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BEFORE THE HEARING BOARD OF THE SAN LUIS OBISPO COUNTY
AIR POLLUTION CONTROL DISTRICT
STATE OF CALIFORNIA

In the Matter of

CALIFORNIA DEPARTMENT OF
PARKS AND RECREATION – OFF-
HIGHWAY MOTOR VEHICLE
RECREATION DIVISION – OCEANO
DUNES STATE VEHICLE
RECREATION AREA,

Case No. 17-01

**STATE PARKS’ ANSWER TO
PETITION FOR ABATEMENT
ORDER**

Date: November 13, 2017
Time: 9:00 am
Location: San Luis Obispo County
Government Center
Board of Supervisors Chambers
1055 Monterey Street
San Luis Obispo, California

Pursuant to Air District Rule 809, the California Department of Parks and Recreation (“State Parks”), Division of Off-Highway Motor Vehicle Recreation (“OHMVR”), answers the Petition for Abatement Order (“Petition”), as follows:

BACKGROUND

The California Legislature created the OHMVR Division in 1971 to address the critical need to better manage the growing demand for off-highway recreation, while at the same time fostering respect for private property rights and protecting California’s natural and cultural resources. Today the OHMVR Division operates eight State Vehicular Recreation Areas (“SVRAs”). Oceano Dunes SVRA, established in 1982, is the most popular camping destination in all of State Parks, welcoming more than 1.5 million visitors annually.

1 Oceano Dunes SVRA (“ODSVRA”) covers approximately 3,600 acres near Pismo Beach,
2 California. Off-highway vehicle riding is permitted on approximately 1,500 of the dunes’ acres,
3 except during March through October, when an additional approximately 250 acres are closed to
4 vehicles to protect nesting birds. The remaining approximately 2,100 acres are closed to vehicles
5 year-round and managed as native habitat.

6 Although State Parks established Oceano Dunes SVRA in 1982, the dunes have been a
7 favorite camping and recreation site for families for over 100 years. Vehicle riding on the beach
8 dates back to at least 1906. Today, Oceano Dunes SVRA is the only place in California where
9 people can legally drive and camp on the beach.

10 A residential area known as the Nipomo Mesa lies to the east and downwind from Oceano
11 Dunes. Based on air monitoring on the Nipomo Mesa that documented air quality conditions that
12 exceeded California’s PM10 standard¹, the San Luis Obispo Air Pollution Control District (“Air
13 District”) published the Nipomo Mesa Particulate Study (the “Phase 1 study”) in March 2007.
14 The Phase 1 study identified particulate matter from dune fields during high wind events as the
15 likely cause of PM10 exceedences.

16 The Air District then undertook a further, “Phase 2” study, to determine if off-highway
17 vehicle activity plays a role in producing the high levels of PM10 at Nipomo Mesa. In March
18 2010, the Air District published the results of the Phase 2 study. The Phase 2 study concluded that
19 the primary source of high PM10 levels measured on the Nipomo Mesa is the open sand sheets in
20 the dune areas of the coast. The study also concluded that sand sheets that are subject to off-
21 highway vehicle recreation emit more PM10 during high wind events when compared to areas
22 that are closed to riding. The working hypothesis from this study is that off-highway vehicle
23 activity has an indirect effect on the natural dune processes by de-vegetation, destabilization of
24 dune structure and destruction of the natural “crust” on the dune surface, which “increases the
25 ability of winds to entrain sand particles from the dunes and carry them to the [Nipomo] Mesa...”
26 Many of the conclusions of the Phase 2 study have been studied further and some of the
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28 ¹ A PM10 standard is a level of particulate matter that is 10 microns or less in diameter.

1 underlying conclusions have been called into question based on better research design and more
2 direct measurements within the dunes in and around Oceano Dunes SVRA.

3 Based on the Phase 2 study’s findings, in November 2011 the Air District adopted Rule
4 1001, specifically to address particulate matter emissions at Oceano Dunes SVRA. The stated
5 purpose of Rule 1001 is to reduce PM10 emissions to “natural background levels.” However,
6 because the Air District never quantified the level of “natural” background emissions, Rule 1001
7 requires State Parks to do so. However, despite years of monitoring before and after Rule 1001’s
8 adoption, the Air District has been unable to quantify the level of “natural” background
9 emissions.

