APPLICATION

Pursuant to California Rules of Court, Rule 8.200, subd. (c), proposed Amicus Curiae, Sierra Club hereby requests permission to file an amicus curiae brief in support of Respondent San Luis Obispo County Air Pollution Control District ("APCD" or "the District"). As Appellant, Friends of Oceano Dunes ("Friends") filed its Reply Brief on December 3, 2014. Pursuant to Rule 8.200 the deadline for this application is December 17, 2014. Accordingly, this application and brief are timely filed on December 17, 2014.

This brief has been drafted without compensation, monetary contribution from, or participation by, any party or counsel for a party, and has been served on all parties (proof of service attached).

Interest of Sierra Club

Sierra Club is a California non-profit membership organization concerned with the protection of the environment and public health. Members of the Sierra Club reside throughout San Luis Obispo County, including in the vicinity of the Oceano Dunes Vehicular Recreation Area ("ODSVRA") (which is the subject of this lawsuit) as well as the Nipomo Mesa, the area most affected by the Particulate Matter ("PM") emissions from the ODSVRA. Sierra Club has long been interested in the California Department of Parks and Recreation's ("DPR") management and operation of the ODSVRA, particularly as DPR's management affects the area's natural resources and the public's health. See, Sierra Club v. Department of Parks & Recreation (2012) 202 Cal.App.4th 735.)

The issue of the ACPD's permitting authority and ability to regulate the PM pollution issuing from the ODSVRA is of critical importance to the Sierra Club and its members because these emissions significantly affect the health of the public, including members of the Sierra Club. As noted by the trial court's informative and well-reasoned Ruling Denying Friend's Petition for Writ of Mandate, a large body of scientific research has documented the serious health consequences of exposure to high concentrations of airborne particulate matter.

The general public and Sierra Club members residing in the Nipomo Mesa have been and continue to be exposed to high levels of particulate matter as a direct result of the DPR's operation and management of the ODSVRA. Sierra Club therefore has a concrete and immediate interest in curtailing these particulate emissions through the APCD's power to regulate DPR's operation of the ODSVRA

This brief has been drafted entirely by the counsel for Sierra Club, without compensation, monetary contribution or other material assistance from any party or counsel for a party, and has been served on all parties as described in the attached proof of service. Sierra Club contends that most of the discussion, citations, and points made in the attached proposed brief have not been presented by the parties in the case before the court.

Dated: December 17, 2014

Respectfully submitted,

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Counsel for Sierra Club

I. INTRODUCTION & SMMARY OF ARGUMENT

After carefully documenting frequent exceedance of ambient PM standards on the Nipomo Mesa, the District undertook two painstakingly thorough studies to determine the extent and source of the problem. The studies concluded that the Riding Facility at ODSVRA is "a major contributing factor to the high PM concentrations on the Nipomo Mesa." (Respondents' Brief at p. 9; 1 CT 160, 2 CT 310; 2 CT311.) The District concluded that the primary cause of high PM levels and the frequent exceedances of PM standards were "a result of the vehicular effect on the dunes themselves." (Ibid.) The off-road recreation that occurs under the DPR's auspices "de-vegetation and destabilization of the dune structure and destruction of the natural crust on the dune surface." (Ibid.)

After a full consideration of all issues and consistent with its statutory authority, the District's Board adopted Rule 1001, which requires State Parks to prepare and implement a plan to reduce PM10 pollution arising from the Off-Road Riding Facility caused by off road vehicles. The Rule creates a timeline for State Parks to reach certain milestones for monitoring and emissions reductions and to obtain a permit from the District once State Parks has reached certain milestones. (Ruling at p. 9.)

The issue on appeal is whether the District exceeded its authority when required the DPR to obtain a permit for its operations. Appellant Friends contends that despite generally broad statutory authority, the District exceeded its permitting authority

Appellant's argument must be rejected because the District reasonably interpreted the Health and Safety Code as granting it broad permitting authority. Appellant's argument that the statute must be interpreted narrowly ignores the legislature's broad grant of authority to the District. Moreover, interpreting the statute narrowly would seriously undermine the District's ability to address the serious exceedances of PM10 standards that result from the operation of the ODSVRA.

