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9 FRIENDS OF OCEANO DUNES, INC.

FILED

JAN - 4 2012

SAN LUIS OBISPO SUPERIOR COURT
BY M. Zepeda
M. Zepeda, Deputy Clerk

10 SUPERIOR COURT OF CALIFORNIA

11 IN AND FOR THE COUNTY OF SAN LUIS OBISPO

12 FRIENDS OF OCEANO DUNES, INC., a
13 California not-for profit corporation,
14 Petitioner and Plaintiff,

15 vs.

16 SAN LUIS OBISPO COUNTY
17 AIR POLLUTION CONTROL DISTRICT, a
18 local air pollution control district; the BOARD
19 OF DIRECTORS OF THE SAN LUIS OBISPO
20 COUNTY AIR POLLUTION CONTROL
21 DISTRICT, the District's governing body, the
22 COUNTY OF SAN LUIS OBISPO, a political
23 subdivision, and the BOARD OF
24 SUPERVISORS of SAN LUIS OBISPO
25 COUNTY, the County's governing body, and
26 DOES 1-50, inclusive;

27 Respondents and Defendants; and

28 CALIFORNIA DEPARTMENT OF PARKS
AND RECREATION, a department of the State
of California, and DOES 1-50, inclusive;

Real Party-in-Interest

Case No.:

CV120013

**FRIENDS OF OCEANO DUNES'
VERIFIED PETITION FOR A WRIT OF
MANDAMUS AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

(C.C.P. § 1085)

1 COMES NOW Petitioner Friends of Oceano Dunes, Inc. ("Friends") requesting
2 this Court for a writ directed to Respondents pursuant to this Verified Petition for Writ of
3 Mandate and Complaint for Declaratory and Injunctive Relief, ordering it to set aside
4 Rule 1001 newly adopted by Respondent San Luis Obispo County Air Pollution Control
5 District, and for other relief, as follows:

6 **The Parties and Venue**

7 1. Friends is, and at all times mentioned in this Petition and Complaint, a
8 California not-for-profit corporation, with its principal place of business in San Luis
9 Obispo County.

10 2. Friends was expressly created to preserve and create recreational uses,
11 including off-highway vehicle recreation, at Oceano Dunes State Vehicular Recreation
12 Area (SVRA) located near Pismo Beach, California. Friends is a voluntary organization
13 which represents approximately 28,000 members and users of Oceano Dunes SVRA, who
14 routinely engage, have engaged and plan to continue to engage in motorized off-
15 highway vehicle (OHV) recreation, beach driving and beach camping at Oceano Dunes
16 SVRA. Hundreds of members engage, have engaged and plan to continue to engage in
17 motorized OHV recreation, beach driving and beach camping at Oceano Dunes SVRA
18 multiple times each year.

19 3. Friends maintains the instant lawsuit for itself and as a representative of its
20 injured members, whom it is duly authorized to represent.

21 4. Friends and its members will be adversely affected by Rule 1001, which
22 purports to set standards regulating and limiting alleged dust and particulate matter
23 emissions from areas used for motorized OHV recreation within Oceano Dunes SVRA.
24 Rule 1001 may require the closure of certain areas within Oceano Dunes SVRA, and the
25 prohibition of OHV recreation in certain areas, or even park wide. Such restrictions
26 would harm Friends and its members by limiting or prohibiting OHV recreation within
27 Oceano Dunes SVRA. Some members of Friends own fee title to private parcel in-

1 holdings located within Oceano Dunes SVRA, and their respective parcels will be
2 affected by closure to OHV, mitigation measures or even claims of violations.

3 5. Respondent and Defendant San Luis Obispo County Air Pollution Control
4 District (the "SLO APCD") is and was the local agency which created and legislatively
5 adopted Rule 1001. SLO APCD is and has been established in California pursuant to
6 Health and Safety Code §§ 40000 – 41133 to adopt and enforce lawful rules regarding
7 nonvehicular sources of pollution to achieve the state and federal ambient air quality
8 standards in areas affected by emission sources under its jurisdiction.

9 6. Respondent and Defendant Board of the SLO APCD (the "Board") is the
10 decision-making body for the SLO APCD and is responsible for adopting rules and
11 regulations regarding nonvehicular sources of pollution in SLO County. The APCD
12 Board is comprised of 12 elected officials, representing each district of SLO County and
13 the incorporated cities.

14 7. Based on information and belief, and on that basis it is alleged, the SLO APCD is
15 part of, or housed within, the Respondent and Defendant County of San Luis Obispo,
16 which has ultimate oversight of SLO APCD. The SLO County Board of Supervisors is the
17 decision-making body for SLO County.

18 8. Real Party-in-Interest California Department of Parks and Recreation ("State
19 Parks") is and has been the state department responsible for managing and operating
20 Oceano Dunes SVRA. In that capacity, State Parks is purportedly subject to Rule 1001,
21 and would be purportedly responsible for ensuring that certain emissions from Oceano
22 Dunes SVRA do not exceed certain ambient air quality standards and for complying with
23 all other elements in Rule 1001.

24 9. The true names and capacities, whether individual, corporate, associate, or
25 otherwise, of Does 1 through 50 are unknown to the Petitioners, who therefore sue these
26 defendants/respondents/real-parties-in-interest by fictitious names. The Petitioners
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1 will amend this Petition/ Complaint to show the Doe defendants/ respondents/ real-
2 parties-in-interests' true names and capacities when ascertained.

3 10. Pursuant to Code of Civil Procedure §§ 393 and 394(a), venue is proper in that
4 the cause of actions arose and the Respondent and Defendant SLO APCD is located in
5 San Luis Obispo County. Real Party-in-Interest State Parks also maintains an office in
6 SLO County.

7 11. This Court has jurisdiction pursuant to C.C.P. §§ 1085, 1060, and 527(a).

8
9 **Background on Oceano Dunes SVRA**

10 12. The area that is now Oceano Dunes SVRA has been a gathering point for "off-
11 highway" motor vehicle recreation for more than 100 years. By the early 1900s, as the
12 automobile became popular, large automobile "meets" were organized, drawing
13 thousands to watch races along the flat sandy beach "speedway" running from the City
14 of Pismo Beach to Mussel Rock which is south of the Santa Maria River. By the 1950s,
15 stock car speed trials were approved by the County and held on Oceano Dunes beach.
16 Also in the 1950s, the first "dune-buggy" was created in Oceano Dunes, spawning the
17 popular "off-highway" vehicle phenomenon. Use of the area for off-road vehicle
18 recreational activities has continued to grow during the past 30 years.

19 13. In the early 1970s, the California Legislature recognized the popularity of off-
20 highway vehicles, recreational vehicles (RVs), and beach camping and adopted the
21 Chappie-Z'berg Off-Highway Vehicle Act, along with the Off-Highway Gas Tax Act.
22 The legislation authorized the state to acquire and designate areas for the specific
23 purpose of OHV recreation.

24 14. Pursuant to this authority and partially funded by the special gas tax, State
25 Parks assembled lands in the Pismo area to create what was then called the Pismo Dunes
26 SVRA. The creation of the new SVRA "was the result of a compromise worked out
27 between then [State Parks] Director William Mott and the environmental community to
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1 close the majority of vehicular beaches in San Luis Obispo County in exchange for
2 creation of . . . [the SVRA] specifically for vehicle recreation." Beaches in the north
3 county were closed to vehicles. State Parks established the area "to make available to the
4 people opportunities for recreational use of off-road vehicles in a large area of
5 unstabilized sand dunes exceptionally adapted to [OHV] recreational activity. . . ."

6 15. State Parks applied for a permit for the SVRA from the California Coastal
7 Commission, and, after a public hearing, the Commission on June 17, 1982 granted State
8 Parks Permit No. 4-82-300 for Pismo Dunes SVRA. The permit recognized OHV
9 recreational activity within the SVRA. The Coastal Commission authorized the
10 establishment of three kiosks "for access control," as well as the construction of 35,000
11 linear feet of fencing to cordon off OHV recreation from certain sensitive vegetated dunes
12 and wetlands.

13 16. In August 1982, shortly after the Coastal Commission granted the permit to
14 State Parks, the California Legislature adopted the Off-Highway Motor Vehicle
15 Recreation Act (the "SVRA" Act). The law declared a state policy of setting aside
16 "effectively managed areas and adequate facilities for the use of off-highway vehicles . . .
17 ." Pub. Res. Code § 5090.02(b). The Legislature also tasked State Parks with "making the
18 fullest public use of the outdoor recreational opportunities [for off-highway motor
19 vehicles]" Id., § 5090.43(a).

20 17. The SVRA Act gave the OHV Division within State Parks broad powers to plan
21 and administer SVRAs including the newly created Pismo Dunes. Pursuant to Pub. Res.
22 Code § 5090.32(a), State Parks has the duty and responsibility for "planning, acquisition,
23 development, conservation, and restoration of lands" within SVRAs. Pub. Res. Code §§
24 5090.32(b), (d) and (h); and 5090.35(a), (b) and (c).

25 18. Today, Oceano Dunes SVRA is unique in the California State Parks system. Its
26 hard surface supports driving and RV camping on the beach. It is the only remaining
27 public beach along the entire 1,100 mile California coastline that legally permits the
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1 general public to drive on the beach in street legal vehicles. Oceano Dunes draws more
2 visitors than any other park in the entire California State Park system – about 2 million
3 visitors annually. It also generates hundreds of millions of dollars in economic activity
4 annually within SLO County, as well as significant fees for State Parks. State Parks,
5 pursuant to its special statutory powers, its long-standing permit from the Coastal
6 Commission, more than 40 years of active and actual use for OHV recreational purposes,
7 and millions of dollars in investment in the creation and on-going operation of the
8 Oceano Dunes SVRA, has a fundamental vested right in the continued operation of the
9 SVRA.

10 19. One 584-acre parcel within Oceano Dunes SVRA known as the LaGrande
11 Tract is not owned by State Parks, but rather is owned by SLO County. In 2006, State
12 Parks offered to purchase the La Grande Tract for about \$ 5 million, but a deal could not
13 be reached with the County.

14 20. However, State Parks and the County did agree on terms to allow State Parks
15 to continue to administer the La Grande Tract as part of Oceano Dunes SVRA, including
16 the payment of a substantial amount of money to compensate SLO County for any
17 environmental impacts.

18 21. SLO County was not entirely satisfied with this financial arrangement and
19 began to work hard to identify and claim additional “environmental” and other impacts
20 for which it could demand “mitigation” compensation from State Parks.

21 **The County’s Effort to Establish Justification for Higher “Mitigation” Payments**
22 **from State Parks**

23 **The Phase I Particulate Matter Report**

24 22. Stemming directly from this effort to justify its demands for increased
25 mitigation payments from State Parks, SLO County began preparing reports seeking to
26 establish that Oceano Dunes SVRA was causing violations of state particulate matter air
27 quality standards.

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1 23. In March 2007, staff for the SLO County Air Pollution Control District
2 prepared the "South County Phase I Particulate Matter Study – Phase 1 Study Report"
3 (Phase I Report).

4 24. The Phase I Report concluded that increased particulate matter (PM) readings
5 were being caused by wind blown sand, dirt, and dust rather than by vehicle
6 combustion. Although several staff members blindly insisted that OHV riding activity
7 was causing increased particulate matter violations, the Phase I Report and underlying
8 data completely failed to establish that OHV riding at Oceano Dunes SVRA contributed
9 in any significant way to particulate matter standard violations in SLO County.

10 25. At the public hearing on the Phase I Report, Petitioner Friends of Oceano
11 Dunes objected to the Report and questioned whether the County was merely attempting
12 to gin up alleged SVRA impacts in order to give SLO County leverage against State Parks
13 in the on-going discussions over the appropriate level of "mitigation" payments from the
14 State to the County. At this time, the SLO County APCD was part of SLO County, rather
15 than a separate legal entity.

16 26. In the end, the Phase 1 Report recommended that PM reduction efforts be
17 focused *not on OHV, but rather on dirt roads*: "This includes a control strategy to reduce
18 emissions from *high volume unpaved roads* by working with County Public Works, County
19 Planning and Building Department, South County Advisory Council and developers to
20 evaluate and implement measures such as speed limit reductions, application of dust
21 suppressants or paving new and existing unpaved roads in areas of higher population
22 where exposure is greatest."