10 Following adoption of Rule 1001, an off-highway vehicle recreation lobbying group called
11 Friends of Oceano Dunes (“Friends”) challenged Rule 1001 in the courts, alleging the Air District
12 as exceeded its authority in adopting it. State Parks joined Friends’ challenge, which was
13 unsuccessful at the trial court level. Friends and State Parks then appealed the trial court’s ruling.
14 Following months of intensive negotiations that involved the California Air Resources Board
15 (“CARB”) as mediator, State Parks and the Air District entered into a settlement agreement –
16 which the parties called a “consent decree” – to resolve State Parks’ legal challenge. In exchange
17 for State Parks dismissing its appeal and agreeing to comply with Rule 1001, the Air District
18 agreed to a dispute resolution process for any dispute involving “Rule 1001, *or any other issue*
19 *related to ODSVRA under the [Air District’s] authority...*” (Emphasis added.) Friends was not a
20 party to the consent decree. Friends ultimately prevailed on its appeal, successfully invalidating
21 an important provision of Rule 1001, but leaving the remainder of Rule 1001, including its dust
22 mitigation requirement, intact.

23 Since 2011, State Parks has implemented seasonal dust mitigation to test the effectiveness
24 of various mitigation measures, such as straw bales, sand fencing and vegetation. After the
25 parties’ approved the consent decree in early 2013, State Parks, the Air District and CARB have
26 met regularly to, among other things, analyze data, plan and implement dust mitigation strategies,
27 and resolve disputes. In March 2017, State Parks certified its final environmental impact report
28 for its comprehensive dust mitigation program in accordance with Rule 1001. And in September

1 2017, the California Coastal Commission approved a coastal development permit for State Parks’
2 dust mitigation program.

3 Notwithstanding the accomplishment of these significant milestones to address dust
4 pollution at Oceano Dunes SVRA, in June 2017, the Air Pollution Control Officer (“APCO”)
5 issued a Notice of Violation under District Rules 402 and 1001 and Health and Safety Code
6 section 41700. Pursuant to the consent decree, State Parks elected to submit the matter to the
7 dispute resolution process. This process provides for mediating the dispute before a neutral, called
8 a “special master,” who is a scientist and expert in sand geology. The parties, along with
9 representatives of CARB, met with the special master in September 2017, and the special master
10 took the matter under submission. However, without waiting for the special master to deliver his
11 report and recommendation, the APCO initiated the instant Petition on October 4. The special
12 master delivered his report and recommendation one week later, on October 11, 2017. The special
13 master recommended that the Notice of Violation be withdrawn in favor of a more collaborative
14 approach between the Air District and State Parks.

15 ANSWER TO PETITION

16 **I. DISTRICT RULE 402 AND HEALTH AND SAFETY CODE SECTION 41700 ARE NOT** 17 **WORKABLE TOOLS TO ABATE NUISANCE DUST AT OCEANO DUNES SVRA**

18 Sand dunes are known to be sources of dust, some producing more than others. What makes
19 Oceano Dunes SVRA unique is that part of its dune system is used for off-highway vehicle
20 recreation, which provides some level of physical impact on the dune system. Oceano Dunes
21 SVRA consists of approximately 3,600 acres of sand dunes, less than half of which is open to off-
22 highway vehicle recreation. Data collected by the Air District and State Parks suggests that off-
23 highway vehicle activity plays a role in augmenting the dust emission system at the park.
24 However, the relative contributions from what may be called natural emissions from the wind
25 moving the sand, on the one hand, and those augmented emissions that result from the off-
26 highway vehicle activity, on the other hand, are not resolved. To date, no measurements exist
27 quantifying what the dust pollution concentrations might have been before off-highway vehicle
28 activity began for comparison purposes.

1 Rule 1001 was adopted by the Air District Board in November 2011 specifically to address
2 dust emissions at Oceano Dunes SVRA. At the heart of Rule 1001 is its comparative analysis,
3 which recognizes that there is a “natural background level” of emissions that the Air District lacks
4 authority to regulate.² Rule 1001’s comparative analysis requires State Parks to compare dust
5 levels downwind of the riding area to dust levels downwind of a non-riding “control” site. Gary
6 Willey, the incoming APCO, testified at the November 16, 2011 hearing that “[c]ompliance with
7 the rule [1001] is based on PM10 monitoring difference between the riding and non-riding areas.”
8 Violations of Rule 1001 occur only when the dust downwind of the riding area is more than 20%
9 above that which is downwind of the “control” site. (Rule 1001, § C.3.) As Mr. Willey explained
10 to the Air District Board,

11 [T]he goal of the rule [1001] is to reduce the SVRA contribution to a natural
12 background level. And that’s really what we were trying to do through this whole
13 process. The rule is based on a 24-hour PM10 standard and natural background
14 levels, the riding area and non-riding area monitoring.... Compliance with the rule is
15 based on PM10 monitoring difference between the riding and non-riding areas.

