

CALIFORNIA COASTAL COMMISSION

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Th23b

Prepared September 13, 2017 for September 14, 2017 Hearing

To: Commissioners and Interested Persons
From: Dan Carl, Central Coast District Director
Subject: **Additional hearing materials for Th23b**
CDP Application No. 3-12-050 (CA Parks and Recreation ODSVRA Dust Control)

Where checked in the boxes below, this package includes additional materials related to the above-referenced hearing item as follows:

- Staff report addendum
- Additional correspondence received in the time since the staff report was distributed
- Additional ex parte disclosures received in the time since the staff report was distributed
- Other.

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Th23b

Prepared September 13, 2017 for September 14, 2017 Hearing

To: Commissioners and Interested Persons

From: Dan Carl, Central Coast District Director
Susan Craig, Central Coast District Manager
Kevin Kahn, Central Coast District Supervisor

**Subject: STAFF REPORT ADDENDUM for Th23b
CDP Application Number 3-12-050 (ODSVRA Dust Control)**

In the time since the staff report was distributed on September 1, 2017, staff has received a number of comments on it. Most of these comments express opinions regarding staff's positions as articulated in the report. Staff believes that the substance of these comments is adequately addressed by the staff report findings, and these comments are noted but not further addressed here. Other comments, however, identify issues of factual or legal significance. The purpose of this addendum is to modify the staff report to address these latter issues. These changes do not alter the staff recommendation, which is still approval of the CDP with conditions. Any changes to the distributed staff report are shown in ~~strike through~~ for deletion and underline for addition as applicable. And a new section, "H. Response to Comments" is added to the end of the report.

A. Modified Special Conditions

The following changes are made to staff's recommended conditions on pages 8 and 9 of the staff report.

- In Special Condition 1, the "California Air Resources Board (CARB)" is referenced to make clear that the approved project is subject to consistency with CARB requirements, and all instances of the term "Permittee" are revised to say "State Parks."
- In Special Conditions 1(a) and 1(c), performance standards/criteria applicable to use of certain specified dust control measures are revised to be more specific.
- In Special Condition 1(b), the CARB reference is modified for consistency.
- In Special Condition 1(d), the windy season is revised to clarify that it is "generally" between March and September of each year, but that it could vary depending on actual conditions. And language is added to make clear that the approval is based on underlying landowner approval to undertake development on any particular property.
- In Special Condition 3, authority to extend the term of the CDP is revised from the Executive Director to the Commission itself.
- In Special Condition 4, all instances of the term "Permittee" are revised to say "State Parks."

Additions to special condition text are denoted in underline, and deletions are denoted in ~~strikethrough~~ as follows:

- I. *Approved Project.*** *This CDP authorizes ~~the Permittee~~ State Parks to implement specified airborne particulate matter emission (“dust”) control and related monitoring measures at ODSVRA in order to reduce and control dust generated at the Oceano Dunes State Vehicular Recreation Area (ODSVRA) consistent with the requirements of San Luis Obispo County Air Pollution Control District (APCD) and the California Air Resources Board (CARB) subject to these standard and special conditions, including all of the following:*

