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BEFORE THE HEARING BOARD OF THE
IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT

<p>In the Matter of</p> <p>MATTHEW DESSERT AIR POLLUTION CONTROL OFFICER IMPERIAL COUNTY AIR POLLUTION CONTROL DISTRICT,</p> <p style="text-align: right;">Petitioner,</p> <p style="text-align: center;">vs.</p> <p>IMPERIAL IRRIGATION DISTRICT,</p> <p style="text-align: right;">Respondent.</p>	<p>Order Number:</p> <p>STIPULATED ORDER FOR ABATEMENT</p> <p>Hearing Dates: December 18, 2020, January 29, 2021, February 19, 2021, March 18, 2021, March 19, 2021, April 16, 2021, and May 2, 2022</p> <p>Location: Imperial County, California</p>
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INTRODUCTION

A petition from the Imperial County Air Pollution Control District’s (“District”) Air Pollution Control Officer (“APCO”) for an Order for Abatement (“Order”) was heard on December 18, 2020, January 29, 2021, February 19, 2021, March 18, 2021, March 19, 2021, and April 16, 2021. The following members of the Imperial County Air Pollution Control District Hearing Board (“Hearing Board”) were present at various times: Chairman Sergio Cabañas, Robert Fischer, Vince Signorotti, Shavonne Borchardt, and Debbie Salas. The Hearing Board was represented by Assistant County Counsel, Eric Havens. Petitioner Matthew Dessert, APCO, was represented by County Counsel, Adam Crook, and Alene M. Taber and Kathryn M. Casey of Jackson Tidus. Respondent Imperial Irrigation District (“IID”) was represented by Clifton McFarland and Jennifer Williams of Downey Brand, and Joanna Smith Hoff, Deputy General Counsel for IID. The public was given an opportunity to testify. The matter was submitted and evidence received. The Hearing Board issued the Order on April 16, 2021.

1 After the Order was issued, IID filed a Petition for Writ of Administrative Mandamus in
2 Imperial County Superior Court, Case No. ECU001904, on May 14, 2021 (“Litigation”) against
3 the District and the Hearing Board challenging the Order. The District, Hearing Board and IID
4 (“Litigation Parties”) entered into two stipulations to stay the Litigation and Order to allow the
5 Litigation Parties an opportunity to meet and confer regarding a stipulated order for abatement.
6 After the Stay expired, the Litigation Parties reached a Stipulated Order for Abatement
7 (“Stipulated Order”) that was presented to the Hearing Board on May 2, 2022, during a public
8 hearing.

9 The Hearing Board finds, concludes, and orders that the Order issued on April 16, 2021,
10 be replaced with this Stipulated Order for Abatement.

11 The Hearing Board finds, concludes, and orders as follows:

12 **BACKGROUND**

13 1. The District is a corporate and political body established and existing pursuant to
14 California Health and Safety Code Sections 40000 et seq., and is the sole and exclusive agency
15 vested with the primary responsibility for the control of emissions from, and the permitting of,
16 non-vehicular sources of air pollution within the County of Imperial (Health & Saf. Code, §§
17 40000-40002.)

18 2. IID is a California irrigation district organized in 1911 under the California
19 Irrigation District Law, Water Code Sections 20500 et seq. IID is governed by a publicly
20 elected five-member board of directors. IID’s mission is to provide reliable, efficient and
21 affordably priced water and energy service to the communities it serves.

22 3. IID owns approximately 560 acres of real property located in Imperial County,
23 California (known as the Red Hill Bay (“RHB”) Site). (See Exhibit 1, Map of RHB Site.)

24 4. For purposes of this Stipulated Order only, the parties agree the RHB Site
25 constitutes an Open Area within the meaning of District Regulation VIII, and subject to District
26 Rules 401, 800, 801, and 804 for the RHB Site.

27 5. The RHB Site consists of Assessor Parcel Numbers (“APNs”) 020-100-032, 020-
28

1 100-042, 020-100-023, as well as a portion of APNs 020-090-004 and 020-090-003.

2 6. The United States Fish and Wildlife Service (“USFWS”) manages the Sonny Bono
3 Salton Sea National Wildlife Refuge (“Refuge”). The USFWS previously proposed a project at
4 the RHB Site aimed at creating hundreds of acres of shallow marine wetlands to provide aquatic
5 bird habitat and reduce airborne dust from playa exposed due to a shrinking Salton Sea (“RHB
6 Project”).

7 7. Implementation of the RHB Project is currently not moving forward.

