SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

FRIENDS OF OCEANO DUNES, INC., a California not-for profit corporation, Petitioner and Plaintiff, v. CALIFORNIA COASTAL COMMISSION, an agency of the State of California, and DOES 1 to 50, Inclusive, Respondent and Defendant.	Case No.: 17CV-0576 **RULING ON PETITIONER'S MOTION FOR ATTORNEYS' FEES**
CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, a department of the State of California, and DOES 1-50, inclusive, Real Party in Interest, et al.	

The hearing on Petitioner Friends of Oceano Dunes, Inc.'s motion for attorneys' fees came on for hearing on July 15, 2020. Thomas Roth appeared on behalf of Petitioner; Mitchell Rishe on behalf of the California Coastal Commission and Department of Parks and Recreation; Jon Ansolabehere on behalf of San Luis Obispo County; Michelle

Gearhart on behalf of SLO County Air Pollution Control District; Molly Thurmond for the City of Grover Beach; andJohn Sasaki and Adam Levitan appeared for the California Air Resources Board. After considering the arguments of counsel, the Court took the matter under submission and now adopts its tentative ruling, as more fully set forth herein.

On October 23, 2017, Friends of Oceano Dunes, Inc. ("Petitioner" or "Friends"), an organization of off-highway vehicle enthusiasts, filed a Verified Petition for Writ of Administrative Mandamus (Code Civ. Proc. § 1094.5) and/or Traditional Mandamus (Code Civ. Proc. § 1085), and Complaint for Injunctive Relief. On October 4, 2018, Petitioner filed its First Amended Verified Petition for Writ of Administrative Mandamus (Code Civ. Proc. § 1094.5) and/or Traditional Mandamus (Code Civ. Proc. § 1085), and Complaint for Injunctive Relief (the "Petition"). On March 19, 2019, the parties filed a stipulation and order dismissing counts two and seven from the Petition.

After the dismissal of counts two and seven, the California Coastal Commission ("Respondent" or the "Commission") was the only remaining Respondent and Defendant. The San Luis Obispo County Air Pollution Control District and its Board of Directors (the "APCD"), the City of Grover Beach ("Grover Beach"), the California Department of Parks and Recreation ("CDPR") and the California Air Resources Board ("CARB") remained in the action solely as Real Parties-in-Interest.

Petitioner sought a writ for administrative mandamus pursuant to Code of Civil Procedure section 1094.5 against the CCC for an alleged unlawful issuance of a coastal development permit to CDPR for a public works project related to dust control measures at the Oceano Dunes State Vehicular Recreation Area ("SVRA" or the "Oceano Dunes").

On February 26, 2020, this Court issued a Final Judgment and Peremptory Writ against the Commission.

Friends requests this Court award reasonable attorneys' fees and costs under Code of Civil Procedure section 1021.5 against the Commission. Friends argues that Section 1021.5 compels a fee award because Friends' lawsuit resulted in a significant public

benefit through hard fought litigation lasting more than two years.[1]

The Commission opposes the motion, and the APCD and the County of San Luis Obispo join the Commission's opposition. The Commission filed a declaration from its counsel in support of its opposition, as well as various supporting exhibits.

Grover Beach also filed a response to the motion, opposing an award of fees against it to the extent any such award is requested or contemplated.

Code of Civil Procedure section 1021.5 provides that the Court "may award attorney's fees to a successful party against one or more opposing parties in any action which has resulted in enforcement of an important right affecting the public interest if: (a) a significant benefit . . . has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement . . . are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

Section 1021.5 codifies the private attorney general doctrine in California. "The fundamental objective of the doctrine is to encourage suits enforcing important public policies by providing substantial attorney fees to successful litigants . . . ." (*Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565, quoting *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1289.)

"Although section 1021.5 is phrased in permissive terms (the court 'may' award), the discretion to deny fees to a party that meets its terms is quite limited...the private attorney general theory, from which section 1021.5 derives, requires a full fee award unless special circumstances would render such an award unjust." (*Lyons v. Chinese Hospital Assn.* (2006) 136 Cal.App.4th 1331, 1344 [citations omitted].) That respondent may have been acting in good faith is irrelevant. (*Wilson v. San Luis Obispo County Democratic Central Committee* (2011) 192 Cal.App.4th 918, 926.) The party moving for fees bears the burden of establishing its entitlement to those fees. (*Ryan v. California*

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[1] The Court grants Friends' Request for Judicial Notice.

Interscholastic Federation (2001) 94 Cal.App.4th 1033, 1044.)

