

**CASE NO. B330994**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX**

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FRIENDS OF OCEANO DUNES, INC., et al.  
*Respondents and Cross-Appellants*

v.

CALIFORNIA COASTAL COMMISSION, et al.  
*Appellants and Cross-Respondents*

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**Application to file Amicus Curiae Brief and [Proposed] Amicus Curiae  
Brief in Support of Appellants and Cross-Respondents**

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On Appeal from the Superior Court for the State of California,  
County of San Luis Obispo, Case No. 21CV-0214,  
[Consolidated with Case Nos. 21CV-0219, 21CV-0246, 21CV-0541]  
Hon. Tana L. Coates

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**APPLICATION FOR LEAVE TO FILE  
AMICUS CURIAE BRIEF AND  
[PROPOSED] BRIEF IN SUPPORT  
OF CALIFORNIA COASTAL COMMISSION**

Pursuant to Rule 8.200, subdivision (c) of the California Rules of Court, The Surfrider Foundation, Oceano Beach Community Association, Northern Chumash Tribal Council, Sierra Club, Center for Biological Diversity, and San Luis Obispo Coastkeeper (collectively, Amici) respectfully request leave to file the attached amicus curiae brief in support of the California Coastal Commission (Commission).

**HOW THIS BRIEF WILL ASSIST THE COURT**

Amici’s proposed amicus curiae brief will assist the Court by providing context demonstrating that this case does not involve a choice between preserving environmentally sensitive habitat area (ESHA) and facilitating access to public recreation but, instead, pits inherently destructive off-highway vehicle use (OHV) against ESHA, all other public uses, and the continued existence of the Oceano Dunes. The brief will highlight the factual background and legal landscape underscoring the necessity of phasing out OHV use in furtherance of low-impact recreation, public health and safety, environmental justice, and the preservation of tribal cultural resources—in conjunction with the preservation of ESHA. The parties’ briefs do not fully address these issues, which are critical to understanding the questions before the Court.

## STATEMENTS OF INTEREST OF AMICI CURIAE

### I. Surfrider Foundation

Surfrider is a national grassroots nonprofit organization headquartered in Orange County, California, and dedicated to the protection and enjoyment of the ocean, waves, and beaches. Surfrider works to secure universal, low-impact beach access for all people as a matter of right. It has more than 300,000 supporters, activists, and members who live in the United States and roughly 200 local chapters and school clubs nationwide, including the volunteer-based San Luis Obispo County Chapter. Surfrider has a long history of participating as a party or amicus curiae in California litigation involving coastal issues.<sup>1</sup>

Surfrider has a particular interest in the outcome of the present litigation. This case involves the ability of OHV users to effectively exclude all other members of the general public from safely accessing the beaches of Oceano Dunes and, accordingly, the ocean beyond. Surfrider has members who live and work near Oceano Dunes, along with members who visit the surrounding areas and who desire to engage in low-impact recreation—such as beach walks and picnics, sunbathing, hiking, tent

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<sup>1</sup> For examples of direct litigation and intervention, see *Surfrider Foundation v. Martins Beach I, LLC* (2017) 14 Cal.App.5th 238; *Beach & Bluff Conservancy v. City of Solana Beach* (2018) 28 Cal.App.5th 244. For examples of amicus curiae participation, see *Lynch v. California Coastal Com.* (2017) 3 Cal.5th 470; *Lent v. California Coastal Com.* (2021) 62 Cal.App.5th 812, as modified on denial of reh'g (Apr. 16, 2021); *Marine Forests Society v. California Coastal Com.* (2005) 36 Cal.4th 1; *Schmeer v. County of Los Angeles* (2013) 213 Cal.App.4th 1310, as modified (Mar. 11, 2013); *Bldg. Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, as modified on denial of reh'g (Jan. 4, 2005).

camping, surfing, sandboarding, and birdwatching—in the affected areas but have been dissuaded from doing so by OHV use. Moreover, Surfrider participated in the administrative proceedings related to the present dispute, including by offering public comments and attending hearings.<sup>2</sup> Given its mission, Surfrider also has a general interest in the California Coastal Commission’s ability to carry out its legal obligations to protect beaches and maximize public beach access and recreational opportunities in the coastal zone.

## **II. Oceano Beach Community Association**

Oceano Beach Community Association consists of a coalition of residents and Oceano businesses owners whose goal is improving livability, accessibility, and beauty while preserving cultural diversity, historic character, and coastal environmental health. Low-impact, safe beach access is critical to an Oceano that can be enjoyed by locals and visitors alike. The population of Oceano, which is nearly half Hispanic, is currently unable to safely engage in low-impact recreation on its local beach due to OHV use, and Oceano’s economy suffers from a lack of tourism compared to nearby cities with more peaceful and less dangerous coastal lands. The Association’s members have documented the degradation of the Oceano Dunes caused by OHV use for the Coastal Commission via extensive involvement in the administrative proceedings below and have consistently

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<sup>2</sup> See AR 1462–1464, 2304, 20272, 27237 (comments in Surfrider’s name); AR 2155–2156, 3245–3247, 40816–40074, 55679 (comments as a member of the Dunes Alliance).

attended meetings held by the Commission regarding OHV use in the Dunes.<sup>3</sup>

### **III. Northern Chumash Tribal Council**

The Northern Chumash Tribal Council (Chumash) maintains a deep cultural and historical connection to the coastline that spans from the Big Sur mountains to the Malibu coast. This area, including the portion known today as the Oceano Dunes State Vehicular Recreation Area (ODSVRA), has been home to the Chumash people for generations. The Chumash have been the land's stewards and caretakers since time immemorial, and this role has been compromised by the advent of OHV activities. These activities have not only impeded traditional practices but have also caused pollution and degradation of the land, affecting both the tribe's material culture and spiritual well-being. The Chumash deem it imperative that OHV activities on the dunes cease, with priority given to coastal care and the health of species reliant on clean ocean and river waters. Through comments and multiple agency consultations, the tribe has called for immediate action to remediate pollution and restore and repair sensitive sites, and to devise a future plan that includes low-impact recreational use while prioritizing the preservation of these unique coastal dunes.<sup>4</sup>

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<sup>3</sup> See, e.g., AR 3511–3512, 17250–17253, 51575–51577, 57345 (comments in the Association's name); AR 3245–3247, 40816–40074, 55679 (comments in conjunction with the Dunes Alliance); AR 110, fn. 121 (findings of the Commission recognizing the Association's engagement on environmental justice issues at the Dunes).

<sup>4</sup> See AR 2727–2733, 12624–12631, 12633–12638, 25030–25031, 27230–27233, 52515–52517 (comments directly on behalf of the Northern Chumash); AR 2155–2156, 3245–3247, 40816–40074, 55679 (comments as a member of the Dunes Alliance).

#### **IV. Sierra Club**

The Sierra Club is a national nonprofit environmental group with approximately 613,000 members, including over 132,000 in California, dedicated to exploring, enjoying, and protecting the wild places of the earth; practicing and promoting the responsible use of the earth's ecosystems and resources; educating and enlisting humanity to protect and restore the quality of the natural and human environment; and using all lawful means to carry out these objectives for the benefit of present and future generations. The Sierra Club has fought to preserve and defend the Dunes for over 50 years, including by providing comments concerning the harm to access and ESHA caused by OHV use and otherwise participating in the administrative proceedings below.<sup>5</sup>

#### **V. Center for Biological Diversity**

Center for Biological Diversity is an organization with over 89,000 members that works to secure a future for all species, great and small, hovering on the brink of extinction, through science, law, and creative media, with a focus on protecting the lands, waters, and climate that species need to survive. The Center has members who live and work near Oceano Dunes, along with members who visit the surrounding areas, and who appreciate the inherent value of the Dunes and the species that inhabit them. The Center's members also value the opportunity to observe protected

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<sup>5</sup> See, e.g., AR 1490–1491 (comments in Sierra Club's name); AR 2155–2156, 3245–3247, 40816–40074, 55679 (comments as a member of the Dunes Alliance); AR 398 (summarizing more than 2,500 comments from Sierra Club supporters).

species such as Western snowy plovers and least terns in the affected areas but have been dissuaded and impeded from doing so by OHV use.

The Center has a long history of advocacy in protecting wildlife from the damage caused by OHVs in the Oceano Dunes, including through public comments in the administrative proceedings below, in its own name and as part of the Dunes Alliance coalition;<sup>6</sup> by directly engaging in litigation as a plaintiff in a pending federal case challenging the illegal “take” of protected species at the Dunes under the Endangered Species Act;<sup>7</sup> and by intervening in a related action.<sup>8</sup>

## **VI. San Luis Obispo Coastkeeper**

The San Luis Obispo Coastkeeper (SLO Coastkeeper) is a member of the Waterkeeper Alliance—an international organization dedicated to conservation and the protection of fishable, swimmable, and drinkable water. SLO Coastkeeper aims to protect and improve healthy and diverse Central Coast watersheds and marine ecosystems and is dedicated to the consistent enforcement of coastal planning regulations in San Luis Obispo County.

SLO Coastkeeper has approximately 900 supporting members, including members who live and work near Oceano Dunes, along with

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<sup>6</sup> See AR 1280–1283 (own name); AR 2155–2156, 3245–3247, 40816–40074, 55679 (as a member of the Dunes Alliance).

<sup>7</sup> See *Center for Biological Diversity v. Quintero* (C.D. Cal., Oct. 29, 2020, No. 20-CV-09965) (alleging illegal “take” of protected species based on OHV use at Oceano Dunes).

<sup>8</sup> See *California State Grange v. Norton* (E.D. Cal., Sept. 14, 2005, No. CIV. S 05-0560 MCE PAN) 2005 WL 8176680 (allowing intervention in a case challenging federal agencies’ failure to conduct a five-year status review of protected species including least terns at Oceano Dunes).



members who visit the surrounding areas and who desire to engage in low-impact recreation in the affected areas but have been dissuaded from doing so by OHV use.

SLO Coastkeeper has provided public comments in the administrative proceedings below,<sup>9</sup> along with attending related hearings, and can contribute a unique understanding and perspective on how OHV use at the Dunes negatively affects residential and visitor life and environmental health.

#### **STATEMENT REGARDING PREPARATION OF BRIEF**

No party or counsel in the pending case authored the proposed amicus curiae brief in whole or in part, or made any monetary contribution intended to fund the preparation or submission of the brief. No person other than the proposed Amici made any monetary contribution intended to fund the preparation or submission of this brief.

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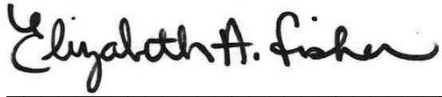
<sup>9</sup> See AR 2155–2156, 3245–3247, 40816–40074 (comments as a member of the Dunes Alliance).

**REQUEST FOR LEAVE TO FILE**

Because the decision of this Court will directly affect Amici, and because their proposed amicus brief brings a unique perspective to bear on this matter, Amici respectfully request that the Court grant leave to file this amicus curiae brief.

DATED: November 15, 2024

EARTHJUSTICE

By: 

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## BRIEF OF AMICI CURIAE

### INTRODUCTION

The Oceano Dunes<sup>10</sup> along the Central Coast of California are irreplaceably beautiful, ecologically important, and culturally significant—as the final resting place of ancestors of living Native Americans, the location of culturally significant ancestral sites, and a place of spiritual connection. Allowing such a significant place to be used as a playground for off-highway vehicles (OHVs)<sup>11</sup> to destroy defies all logic and is inconsistent with the mandates of the California Coastal Act.

