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Ruth Coleman, Director

November 2, 2011

The Honorable Bruce S. Gibson
Chair Person
Air Pollution Control District County of San Luis Obispo
San Luis Obispo, California 93401

Subject: Draft Rule 1001, Coastal Dunes Dust Control Requirements.

Dear Chair Person Bruce S. Gibson,

California State Parks' OHMVR Division (State Parks) welcomes the opportunity to provide this letter in response to the Notice of Public Hearing dated October 12, 2011 regarding the Adoption of a New Rule to Implement Dust Control Requirements on Coastal Dunes where Vehicle Activity Occurs. (See draft Rule 1001 dated 10/12/2011.) By these comments, State Parks hopes to continue assisting the APCD and your Board to address the issue of high PM10 levels on the Nipomo Mesa measured during naturally occurring high wind events.

To date, State Parks has worked together with the APCD and the County to fund and implement a number of projects and efforts to measure dust levels and implement specific dust control strategies. Recent efforts include implementing pilot projects to test dust control methods, funding a contract to conduct regular street sweeping on Pier Avenue in Oceano, participating with the County and APCD staff in a Management Oversight Committee and Technical Advisory Committee, and providing matching funding for a community monitoring program to test PM10 levels at receptor sites on the Nipomo Mesa.

In this spirit of collaboration, we are taking this opportunity to provide the following comments on the rule. Please note these comments were prepared and submitted prior to the release of a staff report by the APCD for the upcoming noticed meeting. As such, State Parks will submit further remarks or comments to respond to the staff report as needed.

1. The Temporary Baseline Monitoring Program must be implemented collaboratively prior to adopting the rule.

In reviewing the revisions to the proposed Rule 1001 that have been made since the Board's meeting on September 28, 2011, State Parks is pleased the provision has been made for a Temporary Baseline Monitoring Program, but, notes that the temporary Baseline Monitoring Program must be implemented collaboratively prior to adopting the rule.

The absence of data from an agreed upon baseline monitoring system means the Board is unable to determine that the rule as proposed will, in fact, result in alleviating the problem of particulate matter emissions and promote the attainment or maintenance of the PM10 ambient air quality standard on the Nipomo Mesa. The District's responsibility for making this determination before adopting the rule is spelled out in California Health and Safety Code Section 40001 (c).

Prior to adopting any rule or regulation to reduce criteria pollutants, a district shall determine that there is a problem that the proposed rule or regulation will alleviate and that the rule or regulation will promote the attainment or maintenance of state or federal ambient air quality standards. [Emphasis added.]

Scientific studies to date have not sufficiently established measureable differences between naturally occurring PM10 and PM10 arising from the OHV recreation activities on the SVRA. Even the Executive Summary of the Phase 2 Study at page iii states that the data strongly suggest, but are not conclusive, that more particulate matter may be indirectly emitted as a result of vehicular activity on the dunes. Further, the Desert Research Institute's study of pilot projects indicates the potential exists for control measures that will reduce the movement of sand during high wind events experienced on the dunes. But, no correlation was made or conclusions reached as to the potential effectiveness of such measures in alleviating the PM10 exceedances as measured by the District's monitoring stations. As was discussed during the Board's September 28 meeting, the data produced to date do not provide sufficient information on the amount of particulate matter that is produced from the Oceano Dunes State Vehicular Recreation Area (SVRA) when compared with particulate matter that is produced from areas where no riding occurs. In the absence of this information, neither the APCD staff nor State Parks is in a position to propose a plan for controlling emissions caused by riding, because those emission levels are not known. Because of this, the District is unable to determine that the rule will alleviate the problem or promote the attainment of the PM10 standard. Thus, contrary to the requirement above, the rule proposes to defer this determination.

State Parks agrees that a Temporary Baseline Monitoring Program is an essential step to inform the development of a Particulate Matter Reduction Plan (PMRP) that includes a long-term monitoring program that provides assurance that possible PMRP-proposed control measures will be successful. State Parks has demonstrated its willingness to work with the APCD, and will voluntarily continue in that spirit to ensure a valid monitoring system will be implemented at State Parks' expense.