16 The current APCO, Larry Allen, similarly acknowledged at the November 16, 2011 Air
17 District hearing that Rule 1001 is designed to reduce particulate matter concentrations “to natural
18 background levels.”

19 In adopting Rule 1001, Chairperson Gibson acknowledged that the Air District was not
20 requiring State Parks to abate “natural causes” of dust emissions:

21 We do know that the dunes were formed by wind, that there are likely to be dust
22 exceedances from natural causes. But this rule is very specific and has a very rational
23 technical basis for requiring that manmade pollution be reduced here.

24 Thus, Rule 1001 recognizes that there is a “natural background level” of emissions, and
25 only requires State Parks to reduce dust emissions to this “natural background level.” But Rule
26 1001 also recognizes that the “natural background level” is not currently known. For instance,
27 section C.1. of Rule 1001 requires *State Parks* (**not** the Air District) to develop a “Temporary
28 Baseline Monitoring Program” in order to “determine baseline PM10 concentrations” at Oceano

² Under nuisance law, property owners are not liable for the natural conditions of their land in the absence of negligent conduct. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 101.) Thus, Rule 1001 recognizes that the Air District lacks authority to require State Parks to reduce dust pollution below naturally occurring levels.

1 Dunes SVRA. Mr. Willey confirmed at the hearing on Rule 1001 that the Air District did not
2 know what the natural background levels were.

3 The APCO's proposed abatement order disregards his and his soon-to-be successor's prior
4 admission that there is a natural level of background emissions that the Air District lacks the
5 authority to regulate. Relying instead on Rule 402 and Health and Safety Code section 41700, the
6 APCO can utilize the mere existence of particulate matter emissions from Oceano Dunes SVRA
7 as evidence that Oceano Dunes SVRA constitutes a public nuisance, without ever proving the
8 contribution attributable to off-highway vehicle activity. But Oceano Dunes SVRA is not akin to,
9 for instance, a polluting factory or farm to which *any* amount of pollution can be attributed and
10 for which Rule 402 is designed. Here, even if the APCO can establish that *some amount* of
11 emissions are the result of off-highway vehicle activity, without identifying the amount that is
12 attributable to such activity, it is impossible to quantify the amount that State Parks must abate.
13 Using Rule 402 and Health and Safety Code section 41700 evades this information gap by
14 holding State Parks potentially liable for all emissions, even those that the APCO recognizes are
15 "natural."

16 For example, the APCO's Petition states that "[c]omplaints regarding dust from the
17 ODSVRA have been documented since May of 2010" and that "[a] total of 122 complaints have
18 been received since the implementation of District Rule 1001, beginning in May 2012." However,
19 missing from this report is whether, and to what extent, those complaints recognize and account
20 for the significant amount of naturally-occurring dust emissions which the Air District is not
21 authorized to regulate and State Parks is not legally required to abate.³ Since the Hearing Board
22 cannot require State Parks to abate naturally-occurring dust emissions, the Hearing Board cannot
23 fashion an effective abatement order unless and until the APCO quantifies the dust emissions
24 specifically attributable to off-highway vehicle activity.⁴

25 ³ This is not to say that State Parks will not attempt to mitigate dust pollution to the
26 greatest extent possible. Rather, the Air District lacks authority to regulate dust pollution below
"natural background levels."

27 ⁴ In multiple Air District hearings, members of the public, the APCO, and even some
28 technical specialists have speculated as to the amount that off-highway vehicle activity

1 The impropriety of Rule 402 and Health and Safety Code section 41700 to address dust
2 emissions at Oceano Dunes SVRA is apparent in the proposed abatement order submitted by the
3 APCO. That order seeks to require State Parks to prepare “[a] Particulate Matter Reduction
4 Plan⁵, *as required by Rule 1001.*” (Emphasis added.) The reliance on Rule 1001’s requirements
5 to achieve the APCO’s desired results renders this action redundant and unnecessary. The Air
6 District developed Rule 1001 specifically to address nuisance dust at Oceano Dunes SVRA and
7 has enforcement mechanisms at its disposal to address an alleged violation. The Air District
8 should not use Rule 402 as a back door to enforce Rule 1001’s requirements.

