CALIFORNIA COASTAL COMMISSION
CENTRAL COAST DISTRICT
725 FRONT STREET, SUITE 300
SANTA CRUZ, CA 95060
PHONE: (831) 427-4863
FAX: (831) 427-4877
WEB: WWW.COASTAL.CA.GOV

F12a

Prepared December 14, 2021 for December 17, 2021 Hearing

To: Commissioners and Interested Persons

From: Kevin Kahn, Central Coast District Manager

Subject: Additional hearing materials for F12a
CDP Amendment Number 3-12-050-A3 (State Parks' Oceano Dunes Dust Control, Grover Beach/Oceano)

This package includes additional materials related to the above-referenced hearing item as follows:

Additional correspondence received in the time since the staff report was distributed

Jim Suty, President
15131 Garcal Drive
San Jose, CA 95127
805-994-9309
E-mail: jim@oceanodunes.org
www.oceanodunes.org

December 10, 2021

By Email
Jack Ainsworth
Executive Director
California Coastal Commission
455 Market Street
Suite 300
San Francisco, CA
94105

Kevin Kahn
District Supervisor
Central Coast District Office
California Coastal Commission
725 Front Street
Santa Cruz, CA 95060

Mr. Ronnie Glick
Senior Environmental Scientist
California Department Parks and Recreation
Oceano Dunes District
340 James Way, Ste. 270
Pismo Beach, CA 93449

Re: Comments of Friends of Oceano Dunes on the CDP Amendment for the Oceano Dunes Dust Control Project; December 17, 2021 Coastal Commission Agenda Item F12a; Application No. 3-12-050-A3

Dear state officials:

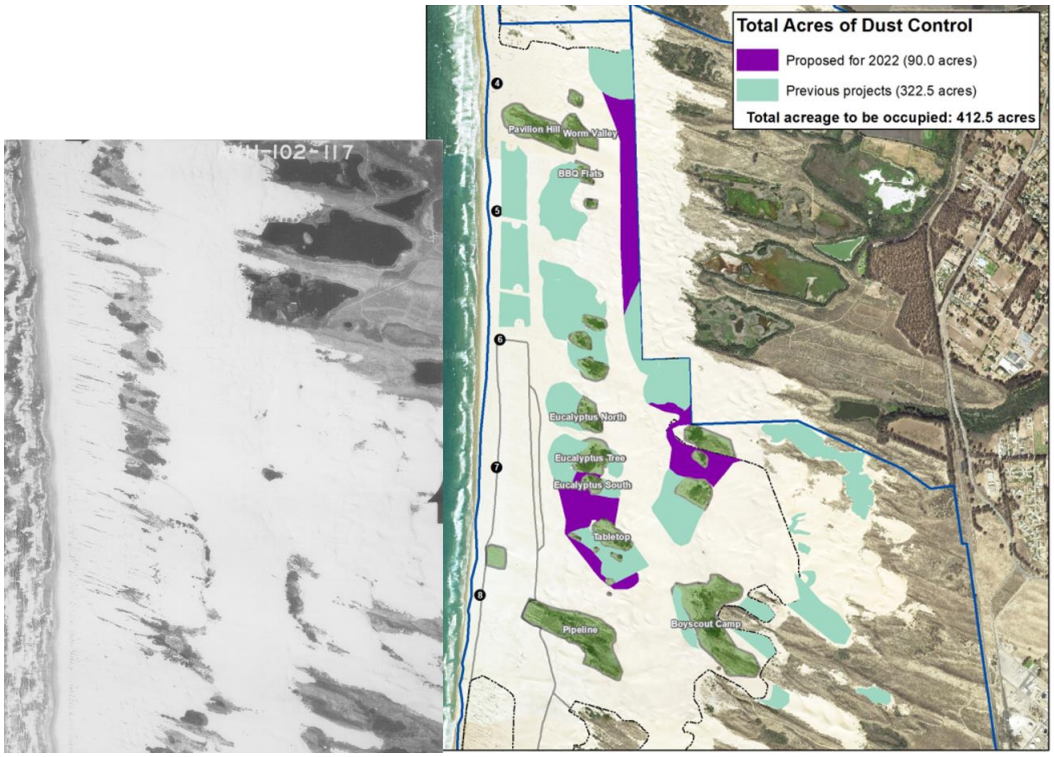
These comments are filed on behalf of Friends of Oceano Dunes, Inc. ("Friends"), which is a California not-for-profit corporation, representing approximately 28,000 members and users of the Oceano Dunes State Vehicle Recreation Area ("SVRA") located near Pismo Beach, California.

Friends is a public watchdog organization created in 2001 expressly to preserve and expand recreational uses at Oceano Dunes SVRA. Friends' watchdog role includes review and challenges to local, state and federal rules and activities that may impact, restrict or limit recreational uses at Oceano Dunes. Friends' members live near, use, recreate, visit and personally enjoy the aesthetic, wildlife and recreational resources of the dunes area, including off road recreation, hiking, and observing wildlife.

The CDP amendment is seeking approval of taking more acreage from recreation for vegetation.

"allow an additional 130 acres of permanent dust control mitigation (i.e., removing these areas from use (where applicable) and restoring/enhancing their dune habitat values) in the dunes (with 108 acres in vehicular access and camping dune areas and 22 acres outside of these areas), which would thus mean that a total of roughly 380 acres of permanent dust control mitigation would be allowed under the CDP as amended (with some 330 acres in vehicular access and camping dune areas and 50 acres outside of these areas)."

Sadly, the Coastal Commission Staff continues to imply that vegetating the dunes in the Oceano Dunes SVRA is "restoring/enhancing" them. Unfortunately, there is ample evidence that shows the SVRA acreage has historically had much less native vegetation…therefore, **adding native vegetation is not restoring the dunes it is destroying the natural dunes**.



Compaing the 1939 aerial image on the left to current proposed dust

mitigation strategies clearly show vegetation is being planted where it never existed before. In addition, the 1939 aerial vegetation includes massive areas of non-native vegetation.

Our attached legal briefing will go into more details on why the Coastal Commission is exceeding its authority and further legal challenges will be required.

Sincerely,

Jim Suty
President – Friends of Oceano Dunes

Attachment: Legal Complaint from Tom Roth

CC: Tom Roth
FoOD BOD
OHV Commission

LAW OFFICES OF THOMAS D. ROTH
1900 S. Norfolk Street, Suite 350
San Mateo, California 94403
(415) 508-5810
Rothlaw1@comcast.net

December 10, 2021

By Email

Jack Ainsworth
Executive Director
California Coastal Commission
455 Market Street
Suite 300
San Francisco, CA
94105

Kevin Kahn
District Supervisor
Central Coast District Office
California Coastal Commission
725 Front Street
Santa Cruz, CA 95060

Mr. Ronnie Glick
Senior Environmental Scientist
California Department Parks and Recreation
Oceano Dunes District
340 James Way, Ste. 270
Pismo Beach, CA 93449

Re: Comments of Friends of Oceano Dunes on the CDP Amendment for the Oceano Dunes Dust Control Project; December 17, 2021 Coastal Commission Agenda Item F12a; Application No. 3-12-050-A3

Dear state officials:

This firm represents Friends of Oceano Dunes, a California nonprofit watchdog association, which represents approximately 28,000 users of Oceano Dunes SVRA ("Friends").

Documentary evidence in support of these comments is submitted by hand delivery to the Commission headquarters. These materials should be included in the administrative record for this hearing agenda item.

Friends objects to the proposed CCC action approving an amendment to the dust control program at Oceano Dunes because it violates the California Environmental Quality Act ("CEQA"), the California Endangered Species Act ("CESA"), the fully protected species statutes, the federal Endangered Species Act ("ESA"), the Coastal Act and the SVRA Act.

More detailed objections and comments are provided below:

1. Section 9 of the ESA prohibits "take" of a protected species, which means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct." 16 U.S.C. §§ 1532(19), 1538(a)(1)(B). Harm is defined in the broadest possible manner to include every conceivable way in which a person may take or attempt to take any wildlife. The "take" prohibition extends to habitat degradation that prevents or possibly retards recovery of species, or that results in the death of a protected species.

2. Habitat destruction and predation are threats expressly recognized in the ESA. 16 U.S.C. § 1533(a)(1). Pursuant to the ESA and its implementing regulations, a species is threatened or endangered based on any one or a combination of the following section 4(a)(1) factors: "the present or *threatened destruction, modification, or curtailment of its habitat* or range; overutilization for commercial, recreational, scientific, or educational purposes; disease or predation; [] inadequacy of existing regulatory mechanisms; or *other natural or manmade factors* affecting [the species'] existence."

3. CESA also prohibits take of protected species. Section 2080 of the Fish and Game Code prohibits "take" of any species that the California Department of Fish and Wildlife ("CDFW") determines to be an endangered species or a threatened species, except as otherwise provided. Take is defined in § 86 of the Fish and Game Code as "hunt, pursue, catch, capture, or kill, or attempt to hunt, pursue, catch, capture, or kill." Unlike the ESA, the definition of take under CESA does not include harm or harassment. Like the ESA, CESA allows for take incidental to otherwise lawful activities. However, Fish and Game Code § 3511 designates certain species as fully protected species and those fully protected species may not be taken except pursuant to an approved Natural Community Conservation Plan ("NCCP"). The NCCP Act requires the NCCP to contribute to the recovery of the species. Fish & Game Code, § 2800 *et seq.* State Parks has not at this time proposed, completed or certified a NCCP.

4. Persons can avoid the take prohibition in the ESA and CESA by obtaining an incidental take permit ("ITP"). Incidental take "result[s] from, but [is] . . . not the purpose of, carrying out an otherwise lawful activity conducted by the Federal agency or applicant." 50 C.F.R. § 402.02.

5. Under CESA, § 2081 (b) allows CDFW to authorize take that is incidental to an otherwise lawful activity. "Incidental take" is a euphemism for incidental kill or capture. Fish & Game Code, § 86. But an incidental take permit cannot be issued for a fully protected species without a NCCP. Under CESA, the CDFW, before issuing an incidental take permit, must find that the impacts of the proposed take will be minimized and fully mitigated (Fish & G. Code, § 2081 (b)(2)), the applicant will ensure adequate funding to implement the minimization and mitigation measures (§ 2081 (b)(4)), and the permit sought will not jeopardize the continued existence of the species (§ 2081 (c)). The CDFW has made habitat conservation planning the centerpiece of its environmental protection policy. CDFW's permit application is modeled on the federal template, including, as it does here, a comprehensive habitat conservation plan. Fish and Game Code § 2081 (c) requires the CDFW consider "known threats to the species" and "reasonably foreseeable impacts on the species from other related projects and activities." It also requires reliance on the "best scientific and other information that is reasonably available." State agencies must consult with the CDFW to ensure any proposed governmental action resulting in an incidental taking of protected species contain "reasonable and prudent measures that are necessary and appropriate to minimize the adverse impacts of the incidental taking." Id., § 2091.

6. State Parks has repeatedly admitted the likely take of protected species from dust control projects in the vicinity of habitat for the western snowy plover and the California least tern.

7. The western snowy plover ("WSP") is listed as a threatened species under the ESA, and the California least tern ("CLT") is listed as an endangered species under the ESA.[1] The CLT is also listed as endangered under CESA and under the state's fully protected species statutes. The California brown pelican is a full protected species under state law and is found at Oceano Dunes. WSP and CLT (including nesting and breeding) would be impacted.

8. In 2012, FWS designated critical habitat for the WSP that includes large areas within Oceano Dunes SVRA. The Ninth Circuit Court of

[1] State Parks uses the alternative abbreviation "CLTE" for the California least tern, and "SNPL" for the western snowy plover. Those abbreviations are used when quoting from text prepared by State Parks.

Appeals has held that the purpose of critical habitat designations is not merely to ensure the species' survival, but also to "carve out territory" that is "essential for the species' recovery." *Gifford Pinchot Task Force v. United States Fish & Wildlife Serv.,* 378 F.3d 1059, 1070 (9th Cir. 2004). *Gifford Pinchot* concluded that the ESA views "conservation and survival as distinct, though complementary, goals, and the requirement to preserve critical habitat is designed to promote **both** conservation and survival." (Id.)

9. The FWS has identified 6 WSP recovery units in the nation. WSP breeding in San Luis Obispo County (part of Unit 5) is nearly **19.5 percent** of all breeding for the WSP **in all of California**. SLO County accounts for 16 percent of WSP breeding in the **entire nation**. SLO County is the **single largest** location for WSP breeding in the nation.

10. WSP breeding in San Luis Obispo County is approximately 44 percent of all WSP breeding in Unit 5. WSP breeding in San Luis Obispo County *alone* is greater than the total breeding in three of the 6 recovery units, including Units 2, 3 and 4. In other words, one county (SLO) has a larger breeding population than 3 of the 6 *entire* recovery units. This shows that SLO County is very important to WSP breeding as a whole, range-wide, and within Unit 5.

11. Within Unit 5, Oceano Dunes is by far the most important WSP location for breeding. Since 2005, there have been more than 2,400 nests there.

12. CLT typically nest in habitats similar to those of WSP, and there is often an overlap with the two species breeding on the same beach (USFWS 2007a). CLT nesting colonies along the California coast are typically located on broad dune-backed sandy beaches or small sandspits where vegetation is either sparse or altogether absent. CLT forage primarily in near shore ocean waters and in shallow estuaries and lagoons (Massey 1988). Within the central California coast, the CLT is part of a geographic cluster that includes Oceano Dunes SVRA, Rancho Guadalupe County Park, Coal Oil Point Reserve, and VAFB. California typically nest among the large open expanses of the beach and dunes that are completely or nearly completely devoid of vegetation. Nests may be found from within several feet of the shore to more than a mile inland. Nests are normally located in open areas where aerial and terrestrial predators can be detected at a distance. When threatened, adult CLT will leave the nest and aggressively harass an intruder by mobbing, defecating, and vocalizing. Reduced exposure to disturbance from predators is likely an important factor in the selection of a night roost location. During the 16-year period from 2002 through 2017, an average of 48 nests per year were found. In

2018, 35 nesting attempts were documented. The CLT breeding colony within Oceano Dunes SVRA has benefited from the increased level of protection and management actions provided since 2002. The colony is important in meeting statewide recovery goals as loss of breeding habitat has resulted in a fragmented population distribution and a limited number of remaining breeding populations (USFWS 1985, 2006b). On a regional level, very few active breeding sites exist along the central coast of California, and none remain between Oceano Dunes SVRA and San Francisco Bay. **Oceano Dunes SVRA is the only site in San Luis Obispo County**. The CLT at Oceano Dunes SVRA represent a significant component of the regional population. Oceano Dunes SVRA also has become an important source of productivity for this regional population. During the period 2004–2018, Oceano Dunes SVRA produced a minimum of 659 juvenile CLTE while Rancho Guadalupe Dunes County Park, VAFB, and Coal Oil Point Reserve combined produced 262 juveniles.

13. Here, the placement of permanent dust control measures will cause "indirect effects to critical habitat," due to increased predation caused by the additional cover to predators in or near WSP critical habitat, or primary and secondary habitat of the CLT that the dust control installation provides. Indirect effects are caused by or result from the action, are later in time, and are reasonably certain to occur. Indirect effects include "attenuated consequences" of the action.

14. Recovery means more than just improved status; it means improvements to the point where the species may be *delisted*. *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). The CCC's proposed action here would impede recovery of the WSP and CLT.

15. Courts have held that government agencies or officials charged or tasked with land or resource management (including governmental authorization, mandate or direction to third parties) engage in a take in violation of ESA § 9 both by conduct and the failure to act that results in harm to a listed species, or significant impairment of habitat or breeding patterns. *Strahan v. Coxe*, 127 F.3d 155 (1st Cir. 1997) (State licensing system authorizing gillnet and lobster pot fishing caused injury to protected endangered whales and the Court properly enjoined state officials under the ESA, holding that the ESA prevents state officials from bringing about the acts of another party that leads to a taking); *Sierra Club v. Yeutter*, 926 F.2d 429 (5th Cir. 1991) (Court held U.S. Forest Service's management activities constituted a taking in violation of § 9 by causing population declines of red-cockaded woodpeckers on lands managed by Forest Service); *Palila v. Hawaii Department of Land and Natural Resources*, 852 F.2d 1106 (9th Cir. 1988) (State agency's practice of maintaining sheep (and failure to

remove them) in listed bird's habitat constituted a taking due to habitat destruction that could result in extinction because the sheep were damaging the woodland that the birds depended on for food and shelter).

16. A government official violates the ESA's take prohibition when that official authorizes someone or an agency to exact a taking of an endangered species, which, but for the authorization, could not have taken place. *Seattle Audubon v. Sutherland*, 2007 WL 1300964, at *8 (W.D. Wash. May 1, 2007) (holding that governmental officials can be liable when operators "are specifically authorized by the government to undertake forest practices that are likely to take spotted owls"); *Sierra Club v. Von Kolnitz* (D.S.C., Aug. 14, 2017, No. 2:16-CV-03815-DCN) 2017 WL 3480777, at *5. See also *Red Wolf Coal. v. N.C. Wildlife Res. Comm'n*, No. 2:13–CV–60–BO, 2014 WL 1922234, at *5–8 (E.D.N.C. May 13, 2014) (unpublished) (holding that the state may "be liable for the unauthorized takes of red wolves where its actions [in licensing coyote hunting] have greatly increased the likelihood of the take" of red wolves); *Animal Prot. Inst. v. Holsten*, 541 F.Supp.2d 1073, 1076–80 (D. Minn. 2008) (concluding that state officers may be liable for lynx takings that are incidental to the trapping activities because "[i]n order to legally engage in trapping in Minnesota ... one must obtain a license and follow all governmental regulations governing trapping activities").

17. As described herein, at Oceano Dunes, government entities or officials responsible for land management or resource management are authorizing, mandating or implementing actions that will result in the take of two listed species through increased bird predation caused by the project (or the take is reasonably foreseeable in light of the multiple biological opinions of Dr. Rob Roy Ramey[2] and Paul Kephart, the history of predation at Oceano Dunes SVRA and in the area, and scientific articles and studies linking cover, proximity and increased predation). That includes CCC Executive Director Ainsworth, and officials working under him, and State Parks Director Armando Quintero, Liz McGuirk, Dan Canfield and others, as well as SLO County, the San Luis Obispo County Air Pollution Control District, and the SLO APCD Hearing Board. They are liable for take under section 9 of the ESA, and under provisions of CESA and the fully protected species statutes.

[2] Friends submits the 2017 Ramey Report on dust control measures and the 2020 Ramey Report on the draft HCP and DEIR for the HCP. The Ramey comments on the HCP/DEIR are equally applicable to this CDP application and the amendment to the CDP because they address past, proposed and reasonably foreseeable dust control measures at Oceano Dunes.

18. State Parks' consultant, DRI, opines that "the relative contributions from . . . natural emissions from the wind moving sand and those augmented emissions that result from OHV activity **is not resolved**." The California Department of Conservation, California Geological Survey, in August 2015, determined that smaller sand grain sizes in certain locations within Oceano Dunes SVRA are more easily lifted by wind and are creating greater emissivity at those locations. Locations in the northern section of the SVRA, where there are greater emissions, contain finer grain sand. DRI, State Parks' consultant, agrees that sand size is one of the factors that make it difficult to ascertain to what extent OHV activity is causing dust emissions when compared to natural conditions. DRI states: ". . . emissions of PM10 are higher in the north . . . at least in part, because the sand is finer." DRI also has identified a range of variables other than OHV riding that may explain variances in dust emissions, including the amount and placement of vegetation (momentum partitioning effect, the interruption of fetch, the threshold shear velocity, the percentage of open sand space, wind speed variability at the 10-meter above-ground level, the overall wind speed, topography and the contribution of air borne sea salt and marine aerosolized particulates. The DRI concludes "critical environmental factors" other than OHV riding "exert considerable control on the dust emission process . . . ." **These findings by experts employed by governmental agencies show that it is not clear at all that OHV is causing dust emissions, or is even a principal or substantial cause. Instead, these dust emissions may well be a natural condition**.[3]

19. In late 2021, the Scripps Institution of Oceanography (Scripps) issued a report on a 3-year study called "Preliminary Results from May 2021 Aerosol Measurements." The Scripps team has undertaken additional quantitative chemical sampling to improve the understanding of the sources of airborne particles downwind of the SVRA. Scripps' Lynn M. Russell, Distinguished Professor of Atmospheric Chemistry, stated: "The primary purpose of this investigation, which is part of a larger three-year study, is to quantify that portion of measured PM that consists of mineral dust. Mineral dust is generated from the windblown sand dune building process called saltation, and so quantifying the mineral dust portion of PM at the CDF site provides a conservative measure of that portion of PM on the Mesa that could possibly be from

[3] Even SLO APCD which asserts that OHV riding causes greater dust emissions, has failed to establish in any way what percentage of emissions are natural (baseline) and what percentage are caused by OHV riding, or even that the OHV contribution is significant. In any event, courts are not required to defer to an agency conclusion that runs counter to that of other agencies or individuals with specialized expertise in a particular technical area.

the Oceano Dunes SVRA. The mineral dust measure is conservative because saltation occurs in the dunes inside and outside the SVRA, and mineral dust is also derived from agricultural operations and vehicles driving on dirt roads-activities that occur in the region that lies between the SVRA and the Mesa." Key findings of this report:

(a) There is no evidence of mineral dust contributing to all or even the majority of BAM PM10. (This contrasts starkly with what the SLOAPCD has consistently claimed, since 2007, that mineral dust from ODSVRA causes high PM10 concentrations on the Nipomo Mesa.)