As the Temporary Baseline Monitoring Program proceeds, State Parks and the District will be in a position to consider and agree on potential control or mitigation measures should the monitoring results demonstrate there is an excess of particulate emissions from the motorized recreation area over the non-motorized recreation control area(s). This will enable the Board to determine the potential effectiveness of the control measures and to meet its obligation to evaluate the cost effectiveness of proposed measures before adopting the rule. The District's obligation to evaluate and rank potential control measures prior to rule adoption is found at Health and Safety Code Section 40703.

In adopting any regulation, the district shall consider, pursuant to Section 40922, and make available to the public, its findings related to the cost effectiveness of a control measure, as well as the basis for the findings and the considerations involved. A district shall make reasonable efforts, to the extent feasible within existing budget constraints, to make specific reference to the direct costs expected to be incurred by regulated parties, including businesses and individuals.

40922. (a) Each plan prepared pursuant to this chapter shall include an assessment of the cost effectiveness of available and proposed control measures and shall contain a list which ranks the control measures from the least cost-effective to the most cost-effective.

(b) In developing an adoption and implementation schedule for a specific control measure, the district shall consider the relative cost effectiveness of the measure, as determined under subdivision (a), as well as other factors including, but not limited to, technological feasibility, total emission reduction potential, the rate of reduction, public acceptability, and enforceability.

State Parks is entitled to know what the expectations, as well as the expense of implementation, will be prior to being held to an enforceable rule. Without baseline information to monitor against, it simply is not possible to evaluate the potential cost of control measures or their potential effectiveness.

2. The APCD may not impose a requirement to obtain an operating permit for an indirect emission source.

Item C. (5) of the proposed rule states, "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." Section 42300 (a) authorizes the APCD to establish a permit system for articles, machines, equipment, or other contrivance; but not for an indirect source such as the SVRA.

Every district board may establish, by regulation, a permit system that requires, except as otherwise provided in Section 42310, that before any person builds, erects, alters, replaces, operates, or uses any article, machine, equipment, or other contrivance which may cause the issuance of air contaminants, the person obtain a permit to do so from the air pollution control officer of the district.

The Phase 2 Study, Executive Summary, p. iii, states only that the data strongly suggest that OHV activities involve indirect emission impacts that are the primary cause of the high PM levels measured on the Nipomo Mesa during episode days. [Emphasis added.]

The SVRA is not an article, machine, equipment, or other contrivance. It is a public recreational area operated in a naturally occurring coastal beach and sand dune environment. Such an indirect source cannot be classified as an "article, machine, equipment, or other contrivance" as required by Section 42300 (a). (See also, Office of the

Attorney General Opinion No. 92-519, March 11, 1993: 76 Ops. Cal. Atty. Gen. 11, 1993
WL 112942 (Cal.A.G.)

3. Section C. 3. of the draft rule dated 10/12/11 does not adequately account for allowable monitoring equipment tolerances when measuring PM10.

Federal Equivalent Method (FEM) PM10 monitors as defined in 40 Code of Federal Regulations Part 53, PM10 establish a sampling effectiveness of such that the expected mass concentration is within +/- 10% of that predicted for an ideal sampler. Therefore, if there is 50 $\mu\text{g}/\text{m}^3$ present in the ambient air, the instrument may measure anywhere from 10% lower, which would be 45 $\mu\text{g}/\text{m}^3$, or 10% higher, which would be 55 $\mu\text{g}/\text{m}^3$. This creates an potential variation of 10 $\mu\text{g}/\text{m}^3$ when the actual level of PM10 is 50 $\mu\text{g}/\text{m}^3$. At all other levels, the potential variance would be different.

For instance, at 100 $\mu\text{g}/\text{m}^3$, the instrumentation is only required to be accurate to within 10% lower (90 $\mu\text{g}/\text{m}^3$), or 10% higher (110 $\mu\text{g}/\text{m}^3$). This means the range of accuracy could vary by as much as 20 $\mu\text{g}/\text{m}^3$. At this level of PM10, the 10 $\mu\text{g}/\text{m}^3$ variance allowed by the draft rule would not allow for the +/- 10% limitation of the measurement instrumentation.

