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FRIENDS OF OCEANO DUNES, INC.

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN LUIS OBISPO

FRIENDS OF OCEANO DUNES, INC., a California not-for profit corporation,

Petitioner and Plaintiff,

vs.

SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT, a local air pollution control district; the BOARD OF DIRECTORS OF THE SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT, the District's governing body;

and

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

Respondents and Defendants

Case No.: 14CV-0514

BY FAX

FRIENDS OF OCEANO DUNES' FIRST AMENDED, VERIFIED PETITION FOR A WRIT OF TRADITIONAL MANDAMUS (C.C.P. § 1085), AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

COMES NOW Petitioner and Plaintiff Friends of Oceano Dunes, Inc. ("Friends") requesting this Court for a writ of traditional mandamus (C.C.P. § 1085), directed to

Respondents San Luis Obispo County Air Pollution Control District (the "District") and California Department of Parks and Recreation ("State Parks") pursuant to this Verified Petition for Writ and Complaint, ordering Respondents to set aside the March 26, 2014 Consent Decree and the First Amendment to the Agreement Set Forth in the Proposed Consent Decree dated March 26, 2014 (collectively referred to as the "Agreement")[1] (A true and correct copy of the First Amendment to the Agreement Set Forth in the Proposed Consent Decree dated March 26, 2014," which includes the proposed Consent Decree as Ex. A, is attached hereto as Ex. 1) as exceeding the District's authority under state law to amend Rule 1001 without complying with statutorily required notice and comment procedures, and for other relief, as follows:

The Parties and Venue

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

2. Friends was expressly created in 2001 to preserve, create and expand recreational uses, including off-highway vehicle recreation, at Oceano Dunes State Vehicular Recreation Area ("SVRA") located near Pismo Beach, California. A true and correct copy of Friends' Articles of Incorporation is attached as Ex. 2 hereto. Friends is a voluntary, public watchdog organization which represents approximately 28,000 members and users of Oceano Dunes SVRA, who routinely engage, have engaged and plan to continue to engage in motorized off-highway vehicle ("OHV") recreation, beach driving and beach camping at Oceano Dunes SVRA. Hundreds of members engage, have engaged and plan to continue to engage in motorized OHV recreation, beach driving and

[1] The District and State Parks refer to these documents a "consent decree and amendment." However, the Court of Appeal denied the agencies' motion to enter the "consent decree" and no other court has entered the decree. To counteract the agencies' "spin" that the agreement is a judicially enforceable "consent decree," this writ and complaint refers to the consent decree and amendment as the "Agreement."

beach camping at Oceano Dunes SVRA multiple times each year. Friends' watchdog role includes review and challenges to local, state and federal rules that have the effect of limiting or restricting recreational uses at Oceano Dunes, or that exceed the agency's authority under California law.

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

4. To the extent that they are applicable, Friends has exhausted administrative remedies through participation in the rule-making process of Rule 1001, and through repeated oral and written requests, demands and submissions to State Parks and the District not to enter into the proposed consent decree at issue herein. To the extent that any of these efforts are considered deficient in any respect, Friends is otherwise excused from any exhaustion requirements, the exhaustion requirements do not apply to the claims herein, *inter alia*, because the subject matter is a question of law and the action of the District and State Parks exceeds their respective authority under the law, it would have been futile to pursue such exhaustion of administrative remedies and/or Friends is exempted by virtue of this public rights enforcement action and claims.

5. Friends is beneficially interested within the meaning of CCP § 1086 and California law by virtue of its respective participation in the Rule 1001 administrative proceedings below, and by Friends and its officers and members' use and enjoyment of Oceano Dunes SVRA for the park's statutorily authorized purpose of recreational off-highway vehicle use and state-authorized and sanctioned recreational vehicle beach camping. Since Friends' Articles of Incorporation define its very purpose as preserving and expanding recreational opportunities at Oceano Dunes, its interests would be directly affected by any restriction of OHV recreation or by closure of the SVRA. Friends and its members will be directly and adversely impacted and irreparably harmed by the District's and State Parks' adoption of a proposed consent decree, agreement or contract that amends, changes or modifies District Rule 1001 in violation of state law and air quality

statutes that require a public hearing, and a public notice and comment period. Petitioner Friends and its members are beneficially interested in the issuance of the writ because as historical, on-going and future users of Oceano Dunes SVRA for OHV recreation and other recreation, beach driving and beach camping, and as a not-for-profit corporation specifically formed under the laws of the state of California to preserve, continue and expand OHV recreation at Oceano Dunes, and whose membership includes taxpayers of the State of California and payers of special OHV registration fees and gas taxes paid into a special State of California budget fund expressly established for the purpose of maintaining OHV and SVRA facilities within the State, Petitioners Friends and its members have an interest in ensuring: (1) that public officials and agencies do not unlawfully exceed their jurisdiction in adopting or attempting to impose standards or rules that ultimately will or may restrict or prohibit said OHV recreation at Oceano Dunes SVRA; (2) that laws, regulations, and duties are executed and enforced uniformly, fairly, and as written; and (3) that public officials and agencies do not exceed their authority in adopting or amending rules without a mandatory public hearing and public notice and comment. Further, the trial court already has ruled in San Luis Obispo Superior Court Case No. CV120013 that Friends has standing to challenge Rule 1001. That standing is easily extended to a challenge to a proposed consent decree or agreement to amend Rule 1001. In fact, the District sought to have Friends' objection to the proposed consent decree before the Court of Appeal thrown out based on the argument that Friends has no standing to challenge the proposed consent decree and the Court of Appeal rejected the District's argument in its July 30, 2014 ruling.

6. Alternatively, Petitioner Friends and its members are citizens seeking to enforce public rights and the object of this mandamus is to enforce a public duty. Friends and its members have "citizen standing" or "public interest standing" to bring the writ petition under the "public interest exception" to the beneficial interest requirement. The public interest exception applies where the question involves a public right and the

objective of the action is to enforce a public duty. Amending Rule 1001 in the government chambers without complying with the statutorily required public vetting process interferes with the fundamental vested rights of State Parks' long-standing and continued operation of Oceano Dunes SVRA. Friends has an interest in having this public duty (to follow the requirements of state law mandating a public hearing and process for changes to an agency rule), enforced. This litigation, if successful, will result in enforcement of important rights affecting the public interest and benefiting all users of Oceano Dunes SVRA.

7. Friends has no plain, speedy or adequate remedy at law.

8. This action has been filed and served within the applicable statute of limitations.

9. Respondent and Defendant San Luis Obispo County Air Pollution Control District (the "District") is and has been established in California pursuant to Health and Safety Code §§ 40000 – 41133 to adopt and enforce lawful rules regarding nonvehicular sources of pollution to achieve the state and federal ambient air quality standards in areas affected by emission sources under its jurisdiction. The District is and was the local agency which created and legislatively adopted Rule 1001, and then attempted to obtain judicial approval of a proposed consent decree to unlawfully amend Rule 1001.

10. Respondent and Defendant Board of the District (the "Board") is the decision-making body for the District and is responsible for adopting rules and regulations regarding nonvehicular sources of pollution in San Luis Obispo County. The District Board is comprised of 12 elected officials, representing each district of San Luis Obispo County and the incorporated cities. The Board voted in closed session to adopt the proposed consent decree and amendment at issue herein.

11. Respondent and Defendant California Department of Parks and Recreation ("State Parks") is and has been the state department responsible for managing and operating Oceano Dunes SVRA. In that capacity, State Parks is purportedly subject to

Rule 1001, and would be purportedly responsible for ensuring that Oceano Dunes complies with Rule 1001. State Parks signed the Agreement executed with the District. Pursuant to the Agreement, on September 30, 2014, State Parks dismissed its appeal in *Friends of Oceano Dunes v. San Luis Obispo Air Pollution Control District*, Appeal Case No. B248814. (Agreement, Ex. 1 at ¶ 1 (State Parks required to dismiss its appeal].)

12. Petitioner and Plaintiff Friends and its members are adversely affected by the Agreement, which attempts to amend, change or modify District Rule 1001 concerning wind-blown dust from Oceano Dunes SVRA. On July 30, 2014, the Court of Appeal, Second District, Division Six, denied a motion by the District and State Parks to enter the proposed consent decree. Specifically, the Court of Appeal ruled "we deny the joint motion to dismiss and request for approval of the consent decree filed by respondent San Luis Obispo County Air Pollution District and real party-in-interest/appellant California Department of Parks and Recreation."

13. Despite the Court of Appeal's rejection of the proposed consent decree, the District approved the Agreement in a closed session on or about September 24, 2014, without public review, and State Parks signed it shortly thereafter (September 26, 2014). Despite its title, the document is not a "consent decree" because it has not been adopted by or entered by any court.

14. The Agreement is unlawful, inter alia, because it purports to amend, change or modify Rule 1001 and the District does not have the legal authority to modify, change or amend Rule 1001 through an agreement or contract and without a public hearing and the state-mandated public notice and comment period and process.

15. The true names and capacities, whether individual, corporate, associate, or otherwise, of Does 1 through 50 are unknown to the Petitioner and Plaintiff, who therefore sue these defendants/respondents/real-parties-in-interest by fictitious names. Friends will amend this Petition/Complaint to show the Doe

defendants/respondents/real-parties-in-interests' true names and capacities when ascertained.

16. Pursuant to Code of Civil Procedure §§ 393 and 394(a), venue is proper in that the cause of actions arose and the Respondent District is located in San Luis Obispo County. Respondent State Parks also maintains an office in San Luis Obispo County.

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

Background on Oceano Dunes SVRA

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

19. In 1934, State Parks began acquiring the lands that would eventually become Pismo State Beach and Oceano Dunes SVRA. Additional acquisitions occurred in 1949, 1951,1958-1964, and 1974. In the early 1970s, the California Legislature recognized the popularity of off-highway vehicles, recreational vehicles (RVs), and beach camping and adopted the Chappie-Z'berg Off-Highway Vehicle Act, along with the Off-Highway Gas Tax Act. The legislation further authorized the state to acquire and designate areas for the specific purpose of OHV recreation.

20. Pursuant to this authority, State Parks assembled lands in the Pismo area to create what was then called the Pismo Dunes SVRA. The creation of the new SVRA "was the result of a compromise worked out between then [State Parks] Director William Mott

and the environmental community to close the majority of vehicular beaches in San Luis Obispo County *in exchange for* creation of . . . [the SVRA] specifically for vehicle recreation." Beaches in the north county were closed to vehicles. State Parks established the area "to make available to the people opportunities for recreational use of off-road vehicles in a large area of unstabilized sand dunes exceptionally adapted to [OHV] recreational activity. . . ."

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

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

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

24. Oceano Dunes SVRA is unique in the California State Parks system. Its hard surface supports driving and recreational vehicle camping on the beach. It is the only remaining public beach along the entire 1,100 mile California coastline that legally permits the general public to drive on the beach in street legal vehicles. Approximately 5 ½ miles of beach and 1,500 acres of sand dunes are open to vehicular use at Oceano Dunes SVRA and adjoining Pismo State Beach. (Prior to the 1980s, most of the approximately 18,000 acre Guadalupe-Nipomo Dunes Complex was available to vehicular use.) Oceano Dunes draws more visitors than any other park in the entire California State Park system – about 2 million visitors annually. It also generates hundreds of millions of dollars in economic activity annually within San Luis Obispo County, as well as significant fees for State Parks. State Parks, pursuant to its special statutory powers, its long-standing permit from the Coastal Commission, more than 40 years of active and actual use for OHV recreational purposes, and millions of dollars in investment in the creation and on-going operation of the Oceano Dunes SVRA, has a fundamental and legally sanctioned vested right in the continued operation of the SVRA.

