

**LAW OFFICES OF THOMAS D. ROTH
ONE MARKET, SPEAR TOWER, SUITE 3600
SAN FRANCISCO, CALIFORNIA 94105
(415) 293-7684
Rothlaw1@comcast.net**

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By E-Mail

boardclerk@slocleanair.org

Jim Anderson
William Johnson
Paul Ready
Robert Carr
Thomas Richards

Clerk
San Luis Obispo County
Air Pollution Control District Hearing Board
3433 Roberto Court
San Luis Obispo, CA 93401

Gary Willey
Air Pollution Control Officer
SLO County APCD
3433 Roberto Court
San Luis Obispo, CA 93401

Armando Quintero, Director
California Department of Parks and Recreation
1416 9th Street
Sacramento, CA 95814

**Re: Comments of Friends of Oceano Dunes on SLO APCD
Hearing Board/ APCD APCO Approval of Implementation
Items/Work Plan under Stipulated Order of Abatement**

Dear SLO APCD Hearing Board, Clerk and other Government Officials:

This firm represents Friends of Oceano Dunes, a California nonprofit watchdog association, which represents approximately 28,000 users of Oceano Dunes SVRA ("Friends"). This letter is sent on behalf of Friends and its members.

Three CDs, Vols. 1-3, with documentary evidence, and a video sent via email link, have been submitted by hand delivery to the APCD Hearing Board. These CDs should be included in the administrative record for any APCD Hearing Board, APCO, and/or SLO APCD approval, provisional approval or any other action taken with respect to the annual work plan and related approvals, actions or activities (all under the auspices and purported authority of the Stipulated Order of Abatement (SOA), as amended).

Friends contends that the APCD Hearing Board's issuance, and implementation of, the SOA, as amended, exceeds its authority. Because the Hearing Board's SOA and implementing actions and approvals exceed its authority, they are void acts that may be set aside at any time. For instance, State Parks has proposed dust control program actions and activities to be undertaken or completed in the coming year, including model-predicted PM₁₀ mass and concentration reductions and progress towards meeting SOA standards and goals. The APCD, the APCD Hearing Board and/or the APCO propose to approve the annual work plan and activities under the auspices of the SOA. Such approvals exceed the APCD Hearing Board's authority, the APCD's authority, and the APCO's authority, as well as State Parks' authority to implement the annual dust control.

More detailed objections and comments are provided below:

1. SLO APCD Rule 402 states "Rule 402, Nuisance, Visible Emissions. Rule 402, Nuisance, Visible Emissions, establishes that a **person** shall not **discharge** from any source whatsoever such quantities of air contaminants or other material which cause injury, detriment, nuisance or annoyance to any considerable number of persons or to the public, or which endanger the comfort, repose, health or safety of any such persons or the public, or which cause, or have a natural tendency to cause, injury or damage to business or property." **The majority of dust/sand emissions from Oceano Dunes SVRA are natural, resulting from wind blowing sand that form and move the sand dunes.**¹

¹ See, e.g., State Parks' 2017 DEIR on dust control, p. 5-11 ["According to the California Geological Survey, Oceano Dunes SVRA is located within the youngest, most active formations of the dune complex, where winds transport sand and dunes are actively migrating inland several feet per year (CGS, 2007). The dunes, including the area in which Oceano Dunes SVRA is located, are exposed to strong and frequent prevailing winds from the northwest (i.e., blowing towards the southeast), especially during the springtime (approximately March through June) (SLOAPCD, 2007). These strong prevailing winds exert a force on the surface of the dunes that causes particles to move along the ground surface. This movement can take the form of sand creep, where sand grains are pushed along the ground surface, or saltation, in which sand grains are lifted by the wind, carried a short distance (generally a few inches to a few feet), and then fall back down to the ground surface. These processes can cause some particles to become suspended in the air and carried away downwind. The saltation process is depicted in

Such emissions are not “discharged” by a “person” and therefore are not lawfully regulated by Rule 402. Yet, The APCD and the APCD Hearing Board demand compliance, and State Parks continues to attempt to comply with various edicts, under the auspices of Rule 402 and other rules without ascertaining, or even theorizing, what percentage of emissions are a natural phenomenon. In addition, State Parks is exceeding its authority by imposing dust control measures based on natural emissions when not required to do so by law. Pub. Res. Code § 5090.43(a) [“Areas shall be developed, managed, and operated for the purpose of *providing the fullest appropriate public use of the vehicular recreational opportunities present . . . while providing for the . . . conservation and improvement of natural resource values over time.*”] It is inconsistent with its mandate to “*provide the fullest appropriate public use of the vehicular recreational opportunities present.*”