23 27. The emphasis on reducing PM emissions from dirt roads made sense given
24 that *dirt roads are by far the largest cause of PM emissions in SLO County*, and given that SLO
25 County originally appeared to be developing plans to attack dirt roads as the most
26 effective way to reduce PM emissions in the State. Previously, in 2003, the California
27 Legislature enacted Senate Bill 656 to reduce public exposure to particulate matter. SB
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1 656 required the California Air Resource Board (ARB) in consultation with local air
2 pollution control districts, to develop and adopt a list of PM reduction strategies. The
3 Phase 1 Report recommended that the SLO APCD move forward with PM control
4 strategies which had been previously adopted by the APCD as part of the 2005
5 Particulate Matter Report to meet the requirements of SB 656.

6 28. With respect to alleged emissions from secondary effects of OHV activity at
7 Oceano Dunes SVRA, the Phase 1 Report simply recommended that the SLO APCD work
8 with State Parks to investigate the impact of OHV activity and to identify mitigation
9 measures if necessary.

10 **The Phase 2 Particulate Matter Report**

11 29. Strangely, at the hearing on the Phase 1 Report, the SLO APCD Board quickly
12 abandoned the Phase 1 Report's primary recommendation – to implement control
13 strategies to decrease PM emissions from dirt roads. In fact, to date, the SLO APCD has
14 taken no additional action to control PM emissions from dirt roads.

15 30. Instead, now that the controversy had subsided somewhat, SLO APCD
16 returned to its core political goal – to prepare a new report that placed the primary blame
17 for PM10 emissions on OHV activity, and that justified higher mitigation payments from
18 (or even monetary fines on) the State of California. To this end, in March 2010, the SLO
19 APCD released this new report called the "South County Phase 2 Particulate Matter
20 Study" (Phase 2 Report).

21 31. The Phase 2 Report asserted that greater amounts of PM10 are generated when
22 wind blows over areas where OHV riding occurs within Oceano Dunes SVRA, when
23 compared to areas within the SVRA that are closed to riding. The premise of the report
24 was that OHV activity breaks a "crust" on the sand dune surface, and that "increases the
25 ability of winds to entrain sand particles from the dunes and carry them to the Mesa,
26 which is an indirect emissions impact from the vehicles." The Report continues: "The data
27 strongly suggests these indirect emissions are the primary cause of the high PM levels
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1 measured on the Nipomo Mesa during episode days." The Phase 2 Report Executive
2 Summary similarly claims that "the data strongly suggests this is the *primary cause* of the
3 high PM levels measured on the Nipomo Mesa during episode days."

4 32. To the contrary, the data does not provide any support for the assertion that
5 OHV riding breaks up a "crust" or that such riding is the "primary" cause of PM
6 emissions on the Nipomo Mesa.

7 33. Thus, the linchpin of the Report is the novel theory (never before asserted with
8 respect to sand dunes) that the dunes have a "crust" and that OHV riding breaks up that
9 crust, allowing wind to more easily carry dust off the dunes. Notably, during the
10 presentation of the Phase 2 Report to the SLO APCD Board, SLO APCD staff member
11 Joel Craig admitted that the "ability to carry out such a complex study was really beyond
12 our ability." He also acknowledged that State Parks is "really . . . the expert[] on the
13 dunes." SLO APCD staff has no expertise on dune geology, and was forced to rely
14 entirely on well paid outside consultants to reach these conclusions.

15 34. Not surprisingly, leading up to and at the public hearing, the Phase 2 Report
16 was heavily criticized.

17 35. Even members of the SLO APCD Board itself were highly critical of the
18 methodology, monitoring, testing and data analysis used in the Phase 2 Report.

19 36. Likewise, the real expert agency on dune geology – the State of California
20 Geological Survey, housed within the California Department of Conservation – was
21 highly critical of the Phase 2 Report and its conclusions.

22 37. The California Geological Survey concluded that high wind events disturb all
23 of the dunes at Oceano Dunes SVRA, not just areas where OHV riding occurs. Sand and
24 dust is naturally blown from all areas, regardless whether there is OHV riding activity.
25 In fact, that is precisely how the sand dunes are formed. Because of the natural dune
26 formation process, higher PM10 levels can be expected whether or not there is OHV
27 activity at Oceano Dunes SVRA.

1 38. The California Geological Survey also concluded that the Phase 2 Report
2 erroneously equated the coastal dune environment with the dust problem that
3 historically occurred at the dry Owen Lake lakebed in the high desert in Inyo County,
4 California. The agency concluded that "there is no 'stabilizing crust' in the dunes south
5 of the SVRA that is comparable to the salt flats of the Owen Lake playa. There is no
6 'stabilizing crust' at all. The authors mistakenly identify dune laminae as a 'stabilizing
7 crust.'" The agency also questioned the sufficiency and scientific accuracy of SLO
8 APCD's discussions with outside consultants regarding dune morphology.

9 39. The California Geological Survey further concluded that the Phase 2 Report
10 used a faulty wind analysis to ascertain the movement of sand. By way of example, the
11 California Geological Survey concluded that "correlations of wind speed that was
12 measured two and a half miles inland cannot be made to sand movement in the coastal
13 dunes." The agency noted that the faulty wind and crust analysis led SLO APCD to
14 wrongly conclude that substantially greater sand and dust is blown off of OHV riding
15 areas than other non-riding areas within Oceano Dunes SVRA.

16 40. The California Geological Survey also questioned the SLO APCD methodology
17 for asserting that PM10 was not being partially caused by agricultural fields, dirt roads,
18 and petroleum coke piles at the nearby Conoco Phillips refinery, which exist *between* the
19 SVRA and the PM10 monitors set up by the SLO APCD.

20 41. The California Geological Survey's analysis concluded that a potential source
21 of the PM10 which was not being considered was particulate matter generated directly
22 from the ocean seasonally during high wind and high surf events.

23 42. The California Geological Survey noted that the SLO APCD collection
24 equipment broke down and malfunctioned during the tests, raising questions regarding
25 the reliability of the data. Insufficient quality assurance testing was performed. Data
26 was omitted. There were mistakes in the data analysis, all of which SLO APCD has
27 admitted.

1 43. In sum, the California Geological Survey concluded that the Phase 2 Report
2 failed to adequately differentiate and evaluate potential PM10 sources, and could not
3 conclude that dust from OHV riding areas was the chief cause of violations of State PM10
4 ambient air quality standards.

5 44. In addition to the California Geological Survey, State Parks also was highly
6 critical of the Phase 2 Report.

7 45. State Parks first noted that the Phase 2 Report "found zero correlation between
8 daily visitation and vehicle use and observed particulate matter" emissions from the
9 SVRA.

10 46. State Parks also noted that the Phase 2 Report raw data failed to show a clear
11 distinction in the gross amount of sand being blown off of riding areas within the SVRA
12 and non-riding areas. The Phase 2 Report similarly failed "to draw a quantitative
13 conclusion about how vehicular activity increases emission or how much vehicular
14 activity contributes to elevated particulate."

15 47. State Parks joined the California Geological Survey in many of its criticisms of
16 the Phase 2 Report.

17 48. State Parks retained an air quality expert who concluded that the Phase 2
18 Report used flawed wind speed data which resulted in material errors in the conclusions
19 of the report.

20 49. SLO APCD also ignored historical data that shows that dust is anything but
21 new to the Nipomo Mesa and surrounding region. Historical records reflect that blowing
22 sand from the dunes in the area from the mid-1800s through the early 1900s ruined
23 barley and other crops. The area was a "breeding place of winds that turned into an
24 inferno of frequent sandstorms about as formidable as those of the Sahara." Neither
25 these winds nor the resulting sand storms had anything to do with OHV recreation. A
26 1916 U.S. Department of Agriculture Soil Survey noted that "Santa Maria Valley, being
27 open to the ocean, receives the full force of the west and northwest winds, resulting in
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1 the building of extensive sand dunes and the formation of other wind-blown soils." "A
2 land use survey for only the Nipomo Mesa Management Area was performed in 2007
3 based on 2007 aerial photography. Based on these surveys, land use in the NMMA has
4 changed dramatically over the past half-century. Urban development has replaced
5 native vegetation at an increasing rate, especially over the past 10 years. The generalized
6 loss of vegetation resulting from increased development has likely increased the blowing
7 of dust and sand." SLO APCD also ignored recent studies of sand dunes elsewhere
8 which concluded that unvegetated dunes produce little or no dust emissions.

9 50. The SLO APCD rejected all of these concerns.

10 51. SLO APCD staff admits that the PM-10 levels include naturally-occurring dust
11 caused by winds emanating from the non-riding areas of the SVRA, and that dust would
12 blow off the dunes regardless whether there is OHV riding.

13 52. The SLO APCD failed to demonstrate clearly that OHV activity is directly or
14 indirectly causing a significant increase to PM-10 emissions that are resulting in
15 exceedances of State or Federal ambient air quality standards.

16 53. The SLO APCD Board did not formally "adopt" the Phase 2 Report, but
17 rather took the procedural step of simply "accepting it for filing." At later hearings, SLO
18 APCD Board President Gibson would claim that the Report's findings had been adopted,
19 but the record shows otherwise.

20
21 **SLO APCD Adopts Rule 1001 Requiring a Permit, a Plan to Eliminate PM10**
22 **Emissions from Oceano Dunes SVRA, and the Payment of Large Civil Fines for**
23 **Failure or Violations**

24 54. Undeterred with the errors in the Phase 1 and Phase 2 Reports, the SLO APCD
25 staff began developing a regulation to control the emissions of PM10 from Oceano Dunes
26 SVRA, even though there was little or no evidence that OHV riding was actually a cause
27 of the wind-driven emissions.

1 55. At the September 28, 2011 SLO APCD Board meeting, staff presented a draft
2 regulation "to reduce fugitive dust emissions from the ODSVRA." The draft regulation,
3 known as Rule 1001, was purportedly based on the Phase 1 and 2 Reports.

4 56. During the public hearing which considered an earlier draft version of Rule
5 1001, SLO APCD Executive Director Larry Allen acknowledged that "the extent of . . .
6 [mitigation] strategies is a pretty big unknown at the moment."

7 57. Certain SLO APCD Board members continued to express concerns about the
8 draft rule and the underlying studies and data: "My concern still is that if we don't get
9 everything right, that this is subject to legal challenges I certainly found several
10 flaws in the study [for instance] a strong signature for the effect of road traffic. You have
11 much higher, 50% higher . . . particulate on weekdays at 7 am than you do on weekends.
12 That's not been studied. The data is there. . . . This is a strong signature for dust from the
13 road. . . . Those kinds of things, if the data is there, weren't studied. . . . road dust is
14 common thing you look for. Those kinds of holes I see in the study could undermine this
15 effort toward getting any regulations done. . . . For example, the wind speeds. State Parks
16 has been gathering wind data on the dunes since I think about April of this year, and yet
17 there's been no inclination by staff to even look at the possible application of those wind
18 speeds to this study. . . . Unless we address those items, I think we're subject to legal
19 challenge and instead of moving forward, we'll go to the courts." (Board member Waage)
20 "I am disturbed when I hear Mr. Allen state that he doesn't know what the mitigation
21 measures will be. I think at this stage and time, we have a lot of data on our plate, this
22 data is very helpful to making these decisions, but it is not conclusive because of the
23 variables that are out there in terms of wind speed and other things that we probably will
24 not know for quite some time until these practices are put into place. I find hard numeric
25 standards to be a difficult position to take." (Board member Fonzi)

26 58. At that same hearing, SLO APCD Board member Bright commented "I do
27 have some concerns though regarding the rule. And that is enforcement at this point
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1 seems to be fee driven." In other words, the rule seemed more about collecting fees and
2 fines than anything else.

3 59. In preparation for the September 28, 2011 hearing, Petitioner Friends retained
4 James Westbrook and Bluescape Environmental, a firm specializing in air quality science,
5 to review the Phase 1 and 2 Reports and proposed Rule 1001.