The Court of Appeal's Rejection of the Proposed Consent Decree and the Subsequent District and Parks Effort to Salvage the Agreement

25. In April 2014, the District and State Parks filed a joint motion in the Court of Appeal in *Friends of Oceano Dunes v. San Luis Obispo Air Pollution Control District*, Appeal Case No. B248814, requesting judicial approval of the proposed consent decree, dismissal of all appeals and remand to the trial court for continuing enforcement of the consent decree under C.C.P. § 664.6.

26. The proposed consent decree purported to substantially amend District Rule 1001 (the rule adopted by the District to address wind blown dust from Oceano Dunes SVRA) by: adding additional compliance standards (Proposed Consent Decree, Ex. 1 at 4 [¶ ii]), establishing quarterly non-public meetings (id. at 4 [¶ iii]), establishing annual

California Air Resources Board ("CARB") review (id. at 4 [¶ iv]), suspending (at least temporarily) the permit to operate requirement (id. at 4-5 [¶ 4]), imposing additional cost reimbursement obligations on State Parks (id. at 5), requiring the appointment of a Court-supervised Special Master with extensive duties (but no public input on the selection of the Master or the Master's review) (id. at 5 [¶ 5]), authorizing the Special Master to address not only the modified Rule 1001, but "any other issue related to [Oceano Dunes] SVRA under the [District's] authority" (id. at 6 [¶ 6]), establishing an inter-governmental mediation dispute process (id. at 6-7), and creating on-going Court supervision (id. at 7-8). A true and correct copy of the final version of Rule 1001 adopted is attached as Ex. 3 hereto.

27. Friends opposed this joint motion on the grounds that: (1) the proposed consent decree amends/modifies Rule 1001 without complying with the State-mandated public notice, hearing and rule-making requirements, and unlawfully sought to enlist the Court to impose the amendments to the rule through judicial fiat outside of the normal, legislative rule-making process; (2) Friends' appeal is not moot, or alternatively, falls within one or more exceptions to the mootness doctrine; and (3) Friends has standing to bring its appeal.

28. On July 30, 2014, the Court of Appeal denied Defendants' request for approval of the proposed consent decree and ordered State Parks to file its opening brief.

29. Ignoring the Court of Appeal's rejection of their proposed consent decree, the Respondents/Defendants now have purported to unilaterally approve the proposed consent decree rejected by the Court of Appeal and to add amendments pursuant to the First Amendment to the consent decree. (Ex. 1 at 1.) Respondents/Defendants are "desirous of resolving all disputes between them and continuing with the agreements and dispute resolution process set forth in the proposed Consent Decree" rejected by the Court of Appeal. (Ex. 1 at 1.) The District and State Parks "agree that the terms and conditions of the Consent Decree, except as amended herein, shall continue in full force

and effect notwithstanding Paragraph 8 of the Consent Decree, which provides in part that: 'In the event that the Court of Appeal does not approve the Consent Decree and dismiss the appeal as to all the parties, this agreement shall have no further force and effect.' " (Id. at 2 [¶ 4].)

30. Quotations from the Agreement are misleading and confusing because the document references a "consent decree" oftentimes (id. at 1-4) , but no such "consent decree" has been approved by any Court.

31. No court could approve it or take jurisdiction under C.C.P. § 664.6 because that statute does not authorize a court to endorse or enforce a settlement agreement or stipulation that is illegal, contrary to public policy, or unjust. The Agreement at issue here seeks to change, amend or modify District Rule 1001 without a public hearing, statutory notice or public input or comments process. Respondent/Defendant District can not amend Rule 1001 by either a proposed consent decree or any contract or agreement that has not been subjected to the statutorily required rule-making process for amending rules promulgated by an air pollution control district.

32. Defendants and Respondents the District and State Parks, after having their proposed consent decree rejected by the Court of Appeal, now have adopted the Agreement without judicial approval, which thus means that the Agreement is nothing more than an illegal amendment to Rule 1001 without public notice or a hearing.

The Agreement Is Unlawful Because It Purports to Amend Rule 1001 Without the Statutorily Mandated Public Notice, Hearing and Opportunity for Public Comments Required for a Rule-Making

33. The District adopted Rule 1001 - the rule at issue in this writ - as part of a standard legislative rule-making, after substantial public comment and a full public hearing on the proposed rule. Friends then filed a challenge to Rule 1001, which was denied by the trial court. That led to an appeal, in which Friends contended that the

District lacked authority to require State Parks to obtain from the District a "permit to operate" Oceano Dunes SVRA.

34. Immediately after Friends filed its opening brief with the Court of Appeal, the District and State Parks obtained a stay in order to allow settlement talks. The Court ordered a stay but Friends (and all parties, including the public) were excluded entirely from the private, closed-door settlement talks between the two governmental agencies. As a result, the agencies negotiated a proposed consent decree that radically amends Rule 1001 behind closed doors.

35. Friends opposed the proposed consent decree before the Court of Appeal in part because the decree constitutes an illegal rule-making without public notice, hearing and comment. If the District wants to modify Rule 1001, it cannot do so through private, closed door meetings. It must respect and comply with the statutorily mandated public rule-making process.

36. After the Court of Appeal rejected the consent decree proposed by the District and State Parks, the Respondents/Defendants now seek to use the rejected consent decree and an amendment thereto (the Agreement) to amend Rule 1001, not with judicial blessing and process, but solely based on the Respondents/Defendants unilateral closed door "approval" of the documents.

37. Neither the District, State Parks nor the Court has authority to promulgate, approve or issue a consent decree that amends an existing local regulation when the proposed changes have not been vetted by public notice, hearing and comment. The Respondents/Defendants can not unilaterally amend Rule 1001 by simply executing a private settlement agreement or contract. "A district board shall not adopt, amend, or repeal any rule or regulation without first holding a public hearing thereon" with notice to the California Air Resources Board ("CARB") and the public so that the public can provide input and comments. Health & Safety Code § 40725. Only after the District holds a public hearing that provides for public comments and participation may it amend the

regulation (Health and Safety Code, § 40726), and then only if it issues findings of "necessity, authority, clarity, consistency, nonduplication, and reference." Id., §§ 40727, 40727.2, 40728.5, 40703. The District also is required to maintain a file with the regulation (as amended), and file the rule with CARB. §§ 40728, 40704.

38. Even a court cannot approve and enter a proposed consent decree that effectively legislatively amends Rule 1001 because the court's power is limited to striking invalid provisions in legislative acts. Indeed, the Court of Appeal rejected the proposed consent decree proffered by the District and State Parks.

Background of Rule 1001 and Settlement Endeavors

39. Petitioner Friends submitted detailed comments and fully participated in the rule-making process that resulted in the District's adoption of Rule 1001.

40. In January 2012, Friends filed a Petition for Traditional Writ against the District in San Luis Obispo Superior Court challenging the validity of Rule 1001 (Case No. CV 120013). Friends also named State Parks as a Real Party-in-Interest.

41. On April 19, 2013, the trial court issued a Ruling and Order Denying Petitions for Peremptory Writ of Mandate.

42. In May 2013, Friends appealed the trial court's Ruling and Order to the Second Appellate District (Case No. B248814), arguing specifically that the District lacks authority to require a permit to operate Oceano Dunes SVRA. State Parks also appealed.

43. On September 30, 2014, State Parks dismissed its appeal and the Court of Appeal issued a partial remittitur.

44. Friends has undertaken many efforts to try to settle this matter. During the last several months, Friends has made several overtures to State Parks and the District in an effort to settle its concerns with the legality of a proposed "consent decree," which amends District Rule 1001 concerning dust emissions from Oceano Dune SVRA. After the Court of Appeal rejection of the consent decree, Friends made proposals to the

District and State Parks through State Parks. State Parks and/or the District have rejected these overtures.

45. The rejection of these overtures shows that the District is not interested in discussing this matter further with Friends, and that settlement efforts are futile. Indeed, reports from State Parks and in the press make clear that the District has communicated repeatedly that it will never meet with Friends to discuss ways to settle any issues. District Director Allen was quoted in an August 6, 2014 New Times newspaper article that the District "has no intention of working with Friends."

46. Despite the open hostility of the District and apparent futility of making this additional request, on September 27, 2014, counsel for Petitioner Friends sent by email to counsels for the District and for State Parks a settlement demand in a good faith effort to resolve Friends' objections to the Agreement short of litigation. Friends stated that it remains open to settlement discussions prior to filing a lawsuit challenging the rule. As such, Friends renewed its request that State Parks and the District immediately set aside or suspend the proposed consent decree and amendment to the proposed consent decree or Agreement, and that the District staff sit down with Friends' representatives to discuss alternatives. On October 8, 2014, both the District and State Parks, in separate letters, rejected Friends' settlement demands.

FIRST CAUSE OF ACTION
(Petition for Writ of Traditional Mandate, C.C.P. § 1085)

47. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by reference, the allegations contained in paragraphs 1-46, inclusive, as though fully set forth.

48. Respondents/Defendants can not unilaterally amend Rule 1001 by simply executing a private settlement agreement or contract. "A district board shall not adopt, amend, or repeal any rule or regulation without first holding a public hearing thereon"

with notice to CARB and the public so that the public can provide input and comments. Health & Safety Code § 40725. Only after the District holds a public hearing that provides for public comments and participation may it amend the regulation (id., § 40726), and then only if it issues findings of "necessity, authority, clarity, consistency, nonduplication, and reference." Id., §§ 40727, 40727.2, 40728.5, 40703. The District also is required to maintain a file with the regulation (as amended), and file the rule with CARB. §§ 40728, 40704. These provisions reflect a statutory regime that embodies the public policy of encouraging public participation in matters of air quality regulation, which is a matter of public significance.

49. The District and State Parks have exceeded their respective authority and have violated the public hearing and notice and comment rule-making requirements described in paragraph 48 by entering into an agreement (the Agreement or proposed consent decree) that amends, changes and modifies District Rule 1001 as described herein without complying with said public notice and hearing requirements.

50. State Parks has exceeded its authority by purporting to enter into an agreement that amends, changes and modifies District Rule 1001 through the Agreement and as described herein without complying with said public notice and hearing requirements. State Parks does not have authority to establish rules or regulations or enter into agreements or contracts "inconsistent with law" and contrary to public policy. See, e.g., Pub. Res. Code § 5003. Any such agreement is ultra vires, void and without force and effect.

51. Friends has a beneficial interest as detailed in paragraph 5 above, or alternatively, falls within the citizen standing exception described in paragraph 6 above.

52. Petitioner has performed all conditions precedent to the filing of this Petition and Complaint and otherwise exhausted all required and applicable administrative remedies, or is otherwise excused given that this is a challenge to the authority of the District and State Parks or under the doctrine of futility.

53. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other than the relief sought in this petition. Absent intervention by this Court, the District will enforce, implement and apply the proposed consent decree or Agreement to the detriment of Petitioner Friends and its members as described above. No additional administrative appeal or other form of relief is available to prevent such an occurrence. Petitioner Friends has a clear, present and beneficial right to performance of the public business in accordance with the standards set forth herein.

SECOND CAUSE OF ACTION
(Declaratory Relief)

54. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by reference, the allegations contained in paragraphs 1-53, inclusive, as though fully set forth.