II STATEMENT OF THE CASE

The case presents a number of procedural and substantive issues. At its core, however, this appeal strives to curtail the authority of the APCD, and by extension, all districts, to promulgate rules and issue permits in order to achieve and maintain healthful ambient air quality standards. Consistent with its statutory mandate, the APCD resists the appellant's efforts to undermine its authority to engage in rule-making and other quasi-legislative acts to protect the health and safety of the residents of San Luis Obispo County.

Appellant essentially argues that the APCD (and districts, generally) has no permitting authority to regulate any facility, structure or recreational areas, such as the ODSVRA, even if the facility or recreational area has been proven to be the source or a major contributor to a serious air pollution problem. Sierra Club has a strong interest in preserving the APCD's authority to address unhealthful air pollution through its rule-making and permitting authority.

III ISSUE PRESENTED

1. Was it reasonable for the APCD to conclude that the ODSVRA is a "direct" source of emission because it can reasonably be viewed as a "contrivance" without the meaning of H&S Code §42300(a)[1].

/ / /

[1] / All statutory references are to the Health and Safety Code unless otherwise noted

IV SUPPLEMENTAL STATEMENT OF FACTS

Amicus curiae Sierra Club adopts by this reference of the Respondent's factual and procedural facts, as supplemented by the following brief supplementary statement of facts.

> "Particulate Matter" (PM) refers to very small solid or liquid particles that can be suspended in the atmosphere. Particulate Matter consisting of particles that are 10 micrometers or less in diameter (PM10) is considered an air pollutant. (40 C.F.R. § 50.6(c) (2009).) PM10 can be further subclassified into fine particles, which are 2.5 micrometers or less in diameter (PM2.5) (40 C.F.R. § 50, appen. L (2009)) and coarse particles, which are between 10 and 2.5 micrometers in diameter (PM10-2.5) (40 C.F.R. § 50, appen. O (2009)).''

(California Unions for Reliable Energy v. Mojave Desert Air Quality Management Dist. (2009) 178 Cal.App.4th 1225, 1231-1232.) ("CURE").

The EPA is required to set ambient standards for air pollutants, including both PM 10 and 2.5. Id., 1232.

It is well-settled that "[a]ll fine airborne particulate matter, regardless of composition, can cause respiratory distress when inhaled, especially to the very young, the elderly and those with compromised respiratory systems." Administrative Record ("AR") at 1:6.

Owing in part to the public concern about the unhealthful level of PM pollution on the Nipomo Mesa and in Oceano, the APCD undertook the first comprehensive study of the PM pollution in the Nipomo Mesa in 2004. The results confirmed what the residents of the Nipomo Mesa had known all along, namely, that the concentration of PM in the

Nipomo Mesa frequently exceeds the health standards set by the Environmental Protection Agency (EPA) and the California Air Resources Board ("CARB"):

> Particulate concentrations in the Nipomo Mesa area are significantly higher than other locations in San Luis Obispo County (II). Federal and state health standards have been established for both PM l0 (coarse) and PM2.5 (fine) particulates (see Table 1). Numerous violations of the state 24 hour PMl0 standard and one violation of the federal 24 hour PM l0 standard have been recorded at one or more of the monitoring stations in the Nipomo Mesa area. In the other areas of San Luis Obispo County, the state 24 hour PM l0 standard is violated only occasionally, and has never come close to the higher federal 24 hour PM l0 standard. AR 1:14.

The health effects of PM pollution are well known, as the issue has been the subject of more than 2000 scientific studies. As the trial court's Ruling explained, these studies have determined that exposure to high concentration of PM can cause serious health effects, including increased hospitalization and emergency room visits for respiratory distress in children, decreased lung function among children, exacerbation of symptoms of asthma, bronchitis and other respiratory diseases, increased cardiovascular stress for those with pre-existing heart disease, and premature death. AR 1:163.

