Conditions to Respond to Coastal Needs	9
II. State Parks Is Not Required to Maintain OHV Recreation in the Park	11
A. Since 1982, the OHV Act Has Required that State Parks Protect and Conserve Ecological Resources Such as Wildlife, Water, and Soil	11
B. Subsequent Statutory Amendments Bolster and Prioritize Environmental Protection.....	12
C. Where OHV Use Cannot Be Maintained Consistent with Ecological Standards, State Parks Must Close OHV Use to Restore Lands	13
III. Protection Of Endangered Species In The Odsvra Requires Eliminating OHV Use....	15
A. The Federal Endangered Species Act Requires Protection of Listed Species, Particularly the Snowy Plover and the California Least Tern	15
B. The California Endangered Species Act Prohibits Even Incidental Take of the California Least Tern	18
IV. Environmental Justice Considerations Demand Eliminating OHV Use.....	20
A. OHV Use at the Park Contributes to Persistent Poor Air Quality and Dust Pollution	21
B. Northern Chumash Tribal Resources in ODSVRA Demand Eliminating OHV Use.....	23
C. OHV Use Comes at the Expense of the Oceano Community.....	25
V. Conclusion	29

I. The California Coastal Commission Has the Legal Authority to Restrict Off-Highway Vehicle Use in the Park

The conservation of coastal resources is the animating force behind the Coastal Act.² The California Coastal Act was enacted to “[p]rotect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.”³ The Legislature specified that the coastal zone is one of the state’s “most precious natural resources” and that the protection of coastal resources is paramount in coastal management decisions.⁴ When conflicts arise between provisions within the Coastal Act, they must be “resolved in a manner which on balance is the most protective of significant coastal resources.”⁵ In *McAllister v. Coastal Commission*, the court held that “when a provision of the Coastal Act is at issue, we are enjoined to construe it liberally to accomplish its purposes and objectives, giving the highest priority to environmental considerations.”⁶

The Coastal Act provides a comprehensive scheme to govern land use for the entire coastal zone of California⁷ and gives the Commission “primary responsibility for implementation” of the legislation.⁸ The Commission and local governments regulate coastal zone development through the Coastal Development Permit (CDP) process. CDPs are required for any individual or agency seeking to undertake a development in the coastal zone.⁹

As a development in the Coastal Zone, the ODSVRA and the surrounding recreational area (hereinafter referred to jointly as “the Park”) requires a CDP to operate. The Commission first issued a temporary CDP to State Parks for operation of the Park – denominated CDP 4-82-300 – in 1982, including conditions that limited OHV use.¹⁰ Since then, the Commission has periodically updated the conditions for CDP 4-82-300 to reflect the needs of the coastal zone.¹¹ As staff reports and mounting evidence demonstrate, further amendment to the CDP is now required to protect access to light-footprint recreation, unique ecosystems and species, and the continued viability of Oceano Dunes as a coastal resource for generations to come.

Below, we provide five points of law that should guide the Commission’s decision, all of which warrant – and indeed, mandate – the elimination of OHV use at the Park. First, most of the Park is designated as environmentally sensitive habitat area (ESHA), a highly protected category of

² Cal. Pub. Res. Code § 30000 et seq. All statutory references are to the Public Resources Code unless otherwise noted.

³ Cal. Pub. Res. Code § 30001.5(a).

⁴ Cal. Pub. Res. Code § 30344.

⁵ Cal. Pub. Res. Code § 30007.5.

⁶ 169 Cal. App. 4th 912, 928 (2008) (interpreting Cal. Pub. Res. Code § 30009).

⁷ *Surfrider Found. v. Martins Beach I, LLC*, 14 Cal. App. 5th 238, 249 (2017).

⁸ Cal. Pub. Res. Code § 30330

⁹ Cal. Pub. Res. Code § 30600.

¹⁰ Initial conditions included barring night riding north of the sand highway, barring OHV use on vegetated dune areas, and prohibiting vehicle use south of Oso Flaco Creek. CAL. COASTAL COMM’N, Oceano Dunes Coastal Development Permit 4-82-300 (Prepared for July 2019 Hearing), Ex. 4, 2.

<https://documents.coastal.ca.gov/reports/2019/7/Th12a/Th12a-7-2019-exhibits.pdf>.

¹¹ CAL. COASTAL COMM’N, Oceano Dunes Coastal Development Permit 4-82-300 (Prepared for July 2019 Hearing), Ex. 4, 35. <https://documents.coastal.ca.gov/reports/2019/7/Th12a/Th12a-7-2019-exhibits.pdf>.

land on which development is extremely limited and activities that are inconsistent with coastal resource protection – such as OHV use – are precluded. Second, continued OHV use at the Park does not comply with the Coastal Act’s other mandatory Chapter 3 provisions. Third, the Coastal Act’s provisions protecting agencies from redundant regulations do not limit the Commission’s authority to enforce Coastal Act protections in the coastal zone or provide an affirmative defense for State Parks to ignore Commission mandates. Fourth, the Commission has a public trust obligation to protect the tidelands and the wildlife that depend on them, both of which demand phasing out OHV use at the Park. Fifth and finally, CDP conditions can change over time to respond to coastal needs, and the Commission has the authority to eliminate OHV use as a condition to protect coastal resources.

A. The Park Is an Environmentally Sensitive Habitat Area that Demands Heightened Protection

The Commission and local governments work in tandem to identify coastal areas that merit special protection, including designating ESHA, defined as “any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.”¹² Reflecting their vulnerability, ESHAs are to “be protected against any significant disruption of habitat values.”¹³

Development on ESHA is strictly limited by statute and precludes OHV use at the Park. Section 30240 of the Coastal Act provides that “only uses dependent on [habitat] resources shall be allowed” in ESHA.¹⁴ The courts have confirmed that only those uses that “are dependent on the resources to be protected *and* that do not significantly disrupt habitat values” may be permitted in ESHA.¹⁵ Among the developments that have not met this definition are residential construction with an alternative habitat built nearby,¹⁶ a three-hole golf course on private property,¹⁷ and a public roads project.¹⁸ Even developments adjacent to ESHA – including parks – must be “designed to prevent impacts which would significantly degrade [ESHA]” and be compatible with the “continuance of those habitat and recreation areas.”¹⁹

The Commission has primary responsibility for protecting ESHA and cannot balance economic interests – as claimed by State Parks – against the preservation of habitat. While section 30240 is silent on who must ensure that ESHA is protected, the court found in *Douda v. California Coastal Com.* that “[b]ecause it was not otherwise *specifically* provided, the primary

¹² Cal. Pub. Res. Code § 30107.5.

¹³ Cal. Pub. Res. Code § 30240.

¹⁴ Cal. Pub. Res. Code § 30240.

¹⁵ See *McAllister*, 169 Cal. App. 4th at 929 (emphasis added) (describing “those resources” as “the resources that make an area a protected habitat—i.e., plant or animal life or their habitats [that] are either rare or especially valuable because of their special nature or role in an ecosystem”).

¹⁶ See *Bolsa Chica Land Tr. v. Superior Court*, 71 Cal. App. 4th 493, 507 (1999).

¹⁷ *Feduniak v. California Coastal Com.*, 148 Cal. App. 4th 1346, 1376 (2007).

¹⁸ *City of San Diego v. California Coastal Com.*, 119 Cal. App. 3d 228 (1981).

¹⁹ Cal. Pub. Res. Code § 30240.

responsibility for implementing section 30240, by default, must go to the Commission.”²⁰ In *Bolsa Chica Land Tr. v. Superior Court*, the court added that “while compromise and balancing in light of existing conditions is appropriate and indeed encouraged under other applicable portions of the Coastal Act, the power to balance and compromise conflicting interests cannot be found in section 30240.”²¹ In short, once ESHA is identified, the Commission – and all other state agencies – cannot ignore the protection it mandates for sensitive lands.

The San Luis Obispo County LCP governs land use policy in the county’s coastal zone, including in the Park.²² The LCP identifies nearly all of the Park – including all of the current ODSVRA riding area – as ESHA.²³ The Commission’s LCP Review describes the protected dune habitats as “some of the most important, and most endangered, stands of the central coast’s dwindling environs.”²⁴ Indeed, the Park is part of the Guadalupe-Nipomo dune complex, the largest intact coastal dune system in the world.²⁵ The protected areas include both sparsely and heavily vegetated dunes, as well as sandy beaches and nearby areas that serve as habitat.²⁶ For protection of shorebirds – such as the western snowy plover and California least tern – the Commission’s LCP Review recommends designating and protecting all “habitat, or potential habitat . . . as ESHA.”²⁷ Finally, the LCP provides for working with land managers to ensure developments are “sited and designed to prevent impacts that would significantly degrade [ESHA] and shall be compatible with the continuance of such habitat areas.”²⁸

The courts have been clear that section 30240 of the Coastal Act “unambiguously establishes two restrictions on development in [ESHA] areas: (1) there can be no significant disruption of habitat values; and (2) only resource-dependent uses are allowed.”²⁹ As the court explained in *McAllister*, “the use of ‘and’ in section 30240(a) to conjoin the two restrictions means that they both apply equally to any development in [ESHA].”³⁰ OHV use in the Park violates both of these statutory requirements.

²⁰ 159 Cal. App. 4th 1181, 1194, (2008).

²¹ 71 Cal. App. 4th 493, 508 (1999).

²² CAL. COASTAL COMM’N, San Luis Obispo County’s Local Coastal Program Periodic Review (2001). <https://www.coastal.ca.gov/recap/slosum.html>.

²³ CAL. COASTAL COMM’N, County’s ESHA Combining Designation and Areas Containing Federally-Listed Species, <http://www.coastal.ca.gov/recap/slo/slo-map-4-a.pdf>; CTY. OF SAN LUIS OBISPO DEP’T OF PLANNING AND BUILDING, South County-Coastal Planning Area Rural Combining Designation Map. <https://www.slocounty.ca.gov/Departments/Planning-Building/Forms-Documents/Coastal-Zone-Maps/South-County-Coastal-Planning-Area-Maps/South-County-Coastal-Planning-Area-Combining-Desig.pdf>.

²⁴ CAL. COASTAL COMM’N, San Luis Obispo County’s Local Coastal Program Periodic Review, Ch. 4: Environmentally Sensitive Habitat Areas (ESHA), 170 (2001). <http://www.coastal.ca.gov/recap/slo/slo-ch4.pdf>.

²⁵ The Nature Conservancy, Guadalupe-Nipomo Dunes, <https://www.nature.org/en-us/get-involved/how-to-help/places-we-protect/guadalupe-nipomo-dunes> (last visited Feb. 19, 2021).

²⁶ See *supra* note 24.

²⁷ *Id.* at 183.

²⁸ CTY. OF SAN LUIS OBISPO, San Luis Obispo County Coastal Plan Policies, Environmentally Sensitive Habitats, 6-20. https://www.slocog.org/sites/default/files/documents/Appendix%20D_0.pdf.

²⁹ *McAllister*, 169 Cal. App. 4th at 928.