(b) On average, just 14% of the PM10 measured at the CDF site consists of mineral dust and 4% consists of sea salt. The remaining 82% of the PM10 is likely from atmospheric water, organic components, ammonium, nitrate, non-sea-salt sulfate, and other semi-volatile chemical species.

(b) Scripps also notes that the particulate sources consisting of sea spray (sea salt) and mineral dust from dune saltation do not contain toxic compounds (such as heavy metals or polycyclic aromatic hydrocarbons) and so associated these particulates with detrimental health effects, as the SLOAPCD has done, may be without foundation.

(c) The association of high PM10 and PM2.5 concentrations with high wind conditions, even when recreational vehicles were limited at Oceano Dunes compared to prior years, indicates that dune-derived mineral dust is more likely derived by natural forces (i.e. wind) rather than human activities.

20. In light of these findings, State Parks should only be using temporary measures rather than permanent dust control measures.

21. The proposed action here de facto amends the uses allowed by the 1982 CDP. In footnote 1 of the staff report, staff writes "Permanent dust control mitigation' consists of permanently eliminating any OHV, street-legal vehicle, camping, and any other non-habitat use in these areas, fencing them off, and restoring them via native dune plant revegetation." The CCC is seeking to approve permanent dust control that will make certain areas previously available for OHV recreation now off-limits. This de facto changes the 1982 CDP as amended.

22. **However, the CCC may not do that without giving notice of a public hearing and an opportunity for public comment on the amendment of CDP 4-82-300 (a violation of the Bagley Keene Act)**. The CCC has failed to give adequate notice or substantially

comply with the notice requirements. This causes prejudice to Friends and the public.

23. On page 2, staff writes "State Parks proposes to amend [the CDP] to allow for permanent dust control mitigation to be applied to an additional 130 dune acres, with 108 of those acres to be located inside the active off-highway vehicle riding and camping area and 22 acres to be located outside of it.2 State Parks also proposes to authorize seasonal sand fencing (i.e., fencing meant to control the movement and buildup of sand) near the Park entrances at West Grand and Pier Avenues annually from March to July as a means to control natural sand drift from the beach to protect against sand driven problems at and near Park entrances."

24. This violates CEQA in two ways. First, staff's analysis fails to analyze the reasonably foreseeable future expansion that is a consequence of the dust control program. Second, the CCC must analyze **now** the environmental impact of "implementation of specific future measures under the CDP at any time." CEQA makes clear that even in a program environmental review, an agency must study environmental impacts on reasonably foreseeable expansions by evaluating the "most probable development pattern." CEQA mandates that an agency undertake an expanded environmental analysis if the "future expansion or other action ... is a reasonably foreseeable consequence of the initial project," and (2) if that "future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396. CEQA review is mandated when it is "indisputable that the future expansion and general type of future use is reasonably foreseeable". APCD's 2017 letter makes clear that 150 acres isn't going to satisfy the APCD. As recently as May 27, 2020, APCD Board member Bruce Gibson pressed staff and SAG to commit that they were still working toward committing 500 acres to dust control. In addition, State Parks is seeking authorization in a habitat conservation plan (HCP) for an additional 319 acres. Other CCC staff reports summarize the modeling by the agencies that concludes that 500-800 acres of dust control will be necessary. A consequence is reasonably foreseeable when the agency subjectively "intends" or "anticipates" the consequence, and the project under review is meant to be the "first step" toward that consequence. *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454 [agency, when evaluating temporary use of interim detention center for 7 years, should have also examined a longer use period in light of evidence that the use could be permanent]; *Laurel Heights, supra*, 47 Cal.3d at p. 398 [agency, when evaluating lease of part of a building, should have also examined potential lease of remaining area]; *Fullerton*, Cal.3d at 797 [agency, when evaluating

secession from existing school district, should have also examined construction of new high school for which succession was "an essential step"]. Here, the CCC fully anticipates that the dust control measures will be expanded given that the APCD already has filed a map showing where it wants dust control, and that far exceeds 150 acres (and State Parks is undergoing a separate permitting process for 319 acres in the HCP, and the CCC has summarized the opinion of the SAG and others that 500-800 acres of dust control is necessary). The APCD has complained bitterly that the dust control measures won't meet the dust reduction standard. The APCD advised the CCC in writing that a "more comprehensive plan based on the CARB modeling must be prepared that demonstrates the ability to meet the requirements of Rule 1001 before APCD can approve it." AR 629-30; see also AR 1215 [". . . APCD expressed its strong concerns regarding the inadequacy of this proposal . . . ."] It is certain that the APCD or its Hearing Board will require an expanded dust control plan. As a result, the CCC is mandated under CEQA to analyze the impacts of an expanded plan (to the maximum extent possible under the expanded authority), and impose mitigation needed to reduce the additional impacts on that expanded area to less than significant.

25. Because the expanded dust control measures are sufficiently certain to come to pass, it doesn't matter that the consequence might be subject to later CEQA review when its contours become more concrete. *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 282. Nor must the extent of the expansion or its impact be "gauged with exactitude." *Terminal Plaza Corp. v. City* (1986) 177 Cal.App.3d 892, 904–905; see also *Stanislaus Audubon Society, Inc. v. County of Stanislaus* (1995) 33 Cal.App.4th 144, 158 [that the exact extent and location of expansion cannot now be determined does not excuse the agency from CEQA analysis]. Thus, the CCC violates CEQA by failing to conduct an adequate environmental analysis of the reasonably foreseeable expanded area that APCD is requesting, and that SAG and others opine is necessary. This constitutes a failure to proceed in the manner required by law. Since the APCD in 2017 issued a letter and a map showing where it thought dust control is needed, and it is vastly larger than 150 acres, the CCC must study the impacts of that reasonably foreseeable expansion NOW, before approving this project. Any effort to side-step this is a violation of CEQA. And that's what the CCC is doing.

26. On page 3, staff writes "With respect to the proposed amendment's consistency with other Coastal Act requirements, similar to the original CDP (including as amended), the proposed amendment at its core is a series of projects that seek to stabilize dune structure. They are designed to protect and restore dune surface and vegetation properties to help reduce emissions, including in areas where OHV riding

activities take place. These areas have been scientifically shown by air quality regulators to be highly emissive as a result of such activity."

27. What this fails to disclose is that the most likely explanation for the higher emission levels in these areas are naturally occurring smaller sand grain sizes that are more easily transported by the high winds near the shore. It also does not adequately consider the findings of the Scripps study released in early November 2021 that show that dust emissions are not primarily mineral dust. The CCC relies only on "preliminary" comments by the APCD and SAG, which is not substantial evidence. (Staff report, p. 29.)[4] It also fails to disclose that added vegetation creates unstable dune areas that collapse or create large depressions on the nonwind side of the vegetation. Failure to disclose these considerations are highly misleading to the public and violate CEQA.

28. 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.[5] the

---

[4] There is also evidence that the APCD and SAG have been improperly deeming as "confidential" data and analysis that is consistent with Scripps' findings. To the extent that Friends is able to obtain this information later, it is admissible under CCP § 1094.5(e) since Friends just learned of the data and has made reasonable attempts to obtain it prior to the December 17, 2021 hearing.

[5] See DEIR, 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 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."]

Scripps study supports this. Such emissions are not "discharged" by a "person" and therefore are not regulated by Rule 402. Yet, State Parks continues to attempt to comply with various edicts under Rule 402 and other rules without ascertaining, or even theorizing, what percentage of emissions are a natural phenomenon. Failure to disclose this information violates CEQA and misleads the public. 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.*"

29. On page 3, staff writes "The project, as conditioned, will benefit dune habitat through dune restoration, and is thus inherently an allowed use within dune ESHA and is designed not to significantly disrupt habitat values, and in fact to enhance such values. Thus, the proposed amendment is consistent with Coastal Act habitat protection policies." Nope. This argument neglects two considerations. First, there is concrete evidence *at Oceano Dunes* that placing dust control measures, i.e., vegetation, on dunes causes significant depressions on the backside of the vegetation due to wind action. This destabilizes the dunes. The CCC ignores this, provides no countervailing evidence, and fails to adequately consider an important relevant factor. In doing so, the CCC violates CEQA and separately violates the Coastal Act by failing to protect against disruption of habitat values and degradation of ESHA. Pub. Res. Code § 30240. Second, the dust control vegetation will cause a substantial increase in WSP and CLT predation due to the expanded cover. This violates CEQA by dismissing a relevant factor, and separately violates the Coastal Act by failing to protect against disruption of habitat values and degradation of ESHA. Id.

30. On pp. 3-4, staff writes "At the same time, similar to the originally approved CDP (including as amended), the proposed additional dust abatement and restoration areas will lead to a decrease of some nearly 109 acres currently used for OHV use and other forms of public recreation. Staff believes allowing for dust control in this area is appropriate and Coastal Act consistent because these areas are being removed from that public recreational use due to problems emanating from the use itself. In such cases, the Act is clear that its requirements for providing maximum public recreational access opportunities must be tempered with the need to "protect ... natural resource areas from overuse", and explicitly requires that its public access provisions "be implemented in a manner that takes into account the need to regulate

the time, place and manner of public access" depending on, among other things, "the capacity of the site to sustain use and at what level of intensity," and the need to potentially limit access "depending on such factors as the fragility of the natural resources in the area" and for "the protection of fragile coastal resources." Wrong. It is inconsistent with the Coastal Act which requires the preservation of public recreation areas. See Pub. Res. Code §§ 30001.5(c) [Legislature finds and declares that a fundamental goal is to "maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone . . . ."]; 30213 [mandates that "lower cost . . . recreational facilities shall be [protected]"; 30525(d) [defines "sensitive resource value" to include public recreational areas where quality of the recreational experience is dependent on the character of the surrounding area]; 30116(b); 30221 [ocean front land suitable for recreational use shall be protected for recreational use]; 30223 [upland areas to support coastal recreational use must be protected]. The CCC makes no effort to condition the project to achieve consistency. Rather, the CCC asserts "staff *believes* it is appropriate and Coastal Act consistent because these areas are being removed from that public recreational use due to problems emanating from the use itself." A "belief" is not "substantial evidence." In addition, that belief is false. The pandemic showed that OHV activity and beach camping is not causing the increased dust emissions, because when that activity stopped, dust emissions DOUBLED. The CCC failed to account for this relevant factor in violation of CEQA and the Coastal Act. There is no evidence that "overuse" is causing dust emissions. Dust emissions do not show a need to protect the resource. The entire purpose of the project is to reduce emissions on areas *surrounding the SVRA*, which is an entirely different consideration.

31. The staff analyzes is further flawed in that it seeks to deem certain areas ESHA unlawfully. In another case decided by the San Luis Obispo County Superior Court on November 15, 2021, the Court determined that the County LCP has "mapped" ESHA. See also, LCP, p. 6-20 ["The ESH areas have been mapped in the LUE and appropriate setbacks from habitat areas have been established."]; and South County Plan, p. 8-10 ["ORV use shall be permitted . . . in identified unfenced vehicular use area."] So the CCC has no authority to designate an area covered by a certified LCP as ESHA. Any effort by the CCC to do so here or previously is void.

32. To the extent that the County LCP purports to attach a map showing any part of the SVRA as ESHA, there are several legal problems. First, there is no evidence that the map currently used was adopted as part of the certified LCP. If it was added subsequently by County staff, which appears to be the case, staff exceeded its authority to purporting to amend the LCP without going through the process required by the

Coastal Act.[6] Second, the text of the LCP makes clear that vast areas that the map asserts are ESHA, were not deemed ESHA in the LCP. That makes the LCP internally inconsistent and thus invalid. A general plan is internally inconsistent when one required element impedes or frustrates another element or when one part of an element contradicts another part of the same element. The LCP text and the map cannot be reconciled. To the extent that the LCP narrative and the map are inconsistent, an alternative argument is that the text overrides the map, and therefore, the area in question is not ESHA.

33. The areas being set aside as dust control are not properly mapped ESHA, not "sensitive resource areas," and are identified in the LCP as areas where OHV is allowed. Thus, the LCP must be amended through the formal process before these areas may be designated as ESHA, and deemed to be dust control areas.

34. The mapping of ESHA can only occur through a legislative act and cannot be changed by the CCC (or the County) without going through the formal LCP amendment process. *Security National Guaranty, Inc. v. California Coastal Com.* (2008) 159 Cal.App.4th 402, 415-416. The area that the CCC declares to be ESHA here has never been *legislatively* determined by the SLO County to be ESHA, and has never gone through the LCP amendment process. A map issued by County staff or the CCC staff is legally insufficient to deem land to be ESHA, and has no legal effect. Simply declaring this area to be ESHA exceeds the authority of County staff and the CCC. [LCP]

35. On page 4, staff writes "Staff believes allowing for dust control in this area is appropriate and Coastal Act consistent because these areas are being removed from that public recreational use due to problems emanating from the use itself. In such cases, the Act is clear that its requirements for providing maximum public recreational access opportunities must be tempered with the need to "protect ... natural resource areas from overuse", and explicitly requires that its public access provisions "be implemented in a manner that takes into account the need to regulate the time, place and manner of public access" depending on, among other things, "the capacity of the site to sustain use and at what level of intensity," and the need to potentially limit access "depending on such factors as the fragility of the natural resources in the area" and for "the protection of fragile coastal resource. [¶] In this case, it is appropriate to implement the proposed dust control measures at the dunes in question to stabilize their structure, restore their surface and vegetation properties, and address

[6] If the map was added through a proper plan amendment, it is still invalid because a general plan amendment must not cause the general plan to become internally inconsistent.

the problems emanating from such use, namely "requirements imposed by an air pollution control district", here the APCD. In addition, all of the proposed restoration is taking place in dune ESHA, and eliminating non-resource- dependent vehicular uses in ESHA (i.e., something the Coastal Act doesn't allow in these dune ESHA areas) and restoring these areas as protected dune habitat (i.e., something the Coastal Act fundamentally requires and supports in these dune ESHA areas) is inherently and clearly consistent with the Coastal Act. And indeed, all of these issues (and others) led the Commission to discontinue OHV, vehicular recreation, and camping uses in ESHA at the Park in three years (by January 1, 2024) pursuant to the recent changes to CDP 4-82-300 enacted by the Commission on March 18, 2021, including in the areas affected by this proposed amendment. In short, the proposed changes are consistent with the Coastal Act's public recreational access provisions that require unsustainable uses and use intensities to be restricted when they lead to resource and other problems. Here, those are air quality problems and APCD requirements." This analysis is faulty.

36. The CCC falsely asserts that restricting public access by foreclosing use of more than 209 acres is allowable under the Coastal Act because it is merely regulating the time, place and manner of access, depending on the "capacity of the site to sustain use and at what level of intensity." State Parks did not propose the dust control program because there is some issue regarding the "capacity of the site to sustain use." There is no evidence whatsoever in the record (much less substantial evidence) that the dust control program is intended to sustain use or capacity. Rather, it is intended to mitigate the effects of dust on surrounding areas.

37. Nor is there any evidence that the dust control measures have been proposed to mitigate the "fragility of the natural resource."

38. The CCC also suggests that the prohibition of riding in these areas is necessary to preserve the resource, but there is nothing in the record to support that contention either. The vegetation islands are likely to create deep depressions (as historically has been the case), which is exactly the opposite of preserving and protecting the dune resource.

39. The CCC wholly ignores the drastic reduction in riding are that has occurred since the 1970s. Figure 4-1 in State Parks' 2017 EIR shows this graphically. The riding area has been reduced by more than 10,000 acres.

40. The CCC miscalculates the effect of reducing the riding area further. The current area available to riding on a seasonal basis is no more than 980 acres. That doesn't account for a reasonably foreseeable further

reduction of between 500 acres and 800 acres of additional dust control, as discussed herein. (See comments by Bruce Gibson from APCD Board and SAG.) There may well be a reduction of 90 percent or more. The CCC failed to consider this analysis in violation of CEQA and the Coastal Act. Thus, all dust control measures may well reduce the riding area by more than 90 percent from the already drastically reduced area.

41. Since 1981, the riding area already has been reduced by 91 percent or more. After a 91 percent reduction, the CCC cannot characterize another 90 percent reduction as "relatively minor."

42. In past analyses, the CCC asserted that under any scenario "over two square miles" will be available for off-road use and that's enough. The CCC deleted that because the new restrictions don't allow two square miles. Even if they did, the CCC fails to consider that those two square miles must service nearly two million visitors per year. Given this level of visitation by off-roaders, and given that this is the single most visited park in the entire California park system (OHV or non-OHV), there is no basis to argue that this reduction is "minor," and it has not been fairly analyzed under CEQA in a way that discloses the true impacts.

43. To add insult to injury, the CCC has also been pushing to reduce visitation to a certain "carrying capacity." The CCC will now argue that the reduced area has a reduced "carrying capacity," and thus visitation must be further restricted.

44. The CCC also appears to ignore State Parks' thresholds of significance analysis without any basis. In determining whether the dust control program would substantially limit, reduce, or interfere with established recreational activity, State Parks considered the following factors: The recreational history of Oceano Dunes SVRA; the number of visitors that could be affected by a change in established recreational opportunities; the extent to which changes to established recreational opportunities would be perceptible to visitors; the ability of visitors to use similar facilities instead of Oceano Dunes SVRA; and the legislative mandate and mission of the OHMVR Division. The CCC fails to refute this standard or this analysis with any evidence.

45. Using this standard, State Parks determined that under either its proposal, or the larger APCD proposal (alternative scenario), "closure of land inside the Oceano Dunes SVRA open riding and camping area" is "a potentially significant impact on OHV recreation." (Draft EIR, p. 4-24.)

46. In compliance with Public Resources Code § 5090.35 regarding monitoring and protecting wildlife resources, State Parks also adopted

SPRs that would avoid or minimize the potential adverse biological resource effects of the Program including: Designing and implementing the Dust Control Program "to disturb and occupy as little land as possible." (Draft EIR, p. 7-17.) The CCC ignores these, and discounts or ignores these findings with little or no data that contradicts State Parks. The CCC also ignores the 2017 EIR finding that the expanded alternative would result in greater impacts to public access and recreational lands, including impacts to the "Sand Highway." (Draft EIR, p. S-9.)

47. The CCC's misanalysis is worsened because it completely rejects State Parks' proposed mitigation for impacts to recreation and public access. See staff report footnote 48. The CCC basically throws out State Parks finding that the significant impacts to this resource can only be mitigated through mitigation measure REC-1 (putting aside State Parks' further conclusion that the mitigation may not be enough to address these impacts). (Draft EIR, pp. 4-24 and 4-25; and Final EIR, pp. 3-1, 3-2 and 3-17.) The CCC is wrong, its finding is not supported by substantial evidence, its actions is a prejudicial abuse of discretion, and it violates the Coastal Act and CEQA.

48. The CCC's conclusions are erroneous, contrary to law, unsupported by substantial evidence, a prejudicial abuse of discretion, ignores basic information and facts, and rejects State Parks' standard of significance without any support or argument.