9 **II. THE APCO’S USE OF NUISANCE ABATEMENT IS AN IMPROPER ATTEMPT TO END-
10 RUN DISTRICT RULE 1001 AND THE CONSENT DECREE BETWEEN THE AIR DISTRICT
11 AND STATE PARKS**

12 In March 2014, to settle legal challenges to Rule 1001, State Parks and the Air District
13 entered into the consent decree. Under the consent decree, State Parks dismissed its legal
14 challenge to Rule 1001 and agreed to comply with the technical requirements of Rule 1001, and
15 the Air District agreed to a specific procedure to resolve disputes involving Rule 1001 “*or any
16 other issue related to*” Oceano Dunes SVRA. The dispute resolution process includes either
17 party’s right to submit a dispute to a neutral – called a “special master” – if the parties cannot
18 informally resolve the dispute.

19 State Parks and the Air District re-affirmed their respective commitment to the consent
20 decree in September 2017 by entering into an amendment to the consent decree. State Parks has
21 been sued by Friends for its part in entering into the consent decree. Nonetheless, State Parks’
22 commitment to the consent decree process has remained inviolate. Regrettably, the same cannot
23 be said of the APCO.

24 _____
25 contributes to dust emissions at Oceano Dunes SVRA. However, these statements have not been
26 independently confirmed by air pollution control specialists or atmospheric scientists. Thus,
27 though there may statements in the record indicating the specific percentage of emissions
28 attributable to off-highway vehicle activity, those statements are not scientific fact, but rather an
expression of personal opinion.

⁵ As set forth in State Parks’ documentary record, it has already obtained APCO approval of its Particulate Matter Reduction Plan.

1 In accordance with Rule 1001, and in reliance on the Air District’s good faith commitment
2 to the consent decree process, State Parks has expended millions in public funds to implement
3 Rule 1001. Among other compliance actions, State Parks has: (1) prepared a monitoring site
4 selection plan (Rule 1001, § F.1.a.); (2) prepared a particulate matter reduction plan (Rule 1001, §
5 F.1.b.); (3) installed and maintained a “control site” monitor, and collected and analyzed data
6 from the monitor; (4) installed seasonal dust mitigation every Spring since 2011 to test the
7 effectiveness of various mitigation measures including, but not limited to, straw bales, sand
8 fencing and vegetation; (5) prepared and published an environmental impact report for its
9 comprehensive dust mitigation program; (6) applied for and obtained approval from the
10 California Coastal Commission for its comprehensive dust mitigation program; and (7) defended
11 itself against a litany of lawsuits challenging its actions to comply with Rule 1001.

12 In addition, since mid-2013, CARB has facilitated regular meetings between State Parks
13 and the Air District to implement Rule 1001. These meetings have involved, among other things,
14 analyzing data, planning and implementing dust mitigation measures, and resolving disputes.

15 After the Air District delivered its Notice of Violation (“NOV”) to State Parks in June
16 2017, State Parks elected to submit the matter to the special master in accordance with the
17 consent decree’s dispute resolution process. The parties met with the special master in September
18 2017. CARB representatives also attended the meeting. Following the meeting, the special master
19 took the matter under submission. However, without waiting for the special master to deliver his
20 report and recommendation, the APCO initiated the instant Petition on October 4. One week later,
21 the special master delivered his report and recommendation. The report noted the APCO’s lack of
22 objectivity and failure to provide evidentiary support for his Notice of Violation:

23 The submission report provided by Parks is highly focused, well documented, and
24 attempts to address the issues relating to the NOV straight on and without
25 embellishment. It stands in strong contrast to the submission provided by [the Air
26 District], which contains inflammatory language, demonstrates a notable lack of
27 objectivity, and fails to provide direct reference to supporting documentation and
28 data.

1 The special master also questioned the timing of the Notice of Violation, given that State
2 Parks had only recently installed a new deputy director in charge of State Parks' OHMVR
3 Division, and the APCO was retiring and a new APCO would soon be taking over:

4 There is also the need to give the new Deputy Director of the OHMVR and the new
5 incoming Air Pollution Officer for the [Air District], a fair chance to improve co-
6 operation between the two units and to get control measures in place as quickly as
7 possible using important input from as many stakeholders as possible.