55. An actual controversy has arisen and now exists between Petitioner and Plaintiff Friends and Respondents and Defendants the District and State Parks concerning the lawful process to amend Rule 1001, and the authority of those governmental agencies to amend, change and modify District Rule 1001 through the Agreement and as described herein without complying with said public notice and hearing requirements. Any such agreement is ultra vires, void and without force and effect. The Respondents/Defendants can not unilaterally amend Rule 1001 by simply executing a private settlement agreement or contract. "A district board shall not adopt, amend, or repeal any rule or regulation without first holding a public hearing thereon" with notice to CARB and the public so that the public can provide input and comments. Health & Safety Code § 40725. Only after the District holds a public hearing that provides for public comments and participation may it amend the regulation (id., § 40726), and then only if it issues findings of "necessity, authority, clarity, consistency, nonduplication, and reference." Id., §§ 40727, 40727.2, 40728.5, 40703. The District also is required to

maintain a file with the regulation (as amended), and file the rule with CARB. §§ 40728, 40704. State Parks does not have authority to establish rules or regulations or enter into agreements or contracts "inconsistent with law," and contrary to public policy. See, e.g., Pub. Res. Code § 5003. The District and State Parks exceed their respective authority by purporting to enter into the Agreement when these state law requirements have not been met.

56. Petitioner and Plaintiff Friends desires a judicial determination of said rights and duties under these provisions of the Health and Safety Code, and a declaration as to the validity or invalidity of the District's compliance with these provisions, and its own regulations, as well as the authority of State Parks to enter into such an agreement.

57. A judicial declaration is necessary and appropriate at this time under the circumstances in order that Petitioner and Plaintiff may ascertain the legitimacy and lawfulness of the Respondents/Defendants' adoption of the Agreement which amends, changes and modifies Rule 1001.

THIRD CAUSE OF ACTION
(Injunctive Relief)

58. Petitioner and Plaintiff Friends repeats, realleges and incorporates herein by reference, the allegations contained in paragraphs 1-57, inclusive, as though fully set forth.

59. Injunctive relief is available against an official governmental action that is unlawful or in excess of its authority.

60. Plaintiffs and Petitioner Friends possesses no speedy, adequate remedy at law, and will suffer irreparable and permanent injuries if the District and State Parks follow an Agreement that amends, changes or modifies District Rule 1001 without a public hearing or notice and public comment.

61. A stay, and preliminary and permanent injunction, should be issued restraining the Respondent governmental agencies from enforcing, attempting to enforce, abiding by or implementing in any way the Agreement (proposed consent decree and amendment thereto) since the Agreement exceeds the authority of each of these agencies.

PRAYER FOR RELIEF

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

1. That the Court issue a writ of traditional mandate under CCP § 1085 ordering Respondents/Defendants the District and State Parks to set aside or vacate the Agreement.

2. That the Court issue a declaratory judgment against Respondents/Defendants the District and State Parks declaring and finding that the Agreement exceeds the District's authority under Health and Safety Code §§ 40725, 40726, 40727, 40727.2, 40728.5, 40703, 40728, and 40704, as well as State Parks' authority under the law.

3. That the Court enjoin the District and State Parks from enforcing, attempting to enforce, abiding by or implementing in any way the Agreement (proposed consent decree and amendment thereto).

4. That the Court award costs of suit to Petitioner and Plaintiff Friends.

5. That the Court award attorneys' fees to Petitioner and Plaintiff Friends, pursuant to C.C.P. § 1021.5, the equitable private attorney general doctrine, and state law.

6. For any other equitable or legal relief that the Court deems just and proper.

Dated Oct. 27, 2014

Respectfully submitted,

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

VERIFICATION

State of California

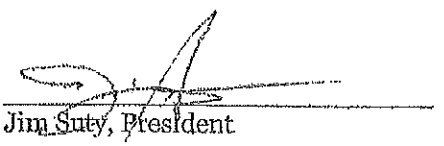
County of Santa Clara

I am the President of FRIENDS OF OCEANO DUNES, INC. 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' FIRST AMENDED, VERIFIED PETITION FOR A WRIT OF TRADITIONAL MANDAMUS (C.C.P. § 1085), AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF and know the contents thereof. I am informed and believe the matters therein to be true and on that ground allege that the matters stated therein are true.

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

Executed October 26, 2014 at San Jose, California.



Jim Suty, President

Ex. 1

FIRST AMENDMENT TO THE AGREEMENT SET FORTH

IN THE PROPOSED CONSENT DECREE DATED MARCH 26, 2014

WHEREAS, the California Department of Parks and Recreation, Division of Off-Highway Motor Vehicle Recreation ("State Parks") and the San Luis Obispo Air Pollution Control District ("District") entered into a proposed Consent Decree, Dismissal of Appeals, and Remand to the Trial Court to Enforce the Consent Decree Through Continuing Jurisdiction pursuant to CCP §664.6 ("Consent Decree"); and

WHEREAS, a true and correct copy of the proposed Consent Decree is attached hereto and incorporated by reference as "Exhibit A;" and

WHEREAS, State Parks and District submitted the proposed Consent Decree to the Court of Appeal as part of a joint motion to approve the Consent Decree and dismiss all appeals, including the appeal filed by Friends of Oceano Dunes, Inc. in the case *Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control District, et al.*, Civil Case Number CV 120013; and

WHEREAS, on July 30, 2014, the Court of Appeal denied the joint motion to dismiss and request for approval of the proposed Consent Decree, and ordered State Parks to file its opening brief within thirty days from the date of the order; and

WHEREAS, on August 26, 2014, the Court of Appeal granted an extension of time for State Parks to file its opening brief until September 29, 2014; and

WHEREAS, District and State Parks are desirous of resolving all disputes between them and continuing with the agreements and dispute resolution process set forth in the proposed Consent Decree; and

WHEREAS, State Parks is desirous of dismissing its appeal in *Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control District, et al.;* and

WHEREAS, the parties are desirous of implementing an interim dispute resolution process in place of the continuing jurisdiction under CCP §664.6 as anticipated in the proposed Consent Decree until such time as *Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control District, et al.* is finally adjudicated and the matter is remanded to the trial court to exercise its continued jurisdiction pursuant to CCP §664.6.

NOW THEREFORE, the parties hereby agree as follows:

1. State Parks will dismiss its appeal in Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control District, et al., Civil Case Number CV

120013 immediately upon execution of this Amendment by District and State Parks.

2. District will continue in its defense of the underlying litigation as to plaintiff and appellant Friends of Oceano Dunes, Inc. until such matter is finally adjudicated.

3. District will continue it its efforts to provide for continuing jurisdiction by the Superior Court over the terms and conditions of the Consent Decree upon resolution of the underlying appeal and issuance of the Court's remittitur restoring the Superior Court's jurisdiction.

4. The parties agree that the terms and conditions of the Consent Decree, except as amended herein, shall continue in full force and effect notwithstanding Paragraph 8 of the Consent Decree, which provides in part as follows: "In the event that the Court of Appeal does not approve the Consent Decree and dismiss the appeal as to all the parties, this agreement shall have no further force and effect."

5. Until such time as the Superior Court assumes continuing jurisdiction pursuant to CCP §664.6, as anticipated by the parties, Paragraph 6(e) of the Consent Decree shall be of no force or effect. Instead, Paragraph 6(d) shall be amended to read as follows: "If a party disagrees with the recommendation of the Special Master and mutual resolution of the issue cannot otherwise be reached, the parties shall be free to pursue whatever legal remedies are available to resolve the issue."

6. Until such time as the Superior Court assumes continuing jurisdiction pursuant to CCP §664.6, as anticipated by the parties, Paragraph 5 of the Consent Decree shall be amended to read as follows: "In order to assist the parties in resolving disputes under this Consent Decree, the parties have selected a Special Master, who shall be neutral and answer to no party. The Special Master's powers and duties shall include, but not be limited to: the mediation of disputes; the evaluation of the technical, scientific and/or reasonable cost issues raised in a particular dispute between the Parties to this Consent Decree; and rendering an impartial recommendation to the Parties. The Parties shall each pay half of the Special Master expenses; however, District shall be entitled to recover its expenses for the Special Master through the cost reimbursement process, set forth in paragraph 4 above. Should the Special Master resign or become unavailable, or should the Parties mutually agree to remove and replace the Special Master, the Parties shall select a substitute Special Master."

7. Until such time as the Superior Court assumes continuing jurisdiction pursuant to CCP §664.6, as anticipated by the parties, Paragraph 16 of the Consent Decree shall be amended to read as follows: "This Consent Decree shall remain in full force and effect until such time as the parties jointly agree that the requirements of this Consent Decree are no longer needed."

8. Until such time as the Superior Court assumes continuing jurisdiction pursuant to CCP §664.6, as anticipated by the parties, Paragraph 4.ii. of the Consent Decree shall be amended to remove the last phrase of that paragraph: "and ultimately subject to the continued jurisdiction of the Superior Court to determine the reasonableness of such actual costs."

9. Until such time as the Superior Court assumes continuing jurisdiction pursuant to CCP §664.6, as anticipated by the parties, Paragraph 15 of the Consent Decree shall be amended to remove the last phrase of the second sentence of that paragraph: "or the determination of the Superior Court under Paragraph 6, above."

10. Paragraph 7 of the Consent Decree shall become effective only upon the restoration of the Superior Court's jurisdiction, as set forth in paragraph 3.

11. Paragraph 9 of the Consent Decree is deleted.

12. Except as amended herein, the remaining terms and conditions of the Consent Decree shall continue in full force and effect in order to effectuate the parties' agreements and the dispute resolution process set forth in the Consent Decree.

On behalf of the parties designated below, the undersigned agree to the foregoing first amendment to the Consent Decree on the dates below stated.

For:

San Luis Obispo County Air Pollution Control District

Date: 9/24/2014

Roberta Fonzi, Chair

Date: 9/24/14

Larry R. Allen, Air Pollution Control Officer

Date: 9/24/14

Raymond A. Biering, District Counsel

For:

California Department of Parks and Recreation

Date:_____

Lisa Mangat, Acting Director

Date:_____

Col. Christopher Conlin, USMC (Ret.), Deputy Director, Off-Highway Motor Vehicle Recreation Division

Date:_____

Mitchell E. Rishe, Deputy Attorney General

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Date:_____

Raymond A. Biering, District Counsel

For:

California Department of Parks and Recreation

Date:_____

Lisa Mangat, Acting Director

Date: 23 SEPT 2014

Col. Christopher Conlin, USMC (Ret.), Deputy Director, Off-Highway Motor Vehicle Recreation Division

Date: 9/26/14

Mitchell E. Rishe, Deputy Attorney General

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Date:_____

Raymond A. Biering, District Counsel

For:

California Department of Parks and Recreation

Date: 9/29/14

Lisa Ann L. Mangat, Acting Director

Date:_____

Col. Christopher Conlin, USMC (Ret.), Deputy Director, Off-Highway Motor Vehicle Recreation Division

Date:_____

Mitchell E. Rishe, Deputy Attorney General

EXHIBIT A

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

CASE NO. B248814

FRIENDS OF OCEANO DUNES, INC. Plaintiff and Appellant, v. SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT, et al.; Defendant and Respondent.	Civil Case No. CV 120013
CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, Real Party-In-Interest and Appellant.	