6 60. Bluescape concluded that the Phase 2 Report was flawed for several reasons.
7 First, it failed to provide direct, reliable scientific evidence that PM10 generated at
8 Oceano Dunes SVRA is causing or contributing to the exceedances of the state 24-hour
9 average PM10 standard. SLO APCD refused to perform direct dust emission calculations
10 or perform dispersion modeling work needed to make that determination. Second, the
11 Phase 2 Report ignored factors that could directly affect the conclusions of the Report
12 such as localized dust emissions sources (like dirt roads, or even Highway One) close to
13 PM10 monitors, the distance of monitors, inaccuracies in wind data and monitoring,
14 other transport factors, improper control sites, and upwind obstructions. Third, the
15 Phase 2 Report failed to ascertain what portion, if any, of the total Oceano Dunes SVRA
16 dust emissions are from "natural sources," and what portion is from OHV riding area
17 emissions. Such a determination is crucial before finding that OHV riding area emissions
18 are contributing significantly to violations of State PM10 ambient air quality standards,
19 and before finding that a rule is necessary (or even authorized). Fourth, the Phase 2
20 Report failed to prove a direct, conclusive correlation between PM10 impacts and OHV
21 riding within the Oceano Dunes SVRA. Fifth, SLO APCD ignored its own emissions
22 inventory which shows that unpaved roads contribute 32.9 percent of PM10 emissions in
23 SLO County, 19.7 percent from paved roads and 14.9 percent from construction activity.
24 SLO APCD asserts that windblown dust constitutes 6.4 percent of total PM10 emissions
25 within SLO County, but that includes natural sources. SLO APCD failed to demonstrate
26 that any significant portion of the 6.4 percent windblown dust emissions are caused by
27 OHV riding. Sixth, not enough information is available to reliably select a "control" site

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1 to predict what portion, if any, of Oceano Dunes SVRA PM10 emissions are caused by
2 OHV riding. There are prohibitive uncertainties in wind direction, shifts in wind
3 direction, fetch of dunes, mixing with other regional and localized sources, and technical
4 limitations of the monitoring equipment.

5 61. Both Petitioner Friends and Real Party-in-Interest State Parks submitted
6 detailed comments and also objected to many of the draft rule's provisions at the
7 September 28, 2011 Board public hearing.

8 62. The SLO APCD rejected all of these concerns.

9 63. At the September 28, 2011 hearing, the SLO APCD Board instructed staff to
10 finalize the draft Rule 1001 to be considered and voted on at the November 16, 2011 SLO
11 APCD Board meeting and public hearing.

12 64. State Parks continued to express concerns with the draft rule. In preparation
13 for the final hearing on November 16, 2011, State Parks filed written comments highly
14 critical of the proposal.

15 65. State Parks was concerned that the proposed rule was putting the cart before
16 the horse. "The absence of data from an agreed upon baseline monitoring system means
17 the Board is unable to determine that the rule as proposed will, in fact, result in
18 alleviating the problem of particulate matter emissions and promote the attainment or
19 maintenance of the PM10 ambient air quality standard on the Nipomo Mesa. The
20 District's responsibility for making this determination before adopting the rule is spelled
21 out in California Health and Safety Code Section 40001(c)." It noted that scientific
22 studies had not sufficiently established measurable differences between naturally
23 occurring PM10 and PM10 arising from the OHV recreation activities on the SVRA. It
24 commented that "the data produced to date do not provide sufficient information on the
25 amount of particulate matter that is produced from the Oceano Dunes State Vehicular
26 Recreation Area (SVRA) when compared with particulate matter that is produced from
27 areas where no riding occurs. In the absence of this information, neither the APCD staff

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1 nor State Parks is in a position to propose a plan for controlling emissions caused by
2 riding, because those emission levels are not known. Because of this, the District is
3 unable to determine that the rule will alleviate the problem or promote the attainment of
4 the PM10 standard. Thus, contrary to the requirement above, the rule proposes to defer
5 this determination.”

6 66. State Parks also alerted the SLO APCD that it had not performed required cost
7 effectiveness analysis.

8 67. State Parks further objected to a flaw in the performance standard provision of
9 Rule 1001. “. . . the draft rule should not require the state to achieve a concentration of 55
10 $\mu\text{g}/\text{m}^3$ at times when the control site reads a far higher level. The draft rule Section C.3.
11 requires the CDVAA operator to reduce PM10 emissions from the activity area of the
12 park to 55 $\mu\text{g}/\text{m}^3$ any time the difference in measurement between the control site and
13 the CDVAA monitor site exceeds 10 $\mu\text{g}/\text{m}^3$. This potentially obligates State Parks to
14 reduce PM levels below naturally occurring levels that exceed the ambient air quality
15 standard. For example, if the control site measured a concentration of 90 $\mu\text{g}/\text{m}^3$ and the
16 OHV site measured 110 $\mu\text{g}/\text{m}^3$, the state would be considered out of compliance due the
17 difference between the two sites exceeding 10 $\mu\text{g}/\text{m}^3$, and the OHV site exceeding 55
18 $\mu\text{g}/\text{m}^3$. As the rule is written, the state would not be in compliance until the SVRA site is
19 at 55 $\mu\text{g}/\text{m}^3$, well below the control site measurement. The state cannot mitigate beyond
20 ambient levels.”

21 68. State Parks objected that the relationship between the standards proposed in
22 the draft rule and PM10 measurements on the Nipomo Mesa is unclear. “We are
23 concerned the rule does not account for the relationship between real-time monitoring
24 data at Mesa 2 and CDF and emissions monitored at the SVRA. The intent of the draft
25 rule is to address PM10 that exceeds the state standard as officially determined by
26 measurements taken at the APCD monitoring stations on the Nipomo Mesa. The rule
27 must clarify the relationship between the temporary monitoring sites at the park and the
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1 permanent monitoring sites at Mesa 2 and CDF to specify how a violation of the state or
2 federal standard at Mesa 2 or CDF relates to compliance with the performance standards
3 at the SVRA.

4 69. State Parks also continued to have concerns regarding conclusions and data
5 presented in past studies.

6 70. State Parks also objected to potential fines of up to \$1,000 per day. As a
7 legislative body, the Board has no power to delegate to the Air Pollution Control Officer
8 (APCO) the Board's power to determine when State Parks is acting unlawfully and
9 subject to a fine. Delegation of uncontrolled discretion is an impermissible delegation of
10 the Board's legislative power. To be effective, the rule must set forth with clarity some
11 norm or standard by which State Parks may know when its actions and proposed plans
12 would be in violation of the rule as intended by the Board. Because the proposed rule
13 commits application of the rule to the APCO's discretion, the rule must set up a uniform
14 standard for the APCO and State Parks to follow.

15 71. The California Geological Survey (CGS) filed another set of comments
16 regarding the rule. CGS performed its own tests and determined that the potential to
17 emit PM10 had little to do with whether the source was within or outside of a riding area
18 – which completely contradicted the fundamental premise of Rule 1001. CGS also
19 performed a soil analysis that concluded that it was difficult to discount agricultural
20 operations and dirt roads as other likely sources of the subject PM10 emissions. It also
21 reviewed historical aerial photography of the area and concluded that contrary to the
22 assertion in the Phase 2 Report, open sand areas have actually decreased by hundreds of
23 acres in Oceano Dunes since the 1930s (and vegetation has increased), which is strong
24 evidence that OHV activity *is not resulting in less vegetative cover over the decades*. Thus,
25 again, flatly contradicts the Phase 2 Report and the premise of Rule 1001.

26 72. Petitioner Friends also again presented written and oral objections to Rule
27 1001.

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1 73. Despite all of these concerns, at the November 16, 2011 SLO APCD Board
2 meeting, the Board voted to adopt Rule 1001 to implement "coastal dunes dust control
3 requirements." It rejected all of the concerns raised about the rule and the underlying
4 reports and data.

5 74. Rule 1001 requires State Parks to create and submit a "particulate matter
6 emission reduction plan" to achieve certain particulate matter performance standards.

7 75. The SLO APCD admits that it does not have authority under Health and
8 Safety Code § 39614 to adopt Rule 1001. Stated differently, SLO APCD is not relying on
9 the authority of SB 656 (PM reduction, discussed above) for this Rule, because that
10 statutory authority has sunset and is no longer available.

11 76. In its Findings, the SLO APCD erroneously asserted that Rule 1001 was
12 necessary to achieve the State PM10 ambient air quality standard.

13 77. In its Findings, the SLO APCD asserted that its sole authority to adopt Rule
14 1001 is Health and Safety Code §§ 40001 and 40702.

15 78. A true and correct copy of the final version of Rule 1001 adopted is attached as
16 Ex. 1 hereto.

17
18 **FIRST CAUSE OF ACTION**
19 **(Petition for Writ of Mandate, C.C.P. § 1085)**

20 79. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
21 reference, the allegations contained in paragraphs 1-78, inclusive, as though fully set
22 forth.

23 80. Petitioner Friends and its members are beneficially interested in the issuance of
24 the subject writ mandating that SLO APCD set aside Rule 1001. Petitioner Friends and
25 its members are beneficially interested in the issuance of the writ because as historical,
26 on-going and future users of the public facility of Oceano Dunes SVRA for OHV
27 recreation and other recreation, beach driving and beach camping, and as a not-for-profit
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1 corporation specifically formed under the laws of the state of California to preserve,
2 continue and expand OHV recreation at Oceano Dunes, and whose membership includes
3 taxpayers of the State of California and payers of special OHV registration fees and gas
4 taxes paid into a special State of California budget fund expressly established for the
5 purpose of maintaining OHV and SVRA facilities within the State, Petitioners Friends
6 and its members have an interest in ensuring (1) that public officials and agencies do not
7 unlawfully exceed their jurisdiction in adopting or attempting to impose standards or
8 rules that ultimately will or may restrict or prohibit said OHV recreation at Oceano
9 Dunes SVRA; (2) that laws, regulations, and duties are executed and enforced uniformly,
10 fairly, and as written; (3) that public officials and agencies do not abuse their discretion in
11 adopting or promulgating rules; and (4) that that public officials and agencies do not take
12 said action in an arbitrary and capricious manner, lacking in evidentiary support, or in
13 the absence of proper procedures or proper notice. Alternatively, Petitioner Friends and
14 its members are citizens seeking to enforce public rights and the object of this mandamus
15 is to enforce a public duty. The adoption of Rule 1001 interferes with the fundamental
16 vested rights of State Parks' long-standing and continued operation of Oceano Dunes
17 SVRA.

18 81. Petitioner has performed all conditions precedent to the filing of this Petition
19 and Complaint and otherwise exhausted all required and applicable administrative
20 remedies, including providing extensive written and oral comments at SLO APCD public
21 hearings during the rule-making.

22 82. Petitioner has no plain, speedy, and adequate remedy in the ordinary course
23 of law, other than the relief sought in this petition. Absent intervention by this Court, the
24 SLO APCD will enforce, implement and apply Rule 1001 to the detriment of Petitioner
25 Friends and its members as described above. No additional administrative appeal or
26 other form of relief is available to prevent such an occurrence. Petitioner Friends has a
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1 clear, present and beneficial right to performance of the public business in accordance
2 with the standards set forth herein.

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4 **COUNT 1**
5 **(Failure to Provide Sufficient Notice of Proposed Rule,**
6 **In Violation of Health and Safety Code § 40725)**

7 83. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
8 reference, the allegations contained in paragraphs 1-82, inclusive, as though fully set
9 forth.

10 84. State law requires that, prior to adopting a new rule or regulation, the SLO
11 APCD must hold a public hearing and give notice of that hearing. Specifically, Health
12 and Safety Code § 40725 provides:

13 “(a) A district board shall not adopt, amend, or repeal any
14 rule or regulation without first holding a public hearing thereon.

15 (b) Notice of the time and place of a public hearing to adopt,
16 amend, or repeal any rule or regulation shall be given not less than
17 30 days prior thereto to the state board, *which notice shall include*
18 *a copy of the rule or regulation proposed to be adopted, amended, or*
19 *repealed*, as the case may be, and a summary description of the effect
20 of the proposal, and by publication in the district pursuant to
21 Section 6061 of the Government Code. In addition, in the case of a
22 district which includes portions of more than one county, the notice
23 shall be published in each county not less than 30 days prior to the
24 date of the hearings.

25 (c) Notice published pursuant to subdivision (b) shall invite
26 written public comment and indicate the name, address, and telephone
27 number of the district officer to whom these comments are to be
28 addressed, and the date by which comments are to be received.”