In addition to causing human death and suffering, PM pollution results in significant financial impact on the entire health care system. As APCD director Larry Allen explained at an APCD hearing: "A recent study by the Rand Corporation found that from 2005 to 2007, it cost California -- just California -- nearly $145 million just in the hospitalizations for respiratory, cardiovascular, and asthma conditions resulting from exceedances of the Federal PM2.5 standard during that period resulting in over 22,000 hospitalizations." AR 3:595.

Implementation of these standards, however, is the responsibility of the local air pollution control district, such as the APCD:

> Each state is required to adopt a state implementation plan (Plan) that "provides for implementation, maintenance, and enforcement" of the Standards. (42 U.S.C. § 7410(a); see also *id*., § 7407(a).) A Plan must include a permit program for major new or modified stationary sources of air pollution in nonattainment areas (new source review). (42 U.S.C. §§ 7410(a)(2)(C), 7502(c)(5), 7503.) A permit for a new source may be granted only if it obtains emission reduction credits to offset the increased emissions that it will produce. (42 U.S.C. § 7503(a)(1)(A), (c).

CURE, supra, 178 Cal.App.4th at 1232.

Local agencies have the primary responsibility for "the development, implementation, monitoring, and enforcement of air pollution control strategies." Id., §40001(a) (Subject to the powers and duties of the state board, the districts are required "to adopt and enforce rules and regulations to achieve and maintain the state and federal ambient air quality standards in all areas affected by emission sources under their jurisdiction.") With few exceptions, for every county, a county district such as the San Luis Obispo APCD is the local agency responsible for implementation and enforcement of air pollution control standards. § 40002.

Trial Court's Ruling

The trial court determined that the APCD reasonably determined that it could directly regulate the operation of the ODSVRA by requiring a permit because the facility is a "contrivance". The trial court determined that in light of the quasi-legislative nature of the ACPD's action, its presumed expertise within its own area of regulation and its broad statutory authority to take appropriate action to maintain

healthful air quality standards, its review of the APCD's rulemaking is subject to a deferential standard of review.

The trial court also concluded that APCD correctly concluded that the Off-Road Riding Facility is a "contrivance" within the meaning of §42300(a) and therefore a 'direct' emission subject to a permit because it agreed with the ACPD's assessment that the ODSVRA is a "facility" consisting of "multiple man-made improvements, including, among other things, gates, fences, walking paths, access roads, signage, parking lots, and restrooms." Ruling at 14.

The trial court upheld the APCD's determination that the off-highway vehicle ("OHV") use at ODSVRA is a "major contributing factor to increased PM10 levels on the Nipomo Mesa." Ruling at 16. The court concluded that substantial evidence (in the form of both the Phase 1 and Phase 2 Studies) supports the APCD's conclusion that "[t]he elevated emissions of PM10 would not occur but for the operation of the OHVs in and around the dunes." Ruling at 14.

In this appeal, Friends does not challenge the ACPD's factual determination about the causal connection between the operation and management of the ODSVRA and the elevated PM pollution and air quality exceedances on the Nipomo Mesa. The appeal is limited to the whether the ODSVRA is a direct source of the PM pollution.

V ARGUMENT

A. The plain meaning of the statute and the overall scheme of the Health and Safety Code does not support Friends' narrow interpretation of the districts' permitting authority

1. The plain meaning of the text supports the District's interpretation of the scope of its statutory authority.

As the trial court recognized, the ODSVRA meets the definition of "contrivance" within the meaning of the statute. Of the several definitions of the term "contrivance," the most relevant to the present context is "something contrived," which is ""[t]o bring about by artifice" or "[t]o invent or fabricate." (Ruling at 13, citing Webster's II New College Dictionary, at 246.) The trial court concluded that the "Off-Road Riding Facility" is a "contrivance" within the meaning of the statute because "the Facility is one component of a larger recreational area consisting of multiple man-made improvements, including, among other things, gates, fencing, walking paths, access roads, signage, parking lots, and restrooms." Ruling at 14.