Oceano Dunes attracts many visitors, for a range of recreational, scientific, and spiritual activities;<sup>12</sup> yet decades of OHV use are slowly

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<sup>10</sup> Unless the context requires otherwise, references to “Oceano Dunes” or “the Dunes” throughout this brief shall encompass the entirety of the nearly 5,000-acre state park that includes 8 miles of shoreline and beach along with a natural sand dune system extending 2 miles inland, and which is “part of the larger 18-mile-long Guadalupe-Nipomo dunes complex (the largest such intact coastal dunes system in the world, and a federally designated National Landmark).” AR 1–2.

<sup>11</sup> As used herein, the term “OHVs” may include street-legal vehicles engaged in beach driving in environmentally sensitive habitat where required by the context.

<sup>12</sup> See, e.g., Pub. Resources Code, § 30251 (“The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance[.]”); AR 1538, 1541, 4058 (describing visitors’ appreciation of the beauty of Oceano Dunes); Sivas and Caldwell, *A New Vision for California Ocean Governance: Comprehensive Ecosystem-Based Marine Zoning* (2008) 27 Stan. Env’t L.J. 209, 213 (referencing “the broad sandy beaches and beautiful rocky shorelines that lure coastal recreation and tourism” and noting that “the state’s diverse coastal communities are primary drivers of economic activity and aesthetic enjoyment”).

To the extent this brief cites law review articles or academic studies outside the administrative record, Amici note the function of amicus curiae briefs is to help the Court “broaden[] its perspective on the issues raised by

destroying the dunes by eroding and destabilizing these landforms, degrading the surrounding ecosystem, and killing wildlife.

OHV use effectively excludes myriad forms of low-impact public recreation by forcing the public to choose between staying away from the Dunes or risking serious bodily injury from vehicles and respiratory harm from particulate matter that OHVs mobilize both directly and indirectly. Allowing OHV use to continue at Oceano Dunes would perpetuate an unlawful barrier to public access, in violation of the mandates of the Coastal Act to prioritize the protection of environmentally sensitive habitat area (ESHA) while maximizing compatible public recreation “for all the people.”<sup>13</sup> OHV use further violates the Commission’s environmental justice policy by increasing the air pollution burden and limiting recreation options for residents of disadvantaged communities, and is inconsistent with interrelated terms of the Local Coastal Program (LCP) and Coastal Development Permit (CDP) intended to protect sensitive resources, including spaces that are culturally significant to Native American tribes.

Consistent with these interrelated laws and policies, Amici respectfully support Appellants’ request to reverse the judgment below and

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the parties” and “facilitate informed judicial consideration of a wide variety of information and points of view that may bear on important legal questions.” (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1177.) Appellate rules and practice “accord wide latitude” to amici. (*Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 405, fn. 14, as modified (Nov. 12, 1992).

<sup>13</sup> Pub. Resources Code, § 30210; see also Cal. Const. art. X, § 4 (discussing the public’s right to access navigable waters).

allow the Coastal Commission's 2021 decision phasing out OHV use at Oceano Dunes to take effect.<sup>14</sup>

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<sup>14</sup> The Commission also properly phased out beach driving by street-legal vehicles on over two miles of ESHA (including Arroyo Grande Creek) south of Pier Avenue, which had connected the Pier Avenue park entrance to an OHV staging area; and properly closed the vehicle access point at Pier Avenue. AR 22, 28.

## ARGUMENT

### **I. Destructive OHV Use at Oceano Dunes Is Fundamentally Incompatible with the Coastal Act's Mandates, the Commission's Environmental Justice Policy, and the Dunes' Continued Existence.**

There is “a philosophical struggle occasioned by incompatible desires and aims between [OHV] users and non-motorized trail users.”<sup>15</sup> It is “fairly obvious” that OHV use “is often incompatible with the quiet enjoyment of the seashore that . . . the vast majority of visitors would seek.”<sup>16</sup> Accordingly, OHV use on public land is a “dilemma of sharply inconsistent uses,” such as “negative environmental consequences, including soil disruption and compaction, harassment of animals, and annoyance of wilderness lovers.”<sup>17</sup>

The California Department of Parks and Recreation (State Parks) granted primacy to OHV Users<sup>18</sup> and OHV service-providers (collectively, OHV Parties)<sup>19</sup> on Oceano Dunes' protected lands for decades, effectively choosing this special interest group over everything else at stake—ecologically sensitive habitat, tribal cultural resources, public health, and all other forms of public recreation. The Commission's ultimate decision to

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<sup>15</sup> *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture* (9th Cir. 1994) 18 F.3d 1468, 1475 (hereinafter *Northwest Motorcycle Ass'n*).

<sup>16</sup> *Conservation Law Foundation of New England, Inc. v. Secretary of the Interior* (1st Cir. 1989) 864 F.2d 954, 961 (conc. opn. of Breyer, J.).

<sup>17</sup> *Norton v. Southern Utah Wilderness Alliance* (2004) 542 U.S. 55, 61.

<sup>18</sup> The phrase “OHV Users” shall mean Friends of Oceano Dunes, Inc.

<sup>19</sup> The phrase “OHV Parties” shall mean Friends of Oceano Dunes, Inc.; Ecologic Partners, Inc; and Specialty Equipment Market Association.

phase out OHV use at Oceano Dunes rectifies this historic imbalance and is the only result supported by California law and policy.<sup>20</sup>

**A. The Coastal Act Recognizes the Interdependence between Coastal Recreation and Ecosystem Health.**

California’s Coastal Zone is “unique and irreplaceable.”<sup>21</sup> Coastal dunes comprise only 58,000 of the State’s 104 million acres.<sup>22</sup> Oceano Dunes, in particular, represents an “extremely limited environmental resource of statewide significance.”<sup>23</sup> The uniqueness of the coast’s visually

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<sup>20</sup> The Commission’s decision is supported by extensive factual findings that the OHV Parties have not challenged. AR 1-203. Amici rely on these uncontested findings throughout this brief.

<sup>21</sup> *City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472, 481 (hereinafter *City of Chula Vista*).

<sup>22</sup> See Ocean Protection Council, State of California Coast and Ocean Annual Report 2022 (2022) p. 20 (noting 58,192 acres of dunes), <[https://www.opc.ca.gov/webmaster/\\_media\\_library/2023/01/Annual-State-of-the-Coast-and-Ocean-Report-2022-508.pdf](https://www.opc.ca.gov/webmaster/_media_library/2023/01/Annual-State-of-the-Coast-and-Ocean-Report-2022-508.pdf)> (as of Nov. 12, 2024); Yoohyun Jung, *Here’s how much of California is owned by different government agencies and why that matters*, S.F. Chronicle (Jan. 14, 2022) (stating that California has more than 104 million acres of land), <<https://www.sfchronicle.com/bayarea/article/Here-s-how-much-of-California-is-owned-by-16773882.php>>.

<sup>23</sup> AR 81. Other states have also recognized the inherent value, fragility, and irreplaceable nature of sand dunes. (See, e.g., *Port Sheldon Beach Ass’n v. Dept. of Environmental Quality* (2016) 318 Mich.App. 300, 314, fn. 7 (“The critical dune areas of this state are a unique, irreplaceable, and fragile resource that provide significant recreational, economic, scientific, geological, scenic, botanical, educational, agricultural, and ecological benefits to the people of this state and to people from other states and countries who visit this resource.”) (citation omitted); *Bubis v. Kassin* (2005) 184 N.J. 612, 623 (quoting case law characterizing sand dunes as “an irreplaceable physical feature of the natural environment possessing outstanding geological, recreational, scenic and protective value”) (citation omitted); Conn. Gen. Stat. Ann. § 22a-91 (2024) (stating that “coastal resources,” including “beaches and dunes,” “form an integrated natural estuarine resource system which is both unique and fragile”); Me. Rev. Stat.

stunning landscapes and healthy ecosystems is what makes coastal recreation desirable,<sup>24</sup> and the recognition that the latter cannot continue without preservation of the former underpins the Coastal Act. Specifically, the Legislature enacted the Coastal Act under a backdrop of “[g]rowing public consciousness of the finite quantity and fragile nature of the coastal environment,” and the public becoming “painfully aware of the deterioration in the quality and availability of recreational opportunities along the California coastline . . . .”<sup>25</sup> The resulting law “unequivocally voice[s] a strong preference for the natural state of the coast,” especially in ESHA and ESHA-adjacent areas, while emphasizing the importance of facilitating compatible public recreation.<sup>26</sup>

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Ann. tit. 38, § 480-A (2024) (declaring coastal sand dune systems as “resources of state significance” with “great scenic beauty and unique characteristics” such that their degradation and destruction “produc[e] significant adverse economic and environmental impacts and threaten[] the health, safety and general welfare of the citizens of the State”); N.C. Gen. Stat. Ann. § 113A-102 (West 2024) (recognizing the “natural productivity” and “biological, economic and esthetic values” of the state’s barrier dune system).

<sup>24</sup> See *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 246 (recognizing that “one of the most important public uses” of the shorezone “is a 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” (citation omitted)); see also *Ex parte Walter* (Ala. 2002) 829 So.2d 186, 195 (stating that “the aesthetic value of preserving the natural beauty of that coastline for a city heavily dependent on tourism cannot be overstated”).

<sup>25</sup> *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 162–163.

<sup>26</sup> *Feduniak v. California Coastal Com.* (2007) 148 Cal.App.4th 1346, 1377 (hereinafter *Feduniak*).



For example, the Coastal Act recognizes the importance of the Coastal Zone as a natural resource that must be made available “to all the people,” and requires state agencies to “[m]aximize public access . . . and maximize public recreational opportunities in the coastal zone”—but only to the extent “consistent with sound resources conservation principles.”<sup>27</sup> The Act reiterates that “maximum” access to recreational opportunities does not mean unfettered access for a single special interest group, but access “for all the people,” which must be consistent with public safety, the protection of public rights, and the prevention of “overuse” of natural areas.<sup>28</sup> The Act specifically prohibits public access that is “inconsistent with . . . the protection of fragile coastal resources,” and mandates that implementation of public access account for the “capacity of the site to sustain use and at what level of intensity” and “the fragility of the natural resources in the area.”<sup>29</sup> The Act further requires development in the Coastal Zone “to minimize the alteration of natural land forms . . . .”<sup>30</sup>

In other words, the Coastal Act is based on the premise that, without the preservation of natural landforms and ecosystems, there would be no “natural and scenic resources” for current or future people to visit and

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<sup>27</sup> Pub. Resources Code, §§ 30001, subd. (a), 30001.5, subd. (c).

<sup>28</sup> *Id.* at § 30210.

<sup>29</sup> *Id.* at §§ 30212, subd. (a)(1), 30214, subd. (a)(2)–(3).

<sup>30</sup> *Id.* at § 30251.

enjoy.<sup>31</sup> The Act also insists on the inherent value of these resources.<sup>32</sup> Accordingly, the Act does not enshrine an absolute right to coastal access or recreation regardless of the cost. Instead, the Act recognizes a paramount and “vital” public interest “in the protection and preservation of the California coast,” which is a necessary precondition to ensure access to coastal recreation for generations to come.<sup>33</sup> Due to its inherently destructive nature, OHV use is incompatible with the precepts of the Coastal Act and the underlying public rights at stake.<sup>34</sup>

**B. OHV Use on the Oceano Dunes Is an Unsustainable Form of Recreation that Destroys the Very Landscapes on which It Depends.**

While the OHV Users portray the riding area at Oceano Dunes as “highly-tolerant, barren sand ESHA,”<sup>35</sup> such phrasing contains an

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<sup>31</sup> See *id.* at § 30001, subd. (b) (“[T]he permanent protection of the state’s natural and scenic resources is a paramount concern . . . .”); *id.* at § 30251 (“The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance . . . .”); *San Diego Unified Port Dist. v. California Coastal Com.*, 27 Cal.App.5th 1111, 1129 (2018), as modified on denial of reh’g (Oct. 1, 2018) (“It is ‘beyond dispute that California has a legitimate interest in protecting and maintaining its beaches as recreational resources.’ [Citation.]”).