1 (Emphasis added.)

2 85. The purpose of this statutory notice requirement is to provide interested and
3 affected members of the public sufficient time to study the proposed rule and to prepare
4 meaningful and complete comments.

5 86. The SLO APCD violated these notice requirements by preparing a new, revised
6 rule (Rule 1001) *after* the public notice was issued (containing an earlier version of the
7 rule), but releasing that new, revised rule to the public only 3 business days prior to the
8 actual public hearing. The version of the rule presented to the SLO APCD Board and
9 discussed at the public hearing was released to the public during the afternoon of
10 November 10, 2011. This version discussed contained numerous substantive changes
11 from the previous version of the rule, and for the first time provided a written
12 explanation of the proposed rule's provisions. In fact, prior to November 10, 2011, the
13 SLO APCD provided no explanation why it thought it had legal authority to promulgate
14 rule – thus requiring the public to challenge every possible claim of authority by SLO
15 APCD. The SLO APCD website on November 10 still contained the October 12th version
16 of the rule, not the November 10th, 2011 version, which was confusing and misleading to
17 the public.

18 87. Friends provided a written objection to SLO APCD prior to the hearing, noting
19 that it would be unlawful and unfair for the Board to vote on the November 10, 2011
20 version of the proposed Rule 1001 at the November 16, 2011 hearing because that did not
21 provide a 30-day notice and review period on that version of the rule. The SLO APCD
22 ignored this objection and provided no reasoning as to why its failure to provide 30-day
23 notice on the November 10, 2011 version of the rule was lawful.

24 88. Thus, the SLO APCD violated Health and Safety Code § 40725 by failing to
25 provide 30 days' notice of the public hearing on the November 10, 2011 version of Rule
26 1001. SLO APCD has not proceeded in the manner required by law.

1 89. Because the SLO APCD failed to give the notice required by Health and Safety
2 Code § 40725 prior to adopting Rule 1001, Rule 1001 is invalid and of no force and effect.

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4 **COUNT 2**
5 **(Rule 1001 Exceeds the SLO APCD's Authority**
6 **to Regulate Indirect Sources of Air Pollution)**

7 90. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
8 reference, the allegations contained in paragraphs 1-89, inclusive, as though fully set
9 forth.

10 91. Administrative agencies have only the power conferred upon them by statute,
11 and an act in excess of those powers is void.

12 92. While Health and Safety Code § 40716 (a)(1) authorizes APCDs to adopt and
13 implement rules to "reduce or mitigate emissions from indirect and areawide sources of
14 air pollution," the statute does not authorize an APCD, expressly or implicitly, to require
15 permits for indirect sources of air pollution, or to operate one.

16 93. Rule 1001 is written in way so that it presently applies only to Oceano Dunes
17 SVRA.

18 94. Oceano Dunes SVRA, to the extent that it is a source of pollutant emissions at
19 all, is an "indirect" source of said pollutants.

20 95. The only reference to indirect sources in the statutory provisions of the
21 California Clean Air Act pertaining to permitting is contained in Health and Safety Code
22 § 42311(g): "A district may adopt, by regulation, a schedule of fees to be assessed on
23 areawide or indirect sources of emissions which are regulated, but for which permits are
24 not issued, by the district to recover the costs of district programs related to these
25 sources."

26 96. In adopting § 42311(g), the Legislature has recognized indirect sources as
27 different from other sources of pollution and consequently has made them exempt from
28 ordinary permitting requirements.

1 97. Permits may not be required of indirect sources under either the general
2 permitting authority (§ 42300), the special permitting authority provisions relating to the
3 attainment of state ambient air quality standards (§§ 40910-40926), or any other
4 provision.

5 98. Statutory authority under Health & Safety Code § 42300(a) to establish a
6 permit system is limited to permitting machines, equipment, or other contrivances that
7 emit air contaminants, not indirect sources like Oceano Dunes SVRA.

8 99. Because Rule 1001 seeks to require a CDVAA Operator, i.e., State Parks, to
9 obtain a "permit to operate" from the SLO APCD, and imposes a "performance
10 standard," as well as civil penalties and fines for violations, Rule 1001, taken wholly, and
11 each of these provisions taken separately, exceeds the authority of the SLO APCD under
12 the statutory provisions discussed above, and constitutes an unlawful attempt to impose
13 a permitting scheme on an indirect source.

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15 **COUNT 3**

16 **(Rule 1001 Is an Invalid Indirect Source Review Program
Which Has Not Been Triggered by a Discretionary Action or Approval)**

17 100. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
18 reference, the allegations contained in paragraphs 1-99, inclusive, as though fully set
19 forth.

20 101. Administrative agencies have only the power conferred upon them by statute,
21 and an act in excess of those powers is void.

22 102. Rule 1001 is written in way so that it presently applies only to Oceano Dunes
23 SVRA.

24 103. Oceano Dunes SVRA, to the extent that it is a source of pollutant emissions at
25 all, is an "indirect" source of air pollution.

26 104. Rule 1001 constitutes an Indirect Source Review Program.
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1 105. By law and in long-standing practice, an Indirect Source Review Program
2 embraces only a facility-by-facility preconstruction or premodification review of indirect
3 sources of air pollution.

4 106. Application of an Indirect Source Review Program to an existing facility is
5 triggered only by a new discretionary action or approval with respect to the facility.
6 Typically, such a program is triggered by a land use permit application and process for
7 the covered facility. The Program cannot be imposed on an existing facility unless there
8 is a new action, development or expansion, triggering the need for a new discretionary
9 approval.

10 107. Since State Parks has been operating Oceano Dunes SVRA pursuant to a
11 valid coastal development permit issued directly by the California Coastal Commission
12 30 years ago, there is no current need to obtain a development permit, an amendment to
13 that permit, or any other approval. Accordingly, there is no valid discretionary trigger
14 for an ISR Program.

15 108. Until State Parks seeks such a development permit or proposes to take some
16 action requiring a discretionary permit or approval, no compliance with Rule 1001 is
17 required and the rule is ineffective.

18 109. In addition, State Parks, pursuant to its special statutory powers, its long-
19 standing permit from the Coastal Commission, more than 40 years of active and actual
20 use for OHV recreational purposes, and millions of dollars in investment in the creation
21 and on-going operation of the Oceano Dunes SVRA, has a fundamental vested right in
22 the continued operation of the SVRA. Rule 1001 unduly interferes with this fundamental
23 vested right.

24 110. Thus, Rule 1001 is an unlawful effort to impose Indirect Source Review
25 Program on the CDVAA Operator, i.e., State Parks, and exceeds the SLO APCD's
26 authority under state and federal law.

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COUNT 4
(Rule 1001 Exceeds the SLO APCD's Authority Because It
Is Scientifically Flawed and Fails to Establish
That OHV Riding Area Emissions Are Causing Violations of Ambient Air
Quality Standards or Any Significant Emissions)

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111. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by reference, the allegations contained in paragraphs 1-110, inclusive, as though fully set forth.

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112. Rule 1001 and the underlying data and studies are scientifically flawed and fail to support the need for Rule 1001.

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113. The Phase I Report and underlying data completely failed to establish that OHV riding at Oceano Dunes SVRA contributes in any significant way to particulate matter standard violations in SLO County.

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114. The Phase 2 Report asserted that greater amounts of PM10 are generated when wind blows over areas where OHV riding occurs within Oceano Dunes SVRA, when compared to areas within the SVRA that are closed to riding. The premise of the report was that OHV activity breaks a "crust" on the sand dune surface, and that "increases the ability of winds to entrain sand particles from the dunes and carry them to the Mesa, which is an *indirect emissions impact* from the vehicles." The Report continues: "The data strongly suggests *these indirect emissions* are the primary cause of the high PM levels measured on the Nipomo Mesa during episode days." The Phase 2 Report Executive Summary similarly claims that "the data strongly suggests this is the *primary cause* of the high PM levels measured on the Nipomo Mesa during episode days."

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115. To the contrary, the data does not provide any support for the assertion that OHV riding breaks up a "crust" or that such riding is the "primary" cause of PM emissions on the Nipomo Mesa.

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116. High wind events disturb all of the dunes at Oceano Dunes SVRA, not just areas where OHV riding occurs. Sand and dust is naturally blown from all areas,

1 regardless whether there is OHV riding activity. That is precisely how the sand dunes
2 are formed. Because of the natural dune formation process, higher PM10 levels can be
3 expected whether or not there is OHV activity at Oceano Dunes SVRA.

4 117. The Phase 2 Report erroneously equated the coastal dune environment with
5 the dust problem that historically occurred at the dry Owen Lake lakebed in the high
6 desert in Inyo County, California. There is no stabilizing crust in the dunes. The authors
7 mistakenly identify dune laminae as a "stabilizing crust."

8 118. The Phase 2 Report used a faulty wind analysis to ascertain the movement of
9 sand. Faulty wind and crust analysis led SLO APCD to wrongly conclude that
10 substantially greater sand and dust is blown off of OHV riding areas than other non-
11 riding areas within Oceano Dunes SVRA. State Parks sought to undertake additional
12 wind tests, but SLO APCD refused to support State Parks' application for a coastal
13 development permit for installation of wind towers and additional equipment to acquire
14 additional data, resulting in a smaller test study.

15 119. The SLO APCD monitoring and overall methodology is flawed and fails to
16 properly account for PM10 emissions by agricultural fields, dirt roads, and petroleum
17 coke piles at the nearby Conoco Phillips refinery, which exist *between* the SVRA and the
18 PM10 monitors set up by the SLO APCD. The Phase 2 Report failed to consider
19 particulate matter generated directly from the ocean seasonally during high wind and
20 high surf events.

21 120. The SLO APCD's conclusions are flawed due to collection equipment break
22 downs and malfunctioning during tests. Insufficient quality assurance testing was
23 performed. Data was omitted. There were mistakes in the data analysis, all of which
24 SLO APCD has admitted.

25 121. The Phase 2 Report failed to adequately differentiate and evaluate potential
26 PM10 sources, and could not conclude that dust from OHV riding areas was the chief
27 cause of violations of State PM10 ambient air quality standards.

1 122. The Phase 2 Report found zero correlation between daily visitation and
2 vehicle use and observed particulate matter emissions from the SVRA.

3 123. The Phase 2 Report raw data failed to show a clear distinction in the gross
4 amount of sand being blown off of riding areas within the SVRA and non-riding areas.
5 The Phase 2 Report similarly failed "to draw a quantitative conclusion about how
6 vehicular activity increases emission or how much vehicular activity contributes to
7 elevated particulate."

8 124. SLO APCD ignored historical data that shows that dust is anything but new
9 to the Nipomo Mesa and surrounding region. Historical records reflect that blowing
10 sand from the dunes in the area from the mid-1800s through the early 1900s ruined
11 barley and other crops. The area was a "breeding place of winds that turned into an
12 inferno of frequent sandstorms about as formidable as those of the Sahara." Neither
13 these winds nor the resulting sand storms had anything to do with OHV recreation. A
14 1916 U.S. Department of Agriculture Soil Survey noted that "Santa Maria Valley, being
15 open to the ocean, receives the full force of the west and northwest winds, resulting in
16 the building of extensive sand dunes and the formation of other wind-blown soils." "A
17 land use survey for only the Nipomo Mesa Management Area was performed in 2007
18 based on 2007 aerial photography. Based on these surveys, land use in the NMMA has
19 changed dramatically over the past half-century. Urban development has replaced
20 native vegetation at an increasing rate, especially over the past 10 years. The generalized
21 loss of vegetation resulting from increased development has likely increased the blowing
22 of dust and sand." SLO APCD also ignored recent studies of sand dunes elsewhere
23 which concluded that unvegetated dunes produce little or no dust emissions. The SLO
24 APCD failed to account for effects from rapid population growth in the area which
25 increases PM emissions; it failed to consider historical impacts from drought or rainfall
26 decreases; and it failed to account for the large development projects (with large amounts

1 of grading and cut and fill), including some across the street from the CDF monitoring
2 station.