49. The CCC argues that it's ok to eliminate OHV and beach camping because the area is ESHA. Yet, the CCC admits elsewhere that OHV was allowed in the area in 1982 because all parties recognized that OHV use long-predated the Coastal Act or the designation of ESHA. In addition, the CCC ignores that the activity is lawfully permitted, and the CCC is changing the 1982 permit *without notice and a public hearing on that permit,* violating CEQA and the Coastal Act. Also, ESHA has not been properly designated as detailed above in this comment letter. Further, the LCP expressly allows OHV recreation in the area at issue and there has been no amendment to the LCP to change that. The CCC's action exceeds its authority.

50. On page 4, staff writes "the proposed amendment aligns with the goals of the Commission's Environmental Justice Policy and the Coastal Act's environmental justice objectives by ensuring that Commission CDP actions do not unduly burden particular segments of the populace with adverse environmental outcomes, particularly on issues as important and fundamental to public health and welfare as air quality. Namely, the air quality problems associated with these uses at Oceano Dunes fall predominantly on the adjacent and downwind communities of Oceano and Nipomo, and on the Cities of Santa Maria and

Guadalupe and the Santa Maria Valley more broadly in Santa Barbara County. These communities bear the brunt of Park air quality impacts, thereby raising prototypical environmental justice concerns regarding the benefits and burdens of environmental protection. The proposed amendment is designed to help ease the air quality burdens felt by these communities, and thus it is consistent with Commission and Coastal Act environmental justice objectives and requirements. This is total and utter nonsense, and a complete false narrative.

51. As the pandemic shutdown showed, it isn't OHV "use" that causes the dust emissions. The dust emissions are natural due to wind blowing sand off of sand sheets and dunes. It has how the dunes are formed and shaped. The Scripps report and three-year study proves this.

52. This is not a "prototypical environmental justice concern." The Public Policy Institute of California determined that the average poverty rate for all of California is up to 17.8 percent, meaning that Oceano is only slightly below average. (It also found that the poverty rate in SLO County is 17.2 percent). On average in California Hispanics have a poverty rate of 23.6 percent, meaning Oceano's Hispanic population actually has *less* poverty than the average in the state. Nipomo also has about the same poverty rate overall and in the Hispanic community when compared the average in the state. Also, Hispanics outnumber whites in *all* of California. According to Zip Atlas, Hispanics make up 44 percent of Oceano's population, not 50 percent. So Oceano is *less* Hispanic than the average community in California. In sum, environmental justice concerns don't exist and are not a valid basis for adopting the CDP amendment.

53. Pub. Res. Code § 30107.3(b)(2) states environmental justice includes "The deterrence, reduction, and elimination of pollution burdens for populations and communities experiencing the adverse effects of that pollution, so that the effects of the pollution are not disproportionately borne by those populations and communities." But as the data above shows, the Hispanic community in Oceano is not experiencing adverse effects "disproportionately." The CCC also makes the argument that because Pismo Beach has a larger white population and less poverty, but has less dust emissions that somehow that violates environmental justice. But the CCC answers this itself. Pismo Beach is located "upwind." Nature, not man, dictates where the wind blows. No man located the SVRA there in order to ensure that wind would blow more dust on Nipomo or Oceano. Those communities grew because people wanted to be close to the dunes. To now say that because natural dust emissions are blown over Oceano and Nipomo more, that somehow undermines environmental justice is ridiculous. This isn't like a factory that was located in a way to send smoke over poor, non-white communities. It's a natural process. It existed long before Hispanics

populated the communities. And even now, there are no more Hispanics there than there are whites. The natural dust is affecting whites to the same extent (or more) in Nipomo and Oceano Dunes than it is Hispanics. The proper comparison is not Oceano to Pismo, but how populations within Oceano or within Nipomo are affected, and there is no evidence that Hispanic populations *within* those communities are affected more than whites.

54. The CCC also fails to consider at all another aspect of environmental justice. State Parks commissioned an Economic Impact Analysis Report 2016/17 for Oceano Dunes SVRA. That study showed that 27 percent of the park visitors are Hispanic. The CCC's action here greatly diminishes OHV riding and beach camping opportunities at Oceano Dunes. That will affect the Hispanic community directly. Also, State Parks has identified beach camping on the SVRA as a low-cost visitor accommodation/recreation opportunity that is being severely curtailed by the CCC's action. The CCC failed to consider this relevant factor in violation of the Coastal Act environmental justice provisions.

55. On page 32, the CCC claims that impacts to changes in the long-standing land use of OHV recreation, camping and beach driving do not need to be analyzed under CEQA. Wrong. Under CEQA, "environment" refers to "the physical conditions which exist within the area which will be affected by a proposed project, including **land**, air, water, minerals, flora, fauna...." Pub Res. Code, § 21060.5. (Emphasis added.) Impacts to "land" include the uses of that land, such as a recreational use. "A project will normally have a significant effect on the environment if it will . . . conflict with established recreational . . . uses of the area." *Baldwin v. City of L.A.* (1999) 70 Cal.App.4th 819, 842. The CCC doesn't dispute that OHV recreation and camping have been established uses at Oceano Dunes for decades and decades. The CCC admits that the dust control adversely impacts, if not eliminates, this long-established land use. Previously, the CCC has argued that impacts to an established land use as a recreational area is merely a "social" impact. That argument doesn't work. Friends argues that there has been a long-standing use of the land at the SVRA as a recreational area for OHV recreation, and that physical land use is being eliminated and replaced by a different land use – dust control mitigation. Thus, changes to the recreational land use is an impact that must be evaluated under CEQA. The CCC didn't do that and thus violated CEQA.

56. Special Condition 1(a) violates CEQA and the Coastal Act because the CCC has not evaluated the reasonably foreseeable expansion of dust control measures or the most probable development pattern based on the CCC's, SAG's and Parks' previous determinations that between 500 and 800 acres of dust control are necessary. The expansion will have

significant impacts on coastal recreational areas, lands and uses, and sensitive species.

57. Special Condition 1(b) violates CEQA and the Coastal Act the CCC has not evaluated the reasonably foreseeable expansion of dust control measures or the most probable development pattern based on the CCC's, SAG's and Parks' previous determinations that between 500 and 800 acres of dust control are necessary. The expansion will have significant impacts on coastal recreational areas, lands and uses, and sensitive species.

58. With respect to Special Condition 1(e), State Parks must obtain express consent of the SLO County Board of Supervisors prior to installing any dust control measures on County property, including the La Grande Tract. It has not done so.

59. Special Condition 4 is unlawful and exceeds the CCC's authority under the Coastal Act. Pub. Res. Code § 30620(c)(1) states in relevant part: "The commission may require a reasonable filing fee and the reimbursement of expenses for the processing by the commission of an application for a coastal development permit under this division and, except for local coastal program submittals, for any other filing, including, but not limited to, a request for revocation, categorical exclusion, or boundary adjustment, that is submitted for review by the commission." This statute does not in any way authorize the reimbursement of litigation expenses. The administrative regulations also do not authorize the reimbursement of litigation expenses. Thus, this requirement exceeds the CCC's authority under the Coastal Act. To the extent read otherwise, the administrative regulations exceed the CCC's authority under the Coastal Act.

60. On page 12, the CCC writes: "Two APCD studies have concluded that OHV activity is a major contributing factor to the high particulate matter levels recorded inland of the Park, including on the Nipomo Mesa and the further inland locations described above, and that the primary emissions causes are direct as well as indirect impacts associated with OHV use. These studies show that indirect OHV-related emission impacts stem from de-vegetation, dune structure destabilization, and destruction of the natural dune surface caused by OHV use, which increase the ability of the wind to entrain sand particles from the dunes. The studies also found that direct OHV-related emission impacts, meaning those impacts associated with fuel combustion exhaust or dust raised by vehicles moving over the sand, are a lesser, but not insignificant, contributors to the elevated PM10 levels. Based on the conclusions reached in the studies, and to address these air quality impacts, APCD adopted Rule 1001 in 2011." The California Department of Conservation, California Geological Survey,

in August 2015, determined that smaller sand grain sizes in certain locations within Oceano Dunes SVRA are more easily lifted by wind and are creating greater emissivity at those locations. Locations in the northern section of the SVRA, where there are greater emissions, contain finer grain sand. DRI, State Parks' consultant, agrees that sand size is one of the factors that make it difficult to ascertain to what extent OHV activity is causing dust emissions when compared to natural conditions. DRI states: ". . . emissions of PM10 are higher in the north . . . at least in part, because the sand is finer." DRI also has identified a range of variables other than OHV riding that may explain variances in dust emissions, including the amount and placement of vegetation (momentum partitioning effect, the interruption of fetch, the threshold shear velocity, the percentage of open sand space, wind speed variability at the 10-meter above-ground level, the overall wind speed, topography and the contribution of air borne sea salt and marine aerosolized particulates.) The DRI concludes "critical environmental factors" other than OHV riding "exert considerable control on the dust emission process . . . ." **These findings by experts employed by governmental agencies show that it is not clear at all that OHV is causing dust emissions, or is even a principal or substantial cause. Instead, these dust emissions may well be a natural condition**.[7] The Scripps' three-year study supports the finding that the emissions are a natural condition.

61. During the pandemic, no OHV riding or beach camping was allowed. Conditions returned to "non-riding" area characteristics. Yet, the SVRA had many more violations of state PM10 standards than in previous years (a doubling). So, restoring the dune surface properties had the effect of vastly *increasing* dust emissions. State Parks' approach to dust control mitigation includes creating "roughness" on the open sand sheets. Yet, OHV use serves exactly the same purpose. As of January 1, 2020, State Parks closed a 48-acre "foredune" area entirely to beach camping and OHV riding. Then, due to the pandemic, State Parks closed OHV riding from about March 2020. State Parks expected to see a decrease in dust emissions. That's not what happened. Rather, dust emission violations (of state law) DOUBLED. What has happened from the closure is that the open sand sheets have smoothed over. It is a process of efficiency: The vehicles leave groove

[7] Even SLO APCD which asserts that OHV riding causes greater dust emissions, has failed to establish in any way what percentage of emissions are natural (baseline) and what percentage are caused by OHV riding, or even that the OHV contribution is significant. In any event, courts are not required to defer to an agency conclusion that runs counter to that of other agencies or individuals with specialized expertise in a particular technical area.

paths and tire depressions on the windward side of the dunes. That effectively creates roughness, similar to the hay bales that have been placed in the dunes as mitigation. With vehicles now gone from the dunes, the dunes have been smoothed over by the wind. Now the sand can bounce more easily up the windward side of the dunes, and the dunes themselves can migrate inland more readily, i.e., greater dust emissions. All of this shows that OHV activity is not the cause of significant dust emissions.

62. On page 13, staff describes Rule 1001 and suggests that this amendment is designed to comply with that regulation. The CCC further writes: "State Parks' dust control efforts are meant to be adaptive, acknowledging that the actual measures to be employed on the ground over time would be developed in conjunction with APCD and CARB, including to meet Rule 1001 compliance and objectives. Prior year's dust control measures, and their success or failure at reducing dust, inform future dust control measures. And any such measures coming out of that adaptive effort that are not authorized by this CDP, as described above, require their own environmental analysis and authorization. Such is the nature of this proposed CDP amendment." Yet, Rule 1001 is exclusively implemented through a so-called 2014 "consent decree" agreement. In October 2021, the San Luis Obispo County Superior Court issued a final judgment declaring that agreement void. The CCC's insistence that it is still approving dust control to comply with Rule 1001 is wrong, and misleading. The CCC's failure to alert the public to this violates CEQA. It also violates the Coastal Act since the CCC's claim that the amendment is necessary to comply with Rule 1001 in order to "be consistent with the requirements imposed" by a local air district, Pub. Res. Code § 30253(c), and the *APCD claims it is not enforcing Rule 1001.*

63. At the May 2020 SLO APCD Board meeting, the APCO admitted that the 50 percent reduction goal is unachievable. It is a standard that is impossible to meet. This is highly relevant information that the CCC has failed to disclose to the public in this CEQA review, meaning that the public and full Commission do not have highly relevant information before them when the Commission votes on December 17, 2021. That is a prejudicial abuse of discretion and violates CEQA. The approach is also highly flawed because the Hearing Board does not account for how much of the dust emissions are natural, and would occur regardless whether there is OHV riding and beach camping. Again, the CCC fails to disclose this, meaning that the public and full Commission do not have highly relevant information before them when the Commission votes on December 17, 2021.

64. On pages 15, 16 and 18, staff writes the that it is finding consistency with PRC § 30253(c). But part of what the CCC seeks to do is

determine consistency with SLO APCD *Hearing Board* requirements. Yet, the Hearing Board is an "*independent* body, appointed at-large by the APCD Board." Pub. Res. Code § 30253(c) requires consistency only with the APCD. It does not say there must be consistency with an independent hearing board. Thus, the CCC has exceeded its authority under the Coastal Act by insisting on such consistency.

65. On p. 17, staff writes "The proposed measures are mostly located in areas that are disturbed dune ESHA currently used for vehicular, OHV, camping, and other non-habitat purposes (i.e., 83% of the total proposed)." First, there has been no lawful determination that the area is ESHA. Second, there is no evidence that the CCC's biologist has visited the site more recently than 2 or 3 years ago. Third, even she agrees that "certain types and locations of vegetation can harbor predators with risk to snowy plovers and least terns." Good thing, because there are numerous scientific studies that establish this as fact. Fourth, here is no basis for asserting the risk is small. And there is no evidence that the predator management program will be expanded to the extent necessary to account for increased predators occupying hundreds of acres of new vegetation. Impacts from OHV use have been very small throughout the history of the SVRA. The CCC has failed to make available to the public any communications it has had with FWS regarding this issue. On July 1, 2020, CCC staff provided two emails with the FWS. The FWS email is one paragraph, and contains no data, evidence, or even analysis. The FWS staff person simply says she is "less concerned" about predators. There is nothing to support her analysis, and no evaluation on whether the predator management plan would be expanded to cover an additional 500 or 800 acres of dust control. Further, FWS is in the process of negotiating an HCP with State Parks that includes dust control. So if FWS is communicating final decisions regarding dust control impacts now prior to the completion and approval of an HCP (which FWS has not released to the public yet), then FWS is pre-determining the outcome of the HCP in violation of the ESA and NEPA. The CCC is violating the Coastal Act, CEQA, CESA and the fully protected species statutes by failing to adequately consider the biological opinions of Dr. Ramey and Mr. Kephart, by relying on a FWS pre-decisional communication that is not final and not supported with any analysis, and by failing to include substantial evidence supporting its decision.

66. The CCC improperly abandoned Parks' proposed 1,100-foot setback The CCC merely expanded the project in this way because the APCD demanded it. See AR 1215 [APCD letter: "The proposed setback of 1,100 to 1,500 feet from the shoreline in the La Grande tract should be eliminated because it excludes from dust controls some of the highest particulate emission zones. . . ."] However, the CCC is obligated under CEQA to require feasible mitigation needed to lessen environmental

impacts, even in the face of the APCD's demands. Notably, the state air quality agency involved in this project, CARB, do not insist that the 1,100-foot setback be abandoned. See AR 1224 [CARB reviewed draft EIR], and AR 1377 [only State Parks and CARB reached consensus on the proposed dust control approach; APCD refused to agree and objected to the 100-acre plan]. But the CCC dispensed with the 1,100-foot setback anyway based solely on the APCD demand. In addition, there is no approved HCP for placing dust control measures directly within WSP critical habitat or CLT occupied habitat, or authorizing the hundreds of acres of dust control contemplated. The CCC is relying on Parks' findings regarding no significant impact for a design and mitigation package that was much more robust than what the CCC is requiring. Thus, the CCC's action violates the ESA, CESA, the fully protected species statutes, the Coastal Act, and CEQA.

67. On p. 4, staff writes "the Act is clear that its requirements for providing maximum public recreational access opportunities must be tempered with the need to "protect ... natural resource areas from overuse", and explicitly requires that its public access provisions "be implemented in a manner that takes into account the need to regulate the time, place and manner of public access" depending on, among other things, "the capacity of the site to sustain use and at what level of intensity," and the need to potentially limit access "depending on such factors as the fragility of the natural resources in the area" and for "the protection of fragile coastal resources." There is no evidence of "overuse." Even if dust emissions are caused by OHV recreation, that is not evidence of "overuse." Even if OHV recreation changes the character of the dune formation, that is not evidence of "overuse." There is no evidence that the capacity of the site is being taxed. And there has been no lawful determination of ESHA for this area. The LCP says it's not ESHA.

68. State Parks did not propose the dust control program because there is some issue regarding the "capacity of the site to sustain use." There is no evidence whatsoever in the record (much less substantial evidence) that the dust control program is intended to sustain use or capacity. Rather, it is intended to mitigate the effects of dust on surrounding areas. In addition, the dust emissions are a natural occurrence that are not principally caused by OHV use. Nor is there any evidence that the dust control measures have been proposed to mitigate the "fragility of the natural resource."

69. The CCC also suggests that the prohibition of riding in these areas is necessary to preserve the resource, but there is nothing in the record to support that contention either. The vegetation islands are likely to create deep depressions (as historically has been the case), which is exactly the opposite of preserving and protecting the dune resource.

70. The CCC suggests that OHV riding is not coastal dependent under the Coastal Act. Notably, the CCC does not say that beach camping is not coastal dependent here. The CCC also errs by rejecting State Parks' long-standing determination that OHV riding at this location is a "coastal dependent" resource. As State Parks notes, the Coastal Act defines " 'coastal-dependent development or use' to mean any development or use which requires a site on, or adjacent to, the sea to be able to function at all (PRC § 30101)." Beach- and dune-oriented recreational opportunities like those uniquely available at Oceano Dunes are therefore coastal-dependent recreation activities. This is the only location in California where beach driving, RV beach camping and coastal dune off-recreation is available. The question is whether beach camping, beach driving and OHV riding on beach dunes must be undertaken "adjacent" to the sea in order to be "beach" camping, "beach" driving, and riding on "beach" dunes. Ocean beaches only occur – wait for it – next to oceans. You can't have beach activities without a beach adjacent to the ocean. Seems pretty obvious. This site was selected for these activities because of its unique attributes, i.e., its location next to the sea, the flat area for camping and driving and the adjacent dunes formed as a result of the wind action off the ocean. The CCC suggestion that because SVRAs exist outside of the coastal zone, that shows OHV riding is not dependent on the coast. Yet, you have oil producing facilities outside of the coastal zone, but in certain circumstances those are deemed coastal dependent. See Pub. Res. Code § 30001.2. Here, this is SVRA was established because of its unique characteristics stemming from its immediate adjacency to the ocean. There is literally no other facility like it in California. See State Parks 2017 EIR.

71. On pp. 32-33, staff claims no additional feasible alternatives or feasible mitigation measures available which would substantially lessen any significant adverse environmental effects which approval of the proposed project, as conditioned, would have on the environment within the meaning of CEQA. This finding is wrong.

72. CEQA Guidelines § 15126.6 states that an environmental review shall describe a range of reasonable alternatives to a project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project. The CCC fails to comply with this requirement because it fails to consider meaningfully the alternative proposed by State Parks in the 2017 EIR on the dust control measures, i.e., a dust control measure program that avoids critical and primary habitat for the WSP and CLT by prohibiting dust control measures from the ocean to 1,100 (or 1,500 feet in some places) inland, and that limits dust control to a 690-acre program area. State Parks found that this approach would achieve dust emissions reduction objectives while

still fully protecting the WSP and CLT. That alternative must be considered and analyzed here in order for there to be a reasonable range of alternatives. The requirement that an EIR identify and discuss alternatives stems from the fundamental statutory policy that public agencies should require the implementation of feasible alternatives or mitigation to reduce the project's significant environmental impacts. The alternatives discussed should be ones that offer substantial environmental advantages over the proposed project. Alternatives need be environmentally superior to the project in only some respects, i.e., lessen one or more effects. Alternatives are not required to meet all project objectives. The analysis should focus on alternatives that can eliminate or reduce significant environmental impacts even if they would impede attainment of project objectives to some degree or be more costly. See 14 CCR § 15126.6(b). The CCC failed to do that here.

73. CEQA demands the consideration of a reasonable range of alternatives. The scope of alternatives reviewed must be considered in light of the nature of the project, the project's impacts and other material policies and facts. The range of alternatives examined should be designed to foster informed decision-making and public participation. An agency should not adopt artificially narrow project objectives that preclude consideration of reasonable alternatives for achieving the project's underlying purpose. The alternatives considered should not be artificially limited by omitting information that is highly relevant to the agency's or a responsible agency's permitting function. Also, the CCC may not exclude a discussion of environmentally superior alternatives without providing evidence and analysis showing why it is not available. Courts reject an analysis of alternatives when an alternative that would reduce significant impacts and achieve most project objectives is omitted from the analysis and fails to provide a reasonable explanation. An analysis may not be based on an overly narrow range of alternatives in light of the nature of the project and its environmental effects. The CCC has violated each of these principles here.