<sup>32</sup> See Pub. Resources Code, § 30001, subd. (a) (“[T]he California coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced ecosystem.”); *id.* at § 30251 (stating that the “scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance”).

<sup>33</sup> *Feduniak, supra*, 148 Cal.App.4th at p. 1376.

<sup>34</sup> See AR 85 (acknowledging the “particular[] difficult[y]” of habitat conservation at Oceano Dunes in light of “the fact that the Park’s dunes, creeks, beaches, and other natural resources serve as the location upon which high-intensity vehicular recreation takes place”).

<sup>35</sup> OHV Users’ Combined Respondent and Cross-Appellant’s Brief at p. 66.

oxymoron. An area cannot be both “highly-tolerant” and “environmentally sensitive.” By conceding that the ESHA label applies to Oceano Dunes, the OHV Users implicitly acknowledge the Dunes’ fragility.<sup>36</sup> Even if bare sand dunes are *relatively* more tolerant to impacts compared to other dunes habitat, *all* portions of Oceano Dunes are nevertheless ESHA, and easily disturbed and degraded by OHV use. At best, OHV use alters the Dunes’ natural morphology and topography and, at worst, “could obliterate” key portions of the Dunes entirely.<sup>37</sup> Accordingly, OHV use at Oceano Dunes “fundamentally” implicates “core questions of sustainable use . . . in light of coastal resource considerations.”<sup>38</sup> As OHV use at Oceano Dunes is not sustainable, the Coastal Act answers these core questions in favor of the Dunes.

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<sup>36</sup> See Pub. Resources Code, § 30107.5 (defining ESHA 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*”) (emphasis added); *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 162 (noting that “[g]rowing public consciousness of the finite quantity and fragile nature of the coastal environment” led to passage of the Coastal Act); *Lucas v. S.C. Coastal Council* (1992) 505 U.S. 1003, 1032 (conc. opn. of Kennedy, J.) (recognizing that coastal environments are “fragile land system[s]” that justify a higher degree of government regulation).

<sup>37</sup> AR 118–119.

<sup>38</sup> AR 55226.

**1. The Oceano Dunes are ecologically important and highly fragile.**

Dune systems are “rare and important” landforms comprised of beaches and dunes that work interactively<sup>39</sup> and, together, play a “critical function[.]”<sup>40</sup> Dune systems provide “habitat for very unique flora and fauna,” “which are specially adapted to the conditions and opportunities found in the dunes.”<sup>41</sup> In addition to providing habitat, dune plants “play a special role by [ ] stabilizing the dunes from the effects of wind erosion[.]”<sup>42</sup>

Here, the Oceano Dunes ecosystem “includes critical habitat for the threatened western snowy plover, and supports other sensitive species including the endangered California least tern, endangered tidewater goby, and threatened steelhead trout.”<sup>43</sup> Indeed, even bare sand areas of the Dunes “provide nesting areas for the threatened western snowy plover” and “will also support the natural and human induced recurrence of rare native plant and animal species, as will areas of the site where habitat values have been diminished by the presence of non-native species.”<sup>44</sup>

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<sup>39</sup> AR 82, 118; see also *United States v. Sanderlin* (E.D.N.C. 2007) 491 F.Supp.2d 542, 543 (characterizing the beach ecosystem as “a delicate ecological community”) (hereinafter *Sanderlin*).

<sup>40</sup> AR 81.

<sup>41</sup> AR 81–82.

<sup>42</sup> AR 82; see also AR 95, fn. 104 (discussing an interdisciplinary State Parks study of Mendocino County’s Ten Mile Dunes, which “found that under natural conditions, dune surfaces slowly build a surface armor of grains too large to be entrained by wind”).

<sup>43</sup> AR 27–28; see also Endangered and Threatened Wildlife and Plants; Determination of Threatened Status for the Pacific Coast Population of the Western Snowy Plover, 58 Fed. Reg. 12864 (Mar. 5, 1993); Endangered and Threatened Wildlife and Plants; Initiation of 5-Year Reviews, 70 Fed. Reg. 39327 (July 7, 2005) (cited at AR 40830).

<sup>44</sup> *Ibid.*

## 2. OHVs have damaged and disrupted the Dunes ecosystem.

Nevertheless, the record reflects that, due to OHV use, “the natural dune system has been fragmented and degraded, [and] the risk of extinction has increased for [protected] species,” with every new impact contributing to their cumulative decline.<sup>45</sup> Similarly, “the unique flora of much of the inland dunes is being severely degraded by recreational vehicle use,” including through OHVs’ disturbance of “sensitive dune vegetation” that naturally “deters wind erosion and stabilizes dunes.”<sup>46</sup> Such “[d]isturbance of this vegetation by off-road vehicles leads to dune destabilization.”<sup>47</sup> Likewise, OHVs’ role in smoothing out the topography at the intersection of the beach and foredunes can “increase the susceptibility of the main foredunes to erosion during high wave conditions.”<sup>48</sup> When foredunes and back dunes are impacted from vegetation removal, “the dunes revert to active moving dunes that often overtake and bury wetlands and other areas of sensitive dune habitat.”<sup>49</sup>

Indeed, “decades of OHV activity have fundamentally altered the natural beach-dune landscape” in a negative manner.<sup>50</sup> The Commission’s

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<sup>45</sup> AR 82.

<sup>46</sup> AR 67.

<sup>47</sup> *Ibid.*

<sup>48</sup> AR 118–119; see *Il Lagunita, LLC v. California Coastal Com.* (2020) 58 Cal.App.5th 904, 911, as modified on denial of reh’g (Jan. 7, 2021) (upholding a cease-and-desist order for removal of a seawall under the Coastal Act “in part, because the soil behind the seawall can no longer replenish the sand on the beach through natural erosion, eventually causing the beach to disappear”).

<sup>49</sup> AR 86.

<sup>50</sup> AR 106.

staff ecologist described OHV use as “one of the most significant threats to Oceano Dunes’ because OHVs ‘compact the sand, kill beach macro-invertebrates, and destroy wrack [organic marine material that washes ashore] and the associated invertebrate community that serve as food resources for shorebirds and fish.”<sup>51</sup> Such harm is exacerbated by State Parks’ use of heavy equipment to groom the dunes for the specific purpose of accommodating OHVs, compacting sand and removing wrack to provide for future OHV use,<sup>52</sup> which, in turn, increases climate vulnerability in underserved communities “with fewer resources to address the impacts.”<sup>53</sup>

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<sup>51</sup> AR 2163; see also *American Sand Ass’n v. U.S. Dept. of Interior* (S.D. Cal. 2003) 268 F.Supp.2d 1250, 1255 (recognizing that OHVs were “causing or will cause considerable adverse effects upon soil, vegetation, wildlife, wildlife habitat, cultural resources, historical resources, threatened or endangered species” at the Algodones Dunes in Imperial County) (citation omitted); *Northwest Motorcycle Ass’n, supra*, 18 F.3d at p. 1476 (upholding an OHV closure based on “the noise, dust, trail damage, exhaust, and safety concerns cause by [OHV] use” in conflict with non-motorized trail use, pursuant to a state wilderness law and the federal Administrative Procedure Act); *Ohio Valley Trail Riders v. Worthington* (E.D. Ky. 2000) 111 F.Supp.2d 878, 885 (discussing “studies documenting the adverse environmental effects of OHV use,” including sedimentation and increased stream turbidity; injury, death, and disturbance of wildlife; erosion; and the destruction of vegetation, and upholding the government’s decision to close hundreds of miles of trails to OHV use).

<sup>52</sup> See AR 11 (recognizing “significant coastal resource degradation” associated with State Parks’ maintenance activities including grading and grooming); AR 161, fn.171 (discussing concerns with beach grooming and sensitive species), AR 201 (recognizing that Dunes habitat and species “are easily disturbed” by beach grooming).

<sup>53</sup> AR 118–119 (finding that dunes “are the community’s first line of defense from coastal storms and wave runoff and, over the longer term, sea level rise,” and that regular grading to facilitate OHVs removes sand and makes the beaches more flood-prone, with damaged dunes funneling storm surge into the town of Oceano rather than buffering against it); Zappelli, et al., *High surf causes flooding, water rescues on SLO County coast*, The

In fact, evidence of the continuous damage caused by OHVs at Oceano Dunes is “overwhelming.”<sup>54</sup>

### 3. OHVs harass and kill protected species.

Along with the habitat-related impacts discussed above, direct “take” of protected species is a common occurrence, with “many snowy plover and least tern deaths from collisions with vehicles” being documented over time.<sup>55</sup> For example, there were “three western snowy plovers known to be killed by vehicles in just one 30-day period,” with “at least three more killed in the next several months[.]”<sup>56</sup> The California Department of Fish and Wildlife “identified seven documented California least tern deaths in 2014,” and “State Parks documented one tern and 36 plover deaths” in 2018, “with eight of them crushed and killed by OHVs.”<sup>57</sup> The following year, “three terns and 26 plovers were killed, with several of these

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Tribune (Dec. 29, 2023) (stating that flood waters overturned a pickup truck at Arroyo Grande Creek and washed RVs into the surf line at Oceano Dunes)

<<https://www.sanluisobispo.com/news/local/article283600298.html>>.

<sup>54</sup> AR 4; see also *Sanderlin, supra*, 491 F.Supp.2d at 542 (stating the following in a beach driving case involving threatened piping plovers, the Western snowy plover’s East Coast counterpart: “In sum, off-road vehicles have impacted the beach environment by disrupting a delicate ecological community. As vehicles drive on the beach, they disrupt sediment cycles, cause erosion, and destroy vegetation and plant life. Vehicular traffic has also crushed endangered species within their tracks.”); *United States v. Town of Plymouth, Mass.* (D. Mass. 1998) 6 F.Supp.2d 81, 90–91 (holding that beach OHV access had created “a likelihood that piping plover chicks will be killed and disturbed and that the nesting and feeding habitat will be adversely modified during the upcoming breeding season”).

<sup>55</sup> AR 86.

<sup>56</sup> AR 85.

<sup>57</sup> *Ibid.*

individuals found amidst tire tracks.”<sup>58</sup> Such numbers are “undoubtedly underestimated” and account for only deaths as opposed to other forms of harassment.<sup>59</sup>

Another “significant concern” has resulted from OHVs driving through Arroyo Grande Creek, a perennial stream that vehicles “must cross” near its mouth at the ocean to reach the OHV riding and staging areas, “potentially affecting ESA-endangered tidewater goby and ESA-threatened south central steelhead known to be present there.”<sup>60</sup> Likewise, “California red-legged frogs are also known to inhabit Arroyo Grande Lagoon, and are similarly under threat, particularly at night when some frogs migrate through upland habitat.”<sup>61</sup> Steelhead are anadromous fish, “meaning that they migrate from the creek to the ocean each year, but return to the creek for a portion of their life cycle and to spawn,” such that “the integrity of the connection between the creek and the ocean is vital[.]”<sup>62</sup> In addition to the risk of species being run over, OHVs “breach[] the banks of the creek” and “cause[] the creek banks to erode considerably,” which affects water quality and depth, can make steelhead migration and reproduction more difficult, and could “flush[]” tidewater goby and red-legged frogs and their egg sacs into the ocean “and cause their demise.”<sup>63</sup>

Despite decades of damage from OHVs, there is still hope for rehabilitation of the Oceano Dunes ecosystem—if, and only if, an OHV

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<sup>58</sup> *Ibid.*

<sup>59</sup> *Ibid.*

<sup>60</sup> AR 28, 85–86, 90.