On Appeal From
A Judgment Of The Superior Court For San Luis Obispo County
Honorable Charles S. Crandall

CONSENT DECREE, DISMISSAL OF APPEALS, AND REMAND TO THE TRIAL COURT TO ENFORCE THE CONSENT DECREE THROUGH CONTINUING JURISDICTION PURSUANT TO CCP §664.6

RAYMOND A. BIERING, SBN 89154
JEFFREY A. MINNERY, SBN 232259
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Attorneys for Defendants/Respondents, THE SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT (AND THE BOARD OF DIRECTORS)

KAMALA HARRIS
Attorney General of California
MITCHELL E. RISHE, SBN 193503
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Telephone: (213) 897-6224
Facsimile: (213) 897-2801
Attorneys for Appellant and Real Party-in-Interest, CALIFORNIA DEPARTMENT OF PARKS AND RECREATION

EXHIBIT 4

CONSENT DECREE, DISMISSAL OF APPEALS, AND REMAND TO THE TRIAL COURT TO ENFORCE THE CONSENT DECREE THROUGH CONTINUING JURISDICTION PURSUANT TO CCP §664.6

WHEREAS, the California Department of Parks and Recreation ("State Parks"), Division of Off-Highway Motor Vehicle Recreation ("OHMVR"), operates the Oceano Dunes State Vehicular Recreation Area ("ODSVRA" or "Facility"), for the purpose of off-highway vehicle ("OHV") recreation; and

WHEREAS, on November 16, 2011, the San Luis Obispo Air Pollution Control District ("District") adopted Rule 1001, which requires State Parks to design and implement a plan to monitor and reduce airborne particulate matter ("PM10") caused by OHV activity at the Facility and also requires State Parks to apply to the District for a permit to operate ODSVRA; and

WHEREAS, the District is entitled to recover the costs of its regulatory compliance programs from permitted and unpermitted sources of air pollution; and

WHEREAS, Friends of Oceano Dunes, Inc. ("Friends") challenged Rule 1001 in a writ of mandate proceeding before the Superior Court for the County of San Luis Obispo; and

WHEREAS, State Parks, named as a real party-in-interest in the lawsuit, was joined in the writ proceeding and filed briefs in support of the writ petition; and

WHEREAS, the Superior Court entered a Ruling and Order Denying Petitions for Preemptory Writ of Mandate in a written decision filed April 19,

2013, a true and correct copy of which is attached hereto and incorporated by reference as "Exhibit A"; and

WHEREAS, on May 14, 2013, Friends filed a Notice of Appeal to the California Court of Appeal, Second District, appealing the trial court's Judgment denying the Petition for Writ of Mandate; and

WHEREAS, on June 4, 2013, State Parks also filed a Notice of Appeal of the Trial Court's Judgment denying the Petition for Writ of Mandate; and

WHEREAS, the Court of Appeal entered an Order on October 3, 2013, granting the Joint Motion filed by Appellant State Parks and Respondent District to stay further proceedings in the appeal for a period of 180 days from the date of the Order; and

WHEREAS, the purpose of the stay was to enable State Parks and District to meet with the California Air Resources Board ("CARB"), acting as a facilitator, to mediate and attempt to resolve the matters at issue in the appeal, in particular Rule 1001's "Permit to Operate" requirement; and

WHEREAS, the District and State Parks are desirous of implementing meaningful mitigation measures to address State and Federal PM10 standards; and

WHEREAS, the Parties do not intend by this Consent Decree to decrease the legislative requirements and environmental protections set forth in Rule 1001, but rather, the Parties intend to implement the requirements of Rule 1001 through this Consent Decree; and

WHEREAS, the Parties have agreed to a settlement of this action without any admission of fact or law, which they consider to be a just, fair, adequate and equitable resolution of the claims raised in this action; and

WHEREAS, it is in the interest of the public, the Parties, and judicial economy to resolve the issues in this action without protracted litigation, including further appellate proceedings; and

WHEREAS, the Court finds that this Consent Decree represents a just, fair, adequate and equitable resolution of the claims raised in this action.

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. Rule 1001, as adopted by the District on November 16, 2011, is hereby incorporated by reference into this Consent Decree as though fully set forth herein. In implementing Rule 1001, the District will continue to exercise its jurisdiction and authority with regard to the requirements of Rule 1001, except as subject to this Consent Decree.

2. In recognition of the fact that a consent decree in and of itself does not trigger the California Environmental Quality Act ("CEQA") and, in any case, the original adoption of Rule 1001 was conducted in accordance with the requirements of CEQA, and that the effect of this Consent Decree and the Parties' agreement does not result in any relaxation or reduction of environmental requirements under Rule 1001, the approval of this Consent Decree does not trigger subsequent CEQA review.

3. Notwithstanding Paragraphs 1 and 2 above, as to State Parks and ODSVRA, this Consent Decree shall be the method of implementation of Rule 1001. As such, the Parties acknowledge and agree:

i. That the District and State Parks will work cooperatively and in good faith to achieve the reductions in PM emissions required under Rule 1001;

ii. That given the interest in acting immediately, the District and State Parks, in consultation with CARB, have agreed to take action to reduce PM10 emissions as soon as possible. This will involve an iterative process of mitigation actions, evaluation, and revision to achieve the immediate goal of meeting the Federal PM10 standard at the monitor located on the Nipomo Mesa known as "CDF" and to provide ongoing progress toward achieving the State PM10 standards and meet the standards set forth in Rule 1001;

iii. That the District and State Parks will hold regular meetings at least quarterly to share and discuss information regarding mitigation actions and progress achieved in reducing PM air quality impacts on the Nipomo Mesa, unless the Parties agree in writing to reduce the occurrence of the meetings. These meetings will serve as the forum to discuss the appropriate next steps for ongoing implementation of Rule 1001; and

iv. CARB will participate in an annual meeting with the District and State Parks to review the status of compliance with the Federal and State PM10 standards and associated planning requirements.

4. Without prejudice to District's authority to regulate coastal dune vehicle activity areas subject to Rule 1001, and without State Parks

acknowledging that the District has legal authority to require ODSVRA to obtain a permit, State Parks will not be required pursuant to this Consent Decree to obtain a "Permit to Operate." State Parks will reimburse the District for its actual costs of implementing Rule 1001 including, but not limited to the following:

i. All costs for operation and maintenance of the District's CDF monitoring site unless and until an alternate site is approved by the U.S. Environmental Protection Agency; and

ii. The reasonable costs associated with implementation of Rule 1001 and this Consent Decree as documented through the District's cost accounting system and at the Board adopted labor rate. Disagreements on reasonable costs shall be settled by the Special Master process described in Paragraph 6, below, and ultimately subject to the continued jurisdiction of the Superior Court to determine the reasonableness of such actual costs.

5. In order to assist the Superior Court in the exercise of the Court's continued jurisdiction, a Special Master shall be appointed by the Superior Court to assist it in its exercise of jurisdiction and understanding of the case before it. The Special Master shall be neutral and answer solely to the Superior Court. The Special Master's powers and duties shall include, but not be limited to: the mediation of disputes; the evaluation of the technical, scientific and/or reasonable cost issues raised in a particular dispute between the Parties to this Consent Decree; and rendering an impartial recommendation to the Parties and the Court. If the parties do not agree with the Special Master, the Parties shall follow the procedures in Paragraph 6, below. The

Superior Court will not be obligated to follow the Special Master's recommendations, but may give such recommendations great weight in its ultimate determinations. The Superior Court shall appoint the Special Master, at its discretion, based upon a mutually agreed upon joint recommendation of the parties to this agreement. In the event the parties are unable to agree to a joint recommendation for the Special Master, the District and State Parks shall each nominate two candidates to serve as the Special Master, and the Court shall thereafter appoint the Special Master after consideration of such nominations. The Parties shall propose the candidates for Special Master to the Superior Court within thirty days from the entry of this Consent Decree. Parties shall each pay half of the Special Master expenses; however, District shall be entitled to recover its expenses for the Special Master through the cost reimbursement process, set forth in paragraph 4 above, except to the extent that the Superior Court determines that the District is not a "prevailing party" in any dispute, as set forth in Paragraph 7, below.

6. In the event of a dispute between the Parties involving the implementation of this Consent Decree, Rule 1001, or any other issue related to ODSVRA under the APCD's authority, the dispute will be resolved as follows:

a) In the event the District Air Pollution Control Officer determines that State Parks is in violation of Rule 1001 in any respect, the Air Pollution Control Officer shall notify State Parks and convene a meeting between the parties within thirty days of such notification to confer and attempt to informally resolve the alleged violation of Rule 1001. If the parties cannot

informally resolve the alleged violation after meeting in accordance with this Paragraph 6(a), the Air Pollution Control Officer may issue a "Notice of Violation" in accordance with Rule 1001 and the California Health & Safety Code.

b) In the event of any other dispute over this Consent Decree or any other issue relating to ODSVRA under the APCD's authority, the District and State Parks will thereafter meet within thirty days to confer and attempt to informally resolve the dispute.

c) In the event that the Parties are not able to resolve their differences through the meet and confer process described in subparagraphs (a) and/or (b) above, either or both Parties may elect to submit the matter to the Special Master through written notice within fifteen days from the voluntary meet and confer meeting.

d) The Special Master shall convene a meeting with the District and State Parks within thirty days thereafter, unless a different date is agreed to by the Parties and the Special Master, to evaluate the dispute. The District and State Parks will be entitled to present their respective positions to the Special Master, which shall in turn make its recommendation to the Parties.

e) If a Party disagrees with the recommendation of the Special Master, that Party may, within thirty days after the Special Master makes its recommendation to the Parties, petition the

Superior Court under its continuing jurisdiction to resolve the Parties' dispute. In such event, the Special Master shall submit its report and recommendation, prepared in response to Paragraph 6(d) above, to the Superior Court for its consideration. In the event of a review of the dispute by the Superior Court under its continuing jurisdiction, the determination of the Superior Court shall be final.

7. In the event a dispute is resolved at the Superior Court level, as set forth in Paragraph 6, above, the Superior Court shall determine the prevailing party, with the other party (i.e., the non-prevailing party) paying 1) the Special Master's costs and expenses, and 2) the prevailing party's attorneys' fees incurred in resolving the dispute. Such fees and costs, if awarded to the District, shall not be included in the District's cost reimbursement program. In the event a dispute over the alleged violation of this Consent Decree, Rule 1001 or any other issue relating to ODSVRA under the APCD's authority results in the Superior Court's imposition of civil penalties against State Parks, such penalties shall be based on and limited to the penalties designated pursuant to Health and Safety Code sections 42400 *et seq.*

8. The District and State Parks have jointly filed a motion herewith to approve this Consent Decree and dismiss all of the pending appeals in this case as to all Parties on the grounds of mootness and lack of standing, in order to implement the terms and conditions of this Consent Decree. In the event that the Court of Appeal does not approve the Consent Decree and dismiss the appeals as to all the Parties, this agreement shall have no further force and effect.

9. Upon dismissal of the appeals herein, the Court hereby orders that this matter shall be remanded to the Superior Court for the County of San Luis Obispo to implement the terms and conditions of this Consent Decree under its continuing jurisdiction pursuant to Code of Civil Procedures section 664.6. In the interest of judicial economy, the Superior Court shall have the authority to assign, from time to time, any standing Superior Court judge within its discretion to maintain the continuing jurisdiction over this matter.

10. The Parties to this Consent Decree ("Decree") are the District and State Parks. Nothing in this Decree shall be construed to make any other person or entity not executing this Decree a third-party beneficiary to this Agreement.

11. This Decree applies to, is binding upon, and inures to the benefit of the Parties and their successors, assigns and designees.

12. This Decree shall not constitute an admission or evidence of any fact, wrongdoing, misconduct, or liability on the part of the Parties, their officers, or any person affiliated with them.

13. Any deadline stated herein that falls on a Saturday, a Sunday, or a legal holiday shall be extended to the next day which is not one of the aforementioned days.