3 125. SLO APCD staff admits that the PM-10 levels include naturally-occurring
4 dust caused by winds emanating from the non-riding areas of the SVRA, and that dust
5 would blow off the dunes regardless whether there is OHV riding. The California
6 Geological Survey performed its own tests and determined that the potential to emit
7 PM10 had little to do with whether the source was within or outside of a riding area –
8 which completely contradicts the fundamental premise of Rule 1001. CGS also
9 performed a soil analysis that concluded that it was difficult to discount agricultural
10 operations and dirt roads as other likely sources of the subject PM10 emissions. It also
11 reviewed historical aerial photography of the area and concluded that contrary to the
12 assertion in the Phase 2 Report, open sand areas have actually decreased by hundreds of
13 acres in Oceano Dunes since the 1930s (and vegetation has increased), which is strong
14 evidence that OHV activity *is not resulting in less vegetative cover over the decades*. Thus,
15 again, flatly contradicts the Phase 2 Report and the premise of Rule 1001.

16 126. The SLO APCD failed to demonstrate clearly that OHV activity is directly or
17 indirectly causing a significant increase to PM-10 emissions that are resulting in
18 exceedances of State or Federal ambient air quality standards.

19 127. Gaps and errors in the data were ignored: for instance SLO APCD Board
20 member Waage found several flaws in the study such as a strong signature for the effect
21 of road traffic. "You have much higher, 50% higher ... particulate on weekdays at 7 am
22 than you do on weekends. That's not been studied." "The data is there... . This is a
23 strong signature for dust from the road... . Those kinds of things, if the data is there,
24 weren't studied... road dust is common thing you look for. Those kinds of holes I see in
25 the study could undermine this effort toward getting any regulations done... . For
26 example, the wind speeds. State Parks has been gathering wind data on the dunes since I

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1 think about April of this year, and yet there's been no inclination by staff to even look at
2 the possible application of those wind speeds to this study....”

3 128. Independent studies by the California Geological Survey show that the
4 northwest prevailing winds that have created the Callender [Oceano] Dunes are
5 strongest in the spring months, and so the potential for saltation is greatest during this
6 time. The plots of the peak wind speed data show that the times of the peak winds for
7 each monitoring site do not coincide, and the observed correlation pattern only reflects
8 the regional fluctuation in wind speed, illustrating when winds in general are strong or
9 calm in the south County. Consultant DRI noted, based on three weeks of recorded
10 wind measurements (from April 15 to May 4, 2011) that the wind data recorded at that
11 anemometer was “very similar in magnitude and frequency” to the wind data collected
12 at the two meter high anemometer positioned on the S1 Tower. This is an indication that
13 wind from the prevailing wind direction advances over the dunes at approximately the
14 same speed. From its pilot project testing at different locations within Oceano Dunes
15 SVRA, scientific consultant DRI also found that the emissivity of a dune surface—its
16 potential to emit PM10— shows little variability, whether the dune is inside or outside
17 the OHV riding area – which contradicts a fundamental premise of Rule 1001 and the
18 underlying studies. Yet, the SLO APCD ignored this.

19 129. To assess potential sources of PM10, CGS examined the percent clay
20 component of soils in south SLO County. The agency concluded that “dirt roads traverse
21 these deposits, allowing access for agricultural workers and their equipment to till, plant,
22 and harvest row crops grown in fields composed of these sediments. Wind over barren
23 fields and general agricultural and earth-moving operations on these soils have the
24 potential to stir PM10, making it difficult to discount these soils of the south county as a
25 potential PM10 source impacting the Nipomo Mesa, particularly given their reservoir of
26 PM10-sized particles.” The SLO APCD ignored this.

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1 130. CGS also studied aerial photography acquired from the National
2 Agricultural Imagery Program (NAIP). This imagery was compared to the earliest aerial
3 photographs available of the active dunes of the Callender Dune [Oceano] Sheet to
4 discern changes in vegetation and open sand sheet acreage over time. Digital scans of
5 aerial photographs from a 1930 flight survey of the dunes were combined with scans of a
6 1939 aerial survey of the dunes conducted by the United States Army to give a complete
7 picture of the active dunes in the 1930's. Using geographic information system software
8 (GIS), the images were sized to a common scale, spliced together, and geographically
9 referenced so that the imagery from the 1930's could be draped over the 2010 NAIP
10 imagery. The extent of open sand sheet and vegetation acreage displayed in the 1930's
11 imagery was digitized using GIS, as was that displayed in the 2010 NAIP imagery, so
12 that changes in open sand sheet acreage and vegetation coverage could be quantified. A
13 vegetation analysis performed by CSP staff shows that the amount of vegetation within
14 and near the OHV riding area, as measured between the years 1985 and 2003, increased
15 approximately 80 acres. Additionally, at current staffing levels, Division personnel plant
16 between 10 and 25 acres of native vegetation within the boundaries of Oceano Dunes
17 SVRA annually. Overall, the 1930's to 2010 aerial imagery comparison shows open sand
18 sheet acreage in the dunes has been significantly reduced, resulting in a significant net
19 reduction in the amount of saltation that occurs naturally in this dune setting. The SLO
20 APCD ignored this.

21 131. The SLO APCD data failed to provide direct, reliable scientific evidence that
22 PM10 generated at Oceano Dunes SVRA is causing or contributing the exceedances of the
23 state 24-hour average PM10 standard. SLO APCD refused to perform direct dust
24 emission calculations or perform dispersion modeling work needed to make that
25 determination. The Phase 2 Report ignored factors that could directly affect the
26 conclusions of the Report such as localized dust emissions sources (like dirt roads, large
27 development projects, or even Highway One) close to PM10 monitors, the distance of
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1 monitors, inaccuracies in wind data and monitoring, other transport factors, improper
2 control sites, the implications of the much larger sand sheets at the SVRA riding and
3 buffer area when compared with the much smaller sand sheet area at the Oso control site,
4 and upwind obstructions. The Phase 2 Report failed to ascertain what portion, if any, of
5 the total Oceano Dunes SVRA dust emissions are from "natural sources," and what
6 portion is from OHV riding area emissions. Such a determination is crucial before
7 finding that OHV riding area emissions are contributing significantly to violations of
8 State PM10 ambient air quality standards, and before finding that a rule is necessary (or
9 even authorized). The Phase 2 Report failed to prove a direct, conclusive correlation
10 between PM10 impacts and OHV riding within the Oceano Dunes SVRA. SLO APCD
11 ignored its own emissions inventory which shows that unpaved roads contribute 32.9
12 percent of PM10 emissions in SLO County, 19.7 percent from paved roads and 14.9
13 percent from construction activity. SLO APCD asserts that windblown dust constitutes
14 6.4 percent of total PM10 emissions within SLO County, but that includes natural
15 sources. SLO APCD failed to demonstrate that any significant portion of the 6.4 percent
16 windblown dust emissions are caused by OHV riding. Not enough information is
17 available to reliably select a "control" site to predict what portion, if any, of Oceano
18 Dunes SVRA PM10 emissions are caused by OHV riding. There are prohibitive
19 uncertainties in wind direction, shifts in wind direction, fetch of dunes, mixing with
20 other regional and localized sources, and technical limitations of the monitoring
21 equipment.

22 132. The absence of data from an agreed upon baseline monitoring system means
23 the Board is unable to determine that the rule as proposed will, in fact, result in
24 alleviating the problem of particulate matter emissions and promote the attainment or
25 maintenance of the PM10 ambient air quality standard on the Nipomo Mesa. Scientific
26 studies had not sufficiently established measurable differences between naturally
27 occurring PM10 and PM10 arising from the OHV recreation activities on the SVRA. The
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1 data produced to date do not provide sufficient information on the amount of particulate
2 matter that is produced from the Oceano Dunes SVRA when compared with particulate
3 matter that is produced from areas where no riding occurs. In the absence of this
4 information, neither the APCD staff nor State Parks is in a position to propose a plan for
5 controlling emissions caused by riding, because those emission levels are not known.
6 Because of this, the SLO APCD is unable to determine that the rule will alleviate the
7 problem or promote the attainment of the PM10 standard. Thus, contrary to the law, the
8 rule proposes to defer this determination.

9 133. Rule 1001 should not require the state to achieve a concentration of 55 $\mu\text{g}/\text{m}^3$
10 at times when the control site reads a far higher level. Rule 1001 requires the CDVAA
11 operator to reduce PM10 emissions from the activity area of the park to 55 $\mu\text{g}/\text{m}^3$ any
12 time the difference in measurement between the control site and the CDVAA monitor
13 site exceeds 10 $\mu\text{g}/\text{m}^3$. This potentially obligates State Parks to reduce PM levels below
14 naturally occurring levels that exceed the ambient air quality standard. The state cannot
15 mitigate beyond ambient levels.

16 134. The relationship between the standards in Rule 1001 and PM10 measurements
17 on the Nipomo Mesa is unclear. Rule 1001 does not account for the relationship between
18 real-time monitoring data at Mesa 2 and CDF and emissions monitored at the SVRA. The
19 intent of the draft rule is to address PM10 that exceeds the state standard as officially
20 determined by measurements taken at the APCD monitoring stations on the Nipomo
21 Mesa. The rule must clarify the relationship between the temporary monitoring sites at
22 the SVRA and the permanent monitoring sites at Mesa 2 and CDF to specify how a
23 violation of the state or federal standard at Mesa 2 or CDF relates to compliance with the
24 performance standards at the SVRA.

25 135. As a legislative body, the Board has no power to delegate to the Air Pollution
26 Control Officer (APCO) the Board's power to determine when State Parks is acting
27 unlawfully and subject to a fine. Delegation of uncontrolled discretion is an
28

1 impermissible delegation of the Board's legislative power. To be effective, the rule must
2 set forth with clarity some norm or standard by which State Parks may know when its
3 actions and proposed plans would be in violation of the rule as intended by the Board.
4 Because the proposed rule commits application of the rule to the APCO's discretion, the
5 rule must set up a uniform standard for the APCO and State Parks to follow or is
6 otherwise invalid.

7 136. Especially to the extent that Rule 1001 in effect attempts to regulate the
8 natural occurrence of sand dune formation and wind blowing sand off of the dunes as a
9 natural process, it conflicts with State Parks' special statutory authority to govern SVRAs.
10 Public Resources Code § 5090.32(a) grants State Parks the duty and responsibility for
11 planning and development in SVRAs. Subsection (b) gives State Parks authority over
12 "direct management, maintenance, administration, and operation of lands" in SVRAs.
13 Subsection (d) gives State Parks authority over implementation of all aspects of the
14 program. The statute tasks State Parks with repairing and continuously maintaining
15 areas, preventing erosion and restoring lands within SVRAs. Pub. Res. Code §
16 5090.35(a). It specifies what agencies that State Parks must consult with, which does not
17 include the County or the SLO APCD. If there is excessive damage or erosion, then State
18 Parks, not any other agency, is authorized to close that portion of the SVRA until soil
19 standards are met. Pub. Res. Code § 5090.35(b). State Parks must evaluate this task in
20 light of its overall mandate to make the fullest public use of the outdoor recreational
21 opportunities at the SVRA. Pub. Res. Code § 5090.43(a). The proposed Rule imposes a
22 performance standard for PM-10 based on speculation that OHV riding areas increase
23 "emissions" due to riding impacts on the sand dunes. Even assuming that this occurs,
24 (or if it occurs simply by a natural process unrelated to OHV riding), by its nature,
25 control of such an impact implicates planning, area closure, erosion control, and soil
26 standard actions that only State Parks is authorized to make. This proposed rule
27 unlawfully constrains State Parks' authority under the SVRA organic act. The Rule thus
28

1 exceeds SLO APCD's authority and conflicts with State Parks' jurisdiction, authority and
2 discretion under Pub. Res. Code §§ 5090 et seq.