In its Opening Brief, Appellant challenged the trial court's conclusion that the ODSVRA meets the definition of a contrivance largely by insisting that the ODSVRA is nothing more than a natural area, and that "it is not accurate that Oceano Dunes contains 'access roads' or "walking paths'." Op Br at 24-25. In the same vein, Appellant complains that the court's reasoning proves too much because it could transform any natural area served by paths, fences and parking into an "other contrivance." Op Br at 25.

Appellant's attempt to characterize the ODSVRA as merely a natural area without any infrastructure, man-made control devices, or active management is completely inaccurate. The DPR is statutorily required to actively manage and maintain the ODSVRA. (Pub Resources Code § 5090.35) (" the division shall promptly repair and

continuously maintain areas and trails, anticipate and prevent accelerated and unnatural erosion, and restore lands damaged by erosion to the extent possible.") "When areas or trails or portions thereof cannot be maintained to appropriate established standards for sustained long-term use, they should be closed to use and repaired, to prevent accelerated erosion." (Pub Resources Code §5090.2(c)(4)). More generally, Pub. Resources Code §5090.2 (c)(1) provides that: "off-highway motor vehicle recreational areas, facilities, and opportunities should be expanded and **managed** in a manner consistent with this chapter, in particular **to maintain sustained long-term use**." (Emphasis added).

According to the DPR's website (http://ohv.parks.ca.gov/?page_id=1207)"Vault toilets and chemical toilets are provided, and water-delivery and holding-tank pump-out services are available on the beach. Campsite reservation information can be obtained by calling 1-800-444-7275."

The administrative record contains evidence that the DPR's management of the ODSVRA includes maintaining a perimeter fence around the active riding area, and fences around sensitive vegetation within the riding area. AR 1:169, 2:313-314.

Accordingly, there is ample evidence to support the conclusion that the ODSVRA is much more than an unmanaged natural area, as Appellant would have the court believe. The ODSVRA is actively managed by the DPR, whose duties include overseeing onsite camping, regulating the number of visitors and campers, maintaining perimeter fencing around the riding area and protective fencing around vegetation islands, and maintenance and repair of damaged trails. The ODSVRA therefore meets the definition of a

contrivance in that over-all, it is a manmade facility whose operation and maintenance as an off-highway vehicle park is a function of active human management.

Finally, it should be noted that the District's interpretation of the scope of the term "contrivance" is accorded considerable deference. (California Building Industry Assn. v. San Joaquin Valley Air Pollution Control Dist. (2009) 178 Cal.App.4th 120, 137. Similar to the Appellant here, in California Building Industry, the Building Industry Association had complained that the San Joaquin Valley Air Pollution Control District's definition of "indirect" was too broad. The Court rejected this argument in part because it found that "as an agency acting in a quasi-legislative manner, the District has the power to elaborate the meaning of key statutory terms." (Id.) The same result should obtain here.

2. The legislative history does not support Appellant's argument that the scope of the District's permitting authority must be construed narrowly.

Although Appellant spends a lot of breath trying to convince this court that the legislature intended to curtail the districts' permitting authority, it can offer little by way of legislative history, statutory analysis or case law to support this claim. As the trial court recognized, "[u]nder the mandate of the Health and Safety Code §40001, the District has broad authority to take action to reduce air pollution and maintain ambient air quality standards. To accomplish this mandate, the District has been delegated with the Legislative law making power." (Ruling at 9, citation omitted).

The over-all legislative scheme shows that while the responsibility for achieving and maintaining healthful air quality standards is placed on the shoulders of the districts

in the first instance, they are granted broad authority discharge this legislative mandate. (CURE, supra, 178 Cal.App.4th at 1232) ("The Legislature intended the District "[t]o successfully develop and implement a comprehensive program for the attainment and maintenance of state and federal ambient air quality standards … ." (Health & Saf. Code, § 41200, subd. (d).) To that end, the District has the power to make rules that become part of the state Plan. (Health & Saf. Code, § 41230; see generally *id*., § 41200 et seq.)")