³⁰ *Id.*, 169 Cal App. 4th at 930; see also *Sierra Club v. California Coastal Com.*, 12 Cal. App. 4th 602, 617 (1993); *Feduniak v. California Coastal Com.*, 148 Cal. App. 4th 1346, 1376 (2007) (“development in ESHA areas themselves is limited to uses dependent on those resources, and development in adjacent areas must carefully safeguard their preservation”).

First, OHV use is severely degrading a unique dune habitat and harming the species that occupy it. As noted repeatedly in the Commission's staff report, OHV use is "disturbing dune physical attributes and stability [and] destroying dune vegetation and leading to lower plant diversity and cover."³¹ Indeed, the Commission has documented CDP violations directly related to dune degradation, such as riding on vegetation, riding through Arroyo Grande Creek, and take of endangered species.³² To manage sand dunes for OHV use, State Parks has even graded areas in the Park with heavy equipment, disturbing shorebird habitat.³³ There is no plausible reading of the Coastal Act that would allow such destructive activities in designated ESHA.

Second, contrary to State Parks assertions, OHV use is not dependent on protected ESHA resources. OHV enthusiasts have access to other sand dunes for recreational use elsewhere in California, and there is nothing about the particular recreational use occurring at the Park that is dependent on the protected ESHA resources; to the contrary, OHV use on these dunes destroys the very features that warrant ESHA protection. On the other hand, there are many resource-dependent uses of this habitat, including "nature education and research, hunting, fishing, and aquaculture,"³⁴ that are impeded or impaired by today's dominant motorized use.

Finally, staff's proposal to move camping activities north of Pier Avenue appears consistent with the Commission's statutory mandate under section 30240. The recommendation to move camping activities reflects the fact that the beach area between Pier Avenue and Grand Avenue is one of the few small areas of the Park that is not deemed ESHA.³⁵ In finding that the northern section of beachfront is not ESHA, the Commission's staff ecologist noted the area is a "flat sandy beach area" and not part of the dunes complex that provides valuable habitat to shorebirds and other species.³⁶ As opposed to the rest of the Park, the northern area can support "more intensive recreational uses" such as beach camping without degrading dunes habitat or violating the Coastal Act's ESHA provisions.³⁷ Eliminating OHV use and moving camping areas north would better protect ESHA, and in turn, comply with Coastal Act requirements.

B. Current Operations in the Park Do Not Meet Other Coastal Act Chapter 3 Standards

Because the Park falls within the coastal zone between the first public road and the ocean, the CDP must include a finding that the development is "in conformity" with all of the Coastal Act's

³¹ CAL. COASTAL COMM'N, Memo Oceano Dunes Coastal Development Permit 4-82-300 Review, 87 (Prepared for March 18, 2021 Hearing). <https://documents.coastal.ca.gov/assets/oceano-dunes/Report.pdf>.

³² CAL. COASTAL COMM'N, Oceano Dunes Coastal Development Permit 4-82-300 (Prepared for July 2019 Hearing), 57-58. <https://documents.coastal.ca.gov/assets/oceano-dunes/July%2011,%202019%20Report.pdf>.

³³ Letter from California Coastal Commission to Lisa Mangat, California State Parks Director (July 3, 2020), 1-2. https://www.biologicaldiversity.org/species/birds/western_snowy_plover/pdfs/CCC-cease-and-desist-letter-7-3-20-Oceano-Dunes.pdf.

³⁴ *McAllister*, 169 Cal. App. 4th at 924 (citing Big Sur Land Use Plan, Section 3.3).

³⁵ See *supra* note 31 at 14.

³⁶ See *supra* note 31 at 83-84; CAL. COASTAL COMM'N, Memo Oceano Dunes Coastal Development Permit 4-82-300 Review, Ex. 11 (Prepared for March 18, 2021 Hearing).

³⁷ See *supra* note 31 at 14.

Chapter 3 requirements.³⁸ Among those provisions is section 30213, which provides that “lower cost visitor and recreational facilities shall be protected, encouraged, and, where feasible, provided.”³⁹ Here, OHV use – a recreational activity requiring the purchase or rental of expensive equipment – is interfering with lower cost alternatives, such as camping or day-use visits. The San Luis Bay Area Plan recognized that “vehicle use of the beach and dunes has led to many conflicts between recreation users of the area.”⁴⁰ The conflict between these two values should be decided in favor of the lower-cost alternative, namely non-OHV use of the Park.

Chapter 3 of the Coastal Act also provides that scenic and visual qualities “shall be considered and protected as a resource of public importance.”⁴¹ In particular, development is to be limited to “minimize the alteration of natural land forms.”⁴² As noted by Commission staff in its 2019 report, ODSVRA is a part of the Guadalupe-Nipomo Dunes Complex, a “significant and sensitive ecological system.”⁴³ In fact, the Nature Conservancy describes the area as the “largest intact coastal dune ecosystem on Earth.”⁴⁴ The Park is an “integral part” of the larger complex and includes “several landscapes elements [that] are only found in Oceano Dunes. . . .”⁴⁵

OHV use in the Park has a significant effect on the quality of the dunes themselves through erosion and degradation. The Commission’s staff ecologist describes OHV use as “one of the most significant threats to Oceano Dunes” because OHVs “compact the sand, kill beach macro-invertebrates, and destroy wrack and the associated invertebrate community that serve as food resources for shorebirds and fish.”⁴⁶ Additionally, the erosive effects of OHV use on the dunes are obvious and undeniable.⁴⁷ State Parks used heavy equipment to groom the Park in June 2020, compacting sand and removing wrack to provide for future OHV use.⁴⁸ Such damage to the dune ecosystem should be considered as a serious mark against State Parks’ compliance with Chapter 3.

C. State Parks’ Management of the Park Does Not Undermine or Supersede Commission Authority

³⁸ Cal. Pub. Res. Code § 30604(c).

³⁹ Cal. Pub. Res. Code § 30213.

⁴⁰ CTY. OF SAN LUIS OBISPO, San Luis Bay Area Plan (Coastal), 6-14 (Revised April 2007).
<https://www.slocounty.ca.gov/Departments/Planning-Building/Forms-Documents/Plans-and-Elements/Area-Plans/Coastal-Zone/San-Luis-Bay-Coastal-Area-Plan.pdf>.

⁴¹ Cal. Pub. Res. Code § 30251.

⁴² Cal. Pub. Res. Code § 30251.

⁴³ See *supra* note 32 at 14.

⁴⁴ See *supra* note 25.

⁴⁵ CAL. COASTAL COMM’N, Oceano Dunes Coastal Development Permit 4-82-300 (Prepared for March 2021 Hearing), Ex. 9, 4.

⁴⁶ *Id.* at 22.

⁴⁷ A case study of OHV use on sand dunes found that vehicles destroyed one-fifth of dune front in the areas they were permitted and that Four Wheel Drive vehicle traffic is “unlikely to be compatible with strategies that explicitly emphasize the sustainable use and conservation of coastal assets.” Luke Thompson and Thomas Schlacher, *Physical Damage to Coastal Dunes and Ecological Impacts Caused by Vehicle Tracks Associated with Beach Camping on Sandy Shores: A Case Study from Fraser Island, Australia*, 12 J. OF COASTAL CONSERVATION 67, 80 (2008).
<https://www.jstor.org/stable/pdf/40301473.pdf?refreqid=excelsior%3Aflbc97fd180e9cbe57c8473effc838e7>, 80.

⁴⁸ Use of the equipment violated endangered species laws and the conditions of the CDP. See *supra* note 33.

State Parks' status as a state agency does not change the legal effect of the Coastal Act on its actions. Section 30401 provides that the Coastal Act "does not increase, decrease, duplicate or supersede the authority of any existing state agency."⁴⁹ State Parks appears to interpret this language as constraining the Commission's authority to enforce the Coastal Act or to provide State Parks with a vested right to determine the future of the Park. That reading is incorrect. Chapter 4 of the Coastal Act makes clear that the Commission has sole authority to carry out the statute's duties and responsibilities⁵⁰ and that "[a]ll state agencies shall carry out their duties and responsibilities in conformity with [the Coastal Act]."⁵¹ Although the Coastal Act does not supersede the authority of other state agencies, that language "shall not be construed to limit in any way the [Coastal Commission's] regulatory controls over development."⁵² In short, as long as the Commission does not "set standards or adopt regulations that duplicate regulatory controls established by any existing state agency," all other state agencies, including State Parks, must comply with the mandates of the Coastal Act, as implemented through the Commission's CDP.⁵³

Eliminating motorized recreation does not "duplicate regulatory controls established" by State Parks. Indeed, the Coastal Act provides for "coordination and cooperation between the Coastal Commission and other state agencies."⁵⁴ The Commission is simply exercising its authority to protect coastal resources at Oceano Dunes through conditions to the CDP.⁵⁵

D. The Commission Has a Duty to Protect the Public Trust

Separate from its Coastal Act obligations, the Commission is required to comply with common law public trust doctrine. American public trust doctrine dates back to a century-old United States Supreme Court decision finding that the state holds lands in navigable waters "in trust for the people of the state, that they may enjoy the navigation of the waters, carry commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."⁵⁶ In California, public trust land encompasses all navigable lakes, streams, tidelands, and nonnavigable tributaries of navigable waterways.⁵⁷ As a state agency, the Commission has an affirmative duty to "protect people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when abandonment of that right is consistent with purposes of trust."⁵⁸

⁴⁹ Cal. Pub. Res. Code § 30401.

⁵⁰ Cal. Pub. Res. Code § 30400 (noting the Legislature's intent in Chapter 4 was to minimize duplication and conflict among existing state agencies).

⁵¹ Cal. Pub. Res. Code § 30402.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 50 Cal. Jur. 3d Pollution and Conservation Laws § 342, *Coordination with state agencies*.

⁵⁵ At worst, any perceived conflict involving the Parks' mandate is one that should be harmonized with the Coastal Act under a typical statutory interpretation analysis. *See Big Creek Lumber Co. v. Cty. of Santa Cruz*, 38 Cal. 4th 1139, 1161 n. 16 (2006) (explaining that "when interpreting statutory provisions 'intended to further two separate objectives,' we have "stressed the importance of attempting to harmonize these goals" (quoting *Far West Financial Corp. v. D & S Co.*, 46 Cal.3d 796, 810 (1988))).

⁵⁶ *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 452 (1892).

⁵⁷ *See Nat'l Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 437 (1983) (holding that the public trust doctrine "protects navigable waters from harm caused by diversion of nonnavigable territories").

⁵⁸ *Id.* at 441.