3 137. Also, SLO APCD failed to establish that it used reasonable standards to select
4 peer reviewers or that it undertook due diligence to establish independence and no
5 conflict of interest. SLO APCD also failed to set standards for the peer reviewers to
6 follow when evaluating information related to the proposed dust rule or underlying
7 reports or studies. Individual letter reviews are more appropriate when a draft
8 document covers only one discipline or when premature disclosure of a sensitive report
9 to a public panel could cause harm to government or private interests. When time and
10 resources warrant, panels are preferable, as they tend to be more deliberative than
11 individual letter reviews and the reviewers can learn from each other. SLO APCD failed
12 to select a panel, but rather sought input from individual reviewers with pre-existing
13 relationships. The charge to the reviewers should be determined in advance of the
14 selection of the reviewers, which was not done here. In drafting the charge, it should
15 include specific technical questions, which was not done adequately here. Peer reviewers
16 are best used to distinguish scientific facts from professional judgments. Most peer
17 reviewers here failed to do that. Since not all uncertainties have an equal effect on the
18 conclusions drawn, reviewers should be asked to ensure that the potential implications of
19 the uncertainties for the technical conclusions drawn are clear. That also was not done.
20 Peer reviewers should be asked to recommend value-of-information analyses that
21 identify whether more research is likely to decrease key uncertainties. That was not
22 done here. A description of additional research that would appreciably influence the
23 conclusions of the assessment can help an agency assess and target subsequent efforts.
24 That was not done adequately here. SLO APCD did not adequately establish the relevant
25 expertise of each reviewer. Another issue is whether government-funded scientists in
26 universities and consulting firms have sufficient independence from the government
27 agencies that support their work to be appropriate peer reviewers. Also, if a scientist has
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1 repeatedly served as a reviewer for the same agency, some may question whether that
2 scientist is sufficiently independent from the agency to be employed as a peer reviewer
3 on agency-sponsored projects. All of these failures undermine SLO APCD's use of peer
4 reviewers here.

5
6 **COUNT 5**
7 **(Rule 1001 Exceeds the SLO APCD's Authority Because It**
8 **Violates the Requirements of Health and Safety Code § 40727(a))**

9 138. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
10 reference, the allegations contained in paragraphs 1-137, and 149-158, inclusive, as
11 though fully set forth.

12 139. Administrative agencies have only the power conferred upon them by statute,
13 and an act in excess of those powers is void.

14 140. Under Health and Safety Code § 40727 (a), before adopting a rule or
15 regulation, the SLO APCD Board must make findings of necessity, authority, clarity,
16 consistency, and nonduplication.

17 141. The SLO APCD failed to comply with this statute by providing erroneous,
18 incorrect and improper findings of necessity and authority.

19
20 **Erroneous and Improper Necessity Finding**

21 142. "Necessity" means that a need exists for the regulation. Since particulate
22 matter emissions from Oceano Dunes SVRA are caused by natural wind events blowing
23 sand and dust from natural sand dune formations, and since OHV riding areas within
24 the SVRA contribute little if any more dust or PM10 than the same area would if it were
25 "non-riding," a rule intended to address OHV riding areas will have little effect on PM-
26 10 levels and thus is not "necessary." The SLO APCD has failed to show that any said
27 emissions resulting from OHV riding or riding areas (over and above natural emissions
28

1 that would exist in any event) have caused or are causing violations of state or federal
2 ambient air quality standards for any pollutants. The SLO APCD has admitted that it
3 does not know what, if any, portion of PM-10 exceedances are attributable to OHV riding
4 areas at Oceano Dunes SVRA, over and above those that occur naturally. The SLO
5 APCD also has failed to show that State Parks' actions, or OHV riding activity, cause any
6 air pollution episodes which, at intervals, cause discomfort or health risks to, or damage
7 to the property of, a significant number of persons or class of persons. Further, the
8 activity complained of is performed under the express authority of a statute, Public
9 Resources Code §§ 5090 et seq. See also Civ. Code § 3482. The District thus has failed to
10 show that there is a problem that the proposed rule will alleviate and that the rule will
11 promote the attainment or maintenance of state or federal ambient air quality standards.
12 Even assuming that incremental emissions are caused indirectly by OHV riding (which
13 has not been demonstrated scientifically), the SLO APCD has not quantified what portion
14 (if any) is manmade and what portion is natural (that would occur with or without OHV
15 activity). Without such quantification of what the SLO APCD has deemed "indirect
16 emissions," the District has not established, and cannot establish, that the rule is
17 "necessary" as required by Health and Safety Code § 40727 (a).

18 143. Rule 1001 purports to mandate that the operator of Oceano Dunes SVRA
19 prepare a particulate matter reduction plan *prior to* establishing whether any significant
20 emissions are actually caused by OHV riding, and before any finding has been made that
21 any such emissions have caused, or are causing, violations of state or federal air quality
22 standards. In other words, the SLO APCD has adopted Rule 1001 before establishing
23 that the rule is "necessary" as required by Health and Safety Code § 40727 (a).

24 144. Rule 1001 also is not "necessary" for the reasons stated above and because
25 there are alternative methods of emission reduction, emissions monitoring, and
26 recordkeeping through State Parks' implementation of best management practices. The
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28

1 SLO APCD has refused to consider or allow these. Adoption and implementation of
2 these measures would render Rule 1001 unnecessary.

3
4 **Erroneous and Improper Authority Finding**

5 145. By failing to demonstrate "necessity," the SLO APCD also fails to
6 demonstrate "authority," since under Health and Safety Code § 40727(a) the SLO
7 APCD's authority stems from showing "necessity."

8 146. Also, as articulated in Count 6 below, the SLO APCD is exceeding its
9 authority under Health and Safety Code §§ 40001 and 40702.

10 147. Also, as articulated in Count 2 above, the SLO APCD is exceeding its
11 authority by attempting to impose a permitting scheme on an indirect source of air
12 pollution. This also violates Health and Safety Code § 40727(a) because the District has
13 failed to demonstrate authority for Rule 1001.

14 148. Oceano Dunes SVRA is not a stationary source under state law and cannot be
15 regulated under authorities governing stationary sources.

16
17 **COUNT 6**
18 **(Rule 1001 Exceeds the SLO APCD's Authority Under**
19 **Health and Safety Code §§ 40001 and 40702)**

20 149. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
21 reference, the allegations contained in paragraphs 1-148, inclusive, as though fully set
22 forth.

23 150. Administrative agencies have only the power conferred upon them by statute,
24 and an act in excess of those powers is void.

25 151. The SLO APCD, after remaining silent through months of the rule-making
26 process, finally articulated its position on November 10, 2011 that its legal authority for
27 Rule 1001 is Health and Safety Code §§ 40001 and 40702. Neither of these provisions
28

1 provide authority for the SLO APCD to adopt Rule 1001 because the circumstances and
2 conditions required by these statutory provisions do not exist.

3 152. Section 40702 is simply a "necessary and proper" clause and does not
4 authorize rules beyond the authority otherwise granted to the SLO APCD by the
5 Legislature. It in no way independently authorizes Rule 1001.

6 153. Section 40001(a) allows air pollution control districts to adopt and enforce
7 rules and regulations to achieve and maintain the state and federal ambient air quality
8 standards in all areas affected by emission sources under their jurisdiction. However,
9 here, the SLO APCD has failed to show that the adoption of Rule 1001 is required to
10 achieve and maintain, or has any effect on achieving or maintaining state and federal
11 ambient air quality standards.

12 154. Section 40001(b) allows air pollution control districts to provide for the
13 prevention and abatement of air pollution episodes which, at intervals, cause discomfort
14 or health risks to, or damage to the property of, a significant number of persons or class
15 of persons. However, here, the SLO APCD has failed to show that the adoption of Rule
16 1001 would prevent or abate such air pollution episodes.

17 155. Section 40001(c) requires that prior to adopting any rule or regulation to
18 reduce criteria pollutants, a district shall determine that there is a problem that the
19 proposed rule or regulation will alleviate and that the rule or regulation will promote the
20 attainment or maintenance of state or federal ambient air quality standards. Here, the
21 SLO APCD failed to show that the adoption of Rule 1001 would do either of these things.
22 The absence of data from an agreed upon baseline monitoring system means the Board is
23 unable to determine that the rule as proposed will, in fact, result in alleviating the
24 problem of particulate matter emissions and promote the attainment or maintenance of
25 the PM10 ambient air quality standard on the Nipomo Mesa. Scientific studies have not
26 sufficiently established measurable differences between naturally occurring PM10 and
27 PM10 arising from the OHV recreation activities on the SVRA. The data produced to
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1 date do not provide sufficient information on the amount of particulate matter that is
2 produced from the Oceano Dunes SVRA when compared with particulate matter that is
3 produced from areas where no riding occurs. In the absence of this information, neither
4 the APCD staff nor State Parks is in a position to propose a plan for controlling emissions
5 caused by riding, because those emission levels are not known. Because of this, the SLO
6 APCD is unable to determine that the rule will alleviate the problem or promote the
7 attainment of the PM10 standard. Thus, contrary to the law, the rule proposes to defer
8 this determination.

9 156. Section 40001(d)(1) requires district rules and regulations to include a process
10 to approve alternative methods of complying with emission control requirements that
11 provide equivalent emission reductions, emissions monitoring, or recordkeeping. SLO
12 APCD failed to comply with this provision in adopting Rule 1001.

13 157. Section 40001(d)(2) requires a district to allow the implementation of
14 alternative methods of emission reduction, emissions monitoring, or recordkeeping if a
15 facility demonstrates to the satisfaction of the district that those alternative methods will
16 provide equivalent performance. Any alternative method of emission reduction,
17 emissions monitoring, or recordkeeping proposed by the facility shall not violate other
18 provisions of law. SLO APCD failed to comply with this provision in adopting Rule 1001.

19 158. Section 40001(d)(3) requires that if a district rule specifies an emission limit
20 for a facility or system, the district shall not set operational or effectiveness requirements
21 for any specific emission control equipment operating on a facility or system under that
22 limit. Any alternative method of emission reduction, emissions monitoring, or
23 recordkeeping proposed by the facility shall include the necessary operational and
24 effectiveness measurement elements that can be included as permit conditions by the
25 district to ensure compliance with, and enforcement of, the equivalent performance
26 requirements. SLO APCD failed to comply with this provision in adopting Rule 1001.

COUNT 7
(In Adopting Rule 1001, SLO APCD Failed to
Comply with Health and Safety Code §§ 40703 and 40922)

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4 159. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
5 reference, the allegations contained in paragraphs 1-158, inclusive, as though fully set
6 forth.

7 160. Administrative agencies have only the power conferred upon them by statute,
8 and an act in excess of those powers is void.

9 161. Under Health and Safety Code §§ 40703 and 40922, before adopting a rule or
10 regulation, the SLO APCD must consider and make available to the public, its findings
11 related to the cost effectiveness of control measures, as well as the basis for the findings
12 and the considerations involved.

13 162. SLO APCD has failed to comply with these provisions.

14 163. In the November 10, 2011 staff report, staff admits that it has spent \$500,000
15 on this rule. It expects to spend another \$50,000, and the rule would compel State Parks
16 to spend possibly more than \$ 400,000 attempting to comply with it. Staff acknowledges
17 another \$ 100,000 in monitoring and operating costs, plus more than \$ 30,000 per year in
18 just monitoring site maintenance and operational costs. Thus, well more than \$ 1,000,000
19 in public funds are being spent on this effort. (It should be noted that the district has not
20 provided any back up documentation confirming that these figures are accurate, or
21 allowing the public to evaluate their accuracy.)

22 164. However, the SLO APCD does not evaluate the cost effectiveness of the rule
23 or the likely control measures. The SLO APCD fails to advise the public that this rule
24 will have a minimal impact on reducing dust and particulate matter. Even assuming that
25 there will be any reduction at all, which is unlikely, the cost per ton of reduced PM-10
26 would make this one of the most expensive and least cost effective efforts in the entire
27 country. The SLO APCD violated these statutory provisions by failing to advise the
28

1 public of this misuse of public funds, i.e., staff made no effort to determine the "cost
2 effectiveness" of the rule or control measures as required by the Health and Safety Code.

3 165. The SLO APCD also has failed to prepare a list which ranks the control
4 measures from the least cost-effective to the most cost-effective.

5 166. In addition, the SLO APCD has failed to consider the relative cost
6 effectiveness of possible measures, as well as other factors including, but not limited to,
7 technological feasibility, total emission reduction potential, the rate of reduction, public
8 acceptability, and enforceability. The SLO APCD has not appropriately considered cost
9 effectiveness of Rule 1001 so that the cost-benefit of control measures can be addressed,
10 and undue burden is not placed on a facility operator such as State Parks.