 - (a) *Dust Control Measures.*** *Approved dust control measures include planting native dune vegetation, installing wind fencing, installing porous roughness elements, installing perimeter fencing (around emissive ‘hot spots’), installing ‘track out’ devices at the Pier Avenue and West Grand Avenue entrances to ODSVRA, and installing native trees inland of ODSVRA. Soil stabilizers and straw bales shall only be utilized when the Executive Director determines that the proposed soil stabilizers and/or straw bales will be utilized in an amount, configuration, and composition that will not significantly disrupt dune habitat values (e.g., no significant degradation of dune habitats and/or vegetation; use to be kept to the minimum amount necessary to abate dust, etc.).*
 - (b) *Monitoring Measures.*** *Approved monitoring measures include the construction and operation of the S1 and Oso Flaco Meteorological and Air Quality Monitoring Stations in the locations identified in Exhibit 6, as well as other similar monitoring stations consistent with APCD or ~~California Air Resources Board (CARB)~~ requirements.*
 - (c) *Dust Control and Monitoring Area.*** *Approved dust control and monitoring measures are to be located in the area identified as “Primary Dust Control Area” in Exhibit 6, but may extend out of this area as necessary to meet CARB or APCD requirements, subject to concurrence by the Executive Director. In addition, track out devices are to be located at Pier and West Grand Avenues, but shall only be allowed within the existing paved street areas and shall not be allowed on the beach sand. Further, native trees shall only be planted where the Permittee has provided property owner consent for same, and where the Executive Director determines that the proposed native trees will be planted in an amount, configuration, and species type that will not have significant adverse effects on coastal resources (e.g., no obstruction of any public coastal views; no significant degradation of dune vegetation and habitat; no loss of prime agricultural lands or lands used for agricultural production, etc.).*
 - (d) *Dust Control Measures Coverage.*** *Approved dust control measures are expected to result in planting/maintaining approximately 20 acres of vegetation each year (or approximately 100 acres over a five-year period), and installing approximately 40 acres of other dust control (e.g., wind fencing, etc.) during the windy season (generally between March through September) each year. Authority for State Parks to implement the approved dust control and related monitoring measures at any given location is subject to the requirement that State Parks has landowner approval to undertake development on that property.*

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

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

- 2. **Annual Approval Required.** Prior to implementing any of the Approved Project elements for each calendar year, the Permittee shall submit, for Executive Director review and approval, an Annual Work Plan that clearly describes the dust control and monitoring measures to be implemented for that year, where the Annual Work Plan shall be submitted with evidence that APCD and CARB have reviewed the measures and consider them consistent with their requirements related to dust control at ODSVRA. Each Annual Work Plan shall include a description of the previous year's measures, including monitoring data identifying effectiveness and any coastal resource impacts, including the effectiveness and success of dune revegetation.*
- 3. **Duration of Authorization.** This CDP authorizes the Approved Project for five years (i.e., until September 14, 2022). The ~~Commission Executive Director~~ may extend the expiration date by additional five-year periods if the Permittee submits a written request to do so prior to September 14, 2022 (and prior to the expiration date for any subsequent five-year extension approvals), where such request shall summarize the previous five year's efforts subject to the same requirements as the Annual Work Plan, and the expiration date shall only be extended if the summary of the Annual Work Plans and/or other related information demonstrate that there are not changed circumstances that the ~~Commission Executive Director~~ determines would require the proposal to be heard as a new CDP or CDP amendment ~~by the Coastal Commission~~.*
- 4. **Indemnification by State Parks Permittee/Liability for Costs and Attorneys' Fees.** By acceptance of this CDP, ~~the Permittee~~ State Parks agrees to reimburse the Coastal Commission in full for all Coastal Commission costs and attorneys' fees (including (1) those charged by the Office of the Attorney General, and (2) any court costs and attorneys' fees that the Coastal Commission may be required by a court to pay) that the Coastal Commission incurs in connection with the defense of any action brought by a party other than State Parks ~~the Permittee~~ against the Coastal Commission, its officers, employees, agents, successors and assigns challenging the approval or issuance of this CDP. The Coastal Commission retains complete authority to conduct and direct the Commission's defense of any such action against the Coastal Commission.*

B. Air Quality Data

Questions have been raised by some commenters regarding a limited subset of data presented in Dr. Laurie Koteen's (the Commission's Staff Ecologist) memo that is attached as Exhibit 10 of the staff report. Specifically, Table 1 lists the state and federal particulate matter standards. The

table lists the state PM2.5 24-hour standard at 35µg/m³ and does not list a federal standard. However, the opposite is true, in that the federal 24-hour PM2.5 standard is 35µg/m³ while there is no state standard for this metric. Furthermore, while Exhibit 10 states that between 2013 and August 2017 there were nine exceedances of the federal daily PM2.5 standard, there were actually six exceedances in this timeframe. The staff report also states that state and federal standards were exceeded at the Mesa 2 “and other air quality stations,” while the data presented in the staff report and memorandum only document the exceedances at the Mesa 2 station. And finally, while Exhibit 10 lists 49 exceedances of the state 24-hour PM10 standard at the CDF monitoring station, there were actually 59 exceedances. The staff report is modified as follows to correctly identify the numbers:

Modify page 17 of the staff report as follows:

Between 2013 and August 2017, an APCD air quality monitor (often referred to as the CDF monitor or tower), located one-half mile east of ODSVRA near the residential community of Nipomo, has recorded two exceedances of the Federal daily PM10 standard,¹ 282 exceedances of the State daily PM10 standard,² and ~~nine~~ six exceedances of the federal daily PM2.5 standard. In addition, the federal and state standard for annual average emissions of PM2.5 is 12.0 µg/m³, and monitoring indicates that this standard too has been exceeded twice in this same time frame. All of these Federal and state standards have also been exceeded at the Mesa 2 monitoring station ~~and other local air quality monitoring stations.~~ ...

Modify Table 1 on page 3 of Exhibit 10 as follows:

Table 1: State and National Ambient Air Quality Standards for Particulate Matter

	California Ambient Air Quality Standards for PM³		National Ambient Air Quality Standards for PM⁴	
Averaging Time	<i>PM10</i>	<i>PM2.5</i>	<i>PM10</i>	<i>PM2.5</i>
Annual	20 µg.m ⁻³	12 µg.m ⁻³	*	12 µg.m ⁻³
24 Hours	50 µg.m ⁻³	* 35 µg.m⁻³	150 µg.m ⁻³	* 35 µg.m⁻³

* Standards not set for these emission categories

Modify Table 2 on page 3 of Exhibit 10 as follows:

¹ The federal daily standard for PM10 is 150 micrograms (one-millionth of a gram) per cubic meter of air (expressed as 150 µg/m³), and the federal daily PM2.5 standard is 35 µg/m³.

² The California daily standard for PM10 is 50 micrograms per cubic meter of air (50 µg/m³).

³ <http://www.arb.ca.gov/research/aaqs/caaqs/pm/pm.htm>.

⁴ The actual standards ~~are~~ actually require slightly more computation. The PM2.5 annual standard is more precisely, 35 µg.m⁻³ averaged over three years. The daily standard for PM2.5 sets the threshold at the 98th percentile averaged over three years. The daily PM10 standard states that concentrations should not exceed 150 µg.m³ more than once on average over three years. <https://www.epa.gov/criteria-air-pollutants/naaqs-table>.

Table 2: Number of State and Federal Exceedances of Particulate Air Standards at the CDF Station on the Nipomo Mesa.

Year	PM10			PM2.5	
	Federal 24-hr Exceedances	State 24-hr Exceedances	Annual Average*	Federal 24-hr Exceedances	Annual Average
2017 **	0	49	26.7	0	10.1
2016	0	75	27.1	0	8.4
2015	1	67	27.7	1	11.2
2014	1	42	28.6	2	12.8
2013	0	49 59	30.5	3	12.6

** Partial year, data through 8.27.17.

C. New Staff Report Section

Add the following as Section H of the staff report following the end of the CEQA section on staff report page 31:

H. Response to Comments

Commission Authority With Respect To Air Quality

Contrary to assertions stating otherwise, approval of the project as conditioned does not expand the authority vested to the Commission under the Coastal Act to regulate and protect coastal resources by assuming the San Luis Obispo County Air Pollution Control District's (APCD) or the California Air Resources Board's (CARB) role in regulating air quality, and it does not expand its authority in an attempt to modify, create, or promulgate air quality protection programs or requirements contrary to Coastal Act Section 30414 direction. To the contrary, this report is clear that the Coastal Act specifically states that air quality protection programs, requirements, and emissions standards are the purview of CARB and local air pollution control districts, in this case the APCD. At the same time the Coastal Act specifically tasks the Commission with ensuring that proposed development is consistent with the requirements of CARB and APCD through Coastal Act Section 30253(c). Thus, a key question in this process has been to what extent DPR's proposed project is consistent with APCD's and CARB's respective air quality requirements. Both CARB and APCD have weighed in on this point (as shown in Exhibits 8 and 9), and, as required by Section 30253(c) of the Coastal Act, the recommended conditions reflect the need to ensure that what is approved is consistent with their requirements. And it is important to note that the Commission's approval here does not necessarily *require* that the authorized measures be undertaken, but simply authorizes them as potential tools that the Commission expects to be used through the ongoing collaboration

between DPR, CARB, and APCD to ensure State Parks complies with CARB and APCD requirements in its operation of ODSVRA. Thus, in conclusion, this approval does not modify any air quality standard, metric, or program, which the Coastal Act specifically identifies as the purview of CARB and APCD, but rather authorizes a broad suite of tools, consistent with APCD and CARB requirements, to address the identified air quality problem which necessitates this CDP application in the first place. The discussion beginning on page 21 further elaborates on these points.