8 8. The District contends that, as of June 2020, the RHB Site was experiencing events
9 of excessive airborne dust that violate District rules and threaten public health and safety, which
10 prompted the District’s issuance of Notices of Violation. IID disputes the District’s contentions.
11 This Stipulated Order does not prevent IID from seeking a modification of this Stipulated Order
12 to construct the RHB Project if it reaches an agreement with the USFWS.

13 **PROCEDURAL HISTORY AND PUBLIC HEARINGS ON ORDER**

14 9. On November 10, 2020, the APCO filed with the Clerk of the Hearing Board a
15 petition for proposed abatement order and provided service of the same to IID.

16 10. On December 2, 2020, IID responded to the Petition.

17 11. On December 18, 2020, January 29, 2021, February 19, 2021, March 18, 2021,
18 March 19, 2021, and April 16, 2021, the Hearing Board held a public hearing on the Order and
19 adopted the Order.

20 12. After the Order was issued, IID filed a Petition for Writ of Administrative
21 Mandamus in Imperial County Superior Court, Case No. ECU001904, on May 14, 2021
22 (“Litigation”) against the District and the Hearing Board challenging the Order. The parties are
23 now entering this Stipulated Order for Abatement (“Stipulated Order”) to settle the Litigation.

24 13. Subsequently, the District and IID agreed to a Stipulated Order to be submitted to
25 the Hearing Board for its approval.

26 14. On April 17, 2022, the Hearing Board issued a Notice of Public Hearing for May
27 2, 2022, on the Stipulated Order.

1 15. On May 2, 2022, the Hearing Board held a public hearing on the Stipulated Order.

2 16. Notice of the above hearing on this matter was duly given and published in
3 accordance with Health and Safety Code sections 40823, 42450, 42451, and District Rule 106.
4 Members of the public were informed that they had the opportunity to provide comments on this
5 Stipulated Order during the public hearings.

6 **RELEVANT DISTRICT RULES**

7 17. The District contends that IID is subject to its rules and regulations. IID disputes
8 this contention. For purposes of this Stipulated Order only, IID will comply with the following
9 rules with respect to the RHB Site only:
10

11 **District Rule 401 – Opacity of Emissions**

12 18. The District’s Rule 401.B provides in relevant part:

13 No Person shall release or discharge into the Atmosphere from any single
14 source of emission whatsoever, any Air Contaminant, other than
15 uncombined water vapor, for a period or periods aggregating more than
16 three (3) minutes in any hour which is:

17 B.1 As dark or darker in shade as that designated as No. 1 on the
18 Ringlemann Chart, as published by the United States Bureau of
19 Mines; or

20 B.2 Of such Opacity as to obscure an observer's view to a degree equal to
21 or greater than does smoke described in subsection B.1. above,

22 B.3 Except that, for a any Source in operation prior to July 1, 1972 and
23 which has been continuously subject to a valid permit to operate from
24 the Air Pollution Control District, the "shade" or equivalent "Opacity"
25 shall not exceed Ringlemann No. 2.

26 **District Rule 800 – General Requirements for Control of Fine Particulate Matter**

27 19. The District’s Rule 800 provides, in relevant part:

28 C.37 STABILIZED SURFACE: Any disturbed surface area or open bulk
storage pile that is resistant to windblown Fugitive Dust emissions. A
surface is considered to be stabilized if it meets at least one of the following
conditions specified in this Section and as determined by the test methods
specified in

Appendix B, Section A, B and D-G tests of this rule:

- 1 C.37.a A visible crust; or
- 2 C.37.b A threshold friction velocity (TFV) for disturbed surface areas
- 3 corrected for non-erodible elements of 100 centimeters per second
- 4 or greater; or
- 5 C.37.c A flat vegetative cover of at least 50 percent that is attached or
- 6 rooted vegetation; or unattached vegetative debris lying on the
- 7 surface with a predominant horizontal orientation that is not
- 8 subject to movement by wind; or
- 9 C.37.d A standing vegetative cover of at least 30 percent that is attached
- 10 or rooted vegetation with a predominant vertical orientation; or
- 11 C.37.e A standing vegetative cover that is attached or rooted
- 12 vegetative with a predominant vertical orientation that is at least
- 13 10 percent and where the TFV is at least 43 centimeters per second
- 14 when corrected for non-erodible elements; or
- 15 C.37.f A surface that is greater than or equal to 10 percent of nonerodible
- 16 elements such as rocks, stones, or hard-packed clumps of soil.

17 **District Rule 801 – Construction and Earthmoving Activities**

18 20. The District’s Rule 801 provides, in relevant part:

19 F. Best Available Control Measures for Fugitive Dust (PM-10)

20 F.1 Construction and Earthmoving Activities shall comply with the

21 following requirements:

22 F.1.a Pre-Activity:

23 F.1.a.1 Pre-water site sufficient to limit VDE to 20% opacity, and

24 F.1.a.2 Phase work to minimize the amount of disturbed surface area

25 at any one time.