Section 1021.5 compels a fee award if the statute's criteria are met – (1) the applicant is a "successful party"; (2) the action resulted in the enforcement of an important right affecting the public interest; (3) the action conferred a significant benefit on the general public or a large class of persons; (4) a fee award is "appropriate" given the necessity and financial burden of private enforcement; and (5) that, in the interests of justice, the fee should not be paid out of the recovery. (1 Cal. Atty. Fee Awards (Cont.Ed.Bar 2020) § 3.37, p. 3-29.) Friends argues that each of these criteria justify a fee award in this matter.

The Commission does not dispute that Friends was the successful or prevailing party in this action, and the Court finds that Friends was the successful party. The Court further finds that Friends' action seeking to enforce compliance with environmental laws enforced an important right affecting the public interest. (*Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 936; *Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 612; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 754.)

Friends argues that its successful lawsuit benefited the 2 million annual visitors, including the approximate 28,000 Friends' members and users of the Oceano Dunes who recreate at the SVRA, as well as those that engage in activities such as observing sensitive shorebirds there. (*Sierra Club v. Dep't of Parks & Recreation* (2012) 202 Cal.App.4th 735, 739; Roth Decl., Exh. 3; Suty Decl.) Friends also argues that its lawsuit benefits the general public by effectuating the State policy expressed in CEQA by ensuring that the dust control measures will be properly evaluated for environmental impacts. It argues that it therefore conferred a significant benefit on the general public and a large class of persons.

In opposition, the Commission argues that Friends' technical victory in this action did not confer a significant benefit on the public, and that private enforcement was neither necessary nor appropriate. The Commission further argues that the amount of fees sought

by Friends is unreasonable.

Under section 1021.5, subdivision (a), a party is not entitled to fees unless the litigation confers a significant benefit on the general public or a large class of persons. "[T]he public always has a significant interest in seeing that legal strictures are properly enforced and thus . . . the public always derives a 'benefit' when illegal . . . public conduct is rectified." (*Woodland Hills Resid. Assn. v. City Council of Los Angeles* (1979) 23 Cal.3d 917, 939.)

However, "the Legislature did not intend to authorize an award of attorney fees in every case involving a statutory violation" and expects trial courts to "determine the significance of the benefit, as well as the size of the class receiving benefit, from a realistic assessment, in light of all the pertinent circumstances, of the gains which have resulted in a particular case." (*Woodland Hills Resid. Assn, supra,* 23 Cal.3d at pp. 939–940.)

The Commission argues that when an action results in only a minor or technical victory, attorney fees are not appropriate. (*Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986, 1000 [denial of attorney fees affirmed where petitioners prevailed only on a technical point of lack of public notice on the final EIR]; *Center for Biological Diversity v. California Fish & Game Com.* (2011) 195 Cal.App.4th 128, 141 [no significant benefit or enforcement of important right affecting the public interest where petitioner achieved a do-over because Commission might have employed an incorrect standard, but no substantive remand].)

The Commission argues that Friends was successful in requiring it to clarify the scope of the authorization in the Coastal Development Permit at issue, and nothing more. The Commission contends that Friends now attempts to broaden its victory, and that the Court's decision derived solely from its determination that the Commission's authorization was ambiguous, unclear, and allowed for the possible implementation of a vastly expanded dust mitigation program.

The Commission further contends it can comply with the writ simply by noticing the permit for re-hearing and at the re-hearing, resolve the ambiguity by clarifying that the

scope of the dust control measures approved by the Commission are exactly what the Commission, CDPR and the APCD all along have understood the scope to be—approximately 100 acres of dust controls. It argues that no additional environmental review will be required. (See, e.g., *Ctr. for Biological Diversity, supra*, 195 Cal.App.4th at p. 141 ["minor revisions or rewordings are not sufficiently significant to support an award under section 1021.5."].)

In reply, Friends argues that its victory benefitted not only the public at large but all users of off-road recreation at the Oceano Dunes, which exceeds 1.4 million people every year. Friends further argues that calling the success technical is contradicted by the Court's ruling, which was overwhelmingly in Friends' favor, and that this Court did not simply rule that the Commission's action needed to be clarified. Rather, the Court held that the Commission authorized unlimited dust control measures throughout the SVRA and did not put an outside limit on the program. The Court held, as an alternative rationale, that at a minimum the project description is ambiguous. Friends also argues that *Stevens, supra,* 125 Cal.App.3d 986, is inapposite because in that case, the plaintiffs prevailed only on an inadequate notice claim, whereas here, the Court found a substantive violation.