<sup>61</sup> AR 86.

<sup>62</sup> AR 90.

<sup>63</sup> AR 90–91.



phase-out moves forward. The closure of the park to OHVs during the COVID-19 pandemic demonstrated the positive potential of an OHV-free dunes system at Oceano, including vegetation rejuvenation<sup>64</sup> and increased populations of protected species. In particular, the closure led to “a significant increase of habitat activity in the southern part of the Park as the beach and dunes were left alone, and sensitive species thrived.”<sup>65</sup> The Commission documented “a significant increase in plover activity, extending . . . over a mile north of the seasonal exclosure.”<sup>66</sup> Indeed, the Commission located “a substantial number of snowy plover nests initiated in the open riding area,”<sup>67</sup> despite State Parks embarking “on a series of unpermitted measures to disrupt nesting-related plover activities outside of the seasonal exclosure area.”<sup>68</sup> Such evidence supports the Commission’s finding that, “[i]f street legal vehicles and OHV use ended, the snowy plovers . . . would expand their foraging, breeding, and nesting territories.”<sup>69</sup>

Based on the foregoing, “OHV use [at Oceano Dunes] is incompatible with the preservation of dune and beach habitat resources and the species that live on them,”<sup>70</sup> and inconsistent with the intent and purposes of the Coastal Act.

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<sup>64</sup> See AR 102 (discussing successful dunes re-vegetation efforts that contributed to a reduction in dust emissions).

<sup>65</sup> AR 15.

<sup>66</sup> AR 88.

<sup>67</sup> AR 12735. Such evidence refutes the OHV Users’ claim that “large sand dunes like the current OHV riding area don’t provide nesting habitat” for protected birds. OHV Users’ Reply Brief at p. 62.

<sup>68</sup> AR 26520.

<sup>69</sup> AR 320.

<sup>70</sup> AR 86.

**C. OHV use at Oceano Dunes conflicts with the Coastal Act’s mandate to “maximize” ESHA-compatible public recreation.**

While the OHV Users suggest that it is necessary to “balance” ESHA protection with recreational needs<sup>71</sup> and correctly note that terms and conditions in coastal development permits must be “reasonable,”<sup>72</sup> such principles weigh in favor of ending OHV use rather than allowing it to continue. The status quo of allowing OHV use at Oceano Dunes at the expense of all other uses and users is out of balance and unreasonable, both ecologically and for members of the public interested in myriad other forms of recreation, in violation of the Coastal Act’s directive to “maximize” ESHA-compatible public recreation.

Rather than facilitating access “for all the people,” OHV use at Oceano Dunes has effectively precluded many low-impact uses by forcing those who wish to participate to choose between abstaining from their desired recreation or assuming a risk of bodily injury from contact with OHVs and a risk of respiratory injury through breathing in harmful particulate matter associated with the destabilized dunes.<sup>73</sup>

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<sup>71</sup> OHV Users’ Combined Respondent and Cross-Appellant’s Brief at pp. 18–19.

<sup>72</sup> Pub. Resources Code, § 30607.

<sup>73</sup> See Adams and McCool, *Finite Recreation Opportunities: The Forest Service, the Bureau of Land Management, and Off-Road Vehicle Management* (2009) 49 Nat. Res. J. 45, 47 (“Because motorized use generally displaces non-motorized uses, current [OHV] management privileges motorized recreation at the expense of non-motorized recreation.”).

**1. OHV use has hindered myriad low-impact uses and visitors.**

Permitting a single use for which there is zero carrying capacity<sup>74</sup> is inconsistent with the definition of the word “maximize”—i.e., “[t]o increase to the highest possible degree or value . . . to enhance to the utmost . . . .”<sup>75</sup> The Coastal Act mandates consideration of “the capacity of the site to sustain use and at what level of intensity,”<sup>76</sup> and such capacity is tied to “the amount of recreation use that an area can support without causing excessive damage to the physical environment and lessening visitor enjoyment.”<sup>77</sup> Due to the intensive nature of OHV driving, “the same park may support a very large number of visitors engaged in low-impact activities, such as hiking and fishing, or only a very few visitors engaged in high-impact activities, such as off-road vehicle use . . . .”<sup>78</sup>

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<sup>74</sup> See AR 136 [“[I]t is clear that there is no legal carrying capacity for vehicular/OHV uses in ESHA at the Park[.]”].

<sup>75</sup> Oxford English Dict., <<https://www.oed.com/search/dictionary/?scope=Entries&q=maximize>> (as of Nov. 12, 2024); see OHV Users’ Combined Respondent and Cross-Appellant’s Brief at p. 83 (relying on a dictionary definition).

<sup>76</sup> Pub. Resources Code, §§ 30212, subd. (a)(1), 30214, subd. (a)(2)–(3).

<sup>77</sup> AR 55618.

<sup>78</sup> Herman, *Loving Them to Death: Legal Controls on the Type and Scale of Development in the National Parks* (1992) 11 Stan. Env’t L.J. 3, 10, fn. 40. For example, a controlled experiment conducted in the grasslands of Montana revealed that “two hundred passes by a motorcycle removed twice as much vegetation as the same number of passes by a horse and nine times as much vegetation as two hundred hikers.” Comment, *Toward Sustainable Recreation on Colorado’s Fourteeners* (2020) 91 U. Colo. L.Rev. 345, 369, fn. 160 (citing Weaver and Dale, *Trampling Effects of Hikers, Motorcycles and Horses in Meadows and Forests* (1978) 15 J. Applied Ecology 451, 453–456).

Here, the Local Coastal Program itself notes that “[c]ontinued use of the dunes by off-road vehicles . . . has eliminated historical daytime uses,” which “included surf fishing, clamming, and walking along the beach.”<sup>79</sup> The record confirms both the excessive damage caused by OHV use (discussed above) and its effect of lessening non-OHV visitors’ enjoyment and dissuading them from participating in low-impact activities that the Park could otherwise support.

In particular, residents’ and visitors’ experiences during the Park’s COVID-19 closure illustrate the wide array of uses currently precluded or deterred by OHV use. The Commission confirmed that “the Park still saw significant general beach use” during the period of time in 2020 when the dunes were closed to OHV use—but open to non-motorized recreation—during the COVID-19 pandemic.<sup>80</sup> In fact, “[p]eople showed up in large numbers to walk, run, ride bikes and horses, fly kites, picnic, and play in the sand and surf,” including “locals who had never before visited the beach because of the historic vehicle use there.”<sup>81</sup>

Specific recreation activities mentioned in the record include walking or running along the coastline;<sup>82</sup> horseback riding, fishing, and surfing;<sup>83</sup> wading in the water, collecting shells, and building sand castles;<sup>84</sup> observing birds and other wildlife, such as egrets, pelicans, gulls, turkey vultures, herons, sandpipers, whimbrels, snowy plovers, and a flock of least

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<sup>79</sup> AR 36933.

<sup>80</sup> AR 15.

<sup>81</sup> AR 116–117.

<sup>82</sup> AR 3605, 4058, 4068, 5878, 7009, 7129, 7367, 7637, 12127, 17119.

<sup>83</sup> AR 5878, 17119.

<sup>84</sup> AR 17133.

terns;<sup>85</sup> observing the reemergence of flowers and plant life;<sup>86</sup> and quiet relaxation.<sup>87</sup>

Two sentiments echoed throughout the public comments<sup>88</sup> discussing the COVID-19 closure are (1) appreciation for the peacefulness, quiet, and solitude without the presence of OHVs,<sup>89</sup> and (2) a fear of engaging in non-motorized recreation prior to the OHV closure due to safety concerns.<sup>90</sup> To share a small sampling of testimony, a local resident of the Nipomo Mesa said: “It has been a rare gift during Covid to be able to walk those dunes without fear of being run over or picking up litter left behind by those who don’t seem to value this invaluable coastal land.”<sup>91</sup> Another person wrote: “I have lived on the Central Coast for over 30 years. Until recently, I had never visited the stretch of beach that was over-run with vehicles. Now that the beach is closed to vehicles, I have taken to walking there several times a week.”<sup>92</sup> A parent testified: “It was not until the COVID-19 pandemic when the beach was closed to OHVs that I dared visit [] [Oceano Dunes] with my kids.”<sup>93</sup> Another longtime resident of the Central Coast stated: “What a joy it has been to see the area, see the

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<sup>85</sup> AR 2942, 3291, 3605, 4058, 7052, 7129, 17119.

<sup>86</sup> AR 4068, 12006.

<sup>87</sup> AR 2942, 4068, 17133.

<sup>88</sup> It is well recognized that “[i]ndividual comment is a very persuasive indicator of ‘user conflict . . . .’” *Northwest Motorcycle Ass’n, supra*, 18 F.3d at p. 1475. Indeed, there is “no better way to determine the existence of actual past or likely future conflict between two user groups than to hear from members of those groups.” *Ibid.*

<sup>89</sup> AR 3291, 4068, 4092, 5878, 7129.

<sup>90</sup> AR 3605, 4068, 4430, 7009, 7367, 12127.

<sup>91</sup> AR 12127.

<sup>92</sup> AR 4058.

<sup>93</sup> AR 4430.

wildlife return, not see dead birds that have been hit by vehicles, not see birds frightened by vehicles and for myself feeling safe as well.”<sup>94</sup>

Reverting back to the pre-COVID status quo of OHV use at Oceano Dunes has minimized rather than maximized access to public recreation “for all the people,” promoting a single use that is inconsistent with sound resources conservation principles, in contravention of the Coastal Act.<sup>95</sup>

**2. The public should not have to risk serious bodily injury to enjoy the Dunes.**

Under the status quo at Oceano Dunes, a risk of death or serious bodily injury is an entry cost that informed members of the public must accept before participating in non-OHV recreation and a toll that uninformed members of the public unknowingly pay. These safety risks have a deterrent effect on visitors in contradiction with the Coastal Act’s mandate to maximize compatible recreation “for all the people.”<sup>96</sup>

The nature of OHV driving “may readily be characterized by the phrase: ‘[t]hrills, chills, and spills.’”<sup>97</sup> This activity includes “unsafe speeds, stirring up dust, becoming airborne on hills and cresting dunes” and

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<sup>94</sup> AR 3605.

<sup>95</sup> Pub. Resources Code, §§ 30001.5, subd. (c), 30210; cf. *Friends of Boundary Waters Wilderness v. Dombeck* (8th Cir. 1999) 164 F.3d 1115, 1129 (rejecting consideration of increased use levels as inconsistent with a federal requirement to “attain the widest range of beneficial uses of the environment without degradation,” where current use levels were “beginning to strain the viability and solitude of the wilderness area and to degrade the intended primitive recreational experience,” and had already “result[ed] in excessive erosion, disturbed water quality and wildlife, [and] diminished campsite availability”).

<sup>96</sup> Pub. Resources Code, §§ 30001.5, subd. (c), 30210.

<sup>97</sup> *Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1257–1258.

“for all intents and purposes has no rules.”<sup>98</sup> Indeed, at Oceano Dunes there is “no formal speed limit . . . in place in the dunes when away from occupied beach campsites.”<sup>99</sup> Accordingly, “there is an inherent risk of injury, serious injury or even death, in the conduct of this sport [OHV driving].”<sup>100</sup>

In *Distefano*, the Fourth District recognized the topographical dangers associated with driving in “natural terrain with blind hills, inherently uneven areas, and vegetation,” including the lack of established streets but only “dirt trails that constantly change as a result of vehicular activity and the forces of nature.”<sup>101</sup> In particular, the Court noted the risk that “coparticipants ascending a blind hill in motor vehicles from opposite directions might not be able to see one another in time to avoid a collision.”<sup>102</sup> The Court held that the risks of OHV use were so inherent that “a person who is injured while participating in such activity may not sue a coparticipant for negligence” because there was “no duty” to protect against collision due to primary assumption of risk.<sup>103</sup>

Similar topographical dangers exist at Oceano Dunes, which add to the risks that OHVs ascending a blind hill to the top of a dune could collide with pedestrians attempting to engage in other forms of recreation, or OHVs driving on the beach could collide with pedestrians walking or

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<sup>98</sup> *Ibid.*

<sup>99</sup> AR 595.