74. Although applicants may enter into contracts and agreements prior to the completion of the environmental review process, such contracts or agreements cannot be used to avoid the scrutiny envisioned by CEQA, including considering a reasonable range of alternatives. Agreements between State Parks and SLO APCD (the consent decree agreement and amendments which has been voided by a court) are being used here to avoid CEQA scrutiny, i.e., to avoid exploring the alternative of State Parks' 2017 dust control program. Ditto for the “stipulated” order of abatement.

75. The CCC also violates CEQA by failing to analyze how State Parks' legal authority and obligations under the SVRA Act, requiring maximizing recreational opportunities, squares with the Coastal Act.

76. To the extent that the full Commission changes the project approval at the December 17, 2021 hearing, the CCC violates CEQA by causing an unstable project description.

Sincerely,

/s/

Tom Roth

Cc: Jim Suty, President, Friends of Oceano Dunes

Document submission: USB stick by hand delivery

LAW OFFICES OF THOMAS D. ROTH
1900 S. Norfolk Street, Suite 350
San Mateo, California 94403
(415) 508-5810
Rothlaw1@comcast.net

December 16, 2021

By Email

Jack Ainsworth
Executive Director
California Coastal Commission
455 Market Street
Suite 300
San Francisco, CA 94105

Kevin Kahn
District Supervisor
Central Coast District Office
California Coastal Commission
725 Front Street
Santa Cruz, CA 95060

Mr. Ronnie Glick
Senior Environmental Scientist
California Department Parks and Recreation
Oceano Dunes District
340 James Way, Ste. 270
Pismo Beach, CA 93449

California Coastal Commissioners:
Donne Brownsey, Chair
Caryl Hart, Vice Chair
Dayna Bochco
Sara Aminzadeh
Effie Turnbull-Sanders
Mike Wilson
Katie Rice
Linda Escalante
Meagan Harmon
Roberto Uranga
Carole Groom
455 Market Street, Suite 300
San Francisco, CA 94105

Re: **Supplemental Comments of Friends of Oceano Dunes on the CDP Amendment for the Oceano Dunes Dust Control Project; December 17, 2021 Coastal Commission Agenda Item F12a; Application No. 3-12-050-A3**

Dear state officials:

This firm represents Friends of Oceano Dunes, a California nonprofit watchdog association, which represents approximately 28,000 users of Oceano Dunes SVRA ("Friends").

Friends submits these supplemental comments on the above-referenced agenda item.

The Coastal Commission's proposed approval of the dust control amendment exceeds its authority under the Coastal Act and is *ultra vires*.

The Coastal Act expressly recognizes the need to "rely heavily" on local government "[t]o achieve maximum responsiveness to local conditions, accountability, and public accessibility … ." (Pub. Resources Code, § 30004, subd. (a).) The Act requires local governments to develop local coastal programs, comprised of a land use plan and a set of implementing ordinances designed to promote the act's objectives of protecting the coastline and its resources and of maximizing public access. (Id., §§ 30001.5, 30500–30526.) Once the Coastal Commission certifies a local government's program, and all implementing actions become effective, the commission delegates authority over coastal development permits to the local government. (Pub. Resources Code, §§ 30519, subd. (a), 30600.5, subds. (a), (b), (c).) (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 794.)

Here, the Coastal Commission certified San Luis Obispo County's LCP decades ago, in 1983 and 1984. As such, any permit application for dust control must be filed with the County, not the Coastal Commission. Under the Coastal Act, the Coastal Commission has **no authority** to take any action on the dust control permit amendment now before it. Any action it takes will be void.

Under previous dust control, the Coastal Commission purported to be granting a permit under the auspices of Pub. Res. Code § 30601.3, allowing for "consolidated permits." That statute allows the Commission to process a permit where a permit is required from the local government and the Commission, and "the applicant, the appropriate local government, and the commission, which may agree through its executive director, consent to consolidate the permit action, provided that public participation is not substantially impaired by that review consolidation."

As the attached letter shows, SLO County limited its authorization and consent to a consolidated permit application to dust control required for compliance with San Luis Obispo County Air Pollution Control District Rule 1001. The current dust control permit application is not being undertaken to comply with Rule 1001, and therefore, the conditions for a consolidated permit do not exist.

We know this with certitude for several reasons.

Friends of Oceano Dunes recently prevailed in litigation against the SLO APCD. In that lawsuit, the Court voided the so-called "consent decree agreement" between the SLO APCD and State Parks, and awarded Friends more than $121,000 in attorneys' fees and costs. A copy of the Final Judgment is attached. By its terms, the consent decree agreement was the sole mechanism for implementing Rule 1001. A copy of the agreement is attached.

In that lawsuit, SLO APCD represented to the Court that implementation of Rule 1001 by the consent decree agreement has been rendered moot by the Stipulated Order of Abatement issued by the SLO APCD Hearing Board. SLO APCD further represents that it has *not* enforced Rule 1001 since 2017, and is *not* presently enforcing it. (See Willey Declaration attached.) Therefore, the current dust control application is not filed to comply with Rule 1001. Rather, State Parks filed the application to comply with the Hearing Board's Stipulated Order of Abatement. The County has never consented to a consolidated dust control permit process for compliance with the Stipulated Order of Abatement. Ergo, the Coastal Commission has no jurisdiction to process this dust control permit amendment.

In addition, the County's previous plan for ensuring that public participation is not substantially impaired (a requirement of § 30601.3) is no longer in effect, and was never implemented. The County represented that it would hold a separate public meeting on dust control. That never happened. And further no County public meeting has ever been held on the new dust control being implemented under the Stipulated Order of Abatement. Thus, the County has no evidence that public participation is not being substantially impaired by the consolidated process, and has no plan to remedy it. When the County makes promises to the public and then disregards those promises of public participation, such participation is being substantially impaired in violation of the statute's mandatory requirements.

As a result of the above facts, any vote by the Commission on this matter is null and void and exceeds the agency's authority.

Any future County authorization for the consolidated permit process requires a vote of the Board of Supervisors.[1] Counties only act by a vote of their legislative bodies, and the authority to decide to participate in a consolidated permit has not been delegated to staff by the Board generally, or authorized specifically in this case.

Sincerely,

/s/

Tom Roth

Cc: Jim Suty, President, Friends of Oceano Dunes

[1] State Parks' failure to obtain approval for the consolidated permit approach in 2012 from the County Board of Supervisors is another reason that the Coastal Commission does not have jurisdiction to hear this permit amendment under Pub. Res. Code § 30601.3. County staff had no authority to commit to that process.

JEFFREY A. MINNERY, District Counsel, SBN 232259
MICHELLE L. GEARHART, SBN 236573
ADAMSKI MOROSKI MADDEN CUMBERLAND & GREEN LLP
Mailing Address: Post Office Box 3835
San Luis Obispo, CA 93403-3835
Physical Address: 6633 Bay Laurel Place
Avila Beach, CA 93424
Telephone: (805) 543-0990
Facsimile: (805) 543-0980
Emails: jminnery@ammcglaw.com
gearhart@ammcglaw.com

(Exempt from filing fees per Gov. Code §§ 27383 and 6103)

Attorneys for Respondents and Defendants, SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT and BOARD OF DIRECTORS OF THE SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN LUIS OBISPO

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

Petitioner and Plaintiff,

vs.

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

and

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

Respondents and Defendants.

Case No. 14CV-0514

DECLARATION OF GARY E. WILLEY IN SUPPORT OF RESPONDENTS AND DEFENDANTS SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT AND ITS BOARD OF DIRECTORS' RESPONSIVE BRIEF

Writ Hearing
Date: September 15, 2021
Time: 9:00 a.m.
Dept.: 9

Date Action Filed: October 6, 2014
Assigned to: Hon. Tana L. Coates
Dept.: 9

///

I, Gary E. Willey, declare as follows:

1. I am the Air Pollution Control Officer ("APCO") of the San Luis Obispo County Air Pollution Control District ("District"), the Respondent and Defendant in the above-titled matter. As such, I make this declaration on behalf of said Respondent/Defendant. This declaration is based upon my personal knowledge, and I could and would competently testify thereto if called upon to do so.

2. After a duly noticed public hearing, the Board adopted District Rule 1001 ("Rule 1001") on November 16, 2011, in accordance with its authority under Health and Safety Code sections 40001 and 40702. A true and correct copy of the Staff Report for the public hearing is attached hereto as Exhibit 1.

3. Section C.3 of Rule 1001 comes into play when PM_{10} concentrations at the monitor located within the Dunes exceed the control monitor's 24-hour average by more than 20%. If the exceedance occurs, it means the riding area is highly emissive and State Parks would need to ensure that PM_{10} concentrations do not exceed 55 micrograms per cubic meter (55 $\mu g/m^3$), which represents the state standard of 50 $\mu g/m^3$, plus 5 $\mu g/m^3$ to address monitor accuracies.

4. Historically, the APCO of an air district is afforded broad discretion in the enforcement of federal, state, and local air quality laws, regulations, and orders. This discretion is statutorily derived and long-standing. As the District APCO, I exercise my discretion in any number of ways, including enforcement or revision of compliance dates, issuance of notices of violation, issuance of penalties, issuance of permits, among others.

5. The District has a history of working with a party that is out of compliance and as the APCO, I will consider a number of factors before issuing a notice of violation or assessing a penalty against the party.

6. The consent decree was an agreement between the California Department of Parks and Recreation ("State Parks") and the District, meant to resolve pending litigation between the parties and to affirm the commitment of State Parks to work with the District to attain federal and state ambient air quality.

7. The District last sought to enforce the consent decree agreement with State Parks over four years ago, in July 2017.

8. In September 2017, the District's former APCO, Larry Allen, invoked the jurisdiction of the Hearing Board pursuant to Health & Safety Code section 42451 to abate emissions from Oceano Dunes that had an injurious impact on public health. The result of these hearings was a Stipulated Order of Abatement which superseded and replaced the consent decree agreement as the controlling document for State Parks' mitigation of PM_{10} caused by off-highway vehicle use at Oceano Dunes.

9. The Stipulated Order of Abatement was subsequently amended on November 18, 2019, and filed on December 9, 2019.

10. The Amended Stipulated Order of Abatement sets mandatory compliance dates for specific abatement and dust mitigation measures. The Stipulated Order of Abatement and the Amendment control the dust mitigation timelines and compliance obligations of State Parks with respect to Oceano Dunes. The consent decree agreement has been superseded by the Hearing Board process and the Orders of Abatement as the implementation and enforcement mechanism for PM_{10} emission reductions at Oceano Dunes.

11. The District and State Parks continue to work collaboratively under the Stipulated Order of Abatement toward attainment of state and federal ambient air quality standards at Oceano Dunes.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 18, 2021, in San Luis Obispo County.

GARY E. WILLEY

EXHIBIT 1

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

TO: Board of Directors, Air Pollution Control District

FROM: Larry R. Allen, Air Pollution Control Officer

DATE: November 16, 2011

SUBJECT: Request for Adoption of New Rule 1001, Coastal Dunes Dust Requirements

SUMMARY

Over the past year, the District has worked with the California Department of Parks and Recreation and the County of San Luis Obispo on ways to reduce particulate matter emissions emanating from the Oceano Dunes State Vehicular Recreation Area (ODSVRA). These efforts occurred under two separate Board-approved Memorandums of Agreement; they have so far resulted in three emission reduction pilot projects at Oceano Dunes and a voluntary sand removal program on Pier Avenue. At Board direction, staff concurrently worked to develop a regulation that would codify the emission reduction goals and protect public health. At the previous Board meeting on September 28, 2011, staff presented a concept rule, and public comment and Board direction was given. The attached Rule 1001, *Coastal Dune Dust Control Requirements*, is the result of that direction and responses to comments. Staff requests the Board consider and adopt proposed Rule 1001.

RECOMMENDATION

That your Board approve the attached resolution adopting Rule 1001 and instruct the chairperson to sign.

DISCUSSION

At the September 28, 2011 Board meeting staff presented draft concepts for a rule to reduce fugitive dust emissions from the ODSVRA. At that meeting, the Board directed staff to revise the proposal to include requirements for earlier implementation of baseline air monitoring and submittal of a draft Particulate Matter Reduction Plan (PMRP) for APCD review in advance of the final PMRP; those revisions have been incorporated into the proposed rule. In addition, staff also made modifications to the performance standard based on comments from State Parks, added an exceptional events exemption based on comments from Friends of the Dunes, and added language which clarifies the operator will not be subject to civil penalties if compliance milestones are not met due to delays caused by oversight agencies. In addition, some minor corrections were made to the language.

The following key concepts of the proposed rule remain unchanged from concept rule:

- a comprehensive PMRP requiring APCD approval
- a performance standard for measuring effectiveness and ensuring accountability
- a compliance schedule with phased milestones of progress

In addition to the concept rule hearing, the District held a public workshop on September 7, 2011 where over 70 members of the public attended and were given the opportunity to ask questions and make comments on the concept rule. All comments on the rule received at the workshop and during the formal comment period prior to rule adoption have been addressed in the attached staff report.

In addition to the background information and details of the rule, the Staff report contains the following:

- Consideration of Findings Related to Cost-Effectiveness of Control Measures
- Environmental determinations
- Comments and responses
- Rule Adoption Findings

The large volume of material contained in the attached documents has been organized and tabulated to aid your review of the information. Staff has spent considerable time and effort reviewing and responding to all significant comments on both the proposed rule and the Phase 2 South County PM Study. Considerable criticism and misinformation regarding the Phase 2 study was presented in many comments, requiring staff to review and apply critical thinking to much of the data and analyses that formed the basis for the findings reached in that Study. Through this extensive review process, staff reconfirmed the substantial weight of evidence supporting those findings and the imperative to reduce emissions from the ODSVRA to protect public health.

In addition, numerous comments in the attached documents questioned the authority of the District to adopt this rule. District Counsel has reviewed and responded to all such comments and has confirmed the authority and obligation of the District in that regard.

Staff recommends approval of Proposed Rule 1001.

OTHER AGENCY INVOLVEMENT

The District reviewed the concept rule with State Parks, the Air Resources Board and the County. Staff anticipates working with the Coastal Commission once specific projects are identified.

FINANCIAL CONSIDERATIONS

To date, the District has invested nearly $500,000 in unreimbursed District funds and staff time spent evaluating the air quality impacts of the ODVSRA and potential solutions. It is estimated that investment of significant additional unreimbursed staff time will be also be required after adoption of the rule to assist State Parks in their efforts to comply with the various requirements. Those costs will likely be covered in the annual budget adoption process through reordering District tasks and

priorities to enable existing staff to perform the work. It is likely, however, that up to $50,000 in District funds may be needed to contract for expert assistance in reviewing the monitoring site selection plan and the PMRP. Such funding has not been allocated in the current budget and will likely need to be appropriated from District reserves. The requirement for a permit in July 2013 and future adoption of a fee schedule based on cost recovery will provide a mechanism for reimbursing District costs from that point forward.

State Parks will incur the cost of developing the PMRP and complying with any necessary land use or other regulatory agency permitting requirements; this could range from $200,000 to $400,000 and possibly more, depending on whether development of the plan is outsourced and the type and extent of environmental review required for the various projects proposed in the Plan. In addition, the cost to meet the air monitoring requirement has been estimated at $69,000 per monitoring site, with annual operating and maintenance costs estimated at $15,500 per site.

The costs associated with implementing PMRP projects and programs cannot be estimated because the projects are dependent upon the measures developed by the facility operator; however, such costs could be significant. In the process of developing the PMRP, State Parks will develop the control strategies, rank their effectiveness and propose those measures they deem necessary and feasible. Presumably, the operator will choose those control strategies that can meet the standard at the lowest cost.

AIR POLLUTION CONTROL DISTRICT
COUNTY OF SAN LUIS OBISPO

STAFF REPORT

PROPOSED RULE 1001, COASTAL DUNES DUST CONTROL REQUIREMENTS

PUBLIC HEARING – NOVEMBER 16, 2011

I. INTRODUCTION

At the direction of the Air Pollution Control Board (Board), staff has developed a rule that will require implementation of a particulate matter emission reduction plan and set particulate matter performance standards for the Oceano Dunes State Vehicle Recreation Area (ODSVRA) operated by the California Department of Parks and Recreation's Off Highway Motor Vehicle Recreation Division (State Parks). The proposed Rule 1001 was not part of the State mandated "all feasible measures" requirement for air districts that do meet the State particulate matter standard, Health and Safety Code §39614. Those measures were adopted during a July 2005 public hearing which was as required at that time. Section of the Health and Safety Code §39614 was automatically repealed in January 1, 2011 by the regulation itself when the legislature did not act to extend it.

II. DISCUSSION

Over the past year, the District has worked with the California Department of Parks and Recreation and the County of San Luis Obispo on ways to reduce particulate matter emissions emanating from the ODSVRA. These efforts occurred under two separate Board-approved Memoranda of Agreement and have so far resulted in three emission reduction pilot projects at Oceano Dunes and a voluntary sand removal program on Pier Avenue. At Board direction, staff has also concurrently worked to develop a regulation to ensure efforts to reduce emissions from the dunes meet air quality requirements and protect public health. The attached rule, titled Rule 1001, *Coastal Dune Dust Control Requirements*, is the result of that direction.

At your May 19, 2010 meeting, the Board directed staff to develop a Memorandum of Agreement (MOA) between the District, the California Department of Parks and Recreation (State Parks) and the County of San Luis Obispo (County) to define the requirements and process for developing a Particulate Matter Reduction Plan (PMRP) to address emissions from the ODSVRA. The Board further directed staff at that meeting to concurrently develop a regulation designed to implement and enforce the PMRP.

A comprehensive MOA was adopted by the Board in July 2010 and required formation of two committees tasked with crafting and overseeing the development of the PMRP, with the required plan contents and development process specified in the MOA. The highly structured MOA process, which included periodic outreach to and input from the public, proved valuable and ultimately led to a voluntary sand removal program on Pier Avenue in Oceano and implementation of three emission reduction pilot projects on the dunes. With the rule adoption

process underway and the pilot projects proceeding, the need for such a formal process was greatly diminished. At the March 23, 2011 hearing, your Board adopted a less formal MOA to facilitate continued cooperation and more timely progress by the three agencies.

The pilot projects completed last spring included studies of the effect of native vegetation and artificial surface disturbance on reducing sand transport, which has been identified as the main source of PM emissions from the ODSVRA. The third pilot project examined the difference in emissions potential (emissivity) between a riding area and a non-riding area. The data from those studies will be used to help craft the PMRP required in the dust rule.

Development of Rule 1001 started with the primary goal of ensuring vehicle activity on the dunes does not result in significant increases in downwind ambient PM levels when compared to PM levels downwind of similar dune areas where vehicle activity is not allowed. The rule is written to apply to any coastal dune vehicle activity area (CDVAA) larger than 100 acres. Currently, the ODSVRA is the only known affected location; however, any new vehicle activity area proposed within coastal dunes in San Luis Obispo County would also be subject to the rule.

Following are the key concepts outlined in the rule:

- a comprehensive PMRP requiring APCD approval
- a performance standard for measuring effectiveness and ensuring accountability
- a compliance schedule with phased milestones of progress

Under the rule, the PMRP would be developed by the facility operator (State Parks); it must include all measures necessary to meet the performance standard and also identify the expected emission reduction effectiveness and implementation timeline for each measure. District input would occur during the development process, and APCO approval is required prior to implementation of the plan. Since the rule does not define specific projects to implement, State Parks will need to obtain all the required permits from the appropriate land-use agencies for any PMRP project that may require those approvals. It is unknown if those projects would also trigger requirements under the California Environmental Quality Act (CEQA) and/or the National Environmental Quality Act (NEPA); they could also involve State Coastal Commission review and oversight.

A performance standard in the rule was deemed essential to ensure the PMRP included sufficient measures to reach the emission reduction goals and to provide accountability for measuring their effectiveness. Staff initially considered using sand transport/sand flux measurements as an indirect method of measuring PM reductions achieved by the PMRP; however, this proved difficult to implement and would not ensure the primary air quality goal was met. After considerable research and discussions with experts, it was determined the most appropriate performance standard would be to measure ambient PM10 concentrations downwind of the ODSVRA and compare them to a "control" site located downwind of a similar dune area where vehicle activity is not allowed. The control site would be chosen to best match the topography and meteorological conditions of the ODSVRA site. The equipment specifications and site locations of the PM10 and meteorological monitoring network needed to perform these comparison measurements would be identified in the PMRP and require District approval.