8 The special master concluded his report as follows:

9 **It is my opinion that the Notice of Violation is not an effective tool to hasten
10 resolution of the ongoing wind erosion problem and disputes between the two
11 parties, and therefore, should be withdrawn. Rather, the two groups should
12 work together cooperatively, as opposed to antagonistically, which seems to have
13 been the model over the past several years. (Emphasis in original.)**

14 In entering into the consent decree, it was never State Parks intention that the APCO be
15 allowed to circumvent the consent decree's requirements by utilizing District Rule 402 or Health
16 and Safety Code section 41700. For this reason, the consent decree broadly provides that its terms
17 apply to "any ... issue related to" Oceano Dunes SVRA. This abatement action is a direct end run
18 around, and breach of, the consent decree approved by the Air District Board and signed by its
19 Chairperson, the APCO, and the Air District's counsel. Significantly, at its most recent hearing on
20 September 27, the Air District Board considered and then *rejected* a motion to urge the APCO to,
21 among other things, initiate a Hearing Board to address alleged nuisance dust.

22 The Hearing Board should not sanction the APCO's attempt to jettison years of cooperation
23 between State Parks and the Air District on the eve of his departure. Instead, the Hearing Board
24 should affirm the Air District's commitment to the process it started in 2011 with the adoption of
25 Rule 1001. With State Parks only recently certifying its Final Environmental Impact Report and
26 only recently receiving Coastal Commission approval for its comprehensive dust mitigation
27 program, now is not the time for the Hearing Board to undermine all the work that has been done
28 to date, and all the work that State Parks still has to do, to mitigate dust pollution at Oceano
Dunes SVRA while still continuing to comply with its legislative mandate to keep the park open
to off-highway vehicle recreation.

1 **III. THE LEGISLATURE HAS CONCLUSIVELY DETERMINED THAT OCEANO DUNES**
2 **SVRA PROVIDES A PUBLIC BENEFIT THAT OUTWEIGHS ANY ALLEGED HARM; AND**
3 **STATE PARKS IS STATUTORILY IMMUNE FROM NUISANCE LIABILITY**

4 The APCO’s Petition fails to take into consideration the important public benefit Oceano
5 Dunes SVRA provides. (See *Hellman v La Cumbre Golf & Country Club* (1992) 6 Cal.App.4th
6 1224, 1231 [“The initial determination of what constitutes a nuisance includes a consideration of
7 conflicting interests leading to a conclusion whether the harm suffered outweighs the utility of the
8 conduct.”].)

9 The California Legislature has conclusively determined that state vehicular recreation areas,
10 and Oceano Dunes SVRA in particular, provide a substantial public benefit. Under the Off-
11 Highway Vehicle Motor Recreation Act, Public Resources Code 5090.01 et seq. (“OHMVRA” or
12 the “Act”), the Legislature established state vehicular recreation areas in recognition of the “every
13 increasing popularity” of off-highway vehicle recreation and the deleterious impact on the
14 environment from the “indiscriminate and uncontrolled use” of those vehicles. (Pub. Resources
15 Code, § 5090.02, subd. (a).) Thus, the Legislature decided that effectively managing off-highway
16 vehicle recreation, through the establishment of state vehicular recreation areas, benefits the
17 environment and is “essential for ecologically balanced recreation.” (Pub. Resources Code, §
18 5090.02, subd. (b).) The Legislature designated Oceano Dunes SVRA as one of only nine state
19 vehicular recreation areas in the entire state. (Cal. Code Regs., tit. 14, § 4753, subd. (e); see also
20 Cal. Code Regs., tit. 14, § 4609.)