2. The APCD, the SAG, the SOA, and the computer modeling conducted by the SAG all assume that the PM emissions are 100% mineral dust derived from saltation within the dunes in Oceano Dunes SVRA.
3. In 2020, the Scripps Institution of Oceanography issued a report that concluded that “during high prevailing wind conditions natural sea salt and inert mineral dust measured in the PM_{2.5} fraction at the CDF location together account for only 30% to 50% of the PM_{2.5} measured at the same location by BAM instrumentation operated by the local air district (SLOAPCD).” The study further concluded that: “Our results suggest the high dust concentrations measured on high wind days in and downwind of Oceano Dunes are likely dominated by **natural saltation processes associated with the indigenous geomorphological dune structure.**” In other words, the dominant problem is natural dust emissions, not dust generated by OHV recreation. Yet, the APCD Hearing Board has completely overlooked, disregarded or failed to consider this highly relevant factor before approving the SOA, as amended. The SOA seeks to solve a problem that either doesn’t exist or that is not causing the high dust emissions. It has no authority to compel actions to address completely natural conditions that are not caused by human use of the area.
4. State Parks discussion of the Scripps report is wholly inadequate. In Section 2.4.2 of the Annual Report, State Parks fails to explain what the Scripps report findings mean in terms of likely other PM sources, or how that affects the allegations of PM contribution by the APCD

Figure 5-3. Generally, when winds exceed approximately 10 miles per hour, the sand grains in the unvegetated dunes that naturally form in the Guadalupe-Nipomo Dunes Complex begin to creep or saltate and generate dust and PM that can affect air quality conditions.”]

Hearing Board. State Parks does note “A number of source apportionment studies have found MSA to be strong indicator for marine biogenic contributions to PM mass (e.g., Calzolari et al., 2015),” but then Parks doesn’t explain that the Scripps report has found that ocean-based sources are the likely cause of high PM emissions, rather than dust from Oceano Dunes SVRA.

5. In Section 3.1.8, State Parks states “WeatherSolve Structures (WSS), a private company, submitted a proposal for installation of industrial style wind fencing at Oceano Dunes SVRA to address the elevated PM10 issues. The SAG reviewed and rejected this proposal as described in Attachment 9 to this ARWP. The SAG determined that beyond the various logistical considerations for installing such a fence in a dynamic beach-dune environment, the wind fence would be ineffective. As described in the WSS proposal, the wind fence would be installed on the downwind edge of the Oceano Dunes SVRA. Thus, the vast majority of emissive surfaces within Oceano Dunes SVRA would experience no change in surface wind speed or shearing stress and, thus, no change in particulate dust emissions. Table 3-8 summarizes the main implementing actions related to evaluating other possible dust control measures.” This analysis is flawed because Parks and the APCD Hearing Board failed to acknowledge other ocean-based emission sources and the effectiveness of the industrial style wind fencing on those sources. Parks and the APCD Hearing Board failed to consider a highly relevant factor in rejecting this alternative mitigation.
6. Health and Safety Code § 41700 states “Except as otherwise provided in Section 41705, a person shall not discharge from any source whatsoever quantities of air contaminants or other material that cause injury, detriment, nuisance, or annoyance to any considerable number of persons or to the public, or that endanger the comfort, repose, health, or safety of any of those persons or the public, or that cause, or have a natural tendency to cause, injury or damage to business or property.” State Parks is not discharging air contaminants. No “person” is discharging air contaminants. Rather, the dust emissions from Oceano Dunes are a natural occurrence due to wind blowing sand. They have been on-going since the dunes were formed long, long ago, and long pre-date even the invention of OHV. Regulation of Oceano Dunes SVRA under this statute is thus unlawful. See also *Schooler v. State* (2000) 85 Cal.App.4th 1004 [government immune under Gov’t Code § 831.25 from nuisance liability for injuries caused by natural conditions].
7. Conditions that occur in nature but happen to be produced by a combination of human and natural forces are **natural conditions** as a matter of law. *Morin v. County of Los Angeles* (1989) 215 Cal. App. 3d 184, 194 [263 Cal. Rptr. 479]; *Tessier v. City of Newport Beach*

(1990) 219 Cal. App. 3d 310, 314 [268 Cal. Rptr. 233]; *Knight v. City of Capitola* (1992) 4 Cal. App. 4th 918, 928 [6 Cal. Rptr. 2d 874]; *Schooler v. Cal.* (2000) 85 Cal.App.4th 1004, 1009 [102 Cal.Rptr.2d 343]. This means even if OHV recreation is contributing in some small way to the natural dust emissions that occur on the sand dunes, by law it is considered a “natural condition.”