26 F.1.b During Active Operations:

27 F.1.b.1 Apply water or Chemical Stabilization as directed by product

28 manufacturer to limit VDE to 20% opacity, or

F.1.b.2 Construct and maintain wind barriers sufficient to limit VDE

to 20% opacity. If utilizing wind barriers, control measure

F.1.b.1 above shall be implemented.

F.1.b.3 Apply water or Chemical Stabilization as directed by product

manufacturer to unpaved haul/access roads and Unpaved

Traffic Areas sufficient to limit VDE to 20% opacity and

meet the conditions of a Stabilized Unpaved Road.

F.1.c Temporary Stabilization During Periods of Inactivity:

1 F.1.c.1 Restrict vehicular access to the area by fencing or signage;
2 and

3 F.1.c.2 Apply water or Chemical Stabilization, as directed by
4 product manufacturer, sufficient to comply with the
5 conditions of a Stabilized Surface. If an area having 0.5 acres
6 or more of disturbed surface area remains unused for seven
7 or more days, the area must comply with the conditions for a
8 Stabilized Surface area.

9 **District Rule 804 – Open Areas**

10 21. The District’s Rule 804 provides, in part:

11 F. Best Available Control Measures for Fugitive Dust (PM10)

12 F.1 OPEN AREAS

13 Any Combination of BACM and Alternative BACM is permissible.

14 F.1.a Apply and maintain water or dust suppressant(s) to all unvegetated areas.

15 F.1.b Establish vegetation on all previously disturbed areas.

16 F.1.c Pave, apply and maintain Gravel, or apply and maintain Chemical
17 Stabilizers/Suppressants

18 F.1.d Implement Alternative BACM for exposed playa at the Salton Sea if
19 approved by both the APCD and EPA. Alternative BACM may be
20 approved by the APCD and EPA in accordance with a technical
21 evaluation demonstrating that the proposed Alternative BACM
22 achieves PM10 emission reductions equivalent to BACM measures
23 identified in subsection F.1.a, F.1.b, and F.1.c and that the dust control
24 method will achieve a STABILIZED SURFACE and meet the 20%
25 opacity requirement in accordance with U.S. EPA Test Method 9.

26 G. Record of Control Implementation

27 Any Person subject to the requirements of this rule shall compile and retain
28 records that provide evidence of control measure application (i.e., receipts and/or
purchase records). Such Person shall describe, in the records, the type of treatment
or control measure, extent of coverage, and date applied. For control measures
which require multiple daily applications, recording the frequency of application
will fulfill the recordkeeping requirements of this rule (i.e., water being applied
three times a day and the date) 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.

29 22. The parties are entering this Stipulated Order as a compromise that in no way
30 shall be treated as an admission of liability, a violation of the District’s rules, or concession as

1 to the District's jurisdiction by IID, and is strictly to settle the Litigation for the benefit of the
2 shared communities of the parties.

3
4 **EXPLANATION**

5 23. This Stipulated Order constitutes the written explanation required by California
6 Health and Safety Code section 42451, subdivision (b).

7 24. The Hearing Board finds that publication of the hearing notices on this Stipulated
8 Order was proper and in compliance with the law.

9 25. The Hearing Board further finds that in advance of and throughout the hearing
10 process, the Hearing Board provided the opportunity for the public to submit written
11 comments. During the public hearing, the Hearing Board provided the opportunity for
12 members of the public to present oral comments.

13 26. The Hearing Board admitted all of the exhibits attached to this Stipulated Order
14 that were submitted by the parties into evidence, and took those exhibits and the public's
15 testimony and comments into consideration during its deliberations and in its decision.

16 27. The Hearing Board further finds that described actions to be taken by IID and
17 its performance of the conditions set forth in this Stipulated Order is anticipated to constitute
18 compliance with Rules 401, 801 and 804 as expeditiously as feasible.

19 28. To the extent that any Explanations are considered or deemed to be Findings of
20 Fact or part of this Stipulated Order, they are incorporated into those sections as if fully set
21 forth therein.