11 167. In fact, the SLO APCD already has determined most of the mitigation it
12 contemplates is infeasible. In 2005, The SLO APCD issued a "Particulate Matter Report
13 Implementation of SB 656 Requirements" (SLO APCD PM Report). Part of the SB 656
14 implementation process included California Air Resources Board working with local
15 APCDs to adopt a list of PM reduction strategies. This "list of measures must be the most
16 readily available, feasible, and cost effective control measures that could be employed by
17 ARB and the air districts to reduce PM levels..."

18 168. The SLO APCD PM Report included "Table D.2: Control Strategies That Are
19 Infeasible Or Not Applicable." This table "gives a brief listing and explanation of several
20 control strategies that were determined to be either infeasible or not applicable to the San
21 Luis Obispo County APCD." The SLO APCD determined that two control measures for
22 fugitive dust were not feasible, yet those two measures are identical to control measures
23 that the SLO APCD is now seriously advocating with Rule 1001: the SLO APCD Staff
24 Report for Rule 1001 discusses how pilot projects "included studies of the effect of native
25 vegetation and artificial surface disturbance on reducing sand transport" and the "data
26 from these studies will be used to help craft the PMRP required in the dust rule." One of
27 the pilot projects tells us the type of measures the SLO APCD may include in the PMRP
28

1 because this pilot project listed potential control measures: add artificial roughness
2 elements (e.g., straw bales) to the sand surface; add vegetation to the surface; stabilize the
3 surface using straw checkerboards; and stabilize the sand surface by using a cover of
4 material such as wood chips, wood strands or gravel." The Staff Report also notes that
5 there are numerous potential reduction measures that could be included in the PMRP,
6 such as "installation of sand fencing; adding artificial roughness elements to the sand
7 surface; planting vegetation in the dunes; re-establishment of foredunes; planting a wind
8 row of trees; reducing vehicle access or activity;"

9 169. The measures now being considered by the SLO APCD in 2011 all are
10 generally the same control measures of vegetation cover/weed abatement or
11 gravel/wood chip cover that were rejected by the SLO APCD in 2005 as not feasible in
12 SLO County. Weed abatement activities generally include measures such as maintaining
13 vegetation by controlling the height of vegetation or the type of vegetation allowed to
14 grow in the dunes, such as planting vegetation or trees in the dunes, or limiting or
15 clearing the areas of vegetation by placing straw bales in the dunes, as suggested in one
16 of these pilot projects. The SLO APCD also issued a finding that reducing open space
17 areas by gravel was not applicable to SLO County, yet now considers the placement of
18 straw bales in the dunes in a pilot project to be a feasible option as well as the option of
19 cover of gravel, which the SLO APCD rejected as infeasible in 2005.

20 170. Questions of infeasibility and necessity for Rule 1001 also involve whether
21 the studies used to determine that Rule 1001 is needed to control fugitive dust from the
22 dunes are scientifically valid before the SLO APCD spends more money on measures not
23 yet determined. The Staff Report states as its statutorily required findings for cost-
24 effectiveness of control measures that "District studies have concluded that the
25 operations subject to this regulation are the only known emission sources that could be
26 controlled and that would result in improvement to the ambient air quality at the
27 impacted locations." Yet, "Appendix B. Emissions Inventory" of the SLO APCD PM
28

1 Report presents a table of the "Top 25 Sources of PM10 (tons/ day)" in which "fugitive
2 windblown dust" is ranked #6, underneath unpaved road dust, paved road dust,
3 construction and demolition, prescribed burning, and farming operations. Clearly, there
4 are other known emission sources that "could be controlled" and clearly, focusing on the
5 dunes as the only source for "fugitive windblown dust" will not result in the intended
6 goal of improving ambient air quality. In fact, the SLO APCD PM Report proposed
7 adopting a Fugitive Dust rule that applied to "construction activities and open lands
8 located throughout SLO County."

9 171. None of these factors were considered or discussed as part of a required cost
10 effectiveness analysis.

11
12 **COUNT 8**
13 **(Rule 1001 Violates the Equal Protection**
14 **Clauses of the U.S. and California Constitutions)**

15 172. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
16 reference, the allegations contained in paragraphs 1-171, inclusive, as though fully set
17 forth.

18 173. The Fourteenth Amendment to the United States Constitution states that "No
19 State shall make or enforce any law which shall . . . deny to any person within its
20 jurisdiction the equal protection of the laws."

21 174. Article I, § 7(a) of the California Constitution states that "a person may not be
22 . . . denied equal protection of the laws.

23 175. The SLO APCD treated Oceano Dunes SVRA (and thus the operator of
24 Oceano Dunes SVRA), as well as Plaintiff Friends and its members differently from other
25 similarly situated persons which "emit" dust and particulate matter by adopting Rule
26 1001 which requires a particulate matter reduction plan even before it is demonstrated
27
28

1 that said emissions are caused by, or the result or, the operation of the SVRA or the use
2 by Friends and its members, and not simply natural forces.

3 176. The difference in treatment of Oceano Dunes SVRA and its operator, State
4 Parks, and its users, Friends and its members, was intentional.

5 177. There was no rational basis for the difference in treatment. To pass muster
6 under the equal protection clauses, a regulation must be rationally related to a legitimate
7 governmental purpose, and there must be a rational basis to uphold the classifications or
8 distinctions created by the regulation.

9 178. Data shows that there are many much larger sources of dust and PM-10
10 emissions in San Luis Obispo County other than OHV recreation, including unpaved
11 roads, paved roads, industrial and manufacturing sources, diesel exhaust, smoke from
12 burning, open dirt construction sites, grading and fill operations, construction equipment
13 hauling, road construction, building and housing construction, sea salt spray, and
14 agricultural operations. SLO County reports state that "emissions from paved and
15 unpaved roads are the main contributor to PM emissions in SLO County, accounting for
16 47.5 percent of total PM10 emissions." [See also, 2009 inventory suggesting it may be
17 more than 52 percent: unpaved road dust nearly 33% and paved road dust nearly 20%.]
18 The causes of, and the problems associated with, the control and abatement of fugitive
19 dust are much greater for other sources such as unpaved roads and agricultural
20 operations than OHV recreation.

21 179. The SLO APCD has imposed no performance standards, permitting
22 requirements, rules or regulations on any of these much larger sources of emissions.
23 Without explanation, SLO APCD and SLO County abandoned the recommendations of
24 the Phase 1 Report to regulate dust emissions from dirt roads, the largest cause of PM
25 emissions in the County, and instead irrationally focused on nearly nonexistent
26 emissions caused by OHV riding at Oceano Dunes SVRA.

1 180. Instead, Rule 1001 singles out OHV recreation at Oceano Dunes SVRA, which
2 produces an insignificant amount of PM-10 emissions, if any. It targeted State Parks as
3 the operator and Friends' members as users.

4 181. Rule 1001 is designed to reduce or limit OHV riding at Oceano Dunes SVRA,
5 rather than reduce emissions, or alternatively, to increase impact mitigation payments or
6 civil fines to compensate SLO County for uncompensated perceived impacts.

7 182. There is no rational basis for singling out this insignificant (or nonexistent)
8 emission source while ignoring larger more pervasive emission sources. To do so is not
9 rationally related to the goal of reducing fugitive dust and PM-10 emissions.

10 Accordingly, the classification is unreasonable and discriminatory. The proposed Rule
11 will result in OHV riding areas being curtailed, adversely impacting Friends, its
12 members, OHV enthusiasts, private landowners within the SVRA, and businesses
13 serving that recreational activity.

14 183. For these reasons, Rule 1001 thus violates the equal protection rights of
15 Friends, its members, OHV users of Oceano Dunes SVRA, private property owners and
16 State Parks itself.

17
18 **COUNT 9**
19 **(Rule 1001 Is Void for Vagueness,**
20 **Overbroad and Violates Due Process of Law**
21 **Under the U.S. and California Constitutions)**

22 184. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
23 reference, the allegations contained in paragraphs 1-183, inclusive, as though fully set
24 forth.

25 185. Rule 1001 is vague, ambiguous, and overbroad. It is written in a way that
26 will make passive dust creation caused by high wind events a violation, subjecting the
27 operator to civil fines and penalties of up to \$ 1,000 a day. It is overbroad because the
28 Rule 1001 does not does not accurately differentiate between emissions which result from

1 the action of natural forces as opposed to those resulting from some human activity
2 conducted on the land.

3 186. A regulation is invalid in that, in its totality, it is so vague that a potential
4 offender cannot determine what he may or may not do to avoid being in violation of the
5 regulation. Rule 1001 appears to hold one in violation of the regulation if the entity is
6 "responsible" for the subject property, whether or not there is any substantial, credible or
7 scientifically sound evidence that the offending entity actively or actually stirred up dust.

8 187. The overbreadth and vagueness violates due process of law. The rule is also
9 void for vagueness.

10
11 **SECOND CAUSE OF ACTION**
12 **(Declaratory Relief)**

13 188. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by
14 reference, the allegations contained in paragraphs 1-187, inclusive, as though fully set
15 forth.

16 189. An actual controversy has arisen and now exists between Petitioner and
17 Plaintiff Friends and Respondent and Defendant SLO County concerning their respective
18 rights and duties under numerous provisions of the California Clean Air Act, as well as
19 the U.S. and California Constitutions. Friends contends that Respondent and Defendant
20 SLO APCD failed to provide sufficient notice of the proposed Rule 1001 in violation of
21 Health and Safety Code § 40725; that Rule 1001 exceeds the SLO APCD's authority under
22 Health and Safety Code §§ 40001 and 40702; that Rule 1001 exceeds the SLO APCD's
23 authority under Health and Safety Code §§ 40716(a)(1), 42311(g), § 42300 and the
24 California Clean Air Act to regulate an indirect source of pollution; that the SLO APCD
25 violated Health and Safety Code §§ 40703 and 40922 by failing to prepare required cost
26 effectiveness analysis of the rule and control measures; and that the SLO APCD's

1 adoption of Rule 1001 violates the Equal Protection Clauses of the California and U.S.
2 Constitutions. Respondent and Defendant SLO APCD disputes these contentions.

3 190. Petitioner and Plaintiff Friends desires a judicial determination of said rights
4 and duties under these provisions of the California Clean Air Act, the Health and Safety
5 Code and the U.S. and California Constitutions , and a declaration as to the validity or
6 invalidity of SLO APCD's compliance with these provisions.

7 191. A judicial declaration is necessary and appropriate at this time under the
8 circumstances in order that Petitioner and Plaintiff may ascertain the legitimacy and
9 lawfulness of the Respondent and Defendant's adoption of Rule 1001.

10
11
12 **PRAYER FOR RELIEF**

13 WHEREFORE, the Petitioner and Plaintiff Friends respectfully prays for relief as
14 follows:

15 1. That the Court issue a writ of mandate ordering Respondent SLO APCD to
16 vacate the SLO APCD's adoption of Rule 1001;

17 2. That the Court issue a writ of mandate ordering Respondent SLO APCD to
18 vacate any and all other actions implementing or effectuating Rule 1001;

19 3. That the Court issue a writ of mandate against Respondent SLO APCD and
20 Real Party-in-Interest State Parks directing them to suspend any and all activity in
21 furtherance of Rule 1001 or its effectuation or implementation;

22 4. That the Court issue a preliminary and/or permanent injunction directing
23 Respondent SLO APCD and Real Party-in-Interest State Parks to cease and refrain from
24 engaging in any and all activities in furtherance of Rule 1001 or its effectuation or
25 implementation.

