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

Date:_____

Raymond A. Biering, District Counsel

For:

California Department of Parks and Recreation

Date:_____

Lisa Mangat, Acting Director

Date: 23SEPT 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: 9/24/14

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

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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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San Luis Obispo, CA 93403-3835
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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
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Los Angeles, CA 90013
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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

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

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[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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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:

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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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