21 Moreover, the Legislature recently re-affirmed the public benefit that state vehicular
22 recreation areas provide. Senate Bill 249 was passed unanimously during the 2017 Legislative
23 session and signed into law by the Governor on October 3, 2017. This bill permanently
24 reauthorized the OHMVRA. The Legislature could have amended the Act to, for instance,
25 prohibit nuisance dust emissions at state vehicular recreation areas. Or it could have amended the
26 Act to de-authorize Oceano Dunes SVRA as a state vehicular recreation area. It did neither,
27 conclusively affirming the public benefit provided by Oceano Dunes SVRA.⁶

28 ⁶ Senate Bill 249 amended Public Resources Code section 5090.24. In doing so, it
reaffirmed the duties of the Off-Highway Motor Vehicle Recreation Commission to, among

1 time and in a meaningful manner.” (*Southern Cal. Underground Contractors, Inc. v. City of San*
2 *Diego* (2003) 108 Cal.App.4th 533, 543, citing *Mathews v. Eldridge* (1976) 424 U.S. 319, 333.)
3 Although due process in an administrative hearing does not require the full panoply of judicial
4 trial procedures (*Stacy & Witbeck, Inc. v. City and County of San Francisco* (1995) 36
5 Cal.App.4th 1074, 1087, as modified on denial of reh’g (Aug. 16, 1995)), it nonetheless requires
6 “that the procedures be tailored, in light of the decision to be made, to ‘the capacities and
7 circumstances of those who are to be heard,’ [citation] ... to insure that they are given a
8 meaningful opportunity to present their case.” (*Mathews v. Eldridge, supra*, 424 U.S. at p. 349.)

9 The abatement hearing does not provide State Parks with a “meaningful opportunity to
10 present [its] case.” First, the pre-conference hearing, originally scheduled for October 25, 2017,
11 was adjourned until November 1, 2017, due to the recusal of the then-Hearing Board Chair Eileen
12 Mackin-Getzoff, *which was made at the request of the Air Pollution Control Officer (APCO)*
13 (State Parks subsequently joined that request). Thus, important matters involving the hearing
14 were not discussed until November 1, 2017, less than two weeks before the hearing.

15 For instance, on October 24, 2017, then-chair Ms. Mackin-Getzoff submitted a letter to the
16 APCO requesting that he clarify certain matters for which the Petition for Abatement Order
17 (“Petition”) was vague or undefined, including such fundamental matters as: (1) the “State Laws
18 and District regulations the APCO and District claim that Respondent, [State Parks] has
19 violated”; (2) the “activity, action, failure to act or other means by which [the APCO] claim[s]
20 ODSVRA behavior constitutes a violation of California Health and Safety Code section 41700
21 and San Luis Obispo County APCD Rule 401 [sic]”; and (3) the “specific orders or conditions ...
22 APCD seek[s] that the Hearing Board include in an abatement order.” The APCO did not respond
23 to the request for clarification until the continued pre-conference hearing on November 1, 2017.
24 Thus, it was not until November 1 that the APCO’s attorney clarified that the Petition is *not* being
25 brought under Rule 1001 and “the Hearing Board is not being asked to consider potential
26 violations of Rule 1001.”⁷

27 ⁷ The APCO’s Petition for Abatement Order cites the legal ground for an abatement order
28 as “Section 41700 of the Health and Safety Code and District Rules 402 *and* 1001” (emphasis
added).

1 But the APCO's attorney's representation made at the pre-conference hearing, and later
2 confirmed in writing, that this Petition does not seek to enforce Rule 1001, is directly contradicted
3 by the APCO's proposed abatement order, first made available on Monday, November 6 and
4 amended on Wednesday, November 8. That abatement order requires State Parks to prepare "[a]
5 Particulate Matter Reduction Plan, *as required by Rule 1001.*" (Emphasis added.) It is also
6 contradicted by the APCO's staff report, which cites at length alleged violations of Rule 1001 to
7 justify an abatement order (see pages 14-19). Thus, despite the APCO's attorney's representation,
8 this action does in fact seek to enforce Rule 1001. The APCO's and his attorney's conflicting
9 legal, factual and evidentiary bases for the Petition has prejudiced State Parks' ability to
10 adequately prepare a defense.

11 In addition, the APCO did not identify the witnesses he intends to call at the hearing or the
12 documentary evidence that supports his Petition until Monday, November 6, just one week before
13 the hearing. Although the Air District's rules provide that "the hearing need not be conducted
14 according to technical rules relating to evidence and witnesses" (District Rule 812), the District
15 still must afford State Parks an adequate opportunity to prepare for the hearing and to confront
16 adverse witnesses. The APCO has afforded State Parks neither.