14. This Decree constitutes a full and final resolution of all matters related to the Existing Litigation.

15. The Parties acknowledge that Rule 1001 and the enforcement agreement contained in the District's May 24, 2013 letter, a copy of which is attached hereto and incorporated by reference as "Exhibit B," presently sets forth certain timeframes and deadlines for the performance of specific

requirements of Rule 1001. The Parties further acknowledge some of those deadlines may, from time to time, need to be adjusted through the enforcement discretion of the District Air Pollution Control Officer or the determination of the Superior Court under Paragraph 6, above. Therefore, the Parties may modify any deadline or other term of this Decree by written stipulation or, if the Parties cannot agree on a modified deadline or other term, in accordance with the dispute resolution procedure set forth in Paragraph 6, above.

16. The Superior Court's continued jurisdiction over this matter shall continue until such time as the parties jointly agree and/or the Superior Court determines that the requirements of this Consent Decree are no longer needed.

17. Any notices required or provided for by this Decree shall be in writing, and shall be deemed effective (i) upon receipt if sent by U.S. Post or (ii) upon the date sent if sent by overnight delivery, facsimile, or email. In addition, to be effective, any such notice must be sent to the following:

For the District:

Larry R. Allen, Air Pollution Control Officer
San Luis Obispo County Air Pollution Control District
3433 Roberto Court
San Luis Obispo, CA 93401

With a copy to:

Raymond A. Biering, District Counsel
Adamski, Moroski, Madden, Cumberland and Green, LLP
P.O. Box 3835
San Luis Obispo, CA 93403-3835

For State Parks:

Chris Conlin, Deputy Director
California State Parks
Division of Off Highway Motor Vehicle Recreation
1725 23rd Street, Suite 200
Sacramento, California 94296
Email: Christopher.Conlin@parks.ca.gov

With a copy to:

Mitchell E. Rishe, Deputy Attorney General
Office of the Attorney General
300 South Spring Street, Suite 1702
Los Angeles, California 90013
Email: Mitchell.Rishe@doj.ca.gov

or such person as any Party may subsequently identify in writing to the other Parties.

18. The various terms, paragraphs, and sections contained herein shall be deemed separable and severable. If any provision of this Decree is deemed invalid or unenforceable, the balance of the Decree shall remain in full force and effect.

19. It is hereby expressly understood and agreed that this Decree was jointly drafted by the Parties. Accordingly, the Parties hereby agree that any and all rules of construction to the effect that ambiguity is construed against the drafting Party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Decree.

20. Each undersigned representative of the Parties to this Decree certifies that he or she is fully authorized by the Party to enter into and execute

the terms and conditions of this Decree, and to legally bind such Party to this Decree.

21. This Decree may be executed in any number of counterpart originals, each of which shall be deemed to constitute an original decree, and all of which shall constitute one decree. The execution of one counterpart by any Party shall have the same force and effect as if that Party had signed all other counterparts.

On behalf of the Parties or Parties designated below, the undersigned agree to the foregoing Consent Decree and consent to its entry as an order of the Court forthwith.

For:

San Luis Obispo County Air Pollution Control District

Date: 3-26-14

Roberta Fonzi, Chair

Date: 3.26.14

Larry R. Allen, Air Pollution Control Officer

Date: 3/26/14

Raymond A. Biering, District Counsel

For:

California Department of Parks and Recreation

Date: 3/20/2014

Maj. Gen. Anthony L. Jackson, USMC (Ret),
Director

Date: 3/20/2014

Col. Christopher Conlin, USMC (Ret),
Deputy Director, Off-Highway Motor
Vehicle Recreation Division

Date: 3/20/2014

Mitchell E. Rishe, Deputy Attorney General

ORDER

UPON CONSIDERATION OF THE FOREGOING, the Court hereby finds that this Consent Decree is fair and reasonable, both procedurally and substantively, consistent with applicable law, in good faith, and in the public interest. THE FOREGOING Consent Decree is hereby APPROVED AND ENTERED AS FINAL JUDGMENT.

SIGNED and ENTERED this _____ day of _____, 2014

For:

_____

Presiding Justice of the California Court of Appeal, Second District

FILED

APR 19 2013

SAN LUIS OBISPO SUPERIOR COURT
BY: _____
Jennifer Novak, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

FRIENDS OF OCEANO DUNES, INC., a California not-for-profit corporation, Plaintiff and Petitioner, v. SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT, a local air pollution control district; et al.; Respondent and Defendants. CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, a Department of the State of California, and DOES 1 – 50, inclusive, Real Party in Interest.	CASE NO. CV 120013 **RULING AND ORDER DENYING PETITIONS FOR PEREMPTORY WRIT OF MANDATE** Date January 24, 2013 Time: 9:00 a.m. Dept: 9

I. INTRODUCTION

Airborne particulate matter levels on the Nipomo Mesa are consistently higher than anywhere on the California coast, and they exceed state health standards approximately 65 days per year. As a result of concentrations exceeding both federal and state standards, residents of the Nipomo Mesa are exposed to a serious and continuing health risk.

Over 2,000 epidemiological studies have documented serious health consequences of exposure to high concentrations of airborne particulate matter, including:

- increased hospitalizations and emergency room visits for respiratory distress in children;
- increased absenteeism from work and school;
- decreased lung function among children;
- exacerbation of symptoms among those already suffering from asthma;
- bronchitis and other respiratory diseases;
- increased cardiovascular stress for those with existing heart disease; and
- premature death. (AR163.)[1]

Because of these risks, in 2004 the San Luis Obispo County Air Pollution Control District (the "District") began comprehensive data-gathering efforts and scientific studies to determine the source of these airborne particulates, spending eight years and over $1 million in staff time and public funds in the process.

On November 16, 2011, the District adopted Rule 1001 in order to address the dispersion of particulate matter onto the Nipomo Mesa, which the District concluded is exacerbated by off-highway vehicle (OHV) use at the Oceano Dunes State Vehicular Recreation Area ("Off-Road Riding Facility" or "Facility"), which is operated by real-party-in-interest, the California Department of Parks and Recreation ("State Parks"). Rule 1001 requires State Parks to design and implement a plan to reduce airborne particulate matter from the Off-Road Riding Facility that is caused by OHV activity. (AR881-885.) The plan creates a timeline for State Parks to reach certain milestones of monitoring and particulate matter reduction, and also requires State Parks to apply for an APCD rule-based permit to operate the Off-Road Riding Facility once it has reached certain milestones. (*Id.*)

Friends of Oceano Dunes, Inc. ("Friends") challenges the District's adoption of Rule 1001. Friends claims that the District exceeded its authority in requiring State Parks to obtain a permit for the operation of the Off-Road Riding Facility, that a permit is an improper

[1] All references to the Administrative Record are cited as "AR", followed by the page number.

method of regulating an "indirect" source of air pollution, that the District failed to make the required findings of necessity and authority, and that the District's actions were arbitrary and capricious based upon its reliance on faulty theories espoused in the scientific studies leading to the rule.[2]

State Parks joins in the Friends' assertion that the Phase 2 study is flawed, based principally upon the criticisms leveled by its sister agency, the State Geological Survey. State Parks also claims that Rule 1001 unlawfully imposes obligations on State Parks, that it improperly delegates authority to the Air Pollution Control Officer, and that it fails to comply with the applicable Health & Safety Code provisions.

The District responds that the Off-Road Riding Facility is a "direct" source of air pollution because it emits sand and dust as a result of OHV activity and because it is a man-made recreational facility that falls within the general statutory definition. The District also claims that its scientific studies are valid and entitled to substantial deference.

The critical function of an air pollution control district is to ensure that state and federal ambient air quality standards are achieved. To accomplish these purposes, a district can require permits for "direct" sources of air pollution that fall within the appropriate statutory definitions.

The Off-Road Riding Facility is a "direct source" of pollution because the airborne particulate matter at the dunes comes from, and is generated by, the dunes themselves. Although the OHV use makes the dunes at the Off-Road Riding Facility more susceptible to pollution, it is not the vehicle activity itself that generates the pollution. In other words, the Off-Road Riding Facility is not an indirect source of pollution that merely attracts polluting off-highway vehicles to the area.

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[2] Friends has a beneficial interest in the overall operation of the Off-Road Riding Facility because the continued operation and availability of the Facility directly concerns Friends which is sufficient to provide standing for purposes of this writ review. (*See, e.g., Save the Plastic Bag v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 166 (corporate plaintiff can have both "public interest standing" and "beneficial interest" standing when the rule or statute would have severe and immediate effect on the members' activities).)

Relatedly, the Off-Road Riding Facility is subject to the general permit requirement of California's Health & Safety Code. The definition of "contrivance" is quite broad and encompasses a large recreational area consisting of multiple man-made improvements, such as gates, fencing, walking paths, access roads, signage, parking lots, and rest rooms. The elevated emissions of dust and sand would not occur but for the operation of man-made activities, i.e., the OHVs operating in and around the dunes.

When a public agency collects evidence and adopts rules related to the public interest within the agency's area of expertise, courts typically employ a narrow scope of review. Given the deference to be afforded, the Court concludes that Rule 1001 was lawfully adopted and is amply supported by the accompanying scientific studies.

The District adequately reviewed and evaluated the scientific studies supporting the conclusion that OHV activity at the Off-Road Riding Facility is a "major contributing factor" to the PM10 pollution on the Mesa. Although the comments of the California Geological Survey were quite critical of the Phase 2 findings, the District was entitled to rely on the conclusions of the Phase 2 study, as well as noteworthy experts and its own staff. Both studies were designed and conducted by multiple experts in the field of air pollution and airborne particulate matter. The Phase 2 study was peer-reviewed by multiple agencies and scientists who agreed with its findings.

As an agency mandated to adopt rules to reduce airborne particulate matter, the District properly determined that a need existed for a rule requiring State Parks to monitor and reduce emissions from the Off-Road Riding Facility.

Given that the District is afforded deference in interpreting the meaning of key statutory terms, its decision to require a permit through the adoption of Rule 1001 is valid. The Administrative Record contains substantial evidence supporting the District's scientific conclusions that a problem exists which will be alleviated by Rule 1001.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Air pollution in California is regulated by federal, state, regional, and local governmental entities. Although the federal Clean Air Act requires the Environmental

Protection Agency (EPA) to set national ambient air quality standards (42 USC §7409(a)), it is states who have primary responsibility for meeting these standards. Accordingly, the Clean Air Act requires states to formulate and enforce implementation plans designed to meet national standards within their borders. (*Id.* at §§7407(a) and 7410.)

In our state, the California Air Resources Board ("ARB") is charged with developing the state air pollution implementation plan and overseeing its enforcement. (Health & Safety Code §§39602, 41502–41505.) The ARB establishes ambient air quality standards to protect public health for each air basin in the state. (*Id.* at §39606(a).) However, the regulation of non-vehicular emissions is assigned to local and regional air pollution control districts. (*Id.* at §39002.)

The Legislature has created thirty-five (35) local and regional districts, one of which is the San Luis Obispo Air Pollution Control District. (See 2 Manaster & Selmi, Cal. Environmental Law and Land Use Practice (1989) §40.51, pp. 40–86, 40–87 (rev. 2012).)

All districts are required to "adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction, and shall enforce all applicable provisions of state and federal law." (Health & Safety Code §40001(a); see, also, *American Coatings Assn., Inc. v. South Coast Air Quality Dist.* (2012) 54 Cal.4th 446, 452-54.)