The compliance milestones contained in the rule represent staff's estimate of the minimum time necessary to craft a comprehensive PMRP; obtain necessary permits and begin implementing the

proposed control measures and PM monitoring; and for the measures (like re-vegetation) to become effective in reducing emissions. The milestones also assume some PMRP projects may trigger CEQA/NEPA review and/or result in Coastal Commission review before they can be implemented.

Should State Parks fail to meet any of the rule requirements, fines could be levied under the California Health and Safety Code, subject to the limitation for delays caused by regulatory or other oversight agencies. As an alternative, or in addition to the appropriate penalty, settlements could include requirements for additional corrective measures if deemed necessary. Penalty fees collected could also be used to implement appropriate offsite mitigation or other programs to benefit impacted communities, such as health awareness programs.

The District held a public workshop on September 7, 2011, where over 70 members of the public attended and were given the opportunity to ask questions and make comments on the concept rule. Additionally, the concept rule was presented to your Board at the September 28, 2011 meeting, where public comment and further Board direction were given. Several changes were made to the proposed rule based upon Board direction, focusing on earlier implementation of the monitoring requirement and adding a requirement for submittal of a draft PMRP for APCD review in advance of the final Plan.

In addition, a change to the performance standard and the addition of conditional relief language related to milestone compliance has been proposed in the attached rule based on comments from State Parks, which are also explained below in section III.

III. RULE DISCUSSION

The proposed rule is shown in Attachment 1. Shown below are key sections of the Rule and an explanation of that section in italics.

C. GENERAL REQUIREMENTS

1. The CDVAA operator shall develop and implement an APCO-approved Temporary Baseline Monitoring Program to determine existing PM10 concentrations at the APCO-approved CDVAA and Control Site Monitor locations prior to implementation of the PMRP emission reduction strategies and monitoring program.

This section is based on Board direction to start monitoring before PMRP projects begin.

2. The operator of a CDVAA shall prepare and implement an APCO-approved Particulate Matter Reduction Plan (PMRP) to minimize PM_{10} emissions for the area under the control of a CDVAA operator. The PMRP shall contain measures that meet the performance requirements in C.3 and include:

   a. An APCO-approved PM_{10} monitoring network containing at least one CDVAA Monitor and at least one Control Site Monitor.
   b. A description of all PM_{10} control measures that will be implemented to reduce PM_{10} emissions to comply with this rule, including the expected

emission reduction effectiveness and implementation timeline for each measure.

c. A Track-Out Prevention Program that does not allow track-out of sand to extend 25 feet or more in length onto paved public roads and that requires track-out to be removed from pavement according to an APCO-approved method and schedule.

This section establishes the PMRP and monitoring requirements and specifies that a Pier Avenue track-out must be part of the PMRP.

3. The CDVAA operator shall ensure that if the 24-hr average PM_{10} concentration at the CDVAA Monitor is more than 20% above the 24-hr average PM_{10} concentration at the Control Site Monitor, the 24-hr average PM_{10} concentration at the CDVAA Monitor shall not exceed 55 ug/m3.

This section is the performance standard used to ensure the PMRP measures reduce the dust emissions from the SVRA to levels similar to those at comparable control sites where no vehicle activity occurs. It is based on close compliance with the State 24-hour average PM_{10} standard of 50 ug/m3, but allows for a margin of error.

The first version of this performance standard contained in the concept rule specified that, if the 24-hour average PM_{10} concentration at the Coastal Dunes Vehicle Activity Area (CDVAA) monitor exceeds 55 ug/m3, it cannot also be more than 10 ug/m3 above the PM10 concentration measured at the control site monitor for the same period. The 55 ug/m3 compliance threshold is based on the state PM_{10} standard plus a 5 ug/m3 buffer for equipment tolerances; the 10 ug/m3 violation trigger was proposed to account for known monitoring equipment tolerances as well as possible variations in upwind topography and meteorological conditions.

State Parks has requested the 10 ug/m3 difference between monitoring sites be changed to a 20% difference. Staff evaluated the request and determined it could be granted without weakening the enforceability of the Rule. The applied result of this proposed change is insignificant at lower PM_{10} levels but allows for a greater margin between the sites as concentrations increase, as shown in the following example: if the 24-hour PM_{10} concentration at the CDVVA monitor was 56 ug/m3, a violation would occur if the control site monitor was 44 ug/m3 (-21%) or less; under the previously proposed 10 ug/m3 margin, a violation would occur if control site monitor was 45 ug/m3 or less. In contrast, if the CDVAA 24-hour PM_{10} concentration was 150 ug/m3, the 20% violation threshold would allow a 30 ug/m3 difference between the monitors compared to the previous 10 ug/m3. Staff analyzed the Phase II study data using the 20% value and found it would not significantly change enforcement of the rule or the level of emission reductions needed to meet the performance standard.

4. The CDVAA operator shall ensure they obtain all required permits from the appropriate land-use agencies and other affected governmental agencies, and that the requirements of the California Environmental Quality Act (CEQA) and the National Environmental Quality Act (NEPA) are satisfied to the extent any proposed measures identified in the PMRP require environmental review.

This requirement ensures any project proposed in the PMRP or Temporary Baseline Monitoring Program complies with CEQA and NEPA requirements, as well as the requirements of any other regulatory or oversight agency.

5. All facilities subject to this rule shall obtain a Permit to Operate from the Air Pollution Control District by the time specified in the Compliance Schedule.

This section was added to clarify a requirement for an operating permit. Currently, no specific fee category exists for this type of operation. Prior to adopting a new fee category, the District Board is required to hold two hearings to receive public comment on the proposed fee.

D. EXEMPTIONS

1. Section C.3 shall not apply during days that have been declared an exceptional event by the APCO and where United States Environmental Protection Agency has not denied the exceptional event.

This exemption is consistent with Federal and District policies and was added to explicitly state that monitoring readings during exceptional events such as wildfires are not considered rule violations; it also addresses a comment from Blue Scape Environmental.

F. COMPLIANCE SCHEDULE:

1. The CDVAA operator shall comply with the following compliance schedule:

   a. By February 28, 2012, submit a draft Monitoring Site Selection Plan for APCO approval.

   Requires drafting and submitting this plan proposal within 3½ months of Board approval.

   b. By May 31, 2012, submit a draft PMRP for APCO review.

   Requires drafting and submitting the draft PMRP within 6½ months of Board approval.

   c. By November 30, 2012, submit complete applications to the appropriate agencies for all PMRP projects that require regulatory approval.

   Allows an additional 6 months for further consultation with oversight agencies and application filings if necessary.

   d. By February 28, 2013, obtain APCO approval for a Temporary CDVAA and Control Site Baseline Monitoring Program and begin baseline monitoring.

Allows 12 months after submittal of the Monitoring Site Selection Plan to select sites, obtain oversight agency approval and install a monitoring system.

e. By May 31, 2013, complete all environmental review requirements and obtain land use agency approval of all proposed PMRP projects.

Allows 12 months after submittal of the draft PMRP to obtain oversight agency approval of the PMRP projects, including any environmental reviews.

f. By July 31, 2013, obtain APCO approval of the PMRP, begin implementation of the PMRP Monitoring Program, and apply for a Permit to Operate.

Allows 2 months to finalize the PMRP based on oversight agency conditions and obtain APCO approval.

g. By May 31, 2015, the requirements of Section C.3 shall apply.

Allows 20 months for PMRP projects to reduce emissions to meet the performance standard.

2. With the exception of section F.1.g, the CDVAA operator will not be subject to civil penalties for failure to meet any timeframe set forth in section F.1 caused solely by delays from regulatory or other oversight agencies required to consider and approve operator's PMRP or any part thereof.

All timelines were drafted to be the most expeditious possible given the expected time requirements. Section F.2 was added to explicitly state the APCD intention not to unfairly penalize the Operator for delays reasonably beyond the Operator's control.

IV. AFFECTED SOURCES

The only known facility that would be subject to Rule 1001at this time is the ODSVRA.

V. CONSIDERATION OF FINDINGS RELATED TO COST-EFFECTIVENESS OF CONTROL MEASURES

Pursuant to Health and Safety Code sections 40703 and 40922, the District has considered the cost effectiveness of the control measures required as a result of Rule 1001. District studies have concluded that the operations subject to this regulation are the only known emission sources that could be controlled and that would result in improvement to the ambient air quality at the impacted locations. The regulation's PMRP presents a best management practices approach that does not require specific projects or controls, but does require the Plan to contain emission reduction strategies sufficient to reduce ambient PM10 concentrations to levels comparable to natural background. Based upon ambient air monitoring data collected during the Phase 2 South County PM Study, achieving this goal is estimated to reduce exceedances of the State PM10 standard at the District's CDF monitoring site by about 75% compared to existing conditions.

When the PMRP is implemented Staff expects significant emission reductions. The mass of the reductions will be dependent on the types of measures selected by the facility operator and cannot be reasonably estimated. Staff also expects an economic benefit from the reduction of heath care costs associated with a reduction in ambient particulate matter concentrations, but again those cannot be reasonably calculated. A traditional cost effectiveness analysis to evaluate the cost per ton of emissions reduced is not applicable in this instance because the individual strategies and their emission reduction effectiveness is currently unknown, and will depend entirely on the measures proposed by the applicant. In the process of developing the PMRP, the affected source will develop the control strategies, rank their effectiveness and propose those measures they deem necessary and feasible, subject to APCD approval. Presumably, the operator will choose those control strategies that can meet the standard at the lowest cost.

The cost of developing the PMRP and complying with any necessary land use or other regulatory agency permitting requirements could range from $200,000 to $400,000 and possibly more, depending on whether development of the plan is outsourced and the type and extent of environmental review required for the various projects proposed in the Plan. Although significant costs associated with implementing proposed PMRP projects and programs are possible, those costs cannot be reasonably estimated because the projects of the PMRP are dependent upon the measures developed by the facility operator and are unknown. The cost for air monitoring has been estimated in Attachment 3, Monitoring Cost Estimate Spreadsheet. The cost of equipment purchase and installation per monitoring site is estimated at approximately $69,000, with annual operating and maintenance costs estimated at $15,500 per site. If utility based electrical power is unavailable as a selected site location, additional costs would be incurred based on distance to the nearest utility line or other power generation system.

VI. ENVIRONMENTAL DETERMINATIONS

The District is the regulatory and public agency with the principal responsibility for approving and implementing the proposed new Rule 1001. Clean air is a valuable and essential natural resource. Proposed new Rule 1001 will serve to aid in the restoration of this natural resource by reducing the amount of air pollutants introduced into the ambient air. The proposed rule will also serve to enhance and protect the environment by controlling and decreasing sources of air pollutants. Therefore, the adoption of proposed new Rule 1001 is not a "project" within the meaning of Section 21065 of the California Environmental Quality Act (CEQA).

The proposed rule simply requires a CDVAA operator to develop and implement a Temporary Baseline Monitoring Program and Particulate Matter Reduction Plan (PMRP), subject to review and approval by the APCD and further subject to all required land-use and other environmental approvals for the proposed PMRP, including review as required under CEQA and NEPA, to provide for particulate matter control measures to reduce PM emissions to comply with the rule. After significant staff analysis, there is no substantial evidence that implementation of the proposed rule itself will have a significant adverse effect on the environment, including indirect effects on the environment. Any potential environmental effects, whether direct or indirect, will depend entirely on the particular measures the CDVAA operator chooses to propose as part of the PMRP

Even assuming the rule were somehow considered to be a project under the California Environmental Quality Act (CEQA), it would be categorically exempt under CEQA as "Class 7 and 8" exemptions under Public Resources Code sections 20183 and 21084, and sections 15307 and 15308 (Actions by Regulatory Agencies for Protection of Natural Resources and the Environment) of the CEQA Guidelines (California Code of Regulations, Title 14, Division 6, Chapter 3. The categorical exemptions provide as follows:

> ***Section 15307. Actions by Regulatory Agencies for Protection of Natural Resources.*** *Class 7 consists of actions taken by regulatory agencies as authorized by state law or local ordinance to assure the maintenance, restoration, or enhancement of a natural resource where the regulatory process involves procedures for protection of the environment. Examples include but are not limited to wildlife preservation activities of the State Department of Fish and Game. Construction activities are not included in this exemption.*
>
> ***Section 15308. Actions by Regulatory Agencies for Protection of the Environment.*** *Class 8 consists of actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.*

Public Resources Code Section 21159 Analysis

As identified above, this regulation does not constitute a project, or is categorically exempt under CEQA. However, Public Resources Code Section 21159 does require an abbreviated environmental assessment, as set forth below:

> ***21159.*** *(a) An agency listed in Section 21159.4 shall perform, at the time of the adoption of a rule or regulation requiring the installation of pollution control equipment, or a performance standard or treatment requirement, an environmental analysis of the reasonably foreseeable methods of compliance. In the preparation of this analysis, the agency may utilize numerical ranges or averages where specific data is not available; however, the agency shall not be required to engage in speculation or conjecture. The environmental analysis shall, at minimum, include all of the following:*
> *(1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance.*
> *(2) An analysis of reasonably foreseeable feasible mitigation measures.*
> *(3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation.*
> *(b) The preparation of an environmental impact report at the time of adopting a rule or regulation pursuant to this division shall be deemed to satisfy the requirements of this section.*
> *(c) The environmental analysis shall take into account a reasonable range of environmental, economic, and technical factors, population and geographic areas, and specific sites.*
> *(d) Nothing in this section shall require the agency to conduct a project level analysis.*
> *(e) For purposes of this article, the term "performance standard" includes process or raw material changes or product reformulation.*

(f) This section is not intended, and may not be used, to delay the adoption of any rule or regulation for which an analysis is required to be performed pursuant to this section.

Environmental Analysis of Reasonably Foreseeable Methods of Compliance
The primary components of the rule that have any potential to cause an environmental impact are the requirement to develop and implement a Particulate Matter Reduction Plan (PMRP), and the requirement to establish and conduct air monitoring downwind of the riding area and a comparable non-riding area.

Particulate Matter Reduction Plan: There are numerous potential emission reduction measures that could be considered for inclusion in the PMRP, including installation of sand fencing; adding artificial roughness elements to the sand surface; planting vegetation in the dunes; re-establishment of foredunes; planting a wind row of trees; reducing vehicle access or activity; and various other possible PM emission reduction measures used successfully in other areas. A few of these potential measures were recently studied as pilot projects in an effort partially funded by State Parks.

Implementation of one or more of these measures may have the potential to cause an environmental impact. However, the rule is not prescriptive regarding these or any other measures that could be chosen for inclusion in the Plan. Thus, which measures will be selected, and how and where they will be implemented, is currently unknown. As a result, it is not possible to evaluate the potential environmental impacts of implementing the PMRP without engaging in significant speculation and conjecture, which Section 21159 expressly provides the District is not required to do. However, the rule requires compliance with CEQA prior to final approval of the PMRP to ensure any potential environmental impacts are evaluated once specific projects are defined.

Establishment of an Air Monitoring Network: The requirement to establish and maintain a minimum of two air monitoring sites also contains a significant level of uncertainty regarding the number and potential location of such monitoring sites; it is currently unknown if the monitoring sites will be located within or outside the SVRA. Nonetheless, some of the likely siting requirements are known, such as the need for electrical power; possible need for minor grading to install a small shed to house the monitoring equipment; and the need for vehicle access to each monitoring site.

There are a number of possible configurations for the equipment and structures needed to comply with the monitoring requirement in the rule. The configuration with the potential largest footprint would likely consist of a mobile trailer no larger than 8 feet by 10 feet to house a particulate sampler and related electronic equipment; a narrow, ten meter aluminum tower would likely be attached to the side of the trailer, with a weather vane and wind anemometer mounted on top of the tower. Data from the monitoring and meteorological equipment would likely be electronically telemetered via cell phone or land line to the APCD and the affected facility offices. Each site would likely need to be visited at least once every other week to perform equipment calibrations and other routine maintenance.

The rule requires that at least one monitoring site be located downwind of the riding area in a location designed to capture peak particulate levels generated by that area, and at least one monitoring site be located in a comparable area downwind of a non-riding area. Research will need to be conducted by the affected facility to determine the most appropriate locations for each

site. Without knowing the potential locations of those sites, it is not possible to evaluate their potential environmental impacts without engaging in significant speculation and conjecture. However, the rule requires compliance with CEQA prior to final approval of the monitoring plan to ensure any potential environmental impacts are evaluated once specific monitoring site locations are defined.

Analysis of Reasonably Foreseeable Feasible Mitigation Measures
Since it is not possible to identify any reasonably foreseeable environmental impacts from this rule, it is not possible to identify feasible mitigation measures.

Analysis of Reasonably Foreseeable Alternative Means of Compliance with the Rule
A reasonably foreseeable alternative means of complying with the PMRP requirement to develop and implement PM reduction strategies would be to reduce or eliminate vehicle activity on the dunes. Neither of these alternatives would result in significant environmental impacts.

A reasonably foreseeable alternative means of complying with the air monitoring requirements in the rule would be to utilize an existing APCD monitoring site downwind of the riding area to meet that portion of the monitoring requirement. Such use would not result in significant environmental impacts as those sites are already established and in use.

VII. PUBLIC AND AGENCY COMMENTS

Comments and responses are found in Attachment 2.

VIII. RULE ADOPTION FINDINGS

As required by Section 40727 of the California Health & Safety Code (H&SC), the District Board shall make findings of necessity, authority, clarity, consistency, non-duplication, and reference.

A. Necessity: The revisions are necessary to achieve the State PM10 ambient air quality standard.

B. Authority: Authority is given to the District to adopt rules pursuant to H&SC Sections 40001 and 40702.

C. Clarity: The proposed rule has been found by the District to be written in clear English and to be as easily understood as possible.

D. Consistency: The District has found the proposed rule consistent with existing District Rules and Regulations, existing state and federal guidelines, and similar Districts in the area.

E. Non-duplication: The revision does not result in a duplication of federal or state statutes or regulations where the requirements of any such statutes or regulations would be the same.

F. Reference: By adoption of the proposed rule the District is implementing, and making specific by adoption, applicable provisions of the state Health and Safety Code.

IX. CONCLUSION AND RECOMMENDATION

Staff recommends the adoption of proposed Rule 1001, Coastal Dunes Dust Control Requirements

X. ATTACHMENTS

Attachment 1, Proposed Rule 1001, Coastal Dunes Dust Control Requirements.

Attachment 2, Agency and Public Comments and Staff Responses.

Attachment 3, Monitoring Cost Estimate Spreadsheet

ATTACHMENT 1

RULE 1001 Coastal Dunes Dust Control Requirements *(adopted (date of Adoption)*

A. APPLICABILITY. The provisions of this Rule shall apply to any operator of a coastal dune vehicle activity area, as defined by this Regulation, which is greater than 100 acres in size.

B. DEFINITIONS. For the purpose of this Rule, the following definitions shall apply:

1. "APCD": The San Luis Obispo County Air Pollution Control District.

2. "APCO": The San Luis Obispo County Air Pollution Control Officer.

3. "Coastal Dune": means sand and/or gravel deposits within a marine beach system, including, but not limited to, beach berms, fore dunes, dune ridges, back dunes and other sand and/or gravel areas deposited by wave or wind action. Coastal sand dune systems may extend into coastal wetlands.

4. "Coastal Dune Vehicle Activity Area (CDVAA)": Any area within 1.5 miles of the mean high tide line where public access to coastal dunes is allowed for vehicle activity.

5. "CDVAA Monitor": An APCO-approved monitoring site or sites designed to measure the maximum 24-hour average PM_{10} concentrations directly downwind from the vehicle riding areas at the CDVAA. At a minimum, the monitoring site shall be equipped with an APCO-approved Federal Equivalent Method (FEM) PM_{10} monitor capable of measuring hourly PM_{10} concentrations continuously on a daily basis, and an APCO-approved wind speed and wind direction monitoring system.

6. "CDVAA Operator": Any individual, public or private corporation, partnership, association, firm, trust, estate, municipality, or any other legal entity whatsoever which is recognized by law as the subject of rights and duties, who is responsible for the daily management of a CDVAA.