Revegetation as an Approved Project Component

In terms of observations that planting dune vegetation for dust control purposes would be inconsistent with Coastal Act requirements, particularly Section 30240 which regulates environmentally sensitive habitat areas (ESHA) such as the dunes at ODSVRA, the Commission disagrees. Dunes can support a healthy mix of vegetation native to dune environments, and the discussion beginning on page 21 and the conditions of approval make clear that such dune plantings are to be undertaken in a manner that protects unique dune habitats, including in terms of being of a plant type and mix that is native and ecologically compatible with the area, including for sensitive species.

In addition, in terms of the assertion that planting dune vegetation may harm sensitive species (like Western snowy plovers and California least terns) by harboring predators, the Commission believes that the significance of this supposition is exaggerated. First, off-highway vehicles (OHVs) are already driving throughout the dune areas in question, potentially adversely impacting special-status species, and replacing that activity in some areas with revegetated dunes would be expected to better protect sensitive species in those areas. In addition, those OHVs would be expected to continue to drive in the dune areas near any revegetation areas, which again can be reasonably expected to have significant adverse impacts on sensitive species in those areas regardless of the potential for any increased predation due to any introduced dune vegetation. And with respect to the potential for increased predation as a result of dune vegetation, Dr. Koteen, who has reviewed the project materials and visited the site, agrees in theory with generalized assertions that certain types and locations of vegetation can harbor predators with risk to snowy plovers and least terns, but she maintains that the increased risk is small, and that it can be mitigated by predator management and judicious vegetation placement. More fundamentally, she concludes that in this case, where such vegetation would be placed in a disturbed dune environment that is heavily used by OHVs, the risk of adverse impacts to special-status species from dune vegetation is not significant in comparison to other impacts which threaten those species (i.e., OHV use). Given those factors, the Commission, relying on Dr. Koteen's expertise, does not believe that the use of dune revegetation presents any significant potential to adversely impact sensitive species through increased sensitive species predation. Thus, as conditioned, the project will be implemented in a manner that will ensure no significant disruption of ESHA, including the habitat on which the western snowy plover and least tern relies.

A related argument that some commenters have made with respect to alleged impacts of dune revegetation on Western snowy plover and California least tern is that revegetation may impact designated critical habitat and further may result in take of these special-status species. On this point, commenters have variously alleged that USFWS has not been consulted prior to

Commission consideration of this item, and that this matter should be postponed until USFWS completes a habitat conservation plan (HCP) for the proposed activities.

The Commission notes that DPR has been in the process of developing a HCP for ODSVRA for over 15 years. The HCP is required by the USFWS for the protection of listed species at ODSVRA, such as the Western snowy plover, California least tern, steelhead trout, and tidewater goby. The primary purpose of the HCP is to ensure that park management, maintenance, and development activities protect these threatened and endangered plant and animal species consistent with the federal and state Endangered Species Acts. According to DPR, the HCP is on its third administrative draft under review by the USFWS and CDFW, and upon review and insertion of additional refinements, DPR plans to release a public review HCP draft (there has not to date been a publicly available review draft). In other words, a HCP for the park has proven elusive, but to date USFWS has allowed DPR to continue to operate the park anyway, including despite documented take of listed species. The suggestion that some dune revegetation may conflict with the HCP (if and when it is finally publicly released) and that this project should not go forward makes little sense considering the context that vehicles continue to drive over these same dunes (which present a much higher risk of significant adverse impacts to special-status species which could result in take, as discussed above) on a daily basis absent a HCP.