Public trust considerations overlap with the other points made in this letter, particularly those related to endangered species and recreation. The public trust doctrine has evolved to require public agencies to consider environmental protection and preservation of wildlife.⁵⁹ While recreation is a public use, the Commission is not “burdened with an outmoded classification favoring one mode of utilization over another.”⁶⁰ Indeed, the California Supreme Court noted half a century ago:

There is a growing public recognition that one of the most important public uses of the tidelands – a use encompassed within the tidelands trust – is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area.⁶¹

Through the LCP, both the Commission and San Luis Obispo County bear responsibility to protect the public trust.⁶² The fiduciary duty bestowed on the Commission mandates that it protect public trust lands and ensure the lands are available to future generations. OHV use is inconsistent with public preservation as vehicles’ harmful effects can seriously and irreparably alter the tidelands and surrounding areas.⁶³ Moreover, as documented below, OHV use presents a clear and present danger to the wildlife in the Oceano Dunes ecosystem. As such, eliminating OHV use in the Park would be the most effective action the Commission could take to protect the public trust.

E. CDPs Can Mandate All Reasonable Conditions to Respond to Coastal Needs

The Commission implements its Coastal Act mandates through issuance of CDPs for any “development,” broadly defined.⁶⁴ In a CDP, the Commission may set “reasonable terms and conditions . . . to ensure that such development or action will be in accordance with the provisions [of the Coastal Act].”⁶⁵ A permit condition will be deemed reasonable by the courts where it is related to a legitimate governmental purpose, such as protecting the public’s right to access the tidelands under the Coastal Act.⁶⁶ In fact, courts test the reasonableness of a condition by “answering the question: is there any reasonable basis to support the legislative determination of the regulation’s wisdom and necessity?”⁶⁷

⁵⁹ *Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc.*, 166 Cal. App. 4th 1349, 1359-60 (2008).

⁶⁰ *Marks v. Whitney*, 6 Cal. 3d 251, 259 (1971).

⁶¹ *Id.* at 259-60.

⁶² *Ctr. for Biological Diversity* 166 Cal. App. 4th at 1369 (holding that a county and other “subdivisions and agencies” of the state must protect public trust resources).

⁶³ OHV riding has an effect on sand surface stability, affecting dune formation and natural processes in tidal areas. CAL. COASTAL COMM’N, Memo Oceano Dunes Coastal Development Permit 4-82-300 Review, Ex. 11, 18 (Prepared for March 18, 2021 Hearing).

⁶⁴ Cal. Pub. Res. Code § 30600.

⁶⁵ Cal. Pub. Res. Code § 30607.

⁶⁶ *Grupe v. California Coastal Com.*, 166 Cal. App. 3d 148, 171 (1985).

⁶⁷ *See Liberty v. California Coastal Com.*, 113 Cal. App. 3d 491, 499 (1980).

Moreover, the understanding of an appropriate development and related conditions in the coastal zone can change over time, with no preference for current conditions or management. In *Liberty v. California Coastal Com.*, the court recognized that the Commission is “not confined to the narrow circumspection of precedents, resting on past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals or general welfare of the public.”⁶⁸

The Commission also does not need to show any special reverence for the status quo, such as preserving OHV use at the Park. Where, as here, the permitholder has failed to rectify harm to coastal resources and to bring an activity into compliance with Coastal Act mandates, there is “no authority which requires [the Commission] to pursue a course shown to be inadequate, thus compounding an existing condition.”⁶⁹ Adoption of staff’s well-supported recommendations for CDP amendments that will finally begin to correct decades of non-compliance is squarely within the Commission’s authority and, therefore, should easily survive judicial challenge as a legitimate exercise of the Commission’s statutory obligations.

State Parks has failed to regulate the Park consistent with the conditions in the CDP. Since initial issuance of CDP 4-82-300, the Commission has expected State Parks to update its entrances to the Park to prevent adverse effects to ESHA and promote more typical beach access.⁷⁰ Nearly forty years later, the entrances remain unchanged. State Parks has also failed to enforce the Commission’s mandated vehicle limits that are based on vehicles’ impacts to coastal resources.⁷¹ State Parks’ failure to comply with the conditions set by the historical iterations of CDP 4-82-300 undermines the Commission’s mandate to properly manage the coastal zone through the Coastal Act. And as noted above, violations of the Coastal Act’s Chapter 3 protections and endangered species laws only compound this long-standing non-compliance with the CDP.

The San Luis Obispo County LCP, South County Area Plan, and San Luis Bay Area plan contemplate a scenario in which State Parks cannot, or will not, comply with the conditions of the CDP. Specifically, the South County Area Plan reads:

Should the terms and conditions of the coastal permit not be enforced *or accomplished* or should they not be sufficient to regulate the use in a manner consistent with the protection of resources, public health and safety and community values, then under the county’s police powers, *the imposition of an interim moratorium on ORV use* may be necessary to protect resources while long-range planning, development of facilities and requisition of equipment and manpower is completed.⁷²

⁶⁸ *Liberty*, 113 Cal. App. 3d at 499.

⁶⁹ *Id.*

⁷⁰ *See supra* note 11 at 22.

⁷¹ *See supra* note 11 at 24.

⁷² CTY. OF SAN LUIS OBISPO, South County Area Plan, 8-8 (1988).

<https://www.slocounty.ca.gov/Departments/Planning-Building/Forms-Documents/Plans-and-Elements/Area-Plans/Coastal-Zone/South-County-Coastal-Area-Plan.pdf>. (emphasis added).

Here, San Luis Obispo County, through an LCP certified by the Commission, has explicitly acknowledged that State Parks does not have universal authority over the Park. Additionally, the LCP sets the floor for what authorities may do to enforce the Coastal Act, not the ceiling.⁷³

The San Luis Bay and South County area plans that cover portions of the Park provide additional specific protections from CDP violations related to OHV use. The South County Area Plan, for example, requires any approval of a CDP for the Park to include a finding that State Parks “is making a commitment for sufficient manpower to ensure resource protection, enforcement and access control in conformance with the conditions of Coastal Development Permit No. 4-82-30[0]A.”⁷⁴ Given the continued failures to adequately protect endangered species and natural resources, the Commission cannot make the necessary finding that State Parks’ management of ODSVRA complies with CDP 4-82-300, the San Luis Obispo County LCP, local area plans, or the Coastal Act.

II. State Parks Is Not Required to Maintain OHV Recreation in the Park

The Off-Highway Motor Vehicle Recreation Act (“OHV Act”)⁷⁵ allows State Parks to discontinue OHV use where it is detrimental to ecological resources like wildlife and soil. In its draft Public Works Plan (“PWP”) and draft Environmental Impact Report (“draft EIR”), State Parks repeatedly cites the OHV Act and related provisions to argue that the agency is legally barred from implementing the Coastal Commission staff’s recommendations and ban OHVs in the Park.⁷⁶ As explained below, this argument is legally flawed and does not reflect the language of the statute, the intent of the Legislature, or the State Parks’ own past practice and precedent.

A. Since 1982, the OHV Act Has Required that State Parks Protect and Conserve Ecological Resources Such as Wildlife, Water, and Soil

The Legislature enacted the OHV Act in its modern form in 1982, following increased OHV use and concerns about public land and natural resources. As the California Attorney General explained in her 2013 legal opinion, the 1982 statute “addressed such matters as complying with environmental quality standards and soil conservation standards; providing law enforcement on all system lands; protecting wildlife habitat and cultural and archaeological resources; closing and restoring damaged areas; and providing instruction to off-highway motorists in such matters as safety, trail etiquette, avoiding trespass, and preventing damage to lands and natural resources.”⁷⁷

⁷³ *Yost v. Thomas*, 36 Cal. 3d 561, 572 (1984) (explaining that once an LCP has been approved by the Commission, the County may “decide to be more restrictive with respect to any parcel of land, provided such restrictions do not conflict with the [Coastal] act.”)

⁷⁴ CTY. OF SAN LUIS OBISPO, South County Area Plan, 8-8 (1988).

<https://www.slocounty.ca.gov/Departments/Planning-Building/Forms-Documents/Plans-and-Elements/Area-Plans/Coastal-Zone/South-County-Coastal-Area-Plan.pdf>.

⁷⁵ Cal. Pub. Res. Code § 5090.01 et seq.

⁷⁶ State Parks argues that banning OHV use conflicts with their responsibility to manage Oceano Dunes in a way that is consistent with their legal mandate to promote accessible recreation. Second, State Parks argues that banning OHVs is forbidden under ODSVRA’s current classification as a State vehicular recreation area. Lastly, State Parks claims that it does not have the power to reclassify ODSVRA.

⁷⁷ Cal. Off. of the Att’y Gen., Opinion Letter No.11-601, (Jun. 12, 2013), https://oag.ca.gov/system/files/opinions/pdfs/11-601_0.pdf.

In sum, the “central purpose of this legislation was to protect public safety and to protect, repair, and restore public lands and natural resources, while facilitating the appropriate use of off-highway vehicles.”⁷⁸

The legislative intent to balance recreational opportunities with ecological imperatives is evident throughout the OHV Act, including in its legislative findings. The Legislature found that “[t]he indiscriminate and uncontrolled use of [OHVs] may have a deleterious impact on the environment, wildlife habitats, native wildlife, and native flora.”⁷⁹ To address these concerns, the OHV Act lays out a framework to ensure that SVRAs are managed sustainably and tasks the Division of Off-Highway Motor Vehicle and Recreation (“the Division”)⁸⁰ with the “planning, acquisition, development, *conservation*, and *restoration* of lands in the state vehicular recreation areas.”⁸¹

The Legislature defined “off-highway recreation” to include “*both* motorized recreation and *motorized off-highway access to nonmotorized recreation activities*.”⁸² Thus, OHV driving through fragile dune ecosystems is not the only recreational activity contemplated under the OHV Act. Off-highway recreation includes RV and car camping on the beach – but only if those activities do not unduly damage natural resources.⁸³

B. Subsequent Statutory Amendments Bolster and Prioritize Environmental Protection

The Legislature amended the OHV Act in 1987, in 2002, and again in 2017, each time reaffirming its desire to ensure that any OHV use on land managed by State Parks prioritize the conservation of ecological resources. Most recently the 2017 amendments, in the form of SB 249, imposed significant new environmental restrictions on the Division because “more [is needed] to be done to improve conservation and restoration efforts and minimize conflicts that frequently arise in [SVRAs].”⁸⁴ SB 249 “strengthens environmental protection measures and better integrates the program with [State Parks] by clearly delineating resource protection and conservation requirements, including requiring standard monitoring and adaptive management practices, and establishing a standard process for avoiding and addressing resource degradation.”⁸⁵

The statutory language reinforces the legislative intent to strengthen environmental protection. For instance, the definition of “conservation” was clarified to include protection of habitats and cultural resources.⁸⁶ The amended law requires that periodic reports submitted to the Governor

⁷⁸ *Id.*

⁷⁹ Cal. Pub. Res. Code § 5090.02(a)(3).

⁸⁰ Cal. Pub. Res. Code § 5090.05.

⁸¹ Cal. Pub. Res. Code § 5090.32(a) (emphasis added).

⁸² Cal. Pub. Res. Code § 5090.02(a)(2).

⁸³ Cal. Pub. Res. Code § 5090.02(c)(4).

⁸⁴ SENATE RULES COMMITTEE, SB 249 SENATE FLOOR ANALYSES, AT 7 (SEP. 14, 2017), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180SB249.