<sup>100</sup> *Distefano v. Forester, supra*, 85 Cal.App.4th at pp. 1257–1258.

<sup>101</sup> *Id.* at pp. 1255, 1263.

<sup>102</sup> *Id.* at p. 1254.

<sup>103</sup> *Ibid.*

playing along the shoreline.<sup>104</sup> Indeed, injuries and fatalities are frequent at Oceano Dunes.<sup>105</sup>

It is both unreasonable and contrary to the Coastal Act to expect pedestrian visitors to take their life in their own hands by assuming such a high risk of bodily injury or death.

**3. By impeding pedestrian access, OHV use at Oceano Dunes contravenes the Commission’s Environmental Justice Policy.**

The increased safety risk to non-motorized users of Oceano Dunes functions as a *de facto* barrier to public access and the public’s ability to engage in other forms of coastal recreation, which has created an environmental injustice. In particular, the Commission’s Environmental Justice Policy “reaffirm[ed] [the Commission’s] long-standing commitment to identifying and eliminating barriers, including those that unlawfully privatize public spaces, in order to provide for those who may be otherwise deterred from going to the beach or coastal zone.”<sup>106</sup> Barriers to access include “both formal and informal” mechanisms that can make members of disadvantaged communities “feel isolated from and unwelcome at beaches and recreational spaces.”<sup>107</sup>

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<sup>104</sup> See *Ralph v. City of Daytona Beach* (Fla. 1983) 471 So.2d 1, 3 (describing the “lethal mixture of cars and reclining persons” at Daytona Beach).

<sup>105</sup> See AR 117 (referencing “a series of significant OHV-caused injuries and deaths”); AR 17040–17041 (discussing fatalities, homicides, and ambulance calls at Oceano Dunes).

<sup>106</sup> AR 31092.

<sup>107</sup> AR 116.



Here, “many in these Park-adjacent communities state that OHV use has all but eliminated opportunities for other types of beach recreation and enjoyment” because “their beach functions as a ‘sand highway’ for vehicles, rendering more typical beach activities, such as walking and picnicking on the beach, dangerous and/or unpleasant.”<sup>108</sup> Additionally, some OHVs “display flags and symbols that have made [non-OHV users] feel unwelcome at the Park,” with the Commission acknowledging “that certain symbolic displays, such as Confederate flags or sexualized images of women or automatic weapons on flags, can have as much of a chilling and exclusionary effect on public access as ‘No Trespassing’ or ‘Private Property’ signs.”<sup>109</sup> By wrongfully impeding public recreation rather than maximizing access for all, formal and informal barriers “alienate”<sup>110</sup> disadvantaged community members in violation of a “core principle” of the Coastal Act.<sup>111</sup>

**D. Allowing OHVs to Degrade Air Quality in and Around the Dunes Contravenes the Commission’s Environmental Justice Policy.**

Public health and ecosystem health are “inextricably intertwined.”<sup>112</sup> Along with the Commission’s responsibility to protect ESHA while maximizing access to compatible recreation for all the people, the Coastal Act entrusts the Commission with the authority “to promote the health,

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<sup>108</sup> *Ibid.*

<sup>109</sup> *Ibid.*

<sup>110</sup> *Ibid.*

<sup>111</sup> *Spencer v. City of Palos Verdes Estates*. (2023) 88 Cal.App.5th 849, 862, review den. (May 31, 2023).

<sup>112</sup> AR 31096.

safety, morals or general welfare of the public”<sup>113</sup> and authorizes the Commission to consider environmental justice in permitting decisions.<sup>114</sup> Dust-related air pollution caused by OHVs at Oceano Dunes amounts to a serious public health risk in surrounding disadvantaged communities and further impedes residents’ ability to engage in low-impact outdoor recreation, or even open their windows without risking respiratory harm. Viewed through the lens of environmental justice, dust-related concerns provide an additional justification to support the Commission’s OHV phase out.<sup>115</sup>

The Commission’s Environmental Justice Policy declares its “[u]nderstanding that . . . ecological impacts are felt first by disadvantaged and at-risk communities, and that there is no environmental justice without a healthy environment[.]”<sup>116</sup> The Act’s definition of “environmental justice” includes “[t]he availability of a healthy environment for all people.”<sup>117</sup> Accordingly, the Commission’s Environmental Justice policy makes a commitment to “work with the relevant public agencies to consider project impacts to air quality and soil health in disadvantaged communities which reduce the positive health and recreational benefits associated with coastal

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<sup>113</sup> *Liberty v. California Coastal Com.* (1980) 113 Cal.App.3d 491, 499 (citation omitted).

<sup>114</sup> Pub. Resources Code, § 30604, subd. (h).

<sup>115</sup> See *Mountainlands Conservancy, LLC v. California Coastal Com.* (2020) 47 Cal.App.5th 214, 241–242 (affirming the Commission’s decision to certify a ban on new vineyards in the Santa Monica Mountains based, in part, on the fact that they increase erosion and create dust-related air pollution).

<sup>116</sup> AR 31096.

<sup>117</sup> Pub. Resources Code, § 30107.3, subd. (b)(1).

access and coastal resources for pollution-burdened communities.”<sup>118</sup>

Likewise, environmental justice demands, “[a]t a minimum, the meaningful consideration of recommendations from populations and communities most impacted by pollution into environmental and land use decisions.”<sup>119</sup>

OHV use at Oceano Dunes has effectuated an environmental injustice by allowing a single special interest group to engage in a use that degrades regional air quality at the expense of all other users, including residents of disadvantaged communities. Such an environmental injustice is contrary to the Commission’s policy goals.

**1. OHV riding is a direct cause of poor regional air quality.**

The air quality immediately downwind of Oceano Dunes is abysmal: “[E]xceedances of state and federal air quality standards for PM10 on some days result in the worst air quality *in the United States* on the Nipomo Mesa,” with the San Luis Obispo Air Pollution Control District documenting that “during high wind events, the dust plume from the Park extends into the Santa Maria Valley[.]”<sup>120</sup> The dust plume from the Dunes further exacerbates impacts from agricultural activities in downwind communities.<sup>121</sup> OHVs are “the primary cause of the dust problem associated with the Park.”<sup>122</sup>

Disadvantaged communities downwind of the Park include “the unincorporated community of Nipomo, which is roughly 44%

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<sup>118</sup> AR 31097.

<sup>119</sup> Pub. Resources Code, § 30107.3, subd. (b)(4).

<sup>120</sup> AR 115 (emphasis in original).

<sup>121</sup> *Ibid.*

<sup>122</sup> AR 4.

Hispanic/Latino, 23% of which have an income two times below the Federal poverty rate,” and the cities of Guadalupe and Santa Maria, which “are 90.4% and 76% Hispanic/Latino, respectively and also have high rates of poverty.”<sup>123</sup> Such communities “have endured many burdens caused by off-roading for decades, while enjoying few if any of the benefits.”<sup>124</sup>

Fundamental alterations to Oceano Dunes from decades of OHV use have made the Dunes “significantly more susceptible to PM emissions than they would be in a natural state.”<sup>125</sup> As further discussed above, OHVs “break up the stiff surface layers that form on beaches and dunes, which facilitates the emission of particulate matter to downwind communities and erodes the dunes.”<sup>126</sup> In the areas of OHV use, “wind erosion has resulted in blowouts larger than would naturally occur and masses of unstable sand now dominate the landscape.”<sup>127</sup>

“Rigorous studies . . . unequivocally conclude that this dust originates from the Oceano Dunes [] and that [OHV] use in the Oceano Dunes State Vehicular Recreation Area is responsible for allowing airborne transport of the dust during high winds[.]”<sup>128</sup> While some OHV supporters claim that the existence of dust during the COVID-19 closure points to non-OHV causes, air quality actually “improved significantly in 2020,” while

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<sup>123</sup> AR 113.

<sup>124</sup> AR 115.

<sup>125</sup> AR 106.

<sup>126</sup> AR 86; see also AR 95 (discussing the Inglenook Fen and Ten Mile Dunes study confirming that “OHVs break and churn this protective crust and expose smaller particles that are entrained by prevailing winds, promoting erosion of the dunes,” and recommending “that OHV use be prohibited[.]”).

<sup>127</sup> AR 86.

<sup>128</sup> AR 43160.

the dunes were closed to vehicles.<sup>129</sup> Additionally, because “dune degradation is at the heart of the dust issue . . . it will take time for the dunes to restore themselves after vehicular/riding activity has stopped.”<sup>130</sup> A mere “few weeks or months of temporary OHV restrictions” would be insufficient “to substantially alter the balance of human versus natural contributions to PM emissions at ODSVRA.”<sup>131</sup> Instead, “it can take years for dunes to heal in [a] way that they no longer contribute to dust problems,”<sup>132</sup> making a full and permanent OHV phaseout necessary under the Coastal Act.

## **2. Poor air quality has negatively impacted residents and visitors.**

Science demonstrates a “clear connection between OHV use on the dunes and Nipomo Mesa residents’ exposure to serious health consequences from the dust[.]”<sup>133</sup> In particular, the County of San Luis Obispo Health Commission found that OHV-mobilized dust exposed residents to “very serious acute, chronic, and cumulative health impacts” from particulate matter, including lung and cardiovascular disease.<sup>134</sup> The Health Commission noted that there is “no minimum threshold for harm” and “a clear correlation between PM exposure and mortality[.]”<sup>135</sup>

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<sup>129</sup> AR 102; see also AR 7416 (area resident who lives “a few miles from the beach” describing “a huge difference in the amount of sand that blew into my windows when the beach and sand dunes were closed to traffic”).

<sup>130</sup> AR 102.

<sup>131</sup> AR 106.

<sup>132</sup> AR 102.

<sup>133</sup> AR 43160.

<sup>134</sup> AR 43160–43161.

<sup>135</sup> AR 43161.

Resident testimony illustrates the magnitude of the dust problem.<sup>136</sup> Area residents report the ability to “visually see the sheets of pollution” on windy days,<sup>137</sup> and take precautions such as restricting the time they spend outdoors on high-particulate days and keeping their windows closed to avoid risking respiratory harm.<sup>138</sup> A Nipomo resident stated as follows: “On a clear day, we can see the dunes 3 miles away at Oso Flaco Lake and the Pacific Ocean beyond. On a day when pollution levels are high, we have difficulty seeing the strawberry fields just 600 feet away because the dust plume is so dense.”<sup>139</sup> The risks have caused residents to invest in air-quality monitoring devices and high-performance air filters and deploy greater use of air conditioning,<sup>140</sup> along with making travel plans during the windiest months.<sup>141</sup> Property values have fallen in dust-affected areas.<sup>142</sup>

Healthwise, a Nipomo resident who engaged in regular outdoor exercise described the difference in a spirometry lung function test shortly after moving to the area, which “showed [their] lung function to be that of an average 55 year old,” and the results of “[t]he same test administered

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<sup>136</sup> See AR 115 (recognizing that “[q]uantitative and qualitative information, including the lived experience of community members, is key to understanding existing environmental justice burdens on a community and the potential for new development to exacerbate those impacts”).

<sup>137</sup> AR 26363, 24997.

