

State Parks' Habitat Conservation Plan for Oceano Dunes Isn't One

When it comes to the Oceano Dunes State Vehicular Recreation Area, the California Department of Parks and Recreation has an established pattern of drafting Environmental Impact Reports that are not so much about identifying environmental impacts of a proposed project or activity and figuring out how to mitigate or eliminate them, but are clearly attempts to increase the riding area at the ODSVRA.

The public review draft of the Habitat Conservation Plan for the Oceano Dunes District – about 25 years late and not worth the wait – is a case in point.

The Draft EIR states, under the headline “Balance of Resource Protection and Recreation Opportunity:”

“The main controversy concerning the HCP is striking an acceptable balance between motorized recreation opportunity and protection of natural resources. State Parks’ mission is to provide both high-quality recreation opportunity (Public Resources Code [PRC] § 5090.01 et seq.) including motor vehicle recreation and resource protection that conserves and improves habitat over time (SB249). The HCP represents State Parks’ efforts to balance these competing needs. Some conservation interests and those opposed to motorized recreation at Oceano Dunes would like to see State Parks reduce park access to OHVs through a complete ban or through increased riding restrictions in either hours, open area, or vehicle numbers. Conversely, motorized recreation interests have seen multiple sizable reductions in park acreage open to OHV recreation and camping and would like to see both the existing area preserved and previously closed areas reopened.”

Note the conflation of what “interests...would like to see” with what the law requires, wielding the former to override the latter.

We’ve seen this movie before.

In 2016, the Off Highway Motor Vehicles Recreation Division issued a Draft Program Environmental Impact Report for the Oceano Dunes SVRA Dust Control Program that attempted to stand the California Environmental Quality Act on its head, stating that “recreational impacts” must be considered by pretending that CEQA required an analysis of the impact of dust control measures on off-highway vehicle recreation in addition to the potential impacts of dust control measures on the environment. This accompanied an analysis that avoided the most potentially effective dust control measures and instead focused on preserving the maximum off-road riding area on the dunes.

We note the comments of the Air Pollution Control District on that 2016 document and cite them here as an overall comment on the HCP Draft EIR:

“This identified impact is based on OHMVR’s creation of their own significance threshold for impacts to Recreation that is found only in this document and goes beyond what is defined in the CEQA guidelines... OHMVR has created the following criterion for defining a significant impact: ‘In addition, the OHMVR Division has determined the project would have a significant environmental impact related to recreation and public access in the project area if it would: Substantially limit, reduce, or interfere with established coastal recreational opportunities at Oceano Dunes SVRA.’ This self-defined ‘qualitative threshold’ is then used as the basis for determining the proposed project would create a significant impact to Recreation that must be mitigated because it would temporarily or permanently reduce the size of the riding area....”

We are disappointed to see this discredited approach imported into the California Department of Parks and Recreation’s Draft EIR for the Oceano Dunes Habitat Conservation Plan: “In addition, CDPR has determined the project would have a significant environmental impact related to recreation and public access in the project area if it would substantially limit, reduce, or interfere with established coastal recreational opportunities or public access” (8-12). The use of the words “*in addition*” and “*related to*” do not suffice to perpetuate a threshold of significance and a category of impact not found in CEQA.

In 2017, the OHMR Division defended its interpretation of CEQA in its Dust Control Permit EIR, which rested on its reading of the sample checklist in Appendix G of the CEQA Guidelines, as follows:

“First, CEQA Guidelines Appendix G does not establish a definitive or exhaustive list of resources, impacts, or thresholds of significance that require evaluation and/or consideration under CEQA. For example, CEQA Guidelines Section 15063(f) states (emphasis added), “Sample forms for an applicant’s project description and a review form for use by the lead agency are contained in Appendix G and H.... *These forms are only suggested, and public agencies are free to devise their own format for an initial study.* In addition, CEQA Guidelines Section 15064 states, in part (emphasis added), “The determination of whether a project may have a significant effect on the environment calls for careful *judgement* on the part of the public agency involved, based to the extent possible on scientific and factual data. *An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting.*”

There were several problems with this argument:

- Permission for agencies to use their preferred format in devising impact checklist forms was asserted as permission to invent a new category of “recreational impacts.”
- The “judgment” allowed by CEQA as to “whether a project may have a significant effect on the environment” does not allow a public agency to substitute an effect on recreation for an effect on the environment or pretend that this concocted impact is equivalent to an effect on the

environment and that the two are either indistinguishable or must be weighed against each other as the occasion requires.