17 The APCO has also refused State Parks' request to conduct discovery prior to the hearing,
18 specifically, to depose the witnesses the Air District intends to call at the hearing. (See *Mohilef v.*
19 *Janovici* (1996) 51 Cal.App.4th 267, 302 [finding in a nuisance abatement case that "because the
20 due process clause ensures that an administrative proceeding will be conducted fairly, 'discovery
21 must be granted if in the particular situation a refusal to do so would so prejudice a party as to
22 deny him due process.'" (citation omitted)]; see also *Southern Cal. Underground Contractors v.*
23 *City of San Diego, supra*, 108 Cal.App.4th at p. 544 [respondent's right to due process satisfied
24 because it "was afforded an effective opportunity to confront adverse witnesses at depositions"];
25 *Stacy & Witbeck v. City and County of San Francisco, supra*, 36 Cal.App.4th at p. 1087
26 [respondent's right to due process satisfied because it "was afforded the opportunity to (and did)
27 depose the City's single witness prior to the hearing".]) Under the circumstances, denying State
28

1 Parks' request to depose the APCO's witnesses "so prejudice[s] [State Parks] as to deny [it] due
2 process." (*Mohilef v. Janovici, supra*, 51 Cal.App.4th at p. 302.)

3 Due process considerations require that State Parks receive notice of the legal, factual, and
4 evidentiary basis sufficiently in advance of the hearing in order to allow it to prepare a defense.
5 But the APCO did not identify its documents and witnesses until Monday, November 6, one week
6 before the hearing. And the APCO did not release its staff report citing the legal, factual and
7 evidentiary bases for its Petition until Wednesday, November 8, *less than two working days*
8 *before the hearing* (given the Veterans Day Holiday). State Parks requested a continuance of the
9 hearing to allow it to adequately prepare a defense, but that request was denied.

10 Finally, State Parks has a right to a full review of its evidence by the Hearing Board, which
11 the Hearing Board cannot reasonably perform in the limited time before the hearing. Dust
12 pollution at Oceano Dunes SVRA is a complex issue. Over the decades there have been numerous
13 studies documenting dust pollution at Oceano Dunes SVRA. The Air District embarked on a
14 years' long process to study and then adopt a regulation (Rule 1001) specifically to address
15 particulate matter emissions at Oceano Dunes SVRA. State Parks, the Air District, and CARB
16 have met regularly for years to plan, implement and analyze on-the-ground dust mitigation
17 measures. State Parks recently certified an environmental impact report, and the Coastal
18 Commission recently approved a coastal development permit, for State Parks' comprehensive
19 plan to mitigate dust pollution at Oceano Dunes SVRA. The record in this case is voluminous,
20 comprising over 2,500 pages of documentary evidence submitted by State Parks alone. However,
21 due to the continuance of the pre-conference hearing, the parties did not submit their documentary
22 evidence to the Hearing Board until Monday, November 6.

23 State Parks has a due process right to have the Hearing Board consider its evidence before
24 reaching a decision. (*Southern Cal. Underground Contractors v. City of San Diego, supra*, 108
25 Cal.App.4th at p. 548.) While the Hearing Board is entitled to a presumption that it has properly
26 performed its official duty to review all the evidence before it (Evid. Code, § 664), that
27 presumption is lost if the Hearing Board cannot reasonably review the evidence in advance of the
28 hearing. It is not reasonable for the Hearing Board to consider over 2,500 pages of evidence (in

1 addition to this Answering Brief, the APCO's staff report and the APCO's documentary
2 evidence) in one week's time, especially with the intervening Veterans Day holiday. Based on the
3 foregoing, the abatement hearing violates State Parks' constitutional right to due process.

4 **CONCLUSION**

5 The Hearing Board cannot issue an abatement order unless it makes the necessary findings,
6 supported by evidence, that:

7 (1) The Air District is legally authorized to require State Parks to abate naturally-
8 occurring dust emissions;

9 (2) The Air District is legally authorized to evade the terms of the consent decree it
10 signed and upon which State Parks has detrimentally relied;

11 (3) The public recreational and economic benefit provided by Oceano Dunes SVRA is
12 outweighed by its harm; and

13 (4) The hearing does not violate State Parks' due process rights.

14 Because the Hearing Board cannot make such findings (either because they do not exist in
15 the record or because the APCO cannot satisfy his burden), it must deny the Petition.

16
17 Dated: November 8, 2017

Respectfully Submitted,

18 XAVIER BECERRA
19 Attorney General of California

20 

21 MITCHELL E. RISHE
22 Deputy Attorney General
23 *Attorneys for California Department of
24 Parks and Recreation*

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