8. The SLO APCD Hearing Board has no authority to issue abatement orders for natural conditions where State Parks has not been negligent in the operation of the SVRA. State Parks has not been negligence and in fact pursuant to Rule 1001 State Parks has been making every effort possible to reduce dust emissions even though it is a natural condition.
9. Here, there is direct evidence casting doubt that OHV recreation is causing any part of the dust emissions. On May 27, 2020, Mr. Walker of the Scientific Advisory Group (SAG) admitted that dust emissions will continue at Oceano Dunes SVRA even if OHV recreation ceased entirely.² This has been borne out by the closure of Oceano Dunes SVRA due to the China virus pandemic. There were higher emissions from Oceano Dunes during this closure than ever recorded, showing that OHV is not causing the emissions. Mr. Martin, in that forum, admitted that it is "impossible" to measure any reduction in "mass" dust emissions. He also admitted that they are using a private DRI model, not a CARB model. SAG asserts that they "believe" that the sand dunes have been impacted by decades of OHV use in a way that causes greater emissions. But they cite no science whatsoever to support that. They ignore other data showing that another explanation of higher emissions areas is due to smaller sand grain size that can be moved more easily by wind. What SAG is doing is not science, but simply their collective "belief." That doesn't pass muster and cannot serve as the basis for the drastic policy actions being pursued.
10. At the May 27, 2020 APCD Board meeting, the APCO, Gary Willey, stated to the Board that neither he nor the SAG had enough data to articulate conclusions about the effectiveness of dust control measures at Oceano Dunes.
11. At the May 27, 2020 APCD Board meeting, SAG admitted that it is "hard to see the direct impact" each year of any particular dust control measures on actual emissions concentrations. Gary Willey was unable to identify any reduction in actual violations in PM10 standards resulting from the mitigation to date. In fact, he admitted that in 2020, with the park shutdown, the number of violations exploded to 24 violations of the state standard (compared to last year's 12 violations).

² Friends also has submitted the video of the May 27, 2020 SLO APCD Board meeting (via email with google drive link) (submitted to the Hearing Board on Oct. 21, 2020).

Mesa 2 saw even higher "peak levels" of violations. SAG admitted that "it is premature" to say that the dust control is the reason that there has been a recent drop in "peak" emissions in 2020.

12. At the May 27, 2020 APCD Board meeting, Gary Willey admitted that the 50 percent reduction target was a "goal," or a "starting point," without any basis in data or science. He also admitted that the 50 percent mass emission reduction goal over 5 years is "not attainable." Mr. Willey also suggested that a "mass reduction" number may not be necessary because it doesn't translate well to a reduction on emission concentration reduction. Indeed, a 50 percent mass emission reduction can't be achieved even if OHV is completely prohibited at Oceano Dunes. That is clear from the pandemic shutdown. Emission violations DOUBLED during the OHV riding shutdown. Board member Gibson noted that the modeling data presented shows that goal will not be achieved.
13. At the May 27, 2020 APCD Board meeting, SAG's presentation was inadequate in a number of ways. First, it failed to discuss the 1 to 1 finding regarding dust emission and dust reduction. This finding is significant because it eliminates the concept of emissive "hotspots" theoretically created by OHVs. It shows that theory is wrong. State Parks has already well exceeded the acreage of vegetation that existed in the dunes "naturally," assuming that means the 1930s (which is another false notion).
14. State Parks' and the agencies' approach to dust emission reduction is flawed because it fails to establish what the baseline of natural emissions are. They seek to reduce emissions by "50 percent" from a point in time (2013) without ever establishing whether those emissions are all natural or part natural or all OHV or part OHV related. Thus, State Parks is seeking to reduce natural emissions as well as OHV emissions. That exceeds State Parks' authority. See also *Schooler v. State* (2000) 85 Cal.App.4th 1004 [government immune under Gov't Code § 831.25 from nuisance liability for injuries caused by natural conditions]. State Parks simply assumes that emissions from a riding area are caused by riding, but there is no evidence or basis to assume that.
15. There is no nuisance liability in the absence of negligence when damage is caused by a natural condition. *Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 99-100. The APCD Hearing Board lacks authority to order abatement of a nuisance when State Parks has not been negligent in its operation of the SVRA and the dust emissions are a natural condition under the law. There is no evidence that State Parks has acted in a negligent manner at Oceano Dunes SVRA. Indeed, all the evidence establishes exactly the opposite.