7. "Control Site Monitor": An APCO-approved monitoring site or sites designed to measure the maximum 24-hour average PM_{10} concentrations directly downwind from a coastal dune area comparable to the CDVAA but where vehicle activity has been prohibited. At a minimum, the monitoring site shall be equipped with an APCO-approved Federal Equivalent Method (FEM) PM_{10} monitor capable of measuring hourly PM_{10} concentrations continuously on a daily basis, and an APCO-approved wind speed and wind direction monitoring system.

8. "Designated Representative": The agent for a person, corporation or agency. The designated representative shall be responsible for and have the full authority to implement control measures on behalf of the person, corporation or agency.

9. "Monitoring Site Selection Plan": A document providing a detailed description of the scientific approach, technical methods, criteria and timeline proposed to identify, evaluate and select appropriate locations for siting the temporary and long-term CDVAA and control site monitors.

10. "Paved Roads": An improved street, highway, alley or public way that is covered by concrete, asphaltic concrete, or asphalt.

11. "PM_{10}": Particulate matter with an aerodynamic diameter smaller than or equal to a nominal 10 microns as measured by the applicable State and Federal reference test methods.

12. "PMRP": Particulate Matter Reduction Plan.

13. "PMRP Monitoring Program": The APCO approved monitoring program contained in the PMRP that includes a detailed description of the monitoring locations; sampling methods and equipment; operational and maintenance policies and procedures; data handling, storage and retrieval methods; quality control and quality assurance procedures; and related information needed to define how the CDVAA and Control Site Monitors will be sited, operated and maintained to determine compliance with section C.3.

14. "Temporary Baseline Monitoring Program": A temporary monitoring program designed to determine baseline PM10 concentrations at the APCO-approved CDVAA and Control Site Monitor locations prior to implementation of the PMRP emission reduction strategies and monitoring program. The program shall include a detailed description of the monitoring locations; sampling methods and equipment; operational and maintenance policies and procedures; data handling, storage and retrieval methods; quality control and quality assurance procedures; and related information needed to define how the temporary monitors will be sited, operated and maintained to provide the required baseline data. The temporary monitors shall meet the specifications of the CDVAA and Control Site Monitors unless otherwise specified by the APCO.

15. "Track-Out": Sand or soil that adhere to and/or agglomerate on the exterior surfaces of motor vehicles and/or equipment (including tires) that may then fall onto any highway or street as described in California Vehicle Code Section 23113 and California Water Code 13304.

16. "Track-Out Prevention Device": A gravel pad, grizzly, rumble strip, wheel wash system, or a paved area, located at the point of intersection of an unpaved area and a paved road that is designed to prevent or control track-out.

17. "Vehicle": Any self-propelled conveyance, including, but not limited to, off-road or all-terrain equipment, trucks, cars, motorcycles, motorbikes, or motor buggies.

18. "24-Hour Average PM_{10} Concentration": The value obtained by adding the hourly PM_{10} concentrations measured during a calendar 24-hour period from midnight to midnight, and dividing by 24.

C. GENERAL REQUIREMENTS

6. The CDVAA operator shall develop and implement an APCO-approved Temporary Baseline Monitoring Program to determine existing PM10 concentrations at the APCO-approved CDVAA and Control Site Monitor locations prior to implementation of the PMRP emission reduction strategies and monitoring program.

7. The operator of a CDVAA shall prepare and implement an APCO-approved Particulate Matter Reduction Plan (PMRP) to minimize PM_{10} emissions for the area under the control of a CDVAA operator. The PMRP shall contain measures that meet the performance requirements in C.3 and include:

   a. An APCO-approved PM_{10} monitoring network containing at least one CDVAA Monitor and at least one Control Site Monitor.
   b. A description of all PM_{10} control measures that will be implemented to reduce PM_{10} emissions to comply with this rule, including the expected emission reduction effectiveness and implementation timeline for each measure.
   c. A Track-Out Prevention Program that does not allow track-out of sand to extend 25 feet or more in length onto paved public roads and that requires track-out to be removed from pavement according to an APCO-approved method and schedule.

8. The CDVAA operator shall ensure that if the 24-hr average PM_{10} concentration at the CDVAA Monitor is more than 20% above the 24-hr average PM_{10} concentration at the Control Site Monitor, the 24-hr average PM_{10} concentration at the CDVAA Monitor shall not exceed 55 ug/m3.

9. The CDVAA operator shall ensure they obtain all required permits from the appropriate land-use agencies and other affected governmental agencies, and that the requirements of the California Environmental Quality Act (CEQA) and the National Environmental Quality Act (NEPA) are satisfied to the extent any proposed measures identified in the PMRP or Temporary Baseline Monitoring Program require environmental review.

10. All facilities subject to this rule shall obtain a Permit to Operate from the Air Pollution Control District by the time specified in the Compliance Schedule.

D. Exemptions

1. Section C.3 shall not apply during days that have been declared an exceptional event by the APCO and where the United States Environmental Protection Agency has not denied the exceptional event.

E. RECORDKEEPING REQUIREMENTS: The CDVAA operator subject to the requirements of this Rule shall compile and retain records as required in the APCO approved PMRP. Records shall be maintained and be readily accessible for two years after the date of each entry and shall be provided to the APCD upon request.

F. COMPLIANCE SCHEDULE:

1. The CDVAA operator shall comply with the following compliance schedule:

   a. By February 28, 2012, submit a draft Monitoring Site Selection Plan for APCO approval.
   b. By May 31, 2012, submit a draft PMRP for APCO review.
   c. By November 30, 2012, submit complete applications to the appropriate agencies for all PMRP projects that require regulatory approval.
   d. By February 28, 2013, obtain APCO approval for a Temporary CDVAA and Control Site Baseline Monitoring Program and begin baseline monitoring.
   e. By May 31, 2013, complete all environmental review requirements and obtain land use agency approval of all proposed PMRP projects.
   f. By July 31, 2013, obtain APCO approval of the PMRP, begin implementation of the PMRP Monitoring Program, and apply for a Permit to Operate.
   g. By May 31, 2015, the requirements of Section C.3 shall apply.

2. With the exception of section F.1.g, the CDVAA operator will not be subject to civil penalties for failure to meet any timeframe set forth in section F.1 caused solely by delays from regulatory or other oversight agencies required to consider and approve the operator's PMRP or any part thereof.

THOMAS D. ROTH, SBN 208601
LAW OFFICES OF THOMAS D. ROTH
1900 S. NORFOLK STREET, SUITE 350
SAN MATEO, CA 94403
TELEPHONE:(415) 508-5810
EMAIL: ROTHLAW1@COMCAST.NET

Attorney for Petitioner and Plaintiff
FRIENDS OF OCEANO DUNES

SUPERIOR COURT OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN LUIS OBISPO

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

Petitioner and Plaintiff,

vs.

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

and

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

Respondents and Defendants

Case No.: 14cv-0514

~~[PROPOSED]~~ FINAL JUDGMENT GRANTING PETITION FOR WRIT OF MANDATE AGAINST SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT

Assigned to the
Hon. Tana L. Coates, Dept. 9

CCP § 1085 Writ Hearing:
Date: September 15, 2021
Time: 9:00 a.m.
Dept. 9

The Court, having reviewed the record in this matter and heard oral argument, and the briefs and papers submitted by counsel; the matter having been submitted for decision; and the Court having issued an October 7, 2021 written ruling in favor of Petitioner Friends, grants, in part, Friends' Petition for a Writ of Mandate, and hereby issues this Final Judgment and directs that a Writ of Mandate issue against the San Luis Obispo County Air Pollution Control District:

ACCORDINGLY, IT IS SO ORDERED, ADJUDGED AND DECREED THAT PETITIONER FRIENDS OF OCEANO DUNES' PETITION FOR WRIT OF MANDATE BE GRANTED AS FOLLOWS:

1. Judgment shall be entered in favor of Petitioner Friends of Oceano Dunes in accordance with this Court's October 7, 2021 written ruling which is attached hereto as Ex. A.

2. A Writ of Mandate under CCP § 1085 shall issue from this Court to Respondent, San Luis Obispo County Air Pollution Control District and its Board of Directors (the "Air District"), directing and finding the 2014 intergovernmental agreement concerning Rule 1001 by and between the Air District and Parks, as amended, to be void as against public policy, as detailed in the attached written ruling, and, as such, set aside.

3. Petitioner Friends of Oceano Dunes, as prevailing party, is awarded costs of suit.

4. Petitioner Friends of Oceano Dunes may file a motion for attorney's fees in accordance with the ordinary procedures and the Court reserves jurisdiction to hear that motion.

IT IS SO ORDERED.

Dated: 10/27/2021

Hon. Tana L. Coates
Judge of the Superior Court

EXHIBIT A

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN LUIS OBISPO

FRIENDS OF OCEANO DUNES, INC., a California not-for profit corporation, Petitioner and Plaintiff, v. SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT, a local air pollution control district; THE BOARD OF DIRECTORS OF THE SAN LUIS OBISPO COUNTY AIR POLLUTION CONTROL DISTRICT, the District's governing body, and DOES 1 to 50, Inclusive, And CALIFORNIA DEPARTMENT OF PARKS AND RECREATION, a department of the State of California, and DOES 1-50, inclusive, Respondent and Defendant.	Case No.: 14CV-0514 **RULING ON PETITION FOR WRIT OF MANDATE**

The Petition for Writ of Mandate came on for hearing on September 15, 2021. Appearing before the Court were Attorney Thomas Roth on behalf of Petitioner; Attorney

Michelle Gearhart on behalf of SLO County Air Pollution Control District; Attorney Mitchell Rishe on behalf of the Department of Parks and Recreation; and County Counsel Jon Ansolabehere on behalf of San Luis Obispo County. After considering the arguments of counsel and review of the pleadings filed herein, the Court took the matter under submission and now issues this ruling.

On October 6, 2014, Friends of Oceano Dunes, Inc. ("Petitioner") filed a Verified Petition for a Writ of Traditional Mandamus (Code Civ. Proc., § 1085) and Complaint for Declaratory and Injunctive Relief, against the San Luis Obispo County Air Pollution Control District and its Board of Directors (the "APCD" or the "District"), and the California Department of Parks and Recreation ("State Parks"). Petitioner filed a First Amended Verified Petition on October 27, 2014.

Petitioner brings its Petition on the grounds that the APCD, through an agreement with State Parks, substantively changed a District regulation (Rule 1001) without public notice, an opportunity for public comment, or a hearing as required by state air quality statutes; and as such, the agreement is void as against public policy.

Health and Safety Code section 40725(a) does not allow the District to adopt or amend any new rule without first holding a public hearing. Changes or amendments to a rule can be made without notice only if they are not so substantial as to significantly affect its meaning. (Health & Saf. Code, § 40726 ["Following consideration of all relevant matter presented, a district board may adopt, amend, or repeal a rule or regulation, unless the board makes changes in the text originally made available to the public that are so substantial as to significantly affect the meaning of the proposed rule or regulation."].)

Petitioner seeks a writ of mandate invalidating the agreement. Petitioner contends that should the agreement be invalidated, the District will be free to hear and re-adopt the agreement (or not) after complying with the Health and Safety Code, including public notice, public comment period, public hearing and corresponding findings, reports, and analyses. (Health and Saf. Code, §§ 40725, 40726, 40727, 40727.2, 40703.)

The District and State Parks oppose the petition, contending that the agreement

was not a substantive change or amendment to Rule 1001, requiring a public hearing. The District further contends that the agreement is no longer enforced and the petition is moot.[1] State Parks contends that it is at most a real party to the litigation, and not a proper respondent in this case, as it is not subject to the Health and Safety Code's public hearing requirements.

The Court grants Petitioner's Request for Judicial Notice filed on July 28, 2021. As set forth *infra*, the Court sustains the District's objections to Petitioner's subsequent requests.

I. Background

The District maintains a regulation known as Rule 1001. The Rule is a self-described "dust-control" regulation that applies to any operator of a coastal dune vehicle activity area ("CDVAA") which is greater than 100 acres in size, i.e., the Oceano Dunes State Recreational Vehicle Area. (Declaration of Thomas D. Roth, Exh. 1 [Rule 1001].) Rule 1001 requires the operator (State Parks) to prepare and implement a Particulate Matter Reduction Plan (PMRP) to minimize PM^{10} emissions in the areas under its control; it does not dictate how the operator is to achieve a reduction in emissions. (*Id.*, ¶ C, C.2.)

Petitioner filed a legal challenge to Rule 1001 in this Court. After an adverse ruling, Friends appealed, as did Real Party-in-Interest State Parks. In 2015, the Court of Appeal, Second Appellate District, overturned, in part, the trial court in a published opinion in Friends' favor. (*Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control Dist.* (2015) 235 Cal.App.4th 957.) On remand, a permit system was severed from the remainder of Rule 1001.

In April 2014, while that appeal was pending, the District and State Parks proposed a "consent decree" to the Court of Appeal, seeking to resolve State Parks' appeal and to move forward with implementation of the portion of the Rule that was not being challenged on appeal. (Roth Decl., Exh. 2.; see also District Nov. 26, 2014, Answer, ¶ 2.) The Court of Appeal denied the District and State Park's motion to dismiss and declined

[1] State Parks joins the District's opposition that the agreement has been rendered moot.

to enter the consent decree. (*Id.*, Exh. 3.)

The District and State Parks then drafted a "First Amendment" that converted the "decree" into a settlement agreement between the two agencies (the "Agreement").[2] (Roth Decl., Exh. 4.) The Agreement was executed by the agencies in September 2014, and the District adopted it in closed session and without a public hearing later that month. (District Answer, ¶ 2; Roth Decl., ¶ 5.)

II. Standard of Review

"The trial court reviews an administrative action pursuant to Code of Civil Procedure section 1085 to determine whether the agency's action was arbitrary, capricious, or entirely lacking in evidentiary support, contrary to established public policy, unlawful, procedurally unfair, or whether the agency failed to follow the procedure and give the notices the law requires." (*California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1483.)

When the facts are not in dispute and the primary issue is a matter of law, the court employs de novo review. (*Vargas v. Balz* (2014) 223 Cal.App.4th 1544, 1552.) When the determination of an administrative agency's jurisdiction involves a question of statutory interpretation, the issue of whether the agency proceeded in excess of its jurisdiction is a question of law. (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1999) 73 Cal.App.4th 338, 349; *BullsEye Telecom, Inc. v. Public Utilities Com.* (2021) 66 Cal.App.5th 301, 309-310.)

Agency actions are sometimes afforded judicial deference. Quasi-legislative rulemaking receives the most deferential level of judicial scrutiny. (*Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal.App.4th 98, 106; *Pulaski v. Occupational Safety & Health Stds. Bd.* (1999) 75 Cal.App.4th 1315, 1331.) However, when an agency is merely construing a statute, whether and to what extent courts defer to the agency's interpretation is situational and dependent on various factors. (*Yamaha Corp. of Am. v. State Bd. of Equalization, supra,* 73 Cal.App.4th at p. 349.) "[A]dministrative

---

[2] The settlement agreement never because a consent decree because no court approved or entered it.

construction of a statute, while entitled to weight, cannot prevail when a contrary legislative purpose is apparent." (*Khan, supra,* (2010) 187 Cal.App.4th 98, 107.) "A court does not... defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued." (*Yamaha Corp. of America, supra,* 19 Cal.4th at p. 11, fn. 4 (citations omitted).) Moreover, "the general rule of deference to interpretations of statutes subject to the regulatory jurisdiction of agencies does not apply when the issue is the scope of the agency's jurisdiction." (*BullsEye Telecom, supra,* 66 Cal.App.5th at pp. 309-310.)

Here, the issue is whether the Agreement substantially or significantly affects the meaning of Rule 1001 such that public notice and hearing was required before entering the Agreement. The Court reviews this question as a matter of law.

III. Discussion

Petitioner contends that the Agreement made substantial changes to Rule 1001 without the mandatory public notice and public hearing requirements pursuant to the Health and Safety Code, and therefore the Agreement is void as against public policy.

A. State Parks as Respondent

State Parks contends that it is at most a real party to the litigation, and not a proper respondent in this case, as it is not subject to the Health and Safety Code's public hearing requirement. Petitioner does not contend that State Parks is subject to the public hearing requirements but advises that it named State Parks as a respondent because State Parks is a party to the Agreement that Petitioner seeks to invalidate.

A person is a necessary party to an action if his or her absence will prevent the court from rendering any effective judgment between the parties or the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in his or her absence may as a practical matter impair or impede the person's ability to protect that interest. (Code Civ. Proc., § 389(a).)

Ordinarily, all parties to a contract are necessary parties in an action involving

rights under the contract. (*Deltakeeper v. Oakdale Irrigation District* (2001) 94 Cal.App.4th 1092, 1106; see also Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2021) ¶ 2:177.) Here, Petitioner does not seek to compel compliance with the public hearing statutes, but rather to invalidate the Agreement. At the outset, as a party to the Agreement that Petitioner seeks to invalidate, State Parks was properly named as a respondent, because Friends seeks to compel both the District and CDPR to set aside the agreement, even though State Parks is not subject to the public hearing and notice requirements under Health and Safety Code sections 40725 and 40726.

Notwithstanding the foregoing, after hearing the arguments of counsel, and reconsidering the caselaw cited by State Parks, the Court determines that State Parks is more properly deemed a real party in interest. (See e.g., *Sonoma County Nuclear Free Zone v. Superior Court* (1987) 189 Cal.App.3d 167, 173.)

B. Strong Public Policy for Public Notice and Opportunity to be Heard

The California Legislature has established mandatory requirements for public notice, an opportunity for public comment, and a public hearing, before the District can lawfully adopt, amend or appeal any rule or regulation. (Health and Saf. Code, §§ 40725, 40726.)

Notice and hearing requirements created by the Legislature implicate protection of the public and strong considerations of policy. (*San Diego County v. California Water & Tel. Co.* (1947) 30 Cal.2d 817, 826-827.) Civil statutes enacted to protect the public are generally broadly applied in favor of that protective purpose. (*Pineda v. Williams-Sonoma Stores, Inc.* (2011) 51 Cal.4th 524, 530; *Southern California Gas Co. v. South Coast Air Quality Management Dist.* (2011) 200 Cal.App.4th 251, 268.)

"[T]he purpose of requiring that proposed regulations be submitted to a public-hearing process is to ensure that every interest is represented, that the rule makers are well informed, and that an equally well-informed public is able to persuade and monitor government through the democratic process." (*Association of Irritated Residents v. San Joaquin Valley Unified Air Pollution Control Dist.* (2008) 168 Cal.App.4th 535, 548.)

In *Association of Irritated Residents, supra*, a writ of mandate was granted on appeal, instructing the district to complete an assessment of the public health impacts of a rule designed to reduce air emissions from agricultural sources. The rule was adopted without compliance with Health and Safety Code section 40724.6, which mandated an assessment of its impact on public health. The court found that "[t]he prejudice is not that the rule was adopted, but that it was adopted without informed and transparent decisionmaking." (*Association of Irritated Residents, supra,* 168 Cal.App.4th at p. 548.)

Health & Safety Code § 40725, et seq., requiring public notice, meetings, and an opportunity to be heard before a rule is adopted or amended, reflects a strong public policy. The District and State Parks do not contend otherwise.

To determine whether the Agreement violates this public policy, the Court must consider whether the Agreement substantially changes Rule 1001.

C. The Agreement Substantially Modified Rule 1001

Petitioner contends that the Agreement changes Rule 1001 in at least two substantial ways: (1) by changing the dust control performance standards; and (2) by deleting the Rule's compliance deadlines in favor of a mutual stipulation between the District and State Parks determining when compliance will be required.

The District and State Parks contend that the Agreement does not change or amend Rule 1001.

The test of whether the Agreement required public notice and hearing is whether the Agreement changed Rule 1001 "so substantial[ly] as to significantly affect the meaning of the . . . rule."[3] (Health and Saf. Code, § 40726.)

i. Dust Control Performance Standards

Rule 1001's performance standards provide:

> The CDVAA operator [State Parks] shall ensure that if the 24-hr average PM^{10} concentration at the CDVAA Monitor is more than 20% above the 24-hr average PM^{10} concentration at the Control Site Monitor, the 24-hr average PM^{10} concentration at the CDVAA Monitor shall not exceed 55

[3] The Court could locate no published case authority interpreting section 40726.

ug/m3.

(Roth Decl., Exh. 1, p. 1001-3 [¶ C.3].)