⁸⁵ *Id.*

⁸⁶ Cal. Pub. Res. Code § 5090.10

and Legislature must now include information about environmental issues that have arisen at SVRAs, including “actions undertaken to ensure compliance with federal and state Endangered Species Acts, local air quality laws and regulations, federal Clean Water and regional water board regulations, or permits.”⁸⁷ In addition, the Division must prepare and implement “management and wildlife habitat protection plans” that are “developed in consideration of statutorily required state and regional conservation objectives.”⁸⁸

The 2017 amendments also strengthen Public Resources Code section 5090.35 pertaining to soil conservation standards, habitat protection programs, and cultural and archeological resources. This provision denominates public safety, appropriate utilization of land, and conservation of natural and cultural resources as “of the highest priority in the management of [SVRAs]” and directs the Division to “take steps necessary to prevent damage to significant natural and cultural resources within [SVRAs].”⁸⁹ It also requires the Division to prepare “a wildlife habitat protection that conserves and improves wildlife habitats for [SVRAs]”⁹⁰ and to review and update soil conservation standards by the end of 2020.⁹¹ In short, the Legislature has imposed increasingly more protective legal obligations on State Parks, which is responsible for much more than just maximizing OHV use in SVRAs.

The 2017 amendments to the OHV Act targeted the very wildlife habitat destruction, soil erosion, and air quality impacts that have plagued the Park for decades. Yet instead of making operational and management changes to address these myriad problems, State Parks proposed in 2017 that the Coastal Commission hold off amending the CDP while it created a PWP. The Coastal Commission initially believed that the PWP would address the Coastal Act, LCP, and CDP issues. But instead of “taking a fresh look at the Parks’ uses, management, and configuration,”⁹² the proposed PWP would actually exacerbate coastal resource impacts by proposing to open more sensitive habitat to destructive OHV use while entirely ignoring the Commission’s directive to evaluate a phaseout of OHV use.

C. Where OHV Use Cannot Be Maintained Consistent with Ecological Standards, State Parks Must Close OHV Use to Restore Lands

The OHV Act directs State Parks to close and restore areas that cannot be maintained within soil conservation standards⁹³ or wildlife habitat protection standards.⁹⁴ If an area cannot be maintained for long-term use, State Parks is required to restore the “land to the contours, the plant communities, and the plant covers to those on surrounding lands or at least those that

⁸⁷ Cal. Pub. Res. Code § 5090.24(h)(6).

⁸⁸ Cal. Pub. Res. Code § 5090.32(g).

⁸⁹ Cal. Pub. Res. Code § 5090.35(a).

⁹⁰ Cal. Pub. Res. Code § 5090.35(c)(1).

⁹¹ Cal. Pub. Res. Code § 5090.35(b).

⁹² *See supra* 32 at 56.

⁹³ Cal. Pub. Res. Code § 5090.35(b)(3).

⁹⁴ Cal. Pub. Res. Code § 5090.35(c)(3). *See also* Cal. Pub. Res. Code § 5090.02(c)(4) (finding that where areas cannot be maintained “to appropriate established standards for sustained long-term use,” the area should be closed to use to prevent accelerated erosion.)

existed prior to OHV use.”⁹⁵ In the draft EIR, State Parks only acknowledges a duty to “temporarily”⁹⁶ close noncompliant areas. However, the OHV Act does not limit protective and restorative measures to short-term closures. Public Resources Code section 5090.02(c)(4) indicates that permanent closure may be necessary to restore damaged areas to their pre-OHV condition.

More broadly, the OHV Act states that “[i]f off-highway motor vehicle use results in damage to any natural or cultural resources or damage within sensitive areas, appropriate measures shall be promptly taken to protect these lands from any further damage.”⁹⁷ Eliminating OHVs may be necessary “for the conservation of cultural resources and the conservation and improvement of natural resource values over time.”⁹⁸ Sensitive areas established within SVRAs must be managed to preserve both “rare or endangered plant and animal species and their supporting ecosystems,”⁹⁹ and “zones which represent significant places or events in the flow of human experience in California.” Section 5090.43(c) goes on to state that the protective measures may include setting up physical barriers and “shall include the restoration of natural resources and the repair of damage to culture resources.”¹⁰⁰ Thus, while the statute does not provide an exhaustive list of the measures that could be taken to “protect [SVRAs] from any further damage,” phasing out OHV use is clearly one of them.¹⁰¹

Indeed, State Parks has not shied away from eliminating OHV use in the past to protect ecologically valuable lands from further damage. In 1977, State Parks recommended that “ORV activity should not be permitted” in the Inglenook Fen area.¹⁰² After conducting a detailed report in the area, the agency at the time noted that the “fen and dune ecosystem . . . are extremely fragile” and took the appropriate steps to protect ecological resources.¹⁰³ State Parks further recommended restricting visitation to a smaller area than was historically allowed and to only allow groups accompanied by an interpretive guide. As the Inglenook Fen example and the text of the OHV Act show, State Parks has never had a mandate to support vehicular recreational activities at the expense of natural resources.

Finally, State Parks’ assertion that it does “not have the authority to phase out OHV activity in the SVRA on its own” is false.¹⁰⁴ As explained above, State Parks already has authority to eliminate OHV use from ODSVRA in order to protect ecological resources, and it does not need the Legislature’s permission to reclassify a State Park unit. Park classifications¹⁰⁵ are not indefinitely fixed. Even after a unit is classified, “there is reserved the power to repeal, amend,

⁹⁵ Cal. Pub. Res. Code § 5090.11.

⁹⁶ See Attachment 1: CAL. DEP’T OF PARKS & RECREATION, DRAFT PUB. WORKS PLAN & DRAFT ENV’T IMPACT REP 19-2 (2020).

⁹⁷ Cal. Pub. Res. Code § 5090.43.1(c).

⁹⁸ Cal. Pub. Res. Code § 5090.43(a).

⁹⁹ Cal. Pub. Res. Code § § 5019.71.

¹⁰⁰ Cal. Pub. Res. Code § 5090.43(c).

¹⁰¹ Cal. Pub. Res. Code § 5090.43(a).

¹⁰² CAL. DEP’T OF PARKS & RECREATION, INGLENOOK FEN; A STUDY AND PLAN, (1977).

¹⁰³ *Id.*

¹⁰⁴ See *supra* 96 at § 12.2.2.1 (2020).

¹⁰⁵ These classifications include SVRAs and: State Recreation Area, Underwater Recreation Area, Beaches, Wayside Campgrounds, and State Urban Recreation Areas.

or modify this section [classifying units] as may from time to time hereafter be necessary and proper.”¹⁰⁶ State Parks has the option to reclassify ODSVRA if it wishes, but in any event, reclassification is not a barrier to eliminating OHV use at the Park.¹⁰⁷

III. Protection of Endangered Species in the ODSVRA Requires Eliminating OHV Use

California’s coast is home to hundreds of intricate, delicate, and irreplaceable ecosystems. Oceano Dunes is no exception. As part of the largest coastal dune tract in California, Oceano Dunes provides essential habitat to unique flora and fauna.¹⁰⁸ Among the wildlife that inhabit the Guadalupe-Nipomo Dunes – of which Oceano Dunes is a part – are eight threatened or endangered animal species and 22 special status plants.¹⁰⁹

Balancing recreational activities with habitat protection has been a paramount concern ever since the Commission granted CDP 4-82-300 to State Parks in 1982. Two bird species, the western snowy plover and the California least tern, have garnered particular concern because of their dwindling numbers and vulnerability to human activity. These species are protected by federal and state endangered species laws that aim to ensure the birds do not face extinction.¹¹⁰ Through the CDP review process, the Commission must ensure that endangered species are adequately protected in the Park.

A. The Federal Endangered Species Act Requires Protection of Listed Species, Particularly the Snowy Plover and the California Least Tern

To protect listed species, the federal Endangered Species Act prohibits all persons – including both federal and state agencies – from taking or authorizing take of any individual of that species.¹¹¹ “Take” is broadly defined as “any action that harms or harasses listed species.”¹¹² “Harm” is further defined to include any act that actually kills or injures wildlife, including “significant habitat modification or degradation.”¹¹³ And “harass” is defined as “intentional or negligent actions that create the likelihood of injury to listed species by annoying them to such an extent as to disrupt normal behavioral patterns.”¹¹⁴ Importantly, government regulations

¹⁰⁶ Cal. Code Regs. tit. 14, § 4753.

¹⁰⁷ See generally Cal. Pub. Res. Code § 5002.1, Cal. Pub. Res. Code § 5002.2(b)(c), and Cal. Pub. Res. Code § 5002.3.

¹⁰⁸ U.S. National Park Service, Nipomo Dunes-Point Sal Coastal Area, <https://www.nps.gov/subjects/nl/landmarks/site.htm?Site=NIDU-CA> (last accessed Mar. 4, 2021).

¹⁰⁹ U.S. Fish and Wildlife Service, Guadalupe-Nipomo Dunes, https://www.fws.gov/refuge/Guadalupe-Nipomo_Dunes/Wildlife_and_Habitat/Wildlife.html (last accessed Feb. 19, 2021).

¹¹⁰ Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Pacific Coast Population of the Western Snowy Plover, 58 Fed. Reg. 12864-01 (Mar. 5, 1993); California least tern is listed federally in Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Reviews, 70 Fed. Reg. 39327 (July 7, 2005).

¹¹¹ 16 U.S.C. § 1538.

¹¹² 16 U.S.C. § 1532.

¹¹³ 50 CFR § 17.3 (2006).

¹¹⁴ *Id.*

authorizing third parties to engage in harmful actions can constitute an illegal take.¹¹⁵ Not only is State Parks potentially liable for a take of listed species in the Park, but the continued tolerance of harmful motorized recreation as part of the CDP could open the Commission to similar take liability.

State Parks understands this risk. It has recently attempted to immunize its actions from ESA liability by seeking an incidental take permit. The U.S. Fish and Wildlife Service (“Service”) manages authorization procedures for so-called “incidental take” – or take incidental to the carrying out of an otherwise lawful activity.¹¹⁶ To obtain an incidental take permit, an applicant must prepare a Habitat Conservation Plan (HCP) and the Service must make a number of factually supported findings, including that (1) any take is incidental; (2) incidental take is minimized and mitigated to the maximum extent practicable; (3) adequate funding for the plan will be provided; and, (4) taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.¹¹⁷

After nearly four decades of operating the Park without any take authorization, State Parks finally released a draft HCP in July 2020.¹¹⁸ According to the proposed HCP, four animal species and six plant species would be covered by an incidental take permit for Oceano Dunes, including both the western snowy plover and the California least tern.¹¹⁹ The draft HCP submitted to the Service would provide a 25-year permit authorizing incidental take of snowy plovers and other endangered species.¹²⁰ The Service issued a draft Environmental Assessment on the proposed HCP in September 2020.¹²¹

The unique habitat covered by the draft HCP is essential for the protection of snowy plovers. In 2012, the Service finalized its designation for swathes of the Park to be critical habitat for snowy plovers – over objections from State Parks – and determined that the park “plays an important role in conservation of the western snowy plover . . . [that] may increase due to climate related changes, including sea-level rise.”¹²² State Parks’ draft HCP notes that the Park represents

¹¹⁵ See *Coal. for a Sustainable Delta v. John McCamman*, 725 F. Supp. 2d 1162, 1167 (E.D. Cal. 2010) (citing *Strahan v. Coxe*, 127 F.3d 155, 163 (1st Cir. 1997) for the proposition that the ESA applies to “third parties that allow or authorize acts that exact a taking and that, but for the permitting process, could not take place.”); see also *Cascadia Wildlands v. Kitzhaber*, 911 F. Supp. 2d 1075, 1085 (D. Or. 2012) (finding that “state officials can indeed be liable for directly authorizing third-party activities . . . that are likely to result in take.”).