16. SAG modeling demonstrates there are no emission “hotspots” created by OHV, or that otherwise exist in the SVRA.³ Indeed, in Section 3.3 of its Annual Report, State Parks admits “The expected benefit of targeting ‘hot spots’ as identified initially in the CARB modeling has not resulted in ‘extra’ emission reduction, because that ‘map’ over-emphasized the presence of high emission areas.”
17. State Parks has planted more vegetation than has existed historically, at least in the past 100 years. Assuming that vegetation reduces dust emissions levels, this means that dust emissions already must be below what they have been historically.
18. SAG modeling fails to account for other sources of emissions other than the dunes, and thus fails to consider other important relevant factors.
19. SLO APCD has previously conducted XRF speciation analysis to determine the elemental/chemical mass of PM sampled. This was not coupled with gravimetric mass. That means the APCD never determined the percentage of mineral dust in the overall PM measured. SLOAPCD, the SOA, the SAG, and the SAG-directed computer modeling assume the PM is 100% mineral dust, contrary to the Scripps report findings. No provisions in the SOA allow for an adjustment of PM measurements based on the actual mineral dust percentage of overall PM. Because the percentage of mineral dust has not been determined by the APCD, there is no data that shows that dust alone causes PM to exceed state PM10 standards.
20. The 48-acre foredune dust control project was predicted to reduce dust by at least 17%. Now, it is clear at best it will result in a 2% dust reduction, but even that prediction wildly optimistic because it assumes 100% efficiency of the “mitigation” and assumes that 100% of the dust measured on the Mesa comes from the riding area. The Scripps report disproves this. The 48-acre foredune project has been a complete failure, at the cost of eliminating 50 percent of the beach camping in violation of the Coastal Act.
21. In Section 3.3 of the Annual Report, State Parks admits “DRI’s emission modeling suggests that reduction in emissions is a linear relation between area under control and emission reductions, i.e., a

³ Friends submitted a request for this data and related documentation to State Parks under the California Public Records Act on April 30, 2020. To date, State Parks has refused to produce all responsive documentation. Given Parks’ refusal to abide by the time limits of the Public Records Act, Friends reserves its right to supplement the record, and articulate additional claims and arguments, after the close of the public comment period and after any action taken on this matter.

1% reduction in emissive area under control lowers mass emission by 1%.” That indicates that Parks would need to close massive areas of the SVRA to achieve the SOA reductions. Yet, during the 8-month pandemic closure, nothing close to the desired reductions were achieved. This clarifies that PM emissions are caused by other sources such as ocean spray rather than dust emissions from the SVRA. Yet, State Parks and the APCD Hearing Board completely ignore this data. So much for following the “science.” The best that Parks can do is the following statement: “Either modeling method indicates that the scale of control required to meet the 50% mass emission reduction of the SOA is considerable, and a challenge both from an engineering and Park operations perspective, as well as an ecological/dune dynamics perspective.” That is a massive and almost comical understatement that completely buries the lead – the 50 percent reduction is **impossible** to achieve. Indeed, the pandemic closure of the ENTIRE SVRA shows not even that achieves a anything close to a 50 percent reduction. Again, the agencies fail to admit that these emissions are natural and not caused by OHV recreation.

22. Parks claims “this emissions ‘accounting’ method does not take into account any secondary effects that the control measures (e.g., foredune) may have on erosion, emissions, and transport.” There is no scientific or any evidence supporting that assertion. Again, rather than consider that other sources are creating PM emissions as the Scripps report shows, the agencies deflect by asserting another bogus claim designed to target OHV as the culprit without any scientific data whatsoever. **Parks in particular should be embarrassed and ashamed of this disingenuous effort.**
23. There is no current or on-going violation of Rule 1001 that supports any abatement order or the SOA.
24. State Parks’ annual plan for which it seeks approval is prepared under the auspices of an unlawful SOA, and is otherwise also unlawful because it seeks to reduce natural dust emissions. Any actions taken by State Parks to implement it are therefore unlawful.
25. State Parks,’ the APCD’s, the APCO’s, the APCD Hearing Board’s, and State Parks’ actions and approvals exceed their respective authority, are not supported by substantial evidence, constitute a prejudicial abuse of discretion, fail to proceed in the manner required by law, are not supported by the findings, and include findings not supported by the evidence.
26. Friends remains open to discussing with the APCD, the APCO, the Hearing Board and/or State Parks alternatives to legal action or litigation to resolve this dispute and invites these entities to engage in

settlement discussions before the annual report is approved and implemented.

Thank you.

Sincerely,

/s/

Tom Roth

cc: Jim Suty, President Friends of Oceano Dunes