The Court agrees that this action is distinguishable from the technical violations in the cases cited by the Commission. (*Stevens*, *supra,* 125 Cal.App.3d 986; *Center for Biological Diversity*, *supra,* 195 Cal.App.4th 128, 141.) The Court did not simply order the Commission to make a clarification in the permit. The project approved contained no limitation on the dust control measures that could be implemented. The Commission has discretion on how to remedy the violation, including but not limited to, amending the permit to place a limit on dust control measures that comports with the environmental review conducted, or conducting an expanded environmental review to meet the expanded scope of the project. Friends achieved more than a technical victory.

Because of the Friends action, the Commission is compelled to comply with CEQA and conduct a proper assessment of the environmental impacts of the dust control project it approves. The Courts finds that the action vindicated important rights and

conferred a substantive, significant benefit to the public and to a large group of persons. (*Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 738 [proper assessment of environmental impacts associated with a project is a significant benefit justifying the award of fees].)

The Commission next argues in opposition that private enforcement was neither necessary or appropriate, claiming that Friends did not need to file a lawsuit to address its concerns; but rather, could have requested an interpretation or a clarification of the permit from the executive director under standard condition 3 of the permit. According to the Commission, such a request would have resolved the issues far more quickly and without the public resources expended in this action.

The Commission further argues that Friends never engaged in good faith settlement efforts, i.e., by demanding that the Commission withdraw its approval altogether. It finally argues that impacts to recreation is not considered an environmental impact under CEQA, and that self-interested promotion of recreational uses is not a CEQA policy supporting an award of fees.

In reply, Friends argues that when an action is brought against a governmental agency, the need for private enforcement is clear. (*Kern River Public Access Com. v. City of Bakersfield* (1985) 170 Cal.App.3d 1205, 1226 ["When an . . . agency . . . fails to enforce the law, private suits . . . are the only practical way to effectuate the policy, so attorneys' fee awards are appropriate."].)

Moreover, contrary to the Commission's argument about standard condition 3 of the permit, Friends reminds the Court that it filed a 29-page single spaced letter to the Commission's executive director explaining why the Commission's actions and permit conditions were unlawful. (AR 900-928). Friends contends that the executive director's response did not remedy the issue. Friends claims that standard condition 3 does not apply to it, but rather governs the relationship between the Commission and the CDPR.

Friends is correct that this Court rejected this argument when raised in the merits of this writ litigation. Friends exhausted its administrative remedies, and the Court finds

that seeking a judicial remedy was necessary and appropriate.

Friends' counsel also challenges the Commission's characterization of the settlement negotiations, arguing that it was the Commission that undermined the settlement efforts. The Commission fails to cite any authority that a failure to settle requires a denial of fees, therefore the Court cannot find that because Friends' counsel's settlement demand was more than it obtained in litigation, that the litigation, which was successful and vindicated an important right on behalf of the public, was unnecessary.

Finally, as to the Commission's argument that recreation is not considered a CEQA policy, Friends contends that land used for recreation in the coastal zone is an impact that must be analyzed under CEQA, that recreation and dust control measures are mutually exclusive, and that impacts to land used for recreation in the coastal zone must be analyzed under CEQA. CEQA requires study of significant impacts on the environment, including impacts to land used for recreation. Moreover, the impact to recreation was only one interest Friends sought to protect.

The Court finds that a fee award is appropriate given the necessity and financial burden of private enforcement and that Friends is entitled to an award of its reasonable attorney fees under Code of Civil Procedure section 1021.5. Friends seeks a total of $241,726.67 in fees, including $235,135.50 in total fees and $6,591.17 in attorney travel costs. Friends does not provide copies of the billing records, but does provide detailed declarations supporting the request, including declarations from the billing attorneys as to specific amounts of time billed and the tasks for which they were billed.

Mr. Roth billed at the hourly rate of $395 per hour, and his associate Ms. Fagerlind seeks a rate of $285 per hour. The Court has reviewed the declarations submitted by Friends and finds those rates to be reasonable market rates in this community for attorneys of comparable experience. (See declarations of Thomas Roth, Erin Fagerlind, Roger Frederickson, David Lanferman and Greg Angelo.)

The Commission does not object to the rates requested by counsel but does object to certain of the fees and expenses as unreasonable. The Commission argues that the fees

sought do not reflect the actual benefit achieved, and that the request should be reduced for fees incurred that were not necessary to the success of the litigation. The Court notes that Petitioners' counsel is entitled to be fully compensated for "all the hours reasonably spent." (*Ketchum v. Moses, supra*, 24 Cal.4th 1122, 1133.)