¹¹⁶ 16 U.S.C. § 1539.

¹¹⁷ *Id.*

¹¹⁸ CAL. STATE PARKS OFF-HIGHWAY VEHICLE RECREATION DIV. STATE PARKS, Draft Habitat Conservation Plan for the California Department of Parks and Recreation Oceano Dunes District (July 2020).

https://www.oceanoduneshcp.com/files/managed/Document/60/ODD%20HCP_Posted%20Nov%202020_Redlined%20From%20February%20Draft.pdf.

¹¹⁹ *Id.* at 1-4. The other covered animal species in the HCP are the California red-legged frog, and the Tidewater goby. The covered plant species are Marsh sandwort, La Graciosa thistle, Surf thistle, Beach spectaclepod, Nipomo Mesa lupine, and Gambel’s watercress. *Id.* at 1-4, 1-5.

¹²⁰ U.S. FISH AND WILDLIFE SERVICE, *Draft Environmental Assessment for the Oceano Dunes District Habitat Conservation Plan Activities Associated with Issuance of Endangered Species Act Section 10(a)(1)(B) Permit in San Luis Obispo County, California*, 4 (September 2020).

¹²¹ *Id.*

¹²² Endangered and Threatened Wildlife and Plants; Revised Designation of Critical Habitat for the Pacific Coast Population of the Western Snowy Plover; Final Rule, 77 Fed. Reg. 36733 (June 19, 2012).

nearly half of the suitable snowy plover habitat in the Guadalupe-Nipomo Dunes Complex, including tracts that were identified as the most favorable for the shoreline bird.¹²³ And it concedes that “lands managed by State Parks were identified as critical to the long-term survival of the [snowy plover]” and that State Parks must monitor and manage the snowy plover population.¹²⁴ In short, all stakeholders agree that the Park represents essential habitat for the western snowy plover.

Moreover, the draft HCP details the extent to which the current operation of the Park harms snowy plovers, and most troublingly, proposes to present them to even greater future harm. Among the activities covered by the HCP, motorized recreation has the greatest effect on the snowy plover.¹²⁵ Nests are found on open areas of the back beach or dunes where vegetation is sparse or nonexistent.¹²⁶ The nests are often several hundred feet from the nearest water source and can be found outside of existing nest enclosures.¹²⁷ Effects from motorized recreation are present even when the vehicles themselves are gone, such as when birds decide to roost in tire tracks or their nests are disturbed to the point where they are abandoned.¹²⁸ The risk from motorized recreation exists equally at night; snowy plover chicks have been killed during night riding.¹²⁹

To gain belated incidental take liability protection, State Parks proposes a set of avoidance and mitigation measures aimed at minimizing risk and ensuring any take is accidental. Forty-six of these measures are directed to mitigating motorized recreation, which is far more than any other activity and reflects the unique threat motorized recreation poses to snowy plovers.¹³⁰ The measures range in their intrusiveness from simply mandating increased outreach regarding endangered species at the Park to additional physical measures such as the construction of fencing to protect individual nests found in the riding area.¹³¹ Some of the measures, such as eliminating one of the large nesting enclosures used by shorebirds, actively *reduce* conservation efforts. State Parks’ promised mitigation measures are overdue and insufficient. Their adoption will not adequately address the take of endangered species in the Park.

In evaluating whether State Parks will, in good faith, implement these promised measures, the Commission should consider that agency’s long history of failure to improve compliance with the ESA. OHV use was identified as a threat to the western snowy plover in its original federal listing in 1993.¹³² State Parks has known the risk of motorized recreation to endangered species at the Park and failed to minimize those risks for decades. CDP 4-82-300 has included special conditions on OHV use related to the protection of snowy plovers and other endangered species

¹²³ See *supra* note 118 at 5-3, 5-4.

¹²⁴ *Id.* at 3-13.

¹²⁵ *Id.* at 4-4.

¹²⁶ *Id.* at 3-7.

¹²⁷ *Id.* at 4-3.

¹²⁸ *Id.* at 4-8.

¹²⁹ *Id.* at 4-6.

¹³⁰ *Id.* at 5-15-5-25.

¹³¹ *Id.* at 5-15, 5-17.

¹³² Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Pacific Coast Population of the Western Snowy Plover, 58 Fed. Reg. 12870 (Mar. 5, 1993).

since at least 2001.¹³³ Yet, unauthorized take of snowy plovers has occurred consistently throughout State Parks' management of the area.

Even if implemented, the measures are insufficient to adequately protect the western snowy plover. Some of the avoidance and mitigation measures only reiterate existing State Parks commitments, such as maintaining seasonal fencing around snowy plover nesting areas.¹³⁴ Others provide regulations that seem to miss the problem, such as providing extra State Parks staff for high-use weekends rather than restricting the activities themselves. Finally, others simply ignore consensus views on what actions are needed to protect shorebirds. For example, the avoidance and mitigation measures propose mechanical trash removal in areas where snowy plovers are actively present.¹³⁵ As noted by the California Department of Fish and Wildlife (CDFW), such a proposal ignores that the trash removal "alter[s] the beach ecosystem" and "may reduce or eliminate the HCP area's ability to continue to serve as a suitable stopover for migrating and overwintering birds."¹³⁶ Similarly, the use of fencing for single nests or smaller enclosures in riding areas does not provide the needed buffers to protect snowy plovers and terns and can actually result in additional "take" due to predators keying in on the enclosures or birds colliding with the fences intended to protect them.

Collectively, the avoidance and mitigation measures reflect State Parks' failure to prioritize protecting endangered species. For the reasons above, they cannot be relied upon to adequately protect the western snowy plover in the Park. Instead of applying myriad mitigation measures in a futile attempt to negate the impact that OHV use is having on the snowy plover population, the Commission can and should act to protect the species by phasing out OHV use at the Park.

The Service's preliminary analysis of the proposed HCP is also flawed, largely because the agency relies on State Parks' legal analysis of governing statutes. While the Service concedes that eliminating vehicle use would "likely be required to avoid habitat disturbance and potential for take of [California least tern] and [western snowy plover]," it nonetheless disregards a no-OHV option on the grounds that it would be "incompatible with the recreational purpose of the SVRA."¹³⁷ The Service then parrots State Parks' argument that section 5090.01 et. seq mandates continued vehicular use in the Park. As explained above, this position is not supported by the statutory language or legislative intent. The Commission should not make the same mistake.

B. The California Endangered Species Act Prohibits Even Incidental Take of the California Least Tern

California's own Endangered Species Act and other state protections also have significant implications for the Park. Under the California Endangered Species Act, the California least tern was listed as endangered in 1971 and is "fully protected" under the California Fish and Game

¹³³ See *supra* note 11.

¹³⁴ See *supra* note 118 at 5-18.

¹³⁵ *Id.* at 5-36.

¹³⁶ Letter from the California Department of Fish and Wildlife to Ronnie Glick, Senior Environmental Scientist, California Department of Parks and Recreation (June 1, 2020).

¹³⁷ See *supra* note 120 at B-1.

Code.¹³⁸ Under state law, the CDFW has jurisdiction over fully protected species¹³⁹ and can only allow take for “necessary scientific research.”¹⁴⁰ In contrast to the federal regime, California law explicitly forbids CDFW or any other agency from “issuance of a permit or license to take a fully protected bird.”¹⁴¹ Accordingly, there are no circumstances that provide State Parks (or the Coastal Commission) to lawfully allow incidental take of this species, even if the Service were to approve the HCP and authorize incidental take under federal law.

California least terns are endangered due to a loss of habitat to human development and recreation.¹⁴² At the Park, the bird nests on the dunes from April to August, particularly within the southern portion of the open riding area.¹⁴³ Nests can be abandoned by California least tern due to human activities in the vicinity.¹⁴⁴ Like snowy plovers, least tern habitat in the Park is deemed critical for the species to meet its recovery goals.¹⁴⁵

Despite the impossibility of receiving permission to take California least tern, State Parks included the bird in its draft HCP. In a June 2020 letter, the CDFW concluded that State Parks’ draft HCP and Draft Environmental Impact Review “do not adequately identify or mitigate the Project’s significant . . . impacts on biological resources.”¹⁴⁶ On the possible take of fully protected species, the CDFW noted that take avoidance measures must meet “very high measures of effectiveness.”¹⁴⁷ If State Parks cannot ensure “full avoidance” of take, the CDFW recommends State Parks “cease all ongoing operations and maintenance activities and refrain from implementation of new activities that could potentially result in take of any fully protected species.”¹⁴⁸ Given CDFW’s jurisdiction over fully protected birds and the take from vehicle use admitted in the HCP, State Parks cannot proceed under the current plan without violating California law.

Separate from the Fish and Game Code’s prohibition on the incidental take of fully protected species, the California Endangered Species Act itself also prohibits any take of a listed species.¹⁴⁹ Incidental take is only allowed under the state statute where (1) there is federal incidental authorization under the ESA and CDFW finds “consistency” under CESA¹⁵⁰ or (2) CDFW provides its own incidental take authorization that ensures impacts are “fully mitigated,” mitigation is adequately funded, and incidental take will not jeopardize the continued existence of the species.¹⁵¹ Because State Parks has not received either a consistency determination or a CDFW incidental take permit, CESA provides that the agency cannot allow activity that kills

¹³⁸ Cal. Fish and Game Code § 3511(b)(6).

¹³⁹ See *supra* note 136 at 8 (citing Cal. Fish and Game Code § 3511).

¹⁴⁰ Cal. Fish and Game Code § 3511(a).

¹⁴¹ Cal. Fish and Game Code § 3511(a).

¹⁴² See *supra* note 118 at 3-29.

¹⁴³ *Id.* at 3-31.

¹⁴⁴ *Id.* at 3-31.

¹⁴⁵ *Id.* at 3-32.

¹⁴⁶ See *supra* note 136 at 9.

¹⁴⁷ *Id.* at 8.

¹⁴⁸ *Id.* at 9.

¹⁴⁹ Cal. Fish and Game Code § 2080.

¹⁵⁰ Cal. Fish and Game Code § 2080.1.