26 5. That the Court issue a declaratory judgment against Respondent SLO APCD
27 declaring and finding that the SLO APCD failed to provide sufficient notice of the
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1 proposed rule in violation of Health and Safety Code § 40725; that Rule 1001 is an
2 Indirect Source Review Program that is ineffective since no triggering discretionary
3 action or approval has occurred; that Rule 1001 is ineffective because the SLO APCD
4 failed to make adequate and required findings of necessity and authority required by
5 Health and Safety Code § 40727(a); that Rule 1001 exceeds the SLO APCD's authority
6 under Health and Safety Code §§ 40001 and 40702; that Rule 1001 exceeds the SLO
7 APCD's authority under Health and Safety Code §§ 40716(a)(1), 42311(g), § 42300 and
8 the California Clean Air Act to regulate an indirect source of pollution; that the SLO
9 APCD violated Health and Safety Code §§ 40703 and 40922 by failing to prepare required
10 cost effectiveness analysis of the rule and control measures; and that the SLO APCD's
11 adoption of Rule 1001 violates the Equal Protection Clauses of the California and U.S.
12 Constitutions;

13 6. That the Court award costs of suit to Petitioner and Plaintiff Friends;

14 7. That the Court award attorneys' fees to Petitioner and Plaintiff Friends,
15 pursuant to C.C.P. § 1021.5, the equitable private attorney general doctrine, and state law.
16 On December 30, 2011, counsel for Petitioner Friends sent by fax counsel for the SLO
17 APCD a settlement demand in a good faith effort to resolve Friends objections to Rule
18 1001 short of litigation. By the terms of the letter, Friends requested a response from the
19 SLO APCD within five days. On January 4, 2012, SLO APCD's legal counsel responded
20 that if Friends wanted a meeting, he would attempt to arrange it. He did not indicate
21 that SLO APCD desired a meeting or that SLO APCD would consider changing its
22 position on Rule 1001 at all. This response thus suggested that the SLO APCD was not at
23 this juncture willing to abandon or make significant changes to Rule 1001 consistent with
24 the detailed comments and objections that Friends previously filed with the agency
25 during the rule-making (as described herein), and, as a result, private enforcement
26 through this lawsuit is necessary.

27 8. For any other equitable or legal relief that the Court deems just and proper.
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1 Dated January 4, 2012

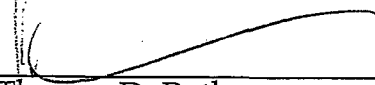
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Respectfully submitted,

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Attorneys for
Petitioner/ Plaintiff Friends of Oceano
Dunes, Inc.

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VERIFICATION

State of California

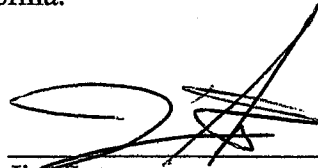
County of Santa Clara

I am the President of Friends of Oceano Dunes, Inc., a California not-for-profit corporation, and I am authorized to make this verification on its behalf, and I make this verification for that reason.

I have read the foregoing **FRIENDS OF OCEANO DUNES' VERIFIED PETITION FOR A WRIT OF MANDAMUS AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** and know the contents thereof. I am informed and believe and on that ground allege that the matters stated in the document are true.

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

Executed January 2, 2012 at San Jose, California.



Jim Suty

EXHIBIT 1

REGULATION X

FUGITIVE DUST EMISSION STANDARDS, LIMITATIONS AND PROHIBITIONS

RULE 1001 Coastal Dunes Dust Control Requirements (Adopted 11/16/2011)

- A. APPLICABILITY. The provisions of this Rule shall apply to any operator of a coastal dune vehicle activity area, as defined by this Regulation, which is greater than 100 acres in size.
- B. DEFINITIONS. For the purpose of this Rule, the following definitions shall apply:
1. "APCD": The San Luis Obispo County Air Pollution Control District.
 2. "APCO": The San Luis Obispo County Air Pollution Control Officer.
 3. "Coastal Dune": means sand and/or gravel deposits within a marine beach system, including, but not limited to, beach berms, fore dunes, dune ridges, back dunes and other sand and/or gravel areas deposited by wave or wind action. Coastal sand dune systems may extend into coastal wetlands.
 4. "Coastal Dune Vehicle Activity Area (CDVAA)": Any area within 1.5 miles of the mean high tide line where public access to coastal dunes is allowed for vehicle activity.
 5. "CDVAA Monitor": An APCO-approved monitoring site or sites designed to measure the maximum 24-hour average PM₁₀ concentrations directly downwind from the vehicle riding areas at the CDVAA. At a minimum, the monitoring site shall be equipped with an APCO-approved Federal Equivalent Method (FEM) PM₁₀ monitor capable of measuring hourly PM₁₀ concentrations continuously on a daily basis, and an APCO-approved wind speed and wind direction monitoring system.
 6. "CDVAA Operator": Any individual, public or private corporation, partnership, association, firm, trust, estate, municipality, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties, who is responsible for the daily management of a CDVAA.
 7. "Control Site Monitor": An APCO-approved monitoring site or sites designed to measure the maximum 24-hour average PM₁₀ concentrations directly downwind from a coastal dune area comparable to the CDVAA but where vehicle activity has been prohibited. At a minimum, the monitoring site shall be equipped with an APCO-approved Federal Equivalent Method (FEM) PM₁₀ monitor capable of measuring hourly PM₁₀ concentrations continuously on a daily basis, and an APCO-approved wind speed and wind direction monitoring system.

8. "Designated Representative": The agent for a person, corporation or agency. The designated representative shall be responsible for and have the full authority to implement control measures on behalf of the person, corporation or agency.
9. "Monitoring Site Selection Plan": A document providing a detailed description of the scientific approach, technical methods, criteria and timeline proposed to identify, evaluate and select appropriate locations for siting the temporary and long-term CDVAA and control site monitors.
10. "Paved Roads": An improved street, highway, alley or public way that is covered by concrete, asphaltic concrete, or asphalt.
11. "PM₁₀": Particulate matter with an aerodynamic diameter smaller than or equal to a nominal 10 microns as measured by the applicable State and Federal reference test methods.
12. "PMRP": Particulate Matter Reduction Plan.
13. "PMRP Monitoring Program": The APCO approved monitoring program contained in the PMRP that includes a detailed description of the monitoring locations; sampling methods and equipment; operational and maintenance policies and procedures; data handling, storage and retrieval methods; quality control and quality assurance procedures; and related information needed to define how the CDVAA and Control Site Monitors will be sited, operated and maintained to determine compliance with section C.3.
14. "Temporary Baseline Monitoring Program": A temporary monitoring program designed to determine baseline PM10 concentrations at the APCO-approved CDVAA and Control Site Monitor locations prior to implementation of the PMRP emission reduction strategies and monitoring program. The program shall include a detailed description of the monitoring locations; sampling methods and equipment; operational and maintenance policies and procedures; data handling, storage and retrieval methods; quality control and quality assurance procedures; and related information needed to define how the temporary monitors will be sited, operated and maintained to provide the required baseline data. The temporary monitors shall meet the specifications of the CDVAA and Control Site Monitors unless otherwise specified by the APCO.
15. "Track-Out": Sand or soil that adhere to and/or agglomerate on the exterior surfaces of motor vehicles and/or equipment (including tires) that may then fall onto any highway or street as described in California Vehicle Code Section 23113 and California Water Code 13304.
16. "Track-Out Prevention Device": A gravel pad, grizzly, rumble strip, wheel wash system, or a paved area, located at the point of intersection of an unpaved area and a paved road that is designed to prevent or control track-out.
17. "Vehicle": Any self-propelled conveyance, including, but not limited to, off-road or all-terrain equipment, trucks, cars, motorcycles, motorbikes, or motor buggies.

18. "24-Hour Average PM₁₀ Concentration": The value obtained by adding the hourly PM₁₀ concentrations measured during a calendar 24-hour period from midnight to midnight, and dividing by 24.

C. GENERAL REQUIREMENTS

1. The CDVAA operator shall develop and implement an APCO-approved Temporary Baseline Monitoring Program to determine existing PM₁₀ concentrations at the APCO-approved CDVAA and Control Site Monitor locations prior to implementation of the PMRP emission reduction strategies and monitoring program.
2. The operator of a CDVAA shall prepare and implement an APCO-approved Particulate Matter Reduction Plan (PMRP) to minimize PM₁₀ emissions for the area under the control of a CDVAA operator. The PMRP shall contain measures that meet the performance requirements in C.3 and include:
 - a. An APCO-approved PM₁₀ monitoring network containing at least one CDVAA Monitor and at least one Control Site Monitor.
 - b. A description of all PM₁₀ control measures that will be implemented to reduce PM₁₀ emissions to comply with this rule, including the expected emission reduction effectiveness and implementation timeline for each measure.
 - c. A Track-Out Prevention Program that does not allow track-out of sand to extend 25 feet or more in length onto paved public roads and that requires track-out to be removed from pavement according to an APCO-approved method and schedule.
3. The CDVAA operator shall ensure that if the 24-hr average PM₁₀ concentration at the CDVAA Monitor is more than 20% above the 24-hr average PM₁₀ concentration at the Control Site Monitor, the 24-hr average PM₁₀ concentration at the CDVAA Monitor shall not exceed 55 ug/m³.
4. The CDVAA operator shall ensure they obtain all required permits from the appropriate land-use agencies and other affected governmental agencies, and that the requirements of the California Environmental Quality Act (CEQA) and the National Environmental Quality Act (NEPA) are satisfied to the extent any proposed measures identified in the PMRP or Temporary Baseline Monitoring Program require environmental review.
5. All facilities subject to this rule shall obtain a Permit to Operate from the Air Pollution Control District by the time specified in the Compliance Schedule.

D. Exemptions

1. Section C.3 shall not apply during days that have been declared an exceptional event by the APCO and where the United States Environmental Protection Agency has not denied the exceptional event.

E. RECORDKEEPING REQUIREMENTS: The CDVAA operator subject to the requirements of this Rule shall compile and retain records as required in the APCO approved PMRP. Records shall be maintained and be readily accessible for two years after the date of each entry and shall be provided to the APCD upon request.

F. COMPLIANCE SCHEDULE:

1. The CDVAA operator shall comply with the following compliance schedule:
 - a. By February 28, 2012, submit a draft Monitoring Site Selection Plan for APCO approval.
 - b. By May 31, 2012, submit a draft PMRP for APCO review.
 - c. By November 30, 2012, submit complete applications to the appropriate agencies for all PMRP projects that require regulatory approval.
 - d. By February 28, 2013, obtain APCO approval for a Temporary CDVAA and Control Site Baseline Monitoring Program and begin baseline monitoring.
 - e. By May 31, 2013, complete all environmental review requirements and obtain land use agency approval of all proposed PMRP projects.
 - f. By July 31, 2013, obtain APCO approval of the PMRP, begin implementation of the PMRP Monitoring Program, and apply for a Permit to Operate.
 - g. By May 31, 2015, the requirements of Section C.3 shall apply.
2. With the exception of section F.1.g, the CDVAA operator will not be subject to civil penalties for failure to meet any timeframe set forth in section F.1 caused solely by delays from regulatory or other oversight agencies required to consider and approve the operator's PMRP or any part thereof.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

FRIENDS OF OCEANO DUNES INC Plaintiff(s),	CASE NUMBER CV120013
VS. SAN LUIS OBISPO CO AIR Defendant(s).	Case Management Conference

Roth, Thomas D.
LAW OFFICES OF THOMAS D. ROTH
One Market, Spear Tower, Suite 3600
San Francisco CA 94105

NOTICE OF ASSIGNMENT & CASE MANAGEMENT CONFERENCE.

This case is assigned to **Hon. Charles S. Candall** for all purposes.
Plaintiff must serve the Summons and Complaint, a copy of this Notice, the Standing Case Management Order of the judge assigned for all purposes and must file proofs of service within 60 days after the complaint is filed.

Defendants shall file responsive pleadings within 30 days of service
unless the parties stipulate to an extension of no more than 15 days.

IT IS HEREBY ORDERED:

- The parties must appear for a first Case Management Conference on:
February 22, 2012 at 9:00 am in Department 9
THE PARTIES OR THEIR ATTORNEYS MUST APPEAR AT THE CASE MANAGEMENT CONFERENCE ***
For information about telephone appearances call **COURTCALL** at (888) 882-6878
- Each party must file & serve a Case Management Statement at least 15 days before the conference.
- The person appearing at the first Case Management Conference must be familiar with the case and prepared to discuss suitability of the case for mediation, binding arbitration, judicial arbitration or some form of alternative dispute resolution.
- Trial will be set within the 11th or 12th month after the filing of the complaint. Counsel must arrange their schedules, reserve dates with witnesses and schedule trial preparation with this in mind. Continuances will be granted only on a clear showing of good cause.
- All law and motion matters will be calendared in the department of the assigned judge and filed with the Clerk's Office.
- Each party should be prepared to show cause why sanctions should not be imposed for a failure to comply with these rules.

*****LIMITED JURISDICTION ONLY:** unless the parties have entered into arbitration as required by Local Rules 9.00 and 26.00. "Entered into arbitration" means the date upon which the administrator mails the arbitration list.

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