Citing the canon of statutory construction known as *expressio unius est exclusio alterius (*the expression of certain things in a statute necessarily involves exclusion of other things not expressed) Appellant argues that had the legislature intended to grant the districts permitting authority to regulate a regulated recreational facility such as the ODSVRA, it would have done so explicitly. (Op Br at 33, quoting Henderson v. Mann Theatres Corp. (1976) 65 Cal.App. 3d 397, 403). Given the breadth of regulatory authority granted to the district, this argument is unavailing.

To the contrary, the legislative scheme suggests that where the legislature intended to curtail the district's authority to regulate, it has done so explicitly. For example, emission sources not subject to this districts' permitting authority (e.g. pipeline emissions) are expressly listed in the Code. (§ 42310(a).) If the legislature had intended to exempt large emitting facilities such as the ODSVRA from the permit requirement, it would have made that intent explicit. Yet, the Appellant is unable to cite any support for its contention that the legislature meant to preclude districts from achieving and maintaining air quality standards by regulating large emitters of air pollution through their permitting authority.

Moreover, Appellant's argument that the statute must be construed narrowly in order to curtail the District's permitting authority ignores the State's public policy of promoting healthful ambient air. To wit, the Legislature has declared that

> the people of the State of California have a primary interest in the quality of the physical environment in which they live, and that this physical environment is being degraded by the waste and refuse of civilization polluting the atmosphere, thereby creating a situation which is detrimental to the health, safety, welfare, and sense of well-being of the people of California. (§ 39000)
>
> The Legislature, therefore, declares that this public interest shall be safeguarded by an intensive, coordinated state, regional, and local effort to protect and enhance the ambient air quality of the state. (§ 39001).

In light of the strong public policy in protecting and enhancing ambient air quality, the scope of statutory mandates intended to promote this public policy must be interpreted broadly.

> Legislation concerning environmental protection is given broad construction to accomplish the objectives of such enactments. Thus, in *Friends of Mammoth v. Board of Supervisors*, 8 Cal. 3d 247 (1972), the Supreme Court at page 254 stated:
>
> > "More recently, a circuit court discussed statutes attesting to the commitment of the Government to control, at long last, the destructive engine of material "progress"'. The duty of the judiciary, it held, is to assure that important environment purposes, heralded in legislative halls, are not lost or misdirected in the vast hallways of administrative bureaucracy."
>
> We think the Legislature intended that section 39276 and the other provisions of the state air pollution control laws discussed above be given a broad construction in order to combat the evil of air pollution to which the legislation is directed. See *Friends of Mammoth v. Board of Supervisors*, supra, 8 Cal. 3d at 259. **(**56 Ops. Cal. Atty. Gen. 531, at 21-22.)

3. *Expressio unius est exclusio alterius* cannot be applied in a way that undermines the legislative intent

The canon of *expressio unius est exclusio alterius* cannot be applied "invariably and without regard to other indicia of legislative intent. (*In re J. W., supra*, 29 Cal.4th at p. 209.) This rule of statutory construction is only a guide and will not be applied if it would defeat legislative intent or produce an absurd result. (*People v. Rizo* (2000) 22 Cal.4th 681, 687 [94 Cal. Rptr. 2d 375, 996 P.2d 27].) The California Supreme Court has clarified courts do not apply the principle " 'if its operation would contradict a discernible and contrary legislative intent' " (In re R.H. (2009) 170 Cal.App.4th 678, 699, citations omitted.)

Accordingly, Appellant's argument based on *expressio unius est exclusio alterius* must be rejected in this instance because its application to this case would defeat a strong legislative intent to grant the districts broad authority to achieve and maintain healthful air quality standards.