When a district recognizes a source of emissions that is exceeding air quality standards, it is supposed to take action to reduce and maintain ambient air quality standards even if it must establish additional air quality standards for non-vehicular sources that are stricter than those set by statute or by the ARB. (Health & Safety Code §§39002, 41508; see, also, Air Resources Board Glossary of Terms (defining Air Quality Management District).)

To better understand the extent and source of these unusually high concentrations of particulate pollution on the Mesa, in 2004, the District commenced a comprehensive air monitoring study. (AR158; AR215.) The Phase 1 South County Particulate Matter (PM) Study ("Phase 1") utilized filter-based particulate samplers measuring both PM10 (particles 10 microns in diameter or less) and PM2.5 (particles 2.5 microns in diameter or less)

concentrations at six monitoring sites located throughout the Mesa. Samples were collected and analyzed for mass and elemental composition. (AR158.)

Data from the Phase 1 study showed air quality on the Nipomo Mesa exceeded the state 24-hour PM10 health standards on over one-quarter of the sample days. (AR159.) The data from the Phase 1 study demonstrated the pollution was caused by gusts of wind entraining fine sand from the dunes at the Off-Road Riding Facility and transporting it inland to the Nipomo Mesa. (*Id.*; see also AR59-60.) (Wind-blown particles are "the single largest cause of high particulate concentrations measured on the Mesa.")

Because the Phase 1 study was not designed to determine whether OHV activity at the Off-Road Riding Facility played a role in the pollution, the District Board directed staff to design and conduct a follow-up study (the "Phase 2" study) with the primary goal of determining whether OHV activity at the Off-Road Riding Facility played a role in the high particulate levels measured on the Mesa. (AR159.) This direction was in accordance with the primary recommendation of the Phase 1 study to "further investigate the effects of off-road vehicle use" as a contributor to high PM concentrations on the Mesa. (AR60.)

To help design and conduct the Phase 2 study, the District and State Parks jointly agreed to retain the services of the Delta Group ("Delta Group"), an affiliation of internationally respected scientists, mostly from the University of California at Davis, who are dedicated to the detection and evaluation of aerosol (i.e., particulate) transport. The Great Basin Unified Air Pollution Control District ("Great Basin APCD"), a recognized leader in understanding and mitigating wind-blown particulate pollution, also provided their expertise to the design and implementation of the study. Scientists from the Santa Barbara County Air Pollution Control District, the California Air Resources Board and State Parks also provided significant input in the design phase of the study. (AR159.)

The Phase 2 study design involved three investigation groups; the Delta Group, the Great Basin APCD, and the District. (AR159.) Each group was composed of professionals and scientists recognized as experts in their field and in the sampling techniques they employed. (AR222.) A broad array of technologies and measurement techniques were

utilized to better understand the source(s) and activities responsible for the particulate pollution problem on the Nipomo Mesa. (AR222.)

The Delta Group's portion of the study included using customized drum samplers to provide detail on the size and composition of PM10, which helps identify the source of particles. (AR222.) The Great Basin APCD's portion of the study included measuring sand movement in the Off-Road Riding Facility and in control areas where OHV riding is not allowed. (AR225.) The District's portion of the study included operating PM10 monitors and wind direction and speed sensors at locations downwind from the Off-Road Riding Facility, as well as downwind from "control locations" where no OHV traffic was present. (*Id.*)

Because determining the role of OHV activity at the Off-Road Riding Facility was an important focus of the study, measurements and analyses were conducted, both downwind of the dunes at the Off-Road Riding Facility, as well as downwind of "control site" dunes north and south of the Off-Road Riding Facility where off-road vehicles are not allowed. (AR224; AR225.) (Identifying monitoring sites and control sites). In this way, any differences in ambient particulate levels between dunes where OHV riding occurs, and dunes where it does not, could be measured. State Parks participated in the selection of the control sites and associated monitor locations. (AR974; AR247.)

From January 2008 through March 2009, the field measurement phase of the study was conducted. (AR159.) The Phase 2 study gathered well over two million data points, taking participants nearly a year to review, validate, and analyze the data and compile the results. (*Id.*) The data analysis was performed by the three research groups, and followed by peer review of the draft study report by a group of scientists with expertise in this field. (AR159-160.)

Each of the three groups concluded that OHV activity in the Off-Road Riding Facility is a major contributing factor to the high particulate matter concentrations on the Nipomo Mesa. (AR160; AR310; AR311; AR565.) These conclusions were supported by evidence

that PM10 concentrations at the control area monitoring sites were significantly lower than the sites downwind from the Off-Road Riding Facility. (AR310.)

Although the data showed that some of the particulate matter resulted directly from dust plumes raised by vehicles moving across the open sand, this type of dust was not the major factor responsible for the high PM levels downwind from the Off-Road Riding Facility. (AR160.) Instead, the research groups concluded that the primary cause of high PM levels measured on the dunes was a result of the vehicular effect on the dunes themselves. (AR160; AR311.)

The research groups found that the particular mechanism of pollution was off-road vehicle activity on the dunes, which causes de-vegetation and destabilization of the dune structure and destruction of the natural crust on the dune surface. (AR314.) Such disturbances of the dunes increase the ability of winds to entrain sand particles from the dunes and carry them to the Mesa. (*Id.*)

Peer review of the Phase 2 study was provided by scientists from the EPA, ARB, Cal Poly, UC Davis and the Santa Barbara APCD. (AR187.) These agencies determined that the study was sound and that the findings were supported by the data.[3]

Following the completion of the Phase 2 study, the District staff presented the District Board a detailed overview of the study design, the data collected, and the major findings

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[3] The United States EPA determined the Phase 2 Study to be "a comprehensive study that was conducted using robust and reliable measurement techniques . . . [t]he analyses in this study were sound and the findings are well-supported by the data." (AR187.) The California Polytechnic State University Earth & Soil Sciences Department agreed: "This letter confirms my review of the second draft of the Nipomo Mesa (South County) Phase 2 particulate matter study, and conveys my support of its methods, results, and conclusions. The addition of the element data especially strengthens the case made by the study, of the origin of the particulate matter being the vehicle area of the Oceano dunes, and subsequently being conveyed to the Nipomo Mesa by prevailing winds." (AR190.) The Santa Barbara Pollution Control District also reviewed the study and concluded, "[w] concur with all . . . , of the major findings, summary and conclusions of the Phase 2 study and most importantly that the predominant source of the PM concentrations measured on the Nipomo Mesa is crustal materials transported from the open sand sheets in the dune area of the coast." (AR194.) In addition, an independent expert in the field also reviewed the study and concluded, "In my opinion the conclusions drawn are supported by the data and the analyses of the data" (AR197.) The ARB also agreed with the findings of the Phase 2 Study: "Air Resources Board technical staff has reviewed the report and agree with the methodology used in the analysis and that it supports the technical findings presented in the report." (AR208.)

drawn from analysis of the data. (AR158.) After much consideration, and two public hearings on the matter, the District Board adopted Rule 1001. (AR158; AR1035.)

Rule 1001 requires State Parks to design and implement a plan to reduce PM10 arising from the Off-Road Riding Facility as a result of OHV activity. (AR881 - 885.) Rule 1001 creates a timeline for State Parks to reach certain milestones of monitoring and PM reduction, and it requires State Parks to apply for an APCD rule-based permit to operate the Off-Road Riding Facility once it has reached certain milestones. (*Id.*)

This lawsuit followed.[4]

III. DISCUSSION OF LEGAL ISSUES

A. Standard of Review

This is a case of traditional mandamus under CCP §1085 to review a legislative or quasi-legislative action. (*Saleeby v. State Bar* (1985) 39 Cal.3d 547, 560.) Petitioner must establish that the District's decision was arbitrary, capricious, unreasonable or entirely lacking in evidentiary support (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th at p. 11; *California Correctional Peace Officers Assn. v. State Personnel Bd.* (1995) 10 Cal.4th 1133, 1154; *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 106.)

Under the mandate of Health & Safety Code §40001, the District has broad authority to take action to reduce air pollution and maintain ambient air quality standards. To accomplish this mandate, the District has been delegated with the Legislature's law making power. (*American Coatings Assn., Inc.*, 54 Cal.4th 446, 460.) Any challenge to its "interpretation" of a controlling statute is entitled to great weight and respect as to the administrative construction. (*Id.*)

When a public agency acting within its jurisdiction exercises rulemaking power, those quasi-legislative rules have the dignity of statutes. (*California School Boards Assn. v. State*

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[4] The County of San Luis Obispo and its Board of Directors were named in, but later removed from, the case by way of demurrer.

Bd. of Educ. (2010) 191 Cal.App.4th 530, 544.) When assessing the validity of such rules, the Court's review is narrow. (*Id.*)

Relatedly, when an agency construes "a controlling statute, '[t]he appropriate mode of review ... is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction." (*American Coatings Assn.*, 54 Cal.4th at 446, 461.) This same deference applies when the Legislature has delegated to the agency the task of interpreting a statute in such instances when there is open-ended statutory language or when an issue of interpretation is heavily weighted with policy choices. (*Id.*)

On the other hand, "[a]n agency does not have discretion to promulgate regulations that are inconsistent with the governing statute, alter or amend the statute, or enlarge its scope." (*California School Boards Assn.*, 191 Cal.App.4th at p. 544.) A trial court 'must conduct an independent examination to determine whether the agency 'reasonably interpreted the legislative mandate' in enacting the regulation. (*State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th at p. 1040.) "[T]he standard governing our resolution of the issue is one of 'respectful nondeference.'" (*California School Boards Assn.*, 191 Cal.App.4th at 530, 544.)

B. The Off-Road Riding Facility Must Obtain a Permit Under Rule 1001 Because It Is a "Direct" Source of Emissions Covered by Health & Safety Code Section 42300

As stated, the principal function of air pollution control districts is to ensure achievement of state and federal ambient air quality standards, with emphasis on non-vehicular sources of air pollution. (Health & Safety Code §40001(a); see *American Coatings Assn., Inc.*, 54 Cal.4th at 446, 452-54.)

One method of regulation is the issuance of permits to "direct" non-vehicular emission sources falling within the general statutory definition of Health & Safety Code section 42300. (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 418; *California ex rel. Sacramento Metropolitan Air Quality Management Dist. v. U.S.* (9th Cir. 2000) 215 F.3d 1005, 1007-08.) Another method is the

issuance of permits to "direct" non-vehicular emission sources that, while not within the general definition, are specially regulated by the legislature. Yet a third method is the adoption and implementation of regulations to reduce or mitigate emissions from "indirect" sources of air pollution under Health and Safety Code section 40716. (76 Cal.Op.Att'y Gen. 11 (1993).)

The distinctions between the three regulatory methods are important because the power to issue permits to operate is limited to certain "direct" pollution sources and does not extend to "indirect" sources. The state and federal legislatures' have concluded that a permit system for "indirect" sources would unduly encroach on local land-use authority.[5] And, a "direct" pollution source is subject to the permitting requirement only if it falls within the statutory definition of Health & Safety Code §42300 or special authorizing legislation.

Friends and State Parks seek to navigate the regulatory shoals as follows: The Off-Road Riding Facility should be considered an "indirect" source because the off-road activity breaks up the dunes crust, which "indirectly" results in an increase in the PM emissions. Even if considered a "direct" source, Friends and State Parks urge that the Off-Road Riding Facility does not fall within the statutory definition under section 42300 and requires special authorizing legislation.

Although not defined under California law, the term "indirect source" has long been used in the federal Clean Air Act:

> For purposes of this paragraph, the term 'indirect source' means a facility, building, structure, installation, real property, road, or highway which attracts, or may attract, mobile sources of pollution. Such term includes parking lots, parking garages, and other facilities . . . . (42 U.S.C. §7410(a)(5)(C).)