¹⁵¹ Cal. Fish and Game Code § 2081.

least terns. Moreover, as noted above, the draft HCP is inadequate and not likely to satisfy the take requirements of CESA. Rather, State Parks would need to prepare and obtain CDFW approval for a Natural Community Conservation Plan, which unlike an HCP must include conservation actions that improve the overall condition of the species.¹⁵²

Finally, the legal analysis of State Parks' ability to protect endangered species in the Park should consider the actions of the agency itself. Beyond its decades-long delay in complying with the Commission's permit conditions and developing an HCP, State Parks has also failed to deliver a wildlife habitat protection plan as required by California law.¹⁵³ And in July 2020, this Commission ordered State Parks to cease and desist its illegal grading, fencing, staking, and bird removal activities in California least tern and western snowy plover habitat.¹⁵⁴ At every turn, State Parks has proven that the legally required protection of endangered species is not the agency's priority. Given State Parks' failure and the legal mandates discussed throughout this letter, the Commission should act to protect endangered species within the Park by eliminating OHV use.

IV. Environmental Justice Considerations Demand Eliminating OHV Use

In 2016, the Legislature amended the Coastal Act to require that at least one of the Governor's appointments to the Commission must represent communities vulnerable to disproportionate pollution burdens and vulnerable to issues of environmental justice¹⁵⁵ and to allow the Commission to expressly consider environmental justice, or the equitable distribution of environmental benefits, when acting on a CDP.¹⁵⁶ The statute defines "environmental justice" as "the fair treatment and meaningful involvement of people of all races, cultures, incomes, and national origins, with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations, and policies."¹⁵⁷ Specifically, environmental justice includes "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."¹⁵⁸

In 2019, the Commission adopted an Environmental Justice Policy. In order to effectuate this Environmental Justice Policy, the Commission must give "[a]t a minimum, the meaningful consideration of recommendations from populations and communities most impacted by pollution into environmental and land use decisions."¹⁵⁹ Currently, operations at ODSVRA are obstructing "the availability of a healthy environment for all people."¹⁶⁰ The Coastal Commission should carefully consider why and how Oceano, a relatively poor and 44 percent

¹⁵² Cal. Fish and Game Code § 2800 *et seq.*

¹⁵³ See Cal. Pub. Res. Code § 5090.35.

¹⁵⁴ See *supra* note 33.

¹⁵⁵ Cal. Pub. Res. Code § 30301(f).

¹⁵⁶ Cal. Pub. Res. Code § 30694(h).

¹⁵⁷ Cal. Pub. Res. Code § 30107.3.

¹⁵⁸ Cal. Pub. Res. Code § 30107.3(b)(2).

¹⁵⁹ Cal. Pub. Res. Code § 30107.3(b)(4).

¹⁶⁰ Cal. Pub. Res. Code § 30107.3(b)(1).

Hispanic community, is being forced to endure air pollution and nuisance from OHV use without any measurable economic benefit.

A. OHV Use at the Park Contributes to Persistent Poor Air Quality and Dust Pollution

The Oceano Dunes region has dangerously high levels of PM₁₀ in the air – at times the worst in the entire country.¹⁶¹ Several times each year, San Luis Obispo County is in “nonattainment” under the Clean Air Act¹⁶² and the California Ambient Air Quality for PM₁₀ standards.¹⁶³ Between May 29, 2012 and October 19, 2017, the San Luis Obispo District received 133 complaints from residents downwind of the Park.¹⁶⁴ Between May 1, 2012 and March 31, 2017, there were 363 days when the San Luis Obispo District observed violations of state PM₁₀ standards at one or more of air quality monitoring sites in the area.¹⁶⁵ In the Coastal Commission’s 2019 Environmental Justice Policy, the Commission committed to working “with 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.”¹⁶⁶ Transitioning away from high-impact vehicle use is long overdue and will improve the health and air quality for those around the Park, as well as curb the loss of coastal sands and soils.

Eliminating OHV use will have a major positive impact on restoring vegetation on the dunes and thus significantly improve the air quality for the surrounding communities. The prolonged high-intensity motorized use of OHVs has contributed to the region’s air quality problems.¹⁶⁷ OHV activity destroys key vegetation areas and dune structures which causes increased erosion and sand movements and more dust emissions when the wind blows.¹⁶⁸ Additionally, areas in the Park subject to the most intense OHV activity usually produce the highest PM₁₀ dust emissions.¹⁶⁹ For example, studies have shown that the Le Grande tract, where a considerable amount of riding and camping occurs, significantly contributes to the PM₁₀ emissions affecting downwind residents.¹⁷⁰ Even during the period when the Park was closed to OHV use, “decades

¹⁶¹ PM₁₀ is particles with diameters that are 10 micrometers and smaller. They can be inhaled and cause serious health problems.

¹⁶² U.S. Env’t Prot. Agency, *8-Hour Ozone (2015) Nonattainment Areas by State/County/Area*, Green Book, (current as of January 31, 2021), <https://www3.epa.gov/airquality/greenbook/jncty.html>.

¹⁶³ SAN LUIS OBISPO AIR POLLUTION CONTROL DISTRICT, 2018 ANNUAL AIR QUALITY REPORT, (2018), <https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/2018aqrt-FINAL.pdf>

¹⁶⁴ Stipulated Order of Abatement #17-01, at 5 (May 2018), <https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/Filed%20%26%20Approved%20SOA%20Case%2017-01%20Apr-30-18.pdf>.

¹⁶⁵ *Id.*

¹⁶⁶ CALIFORNIA COASTAL COMMISSION, 2019 ENVIRONMENTAL JUSTICE POLICY, AT 11 (Mar 8, 2019), https://documents.coastal.ca.gov/assets/env-justice/CCC_EJ_Policy_FINAL.pdf.

¹⁶⁷ Memorandum from the Scientific Advisory Group on SAG comments on the temporary closure of Oceano Dunes State Vehicular Recreation Area (ODSVRA) and impacts on particulate matter (PM) emissions (Apr. 6, 2020), <https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/SAG%20Letter.pdf>

¹⁶⁸ SAN LUIS OBISPO AIR POLLUTION CONTROL DISTRICT, FREQUENTLY ASKED QUESTIONS; AIR QUALITY AND THE TEMPORARY CLOSURE OF OCEANO DUNES (JUNE 30, 2020), <https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/June2020FAQ-42.pdf>

¹⁶⁹ *See supra* note 167.

¹⁷⁰ *See supra* note 164, at 6.

of OHV activity have fundamentally altered the natural beach-dune landscape, making the dunes significantly more susceptible to PM₁₀ emissions than they would be in a natural state.”¹⁷¹ Due to the windy coastline, there will never be a complete elimination of natural PM₁₀ emissions from the dunes. But eliminating OHV use is a crucial step towards the Oceano community consistently meeting state and federal air quality standards.

The air quality is so poor that in April of 2018, the San Luis Obispo Air Pollution Control District (“the District”) entered into a Stipulated Order of Abatement (“Abatement Order”)¹⁷² with State Parks directing them to adopt a Particulate Matter Reduction Plan (“PM₁₀ Plan”) and Annual Report and Work Plan (“Annual Report”) to reduce PM₁₀ emissions by at least 50 percent within four years.¹⁷³ Additionally, the Abatement Order established a Scientific Advisory Group to monitor air quality and mitigation strategies. The District has since attempted to work with a reluctant State Parks to fulfil the Abatement Order’s mandates.

Despite the District and the Scientific Advisory Group’s efforts, State Parks has been an unenthusiastic partner in solving the air-pollution problem. Although State Parks agreed to the Abatement Order, it denied all the allegations therein. State Parks also denied violating California Health & Safety Code section 41700, District Rule 402, or District Rule 1001.11. State Parks instead focuses primarily on the “natural causes” of high concentration of PM₁₀ in the air, such as wind and the sand that makes up the dunes themselves, while ignoring that the natural causes of poor air quality are exacerbated by OHV use.¹⁷⁴ In the 28 pages where State Parks discusses air quality issues in the draft EIR, it mentions OHV use only twice.¹⁷⁵ Indeed, it appears that State Parks is not taking seriously the commitment to emissions reduction standards. For example, one of the Frequently Asked Questions regarding the Oceano Dunes draft PM₁₀ Plan Public Workshop in June 2019 was: “Why are the recommendations from the Scientific Advisory Group (SAG)¹⁷⁶ not being followed?”¹⁷⁷ And the District noted in its draft Annual Report that State Parks has “failed to outline a path to achieving the goals of the Abatement Order.”¹⁷⁸

¹⁷¹ See *supra* note 167.

¹⁷² State Parks and San Luis Obispo Air Pollution Control District entered the Stipulated Order of Abatement pursuant to California Health & Safety Code § 42451.

¹⁷³ See *supra* note 96 at 9-12.

¹⁷⁴ See *supra* note 96 at § 6.3.1.1.

¹⁷⁵ The first reference of OHVs is regarding an unsupported study where there was no finding that OHV use causes air pollution. The second reference was about daily OHV limits at ODSVRA.

¹⁷⁶ The Scientific Advisory Group also “recommends that OHMVR engage with a subset of SAG members to seriously consider scientifically-justified alternatives to the current 50% emission reduction target that may more directly reflect the impact of dust mitigation treatments on downwind airborne dust concentrations. See Memorandum from Scientific Advisory Group on SAG Review of Draft [Annual Report & Work Plan], (Aug. 31, 2020), <https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/SAG%20comments%20on%20Draft%20ARWP%208-1-2020%20-%20FINAL.pdf>

¹⁷⁷ See *supra* note 168.

¹⁷⁸ Memorandum from San Luis Obispo County Air Pollution Control District on California Department of Parks and Recreation’s August 1, 2020 Oceano Dunes SVRA Draft 2020 Annual Report & Work Plan in Response to Stipulated Order of Abatement Number 17-01 (Sep. 4, 2020) https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/SLOAPCD%20Comments_2020_Draft%20ARWP_Dated%20Aug%201%202020%20sent%209-4-20.pdf.

State Parks is still far from achieving the goals set out in the Abatement Order, and the PWP proposal to expand OHV use would further hinder the achievement of those goals. State Parks' own analysis, confirmed by the Scientific Advisory Group analysis, has shown that at least "500 acres of dust control mitigations would be needed" to comply with the [Abatement Order]."¹⁷⁹ Mitigation measures include fencing off large areas to OHV use and, most importantly, revegetating areas with seed, seedlings, and ground cover.¹⁸⁰ As of 2019, 132 acres of the mitigations have been installed, leaving an estimate of 368 acres needed to comply with Abatement Order condition 2c by the 2022 deadline.¹⁸¹ To reach the 368-acre goal in four years, State Parks would need to mitigate around 90 acres each year. However, State Parks initially recommended only 23 acres of new mitigation for the 2019-20 ARWP cycle and only 40 acres in the 2020-21 cycle.¹⁸² The lack of serious commitment put the District and the Scientific Advisory Group in the position of having to explicitly ask State Parks to add 90 acres each year to its mitigation strategies. The final 2020 Annual Report submitted by State Parks does not mention the 500-acre goal at all.¹⁸³

The Coastal Commission should not postpone action in hopes that the air quality will improve. In the draft EIR, State Parks refuses to attribute the high PM₁₀ levels to OHV use at all.¹⁸⁴ It is likely that State Parks will continue to slow-walk the District, in the same fashion it has impeded the Coastal Commission. The threat of "severe health risks despite years of effort to reduce or eliminate dust emissions from the OHV riding area" is why the San Luis Obispo Health Commission "strongly supports the Coastal Commission's Staff recommendations to phase out OHV activity . . . and take action to address the health concerns of our residents."¹⁸⁵

B. Northern Chumash Tribal Resources in ODSVRA Demand Eliminating OHV Use

The lands on which the Park sits have, of course, not always been a motorized recreation park. In fact, the coastal areas of San Luis Obispo County were occupied by the Chumash tribe prior to

¹⁷⁹ CAL. DEP'T OF PARKS & RECREATION, OFF-HIGHWAY MOTOR VEHICLE RECREATION DIVISION, DRAFT PARTICULATE MATTER REDUCTION PLAN PRELIMINARY CONCEPT (MAR. 28, 2019),

https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/PrelimConcept_DraftPMRP_20190328_to%20APCO.pdf

¹⁸⁰ See *supra* note 168.