22 **STIPULATED ORDER FOR ABATEMENT**

23 1. IID prepared a Red Hill Bay BACM Plan ("RHB BACM Plan") dated October
24 12, 2021 for the RHB Site based on conditions that existed on the site at that time. The District
25 has reviewed the RHB BACM Plan and agrees that the measures presented in the RHB BACM
26 Plan would constitute BACM on the RHB Site if appropriately implemented, operated, and
27 maintained. The parties acknowledge that the conditions at the RHB Site are dynamic and, as
28 the date of this Stipulated Order, have already changed since October 12, 2021. To accommodate

1 the changing conditions, IID agrees to install, operate, and maintain BACM on the RHB Site,
2 as represented in Exhibit 1, according to the following:

- 3 a. No later than sixty (60) calendar days after issuance of this Order, IID will
4 submit to the District for review and comment an initial Red Hill Bay
5 Implementation Plan (“RHB Implementation Plan”) to support
6 implementation of BACM described in this Stipulated Order.
- 7 b. No later than 6 months after issuance of this Stipulated Order, IID shall install,
8 operate, and maintain temporary surface roughening to support vegetation
9 establishment at the RHB Site.
- 10 c. No later than 3 years after issuance of this Stipulated Order, IID shall
11 complete all necessary water supply upgrades, install all irrigation
12 infrastructure, and complete all vegetation seeding/transplanting to support
13 implementation of vegetation BACM at the RHB Site, or identify as soon as
14 possible the locations of and initiate the process to install gravel BACM or
15 apply chemical stabilization BACM at the RHB Site where vegetation is not
16 practical.
- 17 d. No later than 5 years after issuance of this Stipulated Order, IID shall achieve
18 the performance criteria for vegetation, gravel, or chemical stabilization
19 BACM under Section 1.c of this Stipulated Order, except for those portions
20 of the RHB Site that will be needed for access, operation, and maintenance of
21 the BACM (e.g., irrigation infrastructure and water supply areas, access ways,
22 and drains and stormwater channels). If there are portions of the RHB Site
23 where vegetation BACM, gravel BACM, or chemical stabilization BACM
24 cannot be implemented to meet the performance criteria specified in this
25 Section 1.d because of operations to access, extract, and otherwise develop
26 the subsurface mineral and geothermal resources, and/or because it is
27 inaccessible due to soil conditions, hydrological conditions, environmental
28

1 constraints or other physical conditions or circumstances preventing the
2 installation of BACM, IID will identify these areas to the District and they
3 will be described in the next semi-annual report as specified under Section 2
4 below.

5 i. Managed Vegetation Performance Criteria: Current vegetation
6 areas and new vegetation BACM areas of the RHB Site are to be covered
7 with at least 30% standing vegetation cover or 50% flat vegetation cover,
8 per the definitions of “standing vegetation” and “flat vegetation” under
9 Rule 800. IID will be doing its own LiDAR-based vegetation cover
10 monitoring, which it will report to the District on an annual basis.

11 ii. Gravel Performance Criteria: Gravel BACM areas of the RHB
12 Site are to have 100% surface cover with either:

- 13 1) 3-inch thick gravel with size screened to > ½-inch in diameter,
14 or
15 2) 2-inch thick gravel with size screened to > ½-inch in diameter
16 underlain with a geotextile fabric.

17 iii. Chemical Stabilization Performance Criteria: Chemical
18 stabilization BACM areas of the RHB Site are to have 100% surface cover
19 with a District-approved Chemical Stabilization product.

20 2. IID shall submit to the APCO for transmittal to the Clerk of the Hearing Board
21 written semi-annual reports by January 31 (for July-December) and July 31 (for January-June).
22 The first report is due January 31, 2023. The last report will be due January 31, 2027. The
23 following information shall be included in the semi-annual reports:

- 24 a. Summary of monitoring data during the reporting period.
25 b. Summary of implementation status and progress made during the reporting
26 period.
27 c. Summary of any maintenance actions during the reporting period.
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d. Identification of any issues that could delay implementation.

3. IID shall not be deemed in violation of this Stipulated Order if IID is acting in good faith to comply with this Stipulated Order, but is impeded in its ability to comply with this Stipulated Order due to one or more of the following circumstances:

- a. Delays caused by any local, state, or federal agency, except IID, in processing IID’s application for any permits or approvals necessary to implement the BACM on the RHB Site.
- b. Denial by any local, state, or federal agency, except IID, of any permits or approvals necessary to allow IID to implement the BACM on the RHB Site.
- c. A condition for a required permit or approval by any local, state, or federal agency, except IID, that is not comparable to conditions contained in similar permits or approvals, necessary to allow IID to implement the BACM on the RHB Site.
- d. Delays caused by any third-party legal challenge in the judicial system to IID’s compliance with the California Environmental Quality Act and/or other environmental local, state, and/or federal laws for the implementation of the BACM on the RHB Site.
- e. A condition of Force Majeure, which is defined to mean extraordinary event or circumstance beyond the control of IID, such as a war, labor actions, riot, crime, a legally imposed judicial injunction or restraining order (provided that IID takes all necessary actions to challenge such order), discovery of cultural resources eligible for inclusion in the California Register of Historical Resources and/or National Register of Historic Places, disruption of utilities or acts of God (such as adverse weather, earthquake, volcanic eruption or other natural disaster). Adverse weather is any weather condition, including but not limited to flooding and dust storms, that forces IID to suspend all construction and implementation activities on the RHB Site or prevents IID

1 from proceeding with 50 percent or more of the normal labor force and of the
2 equipment engaged on critical path work.