Appellant's argument that the scope of the District's permitting authority must be construed narrowly must be therefore be rejected. In order to promote a strong public policy to "combat the evil of air pollution" the scope of the District's permitting authority must be construed broadly.

4. Application of the canon of *Ejusdem Generis* does not compel a finding that the District's permitting authority is limited to individual machines or equipment

Appellant at length argues that the District exceeded its statutory when it concluded that it had permitting authority vis-a-vis the ODSVRA. Appellant's argument

centers on the meaning of the phrase "other contrivance" as the phrase is used in §42300(a). In relevant part, 42300(a) provides:

> Every district board may establish, by regulation, a permit system that requires… 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 trial court concluded that the District had permitting authority in this instance because the ODSVRA is a contrivance within the meaning of the statute. Appellant argues that pursuant to the canon of statutory construction known as *Ejusdem Generis***, "other contrivance"** can only mean a mechanical device; according to Appellant, the phrase cannot be construed as broadly referring to a man-made facility that is created and managed by man. These arguments must fail.

a. Application of *Ejusdem Generis* is inappropriate because it would frustrate the purpose of the statute and undermine the legislative intent

It is well-settled that

> In construing a statute a court's objective is to ascertain and effectuate the underlying legislative intent. (*People v. Woodhead*(1987) 43 Cal.3d 1002, 1007 [239 Cal.Rptr. 656, 741 P.2d 154].) This fundamental rule overrides the *ejusdem generis* doctrine, just as it would any maxim of jurisprudence, if application of the doctrine or maxim would frustrate the intent underlying the statute.

(Moore v. California State Bd. of Accountancy (1992) 2 Cal.4th 999, 1012.)

Despite this fundamental principle, Appellant disregards the legislative context when it argues that the term contrivance must be interpreted to be limited to mechanical devices. Appellant's abstract, confusing and purely semantic argument ignores the

districts' legislative mandate pursuant to which the districts have broad permitting authority in order to achieve and maintain air quality standards.

The discussion of *ejusdem generis* in the case of Bullis Charter School v. Los Altos School Dist. (2011) 200 Cal.App.4th 296 is instructive:

> "The rule of *ejusdem generis* assumes that the general term chosen by the Legislature conveys a relatively 'unrestricted sense.' Sometimes this is so; sometimes it is not. The rule also supposes that the operative characteristics of the enumerated things may be readily discerned from the face of the statute, but that is not necessarily the case. With or without *ejusdem generis*, the real intent of an inclusive or expansive clause must ordinarily be derived from the statutory context and, if necessary, other permissible indicia of intent. *Ejusdem generis*, with its emphasis on abstract semantical suppositions, may do more to obscure than disclose the intended scope of the clause." (*Id*., at 321, citation omitted).

Appellant's insistence that the term "contrivance" must necessarily refer to a mechanical device obscures the intended scope of the statute, which was undoubtedly to grant broad authority to the APCD in order to achieve its statutory mandate. Appellant's argument to the contrary, which ignores this broad mandate and the statutory intent must therefore be rejected.

b. The District has permitting authority to regulate a large recreational facility or other contrivance

Appellant's argument focuses on the words "article", "machine" and "equipment", claiming that these items "are all mechanical in nature." Reply at 25. According to Appellant, the term "other contrivance" must therefore be understood to be limited to the "class" of mechanical devices."

Appellant's interpretation of the statute suggests that while districts have permitting authority over any single "article", "equipment" or "machine," they cannot

require a permit for an aggregate of machines or other devices that may operate in concert or simultaneously within a facility. Interestingly, Appellant claims that "'article, machine, [or] equipment' refer to machinery or mechanical devices that one would find typically in a factory or plant." Reply at 27. It makes no sense, however, to suggest districts may regulate emitting machines or articles, one at a time, but not in the aggregate as in a mining operation or factory that includes several pieces of equipment capable of emitting pollution. The term "other contrivance" can therefore refer to an aggregation of devices, equipment or articles (as in a facility) capable of "issuing" air pollution.