<sup>138</sup> AR 2928, 3073, 18829, 23439, 24996, 24997, 24274, 24725, 24693, 24240, 57539; see also AR 17615 (comment letter from a group of former Commissioners stating: “[W]e have listened to the downwind residents, some carrying oxygen tanks, who can’t go outside their homes or even open their windows because of the health risks.”).

<sup>139</sup> AR 24997.

<sup>140</sup> AR 24997, 3073, 24996, 18829, 24725, 24693, 24274, 24240, 57539.

<sup>141</sup> AR 24996, 24274.

<sup>142</sup> AR 24997.

less than three years later,” which “indicated lung function of a 71 year old.”<sup>143</sup>

Another commenter summed it up as follows: “As a resident of the Nipomo Mesa, I can attest to the fact that the dust problem has a significant impact on my daily life. Particulate counts and forecasts largely determine when I am able to exercise outdoors and enjoy the beauty of the Central Coast, and when I am forced to stay indoors with the windows closed.”<sup>144</sup>

No portion of the Coastal Act prioritizes damaging forms of recreation over public health. On the contrary, the Act’s emphasis on preservation of ESHA is in furtherance of public health because the two principles are “inextricably intertwined.”<sup>145</sup> The air quality and health of communities downwind of Oceano Dunes depend on ending OHV use and restoring dune vegetation to minimize erosion and stabilize dust.

### **3. Ending OHV use would facilitate environmental justice.**

As discussed above, eliminating OHV use at Oceano Dunes would remove a barrier to access for non-motorized recreation, thereby opening the door to a plethora of low-impact uses while triggering an ecological healing process that is key to re-stabilizing the Dunes and controlling the dust problem.

As the Commission found, below, it is “inherent” in the Coastal Act “that certain activities might need to be limited, for all, because the

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<sup>143</sup> AR 24996.

<sup>144</sup> AR 23439.

<sup>145</sup> AR 31096.

underlying resources can't accommodate such intensity of use.”<sup>146</sup> Here, the Commission characterizes the OHV issue as “a classic environmental justice problem, wherein one group reaps a benefit (in this case OHV/vehicular use) while the impacts associated with it (in this case adverse air quality) disproportionately affect lower-income communities of color (in this case Oceano, Nipomo, Guadalupe, and Santa Maria).”<sup>147</sup>

To the extent the OHV Parties may raise competing environmental justice claims regarding allegedly lower-cost recreation opportunities,<sup>148</sup> such claims are inaccurate. OHV use requires the rental or purchase of specialized equipment, and the Commission found that most of the camping at Oceano Dunes “is via RVs, camping trailers, campers, and similar equipment . . . which prices out many [people] of lesser means.”<sup>149</sup>

Likewise, the OHV Users’ forecast of economic impacts to area communities from lost OHV-related revenue<sup>150</sup> is inaccurate in light of a study discussed in the Commission’s underlying findings that confirmed Oceano Dunes would be “at least as valuable to the region economically” without OHVs, with low-impact recreation as the driver for tourism.<sup>151</sup>

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<sup>146</sup> AR 120.

<sup>147</sup> AR 116.

<sup>148</sup> AR 119; see also OHV Users’ Combined Respondent and Cross-Appellant’s Brief at pp. 57-58 (characterizing Oceano Dunes as a lower-cost and “affordable” facility).

<sup>149</sup> AR 76; see also AR 76–77, n.68 (finding that it cost \$5,000 to \$300,000 in 2011 dollars to purchase an RV, plus maintenance, with RV rental costs of \$240 to \$650 per night).

<sup>150</sup> See, e.g., OHV Users’ Combined Respondent and Cross-Appellant’s Brief at p. 99; OHV Users’ Reply Brief at p. 14 (claiming that an OHV phaseout would lead to “enormous economic dislocation”).

<sup>151</sup> AR 14 (discussing study available at AR 380–396).



The mere fact that some people from underserved communities may engage in OHV use “does not provide justification for continued OHV use in the dunes, because *the activity itself* is what is causing the disproportionate burdens to the local underserved communities. The benefits of recreation neither justify nor negate the burdens they cause for others.”<sup>152</sup> Rephrased, OHV enthusiasts’ concerns about recreational equity are “premised on the belief that OHV/vehicular use is a benign one when it is not. Public recreational access is not a zero-sum game under the Coastal Act: one person’s recreational access benefit should not result in someone else’s burden.” Allowing OHVs to continue damaging the Dunes, mobilizing harmful particulate matter, and harassing or injuring visitors and residents seeking to engage in low-impact recreation presents “a textbook case of environmental injustice”<sup>153</sup> that demands to be rectified.

## **II. An OHV Phaseout Is Consistent with the LCP and CDP’s Concern with Protecting Sensitive Resources, in Light of Ongoing Harm to Chumash Cultural Sites.**

The Oceano Dunes are a “cathedral of life” sacred to the Chumash people, who “have inhabited this portion of their homeland for millennia”<sup>154</sup> and who “depend on access to ancestral lands and sacred sites to maintain traditional practices.”<sup>155</sup> Yet OHV use has impeded such access to the same extent as with low-impact recreation, for the reasons discussed above regarding safety and air quality, in contravention of the Coastal Act’s

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<sup>152</sup> AR 119–120 (emphasis in original).

<sup>153</sup> AR 121.

<sup>154</sup> AR 124, 2724, 2727.

<sup>155</sup> AR 51675.

directives to “[m]aximize public access to and along the coast” “for all the people.”<sup>156</sup>

In addition to the OHV-related barrier to access, record evidence documents a history of damage to Chumash cultural sites throughout the Dunes, including from OHVs driving over fences designed to protect cultural sites,<sup>157</sup> and demonstrates a likelihood that many more fragile tribal cultural sites exist undiscovered and unfenced in the riding area.<sup>158</sup> When combined with evidence of OHV-caused degradation to the “irreplaceable”<sup>159</sup> Dunes themselves (discussed above), which have inherent value to the Chumash people, it becomes clear that the OHV-related impacts at Oceano Dunes pose a significant risk of further eroding a culture that has already been deeply impacted by other factors. Such impacts to tribal cultural resources—despite state<sup>160</sup> and agency<sup>161</sup> policies committed to averting such harms—provide an additional factual basis in support of the Commission’s argument that its phaseout of OHV use at Oceano Dunes is consistent with portions of the LCP and CDP concerned

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<sup>156</sup> Pub. Resources Code, §§ 30001.5, subd. (c), 30210; see also AR 25 (mandating, in an uncontested special condition from the CDP, that State Parks “implement measures to maximize use of allowed Park use areas by . . . tribal entities”).

<sup>157</sup> AR 125, 2727, 12632.

<sup>158</sup> AR 123, 2730.

<sup>159</sup> *City of Chula Vista, supra*, 133 Cal.App.3d at p. 481.

<sup>160</sup> See, e.g., Governor’s Exec. Order No. B-10-11 (Sept. 19, 2011) <<https://calsta.ca.gov/-/media/calsta-media/documents/docs-pdfs-2013-executive-order-b-10-11-a11y.pdf>>; Governor’s Exec. Order No. N-15-19 (June 18, 2019) <<https://www.gov.ca.gov/wp-content/uploads/2019/06/6.18.19-Executive-Order.pdf>>.

<sup>161</sup> See AR 31325–342 (Commission’s Tribal Consultation Policy); AR 31082–106 (Commission’s Environmental Justice Policy).

with the protection of sensitive resources, and the intents and purposes of the Coastal Act.<sup>162</sup>

**A. The Dunes Are Replete with Cultural Significance.**

The Chumash people identify “the whole area” of Oceano Dunes as “a Sacred Living Landscape,”<sup>163</sup> and view OHV use as destroying tribal members’ connectivity with their ancestors.<sup>164</sup> The Chumash people lived in the Dunes until the mid-1880s<sup>165</sup> and followed “Life Ways” in “great harmony” with the Dunes, according to former Tribal Chair, Fred Collins. The Dunes are “Sacred Places of deep reflections” where the Chumash obtain “profound understanding” through “experienc[ing] a peaceful, serene, [quiet][.]”<sup>166</sup> Collins described his childhood and young adult experiences “travel[ing] the sand dunes frequently, to walk for miles and miles with only the sounds of the Mother Ocean...”<sup>167</sup> In contrast, OHV use has “alter[ed] forever” the peace of the Dunes,<sup>168</sup> preventing the Chumash from “peacefully engag[ing] in our Way of Life/Religion unencumbered.”<sup>169</sup>

The edge of the Nipomo Mesa houses “the remains of extensive Chumash village activity.”<sup>170</sup> The Chumash “occupied [] narrow coastal

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<sup>162</sup> Commission’s Opening Brief at pp. 51, 61–64; Commission’s Reply Brief at pp. 34-35.

<sup>163</sup> AR 2730.

<sup>164</sup> AR 25030.

<sup>165</sup> AR 14971.

<sup>166</sup> AR 27230.

<sup>167</sup> AR 25030.

<sup>168</sup> AR 27230.

<sup>169</sup> AR 27232.

<sup>170</sup> AR 2724.

terraces, which often included sand dunes and small valleys as well as the windswept outer shore.”<sup>171</sup> The Dunes, estuary and beach also served as “a major source for food and other resources.”<sup>172</sup> Collins stated that there are “over 200 Sacred Village Sites in the Oceano Sand Dunes,”<sup>173</sup> along with “hundreds of hidden sacred middens that are the [marker] for our encampments, and lodges[.]”<sup>174</sup> While the precise number of culturally significant sites in the Dunes is in dispute, the presence of a substantial quantity of Chumash cultural sites is well documented.<sup>175</sup> These sites also include “tribal human remains . . . unearthed in the riding area.”<sup>176</sup> The “mobile dune environment[.]” makes it “common to locate newly revealed archaeological resources in shifting sands.”<sup>177</sup>

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<sup>171</sup> AR 14971.

<sup>172</sup> AR 2724.

<sup>173</sup> AR 25030.

<sup>174</sup> AR 2730; see also AR 2438–2439 (describing “shell or kitchen middens” as “evidence of ancient Indian campsites”). According to the National Parks Service, midden sites are “debris piles containing remnants of past societies,” and “offer us a window into the . . . Chumash world.” Window Into Their World (Apr. 24, 2021) National Parks Service <<https://www.nps.gov/places/000/window-into-their-world.htm>> (as of Nov. 13, 2024).

<sup>175</sup> See, e.g., AR 28777 (“Forty-four sites contain prehistoric elements, which could be considered Tribal Cultural Resources.”); AR 3189 (noting “at least 16 shell midden sites used as temporary camps in the dune area.”); 14971 (confirming the existence of “[o]ver 100 Chumash archaeological sites . . . identified from the town of Grover Beach to Mussel Point,” which is a stretch of land encompassing Oceano Dunes); AR 123 (known potential village sites “54,000 square feet and up”); AR 46774 (Native American Heritage Commission confirming that “Native American cultural sites are present” in the OHV riding area).

<sup>176</sup> AR 125.

<sup>177</sup> AR 2730; see also AR 123 (State Parks acknowledging “a distinct possibility” of discovering “additional archaeological values in the future”

Indeed, the Commission recognized in its underlying findings in support of the CDP amendments that “[t]he entire Park is sacred land where human remains and other sensitive tribal resource[s] may be present,”<sup>178</sup> and “[t]he Northern Chumash . . . want the vehicles and OHVs that degrade [the Dunes] to be removed so that sacred natural space can be honored and cherished.”<sup>179</sup>

**B. Together, the LCP and CDP Demand the Full Protection of Tribal Cultural Resources.**

While the LCP and CDP contain specific provisions for the fencing of sensitive resources, including ESHA and tribal sites at Oceano Dunes, these provisions operate as a floor rather than a ceiling in light of the Coastal Act’s overarching mandate to protect sensitive resources from harm.<sup>180</sup> As fencing has failed protect Chumash cultural sites and ESHA from damage caused by OHVs, the Commission’s decision to phase out OHV use was necessary under the Coastal Act as well as consistent with the LCP/CDP framework.