3 f. Any other act, omission, event, or incident beyond IID's control.

4 4. If IID's Board of Directors ("IID Board") determines that IID has been impeded
5 in its ability to comply with the requirements of this Stipulated Order due to one or more
6 conditions set forth in Section 3, the IID Board shall pass a resolution making such a finding
7 during a noticed public meeting ("Resolution") and provide a copy to the APCO within 20
8 calendar days. If such a resolution is passed by the IID Board, IID shall send the APCO in
9 writing within 7 calendar days of such resolution, proposed deadlines for future actions to come
10 into full compliance with this Stipulated Order and to request an extension of affected deadlines
11 contained in this Stipulated Order ("Revised Schedule"). IID shall provide to the District all
12 evidence relevant to IID's determination that it was impeded in its ability to comply with this
13 Stipulated Order as a result of a condition in Section 3. Within 20 calendar days of receiving a
14 copy of IID's Resolution, the APCO shall provide written notice to IID as to whether the District
15 concurs with IID's determination. If the APCO concurs with the IID Board resolution, IID and
16 the APCO shall jointly petition the Hearing Board to modify this Stipulated Order.

17 a. If APCO believes that IID has not complied with this Stipulated Order in any
18 respect, or any other dispute arises between the parties relating to this
19 Stipulated Order, APCO shall provide written notice of the dispute or
20 disagreement within thirty (30) calendar days.

21 5. Any dispute arising out of this Stipulated Order shall be resolved through the
22 following process: APCO will give IID Written Notice of IID's alleged non-compliance with
23 this Stipulated Order, following which (1) APCD and IID will meet and confer in good faith,
24 with each agency designating one representative and one outside consultant to participate; and
25 (2) the Parties shall continue to meet and confer in good faith until: (a) either agency determines,
26 based on each agency's consultants, no solution/compromise is possible, and (b) after mediation
27 has been discussed as an alternative.

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6. This Stipulated Order does not act as a variance within the meaning of sections 42350 and 42364 of the California Health and Safety Code.

7. This Stipulated Order shall automatically terminate three (3) months after IID has fully complied with the conditions of this Stipulated Order, and any amendment or modification.

8. The USEPA may be informed of this Stipulated Order.

9. IID shall cooperate fully with the submission of this Stipulated Order to the California Air Resources Board and USEPA for inclusion in the California SIP. This Stipulated Order shall replace the Order in its entirety.

10. This Stipulated Order is made and entered into upon the express understanding that it constitutes a negotiated resolution of the Litigation. Nothing in this Stipulated Order is intended to and does not establish or act as precedent in any way whatsoever for any future agreements, orders, proceedings or undertakings of the parties. The Parties agree that the Hearing Board shall have jurisdiction to enforce this Stipulated Order. IID reserves all rights, including under the California Water Code Section 1013, to challenge future modifications, amendments, or enforcement actions related thereto.

The effective date of this Stipulated Order is _____, 2022.

[Signatures on following page]

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ORDERED FOR THE BOARD BY:

Sergio Cabañas, Chair, Hearing Board

Date

ATTEST:

Cassi Justice, Clerk of the Hearing Board

Date: _____

STIPULATED AND AGREED TO BY:

James C. Hanks, President
Imperial Irrigation District

Date

Jesus Eduardo Escobar, Chairman
Imperial County Air Pollution Control District


Date

List of Exhibits:

- 1. Map – Red Hill Bay Site



Legend

 Red Hill Bay Site

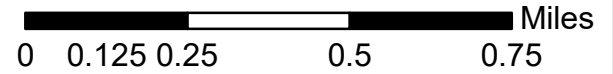
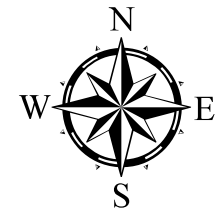


Exhibit 1 - Map of Red Hill Bay Site

April 4, 2022



Source: Esri, DigitalGlobe, GeoEye, Earthstar Geographics, CNES/Airbus DS, USDA, USGS, AeroGRID, IGN, and the GIS User Community