4. Section C.3. of the draft rule should not require the state to achieve a concentration of 55 $\mu\text{g}/\text{m}^3$ at times when the control site reads a far higher level.

The draft rule Section C.3. requires the CDVAA operator to reduce PM10 emissions from the activity area of the park to 55 $\mu\text{g}/\text{m}^3$ any time the difference in measurement between the control site and the CDVAA monitor site exceeds 10 $\mu\text{g}/\text{m}^3$. This potentially obligates State Parks to reduce PM levels below naturally occurring levels that exceed the ambient air quality standard.

For example, if the control site measured a concentration of 90 $\mu\text{g}/\text{m}^3$ and the OHV site measured 110 $\mu\text{g}/\text{m}^3$, the state would be considered out of compliance due the difference between the two sites exceeding 10 $\mu\text{g}/\text{m}^3$, and the OHV site exceeding 55 $\mu\text{g}/\text{m}^3$. As the rule is written, the state would not be in compliance until the SVRA site is at 55 $\mu\text{g}/\text{m}^3$, well below the control site measurement. The state cannot mitigate beyond ambient levels.

5. The relationship between the standards proposed in the draft rule and PM10 measurements on the Nipomo Mesa is unclear.

We are concerned the rule does not account for the relationship between real-time monitoring data at Mesa 2 and CDF and emissions monitored at the SVRA. The intent of the draft rule is to address PM10 that exceeds the state standard as officially determined by measurements taken at the APCD monitoring stations on the Nipomo Mesa. The rule must clarify the relationship between the temporary monitoring sites at the park and the permanent monitoring sites at Mesa 2 and CDF to specify how a violation of the state or

federal standard at Mesa 2 or CDF relates to compliance with the performance standards at the SVRA.

6. New technical data and analysis

State Parks continues to have concerns regarding conclusions and data presented in past studies. State Parks' technical consultants have analyzed additional concerns in the documents listed below:

- a. Attachment 1. New data concerning correlation between Oceano Dunes SVRA vehicle activity and measured PM10 concentrations on the Nipomo Mesa from April 1, 2009 to June 30, 2011 (letter dated November 2, 2011 from TRA Environmental Sciences, Inc.)
- b. Attachment 2. Report by the California Geological Survey, presented to Daphne Greene, Deputy Director, State Parks, dated November 1, 2011. Subject: In consideration of Draft Rule 1001 proposed by the San Luis Obispo County Air Pollution Control District: An analysis of Wind, Soils, and Open Sand Sheet and Vegetation Acreage in the Active Dunes of the Callender Dune Sheet, San Luis Obispo County, California

7. Necessary requirements for compliance with CEQA prior to adoption of a draft rule.

CEQA Guideline § 15187 requires completion of an environmental analysis of the reasonably foreseeable methods by which the rule or regulation will be achieved. This environmental analysis must be considered at the time of adoption of the rule or regulation establishing a performance standard or a treatment requirement.

The draft rule, if adopted, will establish a specific performance standard uniquely applicable to vehicle activity areas in a coastal dune environment. Further, the draft rule requires the implementation of particulate matter emission monitoring as well as the installation and implementation of air quality control measures designed to reduce the level of particulate emissions from the park activity area. CEQA Guideline § 15187 (c) requires the environmental analysis to include: (1) An analysis of the reasonably foreseeable environmental impacts of the methods of compliance; (2) An analysis of the reasonably foreseeable feasible mitigation measures relating to those impacts; and (3) An analysis of reasonably foreseeable alternative means of compliance with the rule or regulation, which would avoid or eliminate the identified impacts.

Based on the record to date, including APCD staff reports and presentations, suggestions included in the Phase 2 Study, and pilot projects tested in the DRI Pilot Project study, implementation of certain control measures is reasonably foreseeable. Increased vegetation in the natural dunes is suggested as a potential control measure in the Phase 2 Study and was evaluated as a potential measure for reducing sand movement in the DRI Pilot Project Study along with the installation of straw bales. The rule further requires the

design and implementation of a particulate matter emission monitoring program on a temporary basis as well as a long-term monitoring network. The monitoring and related equipment will be installed in a sensitive dune habitat and have impacts on that environment that require environmental analysis. Likewise, the potential control measures will have environmental impacts that need to be evaluated pursuant to CEQA.