¹⁸¹ SAN LUIS OBISPO COUNTY, AIR POLLUTION CONTROL DISTRICT, RESPONSE TO STATE PARKS' ANNUAL REPORT WORK PLAN AND SPECIFIC COMMENTS ON ANNUAL REPORT WORK PLAN, 2-3 (AUG. 26, 2019),

<https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/Aug%2026%202019%20APCD%20Response%20to%20SP-Aug%201%202019%20ARWPCOMBINED.pdf>

¹⁸² Memorandum from Scientific Advisory Committee on SAG Review of Draft Annual Report & Work Plan 8-1-2020 (Aug. 31, 2020), <https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/SAG%20comments%20on%20Draft%20ARWP%208-1-2020%20-%20FINAL.pdf>

¹⁸³ CAL' DEP'T OF PARKS AND RECREATION, OFF-HIGHWAY MOTOR VEHICLE RECREATION DIVISION, OCEANO DUNES STATE VEHICULAR RECREATION AREA DUST CONTROL PROGRAM, 2020 ANNUAL REPORT AND WORK PLAN (SEP. 30, 2020), https://storage.googleapis.com/slocleanair-org/images/cms/upload/files/2020ARWP_4thDraft_20200930_reduced.pdf

¹⁸⁴ See *supra* 96 at § 6.2.2.

¹⁸⁵ Letter from San Luis Obispo Health Commission to California Coastal Commission (Jul. 9, 2019).

European settlement.¹⁸⁶ The Northern Chumash, a distinct branch of the larger tribe, lived along San Luis Obispo Bay. Indeed, nomenclature of the area stems from tribal language; Pismo stems from the word “Pismu” in Northern Chumash, meaning “place where there is tar.”¹⁸⁷ The modern Northern Chumash Tribal Council is recognized in the local community and has sought both state and federal recognition.¹⁸⁸ As part of their effort to preserve their ancestral home, the Tribal Council has advocated for the creation of a Chumash Heritage National Marine Sanctuary that would protect the waters and tidelands of the entire San Luis Obispo Coast.¹⁸⁹

In recent years, California’s state government has prioritized receiving input from Native American tribes in the state. Governor Jerry Brown’s Executive Order B-10-11 provided that “it is the policy of this Administration that every state agency and department subject to my executive control shall encourage communication and consultation with California Indian Tribes.”¹⁹⁰ The order explicitly specified that its references to tribes “include all Federally Recognized Tribes and *other California Native Americans*.”¹⁹¹ The Newsom Administration incorporated Executive Order B-10-11 in its own Executive Order N-15-19, which additionally provided that California Native Americans have “meaningful input into legislation, regulations, and policies on matters that may affect tribal communities.”¹⁹² Moreover, the Coastal Commission has recently prioritized building a “meaningful partnership to ensure that tribes are valued and respected contributors to the management of California’s coast.”¹⁹³

The Northern Chumash Tribal Council is a member of the Dunes Alliance and an outspoken opponent of OHV use at the Park. In its comment letter on State Parks’ Public Works Plan, the Tribal Council wrote that the State Parks document “lacks California Native American perspectives, indigenous spiritual understandings, indigenous religious comprehensions, and respect for the human beings that have lived on the Dunes for all time, a Chumash cathedral of life.”¹⁹⁴ The Tribal Council has urged ending OHV use at the Park to preserve Chumash Sites and ensure access to those sites for practicing tribe members.¹⁹⁵

¹⁸⁶ Arielle Ben-Hur, *The Chumash Heritage National Marine Sanctuary: An Exploration of Changing the Discourse on Conservation*, PITZER SENIOR THESES 105, 28 (2020).

https://scholarship.claremont.edu/cgi/viewcontent.cgi?article=1108&context=pitzer_theses.

¹⁸⁷ Randall Milliken and John Johnson, *An Ethnogeography of Salinan and Northern Chumash Communities - 1769 to 1810*, FAR WESTERN ANTHROPOLOGICAL RESEARCH GROUP, 102 (2005).

https://www.researchgate.net/publication/285404168_An_Ethnogeography_of_Salinan_and_Northern_Chumash_Communities_-_1769_to_1810.

¹⁸⁸ Fred Collins, *The Northern Chumash Tribal Council*, The SLO Coast Journal (September 2012),

<http://slocoastjournal.net/docs/archives/2012/sept/pages/chumash.html>.

¹⁸⁹ See *supra* note 186 at 2.

¹⁹⁰ Gov. Edmund G. Brown Jr., Exec. Order B-10-11 (Sep. 19, 2011).

<https://www.ca.gov/archive/gov39/2011/09/19/news17223/index.html>.

¹⁹¹ *Id.* (emphasis added)

¹⁹² Gov. Gavin Newsom, Exec. Order N-15-19 (June 18, 2019). <https://www.courts.ca.gov/documents/BTB25-PreConTrauma-02.pdf>.

¹⁹³ CAL. COASTAL COMM’N, Environmental Justice Policy 6 (adopted March 8, 2019).

https://documents.coastal.ca.gov/assets/env-justice/CCC_EJ_Policy_FINAL.pdf.

¹⁹⁴ Letter from Northern Chumash Tribal Council to Kevin Kahn, District Supervisor, Central Coast District Office, California Coastal Commission (Jan. 26, 2021).

¹⁹⁵ *Id.*

State Parks' management of the Park has fallen well short of the stated goals of the Newsom Administration. The State Parks draft PWP argues that plans to continue, and even expand, OHV use at the Park will not impact any tribal cultural resources.¹⁹⁶ State Parks bases its conclusion in part on not identifying "any tribal cultural resources in the PWP planning area."¹⁹⁷ The Tribal Council disputes that State Parks has engaged in meaningful consultation, describing the draft PWP as "a boiler plate determination of archaeologist and institutional dogma [that] should open everyone's eyes to the white washing of the Chumash Culture."¹⁹⁸ The Commission should act where State Parks has not to ensure the Northern Chumash's opposition to OHV use in the Park is heard.

C. OHV Use Comes at the Expense of the Oceano Community

OHV use has many costs with few benefits, if any, for those who live adjacent to the Park. Oceano is a community where almost half are Hispanic or Latinx and the average income is \$28,277 compared to California's \$36,955 average. The Oceano community is not only burdened with air pollution, but also with limited economic development of the beachfront, high noise levels, disruptive events and concerts, increased crime, and additional trash – all associated with OHV use at ODSVRA. Other nearby communities like Avila and Pismo Beach do not have these problems, and they also do not have motorized beach access.

Moreover, OHV activity at ODSVRA does not appear to provide local economic benefit. Oceano's and Pismo Beach's populations are 7,487 and 8,168 respectively. Even though the populations are roughly the same and a higher percentage of the Oceano population works in the civilian labor force than does the Pismo Beach population, there are approximately 1,000 more firms in Pismo Beach City than in Oceano. In 2012, Oceano had \$9.8 million in retail sales, or roughly six percent of the \$162.6 million in retail sales in Pismo Beach during the same period. A January 2021 report revealed that when vehicle use at ODSVRA was suspended for the COVID-19 pandemic, there were no negative economic impacts to the local economy.¹⁹⁹ This shows that OHV users are not major economic contributors to the local community; their absence will, therefore, have no significant impact on the local economy. The report also found no negative impact from suspending OHV use on unemployment rates and that small businesses in the Oceano area outperformed those in nearby counties during the time OHV use was shut down. The speculative fear of an economic downturn in Oceano if vehicles are banned from the beach did not materialize, confirming that "dubious" assumptions²⁰⁰ underlie State Parks' 2016 conclusion that ODSVRA contributes hundreds of millions of dollars to the local economy.²⁰¹

¹⁹⁶ See *supra* note 96 (Section 4) 4-102.

¹⁹⁷ *Id.*

¹⁹⁸ See *supra* note 194.

¹⁹⁹ PRATISH ANILKUMAR PATEL, ECONOMIC IMPACT FROM SUSPENSION OF VEHICULAR USE AT THE OCEANO-DUNES SVRA, (2021)

²⁰⁰ Letter from Pratih Patel to California Coastal Commission on Oceano Dunes District-California State Parks Economic Impact Analysis Report 2016/2017 Prepared by SMG Consulting, (Jul. 9, 2019), <https://calmatters.org/wp-content/uploads/2020/11/ODSVRA-Econ-Report-Discredited.pdf>.

²⁰¹ CAL. DEP'T OF PARKS & RECREATION, ECONOMIC IMPACT ANALYSIS REPORT 2016/17 BY SMG CONSULTING, https://ohv.parks.ca.gov/pages/1170/files/Final-Oceano_Dunes_SVRA_2016_2017_3-5-18.pdf.

Furthermore, before the early 1970s, people could drive on the beach in Pismo Beach and Morro Bay.²⁰² In fact, the State Parks Commission worked with the Morro Bay city council and ordered the vehicle ban.²⁰³ The Pismo Beach city council closed beach driving a few years later after losing a vehicle beach ramp to storms.²⁰⁴ “Within two years, the depressing little town had become a resort destination.”²⁰⁵ Similar to Pismo Beach’s economic upward trajectory after banning driving on the beach, Morro Bay has higher median per capita income, higher median household income, and significantly higher median housing values than Oceano.²⁰⁶

Oceano CDP Demographic Comparison Table ²⁰⁷			
Demographics	Oceano, CA	Pismo Beach City, CA	California
Total Population	7,487	8,168	39,512,223
White	79.0%	88.2%	71.9%
Black	1.0%	2.8%	6.5%
Hispanic or Latinx	44.9%	12.2%	39.4%
White, not Hispanic or Latinx	45.2%	80.6%	36.5%
Asian	6.3%	1.7%	15.5%
Native American, American Indian, Alaska Native	1.1%	0.3%	1.6%
Median Housing Value	\$392,000	\$768,600	\$505,000
Median Household Income	\$67,742	\$84,484	\$75,235
Median Income Per Capita	\$28,277	\$60,912	\$36,955
Persons without health insurance	12.7%	8.9%	7.5 %
Foreign Born Persons	20.4%	7.7%	26.8%
Firms (2012)	443	1,475	3,548,449
In civilian labor force 2015-2019	60.8%	54.9%	63.3%
Total retail sales, 2012 (\$1,000)	9,845	162,621	481,800,461

The contrast between Oceano and Pismo Beach City, adjacent communities of roughly the same size, raises significant economic justice implications. The Coastal Commission has recognized that “by the late 1970s neighborhoods that have benefited from decades of discrimination against racial minorities translated that benefit into higher property values, despite the end of widespread

²⁰² *Getting Cars Off the Beach in...Morro Bay*, SANTA LUCIAN (Sierra Club, Santa Lucia Chapter, San Luis Obispo Cnty., Ca.), Feb. 2020, at 9, https://www.sierraclub.org/sites/www.sierraclub.org/files/sce/santa-lucia-chapter/lucians/santa_lucian_2020_01_JanFeb.pdf.