In particular, the Commission correctly argues that the LCP (via Recreation Standards 4 through 13 in the South County Area Plan or SCAP) provides for a moratorium on OHV use “to the extent ‘necessary to protect resources’” in accordance with the CDP, and that the LCP “presupposes” that such a moratorium “will remain in place unless and

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and recognizing the need to protect such sites, including through fencing and posting).

<sup>178</sup> AR 125.

<sup>179</sup> *Ibid.*

<sup>180</sup> See Pub. Resources Code, §§ 30001.5, subd. (c), 30212, subd. (a)(1), 30214, subd. (a)(2)-(3) (collectively emphasizing the importance of resource conservation and “the protection of fragile coastal resources”).

until conditions allow OHV use to resume *without* harming sensitive resources.”<sup>181</sup>

Recreation Standard 4 from the LCP, cited by the Commission, states that an OHV moratorium would be warranted “[s]hould 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[.]”<sup>182</sup> Likewise, the Coastal Plan Policies in the LCP include Policy 2 in the Chapter on Policies for Recreation and Visitor-Serving Facilities, which states: “All uses shall be consistent with protection of significant coastal resources.”<sup>183</sup>

The CDP has recognized “significant cultural resources” existing in the Nipomo Dunes complex, including Chumash sites that “have been degraded by OHV activity” from its first iteration in 1982 (hereafter, the Base CDP).<sup>184</sup> The Base CDP contained a discussion of Chumash cultural sites, as well as ESHA, as a preface to its finding that, “[u]nless measures are instituted to control the use of the Nipomo Dunes complex, the resources values which distinguish the area will continue to be degraded, and ultimately lost completely.”<sup>185</sup> CDP amendments over the intervening years have built on the foundation of the Base CDP. Accordingly, the text of

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<sup>181</sup> Commission’s Opening Brief at p. 62 (quoting AR 37449) (emphasis in original).

<sup>182</sup> AR 37449.

<sup>183</sup> AR 36928 (cited at p. 51 of the Commission’s Opening Brief and p. 35 of the Commission’s Reply Brief).

<sup>184</sup> AR 36135.

<sup>185</sup> AR 36135 (cited in the Commission’s Opening Brief at p. 25).

the present-day CDP, as amended, and the historical context from the Base CDP demonstrate that the LCP’s references to coastal “resources” encompass not just ESHA but also Chumash tribal cultural resources.

The terms and conditions in the Base CDP included “protective fencing” as an “initial step in a program to fence all sensitive areas and private property from OHV intrusion,”<sup>186</sup> while contemplating future amendments through a “longer term program to manage OHV use within the park’ consistent with Coastal Act protection policies.”<sup>187</sup> Per the Base CDP, such fencing, in tandem with fencing of ecologically sensitive sites, was designed “to protect [sensitive resource areas] from further degradation [sic] and destruction from off-highway vehicle users.”<sup>188</sup>

The version of the CDP in effect prior to the challenged 2019 amendments carried forward the Base CDP’s concern for sensitive resources, stating that archeological resources within the Oceano Dunes “shall be protected by fencing,” with additional fencing to be added to protect later-discovered archaeological sites “as their locations become known.”<sup>189</sup> Recreation Standard 12 in the LCP implements the CDP’s concern with fencing by stating: “To ensure archaeological resource protection, the State Department of Parks and Recreation should provide

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<sup>186</sup> AR 36126; Commission’s Opening Brief at pp. 25–26.

<sup>187</sup> Commission’s Opening Brief at p. 25 (quoting the Base CDP at AR 36129).

<sup>188</sup> AR 36119–36120, 36125.

<sup>189</sup> AR 227; see also Pub. Resources Code, § 30244 (providing that, “[w]here development would adversely impact archaeological . . . resources as identified by the State Historic Preservation Officer, reasonable mitigation measures shall be required.”).

the fullest protection by fencing all known sites.”<sup>190</sup> For purposes of the Coastal Act, the term “archaeological resources” includes tribal cultural resources.<sup>191</sup>

Even so, the “reactive” approach to conserving tribal cultural sites by fencing them once identified has been ineffective at satisfying the overarching mandate of protecting sensitive resources from OHV impacts.<sup>192</sup> As the Commission recognized in the administrative record: “It is clear that current operations of ODSVRA . . . do not appropriately respond to the needs of the tribes that consider these areas sacred ancestral lands and their ancestral home.”<sup>193</sup> Accordingly, as part of its basis for the OHV phaseout, the Commission found that “[i]t is not enough to protect resources as they are uncovered . . . rather it is critical to understand and acknowledge that Native American tribes have a connection to the land that significantly precedes all of the activities that are being evaluated” at Oceano Dunes.<sup>194</sup> Under the LCP’s framework, moving from reactive fencing to a full OHV phaseout is, thus, “necessary to protect resources”

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<sup>190</sup> AR 37451 (cited generally at p. 30 of the Commission’s Opening Brief).

<sup>191</sup> While treating ancestral tribal homesites, burial grounds, and sacred spaces as simply having “archeological” significance is reductive and inaccurate, affording tribal cultural resources the protections available to archaeological resources is consistent with case law. *Citizens of Goleta Valley v. Bd. of Supervisors* (1988) 197 Cal.App.3d 1167, 1186–1187; see also AR 31326 (stating in the Commission’s Tribal Consultation Policy that “[i]n many cases, tribal cultural resources will qualify as archaeological, paleontological, visual, biological, or other resources that the Commission is tasked with protecting pursuant to the Coastal Act”).

<sup>192</sup> AR 124–125, 2727, 12632; see also AR 125 (noting that “riders do sometimes venture past protective fencing”).

<sup>193</sup> AR 51677, 55256.

<sup>194</sup> AR 124.



and “enforce[] or accomplish[]” the CDP’s demand for compliance with Coastal Act mandates “in a manner consistent with . . . public health and safety and community values.”<sup>195</sup>

**C. The Commission’s Tribal Consultation and Environmental Justice Policies Contextualize the Importance of Protecting Chumash Cultural Resources under the LCP/CDP Framework.**

The Commission’s 2018 Tribal Consultation Policy<sup>196</sup> and 2019 Environmental Justice Policy<sup>197</sup> acknowledge California’s “painful history of [state-sanctioned] genocide”<sup>198</sup> against Native Americans and commit to repairing relationships, restoring tribal sovereignty, and helping tribes preserve the remaining vestiges of their cultures. The modern ethics reflected in these policies lend further import to the argument that a phaseout of OHVs from Oceano Dunes was “necessary” for protecting sensitive resources under the LCP/CDP framework “in a manner consistent with . . . community values.”<sup>199</sup>

The Tribal Consultation Policy outlines the importance of “[a]ssess[ing] the potential impact of proposed Commission Actions on Tribal Interests and ensur[ing], to the maximum extent feasible, that tribal concerns are considered . . . such that impacts are avoided, minimized, or mitigated[.]” This document “strongly advocates for” a proactive approach to the management of Oceano Dunes,<sup>200</sup> in which tribes not only participate

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<sup>195</sup> AR 36129, 37449.

<sup>196</sup> AR 31325–31342.

<sup>197</sup> AR 31082–31106.

<sup>198</sup> AR 31091, 31325.

<sup>199</sup> *Ibid.*

<sup>200</sup> AR 124.

in policy discussions but the State heeds their voices. Here, those voices have demanded the cessation of OHV use as the only feasible way to protect individual sites of cultural and historic significance from further destruction while facilitating the overall healing of the Sacred Dunes themselves.

The Environmental Justice policy further commits to “regular and meaningful partnership to ensure that tribes are valued and respected contributors to the management of California’s coast,” including by working with tribes to address concerns with “access to and protection of areas of cultural significance . . . and sacred sites.”<sup>201</sup>

Both polices address tribal resources in the context of historic wrongs against Native Americans,<sup>202</sup> with the Tribal Consultation Policy citing “a number of executive orders, statutes, guidance documents, and other policy directives” as relevant underlying background materials, including but not limited to SB 18, AB 52, and Executive Order B-10-11.<sup>203</sup>

These background materials confirm that California’s history is “fraught with violence, exploitation, dispossession and the attempted destruction of tribal communities,” including “over a century of depredations.”<sup>204</sup> Historical policies “dislocated California Native Americans from their ancestral land and sacred practices” and caused

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<sup>201</sup> AR 31091.

<sup>202</sup> AR 31091, 31325.

<sup>203</sup> AR 31325-31326, 31333. To the extent not in the record, the legislative findings and executive branch policy statements discussed *infra* are judicially noticeable as official acts of the State of California. Evid. Code, § 452, subd. (c).

<sup>204</sup> Governor’s Exec. Order No. N-15-19, *supra*.

“destructive impacts” that “persist today.”<sup>205</sup> The survival and carrying on of Native cultural traditions has “def[ie]d all odds.”<sup>206</sup> In grappling with its history of genocide, state law and policy have evolved over time, slowly articulating greater commitments to tribal sovereignty and the hope of “begin[ning] to address these wrongs” and healing the State’s relationship with Native people.<sup>207</sup>

California enacted SB 18 in 2004, “[r]ecogniz[ing] that California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places are essential elements in tribal cultural traditions, heritages, and identities.”<sup>208</sup> This law was designed to establish “meaningful consultations” “regarding potential means to preserve those places” and “[e]nable California Native American tribes to manage and act as caretakers of California Native American prehistoric, archaeological, cultural, spiritual, and ceremonial places.”<sup>209</sup>

Similar to SB 18, Executive Order B-10-11 (2011)<sup>210</sup> recognized and reaffirmed “the inherent right of [Native American] tribes to exercise sovereign authority over their members and territory”; ordered the State to “meet regularly” with tribes “to discuss state policies that may affect tribal

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<sup>205</sup> Office of the Governor, Statement of Administration Policy: Native American Ancestral Lands (Sept. 25, 2020) <<https://www.gov.ca.gov/wp-content/uploads/2020/09/9.25.20-Native-Ancestral-Lands-Policy.pdf>>.

<sup>206</sup> Governor’s Exec. Order No. N-15-19, *supra*.

<sup>207</sup> Office of the Governor, Statement of Administration Policy: Native American Ancestral Lands, *supra*.

<sup>208</sup> Sen. Bill No. 18 (2003-2004 Reg. Sess.) § 1, subd. (b)(1).

<sup>209</sup> *Id.* at § 1, subd. (b)(2)–(3), (5).

<sup>210</sup> Governor’s Exec. Order No. B-10-11, *supra*.

communities”; and mandated that state agencies “shall permit” Tribes to “provide meaningful input” on such policies.

Subsequently, AB 52 (2014) acknowledged that tribes “have used, and continue to use, natural settings in the conduct of religious observances, ceremonies, and cultural practices and beliefs”<sup>211</sup> and that “prehistoric, historic, archaeological, cultural, and sacred places are essential elements in tribal cultural traditions, heritages, and identities.”<sup>212</sup> At the same time, AB 52 admitted that the failure to incorporate Tribes’ “knowledge and concerns” “has resulted in significant environmental impacts to tribal cultural resources and sacred places,” to the detriment of both tribes and the environment.<sup>213</sup> AB 52 professed a commitment to the principle that tribes have “existing rights . . . to participate in, and contribute their knowledge to, the environmental review process,”<sup>214</sup> and stated a goal of “[e]nabl[ing] California Native American tribes to manage and accept conveyances of, and act as caretakers of, tribal cultural resources.”<sup>215</sup>

Amici point to these laws and policies not as an independent legal basis for sustaining the Commission’s action (which would be beyond the scope of the issues on appeal), but as contextual background to show that protecting tribal cultural resources is, in fact, a modern community value inscribed in law by the people’s duly elected representatives and in the terms of the LCP, and to underscore the high stakes for contravening this

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<sup>211</sup> Assem. Bill No. 52 (2013-2014 Reg. Sess.) § 1, subd. (a)(4).