Activities which may be initiated by the proposed rule would occur in a unique sensitive coastal dune environment and habitat, which would deprive the APCD of reliance on Categorical Exemption 15308 that might otherwise exempt actions to improve the environment.

Rule 1001 is a project subject to CEQA review prior to adoption. The APCD is the Lead Agency for CEQA purposes and the environmental analysis must be developed and submitted to the APCD Board of Directors at the time it considers adopting the proposed rule. No such environmental analysis has been completed.

8. Until standards for a legally and scientifically justified rule, including cost-effective monitoring and control measures, are more fully developed, State Parks should not be subjected to the possibility of fines.

As noted in the September 28, 2011 staff report to the Board, failure of State Parks to comply with the terms in the rule will subject State Parks to a fine of up to \$1,000 per day. (Health and Safety Code Section 42400.) At the same time, many of the requirements of the rule are not yet fully clear.

Adoption of the rule requires the Board make findings of clarity. (Health and Safety Code Section 40727 (a) and (b) (3).) As a legislative body, the Board has no power to delegate to the APCO the Board's power to determine when State Parks is acting unlawfully and subject to a fine. Delegation of uncontrolled discretion is an impermissible delegation of the Board's legislative power. To be effective, the rule must set forth with clarity some norm or standard by which State Parks may know when its actions and proposed plans would be in violation of the rule as intended by the Board. Because the proposed rule commits application of the rule to the APCO's discretion, the rule must set up a uniform standard for the APCO and State Parks to follow. (See: California Jurisprudence 3d, Municipalities §352; R.W. Agnew v. City of Culver City (1957) 147 Cal.App.2d 144.)

The October 12, 2011 draft rule requires the CDVAA (State Parks) to develop and implement an APCO-approved Temporary Baseline Monitoring Program and a PMRP containing an APCD-approved monitoring network, control measures, and Track-Out Prevention Program. These are new concepts designed by the APCD to attempt to address the presence of PM10. Neither the Temporary Baseline Monitoring Program nor PMRP are used in any other context so far discovered by, or made known to, State Parks. As such, a uniform standard or standards for 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 are

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absent from the rule. Thus, what is an acceptable standard is left to the discretion of the APCD/APCO. The draft rule does not yet provide State Parks with a clear understanding of the expectations for an acceptable submittal. Approval is fully subject to the discretion of the APCO.

Additionally, State Parks is required to obtain all required permits from appropriate land-use agencies and other affected governmental agencies and ensure the requirements of CEQA and NEPA are satisfied to the extent needed. Each of these requirements also is accompanied by a compliance schedule. Other land-use or governmental organization approvals are beyond the control of State Parks. Thus, as written, the draft rule proposes that State Parks may be subject to fine if it is unable to obtain the requisite land-use approvals. Also, the rule as written predetermines that any action or control measure approved by the APCO must be found acceptable in any CEQA or NEPA environmental analysis or State Parks may, again, be subjected to possible fine.

If State Parks submits plans by the compliance date, it is not yet sufficiently clear at what point it would be subject to a fine should a submitted plan or other document fail to meet the expectations or as yet unknown standards of the APCO for an approvable plan or program or fail to obtain other land-use approvals or comply with other environmental requirements within the timelines established by the compliance schedule. The APCD/APCO would be given discretion uncontrolled by the APCD Board to determine when to find State Parks in violation of the rule with regard to the acceptability of plan submittals or best efforts to diligently pursue the necessary land-use permits and environmental clearances.

State Parks is committed to assisting and working with the APCD to implement a temporary monitoring program and to determine potentially effective control measures. We look forward to discussing our concerns outlined in this letter and continuing to work together on these complicated air quality issues.

Sincerely,



Phil Jenkins, Chief
OHMVR Division

cc: APCD Board Member
Larry Allen APCD, Executive Director