Petitioner contends that, per the plain language of the Rule, the performance standards only apply if the CDVAA Monitor reading exceeds the Control Site Monitor by more than 20 percent; if the difference is less than 20 percent, State Parks need not take any action under Rule 1001 even if there are violations of state and federal PM^{10} standards. If the difference exceeds 20 percent, then State Parks must meet the performance standards of 55 ug/m3. (Roth Decl., Exh. 1, p. 1001-3 [¶ C.3].)

Nothing in Rule 1001 references or explicitly requires compliance with state or federal standards for PM^{10} concentrations. (Roth Decl., Exh. 1.) The standards under Rule 1001 (once the 20 percent difference is exceeded) is 55 ug/m3, which is less rigorous than the state standards of 50 ug/m3. (See Roth Decl., Exh. 10.)

Meanwhile, the Agreement, which states that it is the "method of implementation of Rule 1001", provides:

> That given the interest in acting immediately, the District and State Parks, in consultation with CARB [California Air Resources Board], have agreed to take action to reduce PM 10 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 PM 10 standard at the monitor located on the Nipomo Mesa known as 'CDF'** [the CDVAA Monitor] **and to provide ongoing progress toward achieving the State PM 10 standards and meet the standards set forth in Rule 1001**.

(Roth Decl., Exh. 2, p. 5, ¶ 3.ii, emphasis added.)

Petitioner contends that this changes the performance standards by mandating compliance with the more rigorous state standards.

Petitioner further argues that while Rule 1001 based the performance standards on a comparison between the CDVAA Monitor and the Control Site Monitor, the Agreement's standards must be achieved regardless of whether there is a 20 percent greater amount of emissions. Instead, it requires meeting the state and federal PM^{10} standards at the monitor regardless of the difference, eliminating the 20 percent trigger before the standards apply.

The Agreement further requires the standards be met "immediately" rather than by May 31, 2015, as set forth in Rule 1001. (Roth Decl., Exh. 1, p. 1001-4 [¶ F.1.g.]; Roth Decl., Exh. 2, p. 5, ¶ 3.ii.)

Paragraph 3.ii of the Agreement references state and federal standards as well as "the standards set forth in Rule 1001", acknowledging that the state and federal standards are different than those set forth in Rule 1001. (Roth Decl., Exh. 2, p. 5, ¶ 3.ii.)

Petitioner contends that these are material changes to the Rule 1001 performance standards.

The District[4] argues in opposition that nothing in the Agreement constitutes a change in the performance standards under Rule 1001 nor abrogates State Parks' independent statutory obligation to comply with state and federal air quality standards as required by both the Federal Clean Air Acts and California's Clean Air Act.

The District contends that Rule 1001 was created because State Parks was in violation of the state standards at least 65 days per year, and that attainment of state and federal air quality standards is implicit because it is expressly defines the role of the District to enforce those standards and promulgate rules and regulations aimed at achieving those standards. The District does not argue, however, that Rule 1001 expressly requires compliance with state and federal standards; those standards are not mentioned in the Rule. Moreover, as noted above, the Agreement specifically differentiates between state and federal standards, and the standards in Rule 1001. (Roth Decl., Exh. 2, p. 5, ¶ 3.ii.)

The District further maintains that the Board was reminded of its statutory obligation to enforce state and federal ambient air quality standards when it was considering adoption of Rule 1001. (Gearhart Decl., Exh. 2 [AR 1747-1748 ("California law requires the District to plan for and attain Federal and State ambient air quality standards in our basin.").] However, that reminder was not in the context of determining the specific performance standards included in Rule 1001. And those standards were not

[4] State Parks joins the District's opposition.

explicitly incorporated into the Rule 1001 performance standards when clearly, they could have been.

Moreover, the District Air Pollution Control Officer ("APCO") stated at the adoption hearing that "the rule itself is designed to reduce violations of the Health Standards to natural background levels." (Gearhart Decl., Exh. 2 [AR 1654.]) This is where the 20 percent threshold appears to come in – natural events at the Dunes, including wind, create emissions, and State Parks need not act under Rule 1001 when the emission levels are natural, measured by comparison with the control monitoring site rather than by absolute standards.

The District contends that Section C.3 of Rule 1001 requires that when PM^{10} concentrations at the monitor located within the Dunes exceed the control monitor's 24-hour average by more than 20 percent, State Parks must reduce emissions to the state standards of 50 ug/m3, plus 5 ug/m3, to address monitor accuracies. (Willey Decl., ¶ 3.)

The District argues that Rule 1001 thus recognizes that there will be violations of state air quality standards that are the result of naturally occurring phenomena for which State Parks is not responsible; but, that when there are violations attributable to the operation of the Dunes (as determined by a more than 20 percent differential of emissions from the riding area versus the control monitor), State Parks must reduce emissions to the state standards, and the Agreement does not alter this requirement.

However, as pointed out in reply by Petitioner, not only does the Agreement not incorporate the 20 percent differential, but even if the 55 ug/m3 standard incorporates the state standards, the Agreement has no allowance for monitor inaccuracies, which Rule 1001 does, and thus, the Agreement still changes the performance standards under Rule 1001.

The District contends that nothing in the Agreement expresses any intent that overrides the specific mandates set forth in Rule 1001, but that it makes clear its sole purpose is to implement the requirements of Rule 1001. However, while much of the Agreement does implement Rule 1001, the mere fact that the Agreement states that it is

implementing Rule 1001 is not dispositive as to whether some portions substantially change Rule 1001.

The Court finds that the plain language of the Agreement substantially and materially changes the performance standards set forth in Rule 1001.

The drafters of Rule 1001 were clearly aware of the state and federal standards but did not reference or incorporate them into Rule 1001. Meanwhile, the Agreement calls for compliance with state and federal standards at the CDVAA monitor *in addition to* those set forth in Rule 1001, showing on its face, that the drafters of the Agreement considered the Rule 1001 standards to be different from the state and federal standards.

The Agreement further fails to incorporate the 20 percent differential as a trigger requiring compliance, and, to the extent that the 55 ug/m3 standard was based on the state standards, the Agreement eliminates the 5 ug/m3 margin of error, making the standards in the Agreement more restrictive than the standards in Rule 1001.

Moreover, even if the Court gave some deference to the Agency's interpretation of Rule 1001, the Court is not convinced, from the evidence submitted by the District, that Rule 1001 was intended to incorporate the state and federal standards such that the Agreement is not a change or amendment.

The District discusses at some length the extent of agency enforcement discretion and contends that here, the APCO has been charged with enforcing Rule 1001, and possesses the authority by virtue of his independent status under the Health and Safety Code to implement the Rule through the settlement agreement to best accomplish its objectives. The District contends that the settlement agreement and amendment provide mutually agreed upon methods of *implementing* Rule 1001 within the ambit of the APCO's existing enforcement discretion.

However, while the Agreement states that it is solely implementing Rule 1001, and many provisions of the settlement agreement do implement the Rule within the APCO's enforcement discretion (e.g., provisions relating to a special master), the

Agreement compels compliance with different performance standards then those specified in Rule 1001.

Neither the APCO, nor his staff, has authority to unilaterally change a regulation. Health and Code section 40752 provides that "the air pollution control officer shall observe and enforce all of the following: (b) All orders, regulations, and rules prescribed by the district board."

As noted by Petitioner, at the November 16, 2011, public hearing on Rule 1001, Gary Willey, who is now the APCO stated:

> As far as a process of updating or amending the rule, obviously, this is going to be something that the Board is very close to . . . . **Should there be any need to change any of the milestones or final compliance dates or any part of the rule, we would bring it back to the Board and propose changes**.

(Roth Decl., Exh. 7, p. 1665, lines 7-11, emphasis added.)

While the APCO has discretion in how to implement and enforce the standards set forth in Rule 1001, changes to the adopted performance standards clearly set out in the Rule (or deadlines, as discussed below) do not enforce or implement the Rule.

The Court finds that the agreement substantially and significantly changes the performance standards set forth in Rule 1001.

ii. Compliance Deadlines

Petitioner further contends that the Agreement materially changes the compliance deadlines set forth in Rule 1001.

Rule 1001 sets forth a Compliance Schedule, with which the CDVAA operator "shall comply", and which sets forth specific deadlines. (Roth Decl., Exh. 1, p. 1001-4 [¶ F.1.].)

Meanwhile, the Agreement provides:

> The Parties acknowledge that Rule 1001 and the enforcement agreement contained in the District's May 24, 2013 letter...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.

Petitioner contends that modifying the deadlines set forth in Rule 1001 by stipulation is a material change to Rule 1001, which does not allow for stipulations, but instead sets concrete deadlines and authorizes civil penalties. (Roth Decl., Exh. 1, p. 1001-4 [¶¶ F.1, F.2.])

Petitioner contends that while the APCO may have discretion on whether to impose civil penalties against State Parks for violations, he has no authority to change deadlines established by the legislatively-adopted Rule 1001 without Board approval in a public hearing.

The District mentions the compliance deadlines only briefly. The District argues that instead of amending Rule 1001, the Agreement, consistent with the language of the Rule, authorizes the APCO to implement the requirements of the Rule through his existing enforcement discretion, including the compliance deadlines.

However, Rule 1001 adopted clear, straightforward compliance deadlines. It includes no provision for the exercise of discretion in changing those deadlines and does not delegate authority to the APCO to change the deadlines. Rule 1001 does not allow for the deadlines to be changed through a mutual stipulation with State Parks and is a substantial and significant change to Rule 1001.[5]

D. Agreement is Void as Against Public Policy

Petitioner contends that State Parks and the District have exceeded their respective

[5] The Court notes that all of the compliance deadlines set forth in Rule 1001 have long since passed. Nonetheless, that does not necessarily mean that the District and State Parks have the authority to set different compliance deadlines than those set forth in the Rule via stipulation pursuant to the Agreement.

authority by purporting to enter into an Agreement that amends, changes, and modifies Rule 1011 without compliance with the public notice and hearing requirements. As such, Petitioner contends the Agreement is ultra vires, void, and without force and effect.

As set forth above, the public hearing and notice statutes and requirements represent a strong public policy.

"Generally a contract made in violation of a regulatory statute is void. Normally, courts will not lend their aid to the enforcement of an illegal agreement or one against public policy. This rule is based on the rationale that the public importance of discouraging such prohibited transactions outweighs equitable considerations of possible injustice between the parties." (*Asdourian v. Araj* (1985) 38 Cal.3d 276, 291 [citations omitted].)

"Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (Civ. Code, § 3513; see also *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 100.)

Petitioner contends that the mandated public rule-making process is essential to fairness and the democratic process and cannot be discarded for mere administrative convenience, and because the Agreement here contravenes that public policy, it is ultra vires and void.

Petitioner further argues that the Agreement is void because it failed to include findings of "necessity, authority, clarity, consistency, nonduplication", as well as other required analyses, as mandated for rule air district regulation amendments under Health and Safety Code sections 40727 [same], 40727.2 [proposed amendment analysis], and 40703 [cost effectiveness analysis].

Because the Court finds that the changes to the compliance standards as set forth above are substantial, public hearing and notice was required under Health and Safety Code sections 40725 and 40726. Failure to provide such notice and hearing is contrary to the statutes, and contrary to a strong public policy.

The Court therefore finds that the Agreement is void.

E. Petition is Not Moot

The District contends that the petition is now moot and the Court should not rule.

Courts consider only actual and present controversies. (*Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1573 (Wilson) ["California courts will decide only justiciable controversies."]) The pivotal question in determining if a case is moot is whether the court can grant the plaintiff any effectual relief. (*Id.* at p. 1574.)

The District contends that the APCO took action to abate the continued violation of emission standards for PM^{10} at Oceano Dunes by invoking the jurisdiction of the Hearing Board, which has original jurisdiction over abatement proceedings. (Health & Saf. Code, § 42451(a).) State Parks and the District entered into a Stipulated Order of Abatement in 2018 pursuant to subsection (b) of section 42451. The Order was subsequently Amended in 2019. (See Exhibits 4 and 5 to Gearhart Decl.)

The District contends that the Agreement has been superseded by the abatement statutory schedule and the Orders of Abatement as the implementation and enforcement mechanism for PM^{10} emissions at the Oceano Dunes. (Willey Decl., ¶¶ 6-11.)

The District further contends that the Agreement was rendered moot by the passage of time, as the compliance deadlines have come and gone, and any enforcement discretion on the part of the APCO, as contemplated in paragraph 15 of the Agreement, has been replaced by the Orders of Abatement, and disputes are now resolved by the Hearing Board, not by a neutral special master.

Nonetheless, the abatement statutory scheme does not provide that it is the exclusive regulatory mechanism for addressing air pollution violations. Moreover, there has been no showing that abatement and Rule 1001 may not be pursued simultaneously. The District does not contend that Rule 1001 is no longer in effect, but rather, contends that the implementation of the Rule via the Agreement has been rendered moot by the Stipulated Order of Abatement and Amended Stipulated Order of Abatement.

Nonetheless, the Agreement states that it is a method of implementation of Rule 1001, which Rule is still in effect. While the Agreement may not have been enforced since

July 2017 and the District may intend to use the abatement proceedings to address air pollution, Rule 1001 and the "implementing" Agreement remain, and could still be enforced. The petition is not moot.

IV. Objections

The District objects to evidence submitted by Petitioner on reply, and has made eight evidentiary objections. The Court sustains all five evidentiary objections filed on September 7, 2021, and objections 1 and 3 filed on September 9, 2021. As to objection 2 filed on September 9, 2021, the objection is as to argument, not evidence. Nonetheless, the Court has reviewed and considered the District's contentions set forth in the objection.

The Court notes that the evidence to which the District objected was immaterial to the Court's decision.

V. Conclusion

Petitioner's petition for a writ of mandate invalidating the Agreement is granted as to the District, and the District is hereby ordered to set aside the agreement.

DATED: October 7, 2021

Hon. TANA L. COATES
Judge of the Superior Court

TLC:jn

STATE OF CALIFORNIA, COUNTY OF SAN LUIS OBISPO
CERTIFICATE OF MAILING

Friends Of Oceano Dunes Inc vs. San Luis Obispo County Air Pollution Control Board	14CV-0514

Thomas D Roth
Law Offices of Thomas D. Roth
1900 S. Norfolk Street, Suite 350
San Mateo, CA 94403

Raymond A Biering
Adamski Moroski Madden Cumberland Green
P.o. Box. 3835
San Luis Obispo, CA 934033835

Mitchell E Rishe
Deputy Attorney General
300 South Spring Street, Ste 1702
Los Angeles, CA 90013

Jeffrey A Minnery
Adamski Moroski Madden Cumberland Green
P. O. Box 3835
San Luis Obispo, CA 93403

Michelle Landis Gearhart
Adamski, Moroski, Madden, Cumberland & Green LLP
PO Box 3835
San Luis Obispo, CA 93403

I, Chelsie Simms, Deputy Clerk of the Superior Court of the State of California, County of San Luis Obispo, do hereby certify that I am over the age of 18 and not a party to this action. Under penalty of perjury, I hereby certify that on **10/07/2021** I deposited in the United States mail at San Luis Obispo, California, first class postage prepaid, in a sealed envelope, a copy of the attached **Ruling on Petition for Writ of Mandate.** The foregoing document was addressed to each of the above parties.

OR

☒ Document served electronically pursuant to CRC§2.251(b)(1)(B).

Dated: 10/7/2021 Michael Powell, Clerk of the Court

By: /s/ Chelsie Simms Deputy Clerk
Chelsie Simms

PROOF OF SERVICE

Friends of Oceano Dunes, Inc. v. San Luis Obispo County Air Pollution Control District
Case No.: 14CV-0514

I am over 18 years old, not a party to this lawsuit and am employed by the Law Offices of Thomas D. Roth, 1900 S. Norfolk Street, Suite 350, San Mateo, Ca 94403. On October ~~8~~, 2 021, I served the foregoing document described as: **[PROPOSED] FINAL JUDGMENT** as follows:

BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused the above document(s) to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Mitchell Rishe
Deputy Attorney General
California Department of Justice
Office of the Attorney General
300 S. Spring Street
Los Angeles, CA 90013
E-mail: Mitchell.Rishe@doj.ca.gov
(Counsel for State Parks)

Michelle Gearhart
Adamski Moroski et al
6633 Bay Laurel Place
Avila Beach, CA 93424
E-mail: Gearhart@ammcglaw.com
(APCD counsel)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on October 8, 2021, at San Mateo, California.

Thomas D. Roth

Thomas D. Roth

SAN LUIS OBISPO COUNTY
DEPARTMENT OF PLANNING AND BUILDING

December 21, 2012

Dan Carl, District Director
California Coastal Commission
Central Coast Area Office
725 Front Street, Suite 300
Santa Cruz, California 95060

SUBJECT: Consolidated permitting for the Oceano Dunes SVRA (ODSVRA) Dust Control Project

Dear Mr. Carl:

On behalf of State Parks (Oceano Dunes District) the County of San Luis Obispo is requesting that the dust control project required as part of compliance with the San Luis Obispo Air Pollution Control District (APCD) Rule 1001, be considered for combined processing by the Coastal Commission. Per §30601.3 of the California Coastal Act, the Coastal Commission may process and act upon a consolidated coastal development permit application, if the proposed project requires a coastal development permit from both a local government with a certified local coastal program and the commission, and the applicant, the appropriate local government, and the commission, which may agree through its executive director, consent to consolidate the permit action, provided that public participation is not substantially impaired by that review consolidation.

As you know, State Parks is required to develop a Particulate Matter Reduction Plan to minimize emissions of PM10 from the area under its control. The project as proposed will consist of the installation, operation, and maintenance of meteorological, sand flux (ie, sand movement), and particulate matter monitoring equipment and dust and track-out control measures. The dust control measures would include re-vegetation measures and artificial roughness measures. The track-out control measures would require the installation of physical structures to control vehicle track-out onto public roadways, and street sweeping operations to removed sand from public roadways. The purpose of the project is to implement the Rule 1001 requirements and integrate them into the long-term management of the Oceano Dunes SVRA.

976 OSOS STREET, ROOM 300 • SAN LUIS OBISPO • CALIFORNIA 93408 • (805) 781-5600
EMAIL: planning@co.slo.ca.us • FAX: (805) 781-1242 • WEBSITE: http//www.sloplanning.org

Portions of the project area lie within Coastal Original Jurisdiction, as well as within jurisdictional boundaries of San Luis Obispo County, Santa Barbara County, and the City of Grover Beach. Several meetings have been held with various agencies (Coastal Commission, County, State Parks, and APCD staff) to discuss the consolidated permit process as well as the approach to address the dust control issues. The Oceano Dunes District request for consolidated processing is attached. The County agrees that consolidated processing would be appropriate in this case. We do not believe that public participation will be substantially impaired; at the appropriate time during the permitting process, the County, in conjunction with the Air Pollution Control District and the Coastal Commission, will hold one or more local public meetings.

Thank you for consideration of this request. Can you please confirm that the Coastal Commission will process and act upon a consolidated coastal development permit application for the project described above. Please call me at 805/781-5008 if you would like to discuss this further.

Sincerely,

Nancy E. Orton

Nancy E. Orton, AICP
Supervising Planner
Coastal Team

Cc: Brent Marshall, Acting District Superintendent, Oceano Dunes District
Ronnie Glick, Senior Environmental Scientist, Oceano Dunes District

Attachment: ODSVRA letter dated December 4, 2012

State of California • Natural Resources Agency
Edmund G. Brown Jr., *Governor*

DEPARTMENT OF PARKS AND RECREATION
Major General Anthony L. Jackson, USMC (Ret), *Director*

Oceano Dunes District
340 James Way, Suite 270
Pismo Beach, CA 93449
Telephone (805) 773-7170
FAX (805) 773-7176

December 4, 2012

Department of Planning and Building
Attn: Nancy Orton
County Government Center
San Luis Obispo, CA 93408

Re: Consolidated Permitting for Oceano Dunes SVRA Dust Control Project

Dear Ms. Orton;

The California Department of Parks and Recreation, Oceano Dunes District is seeking permits for dust control projects as part of our compliance with the San Luis Obispo Air Pollution Control District, Rule 1001, Coastal Dunes Dust Control Requirement. A project description was provided by e-mail along with a Notice or Preparation and Initial Study Checklist.