- In CEQA, “The significance of an activity,” for both the Dust Control Permit and the HCP, refers to the potential impact on the environment of the Oceano Dunes. State Parks and the OHMVR Division are pretending it refers to the impact of habitat protection measures on off-highway vehicle recreation, essentially an inversion of the reason for the existence of CEQA.

We fail to see how the proposed reduction and elimination of habitat for the Snowy Plover and Least Tern meet the obligation of DPR to provide “resource protection that conserves and improves habitat over time.”

The Draft EIR states that proposed elimination of the 6 Exclosure and East Boneyard Exclosure “would have a beneficial impact on coastal recreational opportunity and public access. The HCP new proposed covered activities have the potential to increase recreational opportunities by providing opportunity to increase year-round recreation on up to 109 acres of open riding area that is presently closed to recreation for 7 months of the year. Therefore, the HCP proposed new covered activities would have no contribution to a cumulative adverse effect on coastal recreational opportunity or public access.”

DPR was informed by the California Coastal Commission, in their comments on the Dust Control Permit EIR, that concerns about coastal recreation and public access were the purview of the Commission, not DPR, and should be removed from the EIR. Additionally, this is a continuation of the fundamental misreading of CEQA that DPR displayed in the 2016 dust control EIR. Per the APCD’s 2016 observation on “OHMVR’s creation of their own significance threshold for impacts to Recreation that is found only in this document and goes beyond what is defined in the CEQA guidelines,” concern for “a cumulative adverse effect on coastal recreational opportunity” does not belong in a plan ostensibly drafted to ensure the protection and conservation of threatened and endangered species and their habitat.

While asserting per Appendix G of the CEQA guidelines that “the construction or expansion of recreational facilities which might have an adverse physical effect on the environment” is not part of the HCP’s proposed projects and they will have no such impact, it also notes that: “The elimination of the East Boneyard Exclosure would expand the area used for open sand dune riding area by approximately 49 acres. The reduced 6 Exclosure would expand the flat beach area along the shoreline open to year-round camping and OHV recreation by up to 60 acres.”

The HCP DEIR must acknowledge that the present exclosure areas represent the project’s environmental baseline. DPR apparently does not believe that their elimination in order to afford an expansion of OHV activity falls under CEQA’s “expansion of recreational facilities which might have an adverse physical effect on the environment.” But a change in the environmental baseline that would convert present habitat exclosures into future areas for “year-round camping and OHV activity” clearly “might have an adverse physical effect on the environment,” per the CEQA Checklist.

In sum, it appears that the DEIR's determination to reduce and eliminate conservation areas springs from the same source identified in a 2/10/20 Coastal Commission memorandum on DPR's Public Works Plan:

“This project [the proposed new campground, staging, riding, and OHV entrance at Oso Flaco Lake] not only presents what appear to be serious LCP inconsistencies related to agricultural conversion and ESHA degradation, at a minimum, but instead of circumscribing Park uses and activities in ways that resolve the problems identified, it actually would appear to increase OHV use and related impacts associated with same. This project appears to be based on a premise of a ‘no net OHV loss of riding area’.... However, as Commission staff informed State Parks then, and as it has continued to inform State Parks since, ‘no net OHV loss’ is not only something the Commission cannot support as a foundational element of the PWP, but is actually both counterproductive to success and counterintuitive in terms of the very real issues and constraints affecting ODSVRA and its continued operations.”

- February 10, 2020, memo from Dan Carl, Central Coast District Director, to Coastal Commissioners and Interested Persons re State Parks' Oceano Dunes State Vehicular Recreation Area Public Works Plan Update.