<sup>212</sup> *Id.* at subd. (b)(1).

<sup>213</sup> *Id.* at subd. (a)(1)–(3).

<sup>214</sup> *Id.* at subd. (b)(6).

<sup>215</sup> *Id.* at subd. (b)(8).

value. Here, the “broad degradation”<sup>216</sup> and fundamental alteration<sup>217</sup> that OHVs have wrought to Oceano Dunes has adversely affected what the Chumash people clearly view as a significant and sacred tribal cultural resource. While State policy “commend[s] and honor[s] California Native Americans for . . . stewarding and protecting this land that we now share,”<sup>218</sup> and strives to “[f]acilitate the access of California Native Americans to sacred sites and cultural resources,”<sup>219</sup> the trial court’s decision to reverse the OHV phaseout will have the opposite effect, given that OHV use will lead to further erosion of both Chumash culture and the sacred Oceano Dunes themselves. By contrast, phasing out OHV use from the Dunes, as the Commission intended, would prevent further irreparable damage to Chumash sites from vehicles while facilitating the restoration of ESHA and preservation of the Dunes’ integrity moving forward, consistent with the LCP, CDP, and Coastal Act.

Amici appreciate the Commission’s leadership in affirming that Native voices “regarding the core use and intensity of use issues being evaluated [at Oceano Dunes] must be heard, and heeded,”<sup>220</sup> and its ultimate decision to stand against further marginalization of the Chumash people by phasing out OHV use at the Dunes. As Governor Newsom acknowledged in Executive Order N-15-19, extant Native cultural traditions are limited and exist in “def[iance] [of] all odds” after the State’s

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<sup>216</sup> AR 4.

<sup>217</sup> AR 102.

<sup>218</sup> Governor’s Exec. Order No. N-15-19, *supra*.

<sup>219</sup> Office of the Governor, Statement of Administration Policy: Native American Ancestral Lands, *supra*.

<sup>220</sup> AR 124.

historic ““war of extermination,””<sup>221</sup> making the remnants of Native culture all the more important to preserve. Cultural resources once lost are lost forever.<sup>222</sup>

## CONCLUSION

Under California law and policy, one group’s high-impact recreational activities may not proceed at the expense of everything else: ecological health, low-impact public recreation, public health and safety, environmental justice, and tribal rights. While this principle should be self-evident—especially in the Coastal Zone, which Californians treasure as a resource to be preserved for the benefit of all—the trial court wrongly allowed the harm associated with OHV use at Oceano Dunes to continue. The trial court’s erroneous finding that the Commission lacked authority to end OHV use is simply wrong. As discussed *supra*, the Coastal Act and interrelated laws and policies mandated the Commission’s actions and compel the conclusion that OHV use at Oceano Dunes—for which there is zero carrying capacity—may not continue. Accordingly, Amici respectfully

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<sup>221</sup> Governor’s Exec. Order No. N-15-19, *supra*, (quoting California’s first Governor, Peter Burnett).

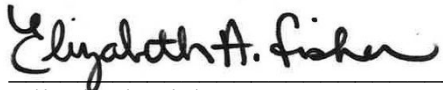
<sup>222</sup> See *Save the Agoura Cornell Knoll v. City of Agoura Hills* (2020) 46 Cal.App.5th 665, 688 (2020) (““Once an archaeological site is destroyed, it can’t be replaced”” (quoting an expert in Native American archaeology and history who raised concerns about a project’s impacts on Chumash cultural resources.); *Colorado River Indian Tribes v. Marsh* (C.D. Cal. 1985) 605 F.Supp. 1425, 1440 (recognizing OHVs could pose “irreparable harm” to fragile tribal cultural resources, whose importance “transcends their spiritual value to the Tribes” by also “represent[ing] a means by which to better understand the history and culture of the American Indians in the past, and hopefully to provide some insight and understanding of the present day American Indians”).

ask this Court to reverse the trial court's ruling and reinstate the Commission's decision to phase out OHV usage at Oceano Dunes.

DATED: November 15, 2024

Respectfully submitted,

EARTHJUSTICE

By: 

Elizabeth Fisher

Sean B. Hecht

*Attorneys for Prospective Amici  
Curiae*

*The Surfrider Foundation, Oceano  
Beach Community Association,  
Northern Chumash Tribal Council,  
Sierra Club, Center for Biological  
Diversity, and San Luis Obispo  
Coastkeeper*

## CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204, subdivision (c)(1) of the California Rules of Court, I hereby certify that this brief contains 11,421 words, including footnotes, but excluding the Application, Tables, and Certificates. I have relied on the word count of the Microsoft Word program used to prepare this Certificate.

DATED: November 15, 2024



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Elizabeth A. Fisher



**PROOF OF SERVICE**

I am a citizen of the United States of America and a resident of Contra Costa County, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is 50 California Street, Suite 500, San Francisco, California 94111.

On November 15, 2024, I served the foregoing **APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS AND CROSS-RESPONDENTS** on the parties listed below by Electronic Mail:

<p>Thomas D. Roth (208601) rothlaw1@comcast.net Law Offices of Thomas D. Roth 1900 South Norfolk Street, Suite 350 San Mateo, CA 94403</p> <p><i>Counsel for Plaintiff, Respondent and Cross-Appellant Friends of Oceano Dunes, Inc.</i></p>	<p>David Patrick Hubbard (148660) dhubbard@gdandb.com Kendall Frances Teal (329076) kendallkraus@gmail.com Gatzke, Dillon &amp; Ballance LLP 2762 Gateway Road Carlsbad, CA 92009</p> <p><i>Counsel for Plaintiffs and Appellants EcoLogic Partner, Inc. and Specialty Equipment Market Association</i></p>
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<p>Rita L. Neal (151156) rneal@co.slo.ca.us Office of the County Counsel 1055 Monterey, Room D320 San Luis Obispo, CA 93408</p> <p><i>Counsel for Real Party in Interest and Respondent County of San Luis Obispo Board of Supervisors and County of San Luis Obispo</i></p>	<p>Jon Michael Ansolabehere (278174) jansolabehere@co.slo.ca.us County Counsel of San Luis Obispo Ofc of the City Attorney 1055 Monterey Street, Room D- 320 San Luis Obispo, CA 93408</p> <p><i>Counsel for Real Party in Interest County of San Luis Obispo</i></p>
<p>Deborah Sivas (135446) dsivas@stanford.edu Environmental Law Clinic Mills Legal Clinic at Stanford Law School Crown Quadrangle 559 Nathan Abbott Way Stanford, CA 94305</p> <p><i>Counsel for Defendants and Appellants California Coastal Commission and John Ainsworth</i></p>	

Furthermore, on November 15, 2024, I served the foregoing **APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS AND CROSS-RESPONDENTS** on the persons listed below by placing a true and correct copy thereof in a sealed envelope, with postage thereon fully prepaid, in the United States Mail, addressed as follows:

Clerk for the Honorable Tana L. Coates  
Superior Court of California  
County of San Luis Obispo  
1050 Monterey Street  
San Luis Obispo, CA 93408

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 15, 2024 in Pleasant Hill, California.

*Firenze Rodriguez*  
\_\_\_\_\_  
Firenze Rodriguez

**CASE NO. B330994**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION SIX**

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FRIENDS OF OCEANO DUNES, INC., et al.  
*Respondents and Cross-Appellants*

v.

CALIFORNIA COASTAL COMMISSION, et al.  
*Appellants and Cross-Respondents*

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**[Proposed] Order Granting Application to file Amicus Curiae Brief in  
Support of Appellants and Cross-Respondents**

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On Appeal from the Superior Court for the State of California,  
County of San Luis Obispo, Case No. 21CV-0214,  
[Consolidated with Case Nos. 21CV-0219, 21CV-0246, 21CV-0541]  
Hon. Tana L. Coates

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EARTHJUSTICE  
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Northern Chumash Tribal Council, Sierra Club, Center for Biological  
Diversity, and San Luis Obispo Coastkeeper*

This matter having come before the Court by application of proposed amici curiae The Surfrider Foundation, Oceano Beach Community Association, Northern Chumash Tribal Council, Sierra Club, Center for Biological Diversity, and San Luis Obispo Coastkeeper, seeking leave to file an amicus curiae brief in the above-captioned matter, and the Court having reviewed the application and proposed amicus curiae brief herein, and being otherwise fully advised in the matter, the Court finds good cause to allow amicus participation.

IT IS HEREBY ORDERED:

The Application for Leave to File an Amicus Curiae Brief in Support of Appellants and Cross-Respondents is GRANTED and the proposed amicus curiae brief SHALL BE FILED by the Clerk of Court.

This \_\_\_\_ day of \_\_\_\_\_, 2024.

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The Honorable Justice of the  
California Court of Appeals  
Second District, Division Six

**PROOF OF SERVICE**

I am a citizen of the United States of America and a resident of Contra Costa County, California. I am over the age of eighteen years and not a party to the within entitled action. My business address is 50 California Street, Suite 500, San Francisco, California 94111.

On November 15, 2024, I served the foregoing **[PROPOSED]**  
**ORDER GRANTING APPLICATION TO FILE AMICUS CURIAE**  
**BRIEF IN SUPPORT OF APPELLANTS AND CROSS-**  
**RESPONDENTS** on the parties listed below by Electronic Mail:

<p>Thomas D. Roth (208601) rothlaw1@comcast.net Law Offices of Thomas D. Roth 1900 South Norfolk Street, Suite 350 San Mateo, CA 94403</p> <p><i>Counsel for Plaintiff, Respondent and Cross-Appellant Friends of Oceano Dunes, Inc.</i></p>	<p>David Patrick Hubbard (148660) dhubbard@gdandb.com Kendall Frances Teal (329076) kendallkraus@gmail.com Gatzke, Dillon &amp; Ballance LLP 2762 Gateway Road Carlsbad, CA 92009</p> <p><i>Counsel for Plaintiffs and Appellants EcoLogic Partner, Inc. and Specialty Equipment Market Association</i></p>
<p>William J. White (1891441) white@smwlaw.com Mindy K. Jian (336139) mjian@smwlaw.com Jenna Naomi Archer (348118) jarcher@smwlaw.com Shute Mihaly &amp; Weinberger LLP 396 Hayes Street San Francisco, CA 94102</p> <p><i>Counsel for Defendants and Appellants California Coastal Commission and John Ainsworth</i></p>	<p>John J. Flynn (76419) jflynn@nossaman.com Samantha Savoni (329243) ssavoni@nossaman.com Nossaman LLP 18101 Von Karman Ave. Suite 1800 Irvine, CA 92612</p> <p><i>Counsel for Real Party in Interest and Respondents California Department of Parks &amp; Recreation and Armando Quintero</i></p>

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<p>Deborah Sivas (135446) dsivas@stanford.edu Environmental Law Clinic Mills Legal Clinic at Stanford Law School Crown Quadrangle 559 Nathan Abbott Way Stanford, CA 94305</p> <p><i>Counsel for Defendants and Appellants California Coastal Commission and John Ainsworth</i></p>	

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follows:

Clerk for the Honorable Tana L. Coates  
Superior Court of California  
County of San Luis Obispo  
1050 Monterey Street  
San Luis Obispo, CA 93408

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 15, 2024 in Pleasant Hill, California.

*Firenze Rodriguez*  
\_\_\_\_\_  
Firenze Rodriguez