

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**

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DEPARTMENT OF PARKS AND  
RECREATION

**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 23<sup>rd</sup> Street, Suite 200  
Sacramento, California 94296  
Email: Christopher.Conlin@parks.ca.gov

With a copy to:

Mitchell E. Rische, Deputy Attorney General  
Office of the Attorney General  
300 South Spring Street, Suite 1702  
Los Angeles, California 90013  
Email: Mitchell.Rische@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: \_\_\_\_\_

\_\_\_\_\_  
Roberta Fonzi, Chair

Date: \_\_\_\_\_

\_\_\_\_\_  
Larry R. Allen, Air Pollution Control Officer

Date: \_\_\_\_\_

\_\_\_\_\_  
Raymond A. Biering, District Counsel

For:

California Department of Parks and Recreation

Date: \_\_\_\_\_

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

Date: \_\_\_\_\_

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

Date: \_\_\_\_\_

\_\_\_\_\_  
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:

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Presiding Justice of the California Court of Appeal, Second District