Finally, it is worth noting that Commission staff did reach out to USFWS for comment on DPR's proposed dust control program prior to drafting the staff report and USFWS staff did not identify any potential problematic issues and did not have any particular comments on the project at that time. The Commission's belief that authorizing revegetation as an appropriate project component here remains unchanged.

Consistency of Approved Project Components With Respect To ESHA Policies

One commenter argues that the dust control measures that would be approved would be inconsistent with Section 30240 of the Coastal Act which protects ESHA, alleging that the proposed measures are not a resource-dependent use, and that the measures will not protect against significant disruption of habitat values.

These arguments essentially seek to undermine the project's consistency with the two prongs set forth in Section 30240 applicable to protection of ESHA. With respect to the first argument, the commenter claims that because the EIR characterizes this project as a dust control project rather than a project which stabilizes and restores dune surface properties (as identified in this report), that the proposed measures cannot constitute a resource-dependent use. However, this distinction fails to recognize that the dust control purpose and dune surface stabilization/restoration purpose of the project are inherently connected. The proposed dust control measures help to stabilize and restore dune surface properties and the dunes themselves overall. Likewise, stabilization and restoration of dunes in this manner is the broad method by which State Parks is expected to control dust emissions at ODSVRA. Thus, it is accurate to describe the project as stabilization/restoration of dunes and in that regard the proposed development overall as a whole is inherently a resource-dependent use.

With respect to the second argument, the commenter generally suggests that placement of the proposed dust control measures in disturbed ESHA will further disturb the ESHA, rather than protect it. However, as discussed above, the proposed measures will be placed in disturbed

ESHA to *protect* the disturbed habitat from further disturbance, which will facilitate stabilization and restoration of the dunes surface properties and the dunes themselves, and thus reduce dust emissions. Placement of the proposed measures within *undisturbed* ESHA is generally unnecessary because such dune habitat does not require dune surface stabilization or restoration in order to reduce dust emissions.

As a specific example, the commenter suggests that the potential use of rough porous elements do not stabilize dune structures, but simply reduce wind-blown dust. However, as discussed above, reducing wind-blown dust, and suppressing saltation which mobilizes dust particles, inherently facilitates stabilization and restoration of dune surface properties and the dunes themselves overall. Moreover, when beaches and dunes are left undisturbed, several processes are set in motion which serve to stabilize the dune surface and reduce its emissivity (see Exhibit 10 for a more lengthy discussion of these biophysical and chemical stabilization processes). By establishing porous roughness arrays, or other means of dust abatement, large areas are cordoned off from active disturbance by OHVs and other human incursions. Thus, use of porous roughness elements here will protect against significant disruption of habitat values.

In addition, perimeter fencing is currently employed at ODSVRA to protect Western snowy plovers and has led to a highly successful breeding program. Thus, if additional perimeter fencing is employed as a means of dust control in other critical habitat areas, it would be expected to have similar habitat benefits, including because such fencing, designed to keep out vehicles and other potentially impactful activities, would be more protective of birds than allowing large moving vehicles in the habitat. As such, these types of activities are appropriate in ESHA, consistent with Coastal Act Section 30240. The discussion beginning on page 21 and in Exhibit 10 further elaborates on these points.

Relation of Commission Action to CEQA Requirements

One commenter makes various CEQA-related arguments with respect to potential Commission approval of the proposed project, all of which arguments are inapposite to the Commission's responsibilities under the Coastal Act.

First, the commenter critiques the Commission's analysis of environmental impacts to coastal resources by citing to various provisions of the CEQA statute and CEQA guidelines. Although certain CEQA requirements do apply to the Coastal Commission's consideration of CDP applications (namely a prohibition against approval of a proposed development if feasible alternatives or mitigation measures would substantially lessen significant adverse effects of the activity on the environment),⁵ the various CEQA statutory and regulatory provisions cited by the commenter do not apply to the Commission's CDP process. As explained in the CEQA section on page 31, consideration and issuance of CDPs has been certified under CEQA as the *functional equivalent* of CEQA (per CCR Section 15251(c)).