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ U.S. Census Bureau, *Morro Bay city, California*, Quick Facts (last visited Mar. 4, 2021), <https://www.census.gov/quickfacts/morrobaycitycalifornia>.

²⁰⁷ U.S. Census Bureau, *California; Pismo Beach city, California; Oceano CDP, California*, Quick Facts (last visited Feb. 19, 2021), <https://www.census.gov/quickfacts/fact/table/CA,pismoeachcitycalifornia,oceanocdpcalifornia/PST045219>

public and official housing discrimination.”²⁰⁸ Unfortunately, Oceano does not appear to be exempt from this trend. The median housing value, number of firms, and total retail sales levels in Oceano are far below Pismo Beach figures. The average owner-occupied home in Pismo Beach is worth roughly 96 percent more than the average owner-occupied home in Oceano. Homeownership rates are particularly telling in the United States, where homeownership has continuously been a method for building wealth. People of color on average are less likely to be homeowners, and if they are homeowners their home value is often a fraction of their white counterparts.²⁰⁹

The non-economic costs to living near ODSVRA are taxing on the Oceano community as well. For one, “[n]oise from vehicle recreation is highest in [ODSVRA], where OHV activity is permitted.”²¹⁰ According to State Parks, “OHVs can generate noise levels in the range of 80-90 dBA” close to vehicles and 70-80 dBA around 50 to 100 feet away from the vehicle.²¹¹ Recommendations for noise exposure for low-density residential uses is less than 60db L_{dn}.²¹² The OHMVR Division receives complaints that OHV noise can be heard in residential areas.²¹³ Not only is typical OHV use a nuisance, but State Parks also permits large events that cause additionally high levels of noise and traffic. In 2014, for example, Huckfest “drew more than 11,000 people from across the country . . . to see trucks and buggies flying dozens of feet into the air over sand crests at the Oceano Dunes SVRA.”²¹⁴ Likewise, the 2018 Oceano Music Fest was advertised as having “70+ hours of continuous sound over 4 days on two alternating stages.”²¹⁵

State Parks has failed its responsibility to protect SVRAs “from damage and preserve the peace therein.”²¹⁶ As stated above, “the protection of public safety” is one of the highest priorities in the management of SVRAs.²¹⁷ Regulations prohibit the operation of an OHV “. . . negligently or willfully in such a manner as to pursue, harass, endanger, or injure any person or animal.”²¹⁸ Despite these rules, the Park has been described as possibly “the most dangerous state park in California.”²¹⁹ Off-roading on these hilly dunes has tragically led to injuries and deaths taking

²⁰⁸ CAL. COASTAL COMMISSION, 2019 ENVIRONMENTAL JUSTICE POLICY, AT 11 (Mar. 8, 2019), https://documents.coastal.ca.gov/assets/env-justice/CCC_EJ_Policy_FINAL.pdf.

²⁰⁹ See generally Richard Rothstein, *Color of Law: A Forgotten History of How Out Government Segregated America* (2017).

²¹⁰ See *supra* 104 at 16.0 (2020).

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ Kaytlyn Leslie, *Huckfest truck-jumping competition at Oceano Dunes is canceled*, The Tribune, (Oct. 8, 2015), <https://www.sanluisobispo.com/news/local/article39088569.html>.

²¹⁵ Monica Vaughan, *Is Oceano Dunes the next hot venue for overnight music fests? One is coming next month*, The Tribune, (Sep. 19, 2018), <https://www.sanluisobispo.com/entertainment/music-news-reviews/article218692650.html>. The 2018 Oceano Music Fest was canceled but has been rescheduled to take place in 2021.

²¹⁶ Cal. Pub. Res. Code § 5008(a).

²¹⁷ Cal. Pub. Res. Code § 5090.35(a).

²¹⁸ Cal. Code Regs. tit. 14, § 4354.

²¹⁹ Julie Cart, *The dust-up over California’s off-road beach; COVID highlights conflicts over air pollution, crime and accidents on California’s central Coast*, High Country News, (Nov. 25, 2020), <https://www.hcn.org/articles/recreation-the-dust-up-over-californias-off-road-beach>.

place at the Park. Reports of speeding, driving under the influence, and inexperienced users in the Park are common. Park rangers made about 47 arrests in 2016, 89 in 2017, 82 in 2018 (including 49 felony arrests, including some for gang-related activity, assault, and rape),²²⁰ and 84 in 2019.²²¹

In 2018, the California Statewide Law Enforcement Association stated that California State Parks rangers with the Resource Protection Peace Officers Association “have major public safety concerns for park visitors and rangers, and the perceived lack of concern by State Parks management.”²²² On busy weekends at the Park, “rangers can’t oversee the safe riding habits of all.”²²³ Vacationing, drinking alcohol, night riding, and off-roaders free to roam 1,500 acres of open dunes “sometimes combust to create a potent brew.”²²⁴ Though there is no definitive record of fatal accidents at the Park, The San Luis Obispo Tribune has identified 44 OHV accident fatalities, including children, between 1992 and 2019.²²⁵ In 2019, an unpermitted concert led to a mass shooting where a gunman allegedly opened fire on a crowd of people, leaving six people injured.²²⁶ The Oceano Dunes Rangers and San Luis Ambulance reported that most OHV users reside outside of San Luis Obispo County.²²⁷ Clearly, State Parks’ proposal to increase OHV use – when it already does not effectively enforce public safety rules – will further burden the local community.

Nor can the high burdens and minimal benefits to the community be justified as a way to provide low-cost recreational access to its parks. A new ATV can cost between \$2,000 and \$17,000,²²⁸ with the most popular models priced at no less than \$6,000.²²⁹ In State Parks’ own

²²⁰ See *supra* note 219.

²²¹ Kasey Bubnash, *Grand jury finds county public safety uninhibited by activities at Oceano Dunes*, New Times SLO, (Jul. 1, 2020), <https://www.newtimeslo.com/SLOthevirus/archives/2020/07/01/grand-jury-finds-county-public-safety-uninhibited-by-activities-at-oceano-dunes>.

²²² California Statewide Law Enforcement Association, *California State Parks Rangers Fear for Your Safety and Their Own; Rangers Call State Parks a ‘Department in Crisis,’* cslea.com, (Mar. 28, 2018), <https://cslea.com/2018/03/california-state-park-rangers-fear-for-your-safety-and-their-own/>.

²²³ SAN LUIS OBISPO COUNTY GRAND JURY, PUBLIC SAFETY SERVICES AND THE OCEANO DUNES, AT (Jun. 24, 2020) <https://drive.google.com/drive/folders/1fATISdb10hX4iUgG7jniUaE6BXGuEa0M>.

²²⁴ See *supra* note 219.

²²⁵ *Death toll at Oceano Dunes: At least 44 OHV accident fatalities since 1992*, The San Luis Obispo Tribune Editorial Board, The Tribune, (Jul. 19, 2020), <https://www.sanluisobispo.com/opinion/editorials/article231413543.html>.

²²⁶ Scott Middlecamp and Monica Vaughan, *6 injured in early morning shooting at Oceano Dunes, suspected gunman arrested*,” The Tribune, (May 5, 2019), <https://www.sanluisobispo.com/news/local/crime/article230050314.html>. The San Luis Obispo County District Attorney later dropped charges on a then 19-year-old in late 2020 due to insufficient evidence.

²²⁷ See *supra* note 223 at 7.

²²⁸ See generally *ATVs For Sale In Arroyo Grande, CA*, GoRollick.com, (last visited Feb. 19, 2021), https://gorollick.com/r/inventory/atvs-for-sale-in-arroyo-grande-california/atvs/93420/-/-/-/-/showroom?utm_source=blog&utm_medium=atvs&page=1.

²²⁹ See generally *Most Popular ATVs*, PowerSports.com, (last visited Feb. 19, 2021), <http://www.powersportstv.com/most-popular/atvs.php>.

commissioned study of ODSVRA users, the average household income of survey respondents was \$115,000, while the median household income for those who live in Oceano is \$28,277.²³⁰

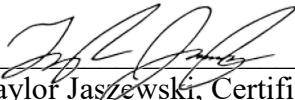
V. Conclusion


We appreciate the opportunity to provide comments on staff's recommended revisions of CDP 4-82-300 and the future of Oceano Dunes. If anything, the December 2020 draft PWP shows an increasing divergence between the Commission's and State Parks' vision for the Park. State Parks' proposed approach is inconsistent with law, devalues the needs of the local community, and ignores the protection of sensitive natural resources. Under the Coastal Act's mandates, the Coastal Commission has the authority to begin a new chapter at the Park. The COVID-19 closures have been a positive example of what Oceano Dunes could be without high-impact motorized use. In the short term, more people can enjoy the beach and new types of light-footprint recreation can take the place of destructive vehicle use. In the long term, endangered species will have a better chance of survival, the damaged and eroding dunes will heal, and local public health will improve. Our clients believe, passionately, that the time to make necessary change is now and they urge the Commission to act upon its staff recommendations to eliminate OHV use at the Park.

We appreciate your further attention to this important matter.

Respectfully submitted,

ENVIRONMENTAL LAW CLINIC
Mills Legal Clinic at Stanford Law School

By: 
Taylor Jaszewski, Certified Law Student
Molly Melius, Supervising Attorney

By: 
Mikaela Pyatt, Certified Law Student
Molly Melius, Supervising Attorney

*Submitted on behalf of the following Dunes
Alliance organizations and the Oceano
Beach Community Association: Santa Lucia
Chapter of the Sierra Club, the San Luis*

²³⁰ See *supra* note 201. This study estimated that ODSVRA provided a \$243 million economic benefit to San Luis Obispo County. An uncommissioned academic report found substantial issues with this "Economic Impact Analysis," such as not even considering permanent costs (such as lower home values) suffered by Oceano residents.

Obispo Chapter of the Surfrider Foundation, the Northern Chumash Tribal Council, Defenders of Wildlife, San Luis Obispo Coastkeeper, the Environmental Center of San Luis Obispo (ECOSLO), the Center for Biological Diversity, Concerned Citizens for Clean Air, Morro Coast Audubon, and Friends of Oso Flaco Lake.