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[5] In this vein, Friends and State Parks assert that imposing a permit requirement on the Facility would override the authority and preempt the mandate of State Parks to provide regulated areas for OHV use. Yet, requiring the operator of the Off-Road Riding Facility to design and implement a plan to reduce PM emissions does not interfere with OHV activity at the dunes in any meaningful way. Further, an operating permit is required only if and when certain milestones are reached.

As discussed in *Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal.App.3d 437, 445, state courts often look to federal courts for guidance in interpretation of a state statute that is similar in wording and purpose to an existing federal statute.

In harmony with the federal statute, both the Air Resources Board and the Attorney General have defined "indirect source" as a facility, building, structure or installation that attracts or concentrates mobile sources of emissions. In *California Bldg. Industry Ass'n v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 127 and 137, the Court of Appeal discussed the distinction between a "direct" and "indirect" source of air pollution:

> "An 'indirect source' is defined as 'any facility, building, structure, or installation, or combination thereof, which attracts or generates mobile source activity that results in emissions of' NOx and PM10 . . . The fact that a housing development does not itself emit pollutants is what causes it to be an 'indirect source' of pollution. Otherwise, it would be a direct source. The [San Joaquin Valley Air Pollution Control] District's definition of 'indirect source' is not only reasonable but is also the only logical way to interpret the term.

In a 1993 opinion (76 Cal.Op.Att'y Gen. 11 (1993)) the Attorney General similarly concluded that an indirect source does not, in itself, emit pollution; rather, the pollution is emitted by vehicles and equipment that are drawn to a location (i.e., a sports complex) which then emits pollution. (*See South Terminal Corporation v. Environmental Protection Agency* (1st Cir. 1974) 504 F.2d 646 at 668, n.24.)

The term "direct" source, likewise, has no statutory definition in California law. However, a close cousin of the term "direct" source is the term "stationary" source, which has long been used in the federal Clean Air Act to differentiate between mobile and fixed sources of pollution. The federal Clean Air Act defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." (42 U.S.C. §7411(a)(3).)

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Keeping in mind the state and federal definitions, the Off-Road Riding Facility is not an "indirect" source of air pollution that merely concentrates vehicles (and, hence, air pollution) in a particular location. Rather, the Facility is a "fixed" or "stationary" man-made "installation" that emits air pollutants.

Increased PM10 levels caused by the breaking up of the dunes' crust are a "direct" source of sand and dust pollution because they are emitted directly from the Off-Road Riding Facility, and the levels of these emissions are increased by the OHV use on the dunes.

While OHVs may also directly emit air pollution, it is not the exhaust from these vehicles that the District is regulating. Rather, it is the regulation of elevated PM10 caused by the activity on the dunes, which directly discharges the pollution. Therefore, operation of the managed recreational facility is directly causing the emission of airborne particulate matter (sand and dust) from the dunes.

Turning to the related, alternative argument of Friends and State Parks, the general permit requirement for "direct" sources of air pollution is contained in Health & Safety Code §42300 (a), which provides as follows:

> Every district board may establish, by regulation, a permit system that requires . . . that before any person builds, erects, alters, replaces, operates, or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants, the person obtain a permit to do so from the air pollution control officer of the district.

Friends and State Parks claim that the Facility is a not a "contrivance" within the meaning of the general permit requirement.

A "contrivance" is commonly defined as the act of "inventing, devising or planning," "ingeniously endeavoring the accomplishment of anything," "the bringing to pass by planning, scheming, or stratagem," or "[a]daption of means to an end; design, intention." (see *Giles v. California* (2008) 554 U.S. 353, 360-61 (citing 3 Oxford English Dictionary, at 850 and 1 Webster, at 47 (1828)). Contrivance is also defined as "something contrived," which is "[t]o bring about by artifice" or "[t]o invent or fabricate." (*See* Webster's II New College Dictionary, at 246.)

Similar considerations support the conclusion that the Off-Road Riding Facility is a "contrivance" within the meaning of Health & Safety Code §42300(a). The Facility is one component of a large recreational area consisting of multiple man-made improvements, including, among other things, gates, fencing, walking paths, access roads, signage, parking lots, and restrooms. The elevated emissions of PM10 would not occur but for the operation of the OHVs in and around the dunes. Rule 1001 is regulating the elevated PM10 caused by the man-made activity on the dunes, which discharges air pollution.

Based upon the District's expertise and technical knowledge with respect to the regulation of air pollution emissions, and given the deferential review afforded to a local agency's interpretation of its enabling legislation, it was reasonable for the District to conclude that the Off-Road Riding Facility is a "direct" source of emissions. (*American Coatings Assn., Inc.*, 54 Cal.4th at 446, 461; *California Bldg. Industry Ass'n.*, 178 Cal.App.4th at 120, 137.)

Likewise, in light of the District's administrative experience and practice, a managed recreational facility is reasonably viewed as a "contrivance" devised by man – *i.e.* – not something that occurs naturally, which causes the emission of airborne particulate matter (sand and dust) from the dunes. (*California Bldg. Indus. Ass'n*, 178 Cal.App.4th at 137 (citing *Ramirez*, 20 Cal.4th at 800).)[6]

C. The District Properly Determined that Rule 1001 Was Necessary to Alleviate The Problem of Elevated Particulate Matter on the Nipomo Mesa

Before adopting any rule or regulation, the District must determine there is a problem that a proposed rule or regulation will alleviate (Health & Safety Code §40001(c)), and it must adopt findings of necessity and authority. (Health & Safety Code §40727.) Friends

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[6] The District has issued numerous permits for other direct sources of fugitive dust such as mining operations, material stockpiles, agricultural sources, and other direct sources of pollution. (AR 944; District's Request for Judicial Notice, Items 2-4.) If an administrative agency has consistently interpreted statutory language over time, its long-standing analysis is entitled to greater deference. (*Yamaha Corp. of America*, 19 Cal.4th at p. 13; *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 801.) That the Legislature has specifically authorized air pollution permits for agricultural and livestock sources does not negate the District's existing, more general statutory authority, which is far from unambiguous. (*Bonnell v. Medical Board* (2003) 31 Cal.4th 1255, 1265; *People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th at p. 309.)

claims there is no evidence supporting the position that Rule 1001 will eliminate or reduce "man-made" contributions to the naturally occurring PM10 levels and that the District's findings of necessity and authority are deficient.[7]

According to Friends, no credible scientific evidence establishes that sand blowing from OHV use actually increases PM10 levels. Friends asserts that the Phase 2 study improperly draws conclusions based upon flawed and speculative data that OHV riding areas emit greater amounts of PM compared to undisturbed sand sheets. Friends claims that the Off-Road Riding Facility is comprised of large sand sheets which naturally have greater PM emissions, and State Parks emphasizes that the wind speed data is flawed. (AR 1025.)

Both Friends and State Parks are especially critical of the findings in the Phase 2 study. They contend that there is no credible evidence to substantiate the study's "crust" theory, citing the expert opinion of the California Geological Survey. They also claim that the District intentionally disregarded the Geological Survey's expert opinion, a State agency with the most expertise in the field of dune pollution.

As discussed, the Court's review of a quasi-legislative action defers to the agency and its presumed expertise within its area of regulation. (*Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 786; *California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 211–212.) "When there are technical matters requiring the assistance of experts and the study of scientific data, courts will permit agencies to work out their problems with as little judicial interference as possible." (*California Bldg. Industry Ass'n,* 178 Cal.App.4th at 120, 129-30.)

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[7] Friends claims that Rule 1001 puts the cart before the horse by requiring State Parks to provide the scientific data "to know whether the rule was legally authorized." However, the District persuasively responded to this specific criticism. (AR 940-946.) In *Southern Cal. Gas Co. v. South Coast Air Quality Management Dist.* (2011) 200 Cal.App.4th 251, 262, the Court of Appeal upheld an air quality monitoring program that, among other things, required Southern California Gas to implement a gas quality monitoring program for the purposes of reporting and monitoring specified emission levels. The court noted that the information collected "would allow the district to determine the extent of increases in nitrogen oxides emissions from the combustion of higher Wobbe Index natural gas." (*Id.* at 262.) In the words of the Court of Appeal, the District plainly has the authority to require the operator of a pollution source to disclose data concerning emissions and to take "reasonable actions to determine the amount of emissions from a source." (200 Cal.App.4th at 271.)

A reviewing court should not substitute its policy judgment for the agency's in the absence of an arbitrary decision. (*Western Oil & Gas Ass'n v. Air Resources Board* (1984) 37 Cal.3d 502, 509.) Nor should the court substitute its opinion for that of the expert's, and any choice made between conflicting expert analyses is an agency's decision and not the Court's. (*Id.* at 515.)

The District was presented with substantial evidence in the form of both the Phase 1 and Phase 2 studies establishing OHV use as a major contributing factor to increased PM10 levels on the Mesa. (AR311.) These reports and findings were vetted by multiple experts, and the results were peer-reviewed. (AR187, 190, 194, 197, 199 and 208.)

The District and its supporting experts determined that OHV activity causes de-vegetation and destabilization of the dune structure, and breaks the natural crust on dunes, which allows the wind to entrain more particles and blow them onto the Mesa. The studies conclude that structural stability of undisturbed sand makes particulate matter less vulnerable to wind entrainment than sand disturbed by OHV activity. (AR310.) In addition, consecutive days of high OHV activity at the Off-Road Riding Facility resulted in higher downwind PM10 concentrations compared to days where the OHV activity was low. (AR310; AR472; AR281 (with Table Analysis). The study also observed that a thin crust existed on undisturbed dunes that was not present on disturbed sand in the Off-Road Riding Facility. (AR310.)

The District responded to all of the criticism leveled by Friends, State Parks and others. (AR 971, 987, 1025, 1035 and 1073.) It is apparent from the record that the District's Board and its staff were aware of the criticisms set forth by the Geological Survey, Friends and State Parks. (AR1767, 1778, 1779 and 1781.) The criticism and information was considered, but the District ultimately chose to rely on the findings in the Phase 2 study and on the presentations by other experts.

When dealing with scientific matters, "a reviewing court must remember that the [agency] is making predictions, within its area of expertise, at the frontiers of science.... [W]hen making this kind of scientific determination, as opposed to simple findings of fact, a

reviewing court must be at its most deferential." (*Baltimore Gas and Electric Co. v. NRDC* (1983) 462 US 87, 103; *California Building Association*, 178 Cal. App 4th at 129.)

The Phase 1 and Phase 2 studies identified a PM10 level emissions problem caused by, or at least connected with, OHV use at the Off-Road Riding Facility. This was sufficient to provide the necessity for the District to enact Rule 1001. Friends and State Parks have not presented compelling evidence that the District's interpretation and reliance on the scientific evidence was arbitrary or capricious. (See *Golden Drugs Co. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1466.) The record fully supports the "necessity" for Rule 1001.[8]

D. KEVIN RICE PETITION FOR WRIT OF MANDATE

Consolidated with the Friends' action is a petition brought by Kevin Rice (Rice), contesting the District's procedural processes in adopting Rule 1001. Rice contends that the District's notice violated Health & Safety Code §40725 because it did not include the name and telephone number of the District officer to whom comments could be sent.

Rice also argues that the District was guilty of a "bait and switch" by posting an October 12, 2011 version of the proposed rule and then, three days prior to the hearing, issuing a November 16, 2011 version that contained substantial changes. Rice contends that the District should not have taken immediate action, but instead should have continued the hearing date to allow for further public comment.