Relatedly, the commenter critiques the report for not reaching the same conclusions as DPR's EIR with respect to the significance of various environmental impacts on coastal resources. However, the Commission is not obligated to reach the same conclusions as DPR's EIR

⁵ See, for example, California Code of Regulations (CCR) Section 13096 and Public Resources Code (PRC) Section 21080.5(d)(2)(A).

regarding the significance of project impacts to coastal resources. As stated in the CEQA section of the report, the Commission complies with CEQA “by considering the EIR ... prepared by the Lead Agency and by reaching its own conclusions on whether and how to approve the project involved” (CCR Section 15096(a)). CEQA does not compel the Commission to reach the same conclusions as the EIR regarding the significance of project impacts to coastal resources. And in this case, and as articulated on page 31, the conclusions drawn under the Coastal Act here may be derived under different analytic methodologies than DPR’s EIR conclusions, and are different in this case for analysis of certain coastal resources, as the Commission is empowered to under the Coastal Act.

Finally, the commenter critiques the aforementioned analysis for not concluding that impacts to public access constitute a significant adverse environmental impact. However, the commenter cites no authority for the proposition that impacts to public access are an environmental impact for CEQA purposes.⁶ Public access *is*, however, a Coastal Act issue, and it is within that framework – not CEQA – that the Commission here is evaluating public access impacts. And, as a *Coastal Act* matter, the staff report adequately addresses why the project will have less than significant impacts on public access and is otherwise consistent with the public access and recreation policies of the Coastal Act. See that discussion beginning on page 26. In addition, even if the conclusions in the staff report were in some way in conflict with substantive provisions of CEQA relating to public access, which they are not, to the extent that there is a conflict between CEQA and the Coastal Act, the provisions of the Coastal Act control.⁷

State Parks Authority With Respect To La Grande Tract

A number of commenters have raised the issue that it appears that State Parks does not have a valid agreement, lease, or memorandum of understanding (the latter of which appears to be required under the LCP) with the County to undertake the approved development on the La Grande Tract. A lease agreement provided by DPR that purported to specify such an agreement appears to be expired, but as stated in the staff report State Parks represents that it leases the property from the County on a month-to-month basis by operation of Civil Code Sections 1945 and 1946 since the County has never provided notice that it intended to cancel the lease. And County staff has indicated that DPR continues to operate on the basis of an ongoing “holdover” month-to-month agreement with the County.

In addition, it is worth noting that during the five years that this CDP application has been in development, both the County and State Parks have consistently represented to the Commission that State Parks has the authority to administer and operate its OHV program within the La Grande Tract. Since the County has never complained or asserted otherwise (that State Parks does not have authority to use the La Grande Tract), and in fact has said that DPR is operating there with their acquiescence, based on Commission staff’s communications with the County, the Commission reasonably relied on these representations in concluding that State Parks had authority to undertake the proposed development within ODSVRA, including specifically within the La Grande Tract.

⁶ See PRC Section 21060.5 and CCR Section 15360 for CEQA definitions of “environment” as “**physical conditions** that exist within the area which will be affected by a proposed project...” (emphasis added).

⁷ PRC Section 21174.

A related issue with respect to La Grande Tract is that there are other small inholdings scattered within that area that are owned by other parties, which appear to be a function of a historic paper subdivision in that area. As required by the Coastal Act (Section 30601.5) Commission staff invited the 41 owners of such private inholdings in the La Grande Tract to join as co-applicants for this CDP application. To date only one of these private inholding owners has responded affirmatively that she seeks to join State Parks as a co-applicant of this permit. As a co-applicant, this landowner would be responsible for complying with all of the conditions of this permit, including working with State Parks to implement the proposed dust control measures.

In light of the concerns identified above with respect to State Parks' authority to undertake the proposed project on the La Grande Tract, including both the County-owned portion and the portion owned as private inholdings, Special Condition 1(d) authorizes State Parks to pursue the approved development at any given location in ODSVRA only to the extent that it has landowner approval to undertake development on that particular parcel. Should there be complications associated with including a co-applicant on this permit, Special Condition 1(d) would operate to prohibit development on that particular landowners' parcel. Wind fencing and other development authorized in this permit could be placed outside of any such parcel, to reduce emissions, if any, emanating from the parcel, but the development would not be placed directly on that parcel.