The premise of “no net OHV loss” also clearly underlies the premise of the Habitat Conservation Plan, where its presence is equally or more inappropriate than its presence in the Public Works Plan. An attempt to expand OHV riding area in the HCP is contrary to the Endangered Species Act and its purpose of assuring the protection *and recovery* of listed species, the fundamental purpose of a Habitat Conservation Plan, and the tenets of the California Environmental Quality Act. All proposed projects that spring from the premise of “No net OHV loss” and presume to avoid “impacts on recreation” or confer “recreational benefits” at the expense of listed species and habitat must be removed from the HCP. Per the USFWS, an HCP “should address specific conservation needs of the species and be manageable and enforceable. Mitigation measures may take many forms, including, but not limited to, payment into an established conservation fund or bank; preservation (via acquisition or conservation easement) of existing habitat; enhancement or restoration of degraded or a former habitat; establishment of buffer areas around existing habitats; modifications of land use practices, and restrictions on access” (<https://www.fws.gov/endangered/esa-library/pdf/hcp.pdf>). There is no circumstance in which the removal of protections for existing habitat and the lifting of restrictions on access can be considered part of an effort to protect and assure the recovery of listed species. DPR's position that these measures will avoid impacts on recreation or confer recreational benefits is a non sequiter.

Finally, the HCP DEIR needs to justify its existence in light of the “extraordinary case” requirement of the Endangered Species Act (“...the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary, [which] in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking”), and the Section 10 requirement to list “what alternative actions to such taking the applicant considered and the reasons why such alternatives are not being utilized.”

That list of actions considered should incorporate the comments of the California Coastal Commission from its July 11, 2019, staff report:

- “It is important to note that that legislation...supports and encourages OHV recreational use, but at the same time it does not support it at all costs. In fact, the legislation is clear that when OHV use is leading to problems, such as is the case at ODSVRA, then it is appropriate to shutdown that use if necessary to protect sensitive natural and cultural resources. For example, PRC Section 5090.02(a)(3) states that the Legislature finds: ‘The indiscriminate and uncontrolled use of those vehicles may have a deleterious impact on the environment, wildlife habitats, native wildlife, and native flora’; and PRC Section 5090.02(c)(4) states: ‘When areas or trails or portions thereof cannot be maintained to appropriate established standards for sustained long-term use, they should be closed to use and repaired, to prevent accelerated erosion. Those areas should remain closed until they can be managed within the soil conservation standard or should be closed and restored’; and PRC Section 5090.35(a) states: ‘The protection of public safety, the appropriate utilization of lands, and the conservation of natural and cultural resources are of the highest priority in the management of the state vehicular recreation areas.’ Thus, although it has been argued by some that this enabling legislation does not allow for the phasing out of OHV use, the legislation itself paints a different picture, one that clearly recognizes that it does not stand for OHV use at all cost, and rather requires such use to be undertaken in a manner consistent with long-term sustainable use where the conservation of natural and cultural resources is prioritized; and it certainly allows for closing off OHV use where it is causing the types of problems it is causing at ODSVRA. In addition, and perhaps just as compelling, PRC Section 5090 does not somehow preempt other State laws, including the Coastal Act (and by extension the LCP). On the contrary, as with other laws affecting the same resources, it is important to harmonize the laws as much as possible. On that point, here, proper application of both laws based upon facts on the ground would appear to suggest the same outcome: namely that OHV use at this location is not sustainable, and the time has come to transition to other appropriate recreational uses.”

In other words, the DEIR needs to explain why the ODSVRA is “the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved,” and, in addition to its hundreds of pages dedicated to promises of increased monitoring, chick and egg capture and captive breeding, decreeing automotive buffers around stray nests, etc., must analyze the transition to other appropriate recreational uses as an alternative to the taking contemplated by the applicant, said taking being necessitated by the continuation and proposed expansion of an inappropriate use.

The full EIR can be read here. Comments are due by 5:30 p.m. on June 14. Send yours to Ronnie Glick, Senior Environmental Scientist, California Department Parks and Recreation, Oceano Dunes District, 340 James Way, Ste. 270, Pismo Beach, CA 93449 or to OceanoDunesHCP@parks.ca.gov