Over the past few months, we have been discussing the possibility of a consolidated permit for this project because the project crosses a number of jurisdictional boundaries including Coastal Commission retained jurisdiction, San Luis Obispo County LCP, Santa Barbara County LCP, and the City of Grover Beach LCP areas.

We would like to formally request a consolidated permit process for this project pursuant to California Public Resource Code Section 30601.3.

I trust that you will agree that this consolidated permit process would be a timely and efficient way to review our proposed dust control project. If you wish to discuss this issue in more detail, please contact Ronnie Glick, Senior Environmental Scientist at 805-773-7180.

Sincerely;

Brent Marshall
Acting District Superintendent

Concerned Citizens for Clean Air

December 8, 2021

Dear Director Ainsworth and Commissioners,

Concerned Citizens for Clean Air strongly supports staff recommendation to approve the State Parks Permit Amendment Application No. 03-12-050 A3. Approval will give State Parks the green light to continue with its mitigation efforts related to the environmental impact of its operation related to air quality. While it is a meager step, it is supported as a necessary part of the process as we fight for stronger action. Once again, your staff has done a solid job in its evaluation. We would appreciate a Commission vote of approval.

Sincerely,

Arlene Versaw and Rachelle Toti
Concerned Citizens for Clean Air

ccca3858@gmail.com http://mesaairfacts.net

December 15, 2021

Jack Ainsworth, Executive Director, California Coastal Commission
Steve Padilla, Chair of the California Coastal Commission
455 Market Street, Suite 300
San Francisco, CA. 94105

Re: Oceano Dunes Dust Control Coastal Development Permit (CDP) Amendment Application Number 3-12-050-A3

Dear Executive Director Ainsworth and Chair Padilla:

The Motorcycle Industry Council (MIC), the Specialty Vehicle Institute of America (SVIA), and the Recreational Off-Highway Vehicle Association (ROHVA) (collectively, the "Associations")[1] respectfully submit these comments regarding the California Coastal Commission's review of Coastal Development Permit 3-12-050-A3 for the Oceano Dunes Dust Control Coastal Development Permit Amendment.

For several years, the Associations have sought to engage with the Coastal Commission, with State Parks and with the Off-Highway Motor Vehicle Recreation (OHMVR) Commission to preserve off-highway vehicle (OHV) access at the Oceano Dunes State Vehicular Recreation Area (ODSVRA) through programs supporting stewardship, and safe and responsible developed use. Throughout the Public Works Plan (PWP) process, we submitted comments and testified at public hearings suggesting ways to responsibly and safely preserve OHV access and resources at ODSVRA. We repeatedly offered to partner with State Parks to enhance safety, training, and awareness of sensitive areas at ODSVRA. Yet our efforts to collaborate have been dismissed.

At the Coastal Commission hearing on December 17, the Commission staff is proposing an amendment to implement an additional 130 acres of permanent dust control mitigation via dune restoration (with 108 acres inside the off-highway vehicle (OHV) riding and camping area and 22 acres outside of it) at Oceano Dunes. This would immediately shut down OHV access on the 108 acres. Further restriction of OHV use is contrary to the Coastal Act mandate, discriminates against California's diverse OHV recreational community, denies OHV access to the beach for recreation enthusiasts, and fails to acknowledge, value, or balance the successful OHV-trust-funded natural resource programs.

We strongly oppose the amendment and urge you to the table it at the December 17, 2021, meeting so the public and the OHMVR Commission can have adequate time to review, analyze, and comment on the proposal.

[1] The Motorcycle Industry Council (MIC), the Specialty Vehicle Institute of America (SVIA), and the Recreational Off-Highway Vehicle Association (ROHVA) are national not-for-profit trade associations. MIC represents several hundred manufacturers, distributors, dealers, and retailers of motorcycles, scooters, motorcycle parts, accessories, related goods, and allied trades. SVIA represents manufacturers and distributors of all-terrain vehicles (ATVs). ROHVA represents manufacturers and distributors of recreational off-highway vehicles, also known as side-by-sides. Together, the Associations serve the $40 billion/year powersports industry in the United States. California represents nearly $3.5 billion of that, generating more than a quarter-billion dollars in payroll for the employees that sell and service the 2.1 million vehicles in use across the state.

Since 2007, the San Luis Obispo County Air Pollution Control District (APCD) has consistently maintained that high PM10 concentrations detected during high wind days on the Nipomo Mesa were primarily comprised of windblown mineral dust from the Oceano Dunes exacerbated by OHV activity. Based on this assertion, a Stipulated Order of Abatement (SOA) was placed on ODSVRA. However, the ACPD's conclusion and the need for an SOA has clearly been debunked in two separate reports authored by Dr. Lynn Russell of the University of California, San Diego's Scripps Institution of Oceanography.[2] Her most recent report published on November 8, 2021, concluded that the dust is primarily caused by the wind and dunes themselves, not human activities:

> *"The association of high PM10 and PM2.5 with high wind conditions, even when recreational vehicles were limited at Oceano Dunes compared to prior years, indicates that dune-derived mineral dust is more likely to be primarily caused by natural forces (i.e., wind) rather than human activities. The attribution of mineral dust to natural wind is a common feature of air quality in the western U.S. [Malm et al., 1994; Noll et al. 1985]. While the short duration of this study provides only limited statistics in support of this result, the longer records provided by APCD provide additional confirmation [Li et al., 2013]. For this reason, the contribution of mineral dust to high PM10 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, rather than by recreational activities, as negligible differences were observed between weekday and weekend concentrations [Li et al., 2013]."*

On December 9, 2021, the OHMVR Commission held a workshop to discuss the recent Scripps Report findings. After Dr. Russell's detailed and scientific overview, several commissioners expressed concerns about the previous assumptions made by the San Luis Obispo County APCD and indicated that the data previously collected is now in question. Several commissioners requested the OHMVR take action on the Scripps findings to potentially provide comments for the Coastal Commission meeting on December 17.

Unfortunately, the OHMVR Commission could not do so because it was not identified as an actionable item on their agenda. The Coastal Commission tabling this proposal would allow the OHMVR and the general public adequate time to provide comments through a deliberate process rather than ramming the amendment through during the holidays with minimal public notice.

MIC, SVIA, and ROHVA urge that the Coastal Commission table the amendment reducing OHV use at Oceano Dunes, and that you eliminate the SOA. The Scripps Report findings contradict critical previous conclusions by APCD, which at the very least have <u>incorrectly identified the source of the problem as OHV use.</u>

Ironically, the OHV Fund has been required to pay more than $22M in expenses associated with shutting down access to OHV activity at ODSVRA as a result of the Coastal Commission's actions. Advancing this amendment will further diminish the recreational experience and access for the millions of visitors to Oceano Dunes each year.

Sincerely,

President and CEO
MIC, SVIA, and ROHVA

[2] Russell, Dr., L. (2021). *Scripps Interim Year 3 Report.* Scripps Institution of Oceanography, University of California, San Diego.

PO Box 24638 - Tempe, AZ 85285
888-540-7263
www.americansandassociation.org

California Coastal Commission
John Ainsworth, Executive Director

California OHMVR Commission

December 16, 2021

RE: Oceano Dunes Dust Control Coastal Development Permit (CDP) Amendment Application Number 3-12-050-A3

The American Sand Association (ASA), a California 501(c)(4) non-profit organization, has advocated for Sand Sport enthusiasts for over 21 years. From day one, the official position of the ASA is that the best available science be the basis for any and all decisions regarding land management, especially in the case of proposed land closures.

The ASA is vehemently opposed to the proposed staff amendment that would immediately shut down an additional 108 acres of OHV access at Oceano Dunes if it is adopted at the Coastal Commission hearing on December 17th. We strongly urge you to oppose the proposal.

Since 2007, the San Luis Obispo County Air Pollution Control District (APCD) has consistently maintained that high particulate concentrations detected during high wind days on the Nipomo Mesa were primarily comprised of windblown mineral dust from the Oceano Dunes exacerbated by OHV activity. Based on this assertion, a Stipulated Order of Abatement (SOA) was placed on ODSVRA. However, the ACPD's conclusion and the need for an SOA has been clearly disproven in two reports authored by Dr. Lynn Russell of the University of California, San Diego's Scripps Institution of Oceanography. Her most recent report published on November 8, 2021, concluded that the dust is primarily caused by the wind and dunes themselves, **not human activities**.

I urge that the Coastal Commission oppose the amendment reducing OHV use at Oceano Dunes, and that you eliminate the SOA. The Scripps Report scientific findings contradict critical previous conclusions by APCD, which have incorrectly identified the source of the PM 10 and PM 2.5 problem as OHV use. In light of the wasteful spending of $22 Million of OHV "Green Sticker" money on abatement so far, the APCD must accept Dr. Russell's reports as the best available science and abandon the "OHV use as a major source of dust" narrative. Closing additional acreage at the park will do nothing to mitigate dust issues on the Mesa.

Dear Director Ainsworth and Commissioners,

I am writing in support of the permit amendment no. 03-12-050-A3 that you will be considering on December 17th. Incremental progress is being made by the Air Pollution Control District and State Parks in addressing the dust pollution coming from the park. The acres proposed, while aligned against the eastern fence line, will probably have some measure of improvement in emissions. As we are about half way through the Stipulated Order of Abatement, and have achieved reductions in particulate matter at CDF, the next work plan will need to be targeted to the most emissive areas and cover more acreage.

Attached is a chart of the air quality on Oct, 11 2021 one of the days of poor air quality on the Nipomo Mesa. In 2021, the CDF and Mesa 2 monitors had 40 State Exceedances each and the Oso Flaco monitor had 8. The Oso Flaco monitor represents the natural background level of dust emissions. Residents would be very happy with 8 State exceedances in a year, or even 16. What we have is five times that level.

On another topic, I would like to share a paragraph from page 107 of the draft 2022 OHMVR Program Report being prepared by the State Parks OHV Division. It describes how restoration efforts are beneficial to many types of wildlife in the Oceano Dunes State Vehicular Recreation Area.

"Also, evidence of small mammals, large mammals, amphibians, reptiles, and invertebrates have been documented dispersing throughout the active dune areas in the OHV and non-OHV regions of the park. In a recent small mammal study, kangaroo rats were recorded moving between vegetation islands and foraging in the open riding area at night. There is also evidence that kangaroo rats, California mice, California pocket mice, and deer mice are moving between islands recently connected through revegetation, suggesting that restoration efforts are beneficial to the small mammals in the park. Continued restoration efforts and connectivity of vegetation islands are predicted to increase small mammals' diversity and colonization rates. They could benefit other taxonomic groups such as large mammals, reptiles, amphibians, and invertebrates."

Continue your important work of protecting the coastal resources.

Rachelle Toti

Nipomo Mesa resident

APCD Board Agendas/Minutes

Learn More

Downloadable Forms

Learn More

Grant Funding

Learn More

Permit Information

Learn More

AirAware Alerts

Learn More

Electronic Payments

Learn More

Current Air Quality Conditions

	OZONE	PM10	PM2.5
San Luis Obispo		56	45
Atascadero	33	67	38
Paso Robles	38	67	
Morro Bay	32		51
Red Hills	34		
Carrizo Plain	37		
Nipomo - NRP	31		
Nipomo - CDF		194	160
Nipomo - Mesa2		155	136

Click here for the air quality in all SLO County Regions

Burn Day Status:

Click here for more burning information

From: Pam Nelson
To: CentralCoast@Coastal
Subject: CDP amendment app 3-12-050-A3
Date: Thursday, December 9, 2021 12:52:25 PM

Dear Commissioners,
For too long, off-road enthusiasts have gotten their way and have been allowed to destroy public lands habitats. We, taxpayers, therefore are funding this destruction. It pains me to think that I have allowed destruction of our coastlines, as well as, deserts, mountains and chaparral.

You are able to send a message with this amendment. Protection of our coastline habitats has been long-coming. There is little left that we humans haven't impacted. Please do your best to save this region. In my opinion, there should be no vehicle activity along these fragile sands. Humans and wildlife are effected.

Please keep protecting our coasts!

Thanks,
Pam Nelson
Warner Springs, CA

From: rjvaldez@earthlink.net
To: CentralCoast@Coastal
Subject: CDP Amendment Application Number 3-12-050-A3
Date: Thursday, December 9, 2021 1:18:14 PM

California Coastal Commissioners,

I am writing to express my complete opposition to the proposed removal of an additional 130 acres of camping and OHV area for the purpose of allegedly reducing dust at Oceano Dunes SVRA. You do not have conclusive data to support moving forward with any additional closures, especially when the Scripps study indicates that natural wind, not OHV, is the cause for dust particles traveling inland.

I would also like to express my opposition to the current and ongoing process of introducing non native vegetation, hay, and orange snow fencing. There has been numerous instances where the orange snow fencing separates from the stakes and gets partially buried in the sand or carried out to the ocean. This is littering the Oceano Dunes SVRA and becoming an entanglement hazard to the ocean life.

The use of our OHV funds is for the specific purpose of "acquisition of new OHV areas, development and operation of existing OHV areas, enforcement of the rules and regulations, and protection of the natural resources" not closure and removal of existing riding and camping areas, and addition of non native vegetation.

I family and I have enjoyed off-roading and camping at Oceano Dunes SVRA for over 26 years and wish to continue doing so for many years to come. My wife and I, along with other family members, have introduced three sons and four grandchildren to Oceano Dunes and have high hopes for future generations of our family to enjoy the area in the same way that we have.

Thank you.

Randy Valdez

From: ctva_action@q.com
To: CentralCoast@Coastal
Subject: Comments for the Oceano Dunes
Date: Monday, December 6, 2021 12:31:37 PM

California Coastal Commission members,

Please accept the following comments on the Oceano Dunes:

- The public urgently needs camping and motorized recreational opportunities in the Oceano Dunes area and especially during these times of covid.

- The existing level of camping and motorized recreation is not adequate and these opportunities should be increased to meet the needs of the public. Both uses are entirely reasonable and badly needed by the public at Oceano Dunes.

- The cumulative impact of all camping and motorized recreational closures has been significant and this action should not add to that significant negative impact.

- The social/economic impacts of the pandemic have significant increased the need for motorized recreational opportunities at Oceano Dunes.

We are looking forward to reviewing to your consideration of these significant issues and your use of them to develop a reasonable Pro-Recreation Alternative.

Thank you for considering our input.

Sincerely,

/s/ CTVA Action Committee on behalf of our 240 members and their families and friends
Capital Trail Vehicle Association (CTVA)
P.O. Box 5295
Helena, MT 59604-5295

From: Ed Harris
To: CentralCoast@Coastal
Subject: Dec. 17 hearing
Date: Wednesday, December 8, 2021 6:23:15 AM

I support the staff report on 3-12-050-3A.

Ed Harris

From: Anita and Tom Giangreco
To: CentralCoast@Coastal
Subject: Friday Meeting
Date: Tuesday, December 7, 2021 6:05:29 PM

I live on the Nipomo Mesa, Please keep the mitigation efforts going as planned. We are hoping to someday have better air to breathe.

Thank You

From: Tim Elliott
To: CentralCoast@Coastal
Subject: Oceano Dunes Dust Control Program
Date: Wednesday, December 8, 2021 8:32:56 AM

I continue to support reducing vehicle caused dust and other negative impacts to the the coastal environment caused by off-road vehicles.
I say this even if studies show that off-road-vehicles is not the primary cause of dust and negative environmental impacts.
Tim Elliott
3233 Arbor Lane
Santa Maria Ca 93455

From:	Linda Reynolds
To:	CentralCoast@Coastal
Subject:	Public Comment on December 2021 Agenda Item Friday 12a - Permit Amendment Application No. 3-12-050-A3 (State Parks' Oceano Dunes Dust Control, Grover Beach/Oceano)
Date:	Tuesday, December 7, 2021 5:17:15 PM

I support the Coastal Commission"s staff recommendations. We are finally moving towards healthier air but still have a long way to go.
Regards,
Linda Reynolds
Nipomo, Ca

From:	Arlene Versaw
To:	CentralCoast@Coastal
Subject:	Public Comment on December 2021 Agenda Item Friday 12a - Permit Amendment Application No. 3-12-050-A3 (State Parks' Oceano Dunes Dust Control, Grover Beach/Oceano)
Date:	Monday, December 6, 2021 4:09:03 PM

Commissioners:

Please support your staff's recommendation and approve Permit Application 3-12-050-A3 in support of additional mitigation projects on the Oceano Dunes. As usual, the staff report does a very good job of laying out the rationale, issues, and Coastal Act references that support its recommendation. While I would like to see even more done with regard to the air quality and environmental damage on the dunes, progress would be made with this work, and that is something. Thank you for your consideration.

Arlene Versaw

"Only truth and transparency can guarantee freedom." - John McCain
"Freedom of the press ensures that the abuse of every other freedom can be known, can be challenged and even defeated". Kofi Annan

From:	Chris Sorensen
To:	CentralCoast@Coastal
Subject:	Public Comment on December 2021 Agenda Item Friday 12a - Permit Amendment Application No. 3-12-050-A3 (State Parks' Oceano Dunes Dust Control, Grover Beach/Oceano)
Date:	Monday, December 6, 2021 4:03:02 PM

The Commission's past support for efforts to mitigate the Oceano Dunes SVRA dust emissions is greatly appreciated by all who live, work and school on the Nipomo Mesa. As a resident of the Mesa, I know from experience that these efforts have proved beneficial to our air quality. However, there is still much to do. I urge the Commission not be swayed by the misinformation spouted by some who oppose this important work. Respect for sound science and honest fact finding is the foundation of reality based decision making. Stay real, stay the course to clean air. Thank you for your continued support.

Chris Sorensen

From: Richard Wishner
To: CentralCoast@Coastal
Subject: Public Comment on December 2021 Agenda Item Friday 12a - Permit Amendment Application No. 3-12-050-A3 (State Parks' Oceano Dunes Dust Control, Grover Beach/Oceano)
Date: Monday, December 6, 2021 12:32:11 PM

Dear CCC,

In the Stipulated Order of Abatement, State Parks has legally agreed to reduce air pollution by 50% by 2023. They have estimated that this will take planting of more than 500 acres. At the current rate they will not make their commitment. Nevertheless, their request is a step in the right direction, and I support their approval.

In case the latest fabrication by the Friends of Oceana Dunes comes up about OHVs not being the cause of air polution and ESHA, I hope you will review the strong evidence that refutes their assertions and continue on the plan to close the Dunes to OHV riding. This will allow local citizens to walk on and enjoy the beach and protect ESHA.

Dick

From: Dorothy Modafferi
To: CentralCoast@Coastal
Subject: Public hearing for 3-12-050-A3 (Oceano Dunes Out Control Program
Date: Thursday, December 9, 2021 6:25:55 AM

To the Members of the California Coastal Commissionz;

I support the staff report on item 3-12-050-A3.

As a person impacted by the Oceano Dunes dust (according to my Pulmonologist), I am now using an asthma inhaler and asthma medication and staying indoors with windows closed and air filters going on days when I receive notices of air pollution in San Luis Obispo South County. Clean air is of critical importance to me and so many others whose health is also compromised.

The delays and obstructions and excuses by California State Parks has gone on too long. It is now time for them to meet the deadlines agreed by them and improve the air quality of those living and working south of Oceano Dunes.

Thank you for your support on this issue.

Sincerely,

Dorothy Modafferi
Nipomo, CA

From: Paulina
To: Coastal coast4u; CentralCoast@Coastal
Cc: Kahn, Kevin@Coastal
Subject: Re: Public Hearing Notice for 3-12-050-A3 (Oceano Dunes Dust Control Program)
Date: Thursday, December 9, 2021 11:10:52 PM

Dear Coastal Commission,

Item N 12a. Application N 3-12-050-A3

Please restore any Dune habitat that needs restoring. Remove ALL vehicles used for recreation from all the Oceano Dune habitat.
Vehicles do not belong there. We need to be saving habitat. Vehicles, especially the recreational kind that is so constant, destroy it.

I do not know what "dust mitigation" means. Please DO NOT pave anything. Don't squander water.

Sand blows. Sand is NOT dust. I am never sure what euphemisms are being used for what by developers be they private or public.

Please in the future state exactly what is going to be done. Perhaps you did here I'm not sure without doing a big search.

Sincerely yours,

Paulina Conn
Santa Barbara, CA 93105

On Dec 3, 2021, at 12:59 PM, California Coastal Commission <coast4u@coastal.ca.gov> wrote:

Please consider this Important Public Hearing Notice of the upcoming

CA Coastal Commission Hearing.

Click here to view hearing notice.