The Commission objects to the $26,030.50 in fees and $1,696.43 in travel-related expenses Friends' seeks in connection with the administrative proceedings before the Commission. The Commission argues that those fees should be reduced by the amount of fees and expenses Petitioner's counsel incurred to attend the Commission's September and October 2017 meetings, because as a mere observer, counsel could have watched the live stream of the Commission's meetings or reviewed the transcript. The Court disagrees and finds these fees and expenses to be reasonably incurred. The Court agrees with Friends that counsel's live attendance at these hearings was reasonable and necessary for the litigation on behalf of his clients.

The Commission further argues that it was unreasonable for Friends' attorney to incur 40.7 hours of time to review the Commission's staff report and findings and draft a 29-page single-space letter in response. The Commission argues that Petitioner's attorney does not explain why a 29-page letter was necessary, and that the comment letter addresses matters that were either not alleged in the petition or were subsequently withdrawn.

However, Friends must raise all potential issues during the administrative process or risk waiver. The Court also finds these fees to be reasonable and necessary.

The Commission next objects to fees for the time Friends' attorneys spent litigating against and communicating with the real parties, including time spent opposing a demurrer filed by Grover Breach, as well as other litigation activities against the real parties. (See opposition, 15:8-20.)

In reply, Friends argues that in one case cited by the Commission, *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 517, the court divided the Code of Civil Procedure section 1021.5 fees among the losing parties. However, the appellate court in that case simply held that the trial court had discretion to divide the fees, but not

that the court must do so. Friends argues that if the Court wishes to order apportionment that is fine, but that is no basis for reducing the award.[2]

Friends argues that it was legally required to name the real parties, or the Court could have dismissed the entire case for failure to join an indispensable party. (See *Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 522; *Sierra Club v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 501 ["if the plaintiff or petitioner prays for the cancellation of a legal right in a certificate, permit or license issued in the name of and being the property of a third person, such person is an indispensable party to the action"]; see also *Beresford Neighborhood Assn. v. City of San Mateo* (1989) 207 Cal.App.3d 1180, 1188.)

Friends argues that in fairness, the Commission should bear the cost of Friends having to oppose Grover Beach's demurrer (that was overruled), because Friends could not have maintained this lawsuit without naming Grover Beach as a real party. "Where a lawsuit consists of related claims, and the plaintiff has won substantial relief, a trial court has discretion to award all or substantially all of the plaintiff's fees even if the court did not adopt each contention raised." (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 997.)

The Court finds that the joinder of Grover Beach was reasonably necessary to the litigation, finds that the fees incurred to oppose Grover Beach's demurrer were reasonably incurred, and finds that the Commission, whose actions in approving the permit underly this action, should reasonably bear those fees.

The Commission next objects that counsel spent 50 hours drafting a 72-page petition, and then nevertheless incurred more fees drafting an amended petition and preparing, filing, and attending the hearing for leave to file the amended petition; and then negotiating and preparing stipulations and dismissals of certain counts. The motion to amend was unopposed, and the Commission argues that a stipulation to amend would

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[2] Apportionment was not requested by Friends in its moving papers and thus is not currently before the Court.

have sufficed. Thus, the Commission contends that the Court should reduce Friends' fee award by $9,340.35 ($7,426 + $492.35 + $1,422), for fees and travel-related expenses Petitioner's attorneys incurred amending the petition and preparing stipulations to dismiss.

In reply, Friends' counsel declares that the time spent preparing the amended petition was required because counsel prepared red-line and clean versions, researched and updated caselaw, and discussed with each parties' legal counsel, as well as drafted the motion for leave and supporting documents and traveled to and attended the hearing. Counsel declares that he was not the only counsel to appear in person, that he decided his personal appearance was warranted and he wanted to address in person any questions posed by the Court.

While not unreasonable, the Court does query why counsel did not seek a stipulation to file an amended petition, rather than file a motion, given that the motion was unopposed. However, reviewing the time records, the Court finds that the time was reasonable, as preparing, discussing, obtaining and filing a stipulation would have taken significant time from counsel. Moreover, as to the hearing itself, the motion was heard at the same time as a trial setting conference, at which counsel's appearance was reasonably necessary. Thus, the travel to the hearing would have reasonably been incurred for the trial setting conference, even absent the motion.

As to the Commission's objections to the length of the briefing and the hours expended, the Court approved the length of the briefs. Given the complexity of the issues here, the Court finds that length of the briefing and hours expended in preparation are reasonable.

The Commission further objects to fees and expenses for counsel's in person attendance at a November 18, 2019 readiness conference, November 21, 2019 case management conference and February 26, 2020 hearing on the judgment. The Commission objects that counsel could have just as easily attended these hearings by CourtCall, as all other non-local attorneys did, and the Commission should not have to bear the costs of Friends' attorney's decisions.