5. The APCD and other districts have consistently and for a long time exercised broad permitting authority to achieve healthful air standards

APCD argues that its interpretation of the breadth of its permitting authority is owed significant deference because "it has consistently interpreted statutory language over time." (Respondents' Brief at 41.) In support of this argument, the District cites several permits for a variety of direct sources of emission such as mining operations, material stockpiles and other direct source of emission. (Ibid.)

The Manaster & Selmi treatise, which Appellant has itself cited, recognizes that "landfills" are subject to permits by the districts. (Manaster & Selmi, § 41.03.).

Appellant has no problem with the District's permitting authority as it applies to PM emissions from stockpiles of contaminated soil with the aid of heavy equipment. (Reply Brief at 55). This position cannot be reconciled with the Appellant's position that the District's permitting authority only extends to machinery. Although heavy

equipment is used to move stockpiles, the permit does not regulate emissions from any one piece of machinery. Rather, as the District explained in its Respondents' Brief (at 43), the permit regulates the aggregate discharge of fugitive dust from a stockpile site as a whole. These emissions are from a number of difference sources, which include the stockpile itself, as well as the emissions caused by heavy machinery moving the contaminated soil, traffic and staging within the site.

The APCD is not the only district with a history of exercising permitting authority over facilities and other non-mechanical sources of emission. Other districts have similarly interpreted §42300(a) as granting broad permitting authority. As described in Standard Oil v. Feldstein (1980) 105 Cal. App. 3d 590, 505-596:

> Pursuant to its authority [under §40001], District [Bay Area Air Quality Control District] here promulgated regulation 2. Regulation 2 provided for a permit system to "**construct any facility** . . . or erect, alter, or replace" any "article, machine, [or] equipment" or to operate any of the foregoing if such operation would increase, eliminate, reduce or control the emission of air contaminants. (§§ 1301, 1302.) [4] Thus, if one sought to build such a facility, a *written* permit to construct had to be obtained from the Control Officer before construction could begin. Upon completion of construction, a *written* permit to operate had to be secured from the Control Officer before the facility could be put into use.

Thus, in 1973 The Bay Area Air Quality Control District (BAACQD) had interpreted its permitting authority under §42300(a) broadly, promulgating regulation that require a permit for any "facility or building." Id., at fn. 5. The case does not include any discussion of the scope of the District's rule. Accordingly, the APCD's broad interpretation of the scope of its permitting authority was implicitly approved by the Court in Standard Oil. This is persuasive evidence that the APCD's interpretation

of its permitting authority is correct.

B Adopting Appellant's interpretation of the statute would leave a regulatory void that would undermine the District's ability to discharge its statutory duty to achieve and maintain healthful air quality standards

Given the District's heavy statutory burden to achieve and maintain air quality standards through adopting and enforcing rules and regulations, the APCD had no choice but to address the significant PM exceedances it had documented on the Nipomo Mesa through all available means, including its permitting authority. The question becomes, what effective regulatory tools other than the permitting authority does the APCD have in its arsenal to achieve compliance with the PM10 standards?

Friends argue the APCD was required to employ the "fees and mitigation" scheme described in §42311(g). Friends does not fully describe how this "mitigation and fee" scheme is supposed to work, but the plain meaning of the text of §42311(g) does not support Friends' argument.

In its entirety, §42311(g) provides: "A district may adopt, by regulation, a schedule of fees to be assessed on area-wide or indirect sources of emissions which are regulated, but for which permits are not issued, by the district to recover the costs of district programs related to these sources." According to this section, the district may impose fees on indirect sources of emissions. This provision does not apply here because the ODSVRA is not an indirect source. §42311(g) also allows districts to impose a fee on "regulated" sources "for which permits are not issued." This suggests that where a district cannot require a permit (because the source is indirect) or where it

can require an area-wide[2] permit but (for practical reasons) it has not elected to do so, it may impose a fee to "recover the costs of district programs related to these sources."