The District complied with Health & Safety Code §40726 in the adoption of Rule 1001. The changes made to the October 12, 2011 proposed rule, which were incorporated

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[8] The Court rejects State Parks' claims that Rule 1001 unlawfully delegates uncontrolled authority to Larry Allen, the Control Officer, to approve and/or enforce the State's Monitoring Program and PM Reduction Plan. (*Agnew v. City of Culver City* (1956) 147 Cal.App.2d 144, 153-154.) Approval and enforcement of air pollution plans necessarily involve a certain amount of administrative discretion. Smaller districts, such as San Luis Obispo, unavoidably rely upon small staffs. The mere existence of a small staff does not render a regulatory plan unduly subjective or unbridled. In *Western States Petroleum Ass'n v. South Coast Air Quality Management Dist.* (2006) 136 Cal.App.4th 1012, 1021, the appellate court upheld rulemaking based, in part, upon promises by the district staff to adjust the rule, if necessary, to avoid inordinate regulatory burdens. The District has given similar assurances here. In any event, such concerns about arbitrary enforcement are, at the moment, purely hypothetical.

into the November 16, 2011 draft, did not substantially nor significantly affect the meaning of the rule.

The District's staff made a specific representation that the changes did not materially change the rule or the effectiveness or the nature of the rule. In fact, there were no significant changes between the rule published in the notice and the rule adopted by the District. (AR1658.) Contrary to Rice's assertion, the changes made on the November 16, 2011 draft did not preclude the public from thoroughly analyzing the rule or presenting knowledgeable comments.

Rice himself was not prejudiced by any late amendments nor any alleged failure to include the name and telephone number of the District officer. On November 2, 2011, Rice submitted an eight-page letter to the District with his comments on the draft of Rule 1001. (AR1027-1034.) The District provided a written response to the specific issues raised in Rice's letter. (AR1035-1036.) [9]

IV. CONCLUSION

The studies conducted by the District support its conclusion that OHV activity at the Off-Road Riding Facility is a major contributor to the problem of airborne particulate matter on Nipomo Mesa. The OHV activity from the Facility, on the dunes, exacerbates the problem of dust and sand pollution and increases the amount of PM10 blown onto the Nipomo Mesa. Multiple agencies peer-reviewed the scientific findings and conclusions.

The District undertook the process of developing a regulation designed to reduce the offending emissions. It held public workshops, considered and responded in detail to over 200 pages of comments submitted by rule opponents, and made several changes in response. After weighing the evidence, the District Board of Directors appropriately adopted Rule

[9] Rice's request for judicial notice of legislative history documents is granted. Rice's requests to correct and augment the record are granted. State Parks' motions to augment the record are granted. State Parks' request for judicial notice of California Geological Survey documents and the San Luis Obispo County Air Pollution Control District's 2001 Clean Air Plan is granted. The District's request for judicial notice of the 2007 CGS Study and other District Permits is granted. Friends' request for judicial notice of the legislative history and meteorological monitoring guidance is granted.

1001, which requires State Parks to monitor and reduce sand and dust emissions resulting from OHV riding.

Friends', Rice's and (through joinder) State Parks' request for peremptory writs of mandate are DENIED. Counsel for the District shall prepare the appropriate judgment and circulate it for approval as to form.

It is so ORDERED.

Dated: April 19, 2013

CHARLES S. CRANDALL
Judge of the Superior Court

CSC:jn

STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO

Civil Division

CERTIFICATE OF MAILING

FRIENDS OF OCEANO DUNES INC VS. SAN LUIS OBISPO CO AIR(LEAD)	CV120013

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OFFICE OF THE ATTORNEY GENERAL
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Los Angeles CA 90013

Rice, Kevin F
Petitioner In Pro Per

Under penalty of perjury, I hereby certify that I deposited in the United States mail, at San Luis Obispo, California, first class postage prepaid, in a sealed envelope, a copy of the foregoing addressed to each of the above
OR
If counsel has a pickup box in the Courthouse that a copy was placed in said pickup box this date.

SUSAN MATHERLY, Court Executive Officer

by _____, Deputy Dated: 4/19/13
"via email

SLO COUNTY apcd | Air Pollution Control District
San Luis Obispo County

CERTIFIED MAIL

May 24, 2013

Chris Conlin, Chief
OHMVR Division California Department of Parks and Recreation
1725 23rd Street, Suite 200
Sacramento, CA 95816

SUBJECT: San Luis Obispo County Air Pollution Control District Notice of Violation Number 2852 RULE 1001 - Coastal Dunes Dust Control Requirements

Dear Mr. Conlin:

Thank you for your reply dated May 16, 2013, to our May 10, 2013, settlement agreement letter (copy enclosed) for the Notice of Violation (NOV) issued on March 18, 2013. The Off-Highway Motor Vehicle Recreation Division (OHMVRD) of the California Department of Parks and Recreation (State Parks) was issued a Notice of Violation (copy enclosed) for violations of California Health and Safety Code and the Rules and Regulations of the San Luis Obispo County Air Pollution Control District (District or APCD). The specific violations are listed below:

- Failure to meet the provisions of Rule 1001 F.1.c
  By November 30, 2012, submit complete applications to the appropriate agencies for all PMRP projects that require regulatory approval; and
- Failure to meet the provisions of Rule 1001 F.1.d
  By February 28, 2013, obtain APCO approval for a Temporary CDVAA and Control Site Baseline Monitoring Program and begin baseline monitoring.

We have reviewed your proposed changes to the settlement agreement and can accept them with the understanding that OHMVR will work with the California Coastal Commission (CCC) to expedite approval or obtain a temporary exemption for Temporary Baseline Monitoring to begin before May of 2014; it is imperative this monitoring capture the spring 2014 wind season. The Air Pollution Control District is willing to settle the above-referenced violations without a civil penalty, provided OHMVR Division California Department of Parks and Recreation take the following corrective actions and observe the conditions set forth below:

1. Obtain conceptual approval by the Air Pollution Control Officer (APCO) for the Particulate Matter Reduction Plan (PMRP) by July 31, 2013.
2. Obtain final agency approvals for all PMRP projects and obtain final APCO approval of the PMRP by July 31, 2014.
3. Obtain APCO approval for the control site and vehicle activity area monitoring sites and begin monitoring at those sites by November 1, 2014.
4. State Parks will adhere to the timelines mutually agreed to below, unless modified by the APCO. State Parks understands and agrees that failure to meet any of the timelines set forth below will subject it to the civil penalties otherwise provided by law:
   A. Submit revised Coastal Development Permit (CDP) application to CCC and obtain a completeness finding from CCC by August 31, 2013.
   B. Submit a Temporary Baseline Monitoring Program to the APCO for review by September 30, 2013.
   C. Obtain APCO approval for the Temporary Baseline Monitoring by December 31, 2013.
   D. Begin 5-month Temporary Baseline Monitoring by June 1, 2014.
   E. Obtain CDP approval from the CCC by May 31, 2014.
   F. Obtain all necessary permits, including an APCD Authority to Construct, for a track-out control system by December 31, 2015.
   G. Install and operate a track-out control system within 6 months of obtaining required permits.

This settlement shall not constitute an admission of liability nor shall any such admission be inferred in any administrative or judicial proceeding.

Please sign below your acknowledgment of the settlement as set forth in this letter and **return it by May 28, 2013.** Upon receipt of the signed settlement acknowledgment, and completion of any conditions required as part of this settlement, you will be released from liability under the terms as set forth above. If this settlement is not accepted, or if alternate arrangements have not been made with the District within the time period set forth above, the offer will be revoked and the violation will be referred to our enforcement section or legal counsel for further prosecution.

Please call me at (805) 781-5912 if you have any questions or need additional information regarding this matter.

Very truly yours,

Larry R. Allen
Air Pollution Control Officer

The foregoing terms and conditions of mutual settlement are hereby agreed and accepted.

Dated: _____

_____
Chris Conlin, Chief, OHMVR Division
California Department of Parks & Recreation

LRA/arr

Enclosures: Copy of Violation
Mutual Settlement Pamphlet

cc: Raymond A. Biering, District Counsel
Phil Jenkins, OHMVR Division, California Department of Parks & Recreation

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Ex. 2

2314429

FILED
In the Office of the Secretary of State
of the State of California

JUN 12 2001

BILL JONES, Secretary of State

ARTICLES OF INCORPORATION

OF

FRIENDS OF OCEANO DUNES

ONE: The name of this corporation shall be:

FRIENDS OF OCEANO DUNES

TWO: This corporation is a nonprofit public benefit corporation and is not organized for the private gain of any person. It is organized under the Nonprofit Public Benefit Corporation Law exclusively for charitable purposes. The corporation is formed for the express purpose of preserving and developing recreational uses in the Oceano Dunes areas of San Luis Obispo County, California. Such purposes for which this corporation is formed are exclusively charitable within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986.

Notwithstanding any other provisions of these articles, the corporation shall not carry on any activities not permitted to be carried on (a) by a corporation exempt from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law) or (b) by a corporation, contributions to which are deductible under Section 170(c)(2) of the Internal Revenue Code of 1986 (or the corresponding provision of any future United States Internal Revenue Law).

THREE: The name and address in California of this corporation's initial agent for service of process are:

EDWARD H. WALDHEIM
3550 Foothill Boulevard
Glendale, CA 91214

FOUR:

(a) No substantial part of the activities of this corporation shall consist of lobbying or propaganda, or otherwise attempting to influence legislation, except as provided in Section 501(h) of the Internal Revenue Code of 1986, and this corporation shall not participate in or intervene in (including publishing or distributing statements) any political campaign on behalf of or in opposition to any candidate for public office.

(b) All corporate property is irrevocably dedicated to the purposes set forth in Article Two, above. No part of the net earnings of this corporation shall inure to the benefit of any of its directors, trustees, officers or members, or to individuals.

(c) Upon the winding up or dissolution of the corporation, after paying or adequately providing for the debts and obligations of this corporation, the remaining assets shall be distributed to a non-profit fund, foundation, or corporation which is organized and operated exclusively for charitable and religious purposes and which has established its tax-exempt status under Section 501(c)(3) of the Internal Revenue Code and Section 23701(d) of the Revenue and Taxation Code. If this corporation holds any assets in trust, such assets will be disposed of in such a manner as may be directed by decree of the Superior Court of the county in which this

corporation's principal office is located, upon petition therefor by the Attorney General or by any person concerned in the liquidation.

FIVE: Subject to the limitations imposed by Corporations Code Section 5238, the Corporation shall, and does hereby, indemnify and hold each of its directors and officers free and harmless from and on account of all matters provided in Corporations Code Sections 5238 (b) and (c).

Dated: May 11, 2001

Edward H. Waldheim
Incorporator

I hereby certify that the foregoing transcript of 3 page(s) is a full, true and correct copy of the original record in the custody of the California Secretary of State's office.

JAN 04 2012

Date: _____

DEBRA BOWEN, Secretary of State

Ex. 3

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 PM_{10} 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) PM_{10} monitor capable of measuring hourly PM_{10} 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 PM_{10} 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) PM_{10} monitor capable of measuring hourly PM_{10} 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. "PM_{10}": 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 PM_{10} Concentration": The value obtained by adding the hourly PM_{10} 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 PM_{10} 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 PM_{10} monitoring network containing at least one CDVAA Monitor and at least one Control Site Monitor.
   b. A description of all PM_{10} control measures that will be implemented to reduce PM_{10} 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 PM_{10} concentration at the CDVAA Monitor is more than 20% above the 24-hr average PM_{10} concentration at the Control Site Monitor, the 24-hr average PM_{10} 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.