In reply, Friends argues that these fees were reasonably necessary, that courts prefer counsel to attend a trial readiness conference in person, and that the November 21, 2019 case management conference was unusually important as Judge Coates took over the case after Judge Garrett's recusal. Friends' counsel further argues that the hearing on the final judgment was important to attend because of the stark disagreement of the parties.

Given the posture of the case at each of these hearings and including the Court's requirement that counsel for the parties personally appear at trial readiness conferences, the Court agrees that counsel's in person attendance was reasonable and necessary.

The Commission next opposes fees sought by Friends in connection with settlement communications, because it argues that Friends' counsel engaged in insincere efforts to settle various litigation measures, resulting in motion work and unnecessarily increasing the cost of litigation to all parties.

The Commission challenges 2.5 hours to prepare a stipulation for an extension of time to file Friends' reply brief, and then 1.4 hours of time for preparing an ex parte application for the same relief. The Commission's counsel declares that all parties consented to the extension of time; however, Friends' counsel insisted on including a superfluous provision in the stipulation regarding a pending federal court case, and when the parties did not agree to the inclusion of this language, rather than striking the language, counsel sought ex parte relief, which was unopposed.

The Commission also challenges 2.4 hours for communications regarding the settlement of Petitioner's attorneys' fees and for the drafting of a stipulation to extend the time to file Petitioner's attorney fee motion. The Commission's counsel declares that those discussions were not in good faith. (Rishe Decl., ¶¶ 9, 10, Exhs. G, H.) The Commission also objects that it is impossible to tell from Mr. Roth's declaration whether entries for settlement discussions were for this matter, or for the other six cases Petitioner is prosecuting. (Roth Decl., ¶¶ 33, 45, 55.)

In reply, Friends' counsel notes that the amount sought here is small, that there is no evidence that Friends was insincere, and sets forth the interactions and disagreements

between the parties from Friends' point of view. The Court also does not find this time unreasonable.

Finally, the Commission objects to Petitioner's counsel spending over 80 hours preparing for oral argument on this case, as well as time spent preparing an 81-page PowerPoint for presentation during oral argument, which the Commission argues was withdrawn after objection and never used.

In reply, Friends' counsel argues that he had to prepare for oral argument three times because of last-minute continuances on the writ hearing by the Court. He further argues that he prepared the PowerPoint instead of preparing notes, which would have taken him the same amount of time, and that his presentation contained information that the Court requested regarding remedies that served as a foundation for the parties' discussion of remedies at oral argument. He further argues that the Commission and the Court were provided a copy of the presentation, and that he observed the Commission's counsel reviewing it prior to oral argument.

The Court has reviewed the declarations setting forth the billing records in detail. The Court notes that Friends is not seeking compensation for any paralegal time. Friends' counsel has written off some time and seeks basic lodestar fees.

The Court finds the fees and expenses to be reasonable. The Commission may disagree with how Friends prosecuted this action, but it has not shown that any of the time sought was unreasonable or unnecessary.

"[F]ees granted under the private attorney general theory are not intended to punish those who violate the law but rather to ensure that those who have acted to protect public interest will not be forced to shoulder the cost of litigation." (*San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 756.) Private attorneys general serve an important role. "Adequate fee awards are perhaps the most effective means of achieving this salutary goal. Courts should not be indifferent to the realities of the legal marketplace or unduly parsimonious in the calculation of such fees." (*Thayer v. Wells Fargo Bank, N.A.* (2001) 92 Cal.App.4th 819, 839.)

Friends' motion for attorneys' fees is granted.

DATED: July 31, 2020

Hon. TANA L. COATES
Judge of the Superior Court

TLC:jn

STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO
CERTIFICATE OF MAILING

Friends of Oceano Dunes, Inc. vs. California Coastal Commission	17CV-0576

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I, Alyssa Goriesky, Deputy Clerk of the Superior Court of the State of California, County of San Luis Obispo, do hereby certify that I am over the age of 18 and not a party to this action. Under penalty of perjury, I hereby certify that on **07/31/2020** I deposited in the United States mail at San Luis Obispo, California, first class postage prepaid, in a sealed envelope, a copy of the attached **RULING ON PETITIONERS MOTION FOR ATTORNEYS FEES.** The foregoing document was addressed to each of the above parties.

OR

If counsel has a pickup box in the Courthouse a copy was placed in said pickup box this date.

OR

☒ Document served electronically pursuant to CRC§2.251(b)(1)(B).

Dated: 7/31/2020

Michael Powell, Clerk of the Court

By: /s/ Alyssa Goriesky Deputy Clerk
Alyssa Goriesky