§42311(g) clearly has no application to the case at bar. As the trial court cogently explained, the ODSVRA is not an indirect source because the facility itself is the source of the pollution; the OHV activity organized and authorized by the DPR merely exacerbates the emissions.

Moreover, the issue in this case is not the imposition of a fee on "area-wide" sources of emissions. APCD has concluded that the ODSVRA is by far the single biggest contributor to the frequent exceedances of PM 10 standards in the area. Area-wide regulation therefore cannot adequately address the problem.

In any event, according to §42311(g), districts may impose a fee on area-wide sources that are unpermitted, but are otherwise potentially subject to a permit. Yet, according to the Appellant, the APCD has no authority to regulate the operation of the ODSVRA via a permit.

Finally, §42311(g) merely authorizes districts to impose a schedule of fees to "recover the costs of district programs related to those sources." Nothing in the text of §42311(g) supports Friends' contention that the legislature had intended to limit the district's authority to promulgating broad regulations or imposition of fees when it came to a single substantial source of pollution such as the ODSVRA.

[2] / As Appellant notes in its Reply Brief, "the term 'area-wide' has been defined to mean nonpermitted sources such as residential heaters and wood stoves." Citing Manaster & Selmi, 2 California Environmental Law and Land Use Practice, §41.01, n.2.

This provision simply has no application here because the APCD is not seeking to recover the cost of an ongoing program to address indirect or area-wide sources. The issue is whether the DPR can be required to implement on-site mitigation measures and monitoring in order to address the PM10 leaving the ODSVRA. Accordingly, §42311(g) has no application here.

In its Opening Brief, Friends argues that "[i]nterpreting narrower District **permit authority** under § 42300(a) doesn't leave emissions **unregulated;** here, it simply means that the District would be limited to regulating such sources through direct mitigation funded by fees collected from State Parks, § 42311(g) . . . ." Op Br at 21 (emphasis in the original). As shown above, however, §42311(g) does not authorize the APCD to impose a fee to fund a non-existing mitigation program. As a matter of fact, any mitigation to reduce the PM10 emissions from the ODSVRA has to be implemented at the ODSVRA, by the DPR, who is in charge of management and operation. Accordingly, there is no evidence to support Friends' vague claim that the APCD's otherwise broad authority to promulgate rules and regulations to address a significant public health problem is through the imposition of fees for mitigation outside of the ODSVRA when the evidence shows the major contributor to the underlying problem is the DPR's management and operation of the ODSVRA.

Appellant also repeatedly claims that the District "is expressly authorized to adopt an additional regulation for indirect sources that creates on or off-site mitigation measures and fees to pay for those mitigation measures. §§ 40716(a)and 42311(g)." This claim cannot withstand scrutiny. To begin with, the ODSVRA is not an indirect

source. But even if it were, Appellant has not shown that the District has the authority to impose on or off-site mitigation measures on the DPR other than through a permit.

Thus, contrary to Friends' claim, interpreting the District's permitting authority narrowly will leave a substantial regulatory gap. This would be consistent with Friends' stated objective, which is to maximize OHV recreational opportunity at the ODSVRA and to ensure that the imposition of mitigation measures to address the PM10 exceedances at Nipomo Mesa do not result in any restrictions on OHV recreation at the ODSVRA. According to its Reply Brief, Friends and its members "have an interest in ensuring the District does not eliminate or restrict off-highway vehicle recreation" at the ODSVRA. Reply at 4. Friends admits that if Rule 1001's permit to operate requirements are upheld, OHV activities may be restricted in certain areas within the ODSVRA. Ibid. Thus, while Friends argues that restricting the Districts' permitting authority would not leave a regulatory gap, its own stated objective is to ensure the District's permitting authority does not result in any OHV riding restrictions at the ODSVRA.

VI CONCLUSION

For all of the foregoing reasons, Amicus Sierra Club urges this court to uphold the trial court's well-reasoned Ruling and deny the appeal.

Respectfully submitted

December 17, 2014 LAW OFFICE OF BABAK NAFICY

By:_____
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